

Dated 1 May 2003

**LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE**

**Question 3:**

**Can the exercise of copyrights or related rights, especially by copyright collection societies, constitute an abuse of a dominant position?**

**If this is the case, up to what extent and under which circumstances?**

**Response of UK National Reporter**

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Ref SMEH

### **Sub-question 3.1**

*Please state which works are generally covered by copyright and related rights in your jurisdiction.*

*For this purpose, the expression "works" includes the following:*

- *Musical works*
- *Literary works*
- *Dramatic works*
- *Artistic works*
- *Cinematographic works (including film and television)*
- *Performances*
- *Sound recordings*
- *Designs*
- *Databases*

*The expression "related rights" means all rights related to copyright such as performers rights, moral rights, design rights, sound recording rights, database rights.*

*These lists are not exhaustive and the terminology will differ from jurisdiction to jurisdiction.*

### **Answer to Sub-question 3.1**

In the UK, the following works are covered by copyright and related rights under the Copyright Designs and Patents Act 1988 (CDPA):<sup>1</sup>

- **Literary works:** any original work, other than a dramatic or musical work, which is written, spoken or sung, which includes - (a) a table or compilation other than a database; (b) a computer program; (c) preparatory design material for a computer program; and (d) a database. It does not have to be a work of literature, but it must convey information, provide instruction or give pleasure in the form of literary enjoyment. "Database" means a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way; and (b) are individually accessible by electronic or other means. A database will only be original if, by reason of the selection or arrangement of the contents of the database, the database constitutes the author's own intellectual creation.
- **Musical works:** any original work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music. The work must be reduced to writing or recorded in some other material form. (A song will therefore have two copyrights, one in the music and another in the words.)
- **Dramatic works:** any original work of action with or without words or music, including works of dance or mime, which is capable of being performed before an audience. The work must

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<sup>1</sup> The CDPA is likely to be amended within the next few months to implement EC Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

be recorded in a material form for copyright to subsist in it. Films can therefore be dramatic works as well as having separate copyright protection as films.

- Original Artistic works: cover (a) a graphic work, (which expression includes any painting, drawing, diagram, map, chart or plan, engraving, etching, lithograph, woodcut or similar work); a photograph, sculpture or collage, all irrespective of artistic quality; (b) a work of architecture, being a building or a model for a building (also with no requirement for artistic quality); or (c) a work of artistic craftsmanship, for which there is a requirement of artistic quality. However, it is not an infringement of the copyright in the designs for most commercially-manufactured articles to make or copy such articles. Instead, such articles may be protected by the separate legal provisions concerning registered designs<sup>2</sup> or unregistered design right.<sup>3</sup>
- Sound recordings: cover (a) a recording of sounds, from which the sounds may be reproduced, or (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced, in each case regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced. The CDPA talks of "sound" and not of "music", so recordings of non-musical works come within the definition. More than one person may make a sound recording of a particular work and each will have an independent copyright in their own recording. However, copyright will not subsist in a sound recording which is, or to the extent that is, a copy taken from a previous sound recording.
- Film: a recording on any medium from which a moving image may by any means be produced. The sound track accompanying a film is treated as part of the film (so that showing the film includes playing the sound track); but the sound track will also have a separate copyright as a sound recording. Again, copyright will not subsist in a film which is, or to the extent that is, a copy taken from a previous film.
- Broadcasts: a transmission by wireless telegraphy of visual images, sounds or other information which (a) is capable of being lawfully received by members of the public, or (b) is transmitted for presentation to members of the public. The place from which the broadcast is made is important as this will determine whether the broadcast attracts UK copyright.<sup>4</sup>
- Cable programmes: programmes which are included in a "cable programme service", i.e. a service which consists wholly or mainly in sending visual images, sounds or other information by means of a telecommunications system, otherwise than by wireless telegraphy, for reception (a) at two or more places (whether for simultaneous reception or at different times in response to requests by different users), or (b) for presentation to members of the public. A website could be deemed to be a cable programme service and items contained on it could be cable programmes. There are a number of exclusions

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<sup>2</sup> The Registered Designs Act 1949, as amended. Substantial amendments were made in 2003 to implement the new Community design regime.

<sup>3</sup> Part III of the CDPA. There is now also separate Community protection for unregistered designs.

<sup>4</sup> Under the proposed amendments to the CDPA to implement Directive 2001/29/EC, the definition of "broadcast" (and "broadcasting") in section 6 will be redefined to cover transmissions by any electronic means which are not interactive. This will therefore assimilate the non-interactive aspects of cable programmes, which will be deleted from the lists of work in which copyright subsists.

covering things such as in-house telecom systems or private domestic telecom systems. Cable programmes do not have to be “original” to qualify for copyright protection.<sup>5</sup>

- Typographical arrangements: the typographical arrangement of a published edition of the whole or any part of one or more literary, dramatic or musical works. This separate copyright can only be infringed by reprographic means.
- Designs: as well as registered design protection, there is protection for unregistered designs under principles broadly analogous to copyright law under Part III of the CDPA, but for a shorter period and subject to qualification requirements.
- Performances: The CDPA defines “performance” as: a dramatic performance (which includes dance or mime); a musical performance; a reading or recitation of a literary work; or a performance of a variety act or similar presentation which is a live performance given by one or more individuals. Under the current CDPA, a performer’s consent is required for the exploitation of their performances. This right is independent of copyright.<sup>6</sup>

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<sup>5</sup> Under the proposed amendments to the CDPA to implement Directive 2001/29/EC, cable programmes will be deleted from the lists of work in which copyright subsists. There is no need to protect a "cable programme" as a species of copyright work other than where this is a "broadcast" (as redefined) since any material included in an interactive cable service will be protected under other headings, i.e. as a literary, artistic, dramatic or musical work, sound recording or film.

<sup>6</sup> Under the proposed amendments to the CDPA to implement Directive 2001/29/EC, the exception which currently provides that the rights of a performer are not infringed by the making of a recording of a live performance "for private and domestic use," would be deleted.

### **Sub-question 3.2**

*What specific rights are accorded to the owners of copyrights and related rights in your jurisdiction?*

*For example, in the UK a copyright holder has the exclusive right to:*

- *copy the work;*
- *issue copies of the work to the public;*
- *rent or lend the work to the public;*
- *perform, show or play to the public;*
- *broadcast the work or include it in a cable programme service; and*
- *make an adaptation.*

*For example, in the UK, a holder of a performer's right (a related right) has a right to equitable remuneration for the exploitation of the performance and to require that exploitation of his performance is only with his consent. Exploitation includes copying, issuing copies to the public, recording, renting or lending copies to the public.*

*These lists are not exhaustive and the terminology will differ from jurisdiction to jurisdiction.*

### **Answer to Sub-question 3.2**

In the UK, the owners of copyright have the exclusive right to:

- Copy the work;
- Issue copies of the work to the public;
- Make the work available to the public by means of an electronic retrieval system;
- Rent or lend the work/copies of the work to the public;
- Perform, show or play the work in public;
- Broadcast the work or include it in a cable programme service; and
- Make an adaptation of the work.

Moral rights:

- Authors of copyright works and directors of copyright films (whether or not they are also the owners of the relevant copyrights) have certain moral rights in the UK. They include a "paternity right" (the right to be identified as author or director); an "integrity right" (the right not to have his/her work subjected to derogatory treatment); and the right not to have a work or film falsely attributed to him/her as author or director. Those moral rights are subject to various exceptions.

Rights in performances:

In the UK performers have the following rights in relation to a performance (i.e. a live dramatic or musical performance, a reading or recitation of a literary work, or a performance of a variety act or similar presentation), subject to certain qualification requirements:

- the right to prevent the recording, broadcast, or recording of a broadcast of a qualifying performance without consent;
- the right to prevent the making of an unauthorised copy of any such recording;
- the right to prevent the issue to the public of copies of a recording of a qualifying performance (unless such copies had previously been put into circulation with his consent in the EEA);
- the right to prevent the rental or lending of copies of a recording of a qualifying performance;
- the right to equitable remuneration where a sound recording of a performance is played in public or included in a broadcast or cable programme service. This right is not assignable by the performer, except to a collecting society which acts on the performer's behalf. where the performer's rental right in a film or sound recording has been transferred to the producer, the performer retains the right to equitable remuneration for rental of the film or sound recording;

In addition, persons who are parties to exclusive recording contracts with performers have the right to prevent the making of a recording of performances within the scope of the recording contract and to prevent the exploitation of infringing recordings.

### **Sub-question 3.3**

*Have there been any national decisions of courts, tribunals or competition authorities in which the exercise of copyright or any of the related rights mentioned above (or any others which you have identified which fall within that category in your jurisdiction) by an individual has either:*

3.3.1 *been found to amount to an abuse of a dominant market position?*

3.3.2 *been found not to amount to an abuse of a dominant market position after the rightholder in question has successfully defended itself against such a claim?*

#### **Answer to Sub-question 3.3.1**

The following list sets out all UK and EC decisions where the exercise of the relevant right has been found to amount to an abuse of a dominant position. Brief summaries of these cases can be found at Annex 1.

##### **(a) UK Cases and Reports**

*Ford Motor Company Limited: Monopolies & Mergers Report on refusal to grant licences*<sup>7</sup>

*Intel Corporation v Via Technologies*<sup>8</sup>

##### **(b) EC Cases**

*Magill –Magill TV Guide/ITP, BBC & RTE*;<sup>9</sup> *RTE, BBC & RTE v Commission*;<sup>10</sup> *RTE v Commission*;<sup>11</sup> *BBC v Commission*;<sup>12</sup> *ITP v Commission*;<sup>13</sup> *Radio Telefis Eireann and Independent Television Productions v Commission*<sup>14</sup>

*Micro Leader v Commission - Micro Leader/Microsoft* (unpublished); *Micro Leader v Commission*<sup>15</sup>

*IMS Health – Commission Decision in Case 38.044 IMS Health* of 3 July 2001; *IMS Health v Commission*;<sup>16</sup> *NDC Health v Commission*<sup>17</sup>

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<sup>7</sup> Cmnd. 9437 of February 1985

<sup>8</sup> [2002] EWHC 1159 (Ch); EWCA Civ 1905

<sup>9</sup> Commission Decision 89/205 in Case 31.851 *Magill TV Guide/ITP, BBC & RTE* [1989] OJ L78/43

<sup>10</sup> Case C-76, 77 and 91/89R *RTE, BBC & RTE v Commission* [1989] ECR 1141

<sup>11</sup> Case T-69/89 *RTE v Commission* [1991] ECR II-485

<sup>12</sup> Case T-70/89 *BBC v Commission* [1991] ECR II-535

<sup>13</sup> Case T-76/89 *ITP v Commission* [1991] ECR II-575

<sup>14</sup> Joined Cases C-242/91P and 242/91P *Radio Telefis Eireann and Independent Television Productions v Commission* [1995] ECR I-743

<sup>15</sup> *Micro Leader v Commission - Commission Decision in Case 36.219 Micro Leader/Microsoft* (unpublished); Case T-198/98 *Micro Leader v Commission* [1999] ECR II-3989

<sup>16</sup> *IMS Health – Commission Decision in Case 38.044 IMS Health* of 3 July 2001; Case T-184/01R *IMS Health v Commission* (No.1) [2001] ECR II-2349; (No.2) [2001] ECR II-3193

<sup>17</sup> Case C-481/01P(R) *NDC Health v Commission* [2002] ECR I-3401 - **NB** a decision on the merits is still awaited; the case has been suspended by the CFI pending a decision by the ECJ on a reference about the same dispute from the German courts in Case C-418/01 *IMS Health v NDC Health*. There was a hearing on 6 March 2003 in the latter case.

### **Answer to Sub-question 3.3.2**

The following list sets out all UK and EC decisions where the exercise of the relevant right has been found not to amount to an abuse of a dominant position. Brief summaries of these cases can be found at Annex 1.

#### **(a) UK Cases**

*Hoover v George Hulme*<sup>18</sup>

*British Leyland v Armstrong Patents*<sup>19</sup>

*Ransburg-Gema v Electrostatic Plant Systems*<sup>20</sup>

*Yale Securities Products v Newman*<sup>21</sup>

*Intergraph v Solid Systems CAD Services*<sup>22</sup>

*HMSO v The Automobile Association*<sup>23</sup>

*BSkyB OFT Investigation* - OFT Decision 31/1/03

#### **(b) EC Cases**

*Deutsche Grammophon v Metro-SB-Großmärkte*<sup>24</sup>

*Tiercé Ladbroke v Commission* - Commission Decision in Case 33.699 *Tiercé Ladbroke (B)/PMU* (unpublished); *Tiercé Ladbroke v Commission*<sup>25</sup>

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<sup>18</sup> [1982] 3 CMLR 186

<sup>19</sup> [1982] 3CMLR 603; [1984] 3 CMLR 102

<sup>20</sup> [1989] 2 CMLR 712

<sup>21</sup> [1990] FSR 320

<sup>22</sup> [1995] ECC 53

<sup>23</sup> [2001] ECC 34

<sup>24</sup> Case 78/70 *Deutsche Grammophon v Metro-SB-Grossmärkte* [1971] ECR 487

<sup>25</sup> *Tiercé Ladbroke v Commission* - Commission Decision in Case 33.699 *Tiercé Ladbroke (B)/PMU* (unpublished); Case T-504/93 *Tiercé Ladbroke v Commission* [1997] ECR II-923



### **Sub-question 3.4**

*If so, please provide details of the factual circumstances, economic analysis and legal decision made, with particular regard to the following questions:*

- 3.4.1 *what right or rights were involved?*
- 3.4.2 *what form(s) of utilisation of that right(s) was involved?*
- 3.4.3 *if there was a finding that the rightholder had a dominant position in the market in question, was the existence of dominance:*
  - (a) *based entirely upon the ownership of the right concerned;*
  - (b) *based in part upon the ownership of the right concerned;*
  - (c) *based on factors independent from the ownership of the right concerned?*
  - (d) *what forms of exercise of the right(s) were found to be abusive and in what circumstances?*
  - (e) *what forms of exercise of the right(s) were found not to be abusive and in what circumstances?*

### **Sub-question 3.5**

*What criteria were used by the court/tribunal/competition authority to determine the appropriate balance to be struck between the need to ensure that the rightholder was not deprived of the substance of its right and the need to ensure that the rightholder did not exercise the right unfairly? In particular please state whether any of the following points were considered in cases where the abuse concerned either a refusal to supply or excessive pricing and if so, what conclusions were drawn?*

#### *Refusal to supply*

- (a) *the material which was the subject of the right was indispensable for the production of a new and independent product or service;*
- (b) *the new product or service did not exist at the time of requesting a licence of the right and there was demonstrable demand for the product or service in question;*
- (c) *there was no objective justification for the refusal to supply;*
- (d) *the refusal would eliminate all competition in the market in question.*

#### *Unfair/excessive/discriminatory pricing*

- (a) *what costs or other charges did the court/tribunal/competition authority use as a basis for measuring whether the royalties charged for using the licensed work was unfair/excessive?*

### **Answer to Sub-questions 3.4.1 and 3.4.2**

The form of rights and utilisation of rights involved in the various cases are briefly set out below and described in more detail in Annex 1:

## **Dominant Position**

### **(a) UK Cases**

- *British Leyland v Armstrong Patents*: copyright in designs for exhaust systems for various cars.
- *BSkyB OFT Investigation*: exclusive rights to content of premium television channels.

### **(b) European Cases**

- *Deutsche Grammophon v Metro-SB-Großmärkte*: right of distribution of sound recordings.
- *Magill*: copyright in television listings.
- *Info-Lab/Ricoh*: unregistered design right in toner cartridges for photocopiers.
- *IMS Health*: copyright in system dividing Germany into a number of areas in order to monitor sales of pharmaceuticals.

## **Abuse**

### **(a) UK Cases and Reports**

- *Hoover v George Hulme*: copyright in drawings for electrical appliances.
- *British Leyland v Armstrong Patents*: copyright in designs for exhaust systems for various cars.
- *Ford Motor Company Limited*: Monopolies & Mergers Report on refusal to grant licences: copyright in designs for vehicle body parts.
- *Ransburg-Gema v Electrostatic Plant Systems*: copyright in designs for electrostatic powder coating equipment.
- *Yale Securities Products v Newman*: copyright in designs for key blanks.
- *Pitney Bowes v Francotype-Postitalia*: patent infringement action concerning postal franking machines.
- *Chiron Corporation v Murex Diagnostics Ltd (No. 2) Organon*: patent infringement claim involving a Hepatitis C Virus testing kit.
- *Intergraph v Solid Systems CAD Services*: copyright in software packages.
- *HMSO v The Automobile Association*: copyright in Ordnance Survey maps.
- *Intel Corporation v Via Technologies*: patents over computer chipsets.
- *BSkyB OFT Investigation*: exclusive rights to content of premium television channels.

### **(b) European Cases**

- *Deutsche Grammophon v Metro-SB-Großmärkte*: right of distribution of sound recordings.
- *Magill*: copyright in television listings.
- *Tierce Ladbroke v Commission*: licence over the sound and pictures of French horse races.

- *Micro Leader v Commission*: copyright in software.
- *IMS Health*: copyright in system dividing Germany into a number of areas in order to monitor sales of pharmaceuticals.

### **Answer to Sub-questions 3.4.3 and 3.5**

In order to answer these questions in an effective manner, we have considered the relevant cases under the following headings: (a) assessment of dominant position; (b) assessment of abuse. The cases considered under heading (a) respond to sub-questions 3.4.3(a)-(c) and the cases considered under heading (b) respond to questions 3.4.3(d)-(e) and 3.5.

Only the cases where the question has been considered are listed.

As indicated above, we also include summaries of all cases looked at which involve copyright or related rights and claims of abuse of a dominant position and the claimed abuse, as Annex 1.

## DOMINANT POSITION

### (a) UK Cases

- British Leyland v Armstrong Patents

The court made it clear that dominance is an economic concept and that an owner of a monopoly right who can refuse to grant licences does not “by that fact alone” have a dominant position.

On the facts of the case, even if the market was restricted to British Leyland exhausts (rather than all car exhausts) then there was no dominant position - British Leyland only had 24% of that market while its licensees had 36% of the market, and there was evidence that the market was competitive and that British Leyland had had to reduce prices and produce a cheaper article in order to remain competitive.

**NB it should be noted that this decision was overturned by the House of Lords on different grounds and so this was not reconsidered. Therefore some doubts may remain about the matters discussed.**

- BSkyB investigation: alleged infringement of the Chapter II prohibition

The Director General of Fair Trading found that the product markets were for the wholesale and retail supply of packages containing content unique to premium pay TV sports channels and of packages containing premium film channels.

It found that (a) BSkyB supplies almost all such packages; (b) BSkyB has exclusive rights, protected by intellectual property, to that content necessary to compete in those markets; (c) those exclusive rights act as an absolute barrier to the market for the duration of the exclusivity; and (d) buyer power is weak as BSkyB controls the distribution system that supplies most UK pay TV subscribers.

Therefore BSkyB was held to be dominant based in part on the ownership of exclusive rights to the content necessary to compete on the relevant product markets.

### (b) European Cases

- Deutsche Grammophon v Metro-SB-Großmärkte

The Court held that a copyright holder “does not occupy a dominant position within the meaning of Article [82] of the Treaty merely by exercising his exclusive right to distribute the protected articles” but rather that “this further requires that the manufacturer, alone or jointly with other undertakings in the same group, should have the power to impede the maintenance of effective competition over a considerable part of the relevant market, having regard in particular to the existence of any producers marketing similar products and to their position on the market.”

When analysing this, the Court said that “if recording artists are tied to the manufacturer by exclusive contracts consideration should be given, *inter alia*, to their popularity on the market, to the duration and extent of the obligations undertaken and to the opportunities available to other manufacturers of sound recordings to obtain the services of comparable performers.” Thus, in the Court’s view, the existence of dominance was based in part on the ownership of the right concerned.

However, as this was an Article 234 reference it was left to the national German court to determine whether there was a dominant position or not.

- Magill

The Court again held that “mere ownership of an intellectual property right cannot confer [a dominant] position.”

However, the Court held that, in this case, there was a dominant position with respect to the information used to compile the listings. It stated that “the basic information as to the channel, day, time and title of programmes is the necessary result of programming by television stations, which are thus the only source of such information” and that therefore the television stations had “a de facto monopoly over the information used to compile listings for the television programmes received in most households in Ireland and 30% to 40% of households in Northern Ireland” and were “in a position to prevent effective competition on the market in weekly television magazines.” It seems, therefore, that the Court was treating the information itself as a market and weekly television magazines as a second market with dominance being established on the first.

- Info-Lab/Ricoh

The Commission envisaged that Article 82 might apply if Ricoh had a dominant position on the consumables market allowing it to act independently of possible competitors and, in particular, to be free in setting prices. The Commission held that, although “Ricoh was the only undertaking which sold filled toner cartridges compatible with Ricoh photocopiers”, “Ricoh did not have a dominant position in the photocopiers market”. It went on to consider whether a company could be considered dominant in the consumables market where there was no dominance in the upstream market i.e. the photocopier market. The Commission held that “the photocopier market and the consumables market were interrelated in such a way that competition on the photocopier market also constituted an effective competitive constraint on the consumables market.”

Ricoh did not hold a dominant position as competitive forces (such as upstream competition) meant that Ricoh, the copyright owner, was in economic terms subject to competitive forces on the photocopiers/consumables market.

- IMS Health

The Commission held that the relevant market was German regional sales data services.

It then held that “IMS is in a quasi-monopoly situation” based on the market shares of the three providers, IMS, NDC and AzyX (which are not provided as business secrets) and the fact that “prior to the entry of NDC and AzyX, there was no competition in this market”. It recognised that a dominant position might be the outcome of a number of factors which, when considered separately might not be determinative. However, in the absence of exceptional circumstances, extremely large market shares were in themselves evidence of a dominant position. Thus, the Commission’s finding of dominance in this case appears to have been based on IMS’s high shares and not specifically on ownership of the copyright.

## ABUSE

### (a) UK Cases and Reports

- Hoover v George Hulme

The first claimed abuse under Article 82 was the imposition by Hoover in its dealer agreements of a term requiring the dealers only to use Hoover spare parts. The Court rejected this but the reasoning is obscure. The Court had assumed that the relevant market was for Hoover spare parts and that Hoover was dominant on that market, but then said that there was no abuse because there were other vacuum cleaner manufacturers and the price of Hoover spare parts was related to the price of the spare parts of other manufacturers. This seems like the reasoning of the European Commission in the later Info-Lab/Ricoh case, but that was used to show no dominance rather than no abuse.

The second claimed abuse was that Hoover was pressurising suppliers to stop selling spare parts. The Court held that the fact that Hoover was negotiating with its suppliers on the question of a possible infringement of copyright could not constitute an abuse.

The third claimed abuse was that Hoover's conduct in bringing actions asserting copyright infringement or passing off was an attempt to monopolise the market. The Court considered that any such abuse would be an abuse of the process of the court rather than an abuse under Article 82. Moreover, Hoover recognised that certain spare part makers were making spares comparable to those that were the subject of the proceedings and that fit its machines in respect of which no objection could be taken. In this context, the *Imperial Chemical Industries v Berk Pharmaceuticals* case<sup>26</sup> was cited where the Vice Chancellor had stated that the fact that plaintiffs impose unfair selling prices in breach of Article 82 does not mean that the defendants are set free from any liability to the plaintiffs, for example, for committing the tort of passing off. Similarly, a prohibition against the plaintiffs charging unfair prices does not also amount to a prohibition against taking action that enables them to get a full return from their unfair prices, such as taking steps to prevent competitors from passing off their goods as being the plaintiffs. There was therefore no case of abuse shown.

The fourth claimed abuse was excessive pricing. The Court noted that the prices charged by Hoover were much higher than prices charged by those dealing in the spare parts. However, the Court held that it was reasonable to expect Hoover's prices to be higher than those dealing in spare parts since Hoover's spare parts should bear some part of the costs of the research, design, testing and marketing of the original equipment. The evidence given by one of Hoover's directors was that profits on spare parts was of the order of 15.7%, which was held to be based on not unreasonable assumptions and was not found to be an unreasonable level of profits for a manufacturing wholesaler. As the evidence of the director in question was given in camera, the judgment does not provide any further details as to how the Court reached the conclusion that the prices charged by Hoover were not excessive.

- British Leyland v Armstrong Patents

The first claimed abuse under Article 82 was that the royalties charged were unreasonable. The defendants claimed that the costs of development of exhausts should be recovered entirely through the price of the cars or, alternatively, that the royalties on spare parts should be related to the development costs. The defendants also claimed that a 7% royalty was much higher than that charged for other licences. However, on the facts no

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<sup>26</sup> [1981] FSR 1 at 6, [1981] 2 CMLR 91 at 96.

unreasonableness was found by the judge (the licences were entered into after arms-length negotiations, no licensee had complained or suffered a significant change in market share, and the other licences were for markets where the licensee were not competing with the licensor). The judge therefore held that British Leyland was “merely making normal use of [its] property rights” and that was upheld by the Court of Appeal.

The second claimed abuse was that British Leyland operated a blanket royalty which was also charged on non-copyright designs. However, the Court held that a part-by-part licence would have had two drawbacks (the need to update it for new designs and the need for licensees to account to British Leyland, a competitor, for the number of sales of each part) and that, though offered, it was not accepted by the licensees. The Court therefore held that the system was a convenient way of calculating a 7% royalty on infringing parts and so was not an abuse.<sup>27</sup>

The final claimed abuse was that British Leyland claimed an injunction and conversion damages. This was rejected on the basis that if the licence would not be an abuse then the claim of remedies could not be an abuse.

**NB it should be noted that this decision was overturned by the House of Lords on different grounds and so this was not reconsidered. Therefore some doubts may remain about the matters discussed.**

- *Ford Motor Company Limited: MMC report on refusal to grant licences*

This was a reference under the old Competition Act and so did not concern abuse of a dominant position. However, the analysis and the issues raised are similar.

Until 1981, Ford accepted competition in the market for Ford replacement body panels, in that Ford did not grant licences, but equally did not assert property rights against independent suppliers of replacement panels and refrained from legal action against such suppliers. However, from 1981, Ford had, according to the MMC, acted as a monopolist by refusing to grant any licence for the manufacture or sale of body panels and by seeking to use its industrial property rights to prevent manufacture or sale of body panels for its cars by anybody else.

The MMC found that Ford, by refusing licences to produce body parts for its cars, was engaging in an anti-competitive practice. In particular, the MMC rejected the defence by Ford that this was “the ordinary exercise of intellectual property rights” and not the conduct of the business. The MMC considered certain travaux préparatoires regarding the policy and practice of Ford of not granting licences to manufacture or sell in the UK certain replacement body parts for Ford vehicles and a comparison with compulsory patent licences.

In determining whether Ford’s refusal was against the public interest, the MMC considered a number of factors including competition, prices, and availability of parts; quality and safety; employment, investment and overseas trade; and encouragement of innovation. The MMC considered Ford’s complaint that competition from the independent spare parts manufacturers (“the independents”) was unfair, in that the independents could charge lower prices, as they paid no royalties and did not fund the research and development which

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<sup>27</sup> Contrast this to the decision in Case 193/83 *Windsurfing* [1985] ECR 611, where the ECJ found that requiring a royalty for the net selling price of a windsurfing rig + board was restrictive of competition under Article 81 as the patent only covered the rig. However, see the possibly contrary position taken in the Technology Transfer Block Exemption at Article 2(7)(b), where the licensor may require the licensee to pay royalties “over a period going beyond the duration of the licensed patents, in order to facilitate payment”.

created the demand for replacement parts. However, the MMC sought to balance the public interest in allowing Ford a due reward for its innovation against the public interest in encouraging competition and its advantages. In relation to competition, the MMC held that the competition from the independents was beneficial, in that it gave consumers, especially those with older or used cars, (which might otherwise be scrapped or left unroadworthy for lack of repairs), a choice between more expensive Ford body panels and cheaper equivalents from the independents. Competition had also led Ford to reduce or limit certain price increases. The MMC held that the principal effect of Ford's conduct was to keep prices up and that if competition were to cease, prices of replacement panels would be likely to rise. Elimination of competition from the independents was therefore against the public interest. In relation to innovation, the MMC stated that it was the independents who had introduced corrosion part panels. The MMC speculated as to whether Ford would have ever introduced these panels if competition from the independents had not existed, and concluded that Ford's practice of refusing to licence the manufacture of replacement parts was "thus clearly adverse to the public interest."

- *Ransburg-Gema v Electrostatic Plant Systems*

The first claimed abuse was that the plaintiffs threatened to and did bring actions to drive their competitors out of the market. The Court held that the defence could only lie if the enforcement of the copyright would be abusive, and that instituting proceedings could not in itself be an abuse. The intention of the plaintiffs did not affect this. Moreover (obiter) any claim that plaintiffs were abusing their dominant position by informing potential customers of the action and that the defendants might have to pay damages and that they were "disreputable" would not make the exercise of copyright itself an abuse.

The second claimed abuse was the plaintiffs' refusal to sell spare parts to the defendants. The Court held that not all refusals to supply spare parts were wrongful under Article 82 and that, to constitute an abuse, "something more than refusal to supply must be pleaded and particularised" and that this had not been done in the case.

The third and fourth claimed abuses were claiming conversion damages (as they are not compensatory) and injunctive relief. The Court held that these in themselves could not be abusive if enforcement of the copyright was not abusive.

The fifth claimed abuse was that the purpose of the proceedings was oppressive. The Court held that the purpose of the proceedings was irrelevant and also that such a claim would have to be particularised in any event.

- *Yale Securities Products v Newman*

The first claimed abuse was that the plaintiff had delayed in enforcing its rights. The Court held that this could not constitute an abuse.

The second claimed abuse was that the plaintiff had discriminated by enforcing its rights against the defendant but not against other infringers. Again, the Court held that this could not constitute an abuse.

The third claimed abuse was that the plaintiff was hindering competition by exercising its rights. The Court held that this was a natural consequence of monopoly rights and without "special circumstances" was not an abuse.

The fourth claimed abuse was in effect a claim that the plaintiff was trying to enforce its monopoly, which the Court held was not an abuse.



The fifth claimed abuse was seeking conversion damages disproportionate to the injury suffered. The Court held that this was not an abuse (but apparently on the basis that it fell within what is now Article 30 of the EC Treaty).

The sixth claimed abuse was the enforcement of copyright more than 32 years old. Again this was held not to be an abuse (although again on the basis that it fell within Article 30).

The seventh claimed abuse was that the plaintiffs falsely claimed they operated a high security system for key replacement. The Court held that, even if this was true, the prevention of illicit supply of keys could not be said to contribute to that abuse.

The eighth and final claimed abuse was that the plaintiffs failed to offer the defendants a licence. The Court held that “the owner of intellectual property rights whose national law accords him a monopoly is entitled to insist on the monopoly and mere refusal of a licence cannot in itself bring him within Article [30]”.

- *Pitney Bowes v Francotyp-Postitalia*

In this case, relating to a patent infringement concerning postal franking machines, the following abuses were alleged:

- (a) charging unfairly high prices;
- (b) discriminating against smaller customers by charging them higher prices without objective justification;
- (c) discriminating against the home market by exporting at lower prices;
- (d) discouraging supply to dealers or middlemen;
- (e) requiring customers to take leases through an in-house leasing company;
- (f) certain malpractices by the plaintiff's salesman;
- (g) certain matters the subject of an earlier inquiry by the Monopolies and Mergers Commission;
- (h) threats of proceedings for patent infringement made by the plaintiff against the defendant in respect of patents not relied upon in the action;
- (i) entering into a cross-licensing agreement with its main U.K. competitor A following threats of proceedings for patent infringement against A
- (j) pursuing the action with a view to compelling the first defendant to enter into a licence on unreasonable terms;
- (k) prosecution of the action when franking machines had to be licensed by the Post Office and this in practice required infringement of the plaintiff's patents; and
- (l) refusing to offer the defendants the same terms as were offered to A.

The UK court held that allegations (a) - (e) and (g) potentially constituted abuses under Article 86 (now Article 82).

With regard to the allegation concerning the plaintiff's salesmen (f) and the threats allegation (h), the court held that these actions could not constitute an abuse of a dominant position since they were not connected with the existence of the dominant position and did not involve abuses of it.

The court held that the cross-licensing agreement (i), might strengthen the plaintiff's dominant position but that did not necessarily involve abusing it. The agreement could not have been an infringement of Article 86 unless it was procured by an abuse of the dominant position. Since neither the threat nor the institution of patent proceedings could be an abuse, this was not so.

The court was clear that a refusal to grant a licence on reasonable terms (j), was not itself an abuse. It held that it did not improve the allegation to say that the plaintiff would have granted a licence on unreasonable terms.

Although the court recognised that the Post Office requirements (k), together with the patents might strengthen the plaintiff's dominant position and might even make it a monopoly, it held that this could not make it *per se* an abuse for the plaintiff to enforce its patent rights. Something more was required.

Finally, the court held that, even assuming that discrimination between licensees without objective justification (l), might be an abuse of a dominant position, a bare allegation that one was not offered the same terms as another licensee was insufficient.

As this case was an application by the plaintiff to strike out certain allegations in the defence and counterclaim, the judge assessed the abuses in order to resolve whether they could be resolved on a motion to strike out or whether they required a trial and possibly a reference to the European Court. Accordingly, the case does not provide a detailed assessment of the criteria to be used in determining whether the plaintiff's conduct had been abusive.

- *Chiron Corporation v Murex Diagnostics Ltd (No. 2) Organon*

In this case it was alleged that Chiron was abusing its dominant position by:

- (a) refusing to license its Hepatitis C Virus testing kit; and
- (b) charging excessive prices for licences and for kits.

The UK court held that since no link had been pleaded between the alleged abuses and an effect on inter-State trade the claim could not be successful. Such a link was necessary for the application of Article 86 (now Article 82).

- *Intergraph v Solid Systems CAD Services*

The claimed abuse was that Intergraph refused to grant a software licence to the defendants and refused to grant transferable licences to other customers. Intergraph argued that it was merely exercising the subject of its exclusive right and so this could not constitute an abuse of a dominant position. However, the defendant argued that Intergraph was not merely refusing to grant a licence, but actually using this right both to control the market for maintenance by excluding third parties from it and to prevent the development of a market for second hand systems. The defendants cited the *Magill* case.

In a preliminary application to strike out this "Euro-defence," the Court held that the dividing line between what is permissible and what is prohibited was hard to draw, particularly where the facts had yet to be established. Consequently, it could not at that stage determine whether or not the conduct might be abusive and so refused to strike out the defence.

- *HMSO v The Automobile Association*

The first claimed abuse was that other government departments did not pay to use the government department-owned copyright material. The Court held that this was irrelevant as

they constituted a part of the same undertaking and so this was not an arguable case of abuse.

The second claimed abuse was that the plaintiffs were only bringing an infringement action against the defendants and not against other parties. The Court held that this was a mere assertion and that the plaintiffs had said that they would bring an action if they became aware of any such infringement, and so this was not an arguable case of abuse.

The third claimed abuse was that the plaintiffs were reserving the market to themselves by refusing to grant licences. On the facts this was not an arguable case of abuse as the plaintiffs were in fact keen to license in order to profit from the royalties.

The fourth claimed abuse was that the terms of the licence were unreasonable and discriminatory. The claims of unreasonableness were:

- (a) that the rights were only offered in a tied or bundled form (i.e. rights that the defendant wanted were bundled with rights that it did not want) - the Court held that this was not shown on the evidence;
- (b) that the defendants would not be allowed to sub-licence the rights - the Court held that this was not required by *Magill* or any other case anyway;
- (c) that the defendants would have to acknowledge that the product included map data that was licensed by the plaintiffs in an unreasonable way - the Court dismissed this plea on the basis that, while the defendants objected to the form of wording, the plaintiffs were prepared to negotiate a more acceptable form of wording;
- (d) that the royalty rate was not zero - the Court held that there was no authority that required this (not even the *Magill* case which was cited as the most favourable of authorities) and that it would amount to destruction of the IP right.

- *Intel v Via*

Although this case did not concern copyright but rather patent law, the analysis and the issues raised are similar.

Via claimed that Intel had committed the following abuses:

- (a) Intel's bringing the proceedings was an abuse of the exercise of IP rights;
- (b) Intel's refusal to grant a licence either at all or on lawful or reasonable terms; and
- (c) Intel's refusal to licence Via in respect of the patents in suit was abusive because it formed part of a plan to withdraw from the market certain products for which there was a continuing demand and to force consumers and users to adopt a new and more expensive technology.

At first instance, the court took the view that the Commission's approach in the *IMS Health* case, under which there would be no need to show a new product market in order for there to be "exceptional circumstances" within the meaning of *Magill*, was wrong and that the European Court's decisions made it clear that the *Magill* requirements were cumulative. It concluded that there was nothing in the decisions of the European Court of Justice or of the Commission to suggest that it was seriously arguable that the owner of a patent, which would eliminate competition, might not refuse a licence merely on the ground that the applicant needed it in order to make use of the invention. The court proceeded to find that the conditions were not met on the facts of the case, as there would be no elimination of

competition and there was no evidence that spare parts would be removed from the marketplace. The Article 82 defences were therefore struck out.

However, on appeal this was overturned, the appeal court finding that the European case law was not settled and that the facts of the case might constitute “exceptional circumstances” such that there could be an abuse under Article 82. The case has since settled, so this issue will not be determined at trial.<sup>28</sup>

- *BSkyB investigation: alleged infringement of the Chapter II prohibition*

On a general note, the OFT held that “the normal principles of UK and ... EC competition law apply to [BSkyB’s] conduct”, “notwithstanding the fact that the primary object of the supply of BSKyB’s premium channels is the provision of a copyright licence”.<sup>29</sup> In particular, the OFT said that it was not bound by the decisions of the UK court, in particular in *HMSO v The AA*.

The first claimed abuse was that BSKyB, as the dominant undertaking at the wholesale level, had squeezed the margin between the wholesale and retail prices for its competitors at retail level. The OFT held that the margin allowed by BSKyB would have to cover its own costs of transformation, i.e. the question was whether a distributor as efficient as BSKyB’s distribution operations could make a profit. The OFT held there was insufficient evidence of any such market squeeze.

The second claimed abuse was that BSKyB gave various discounts for mixed bundles. The OFT held that this would only be abusive if it exceeded what would occur under normal market conditions i.e. would represent a clear deviation from a profit maximising strategy by giving discounts such that the marginal price of the additional service in the bundle would be lower than the marginal costs of providing such services, without objective justification. The OFT then held that, although this was the case for certain packages, there were insufficient grounds to conclude that this foreclosed the market for rivals.

The third claimed abuse was BSKyB’s other discounting practices. Here, the OFT held that they would not foreclose entry to wholesale premium channel market; they were linked to legitimate factors, the pricing discrimination was not material, BSKyB channels were not unduly promoted and distributors were not tied into following BSKyB’s distribution strategy. Therefore again there was no abuse.

### **(b) European Cases**

- *Deutsche Grammophon v Metro-SB-Großmärkte*

The claimed abuse was that the prices of records in Germany were higher than the prices of records bought in France and imported into Germany. The Court held that “the difference between the controlled price and the price of the product reimported from another member state does not necessarily suffice to disclose such an abuse; it may however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse.”

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<sup>28</sup> see <http://www.internetnews.com/infra/article.php/2177831> - April 8, 2003

<sup>29</sup> Compare s2.0a of the US DoJ’s Antitrust Guidelines for the Licensing of Intellectual Property, which states that “the Agencies regard intellectual property as being essentially comparable to any other form of property”.

- Magill

The claimed abuse was that the television stations used their copyrights to prevent the publication of weekly TV information. The ECJ made it clear that exercise of copyright can be reviewed under Article 82, although the determination of the conditions and procedures for granting protection is a matter for national rules and “the exclusive right of reproduction forms part of the author's rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position”. However, “the exercise of an exclusive right by the proprietor may, in *exceptional circumstances*, involve abusive conduct” (emphasis added).

The circumstances considered by the CFI included the fact that (a) there was no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead; (b) there was a specific, constant and regular potential demand on the part of consumers; (c) the television stations were, by force of circumstance, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide; (d) this prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand; (e) there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines; and (f) the television companies, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide. The ECJ upheld the CFI's finding that the refusal constituted an abuse under heading (b) of the second paragraph of Article 82 of the Treaty.

- Tiercé Ladbroke v Commission

The claimed abuse was that the French sociétés de courses refused to grant Ladbroke a licence for the sounds and pictures of French horse races for the territory of Belgium. The Court rejected the claim that sociétés de courses had abused a dominant position. It reached this conclusion on the basis of an assessment of the following:

- (a) the refusal to grant a licence could not be discriminatory as no licence had been granted to anyone and a mere offer to another party of a licence was insufficient to show discrimination i.e. the absence of any licences on the particular market meant that there was no reference point upon which to find the particular refusal arbitrary;
- (b) given the structure of the market, which was divided into national markets, sociétés de courses' licensing policy did not have the effect of partitioning the common market;
- (c) the refusal to exploit the rights in Belgium could not be considered arbitrary or discriminatory merely because the rights had been exploited in other distinct national markets;
- (d) the fact that Ladbroke was prepared to pay an appropriate fee for a licence to transmit French races did not constitute sufficient evidence of an abuse in the absence of discrimination against it by the sociétés de courses in the relevant geographical market;
- (e) the absence of technical barriers to the transmission of French sound and pictures in Belgium could not make the refusal to supply an abuse;

- (f) the fact that Ladbroke might be regarded, from an overall perspective, as a potential competitor of the sociétés de courses could not make it an abuse since the sociétés de courses themselves were not present in the separate geographical market on which the applicant operated and, secondly, they had not granted any licence to other operators on that market;
- (g) this case was distinguishable from *Magill* as the refusal to supply did not prevent market entry: here Ladbroke was not only present in, but had the largest share of, the main betting market on which the product in question, namely sound and pictures, was offered to consumers whilst the sociétés de courses, the owners of the intellectual property rights, were not present on that market. Moreover, even if that were not decisive, the refusal to supply would only be an abuse if it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers. In this case it was suitable but not indispensable; and
- (h) similarly, the case was distinguishable from other refusal to supply cases involving exclusion of a competitor because the sociétés de courses were not present on the Belgian market either directly or through a third party.

- *Micro Leader v Commission*

The claimed abuse was that “the resale prices of Microsoft products on the French market were influenced by means of a prohibition on importing French-language versions of products marketed by Microsoft on the Canadian market.”

The Commission said that “Microsoft’s action to prevent the importation of copies of its software for which no licence was granted in the Community and which therefore enjoy legal protection in the Community constitutes the lawful enforcement of its copyright” and that to be abusive there would need to be evidence that (a) Microsoft refused to supply Micro Leader or sold Micro Leader its products at different prices from those offered to similar clients in the Community; (b) Microsoft imposed resale prices on its distributors; or (c) Microsoft was charging lower prices on the Canadian market than on the European market for equivalent transactions and that the European prices were excessive.

However, the Court overturned the Commission’s finding on (c), stating that “the factual evidence put forward by the applicant constitutes, at the very least, an indication that, for equivalent transactions, Microsoft applied lower prices on the Canadian market than on the Community market and that the Community prices were excessive.” This evidence was that one of the undertakings in the Microsoft group had said that “the products imported from Canada were in direct competition with the products marketed in France and that their resale price in France was significantly lower, despite the expense of importing them into the Community from a third country.”

The Court went on to confirm that “it is clear from the case-law that whilst, as a rule, the enforcement of copyright by its holder, as in the case of the prohibition on importing certain products from outside the Community in to a Member State of the Community, is not in itself a breach of Article 86 of the Treaty, such enforcement may, in exceptional circumstances, involve abusive conduct” and that “In the present case, therefore, the Commission could not argue, without undertaking further investigation into the complaint, that the information in its

possession at the time it adopted the contested decision did not constitute evidence of abusive conduct by Microsoft.”

- IMS Health

The claimed abuse was the refusal by IMS to license the copyright for its 1860-brick structure to its competitors.

The Commission held that “the criteria for the establishment of abuse under Article 82 in cases relating to the exercise of a property right, as further clarified by the Court in *Bronner*, are whether:

- the refusal of access to the facility is likely to eliminate all competition in the relevant market,
- such refusal is not capable of being objectively justified, and
- the facility itself is indispensable to carrying on business, inasmuch as there is no actual or potential substitute in existence for that facility.”

The Commission gave a detailed analysis of the facts as a result of which it concluded that the legal tests had been met.

The President of the Court of First Instance then considered whether or not Commission’s decision should be stayed, pending a full appeal, and so considered whether there was a serious dispute about the correctness of the Commission’s findings.

The President referred to three sets of exceptional circumstances in the *Magill* case: (i) the refusal to provide the information by relying on national copyright provisions prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the broadcasters did not offer and for which there was a potential consumer demand; (ii) there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines; and (iii) the broadcasters’ conduct had the effect of reserving to themselves the secondary market of weekly television guides by excluding all competition on that market, through denying access to the basic information which is the raw material indispensable for the compilation of such a guide.

The President then held that “there are a number of potentially important differences between the circumstances of that case and those underlying the contested decision, whose existence, albeit not their significance, has not been seriously contested by the Commission.” In particular, the President noted that the Commission did not regard the circumstances of *Magill* as necessary for there to be “exceptional circumstances”. This was arguable and would have to be settled at a main trial.

Moreover, in this case the President said that the Commission had in effect found that “the prevention, by means of a refusal to license an intellectual property right, of the emergence of new competitors willing to offer, at most, new variations of the same services and on the same market as the dominant undertaking may amount to an abuse where those competitors cannot otherwise access the market in question because the protected work constitutes a de facto industry standard.” The President then said that the question of whether the Commission also needs to show “the prevention of the emergence of a new product or service for which there is potential consumer demand” would have to be settled at a main trial.

### **Sub-question 3.6**

*Do you agree with the balance struck and if not, what criteria would you have used and why?*

### **Answer to Sub-question 3.6**

The balance currently struck in the UK and in the EU appears to be largely appropriate.

Both sets of courts and authorities accept that exercise of copyright is not immune to challenge for abuse of a dominant position. At the same time, they both accept that the “monopoly” granted by a copyright does not automatically mean that the owner has a dominant position. The fact that copyright or related rights are involved should not mean that a different competition assessment should be undertaken.

Many of the decisions to date have concerned spare parts or other secondary markets, where the underlying claim is that copyright should not protect the secondary market. The courts and authorities have rightly resisted this underlying claim, as the scope of copyright is a matter for national or European legislation and not for competition law. In these cases, as with others, the question is whether there is truly a dominant position on the relevant market, or whether competitive forces (such as upstream competition) mean that the copyright owner is in economic terms subject to competitive forces on that market. The Commission’s decision in *Info-Lab/Ricoh* is a good example of such analysis.

However, the need for proper analysis also extends to cases which concern primary markets, such as *Deutsche Grammophon*, *Micro Leader* and *IMS Health*. In such cases too the courts and authorities must ensure that they do not interfere with the use of copyright save where it is or is part of an abuse of a dominant position. Although a single set of factors cannot be laid down, it is only in rare cases that a copyright owner will be free from potential competition. As a position of dominance is a pre-requisite for a finding of abuse, this means that only rarely will there be any question of whether there is a refusal to supply or excessive pricing. In such cases, though, normal competition principles should apply.

This said, there is a continuing uncertainty at European law which largely results from the definition of the term “exceptional circumstances” used in the *Magill* case. Although this may be resolved in the final *IMS Health* decision, it is unclear whether this method of analysis does in fact add anything to the process or whether it would be clearer to follow the approach of the OFT and say that the fact that IP rights are involved does not alter the fundamental analytical process.

This uncertainty is reflected in the UK approach in the *Intel v Via* case. However, it should be noted that the UK authorities took a different approach in the *BSkyB* decision, where they took the view that intellectual property should not be treated as a special category. Although the *BSkyB* case did not concern a refusal to licence, and so can be distinguished as not being an “essential facilities” case, it is not clear that this is a meaningful decision on which to base a very different approach to analysis, especially as the CFI in *IMS Health* specifically continues to contemplate that a different approach may be adopted to analysing the use of IP rights from the approach adopted in relation to other possible abuses of a dominant position.



### **Sub-question 3.7**

*Have there been any circumstances in which a court/tribunal or competition authority has determined that the mere exercise of a right could amount to an abuse, and if so in what circumstances?*

### **Answer to Sub-question 3.7**

It is hard to say whether “mere exercise” of copyright may of itself constitute an abuse because it is difficult to conceive of circumstances where copyright is exercised without any external factors. Exercise of a copyright will normally involve preventing another party from doing something they would otherwise be free to do.

The more important issue is that the courts and authorities have not determined that exercise of copyright by a dominant undertaking cannot ever constitute an abuse.

By way of example, the Commission in *Micro Leader* argued before the Court of First Instance that “the prohibition by Microsoft on illegally importing copies of its software from Canada is not an abuse within the meaning of Article 86 of the Treaty, since that prohibition constitutes a lawful enforcement of its copyright under Article 4(c) of Directive 91/250.” (paragraph 41). The Court of First Instance, however, overturned the Commission’s decision for a manifest error of assessment, stating that “It is clear from the case-law that whilst, as a rule, the enforcement of copyright by its holder, as in the case of the prohibition on importing certain products from outside the Community in to a Member State of the Community, is not in itself a breach of Article 86 of the Treaty, such enforcement may, in exceptional circumstances, involve abusive conduct [referring to the *Magill* case]” (paragraph 56) and that the Commission could not therefore ignore certain evidence of excessive or discriminatory pricing which had been raised.

However, although this type of defence has been rejected in various cases (see also the UK’s MMC decision in *Ford*) it is difficult to balance with the continued requirement of “exceptional circumstances” in the ECJ case law. If use of an IP right only constitutes an abuse in “exceptional circumstances” then by definition its use in “unexceptional circumstances” will not be an abuse. This approach ultimately seems to derive from *Consten v Grundig* where the court, to avoid difficulties with the property provisions of Article 295 of the EC Treaty, distinguished the “existence” and “exercise” of IP rights. Alternatively, it may be restricted to refusal to supply/essential facility type cases, in the manner suggested by the OFT in *BSkyB*.

### **Sub-question 4.2**

*For this purpose, a collecting society is considered to be an undertaking or association whose primary purpose is to administer rights on behalf of its members in such a way that the society is empowered by each of its members to negotiate and act in respect of his works. There is no need for individual consultation with members as to the terms on which licences authorising the use of their works are to be granted and licences are granted in respect of the works of more than one rightholder.*

*What copyright collecting societies exist in your jurisdiction and describe:*

*4.2.1 the rightholders they represent;*

*4.2.2 the function they perform including the scope of the exercise of the rights transferred or assigned to them;*

*4.2.3 their objective and rationale for carrying out this task on a collective basis;*

*4.2.4 the legal basis for collective administration, including e.g.*

*(a) Voluntary collective licensing: where a society or governing body is mandated by its members to collect and distribute royalties on their behalf:*

*e.g. in response to a collective need where the rights administered by a collecting society comprise one or more exclusive rights conferred by statute on the rightholder and the rightholder finds it impractical or impossible to individually license and monitor use or in fact the use is tied up with or integrally involved with the exercise of rights of other rightholders and income from exploitation is generated jointly;*

*(b) Hybrid of legislation and voluntary licensing: Rights are conferred by statute and mandated to a collecting society (e.g. collecting societies for cable retransmission right under EC Directive 93/83/EEC);*

*(c) Special juridical status or other statutory basis*

### **Answer to Sub-question 4.2**

See Annex 2 for a table summarising the answers to 4.2.1, 4.2.2 and 4.2.4.

### **Answer to Sub-question 4.2.3**

Collective administration is a practically and economically effective way of enforcing the rights of members of collecting societies. The service which collecting societies provide to their members enables those members to enforce and administer their copyrights effectively and cheaply. If members were forced to administer such rights individually and separately, it would not be practical for those members to police all of their copyrights around the world.

Additionally, collecting societies provide a valuable service to licensees, who would otherwise have the logistical (and expensive) problem of obtaining direct licences from each individual copyright owner, rather than from one society representing all of those rights holders.

### **Sub-question 4.3**

*Do any specific remedies exist, other than under competition law, to regulate the activities of collecting societies?*

### **Answer to Sub-question 4.3**

The activities of collecting societies are largely regulated internally by members of the societies and by the requirements of UK company law. For example, most societies will have a number of guarantees written into the memorandum and articles of association of the society, effectively providing protection for the members. In general, members of collecting societies who consider that their organisation has acted oppressively towards them or that the terms and conditions of membership are unfair must rely on the general law to find a cause of action.

Collecting societies are also regulated through compliance with the Copyright, Designs and Patents Act (CDPA) 1988. The CDPA 1988 incorporates a number of provisions which relate specifically to collective licensing schemes. For example, section 136 of the CDPA 1988 provides an implied indemnity, in favour of a licensee under a collective licence, in relation to the inadvertent reproduction of works not covered by a particular collective licence.

Furthermore, copyright collecting societies are, to some extent, regulated by the Copyright Tribunal. Regarding references and applications in relation to licence schemes, i.e. schemes setting out the classes of cases in which the operator of the scheme or the person on whose behalf he acts is willing to grant copyright licences and the terms of those licences, the Copyright Tribunal may confirm or vary the scheme as it determines to be reasonable in the circumstances. The Tribunal may not vary the scheme save in a manner which relates to the matters which have been argued before it except with the consent of the parties.

The Tribunal has no investigatory jurisdiction, but has the power to hear and determine proceedings under various provisions of the CDPA 1988. Its jurisdiction covers schemes which relate to licences for copying the work; rental or lending copies of the work to the public; performing, showing or playing the work in public or broadcasting the work. Both proposed and existing schemes can be referred to the Tribunal.

The Tribunal may only exercise its control where the copyright owner or a licensing body has created a licensing scheme or a general licence which covers the works of more than one right holder; it generally does not have jurisdiction over the grant or refusal of individual licences.

The Tribunal may confirm or vary the scheme as it determines to be reasonable in the circumstances. In deciding what is reasonable, the Tribunal has regard to the availability and terms of other schemes, or the granting (and terms) of other licences in similar circumstances, with the aim of securing that there is no unreasonable discrimination between licensees and potential licensees.

Most references made to the Copyright Tribunal and its predecessor, the Performing Rights Tribunal, have concerned royalties or tariffs to be paid by the licensees within the scheme, although there have also been some cases which concerned the substantial terms of the licence. In *Romeike & Curtice Ltd v Newspaper Licensing Agency Ltd*,<sup>30</sup> the Newspaper Licensing Agency (NLA) required press cuttings agencies to stop supplying any client who did not sign a statement

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<sup>30</sup> *Romeike & Curtice Ltd v Newspaper Licensing Agency Ltd* [1999] EMLR 142

that it was not licensed to make copies and did not intend to request the grant of a sublicense from *Romeike & Curtice Ltd* (“Romeike”), and further that Romeike supply to the NLA a list of all its clients so that the NLA could ensure compliance with the licensing provisions. The Tribunal found these conditions to be unreasonable and varied the terms of the licence scheme accordingly.

The Tribunal can make both retroactive and interim orders. Interim orders are regularly made to allow the parties to agree on certain aspects of the new licence, e.g. a new mechanism for the calculation of tariffs, before the Tribunal makes its final order. An order made by the Tribunal may be of indefinite duration or for such time as the Tribunal determines even though the licensing scheme itself is expressed to be of shorter duration. Once an order is made, it can only be varied by a further reference which has to be made within certain time limits. The Tribunal also has full discretion in the matter of parties’ costs.

Finally, the Secretary of State has power under Section 51 of the Fair Trading Act to require an investigation where it appears to him that a monopoly situation exists in relation to the supply of goods or services. Under Section 78, he can require such an investigation where practices appear to have been adopted to preserve a monopoly situation. Such references may cover matters which may have an effect upon the grant of copyright licences.

Under the Enterprise Act, which will repeal large parts of the Fair Trading Act once it enters into force in June 2003, the OFT has the power to make references to the Competition Commission under Section 131 where it appears that any feature of a market prevents, restricts or distorts competition. The Competition Commission may then find that certain copyright licensing conditions operate or have operated against the public interest, i.e. they restrict the use of a work by a licensee or the right of a copyright owner to grant other licences, or involve the refusal of a copyright owner to grant licences on reasonable terms. In these cases, the Secretary of State has power under Section 144 of the CDPA and under Part I Schedule 8 of the Fair Trading Act to cancel or modify such conditions, or provide that the licences in respect of the copyright are to be made available as of right. If the government decides to exercise these powers, the terms of such a licence are to be settled by the Tribunal if the relevant parties cannot reach an agreement and the persons requiring the licences make an application to the Tribunal. Note that Section 131 of the Enterprise Act only applies where it is not more appropriate to deal with the competition issues identified by applying the Competition Act 1998.

#### **Sub-question 4.4**

*Are there other substantial forms of collective administration of such rights by bodies other than "collecting societies" (as defined above) e.g. where a company undertakes as one of its activities, the management and licensing of collective rights where such licences are granted in respect of the works of more than one rightholder (e.g. Media company, sports body) and rightholders voluntarily assign rights under the terms of a contract.*

*4.4.1 If so, please state what they are and answer the questions referred to in 4.2.1 – 4.2.4 above in relation to these bodies.*

#### **Answer to Sub-question 4.4**

It is not possible to provide an exhaustive list of all other entities providing some form of collective administration of copyrights and related rights in the UK. A number of organisations representing members with common interests may be expected to administer, where necessary, such rights on their behalf of their members. However, such organisations rarely state explicitly that they perform this ancillary function.

One example of an organisation which undertakes as one of its activities the management and licensing of collective rights is the Football Association. The Football Association's members are the twenty member clubs of the FA Premier League, all of whom assign their copyrights to the Football Association. The Football Association recently brought a copyright infringement action<sup>31</sup> against the sticker manufacturer Panini, claiming that Panini's production of an unofficial 2003 FA Premier League sticker album, with photographs of all the league's players mainly shown wearing their club strip, amounted to an infringement of the copyright in the FA Premier League logo and each club's emblem, since they feature on the shirts of the players as worn in the photos.

Other examples of organisations that are not copyright collecting societies but do, among other activities, administer copyrights on behalf of their members include The Royal Society and The Press Association.

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<sup>31</sup> *The Football Association Premier League Ltd & Others v. Panini UK Limited* [2002] All ER (D) 260 (Dec); Dated 13th December, 2002

#### **Sub-question 4.5**

*Have there been any national decisions of courts, tribunals or competition authorities in which the collective exercise of copyrights or related rights by any of the organisations identified in 4.2 or 4.4 above have either:*

*4.5.1 been found to amount to an abuse of a dominant market position?*

*4.5.2 been found not to amount to an abuse of a dominant market position after the organisation in question has successfully defended itself against such a claim?*

#### **Answer to Sub-question 4.5**

As a preliminary point it should be noted that, given collecting societies' rationale of providing a practical and economic means of enforcing members' rights, it is often the case that there will be only one collecting society for a particular function within a specific jurisdiction. A number of UK and EC cases have found that this means that collecting societies are often monopolistic in nature. We have not considered these cases in detail, save where they relate to the specific questions set out in 4.6 below.

The collective exercise of copyrights or related rights was found to amount to an abuse in the following cases:

- *Ministre Public v. Tournier*<sup>32</sup> (EC law case).
- *Lucazeau v. SACEM*<sup>33</sup> (EC law case).

Each of these cases is summarised in more detail in the answers to 4.6 below and in Annex 3.

The collective exercise of copyrights or related rights was found not to amount to an abuse following a successful defence in the following case:

- The MMC Report on Collective Licensing<sup>34</sup> (only one collecting society (PPL) fell within the MMC's terms of reference and therefore was the sole subject of the investigation).

Again, this is summarised in more detail in the answers to 4.6 below and in Annex 3.

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<sup>32</sup> Case 395/87 *Ministre Public v Tournier* [1989] ECR 2521

<sup>33</sup> Joined cases 110/88, 241/88 and 242/88 *Lucazeau v SACEM* [1989] ECR 2811

<sup>34</sup> Cm 530 (1988)

#### **Sub-question 4.6**

*If so, please provide details of the factual circumstances, economic analysis and legal decision made, with particular regard to the following questions:*

4.6.1 *what rights were involved?*

4.6.2 *what form of organisation as identified in 4.2 or 4.3 above was involved and on what basis was it found that the organisation held a dominant position in the market in question?*

#### **Answer to Sub-question 4.6.1**

##### **(a) UK Cases and Reports**

- *MTV Europe v. BMG Records (UK) Limited and Others*<sup>35</sup>

This concerned broadcasting and other performing rights in respect of music promotion videos.

- *British Sky Broadcasting Ltd and Sky Television PLC v Performing Right Society Ltd*<sup>36</sup>

This concerned copyright in music.

- *MMC Report on Collective Licensing*

This considered public performance and broadcast rights, specifically copyright.

##### **(b) European Cases**

- *Ministre Public v. Tournier*

This concerned copyright in musical works.

- *Lucazeau v. SACEM*

This also concerned copyright in musical works.

- *La Pyramide*<sup>37</sup>

This also concerned copyright in musical works.

#### **Answer to Sub-question 4.6.2**

##### **(a) UK Cases and Reports**

- *MTV Europe v. BMG Records (UK) Limited and Others*

As described in Annex 3, the defendants in this case were a group of right holders and VPL, a collecting society responsible for administering the right holders' copyrights. IFPI is an organisation which carries out pan-European licensing of broadcasting and cable retransmission rights in music videos of organisations affiliated to it, such as VPL. Although MTV Europe alleged that these organisations

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<sup>35</sup> [1995] 1 CMLR 427

<sup>36</sup> [1998] EMLR 193

<sup>37</sup> Case C-378/93 [1994] ECR I-3999

had abused a dominant position, for procedural reasons the court did not examine the substance of the case and thus did not consider whether either body was dominant.

- (1) British Sky Broadcasting Ltd (2) Sky Television PLC v Performing Right Society Ltd

The Performing Right Society or PRS is a collecting society which exists to administer the rights of public performance, broadcasting and diffusion by cable of musical works subject to copyright. It was found to be dominant as virtually all composers, lyricists and music publishers in the UK have assigned their relevant copyrights to the PRS.

- MMC Report on Collective Licensing

The focus of this report was Phonographic Performance Limited (PPL), a collecting society. It was found to be dominant due to the fact that it was the largest collective licensing body dealing with broadcasting and public performance rights in sound recordings made or published in the UK. Its repertoire contained around 90% of all commercial sound recordings available in the UK.

**(b) European Cases**

- Ministre Public v. Tournier

The organisation considered here was SACEM, the society which manages copyright in musical works in France. The ECJ did not explicitly state why SACEM was considered to be dominant (this was assumed in the terms of reference from the French court) but the terms of reference stated that SACEM enjoyed a *de facto* monopoly in France in copyright management, presumably because it was the only such organisation.

- Lucazeau v. SACEM

This also considered SACEM and similarly the Court was not asked to decide whether SACEM held a dominant position but the terms of reference from the national court simply stated that that was the case.

- La Pyramide

Again, this considered SACEM and again, the terms of reference stated that SACEM was dominant without further explanation.



4.6.3 *what form(s) of exercise of rights were found to be abusive and in what circumstances?*

4.6.4 *what form(s) of exercise of rights were found not to be abusive and in what circumstances?*

#### **Answer to Sub-questions 4.6.3 and 4.6.4**

As stated above, only two of the judgments we have considered found that there was an abuse of a dominant position. These related to the following forms of exercise of rights:

- *Ministre Public v. Tournier*

The defendant in this case claimed that SACEM's general behaviour towards discotheques in France was unfair. Specifically, he claimed that the rate of royalties demanded was arbitrary and unfair and therefore constituted an abuse of a dominant position as the level of royalties charged was appreciably higher than that applied in other Member States and bore no relation to those charged to other large-scale users of recorded music, such as television and radio stations.

The ECJ held that when a dominant undertaking imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States. SACEM could not, on the facts, justify this and therefore was found to be abusing its dominant position.

- *Lucazeau v. SACEM*

These three joined cases related to the refusal of the operators to pay royalties to SACEM for the performance of protected musical works on their premises. The operators put forward a number of arguments to show that SACEM's conduct was abusive; these were identical to the arguments made by the defendant in *Tournier*.

As in *Tournier*, the Court held that Article 82 of the Treaty means that a national copyright-management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discotheques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

Only one other source considered why there was no abuse, as follows:

- *MMC Report on Collective Licensing*

The MMC Report on Collective Licensing concluded that PPL's behaviour in exercising its rights was not abusive. This was on the basis that collective licensing bodies are the best available mechanism for licensing sound recordings, provided

they can be restrained from using their monopoly unfairly. Based on European decisions, the MMC concluded that unfair use of the monopoly may include any of the abuses referred to in Article 82 of the EC Treaty, such as the unfair level of its charges. However, the rates PPL charged the BBC and Independent Local Radio were the result of direct negotiations and a determination by the Performing Right Tribunal respectively and did not require alteration/amendment by the MMC.

Additionally, the MMC made a number of recommendations in order to ensure that the appropriate restraint would be exercised by PPL. These included that PPL should be obliged to permit the use of its repertoire in return for equitable remuneration; that users should be entitled to a statutory licence, initially on the basis of self-assessed royalties, pending a Copyright Tribunal order on equitable remuneration; PPL's injunctive right should be limited; that there should be no changes in PPL's current royalty rates; and that performers should be given equitable remuneration from the royalty income received by PPL, in substitution for the existing unsatisfactory arrangements.

4.6.5 please consider, in particular, the following issues in relation to any decision dealing with either excessive, unfair or discriminatory pricing or bundling or rights:

*Excessive or unfair pricing*

- (a) what costs basis was used to determine a benchmark for a "fair price" or for determining whether a price was discriminatory?
- (b) were any arguments raised to justify prices which exceeded a "fair" comparator on the basis that there were objective reasons for such differences?

*Bundling of rights*

- (a) what forms of bundling of rights resulted in users being required to pay for the use of rights which they did not wish to use in order to access rights which they did want to use?
- (b) on what basis did the collecting society justify such bundling?

**Answer to Sub-question 4.6.5**

***Excessive or unfair pricing***

**(a) *UK Cases and Reports***

- *MTV Europe v. BMG Records (UK) Limited and Others*

On the basis of earlier case law (including *Tournier* – see below), the court concluded that the relevant question for considering whether the activities of VPL and IFPI were abusive was whether the level of fees that they charged was higher as a result of their operations than they would otherwise be were the major record producing companies whose rights they administered prepared to negotiate separately for access to their repertoires and whether the result was a higher level of fees or a reduction of cost resulting from the efficiency of being able to obtain a European-wide licence from one entity.

For procedural reasons, the judgment did not go on to consider any arguments raised to justify prices in excess of this benchmark.

- *British Sky Broadcasting Ltd and Sky Television PLC v Performing Right Society Ltd*

The Court based its decision as to what was a fair rate of royalties on section 129 of the Copyright, Designs and Patents Act 1988, which required it to look at comparable licences and to ensure that there was no unreasonable discrimination between licensees of "the same person". To arrive at different terms for different licensees in respect of the same rights was possible but there must be a logical reason for it. It would be wrong in principle to reject a proposal considered to be reasonable in a particular case because it might be less reasonable in another case. It would be fair to take into account if possible the extent to which the licensee needed the full scope of the repertoire and the extent to which he benefited from the collective administration of the rights. Evidence as to licensing rates and practice in other European jurisdictions was relevant, but was less helpful than United Kingdom comparables because the task of comparison was complex. If rates were higher in

other countries, that might be indicative of abuse and did not mean that they had to be raised here. Before revenue could be used as a measure of the value of music to a broadcaster, an adequate nexus must be shown between the use of music and revenues earned.

It would be unreasonable on the facts of the present case to adopt a percentage-of-revenue basis. It was fairer and more reasonable to use actual rather than potential audience figures where these were available, provided that they were accurate. Having a large number of channels, Sky made more use of music than other broadcasters and offered the viewer more choice. The extra use of music was of value even though people only watched one channel at a time. Broadcast hours were therefore a factor which should be given some recognition in the final royalty, although not in anything approaching a direct proportional relationship.

Evidence was given of comparable licences in the United Kingdom and elsewhere in Europe, from which the PRS argued that United Kingdom royalties were at the low end of the range.

- MMC Report on Collective Licensing

The MMC considered that negotiated tariffs constituted a fair price and that there was no reason to disturb the current arrangements. As regards differing tariffs for Independent Local Radio and the BBC, the MMC stated that there should be no reason why the tariffs should be different because Independent Local Radio was commercial and the BBC was a public service: they both used the same product for the purpose of attracting an audience, and since there was no difference in the supply costs both should pay the same price. The MMC concluded that this implied the adoption of an audience-related hourly rate structure of equal validity for both Independent Local Radio and the BBC which would yield an aggregate revenue acceptable to PPL.

**(b) European Cases and Reports**

- Ministre Public v. Tournier and Lucazeau v. SACEM

As considered above in the response to 4.6.3, the cost basis used by the ECJ in *Tournier* to determine a fair price for royalties was that it would be considered an imposition of unfair trading conditions where the royalties charged (here, to discotheques) were appreciably higher than those charged in other Member States, the rates being compared on a consistent basis.

The collecting society argued that there were objective differences between discotheques in France and those in other Member States which justified dissimilar rates of royalties. In particular, it argued that royalties calculated on the basis of the turnover of discotheques, as in France, were not comparable with those determined by reference to the floor area of the discotheques in question, as in other Member States. If it were possible to compare the royalties on a like-for-like basis, the conclusion would be that the differences between the Member States in the level of royalties were minor. SACEM also argued that particular circumstances justified the difference in rates of royalties; specifically, the high prices charged by discotheques in France, the traditionally high level of protection provided by copyright in France and the French law which provided that the playing of recorded musical works was subject not only to a performing right but also to a supplementary mechanical

reproduction fee. SACEM also argued that the customary methods of collection were different in that in France collecting societies insisted on collecting royalties of even small amounts (unlike in other Member States), due to the wish of authors to have their rights fully observed.

These points were rejected by the Court which held that circumstances of this kind could not account for a very appreciable difference between the rates of royalty charged in the various Member States.

Identical arguments were made by SACEM in *Lucazeau v. SACEM*, which the Court also rejected.

### ***Bundling of rights***

- *Ministre Public v. Tournier*

The defendant in this case claimed that discotheques operators had to pay very high royalties to obtain access to the whole of SACEM's repertoire, even though only part of it was of any interest to them and that SACEM had always refused to grant access to just part. Moreover they could not deal directly with copyright management societies in other countries since the latter were bound by reciprocal arrangements with SACEM and so refused to grant direct access to their repertoires.

The Court's judgment in this case does not indicate the reasons why SACEM justified such bundling. However, it states that the French Government and the European Commission had put forward such a justification, in that fragmenting the repertoire into different marketable sub-divisions would entail great practical difficulties. Discotheques would lose the advantage of total freedom in choosing the musical works which they played. Moreover, differentiation between protected musical works which were or were not allowed to be played would require more extensive surveillance and thus higher costs for the users of the music.

The Court held that if direct access to a sub-division of a repertoire could fully safeguard the interests of authors, composers and publishers of music without also increasing the costs of managing contracts and monitoring the use of protected musical works, then refusal to grant such access could go beyond the limits of what was necessary for the protection of the rights and interests of the members of collecting societies. However, the results of such an appraisal might differ from one Member State to another.

4.6.6 *what criteria were used to strike a balance between conflicting interests involved?*

4.6.7 *do you agree with the balance struck and if not, what criteria would you have used and why?*

#### **Answer to Sub-questions 4.6.6 and 4.6.7**

##### **(a) UK Cases and Reports**

- *MTV Europe v. BMG Records (UK) Limited and Others*

The court stated that it was clear that the operations of collecting societies who administer the rights of copyright owners involved a measure of restriction of price competition. However, quoting *Tournier* (see below), the court implied that collecting societies ensured that the management of performing rights was efficient. The attitude of the European Courts was that such a restriction did not itself constitute a breach of the competition rules but that each collecting society must be looked at individually and must be treated *prima facie* as legitimate. Thus, the question was one of fact and of economic assessment in each case, to be weighed against the efficiencies resulting from the collective management of rights.

- *British Sky Broadcasting Ltd and Sky Television PLC v Performing Right Society Ltd*

As this case was concerned with setting reasonable royalties for broadcast licences, it did not directly address the criteria necessary to strike a balance between conflicting interests, although the consideration of the proper way to set the royalty rate, as discussed above, indicated the desire to find a balance between a fair rate and the true value of the copyrights being licensed.

- *MMC Report on Collective Licensing*

The MMC reiterated that copyright was a form of property right and stated that there was no reason why an individual owner of it should be denied his existing right to seek an injunction to prevent unauthorised use. However, where the owner of copyright in a sound recording entrusted the management of that right to PPL it was appropriate for that body, as the price of its monopoly, to be obliged to permit the use of its repertoire in return for equitable remuneration. This would require legislation under which users of PPL's repertoire would have the right to a statutory licence subject to certain conditions.

##### **(b) European Cases and Reports**

- *Ministre Public v. Tournier*

The Court held that collecting societies pursued a legitimate aim when they endeavour to safeguard the rights and interests of their members vis-à-vis the users of recorded music. However, whilst this was the case and whilst collective management of rights was not itself abusive (and may well be efficient), the dominance it bestowed might be abused by the imposition of unfair trading conditions. The unfair trading conditions considered here were a significantly higher rate of royalties than in other Member States, as discussed above.

- Lucazeau v. SACEM

The Court did not specifically consider the criteria which should be used to strike a balance between conflicting interests involved. However, the tenor of the judgment was in line with that in *Tournier* (the judgments were given on the same day against the same collecting society, SACEM).

In each of these cases, the balance was struck between the protection of rights and the efficiency of collective management on the one hand, and the restriction on competition that results on the other. In our opinion (based solely on the judgments referred to), the balance was correctly struck in that in no case were the efficiencies permitted to outweigh what was clearly a serious restriction of competition.

### **Sub-question 4.7**

*Have there been any decisions of national courts, tribunals or competition authorities in which it has been found that one of the organisations referred to in 4.2 or 4.4 above have: (i) made conditions of membership of a collective group; or have (ii) stipulated conditions on which it would: exercise; administer; manage; or distribute the proceeds resulting from the exploitation of collective rights; that either:*

*4.7.1 amount to an abuse of a dominant position on the market?; or*

*4.7.2 do not to amount to an abuse of a dominant market position after the organisation in question has successfully defended itself against such a claim?*

### **Answer to Sub-questions 4.7.1 and 4.7.2**

As stated in response to question 4.5, it is often the case that there will be only one collecting society for a particular function within a specific jurisdiction, so that a number of UK and EC cases have found that this means that collecting societies are often monopolistic in nature. Again, we have not considered these cases in detail, save where they relate to the specific questions below.

The conditions of collective management of intellectual property rights was found to amount to an abuse in the following cases:

- *The Monopolies and Mergers Commission (“MMC”) Report on Performing Rights*<sup>38</sup>
- *GEMA*<sup>39</sup>
- *GVL*<sup>40</sup>
- *BRT v SABAM*<sup>41</sup>
- *Greenwich Film Production (Paris) v SACEM*<sup>42</sup>

Each of these cases is summarised in more detail in the answers below and in Annex 4.

The conditions of collective management of intellectual property rights was found not to amount to an abuse in the following case:

- *Basset v SACEM*<sup>43</sup>

This is summarised in more detail in the answers below and in Annex 4.

Additionally, certain cases have considered the application of the concept of abuse of a dominant position to collective management of rights copyrights, but no final decision has been reached. These cases have been summarised in Annex 4 and, where relevant, are referred to in the answers below.

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<sup>38</sup> Cm 1224 (1990)

<sup>39</sup> Commission Decisions 71/224 and 72/268 in Case IV/26.760, Commission Decision 82/204 in Case IV/29.971

<sup>40</sup> Commission Decision 81/1030 in Case IV/29.839 and Case 7/82 [1983] ECR 483

<sup>41</sup> Case 128/73 [1974] ECR 51

<sup>42</sup> Case 22/79 [1979] ECR 3275

<sup>43</sup> Case 402/85 [1987] ECR 1747



4.7.3 If so, please provide details of the factual circumstances, economic analysis and legal decision made, with particular regard to the following questions:

- (a) what rights were involved?
- (b) what form of organisation as identified in 4.2 or 4.4 was involved and on what basis was it found that the organisation held a dominant position in the market in question?
- (c) what form(s) of exercise of rights were found to be abusive and in what circumstances?
- (d) what form(s) of exercise of rights were found not to be abusive and in what circumstances?

**Answer to Sub-question 4.7.3(a)**

- The MMC Report on Performing Rights  
This report considered performing rights and film synchronisation rights as administered by the Performing Right Society (PRS)
- U2<sup>44</sup>  
This case concerned music performance rights.
- GEMA cases  
These cases concerned copyrights in musical and cinematographic works.
- GVL  
This case related to the exploitation by the collecting society, GVL, of performers' rights in Germany (i.e. rights which arise out of the reproduction of the author's creative work).
- BRT v SABAM  
This case related to the exploitation by the collecting society, SABAM, of authors', composers' and publishers' rights in Belgium and to the validity of its contracts of membership.
- Greenwich Film Production (Paris) v SACEM  
This case concerned the copyright in the music of two composers.
- Banghalter v SACEM<sup>45</sup>  
This case concerned provisions of SACEM's Articles of Association regarding management of copyrights.
- Basset v SACEM

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<sup>44</sup> Unreported

<sup>45</sup> Commission Decision in Case COMP/C2/37.219

This case related to the exploitation of performances of music at discotheques, on juke boxes and radios.

#### **Answer to Sub-question 4.7.3(b)**

- *The MMC Report on Performing Rights; U2*  
These involved the PRS, which was found to have a monopoly due to the fact that it represented the majority of music copyrights in the UK.
- *GEMA cases*  
These cases involved GEMA, a German collecting society, which was held to have a dominant position as it was the only society in Germany responsible for managing the rights of composers.
- *GVL*  
The Commission held that GVL, the German copyright collecting society, was dominant in view of the fact that it was the only undertaking active in the market for services relating to the management and secondary exploitation of rights vested in performing artists and manufacturers in Germany.
- *BRT v SABAM*  
This case involved SABAM, the Belgian association of authors, composers and publishers. The ECJ acknowledged that SABAM had a “de facto monopoly” in Belgium for the management of copyrights following the Belgian court’s findings, but did not explain why.
- *Greenwich Film Production (Paris) v SACEM; Banghalter v SACEM; Basset v SACEM*  
These cases all concerned SACEM, the French collecting society. In each of these cases it was acknowledged that SACEM had a dominant position or a ‘de facto monopoly’ but in none of them did the Court explain why.

#### **Answer to Sub-questions 4.7.3(c) and (d)**

The following cases considered that there was – or might be – an abuse of a dominant position:

- *The MMC Report on Performing Rights*  
The MMC identified a number of adverse findings, the majority of which were not related to competition issues. Of relevance was the PRS’s refusal to allow members to self-administer their own live performance rights and the MMC recommended that the PRS’s Articles of Association should be amended to allow for this.
- *U2*  
No decision was reached on this case as a settlement was agreed between the parties; however, U2 complained that the PRS had refused to hand back the live performance rights to U2 enabling them to license concert promoters and tour

operators direct and that PRS was operating an inappropriate system of standardised royalties and fees in the live performance sector.

- GEMA cases

These cases considered whether certain provisions of GEMA's statutes were abusive. As summarised in Annex 4, a number of provisions were held to constitute an abuse, although the Commission later permitted an amendment which was held not to be abusive as it provided a means of protecting GEMA's membership as a whole by avoiding the possibility of favouring particular musical works.

- GVL

The European Commission held that GVL abused its dominant position by refusing to conclude management agreements with foreign artists having no residence in Germany - irrespective of whether they were artists from Member States of the European Economic Community - or otherwise to manage their performer's rights in Germany. The Commission found that this constituted discrimination on grounds of nationality and hence an abuse within the meaning of Article 82. This was upheld on appeal.

- BRT v SABAM

The issue was whether SABAM had abused its dominant position by demanding the global assignment of all copyrights without drawing any distinction between specific categories of such rights (e.g. present or future rights) and by being able to continue to exercise these rights 5 years following the withdrawal of a member. The ECJ concluded that the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 82 imposed on its members obligations which were not absolutely necessary for the attainment of its object and which thus encroached unfairly upon a member's freedom to exercise his copyright could constitute an abuse. However, the ECJ held that it was a question for national courts to decide if such obligations were absolutely necessary in this way.

- Greenwich Film Production (Paris) v SACEM

It was alleged that SACEM was abusing its dominant position by requiring its members to execute a general assignment of all categories of rights throughout the entire world. The ECJ held that an abuse might arise where the effect of the collecting society's conduct was to partition the common market and thereby restrict the freedom to supply services, which constituted one of the objectives of the Treaty. The fact that such abuse, in certain cases, related only to the performance in non-member countries of contracts entered into in the territory of a Member State by parties within the jurisdiction of that state did not preclude the application of Article 82 of the Treaty.

The following cases concluded that there was no abuse of a dominant position:

- Banghalter v SACEM

The fact that SACEM's articles prevented certain individuals from managing certain rights themselves was alleged to constitute an abuse of a dominant position, especially as other collecting societies did allow this. SACEM was alleged to discriminate against its own members. The Commission rejected this complaint.

Whilst the Commission held that the requirement to transfer all of one's rights to SACEM could well be an abuse of a dominant position, the fact that SACEM had amended its articles to allow artists to retain certain rights, subject to SACEM's board approving such a request, remedied this potential abuse.

- *Basset v SACEM*

The issue was whether SACEM was entitled to charge a 1.65% "supplementary mechanical reproduction fee" above its normal royalty where the recordings in question were imported from other Member States in which no such fee was payable.

The ECJ held that the necessary charge was not in principle contrary to Article 82, as it amounted to a normal exploitation of copyright and was neither an arbitrary discrimination nor a disguised restriction on inter-Member State trade. The charge merely constituted part of the payment for an author's rights over his work.

4.7.4 *In answering the question concerning abuse please state whether, in particular, the decision dealt with the following matters:*

- (a) *the criteria used to determine whether the obligations imposed upon members were no more onerous or restrictive than those which were absolutely necessary for the attainment of the collecting societies' objective? (restraints may include the length of assignment of rights, the type and scope of the rights which must be assigned, bundling of rights, the territorial reach of any assignment).*
- (b) *the mechanism for calculating the payment to rightholders and whether this included any "social" or "cultural" cross-subsidisation of less popular rightholders by popular rightholders.*
- (c) *what justifications were given by collecting societies (and which of these were accepted by the Court/Tribunal or competition authorities) for requiring rightholders to assign bundles of rights to them as conditions of access to the society/undertaking.*

**Answer to Sub-question 4.7.4 (a)**

- *The MMC Report on Performing Rights*

The MMC did not consider that the PRS's practice of exclusivity in relation to the administration of live performance rights was essential. The PRS had argued that change would be complex and costly in administrative terms and that there would be practical difficulties in enforcing members' rights. The MMC was not convinced that any considerable additional costs would necessarily fall on the PRS and thought that members should be allowed to self-administer their live performance rights as long as they bore any reasonable additional costs caused to the PRS.
- *BRT v SABAM*

In this case the ECJ did not lay down any criteria for determining whether the global assignment of all copyrights was necessary for the attainment of the collecting society's objective, but stated that it was for the national courts to make this determination.
- *Banghalter v SACEM*

In this decision the Commission invoked the principle of proportionality in considering whether the provisions of SACEM's articles preventing certain individuals from managing certain rights themselves were too onerous.

**Answer to Sub-question 4.7.4 (b)**

This was not specifically considered in any of the cases.

#### **Answer to Sub-question 4.7.4 (c)**

- *The MMC Report on Performing Rights*

As discussed above, the PRS required its members to grant it exclusivity in relation to the administration of live performance rights as essential. The PRS had argued that change would be complex and costly in administrative terms and that there would be practical difficulties in enforcing members' rights. For the reasons considered above, the MMC did not accept this argument.

- *BRT v SABAM; Greenwich Film Production (Paris) v SACEM*

Although both of these cases concerned the requirement on rightholders to assign all their categories of rights on a global basis to the collecting society, neither judgment considered the justifications given by the collecting societies, as both judgments were references from the national courts on a point of law.

4.7.5 *If not already dealt with in answer to question 4.7.4 what criteria was used by the court/tribunal/competition authority to strike a balance between the conflicting interests involved?*

4.7.6 *Do you agree with the balance struck and if not, what criteria would you have used and why?*

**Answer to Sub-questions 4.7.5 and 4.7.6**

Please see the responses to question 4.7.4 above.

## ANNEX 1

### Summaries of cases referred to in response to Sub-questions 3.3. – 3.7

#### (a) UK decisions

- *British Leyland v Wyatt Interpart*<sup>46</sup>

**Copyright:** designs for motor vehicles.

**Claimed abuse:** The plaintiff group of English motor manufacturers sued the defendants for breach of copyright. The defendants had bought in Italy spare parts for the plaintiff's vehicles and sold them in Britain. The defendants alleged that the plaintiffs had abused their dominant position in the supply of spare parts for their vehicles and claimed discovery in order to establish such abuse (arising out of the plaintiff's copyright monopoly in the drawings for the vehicle parts). The defendants alleged two abuses: (i) seeking to restrict the supply by third parties of replacement parts for vehicles (ii) adopting a discriminatory policy in this regard between the countries of the European Economic Community, in particular in relation to exports from Italy to other countries of the European Economic Community.

**Held:** This could constitute an abuse of a dominant position and so the documents sought by the defendants were covered by the privilege against self-incrimination but the case was stayed to allow the defendants to bring the case before the Commission.

- *British Leyland v TI Silencers*<sup>47</sup>

**Copyright:** designs for motor vehicles.

**Claimed abuse:** The plaintiffs claimed to own the copyright in drawings of motor car assemblies. The defendant manufactured and supplied replacement parts for the plaintiffs' cars and the plaintiffs claimed that such manufacture and sale amounted to infringement of their copyright. The defendant had negotiated with the plaintiffs for a licence to manufacture and sell under the plaintiffs' copyright but no licence had been granted. Amongst other defences, the defendant asserted that the plaintiffs were using the proceedings to impose quantitative restrictions on the import and export of goods between the UK and the EEC. The defendant claimed that the injunction which the plaintiff sought would prohibit the defendant from trading in exhaust assemblies based on the plaintiffs' drawings. The defendant also claimed that the plaintiff and its licensees were engaged in a concerted practice calculated to compel the defendant to either stop the infringement or to sign an agreement on similar terms. The licensees had each agreed to pay royalties for a licence to manufacture the plaintiff's copyright parts on similar terms. Since the Treaty would avoid the terms of these agreements, the defendant would be forced to accept dissimilar conditions to identical transactions with other trading parties, thereby placing the defendants at a competitive disadvantage. The defendants were being required to take out licences which required them to pay royalties for non-copyright materials or higher royalties for copyright materials only, and applied for the disclosure of relevant documents.

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<sup>46</sup> (No.1) [1979] 1 C.M.L.R. 395; (No.2) [1979] 3 C.M.L.R. 79

<sup>47</sup> (No.1) [1980] 1 C.M.L.R. 598; (No.2) [1980] 2 C.M.L.R. 332; [1981] 2 C.M.L.R. 75



**Held:** The documents should be disclosed but may be covered by privilege. There was an arguable case that there had been an abuse of a dominant position so the defence should not be struck out.

- *Hoover v George Hulme*<sup>48</sup>

**Copyright:** drawings for electrical appliances.

**Claimed abuse:** The plaintiffs manufactured domestic electric appliances, particularly vacuum cleaners and washing machines. They sought relief in respect of alleged infringement of copyright arising out of a trade in parts for these appliances carried on by the defendants. The allegedly infringed copyright consisted of manufacturing drawings for parts of these appliances. The defendants claimed that the plaintiffs had attempted the imposition of terms on persons taking an agency requiring them to use genuine parts; had put pressure on suppliers to stop selling pattern parts through discussions on possible infringements; had brought wide infringement actions; and had charged very high prices for genuine spares.

**Held:** There had been no abuse.

- *Lansing Bagnall v Buccaneer Lift Parts*<sup>49</sup>

**Copyright:** designs for fork lift trucks.

**Claimed abuse:** The plaintiff was the leading UK manufacturer of fork lift trucks and had copyright in 85 spare parts for them. The sale of these spare parts was restricted to a limited number of selected agents. The defendant dealt in spare parts for fork lift trucks but had difficulty in obtaining the parts for the plaintiff's trucks. In an action for breach of copyright in the spare parts, the defendant claimed that the plaintiff was abusing a dominant position. The specific allegations were that the plaintiffs (1) restricted the number of agents who could sell spare parts, (2) overcharged for the spare parts and (3) instructed the agents only to sell at full retail price, even to other traders such as the defendants.

**Held:** The plaintiff's conduct might constitute abuse and so the defence could be amended to add the claims.

- *British Leyland v Armstrong Patents*<sup>50</sup>

**Copyright:** designs for exhaust systems for various cars.

**Claimed abuse:** The plaintiffs ('British Leyland') supplied the spare parts market through a division called 'Unipart' which supplied equipment not only for British Leyland but also for other makes. In general, British Leyland obliged its franchised dealers to buy replacement parts supplied or manufactured by British Leyland. The plaintiffs had, over a period of years, attempted to assert copyright in their designs for parts in British Leyland vehicles and had sought to negotiate licence agreements with spare parts manufacturers whereby those

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<sup>48</sup> [1982] 3 C.M.L.R. 186

<sup>49</sup> [1984] 1 C.M.L.R. 224

<sup>50</sup> [1982] 3 C.M.L.R. 603; [1984] 3 C.M.L.R. 102

manufacturers would pay to the plaintiffs a royalty on spares sold. The defendants refused to do so, and in their defence claimed that (1) the licences to manufacture such systems had excessive royalty levels, (2) the royalties covered non-copyrighted exhausts; (3) the plaintiffs sued those who did not take licences for infringement.

**Held:** The plaintiff did not have a dominant position and therefore there was no abuse.

**NB it should be noted that this decision was overturned by the House of Lords on different grounds and so this was not reconsidered. Therefore some doubts may remain about the matters discussed.**

- *Ford Motor Company Limited: MMC report on refusal to grant licences*<sup>51</sup>

**Copyright:** designs for vehicle body parts

**Claimed abuse:** The Director General of Fair Trading referred Ford to the Monopolies and Mergers Commission (MMC), to investigate “the pursuit by Ford of a policy and practice of not granting to any person (other than to persons supplying body parts to Ford) a licence to manufacture or sell in the United Kingdom any replacement body part where Ford claims to be entitled to prohibit such manufacture or sale by virtue of the copyright subsisting in the drawings or designs of these parts”.

**Held:** This was an anti-competitive practice which operated against the public interest. However, the Secretary of State did not have powers to require licences at a reasonable royalty. Therefore, the MMC recommended that the law be changed to limit such copyright to a five year term.

- *Ransburg-Gema v Electrostatic Plant Systems*<sup>52</sup>

**Copyright:** designs for electrostatic powder coating equipment.

**Claimed abuse:** The plaintiff alleged that the defendants infringed its copyright in drawings relating to electrostatic powder coating equipment and further alleged breach of contract. In their defence, the defendants complained that the following behaviour by the plaintiff constituted an abuse of a dominant position - threatening and bringing an action, even with the intention of driving a competitor out of the market; bare refusal to sell to the defendants; claiming conversion damages; claiming an injunction; bringing an action against an individual.

**Held:** The claims did not say that the exercise of the right was itself an abuse and so they could not constitute a defence and were struck out.

- *Yale Securities Products v Newman*<sup>53</sup>

**Copyright:** designs for key blanks.

**Claimed abuse:** This was an action for breach of copyright in drawings of key blanks by reason of their being imported from other Member States of the Common Market. The

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<sup>51</sup> Cmnd. 9437 of February 1985.

<sup>52</sup> [1989] 2 C.M.L.R. 712

<sup>53</sup> [1990] FSR 320

defendant claimed that the plaintiff knew of the widespread availability of the blanks in question over a period of years – ever since a meeting of the Master Locksmith's Association where the availability was discussed. The plaintiff had not done anything about it even after the Association had set up a committee to investigate the matter, which identified instances of the practice. The defendant claimed that the plaintiff's behaviour therefore amounted to a representation either that (i) the plaintiff had no copyright in the blanks, or (ii) there was no legal objection to the defendant dealing in the blanks or (iii) that the plaintiff would not enforce any copyright it owned which was infringed by the blanks. The defendant claimed that the plaintiff was abusing its dominant position by only suing the defendants and not other infringers; trying to exclude the defendant from the market; seeking disproportionate remedies; refusing to give a licence to the defendants.

**Held:** There was no arguable case of abuse which would operate as a defence and so claims were struck out.

- *Pitney Bowes v Francotyp-Postitalia*<sup>54</sup>

**Copyright:** A patent infringement action concerning postal franking machines.

**Claimed Abuse:** The defendants raised a defence under Article 86 (now Article 82) in which it was alleged that the plaintiff was in a dominant position and had abused that dominant position. The main abuses alleged were (i) charging unfairly high prices; (ii) discriminating against smaller customers by charging them higher prices without objective justification; and (iii) discriminating against the home market by exporting at lower prices.

A number of other abuses were also alleged of which the following were also arguably abuses under Article 86: (iv) discouraging supply to dealers or middlemen; (v) requiring customers to take leases through an in-house leasing company; (vi) certain malpractices by the plaintiff's salesman; (vii) certain matters the subject of an earlier inquiry by the Monopolies and Mergers Commission; (viii) threats of proceedings for patent infringement made by the plaintiff against the defendant in respect of patents not relied upon in the action; (ix) entering into a cross-licensing agreement with its main U.K. competitor A following threats of proceedings for patent infringement against A; (x) pursuing the action with a view to compelling the first defendant to enter into a licence on unreasonable terms; (xi) prosecution of the action when franking machines had to be licensed by the Post Office and this in practice required infringement of the plaintiff's patents; and (xii) refusing to offer the defendants the same terms as were offered to A.

**Held:** The questions raised by the main abuses could not be resolved on a motion to strike out. They required a trial and possibly a reference to the European Court. Of the other abuses, allegations (iv), (v) and (vii) also potentially constituted abuses under Article 86.

The threats allegation could not constitute an abuse of a dominant position but a threat to commit an independent tort (malicious prosecution) unrelated to the dominant position. The same reasoning applied to the allegation concerning the plaintiff's salesman. The acts may have been wrongful but they were not connected with the existence of the dominant position and did not involve abuses of it. The cross-licensing agreement might strengthen the plaintiff's dominant position but that did not necessarily involve abusing it. The agreement could not have been an infringement of Article 86 unless it was procured by an abuse of the dominant position. Since neither the threat nor the institution of patent proceedings could be

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<sup>54</sup> [1991] FSR 72

an abuse, this was not so. It was clear that a refusal to grant a licence on reasonable terms was not itself an abuse. It did not improve the allegation to say that the plaintiff would have granted a licence on unreasonable terms. The Post Office requirements together with the patents might strengthen the plaintiff's dominant position and might even make it a monopoly but that could not make it *per se* an abuse for the plaintiff to enforce its patent rights. Something more was required. Even assuming that discrimination between licensees without objective justification might be an abuse of a dominant position, a bare allegation that one was not offered the same terms as another licensee was insufficient.

- *Chiron Corporation v Murex Diagnostics Ltd (No. 2) Organon*<sup>55</sup>

**Copyright:** patent infringement claim

**Claimed Abuse:** Chiron discovered and patented the genome of the Hepatitis C Virus and immunoassay kits for detecting the antibodies. Murex manufactured and sold the kits in Britain but without obtaining a licence from Chiron. Chiron thereupon sued Murex for patent infringement. Murex defended on the ground that Chiron was abusing its dominant position contrary to Article 86 EEC (now Article 82) by:

- (i) refusing to license the product; and
- (j) charging excessive prices for licences and for kits.

**Held:** Following an interlocutory application, the Euro defences were struck out. On appeal, the Court felt that, although there were doubts as to the existence of a dominant position or its abuse, there was a sufficient possibility to allow the issue to go to trial. However, no link had been pleaded between the excessively high prices and an effect on inter-State trade and that since such a link was necessary to the application of Article 86 the appeal was dismissed.

- *Intergraph v Solid Systems CAD Services*<sup>56</sup>

**Copyright:** software packages

**Claimed abuse:** Intergraph and its UK subsidiary designed, produced, supplied and maintained computer hardware and software in the field of computer-aided design, and claimed copyright in the software. The plaintiffs entered into maintenance contracts with their customers in respect of both hard- and software. The defendants competed with the plaintiffs in the provision of maintenance for the plaintiffs' hardware, and dealt in second-hand equipment originating from the plaintiffs. The plaintiffs alleged that, in competing, the defendants had misused confidential information of the plaintiffs and infringed their copyright. In their defence, the defendants alleged abuse of a dominant position, in the light of the plaintiffs' refusal to licence to third-party maintenance operator; use of copyright to prevent emergence of third-party maintenance market and a market for second-hand systems.

**Held:** The Court refused to strike out the claim as there was a possibility that there was an abuse of a dominant position which would operate as a defence.

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<sup>55</sup> [1994] 1 CMLR 410, CA

<sup>56</sup> [1995] E.C.C. 53

- *HMSO v The Automobile Association*<sup>57</sup>

**Copyright:** Ordnance Survey maps

**Claimed abuse:** The case concerned the Crown's claim to copyright in Ordnance Survey maps and certain graphical information contained in those maps. The claimants alleged that they employed a large number of staff in the never ending task of mapping the United Kingdom, and that part of their remit was to recover some of the costs of this operation by way of royalty payments made by users of their maps. For decades the AA were licensees of the Ordnance Survey, but then decided that they wished to relinquish their licence. They claimed that their own maps were based on their own database and their own mapping information. The Ordnance Survey asserted that the AA was incorrect to claim that they no longer used Ordnance Survey material in the preparation of AA maps and sued for copyright infringement. The AA claimed abuse of a dominant position, in that the use of copyright would block the use of information about proposed roads and road categorisations, and so to claim copyright royalties would be unreasonable and discriminatory for various reasons (government departments not charged royalties; other entities not charged royalties nor sued; no access possible to the market; abusive prices and bundling).

**Held:** There was no arguable case of abuse and so the defence was struck out.

- *Intel Corporation v Via Technologies*<sup>58</sup>

**Copyright:** not applicable, patents over computer chipsets

**Claimed abuse:** The case concerned Intel's patents relating to the protocols by which a microprocessor communicates with the components with which it is connected. VIA wished to produce chipsets which would be compatible with Intel's Pentium 4 microprocessor and claimed that by refusing it a licence to use the necessary patents Intel was abusing its dominant position. Intel applied to have such defences to its infringement action struck out.

**Held:** Although the defences were struck out at first instance they were reinstated by the Court of Appeal.

- *BSkyB investigation: alleged infringement of the Chapter II prohibition*<sup>59</sup>

**Copyright:** (exclusive rights to) content of premium television channels

**Claimed abuse:** The Director General of Fair Trading investigated the conditions on which BSkyB supplied certain channels (namely its premium sport and film channels) to third party distributors. In particular, it analysed three elements of BSkyB's wholesale pricing of its premium sports and films channels in the light of a possible abuse of a dominant position:

- (i) BSkyB had exercised a margin squeeze on its premium channel distributors. The margin offered between the prices charged to distributors and the retail price charged to subscribers was not enough for normal profit to be made had the distributors been as efficient as BSkyB's own distribution business;

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<sup>57</sup> [2001] ECC 34

<sup>58</sup> [2002] EWHC 1159 (Ch); [2002] EWCA Civ 1905

<sup>59</sup> OFT Decision 31/1/03

- (ii) B SkyB's mixed bundling had been applied to an abusive degree; and
- (iii) B SkyB had offered discounts to its distributors on its pay to basic ratecard which either foreclosed or had the potential to foreclose entry to other providers of the premium channels, and distort the competitive conduct of these distributors.

**Held:** The normal rules apply to IP rights, but in this case there were insufficient grounds to prove any of the above abuses.

### **(b) European decisions**

- *Deutsche Grammophon v Metro-SB-Großmärkte*<sup>60</sup>

**Copyright:** right of distribution of sound recordings.

**Claimed abuse:** Deutsche Grammophon Gesellschaft ('DG') distributed records directly or through subsidiaries such as Polydor S.A., Paris ('Polydor'). In Germany, DG sold records directly through retailers and through two wholesale booksellers at a fixed price, subject to a written agreement. In other EEC/EFTA countries, DG distributed records through licensing agreements with its own subsidiaries or those of NV Philips Phonografische Industrie of Baarn (Netherlands). Paragraph 1 of these licensing agreements stated that DG assigned to the licensee the exclusive right to commercially exploit its recordings in that territory. DG signed such an agreement with its subsidiary Polydor. Metro-SB-Großmärkte GmbH & Co. KG ('Metro') was supplied with Polydor records by DG, but was not bound by a pricing agreement. Metro therefore sold the records at a lower price. DG then found that it did not have a written price agreement with Metro, and Metro refused to sign one, so DG severed all relations with Metro. Metro obtained records from Rosner & Co. ('Rosner') of Hamburg and continued selling them at a lower price. The Rosner records had been pressed by DG in Germany and supplied to Polydor in Paris. Polydor had sold them on to a third party, which had then sold them to Rosner. Rosner sold them to Metro. Metro's complaint was that the selling price of records was higher than that of records imported from other Member States, where principal performers are tied with exclusive contracts.

**Held:** Merely exercising right does not show dominance. Guidance was given on how to consider the factors showing an abuse of a dominant position: if recording artists are tied to the manufacturer by exclusive contracts, consideration should be given, *inter alia*, to their popularity on the market, to the duration and extent of the obligations undertaken and to the opportunities available to other manufacturers of sound recordings to obtain the services of comparable performers. For it to fall within Article 82, a dominant position must further be abused. The difference between the controlled price and the price of the product reimported from another Member State does not necessarily suffice to disclose such an abuse; it may however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse.

- *Magill*<sup>61</sup>

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<sup>60</sup> Case 78/70 [1971] ECR 487

<sup>61</sup> Commission Decision 89/205 in Case 31.851 Magill TV Guide/ITP, BBC & RTE [1989] OJ L78/43; Case C-76, 77 and 91/89R RTE, BBC & RTE v Commission [1989] ECR 1141; Case T-69/89 RTE v Commission [1991] ECR II-485; Case T-70/89 BBC v Commission [1991] ECR II-535; Case T-76/89 ITP v Commission [1991] ECR II-575; Joined Cases C-242/91P and 242/91P Radio Telefis Eireann and Independent Television Productions v Commission [1995] ECR I-743

**Copyright:** TV listings

**Claimed abuse:** Magill TV Guide Ltd ('Magill') was established in order to publish in Ireland and Northern Ireland a comprehensive weekly magazine containing information on all forthcoming television programmes and channels available to viewers in the area. Publication began in May 1985. However, Independent Television Publications Ltd, the BBC and Radio Telefis Eireann obtained injunctions restraining Magill from publishing their advance weekly television listings pending full national proceedings on the right to publish this material. Magill ceased publishing the material.

**Held:** The European Court of Justice held that there was a clear dominant position with respect to the information used to compile the listings. The refusal to licence the listings was an abuse and so the television broadcasters were required to grant licences.

- *Tiercé Ladbroke*<sup>62</sup>

**Copyright:** sound and pictures of French horse races

**Claimed abuse:** Pari Mutuel Urbain Français ('PMU') had exclusive responsibility for organised off-course betting in France, plus exclusive rights to take bets abroad on races organised in France and bets in France on races organised abroad. Pari Mutuel International ('PMI') was majority owned by PMU and aimed to exploit outside France televised pictures of and information on horse races organised in France. PMU assigned to PMI the right to market such pictures and information for Germany and Austria. PMI granted Deutscher Sportverlag Kurt Stoof GmbH & Co ('DSV') the exclusive right to exploit televised pictures and sound commentaries of French races in Germany and Austria. Tiercé Ladbroke S.A. ('Ladbroke'), a Belgian company, asked DSV to grant it the rights to retransmit the French sound and pictures in Belgium. DSV refused, claiming its contract with PMI barred this. Ladbroke then asked PMI for details of how to subscribe to the French sound and pictures. PMI referred Ladbroke back to PMU and PMU stated that they had no intention of allowing transmission into Belgium. Ladbroke's case was based on this refusal to license transmission in Belgium.

**Held:** There was no dominant position and no abuse.

- *Info-Lab/Ricoh*<sup>63</sup>

**Copyright:** (possibly) unregistered design right in toner cartridges for photocopiers (the report is not clear whether the right was registered or unregistered).

**Claimed abuse:** Info-Lab, a manufacturer of toner for photocopiers, alleged that Ricoh, a photocopier manufacturer, was abusing its dominant position on the market for toner cartridges compatible with certain Ricoh photocopiers and protected by Ricoh intellectual property rights by refusing to supply Info-Lab with empty toner cartridges, which would enable Info-Lab to compete with Ricoh in the sale of filled toner cartridges. Info-Lab claimed that it was not possible to design a toner cartridge which would fit into the Ricoh machines without infringing Ricoh's intellectual property rights. It therefore wished to purchase empty

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<sup>62</sup> Commission Decision in Case 33.699 Tiercé Ladbroke (B)/PMU (unpublished); Case T-504/93 Tiercé Ladbroke v Commission [1997] ECR II-923

<sup>63</sup> Commission Decision in Case 36.431 Info-Lab/Ricoh (unpublished, summarised in Commission's XXIXth Report on Competition Policy, pp169-170)

toner cartridges from Ricoh, fill them with toner which it already manufactured and then sell the filled toner cartridges in competition with Ricoh. However, Ricoh, which had hitherto neither licensed its design rights nor sold empty cartridges, also refused to allow Info-Lab to purchase empty toner cartridges from it.

**Held:** The Commission concluded that Ricoh did not have a dominant position.

- Micro Leader<sup>64</sup>

**Copyright:** software

**Claimed abuse:** Micro Leader claimed that Microsoft was fixing excessive prices in France and then using its copyright to block substantially lower-priced imports from Canada of identical or similar French-language products to support this price-fixing and thus influence French prices. It also claimed that Microsoft was applying dissimilar conditions to Canadian and French customers, thus placing French customers at a competitive disadvantage.

**Held:** The exercise of copyright could be an abuse of a dominant position and so the Commission was wrong to reject a claim of abuse on the basis that it was the lawful enforcement of copyright.

- IMS Health<sup>65</sup>

**Copyright:** system dividing Germany into a number of areas in order to monitor sales of pharmaceuticals.

**Claimed abuse:** NDC Health (NDC) alleged that IMS Health (IMS) was abusing its dominant position by refusing to grant it a licence to use the '1860 brick structure', a segmentation of Germany into 1860 geographical areas, used to report sales information. Without this licence, NDC claimed that it could not provide regional sales reports based on this structure for Germany, the largest pharmaceutical market of the EU, and was also prevented from making contracts for multi-jurisdictional coverage because it was unable to provide German reports. NDC further claimed that the German Court had strengthened IMS's dominant position through its interim judgements which prohibited NDC's German subsidiary from using the brick structure on the basis that it constituted a personal intellectual creation belonging to IMS.

**Held:** The Commission held that this was an abuse of a dominant position and that IMS was required to grant a licence for the use of the 1860 brick structure. This decision is currently stayed pending an appeal.

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<sup>64</sup> Commission Decision in Case 36.219 Micro Leader/Microsoft (unpublished); Case T-198/98 Micro Leader v Commission [1999] ECR II-3989

<sup>65</sup> Commission Decision in Case 38.044 IMS Health of 3 July 2001; Case T-184/01R IMS Health v Commission (No.1) [2001] ECR II-2349; (No.2) [2001] ECR II-3193; Case C-481/01P(R) NDC Health v Commission [2002] ECR I-3401

**NB** a decision on the merits is still awaited; the case has been suspended by the CFI pending a decision by the ECJ on a reference about the same dispute from the German courts in Case C-418/01 IMS Health v NDC Health. There was a hearing on 6 March 2003 in the latter case.



## ANNEX 2 - Answer to Question 4.2

Collecting Society	Rights holders represented	Function of society	Legal basis for collective administration
The Performing Right Society (PRS)	<ul style="list-style-type: none"> <li>- composers, publishers and authors of music</li> <li>- rights assigned to and protected by PRS include public performing right, broadcasting right, right to include work in a cable programme, and film synchronisation right</li> </ul>	<ul style="list-style-type: none"> <li>- Members assign to the PRS all rights in the music, which the Society then administers on their behalf</li> <li>- seeks to protect copyright music from unauthorised exploitation</li> <li>- grants permission for use on payment of licence fee</li> </ul>	<ul style="list-style-type: none"> <li>- Voluntary collective licensing (members mandate Society to administer rights on their behalf)</li> </ul>
Mechanical-Copyright Protection Society (MCPS) <sup>66</sup>	<ul style="list-style-type: none"> <li>- composers, authors, arrangers and music publishers</li> <li>- licences the right to record</li> </ul>	<ul style="list-style-type: none"> <li>- acts as members' agent in the granting of licences and collection of revenue (no assignment of copyright)</li> </ul>	<ul style="list-style-type: none"> <li>- members grant the Society a mandate to license, collect and distribute royalties for a particular use of a work or catalogue</li> </ul>
Phonographic Performance Limited (PPL)	<ul style="list-style-type: none"> <li>- represents association of record companies</li> <li>- performing, broadcasting and cable programme rights in sound recordings</li> </ul>	<ul style="list-style-type: none"> <li>- members assign their rights to PPL and PPL administers on behalf of its members</li> <li>- collects licence fees from broadcast and public performance users on behalf of the record companies</li> </ul>	<ul style="list-style-type: none"> <li>- Voluntary collective licensing (members mandate Society to administer rights on their behalf)</li> </ul>
Video Performance Limited (VPL)	<ul style="list-style-type: none"> <li>- represents music video producing companies</li> <li>- rights in public performance and broadcasting of music videos</li> </ul>	<ul style="list-style-type: none"> <li>- members assign copyright for public performance purposes, but VPL only acts as non-exclusive agent in relation to the licensing of music videos for broadcasts</li> </ul>	<ul style="list-style-type: none"> <li>- Voluntary collective licensing (members mandate Society to administer rights on their behalf)</li> </ul>
Christian Copyright Licensing	<ul style="list-style-type: none"> <li>- songwriters and publishers of</li> </ul>	<ul style="list-style-type: none"> <li>- grants licences to churches for the</li> </ul>	<ul style="list-style-type: none"> <li>- Voluntary collective licensing</li> </ul>

<sup>66</sup> Since 1998 the 'MCPS/PRS Alliance' has jointly administered performance and mechanical rights.

<b>Collecting Society</b>	<b>Rights holders represented</b>	<b>Function of society</b>	<b>Legal basis for collective administration</b>
International (CCLI)	songs played in the Christian church	reproduction of songs in church	(members mandate Society to administer rights on their behalf)
Authors Licensing & Collecting Society (ALCS)	<ul style="list-style-type: none"> <li>- members of the Society of Authors, Writers Guild of Great Britain, and a number of direct author members and their successors</li> <li>- lending rights, rental rights, reprographic rights, private recording right and performing rights where these have not been assigned to another collecting society</li> </ul>	- Writers grant to ALCS the right to administer on their behalf those rights that they cannot exercise as an individual, that are most appropriately dealt with on a collective basis or where the law stipulates that they must be administered collectively.	- Voluntary collective licensing (members mandate Society to administer rights on their behalf)
Copyright Licensing Agency (CLA)	<ul style="list-style-type: none"> <li>- represents authors and publishers</li> <li>- grants licences in respect of reprographic rights</li> </ul>	- rights granted to CLA are non-exclusive rights in respect of all literary works in which the publisher or author has an interest in the copyright	- obtains mandate from members in association with ALCS and PLS to enable CLA to grant licences on behalf of its members to various organisations
Directors and Producers Rights Society (DPRS)	<ul style="list-style-type: none"> <li>- individual film and television directors and producers</li> <li>- rights in relation to cable retransmission, private copying and video rental</li> </ul>	<ul style="list-style-type: none"> <li>- administers rights on behalf of its members</li> <li>- acts as agent of its members, for the purposes of collecting "recorded performance remuneration"</li> </ul>	- Voluntary collective licensing (members mandate Society to administer rights on their behalf)
Performing Artists' Media Rights Association (PAMRA)	- performers (open to all performers whose performances have been included in a commercially-published sound recording)	- PAMRA collects on their behalf the monies due from the equitable remuneration right in Council Directive 92/100/EEC	- granted mandate by members, extending to all performances recorded prior to the application for membership as well as all performances recorded while the

<b>Collecting Society</b>	<b>Rights holders represented</b>	<b>Function of society</b>	<b>Legal basis for collective administration</b>
			performer remains a member
Designers & Artists Copyright Society (DACS)	<ul style="list-style-type: none"> <li>- artists and designers</li> <li>- certain reprographic rights, the educational off-air recording right and the satellite and cable retransmission right in the UK</li> </ul>	<ul style="list-style-type: none"> <li>- negotiates on behalf of its members and collects revenue from the exploitation of works of visual art</li> </ul>	<ul style="list-style-type: none"> <li>- members provide DACS with an exclusive mandate to administer their secondary rights</li> </ul>
Educational Recording Agency Limited (ERA)	<ul style="list-style-type: none"> <li>- represents a number of the other collection societies and broadcasting networks</li> </ul>	<ul style="list-style-type: none"> <li>- licenses off-air recording of television and radio broadcasts by schools and educational establishments</li> </ul>	<ul style="list-style-type: none"> <li>- hybrid of legislation and voluntary licensing (mandate under Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts and Cable Programmes) (Educational Recording Agency Limited) Order 1990 (SI 1990/879)</li> </ul>
Open University Educational Enterprises Limited	<ul style="list-style-type: none"> <li>- represents the Open University in relation to various broadcasting rights</li> </ul>	<ul style="list-style-type: none"> <li>- operates off-air recording licensing scheme covering television programmes broadcast on behalf of the Open University</li> </ul>	<ul style="list-style-type: none"> <li>- hybrid of legislation and voluntary licensing (mandate under Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) Open University Educational Enterprises Limited Order 1990 (SI 1990/2008)</li> </ul>
Newspaper Licensing Agency (NLA)	<ul style="list-style-type: none"> <li>- represents newspaper publishers in relation to reprographic rights</li> </ul>	<ul style="list-style-type: none"> <li>- members assign to the NLA the copyright in the typographical arrangement of the published editions of any works, and the copyright in the literary and artistic works appearing in the newspaper</li> </ul>	

Collecting Society	Rights holders represented	Function of society	Legal basis for collective administration
		- licenses most types of copying of newspaper articles	
Publishers Licensing Society Limited (PLS)	<ul style="list-style-type: none"> <li>- represents some organisations (such as the Publishers Association, Periodical Publishers Association and Association of earned and Professional Society of Publishers) and some individual publishers' interests</li> <li>- photocopying and other methods of duplication (not digital copying) and limited paper-to-paper fax usage</li> </ul>	<ul style="list-style-type: none"> <li>- together with ALCS, the PLS has a mandate from rights owners on behalf of CLA, which then offers licences to institutions and individuals who want to photocopy copyright works</li> <li>- grants non-exclusive licences</li> </ul>	- Voluntary collective licensing (members mandate Society to administer rights on their behalf)
Compact Collections Limited (CCL)	<ul style="list-style-type: none"> <li>- represents film and television producers</li> <li>- administers cable retransmission right, private copying right and educational off-air recording right</li> </ul>		
British Equity Collecting Society Limited (BECS)	- administers performers' legal rights to payments when their work is rented or lent on video or audio	- administers remuneration in relation to sales of blank audio and video tapes	- Voluntary collective licensing (members mandate Society to administer rights on their behalf)

## ANNEX 3

### Summaries of Cases referred to in response to sub questions 4.5 and 4.6

#### (a) *UK Cases and Reports*

- *MTV Europe v BMG Records (UK) Limited and Others*<sup>67</sup>

This case was brought by MTV against VPL, a collecting society, which administered broadcasting and other performing rights in respect of music promotion videos produced by its members (including the other defendants) and IFPI, which administers the pan-European licensing of broadcasting and cable transmission rights in music videos of its affiliates. VPL is an affiliate of IFPI. The members of VPL assigned to it the copyright in music promotion videos produced by them. VPL was found to hold a dominant position in the British music video market in that if a broadcaster wished to broadcast music using the videos of a member, that broadcaster had to obtain a licence to do so from VPL.

The fees which MTV paid to VPL to reproduce music videos were agreed as percentages of layers of MTV Europe's net revenue, subject to minimum annual payments and an overall maximum fee of 15% of the total net revenue. Under the terms of the licensing agreement, VPL audited the operations of MTV Europe to ensure the correct licence fees were being paid. VPL alleged substantial underpayments and sought to recover such alleged underpayments.

MTV had already complained to the European Commission in June 1992 regarding VPL and the Commission's preliminary assessment had been favourable to MTV. MTV then issued proceedings against the defendants in the UK for damages for breach of statutory duty, claiming amongst other things that the defendants had abused a dominant position under Article 82. This was prompted by the defendants' application for negative clearance or alternatively exemption of their arrangements

The court did not address the substantive issues, as the European Commission was still examining those issues. The case was stayed pending the outcome of the oral hearing and any subsequent negotiations.

- *(1) British Sky Broadcasting Ltd (2) Sky Television PLC v Performing Right Society Ltd*<sup>68</sup>

This was an interim decision in an application to the Copyright Tribunal by British Sky Broadcasting Ltd and Sky Television PLC (together "Sky") referring the question of whether and if so on what terms their licence from the Performing Right Society Ltd (PRS) should continue.

At issue at the hearing was the amount of royalty, which by law had to be reasonable in the circumstances. Sky proposed a royalty based on Sky's share of total United Kingdom television audience viewing (number of people watching

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<sup>67</sup> [1997] 1 CMLR 867

<sup>68</sup> [1998] EMLR 193

multiplied by number of hours watched), the royalty being roughly £2 million a year. The PRS wanted to be paid a percentage of Sky's relevant revenues which would yield some £17 million a year.

The PRS argued that the requirement of reasonableness must be interpreted as satisfied by any conduct falling short of an abuse of the copyright monopoly, and that the PRS's proposal should therefore be approved subject only to minimum modification to prevent it being an abuse. The PRS contended that the revenue basis was fair and easy to measure and could easily be applied to other broadcasters. Sky advocated the audience share basis as providing a "true measure of consumption of PRS music". Neither basis directly concerned the use or exploitation of the music, for which broadcast hours would provide some measure.

Evidence was given of comparable licences in the United Kingdom and elsewhere in Europe, from which the PRS argued that United Kingdom royalties were at the low end of the range.

The Tribunal found that £2.75 million was a reasonable base royalty for 1995 and providing a formula to adjust this for 1996 and subsequent years. This was based on section 129 of the Copyright, Designs and Patents Act 1988, which required it to look at comparable licences and to ensure that there was no unreasonable discrimination between licensees of "the same person". To arrive at different terms for different licensees in respect of the same rights was possible but there must be a logical reason for it. It would have been wrong in principle to reject a proposal considered to be reasonable in a particular case because it might be less reasonable in another case. It would have been fair to take into account if possible the extent to which the licensee needed the full scope of the repertoire and the extent to which he benefited from the collective administration of the rights.

Section 135 of the Act required the Tribunal to have regard to all relevant circumstances. Evidence as to licensing rates and practice in other European jurisdictions was relevant, but was less helpful than United Kingdom comparables because the task of comparison was complex. If rates were higher in other countries, that might be indicative of abuse and did not mean that they had to be raised here. Before revenue could be used as a measure of the value of music to a broadcaster, an adequate nexus needed to have been shown between the use of music and revenues earned.

In a stable marketplace, where revenues rose in line with inflation, a percentage of revenue might have been a convenient and not unjust means of calculating the royalty. But where revenues might rise or fall rapidly for reasons connected with the introduction of new technology and entrepreneurial risk-taking and unconnected with music, the revenue basis was less appropriate. It offended common sense that a single component such as music of a complex final product such as a television programme should be remunerated on a basis which rose and fell with the revenues obtained from the final product, when that component might have had nothing at all to do with those changes in revenue. It would have been unreasonable on the facts of the present case to adopt a percentage-of-revenue basis. The PRS was not a co-adventurer in Sky's broadcasting business. The rapid changes taking place in the broadcasting market were a strong ground for not trying the PRS's royalties to Sky's revenues.

It was fairer and more reasonable to use actual rather than potential audience figures where these were available, provided that they were accurate. Having a large number of channels, Sky made more use of music than other broadcasters and offered the viewer more choice. The extra use of music was of value even though people only watched one channel at a time. Broadcast hours was therefore a factor which should be given some recognition in the final royalty, although not in anything approaching a direct proportional relationship.

- *Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance & Broadcasting Rights in Sound Recordings. Monopolies and Mergers Commission Report December 1988*<sup>69</sup>

This report concerned practices relating to the collective licensing of sound recordings for broadcasting and public performance: in particular, the practice of owners of copyright assigning their rights to collective licensing bodies, and those bodies stipulating royalties, common tariffs and restrictions on performance. Only one collecting society, Phonographic Performance Limited (PPL), proved to be within the MMC's terms of reference. PPL had a substantial monopoly of the market, and some users, in particular the BBC and the independent local radio (ILR) companies, claimed that PPL exploited that monopoly position to their disadvantage.

The MMC's inquiry concerned two conflicting interests: on the one hand, those of the owners of copyright in sound recordings, who enjoy a monopoly with statutory protection, and on the other hand, radio stations and promoters of public performances who are dependent on the ready availability of copyright sound recordings.

The MMC's main conclusions were that collective licensing bodies are the best available mechanism for licensing sound recordings provided they can be restrained from using their monopoly unfairly. The MMC made a number of recommendations, including that PPL should be obliged to permit the use of its repertoire in return for equitable remuneration; that users should be entitled to a statutory licence, initially on the basis of self-assessed royalties, pending a Copyright Tribunal order on equitable remuneration; PPL's injunctive right should be limited; that there should be no changes in PPL's current royalty rates; that performers should be given equitable remuneration from the royalty income received by PPL, in substitution for the existing unsatisfactory arrangements; and that the BBC and ILR stations should be subject to a common tariff, related to audience size.

## **(b) European Cases**

- *Ministere Public v Tournier*<sup>70</sup>

Criminal proceedings had been issued against Tournier, the director of SACEM, the society which manages copyright in musical works in France, on the basis of a complaint made by the operator of a discotheque in France, who claimed damages on the ground that SACEM required him to make excessive, unfair or undue

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<sup>69</sup> Cm 530, 7.12.88

<sup>70</sup> Case C-395/87 *Ministere Public v Tournier* [1989] ECR 2521; [1991] 4 CMLR 248

payments for the performance of protected musical works on his premises, thereby infringing certain provisions of French criminal law. In hearing the case, the French court referred a number of questions to the ECJ, including questions as to whether certain trading conditions imposed on users by SACEM were incompatible with Article 82 of the Treaty.

The ECJ observed that the imposition of any unfair trading conditions by an undertaking holding a dominant position constitutes an abuse of that position. In determining what criteria must be applied to determine whether a national collecting society which holds a dominant position is imposing unfair trading conditions, the ECJ stated that when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference. SACEM claimed that certain circumstances, including the high prices charged by discotheques in France and the traditionally high level of protection provided by copyright in France, justified that difference. However, the ECJ rejected these as a good justification and concluded that a comparison with the situation in other Member States may provide useful indications regarding the possible abuse of a dominant position by a national collecting society. Therefore where the royalties charged are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis, the collecting society is abusing its dominant position.

- *Lucazeau v SACEM*<sup>71</sup>

Three sets of proceedings were instigated by discotheques operators against SACEM. The three disputes related to the refusal of the operators to pay royalties to SACEM for the performance of protected musical works on their premises.

The operators put forward a number of arguments to show that SACEM's conduct towards them constituted anti-competitive conduct prohibited by the EC Treaty, including the claim that the rate of royalties demanded by SACEM was arbitrary and unfair and therefore constituted an abuse of the dominant position held by that society. The level of royalties was appreciably higher than that applied in the other Member States and the rates charged to discotheques bore no relation to those charged to other large-scale users of recorded music, such as television and radio stations. They also claimed that their discotheques used music of Anglo-American origin to a very considerable extent, a fact not taken into account in SACEM's method of calculating royalties, which was based on the application of a fixed rate of 8.25% to the turnover, including value-added tax, of the discotheques in question. The operators had to pay those very high royalties to obtain access to the whole of SACEM's repertoire even though only part of it was of any interest to them SACEM had refused to grant them access to just part of the repertoire, and they could not make a direct approach to the copyright-management societies in other countries since the latter are bound by "reciprocal representation contracts" with SACEM and would accordingly refuse to grant direct access to their repertoires.

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<sup>71</sup> Joined Cases 110/88, 241/88 and 242/88 *Lucazeau v SACEM* [1989] ECR 2811; [1991] 4 CMLR 248



As in *Tournier*, the Court held that Article 82 of the Treaty means that a national copyright-management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discotheques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

- *La Pyramide*<sup>72</sup>

In proceedings between La Pyramide and SACEM regarding money owed to the latter, La Pyramide disputed the amount of the debt on the grounds that SACEM's tariffs represented an abuse of a dominant position within the meaning of Article 82 of the Treaty which SACEM held in particular as a result of its agreements with the copyright-management societies in other Member States which are contrary to Article 81. The Court was asked a number of questions relating to the criteria to be used to establish whether SACEM's practices constituted an abuse. However, for procedural reasons the Court held that the questions referred were all inadmissible and so did not rule on the substantive issues.

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<sup>72</sup> Case C-378/93 *La Pyramide* ECR 1994 p. I-3999

## ANNEX 4

### Summaries of Cases referred to in response to sub question 4.7

#### (a) UK Reports

- *Performing rights: A report on the supply in the UK of the services of administering performing rights and film synchronisation rights – Monopolies & Mergers Commission Report February 1996*<sup>73</sup>

The MMC was asked to investigate whether there is a monopoly situation in relation to the supply of the services of administering performing rights and film synchronisation rights. In making this reference, the Deputy Director General of Fair Trading drew attention to concerns that the revenue distribution policies of the Performing Right Society were not equitable, misgivings about the Society's requirement that members assign their rights to it exclusively, and claims of managerial inefficiency.

During the course of its investigation the MMC took evidence from a wide range of interested parties including publisher and writer members of the PRS, users of music who obtained their licences from the PRS and other collecting societies. The MMC also looked at the way in which performing right societies operate in other countries and at the operation of the Copyright Tribunal in the UK. The MMC took specialist advice on the use of information technology (IT) by the PRS.

The MMC found that the PRS had a monopoly. The MMC was also asked to investigate whether any action or omission on the part of the PRS was attributable to the monopoly situation and whether any facts found in the course of its investigation operate against the public interest. The MMC identified various issues which led the MMC to a number of adverse findings. It found evidence of inefficiency, arising from deficiencies in the corporate structure and management practices of the PRS. The division of activities between the General Council and the executive is inappropriate; nothing is formally delegated to the executive. This is not conducive to the making of clear policy decisions; nor is the lack of a clearly defined set of objectives and a long-term strategy. Furthermore, the MMC considered that the failure to appoint a Chief Executive for almost two years, finally remedied in November 1995, had a prejudicial effect on the way in which the Society is managed. Whilst management are clearly aware of the importance of IT to the business, the need to link business strategy and IT strategy only began to be recognized well into the MMC's inquiry and far too little progress was made in remedying deficiencies in essential databases which were identified several years before.

The MMC found that the PRS failed to consult the membership adequately and that its policies and procedures were not sufficiently transparent. It had cross-subsidized a number of areas of its operations. It had failed to adopt an appropriate cost allocation system and to make clear to members how costs were allocated. Nor did it have in place adequate systems for ensuring that the distribution of royalties was carried out equitably and to assess the consequences to the membership of changes in its distribution policies. There was no mechanism by which members

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<sup>73</sup> Cm 3147, 1.2.96

could appeal against decisions, particularly those regarding the distribution of royalties, which they felt were unfair.

Strong arguments were put to the MMC both in favour of and against the PRS's current refusal to allow a member to self-administer his own live performance rights. The PRS acknowledged that its members were entitled to self-administer entire categories of rights including public performance and broadcasting. But these are not necessarily the categories of rights which members wish to self-administer. Those in favour of change argued that it was not absolutely necessary for the PRS to adopt this stance and that if royalties were collected directly payments would be speedier. Those members who currently receive no payments for live performances could benefit too. The PRS, on the other hand, argued that change would be complex and costly in administrative terms and to the disadvantage of most of its members. They felt there would be practical difficulties in enforcing members' rights.

The MMC was not persuaded that the PRS's present practice of exclusivity was so essential that no further exceptions could be allowed. Nor was the MMC convinced that any considerable additional costs would necessarily fall on the PRS. If members consider that they can administer live performances themselves at least as effectively as the PRS then they should be free to choose, but should bear any reasonable additional costs caused to the PRS.

The MMC found that certain deficiencies, such as the PRS's refusal to allow a member to self-administer his own live performance rights, were acts or omissions of the PRS which were attributable to the monopoly situation and which operate against the public interest. In the light of its adverse findings the MMC made a number of recommendations, which the MMC discussed with the PRS and other interested parties. In making these recommendations the MMC sought to promote efficiency, equity and transparency.

To improve efficiency, the most important of the MMC's proposals related to the formal delegation of day-to-day management of the Society to a small committee comprising the Chairman, both executive directors, both external (non-PRS member) directors and no more than two other director members of the General Council. The MMC also proposed the development of business strategies that place sufficient importance on IT.

The MMC recommended the adoption of a detailed system of cost allocation and the publication of sufficiently detailed accounting information for members to be able to tell where costs arise and which activities are being subsidised. Further recommendations included that the cost of routine membership activities should be collected through the introduction of separate annual membership fees for writers and publishers; the PRS should take advice about improving its measurement of public performance and should amend its distribution policies in the light of that advice; it should set up a special committee to oversee the sampling of performances and should put in place a financial model which will enable it to assess the effect on members of changes to its distribution policies; and that an Appeals Board should be established for members to resolve disputes with the PRS management.

On exclusivity, the MMC considered that Article 7 of the PRS Articles of Association should be amended, to allow explicitly for self-administration of the rights set out in

the GEMA decision, and to enable those members who choose to do so to administer their own live performing rights. The MMC also made a number of recommendations about the way in which some of the practical difficulties of self-administration could be overcome.

- *Summary of Proceedings brought by U2 against the Performing Right Society (extracts from various press sources)*<sup>74</sup>

U2 and Polygram claimed against the Performing Right Society Limited (PRS) under Articles 81 and 82 of the Treaty of Rome. U2 made various claims including the claim that the PRS has failed to adequately represent the band in its dealings with European collecting societies. The specific complaints by U2 were as follows:

- PRS had refused to hand back the live performance rights to U2 enabling them to license concert promoters and tour operators direct.
- PRS should not operate or allow a system of standardised royalties and fees in the live performance area but should tailor everything to the particular works being licensed and to the particular licensee involved.
- The exclusive rights belonging to PRS, allowed them to "maintain a lack of efficient procedures" in relation to the collection and payment of performing right royalties.

The claim was eventually dropped because the PRS offered to pay sufficient royalties to satisfy the claimants. The issue regarding assignment of rights was not settled concurrently, as U2 was waiting for the PRS to settle on a form of implementing self-administration with the Office of Fair Trading before dropping all actions.

### **(b) European cases concerning German collecting societies**

- *GEMA*<sup>75</sup>

GEMA administers as trustee with a view to exploitation the copyrights in musical and cinematographic works assigned to it by its members or third parties. The Commission considered the claim that GEMA had abused its dominant position, in that it (i) discriminates against citizens of other Member States; (ii) places unnecessary contractual requirements on its members; (iii) prevents the emergence of a single market for the services of music producers, distributors and publishers by means of its system; (iv) extends copyright law by contractual means to unprotected works; (v) discriminates between independent record importers and record manufacturers; and (vi) discriminates between importers of sound and picture recording equipment and the German manufacturers of such equipment.

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<sup>74</sup> see <http://www.iael.org/newsletter/D1Midem.html>; <http://www.iael.org/newsletter/D3Allan.html>; [http://www.u2world.com/news/article.php3?id\\_article=623](http://www.u2world.com/news/article.php3?id_article=623); [http://www.u2world.com/news/article.php3?id\\_article=16683](http://www.u2world.com/news/article.php3?id_article=16683); [http://www.u2world.com/news/article.php3?id\\_article=16685](http://www.u2world.com/news/article.php3?id_article=16685)

<sup>75</sup> Commission Decision 71/224 in Case IV/26 760 *GEMA I*, JO 1971 L134/15; [1971] CMLR D35

The Commission found that GEMA had abused its dominant position, and specifically that the following provisions of GEMA's Articles of Association were abuses:

- citizens, music producers, distributors and publishers of other Member States are barred from becoming a 'full member' of GEMA.
- the provisions which make it more difficult for those publishing firms which have commercial or personal links with publishers in other Member States to become a 'full member' of GEMA.
- the requirement - for the purposes of becoming a 'full member' of GEMA - of a minimum revenue from GEMA, but which disregard other musical copyright revenues obtained by other collecting societies.
- the exclusion of citizens of other Member States from being elected to the Supervisory Board.
- The requirement for citizens of other Member States to announce if they have acquired the citizenship of another Member State.
- in countries where GEMA is not directly active, members are deprived of the freedom to (i) transfer in whole or in part to GEMA or to another collecting society their rights for that country; (ii) transfer all their rights to GEMA for those countries where GEMA is directly active or to divide up those rights by categories between several collecting societies; or (iii) to remove the administration of certain categories from GEMA at the end of a year in accordance with the proper termination of a contract. If these provisions are contravened, one would lose one's full membership of GEMA or benefits from the 'valuation procedure' or from the welfare fund.

The following practices were also found to be abusive:

- The contractual extension of copyrights which GEMA already looks after to musical works whose protection period has either expired or which neither belong directly or indirectly to GEMA's repertoire. When invoicing the manufacturers of records, GEMA retains the right to round up to the nearest minute of playing time.
- The imposition of a royalty on records which have been imported or re-imported into Germany by traders, when a royalty has already been paid on the records in a Member State, including Germany. GEMA retains the right to demand from these traders the difference between the lower royalty which has already been paid in a Member State and the normally higher German royalty. This is the case to the extent that GEMA uses as its basis for calculations the average final selling price of the records which the traders have imported.
- The imposition of a higher charge on audio and visual recording equipment imported into Germany than on such equipment which is manufactured in Germany.

GEMA was required immediately to cease the abuses set out above and, within a period of six months from the date of the decision, to make the necessary changes to its policies.

- GEMA<sup>76</sup>

GEMA requested that certain provisions of the Commission's earlier decision be expanded upon, so that an alternative could be found to the proposed remedies of abuses such as the unnecessary and unjustified obligations which GEMA placed on its members. The proposed remedies included giving an annual right of termination and splitting the copyrights up into seven categories. For commercial reasons GEMA sought a minimum membership period of three years. According to GEMA this period would allow it to guard against pressure being exerted on its members by major music users such as radio stations and record manufacturers to transfer their copyrights directly to those users and circumvent GEMA. The Commission accepted GEMA's proposals and amended the remedies accordingly.

- GEMA statutes<sup>77</sup>

GEMA applied for negative clearance or, failing that, exemption of an additional provision in its statutes, worded as follows:

"Article 3.1. The rights to be administered by the association are assigned to it by conclusion of a special agreement (contract of assignment), which defines the scope of the rights to be administered. The contract of assignment must stipulate: (a) ... (d). (e) *that the beneficiary shall refrain from making grants either directly or indirectly of a share of his revenue to parties who have entered into collective agreements with GEMA or with other collecting societies, where said parties, when using the GEMA repertoire, would favour unjustifiably certain works of the beneficiary.*"

The main grounds for the amendment to its statutes which GEMA put forward are that all collecting societies which distribute the funds they receive on the basis of sales proceeds, frequency of performance and playing time are faced with the problem of finding an effective way of preventing their members from manipulating sales figures, frequency of performance and playing time to the detriment of other members. It is very easy to manipulate frequency of performance and playing time, particularly in radio and television broadcasts, but also in the case of direct personal performances. Where frequency of performance and playing time are influenced in such a way, the beneficiary receives a greater share of the amount distributed, to the detriment of other members of GEMA and of other societies, than would be the case if manipulation did not occur.

At the same time collecting societies have to tackle an additional problem: "commercialisation of exploitation potential". From the numerous works offered by the collecting societies, economically powerful users will select certain works which, in their view, have economic potential. However, they will make the use of such

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<sup>76</sup> Commission Decision 72/268 in Case IV/26 760 *GEMA II*, JO 1972 L166/22; [1972] CMLR D115

<sup>77</sup> Commission Decision 82/204 in Case IV/29 971 *GEMA Statutes*, OJ 1982 L94/22; [1982] 2 CMLR 482

works, i.e. the manufacture of copies (e.g. record manufacturer) or the broadcast of the works by radio or television dependent on payment of compensation by the copyright holder (beneficiary) to the user. In practice, the GEMA members' willingness to enter into such an agreement always depends on the user's economic superiority or on the readiness of his access to a form of exploitation which is particularly important to GEMA members (e.g. certain manufacturing processes or broadcasting installations).

The proposed amendment should put a stop to users' preferential exploitation of certain pieces of music, where this preferential treatment depends solely on the direct or indirect share by the users in the amount of royalties paid to the GEMA member or beneficiary. The new provision in the statutes should also prevent the users from commercialising exploitation potential; to make the copyright-holder pay a royalty to the user and not *vice versa* is to pervert protection of copyright.

Where works are used by broadcasting companies whose broadcasting time is necessarily limited, a preferential selection of certain works limits the access of members of GEMA and of other societies to this potential exploitation, for part of the broadcasting time is already taken up by these favoured works. In so far as the broadcasting company's selection is based on its endeavours to reduce its royalty payments to GEMA instead of objective criteria (such as quality of the work, public taste, etc.), the amendment to the statutes should serve to prevent such occurrences. Preferential treatment is therefore only "unjustified" if the user directly or indirectly, i.e. via an intermediary (e.g. a subsidiary) shares in the GEMA member's royalties for the work used and this share is granted for an action performed by the user for which he is liable to pay royalties directly to GEMA. This connection between use of a work subject to royalty payments and a sharing in the revenue from royalties is the essential feature of "unjustified preferential treatment". In addition, the granting of a share of the GEMA member's revenue to parties to collective agreements and the preferential treatment must be linked by a specific objective. A user's share in the beneficiary's revenue pursuant to company law or any other provision and preferential exploitation *per se* fall beyond the scope of the new provision.

The additional provision is to be applied to all parties to collective agreements in the same way without discrimination. It is not directed against specific users (e.g. radio companies) or against a specific undertaking.

The Commission permitted the new provision and found that it did not infringe the prohibition of abuse of a dominant position. It concluded that by the new provision GEMA was restricting itself to prohibiting the beneficiaries from granting shares of royalty revenue to users only where the purpose is to favour certain works of said beneficiaries. In such cases, the granting of the share and the preferential treatment must be directly linked by a specific objective. In this way GEMA protects its membership as a whole. The new provision provides a means, which is not excessive but is effective, of preventing the practices described above. There is therefore no abuse of a dominant position within the meaning of Article 82.

- GVL<sup>78</sup>

This decision concerned GVL, which is a German collecting society responsible for managing copyrights and related claims. Prior to 21 November 1980, GVL refused to conclude management agreements with foreign artists having no residence in Germany - irrespective of whether they were artists from Member States of the European Economic Community - or otherwise to manage their performer's rights in Germany.

It was claimed that the refusal by GVL as a *de facto* monopoly undertaking to conclude management agreements with foreign artists having no residence in Germany constitutes discrimination on grounds of nationality and hence an abuse within the meaning of Article 82. This applied *a fortiori* since such foreign artists were entirely dependent on the services of GVL, being denied access to other collecting societies, and since this refusal meant that they were placed at a financial disadvantage compared with German and domestic artists and led to their being unable to assert their rights.

The Commission found that GVL's conduct prior to 21 November 1980, characterised by its failure to conclude management agreements with foreign artists where the latter were not resident in Germany, or otherwise to manage performers' rights vested in such artists in Germany, constituted, in so far as such artists possessed the nationality of a Member State of the European Communities or were resident in a Member State, an abuse of a dominant position within the meaning of Article 82 of the Treaty.

- GVL v Commission<sup>79</sup>

This case followed on from the Commission's Decision finding that GVL's failure prior to 21 November 1980 was an abuse of a dominant position.

The Court upheld the Commission's Decision, stating that such a refusal by an undertaking having a *de facto* monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of the first paragraph of Article 82 of the Treaty. It therefore followed that the Commission rightly took the view that the first paragraph of Article 82 applied in this case.

### **(c) European cases concerning Belgian collecting societies**

- BRT v SABAM<sup>80</sup>

This case concerned contracts concluded in 1963 and 1967 between the Belgian association of authors, composers and publishers ('SABAM') and two authors, in which the latter assigned some of their rights to SABAM. It was claimed: (i) that an undertaking which enjoys a *de facto* monopoly in a Member State for the

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<sup>78</sup> Commission Decision 81/1030 in Case IV/29 839 GVL, OJ 1981 L370/49; [1982] 1 CMLR 221

<sup>79</sup> Case 7/82 GVL v Commission [1983] ECR 483; [1983] 3 CMLR 645

<sup>80</sup> Case 127/73 BRT v SABAM [1974] ECR 51; [1974] 2 CMLR 238



management of copyrights abuses its dominant position by demanding the global assignment of all copyrights without drawing any distinction between specific categories of such rights; and (ii) that an abuse of a dominant position can consist in the fact that an undertaking stipulates that an author shall assign his present and future rights, and that, without having to give an account of its action, the undertaking continues to exercise the rights assigned for five years following the withdrawal of a member.

The Court held that (i) the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse; and (ii) If abusive practices are exposed, it is for the national court to decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions.

#### **(d) European cases concerning French collecting societies**

- *Greenwich Film Production (Paris) v SACEM*<sup>81</sup>

In this case it was claimed that SACEM's its requirement that its members, in accordance with its documents of association in force at the time, should execute a general assignment of all categories of rights throughout the entire world, constituted an abuse of a dominant position on the market.

The Court held that where an association exploiting composers' copyrights is found to be an undertaking abusing a dominant position within the common market or in a substantial part of it, the fact that such abuse, in certain cases, relates only to the performance in non-member countries of contracts entered into in the territory of a Member State by parties within the jurisdiction of that state does not preclude the application of Article 82 of the Treaty.

- *Banghalter v SACEM*<sup>82</sup>

This case related to article 34 of SACEM's articles of association which prohibit a copyright holder from individually managing certain rights. The complainants were refused membership of SACEM as they allegedly did not meet SACEM's criteria for membership, since the individuals attempted to retain for themselves the rights of exploitation resulting from technical developments or from a future change in the law. The fact that SACEM's articles prevented the individuals from managing certain rights themselves was said to constitute an abuse of a dominant position, especially as other collecting societies did allow this. SACEM was said to discriminate against its own members. The Commission rejected the complaint, as whilst the requirement to transfer all of one's rights to SACEM could well be an abuse of a dominant position, the fact that SACEM had amended its articles to allow artists to retain

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<sup>81</sup> Case 22/79 *Greenwich Film Production v SACEM* [1979] ECR 3275; [1980] 1 CMLR 629

<sup>82</sup> Commission Decision in Case COMP/37.219 - *Banghalter & de Homem Christo / SACEM*, Rejection of complaint: decision 12.08.2002

certain rights, subject to SACEM's board approving such a request, remedied this potential abuse.

- *Basset v SACEM*<sup>83</sup>

In the course of proceedings between Mr Basset, a discotheque operator, and SACEM, SACEM asserted that works from its repertoire had been played in Mr Basset's discotheques without payment of the agreed royalties. SACEM brought proceedings against Mr Basset before the French regional court, which ordered Mr Basset to pay the royalties in question. Mr Basset appealed on the ground that the contracts on which the claim for royalties was based were void as contrary to national and Community law on competition.

The Court held that the prohibition of an abuse of a dominant position does not apply to the conduct of a national copyright-management society simply because it charges a royalty called a "supplementary mechanical reproduction fee", in addition to a performance royalty, on the public performance of sound recordings, even where such a supplementary fee is not provided for in the Member State where those sound recordings were lawfully placed on the market.

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<sup>83</sup> Case 402/85 *Basset v SACEM* [1987] ECR 1747; [1987] 3 CMLR 173