

March 17, 1942

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MEMORANDUM

Re: Decision of Cartel Court of  
April 13, 1934, K 490 - 33

1. The proceedings opened at motion of petitioner are declared to be settled by dismissal of such motion.
2. Section 9, paragraph 1 of the cartel decree is declared to be violated by the respondents toward the petitioner by performing the contract made between the respondents without the consent of the president of the cartel court.
3. Respondents have to pay a court fee of 2500 R.M. Other costs are declared to be set off.

REASONS:

The radio plant M.G.m.b.H. and the merchant who is owner of all shares of this corporation, and its manager, moved in the cartel court to get a declaratory judgment against

- (1) The Association of the Radio Industry
- (2) Telefunken Gesellschaft m.b.H.

The declaratory judgment shall declare that respondents violated Section 9, paragraph 1, of the cartel decree by making impossible the continuance of business of M.A.G., especially the Association of the Radio Industry, by refusing to accept the M.G. m.b.H. as a member of such Association, and Telefunken, by refusing to grant a license to manufacture radio sets.

After the trial the petitioner N withdrew his motion. However, the motion of M.G.m.b.H. was sustained. Respondents asked for the dismissal of the motion for declaratory judgment.

The following allegations as to the contractual relations between the parties are not contested:

The Association of the Radio Industry declared in paragraph 2 of

its by-laws, as its aim, the following:

The improvement of the situation of the German radio industry, especially,

- (1) taking care of the settlement of patent problems important for the members of the Association,
- (2) excluding any kind of unsound competition among the members of the Association and supporting any manufacturing of products which are of unobjectionable quality.

The by-laws contain the following special provision:

The Association has the task of excluding unsound competition among member firms and of supporting any manufacturing of products which are of unobjectionable quality. This may be accomplished by:

(a) fixing of uniform minimum prices or uniform conditions of payment and delivery which must be accepted by the members in connection with all their transactions.

(b) The following general agreement between Association of the Radio Industry and the Telefunken Gesellschaft has been in existence since 1924, and was amended in April 1929. This agreement provides the following:

#### SECTION I:

Between Telefunken and the Association, normal license agreements relating to the use of the Telefunken patents in the field of radio sets, radio accessories, or radio parts have been reached. The Association assumes the duty to impose the obligation on its present and future members to enter a normal license agreement. All ordinary members shall be obliged to accept the normal license agreement for radio accessories and radio parts. Extraordinary members of the Association, however, which manufacture only radio accessories or radio parts in accordance with radio patents, shall be obliged to enter the pertinent special license agreement.

#### SECTION V:

(a) Telefunken is obliged to make license agreements exclusively with members of the Association. This provision shall be enforced even

in cases in which an exchange of patents is the basis of contractual relationship. Telefunken will cancel immediately any kind of license agreement if licensee should leave the Association.

(b) Telefunken is obliged to make the license agreement with every member of the Association. Telefunken can refuse to do so only for very substantial reasons. In cases of a difference of opinion, the Court of Arbitration provided in this agreement shall decide.

(c) Telefunken promises that no licensee will have any better conditions than any other member of the Association.

(d) Telefunken shall, however, be entitled to make any kind of contractual agreements with its own concerns. Telefunken expressly reserves the right to make agreements with these firms even if they are not members of the Association. Telefunken will, however, do everything in its power to induce the concerns and any other licensee outside of the Association to consider in the establishing of sale prices of radio sets, radio accessories, or radio parts, that the fee to be paid to Telefunken by the member firms should be a part of the calculation. Telefunken itself will make its own calculation correspondingly.

(e) Sales conditions for tubes accepted by the members of the Association shall be governed by the custom of the trade and shall be established by Telefunken in collaboration with the association.

#### SECTION VII:

The Association promises to bring no compulsory license suit or suit for annulment of the patent, or any similar suit, against the patent rights which are subject to the license agreement. The Association will never support any other person who brings such suits.

#### SECTION VIII:

Telefunken will do everything in its power to enjoin all firms which manufacture radio sets, radio accessories, or radio parts in violation of the patent rights, providing that the members of the association are obviously affected.

The provisions of the general agreement and the normal license agreements are amended by a memorandum made by the parties on June 1, 1929. The license agreement attached to the general agreement contains in Section 1 the provision relating to the grant of the license, in Section 2 the obligation of the licensee to purchase tubes exclusively from Telefunken. Finally, in Section 8 the following provision is included:

Telefunken is entitled to cancel the license agreement with immediate effect if the membership of the firm in the Association of the Radio Industry should come to an end. The firm is entitled to cancel the contract if the agreement between Telefunken and the Association of the Radio Industry should be cancelled. Cancellation shall be sent by registered mail to the cancellee not later than 14 days after the event upon which the cancellation of the agreement is based.

Relating to the acquisition and loss of the membership in the Association of the Radio Industry, the following provisions are included in the by-laws of said Association:

Section 4:

The ordinary membership can be acquired by single merchants, by partnerships and corporations which are registered in the commercial register and which manufacture radios (receivers or transmitters) in their own plant. The extraordinary membership can be acquired by firms who manufacture accessories or parts of radios in their own plants.

Section 5:

The membership comes to an end

(1) by exclusion of the member by the Board of Directors, which can be done only by a three-fourths majority. The exclusion has immediate effect and is permissible:

(a) If the member violated intentionally or negligently the by-laws or the resolution of the Association, or if the member violates otherwise by his own fault the interests of the Association.

(b) If the member, by his own fault, does not meet his obligation to pay or do other services to the Association or to third persons if the third persons have agreements with the Association.

(c) In case of insolvency.

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(4) In the case of bankruptcy of the member, or in the case of closing down his plant, the membership comes to an end without the necessity of any notice.

The petitioner made the following allegation to justify the motion:

M.A.G. was a member of the Association from April, 1924 to the middle of 1932. M.A.G. is a corporation organized by members of family C and three other persons. It was one of the middle-class firms in whose interest the German Government requested the Telefunken to make the general agreement with the Association of the Radio Industry. It had

an average turnover of about 1.5 million R.M., and it had stock capital of 300,000 R.M.

Besides this corporation, another corporation -- the "Radiowerk M-Sale Corporation" (Petitioner No. 1) entered a contract with M.A.G. by which the new corporation became the agent for a certain territory. The capital of this second corporation amounted to 35,000 R.M., of which capital M.A.G. paid in 15,000 R.M. About the middle of August, 1931, the petitioner N, who participated in the corporation capital with 20,000 R.M. purchased the shares of M.A.G., whereby he acquired control over all the shares of the second corporation.

In connection with the sale of the capital of D plant to the company, all shares of the capital of M.A.G. with the exception of the shares owned by Dr. F. were transferred to the co-founder G, who sold his entire possession of shares to the M-Sales G.m.b.H. in consideration of 40,000 R.M. in the middle of the year 1931.

In the beginning of 1932 the court opened proceedings to compromise between the creditors of M.A.G. and this corporation. The M-Sales G.m.b.H., which was the principal shareholder of the M.A.G. corporation was very much interested in the continuance of the enterprise. A compromise, however, could not be reached because of the resistance of Telefunken, which obviously used the opportunity to diminish the number of licensees. The Association of the Radio Industry also created difficulties. The M.A.G. was excluded from the Association in pursuance of Section 5 of the by-laws. Therefore, in July, 1932, bankruptcy proceedings were opened.

The petitioner N purchased the business of M.A.G. in consideration of a price of 100 R.M. to make possible the continuance of the business of M.A.G. N. Informed the Association of the Radio Industry and Telefunken and asked for the license for M-Sales G.m.b.H. The Telefunken denied this request and declared itself willing to permit only the production of a certain quantity of radio sets out of home material and by the corporation in bankruptcy. Later the Telefunken Company told the manager of M-Sales G.m.b.H. that it believed that the request of M-Sales G.m.b.H. was justified. Later, however, Telefunken refused to recognize this statement.

The negotiations with the Association of the Radio Industry were unsuccessful since the Association definitely refused to accept the M-Sales G.m.b.H. as a member.

The petitioner believes that all such measures of the Association and of Telefunken amount to a boycott within the meaning of Section 9,

paragraph 1, of the cartel agreement. The petitioner believes that the Association itself is to be regarded as a cartel. The general agreement is a cartel agreement within the scope of Section 1 of the cartel decree. This contract is to be considered as a kind of partnership agreement which serves the joint aim of regulating uniformly the production of radio sets in the joint interest of all parties to the general agreement. This uniform regulation is intended to be accomplished by the so-called normal license agreements.

This is not to be considered as an agreement relating to the granting of licenses, but is an actual regulation of the market which will be accomplished by the disciplinary means of a compulsory organization.

The petitioner believes that the refusal of the Association of the Radio Industry to accept the M-Sales G.m.b.H. as a member and of the Telefunken to grant a license to M-Sales G.m.b.H. amounts to a boycott.

Telefunken, as patent owner, may be absolutely free in its discussion of to whom it wants to grant licenses under its own patents. However, it must consider the provision of the cartel decree because of the cartel agreement made with the Association of the Radio Industry. Therefore, in the belief of the petitioner, the Association of the Radio Industry and the Telefunken must ask the president of the cartel court whenever they want to refuse the granting of a license or the acceptance of a member, providing the applicant is a manufacturer whose plant is equipped to manufacture radio sets.

The respondents asked the court to dismiss the motion for the following reasons:

1. The cartel court has no jurisdiction over the motion for declaratory judgment because the provision of Section 9(b) of the cartel decree can no longer apply to cases like the present one, because of the enactment of the statute relating to the Reich's Chamber of Culture of September 22, 1933, R.G.B.L., p. 161.

According to these provisions, only such enterprises may engage in the manufacture of radio sets as are members of the Reich Chamber of Radio. Membership in this Chamber can be acquired by acquisition of membership in any professional association affiliated with the Reich's Chamber of Radio. In Section 10 of the first decree relating to the execution of this statute, it is provided that an applicant may be refused if facts exist which indicate that the pertinent person has not

the necessary reliability and ability. The president of the Chamber alone is entitled to decide if a person can be admitted to one of the professional associations or not. This new regulation abolishes Section 9 and 9(b) of the cartel decree as far as the radio industry is concerned -- in the opinion of the respondent. The respondent refers, furthermore, to a circular decree of the manager of the Reich's Chamber of Radio of December 4, 1933, which reads as follows:

Hereby we inform you that the grant of licenses and the revocation of licenses in the radio economy can only take place after previous understanding with the Reich's Chamber of Radio.

This decree deprived the radio association of its right to make license agreements without the express consent of the Reich's Chamber of Radio. But even if the motion for declaratory judgment would not be subject to dismissal because of lack of jurisdiction, it must be dismissed because of lack of interest of the petitioner; the petitioner can only be considered a retailer, not a manufacturer of radio sets. He does not become a manufacturer by the purchase of the worthless shares of M.A.G.

Finally, the motion for a declaratory judgment should be dismissed because it is substantially unjustified.

The bankruptcy proceeding concerning the M.A.G. was the legal and economic end of this firm. Petitioner No. 1 is not the successor of M.A.G., especially not by virtue of the transfer of the shares and by the sales contract of July 4, 1932. Therefore, the allegation of the petitioner relating to the conditions of M.A.G. is without any significance for the decision in this case.

The license agreement expressly prohibits the assignments of the rights based on the license contract. The M.A.G., conscious of this contractual provision, called on Telefunken after the financial difficulties had arisen for information as to whether Telefunken would sustain the license agreement in spite of the financial difficulties. The M.A.G. received an affirmative answer. The continuance of the license right has been made dependent on the condition that the shareholders remain the same. This condition is of greatest significance for Telefunken, since powerful competition has time and again tried to evade Telefunken's licenses and yet enter the field. The M.A.G. assured Telefunken repeatedly that the shareholders would remain the same. Telefunken did not believe these assurances since it had reliably heard several times of a pending change in the shareholders. It has since been proved that these rumors were correct and that the shares were actually transferred.

In the proceeding relating to financial compromise with the creditors of M.A.G., Telefunken was very reasonable and made the condition that the creditors promise not to sell the shares of M.A.G. assumed by them to any third person. The trustee of M.A.G., when negotiating with Telefunken, made a clear statement that this condition would make impossible any financial arrangement. This statement of the trustee shows clearly that the creditors of M.A.G. had, from the very beginning, tried to sell the shares which had come into their possession at a price as high as possible to diminish the loss. That would have been possible if the worthless shares of M.A.G. were offered to competitors of Telefunken. The allegation of petitioner No. 1 that Telefunken offered 40,000 R.M. to satisfy all creditors is untrue. The allegation of petitioner No. 1 that Telefunken received an offer of 40,000 R.M. in full satisfaction of its claim is incorrect. The trustee made an express statement that no creditor would be preferred, including Telefunken. Telefunken was supposed to get shares of M.A.G. in settlement for its claims. Telefunken was not interested in such a suggestion.

The allegation that the Association of the Radio Industry made difficulties for petitioner No. 1 is untrue. The M.A.G. has not been excluded by the Board of Directors of the Association. The petitioner No. 1 left the Association in pursuance of the by-laws which stated that membership comes to an end in case of the bankruptcy of a member. On May 26, 1932, the Association informed Telefunken of the fact that M.A.G. was no longer a member, whereupon Telefunken canceled the license agreement on May 30, 1932.

According to the allegation of respondents, Petitioner N was not entitled to acquire any right based on the license agreement. Furthermore, the purchase price mentioned in the contract of July 4, 1932 was so small that anyone could see that this contract was not a series contract and made only for the one purpose of acquiring the rights of the license agreement.

Respondents allege that Petitioner asked Telefunken only for the permission to sell the already completed radio sets of N, although Telefunken was not obliged to meet this demand. It did so voluntarily, but it did not receive any thanks. Petitioner No. 1 undertook the final sale in a way which was inconsistent with that of a financier. For instance, the radio sets included in the final sale were priced in a way which might induce the customers to believe that the merchandise was not final sale merchandise, but absolutely new inventions.

Furthermore, Petitioner No. 1 made all complaints to Telefunken when Telefunken tried to make such revisions as were permitted according to the license agreement.

Under these conditions, it can be understood why Telefunken decided to exercise all the rights which it had in relation to the petitioners. One of the reasons was that Petitioner N repeatedly reported discussions which he had as Manager of Telefunken in an absolutely false manner, although Telefunken corrected him expressly. The Manager of Telefunken informed Petitioner N only that he should approach the decision of the radio industry and submit his request to this Association. Only if the Association gave its consent to grant the license could Telefunken discuss the matter, although it would be free even in the case that the Association should give its consent.

The behavior of the petitioners in their relationship to Telefunken was not the reason to refuse the petitioners as members of the Association the granting of a license. The decisive point was that Telefunken because of patent legal consideration, did not like to include petitioner No. 1 in the group of the licensees. However, this matter cannot be considered as a boycott under the scope of Section 9 of the cartel decree. The first problem is, if this matter is based on a cartel agreement the respondents believe that neither the by-laws of the Association of the Radio Industry nor the general agreement can be considered as a cartel. The respondents allege, relating to the general agreement, that Section 1 of the cartel decree does not cover any agreement which deals with the assignment of industrial arts. Furthermore, it should be stated that the general agreement was based only on patent legal considerations, and not on the idea of a market regulation. The right which has been given in the general agreement to limit the number of licensees had no reason other than to avoid any devaluation of licenses granted before and to prevent such a license coming under the control of undesirable prices. The justification of these patent legal considerations become clear when we realize the danger of an assignment of Telefunken licenses to foreign competitors of Telefunken, as this case shows how easily the licenses can be given from one hand to the other by sale of shares without any notice of the licensor. The license is an exclusive license. Such a license can only be considered as a cartel agreement if regulation of the market by any joint enterprise is the aim of the license agreement. In this case, the point is out of question because the general agreement does not serve any joint enterprise, especially not the joint enterprise of a market regulation. The agreement does not even have any similarity with a joint venture. If the petitioners rely upon the rights of mutual control, they are unable to show that those control rights indicate any aim outside of the mere license. Practically in every license agreement one finds such control rights.

A boycott in the definition cannot be found, since the petitioner No. 1 has not <sup>been</sup> excluded from the usual business transaction which was open to other firms, and petitioner No. 1 was never a manufacturer of radio sets and loud speakers, petitioner No. 1 cannot be on the same level as that of the manufacturers included in the Association.

Economist B has been heard as a witness for the cartel Court. He was appointed as trustee of M.A.G. by the court. He testified about his associations with Telefunken relating to the continuance of the license. He testified:

On March 23, 1932, negotiations took place in Berlin, at the request of M.A.G., for the purpose of getting a clear position of Telefunken in the problem of the continuance of the license. He testified that he made a memorandum about his negotiations immediately after the negotiations. This memorandum indicates that it was his impression that Telefunken intended to limit the number of licensees, wherefore he was glad that Telefunken did not revoke the promises previously made.

The parties discussed the result of the evidence of the proceeding. The motion of petitioner No. 2 was denied.

The right of petitioner No. 1 to sue and to ask for declaratory judgment had been contested and the jurisdiction of the cartel court had been denied. The court believed that both contestations were not justified. As far as the problem if the petitioner is entitled to sue is concerned, it is without significance what the relations were between petitioner No. 1 and the firm M.A.G. It is also not important whether petitioner No. 1 acquired any rights to continue the plan of M.A.G. Every one who has an interest in a declaratory judgment is entitled to bring a motion under Sec. 9(b) of the cartel decree by alleging that he has been excluded from the exercise of certain economic activity by a cartel agreement or a resolution of a cartel without the consent of the president of the cartel court. The petitioner alleged that it was able to assume the manufacturing of radio sets, but was prevented from doing so by measures of the respondents which had to be considered as matters under the scope of Sec. 9 of the cartel decree. These allegations are sufficient to make a prima facie case for declaratory judgment.

The jurisdiction of the cartel court has been contested without merit. This jurisdiction has not been affected by the statute relating to the establishment of the Reich's Chamber of Culture. This statute does not change Sec. 9 and Sec. 9(b) of the cartel agreement. The statute relating to the organization of the above-mentioned Chamber has no contents regulating the market, but serves only the establishment structure of the professional organizations in the fields which have to do with culture. This obvious aim of the mentioned provisions is a clear argument against allegation that this statute intended to interfere with the legal provisions of the cartel decree, especially the Sec. 9 of Part 1.

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Since the consent of the president of the court has not been asked for, we have to consider:

- (1) if and to what extent a boycott has been begun,
- (2) if and to what extent this boycott was based upon a cartel agreement.

We have to see that a boycott exists, if we define as boycott the exclusion of a merchant from the usual business way which is available to other enterprises of the same character. By the "normal license agreement" the acquisition of licenses of Telefunken has been reserved to members of the Association of the Radio Industry. The Association of the Radio Industry to which Telefunken referred the petitioner refused to accept the petitioner as a member by its letter of August 15, 1933. Thereby petitioner No. 1 was excluded from the possibility of acquiring a license of Telefunken, and thereby again, from any possibility of working in the field of manufacturing radio sets, because manufacturing of radio sets was practically impossible without using Telefunken patents. The fact that thereby the petitioner No. 1 was excluded from business and was boycotted, cannot be contested by the argument that petitioner No. 1 did not manufacture radio sets up to the present time. Such an allegation would define the exclusion for business too narrow. If we would recognize the justification of such a position, we would require that a merchant make first of all the expenses connected with the establishment of a new plant before he could ever be informed if the cartel court would help him or would give its consent to boycott measures. It would be unreasonable to deprive him of the possibility to clarify this point. Now everyone who intends and is able to work in a certain field is excluded from regular business, if the cartel makes it impossible for him to work, even if he didn't do any work in this field before.

Since conditions are fulfilled here, we answer the question whether a boycott of petitioner No. 1 has been started, by the respondent's answer - affirmative.

We have, however, to consider if this boycott was started on the basis of a cartel agreement. The respondents deny that, and allege that pertinent agreements have only patent legal significance. They see only the grant of an exclusive license to the Radio Association with some more or less significant restrictions. This opinion is unjustified.

The legal significance of the agreements cannot only be studied without considering the connection between all these agreements, because they serve a uniform economic aim. Each contract considered for itself doesn't show its real significance. The interested parties themselves consider the agreement as one uniform contract system. That is even expressed by the fact that all these agreements, including an amending memorandum under the heading "Telefunken Normal License Agreement" were

published.

The connection between the agreements and the fact that these agreements are a uniform contract system becomes clear if we see the references in each contract to the other contracts, by which each contract is amended. By the other contract we read furthermore, in the memorandum of June 1, 1929:

"Telefunken and the Association of the Radio Industry agreed that all agreements expressed in this memorandum shall be considered as a part of the general agreement by the Telefunken and the Association, and as a part of the so-called normal license agreement."

If we consider these agreements in their entirety, we see that these agreements do not amount only to the grant of an exclusive license with some usual restrictions, but on a real regulation of the radio market and the domestic production of radio sets.

Telefunken, whose patents are absolutely necessary to manufacture radio sets, did not restrict itself to grant an exclusive license or to make with some manufacturers independent agreements about the grant of exclusive licenses, it has accomplished much more. Telefunken made the general agreement with the Association of the Radio Industry by which it bound itself in all questions of the grant of new licenses. Such a contract between one enterprise and the entire Association of the industry amounts to a cartel agreement in the scope of Section 1 of the cartel agreement. The justification of this opinion is even stranded by the fact that this Association doesn't restrict itself to patent problems, but has expressed : "to exclude any unsound competition among member firms and to improve the production of qualitatively and objectionable products." This provision may be interpreted in different ways. Its real significance can be learned from its history and from the actual activities of the Association. We learn from the history that the above-mentioned provision contained formerly the following sentence: "This can be effected by: uniform minimum prices and uniform conditions of payment and delivery, which have to be respected by the members in all fair transactions." The striking of this sentence did not change the aim and the significance of the provision. If it was the intention to take the Association out of the cartel supervision by the Government, this end has not been accomplished, since the present provision covers clearly market regulation. It is not proved that the cartel activities of the Association have been changed in any way since the striking of this one sentence of the provision.

The general agreement between Telefunken and the Association is not a simple license agreement, but a long-term community interest between Telefunken and the Association of the Radio Industry and its members by using the patent of the Telefunken for the purposes of an extensive

market regulation. This market regulation is the real aim of the contract. The license agreement from the point of view of the Association of Radio Industry, is only a means for the accomplishment of the end. Telefunken also favors the market regulation and intends to do so in the interest of the best possible utilization of the patents and of its technical equipment and of the equipment of its concerned firms. This end of the market regulation becomes essentially clear by Section 5 of the general agreement. By this section the Association of German Industries did not get an exclusive license with the understanding that the Association may grant the sub-licenses in its own discretion. Telefunken, however, assumes obligation to make agreements with each member of the Association and only with such members, no one else, with the exception of concerned firms, would get a license. The provision that Telefunken may refuse to give a license to a member in special cases is beside legal significance, since only very special cases are caught by this provision. Telefunken must deprive any firm of its license as soon as such firm leaves the Association of Radio Industry. That has nothing to do with the protection of patent legal interests. Furthermore, the exclusion of the Association of Radio Industry, which exclusion has to be followed by the cancellation of the license, may be the consequence of any negligent violation of the by-laws or any resolution of the Association, or any other interference with the interests of the Association. Another reason to consider the contract system as a market regulation is that the Telefunken assumed their obligation to the Association of the Radio Industry "to give the impressions which make a normal license agreement the right to get the same position as any other licensee," and that Telefunken promised to take care of the calculation of the concerned firms. In Section 1 of the general agreement, it is referred to the normal license agreement, especially to Section 2 of this agreement, by which every licensee is obliged to get its supply of tubes exclusively from Telefunken and to use exclusively Telefunken tubes in connection with the manufacturing of radio sets.

Finally, it is referred to the joint interest of all parties to the contract in the protection of the patents.

All these provisions of the contracts indicate the intention to establish a market regulation, the regulation of production, of sale, and of price. The agreements appear to be, to a certain extent, partnership agreements. The agreements are not at all mere license agreements. Also the use of Telefunken patents are of great importance to the contracts. However, the use of the patents is made a means of market regulation. Therefore, those contracts are not mere license agreements or license agreements with a certain joint interest - they are not only agreements similar to cartel agreements, but they are genuine and real cartels, especially as far as the agreement between the Radio Industry and Telefunken is concerned. The fact that industrial property rights are made

a means of market regulation, and that the contracts contain obligations to assign such rights, do not justify any objection against the application of Section 1 of the cartel agreement. Any other opinion would not give full credit to the end or purpose of the cartel agreement, especially the peculiarities of the patent legal situation, which do not require any different opinion, since they can be considered sufficiently in the scope of the proceedings under Section 9 of the cartel decree. The fact that the agreements between the respondents are considered as cartel agreements does not change the fact that Telefunken may refuse to give a license on its patent to the petitioner No. 1. Such a refusal could not be met by the application of the cartel decree, otherwise we would come to a compulsory contract for which all provisions are exclusively made by Section 11 of the patent statute.

In our case, no mere refusal of the granting of a license by Telefunken is an issue, since Telefunken referred the petitioner to the Association of Radio Industry, which has to decide first only if the Association should accept the petitioner as a member. Telefunken may consider if a license shall be granted. The Association stressed very much during the trial that it is not really interested if one licensee more exist, but said that it did not want to accept the petitioner No. 1 as a member. This statement makes it very clear that petitioner No. 1 has not been excluded by Telefunken as patent owner, but in pursuance to a cartel agreement, this exclusion amounted to an exclusion from licenses and from any activities in connection with the manufacturing of radio sets. Therefore, a violation of Section 9, Paragraph 1 of the cartel decree has been established, we did not take any position to the question if the consent to exclude the petitioner shall be given or not. This question can only be decided in a proceeding based on Section 9, Paragraph 1, not in a proceeding based on Sec. 9(b) of the cartel agreement.

Heinrich Kronstein