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COLLECTIVE RIGHTS MANAGEMENT

IN THE ONLINE WORLD

A review of recent Commission initiatives

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¹ The views expressed by the author are personal and may in no way be interpreted as expressing the opinion of the European Commission.

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1. INTRODUCTION

The historic stability in the existing structures for collective management of copyright protected musical works is under pressure. It is fair to say that the pressure has emerged in particular as a result of the rise of the Internet.

We are moving from the distribution of physical goods to online delivery. Traditional radios are being replaced by celestial jukeboxes – and so on.

The music industry has to develop viable business models for the legitimate delivery of music online. All market players - including rights owners and their rights managers - have to adapt to the new market environment.

This is complicated. Copyright in Europe is territorially segmented. The legislation is national. There are multiple forms of rights that come into play in the online environment. Rights ownership is diverse.

The Commission's focus, when enforcing EC Competition Law in this area, is rights management. The Commission has already some while ago warned collecting societies against transposing their national offline monopolies into the online world. This warning was issued in the *Santiago case*² and again in the *CISAC case*.³

The Commission has provided guidance on possible alleys to follow in the new online environment.⁴ It has adopted

² IP/04/586, Commission opens proceedings into collective licensing of music copyrights for online use, of 3.5. 2004.

³ MEMO/06/63 Competition: Commission sends Statement of Objections to the International Confederation of Societies of Authors and Composers (CISAC) and its EEA members, 7.2. 2006.

⁴ See also the Commission's Recommendation on collective cross-border management of copyright and related rights for legitimate online music services OJ L 276, of 21.10.2005, p. 54 and IP/05/1261 of 12.10. 2005.

decisions in respect of for example the *IFPI Simulcasting*⁵ and the *Daft-Punk*⁶ cases.

Some collecting societies have already realised that it is possible to manage the licensing in the online environment without some of the traditional restrictions of competition known from the off-line world.⁷ Other collecting societies have followed suit with announcements about new ways of managing the licensing of legitimate online music services.⁸

It is clear that all Commission services share the same common goal: working toward the next generation of copyright licenses. We wish to see simplification and enhanced efficiency in the administration of copyright. The Internal Market should be a competitive environment to the benefit of both authors and commercial users. This should reduce the administration cost of having access to content that is copyright protected without reducing the income for Europe's creators.⁹

The initiatives of the interested parties the next months will show whether the avenues, which the Commission has outlined, are adequate in creating new licensing methods and management structures for the online world.

⁵ COMP/C2/38.014 IFPI Simulcasting Decision of 8 October 2002, OJ L107 of 30.4.2003, p.58.

⁶ Decision by the Commission of 12.08.2002 in case COMP/C2/37.219 Banghalter / Homem Christo (Daft Punk) v SACEM, available on the Commission web site at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37219/fr.pdf>

⁷ Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 — BUMA and COMP/C2/39151 SABAM (Santiago Agreement — COMP/C2/38126). OJ C 200, 17.08.2005, p. 11-12.

⁸ http://www.gema.de/engl/press/press_releases/pm20060123.shtml and <http://www.sgae.es/recursos/ingles/index.htm>

⁹ For a view on the Commission's efforts on the "Working toward the next generation of copyright licenses" see Dr Herbert UNGERER, "Application of Competition Rules to Internet Licensing" Seminar held by the European Digital Media Association (EDIMA), Brussels, 12 July 2005 and Dr Tilman LUEDER's speech presented at the 14th Fordham Conference on International Intellectual Property Law & Policy, April 20-21, 2006.

I shall try to provide you with an update on the latest developments from an EC Competition Law point of view. In doing so I will concentrate on the following:

- The Commission's approach to IPR protection,
- The restrictions, which we consider slow down the developments in the Community rights management markets,
- The outlook to reform of rights management.

2. THE COMMISSION'S APPROACH TO IPR PROTECTION

The new online technologies provide new business opportunities. Unfortunately they also provide opportunities to music pirates. This is to the detriment of market players wishing to provide legitimate online music services.

The music industry is still in the middle of developing new business models for legitimate online music services that can fully exploit the new opportunities. The provision of attractive legitimate online music services is - in the long term - the only way to reduce the attractiveness of piracy.

The Commission fully recognises the key role of IPR. It has taken strong measures to secure IPRs and to protect the music sector against piracy. The series of EU Directives adopted over the last years on copyright and the enforcement of the protection of those rights testify to this. In particular the "*Enforcement Directive*"¹⁰ is an important piece of Community legislation. The *Enforcement Directive* demonstrates that the fight against piracy is a major concern of the European Union institutions.

However, while it is clear that EC Competition Law cannot be applied regardless of the concrete market situation and economic context - it is likewise clear that IPRs cannot be

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Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195 of 2.6.2004, p. 16.

exercised in a manner that goes beyond the protection of the objective for which the right was legitimately created and recognised in the first place.

We are of course bound to give strong consideration to any argument about the protection against piracy. However, the Commission does not agree to anti-competitive initiatives that impede the development of legitimate on-line systems including for example P2P systems. We have to look into the potential anti-competitive effects that can arise in the exercise of IPRs, and that can lead to market foreclosure as well as other forms of consumer harm.

The Commission's basic philosophy is to apply EC Competition Law to support the development of any type of legitimate system and to act against anti-competitive initiatives that could impede the development of legitimate services in a Community Single Market.

So - while recognising the existence of IPRs - the management of IPRs whether collective or individual - must be exercised within the basic parameters of Community law.

3. RESTRICTIONS THAT SLOW DOWN THE DEVELOPMENT OF A COMMUNITY WIDE RIGHTS MANAGEMENT MARKET

Notions such as the traditional territorial approach to rights management, nationality based criteria and economic residence clauses are an *anomaly* in the Common Market. Exclusivities or other restrictions preventing creators to self-administer in the online world of all or some categories of rights, if they wish, or to choose their protectors, are unacceptable under EC Competition Law.

3.1. Territoriality

A generally applied principle, and a main issue at stake in IPR cases, has always been territorial restrictions. The Coditel

ruling¹¹ has recognised this. However, it is also clear that territorial protection *must not* lead to a partitioning of the Common Market. This is against the very spirit of EC Law. The aim is the achievement of an integrated Community economy. Market partitioning is therefore considered as a hard-core restriction under EC Competition Law.

20 years ago in the *Discotheque* cases,¹² the Court tolerated monopoly like situations held by collecting societies for the management of off-line performing rights. The assumption was that such structures would be the only means of effectively protecting the performing rights of individual rights owners. The Court applied the thesis that local presence is indispensable to appropriately monitor the use of licensed music.

I suggest that the justification for this territorial approach is no longer valid for on-line uses.

You will know from the *Santiago case*,¹³ which concerned bilateral agreements between collecting societies regarding the granting of one-stop-shop central licences for public performance rights that we are not favourable towards agreements under which commercial users are obliged to obtain their license from a particular (national) licensor due to territorial customer allocation clauses or so called economic residence clauses. This line of thinking is continued in the *CISAC case*.¹⁴

¹¹ Case 262/81 *Cotidel v. Cine-Vog* [1982] ECR 3381. For basic principles, see also Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

¹² Joined cases 110/88, 241/88 and 242/88 *Lucazeau v. SACEM* [1989] ECR 2811; case 395/87 *Ministère Public v. Tournier*, [1989] ECR 2521.

¹³ IP/04/586 of 03/05/2004 and OJ C 200 of 17.8.2005, p. 11

¹⁴ MEMO/06/63. Competition: Commission sends Statement of Objections to the International Confederation of Societies of Authors and Composers (CISAC) and its EEA members. Brussels, 7th February 2006.

3.2. Examples of licensing without national territorial restrictions

3.2.1. *IFPI Simulcasting Decision*

The *IFPI Simulcasting Decision*¹⁵ shows some of the new requirements and possibilities of the Internet age. The Decision concerned the collective administration of rights by IFPI for the simulcasting of music via the Internet, and the establishment of a one-stop-shopping facility for Europe-wide licences. It is based on a scheme of reciprocal agreements between the Collecting Societies administering the public performance rights involved.

The IFPI Simulcasting Decision indicates some main lines that we have explored with regard to the restrictions inherent in the traditional nationally based collective rights management. The decision makes it clear that in the online world, territorial restrictions in the management of rights must be reviewed.

The IFPI Simulcasting Decision recognises clearly the efficiencies inherent in one-stop-shopping arrangements via reciprocal agreements between collecting societies. Transaction costs are a major consideration in modern anti-trust actions.

We favour one-stop-shop licensing arrangements for the granting of Community wide multi-repertoire licences. However, as you will know from the *Santiago*¹⁶ and the *CISAC cases*¹⁷ we are not favourable towards agreements under which commercial users are obliged to obtain its license from their national Collecting Society due to territorial customer allocation clauses.

The IFPI Simulcasting Model Reciprocal Agreement does not deal with the commercial terms. Nevertheless, the method to

¹⁵ OJ L 107 of 30.4.2003, p. 58

¹⁶ IP/04/586 of 03/05/2004 and OJ C 200 of 17.8.2005, p. 11

¹⁷ MEMO/06/63. Competition: Commission sends Statement of Objections to the International Confederation of Societies of Authors and Composers (CISAC) and its EEA members. Brussels, 7th February 2006.

determine the appropriate royalty level was investigated thoroughly in the case.

The Commission accepted that the global tariff to be charged to a commercial user for a multi-repertoire / multi-territory license would include a royalty which results from the aggregation of all the Copyright royalties determined individually at national level.

The Commission accepted this price mechanism because the maintenance of a certain degree of control by the individual collecting societies over the licensing terms of their repertoire to protect their right holders' revenues was considered indispensable for the conclusion of the Reciprocal Agreement. The absence of a minimum degree of control would jeopardise the willingness of a collecting society to contribute its repertoire to the licensing framework allowed for by the Reciprocal Agreement.

The IFPI Simulcasting decision implied a separation of the administration fee to be paid by the right holder and the commercial user respectively. This is one possible model.

3.2.2. The Cannes Extension Agreement

Another possible model for central licensing – albeit not in the online area – is found in the phono-mechanical area, where the parties to the Cannes Extension Agreement have just offered commitments¹⁸ in order to meet the Commission's concerns.

The Agreement reflects a development that started some 20 years ago following a Court ruling on the free movement of goods. The Court of Justice decided¹⁹ that sound recordings were subject to the EC Treaty rules on the free circulation of

¹⁸ Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/C.2/38.681 — Universal International Music BV/MCPS and others (The Cannes Extension Agreement) OJ C 122, 23.05.2006, p. 2-3, and <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38681/commitments.pdf>

¹⁹ Joined cases 55/80 and 57/80 Musik-Vertrieb Membran GmbH et K-tel International v GEMA - Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte ECR [1981] page 147.

goods and that it would conflict with these rules if a Copyright owner would use his distribution right to prevent the marketing in one EC member state of sound recordings sold by him or with his consent in another member state.²⁰ As a result of the Court's decision, collecting societies started to consider the implication on the administration of rights. In 1987, the Dutch mechanical collection society, STEMRA, agreed to sign a Central European Licensing agreement with PolyGram.²¹

Although this initiative was first met with significant resistance from other collecting societies, the granting of Central Licenses became the accepted industry standard.

This was facilitated by the fact that the commercial terms underlying the central licensing in the Cannes Agreement is set by the IFPI-BIEM Agreement. The Cannes Extension Agreement regulates the maximum level of administration costs which the Collecting Societies may charge.

From the Commission's point of view this system contains interesting aspects as it has led to competition between Collecting Societies regarding rights administration without leading to a downward spiral of the royalties.

3.3. Exclusivity in the membership relations

Another aspect of music licensing is the relationship between creators and Collecting Societies. Creators must be allowed to take fully advantage of the new technologies for individual rights management and the new methods of distribution.

3.3.1. GEMA Decisions

As many here will know, the balance between collective management of rights and individual administration of rights

²⁰ Case 78/70 Deutsche Grammophon v Metro, ECR [1971] page 487.

²¹ Best Practice Cases in the Music Industry and their Relevance for Government Policies in Developing Countries. (Dr Roger Wallis, Visiting Professor of Multimedia, Royal Institute of Technology, KTH, Stockholm, Sweden. Extra contributor Dr Zelijka Kozul-Wright UNCTAD) December 2001): http://www.wipo.int/about-ip/en/studies/pdf/study_r_wallis.pdf

has been a delicate one ever since the *GEMA Decisions*²² on the matter in the early seventies, with its categories of rights and forms of utilisation.

At the time it was made clear that technological development may require a review.

3.3.2. *Daft-Punk Decision*

The case most recently decided by the Commission regarding the relationship between right holders and collecting societies is the Daft Punk case.²³ The case concerned the application by two members of the band, Daft Punk, to become members of SACEM in respect of their rights in France except for two categories.²⁴ If I have understood well, the two Daft-Punk members wished to manage individually their rights for Internet exploitation, CD- ROM, DVD etc. SACEM refused membership stating that it protected artists from unreasonable demands of the record industry and prevented a cherry-picking of the most valuable rights.

The Commission considered this refusal as a disproportionate ban on individual management of the rights in question contrary to Article 82 of the Treaty. The Commission based its reasoning on three arguments:

²² Commission Decision 71/224/EEC - GEMA I (OJ L 134 of 20.06.1971, p. 15). Commission Decision 72/268/CEE - GEMA II (OJ L 166, of 24.07.1972, p. 22). Commission Decision 82/204/EEC - GEMA III (OJ L 94, of 08.04.1982, p. 12). GEMA IV, XVth Report on Competition Policy (1985), point 81.

²³ Decision by the Commission of 12.08.2002 in case COMP/C2/37.219 Banghalter / Homem Christo (Daft Punk) v SACEM, available on the Commission web site at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37219/fr.pdf>, - reads: "*l'obligation statutaire de gestion collective constitue bien un abus au sens de l'article 82 a) du Traité dans la mesure où cette obligation correspond à une condition de transaction non-équitable.*"

²⁴ «... la catégorie 4, le droit de reproduction sur supports de sons et d'images, y compris le droit d'usage public de ces supports licités pour 'usage privé ainsi que le droit d'exécution publique au moyen de ces supports, et la catégorie 7, les droits 'exploitation résultant du développement technique ou 'une modification de la législation dans 'avenir. »

- Technical progress enables authors to manage certain types of rights individually economically and technically as new technologies have reduced transaction costs.
- Individual management reinforces the moral right of authors.
- The fact that only few Collecting Societies imposed limits of this kind was taken as a proof that these measures were not indispensable.

The Commission considered it legitimate for SACEM to retain the means to monitor which artists wish to manage certain rights individually. The Commission accepted that SACEM may retain its rule against individual management, provided derogations can be granted. Each application will be considered by SACEM on a case-by-case basis and its decisions must be reasoned and objective. This is something which the Commission can keep under review.

Following the *Daft-Punk* decision, SACEM modified its statutes. SACEM's members are now entitled to apply for partial withdrawal of the rights assigned.

However, the *Daft-Punk* decision suggests that the rules on withdrawing rights that were established before the emergence of digital technologies may need to be revisited and the GEMA categories likewise. For example, at first sight it would appear that Internet exploitation rights fall within category 7, or utilisation category 1.

On the other hand, such rights usually require at least

- the right to make a sound recording,
- the right to make an audio-visual recording (*i.e.* the synchronisation right),
- the right to transfer recordings by wire (broadcasting, diffusion services or otherwise),
- the right to re-record original recordings, for example in servers and/or as part of a transmission process;

- the right to reproduce lyrics and musical notations in or associated with the recording for reproduction on screen or by downloading,
- the rights to communicate to the public.

Therefore, if an author wishes to self-administer on-line exploitation of rights, it would need to withdraw only part of some of the GEMA category or utilisation rights granted to the collecting societies. Current agreements with collecting societies, however, do not provide for partial withdrawal and the GEMA decisions do not require them to permit it.²⁵

The offers of collecting societies must be sufficiently unbundled to allow for flexible rights management. The European Commission will be extremely sensitive to any bundling that prevents users from combining the offerings of collective rights management with individual administration of rights. Rights owners must have a free choice in selecting their manager! This will force collecting societies to provide more efficient rights administration on competitive terms.

This thinking is carried on in the Commission's statement of objections in the *CISAC case*.²⁶ One of the two main objections in the CISAC statement of objections is the membership restrictions imposed on European creators and members of Collecting Societies which oblige authors to transfer their rights only to their own national collecting society on an exclusive basis.

You all know that the Oral Hearing of the parties to the CISAC case will take place next week, so I will not go into further detail of the case. The issues at stake are extremely complex and the parties must be given full opportunity to represent their

²⁵ See about this issue David Wood: "Collective Management and EU Competition Law".
http://europa.eu.int/comm/competition/speeches/text/sp2001_025_en.pdf

²⁶ Exemplified as Option 3 in the "Commission staff working document study on a Community initiative on the cross-border collective management of Copyright" of 7 July 2005.

views to the Commission according to our procedural rules before we make any conclusive statements.

4. OUTLOOK TO REFORM – THE CONTRIBUTION OF COMPETITION LAW

This brings me onto the last bit of my presentation: The outlook to reform. Where should it go?

The licensing of music copyright on the Internet must be improved. The absence of Community-wide multi-repertoire copyright licenses makes it difficult for new European online services to take off. The creation of a Community-wide copyright clearance is required. Central licensing is not about making content available on the cheap – it is about efficient licensing.²⁷

It is my understanding that rights owners, publishers and Collecting Societies are already very engaged in the process of reform.

The Commission cannot dictate the outcome of the reform process.

International rights management systems must be adjusted to allow commercial users to have a free choice of one-stop-shopping platforms when acquiring Europe-wide licences for cross-border operations. Efficiency in the administration of rights must be the goal. Competition between one-stop-shopping platforms will be the best driver to render the administration of rights more efficient.²⁸ Commercial users should have a choice of collecting societies for obtaining pan-European multi-repertoire licenses

We must develop a fully competitive rights management market in the Community. Collecting societies should compete

²⁷ Commissioner McCreevy IP/05/872 of 07/07/2005 Music copyright: Commission proposes reform on Internet licensing.

²⁸ See Option 2 in the Commission's study on the reform of Internet licensing in July 2005.

for authors' rights. Authors should be able to entrust their rights to a rights management company of their choice.²⁹ Authors or publishers could also choose to administer their rights individually.³⁰

How can these ideas be reconciled with EC Competition Law?

I can point to a few basic principles:

4.1. Basic principles

4.1.1. *Nationality discrimination*

Discrimination on the basis of nationality is a basic prohibition. Collecting Societies can therefore not choose members or license commercial users on the basis of nationality or economic residence.

4.1.2. *Territorial restrictions*

Territorial restrictions partitioning the Common Market are not permissible – unless objective indispensable constraints make this necessary as the Court held in the *Discotheque* cases.

While under EC Competition Law, we do not question the very existence of the (national) IP rights - it is necessary to **re-think the notion of geographic territory for the management of rights that are exploited in an online environment**. The mandate that a collecting society gets from an author is typically worldwide. When collecting societies are competing for authors they will end up with a portfolio of membership of authors from different Member States. So what is really the territory of a Collecting Society? Collecting Societies will have to get used to compete on the quality of their services in a Community wide market, just like other

²⁹ See Option 3 in the Commission's study on the reform of Internet licensing in July 2005.

³⁰ Recital 9 of the Recommendation states: "*Freedom to provide collective management services across national borders entails that right-holders are able to freely choose the collective rights manager for the management of the rights necessary to operate legitimate online music services across the Community. That right implies the possibility to entrust or transfer all or a part of the online rights to another collective rights manager irrespective of the Member State of residence or the nationality of either the collective rights manager or the rights-holder.*"

businesses. This includes even what they traditionally perceive as “their own geographic territory”.

This will also make it necessary to re-think the notion of repertoire. As often I hear Collecting Societies say **my territory**, I equally often hear them say **my repertoire**. The membership repertoire will develop from being confined to a portfolio of domestic membership into a multi-national membership and hence repertoire.

Such development is likely to outdate the thinking: *“I will not entrust the licensing of my repertoire to anybody who would compete against me with my repertoire in my territory”*.

The removal of the territorial exclusivity in rights management cannot lead to a situation where product exclusivity will be put in place instead.

A single right holder can of course decide to transfer its rights to any collecting society on an exclusive basis. However, we will look differently at this if large portfolios of international rights are concentrated in a single or a few hands.

The Commission is **not** contemplating compulsory licensing and the cases that the Commission is currently pursuing are all based on Article 81 of the Treaty. However, the Commission would not tacitly accept the replacement of 25 monopolies by one or two monopolies.

Then, how to meet the demand from commercial users, which in the online world, is not confined to licensing for a single Member State? While only a limited number of on-line services are truly pan-European in nature, most will nevertheless have a commercial offer that will address customers beyond the frontiers of a single Member State.

As I said earlier, collecting societies should envisage methods how to exchange their portfolios to meet the demand. Collecting Societies should develop their businesses so that

they are able to monitor and enforce licensees beyond their traditional nationally limited geographic area.³¹

Moreover, it does not make economic sense if rights owners do not seek to achieve as many outlets as possible with a view to maximise the licensing of their works. Therefore, I could imagine that rights owners would find it interesting to grant the administration of their works on a non-exclusive basis to several Collecting Societies. There would of course be no problem if such offer is based on fair, reasonable and non discriminatory criteria.

4.1.3. Membership Exclusivity

The Daft-Punk decision must be respected. Authors should have the opportunity to freely choose the administrator of their rights within the Community – be it a single or several protectors for all or some of the rights. Self-administration must be possible.

4.1.4. Royalties

It is clear that a rights owner will not license his work unless his revenues are protected against a downward price spiral. Without protection nobody will contribute repertoire to a Central Licensing system. The Commission accepts that. One example of a pricing mechanism was accepted in the IFPI Simulcasting decision. Another accepted pricing system is found in the Cannes Agreement, where the commercial terms are based on the BIEM-IFPI Agreement.

The Commission would openly study proposals for a mechanism that would allow the maintenance of a certain degree of control by the individual collecting societies contributing repertoire to a Central Licensing system in order to protect their right holders' revenues.

³¹

I anticipate that there would be mergers of Collecting Societies and that these merged entities would find new ways of collaborating. As Dr Tilman Lueder said recently at a conference that “should the new EU online platforms...conclude ‘second tier’ reciprocity arrangements among themselves, broadcasters would gain “a single entry point”, but this time at much lower cost.” “Working toward the next generation of copyright licenses” – Presented at the 14th Fordham Conference on International Intellectual Property Law & Policy, April 20-21, 2006.

4.1.5. *Licensing conditions*

Of course we are not asking rights owners to work with entities that do not respect their rights or which do not properly defend them through appropriate monitoring and enforcement mechanisms. Collecting Societies could refuse to work with such entities. Rights owners and Collecting Societies should elaborate objective, fair, reasonable and non-discriminatory criteria for the conclusion of reciprocal representation agreements or other forms of cross-licensing.

5. CONCLUSION

The new effective structures for cross-border management of rights should ensure that collective rights managers achieve a higher level of rationalisation and transparency.

In adapting to the new requirements arising out of the digital environment rights owners and rights managers will have to make sure that the new avenues forward are not constrained by anti-competitive agreements or conduct. Compliance with EC Competition Law in the reform process is a must.

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