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European music cultures and the role of copyright organisation

- competition aspects

European Music Cultures - Sound or Silence

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Herbert Ungerer

Commission Européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: J70 1/74. Telephone: direct line (32-2) 2968623 / 68622. Fax: (32-2) 2969804 / 94217. E-mail: Herbert.Ungerer@cec.eu.int

Rights management in the new online markets is a topic of central importance to European music development and the development of the new online music services. We need a strong presence of European music and European culture in these new Europe-wide and global media. This means that we need a new dynamism in marketing European music rights to the users of the rights who can expand European presence in those media. And it means that we need taking out restrictions and creating the competitive incentives to act efficiently and proactively.

European law fully recognises the key role of Intellectual Property Rights in providing incentives to innovate and to create. The European Union has taken strong measures to secure these Rights and to protect the music sector against rampant piracy—the series of eight EU Directives over the last ten years on copyright and enforcement of the protection of those rights testify to this. The European Court of Justice has confirmed this fundamental objective in a number of basic rulings, in particular the so-called Cotidel rulings. But as the Cotidel Decisions have shown, we also have to look into the potential anti-competitive effects that can arise in the exercise of those intellectual property rights and that can lead to market foreclosure, and to stagnant music markets.

With the emergence of the new online markets, we are now facing a new situation. New possibilities have opened up. Music via the Internet will become a basic test that the restrictions of the past

will have to pass. Territorial restrictions in the administration of rights can no longer be seen as indispensable for effective management of those rights—and this is one of the very basic requirements for tolerating these restrictions under the strict conditions set by Article 81 of European Competition law. While according to EU law principles, the exploitation of rights can be restricted to national territories, the administration and management of these rights can in principle not—except where indispensability can be proven for doing so as the only means of effective protection.

Territorial protection cannot be used to carve out new empires for Rights management in the new Europe-wide music markets. The administration of rights by collective rights management companies is a point in case. The Commission and the Court have tolerated monopolies, or quasi-monopolies, by collective rights management companies in order to serve rights holders and to collect licence fees, as long as the assumption could be made that such monopolistic structures would be the only means of effective protection of the rights of individual owners. The so-called discothèque cases testify to this, with the Lucazeau line of cases being very explicit in this regard.

We now need a pro-active approach to Europe-wide administration and marketing of the rights of the national authors. We have to take out the restrictions that can hinder finding the most efficient solutions that allow an expansion of the European

music market. Recent decision practice under EU competition law in the field of simulcasting music via the Internet makes it clear that in the new technology fields, territorial restrictions in the management of those rights are generally an unnecessary restriction. That restriction impedes the most efficient right administration in the online world, restricts the choice by the users of the rights and therefore hinders putting those rights in the most efficient manner on the new European music markets. Worse, it hinders the development of Europe-wide legally operating online music distribution systems, the best and ultimately most efficient way to combat online piracy. It works therefore against the very purpose of European rights administration in the online world—the expansion of the presence of the national author and European culture on the European and global music markets, and the effective protection of authors' rights against illegal systems that undermine those rights.

The new principles have been proven in the meantime in implementation—and are now also applied quite generally for issuing global licences for webcasting of music by the members of IFPI, representing the recording industry worldwide, for the rights they hold. The recording industry is an industry well known for the attention it pays to the dangers of piracy. Use of the new global licence systems by this industry is therefore the best proof that these new licensing systems can be operated without risk, safeguarding rights against piracy.

We need favourable conditions for the development of Europe-wide legally operating systems for music distribution to online users. We therefore need Europe-wide and global licenses for music via the new supports, in order to give the European music creators and producers the advantage of dimension in the new markets and to open a new perspective to the European music industry.

We look favourably at one-stop-shopping arrangements, but we want to see one-stop-shopping for Europe-wide licensing in competition, in order to reach the most efficient solution for European rights use in the new music markets. Restrictions in favour of national stakeholders in building these rights management platforms will lead to suboptimal solutions, as an inevitable consequence of the restriction of choice. This will be bad for market development, for the creators and producers, and of course for the European music fan. We therefore cannot accept that licensees of Intellectual Property Rights are forced to choose one particular one-stop-shopping platform, by virtue of a territorial customer allocation restriction in the agreements between the participating collective rights management companies that prescribes that the rights manager controlling their national territory must be chosen for the European or global licence—tying the so-called 'Authority to licence' to the economic residence of the user.

As regards the so-called ‘Santiago agreement’—management of authors' rights for music via the Internet—the Commission has issued a formal statement of objections to the current agreement, in order to convince the collective rights management companies involved to change the anti-competitive features in the current agreement, and to eliminate the economic residence restriction.

Main principles for the future governance of rights management can be found in the European Commission's communication on the topic of April of this year. Let me here concentrate on the competition perspective :

- Territorial restrictions must not stand in the way of creating the new regional and global one-stop-shopping arrangements that are required for gaining efficiencies for regional and global rights licensing in the new music markets in the European Union, fundamental for establishing legally operating online systems for music distribution,

- Under competition law, we will look favourably at one–stop-shopping agreements and the related reciprocal agreements between collective rights management systems,

but

- we cannot allow them to perpetuate the monopoly structures of the past where they are no longer indispensable.

And:

- Rights owners must be able to determine themselves the proper mix between individual rights management and collective management of their music rights.

- Arrangements must not bundle unnecessarily rights management offerings. Individual administration of rights must be allowed to develop. Rights owners must be able to use the new digital rights management techniques for individual rights management where they so choose.

As the Europe-wide and global music markets change fundamentally, the business models of collective rights management will have to change inevitably as well. Efficiency must be remunerated in this business as in others, in order to allow efficient collective rights management to promote the rapid deployment of legally operating online music distribution systems in Europe, and to compete with the big multinationals that dominate the field. The rapid deployment of legally operating systems for online distribution can offer European authors and creators an alternative route to the European and the international market.

We need a level playing field , in order to give also the smaller players in collective rights management a chance in the future global licence markets—competing on merit and efficiency, and

not based on a mandatory customer allocation. European competition law does not allow customer allocation in the new markets. The residence clauses must therefore be eliminated from the new agreements . Only free choice in selecting the collective rights management company offering the best efficiency will allow optimal presentation of the rights of the national authors and creators on the new European and global music markets, and allow them best chances to compete with the multinational music majors that are present on those markets.

Europe does not have a single European copyright but relies on the protection offered by national copyright in the 25 Member States. The more important is the development of systems for efficient Europe-wide management of those rights. We cannot allow suboptimal solutions. Efficient Europe-wide and global licensing that provides for choice will be the best way forward for the rapid deployment of legally operating Europe-wide online music distribution systems and for a strong presence of national authors and national music cultures on the new European and global music markets. It will secure a strong role for European collective rights management in the future, facing the market realities of today. We are at a watershed in European rights management, but we are confident—and we have first indications—that collective rights management in Europe will find solutions that are in line with the European competition order and the requirements of a dynamic development of the new Europe-wide music market.