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Introduction

I have been invited to speak at this regulatory panel of cable TV practitioners on the current application of competition rules to rights management. It is well known that we are bound strictly by our procedural rules that aim to safeguard the rights of parties,their right of reply and their right to be heard before the Commission draws any conclusions. We must keep this in mind in particular with regard to ongoing procedures. I will therefore concentrate in my contribution to this panel on basic principles underlying our approach, rather than going unduly into the details.

Let me make some comments on four points:

- General principles. I believe this is especially important given the large, and sometimes confusing, multitude of different situations and rights that we encounter: performance and mechanical reproduction rights, and the many neighbouring rights in the sector.

- Case law and priorities for a pro-competitive development of rights management, as is also reflected in the recent communication by the Commission on the management of copyright and the related rights.[1]

- The contribution that competition law can make to this process. I will refer here particularly to the IFPI Decision, but will also make a few remarks on the ongoing so-called 'Santiago case'.

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[1]Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The Management of Copyright and Related Rights in the Internal Market COM(2004)261 final, 16 April 2004; available at http://europa.eu.int/comm/internal_market/copyright/management/

- Finally, a short outlook, particularly with regard to the respective roles of competition law and regulatory solutions to the problems in the sector.

Principles

Before going into some detail on the subject, let me make a few general statements that I would ask you to keep in mind.

– The Commission fully recognises the essential function of Intellectual Property Rights;

– *However*, we have to take into account the possible anti-competitive effects of managing and exercising those rights, where such action could effectively impede and strangle the development of the sector;

– We have to be particularly vigilant where anti-competitive practices could impede the development of the new technologies—such as is now happening in your sector and in the New Media;

Before expanding on those points, let me shortly recall a few basics of EU Competition Law for those in this audience that are not well acquainted with those principles.

As regards this area, European Competition Law turns around three basic provisions:

– Article 81 of the EU Treaty: the prohibition of anti-competitive agreements. This concerns the screening of both horizontal and vertical restrictions. A fundamental principle is that we cannot admit restrictions

that lead to market foreclosure and hinder the integration of the Common Market.

– Article 82: the abuse of dominant positions.
  This Article bans in particular, exclusionary conduct and exploitation of customers.

– The EU Merger Regulation, the control of concentrations.

European law fully recognises the key role of Intellectual Property Rights in providing incentives to innovate and to create. This is also the basic frame of mind within which European competition law is applied to this field. The European Court of Justice has confirmed this fundamental objective in a number of basic rulings, in particular the so-called Cotidel ruling.[2] But as the Cotidel Decision 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.

IPRs are firmly recognised and protected under European Union legislation by a series of Directives, in particular the Copyright Directive of 2001.
But a basic principle in dealing with copyright issues under European Competition Law is that protection must be strictly limited to the protection of the specific subject matter of the right, and that it *cannot* go beyond that. This is a basic thread through all of the Court cases dealing with the issue, the Coditel case again a major example in this respect. Exercise of intellectual property rights cannot go beyond the protection of the objective for which the right was legitimately created and recognised in the first place. Neither can it exempt the management and administration of those rights

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[2] 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

from Competition Law scrutiny—and this is particularly true for collective rights management systems. The activities and the current reforms of the Collecting Societies are in this context quite naturally an issue at the centre of attention.

Case law and priorities

A main issue at stake in reviewing cases involving IPRs under European competition law has always been territorial protection, one of the most important topics involved in licensing rights and well known to IPR and competition practitioners in this area. Territorial protection of licensing of rights is a generally applied principle, and again the Cotidel ruling has recognised this—but it *must not* lead to market partitioning within the European Union. Market partitioning is against the very spirit and the objectives of European Competition Rules that aim at dismantling structures that distort the operation of economic operators in the common market. In general, it is therefore seen as one of the worst hard-core offences and restrictions under European Competition Law.

The administration of rights by the Collecting Societies is another point in case. The Commission and the Court have tolerated monopolies, or quasi-monopolies, by the Collecting Societies 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[3].

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

But we are now facing a new situation. New possibilities have opened up, and territorial restrictions in the administration of rights can no longer be seen as indispensable for effective management of the 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 be—except where indispensability can be proven for doing so as the only means of effective protection.

Europe-wide licences / "one-stop-shopping"

The IFPI Decision of 2002 has shown the new requirements and possibilities of the Internet age. The Decision concerned the collective administration of rights by the International Federation of the Phonographic Industry for simulcasting music via the Internet[4], and the establishment of a one-stop-shopping facility for Europe-wide, respectively global licences based on a scheme of reciprocal agreements between the Collecting Societies administering the rights concerned.

The IFPI Decision indicates the main lines that we intend to follow with regard to the restrictions inherent in traditional nationally based collective rights management systems. It makes it clear that in the new technology fields, territorial restrictions in the management of those rights are generally not acceptable and must be reviewed.

The Decision recognises very clearly the efficiencies inherent in one-stop-shopping arrangements via reciprocal agreements between collective rights

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4 Case COMP/C2/38.014 IFPI Simulcasting, Decision of 8 October 2002, OJ L107 (30.4.2003), p.58

management societies for selling music via the Internet. Transaction cost economics are a major consideration in modern anti-trust actions that we will continue to fully take into account.

We therefore look favourably at one-stop-shopping arrangements, but we want to see one-stop-shopping for Europe-licensing in competition, in order to avoid a super monopoly emerging, instead of the twenty-five territorially-based ones that we now have.

We believe that:

- Rights owners must have a choice in selecting their protector. They should have the choice of the collecting society they select to license their rights.

- Users should have the choice of the one-stop-shopping platform when acquiring the licences for the rights for transnational operation. Rights management systems in the international field, and the related reciprocal agreements between rights management societies, must become more efficient and adjust their techniques to the new requirements. Efficiency in the administration of rights must be the goal. Competition between one-stop-shopping platforms will be the best driver to achieve that objective.

- This means, that in particular, we 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 Collecting Societies that prescribes that the rights manager controlling their national territory must be chosen for the regional licence. Nor do we

believe that the current provisions referring to collective rights management under the Satellite Broadcasting and Cable Retransmission Directive should be untouchable, but will need periodic review as any other provision in law.

This leads me then to the future contribution of competition law.

Contribution of competition law

We believe that the broad debate that has followed the April 2004 communication on the Management of Copyright will provide a broad basis for future reform. The position papers produced by this group will certainly be a valued input into this process.

In the meantime, we will continue scrutiny under competition law. We must ascertain that new arrangements are not conceived with a main purpose of extending the dominant positions in traditional media markets into new markets.

Newcomers must be allowed to enter the new markets—and to use new technologies and new methods of distribution. One major point here is that the use of the new technologies for individual rights management—DRM technologies—must be kept open. As many of you here will know, the balance between collective management of rights and individual administration of rights has been a delicate one ever since the GEMA Decisions on the matter of 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 in the future.

That time has now come. We will be extremely sensitive to any bundling that prevents users from combining the offerings of collective rights

management with individual administration of rights, as now made possible by DRMS / Digital Rights Management systems. Rights owners must have the possibility to explore the optimal balance between the flexibility of individual management offered by the new technologies, and collective management offered by the Collecting Societies[5]. The offering of Collecting Societies must be sufficiently unbundled to allow this—and unbundling is likely to become a major topic on our agenda.

As regards the so-called 'Santiago agreement'[6], we will build on the basic principles of the IFPI decision, in particular:

- The principle of competition between one-stop-shopping arrangements built on reciprocal rights agreements;

- banning of territorial customer allocation, where no longer justified by requirements (and therefore covered by the Lucazeau line of court rulings);

- Transparency requirements, such as transparency in accounting and separation of administrative from royalty fees;

All these principles can be found in the Rights Management communication of April. In its press release published one month later on the occasion of

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[5] See also 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

[6] The "Santiago Agreement" was notified to the Commission under Regulation 17 by the collecting societies of France (SACEM), Germany (GEMA), the Netherlands (BUMA), and the UK (PRS), which were subsequently joined by all societies in the European Economic Area (except for the Portuguese society SPA) as well as by the Swiss society (SUISA).

The purpose of the agreement is to allow each of the participating societies to grant to online commercial users "one-stop shop" copyright licenses which include the music repertoires of all societies and which are valid in all their territories.

the formal opening, with the issuance of a formal Statement of Objections, of the Santiago procedure, the Commission has been very clear.[7]

Let me quote:

'…The Commission considers that such crucial developments in online related activities must be accompanied by an increasing freedom of choice by consumers and commercial users throughout Europe as regards their service providers, such as to achieve a genuine European single market. The structure put in place by the parties to the Santiago Agreement results in commercial users being limited in their choice to the monopolistic collecting society established in their own Member State. .. The recent history in the field of collective management of copyrights shows that the traditional monopolistic structure which has so far existed in Europe at national level is not required in order to safeguard the interests of right-holders in the online world… '

and it goes on

'…The lack of competition between national collecting societies in Europe hampers the achievement of a genuine single market in the field of copyright management services and may result in unjustified inefficiencies as regards the offer of online music services, to the ultimate detriment of consumers. The Commission considers that the territorial exclusivity afforded by the Santiago Agreement to each of the participating societies is not justified by technical reasons and is irreconcilable with the world-wide reach of the Internet…'

[7] Commission opens proceedings into collective licensing of music copyrights for online use, IP/04/586, 3 May 2004

Let me then conclude with an outlook.

Outlook

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.

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 Media markets. Territorial restrictions cannot serve to undermine the integration of the Common Market—one of the basic goals of the European Union.

Restrictions falling under Article 81(1) must be justified under the criteria of Article 81(3), in this field as in others. Restrictions must therefore be indispensable for generating claimed benefits and provide a fair share of the benefits for the consumer, while not eliminating competition.

Rights owners must be able to determine themselves the proper mix between individual rights management and collective management of their 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 DRMS techniques for individual rights management where they so choose.

In many instances, the rights owner will need collective rights management for effectively protecting his or her rights, and the user for having convenient access. However, restrictions cannot go beyond this, and

collective rights management must stay within the limits set by Competition Law, and particularly Articles 81 and 82, EC Treaty.

Other aspects must be considered in the future. The Santiago procedure must proceed according to the rules respecting the rights of all parties to be heard. With the expiration of the notification system on 1 May 2004 and Regulation 1/2003 now covering anti-trust proceedings, the Commission has transformed the Santiago procedure into an own initiative procedure against the notifying Collecting Societies, SACEM, Gema, Buma, PRS, and others. Since 1 May 2004, territorially based customer allocation in the context of that scheme can no longer claim protection as was afforded by the notification. Other cases are also in the pipeline. But one must also see that a formal opening of procedure does not mean that agreements cannot be brought in line with the requirements of competition law and that a settlement cannot be reached. Regulation 1/2003 now opens new routes to formal settlements of cases once the necessary commitments are given by the parties to ensure compliance with competition rules.

It will remain to be seen how far the basic principles of liberalisation of rights management set out by the Commission in the Communication of last April on Copyright Management can be pursued via the application of the Competition Rules or whether they need to be pursued in the framework of the new regulatory instrument that has been announced in the Communication. It will also remain to be seen how these principles will apply to the specific problems of your sector, as expressed in the Satellite Broadcasting and Cable Retransmission Directive.

The outcome of this process will, of course, also depend on the position papers you put forward and the persuasiveness of your arguments. All parties are now called upon to make their contributions.