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## Application of competition law to rights management in the music market

### Some orientations

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EU competition law and its application to rights management is of growing importance to the music market, particularly with the emergence of wide-spread satellite television, and with the Internet and mobile communications systems as new media. Independent music producers as represented by Impala play a vital role in Europe's music scene, and in maintaining Europe's creativity and cultural diversity in this area. It is important to have a frank and constructive debate about the contribution that more pro-competitive rights management structures can make to the development of the European music market. I therefore welcome the opportunity to make a few remarks at this Impala Annual Meeting on the pro-active role that competition policy is increasingly playing in this area.

Let me open my short intervention with three statements:

- We fully recognise the essential function of Intellectual Property Rights in driving creation and the development of the music market. My colleague Mr Reinbothe from DG MARKT has been very explicit about this.
- *However*, we have to take account of possible anti-competitive effects in 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—Internet and mobile, or what is now generally known as the New Media.

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

In essence, European Competition Law turns around three basic provisions:

- **Article 81** of the EU Treaty: 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**: abuse of dominant positions. This Article bans in particular exclusionary conduct and exploitation of customers.

- **The Merger Control Regulation.**

The Merger Regulation prohibits the creation or strengthening of dominant positions affecting competition in the Common Market.

I will not speak here about another field of European Competition Law that is very important whenever subsidies are given to a sector or activity—State Aid Control.

Let me then return to my three statements.

*Firstly, Intellectual Property Rights under EU competition law.*

European law fully recognises the key role of Intellectual Property Rights in providing the incentive to innovate and to create, and 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 rulings.<sup>1</sup> 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 rights, and that can lead to market foreclosure.

IPRs and the recognition of the rights resulting from creation and ownership are at the very basis of the mechanisms of market economies—well known, of course, in the field of music creation. IPRs are firmly recognised and protected under European Union legislation by a series of Directives, in particular the Copyright Directive of 2001. This is of particular importance at a time when piracy is rampant. 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. This is a basic thread through all of the Court cases dealing with the matter, with the Coditel case again a major example. Exercise of the 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 from Competition Law scrutiny—and this is particularly true for collective rights management systems, so vital in the music field and for Independent Producers. The activities and the current reforms of the Collecting Societies are in this context quite naturally an issue at the centre of attention.

*This leads me then to my second point: anti-competitive effects in the exercise of the rights.*

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<sup>1</sup> 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

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 the rights and well known to 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 offenses and restrictions under European Competition Law.

But even in this highly sensitive area, European Competition Law has gone a long way to accommodate the concerns of right holders. Discussions around the consecutive technology transfer block exemptions testify to this.

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 for serving right holders and collecting 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 very explicit about this<sup>2</sup>.

*But* we are now facing the New Media—Internet and broadband, fixed and mobile. New possibilities open up, and territorial restrictions in the administration of rights no longer can be seen as indispensable for effective

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<sup>2</sup> 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

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(3) 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.

The IFPI Decision of last year has shown the new requirements and possibilities in 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<sup>3</sup>.

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

*However:*

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<sup>3</sup> Case COMP/C2/38.014 IFPI Simulcasting, Decision of 8 October 2002, OJ L107 (30.4.2003), p.58

- Right 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 regional and global 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 of Internet distribution. 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 in particular that we cannot accept that licensees of Intellectual Property Rights are forced to choose one particular one stop shopping platform, by virtue of a territorial restriction in the agreements between the participating Collecting Societies that prescribes that the rights manager controlling their national territory must be chosen for the global licence.

*This leads then to my third point: new technologies*

As IFPI has shown, we will act under EU Competition Law particularly where anti-competitive practices impede the emergence of new technologies. This means that we will actively scrutinise the markets for situations where these practices could emerge.

Recent cases are well known. We are assessing the new arrangements regarding music via the Internet. This concerns one stop shopping arrangements of the Authors' Collecting Societies, such as the so-called

Santiago agreement, and review of the new Cannes agreement concerning the phonographic industry. Other cases are the new joint ventures launched by the global music majors in the emerging Internet music market, Musicnet and Pressplay being cases in point. We must make sure that third parties do not lose out when the giants launch themselves into the new markets.

We must ascertain that new arrangements are not conceived with as a main purpose in mind the extension of dominant positions in the traditional media markets into the new markets. As has been made clear in merger proceedings such as AOL / Time Warner and Vivendi / Seagram barriers to entry for future competition must be kept low. In all of these cases access to content commitments by the parties for new entrants have played a key role in the approval of these concentrations. Reasonable access is a principle that you will find as a recurrent theme across all of our action.

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 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.

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<sup>4</sup>. The offering of Collecting Societies must be sufficiently unbundled to allow this—and unbundling is likely to become a major topic over the time ahead.

*Let me then conclude.*

We fully recognise the owner's rights and the role of Intellectual Property. Safeguarding the rights of the creator and the author are the basic incentive for creativity and innovation. *However*, we must avoid market foreclosure as we transit to the new technologies. Anything else would not lead to sustainable benefits for any of the actors, and it would with certainty create stagnant markets.

The guiding principle from a competition point of view will be free choice for the creator and the user. The creator must be able to effectively market his product, and to choose himself the protector of his rights—or to choose to protect himself. The user of the rights must be able to obtain regional or global licences from the platform he selects.

Let me resume:

- Free choice for the owner of Intellectual Property Rights in choosing his collective rights manager must be the basic principle governing the relationship between the owner and his Collecting Society;

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<sup>4</sup> Recent 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."

- Free choice for the user of the Rights in choosing where to obtain the licences he needs for regional and global on-line exploitation must be a natural consequence of the new regional and global dimension of the Internet world;
- 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. Arrangements must not bundle unnecessarily rights management offerings, thereby effectively preventing rights owners from determining themselves the proper mix between individual rights management and collective management of their rights.
- 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 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 to the consumer, while not eliminating competition. In the new technology fields, collective rights management societies are at least

potential competitors and any restrictions will therefore have to qualify under these criteria. In many instances, the rights owner will need collective rights management for effectively protecting his 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.

Efficient rights management systems are probably the single most important factor for the future development of the music markets, particularly so in the new markets. We need cost-efficient and accountable rights management systems, and as is well known, we are currently undertaking under EU competition procedures Europe-wide investigations of Collective Rights Management systems to establish reliable comparisons of costs and tariffs.

We have to keep basic principles in mind. We need *both* collective *and* individual rights management to achieve the right balance. We need one stop shopping arrangements for the regional and global administration of rights, wherever this is required and possible. We need the adjustment of our rights management systems to the Internet and New Media age.

We believe that the application of competition rules to the sector can make a major contribution to achieving these objectives.