

And the band played on

The European Commission has prohibited the practices of copyright collecting societies in an effort to foster cross-border licensing – but, ask ROBERT HEINE and CHRISTOPH WÜNSCHMANN, will the value of copyrights be diminished?

The European Commission has adopted an antitrust decision requiring the 24 European collecting societies that are members of the International Confederation of Societies of Authors and Composers (CISAC) to stop applying specific terms in their reciprocal agreements (see case COMP/38.693 – CISAC).

The Commission's aim is to foster cross-border music broadcasting over the internet, cable and satellite by making it easier for users to obtain licences from a single collecting society of their choice.

Collecting societies are entities that act in a fiduciary capacity for a large number of copyright holders. They grant licenses to commercial users of copyrighted works (for example, music), collect fees from the users and then distribute the royalties among the authors. In the last 150 years, collecting societies have been founded in nearly every country of the world.

Traditionally, collecting societies, including those in Europe, operate on a national basis. This has two implications: firstly, collecting societies predominantly represent domestic authors. For example, a French composer will likely entrust his or her copyrights to the French collecting society SACEM, whereas most German composers choose the German society GEMA to represent their rights. As

a result, each national collecting society holds the rights to the so-called national repertoire of musical works.

Secondly, the licences granted by the collecting societies are limited to the territory in which they are domiciled.

Bilateral agreements

As commercial users, such as music-on-demand providers, have a demand for the international repertoire of music, the collecting societies have in the past concluded reciprocal agreements with each other. In these bilateral arrangements, the two groups agree to manage one another's rights in their own territories.

This means that along with its own national repertoire, the affiliated collecting society also obtains the right to the repertoire of the society it has an agreement with. Through this network, each local society represents both its own national repertoire and the international repertoires of all other collecting societies it is affiliated with.

These reciprocal agreements are limited to the territory of the affiliated collecting society. Thus, each society can only license the international repertoire in its own territory. Users of music have no alternative source of obtaining a licence other than through the collecting society established in their respective territory.



Cross-border online music services have brought into question the traditional rights-management agreements

As a consequence of the exclusivity each collecting society has in its home territory, there has been virtually no competition between the collecting societies in the European Community. Despite that, the European Court of Justice (ECJ), in its 1989 decision in *Tournier* (see case No. 395/87), held that the reciprocal agreements were compliant with European competition law. The ECJ found that the reciprocal agreements enabled the collecting societies to make use of the services of similar societies in other states without having to create their own organisation in every country. It also concluded that the agreements were not in violation of the EC treaty.

Online services

However, the emergence of cross-border online music services puts the traditional system of rights management, as it was

approved in the *Tournier* decision, into question. In contrast to the traditional forms of music exploitation (for example, local broadcasting services, discotheques and events), many online services are available across Europe in more than just one state.

Accordingly, online providers require copyright cross-border clearance in line with their international reach. They need one-stop shops and consider the traditional territory-by-territory management of copyrights as an impediment to the roll-out of their cross-border services. The same applies to broadcasters offering cross-border services via cable or satellite.

For this reason, RTL group (in 2000) and online music provider Music Choice (in 2003) filed complaints with the Commission, arguing that the territorial restrictions in the reciprocal agreements between the European

>copyright

collecting societies conflict with article 81 of the EC Treaty. In its recent CISAC decision, the Commission followed the complaints. It found that the network of reciprocal contracts constituted an anti-competitive concerted practice between collecting societies, whereby they limit their activities to the domestic territory of the other collecting societies.

As a result of the Commission's CISAC decision, the collecting societies will in the future have to modify their reciprocal agreements. The present network gives each society a *de facto* monopoly over the international repertoire in its home territory, and cannot be sustained. Rather, the Commission's goal is to establish a system of copyright management where no territorial restrictions exist and where each society is able to grant licences to any commercial user active in the European

Economic Area (EEA) that cover the whole region.

Strong objections

Most collecting societies and authors' representatives strongly disagree with the Commission's approach to territoriality. Their fear is that competition between the collecting societies for online users will diminish the value of copyrights.

The German Composers' Association anticipates that royalties will come under additional competitive pressure, as some collecting societies, at the expense of the authors, will grant swingeing discounts to attract users.

Remarkably, the Commission itself has shared this concern, as expressed in its 2005 impact assessment of reforming cross-border collective management of copyright and related rights for legitimate online music services. In that publication, the

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Commission said competition among collecting societies on the basis of reciprocal agreements 'might deflate online royalty rates'.

It argued that if all collecting societies offered the same product to users (namely the international repertoire assembled under reciprocity), 'smaller societies may have less bargaining power *vis-à-vis* large commercial users and commercial users will exploit this to obtain lower tariffs at the cheapest entry point'.

This finding led the Commission to adopt a recommendation in October 2005 suggesting a model of rights management that would work without reciprocal agreements at all, instead giving rights holders the

choice to appoint a rights manager for the online use of their works across the entire EU. The Commission's CISAC decision does not appear to be fully in line with the recommendation. This might be because both legal acts were adopted by different Directorates General within the Commission. Clearly, rights management reform in the EU is still in development.

Several European collecting societies announced they will appeal the Commission's decision in the EU Court of First Instance ■

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