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DOCTRINE AND OPINIONS

WHEN WILL WE HAVE CROSS-BORDER LICENSING OF COPYRIGHT
AND RELATED RIGHTS IN EUROPE?*

Dr. Lucie Guibault**

In Europe, much has been written recently about the collective management of copyright and related rights. April 2004 saw the publication of the European Commission's Communication to the Council and the European Parliament on the Management of Copyright and Related Rights in the Internal Market.¹ This communication confirms the Commission's intention to adopt, in the not too distant future, a directive on the governance of the societies for collective management of copyright and related rights (collecting societies) in Europe. In addition to describing the current situation in the area of collective management of copyright and related rights in the European Union, the communication presents a number of options for improving the conditions for developing Community-wide licensing of rights. The Commission notes that the management and utilization of copyright and related rights often concerns the European market as a whole; while the digital environment lends itself, by definition, to the cross-border exploitation of rights, the licensing of analogue exploitation is also increasingly taking on a cross-border dimension. Ideally, rights management should therefore adapt to new situations, such as the increasing call for a "Community-wide" licensing of certain rights and should secure a balance between the need to protect authors and artists, on the one hand, and the requirements of commercial users, on the other.

The possibility for a collecting society to license the cross-border exploitation of one of the works belonging to its repertoire is one of the key questions that will have to be resolved by the European Commission if it is one day to meet its objective of facilitating the marketing of intellectual property rights in order to create a true single market in this area. Cross-border licensing raises, however, many questions in the area of competition law, as shown by the European Commission's decision in the "IFPI – Simulcasting"² case and the recent announcement by the Commission to open proceedings concerning the "Santiago Agreement" on music copyright licensing for Internet use.³ In the next few pages we propose to examine the main competition-law issues that cross-border licensing by European collecting societies raises. Let us first briefly outline the different forms of music distribution on the Internet and the existing licensing systems (Section I). We will then consider, on the basis of the European Commission's decision in the "IFPI – Simulcasting" case and the proceedings concerning the "Santiago Agreement", what competition-

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¹ COM(2004)261final, 16.04.2004.

² Case No. COMP/C2/38.014 – "IFPI 'Simulcasting'", Official Journal L 107/58, 30.04.2003.

³ European Commission Press Release IP/04/586, 3 May 2004.

law hurdles European countries must clear in order to be able to issue a Community-wide license (Section II).

Section I – Online music distribution

In recent months in Europe there has been a considerable increase in (legal) sources of music distribution on the Internet, from Apple's "iTunes Music Store" and "On Demand Distribution" (OD2) to the many Internet service providers offering their subscribers the possibility of downloading music in MP3 format, for example. European television and radio operators are becoming increasingly involved in online activities, either through simultaneous transmission via conventional channels (terrestrial, satellite or cable) and the Internet – "Simulcasting", or through Internet-only transmission – "Web transmission". Offering music online has definite advantages compared to selling CDs or DVDs, for authors, composers, performers, publishers, distributors and consumers alike,⁴ for the Internet gives authors and other right owners direct access to a wider audience, more easily and cheaply than traditional distribution systems have ever done. The Internet also makes it easier for authors, composers and artists to have closer links with users. Furthermore it opens up the possibility, not only to established distributors but also to newcomers to the online music business, of adapting the services they offer, to the specific needs of users. In addition, the online delivery of music leads to significant savings and allows the geographic barriers traditionally associated with analogue music distribution to be considerably reduced.⁵

Music distribution on the Internet does, however, involve at least two acts of reproduction – storage in the server's memory followed by storage in the user's computer – and communication to the public of the protected work or object.⁶ Online music delivery can therefore only be legal if distributors have obtained prior permission from the copyright and related rights owners for such reproduction and public communication of the protected work or object. Authorization usually takes the form of a general license granted by a collecting society.⁷ However, when the license is granted by a collecting society – and not directly by the right owner – it is valid only for the territory covered by that society. In the traditional licensing framework, a commercial user wishing to offer this musical work to its clients must therefore ask for a license from each national collecting society involved.

Until present, collecting societies have been unable to grant a license for an international repertoire, only because they all operate in a global network of reciprocal agreements. Under traditional contractual arrangements, the society A entrusts the licensing of the public performance rights and the mechanical rights of its repertoire to the society B, for the territory of the society B. Currently, collecting societies can only grant licenses for works belonging to their own repertoire and for utilization within their national territory. In other words, another consequence of the

⁴ Peter Schønning, "Licensing Authors' Rights on the Internet" (2000), *IIC* 7-8, p. 967.

⁵ Thomas C. Vinje, Dieter Paemen, Jenny Romelsjö, "Collecting Society Practices Retard Development of On-Line Music Market", paper presented at the IViR-Buma/Stemra Conference, Copyright and the Music Industry: Digital Dilemmas, Amsterdam, 4-5 July 2003.

⁶ Daniel J. Gervais, "Transmissions of Music on the Internet: An analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom and the United States" (2001) 35 *Vanderbilt Journal of Transnational Law*, 1363; Schäfer Wandtke, "Music on Demand – A New Type of Use on the Internet?" (2001) 3 *IIC*, p. 291.

⁷ Authorization can also be given directly by the right owner(s), including authors, composers, performers and phonogram producers (providing they have not previously transferred all their rights to a collecting society) or via a digital rights management system.

territorially limited way licensing has traditionally been carried out is that the existing reciprocal representation agreements between collecting societies do not provide for the possibility of a society granting a multi-territory license to a user including, besides its own, the repertoire of a represented sister-society (multi-repertoire license). The existing representation agreements allow a collecting society to grant a license to a user, where it includes the repertoire of a represented sister-society, for its own national territory only.⁸

This type of system is clearly not suited to Internet developments, where utilization of protected musical works across territorial borders has increased. Similarly, it is unrealistic to expect commercial users to obtain a license from each collecting society operating in the different countries where musical works are used online. Ideally, a collecting society should therefore be able to grant a worldwide license, both in terms of repertoire and territorial scope.⁹ If it is not desirable, or even feasible, for every online music provider or distributor to obtain a license in every country of transmission, it has to be decided which collecting society should have competence for granting a single, worldwide license. Should the license be granted following the country-of-destination principle or the country-of-origin principle?

If right owners were to set up a licensing system based on the country-of-origin principle, their rights could be ignored or weakened in the event of insufficient legal protection in the country of origin.¹⁰ Even when there is sufficient legal protection, there is always the risk that the fair remuneration of right owners will be threatened or weakened by systematic searches for the legal territory offering the lowest possible level of remuneration. If, on the other hand, a system is chosen whereby authorization for transmission must be obtained in each country in which the work is communicated to the public, it follows that each utilization of a musical work should be assessed taking into account the legal, economic and commercial conditions of each country of utilization. It also follows that the value of the rights for each territory should be determined according to exploitation in such territory. In order to do this, the tariff applying to the licensing of rights should be that of the country of destination, calculated either according to the number of users or the intensity of utilization. Setting a global tariff applied by a collecting society for a multi-repertoire and/or multi-territory license could be left to each national collecting society. However, this global tariff should reflect, in addition to its own tariff, the different national tariffs determined by each of the participating societies. The global tariff to be charged by the grantor society would therefore have to be an aggregate of all the relevant national tariffs, without being a mere accumulation of fixed tariffs, however. This tariff should take into account factors such as the advertising revenue stream generated or the intensity of the use in each country, insofar as the relevant national percentage tariff is applied in proportion to the amount of such revenue or to the number of users that can be attributed to each territory. Establishing the amount to be paid by users and the sums to be divided up between right owners in the event of a global tariff remains very complex, however, as the tariffs currently practised by the different collecting societies are not harmonized, and vary in particular according to national tax levels and administration costs.¹¹

Section II – Cross-border licenses and European competition rules

In order to solve the problems caused by the territorially limited way licensing has traditionally been carried out, European collecting societies have tried to conclude cross-border

⁸ Case No. COMP/C2/38.014 – “IFPI ‘Simulcasting’”, Official Journal L 107/58, 30.04.2003, para. 16.

⁹ P. Schönning, *op.cit.*, *supra*, note 4, p. 974.

¹⁰ *Ibid.* p. 977.

¹¹ H. Cohen Jehoram, “The Future of Copyright Collecting Societies” (2001) 23 *E.I.P.R.* pp. 134-139, p. 137.

reciprocal representation agreements. These agreements, and the contractual practices of collecting societies in general, must comply with Article 81, paragraph 1 of the Treaty Establishing the European Community, in accordance with which the following are prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Thus, for an agreement to be deemed to violate competition rules, it must have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market in all the Member States.¹² The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Since the early 1970s, the European Court of Justice and the European Commission have passed numerous judgments on the compatibility of licenses granted by certain collecting societies with European competition rules.¹³ The judgments of the European Court of Justice and the Commission have concerned three main aspects so far: the relationship between collecting societies and users,¹⁴ the relationship between collecting societies and their members and, finally, the reciprocal relationship between different collecting societies. Reciprocal representation agreements for cross-border licensing, as envisaged in the “Simulcasting” case and the “Santiago Agreement”, described below, are directly concerned with the third, and indirectly with the first, of these aspects.

A. The IFPI-Simulcasting case¹⁵

On 16 November 2000 the International Federation of the Phonographic Industry (IFPI) applied to the Commission, pursuant to Articles 2 and 4(1) of Regulation No. 17¹⁶ for negative clearance or, alternatively, for exemption under Article 81(3) of the Treaty establishing the European Community, in respect of a model reciprocal agreement (hereinafter the reciprocal agreement) between record producers’ rights administration societies for the licensing of “simulcasting”. On 21 June 2001 the IFPI submitted an amended version of the Reciprocal Agreement, the effect of which was to allow simulcasters located in the European Economic Area

¹² Judgment of the European Court of Justice, Case no. 42/84, *Remia BV v. Commission*, ECR 1985, p. 2545.

¹³ See: P.B. Hugenholtz, “Is concurrentie tussen rechtenorganisaties wenselijk?” (2003) 6 *AMI* 203-208, p. 205. See, for example: Case No. 127/73 (*BRT v. SABAM*) ECR 1974, p. 313, Cases Nos. 55/80 and 57/80 (*MV Membran and K-Tel International v. GEMA*) ECR 1981, p. 147; Case No. 7/82 (*GVL v. Commission*) ECR 1983, p. 483; and cases C-92/92 and C-326/92 (*Phil Collins and Patricia Im- und Export v. EMI*) ECR 1993, p. I-5145.

¹⁴ See for example: ECJ judgment, Case No. 395/87 (*Ministère public v. Tournier*) ECR 1989, p. 2521; and ECJ judgment, Cases Nos. 110/88, 241/88 and 242/88 (*Lucazeau v. SACEM*) ECR 1989, p. 2811.

¹⁵ Case No. COMP/C2/38.014 – “IFPI ‘Simulcasting’”, Official Journal L 107/58, 30.04.2003.

¹⁶ Council Regulation No. 17, First Regulation implementing Articles 85 and 86 of the Treaty, Official Journal P 013, 21.02.1962, p. 204-211 [this Regulation is now superseded by Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (text with EEA relevance), Official Journal L 001, 04.01.2003, p. 0001-0025.

(EEA) to obtain a multi-territorial license from any one of the collecting societies established in the EEA which are party to the reciprocal agreement to simulcast into the signatories' territories. On 22 May 2002 the IFPI notified a second amendment to the reciprocal agreement pursuant to which the agreement was renewed between the parties until 31 December 2004. The second amendment also provided for the parties to introduce a mechanism whereby the collecting societies in the EEA, which are party to the reciprocal agreement had to specify which part of the tariff charged to simulcasters, obtaining a multi-territorial and multi-repertoire license, corresponded to the administration fee charged to the user.

The aim of the reciprocal agreement is to establish a framework ensuring effective management and protection of producers' rights in the face of global Internet exploitation. It reflects the new possibilities offered by digital technology, namely the ability to carry out the monitoring of copyright exploitation from a distance, and it is designed so as to enable collecting societies to grant "one-stop" licenses covering all the territories in which the local producers' collecting society is a party to the reciprocal agreement. This provides simulcasters with a simple alternative to obtaining a license from the local society in every country in which their Internet transmissions are accessed, although this latter approach will still be available to them. The reciprocal agreement provides for the ability of each participating collecting society to grant to the other participating societies the right (in respect of its members' repertoire) to authorize simulcasting, or to claim equitable remuneration in its territory (as appropriate) on a non-exclusive basis. Each party to the reciprocal agreement must enter into bilateral contracts individually and separately with each other party in terms following the model of the reciprocal agreement. More specifically, the reciprocal agreement enables each participating collecting society:

- (a) in the case of an exclusive right, to authorize, whether in its own name or in the name of the right owner concerned, simulcasting of sound recordings belonging to the repertoire of the other contracting party and, where claiming equitable remuneration, to collect all remuneration, to receive all sums due as indemnification or damages and to give due and valid receipt for these collections;
- (b) to collect all license fees required in return for the authorizations, and to receive all sums due as indemnification or damages for unauthorized simulcasts;
- (c) to commence and pursue, either in its own name or in that of the right owner concerned, upon request and with his or her explicit consent, any legal action against any person or corporate body and any administrative or other authority responsible for an illegal simulcast.

With respect to the remuneration of rights, the general principle underlying the reciprocal agreement is the country-of-destination one principle. According to this principle, the act of communication to the public of a protected work takes place not only in the country of origin (transmission-state) but also in all the states where the signals can be received (reception-states). The application of the country-of-destination principle in the framework of the reciprocal agreement means that rights clearance is done in one country but that remuneration is due in all countries where the simulcast signal can be received. According to Article 5(2) of the reciprocal agreement, the country-of-destination principle will apply in respect of the amount to be charged by a collecting society to a user for a simulcast license. This means that each collecting society must take into consideration the tariffs applied in the territories into which the user carries out the simulcasting, and will charge the user accordingly. Given that the envisaged "one-stop" simulcast license covers several repertoires and is valid in multiple territories, the tariff for a simulcast license will be an aggregate tariff composed of the relevant individual tariffs charged by each participating

collecting society for simulcasting on its own territory. This means that any society granting a multi-repertoire and multi-territory license will have to take into account all the relevant national tariffs, including its own, for the determination of a global license fee.

In view of the experimental nature of the reciprocal agreement, the parties declared that the individual collecting societies had not yet definitively decided how to structure the aggregate tariff. They indicated that, owing to the low revenue generation from simulcasting activity at present, collecting societies had thus far tended to seek a lump sum payment for a simulcast license. Nevertheless, the parties foresee two main possibilities: (a) an aggregate tariff based on a percentage of the revenue generated from the simulcasting activity in the territory of each collecting society; (b) an aggregate tariff corresponding to a rate per track per stream (i.e. linked to repertoire use and number of hits on a site). While laying down the general principles for the determination of the global license fee, the reciprocal agreement does not determine the national tariffs to be established by each of the collecting societies. The calculation of an appropriate and equitable remuneration level is therefore a matter for each individual collecting society. According to the parties, the structure and level of the national simulcasting tariffs remains a matter for individual collecting societies, who will set their national tariffs in accordance with respective national legislation and commercial needs.

The first issue that the European Commission had to decide on concerned the definition of the market targeted by the reciprocal agreement. In this case, both the product market and the geographical market had to be defined. With regard to the product market, the Commission highlighted the point that collective management of copyright and/or neighbouring rights concerns different activities corresponding to as many different relevant product markets: administration services of rights for right owners, administration services of rights for other collecting societies and licensing services for users. Therefore, the reciprocal agreement affected directly two relevant markets: (a) multi-territorial simulcasting rights administration services between record producers' collecting societies; (b) multi-territorial and multi-repertoire licensing of the record producers' simulcasting rights. The relevant geographic market for multi-territorial simulcasting rights administration services between record producers' collecting societies comprised at least all the EEA countries where the local collecting society is a party to the reciprocal agreement, i.e. all EEA countries except for France and Spain. Similarly, the relevant geographic market for multi-territorial and multi-repertoire licensing of simulcasting rights was defined as comprising all EEA countries except for France and Spain.

The second stage of the Commission's analysis consisted in examining whether the reciprocal agreement restricted competition within the single market. The Commission noted that, in the present case, the model chosen by the parties for the simulcasting licensing structure results in the society granting a multi-repertoire/multi-territory license being limited in its freedom as to the amount of the global license fee it will charge to a user. In fact, the individual national tariffs determined by each of the participating collecting societies that contribute to the bundle of repertoires and territories being offered to a user through a single license will be imposed on the grantor society. This means that the global fee charged by the grantor society for a multi-repertoire/multi-territory license is to a large extent determined *ab initio*, which significantly reduces the competition in terms of price between EEA-based collecting societies. The fact that a collecting society is free to determine its national simulcasting tariff does not translate into actual price competition between societies because all the national tariffs are aggregated so as to result in a unique global simulcasting tariff for a multi-territorial/multi-repertoire license, and this unique global tariff is the same no matter which of the participating societies grants the license. Such freedom does therefore not translate into any useful advantage to a prospective user in terms of its

ability to choose one provider on the basis of price differences. On the other hand, the fact that a society is free to negotiate with a prospective user on an individual basis the commercial terms of a license (apart from the global fee) may certainly, in some cases, introduce an element of price competition between societies, but this will not always be the case.¹⁷ What renders this mechanism particularly restrictive, in the Commission's view, is the fact that the lack of price competition resulting from the envisaged system occurs not only in respect of the royalty proper due for the use of protected works but also as regards that part of the license fee which is meant to cover the administration costs of the grantor society. In fact, no distinction is made between the two elements, the sum of which necessarily constitutes the total amount of the license fee. By not distinguishing the copyright royalty from the administration fee, the parties significantly reduce the prospects of competition between them as regards pricing for the provision of the licensing service. The Commission concluded that, in the light of the above, the reciprocal agreement was clearly capable of affecting trade between Member States.¹⁸

At the third stage of the examination of the reciprocal agreement, the Commission had to decide whether, despite the likelihood of it affecting trade between Member States, the agreement could qualify for exemption within the meaning of Article 81(3) of the Treaty. The Commission first recalled that in certain circumstances, cooperation may be justified and can lead to substantial economic benefits, namely where companies need to respond to increasing competitive pressure and to a changing market driven by globalization, the speed of technological progress and the generally more dynamic nature of markets. The reciprocal agreement appeared to be a product of such a response, since it gives rise to a new product: a multi-territorial/multi-repertoire simulcasting license, covering the repertoires of a number of collecting societies, enabling a simulcaster to obtain a single license from a single collecting society for its simulcast which is accessible from virtually anywhere in the world via the Internet. In addition, it presents a number of pro-competitive elements which may significantly contribute to technical and economic progress in the field of collective management of copyright and neighbouring rights. The agreement, by allowing collecting societies to supply users with simulcasting licenses covering the repertoires of all societies reciprocally represented by means of the reciprocal agreements, resulted in greater legal certainty and reduced transaction costs for users. In addition, the fact that the use of simulcasting technology is enhanced by the reciprocal agreement resulted in more sound/video recordings being made available to more consumers.

However, the Commission was of the opinion that, had it not been for the notification of the second modification to the reciprocal agreement, the amalgamation of copyright royalty and administration fee would have clearly gone beyond what was required to pursue the legitimate concerns of the parties in respect of adequate legal protection, proper remuneration of right owners and remuneration schemes that reflect the level of exploitation of protected works. In conclusion, the pre-determination of national copyright royalty levels appears to correspond to the least restrictive of the alternatives in the present circumstances so as to create and distribute a new product.¹⁹ Finally, by creating and encouraging competition between participating collecting societies in the EEA, the reciprocal agreement furthers the goal of creating and sustaining a single market, in this case a single market for the provision of inter-society administration services and a single market for the licensing of simulcasting.²⁰ For all these reasons, the Commission concluded

¹⁷ "IFPI 'Simulcasting'" case, para. 69.

¹⁸ Ibid. para. 83.

¹⁹ Ibid., para. 113.

²⁰ Ibid., para. 122.

that the cumulative conditions of Article 81(3) of the Treaty were fulfilled and consequently authorized the exemption of the reciprocal agreement until 31 December 2004.

B. The “Santiago Agreement”

At an international conference held in Santiago de Chile in 2001, representatives of the main European performing rights societies – PRS (United Kingdom), SACEM (France), GEMA (Germany) and BUMA (Netherlands) – signed a cooperation agreement to which all collecting societies in the EEA (except the Portuguese society SPA), and SUISA (Switzerland), subsequently adhered. The aim of the agreement is to allow each participating society to provide online commercial users with a “one-stop shop” for the licensing of public performance of music on the Internet. The licenses obtained, which cover the repertoires of all participating societies and are valid in all their territories, enable users to legally provide services such as music downloading or streaming. The aim of the Santiago Agreement is to enable collecting societies to license the public performance of music on the Internet and distribute the royalties collected for the provision of online music, through downloading or streaming. It covers webcasting, streaming, online music on-demand, and music included in audiovisual works (television, film, etc.) shown on the Internet, with the exception of simulcasting.²¹ The Santiago Agreement has five basic principles:

1. The first and most important point concerns the granting of a license to the content provider who is the responsible party for deciding or approving the content of the database;
2. The license granted to a given content provider shall be granted: (a) by the collecting society operating in the country corresponding to the URL (uniform resource locator) used by the content provider, where the primary language used at the site of the content provider is the primary language of that country; or, failing that, (b) by the collecting society operating in the country where the content provider is incorporated. If the content provider has its economic residence in a different country from the countries set forth above, the license will be granted by the collecting society operating in that country;
3. The license granted to the content provider is a worldwide license granted on a non-exclusive basis, which means that all the content providers will have equal and non-discriminatory access to the repertoire they need;
4. The agreement also contains provisions that secure a swift distribution of the collected royalties;
5. In order to secure the revenues of the right owners, the agreement assumes that in relation to on-line content transmissions, the applicable tariff is the one of the country of destination of the download, if there is any such tariff.²²

Unlike the reciprocal agreement concluded by the collecting societies in the “Simulcasting” Case, the system established under the “Santiago Agreement” obliges music providers to apply for a

²¹ T. Vinje, *op.cit.*, *supra*, note 6, p. 4. The author notes that the “mechanical rights” collecting societies are not involved in the Santiago Agreement. They have concluded a similar agreement, known as the “Barcelona Agreement”. See Case COMP/C-2/38.377 – BIEM Barcelona Agreements, Notification of cooperation agreements, Official Journal C 132, 04.06.2002, p.18.

²² Jürgen Becker, “Santiago Agreement and FastTrack”, speech given at the MIDEM international music market in Cannes on 23 January 2001, *GEMA News*, issue No. 163.

license to the collecting society of their own Member State. For example, if the provider is established in Sweden, it can only obtain a Europe-wide license for transmission of music online from the Swedish collecting society and not from any other collecting society in Europe. This is valid even if the transmitting server is located in another country. Furthermore, if a provider offers music online from several local establishments, each of these establishments would be required to obtain a separate Europe-wide license from the collecting society of their Member State. As a result of the Santiago Agreement, each national collecting society will have a *de facto* monopoly over online multi-territorial music licenses to users in its own country, and thus it need not fear competition from collecting societies in other countries, neither on the license terms, nor with respect to administration fees, with regard to these same users. This situation risks not only to delay the development of online music services and technology, but also to damage the interests of authors, i.e. the very members of the collecting societies.²³

For Vinje, the structure established by Article II of the Santiago Agreement clearly constitutes an unlawful market sharing arrangement between collecting societies, in the form of music users allocation on the basis of a “user’s country of establishment” criterion. Vinje also underlines that for online music companies with subsidiaries established in different Member States, the user allocation of the Santiago Agreement is particularly harmful: Article II.8 of the Santiago Agreement provides that, for purposes of determining which collecting society has the authority to license, each company of a multinational group of companies is to be considered (and licensed) separately, regardless of where the website’s content is hosted or distributed from. Therefore, each subsidiary will be required to obtain a separate license from a different country’s collecting society. Such a provision strengthens the division between customer groups among collecting societies. In the author’s opinion, there is no justification for such anti-competitive practices, nor could these practices qualify for exemption under Article 81(3) of the Treaty Establishing the European Community. Lastly, in his opinion, the anti-competitive effects of the Santiago Agreement are aggravated by the collecting societies’ membership conditions.²⁴ Once they have transferred their rights to a collecting society, authors are not usually able to license their rights in parallel with the collecting society or to withdraw their works from the repertoire or to prohibit certain forms of exploitation. Consequently, under the reciprocal agreement, if they wish to obtain a license, online music providers simply have no choice but to do this through the collecting society of the country they operate in.

The European Commission was notified of the Santiago Agreement in April 2001, pursuant to Articles 2 and 4 of Council Regulation No. 17.²⁵ In response to this notification, in May 2004 the Commission announced its intention to open proceedings concerning the Santiago Agreement.²⁶ For the Commission, the lack of competition between national collecting societies in Europe is likely to hamper the achievement of a genuine single market in the field of copyright management services and could result in unjustified inefficiencies as regards the offer of online music services, to the ultimate detriment of consumers. In its press release announcing its decision to open proceedings, the Commission noted that, in these conditions, the territorial exclusivity afforded by the Santiago Agreement to each of the participating societies was not justified by technical reasons and was

²³ T. Vinje, *op.cit.*, *supra*, note 6, p. 5.

²⁴ *Ibid.*, p. 6.

²⁵ Notification of cooperation agreements (Case COMP/C2/38.126 – BUMA, GEMA, PRS, SACEM) (2001/C 145/02), Official Journal C 145, 17.05.2001, p. 2.

²⁶ K. Koelman, “Collectieve rechtenorganisaties en mededinging – Deel I” (2004) 28 *AMI* 45-50, p. 49.

irreconcilable with the worldwide reach of the Internet.²⁷ The Commission's decision on this case is expected in the coming months.

Conclusion

After more than a century of operations based on the principle of the territoriality of copyright and related rights, it is urgent that collecting societies – in Europe and the rest of the world – adapt to the digital age if they do not wish to run the risk of seeing right owners take control of online licensing on a massive scale, or turn to digital management systems. The ability for collecting societies to issue cross-border licenses is a prerequisite for good collective management in the digital age. However, setting up such a licensing system is no easy matter! There are many potential stumbling blocks, especially from the viewpoint of competition law.

Whereas the reciprocal agreement in the “Simulcasting” case, as it stands, was granted exemption under Article 81(3) of the Treaty Establishing the European Community, the Santiago Agreement risks to be declared null and void, on the grounds that it has as its object or effect the prevention, restriction or distortion of competition within the common market. Not only does the Santiago Agreement contain a clause preventing users from obtaining a license from a collecting society other than that of the country in which users operate, but the very structure of the collecting system has the effect of reinforcing the potential anti-competitiveness of the Santiago Agreement. The possible sources of licensing should no doubt be revised, as should collecting societies' membership conditions, in particular the principle of exclusive management of rights by the societies, especially with regard to the digital environment. In the words of the European Commission, “in the examination of a collecting society's statutes in the light of the Treaty competition rules the decisive factor is whether they exceed the limits absolutely necessary for effective protection (indispensability test) and whether they limit the individual copyright holder's freedom to dispose of his work no more than need be (equity)”.²⁸

The examination by the European Commission of the Santiago Agreement comes at a very appropriate time: at the start of the process for adopting a Community directive on the governance of copyright collecting societies. The European Commission had recently alluded to the tensions existing between collective management and the principles of competition law. Thus, Recital 17 of Directive 2001/29/EC²⁹ provides that “it is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalization and transparency with regard to compliance with competition rules.” It is unlikely, however, that the Commission will directly address, in the framework of the adoption of a possible directive on the governance of collecting societies, the issues raised by the Santiago Agreement. It will no doubt be hard enough for the Commission to try and bring about a consensus at Community level regarding the establishment, and statutes, of collecting societies, particularly with regard to: who can set up a collecting society; the society's statutes; and the proof required of the society's efficiency, operability, compliance with accounting obligations, and sufficient number of copyright owners represented.

²⁷ European Commission, Press Release IP/04/586, 3 May 2004.

²⁸ 82/204/EEC: Commission Decision of 4 December 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.971 – GEMA statutes), Official Journal L 094, 08.04.1982, p. 12-20.

²⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22.06.2001, p. 10.

The Communication published in April 2004 clearly shows that the Commission will also examine the principles of good governance, non-discrimination, transparency and accountability of the collecting society in its relation to right owners.³⁰ These principles should apply to the acquisition of rights (the mandate), the conditions of membership (including the end of that membership), of representation, and to the position of right owners within the society (right owners' access to internal documents and financial records in relation to distribution and licensing revenue and deductions, genuine influence of right owners on the decision-making process as well as on the social and cultural policy of their society). Regarding the mandate, it should offer right owners a reasonable degree of flexibility on its duration and scope. Furthermore, in the light of the deployment of Digital Rights Management (DRM) systems, right owners should have, in principle, and unless the law provides otherwise, the possibility if they so desire to manage certain of their rights individually. The Commission believes that a system for the external control of collecting societies should be put in place, to protect the interests of right owners and users alike, given the exclusive position of most collecting societies and their network of reciprocal agreements.

Lastly, even if the forthcoming European directive does not directly address the issues of competition law raised by the cross-border licensing of copyright and related rights in Europe, the creation of a clear legal framework within which collecting societies can work would at least help to promote greater efficiency and provide greater transparency in the operation of collecting societies.

³⁰ COM(2004) 261 final, 16.04.2004, p. 20.