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# Application of Competition Rules to Internet Licensing

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## Introduction

Music via the Internet is now high on the agenda of the Commission. The proposals for the reform of Internet licensing made last week testify to that[1]. Let me make some remarks on the competition aspects of the forthcoming reform and concentrate on three aspects:

- Firstly, our approach to rights management in the general context of the application of competition rules to IPRs, both to performance and mechanical reproduction rights in the music sector.

- Secondly, the restrictions that hold back developments in the European Rights Management market and impede the emergence of a genuine Internal Market in that sector.

  The European market for legitimate on-line exploitation of music is clearly suffering from this. We urgently need Europe-wide Internet licenses for legitimate music exploitation. I will refer here to recent decisions and case practice—obviously within the limits that confidentiality requirements impose as regards ongoing procedures.

- Thirdly, the roadmap for reform in the rights management sector.

  I am referring here particularly to the announcement and working document of this month mentioned above, and to the preceding

[1]IP/05/872, 7 July 2005, "Music copyright: Commission proposes reform on Internet licensing". For details see Commission Staff Working Document, "Study on a Community Initiative on the Cross-Border Collective Management of Copyright, 7 July 2005. Available at European Commission , Internal Market, http://europa.eu.int/comm/internal_market/copyright/management/

communication of April last year[2]. Competition law application and cases will be one of the main drivers of the reform in the sector.

**First, the basic rationale**

Let me begin with a statement that I would like you to keep in mind throughout this talk. We recognise that the music industry is undergoing an extremely difficult transformation of its way of working, introduced by the massive arrival of the Internet and broadband on-line distribution. The income of the music industry has been eroded over the last few years by rampant piracy, as is well known to everybody in this conference. Both, the Music Majors and Europe's Independent Music Producers are heavily concerned. Both are still searching how to integrate the revolutionary new distribution channel that on-line represents, into their overall approach.

Competition law cannot be applied in a vacuum but must take account of the concrete market situation and economic context. There are deep concerns about the safety of systems and protection against piracy. The Commission has made the deployment of secure rights management systems a major action line of the revamped European Information Society 2010 programme—the i2010 programme—announced in June. And we are bound to give strong consideration to any argument about security of systems and protection against piracy in the cases brought before us.

However, the way forward cannot be to impede the deployment of legitimate on-line systems by anticompetitive means, in order to fight the

[2] 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.

threat from illegal systems. Illegal systems are strong because there are not enough attractive legitimate alternatives for on-line distribution. The overall aim of applying competition rules to the rights management sector is to open the doors for the development of Europe-wide legitimate systems—the best, and in the long run, only effective way to combat on-line piracy.

European Union law fully recognises the essential function of Intellectual Property Rights. The European Court of Justice has confirmed this fundamental objective in a number of basic rulings, in particular the so-called Cotidel rulings.[3] But as the Cotidel Decisions have shown, we also have to look into the potentially anti-competitive effects that can arise in the exercise of those intellectual property rights and that can lead to market foreclosure.

And we have to be particularly vigilant where anti-competitive practices could impede the development of the new technologies—such as the deployment of legitimate on-line systems, and of the underlying rights management structures that are required for such deployment.

This is the basic frame of mind within which European competition law is applied to the field of rights management. 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 from Competition Law scrutiny.

**Second, the restrictions that hold back developments in the European Rights Management market**

A main issue at stake in reviewing cases involving IPRs under European competition law has always been the territoriality of rights, one of the most important topics involved in licensing rights and well known to IPR and competition practitioners in this area. The territorial exercise of rights is also 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 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 Collective Rights Management companies 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.

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[3] 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

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

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 actions that we will continue to fully take into account.

We therefore look favourably at one-stop-shopping arrangements between Collective Rights Management companies. But we need to see one-stop-shopping for Europe-wide licensing in competition, in order to avoid the negative side-effects that the concept can easily involve.

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 customer allocation restriction in the agreements between the participating Collective Rights Management Companies that prescribes that the rights management company controlling their national territory must be chosen for the regional licence.

**Third, Roadmap of reform: the contribution of competition law**

For resolving the current European lag in the deployment of legitimate Internet music systems, we need both short term behavioural and long term structural solutions that deal with the matter at the root.

For a short term solution, competition must be allowed to develop rapidly in the users market where commercial companies license rights from the Collective Rights Management companies, in order to deploy legitimate systems.

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 current 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. The time needed for allocating Europe wide Internet licences must be brought down and the cost formulas used must become more flexible. Competition between one-stop-shopping platforms will be the best driver to achieve that objective.

For a long term solution, the development should be opened towards a fully competitive European rights management market where rights management companies compete for authors' rights and authors entrust their rights to their rights managing company(ies) of choice for Europe-wide exploitation or their rights for online use—as set forth in the Commission's announcement of last week on the proposed reform of Internet licensing[5]

In order to make this work, those rights management companies that want to enter the new markets must be allowed to do so—and to use new technologies and new methods. We will be extremely sensitive to any anticompetitive measure that prevents users from switching to the rights management company or one-stop shopping platform of their choice. As regards rights owners, they must have the possibility to explore the optimal balance between the flexibility of their rights manager for on-line use, and traditional collective management for other uses [6]. The offering of collective rights management services to authors must be sufficiently unbundled to allow this—and unbundling is likely to become a major topic on our agenda.

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[5] IP/05/872, ibidem

## Outlook

The reorganisation of the European rights management sector figures high on the agenda of the Commission, as the announcement on the reform of Internet licensing of last week has shown. For the application of European competition law to the sector this means that we will vigorously pursue any anticompetitive conduct by any actor that stands in the way of that urgently needed transformation—with territorial restrictions in rights management and anticompetitive bundling highest on the agenda.

As is well known, we are currently moving on a number of cases, with the Santiago agreement and action under EU competition law against certain restrictive practices enshrined in that agreement as the most prominent current example. In that case the issue of customer allocation to the national collective rights management company—the socalled economic residence clause—and the reinforcing MFN clauses are at the center of concern. Other cases are due to be brought forward in Autumn.

The fundamental role of the application of competition law is to further the development of procompetitive structures and market integration in the European Union—both as regards choice for users, as well as choice for the authors. The first implies eliminating territorial restrictions and discriminatory provisions in the reciprocal representations agreements concluded between the Collective Rights Management Companies that limit the choice of the users of the rights. The second implies giving rights holders the freedom to authorise Collective Rights Management Companies

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[6] 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

of their choice[7] for the management of their rights and eliminating anti-competitive restrictions that prevent the exercise of this right.

With regard to the first and without being able to go into any detail at this stage, we have the impression over the last few months that the Commission is being heard by the actors—and we believe that we have a fair chance of seeing pro-competitive efficient rights management structures evolving in Europe. The sector has managed in related areas to develop central Europe-wide licensing structures without a territorial customer allocation, such as in the field of mechanical rights for record producers. While these agreements have their own need of review to make sure that their provisions correspond in all of their aspects to the requirements of European Competition Law, they demonstrate that solutions can be found, once a few first movers go forward with offering such Europe-wide licence structures.

As regards the Santiago procedure, let us never forget 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—with some of the involved or with all. 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—and we are not excluding that some of the collective rights management companies involved will choose that constructive route forward.

[7] For a detailed analysis in the context of the Internal Market, see Commission Staff Working Document, "Study on a Community Initiative on the Cross-Border Collective Management of Copyright, 7 July 2005, supra.

Beyond this short term goal, the Commission announcement and the Working Document on the reform of Internet licensing of last week has opened the discussion on a more fundamental reform: the vision of a Europe wide rights management market where rights holders choose freely the rights management company(ies) that are to represent them for the use of certain of their rights for the whole of the Union, and where users can turn to those companies to acquire the rights for the deployment of their legitimate Internet operations. European competition law will have to make sure that the new avenues forward are not constrained by anticompetitive agreements or conduct. In this manner it can make a major contribution to the reform of the sector.