From discothèques to websites, a new approach to music copyright licensing: the Simulcasting decision

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On 8 October 2002 the Commission adopted a decision in case COMP/C2/38.014 IFPI Simulcasting exempting a standard agreement entered into by a number of copyright administration societies from Europe, South America, Asia and New Zealand.

This is the first decision by the Commission concerning the collective management and licensing of copyright for the purposes of commercial exploitation of musical works on the Internet.

Some of the issues at stake in this case have already been subject to a competition assessment at a time when the Internet had no commercial relevance. In the particular context of copyright licensing of physical premises where music is publicly performed, the Court of Justice has addressed the reciprocal relationship between copyright administration societies ('collecting societies') and the relationship between collecting societies and users in the famous ‘discothèques cases’ Ministère Public v. Tournier (1) and Lucazeau v. Sacem (2).

1. Relevance of the case

The relevance of the case is threefold.

First, in spite of a significant flow of complaints and notifications during the past two decades concerning the activity of collecting societies, the last formal (substantive) decision by the Commission in this area was adopted in 1981 (3). Nonetheless, previous Commission decisions as well as numerous judgements of the Court of Justice (4) have in this area laid down important principles as regards the relationship between copyright and competition law.

Secondly, the Simulcasting decision adapts the existing principles to the online environment and carries out a new assessment under EC competition rules of copyright management activities. The loss of territoriality induced by the Internet and the digital format of the products protected by copyright result in:

a) the ability of monitoring copyright usage from a distance by means of appropriate software, thereby rendering meaningless the need for physical monitoring, which was a traditional justification put forward by collecting societies to justify a number of reciprocal arrangements between them containing territorial restrictions;

b) consequently, territorial restrictions contained in the reciprocal agreements between societies not being objectively indispensable anymore;

c) and, finally, there being no objective reason for an EEA-based radio or TV broadcaster not being able to choose the most efficient society in the EEA for the grant of a copyright license.

Thirdly, considering the progressive increase in Internet-based media activities, it is highly likely that the Commission is called upon to intervene in the near future in other cases where analogous questions are raised. The investigation carried out in the Simulcasting case may therefore provide useful indications for the competition assessment of similar cases involving the administration and licensing of copyright protected musical works on the Internet.

2. The notified agreement

This case concerns the notification of a model reciprocal agreement (hereinafter the ‘Reciprocal Agreement’) between collecting societies acting on behalf of record companies. The purpose of the agreement is to facilitate the grant of international copyright licences to radio and TV broadcasters who wish to engage in simulcasting and thereby make musical works available to the public via the Internet.

‘Simulcasting’ is the transmission by radio and TV stations of their signal simultaneously and unaltered both via the traditional means (air, cable and satellite) and the Internet.

(4) For example, Basset, case 402/85, ECJ 09.04.1987; Tournier, case 395/87, cit.; Lucazeau, case 242/88, cit.
The Reciprocal Agreement is intended to facilitate the grant of a multi-territorial licence for the simulcasting activity such as to allow for an international exploitation of the sound recordings administered by the collecting societies through means including the Internet.

By virtue of the territorially limited way licensing has been carried out so far, each collecting society has pursued its activity on its own territory only. Accordingly, the licenses which societies traditionally grant to users for exploitation of sound recordings are limited to their individual national territories. Therefore, the right to simulcast on the Internet, given that it necessarily involves the transmission of signals into several territories at the same time, is not covered by the existing ‘mono-territory’ licenses granted by collecting societies to broadcasters where the simulcast includes the repertoires of several collecting societies. The Reciprocal Agreement is intended to facilitate the creation of a new category of licence which is simultaneously multi-repertoire and multi-territorial.

By means of the notified agreement, simulcasters will have a simple alternative to obtaining a licence 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 is intended to operate for an experimental period after which its nature, scope and operation will be reviewed. The current version of the agreement will expire on 31 December 2004.

3. The parties

The parties to the notified agreement are 29 collecting societies from Europe, Asia, South America and New Zealand the members of which are record and music video producers. The type of rights held by phonogram producers are generally referred to as ‘neighbouring rights’ to copyright or ‘related rights’.

The main function of these collecting societies is the administration of the neighbouring rights of their members for the purposes of broadcasting and public performance. This includes the licensing of rights in the sound recordings of their members to users, determining tariffs for that use, collecting and distributing royalties, monitoring the use of the protected material and enforcing their members’ rights.

4. The relevant markets

Collective management of copyright and/or neighbouring rights covers different activities corresponding to as many different relevant product markets: administration services of rights for right holders, administration services of rights for other collecting societies and licensing services for users. The Reciprocal Agreement affects 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 right.

As regards the first relevant product market, it is characterised on the supply side by record producers’ collecting societies capable of administering on a multi-territorial basis for simulcast use the repertoires of other societies located in territories other than the one where the former are established. On the demand side, it is characterised by record producers’ collecting societies wishing to have their repertoires administered on a multi-territorial basis for simulcast use by another society located in a different territory.

On its part, the product market for multi-territorial and multi-repertoire simulcast licensing is characterised on the supply side by record producers’ collecting societies which have been mandated the necessary rights by their record company members to grant licences to users. On the demand side it is characterised by user TV and radio broadcasters who wish to make the conventional radio/TV signal simultaneously available via the Internet. Since mono-territorial or mono-repertoire simulcasting licences do not represent a viable alternative service for such users, multi-territorial and multi-repertoire licensing of the simulcasting right constitutes the relevant product market.

The relevant geographic market for both products comprises 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.

5. The competition concerns

Insofar as the Reciprocal Agreement created a new product (multi-territorial and multi-repertoire licensing of the simulcasting right) that could not be realistically created without some co-operation among collecting societies, only certain particular clauses of the Reciprocal Agreement deserved
closer attention, since they could constitute restrictions of competition

The Commission services expressed to the parties a number of concerns related to:

a) territorial restrictions contained in the cross-licensing arrangements between the parties, which perpetuated the existing national monopolies held by collecting societies;
b) the amalgamation of copyright royalty and administration fee in the tariffs charged to the users, which maintained an undesirable degree of opacity in the cost structure of collecting societies and which prevented price competition between the parties from emerging as regards the licensing services provided to users.

The competition issues highlighted above had to be balanced against a legitimate concern traditionally expressed by collecting societies and, indeed, national governments as regards the protection of right-holders within the wider framework of national cultural policies.

As a result of the discussions held between the Commission services and the parties, the original agreement was amended so as to ensure that EEA-based simulcasters will be able to choose from which collecting society in the EEA they wish to obtain a single copyright license ('one stop shop' license) for the purposes of simulcasting on the Internet in Europe. This represents a major progress from the previous situation where a simulcaster had to obtain a license from every collecting society in all the territories where its broadcast was made available.

At the same time, the adopted approach ensures that the royalty level to be charged on behalf of right holders is determined at national level by each collecting society, in accordance with national laws, individual commercial needs or cultural policy objectives.

Lastly, the transparency requirement imposed on collecting societies makes sure that a prospective licensee is able to identify the element of the license fee which corresponds to the copyright royalty proper and the element corresponding to the administration fee meant to cover the administration costs of the grantor society. This way, users will be able to identify the most efficient societies in the EEA.

6. The principles underlying the Reciprocal Agreement

Two main principles underlie the Reciprocal Agreement.

6.1. Remuneration of rights

As regards the remuneration of rights, it is the country-of-destination principle that applies. According to this principle, the act of communication to the public of a copyright protected work takes place not only in the country of origin (emission-state) but also in all the states where the signals can be received (reception-states). It is opposed to the country-of-origin principle according to which the act of communication to the public of a copyright protected work takes place in the emission-state only.

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. Given that the envisaged ‘one-stop’ simulcast license comprises 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 the 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 licence fee.

6.2. Clearance of rights

As regards the clearance of rights, under the originally notified agreement a collecting society was empowered to grant an international simulcasting license only to broadcasting stations whose signals originated in its own territory. This meant that broadcasters were required to approach the producer’s collecting society in their own Member State, which constituted the only possible source for a simulcasting license.

However, on 21 June 2001 the IFPI notified to the Commission an amended version of the Reciprocal Agreement allowing broadcasters whose signals originate in the EEA to approach any collecting society in the EEA in order to seek and obtain a multi-territorial and multi-repertoire simulcasting license. The resulting principle is therefore the freedom of choice by EEA-based broadcasters among EEA-based collecting societies.

7. Article 81(1) of the Treaty

The licensing of copyrights and related rights in the online environment is significantly different from the traditional offline licensing, in that no
physical monitoring of licensed premises is required. The monitoring task must necessarily be
carried out directly on the Internet and the crucial
requirements in order to be able to monitor the use
of copyrights and related rights are therefore a
computer and an Internet connection. This means
that monitoring can take place from a distance.

In this context, the traditional economic justifica-
tion for collecting societies not to compete in
cross-border provision of services does not seem
to apply.

It is worthwhile underlining that the Commission
acknowledges the need for proper remuneration of
right-holders, be it phonogram producers, as in the
present case, or performers or authors, in other
cases, and endorses the efforts made to protect and
to encourage the productive or creative effort
underlying the final act of communication to the
public of a work protected by copyright or neigh-
bouring rights legislation. The right to remunera-
tion of a right-holder for the public performance of
a copyright protected work has been recognised by
the Court of Justice as part of the essential function
of copyright (1). However, it is also settled case law
that although the existence of an intellectual prop-
erty right under national law is not prejudiced,
pursuant to Article 295 (ex-Article 222) of the EC
Treaty, by the other Treaty provisions, its exercise
may be affected by the prohibitions of the
Treaty (2) and may accordingly be limited to the
extent necessary to give effect to the prohibition
under Article 81(1) (3). Given that collective
administration of copyright and neighbouring
rights clearly corresponds to the exercise of those
rights, and not to their existence, the way in which
collecting societies put in practice the administra-
tion of the rights they are entrusted with may,
under certain circumstances, infringe Article 81(1)
of the Treaty.

In the present case, the model chosen by the parties
for the simulcasting licensing structure results in the
society granting a multi-repertoire/multi-terri-

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-reper-
toire/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 original version of the Reciprocal Agreement
went beyond the mere recognition that collecting
societies must earn enough revenue to honour their
financial commitments to each other, because it
imposed how to do it, by obliging the societies to
respect the tariffs of the country-of-destination.
This particular element was, thus, considered by
the Commission not to be objectively necessary
for the existence of the Reciprocal Agreement.

What rendered this mechanism particularly
restrictive was the fact that the lack of price
competition as it resulted from the envisaged
system occurred 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 was made
between both elements the sum of which neces-
sarily constitutes the total amount of the license
fee.

By not distinguishing the copyright royalty from
the administration fee, the notifying parties signifi-
cantly reduced the prospects of competition
between them as regards pricing for the provision
of the licensing service. The confusion between
both elements of the license fee prevented
prospective users from assessing the efficiency of
each one of the participating societies and from
benefiting from the licensing services by the
society capable of providing them at the lower
cost. Furthermore, the amalgamation of copyright
royalty and administrative fee that resulted in an
undifferentiated global license fee to be charged to
a user could not be considered as directly related to
the notified agreement or objectively necessary for
the existence of the Reciprocal Agreement.

In conclusion, the provision of the Reciprocal
Agreement which determined that each
contracting party should apply to simulcasters the
license fees which applied in the other contracting

(1) Case 62/79, SA Compagnie Générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others, 18 March
(3) Joined cases 56/64 and 58/64, Établissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v Commission, 13 July 1966, ECR
[1966] 299. See also joined cases 55/80 and 57/80, Musik-Vertrieb membran GmbH et K-tel International v GEMA — Gesellschaft
für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, 20 January 1981, ECR [1981] 147, para. 12, where the
Court says that (in respect of Article 36 of the Treaty) ‘there is no reason to make a distinction between copyright and other
industrial and commercial property rights’.
party’s territory for those simulcasts received in the latter’s territory was considered to restrict competition within the meaning of Article 81(1) of the Treaty.

However, it must also be said that the restrictive effects identified by the Commission may prove to have a mere temporary nature if the parties duly implement the changes to the agreement submitted after the original notification. Accordingly, the parties have explicitly acknowledged that ‘such implementation is a crucial element to be taken into consideration by the Commission in the assessment of any future arrangement concerning the management and licensing of phonogram producers’ rights for the purposes of multi-territorial and multi-repertoire simulcasting.’

8. The exemption

8.1. Promotion of technical and economic progress and improvement in the distribution of goods

The simulcasting licenses to users as they result from the Reciprocal Agreement present a new feature and consequently give rise to a new product. As opposed to traditional rights licenses, simulcasting licenses will allow for the use of the licensed rights in more than one territory.

The Commission accordingly acknowledged that the notified arrangement avoids the necessity for a multiplicity of individual lengthy negotiations by users across the EEA with each individual collecting society. As a result, the reciprocal framework can reduce transaction costs significantly and these efficiencies should be passed on both to the rights-holder and to the user.

Moreover, music records and videos broadcast via terrestrial means, satellite and/or cable necessarily have a limited reach due to technical reasons. By making such music records and videos available through the Internet by means of simulcasting, simulcasters will allow virtually anyone from anywhere in the world to access such products.

Lastly, the Reciprocal Agreement also reduces substantially the legal uncertainty surrounding simulcasting licensing, in that the agreement is based on a common understanding of the relevant legal framework by a significant number of the licensing entities in the EEA.

The distribution of music included in records and videos is therefore improved.

8.2. Benefits for the consumer

The creation of a legitimate marketplace for simulcasting will benefit consumers both in the short-term and in the long-term.

In the short-term, consumers will get easier and wider access to a range of music by means of the available simulcasts. Furthermore, through the Internet they will be able to access their favourite radio and/or TV music programmes from virtually anywhere in the world.

In the long-term, the fact that simulcasting is now put in place within a legitimate framework which ensures the proper remuneration of right-holders ensures that the effort of music producers is duly rewarded and that therefore a wide range of music will still be available in the future.

8.3. Indispensability

The agreement between the societies to amalgamate administration fee and copyright royalty, and thereby to jointly determine a global license fee, was considered to go far beyond what was required to pursue the legitimate concerns of the parties in respect of adequate legal protection and proper remuneration of right-holders.

In order to solve the concern expressed by the Commission, the parties changed the notified agreement on 22 May 2002 such as to separate the copyright royalty from administration fee, and to identify them separately when charging a license fee to a user. Another change introduced in the Reciprocal Agreement is aimed at determining the administration fee with reference to the actual administration costs incurred by the grantor society in respect of the granting of multi-territorial/multi-repertoire licenses.

The parties will present to the Commission by the end of 2003 a set of proposals for the implementation of the separation of the copyright royalty from the administration fee and to implement them as soon as possible after that date. The required mechanisms shall be implemented the latest by 31 December 2004.

The change introduced by the parties into the notified agreement will induce an important degree of transparency in their relationship with users. This will allow users (as well as members of the societies) to better assess the efficiency of each of the societies and to have a better understanding of their management costs. Moreover, it will allow for actual, although limited, price competition between collecting societies in respect of the
licensing service in the market for the licensing of the record producers’ simulcasting right.

The Commission accordingly considered that the changes introduced into the Reciprocal Agreement were adequate in order to solve the competition concerns previously expressed in this respect. Lastly, the Commission also considered the time period required for the assessment and implementation of the proposed mechanisms as indispensable in the meaning of Article 81(3)(a) of the Treaty.

As regards the royalty element which results from the aggregation of all the copyright royalties determined at national level, the notifying parties demonstrated that the maintenance of a certain degree of control by the individual collecting societies over the licensing terms of their own repertoire so as to ensure a minimum level of remuneration for their right-holder members was, in these circumstances, indispensable for the conclusion of the Reciprocal Agreement. On the other hand, the option for the pre-determination of national copyright royalty levels appeared to correspond to the least restrictive of the alternatives so as to create and distribute a new product.

In the light of the foregoing, the Commission considered such restriction to be indispensable in the meaning of Article 81(3)(a) of the Treaty.

8.4. Non-elimination of competition

Within the traditional framework of copyright and neighbouring rights licensing, actual competition between the monopolistic collecting societies in Europe has been virtually non-existent. In the present case, whilst the establishment of the Reciprocal Agreement will require a degree of cooperation between the collecting societies, it will not be replacing any existing competition, since it is geared to the development of an entirely new service.

The amendment to the Reciprocal Agreement notified by the parties on 21 June 2001 encourages competition between record producers’ collecting societies. The collecting societies will be able to actually compete and to differentiate themselves in terms of efficiency, quality of service and commercial terms. Furthermore, the changes introduced by the parties in the Reciprocal Agreement as notified on 22 May 2002 will ensure that, after an initial adaptation period, competition between collecting societies will extend to pricing. Accordingly, the participating EEA societies will have to increase their efficiency as regards their administration costs in such a way as to be able to provide a ‘one-stop’ simulcasting license at the lowest possible cost to EEA users.

Finally, it is worth underlining the fact that, 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.

In the light of the foregoing, the Commission considered that the Reciprocal Agreement did not eliminate competition in respect of a substantial part of the relevant products in the meaning of Article 81(3) (b) of the Treaty and concluded that the cumulative conditions of Article 81(3) were fulfilled.

Conclusion

The Commission has previously stated that in certain circumstances co-operation may be justified and can lead to substantial economic efficiencies, namely where companies need to respond to increasing competitive pressure and to a changing market driven by globalisation, the speed of technological progress and the generally more dynamic nature of markets (1). The Reciprocal Agreement appears to be a product of such a response, given the technological developments which lead to the Internet simulcasting technology.

The *Simulcasting* decision results in the opening up of collective copyright management to competition and in the increase in transparency as regards the relationship between collecting societies and users, whilst maintaining an adequate level of autonomy at national level as regards copyright proper. It demonstrates that the application of competition rules in this area can generate significant consumer benefits and, at the same time, fully respect copyright law and ensure the protection of both right-holders and users.

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