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ONE PROBLEM SOLVED, ANOTHER CREATED? THE EUROPEAN COMMISSION'S STRUGGLES WITH FOSTERING COMPETITION IN THE MARKET FOR PAN-EUROPEAN LICENSES OF MUSICAL WORKS

*Kimberly L. Sweet**

I. INTRODUCTION

This paper analyzes the European Commission's approach to creating an efficient system for the multi-territorial licensing of musical works. The Commission has chosen a free market approach to solve this problem and seeks to introduce competition between collection societies to force those societies to become more efficient.¹ However, a free market is not always the best solution because what is gained in efficiency is lost in equity and cultural diversity. Specifically, while artistic works are private goods subject to copyright protection, the promotion of artistic works is public, and therefore a wholly free market approach is not appropriate.

The best solution to this problem is to establish a single licensing body with the authority to grant pan-European licenses. This body would be joined by all of the national collection societies, who would sign over their rights to license the musical works contained in their repertoires to this body, thus promoting efficiency. The national collection societies should continue to maintain their repertoires and police users within their territories, as these remain functions that are best served on a smaller scale. This hybrid system ensures that the interests of all artists are supported and

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1. Press Release, Brussels European Commission, Antitrust: Commission Prohibits Practices which Prevent European Collecting Societies Offering Choice to Music Authors and Users (July 16, 2008) [hereinafter FAQ], available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/511&format=HTML&>.

that diversity is preserved.

II. REMOVING THE SYSTEM OF NATIONAL MONOPOLIES IN AN ATTEMPT TO FOSTER COMPETITION

In July 2008, the European Commission issued a formal antitrust decision with the hope of streamlining the process for obtaining usage licenses to make musical works available throughout Europe.² The decision broke up the system that had been in place, in which each country's collection society offered blanket licenses for the use of all works (including those within its own repertoire and works contained in all other collection societies' repertoires, with whom they entered into reciprocal agreements) within that country's borders.³ In the digital age, this system has become outdated and inefficient because online music providers are forced to negotiate license rights with collection societies on a country by country basis.⁴

A. Background Information on Collection Societies

Collection societies were first established to allow copyright holders to enforce their rights over their musical compositions in an efficient manner.⁵ At that time, it would have been virtually impossible for each individual right holder to police every establishment where his or her music might be played to collect the royalties that were due.⁶ Instead, authors signed their rights in their works over to a collection society; the collection society would in turn grant blanket licenses to users permitting them to use all of the songs in their repertoire, perform the necessary policing function of ensuring that users had the proper licenses for any songs they played, collect royalties for the songs used, and distribute them appropriately among their members.⁷

Established in France in 1851, the Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM), was the first European collection

2. *Id.*

3. *Id.*

4. Buma/Stemra, Additional Information, <http://www.bumastemra.nl/en-US/Pers/complaints+against+CISAC.htm> (last visited Mar. 21, 2009).

5. Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 414-415 (2008).

6. *Id.* at 414.

7. *Id.* at 415.

society.⁸ The United Kingdom (U.K.) later established the Performing Rights Society (PRS) in 1914.⁹ These two collection societies entered into Europe's first territorial agreement.¹⁰ According to the terms of the agreement, PRS collected royalties due in the U.K. from the use of songs in SACEM's repertoire and turned the collected royalties over to SACEM. SACEM likewise collected royalties due in France from the use of songs in PRS's repertoire and turned the collected royalties over to PRS.¹¹

Until recently, authors who wanted their rights managed by a collection society on their behalf were obligated to use the collection society that existed in their own country within the European Union (EU).¹² Contracts containing membership clauses existed between collection societies.¹³ These clauses were aimed at preventing authors from withdrawing their works from their country's collection society and taking them to another.¹⁴ These contracts also contained territorial restrictions that prevented collection societies from granting licenses to any users located outside of their national geographic area.¹⁵ As it stood, each collection society enjoyed a monopoly in its respective region; these monopolies were perpetuated and enforced by the series of agreements that existed between the collection societies and their memberships.¹⁶

B. The Limits of Territorial Licensing Systems

This system, while efficient at its inception, has created numerous obstacles in the licensing of music in the online arena. At the time the system of reciprocal agreements and national collection societies was established, it was impossible to imagine the modern world where access to anything and everything is at one's fingertips.¹⁷ The evolution of digital technology exposed the many weaknesses of a territorial-based system and

8. *Id.* at 442.

9. *Id.*

10. *Id.*

11. Conley, *supra* note 5, at 442.

12. FAQ, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Dr. Tilman Lueder, Head of Copyright Unit, DG Internal Market and Servs. of the Eur. Comm'n, Speech at the 14th Fordham Conference on International Intellectual Property Law & Policy, Working Toward the Next Generation of Copyright Licenses, (Apr. 20–21, 2006) [hereinafter Working], available at http://ec.europa.eu/internal_market/copyright/docs/docs/lueder_fordham_2006.pdf.

necessitated the development of a new system.¹⁸ The territorial licensing scheme acted as a barrier to entry of modern on-demand delivery systems throughout the EU.¹⁹

In the changing technological climate, the numerous reciprocal agreements with their territorial restrictions created a situation in which online music providers were mired in an environment wrought with legal uncertainty.²⁰ Music providers were left with the difficult and expensive task of obtaining separate licenses for each country in which they wished to make music available.²¹

C. The CISAC Case

RTL Group (RTL), a European broadcaster, brought a complaint about the territorial licensing system to the European Commission in 2000.²² In its complaint, RTL argued that it should not have to negotiate license rights for music use in each country in which it broadcasts, but should instead be able to obtain rights for all of Europe with one license from one collection society.²³ In 2003, Music Choice Europe (Music Choice), a digital music provider, brought another complaint before the Commission, arguing that the International Confederation of Societies of Authors and Composers,²⁴ (CISAC) was in violation of EU competition law based on its efforts to prevent competition between collection societies.²⁵

The Commission opened an investigation into the role and practice of collection societies following the complaints by RTL and Music Choice.²⁶

18. Dr. Tilman Lueder, *The Next Ten Years in E.U. Copyright: Making Markets Work*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 13–24 (2007).

19. Working, *supra* note 17. As an example of this, Dr. Lueder looks to the launch timeline of the Apple iTunes music store. In the United States, there was a single launch date of April 28, 2003. In the European Union, however, there was no single launch date. The music store was launched in the U.K., Germany and France on June 15, 2004; it was launched on October 26, 2004 in Belgium, the Netherlands, Luxembourg, Spain, Italy, Portugal, Finland, Austria and Greece; and it was launched on May 10, 2005 in Denmark, Norway and Sweden. *Id.*

20. *Id.*

21. Conley, *supra* note 5, at 445.

22. Press Release, Buma/Stemra, *European Commission Decision on RTL/Music Choice Complaints Against CISAC* (July 16, 2008), available at <http://www.bumastemra.nl/en-us/pers/persberichten/european+commission+Decision+on+rtl+and+Music+Choice+complaints+against+CISAC.htm> (discussing RTL Group's complaint against the German collection society, GEMA).

23. *Id.*

24. CISAC is an umbrella organization, to which other collection societies belong.

25. Buma/Stemra, *supra* note 22.

26. *Id.*

Realizing that something had to be done to rid the EU of the cumbersome system of territorial licenses, the Commission adopted a Recommendation²⁷ on the management of online rights in October 2005.²⁸

In its Recommendation, the Commission specified that rights-holders should have a choice as to which collection society they want to sign their rights to.²⁹ The Recommendation set out two phases. In the first phase, there would be competition between the individual collection societies and any new licensing platform on the basis of efficiency, lower administrative costs, negotiating skill, and/or clout with commercial users.³⁰ In the second phase, one to three collection societies or licensing platforms would emerge as the most efficient, creating an incentive for authors and publishers to pool their repertoires among only those platforms.³¹ The idea behind the Recommendation was to end up with one to three central EU licensors, down from the prior system of twenty-five.³²

The Commission next sent a Statement of Objections to CISAC and the individual collection societies with membership in CISAC to open formal antitrust proceedings.³³ The Statement of Objections informed the addressees that certain aspects of the CISAC model contract and the bilateral contracts between individual collection societies might be restrictive business practices in violation of the European Community Treaty.³⁴

The Commission adopted its formal decision in the CISAC case in July 2008.³⁵ The decision prohibited collection societies from applying membership clauses that prevent authors from selecting which collection society to join or prevent movement from one collection society to another.³⁶ Further, the decision prohibited the application of territorial restrictions that prevent a collection society from granting licenses to users

27. Recommendations are not binding on Member States, but instead are often precursors to binding legislative action that will be taken by the Commission; see Lueder, *supra* note 18, at 19–20.

28. Working, *supra* note 17.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Press Release, European Commission, *Competition: Commission Sends Statement of Objections to the International Confederation of Societies of Authors and Composers (CISAC) and Its EEA Members* (Feb. 7, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/63>.

34. *Id.*

35. FAQ, *supra* note 1.

36. *Id.*

outside of their national region.³⁷ The Commission found that the restrictive practices employed by collection societies were in violation of Article 81 of the European Community Treaty and Article 53 of the European Economic Area Agreement.³⁸

The Commission's decision aims to foster competition between collection societies with the hope of leading to increased efficiency and transparency.³⁹ The decision has two purposes: (1) to grant authors the opportunity to choose which collection society will manage their copyrights and (2) to foster cross-border music broadcasting over various channels by streamlining the process of obtaining licenses.⁴⁰ In issuing its decision, the Commission has apparently weighed the value of efficiency against the value of cultural diversity within the field of the arts, with efficiency prevailing.

D. Does Free and Open Competition Come at Too High a Cost to Cultural Diversity?

Collection societies have been vocal against the Commission's approach, arguing that the competition envisioned by the Commission would be detrimental, rather than beneficial, to artists' interests.⁴¹ According to a July 2005 press release from the Groupement Européen des Sociétés d'Auteurs et Compositeurs (GESAC), artists have developed strong ties to their local collection society, with which they share trust, proximity and language.⁴² When the Statement of Objections was issued, there were twenty-four collection societies in the European Union.⁴³ There are twenty-three official languages in the European Union, along with many other languages spoken by minority groups throughout the European

37. *Id.*

38. *Id.*

39. *Id.*

40. FAQ, *supra* note 1.

41. See generally Press Release, CISAC, *CISAC Regrets the European Commission's Decision Concerning Reciprocal Representation Contracts* (July 16, 2008), available at http://pr.euractiv.com/?q=system/files/COM08_PR_Decision_SO_EN_OK.pdf.

42. Press Release, GESAC, (July 7, 2005), available at http://www.gesac.org/ENG/NEWS/COMMUNIQUESEN_DEPRESSE/download/COMMUNIQUESEN_20050707_Collective%20Management%20of%20Copyright.doc.

43. FAQ, *supra* note 1 (addressed to collection societies located in Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom).

Economic Area.⁴⁴

CISAC, along with twenty-two European member collection societies have appealed the Commission's July 2008 decision to the Court of First Instance of the European Commission.⁴⁵ According to CISAC, the European collection societies were not in violation of European competition law.⁴⁶ CISAC and the individual collection societies argue that artists are best served by a collection society that is close in geographic proximity.⁴⁷ They further argue that introducing competition between collection societies will cause a "race to the bottom" on royalty value, which would have a devastating effect on the creativity and diversity of artists.⁴⁸

To maintain the cultural diversity of Europe, artists who are members of cultural minorities depend on their local collection societies to act in their best interests.⁴⁹ While free and open competition among collection societies may very well increase the efficiency of the system as a whole, it most will come at a cost to artists in cultural or linguistic minorities.⁵⁰ The European Commission is surprisingly naïve in its desire to introduce a completely free market approach to the arts. In doing so, creativity is the victim.

E. While Musical Works are Private Goods, Music is a Public Good

Certain types of goods are more appropriately considered public goods than private goods. Free market principles, which are easily applied to wholly private goods, are not easily applicable to creative works of art, which have both public and private characteristics. While creative works are private goods subject to copyright protection, the promotion of the arts is public in that it enhances the quality of life for the community. The application of free market principles to the arts results in a homogenized end-product—as mainstream demand directs artists to conform. In the field

44. Languages of the European Union, http://en.wikipedia.org/wiki/Languages_of_the_European_Union (last visited June 29, 2009).

45. Press Release, CISAC, CISAC Appeals the European Commission's Competition Decision (Oct. 8, 2008), *available at* http://www.samro.org.za/uploads/627/Cisac_Appeal_to_Euro...Competition_Commission_Decision.pdf.

46. *Id.* (requesting that Article 3 of the Commission's decision, determining that the twenty four collection societies engaged in a concerted action violating Article 81 EC and Article 53 EEA, be annulled).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*; CISAC, *supra* note 41.

of the arts, this result is antithetical; the arts thrive on diversity and variety.

F. A Free Market System is Not Always the Golden Ticket

Free and open competition, while beneficial to the largest competitors, comes at a high price to smaller, but no less important, competitors. For example, consider the National Football League (NFL). If the NFL operated on a completely free market system, major market teams, such as the New York Giants, would prosper at the expense of small market teams, such as the Buffalo Bills. The number of teams in the NFL would inevitably shrink. Team owners recognized that allowing this free market effect would not be in the collective best interest, and agreed on a hybrid system whereby revenues were shared among the teams. For instance, all licensing rights for team logos and trademarks are signed over to an umbrella organization, NFL Properties LLC.⁵¹ This entity is entrusted with granting all licenses to trademarks and logos.⁵² The system, while taking away some of the profits that would otherwise be enjoyed by the major market teams, ensures diversity in the league through the survival of small market teams.

In an entirely free market system, bigger collection societies with large repertoires and more extensive resources, such as those located in the U.K. or France, will overcome smaller collection societies, such as those located in the Netherlands or Estonia. Large music publishers have already begun withdrawing their works from smaller collection societies and placing them with the larger collection societies.⁵³ While mainstream, Anglo-American style artists in smaller countries may be better off in a completely free market system, artists that fall into a niche category will suffer as their small, local collection societies fail. The larger collection societies in France, the U.K., and Germany will be overly occupied, tending to the interests of their mainstream, popular artists and failing to act in the best interests of these niche artists. Diversity is a critical component of the arts, and steps must be taken to ensure that the creativity of culturally diverse artists survives the development of a new pan-European licensing scheme.

51. See Nat'l Football League Props. LLC, *Licensing Pre-Qualification Terms and Conditions*, <https://www.nfl.info/NFLConsProd/Welcome/cpAgreement.htm> (last visited Mar. 31, 2009).

52. See *id.*

53. Conley, *supra* note 5, at 455–56 (2008); see also Lueder, *supra* note 18, at 56–57.

III. IN SUPPORT OF A HYBRID APPROACH

The European Commission was undeniably correct in determining that the territorial licensing system needed to be replaced with a system that is workable in the digital age.⁵⁴ However, the approach that the European Commission has taken threatens the creativity and diversity of European artists and may cause a “race to the bottom” on royalty rates to the detriment of artistic creativity across Europe. Additionally, the European Commission seemingly ignores the great policing and maintenance functions served by collection societies, which are functions that are best served on a localized level.

Thus, the best approach would be one that separates functions—with the policing of licenses and the maintenance of repertoires remaining on the local level. This ensures accurate accounting and diversity. For the licensing function, the European Commission should create a centralized body, joined by individual collection societies, with the sole responsibility of granting licenses to users throughout Europe. The individual collection societies would largely remain in place, representing the interests of their members and policing users within their territory. However, the rights to license the works in their repertoires would be signed over to this larger centralized body, similar to NFL Properties LLC.

Creation of such a system would modernize the pan-European licensing system and remove barriers to the entry of online music providers throughout Europe. It would also better protect the interests of all artists, particularly culturally diverse artists who are best served by local collection societies. Royalty values would be endangered by the introduction of free and open competition into an arena in which it does not belong. Therefore, the system as a whole would run more efficiently because broadcasters and other music providers would only have to negotiate licenses with one body, as opposed to many.

54. Working, *supra* note 17.

