

October 2011

Establishing minimum standards for collecting societies: applying EU competition case law

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal consumers) Northern Ireland. Our role is to represent the interests of consumers, particularly those who are disadvantaged. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do. We want to see a competitive market in copyrighted content which harnesses digital technology to satisfy consumer demand for innovative products and services. Copyright law and licensing should support this by balancing the interest of consumers, copyright owners and creators.

Consumer Focus welcomes the European Commission's intention to bring forward a framework Directive to enhance governance, transparency and cross-border licensing. It is our view that this could provide significant benefits for creators, consumers and the EU economy.

Since the 1970s European competition authorities have built up a considerable body of case law in relation to collecting societies. Existing case law covers the relationship between collecting societies and their users, ie licensees, the relationship between collecting societies and their members, ie creators, and reciprocal representation agreements between collecting societies. Consumer Focus believes that the existing body of case law should form the basis for the establishment of minimum standards for collecting societies at EU level, particularly with regards to cross-border licensing.

The importance of collective rights management for a competitive market that meets consumer demand

Consumer Focus supports collective rights management because it allows consumers access to a wide variety of content within a competitive and innovative market. Mass use of copyrighted works is only cost effective through collective rights management. Collecting societies are central to the use, performance and retailing of copyrighted works in film and broadcasting, education, hospitality and entertainment, as well as online and mobile commerce. Collecting societies therefore facilitate the mass consumption of copyrighted content and access to knowledge for a wide section of the population. Collective rights management enables copyright and related rights owners and users to jointly access lower transaction costs and so increases the range of rights that are traded. As more copyright and related rights owners join a collecting society the scope for gains from economies of scale is increased.

However, collective rights management also entails the monopoly position of the collecting societies, who may abuse their dominant position and so hinder competition and innovation. A wide variety of industries and consumers have a significant interest in collecting societies administering copyright and related rights efficiently and effectively. Thousands of collecting society members have an equally strong interest in collecting societies operating effectively and transparently, ensuring royalties are distributed fairly. Collecting societies are by nature monopolies which historically did not have to compete for members or users. Because collecting societies are monopolies and not subject to actual competition, they are subject to regulation and supervision in most countries to ensure they comply with competition law.

Minimum standard for collecting societies based on EU case law

Minimum standards for collecting societies should be established to ensure that they refrain from abusing their monopoly and so hinder innovation and competition in the single market. On the basis of established EU case law we have developed a set of principles which should underline minimum standard for collecting societies.

Members:

- Collecting societies must provide members with information to account for administrative charges (inc operational expenses and overheads) and royalties paid to members. All administrative charges must be justifiable by objective and relevant factors (Tournier)
- Collecting societies may not limit individual copyright owners' freedom to dispose of work more than necessary. They must administer the rights of members on a non-exclusive basis. With reference to the indispensability test and the equity test, collecting societies may not require that members assign all their rights to collecting societies. Members in principle have the right to not assign their rights to a collecting society (GEMA 1, GEMA 2 and BRT v SABAM)
- Collecting societies may not discriminate among members with regards to distribution of royalties, and members should have equal rights to equitable remuneration from the day they assign their rights to a collecting society (GEMA 1)
- Collecting societies may not impose discriminatory membership rules, and all members should have equal voting rights (GEMA 1)
- Collecting societies may not refuse membership to nationals of other countries (GEMA 1)

Users:

- Collecting societies may not refuse to grant a licence to part of their repertoire, rather than their entire repertoire, unless the cost of managing contracts and monitoring use is disproportionate (Tournier)
- Collecting societies must use appropriate technology to cost effectively monitor usage for repertoire licensed in their own territory and other member states (Tournier)
- Collecting societies must provide users with a breakdown of tariffs to account for administrative charges (inc operational expenses and overheads) and royalties paid to members. All administrative charges must be justifiable by objective and relevant factors (Tournier)
- Collecting societies may not refuse to grant a licence for their repertoire to users based in another Member State (Tournier)

Other collecting societies:

- Reciprocal agreements must ensure that a collecting society in one member state can rely on the collecting society in another to protect the relevant repertoire. Collecting societies may not refuse to establish reciprocal agreements, unless it is not possible to establish appropriate arrangements with the collecting society based in another member state for the monitoring of repertoire usage by users who have been issued a multi-territory licence (Tournier)
- Reciprocal agreements with collecting societies abroad may not prevent these collecting societies from issuing a multi-territorial licence covering member state content to users from any other territory (IFPI Simulcasting)
- Collecting societies must use appropriate technology to monitor usage of repertoire in other territories (Tournier and IFPI Simulcasting)
- Collecting societies issuing multi-territory licences must provide users with a breakdown of tariffs to account for administrative charges (including its own administrative charges and that of relevant collecting societies in other territories) and royalties paid to members (Tournier and IFPI Simulcasting)

Supervision of collecting societies in the EU

There are a number of models for the supervision of collecting societies in the EU. The majority of EU member states impose transparency and accountability requirements and make collecting societies subject to supervision by an independent body. A minority of countries – Germany, Austria and Portugal – pursue stricter supervision. Under German law anybody wanting to undertake collective rights management must seek prior permission and once authorisation is granted the collecting society remains under permanent supervision, to ensure that it does not abuse its power in relation to members or users.¹ The UK, along with Ireland and Poland, does not regulate collecting societies (other than providing for ad hoc resolution of complaints regarding copyright licences through the Copyright Tribunal). However, UK Government has now committed to imposing minimum standards on collecting societies as recommended in the Hargreaves' Review of IP and Growth.

Ongoing issues regarding the way collecting societies operate and treat both their creator members and licensees demonstrate that more effective supervision of collecting societies is needed. Minimum standards for reciprocal representation agreements are particularly important as the biggest obstacle to the cross-border licensing of copyrighted content is the refusal of collecting societies to establish appropriate agreements which adhere to competition law. Cross-border licensing would bring down the cost of licensing transactions and increase commercial certainty² for businesses who want to sell copyrighted content from different EU countries. But the continuous refusal of collecting societies to establish appropriate agreements, particularly in the music sector, means that cross border licensing in the single market is below potential. Collecting societies are holding back the EU's digital economy by preventing EU based companies from meeting consumer demand and taking full advantage of the significant potential for trade of digital content in the single market. Minimum standards should act as a driver for EU collecting societies to take advantage of cross-border licensing opportunities.

EU case law on collecting societies

The relationship between collecting societies and users

The European competition authorities have established a substantial body of case law on collecting societies' relationship with their users. In the *Tournier* case French disco owners complained that the fees charged by the French collecting society SACEM were excessive, particularly as they mainly played Anglo-American music, while SACEM's fees were calculated for the use of the worldwide repertoire. The disco owners tried and failed to obtain licences from UK music collecting societies. The *Tournier* decision established three important points. It was ruled that national collecting societies may only refuse to grant direct access to their national repertoire to users established in other EU member states for efficiency reasons. For example if it is too burdensome to manage and monitor use of their repertoire in another country. However if the refusal is the result of an agreement between the collecting societies, ie an agreement not to give a license to users based in France, it would restrict competition in the common market and be a violation of Article 101. It was ruled that refusal to grant licenses for only part of their repertoire would only be in compliance with Article 101 if it was not possible to license parts of the repertoire without increasing the costs of managing and monitoring the use of the protected work. The EU competition authorities observed that one of the most significant divergences between collecting societies in different member states was the level of operational expenses and overheads. In relation to the disco owners' complaint that SACEM charged excessive and unfair royalties, it was ruled that national collecting societies impose unfair trading conditions under Article 102 if the royalties charged are appreciably higher than those charged in other member states, unless the difference was justifiable by objective and relevant factors.³

¹ Lucie Guibault & Stef van Gompel, **Collective Management in the European Union**, in Daniel Gervais ed, *Collective Management of Copyright and Related Rights*, Kulwer Law International, 2006, pg.10

² **IFPI Intervention – Public Hearing on the Governance of Collective Rights Management in the EU**, 23 April 2010

³ Lucie Guibault & Stef van Gompel, **Collective Management in the European Union**, in Daniel Gervais ed, *Collective Management of Copyright and Related Rights*, Kulwer Law International, 2006, pg.122–123

The relationship between collecting societies and their members

The two most important decisions on collecting societies' relationships with members both concern the membership terms of the German writers' and publishers' performance rights society. In GEMA 1 (1971) and GEMA 2 (1972) EU competition authorities found that GEMA had abused its dominant position under Article 102, on the grounds of duration, coupled with the breadth of rights which the society required its members to assign. The EU competition authorities felt that members should be free to choose to administer some of their public performance rights themselves. GEMA was forced to allow the re-assignment of 12 different performance rights for self administration by its members on request.⁴ Aspects of the GEMA decisions were confirmed in *BRT v SABAM*. This case established that the decisive factors, when examining the statutes of a collecting society in the light of European competition rules, are a) whether the statutes exceed the limits absolutely necessary for effective protection, the 'indispensability test', and b) whether they limit the individual copyright owner's freedom to dispose of work more than necessary, the 'equity test'.

In GEMA 1 the European competition authorities also ruled that GEMA had abused its dominant position by discriminating among members regarding the distribution of income. The practice of paying supplementary fees, from the revenue collected from the membership as a whole, only to those members who had been ordinary members for at least three years, was ruled to be unlawful. The European competition authorities also ruled that collecting societies: may not refuse nationals of other EU member states as members, and could not impose discriminatory terms concerning their membership rights, such as preventing foreign rights holders from becoming an 'ordinary' member or an 'extraordinary member' (with voting rights). Such practices violate Article 102(c), as they are against the principle of equal treatment.⁵

Reciprocal representation agreements

Regarding relationships between collecting societies, the *Tournier* (1989) and *Lucazeau* (1989) cases established that reciprocal representation agreements do not, as such, fall under Article 101(1), provided that no concerted action is demonstrated. It was also held that such agreements are economically justified in the context of the requirement to monitor usage of copyrighted works across borders. This built on a 1985 decision by European competition authorities which clarified that collecting societies in different member states must compete with each other, at least in certain areas. In 2002 the European Commission found that reciprocal agreements can lead to substantial economic benefits, namely where companies need to respond to increasing competitive pressure driven by globalisation, technological progress and the generally more dynamic nature of markets.

Relying on *Tournier* and *Lucazeau*, the *IFPI Simulcasting* (2002) decision saw European competition authorities ordering collecting societies to amend their reciprocal agreement. The IFPI was ordered to allow users established in the territory of the European Economic Area, to approach any collecting society, established within the territory and party to the agreement, to seek and obtain a multi-territorial simulcasting licence. It was ruled that the monitoring task of collecting societies in the online environment can easily be carried out directly online and can therefore take place from a distance. Furthermore it was ruled that collecting societies must undertake to increase transparency as regards the payment charged, by separating the tariff which covers the royalties from the fee meant to cover the administrative costs. This transparency should enable users to identify the most efficient collecting societies and to seek their licences from the collecting society with the lowest cost.⁶

⁴ Nigel Parker, **Music business: infrastructure, practice and law**, Sweet & Maxwell, 2004, pg.209

⁵ Lucie Guibault & Stef van Gompel, **Collective Management in the European Union**, in Daniel Gervais ed, *Collective Management of Copyright and Related Rights*, Kulwer Law International, 2006, pg.121- 122

⁶ Daniel Gervais ed, **Collective Management of Copyright and Related Rights**, Kulwer Law International, 2010, pg.143-145