EUROPEAN BROADCASTING UNION — UNION EUROPEENNE DE RADIO-TELEVISION

Legal Department — *Département juridique*

10.7.2007
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EBU Observations on

Case COMP/38.698 - "CISAC"

EXECUTIVE SUMMARY

The CISAC proposed Commitments are not appropriate for broadcast services and go much further than necessary. They would jeopardize cultural diversity, hinder the development of new services and increase the administrative costs of licensing.

The CISAC Commitments would be counter-productive as they would most likely lead to results which are contrary to what the Commission is expecting in terms of competition, by creating a concentration of collecting societies.

The Commitments should respect European policy on collective licensing as outlined by the Resolution on Music Online adopted by the European Parliament on 14 March 2007.

Consequently, the Commitments should make an explicit "carve-out" for the licensing of music rights to broadcasters (for all their uses), in the sense that the provision(s) allowing for the withdrawal of rights from the societies must not apply to the granting of licences for broadcast services, but only to the licences for online sale of individual music recordings. Moreover, all references in the Commitments to satellite broadcast services should be deleted.

More generally, it seems obvious that competition law has insufficient tools to exercise proper control over the collecting societies. What is needed instead is adequate framework legislation on the supervision of rights management by collecting societies.

- **Unexpected effects in terms of competition**

  The Commitments are likely to lead to ***real monopolies or at least oligopolies in music rights*** *vis-à-vis broadcasters*. If rights management entities were to grant exclusive licences for certain repertoire and/or certain (offline or online) uses only, this would lead to a significant *distortion of competition between broadcasters* and to an increase in rights acquisition costs, making current transaction benefits redundant. Providing a few music companies with the exclusive power unilaterally to determine all aspects of music rights licensing in the entire European Community cannot be sound competition policy.

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- **Detrimental effects on cultural diversity and consumer choice**

  Providing the few major music publishers with full control over the entire collective licensing regime and the power to determine all possible conditions for the use of music by broadcasters would:

  - result in *unknown, regional and national linguistic repertoires not being played outside the national territory*, because it would be too costly to obtain clearance in addition to the "must-have" repertoires. ***Cultural diversity*** as well as European integration of musical talent would suffer immediately and directly;

  - seriously endanger broadcasters' crucial involvement in online and other content services which is needed to provide the necessary *safeguards for media pluralism and the fulfilment of fundamental European policy objectives* in the digital environment, and

  - lead to fewer radio and television programmes which include extracts from less popular music, resulting in the content of such programmes being of lower quality from the consumer's perspective, and thus *ultimately* ***limit consumer choice*** of broadcast programmes.

- **Counter-productive effects in terms of collective management**

  A fragmentation of rights and/or repertoire over various management societies will inevitably lead to an ***increase in transaction and negotiation costs***, as compared to the costs of clearance, administration and payment to one collecting society only and, ultimately, result in a lack of efficiency. This effect will even be enhanced by the need to deliver broadcasting productions via traditional broadcasting technologies as well as online.

- **Conflicts with the principles of European copyright law**

  The CISAC Commitments are likely to lead to serious *conflicts with* ***fundamental principles of European copyright law*** for broadcast and satellite transmissions. In particular, "multi-territorial" licensing to broadcasters would introduce borders in the EU that have never existed until now. Such a supposed need for the "multi-territorial" licences and the subsequent possibility of allowing a country-of-destination tariff would seem to reintroduce a theory which has been clearly rejected by the Satellite and Cable Directive.

- **No consideration of the broadcasters' needs**

  The CISAC Commitments, to the extent that they stimulate major music right-holders to withdraw any rights for broadcasters' services from the collecting societies, fail to take account of the specific needs of music licensing for broadcasters. *Incorporating existing music into broadcast productions is a "secondary use" which is subject to a specific legal regime for rights clearance*. Consequently, music collecting societies should (continue to) be in a position to grant broadcasters licences for the world repertory not only for traditional broadcasting but also for broadcasters' interactive online services;

The expected ***loss of legal certainty and transparency*** as regards which rights to which repertoire are held by which society or entity in the EU would have ***substantially detrimental effects on the exploitation of musical works by broadcasters***, thereby seriously hindering technical and economic progress. This is the opposite of facilitating effective (collective) licensing to enable music users to stimulate rapid growth of new media platforms;

The licensing of music rights to broadcasters can be effective only if the world repertoire is obtained from one and the same licensing collecting society (on a "one stop shop" basis) for all uses of broadcasters, whether by broadcasting or by making available of their productions. The conditions for the online availability of European content must therefore be improved by introducing *mechanisms to facilitate the process of collective licensing for broadcast content services*, instead of making the rights clearance process even more complicated.

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TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

Case COMP/38.698 - "CISAC"

Preliminary EBU Observations

1. CISAC Commitments likely to lead to *real* monopolies in music rights

a) Competition between major rightholders creates monopolies vis-à-vis broadcasters

The CISAC proceedings before the Commission's Competition Unit seem to have prompted the musical works' collecting societies to deliver commitments which go *far beyond what is necessary from a competition law perspective* and which would have adverse effects on the market for music rights licences. The commitments expressly allow any right-holder to withdraw its repertoire and a large part of its rights from the collecting societies (see, in particular, Sections 5.V and 5.IV.1), and it is very likely that such right-owners, and especially the major music publishers, will then form new rights management entities, perhaps together with one or two of the largest music collecting societies, but dealing *exclusively* with licensing the rights to the withdrawn repertoire. The newly-established CELAS entity demonstrates that this is already the reality today.

For mass users of music rights (such as broadcasters, using up to 180,000 musical extracts every week), *real competition between music collecting societies is possible only if both the rights and the repertoire offered by the societies are virtually the same*. However, instead of merely allowing such users to choose between all the collecting societies in the EEA in order to obtain such non-exclusive licences, which would have stimulated real and effective competition, the present commitments would create *real monopolies* if rights and/or repertoires are exclusively dealt with by one management entity, or a few such entities. When there is only one provider of certain rights, or only a few of them, with respect to a certain music repertoire, this would inevitably lead to a restriction of competition and undesirable "gatekeeping effects" for mass users.

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In this context it needs to be realized that, from any normal broadcaster's perspective, music repertoires and the (secondary) rights thereto are *not substitutable*. Popular music repertoires are "must-have" licences for all broadcasters. Today (or in the future) it is wholly unimaginable that only channel X would be entitled to broadcast Madonna, while for listening to Robbie Williams one could select only channel Y, or that the musical works of both musicians could be played only on terrestrial channels, but not on satellite channels, etc. Music publishers could even decide to exclude broadcasters (almost) entirely and make their works available as exclusively as possible via on-line operators, such as iTunes or Youtube. Such unacceptable effects are also likely given that the music recording industry is extremely concentrated, with around 80% of the publishing rights to popular music in the hands of only four (and perhaps soon only three) major music publishers. *It must be incompatible with any competition law policy if just a few music companies are provided with the exclusive power unilaterally to determine all aspects of music rights licensing in the entire European Community.*

b) Withdrawal of rights creates distortion of competition between broadcasters, loss of transparency and increases costs, making transaction benefits redundant

Broadcasters cannot compete effectively if music rights management entities grant exclusive licences for certain repertoire and/or certain (off-line or on-line) uses only. Such a restricted licensing regime would lead to a significant *distortion of competition* between broadcasters and also create *artificial barriers to the possibly entry of new radio or television operators*. If the rights which European broadcasters need to clear on a collective basis for their services, including via the Internet, are withdrawn from the societies, this would generally diminish the legal certainty which is absolutely necessary for broadcasters as mass users of music. Creating such a drastic loss of transparency as to which rights to which repertoire are held by which society in the EU would have substantially detrimental effects on the exploitation of musical works by broadcasters, thereby seriously hindering technical and economic progress. The latter would be the opposite of facilitating more effective (collective) licensing to enable broadcasters and other users to stimulate rapid growth of new media platforms. Such a result cannot be viewed as a serious attempt to respond to the changing market place driven by globalization or the speed of technological progress.

The removal or drastic limitation of the current collective licensing regime would deny to the broadcasters the *transaction benefits* they enjoy, because the reciprocal agreements guarantee the coverage of all authors worldwide and all rights can be obtained from the same collecting society. By contrast, a fragmentation of rights and/or repertoire over various societies in Europe will inevitably lead to an increase in transaction and negotiation cost, as compared to the costs of clearance, administration and payment to one collecting society only. Subsequently, such fragmentation will also take away the substantial benefits enjoyed by the viewers and listeners of broadcast programmes by virtue of that collective licensing regime.

It could perhaps be argued that the newly-established management entities could simply be obliged to license broadcast rights to all the (other) music collecting societies and allowing them to sublicense the necessary non-exclusive rights to the local broadcasters.

However, for broadcasters there would be no economic benefit whatsoever in building such a "pyramid scheme": the total number of bilateral agreements between the societies would only be *multiplied by the number of additional management entities*, and that would merely increase the administrative and transactional costs for both (other) collecting societies and the broadcasters. Consequently, this process would be likely to lead to artificially higher costs for obtaining those rights which are needed by broadcasters to fulfil their public service remit and/or provide for quality programming.

Finally, it must be emphasized that the licensing of music rights to broadcasters can be effective only if the world repertoire is obtained from one and the same licensing (collecting) society. Admittedly, such a concentration of repertoires requires the tariffs, administration costs and distribution schemes of the collecting societies to be subject to proper control. However, competition law provides insufficient tools to achieve such control; what is needed instead is adequate framework legislation on the supervision of rights management by collecting societies, as initially envisaged by DG Internal Market. Obviously, such supervision should include control over fair tariffs and reasonable conditions.

2. Commitments in conflict with fundamental principles of European law

a) Conflict with European copyright law on broadcast and satellite transmissions

The Commitments refer to "multi-territorial" licences, including for broadcasting via satellite or over the Internet, which would thereby include simulcasting of broadcasts.

The reference to this newly-invented type of licence seems to be based on the clearly *erroneous assumption* that satellite broadcasters or Internet simulcasters would normally be obliged under the law to obtain a licence from the collecting societies or right-holders in every territory in which users can access their services. However, this underlying assumption of the need for such multi-territorial licences is *without any legislative support* in the EEA territory and even *contradicts the principles of rights clearance for broadcasting* underlying the EC Directive 93/83/EEC on the coordination of certain rules concerning copyright and related rights applicable to satellite broadcasting and cable retransmission. This assumption overlooks the fact that mere *receivability* of broadcast signals is only the *result* of a prior act (the transmission to the public) and not the act itself. Exactly as with the act of satellite broadcasting under the above-mentioned Directive, on-line broadcasts are physical acts which take place in a given country and should therefore be subject to the copyright law of that country only. It would be an anomaly if European broadcasters had to clear the right to satellite broadcasting under the law of one single country but then clear the rights for virtually all the countries in the world if that same satellite broadcast were to be simulcast over the Internet. The same anomaly would exist for radio or television programmes which are first broadcast and later podcast. Indeed, the application of the principles of the Satellite and Cable Directive to those cases would be fully in line with the (future) Audiovisual Media Services Directive.

Such a presupposed need for "multi-territorial" licences for satellite or Internet simulcast broadcasts (and, consequently, the possibility to allow for a "country-of-destination" tariff as provided by Section 5.IV.2) would seem to reintroduce the "Bogsch theory",

which was clearly rejected for direct satellite broadcasting in the Satellite and Cable Directive. In that Directive, it is provided that (in short) the copyright relevant act of satellite broadcasting takes place *only* in the country where, under the control of the broadcaster, the signal is introduced into the chain leading to the satellite. This means, first of all, that the *place of reception* of such satellite broadcasts has *no relevance for the applicable law.* This is in conformity with cross-border overspill from terrestrial broadcasting which is not considered as a separate act under European (or national) copyright law. Secondly, for the applicable law it is also entirely irrelevant which percentage of the satellite service's audience is situated in one and the same EEA Member State. The audience is a factor for determining the *payment level* (as follows on from Recital 17 of that Directive) but cannot be used as the basis for *splitting up licences* by territory, as the latter would contradict the basic purpose of that Directive. "Multi-territorial" licensing to broadcasters would therefore introduce borders in the EU that did not exist before.

Moreover, as the Commitments seem to indicate by allowing the possibility of applying the "country-of-destination" tariff, this would lead to a *cumulation* of different national tariffs, as well as an *increase* in (international) administration costs. Since such country-of-destination tariffs have never existed for broadcast services, the collecting societies would have to make new arrangements in order to set up a scheme for such tariff collection and distribution over the various countries. Consequently, introducing "multi-territorial" licences for broadcast services would only raise the total costs for broadcasters, which is the exact opposite of what should be the purpose of these proceedings.

Consequently, all references in the Commitments to satellite broadcast services should be deleted.

It may be recalled that, in the 2002 IFPI Simulcasting decision, the Commission held that concerns regarding the *legal grounds* for the simulcasting licences fell *outside the scope of the procedure*, and that its analysis in that case was strictly limited to assessing the agreement under the relevant Community and EEA competition rules. Accordingly, the Commission's decision "in no way prejudges any other legal question which may arise from national copyright or general civil law and that would fall within the competence of national authorities and/or national courts". However, given that the CISAC Commitments cover not only Internet simulcasts but also satellite broadcasts, they cannot simply be referred to as an issue under national law but must be in full compliance with European law, and in particular the above-mentioned Directive. The fact that "multi-territorial" licences referred to in the Commitments are assumed to be needed for both satellite broadcasts and Internet simulcasts confirms that the previous IFPI Simulcasting decision was based on the same erroneous assumption.

b) Conflict with specific licensing regime for broadcast services

The Commitments go further than necessary, and are thus not proportionate, as they fail to take account of the specific licensing regime for broadcast services. For broadcasters, being mass users of musical works and recordings, involving a huge number of right-holders from anywhere in the world, collective licensing is the sole effective means of

reconciling the needs and interests of all relevant right-holders and the broadcasters. *This need for collective licensing of music for broadcast services is recognized in international treaties such as the Berne and Rome Conventions (Article 11bis(2) and Article 12 respectively), in the EU copyright "acquis" and in national laws.* Consequently, under international and European copyright law a specific legal regime is foreseen to ensure that clearance of broadcasting rights to music is carried out (if not voluntarily, then by means of a compulsory licence) *solely on a collective basis,* to the benefit of all right-holders concerned.

This special legal regime for broadcasters is based on, *inter alia*, the following considerations:

- the use of existing music for broadcast productions is a *secondary use*, as opposed to the *primary exploitation* of music by, for example, the granting of publishing rights up to the sale of CDs. Once a radio or television production is broadcast, it is in practical terms no longer possible to make the exploitation thereof, e.g. the on-demand offer of broadcast programmes, subject to another rights clearance regime;

- the *need for legal certainty* for broadcasters is provided by their collective licence agreement as it includes a "blanket licence" with a warranty that it covers all authors represented by the other societies (and for which, in several Member States, the so-called "extended collective licence" was also introduced), and

- the necessary *safeguarding of the editorial freedom* for broadcasters' use of music in their programming can be guaranteed only via collective licensing schemes.

Consequently, an essential requirement for the use of music by broadcasters has always been the one-stop-shop non-exclusive licensing arrangements which enable broadcasters to access the *world repertoire*, i.e. music from all over the world, through a contract with *one collecting society* for the category of protected material it represents. The well-established system of reciprocal representation agreements between collecting societies in all the different countries is necessary to make this possible.

This specific legal regime is also one of the reasons why the 2005 Recommendation on Music On-line was intended to cover the *on-line sale of individual recordings* (the latter being close akin to the primary exploitation of music) but not broadcast services (including by satellite or cable). In particular, it must be realized that broadcast services are entirely different from, and have no significant impact on, the mere on-line sale of music recordings and similar Internet-based music services.[1] A more detailed explanation can be found in the Annexe hereto.

[1] It could perhaps be asserted that certain Internet radio services might be regarded as somehow competing with on-line music sales websites, as freely available filtering software would allow consumers to reproduce and store a selection of their preferred songs. However, apart from the differences in technical quality and the difficult question of whether or not such consumer behaviour would be covered by the national private use exceptions (given that such selection and storage are lawfully possible in the analogue world), this assertion presupposes that such an Internet radio stream consists predominantly of "back-to-back" musical tracks.

c) Conflict with European policy on collective licensing

The above-mentioned concerns of broadcasters have also been expressed by the recent report on the 2005 Recommendation on Music On-line adopted by the European Parliament on 14 March 2007 (the "EP Resolution"). In particular, the EP Resolution points out that the "lack of clarity as to the applicability of differing licensing systems leads to legal uncertainty and entails disadvantages particularly for on-line broadcasting services". The EP Resolution favours a so-called "controlled form of competition" between collecting societies, but only as long as it would "safeguard and promote the diversity of cultural expression, notably by offering users, via one and the same collecting society, large diversified repertoires, including local and niche repertoires and in particular the world repertoire for broadcasters' services." It is also explicitly stated that Member States "in full coherence with the rules for cross-border broadcasting set out in the Satellite and Cable Directive 93/83/EEC, should create legal certainty for providers of on-line services other than the on-line sale of music (...)."

The EP Resolution stressed that collective licensing for music on-line services should consist of, *inter alia*, the following features:

- providing users with a high degree of legal certainty and *preserving the availability of the global repertoire* through licences available from any CRM within the EU (...), and

- guaranteeing the efficiency and coherence of licensing systems (*e.g. by enabling broadcasters to acquire rights in accordance with the copyright legislation of the Member State in which the programme in question originates*) and simplifying the extension of existing collective agreements so as to include interactive on-line distribution of existing content (*e.g. podcasting*). [All emphasis added]

The Commitments, if applied to broadcast services provided by EU broadcasters, would clearly have a negative effect on these policy requirements.

In the light of the foregoing, the Commitments should make an explicit "carve-out" for the licensing of music rights to broadcasters, in the sense that the provision(s) allowing for the withdrawal of rights from the societies must not apply to the granting of licences for broadcast services, but only to licences for the on-line sale of individual music recordings.

The need to make a *distinction between the type of exploitation*, on the one hand, while recognizing *the special interests of broadcasters as specific category of rights buyers* on the other, is fully in line with other case-law of the EC Commission.

It goes without saying that the required carve-out of the rights for broadcasters' services should apply equally to the *reproduction rights* which may be used by broadcasters in order to exercise those rights.

3. Negative consequences for consumers, the European Information Society and the European culture

a) Minimize consumer choice of broadcast programmes, including popular music

The most likely occurrence under the proposed individual or semi-central licensing regime of music rights to broadcasters is not only the dismantling of national repertoires but also a tendency towards further polarization: in the absence of non-exclusive collective licensing of the global repertoire to broadcasters it is likely that successful and popular authors would be able to license their rights more frequently, while right-owners of less popular music would have greater difficulties (and increasingly so). Consequently, exclusive management of rights or repertoire would lead to fewer radio and television programmes which include extracts from less popular music, resulting in a *lower quality of the content of such programmes* from a consumer's perspective, and this would ultimately limit consumer choice of broadcast programmes.

In addition, a centralized licensing regime dominated by a few major music publishers would be liable to jeopardize the editorial freedom of broadcasters. If they were no longer allowed to play certain musical works at times or in the programmes of their choice, this would ultimately be in conflict with the general preference of broadcast listeners and viewers to have a wide variety of music included in various programmes provided by each individual broadcaster.

b) Conflict with the needs of the Information Society

The polarization effects of the Commitments would be diametrically opposed to the needs of the Information Society. Providing the few major music publishers with full control over the entire collective licensing regime and the power to determine all possible conditions for the use of music by broadcasters would seriously endanger broadcasters' crucial involvement in on-line and other content services which is needed to provide the necessary safeguards for media pluralism and the fulfilment of fundamental European policy objectives in the digital environment (such as social cohesion, cultural diversity and public information services; see also below). Broadcasters must be able to acquire the necessary rights to provide their viewers and listeners with access to their programme services via both off-line and on-line delivery. However, such delivery of content services by broadcasters will be impossible if the music collecting societies are no longer in a position to grant the necessary rights. The conditions for the on-line availability of European content must therefore be improved by introducing mechanisms to facilitate the process of collective licensing for broadcast content services, instead of making the rights clearance process even more complicated.

c) Jeopardy of cultural diversity

The current licensing system for broadcasters ensures that all European (and non-EU) music is rewarded with similar play-time on European broadcast channels and with equitable remuneration. The existing polarization between world stars and unknown musical talent made the existence of an agreed scheme for the redistribution of licensing

income necessary in the interests of creating and preserving a healthy balance between musical authors, which, in turn, is vital for maintaining interest in, and the quality of, all types of music. A fragmentation and concentration of music licensing entities within the EU is likely to result in unknown, regional and national linguistic repertoires not being played outside the national territory, because it would be too costly to obtain clearance (as those rights would need to be cleared *in addition* to the "must-have" repertoires). It need hardly be stressed that cultural diversity as well as European integration of musical talent would suffer immediately and directly.

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1 Annexe