

## **CISAC and European Collecting Societies – Judgment of the General Court in the CISAC case**

In a series of judgments dated April 12<sup>th</sup>, 2013<sup>1</sup> the General Court has partly annulled the Commission's competition decision, addressed to CISAC and to 24 European collecting Societies, concerning exploitation of musical copyright over the internet, by satellite, and by cable retransmission. The Court allowed the Commission's prohibition on membership clauses that restrict the ability of authors of musical works to choose the Society that they wish to join. It also upheld the prohibition on exclusivity clauses, which give each Society, in the State in which it is established, absolute territorial protection against other Societies. However, the Court annulled the Commission's finding that there had been a concerted practice between the Societies to limit, in their reciprocal representation agreements with other Societies, the right to grant licences of the licensor Society's repertoire in the territory of the other Society.

The Court ruled that the Commission had not shown sufficient evidence of concertation between the Societies on the territorial scope of the mandates that they grant to one another. It also ruled that the Commission had not disproved the Societies' argument that their parallel conduct was not the result of a concerted practice, but was the result of their responsibility to act effectively against unauthorised performance of musical works.

It is not yet clear whether the Commission or the Societies will appeal to the Court of Justice. The Commission's decision had not imposed fines.

The Commission's decision, and the Court's judgments, do not concern traditional "off-line" reproduction of copyright music.

Most of the judgments seem to be in substantially similar terms (apart from some procedural questions). The Spanish Society had not appealed in time against the Commission's decision, and BUMA and SABAM had not appealed at all. The Swedish Society's appeal was dismissed, as it had not made the arguments concerning lack of evidence in time. Only a small minority of the Societies had argued against the Commission's prohibition on membership and exclusivity clauses.

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<sup>1</sup> These judgments were given in parallel cases brought by most of the collection Societies in the EU, and by CISAC, the International Confederation of Societies of Authors and Composers (Case T-442/08).

## **I. ANALYSIS AND COMMENTS**

In order to grant licences and collect royalties from commercial users abroad, the collecting societies co-operate worldwide on the basis of “reciprocal representation agreements” (“RRA”). Under such contracts, the parties give each other the right to grant licences for any public performance of musical works of their respective members in the licensee’s country.

The CISAC model RRA provided that collecting societies could not accept as a member an author already affiliated to another collecting society or having the nationality of one of the countries in which another collecting society was active. Although the clauses were part of the model contract only until 2004, the Commission could not rule out that some RRAs still contained such a clause.

The model also provided exclusivity clauses, until May 1996. Each collecting society would grant the others, reciprocally, the exclusive right on the territories on which the latter operated. The model left open the definition of the territories, but the licenses were in practice mostly national. According to the Commission, the collecting societies applied the model contract in such a way as to introduce territorial limitations corresponding to the EEA country in which the society in question was established.

## **II. ONLINE DISTRIBUTION OF MUSIC**

The Court pointed out the limited scope and nuanced terms of the Commission’s conclusions. The Commission had not objected to the existence and use of standard reciprocal agreements, or questioned the need for cooperation between the Societies. The Commission had not objected to the territorial limitations of the reciprocal mandates, but only what the Commission regarded as a concerted practice to include the limitations in all of the agreements.

The Court begins with some important general comments about the burden of proof on the Commission and the presumption of innocence. These comments are based on existing case law on Commission fines, but the Court said that they apply also to findings of infringement when no fines are imposed, and cited a judgment of the EFTA Court in the *Posten Norge* case in April 2012. The Court then considered whether the Commission had proof, other than clear parallel conduct, of a concerted practice, and concluded that there was not sufficient proof, bearing in mind that the Commission had not objected to the reciprocal agreements, or even the territorial limitations in them.

The Court rejected the Commission’s argument that territorial limitations constitute the preservation, by means of a concerted practice, of the anti-competitive conduct relating

to the exclusivity clauses. The Court emphasised that collecting societies can grant direct licences since the abandonment of the exclusivity clauses. Major users will be able to acquire worldwide valid licences over the repertoires which interest them. The fact that such demand still needs to develop and did not immediately affect the territorial limitations did not suffice to prove a concerted practice. In addition, the Court considered that the structures used for collective copyright management on-line originate in the structures used for traditional forms of exploitation, *i.e.*, off-line, with regard to which the national territorial limitations are not considered by the Commission to constitute an infringement of competition rules.

The Court then went on to consider whether the parallel agreements could only be the result of a concerted practice, and ruled that other explanations were sufficiently convincing, and that the Commission's conclusion could not stand. The Societies had argued that they needed to be on the spot to monitor, to ensure that the royalties due to copyright owners were not reduced, and to ensure that in each State there was a single licensing body. The Commission had said that an authorised user's broadcasts could be monitored remotely, but that did not solve the problem of unauthorised users. The Commission had not explained how Societies would help each other, *e.g.*, with granting multinational licences, while at the same time being competitors. The Society in a given State would have little incentive to pay the costs of detecting unauthorised broadcasting if the user could get a licence from a different Society. The Court clearly considered that the Commission had not explained how unauthorised use would be prevented if there were competition between Societies.

In short, the Commission had no clear vision of how the market should work in the light of its decision. Apart from a possible appeal, it is not clear whether the result of the Commission's procedure will significantly alter the practices of the Societies, which in any case are changing for a number of reasons not discussed by the Commission or the Court.

In particular, much of the UK/US repertoire is now being licensed only to certain Societies, and an increasing amount of big music publishers' repertoires is being licensed directly for the internet, without any Society being involved.

### **III. COMMENT – BURDEN OF PROOF AND CONCERTED PRACTICES**

The judgments contain interesting and important comments on two more general competition law issues.

On the burden of proof, the Court said (*CISAC* judgment, Case T-442/08, paragraphs 91-93):

“91. *It follows from Article 2 of Regulation No. 1/2003 and from settled case-law that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is incumbent on the Commission to prove the infringement found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement .....*”

92. *In that context, any doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine .....*”

93. *It is necessary to take into account the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which is one of the fundamental rights which, according to the case-law of the Court of Justice, constitute general principles of the Union’s legal order. Given the nature of the infringements in question and the nature and degree of severity of the penalties which may ensue, the principle of the presumption of innocence applies, inter alia, to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments .....*”

This language seems to go further than the EU Courts have gone until recently. In particular, paragraph 92 (“*any doubt*”) suggests a burden of proof comparable to that in criminal cases. The General Court had used similar language in Case T-11/06, *Romana Tabacchi* (October 5<sup>th</sup>, 2011, para.129, cited by the Court in the *CISAC* judgments) and in *Dresdner Bank* (Joined Cases T-44/02 OP and others, [2006] E.C.R. II-3567, paras 60-61). But in the *CISAC* judgments the Court went on to say that the same principles apply even when no fine has been imposed. The Court concluded:

“*Thus the Commission must show precise and consistent evidence in order to establish the existence of the infringement ... and to support the firm conviction that the alleged infringement constitutes a restriction of competition within the meaning of Article [101(1)].*”

The Court then explained how the burden of proof and the presumption of innocence apply to evidence of a supposed concerted practice. The Court considered the evidence that is necessary to prove an unlawful concerted practice. The Court said:

*“... where the Commission’s reasoning is based on the supposition that the facts established in its decision cannot be explained other than by concertation, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and this allow another explanation of the facts to be substituted for the one adopted by the Commission.”*

However, this does not apply where the proof of concertation *“is based not on a mere finding of parallel market conduct but on documents which show that the practices were the result of concertation”*. The applicants then need not merely to offer another explanation, but to challenge the facts shown by the Commission’s documents.

The Court accordingly looked first at the Commission’s evidence, other than parallel conduct. It is only when the Commission’s only evidence is parallel conduct that it can be a defence to provide a plausible alternative explanation.

In the end, as explained above, the Court considered that the Commission’s other evidence was insufficient, that the Commission was compelled to rely on parallel conduct, and that a plausible alternative explanation had been given by the Societies.

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