Symposium: Collective Management of Copyright: Solution or Sacrifice?

Cross-Border Issues in Collective Management

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Good morning, everybody.

I was an LLM student here a few years ago, so I am very happy to be back here today. I want to thank Professor Ginsburg for giving me this opportunity and I also want to thank the team from the Kernochan Center for its support. They have invited me to come and talk about cross-border licensing issues in Europe. I do not know how familiar everyone is with all of the things that have been going on in the last ten years in Europe concerning this issue. So, I am going to go through the steps that we have undertaken. At the end, I would like to share with you my ideas about what the future of collective management for online works should be, in Europe and worldwide.

First, in order to see how the system of collective management of rights has evolved, I would like to quickly look back at how it used to work in the offline world. You probably know that through the umbrella organizations called CISAC and BIEM (CISAC for performing rights and BIEM for mechanical rights) collective societies worked through what we called “reciprocal representation agreements” (“RRAs”). This meant that society A signed an RRA with society B, and through this RRA society A represented the repertoire of society B in the territory of society A. These RRAs were signed by almost all the societies in the world, creating a net of agreements that allowed society A to represent almost all of the world’s repertoire in its own national territory. With the arrival of the Internet, licenses could no longer be nationally given, and thus the collective management organizations under CISAC decided in 2000 to adapt the reciprocal representation agreements to the online world through signing the Santiago Agreements for performing rights and the Barcelona Agreements for mechanical rights.

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What did these new agreements establish? They established: 1) that the territorial scope of the license was no longer national, but rather was worldwide; 2) that the licensed repertoire would be the repertoire of all the societies signing these agreements (at the beginning there were six or seven societies that started signing the agreements, but soon there was almost a worldwide representation of societies); and 3) that the licensor would be the society of the licensee’s economic residence. Societies also included in the new agreements a most favored nation clause, according to which, if any society extended better conditions to another society, these better conditions would be extended to the rest of the societies signing the Santiago and Barcelona agreements.

European societies communicated the Santiago and Barcelona agreements to the European Commission (“EC”) for validation, but the EC considered these agreements against article 81 of the European Union treaty, which fights restrictions of markets and barriers for the creation of a single European market. The agreements gave absolute national exclusivity to existing national societies, reinforced the already natural monopolies that these societies had in their countries and eliminated competition between collective societies through the most favored nation clause. According to the EC, the agreements were preventing the market from evolving and from creating alternative offers, thus restricting the trade between member states. As a consequence of the EC reply, E.U. collecting societies terminated the Santiago and Barcelona agreements and went back to the “offline world.”

But the EC considered it necessary to take further action in order to change the situation and to develop an easier licensing system for users. The first action undertaken by the EC in this respect was the May 18, 2005 Recommendation on Collective Cross-Border Management of Copyrights and Related Rights for Legitimate Online Music Services. The recommendation stated that rights holders in the E.U. could join any collective society they wished to, irrespective of their national economic residence or that of the society; that rights holders could select the territorial scope of the mandate given to the collective management and determine the online rights to be entrusted to the societies; and that rights holders could also transfer multiterritorial management of rights to another society, different than the one that had been his or her society until then.

The next step undertaken by the EC was the 2005 Impact Assessment Reforming Cross-Border Collective Management of Copyrights and Related Rights for Legitimate Online Music Services, in which the Commission analyzed the pros and cons of different options to be applied in the online music market and the role that the EC should play in any of these options. There were three options.
one: do nothing and see how the market would evolve by itself. Option two proposed to eliminate restrictions and customer location provisions in the reciprocal representation agreements, creating a system like the “Santiago” system but without the national territorial restriction and the economic residence restriction. Finally, option three proposed giving rights holders the ability to appoint the collective rights manager that they wished for the online use of their musical works. Option three, as we will see, was the one chosen by many rights holders in Europe.

The final step undertaken by the EC was the CISAC decision, which held that the traditional reciprocal representation agreements signed by the CISAC societies were anticompetitive. The origins of this decision was a complaint issued by a TV broadcaster against GEMA, the German collective management society, as a consequence of GEMA’s refusal to grant to the TV broadcaster a pan-European license instead of a national territory license covering the German territory, according to the reciprocal representation agreement system in place. The EC believed that CISAC reciprocal representation agreements restricted competition since they limited the ability of collective rights managers to offer their services outside of their domestic territories.

So, what have been the consequences of these actions undertaken by the EC? Many multinational publishers withdrew their online rights from collective management organizations and created new licensing bodies for their own repertoires. Also, the E.U. collective management societies have renegotiated their reciprocal representation agreements and have eliminated the membership, exclusivity and territoriality clauses.

Now, compared with the situation before, all of the authors’ rights are no longer evidently available from collective management societies. That means that a user in Europe needs to knock on many different doors now in order to be sure that he or she has all the necessary licenses that will allow him or her to start a music business. And collective societies compete with each other for repertoires.

This is a map of the European Union licensing situation right now. A licensee today—for example, an entrepreneur who wants to start a music business in Europe—must knock on too many doors. If he wants to have the Anglo-American repertoire—which is, of course, the most attractive for music businesses—he will have to request licenses from CELAS for the EMI Anglo-American repertoire; from PAECOL for the Sony Anglo-American repertoire; from DEAL for the Universal repertoire; and from several European collecting societies under the Pan-European Digital Licensing (“PEDL”) initiative for the Warner Anglo-American repertoire. Also, if he wants the Latin repertoire, he must call SGAE to obtain


rights to the Sony Latin repertoire, the Peermusic Latin repertoire, SGAE’s own repertoire, the repertoire from SPA (Portugal) and the repertoires from many of the Latin-American societies.7

With all these licenses, he will have approximately seventy percent of the pie. But he will still have to contact the remaining European societies to obtain licenses for other local repertoires: the Greek repertoire, the Italian repertoire and so on.

In sum, the licensee must obtain around thirty different licenses if he wants to be sure that he will not receive claims from any local collective rights society.

What are the consequences of this situation? It is true that we do not have a fragmented territory anymore, but rather now we have fragmented repertoires. And a fragmented repertoire effectively creates a fragmented territory again because users have to knock on many doors across Europe. This licensing scheme is not easy for users: they incur high transaction costs and much legal uncertainty, which creates barriers to entry for small businesses. A big music business, such as iTunes, can hire lawyers and work across different countries to obtain all of the necessary licenses to start its business, but it is difficult for a small business that also wants to compete on the Internet. “Long tail theory businesses” cannot succeed in such a landscape.8

The process of clearing rights is also much more complicated for collective rights societies and raises concerns about the survival of Europe’s cultural diversity. Small repertoires are not appealing to big businesses; a licensee may renounce, for example, the Greek repertoire in order to develop its online music business, since it may be worth the trade-off in losing those consumers that would be interested in that repertoire.

The current situation also enables the growth of piracy in Europe and erects barriers to entry for legal businesses in Europe. While digital music represents about forty-five percent of the overall U.S. music market, it represents only around fifteen percent of the overall European music market.9 The 2011 Digital Music

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Report of the International Federation of the Phonographic Industry ("IFPI") indicates that one out of four Internet users in the European Union visits unlicensed sites each month.\(^\text{10}\) For example, Spain has become a real champion in digital piracy, and such piracy is harming the music sector and musical diversity in Europe. There have been no new artists among Spain’s top sales since 2008, and there have been no Spanish artists in the European Union’s top sales since 2007.\(^\text{11}\) This is a new situation; previously, there were new Spanish artists coming up every year.

So, what can we do in order to improve this situation? The European Community probably did not contemplate these consequences when it undertook various reforms, but it is important to address them.

In response to licensing difficulties, stakeholders have proposed the creation of HUBS, which are aggregations of certain repertoires by some collective rights societies. Armonia, for example, is a project that allies SGAE (Spain), SACEM (France) and SIAE (Italy) in order to aggregate the repertoires of these three societies.\(^\text{12}\) The International Copyright Enterprise ("ICE") is a similar joint venture undertaken by PRS (United Kingdom) with STIM (Sweden).\(^\text{13}\) CISAC has also been working for the last year on the creation of a pan-European licensing portal. Finally, the European Broadcaster’s Union ("EBU") has raised a proposal similar to the Satellite-Directive model and to the Santiago Agreement model.

The most important initiative on the part of regulators is the project of a collective management directive from the European Commission’s Directorate-General for Internal Market and Services ("DG MARKT"). There are not yet many publicly available details about this directive, but we do know that DG MARKT hopes to launch this project in early 2011. Some of the main issues raised will be transparency in collective management of rights and simplification of the licensing system created in the last two years.

In my opinion, the HUBS model will be more favorably received by the European Commission than a pan-European portal model. A pan-European portal would unify all European Union licenses into a one-stop shop, whereas the HUBS system would offer several “points” of licensing (similar to the system in the United States, where three collective rights management societies grant licenses).

Clearly, the options are completely open right now, and collective rights management societies are working very hard with the European Commission and...
with other stakeholders to create a better situation than the current one.

Thank you.