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PERFORMERS' RIGHTS IN TODAY'S EUROPEAN ENVIRONMENT: HOW TO ADAPT THE EXISTING RIGHTS TO NEW USES OF PERFORMANCES?

PANEL 3: "COLLECTIVE MANAGEMENT OF RIGHTS IN A GLOBALIZED ENVIRONMENT: ROLE AND CHALLENGES"

COLLECTIVE MANAGEMENT OF RIGHTS ACROSS BORDERS: WAYS FORWARD

Dear Ladies and Gentlemen, dear Colleagues,

Thank you for giving me the opportunity to share some thoughts on trans border rights management from a perspective of a collecting society.

This issue has different aspects: The international rights administration in its traditional way was the granting of national licences for the global repertoire including all foreign rightholders, be they represented as direct members, via bilateral agreements with sister-organisations or based on a national legal mandate in the country of operation of the collecting society. All this requires an international cooperation and exchange between collecting societies as cost effectively as possible. Here the development of the neighbouring rights all over the world is a positive aspect but a challenge as well. We all know the limited number of members of the Rome-Treaty on Performers and Phonograms from 1961 and the broad acceptance – even with some reservation from some countries such as US – of the WPPT. Since the protection of foreign repertoire differs from member state to member state even within the EU, proper licensing is a complex task even on national level.

However, the selection of the panellist indicates to me, that I should focus on the Cross border licensing: Of course, we have to provide solutions for multiterritorial uses, such as broadcasting via internet. Here the Collecting Societies for phonogram producers – but also for performers in the case of a joint society such as GVL – provide multiterritorial rights based on the model of the "IFPI-Simulcast agreement", approved by DG Competition. Users can get a multiterritorial licence, but in order to avoid a race to the bottom of the tariff by a price competition, they have to pay the established tariffs of each recipient country. This is a complex model, but in the era of the computer manageable.

The competition is limited to the admin. fees of the Collecting Societies. The advantage is that no customer allocation clause (which is legally impossible according to the CISAC Case) is needed. This means any Collecting Society can grant this licence also for users in a foreign country. The same model was extended to webcasting (broadcasting via internet) and also for Catch-up TV and Radio – the exclusive making available right.

Due to the fact that this is a voluntary agreement, some important rightholders decided not to give these rights to a Collecting Society and decided to act separately. There are also complex requirements re. the ratio of phonograms in the program. And one huge difference from the traditional mandates to Collecting societies – at least in Germany – is the Non-Exclusivity. This means, that even if a Collecting society represents the rights and based on the bilateral agreements multiterritorial licenses can be granted for the repertoire, the phonogram-producer can license the use directly.

This situation allows cherry-picking on both sides: Phonogram producers can make direct deals, if they are attractive or important users can get licenses from weak rightholders for free. Both has a negative impact on the collective bargaining power of Collecting Societies, since they don't represent all rightholders jointly.

I know that my Colleague Christian Hauptmann has asked for this Non-Exclusivity in the EU Hearing on Collective management this spring. But what would be the effect?

Of course the idea sounds compelling:

“the grant of rights to a collecting society must be made non-exclusive so that right holders can license directly to users - i.e., around the collecting society, if and when it makes business sense for them to do so. This one change by itself, will give right holders and users more flexibility to enter into licensing agreements, when it is good business to do so...”

I can tell you from my practice, what we currently face. Our Indie-members from the record-industry have been asked by broadcasters to give their on-demand rights for catch-up uses for free. The broadcasters promised to use the repertoire in the broadcasted program, which would lead to payments from GVL for the broadcasting. Based on an exclusive mandate we would have the bargaining power to negotiate a fair remuneration, but now our members can be put under pressure and get rid of their rights.

This interest, to combine repertoire and to strengthen rightholders with a weak bargaining power by administering their rights exclusively is as I believe our fiduciary duty towards our rightholders.

Another important aspect is the one stop shop towards the user, we can provide in case of the rights with compulsory collective management such as broadcasting of published phonograms. Of course, all broadcasters are asking for this one stop-shop. But how shall this be organised based on a non-exclusive mandate? Attractive deals would be made by the Major rightholders directly for a better price since they are not under the obligation of a collecting society to give 50% to the performers, to give cultural and social support to their members e.g.. which necessarily reduces the profit for the Labels. How can the niche repertoire necessary for the cultural diversity be administered effectively on that basis?

I think asking for the non exclusivity means abandoning the idea of a one-stop shop. You cannot have the cake and eat it, too...

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