STUDENT NOTE

THE CONFLICTS BETWEEN E.U. COLLECTING SOCIETIES & E.C. COMPETITION LAW

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This Note examines the monopolistic nature of the conduct of collecting societies within the E.U. and how developments in E.C. competition law are rendering previously lawful conduct unlawful. It also analyzes the changes in the role of collecting societies in light of the developments in online music distribution and digital rights management. The conflict between collecting societies within the European Union, European Community competition law, and copyright law as it relates to musical works has recently become a controversial area of increasing dominance in legal processes. E.C. competition law has dealt with collecting societies in three major areas: (i) relationships with commercial users of music; (ii) relationships with their members; and (iii) reciprocal relationships between collecting societies. Whether the contribution of E.C. competition law has led to effective competition among the societies and economic efficiency is questionable. In light of the rapid growth of music distribution via the Internet, antitrust enforcement will perhaps prove a solution to this conundrum.

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I. INTRODUCTION

The conflict between collecting societies within the European Union (E.U.), European Community (E.C.) competition law, and copyright law as it relates to musical works has recently become a controversial area of increasing dominance in legal processes. This paper will examine the monopolistic nature of the conduct of collecting societies within the E.U. and how developments in E.C. competition law are rendering previously lawful conduct unlawful.

Furthermore, this article will analyze the change in the role of collecting societies in light of the developments in online music distribution and digital rights management. First, however, we shall gain a perspective on the relationships between commercial users, collecting societies, and their members.

II. BACKGROUND

The Performing Rights Society ("PRS"), set up in 1914, is an example of a collecting society based in the U.K. whose membership is comprised of composers and publishers. PRS is the main body that collectively enforces rights, organizes the requisite licensing schemes for different categories of users, and sets rates for the latter. This accumulation of rights forces users to respect copyright but has also been perceived to deprive them of the opportunity to object to licensing fees for a single piece of music. It is argued that because a user who believes a fee is too high may choose to play a cheaper work, the user is less likely to contest the rates set by a given collecting society.[1] Not only do collecting societies have market power to set high prices, but they have also been reported to discriminate among commercial users and demand that performances be of a particular kind (for example, live rather than recorded).[2] The issue that collecting societies face today, specifically in the E.U., is how to persuade competition authorities that their economic dominance, derived from the drawing together of rights in the works sought by users, remains a justified market necessity—and it is from this that the thrust of this paper emerges.

A. E.C. Competition Law and Collecting Societies

The existence of empowered single bodies that are solely responsible for administering rights is the source of numerous problems in the E.U. today. Copyright owners have few alternatives to joining these societies and are therefore forced to agree to restrictive terms. The options for consumers are similarly limited and so consumers accept licenses from collecting societies on whatever terms the

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[1] WILLIAM CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADEMARKS AND ALLIED RIGHTS 406–408 (2007).

[2] *Id*.

latter may choose. As a result, collecting societies have been coined to be "at once the most ingenious and the worst invention of mankind."[3]

Competition authorities, such as the Office of Fair Trading in the U.K., have reacted by lobbying for specific legislation, regulation, and empowerment, resulting in the adoption of legislation such as the Enterprise Act 2002, which prohibits collecting societies from engaging in anti-competitive agreements and practices.[4] The necessary interplay between competition law and collecting societies is evidenced by their generally dominant positions in supplying services to composers, authors, and publishers in their respective marketplaces. In the absence of any regulatory control, collecting societies have the capacity to charge exorbitant fees, discriminate unfairly against certain categories of users, or require users to hold licenses for many more works than they usually desire. E.C. competition law addresses the behavior of collecting societies in this respect.[5]

The aim of Articles 81 and 82 E.C. Treaty was to create competition among collecting societies by enabling rights-holders to contract with collecting societies based in E.U. Member States other than their own, and by excluding exclusivity clauses in reciprocal representation agreements between domestic collecting societies and national rights-holders. In the broader E.U. arena, Article 82 E.C. Treaty was one of the main legislative instruments introduced in order to prohibit "undertakings," that is, the abuse by collecting societies of their dominant position in a given Member State's market.[6] An incumbent collecting society with a dominant market position in a Member State would impinge upon this provision if it discriminated between different rights-holders on the basis of, for example, their nationality or music style. However, if Article 82 E.C. Treaty creates a duty for collecting societies to contract with rights-holders on a non-discriminatory basis without the possibility of taking into account costs and profits, then Article 82 E.C. is not actually encouraging competition. New entrants would inevitably be excluded from the market because a well-established incumbent would focus on the more attractive option of receiving all of its income from its current rights-holders. In the U.S., such a result would constitute a clear violation of Section 2 of the Sherman Act. Collecting societies in the U.S. are not obliged to administer the rights of all rights-holders in a non-discriminatory manner, since such a practice can be construed as leading to anti-competitiveness and abuses of market positions.[7] Nonetheless, a non-discriminatory administration of rights of copyright owners could work if more than one collecting society existed within each market.

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[3] Andre Bertrand, *Performing Rights Societies: The Price is Right "French Style," or the SACEM Cases*, 3 ENT. L. REV. 146, 146 (1992). Collecting societies are especially important in the broadcasting context, which is considerably dependent upon live and recorded music used in cinemas, bars, restaurants, shops, and even schools.

[4] Enterprise Act 2002, c. 40, art. 131 (Eng.).

[5] ALAN STORY, COMM'N ON INTELL.PROP. RIGHTS, STUDY ON INTELLECTUAL PROPERTY RIGHTS, THE INTERNET, AND COPYRIGHT (2002), *available at* http://www.wipo.int/export/sites/www/academy/en/research/research/pdf/copyright.pdf.

[6] *Commission Report on Competition Policy 2008*, at 31, COM (2009) 374 final (July 23, 2009), *available at* http://register.consilium.europa.eu/pdf/en/09/st12/st12567.en09.pdf.

[7] JOSEF DREXL, MAX PLANCK INST. FOR INTELL. PROP., COMPETITION & TAX L., COLLECTING SOCIETIES & COMPETITION LAW 8–9 (2007), *available at* http://www.ip.mpg.de/shared/data/pdf/drexl_-_crmos _and_ competition.pdf.

The E.U. seems to be heading in a direction which is at odds with the U.S. approach. In *GVL v. Commission*,[8] the European Court of Justice (E.C.J.) held that a collecting society would abuse its dominant market position in domestic territory if it refused to administer the rights of a citizen of another Member State. German Law would thus infringe Article 12 E.C. Treaty, which bans discrimination on grounds of nationality, if it required collecting societies to contract only with German rights-holders.[9] More so, the E.C.J. interpreted Article 81 E.C. Treaty to prevent collecting societies from restricting competition by concluding agreements with rights-holders, users, and other collecting societies. Case law thus provides national courts with general guidance on legitimate collecting society behavior. That is, societies may not discriminate on grounds of nationality, for instance, by conferring associate status solely on foreign authors. This also implies that all collecting societies must permit other E.U. nationals to become members.[10]

The European Commission has stated that collecting societies' by-laws should ensure that no group of members may obtain preferential treatment based on the amount of revenue collected as a result of their membership.[11] Further, in the landmark decision *Belgische v. SABAM*,[12] the E.C.J. held that abuse would occur if a society imposed on its members obligations that are not necessary for the attainment of the relevant society's objectives and that may encroach unfairly on the members' freedoms.[13] The E.C.J. also held that notice periods regarding the retention of rights following a member's withdrawal may not be of undue length.[14] A similar market distorting practice was discussed in *Ministere Public v. Tournier*.[15] Here, arrangements between the French copyright management society SACEM and discotheques, which involved charging excessive blanket license fees for only part of the repertoire and carving out foreign music (specifically, popular Anglo-American music), were found in violation of Articles 81 and 82 E.C. Treaty. The E.C.J. held that:

> If it were proved that the fees of a dominant undertaking in one Member State are appreciably higher than those charged in other Member States, and where such a comparison of the fee levels has been made on a consistent basis, it follows that the discrepancy must be regarded as indicative of an abuse of dominant position.[16]

The aforementioned case law highlights the need for greater harmonization. A report by the European Parliamentary Committee on Legal Affairs and the Internal

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[8] Case 7/82, Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. Comm'n, 1983 E.C.R. 483, ¶ 56.

[9] *Id.*; Gesetz uber die Warnehmung von Urheberrechten und verwandten Schutzrechten [Urheberrechtswahrnehmungsgesetz] [Copyright Administration Law], Jun. 23, 1995, BGBl. I, § 6 (F.R.G.).

[10] Case 71/224/CEE, Re GEMA (No. 1), 1970 WL 30230 (June 2, 1971).

[11] LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY 267–70, 284–89, 295, (2nd ed. 2004).

[12] Case 127/73, Belgische Radio en Televisie v. SV SABAM, 1974 E.C.R. 313, ¶ 1.

[13] *Id*.

[14] *Id*.

[15] Case 395/87, Ministere Public v. Jean Louis Tournier, 1989 E.C.R. 2521.

[16] *Id*. ¶ 38. Assessment of anti-competitive behavior or abuse is a task for national authorities.

Market[17] anticipated the need for the establishment of a European Competition Network, and mentioned that the vast number of Directives on point[18] reflects the need for collecting societies to meet standards of rationalization, transparency, and accountability to their members, as well as for an increase in scrutiny by competition authorities in cases of abuse.[19] Another option would be to allow collecting societies to simply reject the administration of rights so as to legally discriminate between different rights-holders based on the market value of their rights. It has been argued that this would promote the goal of copyright[20] in that creativity would be rewarded through constant dynamic competition between collecting societies and their respective catalogues.[21]

B. E.U. Collecting Societies: A Natural Monopoly?

The overarching goal of E.U. legislation in the area of collecting societies has been to establish an undistorted internal market by enabling collecting societies to provide services across borders. Traditionally, collecting societies were a means of protecting authors and artists against large exploiters of the copyright industry. The E.C.J. expressed this idea in *SABAM*,[22] where it stated that the aim of collecting societies is to protect rights-holders and their members against major exploiters and distributors of music, such as record labels and large radio broadcasters. Today, however, it can be reasonably asserted that if collecting societies attract all the rights in which a particular user is interested, they become the single license provider and hence gain monopoly power.

While it can be argued that anticompetitive regulation allows artistic competition to thrive because it facilitates access to the marketplace, there is a strong case for allowing collecting societies to hold monopoly power. More specifically, if collecting societies have monopoly power, rights-holders obtain certain advantages, such as a larger income resulting from the collecting societies' ability to charge higher prices. This is desirable because it promotes the original reasons for the existence of collecting societies, namely to protect rights-holders against exploitation by large record labels and broadcasting companies. Ideally, it would encourage innovation by demonstrating to creators of music that contracting their works with collecting societies can result in a gain that is low-risk but has a high reward; the transfer of higher royalties to the rights-holders may thus increase investment in creativity, ultimately fulfilling one of the goals of copyright law.[23] It is surprising, therefore, that the Commission has recommended the introduction of competition

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[17] EUR. PARL., Comm. on Legal Aff. & the Internal Mkt., *Report on a Community Framework for Collecting Societies for Authors' Rights*, INI/2002/2274 (Dec. 11, 2003) (*prepared by* Raina A. Mercedes Echerer).

[18] *See, e.g.*, Council & Parliament Directive 2001/29, 2001 O.J. (L 167) 10 (EC). *See also* Council & Parliament Directive 2001/84, pmbl., 2001 O.J. (L 272) 32, 34 (EC), ¶ 28.

[19] Comm. on Legal Aff. & the Internal Mkt., *supra* note 17.

[20] Giovanni B. Ramello, *Copyright and Antitrust Issues, in* THE ECONOMICS OF COPYRIGHT, DEVELOPMENTS IN RESEARCH AND ANALYSIS, 1–5, 12, 14, 15, 25, 28 (Wendy J. Gordon & Richard Watt eds., 2003).

[21] *Id.*

[22] Case 127/73, Belgische Radio en Televisie v. SV SABAM, 1974 E.C.R. 313.

[23] DREXL, *supra* note 7, at 21.

amongst collecting societies,[24] though its efforts can be deemed to have been thwarted in some respects.

The question thus arises: can several collecting societies be active in the same market? The answer is that it depends on the jurisdiction. Some countries provide for legal monopolies. Austria, for instance, grants the necessary authorization for the administration of a particular set of rights only to one society.[25] In contrast, in the U.S. collecting societies are permitted to coexist. Though ASCAP and BMI are not directly competing with one another, they have been active in the same market since 1940.[26] In other countries, however, natural monopolies have developed.[27] This is the case in Germany, for example, where collecting societies must seek administrative authorization before commencing operations[28] and are required to accept all rights-holders on a non-discriminatory basis.[29]

In spite of all this, it has been argued by several major academic commentators that competition between collecting societies can and should exist.[30] An obvious advantage of competition between collecting societies is that users would be able to choose between several societies, each of which would offer multi-territorial licenses. Licensees would also have access to a much larger repertoire by joining collecting societies that would grant blanket licenses. The Commission has argued that the present natural monopoly environment seriously distorts the price system for music by not taking into account other competition-orientated options.[31] The Commission has stated that an increase in competition would lead to more effective administration and lower administrative costs which would in turn increase income for all parties. However, whether higher incomes would be a reality is uncertain because commercial users would face higher search costs, which could lead to lower

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[24] This otherwise surprising recommendation can be explained in several ways. The Commission may want to increase competition vis-à-vis collecting societies because if it can be proved that one single monopolistic collecting society factually benefits rights-holders and consumers, having several collecting societies operating within the same market can only mean aggregately greater advantages for rights-holders and consumers. Alternatively, it could be advantageous in the sense that though one monopoly is good for rights-holders, it is not so beneficial for consumers of music; therefore, having competition between the collecting societies would provide protection for consumers rather than rights-holders.

[25] Bundesgesetz über Verwertungsgesellschaften [Federal Act on Collecting Societies] Bundesgesetzblatt Teil I [BGB1 I] No. 9/2005, § 3 ¶ 2 (Austria).

[26] DREXL, *supra* note 7, at 8.

[27] *Id*.

[28] *Id.*; Copyright Administration Law, *supra* note 9*,* art. 3(1). This authorization may only be rejected for three very limited reasons listed in art. 3(1) of the Act, which do not include prior grant of such an authorization to a competing society: (i) the charter of the society is not in conformity with the law; (ii) indications that the persons representing the society do not have the reliability required for the activity of collective administration; (iii) the economic situation of the society endangers effective administration of the rights.

[29] Attempts to enter the market where an incumbent is already active are rarely successful. In 2004, a new German collecting society called vGwerburg + Musik GmbH began business in competition with GEMA, Germany's major dominant collecting society, only to experience a drop in profits as it failed to attract a considerable repertoire for licensing music for advertisements. DREXL, *supra* note 7, at 7.

[30] CORNISH & LLEWELYN, *supra* note 1; Bertrand, *supra* note 3; DREXL, *supra* note 7; BENTLY & SHERMAN, *supra* note 11; Ramello, *supra* note 20. *See also* Stanley M. Besen et al., *An Economic Analysis of Copyright Collective*, 78 VA. L. REV. 383, 397–405 (1992).

[31] STORY, *supra* note 5; *Commission Report on Competition Policy*, *supra* note 6; Comm. on Legal Aff. & the Internal Mkt., *supra* note 17.

demand for the collecting societies' services. Disadvantages also abound. One is that the coexistence of several collecting societies in a given market would lead to an exponential increase in costs due to more infringement suits being brought—for instance, there are costs associated with proving that the rights which a collecting society argues are illegally used belong to its own repertoire and not to that of a competitor.[32] Another disadvantage, as mentioned before, comes in the form of higher search costs. Users would bear the cost of having to find out which of the several collecting societies holds rights in the music they want to use.

Although there might be a situation where collecting societies are competing for rights-holders, it is possible that there will be no competition for commercial users since competition in the licensing market is usually excluded by the so-called "superstar phenomenon."[33] Users such as radio stations do not know in advance which songs are going to prove successful. The possibility of obtaining blanket licenses thus ensures that users will have instant and immediate access to music of future "superstars." Regardless of the number of societies in a given market, it can be said with sufficient certainty that there exists no competition between collecting societies with regard to professional users.[34] Because repertoires of various societies are not perfect substitutes, each society holds a dominant market position. Users need access to all of the collecting societies' repertoires and thus it is common for them to request blanket licenses from several societies.[35] The U.S. example confirms this theory as most U.S. users of public performance rights acquire licenses from both ASCAP and BMI, which inevitably leads to the advent of a natural monopoly, much like in Germany.[36]

It can be inferred from the preceding paragraph that competition between collecting societies will simply not function efficiently. The author argues that competition will only benefit those that hold rights in music that is popular to start with, and will thus benefit some but not all rights-holders. If collecting societies were able to reject the administration of individual rights, the societies would be inclined to identify the music that they want to offer to their users, i.e. record labels. Managers of collecting societies would distinguish between attractive and non-attractive music within a particular genre based on current public tastes. Much like businesses which meet the needs of the average consumer, collecting societies would have firm incentives to concentrate on the music of publishing companies, authors, and artists that market well throughout the E.U. at a given time. We could see collecting societies compete to acquire repertoires consisting of mainstream "pop" music for their cross-border licensing purposes.

Competition among societies in acquiring mainstream music is already present in the online arena. Management of online rights in musical works promotes the interests of rights-holders who control rights in internationally popular mainstream

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[32] Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. COMPETITION L. & ECON. 541, 541, 580 (2005), *available at* http://jcle.oxfordjournals.org/cgi/reprint/1/3/541.

[33] DREXL, *supra* note 7, at 13.

[34] Katz, *supra* note 32.

[35] DREXL, *supra* note 7, at 13; Katz, *supra* note 32.

[36] DREXL, *supra* note 7, at 7.

music, such as music sung in English.[37] If this was a reality in the realm of collecting societies, specialization of collecting societies would be the foreseeable result,[38] since specialization would make them better equipped to target relevant markets for different categories of musical works. Unfortunately, there are downsides to such specialization. Music preferred by a minority of people, for example music in a specific language, would interest a minimal amount of collecting societies. This would mean that a domestic collecting society within a Member State where the language is spoken would operate in a way which would yet again create a monopoly situation. Barriers would be formed for music serving the minority public taste as well as for innovative music. This result is problematic because it neglects the goal of copyright—promoting creativity—and because it would harm cultural diversity within the E.U.[39] Solutions to these dilemmas may lie in the developments in the online music industry.

C. The Future of E.U. Collecting Societies & Online Music Distribution

In the *Daft Punk* case,[40] the Commission held that because authors may enter into direct contracts with users over the Internet, collecting societies would abuse their market power if they forced authors to license their rights. This suggests that in order to prevent potential Article 82 E.C. violations, there needs to be a possibility for individual administration by authors and publishing companies.[41] The *Daft Punk* case reveals the growing role of the Internet in music distribution at a global level, as well as the increase in competition in this market segment. The Internet being a medium which best facilitates direct transactions between rights-holders and users, the Commission recommended that collecting societies compete for online rights of rights-holders and thus grant multi-territorial licenses directly to users.[42] This would mean that since there is no duty for rights-holders to contract with collecting societies, the societies' rights managers would be free to reject the administration of individual rights and hence could specialize in various categories of music. Users would have the opportunity to distinguish between collecting societies on the basis of their repertoire. New collecting societies would form as a response to the change in demand, generating further competition. Nevertheless, one should not underestimate the risk that certain rights-holders could remain excluded from access to a system of collective administration.

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[37] *Id*.; I. Fred Koenigsburg, Lecturer-in-Law, Columbia University School of Law, Seminar on "Law and the Music Industry" (Oct. 2008).

[38] DREXL, *supra* note 7, at 10–13.

[39] *Id.* at 21–22.

[40] EUR. COMM., Directorate General for Competition, *Re COMP/C2/37.219 Banghalter & Christo v SACEM*, COMP/C2/37.219 (Aug. 12, 2002) (*prepared by* Michael Barnier).

> According to its rules, the French SACEM denied membership to the two composers Banghalter and Homem Christo, working for the punk group Daft Punk. SACEM's rules required that certain rights would have to be administered by a collecting society, not necessarily SACEM. The composers wanted to exclude certain rights from the contract with SACEM. Whereas some of these rights were administered by the British PRS, the composers intended to administer the remaining rights individually.

DREXL, *supra* note 7, at 25.

[41] DREXL, *supra* note 7, at 28–29; Katz, *supra* note 32.

[42] DREXL, *supra* note 7, at 9.

In the near future, large Internet platforms may well replace the functions of collecting societies and may even offer multi-territorial licensing to commercial users worldwide.[43] Large rights-holders, such as music publishing companies, would ultimately run their own Internet platforms for licensing their performing artists' rights, as well as monitor the rights themselves. Competition would increase because these individual administrators of online rights would be competing with the traditional collecting societies. In furtherance of this theory, evidence of recent mergers between music publishers and collecting societies reflects the notion of growing competition via online music distribution. For instance, in 2006, EMI Music Publishing entered into a contract with the U.K. collecting society MCPS-PRS Alliance and the German collecting society GEMA, creating an Internet platform for the licensing of EMI's Anglo-American repertoire also known as CELAS.[44] This "bundling" of repertoires has proved to be greatly attractive for commercial users.[45]

The online music industry may also provide a solution to higher search costs in a market where collecting societies compete with one another. The IFPI Simulcasting Agreement,[46] which permits the granting of online rights licenses in the form of multi-repertoire licenses covering 31 countries to date (including 15 Member States), could be replicated for other types of licenses. The advantage of multi-repertoire licenses is that users have a "one-stop shop"—they can obtain a blanket license for all national territories and all repertoires of the collecting societies which participate in the network from any society in the network.[47]

III. CONCLUSION

We have dealt in this paper with collecting societies for works of music in the E.U. Several issues were raised about the market power, efficiency, and goals of collecting societies. Conclusively, E.C. competition law has dealt with collecting societies in three major areas: (i) relationships with commercial users of music; (ii) relationships with their members; and (iii) reciprocal relationships between collecting societies. The usefulness of the intervention of E.C. competition law has also been examined. Indeed, it can be maintained that there has been an increase in the freedom of choice for rights-holders in their negotiations with collecting societies, as well as in the user's freedom to negotiate. Whether the contribution of E.C. competition law has led to effective competition among the societies and economic efficiency is questionable. In light of the rapid growth of music distribution via the Internet, antitrust enforcement will perhaps prove a solution to this conundrum.

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[43] Katz, *supra* note 32.

[44] DREXL, *supra* note 7. *See* CELAS, http://www.celas.eu.

[45] DREXL, *supra* note 7, at 29.

[46] *See* Commission Decision 2003/300/EC, Relating to a Proceeding Under Article 81 of the E.C. Treaty and Article 53 of the EEA Agreement, 2003 O.J. (L107) 58, 68–82, ¶¶ 12, 14, 27, 29, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:107:0058:0084:EN:PDF.

[47] The Internet's intervention is also required in the payment of copyright. It is suggested that by "e-tagging" services provided, collecting societies can receive and provide records of use that are cheap and accurate. Monitoring use and infringement becomes easier and it is possible to contemplate offering terms for use that distinguish one work from another for users. Consumers would be able to choose individually. Payments would be attributed to particular authors efficiently and producers would realize more revenue. DREXL, *supra* note 7, at 28–29.