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Is There Life after Competition Law?
- Reflections on the CISAC and CELAS Cases

MIDEM – IAEL Legal Review – 27 January 2008

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Overview

- Why do we talk about this every year?
- The CISAC and CELAS cases
  - What are the issues?
- 2007 - Hubris and Nemesis
  - Failure of CISAC Settlement Proposal
  - Antitrust Complaint Against CELAS for Market Foreclosure
- 2008 - What to expect?

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What are the issues?

The CISAC Procedure [1]

- Refusal by major societies for a central license deal in 1999
  - Restrictions in Reciprocal Agreements among collecting societies cited as ground for refusal
- RTL filed complaint against GEMA in 2000
- Raised Art 81 argument on territorial restrictions
- GEMA and CISAC defended:
  - Collecting societies are not competitors
  - No restriction of competition
- In 2003-04, *Simulcast* and *Santiago* cases gave guidance on Commission position
- 2006: Statement of Objections in joined MusicChoice/RTL case
- 2007: “Article 9” Settlement Offer

Note 1: See generally 2007 IAEL Yearbook

CISAC - Summary of Commission Case

- Statement of Objections – 2006
  - Where society can monitor signal cross-border, Article 81 applies to reciprocal agreements (contrary to 1989 *Lucazeau* case law)
  - The network of agreements stifles competition
  - The restrictions placed on collecting societies are not "objectively necessary"
  - Membership restrictions remain in many cases removing incentives for migration of authors and non-exclusive representation

CISAC – A Legal Reciprocal System

- Initiative intended to foster competition among societies *for rights administration services!*
- One-stop shops covering the whole of Europe
- Central license would be a "bouquet" of national tariffs: *No race to the bottom on cost of rights*
- Central licensing would promote technological and economic efficiencies
  - This leads to more revenues for distribution to authors
  - Today a substantial part of licensing fees is spent on administration costs
- Such costs are "lost revenues" for authors and benefit no one
- Aim: A legal reciprocal licensing regime among collecting societies

"Option 3" and Disintegration of the Global Repertoire Licensing System

- The progeny of the 2005 Commission Recommendation on Online Licensing
  - Option 3: Rightholders withdraw from collecting society system and appoint a rights manager
  - Single repertoire licensing model
  - Rights are no longer part of the reciprocal licensing system
  - No global repertoire available.. Only bits and pieces..
- Option 3 leads to collapse of reciprocal agreements:
  - Rightholders migrate to large societies to achieve benefits of economies of scale, or
  - Large societies guarantee low admin deductions to powerful rightholders by managing their rights outside of the ordinary "solidarity" system – Is it a *free ride*?
  - "Small repertoires" will not be represented – pay to get carried?

CELAS

- CELAS is an implementation of this principle
  - Smaller societies lose access to repertoire (BUMA v. CELAS)
  - Market tips in favor of societies controlling “must have” repertoire
  - Allows certain powerful rightholders to extract more value at the expense of other rightholders?
  - Effective end of the solidarity system – Equal pay per play
  - An attempt to end national regulation of collective management?
- May work for certain limited music services, but not for general broadcasting and mass uses of broadcasting
  - Broadcasters cannot predict use of specific music in programming
  - Single repertoire licensing does not work for mass uses of music
  - Licensing will not be able to cover all performing rights
  - Who will bother to clear rights for non-essential repertoire?
  - “No pay” or “no play” for the smaller authors?

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2007 – Hubris and Nemesis

2007 – Hubris and Nemesis

- CISAC settlement proposals (Spring 07)
  - Proposals did not address stated Objections
  - Added new competition law violations
  - Attempted to solve many unrelated issues
  - Break-up of global repertoire was implied
  - Too many agendas; Overloaded the proposals
- Public consultation on settlement proposal (July)
  - Overwhelmingly negative response
  - Proposals created more problems than they resolved
  - Licensees all objected
  - Many proponents were unhappy (21 small societies)

Two bridges too far..

- On CISAC, EU went back to the drawing board
  - Commission reverted to the SO
  - No real sense that societies could agree on new proposal
  - Publishers could not be brought to the table in Art 9 procedure
  - If procedure is opened there must be a decision / failure to act
- BUMA v. CELAS forces the issues (Sep 07)
  - While trying to arrive at a better one-stop shop in CISAC, CELAS threatened disintegration of the reciprocal system
  - CELAS a threat to societies and licensees alike
  - Complaint and investigation; Negative reactions
  - What next?

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2008 – What to expect?

The CISAC and CELAS cases – Symptoms of the same malaise

- Both cases are about restructuring the market
- The Commission must take a decision in CISAC
  - On substance, EU is bound by the SO and case law
  - Too late for settlement?
  - After a decision, futures structures will have to comply
- CELAS – Commission investigation?
  - Foreclosure and market tipping
  - Is EMI repertoire essential for global repertoire?
  - Can one both be a collective management body and engage in individual licensing?
    - Can you be an agent for conflicting interests?
    - National regulation of collective management
    - Dominant licensor – Obligations under Article 82