Kluwer Copyright Blog

Spain: Competition and limitations on Collecting Societies safeguarding independence from users

Pablo Hernández · Tuesday, November 17th, 2015

Introduction

The SGAE case recently resolved by the Spanish Competition Authority ended in a settlement agreement, as we previously reported .

As we indicated in that article, this case did not just examine relations between the collecting society and users regarding the establishment of licensing terms and conditions. The initial analysis also tackled the complex issue of the society's links with users who become members of the collecting society, since they are rightholders, and then make intensive use of their musical repertoires in order to obtain the highest possible returns on their payments to the society.

Resolution by settlement agreement has largely enabled circumvention of this second issue, the extent to which the society can establish limitations in the marketplace to ensure that it operates independently of users and guarantee that the share-out of the society's revenue is not distorted.

This case serves to remind us of the principles that must govern that conflictive relationship between the collecting society and the user of the works who becomes a rightholder/member of the society, as well as the restrictions on freedom of contract that a collecting society may impose in order to safeguard copyright. We must point out that this issue was not resolved in this competition case, but it will surely come back to the table sooner or later.

The duty of collecting societies to participate in the market and case-law precedents

According to the Spanish Copyright Act, collecting societies must establish "*adequate provisions in their statutes to ensure administration that is free of influence on the part of users of their repertoire, and to avoid the giving of undue preference in the use of those works*" (previously Article 153.2, now 151.13 of the Spanish Copyright Act).

This provision is not without precedent. However, in the absence of an express legal provision, similar societies in other European countries have adopted internal provisions which prohibit members from granting rights to users in order to provoke the preferential use of their works to the detriment of creations from the society's other members.

In fact, some years ago, the European Commission examined the approval by the German society responsible for managing copyright in musical works, GEMA, of internal rules which forced its

members not to grant, either directly or indirectly, a percentage of their revenue to those who had been licensed by GEMA in order to favour use of their works (82/204/EEC; Official Journal of the European Union 8.4.82).

The reasons set out by the German society were summed up in a simple argument: members receiving a share in the society's revenue had to depend on the public success of the work, and in order to guarantee that principle, the society had to prevent certain members from reaching agreements with users, such as television broadcasters, which led to manipulation of the use of the works to the detriment of the remaining members.

With that objective in mind, the German society had prohibited its members from granting users or companies linked to them a share in the revenue deriving from their repertoires. In that regard, GEMA pointed out that:

"*There have always been authors and publishers who attempt to increase their share of royalties by influencing users and hence disregarding public taste, which in the long run should be the only yardstick for exploitation of a given work*" (para (21)).

Besides that initial argument, GEMA put forward another ground in favour of internal regulations. The society considered that if broadcasters received a share of royalties, their behaviour as programmers would obviously be compromised, since broadcasters, who benefit from the airing of their works, would unfairly favour those belonging to them, and the exploitation potential of the other works would be limited.

"*If this manipulation stems from contacts with a user, for instance a broadcasting company, the broadcasting company itself can virtually determine how much it pays to GEMA. The more frequently it plays the work given preferential treatment, the greater the amount of royalties to be paid by GEMA to its member for the said work and the greater the amount returned to the broadcasting company of the lump sum paid in royalties to GEMA.*" (para (22)).

Two private broadcasters countered those arguments by alleging that GEMA's rules limited their business activities and that nothing could preclude the collecting society's members from being able to reach agreements with users to promote the use of their works.

In light of these opposing positions, the Commission ultimately accepted GEMA's rules on the grounds that they satisfied an interest worthy of protection and they passed the proportionality test in respect of the measures applied.

"*At any rate, it cannot be regarded as inequitable for a collecting society to prevent such perversion of copyright law on behalf of its members who no longer have any opportunity in law of influencing the amount of royalty payments. The additional provision therefore merely safeguards the spirit of copyright law.*" (para (50)).

It should be noted that in the resolution of this case, the Commission followed the doctrine established in its previous decision of 2 June 1971 (71/224/EEC), in which it had recognised the existence of a conflict of interests between the user/member and the society, and thus the society's right to establish measures to safeguard its independence.

"*ceci ne met pas en cause le fait que la GEMA s´efforce, par ces deux dispositions, d´exclure toute influence des utilisatuers d´ouvres musicales –par le biais de l´affiliation et du conseil de*

surveillance- afin de prévenir tout conflit d´intérêts;"

Basically, the legitimate aim of safeguarding the society's independence and the fairness of the share-outs warrants the society's adoption of restrictive measures. However, given the society's dominant position, those measures must be indispensable, appropriate and as non-detrimental as possible in order to comply with the principle of proportionality:

"*la GEMA est soumise, en tant qu´entreprise détenant une position dominante, á l`interdiction de dépasser la mésure équitable, que pour éviter le risque d`un conflit d´intérêts, d´ailleurs admis par la Commission, elle doit choisir le moyen le moins restrictif*".

Resolution of the Spanish case

In the Spanish case, the collecting society had made access to certain discounts contingent upon broadcasters entering into two undertakings: a) limiting the use of musical works under their control; and b) observing the fact that authors should not grant more than 50% of the revenue generated by their work in the publishing contracts entered into with publishing companies that are subsidiaries of broadcasters.

Although the decision tiptoes around this last issue, it must be said that it initially merited special attention from the competition authorities insofar as the decision states that its origin derives from a provision of the International Confederation of Societies of Authors and Composers (CISAC) known as the "London rule for Continental-European Works", dating back to the 30s, and it refers to the inexistence of a public provision to enshrine this rule. In any event, this matter was not examined in detail by the Competition Authority.

The Spanish Authority, when determining whether SGAE was imposing abusive conditions, referred solely to the fact that the discount was attached to the operator limiting the number of musical works that it controlled, and so the Competition Authority's position remains unclear in respect of this traditional rule concerning publishing contracts.

In any event, what is most surprising about the decision are the deficient grounds offered in the analysis of the society's conduct. Although this is largely excused by the settlement agreement, it would have been highly advisable for the Competition Authority to have resorted to the analytical tools employed by the European Commission for such cases. Had it followed those established guidelines, it would not have been difficult to observe that the society held an 'interest' worthy of protection in the adoption of measures to safeguard its independence and guarantee a fair share-out, even more so considering that this is a legal requirement in Spain, as indicated previously. It is more difficult to apply the proportionality rule in order to check whether the conditions promoted by SGAE were indispensable, appropriate and not excessive in order to achieve that end.

The case does not shed any light on the actual situation that the collecting society was up against. At most, it can be inferred that broadcasters could obtain "returns" from the society itself for using works that they controlled, up to 33% of what they themselves had paid. This single piece of information does not enable us to elaborate in this regard or replace the Spanish Competition Authority's analysis. However, in principle, there is no reason for a society in a dominant position to be unable to, or even to have to, take measures that encourage users not to favour certain works with the sole aim of generating returns, with the consequent loss of revenue for the other members. Those measures will certainly have to be offered transparently and equally to all users, and the principle of proportionality should be respected.

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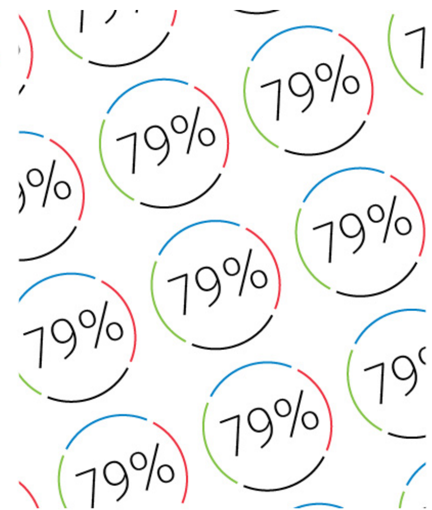

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