

Oral Hearing
Case n°COMP/38.698 - CISAC
Comments by Caroline van Weede on 16 June 2006

The ECCA Organisation

ECCA represents national and pan-European cable operators as well as their trade associations. Member companies and organizations across Europe cover more than 55 million households.

ECCA members distribute radio and television programmes via analogue but also increasingly via digital platforms, offer broadband internet access and voice telephony.

ECCA favours competition in general and also demands a level playing field for all players.

ECCA's interest in the collective management of copyright

Cable operators have to clear a large number of rights (including music rights) for the re-transmission of radio and TV programmes. Re-transmission rights are regulated under the SATCAB Directive and national legislation.

In general terms one can say that there are two situations:

A. Cable operators have to clear the retransmission right with a collecting society, especially for 3rd party rights – as well as with broadcasters –for their own rights;

Or

B. broadcasters can handle retransmission rights themselves and offer all rights included packages to the cable operator

Because of the first situation, where cable operators have to clear re transmission rights with a collecting society, ECCA members have gained some practical experience – unfortunately not particular a positive experience - with the current collective management system, which they would like to share with this audience.

We understand from the SO that this case focuses on musical rights. However I feel it is important to underline briefly that cable clearance of musical rights cannot be isolated from clearance of all other rights. Many different types of rights are involved in the re-transmission of a channel and together these rights constitute a package on its own. If the negotiation with a CS representing one particular type of right, e.g. musical rights, fails the programme as a whole cannot be distributed.

New Market Environment for Cable Operators

I would like to briefly describe in this presentation the new market environment for cable operators.

Four trends can be identified which all have an impact on copyright:

- the digitisation of content distribution : Traditionally, channel packages were only offered on cable operators own distribution network. With new technologies, distribution of channel packages can be done by cable operators outside their traditional services area.
- the emergence of IPTV
- the restructuring of the market in a new value chain
- and the internationalisation of cable distribution and the emergence of pan-European cable operators

These trends obviously have an impact on the way rights are cleared - and will be cleared - in the future. I would like to highlight for this Case the importance of the trend towards digitisation (multiplication in the number of channels and new technical means) together with the trend of internationalisation: For the distribution of channel packages, cable operators are no longer confined to their own networks. In addition, more channels, more "international" channels are available. Finally, with the emergence of cross border service offerings there will be an increase in the number of rights clearance transactions. This is particularly true if territorial licensing continues to be the rule. .

The consumer benefits potentially brought by the new market environment for cable cannot be fully realised because of the problems resulting from the lack of competition between the collecting societies

No incentive for CS to negotiate fair market oriented prices: cable has an interest to negotiate on the basis of a fair market value of the rights which need to be cleared. One channel has more value than another: national channels have less market value in markets outside of their home country (because of a different cultural and linguistic environment). The value of the third party rights used by those channels (e.g. music rights) should be derived from the value of the channel in each particular market.

Artificial fragmentation of the market according to technologies (analogue, digital and IP): Collecting societies consider each technical standard used by a cable operator for the retransmission of channels as a new communication for which the rights need to be cleared, even if the exploitation model remains unchanged.

Finally, and this is what is the most relevant to this Case, **the lack of multi territorial licensing.** With the emergence of pan-European cable operators and cross border service offerings the need for multi-territorial licensing has become more acute than before. Such central licensing will reduce the number of transactions necessary to clear the rights, it will increase legal certainty on the rights to be cleared and increase the speed at which services can be rolled out cross border.

I would like to give this audience some examples of restrictive practices:

ECCA believes that restrictive provisions in the reciprocal agreements further cement the Collecting Societies monopoly positions. Let me give you a few examples.

The BBC may clear the rights for BBC world and BBC prime distribution in the Dutch market but not for the other BBC channels because of the refusal of the relevant CISAC members in agreement with other collecting societies to clear the rights without reason. They also refuse that the cable operators appoint the BBC as their agent to negotiate with them.

GEMA refuses to grant broadcasters in Germany the retransmission rights for musical rights. Therefore broadcasters cannot serve as a one-stop-shop for cable operators when acquiring retransmission rights.

ARTE makes its channel available free of charge for the Dutch market, but third party rights need to be cleared by the cable operators. CISAC collecting societies in agreement with other collecting societies claim that their right have an autonomous value and refuse to negotiate a fair market price. Consequently, broad distribution of ARTE in the Netherlands is impossible.

Monitoring at a distance

Much has been said during this audience on monitoring and in particular monitoring at a distance. Monitoring the use of works by cable in different countries is not a problem because cable is merely re-transmitting the programmes of broadcasters. The latter have already available the data on the exploitation of the works. Broadcasters – as right users – who are located in another country than where cable distribution takes place also have a monitoring interest but they have resolved the issue.

DRM we heard from a number of speakers will also offer solutions.

In addition, the cable sector is witnessing a consolidation trend. There is now only one cable operator in large countries such as the UK and France competing with other technology platforms. To monitor their activity is not a problem. This consolidation trend can be observed elsewhere such as Norway and Austria where the subscribers of the two or three leading cable companies account for the vast majority of cable subscribers.

To the extent that local monitoring remains an argument for CS to maintain the territoriality clauses, alternative solutions are available as already mentioned before during this hearing. Given industry and internal market requirements, maintaining the territorial restrictions seems to be disproportionate in relation to the aim pursued.

Conclusion

We agree with the Commission's assessment in the SO and in particular believe that a multi territorial licensing system will benefit many stakeholders. Competition between CS is essential.

We believe that reciprocal agreements are not wrong as such,. They benefit both authors / right holders and commercial users such as ECCA members. However, because of the restrictive provisions the benefits fail to materialise.