

<p style="text-align: center;"><b>RATE SHOPPING IN THE EU FOR THE OFFLINE LICENSING OF RECORDS</b></p>
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1. For some time BIEM members have been noticing and reporting that certain record producers choose to set up some form of presence, *e.g.* mailbox office, in a country, without however in fact operating there, in order to benefit from a more advantageous licensing scheme than the one which would apply to the markets where their records are distributed. Such behaviour is highly detrimental to rights holders (1) and therefore needs to be addressed (2).

**1/ Some record producers' behaviour is hurting rights holders' interests**

2. The United Kingdom has in recent years attracted record producers eager to take advantage of the licensing scheme imposed by the 1 November 1991 Copyright Tribunal decision which provides for a royalty rate of 8.5% of PPD (Published Price to Dealers) – *i.e.* much lower than the BIEM-IFPI rate which prevails in the other European countries<sup>1</sup> - and which does not include any limitation on maximum number of tracks and minimum royalty provisions.
3. It appears that some producers are seeking to take advantage of the UK rate by creating an artificial link with the United Kingdom while effectively marketing their records in other European countries only.
4. Such is, for example, the case of French producer Jacky Boy Music (JBM) and its UK licensee, Habana.
5. JBM is a French record producer specialising in CD budget compilations, largely of back catalogue, sold in hypermarkets. It has an agreement with Habana, a company located in the United Kingdom, according to which JBM licenses to Habana the right to manufacture and distribute copies of the recordings in JBM's repertoire.
6. Habana requests a mechanical right license to manufacture and distribute copies of the musical works contained within those recordings from MCPS, the British authors' rights society, and then orders the manufacturers to press the sound carriers. It appears that the manufacturing of sound carriers is in fact ordered to a French pressing plant (the name appearing on the manufacturer's invoices and delivery note is not Habana but JBM) and the sound carriers are directly delivered by the pressing plant to the distribution platforms of the French hypermarkets to be sold in France, in boxes written in French.
7. A number of JBM's products, bearing the Habana name, have been made available to the French hypermarket, Carrefour, on an exclusive basis according to the press coverage and promotional material, demonstrating that there was never any intention that such products

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<sup>1</sup> 1 November 1991 to 30 September 1992: 9.504% of PPD; 1 October 1992 to 30 September 1997: 9.306%; 1 July 1997 onwards: 9.009%.

should be distributed in the United Kingdom. Furthermore, the average price of the CDs in question is €1 each or €15 for a box containing 20 CDs.

8. Therefore the JBM / Habana agreement appears to be being used for the express purpose of reducing JBM's royalty liability, enabling it to circumvent the higher royalty rates and minimum royalties charged by SDRM, the French authors' rights society which is part of the price.
9. It is estimated that, for the 2000-2006 period, the difference between the royalties collected by MCPS and the royalties that would have been collected had SDRM been the licensor was at least 4.2 million euros.

From October 2000 to June 2006, MCPS' total receipts were £ 415,985.02 (619 256 €). During this period, 205 products were licensed with the total number of units amounting to 4,188,353.

On the basis of this information for this period, SDRM's estimation of collection by application of SDRM documentation and minimum royalty is 4,787,000 € (*ie* + 670%).

10. The financial consequences of such behaviour are therefore far from being marginal, all the more so as the royalties are the rights holders' remuneration.
11. The same incentives bring some producers to create an artificial link with Ireland. Indeed, although the UK Copyright Tribunal decision is not binding in Ireland, in practical terms, efforts by MCPS Ireland to apply different terms and conditions than those prevailing in the United Kingdom have been resisted (the rate in Ireland is 8.5%PPD). Therefore Ireland is also used for rate shopping.
12. GEMA, the German authors' rights society, has encountered a similar situation to the "Habana situation". ODS Optical Disc Service, a German pressing plant, is part of a linked group of companies and/or persons which/who obtain licenses for its records in Ireland through Fonoteam Music Limited, its Irish subsidiary, and then manufactures and distributes its products on the German market.
13. These examples are all but random and innocuous. Many more were brought to BIEM's attention. They show how necessary it is to find a way to discourage record producers' sham constructions, which hurt rights holders' interests. What is at stake is the right holders' remuneration, the importance of which has been stressed on numerous occasions by the European Commission, and most recently in the Study of the Internal Market and Services Directorate General made public on 7 July 2005<sup>2</sup>.
14. Such action is all the more justified that it is recognized that the exercise of the freedoms guaranteed by the EC Treaty should not be used to circumvent national law<sup>3</sup>.

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<sup>2</sup> See also recital 66 of the IFPI "Simulcast" decision (Commission decision of 8 October 2002 relating to a proceeding under Article 81 of the EC treaty and Article 53 of the EEA Agreement – Case n° COMP/C2/38.014 – IFPI "Simulcasting", *OJUE* of 30 April 2003 L 107, p.58) : "*The Commission acknowledges the need for proper remuneration of right-holders*".

<sup>3</sup> See ECJ, 5 October 1994, *TV 10 SA v. Commissariaat voor de Media*, Case C-23/93, §§ 20-21:

*"(...) the Court has already held in connection with Article 59 of the Treaty on the freedom to provide services that a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or*

## 2/ The remedy proposed by BIEM

15. BIEM proposes, as a means to prevent this abuse of low tariff situations, to introduce the principle of applying the tariff (rate and PPD) in the country of destination and it now seeks the Commission's views on this proposal.
16. According to this principle, the remuneration is the remuneration applicable where the copyright protected works are exploited, *i.e.*, in the case in at hand, where the records are marketed.
17. BIEM is aware that this principle was accepted by the European Commission in the IFPI "Simulcast" decision of 8 October 2002, where "*the method to determine the appropriate royalty level was investigated thoroughly*"<sup>4</sup>.
18. BIEM notes that, in their notification, the notifying parties justified the need to apply the principle of the tariff in the country of destination on the grounds that the "*risk of proper remuneration of right-holders being endangered or weakened by means of 'forum-shopping' throughout jurisdictions offering the lowest possible remuneration level*" that would arise from the implementation of the principle of the country of origin (recital 63 of the decision).
19. Whatever reservations some stakeholders may have about the IFPI "Simulcast" decision itself, it cannot be denied that the tariff in the country of destination principle is very well suited also to the area of offline exploitation of rights.
20. In this respect, BIEM is also aware of other instances where the Commission has considered positively the principle of the tariff in the country of destination as, for example, in a case involving broadcasting from the United Kingdom to Sweden in Swedish where it has accepted that the British society should charge the rate applicable in Sweden<sup>5</sup>.
21. The principle of the country of destination could contribute to defeat any intention a society would have of creating an artificial link with a country to benefit from the more advantageous terms and conditions applicable in that country to the detriment of rights

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*principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State (see van Binsbergen, cited above).*

*It follows that a Member State may regard as domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State's territory, since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law, in this case those designed to ensure the pluralist and non-commercial content of the programmes".*

and Viviane Reding, "Media Regulation in the Convergence Era: Doing More with Less?", Speech at the TVWF Seminar held in Luxembourg, 30 May 2005.

<sup>4</sup> See Torben TOFT, « Collective Rights Management in the Online World – A Review of Recent Commission Initiatives », 8 June 2006.

<sup>5</sup> See Case COMP C2/38.071 "TV3/VIASAT". This case concerned the territory of destination approach which formed the basis of PRS' Policy for Licensing Broadcasts from the UK for the purposes of Direct to Home Reception outside the UK.

holders, *i.e.* any forum shopping by record producers detrimental to the interests of rights holders. The principle of the country of destination follows the right of the rights holders that they are entitled to set the rate for their territory.

22. The principle of the tariff in the country of destination would therefore help to ensure that rights holders receive fair compensation for the exploitation of their works. And BIEM would like to recall in this respect that the Commission has laid emphasis on the “*need to properly remunerate right-holders and to ensure distribution of royalties to right-holders*” and referred to the fact that “*Right-holders must be able to enjoy copyright and neighboring right protection wherever such rights are established, independent of national borders, modes of use during the whole term of their validity*”<sup>6</sup>.
23. The principle of the tariff in the country of destination would induce no negative effect on competition and would in no way prevent the free flow of goods within the Internal market. Indeed, all the records marketed in a given territory would be licensed on the basis of the same tariff with no disadvantage to any one record producer who would still be able to market his records wherever he wished on the basis of a single license.

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<sup>6</sup> See p. 25 and p. 32 of the Study of the Internal Market and Services Directorate General made public on 7 July 2005.