(Translated from the German)

Decision of the Arbitration Bureau in the GEMA/IFPI Germany case of 6/11/2000 concerning the 12% TV ticket

In this case: Significant stage victory for GEMA

Mr President,
Members of the Supervisory Board,

At the request of GEMA, the Arbitration Bureau of the German Patents and Trademarks Office has rejected the claim defended sedulously for years by IFPI Germany, that GEMA, like the other copyright management societies in Europe, should apply a discount to the normal rate of remuneration, especially for audio carriers which are advertised in the media. In the arbitration procedure in course since 1997, the Arbitration Bureau on 6.11.2000 took the decision enclosed in appendix, indicating that the granting of a 12% rebate of this type would result in an unfair level of remuneration for audio carriers in Germany.

At the next meeting of the Supervisory Board in December, we shall discuss in greater depth this decision taken by the Arbitration Bureau.

As of now, I should like to mention in detail the following essential points of this arbitration decision:

- GEMA has largely allowed for the interests of the audio carrier manufacturers and taken into consideration certain advertising efforts by establishing accounts for approximately 60% of releases 12 months after the start of the accounting period, and the remaining 40% after 18 months.

- The accounting method foreseen by IFPI, which involves applying a 12% deduction to audio carriers advertised on television, is an unacceptable attempt to make the authors share the operating and budget risks of the audio carrier manufacturers.

- Another point which is very decisive is that the rule proposed by IFPI Germany results in disadvantages and unfair treatment for the small manufacturing firms, because they could not develop and could therefore not benefit from the rebate.

The latter point was a key argument for the Arbitration Bureau of the German Patents and Trademarks Office, that was already emphasised by the Federal Cartel Office notably in its recommendation. For example, the Federal Office writes:

> “The granting of a 12% rebate in the field of audio carriers advertised on TV in this way constitutes a difference of treatment of two groups of audio carrier manufacturers. Both the parties (GEMA and IFPI Germany) agree to consider that certain audio carrier manufacturers regularly perform advertising on radio and television, while alongside them there is a group of small manufacturers which, in general, do no advertising.
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> For the Federal Cartel Office there are already doubts as to whether, in general, the interest of a 12% rebate should be taken seriously into consideration, because it is not obvious that the audio carrier manufacturers bear a significant commercial risk in advertising their products on radio and television”.

The Federal Cartel Office then examines the assertion of the audio carrier industry that there are normally weak sales with 40% of CD publications, and brings into question the aptness of their commercial strategy, concluding as follows:

> "The 12% rebate requested would simply constitute a hidden subsidy for certain audio carrier manufacturers by GEMA, which would provide the beneficiaries with a cost advantage in the market by comparison with the non-subsidised competitors".

The Arbitration Bureau of the German Patents and Trademarks Office fully agrees with the arguments put forward by the Federal Cartel Office:

> "That is why the Arbitration Bureau considers unapplicable an overall contractual agreement for a 12% reduction presented by the plaintiff ... The Arbitration Bureau does not share the viewpoint that due to market clout, different situations are treated unequally. On the contrary, there is a level playing field in the market for the audio carrier manufacturers. The market is not uniform, but differentiated by marketing and advertising measures taken by the various firms. However, differences in commercial behaviour do not justify making an objective distinction between firms. On the contrary, what is essential is that all the audio carrier manufacturing groups be classified as firms of the same type, because they are comparable in their economic function".

As a consequence the Arbitration Bureau rejected the request of IFPI Germany and declared acceptable and in conformance the current rule of 60% and 40% accounting performed by periods.

This decision handed down by the Arbitration Bureau is of particular value and importance within the framework of future disputes, not only with IFPI Germany but also with IFPI International, even though it can no doubt be expected that IFPI Germany will now bring the case before the Landgericht (High Court) and/or the Oberlandgericht (Court of Appeal) of Munich. But the Arbitration Bureau's decision has established a good starting point.

Munich, 6.11.2000

ARBITRATION BUREAU
by virtue of the Act on the protection of
copyright and neighbouring rights
of the German Patents and Trademarks Office
Sch-Urh 34/97

In the case

Plaintiff

Deutsche Landesgruppe der Internationalen Vereinigung der phonographischen Industrie e.V. (IFPI), represented by Mr Wolf D. Gramatke, President of the Management Committee
Greickstrasse 36
22529 Hamburg

Legal representatives

Legal firm of
Geyso & Dierkes
Postfach 90 21 65
21055 Hamburg

versus

Respondent

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), represented by Prof. Dr. Reinhold Kreile, member of the Management Committee and General Manager
Rosenheimerstrasse 11
81667 München

Legal representatives

Legal firm of
Weidenbach und Partner
Oberanger 43
80331 München

due to the conclusion of an overall agreement, by virtue of the Act on the protection of copyright and neighbouring rights, the Arbitration Bureau, consisting of the President LRD Schaegger and judges RD Portmann and RD Dr. Zeisberg, decree as follows in the written procedure of 30 October 2000 in conformance with section 14c, paragraph 1 UrhWG:

PROPOSAL FOR AN OUT-OF-COURT AGREEMENT

I.

The following overall agreement is proposed to the parties:

OVERALL AGREEMENT

for the period from 1st January 1997 to 30 June 2000

between

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), represented by Prof. Dr. Reinhold Kreile, member of the Management Committee,
Rosenheimerstrasse 11
81667 München

and

Deutsche Landesgruppe der IFPI e.V.
represented by Mr Wolf-Dieter Gramatke, member of the Management Committee
Greickstrasse 35
22529 Hamburg

the following agreement is signed for the IFPI members by virtue of section 12 of the law relating to the protection of copyright:

1. The current overall agreement of 25 October and 12 November 1990 concerning conventional audio carriers and audio Compact Discs (except for special products produced in the name and on behalf of third parties), together with the additional agreements and renewal agreements of 24 May and 6 June 1991, 6 and 18 February 1992, 4 May 1993, 25 May 1993, 7 December 1993, 4 May 1994, 29 September 1994, 3 August 1995 and the undated agreement signed for the period from 1st January 1996 to 31 December 1996, is extended up to 30 June 1997.

2. The aforementioned agreements are valid from 1st July 1997 to 30 June 2000 given additional agreement No. 7 of 30 June 1998 signed between BIEM (Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique) and IFPI (International Federation of the Phonographic Industry) to the 1975 Standard Contract for the Phonographic Industry and the adaptations for the minimum royalty rate in accordance with the report drawn up by GEMA and enclosed with this agreement in Appendix 1.

3. This overall agreement serves as a basis for the individual agreements to be signed between GEMA and the members of IFPI.

Hamburg, …… (date)

……

IFPI

Berlin, (date) ……

……

GEMA

II.

The plaintiff is condemned to pay the expenses. The parties shall pay for their own extra-legal costs.

Statement of reasons

I.

The plaintiff is the German branch of the International Federation of the Phonographic Industry (IFPI) to which belong virtually all the audio carrier manufacturers in the Federal Republic of Germany. The safeguarding of all the similar interests of its members, notably in the economic and legal areas, is among its statutory obligations.

The respondent is the "Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique". It administers as trustee the exclusive musical exploitation rights transferred to it by virtue of the derivative contracts for exploitation of works signed with German composers, lyric writers and music publishers and by virtue of the contracts signed with foreign management societies.

On 25 October and 12 November 1990, the parties signed an overall agreement in accordance with section 12 of the Act on the protection of rights relating to the manufacture and distribution of traditional audio carriers and audio Compact Discs (except for special products in the name and on behalf of third parties). This agreement is based on a framework agreement signed between "Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique" (BIEM) and the International Federation of the Phonographic Industry (IFPI) and was valid together with the additional agreements of 24 May and 6 June 1991, 7 December 1993 and a renewal agreement from 28 August 1996 to 31 December 1996.

The parties to the legal proceedings were unable to reach an agreement on an extension, from 1st January 1997, to the overall agreement concerning a method of remuneration for the granting of rights of use and the award of licences for the manufacture and distribution of traditional audio carriers and audio compact discs (except for special products produced in the name and on behalf of third parties), and an overall contractual agreement was accordingly not reached.

The plaintiff feels that in the disputed contractual method of remuneration for audio carriers advertised on television and radio, the respondent does not take into account the high costs of advertising and marketing in the electronic media incurred by the audio carrier manufacturers. It therefore receives an unfair remuneration for a licensing royalty of 9.009% on each unit. That is why the plaintiff demands the introduction of a TV ticket for which the text of the relevant Article V (18 ter) of the agreement remaining to be concluded could be worded as follows:

> “The remuneration for audio carriers advertised on electronic media (in particular TV, radio, cinema, networks) will be calculated and paid according to the relevant contract under the following conditions:
>
> a) A 12% deduction will be applied to the remuneration determined in accordance with paragraphs 3 to 5 and 23 of Article V.
>
> b) The manufacturer will be entitled to account for 50% of the releases determined pursuant to the preceding paragraphs (16 and 17) at the end of each accounting period within 12 months from the start of the accounting period of the first delivery. The manufacturer shall make an interim account of all releases up till then, namely audio carriers paid for and returned, and this for the end of the accounting period which coincides

with the expiry of a period of 18 months from the start of the accounting period of the first delivery. If the interim account shows a balance in favour of GEMA, it shall be settled.

Otherwise GEMA shall submit a credit note to the manufacturer.

Then proceed according to Article V (18). GEMA shall each time establish credit notes for surplus returns".

The required fixed deduction of 12% is justified by the sales figures and the proportion of marketing and advertising costs, as was demonstrated during the legal proceedings. Moreover, allowance must be made for the fact that only the audio carriers actually sold will be remunerated. That is why the respondent will have to establish a credit note at the end of the period of 18 months for the audio carriers for which the supplier has paid the respondent but which have not been actually sold during the period. Only this method of calculation will make it possible to reach a profitability threshold relative to the method of settlement of returns of the respondent, which justifies fair remuneration of the authors. The author can only claim an appropriate share of the profits after deducting all the expenses incurred.

That is why the plaintiff makes the following request:

1. Submit to the parties for the period ranging from 1st January 1997 to 30 June 2000 a draft overall agreement for the establishment of rights of use or the granting of licences for the manufacture and distribution of traditional audio carriers and audio compact discs (except for special products produced in the name and on behalf of third parties) based on the draft enclosed in appendix to this request.

2. Sentence the respondent to pay expenses including the costs incurred by the plaintiff in accordance with section 14 I of UrhSchiedsV.

The respondent requests that:

1. The current overall agreement concerning traditional audio carriers and audio Compact Discs (except for special products produced in the name and on behalf of third parties) of 25 October and 12 November 1990 together with the additional agreements and renewal agreements of 24 May and 6 June 1991, 6 and 18 February 1992, 4 May 1993, 25 May 1993, 7 December 1993, 4 May 1994, 29 September 1994, 3 August 1995 and the undated agreement signed for the period from 1st January 1996 to 31 December 1996 will be extended up to 30 June 1997.

2. From 1st July 1997 to 30 June 2000 the aforementioned agreements are valid given additional agreement No. 7 of 30 June 1998 to the 1975 Standard Contract for the Phonographic Industry and the adaptations for the minimum royalty rate in accordance with the report drawn up by GEMA and enclosed with this agreement in Appendix 1, signed between BIEM (Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique) and IFPI (International Federation of the Phonographic Industry).

3. The other points in the requests are rejected.

The respondent explains that an agreement concerning audio carriers advertised on television and radio exists between the parties in the overall agreement of 25 October and 12 November 1990 for traditional audio carriers and audio compact discs (except for special products produced in the name and on behalf of third parties), of which the latest version in force, dated 3 August 1995, is worded as follows:

> "The manufacturer is entitled to account for 60% of releases determined pursuant to the preceding paragraphs (16 and 17) at the end of each accounting period within 12 months from the start of the accounting period of the first delivery. The manufacturer shall account for the 40% balance, where applicable, at the end of the accounting period which coincides with the expiry of a period of 18 months from the start of the accounting period of the first delivery, taking into account returns not yet deducted".

Thus the interests of the audio carrier manufacturers are sufficiently taken into account. This regulation is in conformance with the BIEM/IFPI contract, Article V (25) of which provides that establishment of the relevant rights of use for audio carriers advertised on TV and the remuneration to be paid for this purpose come within the competence of the national management societies. A 12% reduction in the current rate of remuneration of 9.009% of the published price to dealers (PPD) and/or 7.4% of the retail selling price/public selling price could not be taken into account in view of the principle of appropriate profit sharing with the authors. Fair participation of the authors also opposes the method of settlement of returns desired by the plaintiff. The accounting method proposed by the plaintiff is an unacceptable attempt to make the author bear part of the operating and budget risk of the audio carrier manufacturer. But the pecuniary value represents the

basis for calculating the remuneration, which is determined by revenues and not by profit. Besides, the regulation proposed by the plaintiff results in disadvantages and unfair treatment for the small firms, which cannot practice large-scale advertising and can accordingly not benefit from the rebate.

The plaintiff replies that the proposed reduction in the remuneration is justified, because allowance must be made for the change in actual business conditions. According to the decision already taken by the Arbitration Bureau, the acquisition costs, of which advertising expenses form a part, must be taken into consideration in examining the request for fair remuneration, and the reduction can represent a deduction expressed as a percentage. There is no unfair treatment of small firms, because each firm will profit from this proposal.

The Arbitration Bureau scheduled a hearing for 24 July 1999. Reference is made to the minutes.

Moreover, the Federal Cartel Office was informed of the legal proceedings (§ 14c, paragraph 3 UrhWG) and asked to give a decision concerning the inequality of treatment alleged by the respondent due to the regulation demanded by the plaintiff. Reference is made to the reply of the Federal Cartel Office dated 25 October 1999 and the various positions expressed by the plaintiff on 30 December 1999 and by the respondent on 29 February 2000.

For other details, refer to the dossier and the appendices.

II.

Given the admissibility of the request for the conclusion of an overall agreement, the Arbitration Bureau will have to carry over the content of the overall contract into the proposed agreement.

1. The request for the conclusion of an overall agreement is admissible (§ 14, paragraph 1, No. 1b UrhWG). The negotiations held between the parties with a view to signing an overall agreement have failed.

   The capability of the plaintiff for signing an overall agreement is not disputed during the proceedings. The respondent, which is a management society, stated that it was prepared to sign an overall agreement (§ 1, paragraph 2 UrhSchiedsVO).

2. By virtue of § 14c, paragraph 1, sentence 1 UrhWG, the content of the overall agreement shall be applied by the management society. In making this proposal the Arbitration Bureau is guided by the following considerations:

   a) Legally valid overall agreements replace a unilaterally established tariff. For the tariffs agreed in the overall agreements it is therefore important to comply with the legal provisions indicated in § 13 UrhWG governing the tariff structure. These provisions are designed to ensure identical treatment for all comparable cases (cf. Nordemann, intellectual property law, 9th edition, § 13 UrhWG, Rd No. 1; Schricker, intellectual property law, 2nd edition, § 13 UrhWG, Rd No. 1). It is therefore important to comply with the principle of identical treatment in the price structure (Arbitration Bureau ZUM 1987, 187, 189). This requirement that firms of the same type be treated in the same way is based on § 20, paragraph 1

GBB and requires a decision by the Federal Cartel Office. After having been informed by the Arbitration Bureau (§ 14, paragraph 3 UrhWG), the Federal Office replied as follows:

"The plaintiff requests a 12% reduction in the remuneration to be paid to the respondent for the various audio carriers referred to. Alongside arguments relating to intellectual property, the respondent points out, on the other hand, that the desired reduction in the remuneration is forbidden to it for reasons relating to cartel law, because otherwise it would infringe the prohibition on discrimination in § 20, paragraph 1 GWB (corresponds to § 28, paragraph 2 GWB et seqq.). In addition to this, it is prohibited for firms having a dominant position in the market to treat differently, without a justified objective reason, other firms relative to firms of the same type.

1. First, it is beyond question that the respondent is concerned by this legal rule, because it is the only supplier proposing musical reproduction rights coming within the scope of application of the GWB. The granting of licences to the rights protected by the respondent for the reproduction and distribution of the repertoire entrusted to it by the authors also constitutes commercial relations which are normally accessible to firms of the same type, in this case the audio carrier manufacturers. Given this therefore characteristic function illustrated by case law in a rough examination, all audio carrier manufacturing groups should be considered as firms of the same type, irrespective of whether or not they perform advertising on radio and television. The decisive factor is that they are comparable through their corporate activity and their economic function (cf. Markert in Immenga/Mestmäcker, comments concerning GWB, 2nd edition, § 26 Rd No. 160, 162). Granting a 12% rebate for audio carriers advertised in this way constitutes a difference of treatment of two groups of audio carrier manufacturers. According to excerpts from the documents sent, both

parties agree unanimously that certain audio carrier manufacturers advertise regularly on radio and television, while alongside them is another group of small firms which, in general, do no advertising.

2. The question as to whether this difference of treatment occurs without any justified objective reason can be judged according to the constant case law of the Federal Court of Justice by taking into consideration the interests of the parties given the GWB guidelines on freedom of competition.

   Due to the fact that the respondent, to which the legal rule applies, does not want to make a difference of treatment on its own initiative, one must refer to the plaintiff's grounds for taking into consideration the interests. It refers to the fact that the audio carrier manufacturers which perform radio and television advertising incur high marketing and advertising costs and take a greater risk for sale of their products, which is why the respondent must take this into account through the desired reduction. To this are opposed the interests of those of the audio carrier manufacturers which, doing no advertising on radio and television, cannot benefit from the 12% reduction and are therefore disadvantaged on the cost level in the competition to win end users. The result is that there is no objective justification in the present case.

   There are already doubts on the question as to whether, in general, the interest of a 12% rebate should be taken seriously into consideration, because it is not obvious that the audio carrier manufacturers bear a significant commercial risk in advertising their products on radio and television. The respondent disputes the fact that audio carriers advertised on radio and television are exposed to the 40% “risk of failure” depicted by the plaintiff (sheets 107/108 of the dossier). The plaintiff then decided

not to demonstrate the grounds for this (sheets 128/129 of the dossier) and the Federal Cartel Office has no other information on this subject.
But even if one accepts the plaintiff's contention that 40% of audio carriers advertised on radio and television are a commercial failure, the resulting interest of a rebate granted to the audio carrier manufacturers which are affected by this would not exceed the interest of the other audio carrier manufacturers in very free competition with a view to winning end users, which is subject to incidents resulting from market clout. This results from the fact that the risk claimed by the plaintiff has already been taken into account in the overall calculation of the firms concerned, as shown by economic experience and its own statements, and that there is no room for a reduction in the remuneration by the respondent. On the one hand, the 40% of returns are sufficiently compensated for by sales, otherwise such a risky commercial strategy would not be justified from the firm's viewpoint over such a long period. On the other hand, the plaintiff recognises explicitly in its 1999 economic report that all manufacturing costs, hence also marketing and advertising costs, are in general taken into consideration in the overall calculations of an audio carrier manufacturer. In the economic report, the following is written on this subject: *“Although there are high advertising costs that have to be offset by sales, products in this segment are regularly positioned in the higher price levels”* (cf. Appendix 1 to the memorandum of 23 September 1999, page 7). Given this situation, the requested rebate constitutes, according to the respondent, a hidden subsidy for certain audio carrier manufacturers which would provide the beneficiaries with a cost advantage in the marketplace by comparison with the non-subsidised competitors. On the other hand, the competitiveness of the latter would be greatly affected by additional charges relative to their competitors (cf. order of the Federal Court of Justice concerning “tape recorders”, WuW/E BGH1089, 1073).

The plaintiff cites, unconvincingly, other cases in which the respondent is alleged to have treated audio carrier manufacturers differently, notably by granting rebates for launching CDs, co-authored discs and DCCs. To date, these cases have not been examined by the decision-making section of the Federal Cartel Office and contribute no new factors for the present judgement. In the present case, it is clear that no services of the audio carrier manufacturers concerned for the respondent, which could justify even the slightest difference of treatment, are cited alongside the request for a 12% rebate for audio carriers advertised on radio and television. Advertising of products not only in the written media but also in the electronic media has always been taken care of by the manufacturer.

The prohibition on discrimination according to cartel law does not impose on the dominant firm in the market the way in which it has to eliminate the difference of treatment. The respondent can theoretically rule out the accusation of discrimination due to the fact that the remuneration to be paid by the small audio carrier manufacturers is reduced to a level corresponding to that which has to be paid by manufacturers performing radio and television advertising for their products due to the requested 12% rule.

3. Finally, it should be emphasised that the respondent could also be liable to the accusation of discrimination from the authors which are its members, if it were to grant rebates for audio carriers advertised on radio and television, because all the authors will have to co-finance the requested subsidy through a reduction in their total licensing revenues, but each author is not represented in this form of audio carrier advertising.

That is why the Arbitration Bureau feels that the overall contractual agreement concerning the 12% rebate put forward by the plaintiff is not applicable. The explanations put forward by the plaintiff to counter the grounds for the decision of the Federal Office are not convincing. These are general objections, and not of a very serious nature. The Arbitration Bureau does not share the viewpoint that due to market clout, different situations are treated unequally. On the contrary, there is a level playing field in the market for the audio carrier manufacturers. The market is not uniform, but differentiated by marketing and advertising measures taken by the various firms. However, differences in commercial behaviour do not justify making an objective distinction between firms. On the contrary, what is decisive, and this was emphasised by the Federal Office, is that all the audio carrier manufacturing groups are firms of the same type, because they are comparable in their economic function.

Among the suggestions put forward, one must also consider unacceptable the request made by the plaintiff concerning the calculation of returns by credit note. A rule of this type would likewise apply only to the restricted circle of audio carriers advertised in the media.

That is why the proposal concerning the overall agreement, by which the current overall contractual provisions authorise fundamentally uniform charges for the audio carrier manufacturers, was decisive for the Arbitration Bureau.

III.

The plaintiff shall bear the administrative costs of the proceedings, which corresponds to successful proceedings. The rule of reimbursement of extra-legal expenses does not seem fair. In particular, there is no indication which would in this case justify sentencing to the payment of expenses for reasons of fairness (§ 14, paragraph 1, sentence 2 UrhSchiedsVO). The principle applied until now during these proceedings is thus retained, by which the parties themselves pay the requisite expenses.

IV.

The amount in dispute will be fixed separately after a statement by the parties.

V.

The parties are entitled to appeal against this proposed agreement within a period of 1 month.

The time limit for raising an objection shall begin to run from the day of receipt of notice. Any objection shall be sent to:

Arbitration Bureau, under the Act on the protection of copyright and neighbouring rights, with the German Patents and Trademarks Office, 80297 Munich

If no claim is put forward, the proposed agreement shall be considered as accepted.

VI.

The decision relating to expenses may be disputed separately by a request for a legal decision, even in the event of acceptance of the proposed agreement.

The request should be sent to Oberlandgericht München, 80333 München.

Schaeger unable to sign due to illness | Portmann | Dr. Zeisberg