

Main Facts and Arguments

The present submission responds to the complaint lodged by Universal Music International Limited (“the complainant”) against Bureau International des Sociétés Gérant les Droits d’Enregistrements et de Reproduction Mécanique (“BIEM”) and its relevant member societies.(Case COMP/C2/38.440).

I. Facts

1. The complaint contains numerous misrepresentations, distortions, incomplete statements or statements out of context.
2. Copyright management societies (“societies”) grant Record Producers licences for the mechanical reproduction of musical works. These licences relate to copyrights, which each society’s members (composers and lyricists [“creators”] and publishers) have assigned to the society and which together are called the “repertoire” of the society.
3. Successful and efficient licensing of mechanical rights rests on two pillars:
 - (1) BIEM and IFPI, the associations of the societies and of the recorded music industry, respectively, negotiate a Standard Agreement. The Standard Agreement is followed by societies in their licensing agreements with Record Producers.
 - (2) Each BIEM member society maintains with each other BIEM member society a reciprocal representation contract. By these contracts, which are similar, these societies exchange their repertoires. This puts each society in the position to grant licences for almost the entire world repertoire (“licence unique et globale”).

4. One of the main purposes of collective licensing is to ensure fair remuneration for the use of works of creative persons, most of whom do not have the necessary resources to license the use of their works on their own (that is: through individual arrangements). Collective licensing also enables each society to grant a "licence unique et globale" to every Record Producer on non-discriminatory conditions and on a non exclusive basis. Each Record Producer only needs to deal with a society ("one-stop-shop"), in lieu of multiple negotiations with each right owner. This is of particular importance to small Record Producers, for whom collective licensing is the only gateway to the market. In sum, collective licensing is a necessity for creators and users alike.

II. General Observations

5. The complainant does not challenge collective licensing as such. Rather, the complaint is a "fishing expedition", without a precise focus. It invites the Commission to support IFPI in its negotiations with BIEM in order to reach a lower royalty rate. The complaint is not backed by a "legitimate interest" within the meaning of Article 3 (2)(b) of Regulation No 17.
6. The complainant invites the Commission to act as a price regulator. As a competition authority the Commission only examines whether there has been an infringement of the rules on competition.
7. There is no Community interest to investigate the complaint. The Court of Justice and the Commission have recognized the benefits of collective licensing. Collective licensing is self-regulatory on the basis of negotiations between the two associations BIEM and IFPI. If there is a reason for examination (which we believe there is not) then the questions raised in the complaint can be adequately dealt with by national authorities and Courts, in line with the Commission's policy on co-operation with national authorities and Courts.

III. Article 81 (1) EC

8. The complaint does not demonstrate a *prima facie* infringement of Article 81 (1) EC. The BIEM statutes are covered by the Commission's comfort letter dated 4 December 2000 (Case COMP/36.941). This comfort letter was issued on the basis of knowledge of the full facts, including the last version of the Standard Agreement, which BIEM brought to the attention of the Commission.

IV. Article 82 EC

1. Burden of Proof

9. The burden was on the complainant to provide evidence for a *prima facie* case of an "abuse", and, in particular, of "unfairness" within the meaning of Article 82 (a) EC. The complainant has failed to do so.

2. No "Imposition" within the Meaning of Article 82 (a) EC

10. BIEM does not "impose" conditions within the meaning of Article 82 (a) EC. The major Record Producers, represented by IFPI, have superior bargaining power. The fact that the first negotiation meeting has not led to a result as regards a new Standard Agreement does not mean that the complainant is faced with an "imposition".

3. Acceptance of the Points Complained of as Fair

11. Freedom of contract, which is the basis of the Standard Agreement, must not be lightly discarded through the application of competition law. By concluding the 1998 version of the Standard Agreement, IFPI and the Record Producers have accepted that the four points invoked by the complainant (standard rate, deductions, minimum rate, maximum track numbers – “the Four Points”) are fair.

3. No Obligation of Creators to Share Record Producers’ Risks

12. Creators have already been forced to accept very significant deductions from their royalty income (flat deductions for packaging and for discounts). It is not an “abuse” for creators to refuse further deductions. In particular, it is not an “abuse” to refuse deductions which would depend on non transparent factors outside the control of creators (such as the majors’ discount policy, credit risks, cost-shifting-discounts and other commercial decisions of the Record Producers). These should not be burdened on the creators. The complainant insinuates that creators should only have a share in “money” that Record Producers actually receive. However, the creators are only suppliers (namely of copyright licences). They are not the Record Producers’ joint-venturers. BIEM has made it clear that a new round of negotiations of the Standard Agreement is not automatically a reason for further concessions on its part. BIEM also has stated that it does not accept that each discount should be taken into recognition for the purposes of royalty calculation.

4. No Disproportion or Excessive Royalty Disparity

13. The complainant has not shown an “abuse” in the form of disproportionate royalties or in the form of excessive royalty disparities. These two criteria must be applied with great restraint, given the recognized benefits of collective licensing, the

superior bargaining power of the Record Producers and the fact that the complaint is directed against an agreement concluded between two associations.

14. In the present case, the criterion of “disproportion” is inapplicable as it is impossible to determine the cost of the creation of a work of the imagination such as a musical work.
15. The complainant has not shown excessive royalty disparities. Firstly, following paragraph 38 of the Court’s judgment in *Tournier*¹, only royalty disparities within the Common Market may be taken into account to establish an “abuse”. However, the complainant only cites royalties from third countries. Secondly, even if, contrary to the *Tournier* judgment, one were to look at royalties in third countries, the complainant has failed to prove that its comparisons are based on a homogenous (consistent) basis. Thirdly, even taken at their numeric “face value” (which we contest), the royalty disparities invoked by the complainant are not “appreciably high” within the meaning of case law under Article 82 EC.
16. The complainant advocates a worldwide “race to the bottom”, irrespective of Community policies such as fair remuneration of creators or the protection of intellectual property and culture.

5. No Effect on Consumer Welfare

17. There is no correlation between royalties and consumer prices. The final price of records is influenced by many factors other than royalties before they reach the market. And in fact the consumer price is set by the retailer and not by the Producer.

¹ Case 395/97, *Ministère Public v. Tournier* [1989] ECR 2521.

6. The Four Points

a) The Necessity to Protect Intellectual Property and Culture

18. In assessing whether application of the Four Points is an “abuse”, due account must be taken of the creators’ copyrights, which are protected by the Community legal framework. Pursuant to Article 151 (4) EC, the Commission must also take account of cultural aspects and of the promotion of cultural diversity.

b) No Sufficient Proof

19. The complainant has only presented vague generalities and feelings, but no precise economic proof as to why it considers the application of the Four Points as an “abuse”.

c) The Standard Royalty

20. The standard royalties are not “unfair”. They are calculated on the basis of the list price of records, called the Published Price to Dealers (“PPD”). BIEM and IFPI have adopted this calculation basis at the request of the Commission. The complainant at one point admits that it does not challenge this basis. The PPD ensures that (1) auditing of sales of records, which societies must carry out, remains practicable, and (2) creators’ income does not depend on non-transparent transactions between Record Producers and retailers (see point 12 above). The standard percentage rate (11 % of the PPD) has been negotiated between BIEM and IFPI according to freedom of contract. The complainant has failed to show that the rate is “unfair” especially as it was accepted in 1998. BIEM, for its part, finds that the packaging deduction is unfair because it is disproportionate to the actual cost of packaging.

d) Deductions

21. It is not “unfair” for creators to refuse additional deductions from their royalties, e.g. deductions which would follow the Record Producers’ commercial policies like an analogous wage. Creators have already been forced to accept very significant deductions for packaging and for discounts. They have a right to refuse to sell their work at any price.

e) Minima and “Maximum Track Numbers”

22. Minimum royalties and maximum track numbers are not “unfair”. Both ensure that the creator receives a minimum remuneration (similar to a minimum wage), whatever the commercial or technical conditions may be on which Record Producers mechanically reproduce the creator’s work and sell the ensuing records.
23. The Standard Agreement provides for a normal minimum royalty, and for a still lower “budget minimum royalty”, used for very cheap re-releases of records. Both are calculated on the basis of a reference price, which is the PPD most generally practiced in the relevant country. This reference price is fixed by way of agreement between the relevant society and the relevant national group of IFPI. Minimum royalties ensure a minimum income to creators, for example where Record Producers have set the PPD at an extremely low level.
24. The provisions on “maximum track numbers”, which the Standard Agreement sets out, do not prevent Record Producers from manufacturing any format of records. They only provide for a proportional increase of royalties to the extent that a record exceeds a certain playing time or a certain number of works. They effectively

provide for a guaranteed income per work per record sold. The precise thresholds, which the Standard Agreement sets out, are tailored to market standards.

25. Both minimum royalties and the provisions on maximum track numbers result from an agreement between the two associations BIEM and IFPI and are negotiated according to the freedom of contract. This fact, the intrinsic fairness of the two devices (explained above) and their adaptation to marketing needs suggest that they should not be considered as an “abuse” within the meaning of Article 82 EC.

6. The Consequences of the Complainant’s View

26. If the complainant’s view were upheld, collective licensing would stand to become unattractive to creators for lack of fair remuneration. The BIEM system, earmarked by the Standard Agreement and the network of reciprocal representation contracts, would begin to erode, and with it the “licence unique et globale”. Societies might still grant licences, but the conditions might be different from Member State to Member State and from repertoire to repertoire, to the detriment of the internal market principle set out in Article 14 (2) EC.

7. Conclusion

27. There is no *prima facie* case of an infringement. In our view, no investigation is warranted, and the complaint should be rejected without further action.