Collecting societies – not yet "six feet under"

A brief review of the international symposium "Digital Rights Management: The End of Collecting Societies?" at the University of Lucerne, Switzerland, June 24 and 25, 2004

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Abstract: Despite ubiquitous digitisation and the advent of Digital Rights Management Systems, it seems that collecting societies are not quite yet "six feet under". Even in a world of rapid technological developments collecting societies will keep providing services to authors, users and the public facilitating the management of rights and performing additionally certain important social and cultural functions. However, agreeing on the future of collecting societies and on the particular design of both individual and collective rights administration is not an easy task and the opinions of the major stakeholders are diverse and often conflicting.

Keywords: Collecting societies, cultural diversity, symposium, Switzerland

Introduction

The moment for the symposium was well chosen – not only because visiting Switzerland in early summer is most charming, but mainly due to the fact that a forum discussing the future of individual and collective management of authors' rights was genuinely needed in the face of intensified digitisation and the advent of Digital Right Management systems (DRMs). Responding to that need, as part of their general activities in communications and copyright law, the research centre i-call of the University of Lucerne Faculty of Law, organised in cooperation with the Swiss Federal Institute of Intellectual Property and with the support of the Mercator Foundation an international symposium on this highly controversial topic under the charged title "Digital Rights Management: The End of Collecting Societies?".

The reason for the controversies in the field and for putting forward the above question is at least twofold. On the one hand, DRM systems provide a technological infrastructure that can be used for a multiplicity of purposes, ranging from clearing rights and securing payments to enforcement of those rights. These technological means that could provide business models with low transaction costs and if deployed extensively ultimately render the existing remuneration schemes obsolete, interfere directly with the established systems of rights management and create a whole new reality. Considering the widespread digitisation and notably the pervasive nature of the Internet as information environment, "the legal framework for the protection of copyright and related rights … has to match these realities", as pointed out

by the European Commission in a recent Communication.

On the other hand, the existing system of collective rights management, which was in the focal point of the symposium's discussions, has admittedly come to play a special role in society. Besides facilitating the establishment of unified methods for licensing, collecting and dispersing royalties, over the time, collecting societies have indeed evolved to perform various *social* and *cultural* functions. Moreover, one should not forget that the very intrinsic objective of copyright protection, beyond the economic rationales, is to promote creativity and thus cultural diversity and cultural identity. DRMs cannot (yet) provide solutions to these general social necessities and indeed might seriously hamper them considering the possibilities of control of access that DRMs offer and the inherent content industry concentration.

The symposium programme

The programme was structured in two parts – stock-taking and analytical keynote speeches with following formal discussion on the one hand, and two podium discussions, on the other. Against the background of the above-outlined problematic, the speakers were organised into three thematic modules that elaborated respectively on the *social and cultural policy, human rights* and *competition law* aspects of "rights' management" trying to capture all its implications in a technologically dynamic environment. The faculty challenged with this intricate task comprised:

- Prof. Daniel Gervais, University of Ottawa,
- Prof. Adolf Dietz, Max Planck Institute for Intellectual Property, Competition and Tax Law,
- Dr. Alfred Meyer, SUISA (Swiss Society for the Rights of Authors of Musical Works),
- Prof. Christoph Beat Graber, University of Lucerne,
- Prof. Hugh Hansen, Fordham School of Law,
- Dr. Dorothea Senn, King's College, and
- John Palfrey, Berkman Center for Internet and Society, Harvard Law School.

The symposium discussions

If one thing has become clear and all of the speakers – from the "copy*right*" and the "copy*left*" agreed on, if not with the same level of enthusiasm, is that collecting societies are still needed and that they will have to change in order to live up to the challenges of the moment and still be meaningful and efficient in the future. Prof. Gervais particularly stressed this point in his keynote-speech. While struggling with fragmentation of standards, laws and markets collectives will have to adapt their business practices if they want to survive. Their role would then in his view not diminish but rather *change*. In any future business model, be it only a DRM-based or one involving collectives as well, some forms of centralisation and standardisation would be key to an efficient trade in digital goods. Due to their governmental supervision, collecting societies might provide for more transparency than a DRM scenario and by employing centralised licensing, often referred to as a one-stop-shop, the efficiency might significantly improve. Prof. Dietz agreed on the need for change in the rights' administration mechanisms but called for protection of cultural diversity within the changed design. In that regard, he emphasised that the creation of one-stop-shops should only be permissible under the condition that tasks concerning cultural aspects are left to the individual national collectives.

The second thematic module looked at DRM from the unusual and rarely discussed perspective of human rights. Prof. Graber pleaded for using freedom of expression and information as essential point of reference for decision making (by the legislator rather than courts!) and for the further shaping of copyright law in the midst of the ongoing technological (r)evolution. As a foundation of any democratic society, freedom of expression and information is to be the basis for setting limits and granting exceptions of copyright both in the analogue world and in the digital era. As for the fate of DRM and collectives he argued in favour of finding synergies between the two systems and for safeguarding

the important role of collecting societies as promoters of cultural diversity and cultural identity. Prof. Hansen responded by dismissing the claim for enhanced significance of freedom of expression and information and defended from a "copyright" standpoint the need for maximal protection of authors' rights.

As usual when discussing copyright and digitisation, it is easier to focus on how the law should be rather than how it is. It was thus very refreshing to follow the DRM-focused elaboration of Dorothea Senn on the *Microsoft* (MSFT) decision, taken by the European Commission early this summer. She saw the case in issue as an example of DRM-market dominance with possible spill-over effects on other markets due to the inherent network externalities in the software market and the lack of interoperability among DRMs. With this first decision and the upcoming judgement on the MSFT appeal, the competition law complications of DRM have made it to the courts and one can be curious about the stance of the Community Courts on the "Microsoft" case in the light of the *Magill* and *IMS-Health* decisions on the "essential facilities" doctrine. The fact that the European Commission is well aware of the risk of market dominance in the DRM solutions market has been recently proven again by the opening on August 25 of an in-depth investigation into the proposed joint acquisition of ContentGuard – a company that is active in the development and licensing of standards for the DRM-market – by Microsoft and Time Warner. Building upon Senn's legal analysis of DRMs, John Palfrey of the Berkman Center for Internet and Society wrapped up the first day's discussions stressing the need for a more open approach towards copyright and access and ultimately, a balance between public values and individual interests.

The podium discussions during the second symposium's day were more practice-oriented and addressed the problems posed by the implementation of the EU Digital Copyright Directive and the two WIPO Internet Agreements. Within the latter framework, several copyright lawmakers including Hélène de Montluc, Vittorio Ragonesi and Mihály Ficsor, examined the concrete national situations and agreed – this time with almost equal level of enthusiasm – that easy, fast and fairly cheap lawful access to digital content is still lacking (most notably on the Internet). The representatives of the music and film industries were, nevertheless, quite as firmly fixed as the Alps surrounding the very conference venue in their pro-copyright position coming up once again with the slightly worn-out argument of "the industry is losing money…". Insufficient willingness for compromise was shown in that sense and the bargaining will surely continue.

Bottom line

In their present status of technological sophistication and implementation, DRMs do not present a policy solution to ensure the appropriate balance between the interests involved, be they the interests of the authors, other right-holders or those of the users. DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the legislature. Although they might facilitate to an extent the management of rights in a digital networked environment, they do not have the potential to cater for the cultural and social implications of rights' administration and might indeed constrain cultural diversity. In that sense, it seems that collective societies are not rendered obsolete by the advent of DRMs but will most certainly have to adapt.

Sources

- European Commission Communication, The Management of Copyright and Related Rights in the Internal Market, COM(2004) 261final, 16.04.2004.
- Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty, Case COMP/C-3/37.792 Microsoft, C(2004) 900 final.
- European Commission Press Release, Commission opens in-depth investigation into Microsoft/Time Warner/ContentGuard JV, IP/04/1044, 25.08.2004.

► For a full collection of the conference contributions, see Graber/Govoni/Girsberger/Nenova (eds.), Digital Rights Management: The End of Collecting Societies?, Berne: Staempfli, 2005 (forthcoming).

About the Authors: Authors are members of i-call. i-call, founded in 2002, stands for International Communications and Art Law, Lucerne. It represents a research centre of the Faculty of Law of the University of Lucerne formed under the Chair of Prof. Dr. Christoph Beat Graber. i-call's field of research is focused on the interplay between technological, economic, cultural and particularly legal developments of international markets for media and communications that occurred in the last couple of decades and are still unfolding. Contact: christoph-beat.graber@unilu.ch / tihomira.nenova@unilu.ch / michael.girsberger@unilu.ch / http://www.i-call.ch.

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Masthead

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