

The Monopoly beneath

Support systems and how they hinder alternative licensing in music

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Focusing on the German situation, this paper investigates how systems built around the long established collective rights management monopolies can to some extent perpetuate these monopolies, even if recent EU initiatives to foster competition in this market should eventually lead to substantial copyright law reform and open markets of collective rights management. The example supporting structure covered by the paper is the reporting system maintained by the German collecting society of composers and lyrics writers, GEMA. The way this system is integrated into the internal workflows of radio broadcasters would make implementation of any competing system prohibitively costly for the broadcasters. At the same time, the GEMA reporting system itself is not open to be used in administering third party content outside the repertoire of the collecting societies organised in the CISAG. Therefore, the broadcasters cannot pay for non-society (e.g. freely licensed) content in an effective way and either treat this content as if it were part of the GEMA repertoire or simply stick to playing actual society content only. This indirectly prolongs the imperative for artists to join or stay in the GEMA, because otherwise they get little airplay time, if any at all. To address this effect, law makers across Europe should either require collecting societies to open their reporting systems for third party content or transfer these systems into the hands of independent bodies.

This paper looks at the detrimental effects that monopolies of collective rights management can have on alternative licensing in music, even after the monopoly-constituent rules have been abolished or will be abolished in the near future. The approach to collective rights management in music prevalent in continental Europe is one of singular national collecting societies. It reflects the traditional territoriality of copyright law and is based on statutory provisions in the respective national copyright codes, favouring the formation of only one collecting society per type of works, granting the societies a substantial ease of proof of representation and making certain channels of remuneration society-exclusive. This endows most of the collecting societies with a quasi-public status, even though they in fact are organised as private corporations. This privileged status is usually counterweighted by certain obligations to contract and a regime of supervision by a state authority, regulating the course of business and the membership rules of the collecting societies.

Membership to the national collecting societies in Europe is today – with few exceptions – still constructed around very strict exclusivity agreements, meaning that membership is subject to a transfer of exclusive usage rights concerning all previous and prospective works of the joining artist. In conjunction with the aforementioned statutory provisions, these exclusivity contracts formed a setup that for several decades established the societies firmly as monopolists. It was only after the emergence of the EU Common Market and the rise of online media, which together lead to a considerable pressure on the collecting societies, that the exclusivity paradigm was softened to some extent, so that today every GEMA member can withdraw certain rights from the spectrum GEMA represents for him or her. Nevertheless, the rights remaining with GEMA must still be transferred exclusively. One of the positive results of the society's monopolist status was, that they became one-stop-shops for all usage rights and thus usage types around music, from airplay to playback in clubs to playback at other events to public live performance etc. This was resource saving for prospective user of the repertoire, gave the societies considerable bargaining power and helped them to negotiate better deals on behalf of their members. As a side effect, private and public

users alike had little choice but to also comply with the administrative processes introduced by the collecting societies around their repertoire. On the one hand this led to highly effective workflows of royalty collection, on the other hand, it also made membership de facto an imperative for any artist that wanted to generate an income from music.

For about as long as the analogue age lasted, this traditional European setup of collecting societies had only little down sides. The only recurring complaints about the system then related to excessive bureaucracy, a certain lack of transparency in large collecting societies and a partially unfair distribution of revenue amongst the members. In Germany, however, the first cracks in this traditional setup began to show as early as 1997. In that year the Supreme Court of Germany held, that to put a music file online for download purposes constituted an as yet unknown kind of use. As it were then, the German copyright code (Urheberrechtsgesetz) did not allow for in-advance transfer of usage rights for unknown uses. In result, from one day to the other the German collecting societies for musical works, GEMA and GVL (the latter representing performing artists), did not any longer represent the full spectrum of usage rights of their members.

In theory that opened a path to try out new ways of music distribution and revenue generation via the internet, outside the traditional system. Yet, musicians at the time did not make use of these possibilities, nor did the non-major labels, probably due to the fact that at the time media distribution in digital form over the net was still a very new phenomenon and not backed by properly adapted business models. In addition to that, until the turn of the millennium standard licensing for open access was established around software only. The collecting societies remained in a dominant position, although they had to re-negotiate individual contracts on the newly devised online uses. Where this failed, they lost parts of the rights spectrum to specialised distributors for good. The next significant change to the collecting system happened from the year 2000 onwards with the rise of harddisk-based digital audio players and online music shops. Although levies on blank media still increased during that period, the previous loss of the online rights of their repertoire became perceptible for the GEMA. Later, with streaming becoming more common through growing bandwidth and processor power, also airplay revenues came under pressure. The European collecting societies addressed the cross-border character of the new online marketplace for music with reliance on the very strict territoriality clauses, regulating that artists could only become members of the respective national society, and by entering into the so-called Santiago Agreement of 2000, allowing any member society to sell usage rights on behalf and from the repertoire of any other member society, but only within their own territory. This met severe concerns by the EU Commission, leading to a warning to the societies in 2004 about the agreement possibly violating EU competition law. Through a number of stages the conflict led to decisions by the EU Commission in 2008, deeming the territoriality rules that 24 European societies had established under the Santiago Agreement as being in violation of anti-trust laws.

However, and even though further initiatives to weaken the national monopolies of collecting societies are underway (on both EU and national level in several member states), in Germany the monopolistic status of the GEMA survived all these developments so far. The reasons are manifold, but two things appear to be most influential in this. Firstly, the pivotal legal provision, giving certain collecting societies privileges of proof or representation, remains unchanged until this day. It is contained in the first sentence of section 13c subsection 2 of the copyright representation code (Urheberrechtswahrnehmungsgesetz) and says “(2) *If a collecting society is asserting a claim for compensation under sections 27, 54 subsection 1, 54c subsection 1, 77 subsection 2, 85 subsection 4, 94 subsection 4 or 137l subsection 5 of the copyright code, it is presumed that it in fact represents all persons entitled.*”. This rebuttable presumption reverses the burden of proof in favor of the collecting society – at least as long as this society is the only one accredited to make claims of the kind in question. This so called “GEMA presumption” is the key asset of GEMA's collection procedure, because it quite dramatically reduces the administrative costs of collection. Combined

with the prerequisites of collecting society accreditation, namely the prerequisite of representing a market relevant share of artists, the presumption has a stabilising effect on monopolistic structures. It is hardly possible to establish a second collecting society in any given field, because the already established society has a considerable advantage, following from the presumption, and is thus able to offer much more attractive conditions to its members. To some extent this was quite the intention when the named section was introduced, as the overall amount of fees collectable for a given kind of usage of copyrighted material is regarded as being relatively fixed, which means that any additional society collecting for that kind of usage only means additional administrative costs lowering the overall income of the authors. Whether this view is actually correct is not the topic of this paper, but it is unlikely that any correct assessment on the national scale is just as well correct for the transnational online market.

This paper rather wants to draw attention to the second reason behind the longevity of the GEMA quasi-monopoly, which lies in the soft law and in the supportive processes around the traditional GEMA system. Both the habits of people administering the use of music behind the scenes as well as the technological workflows governing the use of music in mainstream mass media in Germany largely remained the same, even though GEMA no longer represents the world repertoire of music. These related mechanisms have the potential to effectively curb all political efforts to establish more competition in the online rights management market. The most prominent of these mechanisms concerns radio airplay, which continues to be an important factor for market entry of music newcomers. Although new and even automated recommendation schemes for alternative and emerging music styles and artists have developed on the web, access for example to the pop music market still largely relies on the heavy rotation of radio stations. At the same time, radio stations – regardless of whether they are public broadcasters or privately owned – are under a permanent pressure to keep administrative costs low. Therefore, they in turn rely on automated or semi-automated systems to report their playlists to the rights holders. In some cases the airplay related royalties are even paid in a flat-rate manner.

The reporting systems as well as the flat-rate payments are, as a relic from the analogue age, managed by the national collecting societies. And even though these societies are legally entitled to only represent the repertoire of the societies organised in CISAG, backed by constructs like the GEMA presumption they in fact collect bulk amounts of royalties regardless of what is played on the air. The royalties payable by the broadcasters are calculated simply by referring to the number of songs played and an estimate number of listeners. A distinction between types of songs is only made regarding very recently published material, for which a higher price applies, but not in relation to whether the respective artist is actually member of a collecting society or to which license actually might be governing a song. The broadcasters on the other hand are practically in no position to report playlists to rights holders outside of this established collecting society system, simply because to implement more than one reporting workflow multiplies the administrative costs related to reporting. As a result, freely licensed musical content cannot participate in airplay revenue. If this kind of music happens to be played at all, it is either unreflectedly counted as belonging to the default category of general collecting society content (i.e. is then reported as such and paid for as such as part of bulk by-number payments) or is not reported at all. In both cases the artist is deprived of royalties that he or she is entitled to receive, at least as far as the applicable license reserves commercial rights, as f.e. Creative Commons NC licenses do. More often, however, radio executives refrain from having this kind of content played on the air, because they are in doubt about how to handle the royalties and/or cannot afford to integrate additional reporting into their workflows. There is conclusive evidence that this is an important reason for music from the alternative licensing part of the spectrum not being played on public or private radio. Artists who choose to license their music themselves, f.e. through their own websites or aggregators like Magnatune and Jamendo, and therefore cannot at the same time be members of GEMA or other European collecting societies demanding exclusive rights transfer, are in the end effectively

excluded from airplay altogether. From an economical point of view, the reporting structures form a natural monopoly as well as a full-fledged market entry barrier.

It follows from these circumstances that the reporting systems in place, as part of the mechanisms supporting the traditional collecting societies system, work towards a de-facto perpetuation of the societies' monopoly on the airplay market, which has consequences for the whole music consumption circles because airplay oftentimes only functions as a stepping stone. This will not change unless specifically addressed by law reform or until the relevance of airplay will possibly decrease by itself at some point in the future. It is therefore advisable, in order to reach a functioning competition around online music (and the way it is licensed), that the airplay reporting systems are also dealt with in the legislative initiatives against prevalent monopolies. There are several possible solutions at hand. Not all of them would require the GEMA presumption to be abolished by changing section 13c of the copyright representation code. Firstly it could be required of the already established collecting societies to open up their reporting systems for use by other players in the market. This would surely be the most cost-effective way to go ahead, but would place the whole financial burden of correctly allocating royalties to the third party rights holders on GEMA, that then would need to be counterweighted by compensation agreements with a large number of third parties. Another solution would be to take reporting out of GEMA's hands entirely and place it under control of a neutral regulating agency. In Germany, the Federal Net Agency (Bundesnetzagentur) comes to mind, which already regulates other shared networks, from telecommunications to public railway systems. The third solution would be something of a compromise between the other two, and would entail running the reporting system strictly privately by a cooperative of GEMA and other players in the market. This would leave room to distribute the costs evenly or in relation to airplay popularity of the songs actually played. In a way this is already legally preconceived in section 13c subsection 2 sentence 2 of the copyright representation code, which says "*Should more than one collecting society be entitled to make the claim, the presumption only applies, if the claim is asserted by all entitled societies together.*". But for this provision to work, independent artists outside GEMA would need to be organised in some other collecting society. It should therefore be adapted to be open for other representing bodies and individual rights holders.

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