NEWS
LEXTTER

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INTELLECTUAL PROPERTY

2nd NATIONAL CONGRESS ON INTELLECTUAL PROPERTY (Part III)

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EDITORIAL CONTENTS

Editorial
Vasco Marques Correia

The Liability of Intermediate Network Service Provides for Infringement of Intellectual Property Rights
Carmen Baptista Rosa

Competition and Collective Management in Intellectual Property Rights
Cláudia Trabuco

Editorial

This third newsletter on the Second National Congress on Intellectual Property – taking place on 29 and 30 September 2010 in the amphitheatre of the rectory of Universidade Nova in Lisbon – features contributions from a variety of participants and speakers who share with us their knowledge and experience of the issues they will talk about at the Congress.

This newsletter covers themes as important and topical as the management of related rights in the digital environment, intellectual property and e-commerce and the connection between the management of rights and competition law.

Also featured in this newsletter is an analysis of the means of defending intellectual property rights provided for by the law and the complex and stimulating questions of the calculation of loss and the amount of damages to be awarded in the event of infringement of those rights.

All these themes of great importance and current relevance in respect of the defence of intellectual property rights will be the subject of further analysis and more in-depth discussion during the various sessions of the Congress, which is sure to be a forum for the exchange of ideas and experiences of great practical value to the participants.

This newsletter covers themes as important and topical as the management of related rights in the digital environment, intellectual property and e-commerce and the connection between the management of rights and competition law.

Finally, we repeat our invitation to all those interested in attending and participating in the 2nd National Congress on Intellectual Property to register for the Congress – which they can do using the form referred to below - and we welcome everyone in the sure knowledge that that we will get the best out of the debate on the engaging materials that appear in the programme.

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The Liability of Intermediate Network Service Provides for Infringement of Intellectual Property Rights

The development of the information society has brought new challenges in the protection of intellectual property rights. The sending and receiving of information by electronic means, particularly via the Internet, has made it easier for people to break the law and more difficult to identify the offenders. Often, when it is impossible to identify the offenders themselves, it becomes common (and easier) to blame those that distribute the information, even if they have no control over the content. In the face of this situation, the law defends intermediate network service providers, that is, providers not responsible for the production of content that simply serve as a vehicle for its distribution. In the absence of other factors, the law shields these providers from responsibility for the content they make available.

The first great distinction to be made in relation to intermediate service providers is that they do not (or should not) have any say in the content. This means that they only carry or store information as an intermediary or principal. Intermediate service providers are under a duty to inform the appropriate authorities whenever they have knowledge of illegal activities and they must also cooperate with these authorities. However, they are not under a general duty to police or investigate possible illegal practices.

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We can make a distinction between varying degrees of liability according to the type of service provided. We are not concerned with intermediate service providers simply involved in carrying information or storing it temporarily, but rather with those that store information on a server and that can be held liable in two situations: (i) whenever they become aware of the evident unlawfulness of the content they make available, either by notification from interested party or through an administrative or judicial body, and do not withdraw it or (ii) whenever, in the face of circumstances they know about, the providers are – or should be – aware of the unlawful character of the information. Whenever they have powers of control over the user of the service, the usual rules of liability apply to the service providers.

If an infringement comes to light, any interested party may ask the service provider to block access to the unlawful content. In the event of evident unlawfulness, the service provider must comply with the request but it remains to be determined what should be considered as such. It seems that only extreme situations, in which there can be no doubt as to the unlawful nature of the content, fall under this provision. This means that if a lawful character can be attributed to the content, the service provider cannot be required to remove it in the absence of further information.

Another question that arises is knowing in which situations the service provider should have knowledge of the unlawful nature of the information, in situations of which it is aware. We can take as an example an intermediate service provider that creates and makes available a site which encourages third parties to post defamatory information or other types of illegal content. If there is instigation to post this content (or if a place is created in the network for this purpose), it must be considered that the service provider was aware of the unlawful nature of the information, as the provider solicited this information and incited others to post it. Another case that seems clear is when the service provider alters the content of the information provided by developing that information, although doubts may be raised when the information is merely summarised by the service provider, or its image or formatting is altered. In this case, there is a thin line between knowing whether such acts are deemed to amount to the insertion of content, rather than simply making content available that has been supplied by third parties.

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It is clear that the law (following the directive) made a clear choice to try to shield intermediate service providers from liability to the greatest extent possible, because, if those service providers could be held liable for the content they store, that would prevent information from circulating as quickly and efficiently as it does. The service providers were deemed to be mere booksellers who cannot be held liable for the content of the books they sell.

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Competition and Collective Management in Intellectual Property Rights

The law of competition and intellectual property rights are often placed in opposing camps in the light of their differing natures. The former protects the general interest in guaranteeing the operation of the market in terms of competition and the latter ensures the protection of individual interests, guaranteeing that the holders of these rights can get paid for the exploitation of their intellectual creations and inventions.

In reality the areas of tension between the two spheres are limited and frequently the apparent opposition is overcome through solutions involving a balance built upon real cases. The relatively limited level of competition in the area of collective management of rights has been the subject of debate for a long time, with a question mark being placed over the extent to which the tension referred to above is also reflected in these issues.

The system of collective management of copyright and related rights was conceived on the basis of the idea of the holders of the rights being unable or finding it difficult to truly control the use of their works or performances by third parties. Since the conception of the system, the role played by collection societies has consisted in the management of rights in the name of the holders they represent.

The relatively limited level of competition in the area of collective management of rights has been the subject of debate for a long time, with a question mark being placed over the extent to which the tension referred to above is also reflected in these issues.

This principally involves entering into licensing contracts, collecting payments for the use of the economic rights, supervision of the use of the rights and also the distribution of the income to those they represent.

The system of collective management can and has given rise to issues of competition law on three distinct levels: in the context of relationships between collection societies and the authors or holders of related rights, in the context of the relationships between those societies and the users and finally, in the context of the relationships collection societies have with each other.

The relationships between collection societies and authors have been the target of an analysis by the European Commission in the case of the imposition by a German collection management society (GEMA) of conditions considered to be discriminatory on the basis of the respective nationality and the categories of rights that were being managed. In the 1971 decision, the question of the existence of intellectual property rights was obviously not at issue but rather, the exercise of GEMA's dominant position in the market, which was considered to be abusive.

In respect of the second level of analysis - the relationships between the collection societies and the users - attention has been centred principally on the observation of the contractual conditions applied to those that appear in the position of counterparts to the collection societies. The objective is to guarantee that, in the context of the internal European market, the amounts charged by collection societies as royalties are not substantially higher than those charged by their opposite numbers in other Member States. In accordance with the SACEM decision of the Court of Justice of the European Union in 1989, a very significant difference between the conditions

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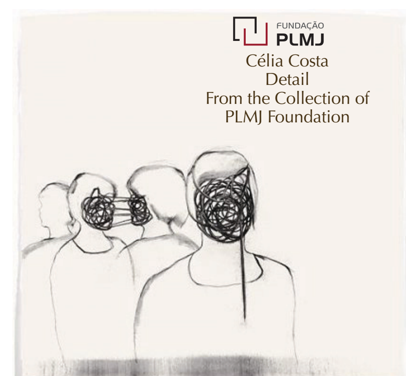
applied to equivalent situations can be considered as an abuse of a dominant position which damages free market competition.

Finally, in the context of the collection societies' relationships with each other, the competition law concerns have been centred on the analysis of reciprocity agreements made between societies from various countries in relation to the representation of the category of rights they work with. On the level of European Union law, the view is that, in themselves, these agreements cannot be considered as agreements which restrict competition. However, it is certain that only an analysis of a variety of real cases could serve to confirm or otherwise the existence of a possible relevant anti-competition risk. In this context, the July 2008 Commission decision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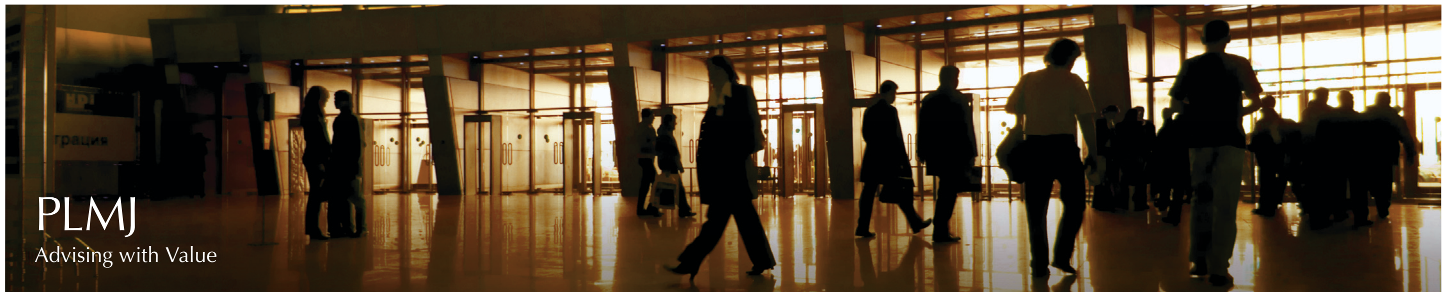

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against CISAC provided additional clarification on the system of reciprocal representation agreements between European collective management societies and their compatibility with EU law.

With the appearance and development of digital technologies and the growing exploitation of works and performances online, not only is the protection of intellectual property rights called into question with the constant fight for the most efficient means of continuing to ensure the essential function of those rights, but also collective management itself is, in a way, being reconsidered

On 8 May 2005, the European Commission published Recommendation 2005/737/CE on collective cross-border management of copyright and related rights for online music services, in which it defends the granting of multi-territorial licences. This was followed by the publication on 3 January 2008 of the a Communication entitled "Online creative content in the single market", in which the Commission called attention to the need to improve the licensing mechanisms in force for different types of creative content, including musical content, so as to allow the development of multi-territorial licences and to foster the interoperability and transparency of the management systems for digital rights.

Just last year the Commission began a new discussion on the theme of a single digital market for online creative content. Its reflection paper of October 2009 relates to the challenge of building a true borderless single market for creative online content (books, music, files, games,…), that can simultaneously both promote retail receipts in the sector, ensure free competition in the market and benefit consumers. Among the areas in which the adoption of legislative measures is considered necessary, what stand out for their implications as to the development of the activity of rights management are the measures that guarantee the supply of a legal means of access to a huge range of content via digital networks to consumers in any place and at any time, with clear prices. Also of importance is the promotion of fair conditions for new business models and innovative distribution solutions for creative content throughout the European Union.

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ACQ Finance Magazine, 2009

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