

Article

Reflecting the Sound of Ring tones and Copyright

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 Copyright; EC law; Mobile telephones; Musical works

Introduction

The article is based on the author's contribution to a seminar organised by the Italian collecting society SIAE¹ and its Japanese counterpart JASRAC,² which took place in Rome on January 31, 2005. The seminar dealt with new technologies and the market for music in mobile telephony. A ringtone is the sound which a mobile phone plays when its number is called. Technological development produces also master tones, realtones, true tones, ring-backs, video tones or voice tones. A ringtone has a purely functional task—to produce a sound which is necessary to attract attention and inform the owner of an incoming call. Also, a ringback is a functional sound which is produced when a mobile phone is rung; these sounds are mostly heard as "teeet teeet", with shorter intervals when the phone is engaged. These sounds can be personalised by means of ring-backs. Realtones or true tones are polyphonic sounds played on a mobile phone, which, to the listener, are similar to a recording of a work. When cut down to the function of a ringtone, they may also be called polyphonic ring tones. Video tones are sounds which are played together with video on the mobile phone's display, and voice tones are sounds based on the human or animal voice.

Ring tones and the European market

Ring tones, these sequences of sounds, created a market which promises considerable profits. In 2004, the income generated from the exploitation of ring tones amounted to some US\$1.5 billion.³

The German collecting society GEMA⁴ had earnings of some €5 million in 2004. The figures for Western Europe will represent some 30 per cent of the global income derived from the sale of ring tones.⁵ Ring tones are an important element of m-commerce. In parallel with the growth of this market in Europe, the music industry's concern about the legal protectability of its products or services increased.⁶ Foreign companies' cross-border offers of downloads gave rise to concern, in particular if these offers do not respect any copyright in the receiving country. Figures show that in the United Kingdom alone, in 2003, the most requested titles were sold up to 15,000 times per month without any payments of royalties. The hypothetical damage on a global basis may amount to a US\$1 million per day.⁷

The market for ring tones is likely to evolve with technological progress. Realtones are more sophisticated than ring tones; they reproduce parts of the musical work with authentic sounds. Ring-back tones are sounds which an end-user can use as his individual telephone sound instead of the standard tone. Mobile content delivery technologies will include mobile television streaming, and also the interactive download of music.⁸ The third-generation GSM⁹ standard is well known as UMTS in Europe. It is expected that the number of UMTS users will rise from 16 million

1. Società Italiana degli Autori ed Editori.

2. Japanese Society for Rights of Authors, Composers and Publishers.

3. *International Herald Tribune*, January 30, 2005, "Ring tones: How Much Is Too Much?"

4. Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, GEMA Newsletter 52, Reinhold Kreile: "Review of the Year 2004".

5. Ovum Research, September 13, 2004.

6. See Picard, Toivonen, Grönlund: "The Contribution of Copyright and Related Rights to the European Economy", Media Group Business Research and Development Centre, Turku School of Economics and Business Administration, final report, Turku, October 20, 2003, p.9.

7. CNN, April 23, 2001.

8. Large parts of the mobile communications industry are organised in the GSMA (Global System for Mobile communications Association); during the recent GSM World Congress in Cannes it emerged that the future of the mobile phone industry appears to be rosy; by now some 1.7 billion mobile phones are used, by the end of the year this figure will have risen to some two billion, *Neue Zürcher Zeitung* of February 18, 2005, "Stoff für Breitband".

9. Global System for Mobile communications.

today, to 70 million by the end of this year. UMTS mobile phones will have powerful multimedia functions, which can use any digital content. Concerning end equipment, the mobile technology is likely to make use of the OMA¹⁰ standard so that the digital content can be heard or seen on different devices.

Contracts for the acquisition of exploitation rights

Which rights do producers and distributors of ring tones have to acquire? On the production level, such a use may be free if it does not fall within the scope of the copyright owner's exclusive rights. A period of between 10 and 15 seconds filled with sequences of sounds, which comes close to the noise of an alarm clock and which is hardly comparable to a representation of a work of music by performers, may hardly justify the assumption that such simple sounds could require the right-holder's authorisation. But whoever wants to avoid risks deriving from a possible infringement should secure a licence for the production and distribution of ring tones.

Technological progress has made possible the offer of more complex polyphonic sounds such as realtones, which can create the impression of a short synthesis of the basic work of music, and it may be wise for the producer to use a comprehensive granting clause so that his business can make use of changing demands instigated by improved technologies. These licence contracts may assume a more complex structure depending on the m-economy's scope of products and services. Thus the use of the basic work of music may not only relate to ring tones, but it may include combinations with digital games and videos, texts, images or logos.

Rights for the production and marketing of ring tones

The reproduction right for recording and storage purposes will be involved at the production level. The producer also needs sampling rights, the right to include the stored products in a database, to upload it to a server, to transmit the work to end users, to store it electronically and/or the right to make it available on the internet, and to store the work on the end user's data carrier. These rights may generally be available from authors, publishers, record companies or collecting societies. In the case of monophonic ring tones, the authors' respectively their publishers' rights were involved and, insofar as the relevant rights had been transferred to a collecting society, also the latter. In the case of polyphonic sounds, additionally the rights of record companies are likely to be involved. For the ring-tone industry, it is burdensome to address a large number of right-holders or individual authors. But national copyright legislation often attempts to protect authors by providing for restrictions on the transfer of rights. Thus buy-outs may be unlawful, or comprehensive granting clauses will be interpreted narrowly.¹¹ Legislation may also provide that grants of rights relating to unknown types of exploitation are without effect.¹²

10. Open Mobile Alliance.

11. See, e.g. Art.29 of the German Copyright Act, which excludes the assignment of the copyright, or Art.31(5) of the Act according to which the grant of exploitation rights has to be narrowly defined.

12. See, for example, Art.31(4) of the German Copyright Act.

Do ring tone rights relate to such new types of exploitation? The German jurisprudence is affirmative.¹³ This would mean that ring-tone rights were not included in granting clauses before this type of exploitation became known in the late 1990s, so that authors would still hold these rights. But ring tones may possibly be considered as included in the grant of internet rights or other digital exploitation rights. If not, the producer or distributor of ring tones will have to ask the relevant author for a licence. This may be very cumbersome, and as a result the intended protection of the author may turn out as an impediment to the cultural enrichment of the nation and the monetary enrichment of the individual work's author, even though the exploitation relates to a modest entertainment.

Exclusive right of reproduction

The author enjoys an exclusive right of reproduction. This right extends also to digital exploitation. Uploading a work to a server or downloading it to computer memory makes a copy, provided that the storage is not merely ephemeral and the work can be reproduced. Yet it is doubtful whether the use for a ring tone with a sequence of sounds, which has a duration of 10–15 seconds, could be considered as a reproduction of the work. Jurisprudence is neither abundant nor clear,¹⁴ but it seems that in the field of music the author enjoys a protection, which extends also to uses of very small parts of the work. If elements of the essential melody are taken, it is likely that there will be infringement.¹⁵

Application of limitations and exceptions

Does the use of a ring tone constitute a quotation of the protected music? Depending on the national legislation, the purpose of a quotation may permit a use not only with regard to the reproduction right, but also concerning the right of distribution and communication to the public.¹⁶ However, the quotation must not amend the work and not treat it in a derogatory manner.¹⁷ The end user can reproduce the ring tone for private use on his mobile telephone.¹⁸ He may rely on the private use exception with regard to the reproduction right, which does not extend to commercial uses.

Exclusive right of communication to the public by wire or without

A service, which sells ring tones and offers their online download, needs to secure the exploitation right to provide access to the work and/or to communicate it to the public by wire or without wire.¹⁹ The end user who plays the ring tone does not perform the work in

13. e.g. District Court of Hamburg of April 4, 2001, ZUM 2001/443; on appeal Court of Appeal of Hamburg of February 2, 2002, JurPC Web-Dok. 298/2002.

14. *ibid.*

15. *Copinger and Skone James on Copyright* (14th ed., Sweet & Maxwell, London, 1999), vol.1 para.7-27.

16. See, e.g. Art.51 of the German Copyright Act.

17. See, e.g. Art.62 of the German Copyright Act.

18. Berndorff, Berndorff, Egler, "Musikrecht" (4th ed., PVP Medien, Bergkärchen, 2004), p.224.

19. See Art.16 of the Italian Copyright Act, or the tariff VR-OD1 of the German collecting society GEMA.

public,²⁰ because his mobile phone does not perform the work of music.²¹ The ring tone serves merely as an acoustic sound.

But the ring tones or music downloaded on a mobile phone may be used for a variety of purposes, just like a corporeal recording. If such a use no longer relates to the function of a signal, but, for example, serves as the entertainment of a larger audience via loudspeakers, such a communication may constitute the performance of the work in public. Under such circumstances, the use on the mobile phone would fall within the right-holder's exclusive right to perform a work in public.²² Obviously, the acquisition of a ring tone by an end user does not authorise such types of exploitation.

Rights of adaptation and modification and moral rights *Right of adaptation and modification*

An author enjoys also the right to adapt the work, which, in the field of music may consist of the right to make an arrangement or transcription of the work.²³ But it is doubtful whether the making of a ring tone can be considered as adaptation of a work of music, in particular since the right of adaptation is often defined by statute with regard to the particular purposes to which the adaptation relates.

The exclusive right to amend the work is often broadly defined, for example in the Italian Copyright Code,²⁴ according to which the author has the exclusive right to introduce any amendments to the work. Whether the reduction of a work to a ring tone constitutes an amendment may be doubtful, but if the author grants the right for the production and distribution of a ringtone, it is obvious that this grant would include the right to amend the work to the form of a ring tone.

Right of integrity

The reduction of the work to a product with a duration of a few seconds is likely to violate the author's right of integrity. There seems to be little doubt that the treatment to which the producer of a ring tone subjects the work of music might be derogatory, or a mutilation, or other prejudicial treatment. In the case of digital sound sampling where only parts of a work of music are taken, the fragmentation may be considered as an infringement of the substance of the work. Even if the producer has obtained the right to adapt the work for the production and distribution of a ring tone, his conduct may nevertheless infringe the author's moral rights.²⁵

The author owns the moral rights including the right to object to any deformation, mutilation or any other modification of the work, which implies damage to his honour or reputation. There is no doubt that a ring tone may constitute a modification of a work of music and, under certain circumstances, also a serious

deformation.²⁶ It may be argued that the author should have to accept that his work should be adapted to use by digital technologies; however, such a far-going assertion could hardly be made in a case where the work would be transformed into sounds similar to those of an alarm clock.²⁷ This moral right cannot be transferred, but the author who knows and accepts the modification may no longer assert or pursue an infringement,²⁸ similar to the doctrine of estoppel in English law. Based on the moral rights of its authors, the EMI company required the companies which offered ring tones to stop such conduct which allegedly infringed the authors' moral rights, even when the companies had acquired the "ring-tone rights" from the relevant collecting societies.²⁹

If the author has granted the exploitation right to the producer of the ring tone, it has to be considered that the author will generally have consented to the use of his work. He may only under such circumstances assert a violation of the right of integrity if the work is presented in a disadvantageous thematic context of which he did not know when granting the right, or with which he did not have to count. Additionally, the right-holder's authorisation to the use of his work as a ring tone may well be considered as including a consent to the "mutilation" of the work concerned.³⁰ In this sense, the Italian Copyright Code states³¹ that the author who knew and accepted the modifications of his work has waived his rights.

European collecting societies like the SIAE may exclude expressly the moral rights from the grant of ring-tone rights,³² but the Japanese JASRAC does not refer to moral rights with regard to the grant of the interactive transmission rights, which include ring-tone rights.³³ The reason may be that European authors are more concerned about an infringement of their moral rights so that the

26. In this sense District Court of Hamburg of April 4, 2001, above, n.13.

27. Court of Appeal of Hamburg, February 4, 2002, JurPC Web-Dok. 298/2002.

28. Art.22 of the Italian Copyright Code.

29. telatarif.de Onlineverlag GmbH, August 23, 2001, "Abmahnung für Handy-Klingeltöne".

30. See Axel Metzger: "Rechtsgeschäfte über das Droit moral im deutschen und französischen Urheberrecht" (C.H. Beck, Munich, 2002), p.45 with reference to Court of Appeal of Munich, GRUR 1986/460 and legal writers.

31. Art.22(2) of the Italian Copyright Code.

32. SIAE's Licence to Use Musical Works as Ring tones for Mobile Phones", Art.2: "Moral Rights. 2.1. The moral rights are expressly reserved to the authors and assignees thereof pursuant to articles 20 to 24 of the (Italian) Copyright Code. 2.2. The modifications of the works or parts thereof, if required by particular technical needs related to the nature and typology of the uses at issue, will be made with due respect of the aforementioned rights. (...) 2.4. From the scope of this Licence is also excluded the adaptation right, and it is expressly reserved to its right owners (Art.18 of the (Italian) Copyright Code)."; also the German GEMA excludes moral rights from its ring-tone tariff VR-OD I: "The moral rights of the author must not be impaired Any alterations to a work with a view to using it as a ringtone, especially the abridgment of the work, must satisfy any requirements contained in Articles 14 and 39 of the (German) Copyright Act".

33. Art.12 of the JASRAC Tariffs for Use of Musical Works, as registered on June 1, 2004, and the Stipulations for Copyright Trust Contract of JASRAC, registered on October 2, 2001.

20. e.g. the exclusive right to perform the work in public, Art.15 of the Italian Copyright Act.

21. Court of Appeal of Hamburg of February 4, 2002, JurPC Web-Dok. 298/2002.

22. See, e.g. Art.15 of the Italian Copyright Act.

23. See, e.g. Art.21(3)(b) of the UK Copyright Designs and Patents Act 1988.

24. Art.18(3) of the Italian Copyright Code.

25. Markus Häuser, "Sound and Sampling" (C.H. Beck, Munich, 2002), p.76.

collecting societies want to avoid any doubts about the scope of the rights, which they can grant.

Monophonic ring tones

In the case of the production of a monophonic ring tone based on a work of music, it may be assumed that there is a modification of the original work which requires the right-holder's authorisation. Yet the copyright laws of EU Member States may offer different solutions concerning the scope of moral rights, and accordingly, it will depend on the law of the relevant state whether the subsistence of an amendment of the work of music can be assumed, which would require the authorisation of the author.³⁴

Non-Transferability of moral rights

The author may not transfer moral rights³⁵ to natural or legal persons, nor to a collecting society.³⁶ Whether an author has consented to the use of his music by the producer and distributor of the ring tones or waived his rights with this regard as a matter of facts. If this is not the case, producers or distributors may have to address the author. Nevertheless, the contracts with collecting societies may contain a clause according to which the collecting society grants the right to use the work of music for the production of a ring tone. But the contractual clauses often state that the collecting society does not avail itself of the right to authorise a modification or amendment of the work, this exclusive right belonging to the original author.³⁷

Polyphonic ring tones and realtones

In the case of polyphonic ring tones or realtones it is even more necessary to acquire rights for the production and distribution of music on the basis of which the ring tone is produced. Any abbreviation of a work, particularly if made by means of an electronic device such as a synthesiser, constitutes a modification of the original work. The abbreviation of a work, which the synthesiser reduced to a sequence jingles without accords, and which produces at a certain moment nothing else than an individual sound, constitutes a modification of the original work. Even if such sounds create a recognitive effect upon the listener, they cannot be assimilated with the original work.³⁸ Therefore right-holders must authorise the exploitation and consent to the impairment of their works' integrity.

Related rights

National legislators also protect producers of phonograms, broadcasters and performers of works, even if their achievements are less worthy of protection than those of the authors of original works of the mind. Producers of phonograms have, *inter alia*, the exclusive right to authorise the reproduction of their phonograms in any

form.³⁹ Performers have, *inter alia*, the right to authorise the reproduction in whatever form or by whatever method of their artistic performances.⁴⁰ Broadcasters have, *inter alia*, the right to authorise the registration of their transmissions communicated by wire or through the air.⁴¹ This means that the producer of a ring tone who wants to make use of a live concert recording or a broadcast may have to acquire a licence from the right-holders of neighbouring rights. But generally, only realtones may involve neighbouring rights, considering, the recording industry's right of reproduction will also be involved in such a case. Insofar as collecting societies do not manage the digital rights of the holders of related rights, they may not grant such rights to producers or distributors of ring tones. Thus Art. 5(3) of the SIAE's Licence to Use Musical Works as Ring tones for Mobile Phones expressly excludes any rights due to producers of phonograms, to performing artists, or to radio and television companies.

Methods for the transfer of ring tones

Ring tones may be sent directly to a mobile telephone via SMS or by email to a computer from where it may be transferred to the mobile phone by infrared. Ring tones may be sent with pictures or text, sound logos, videoclips or songs and other digital content. The type of transfer may involve different exclusive exploitation rights. For example, if the ring tone is transferred offline on a CD, the distributor must ensure that his licence covers the right of distribution of physical copies of the work. If the ring tones are transferred via the internet, the licence should cover the reproduction right and the right of communication to the public, or the making accessible of the work to the public. The traditional transmission mode was communication via SMS (short message service), which developed to EMS (enhanced message service) and MMS (multimedia service) or iMode.

Grant of rights through collecting societies

Collecting societies⁴² offer the grant of licences for the production and distribution of ring tones. The EU Commission favours the administration of digital rights management through collecting societies⁴³:

"Remuneration schemes operated by efficient collecting societies acting as trustees should provide access to potential end users while safeguarding the economic shares of all rightholders, including small and non-corporate ones".

However, due to uncertainties concerning the scope of contractual agreements it has been recommended that the legislators provide for a statutory licence or the involvement of collecting societies.⁴⁴

34. See the "Vodafone group's response to the consultation on the review of the EC legal framework in the field of copyright and related rights", October 31, 2004.

35. *Copinger and Skone James on Copyright* (14th ed., Sweet & Maxwell, London, 1999), vol. I, para. 11-75.

36. e.g. District Court of Hamburg of April 4, 2001, ZUM 2001/443.

37. See the tariff of the VR-ODI of the GEMA.

38. District Court of Hamburg of April 4, 2001, ZUM 2001/443.

39. See, e.g. Art. 72(1) lit. a) of the Italian Copyright Code.

40. See, e.g. Art. 80(2) lit. b) of the Italian Copyright Code.

41. See, e.g. Art. 79(1) lit. a) of the Italian Copyright Code.

42. For example through the SIAE's MPRT (Mobile Phone Ring Tones) Licence; JASRAC's Interactive Transmission Licence (Commercial Transmissions) or GEMA's VR-ODI tariff.

43. EU Commission: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee—The Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final of April 16, 2004, para. 1.2.5.

44. Tilo Gerlach: "Lizenzrecht und Internet—Statement aus der Sicht der GVL", ZUM 2000/856.

Unless particularly authorised collecting societies may not grant sampling rights for a partial reproduction and amendment so that the producer and distributor of the ringtone would have to take recourse to the author.⁴⁵ Whether the GEMA may grant licences for ring tones is doubtful at least with regard to music in which it acquired exploitation rights before 2002.⁴⁶ The grant cannot be based on a provision of the Copyright Act, and assuming that the exploitation by ring tones constitutes a new type of exploitation,⁴⁷ the ring-tone right would not be included in contracts between authors and the GEMA unless the contract contained an express reference.⁴⁸ The GEMA Deed of Assignment was amended accordingly in 2002 so as to include new digital exploitation and internet rights.⁴⁹

The JASRAC envisages in the terms of the Copyright Trust Contract a comprehensive transfer of copyright which shall be administered by it as a trustee. The transfer includes also rights relating to interactive transmissions, which comprise ring-tone rights.⁵⁰

The Community's policy in the copyright sector

The protection of authors and their successors in title within the EU is based on a system which consists of a partial harmonisation of the national copyright laws. There is no unitary copyright applicable in the Member States or a process which would lead to a unified copyright law.

International copyright law

Many states and all EU Member States are members of the Union of Berne⁵¹ or TRIPs.⁵² In application of the principle of national treatment, a state party to these agreements is obliged to protect authors of other Member States in a manner similar to national authors.⁵³ Another principle is based on the state of protection concept. According to this doctrine, in the case of a conflict of national laws the law of the state in which protection is claimed will be applicable.⁵⁴ Accordingly, the author does not enjoy a single

copyright, which would be applicable in different states, but a bundle of national rights, the scope of which may differ from country to country. In cross-border situations these principles serve to determine the applicable jurisdiction. The principle of the state of protection is recognised by the legislature of the Community.⁵⁵

If a company wants to offer its ring tones in different states, for example in England, France and Germany, it needs licences for the exploitation of the works protected by copyright or performances protected by neighbouring rights in any of those countries. Even though the legal situation is harmonised to a considerable degree, there may be differences from one legal system to the next. Unlike the legal situation in the areas of patents, trademarks or models, there is no regulation establishing a unitary copyright which would directly be applicable in the internal market.⁵⁶

Community copyright law

The seven Directives on the Community level, which concern copyright and related rights, give Member States the choice to adopt proposed solutions within a certain range⁵⁷; in 2004, the Community adopted a Directive on the enforcement of intellectual property rights.⁵⁸ For example, the Directive on copyright in the information society envisages regulations for not less than 20 different exceptions to, and limitations of copyright. This mosaic of different national solutions based on the Directives constitutes the "acquis communautaire" in the law of copyright and neighbouring rights.

This legal framework is susceptible to maintaining the fragmentation of the market in the industries which are based on the copyright and neighbouring rights. The optimum allocation of resources may be impeded if the legal structures prevent works

45. See Markus Häuser, above, n.25 at p.71 *et seq.*

46. Ernsthaler, Bosch, Völker, "Handbuch Urheberrecht und Internet" (Recht und Wirtschaft, Heidelberg, 2002), p.279.

47. District Court of Hamburg of April 4, 2001, ZUM 2001/443.

48. Court of Appeal of Hamburg of May 11, 2000, ZUM 2000/870.

49. Kreile, Becker: "The Internet and Digital Rights Management from the Viewpoint of GEMA", Handbuch der Musikwirtschaft—Handbook of the Music Industry (6th ed., Moser/Schermann, Starnberg, 2003).

50. JASRAC: "Stipulations for Copyright Trust Contract of JASRAC, registered on October 2, 2001", and the "Tariffs for Use of Musical Works, registered on June 1, 2004", which refers expressly to ring tones in Art.12 (Interactive Transmissions).

51. Berne Convention for the Protection of Literary and Artistic Works.

52. Agreement on Trade Related Aspects of Intellectual Property Rights.

53. Art.5(1) of the Berne Convention; Arts 1(3) and 3 of the TRIPs.

54. Art.5(2) of the Berne Convention; Art.9 of the TRIPs obliges Members to comply with Arts 1–21 of the Berne Convention.

55. European Court of Justice, Case 62/79, *Coditel v Ciné-Vog Films* [1980] E.C.R. 881; Case 262/81, *Coditel v Ciné-Vog Films* [1982] E.C.R. 3381, para.14.

56. See for example the EU Commission's proposal for a Council Regulation on the Community Patent of August 1, 2000; document COM(2000) 412 final [2000] O.J. C337E; Council Regulation 40/94 of December 20, 1993 on the Community Trademark [1994] O.J. L11 as amended [2004] O.J. L70; and Regulation 6/2002 of December 12, 2001 on Community Designs [2002] O.J. L3.

57. (1) Directive 91/250 of May 14, 1991, on the legal protection of computer programs [1991] O.J. L122/42; (2) Directive 92/100 of November 19, 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] O.J. L346/61; (3) Directive 93/83 of September 27, 1993, on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] O.J. L248/15; (4) Directive 93/98 of October 29, 1993, harmonising the term of protection of copyright and certain related rights [1993] O.J. L290/9;

(5) Directive 96/9 of March 11, 1996, on the legal protection of databases [1996] O.J. L77/20;

(6) Directive 2001/29 of May 22, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society [2001] O.J. L167/10;

(7) Directive 2001/84 of September 27, 2001 on the resale right for the benefit of the author of an original work of art [2001] O.J. L272/32.

58. Directive 2004/48 of April 29, 2004 on the enforcement of intellectual property rights [2004] O.J. L195/16.

or protected products from being distributed or communicated at a price which reflects a low cost price. The argument according to which this fragmentation constitutes an impediment to the creation of the internal market is supported by the wish of the ring tones industry to acquire the necessary rights in a "one-stop-shop" procedure,⁵⁹ particularly in the case of cross-border contracts.

Developments in the field of community copyright

The European Commission is in permanent contact with the industries based on copyright and neighbouring rights.

Management of copyright and related rights in the internal market

In the last year, the Commission published a Communication on Rights Management in the field of copyright and related rights in the internal market.⁶⁰ The discussion, which developed subsequently and which included aspects of relevance to the ring-tones industry, concerned the following aspects:

- **Reduction of the cost price through simplified licensing procedures:** a simplified method for the grant of licences may reduce the cost price for ring tones in the internal market. The European Commission⁶¹ explained that the expanding online market requires the grant of a licence through a single collecting society within a single transaction and with effect for the whole internal market.

- **Involvement of collecting societies:** in the field of collective rights management, the industry put the factual monopoly of collecting societies on the agenda.⁶² Concerning to the risk that collecting societies assume a factual monopoly position, the Commission assured the European Parliament that it observed closely their conduct.⁶³ The role of collecting societies with regard to the grant of ring-tone rights is not regulated by legislators. Whenever a right-holder grants a collecting society digital management rights, the collecting society may offer the acquisition of ring-tone rights to producers or providers of services. But the cross-border co-operation between collecting societies can only be successful in Europe if the collecting societies

apply identical contractual schemes, and acquire identical rights from the original right-holders.⁶⁴

- **Compulsory or statutory licensing of ringtone rights as a limitation of or exception from the copyright:** the right to an equitable remuneration for the use of exploitation rights, which legislators transferred to collecting societies, does not include exploitation by ring tones. Taking into account the system of international neighbouring rights, in particular the Rome Convention,⁶⁵ which does not envisage an exclusive broadcasting right of the producer of phonograms, but only a right to an equitable remuneration,⁶⁶ it does not appear that the legislator could introduce a system of statutory licences or compulsory licences for the benefit of producers or distributors of ring tones. However, it may be conceivable that such a system constituted a limitation of or exception from copyright in the sense of Art. 5(3)(k) or (o) of the EU Directive on copyright in the information society.⁶⁷ In this sense, exceptions from, or limitations of the copyright are admissible, provided that they relate to certain special cases, which do not conflict with normal exploitation of the work or protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder (Art. 5(5) of the Directive).

- **Grant of comprehensive ring tones rights by a collecting society on the basis of voluntary contracts with right-holders:** right-holders and a collecting society may conclude a contract, which authorises the collecting society to market the right-holder's ring-tone rights. Some collecting societies established tariffs for the exploitation of music by ring tones. Such tariffs may contain a comprehensive contractual regulation. For example, the SIAE's "Licence to Use Musical Works as Ring tones for Mobile Phones"⁶⁸ establishes a right to use—for the purposes of the production

64. In the GEMA's view, it is even a precondition for a successful cross-border cooperation that "the collecting societies involved assume a uniform identity", *GEMA Yearbook 1996/97*, Pt.IV.

65. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention).

66. Art.12 of the Rome Convention: If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

67. Directive 2001/29 of May 22, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society; Art.5: "Exceptions and limitations (1) ... (3) Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: ... (k) use for the purpose of caricature, parody or pastiche; ... (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article".

68. SIAE, "Licenza per l'Utilizzazione delle Opere Musicali Tutelate dalla SIAE in Suonerie per Telefonia Mobile", 2005.

59. EU Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee—The Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final of April 16, 2004, para.3.5.2. EU Bull. 4-2004 Internal market (24/26) 1.3.55

60. EU Commission: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee—The Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final of April 16, 2004.

61. *ibid.*, para.1.2.4.

62. See ETNO (European Telecommunications Network Operators' Association) Reflection document on the European Commission Communication on the Management of Copyright and Related Rights in the Internal Market, June 2004, p.2.

63. European Parliament, written question E-0266/03 by Joachim Wuermeling (PPE-DE) to the Commission, Monopoly held by copyright collecting societies, and the reply by Commissioner Bolkestein, [2003] O.J. E222/175, September 18, 2003.

and reproduction as ring tones in mobile phones or similar communication devices—works or fragments of works, which are administered by the SIAE under conditions set out in the tariff. The SIAE authorises the licensee:

- to record and technically adapt for the purpose of the production of a ring tone for use on mobile phones, mono-tracks, polyphonic, RMF or in different technical versions, works or fragments of works belonging to the musical repertoire protected by SIAE;
- to include into a data base files containing these ring tones (uploading);
- to make available to the public such ring tones in Italy and in other countries as described in the Enclosure 1, through telematic and/or telecommunication networks, allowing access to these ring tones from the place and at the time individually chosen by users, with the possibility of listening to samples of ring tones by dialling the numbers of fixed or mobile phones, on Web sites and on other interfaces used for the marketing of the ring tones;
- to allow the reproduction, on a free-of-charge basis or against payment, on their own mobile phones by the end users, for private and personal use as musical ring tones, of ring tones (downloading).

The SIAE tariff reserves the moral rights exclusively to the author, and it obliges the licensee to respect the moral rights when amending the work for the production of the ring tone. In order to comply with right-holders' objections to the use of the music as a ring tone, the tariff contains a clause by means of which the SIAE may ask the licensee to terminate the use of the ring tone. The tariff obliges the licensee to provide comprehensive information on the exploitation of the ring tone so that the SIAE may examine its scope and verify the correctness of payments, which are made on a quarterly basis. The tariff does not include neighbouring rights. The fees for the exploitation of ring tones vary, in the case of a use in Italy it amounts to 12 per cent of the sales price paid by the end user, or at least €0.10 if the service is offered free of charges. The tariff obliges the licensee to report on the use of ring tones, and the SIAE has powers of inspection to verify the correctness of the report. Contractual fines threaten a breach of the tariff.

• **Acquisition of licences in a one-stop-shop' procedure for the internal market:** the purchasers of the ring-tone rights should have the possibility of acquiring the rights within a "one-stop-shop" procedure for the whole territory of the internal market; this proposition was made in different comments addressed to the Commission.⁶⁹ The Commission itself had stated in its Communication of April 16, 2004⁷⁰:

"Collecting societies usually represent a wide, if not worldwide repertoire and have an exclusive mandate for the administration of

69. See, for example, ETNO (European Telecommunications Network Operators' Association) Reflection document on the European Commission Communication on the Management of Copyright and Related Rights in the Internal Market, June 2004, p.2.

70. EU Commission, Communication from the Commission to the Council, the European Parliament and the European

rights in relation to their field of activity. This puts them in an exclusive and strong position vis-à-vis users. This position is appreciated by most, as it enables collecting societies to function as one-stop-shops for licensing."⁷¹

• **Exhaustion of the online communication right after the first marketing within the internal market:** another model for the Community-wide grant of ring-tone rights could be based on the statutory introduction of the exhaustion right applicable to the exclusive right of online communication to the public. The exhaustion could be effective if the exploitation in one EU Member State was based on the right-holder's authorisation. Such a model could facilitate the Community-wide distribution of ring tones. However, it appears difficult to imagine how the right-holders' interests in an equitable remuneration could be maintained if the grant of the online rights for a smaller EU Member State would exhaust these rights also with regard to the larger states. This option, which eliminated the territorial fragmentation of the internal market, could be introduced if the right-holders were aware of the consequences of a grant of such rights for the territory of one Member State, or if the exhaustion was complemented by a system of compulsory licences in those Member States where the voluntary licence did not expressly grant rights.

• **Freedom of choice between collecting societies:** it is conceivable that the right-holders but also the producers and distributors of ring tones would have a choice between the collecting societies active within the internal market for a Community-wide grant of exploitation rights.⁷² This model would require information on the necessity of obtaining production and distribution rights within the internal market, on the scope of rights: which a collecting society could grant, and on the system by means of which collecting societies within the internal market would co-operate, so that the chosen collecting society could grant the exploitation rights for the whole territory of the internal market.

• **Fees for mobile phones?** Is the mobile phone a device for the copying and recording of music for private purposes? In such a case the authors may have the right to an equitable remuneration for the limitation of the reproduction right. This remuneration is generally calculated on the basis of the mobile phone's price.⁷³ But it is also argued that such fees would not be applicable to mobile phones, because the

Economic and Social Committee—The Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final of April 16, 2004, para.3.5.2.

71. This direct grant of community rights was already envisaged within the framework of agreements between collecting societies BIEM/IFPI (Bureau International des Sociétés Gérant les Droits D'Enregistrement et de Reproduction Mécanique/Federation of the Phonographic Industry) on mechanical reproduction rights.

72. See ETNO (European Telecommunications Network Operators' Association) Reflection document on the European Commission Communication on the Management of Copyright and Related Rights in the Internal Market, June 2004, p.2.

73. See, for example, Art.71-septies of the Italian Copyright Code.

right-holders would be able to control and exclude by means of technological measures digital reproductions.⁷⁴

- **Flat rate for the download of music?** Users of online music claim that a flat rate for the download of music should be introduced, which would cover any receipt of music on a mobile phone.⁷⁵

These proposals show that the legal framework for the exploitation of protected works and products by new technologies does not provide satisfactory results.

Revision of the legal framework in the fields of copyright and related rights

Currently the EU Commission undertakes a revision of the legal framework in the field of copyright and related rights,⁷⁶ and it proposes modifications to the present system. The Commission has recognised that the fragmentation of the European market of the copyright-based industries may have a negative impact on the development of the Internal Market and the competitiveness of the EU's industry.

- **Harmonisation of the term of the exploitation right in the sector of music:** the Commission considers a unification of the rules of Member States on the duration of the copyright with regard to works of music.⁷⁷ The Commission stated that in some Member States lyrical works are considered as works of collaboration with the consequence, that the term of the exclusive rights depends on the life of the longest-surviving joint author. In other Member States, such works are considered as independent of each other so that the term of the exclusive rights in the work of music may be shorter than this of the work of literature. The Commission suggested that the Directive on the term of the copyright should be modified, arriving at a solution similar to the term in the case of cinematographic works.⁷⁸

- **Extension of the exclusive right of the making accessible to the public to related rights:** the Italian Association of Producers of Phonograms (AFI)⁷⁹ proposed that the exclusive right of communication to the public should be extended to producers of phonograms. In particular with regard to the online communication of protected products, this extension appears to be justified. The mere technical possibilities of blocking unauthorised reproductions online

is not sufficient, as evidenced by the problems in introducing effective circumvention devices in the case of the offline distribution.

- **The Commission recommends minor modifications of the "acquis communautaire":** the EU Commission recommended minor modifications of the *acquis communautaire* so that the present structures of the EU's copyright law will be maintained.⁸⁰

In this context, ring tones represent only a tiny aspect of the micro-economy, but this aspect is susceptible to illustrate the problems for the European industry, which is based on the copyright.

Conclusions

The problems which arise from the coincidence between the technological progress, particularly in mobile and digital communications, and copyright should not result in an impediment to the distribution and communication of music. A solution should be based on the function of copyright to ensure the distribution and communication of works in order to achieve the optimum allocation of resources. This would benefit not only the individual author, but also the distributors and any participants in the value chain up to the final user. Finally, society as a whole would benefit, because of improved cultural achievements. This means that difficulties obstructing the grant of licences within the internal market through legal barriers or high costs should be reduced. In this context, collecting societies can play an important role, through finding a balance between the interests of authors, artists, producers of phonograms, the mobile phone industry, and consumers.

74. See ETNO (European Telecommunications Network Operators' Association) Reflection document on the European Commission Communication on the Management of Copyright and Related Rights in the Internal Market, June 2004, p.4.

75. C't News of June 14, 2004: "Berliner Erklärung' fordert Musik-Flatrate fürs Internet".

76. Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, document SEC(2004) 995, Brussels, of July 19, 2004.

77. *ibid.*, p.11.

78. *ibid.*, p.12; Directive 93/98 of October 29, 1993, harmonising the term of protection of copyright and certain related rights.

79. AFI, l'Associazione dei fonografici italiana: "Acquis Comunitario in Materia di Diritto d'Autore e Diritti Connessi", Brussels, November 5, 2004.

80. *ibid.*, p.17.