Antitrust and copyright laws – the overlap.

CARS and Markiewicz & Sroczyński GP Scientific Workshop

On 6 March 2008, a scientific workshop was organized in the Foksal Press Centre in Warsaw by the Centre of Antitrust and Regulatory Studies of the Warsaw University (CARS) in co-operation with the law firm Markiewicz & Sroczyński GP (M&S). The subject of the workshop was devoted to the legal issues of the overlap between antitrust and copyright laws.

The discussed topics were closely connected with the jurisprudence of the President of the Office of Competition and Consumer Protection (UOKiK), the Polish courts and the European Community institutions, in relation to the activities of societies for the collective management in the field of copyright and neighbouring rights. The raised issues concerned, among other things, the latest judgements on ZAiKS/Brathanki case\(^1\) as well as CISAC case\(^2\). Last but not least, there were several *de lege ferenda* comments regarding the development of the Polish legislation in copyright and competition laws.

The workshop was opened by Professor Tadeusz Skoczny, director of CARS. After his welcoming and introductory comments, the debate of the workshop began.

The speakers were representatives of the pertinent regulatory institutions, university professors and legal practitioners. It was thus a splendid occasion to discuss the topic of the workshop from the different points of view, giving the chance to face theory and practice of law.

The following speakers known for their expertise in the copyright and competition laws made presentations during the workshop: Mr. Grzegorz Materna, Director of the UOKiK, Dr. Kamil Kiljański of DG COMP in Brussels, Professor Janusz Barta, Professor Ryszard Markiewicz of the Jagiellonian University and M&S, and Mr. Jarosław Sroczyński of M&S.

The workshop was moderated by Professor Tadeusz Skoczny, director of CARS.

The first presentation, given by Mr. Grzegorz Materna, concerned the status of societies for the collective management in the field of copyright in the Polish antitrust law.

\(^1\) Judgment of the Supreme Court of 6 December 2007, III SK 16/07, in the matter covered by decision of the President of the UOKiK, RWA-21/2004, dated 16 July 2004.

\(^2\) On the date of the workshop this case was in its final stage before the Commission, with investigation originating in 2000 upon the complaint lodged by the RTL Group against GEMA. The statement of objections was issued by the Commission on 7 February 2006. The Commission’s decision in CISAC case was adopted on 16 July 2008 (Case COMP/C238.698 – CISAC) and published on 18 November 2008 (http://ec.europa.eu/competition/antitrust/cases/decisions/38698/en.pdf).
The speaker concentrated on the definitions of ‘collective management’ and ‘undertaking’ in competition law, arguing that ZAiKS is the subject of antitrust regulations. In particular, he pointed out that the collective management of copyrights constitutes a service resulting in the economic activity of collecting societies.

Mr. Materna supported his assertions with the findings of the Polish Supreme Court in the ZAiKS/Brathanki case. He concluded that the judgement in question corresponds to the business practice in Poland.

The next presentation was given by Professor Janusz Barta, who made introductory remarks to the confrontation between copyright and antitrust laws. Professor Barta delivered a very interesting speech on the historical roots of the above areas of law, taking listeners back to the Middle Ages. This was where he perceives the very beginning of today’s competition law.

Subsequently, Professor Ryszard Markiewicz continued the issue in detail. He discussed, in particular, the provisions of the pending amendment process of the Polish Copyright Act in the context of competition law. Professor Markiewicz expressed his view on possible consequences of the proposed reforms, focusing on the situation of societies for collective copyright management.

The next speaker was Dr. Kamil Kiljański who considered the collective management in the field of copyright law from the European Community point of view. The problem he tried to solve was the balance between regulation and competition in relation to the collective management societies.

First, Dr. Kiljański noted that the system of individual copyrights management would not be fully beneficial for authors, so the existence of collecting societies is an unavoidable alternative. However, it is essential to promote competition among collecting societies. The speaker was of the opinion that such entities as the CELAS model (EMI/PRS+GEMA) or the Radiohead model (1F clause) could help to develop competition between collective societies. He discussed several European Community acts and decisions referring to the societies for collective management.

An important part of Dr. Kiljański’s presentation were his comments on the recent judgement of the European Court of Justice in CISAC case. He thoroughly studied the practical aspects of this judgement for both EC member states and authors.

The last presentation was given by Dr. Jarosław Sroczyński on practises restricting competition in the business activities of collecting societies. In particular, he discussed the
issue of licensing and management of authors’ copyrights by collecting societies and the related possible infringements of antitrust law.

In his presentation, Dr. Sroczyński defined the areas of confrontation between copyright and competition laws. Principally, he pointed out a few provisions of the Copyright Law Act which are closely connected with the antitrust law and are the possible source of conflicts and infringements.

In the second part of his speech, Dr. Sroczyński concentrated on several cases settled so far by the President of the UOKiK, including ZAiKS/Brathanki and Hologram case. The speaker underlined the possibility of holding a dominant position by the societies for the collective management. In this context, on the basis of Hologram case, Dr. Sroczyński gave examples of practices restraining competition such as tie-in or refusal to deal.

Further conclusions referred to the prerogatives of the President of the UOKiK in the field of copyright law.

After the presentations, there was a vivid discussion focusing on many issues raised by the speakers.

Representatives of the collective societies argued that the approach of the competition regulator was in certain cases overly strict and that the degree of antitrust scrutiny should be determined taking into account the social role played by the collective societies. This evoked heated discussion as to what extent the copyright collective societies should be treated as ‘normal’ undertakings.

The discussion concentrated also on role of the Government (Minister of Culture) in the prospected reforms of the copyright regulations. In particular, the necessity and scope of ministerial intervention in the area of setting the copyright remuneration tables was discussed.

Other participants referred to the European practice in the regulation of the overlap between antitrust and copyright laws, pointing out to various similar problems dealt with by the Commission and the national competition agencies, including the Polish UOKiK. It has been stated that the body of the antitrust case law consists altogether a sound base for understanding the main legal ramifications of the overlap in Poland.

In his closing remarks, Prof. Tadeusz Skoczny emphasized the need for further research of the topics elaborated during the workshop, in light of the current process of the

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legislative changes in the Polish copyright system. He also called for the need to use the feedback offered by the recent developments of the EU jurisprudence.

Over one hundred participants attended the workshop, representing the scientific environment, state and regulatory institutions, the collective management societies, companies (especially from the media sector), law firms and economic consultancies. Furthermore, it was a special honour to host the President of the National Chamber of Legal Counsellors Mr. Maciej Bobrowicz.

The workshop was also an occasion to present the current legal publications of the law publishing house, Wolters Kluwer.

Following the scientific part of the workshop, there was a memorable celebration of the launch of a new law firm, Markiewicz & Sroczyński GP. It was established by two speakers attending the workshop – Professor Ryszard Markiewicz and Dr. Jarosław Sroczyński. This additional event turned out to be another opportunity for sociable meeting of many specialists in various branches of law, economy and business.

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