

Consequences Of The WTO Ruling On The Rights Holders Community

Eamon Shackleton, IMRO

Introduction

Aiken Case

On 17th June 1975, the United States Supreme Court gave a decision in the case *20th Century Music Corp -v- Aiken*.

George Aiken owned and operated a small fast-food shop in downtown Pittsburgh, Pennsylvania, known as *George Aiken's Chicken*. 20th Century sued Aiken for copyright infringement. They complained that the radio reception in Aiken's restaurant of licensed broadcasts infringed their exclusive right to "perform" their copyrighted works.

On appeal to the Supreme Court, it was held that Aiken did not infringe 20th Century Music Corporation's exclusive right to perform the copyrighted work since the radio reception did not constitute a performance. The Court also held that for Aiken to have "performed" the copyrighted works would have obviously resulted in a wholly unenforceable regime of copyright. With the introduction of new copyright legislation in the United States in 1976, the US Government decided to include the Aiken decision in the new Act as Section 110(5). This section was significantly expanded in 1998 by the enactment of the Fairness in Music Licensing Act (later to be incorporated into the US Copyright Act as Section 110(5)(b)).

IMRO

The Irish Music Rights Organisation was created as the national authors' society for Ireland in 1995. It quickly concluded the royalty income in respect of the use of its repertoire in the United States was disproportionately low compared to other territories. IMRO concluded that the direct and indirect affects of the Aiken-style copyright exemptions were major contributors to US royalty payments being significantly lower than in other markets. As part of its strategy to increase revenues from the US, IMRO, in due course, lodged a complaint with the European Commission which later referred the matter to the World Trade Organisation dispute settlement body. In 2001, the US was found to be in breach of its international copyright obligations and was requested to remove the exemptions.

Milestones

"The practical unenforceability of a ruling that all of those in Aiken's position are copyright infringers is self evident. One has only to consider the countless business establishments in this country with radio or television sets on their premises – bars, beauty shops, cafeterias, car washes, dentists, offices and drive-ins – to realise the total futility of any even handed effort on the part of copyright holders to license even a substantial percentage of them."

US Supreme Court, 1975)

"Given that the market to which the business exemption applies was never significantly exploited by the collective management organisations (CMOs) (in the US) the US Congress merely codified the status quo of the CMOs' licensing practices."

(WTO Panel Report)

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“The US Congress found that prior to 1976 the majority of beneficiaries of the then contemplated exemption were not licensed.”

(WTO Panel Report)

“Community collecting societies do extensively license small shops and bars. They would not pursue such licensing policies if the costs of securing licensing from such venues would exceed or even equal the benefit.”

(European Commission Examination Procedure)

“The Commission satisfied itself that a reasonable assumption was that 20% - 25% of music played on US radio belongs to the Communities’ repertoires.”

“In spite of this, less than 5% of the US PROs’ total annual royalty distributions come to Community collecting societies (US\$28 million – 1996).”

(European Commission Examination Procedure)

Current Status Of The WTO Dispute On US Copyright Law

The trade dispute between the European Commission and the US is ongoing.

In 2001, the US maintained that it was not in a position to comply with the terms of the WTO ruling and agreed with the European Commission to submit the matter for arbitration so as to calculate appropriate compensation to be paid to the European Commission for each year the US law remained unamended.

The US Congress voted through US\$1.1 million compensation per annum for the 3 year period ending 2004.

The Consequences

The continued failure by the US Government to amend its copyright legislation threatens confidence in the World Trade Organisation’s system. The inconsistency between the US’ failure to conform its law to WTO rules and its aggressive stance on global intellectual property protection under TRIPS has potentially wide ramifications which could reverberate well beyond copyright. The US refusal to comply with the WTO panel report ruling that a provision of its law is inconsistent with TRIPS, demonstrates that the US is happy to pursue other countries for breach of WTO commitments but content to ignore or buy them off when they occur at home.

The WTO arbitration which considered the value of the losses to the European music rights holders was the first of its kind under the relevant WTO dispute settlement rules. The result was a derisory sum, which ignored the fact that rights were not capable of being fully licensed for a variety of reasons prior to the change in the law. The European Commission had argued that European rights holders were losing US\$25 million per annum, taking into account all of the premises in the US that would normally be required to pay. Based on the arguments put forward by the US, however, the Panel ruled that the level of compensation was to be set at US\$1.1 million per annum.

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The main reason for the huge disparity between the Commission's claim and the arbitrators' decision was that the arbitrators looked only at the actual royalty amounts paid to European rights holders in the 3 years prior to certain amendments being made to the copyright exemptions (and, in practice, the rights were often not exercised because of the pressure from retail and restaurant trade associations) rather than the potential royalties to be paid in respect of the underlying rights by all establishments covered by the exemptions.

There is little incentive for US PROs to pursue royalties in these contentious areas. Repeated international surveys of royalty collections have shown the public performance income collected in the US lags way behind other markets. Low tariff rates are one of the causes. As a result, there is inevitable pressure on PROs to limit the level of administration costs. This, in turn, inhibits their ability to confront music users reluctant to pay which, in turn, encourages non-compliance with copyright law.

A further, and perhaps more worrying, consequence arising from this case is the substitution of proper intellectual property protection by a regime of copyright exemptions and compensation.

For example, what if the US film or software industry wanted to tackle problems in the copyright protection of a new WTO member where there was a major loophole in the substantive law contrary to TRIPS so that licensing was made impossible or reduced. Let us assume that the industry is only a recent entrant to that new market and so minimal licensing is taking place anyway and revenues are at a low base. Even if the US were to win a case at the WTO that the country in question should comply with TRIPS (a goal of the USTR, according to their 2003 statements) the precedents set by the arbitration body in the music copyright dispute would value the compensation to the US at the very lowest end.

Conclusion

The US is setting a terrible example to other WTO countries who may prefer to ignore a ruling rather than meet their current or future WTO intellectual property obligations. With the tide of internet piracy reaching epic proportions, this is the wrong signal to send the global content industries. The precedent would not necessarily be linked to copyright-based trade – owners of pharmaceutical patents or internationally well known trademarks may be surprised when governments of developing countries decide to limit protection on the theory that it is cheaper to submit to an arbitration and pay damages for non-compliance than to implement and enforce TRIPS-based rights.

A further major and real concern is in the area of the on-line distribution of music. Determined lobbying continues to exempt from copyright protection the distribution of music in certain on-line situations. Failure to properly uphold traditional areas of intellectual property, such as those arising in the Aiken case, will only increase the problem for music rights owners in other areas.

Perhaps Steve Jobs and Bill Gates will hold the ultimate solution to the on-line challenges.

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