

**STATEMENT BY PROFESSOR KREILE  
ON THE WTO RULING  
MIDEM, 25th JANUARY 2004**

Ladies and Gentlemen, dear colleagues and friends,

Welcome to this conference that has been jointly organised by EMO and GESAC with the support of the European Commission. First of all I should like to thank the European Commission both personally and on behalf of all the authors represented by GESAC for having referred the subject we are addressing today to the WTO. The attention we have received in this matter deserves as much emphasis as the remarkable achievement accomplished by the people and offices involved in this case during the whole proceedings before the WTO.

The starting point in this issue is Art. 110 (5) of the US Copyright Act. Hidden behind this clause is an extremely explosive exception that in the USA exempts certain localities accessible to the public - like bars, restaurants and retail shops - under certain conditions from the obligation to pay copyright royalties for the public communication of radio or television broadcasts.

There is, however, no justification for such an exception in favour of royalty-free use of protected works: music is an essential part of the scene in shops, bars or restaurants. It unquestionably contributes to their success and enables higher profits to be generated. All this is really perfectly clear: can you imagine a public place like a bar or restaurant - whatever its size, whether big or small - without music? In a very short time, the customers would start looking around for a more hospitable place, and the users from the hotel and catering trade are all too aware of this. But how easy it is to forget to pay for something you cannot feel and whose use or enjoyment leaves no traces behind. All the same, this intangible music brings in the tinkle of coins and it is only right that the authors should claim part of this money.

At this point we should not forget that the first collecting society for musical works, SACEM, emerged in 1851 from the struggle of the authors against the free use of their works in the coffee houses. Over 150 years later, we authors' societies still have a vital role to play in this connection.

As a result of a complaint against Art. 110 (5) of the US Copyright Act submitted to the European Commission by the Irish society IMRO with GESAC's support, the European Commission decided in 1997 to institute arbitration proceedings with the WTO. In July 2000, the WTO arbitration panel ruled that Art. 110 (5) of the American Copyright Act was incompatible with the TRIPs Agreement and called on the USA to amend its Copyright Act.

Although the European Union and the authors have scored a major success with this ruling by the WTO arbitration panel, there is still cause for concern. Because this success at the WTO is primarily a theoretical success. More than 3 years after the ruling by the arbitration panel, the United States have still not amended the offending clause in their Copyright Act. The actual situation in the USA remains just as it was

before: about 70 % of the restaurants, bars and retail shops are still exempted from the obligation to pay royalties for the public communication of radio or television broadcasts in the USA.

Quite apart from changing the law in America, an agreement was reached between the European Union and the United States for the payment of compensation. The damages incurred by the European authors in the USA during the period from 21st December 2001 to 21st December 2004 are to be compensated with a lump sum of 3.3 million US Dollar. This amount has in the meantime been paid to GESAC.

You will be wondering why the payment was made to GESAC. Well, the answer is that the injured parties affected by the situation in the USA are the European authors of musical works and that these authors are represented by GESAC through their authors' societies. For this reason, the Commission decided to entrust GESAC with the task of administering and distributing the money received from the USA. GESAC sought the best way to make optimal use of these funds and in agreement with the Commission has established the major principles for doing so.

Today's conference must be viewed as part of an information strategy on the WTO ruling. By organising this event, we intend to once again draw attention to the need to bring US law into line with the TRIPs Agreement as quickly as possible.

The payment of 3.3 million US Dollar by the USA to the European authors does certainly have a major symbolic value, but it also demonstrates quite clearly that the USA have avowedly failed in their international commitments.

Unfortunately, however, this amount is out of all proportion to the actual damages sustained by the authors. These are certainly far higher than a mere 1.1 million US Dollar per annum. The reason for the small amount is - and this is a decisive point that, as you will see, will also be of interest to other right holders and not just the authors of musical works - the procedure proposed by the USA and adopted by the WTO arbitrators for determining the extent of the damages incurred by the authors. This procedure was based not on the actual use of the repertoire of the European authors, but only on the revenue generated in the past for such use. However, this revenue is not identical to the damages actually sustained.

It is to be feared that an obligation to pay such a small amount will not constitute sufficient reason for the American lawmakers to amend this point in the US Copyright Act and bring it into line with the USA's obligations under international agreements.

This is highly regrettable. If an economic partner of the size and importance of the USA, which has itself played a part in installing the TRIPs Agreement and an obligatory procedure for settling disputes, so blatantly shirks its international obligations, it will be difficult to deter other countries from creating similar exceptions.

You will agree that this is setting a very unpleasant precedent, which even today could turn against the interests of all owners of intellectual property rights. The subject that has brought us together is therefore of immense importance and it is in any case worth devoting a Sunday afternoon to it.

As we now move on to our analysis of this ruling, we are delighted to welcome with us today:

Mr. Eamon Shackleton, Director of IMRO, the Irish music rights society that initiated the proceedings;

Mr. Garcia Bercero, the head of the department of the European Commission (DG « Trade »), which is investigating this case and was represented at the WTO;

Mr. Hannu Wager, adviser to the WTO department for intellectual property.

In addition, we also have two authors here with us, Mr. Henrik Otto Donner, a composer from Finland and President of the Finnish authors' society TEOSTO as well as of EMO, and Mr. Petitgirard, the French composer and Chairman of the Administrative Council of SACEM, who will both let us share their concerns as authors about this sort of exceptions.

Mr. Jeff Taylor will present the viewpoint of IFPI and Mr. Miyet, the Vice-President of GESAC and Chief Executive Officer of SACEM, will moderate the debate.

Thanks to these high-calibre participants, we will receive a complete picture of the situation and then be in a position to talk among ourselves about possible strategies and alliances between the various categories of right holders, with a view to persuading the American government to meet its international commitments as quickly as possible.