Alþingi
Erindi nr. Þ 120/863
komudagur 26/2 1996

Menntamálanefnd Alþingis
b.t. Sigríðar Önnur Þórðardóttur
Alþingi v/Austurvöll
150 Reykjavík

Reykjavík, 20. febrúar 1996.

Nefnd þeirri, sem samdi frumvarp það til breytinga á höfundalögum, sem nú liggur fyrir Alþingi, hefur borist í hendur álit Samkeppnisstofnunar dags. 30. janúar 1996 um frumvarpið, einkum varðandi 10. gr. þess, sem lýtur að fyrirsvari höfundaréttarsamtaka að því er varðar þóknunarrétt fyrir opinbera dreifingu listflutnings af hljóðritum, en nánar tiltekið gerir 10. gr. frumvarpsins ráð fyrir því, að löggilt verði af opinberu aðilum ein samtök hér á landi til þess að annast innheimtu þóknunar vegna notkunar á hljóðritum á grundvelli 47. gr. höfundalaga.

Það sem fyrst vekur athygli í áliti þessu er að niðurstaða Samkeppnisstofnunar varðandi óskorað fyrirsvar höfundaréttarsamtaka fyrir rétthafa, getur á engan hátt talist afdráttarlaus. Þar segir einungis: "eðlilegt þyki með tilliti til samkeppnislegra sjónarmiða" að einstakir flytjendur geti sjálfir farið með réttindi sín. Hér er mjög varfærnislega að orði kveðið og nánast byggt á tilfinningalegum grunni frekar en rökrænum, enda margt í inngangi og forsendum álitsins, sem gæti leitt til þveröfugrar niðurstöðu. Það er því fráleitt, að stofnunin hafi tekið af skarið um, að réttargæslufyrirkomulag það, sem lagt er til að viðhaft verði sé óhæft enda er hér aðeins verið að staðfesta þá framkvæmd, sem tíðkast hefur allar götur frá tilurð þessara réttinda með höfundalögunum frá 1972, þ.e. að ein samtök rétthafa þ.e. SFH, Samband flytjenda og hljómplötuframleiðenda gæti alfarið þessara réttinda í samræmi við gildandi lög og reglugerðir. Hið sama fyrirkomulag er við lýði í flestum öðrum löndum.

Meginástæða þessa, svo sem háttvirtri nefnd hefur áður verið bent á, er að sú félagslega meðferð réttinda sem gert er ráð fyrir í 10. gr. frumvarpsins, er með öllu óhjákvæmileg til að koma böndum á réttarframkvæmdina. Réttindi þau, sem hér um ræðir, er réttur til þóknunar fyrir opinberan flutning af hljóðritum (hljómplötum, geisladiskum, böndum o.s.frv.), svo sem í útvarpi, á skemmtistöðum o.s.frv. Á næstum hverju einasta hljóðriti eru margir flytjendur og á sumum tugir eða jafnvel hundruð flytjenda. Rétthafahópurinn er því svo fjölmennur, skiptir tugum ef ekki hundruðum þúsunda, að fráleitt er að hver og einn semji og innheimti gjald fyrir sjálfan sig. Slíkt er augljóslega óskynsamlegt og með öllu óraunhæft ekki einasta frá sjónarmiði rétthafa, heldur eigi síður neytenda sem þá þyrftu að semja við hvern einstakan í þessu stóra hópi, þar á meðal erlenda rétthafa eða réttindahópa. Jafnvel þótt aðeins lítill hluti hins gífurlega rétthafafjölda kysi að fara með persónulegt fyrirsvar myndi það einnig óhjákvæmilega leiða til glundroða í framkvæmd.

Í þessu sambandi má vísa til úrskurðar finnska Samkeppnisráðsins (Competion Council) dagsett 5. október 1995, þar sem segir orðrétt um þetta atriði: "Another significant fact in the case is that, as far as mass rights are concerned, complete and effective utilisation of copyrights is not possible without intermediate organisations operating between the copyright holder market and the user market. Cessation of the collective administering of copyrights would in practice make it necessary for each copyright holder to negotiate separately with the users of the rights. Music is played in thousands of places. In addition, it is recorded on tapes and discs, recorded for use in films, advertisements and for use by radio- and television companies. Individual copyright holders do not have the technical opportunities to oversee the utilisation of their rights nor the economic prerequisites to negotiate with all the users of them. The users of music are not able to agree about royalties directly with the artists. Agreement about royalties directly between the users and the copyright holders would require such a large number of individual contracts that it must be considered an unrealistic alternative to the present arrangement for reasons of cost. No realistic alternative to the collective administering of copyrights, using present technology and ensuring the effective utilisation of copyrights, has been presented."

Skal nú nánar vikið að einstökum þáttum umsagnar Samkeppnisstofnunar.

Gefið er í skyn að fyrirsvarsaðild höfundaréttarsamtaka standist ekki svokallaðan Evrópurétt. Þessu verður að vísa á bug og skal í því sambandi m.a. bent á, að í tilskipun Evrópusambandsins nr. 92/100/EEC frá 19. nóvember 1992 um útlána- og leiguréttindi er í skyldu tilviki heimilað að veita höfundaréttarsamtökum (innheimtusamtökum) umsýslu réttinda , sbr. 3. mgr. 4. gr. tilskipunarinnar. Ennfremur er í tilskipun Evrópusambandsins um samræmingu á tilteknum reglum vegna útsendingar um gervihnött og endurvarps um kapal frá 27. september 1993 beinlínis mælst svo fyrir í 1. mgr. 9. gr., að einungis í gegnum innheimtumsamtök sé unnt að neyta réttar sem handhafi höfundaréttar eða skyldra réttinda hefur til að veita eða synja dreifanda efnis um kapalkerfi um leyfi til endurvarps um kapal. Þetta sýnir, að þau sjónarmið, sem koma fram í tilvitnuðum dómum í umsögn Samkeppnisstofnunar frá 1971 og 1973 eru úrelt, enda eru viðhorf innan Evrópusambandins til höfundaréttarsamtaka allt önnur nú en í upphafi þegar þessi mál voru til skoðunar.

Þetta kemur þó einna gleggst fram í hinum nýju dönsku lögum frá 1. júní 1995, en Danmörk hefur lengst allra Norðurlandaþjóða verið aðili Evrópusambandins. Í hinu nýja ákvæði í 68. gr. dönsku höfundalaganna frá 1. júní 1995 segir orðrétt "De udövende kunstnere og fremstillerne af lydoptagelser har krav på vederlag. Vederlagskravet kan kun göres gældende gennem en af kulturministeren godkendt fællesorganisation, som omfatter såvel udövende kunstnere som fremstillere af lydoptagelser". Danir leyfa hér engin frávik frá einkaumsýslu innheimtusamtaka í þá veru, að einstakir rétthafar geti hver um sig farið með réttindi sín ef þeir óska þess, af ótta við að slíkt geti leitt til upplausnar í framkvæmd og grafið undan réttarstöðu rétthafa þegar til lengri tíma er litið. Hin danska löggjöf á því sviði, sem hér um ræðir, er efnislega í einu og öllu í samræmi við ákvæði 10. gr. íslenska frumvarpsins þess efnis, að þóknunarréttur fyrir afnot hljóðrita verði aðeins virkjaður af einum samtökum (Gramex í Danmörku). Er í þessu sambandi sérstaklega vakin athygli á bréfi danska menningarmálaráðuneytisins til nefndarinnar frá 14. febrúar 1996. Er eindregið tekið undir þessi dönsku sjónarmið. Í þessu sambandi er rétt að undirstrika að ekki er verið að skylda rétthafa til félagsaðildar að innheimtusamtökum, heldur aðeins að hlíta fyrirsvari samtakanna um innheimtu þóknunnar.

Varðandi ítrekaða umfjöllun í áliti Samkeppnisstofnunar um "markað", "markaðsráðandi stöðu" "markaðsyfirráð", "styrkingu markaðsyfirráðandi stöðu" o.s.frv.

verður að benda á, að fráleitt er að leggja umsýslu höfundaréttar og skyldra réttinda til jafns við það, er vara eða þjónusta er boðin á almennan markað eða vörumarkað og draga síðan ályktanir á þeim forsendum, enda reyndar viðurkennt í álitinu að um "sérstakan markað" sé að ræða, þótt lítið tillit sé tekið til þess í niðurstöðu.

Á sviði höfundaréttar er varla hægt að tala um nokkra samkeppni milli einstakra flytjenda innbyrðis í sambandi við þóknunarrétt þann, sem hér um ræðir, þannig að hugleiðingar t.d. um "samkeppnishömlur" eru vart við hæfi. Hið sama á við um hugleiðingar varðandi "markaðsráðandi stöðu" þar sem innheimtusamtökin ráða engu um sjálfan markaðinn, þ.e. framboð og eftirspurn hljóðrita til opinberrar dreifingar.

Í umfjöllun Samkeppnisstofnunar er vikið að því, að rétthafar hafi samráð um verð, og að innheimtusamtök hafi því aðstöðu til að misbeita aðstöðu sinni í því efni. Síðan segir í álitinu, að í þessu ljósi beri að meta, hvort fyrirkomulag samkvæmt 10. gr. frumvarpsins sé bráðnauðsynlegt. Þessi rökstuðningur og þessar forsendur fá engan veginn staðist vegna þess að samtökin ráða engu um endanlegt verð frekar en notendur. Endanlegt ákvörðunarvald liggur samkvæmt 3. mgr. 10. gr frumvarpsins algjörlega hjá hlutlausri úrskurðarnefnd skipaðri af menntamálaráðherra.

Varðandi niðurstöðu Samkeppnisstofunar er þetta að segja.

Í niðurstöðu er gert ráð fyrir algjörum aðskilnaði á rétti framleiðenda og flytjenda varðandi afnot af hljóðritum. Sú skoðun byggist á misskilningi. Réttur sá, er hér um ræðir er sameiginlegur og aðskilnaður óheimill samkvæmt 8. gr. tilskipunar Evrópuráðsins um útleigu- og lánaréttindi, sem mælir fyrir um sameiginlegan rétt þessara aðila. Samkvæmt íslenskum höfundalögum frá 1972 er um sameiginlegan rétt að ræða og á því er einnig byggt í frumvarpinu.

Sú niðurstaða önnur að leyfa einstökum rétthöfum að gæta réttinda sinna sjálfir getur að dómi endurskoðunarnefndar höfundalaga leitt til þess, að framkvæmd réttinda fari algjörlega úr böndunum, enda hvergi tíðkað svo vitað sé, og verður að telja mjög óæskilega tilhögun bæði frá sjónarhóli rétthafa og neytenda. Að því er varðar meint aðhald með því að gefa fyrirsvarsaðildina frjálsa að hluta til eins og lagt er til í áliti Samkeppnisstofnunar, verður ekki séð í hverju slíkt aðhald geti verið fólgið. Aðhald felst fyrst og fremt í því að, innheimtusamtökin hafi löggildingu opinbers aðila þ.e. menntamálaráðuneytisins, sem eðlilegt þykir að fari með eftirlitsvald í þessu og skyldum tilvikum en ekki samkeppnisstofnanir, sbr. framangreint bréf danska menntamálaráðuneytisins til nefndarinnar, þar sem segir að "at Gramex forhold og tariffer er undtaget fra konkurrencemyndighedernes direkte indgrebskompetence". Ennfremur felst afgerandi aðhald í því, að innheimtustofnunin er háð endanlegu úrskurðarvaldi úrskurðarnefndar samkvæmt 57. gr. höfundalaga um fjárhæðir þóknunar, þannig að girt er fyrir hugsanalega misbeitingu í skilningi samkeppnislaga í því efni.

Loks vill nefndin undirstrika þá skoðun sína, að innheimtustofnun í þessu tilviki geti ekki að mati nefndarinnar náð markaðsráðandi stöðu í skilningi samkeppnislaga, þar sem hlutverk hennar sé einvörðungu að fjalla um kröfur og innheimtur á grundvelli þóknunarréttar listflytjenda og hljóðritaframleiðenda. Þannig geti stofnunin hvorki ráðið framboði né eftirspurn hljóðrita, til opinberrar dreifingar, né komið í veg fyrir notkun þeirra á grundvelli einokunaraðstöðu. Þá ráði stofnunin ennfremur engu um endanlega upphæð þóknunar s.s. áður er að vikið.

Varðandi þau niðurlagsorð í áliti Samkeppnisstofnunar að tilskipun Evrópusambandins á leigu- og útlánaréttindi "krefjist" þess ekki, að innheimtusamtök fari alfarið með réttargæsluna, er heldur ekkert í greindri tilskipun eða öðrum tilskipunum Evrópusambandsins á sviði höfundaréttar, sem girðir fyrir slíka réttarframkvæmd, svo sem að framan er rakið.

Endurskoðunarnefnd höfundalaga,

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14. februar 1996

Kære Thorunn,

Tak for din telefax af 13.2.96 vedlagt en udtalelse fra de islandske konkurrencemyndigheder ang. art. 1o i forslaget til ny islandsk ophavsretslov, som du oplyser ordret svarer til § 68 i den danske ophavsretslov af 14. juni 1995.

For Danmarks vedkommende kan jeg oplyse følgende:

1. Siden 1961 har vi i Danmark haft een organisation - Gramex - der fælles for fonogramproducenter og udøvende kunstnere har varetaget en tvangslicensbaseret opkrævning af vederlag for brug af fonogrammer i radio og TV samt anden offentlig fremførelse (restauranter o. lign.). Institutionen Gramex arbejder og kontrolleres af Kulturministeriet på grundlag af en ministeriel godkendelse. Selskabets tariffer fastsættes ved uenighed mellem de involverede parter af tvangslicensnævnet (nu Ophavsretslicensnævnet).

2.Der har ikke på noget tidspunkt siden 1961 - og heller ikke under behandlingen i Folktinget i foråret 1994 og 1995 af den

gennemførte nye danske ophavsretslov fra de danske konkurrencemyndigheder været fremført indvendinger mod denne ordning, som i Danmark betyder, at Gramex forhold og tariffer er undtaget fra konkurrencemyndighedernes direkte indgrebskompetence.

Der foreligger således ingen udtalelse fra danske konkurencemyndigheder om det af dig fremsendte spørgsmål.

3. Når det gælder den af de islandske konkurrencemyndigheder anførte ældre EU-retspraksis (Gema-dommen osv.), er det svært at se, at den skulle kunne have nogen afgørende betydning for indholdet i den kommende islandske ophavsretslovs art. 10.- Det har i hvert fald ikke været tilfældet for udformningen og vedtagelsen af den danske lovs § 68, som har til formål i justeret form at videreføre en enkel offentlig kontrollerbar opkrævningsordning, som man har haft gode erfaringer med siden 1961.

4. Med hensyn til EU, er det naturligvis korrekt, når det i det sidste afsnit af udtalelsen fra de islandske konkurrencemyndigheder siges, at bestemmelserne i direktiv 92/100/EEC af 19. november 1992 ikke kræver , at medlemsstaterne skal introducere et obligatorisk medlemskab af collecting societies.

Her må man tage i betragtning, at de vedtagne direktiver ikke alle er lige udtømmende formuleret. Udlejningsdirektivet indeholder ikke bestemmelser om medlemsstaternes forhold til collecting societies. - Bestemmelserne i art. 8 (2) i udlejningsdirektivet om sekundær brug af lydoptagelser er imidlertid ved art. 4 i det senere sat-cab direktiv (93/83/EEC) af 27. september 1993 også gjort anvendelige på brug af grammofonplader i radio-og tv sendinger via satellit. I sat-cab direktivets art. 13 er der under kapiteloverskriften "generel provisions" (kap. IV) taget stilling til spørgsmålet om håndteringen af collecting societies. Det siges i art. 13, at: "This directive shall be without prejudice to the regulation of the activities of collecting societies by the Member States."

Det kan også være naturligt at nævne sat/cab-direktivets art. 9 (1), hvor man på kabelretransmissionsområdet direkte foreskriver, at ophavsret og naborettigheder kun kan udøves gennem et collecting society.

Hermed synes det klart, at medlemsstaterne har mulighed for - hvis man ønsker det - at regulere det område, som er dækket af art. lo i det islandske lovforslag på helt samme måde, som tilfældet i ganske mange lande i gennem mange år har været med PRS,GEMA,STIM,TEOSTO,TONO, KODA og STEF- organisationerne og lignende.

Skulle du have tvivl eller yderligere spørgsmål, er jeg naturligvis til rådighed.

Iøvrigt synes spørgsmålet om de nordiske konkurencemyndigheders forhold til de kollektive forvaltningsorganisationer på ophavsretsområdet eventuelt at være egnet til en uformel drøftelse på det næste nordiske departementemtsmøde om ophavsret, som tentativt er berammet til at finde sted i Stockholm den 26. - 27. marts.

Mange hilsner

J. Nørup-Nielsen

Kopi til orientering:

Jukka Liedes, Undervisningsministeriet, Helsingfors
Helge Sønneland, Kulturdepartementet, Oslo
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RULING OF THE OFFICE OF FREE COMPETITION

The Competition Council as an ancillary issue has made a decision on the request from the Office of Free Competition to dismiss Gramex r.y.'s application. In the view of the Office of Free Competition, the exemption order was granted in the manner requested by the applicant and consequently the applicant is not entitled to submit the matter for decision by the Competition Council. The applicant has requested consideration of the application submitted.

1. Review of the case

Under section 19 subsection 2 of the Act on Restrictions of Competition, should the Office of Free Competition deem that there are not the preconditions for the granting of an exemption order, the case must be submitted for decision by the Competition Council if the applicant so requests. Under section 21 subsection 3 of the Act on Restrictions of Competition, decisions of the Office of Free Competition cannot be separately appealed. The provision in section 19 subsection 2 of the Act is therefore not an actual appeal regulation but a norm for redress on the basis of which the litigant has the right to request the case for an exemption order be referred for decision by a higher authority.

It is not explicitly stated in section 19 subsection 1 of the Act on Restrictions of Competition whether the Office of Free Competition can set conditions for an exemption order or to what extent the activities of a trader can be restricted by any conditions. Under section 19 subsection 3 of the Act, the Competition Council can annul an order which has been granted if for instance the conditions set for the order have been breached. Considering the wording and practical implications of section 19 subsection 3, no obstacles to setting conditions can be deemed to exist although the Act does not expressly contain an empowering regulation. The openness to several interpretations of the wording in section 19 subsection 1 relating to the permissibility and content of conditions to be set for an exemption order must for its part be taken into account in the interpretation of the provision for redress in section 19 subsection 2.

The legislative history of the Act does not contain any statements clarifying the field of application of the provision for redress in section 19 subsection 2. According to the principle followed in applying administrative legislation, when the provisions for redress are open to interpretation the litigant must be deemed to have the right of appeal in so far as a decision made by the authorities adversely affects the legal status of the applicant. It is not apparent from the legislative history of the Act on Restrictions of Competition that it was intended to make the right of appeal more restrictive than what is otherwise deemed to be required by legal status in applying administrative legislation. One argument against a narrow interpretation is that in so far as exemption order cases are concerned the Competition Council offers the only means of appeal for a litigant.

The Competition Council considers it clear that, as well as refusal of an exemption order, setting conditions not contained in the application which detrimentally restrict the livelihood of the applicant can adversely affect the legal status of the applicant. The criterion in interpreting section 19 is that of ensuring sufficient and effective legal status in applying the Act on Restrictions of Competition.

The right of appeal must be examined by comparing what is requested in the application and what is granted by the decision. An interpretation which would allow setting conditions restricting a livelihood, but which simultaneously would deny referral of the decision to a higher authority for a ruling, would diminish the legal status of the litigant in the case of a formally favourable administrative decision in which interpretations of the application of the Act are made, or conditions restricting the livelihood are set, which adversely affect the legal status of the applicant. The decisive factor is therefore the relationship of the ruling to the requests presented by the applicant and its effect on his/her legal status, not whether the ruling of the Office of Free Competition is nominally an affirmative ruling or not. Moreover, the aspects indicating that the Competition Council is competent in the case under consideration are that the making of decisions refusing an exemption order which is binding on the trader is the task of the Competition Council under section 8 subsection 4 and section 16 of the Act, and also that on the basis of section 19 subsection 3 the annulment of an exemption order for breaching its conditions is within the competence of the Competition Council.

On the basis of the above, the applicant must be considered to have the right to demand the case be referred to the Competition Council when the exemption order is not granted in accordance with the application and the divergence from the application is significant with regard to the applicant's legal status, i.e. the applicant has a need for legal redress. If the exemption order is granted only in part, the applicant can also demand the case be referred to the Competition Council in so far as the application has been refused. Moreover, included within the authority of the Competition Council, as an ancillary issue to considering an exemption order, is reviewing whether it is actually a restriction of competition prohibited by sections 4 - 6 of the Act at issue, i.e. does the applicant need an exemption order.

The documents show that in submitting the application for an exemption order as required by the Office of Free Competition, Gramex r.y. has requested the Office of Free Competition to confirm that the regular activity of the association is not regarded a restriction on competition prohibited by section 6 of the Act on Restrictions of Competition. In case the activity of the association was, contrary to the applicant's point of view, deemed to be prohibited by the Act on Restrictions of Competition, Gramex r.y. has alternately requested the granting of a permanent exemption order. The Office of Free Competition has denied both of the above requests. Additionally, the order granted has been restricted to apply to the mass use of rights.

The Office of Free Competition has ruled against Gramex r.y. in those respects where the requests of the applicant have been refused, i.e. in so far as

a) the Office of Free Competition, diverging from the applicant's request, has regarded the regular activity of the applicant association to be price-fixing prohibited by section 6 of the Act on Restrictions of Competition and rejected the request for confirmation that there is no need for an exemption order and that the activity of the association is lawful;

b) the Office of Free Competition has restricted the validity of the exemption order to ten years;

c) the Office of Free Competition has not granted an exemption order for mass use as regards unowned rights and has excluded the collective administering of individual rights from the scope of the exemption order.

Gramex r.y.'s application for an exemption order has therefore in effect been refused in part. The decision of the Office of Free Competition alone adversely affects the legal status of the applicant on the basis that the regular activity and main purpose of a registered association, which are confirmed and entered in the public register, are deemed by decision of an authority to be prohibited by law, liable to penalties and a permitted activity only under an exemption order.

The Office of Free Competition has not shown grounds for dismissing the requests of the applicant. The Competition Council rejects the objection raised by the Office of Free Competition.

2. Assessment of Gramex r.y.'s business with regard to legislation on competition

2.1 Description of Gramex r.y.'s business

The purpose of Gramex r.y. is to administer and further the rights of performing artists and recording producers under the law of copyright with regard to the playing and reproducing of recordings. In addition to this, the association monitors developments in copyright legislation in Finland and abroad and works towards promoting and supporting the development of the music and recording business. A crucial task for Gramex r.y. is collecting royalties for the use of recordings and accounting for them to the holders of copyright. Gramex monitors only the secondary or subsequent rights to use recordings.

Under section 45 of the Copyright Act (404/61) the performance of a written or artistic work may not be used without the consent of the performing artist on a record, in a film or in any other device with which it can be reproduced, nor may it be broadcast or communicated to the public without the permission of the performer. Section 46 of the Copyright Act stipulates that a record or similar recording device may not be copied without the consent of the record producer until 50 years after its recording. Performing artists and record producers therefore have the sole right to control the copying of the recordin[illegible] under sections 45 and 46 of the Act.

According to section 47 of the Copyright Act, performing artists and recording producers are always entitled to royalties when protected recordings are used in radio or television broadcasts or in some other public performance for gain. This, however, differs from sections 45 and 46 of the Act in that it is not sole right of copyright. Royalty is collected from use in an event which has already happened nor can the holders of the copyright set conditions for the use. Section 47 of the Act also stipulates that artists who participated in the same performance can only exercise their rights jointly. Likewise, the performing artists and recording producer must present their claims at the same time.

Several performing artists participate regularly in the making of one recording. In addition, the recording can have several producers. In practice, the rights of the same musical work are divided between several holders of copyright. On the other band, legal use of recordings requires payment of royalties to each individual holder of copyright, or acquiring consent to reproduce them from each individual holder of copyright.

Gramex operates in the primary market with a copyright holder who has made a contract with Gramex to be a client, with the contents of the contract being confirmed at a meeting of the association. Under the contract, the client transfers his/her rights to the royalties to which the client is entitled for the use of recordings in a public performance, or for the broadcasting of them to the public, exclusively over to Gramex's supervision. In addition, the client transfers his/her right to copy the recordings, or to transfer recorded performances to a device with which they can be reproduced, and to any other such use of the recording, which Gramex's clients, either directly or through their representative companies, decide to transfer over to Gramex's supervision. Correspondingly, Gramex commits itself to, among other things, supervising the said rights and paying over the royalties to the copyright holder following the provisions for accounting and distribution stated in the contract.

Gramex operates in the secondary market by making royalty contracts with the users of recorded music, which cover royalties under the Copyright Act for all the recorded music used. The users of recorded music include radio- and television-companies, restaurants and discotheques, shops, barbers, bus companies and theatres.

At the end of 1994, a Gramex number had been given to a total of 24,361 artists and 2,701 producers. In 1994 Gramex paid over royalties for 1993 to 7,036 artists and 1,738 producers. At the end of 1994 Gramex's recording stock was over 550,000 recorded tracks/pieces. In addition to its Finnish clients, Gramex represents an extremely high number of foreign clients on the basis of reciprocal agreements made with foreign affiliated companies. According to the applicant's estimate, potential users of recorded music number between 20,000 and 50,000. A mass market for both the holders of copyright and the users of music is therefore involved.

It is characteristic of Gramex's business that it functions in the role of intermediary between individual copyright holders and users of recorded music. Gramex accumulates the copyrights of individual copyright holders, combines them into a coherent package by bundling the rights together and sells the package to the users of music. Conversely, Gramex charges the users royalties and pays these over to the copyright holders. Gramex is thus a channel via which supply from copyright holders meets demand from the users of recorded music. In the absence of an organisation like Gramex, the individual users of music would have to negotiate directly with the individual holders of copyright.

2.2 International practice

Both the Office of Free Competition and Gramex have delivered to the Competition Council a report on international practice with regard to the position of copyright organisations in respect of copyright legislation.

The collective administering of copyrights has been organised also in most member states of the European Union in a manner corresponding to that in Finland. The national legislation of most member states of the EU contains a prohibition on cartels comparable to section 6 of the current Finnish Act on Restrictions of Competition.

The report delivered by the litigants refers to the fact that in member states of the EU copyright organisations have been treated as distribution organisations exercising independent decision-making authority, which may have a dominant market position with regard to the market for copyright holders and users. Regulations prohibiting misuse of a dominant market position have therefore been applied to the most apparent wrongs. There is no mention in the reports that a single member state of the EU would consider that copyright organisations carrying on the collective administering of copyrights require an exemption order from the prohibition on cartels. The Supreme Court of the United States for its part has considered that the collective administering of copyrights under open licences is not to be deemed a price-fixing cartel which would be prohibited per se.

In the European Court of First Instance, article 86 of the Treaty of Rome prohibiting misuse of a dominant market position has been applied to the activity of copyright organisations, when misuse has been revealed. In such cases the interpretation has paid particular attention to the balance between the rights of copyright holders and the requirements of efficient administering of copyrights (BRT vs SABAM, 127/73, 1974, page 313). Against that, no solution is found in the practice of the European Court of Justice in which the basic structure of the collective administering of copyrights would be deemed contrary to section 1 of article 85, and an arrangement within the meaning of section 3 article 85 thus requiring an exemption order. Arrangements necessary for the widespread use of music, for copyright protection and for the effective exercise of rights have been considered permissible.

In the case Ministere Public vs Tournier (395/87, 1989, page 2521) the European Court of Justice has specifically stated that the activity of copyright organisations serves a legitimate purpose in endeavouring to protect the rights and interests of their members in relation to the users of recorded music. Agreements made with the users for this purpose cannot be regarded as restricting competition as meant in article 85 except when a disputed organisation goes further than is necessary to fulfil the said legitimate purpose (sections 30 and 31 of the ruling).

In the case mentioned it was considered that reciprocal agency agreements between the copyright organisations of different countries concerning programmes do not in themselves restrict competition in a manner that would bring them within the scope of section 1 of article 18. The interpretation would be different if access were denied to the market for users of music in another member state by the sole ownership condition contained in the reciprocity agreements, or otherwise unreasonably. On the basis of the practice up until now, the application of article 85 may become appropriate in special situations where, in the case of a certain product, the structure of the market is such that companies involved in the arrangement have in practice the prerequisites to negotiate about royalties also directly with a user group.

The foreign material delivered to the Competition Council by the litigants supports the applicant's concept that the collective administering of copyrights through organisations created for that purpose is not in fact price-fixing that requires an exemption order. The Office of Free Competition has not established anything more of principal than special reasons associated with specific features of the Finnish market that would be grounds for interpreting the Finnish Act on Restrictions of Competition in a manner deviating from international practice.

2.3 Assessment of the collective administering of music copyrights carried on by Gramex r.y with regard to the Act on Restrictions of Competition

In the government proposal (HE 162/1991 vp. page 10) concerning the Act on Restrictions of Competition it has been stated that the prohibition in section 6 of the said Act means both the specific agreements of companies, or comparable joint understandings, as well as the decisions, or corresponding arrangement, of joint organs and joint associations of companies which restrict use at the horizontal level of the means of competition for companies. The decisive factor in the Competition Court is the actual purpose of the arrangement and its effect on the market, not the legal form given to it.

Gramex r.y.'s business idea is to accumulate the individual rights of copyright holders into one package and sell them to the users of the rights. The individual clients of Gramex r.y. cannot alone offer the users of the protected works the same commodity as Gramex. The collective administering of copyrights handled by Gramex must be regarded as creating a new commodity, which clearly differs in content from the commodity which an individual copyright holder could offer users.

Another significant fact in the case is that, as far as mass rights are concerned, complete and effective utilisation of copyrights is not possible without intermediate organisations operating between the copyright holder market and the user market. Cessation of the collective administering of copyrights would in practice make it necessary for each copyright holder to negotiate separately with the users of the rights. Music is played in thousands of places. In addition, it is recorded on tapes and discs, recorded for use in films, advertisements and for use by radio- and television companies. Individual copyright holders do not have the technical opportunities to oversee the utilisation of their rights nor the economic prerequisites to negotiate with all the users of them. The users of music are not able to agree about royalties directly with the artists. Agreement about royalties directly between the users and the copyright holders would require such a large number of individual contracts that it must be considered an unrealistic alternative to the present arrangement for reasons of cost. No realistic alternative to the collective administering of copyrights, using present technology and ensuring the effective utilisation of copyrights, has been presented.

The Copyright Act contains a number of provisions which refer to associations tending to the collective administering of copyrights. Under section 47 of the Copyright Act performing artists and recording producers are entitled to royalties for the playing of protected recordings in radio and television broadcasts and in a public performance for the purpose of gain. According to section 47, artists who participated in the same performance can only exercise their rights jointly. Likewise, the performing artists and recording producer must present their claims at the same time. In practice, the rights of several copyright holders are regularly attached to only one track/piece. The premise in the legislative history of the Copyright Act (HE 161/1990 vp pages 25-26) has been that the royalties meant in section 47 that are paid for the use of recordings can be levied collectively through Gramex r.y. Other provisions in section 47 of the Copyright Act, or elsewhere in the Act, do not exclude or prevent application of the Act on Restrictions of Competition to the activity of copyright organisations. The content, intention and effects of the Copyright Act must for their part, however, be subject to interpretation in assessing whether the collective administering of copyrights is an activity prohibited by section 6 of the Act on Restrictions of Competition.

The commodity offered by Gramex differs significantly from the rights of use controllable by individual copyright holders for their own works. From the point of view of the user group, the value added by the product Gramex offers is in its ease of use and the completeness of the available programmes. Royalties are paid through Gramex to thousands of individual copyright holders. The rights of one performing artist or producer is thus of little consequence in the reproduction of recorded music or its public performance. The issue is a genuinely new product created by packaging rights. This could be called the mass use of works because an individual artist, or a group of artists that have jointly produced a certain work, are not able to offer users a commodity equivalent to that offered by Gramex. Gramex's clients and Gramex therefore offer a different product. Competition between the performing artists who are Gramex's clients and producers occurs at a different stage of production to that

in which Gramex operates. When individual copyright holders do not, do not endeavour, or are not even able, to offer the same, or even a comparable, product and service as Gramex, the issue is not that of horizontal collaboration between copyright holders as it is deemed to be in the ruling of the Office of Free Competition.

An alternative assessment of the legal position concerning competition can be relevant in situations where a limited number of traders through an agreement, or other common understanding, restrict competition between themselves, for example by channelling their sales through the same distribution company when the said traders also have the prerequisites to market their products directly to the customers (Valio Oy, d:o 7/359/93; ruling of the Competition Council 2.12.1993). The case now under review differs from the situation involving Valio Oy's application for an exemption order, where a limited number of traders participated in an agreed arrangement and where the functioning of the market did not require an intermediary organisation like Gramex. The copyright holders represented by Gramex r.y do not in practice have the opportunity to negotiate with the users, while in the Valio case joint venture dairies had full opportunities to agree on prices and other terms of delivery without an intermediary company. Application of section 6 of the Act is not excluded in such cases where competition between co-owners is restricted on the horizontal level through a joint distribution organisation. Should a cartel be associated with Gramex's distribution activity, which is in itself permissible, or be maintained in conjunction with it or by means of it, the Office of Free Competition could review such procedures separately.

Gramex must be deemed an independent trader, which itself determines the level of royalties levied and other conditions of contract. A vertical customer relationship exists between Gramex and the copyright holders who have authorised Gramex as their proxy. The basic structure of the collective administering of copyrights cannot thus be regarded as the collaboration between traders operating within the same stage of production meant by section 6 of the Act on Restrictions of Competition, which would require an exemption order under section 19 of the Act. Should also cartel activity be associated with its distribution activity, in itself permissible, the Office of Free Competition can review such procedures separately.

The Office of Free Competition has itself decided on the interpretation above in the case concerning Kopiosto r.y. The character of the business - collective administering of copyrights - is basically the same in Gramex and in Kopiosto. The Office of Free Competition has not established justifiable grounds with respect to legislation on competition for the different treatment of Gramex r.y. With regard to the business of both organisations, it is pivotal that the clients of the association are not able to offer the commodity or service produced by the association. The fact that Kopiosto's clients are to a larger extent associations than Gramex's clients or that the commodity offered by the organisations is not exactly the same, does not justify an interpretation by the Office of Free Competition which deviates from different and earlier practice of what constitutes the essential elements of section 6 of the Act on Restrictions of Competition.

Section 3 subsection 2 of the Act on Restrictions of Competition deems a dominant market position to be a trader or an association of traders who have an exclusive right, throughout the country or in a certain area, or other such dominant position in a certain commodity market, that it can control the price level or terms of delivery of the commodity, or otherwise affect the conditions of competition in a certain stage of production or distribution. Gramex r.y . has an actual monopoly in administering the copyrights of musical artists in Finland. Gramex r.y. must therefore take section 7 of the Act on Restrictions of Competition, which prohibits misuse of a dominant market position, into consideration in its business activities. Misuse is prohibited in both the relationships between Gramex and the copyright holders it represents as well as in the relationship between Gramex and the users of protected works. The Office of Free Competition can intervene in Gramex r.y.'s business activities under section 7, if there is apparent cause.

3. Conclusion

The Competition Council reverses the ruling on the exemption order made by the Office of Free Competition on 2 January 1995. As Gramex r.y. does not need an exemption order, the rendering of more juridical pronouncements is moot.

4. Appeal

Under section 21 of the Act on Restrictions of Competition, this ruling cannot be appealed.

Helsinki, the 5th day of October 1995

Chairman of the Competition Council Mikko Tulokas

Secretary General of the Competition Council Petri Kuoppamäki

Distribution: The Office of Free Competition

Esittävien taiteilijoiden ja äännitteiden tuottajien tekijänoikeusyhdistys Gramex r.y. (The Copyright Society of Performing Artists and Producers of Phonograms in Finland Gramex r.y.)

The Ministry of Trade and Industry

The Ministry of Education