

## Antitrust and Copyright Collectives – an Economic Analysis

by

Adrianna Zabłocka\*

### CONTENTS

- I. Introduction
- II. Music industry and copyrights
- III. Economic function of copyright collective societies
- IV. CCS and overall social welfare
- V. The *Brathanki v. ZAiKS* decision  
and economic function of CCS
- VI. *The Brathanki v. ZAiKS* decision and welfare analysis
- VII. Conclusions

### *Abstract*

The activity of the copyright collecting societies had been scrutinized by many antitrust authorities. The paper presents the decision taken by the President of the Office of Competition and Consumer Protection (UOKiK), which deals with abusing practices of Polish copyright collective society – ZAiKS. The paper concentrates on the economic aspects of the decision from the President of UOKiK.

**Classifications and key words:** collecting societies, copyright, antitrust, transaction costs, welfare.

---

\* Dr. Adrianna Zabłocka, senior lecturer at the Faculty of Economics, University of Gdańsk.

## I. Introduction

On the 6<sup>th</sup> of December 2007 the Polish Supreme Court dismissed the Polish Society of Authors (ZAiKS) appeal<sup>1</sup> concerning the decision taken by the President of the Office of Competition and Consumer Protection (UOKiK) on the 16<sup>th</sup> of July 2004, which found that ZAiKS had infringed competition law by abusing its dominant position on the market of collective management of copyrights.

The decision of the President of UOKiK was taken after a complaint by the music group Brathanki concerned the mechanical reproduction rights to Brathanki's musical works licensed by ZAiKS, on the group's behalf to the DIGI PRES company. According to Brathanki, the license infringed its rights as the owners of the copyright because it permitted DIGI PRES to reproduce works, the management of which was entrusted by Brathanki to ZAiKS, without granting individual permission by the copyright owners. Brathanki claimed that the main reason for this situation was that ZAiKS was abusing its position by demanding that its members assign their copyrights rights exclusively to ZAiKS, ruling out direct and independent licensing by ZAiKS's members of the same rights. The President of UOKiK in its decision ordered ZAiKS to put an end to their abusive conduct; ZAiKS was forced to acquire or deal with copyright (performing and mechanical rights) on a nonexclusive basis and accept to administer a specific right not only on condition that right holders hand over other rights (either performing or mechanical) pertaining to the same works<sup>2</sup>.

Dealing with the *Brathanki v. ZAiKS* decision has some economic points of interest. Firstly, the collective management in mechanical rights is hardly explored in economics. Therefore it seems interesting to analyze whether the economic literature suggests that greater competition in the provision of mechanical rights management, as ruled in the decision, would be beneficial to society and for creators managing their own rights.

The paper is organized as follows. Section 2. deals with the economic function of CCS within the music industry. Section 3. overviews literature devoted to the economies of collective management of performance and mechanical rights. The part 4. presents some findings concerning welfare analysis of CCS. The final parts of the paper offer some remarks on the economic analysis of the *Brathanki v. ZAiKS* decision.

---

<sup>1</sup> The judgment of the Supreme Court of 6 December 2007, III SK 16/07, unpublished – the cassation of ZAIKS collapsed.

<sup>2</sup> Decision of the President of UOKiK of 16 July 2004 No RWA-21/2004, unpublished.

## II. Music industry and copyrights

National copyright collecting societies (CCS), like ZAiKS, are a common feature of the world music industry. Their existence is not only explained by the complex copyright provisions which cover music, but also by a very special production process of musical works. The basic characteristic of the process of bringing music to the market is the existence of many intermediaries, which usually need some assignment of copyrights to take their actions. In essence copyright protection is a way to control the use as well as a source of income associated with creative works. Figure 1. presents traditional revenue flows in the music industry and is also helpful in describing a location of rights to musical works.

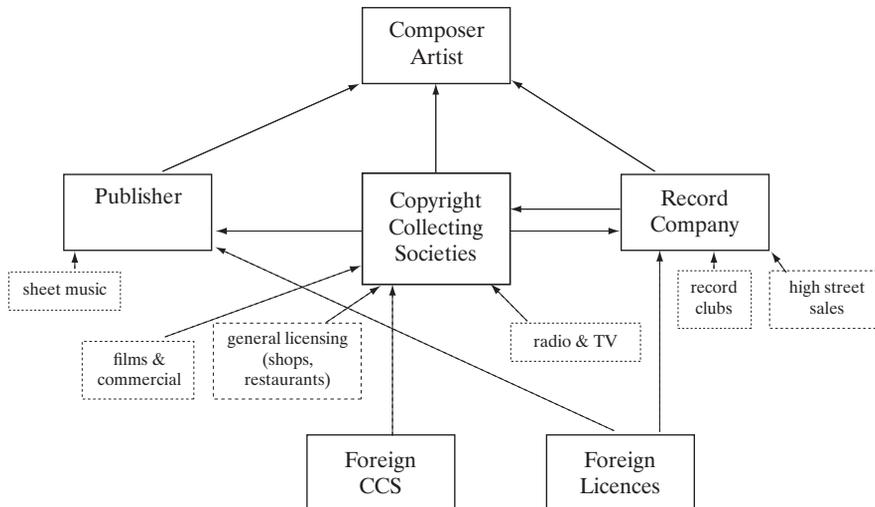


Figure 1. Music intellectual property revenue flows in the entertainment field (Kretschmer et al. 1999:174)

As indicated in Figure 1. the chain of value creation in musical works begins with the author (the lyricist and/or the composer) when he gives his original music idea a fixed expression. At that moment the rights to musical works arise, which initially are located with the author (the rights owner) giving him the exclusive right to the use the creation in all exploitation areas<sup>3</sup>.

<sup>3</sup> *Prawo autorskie i prawa pokrewne* (wprowadzenie J. Barta, R. Markiewicz), Warszawa 2007, p. 50.

On economic grounds, the need to protect creative works is supported by its very special production process, which typically displays very high fixed costs of creation (especially at the stage of bringing the music to the market (the so called “commodification phase”)<sup>4</sup>) and very low marginal costs of reproduction. Such a production process makes it very unlikely that a price close to marginal costs will generate sufficient revenue to cover the fixed costs of creation in a competitive market. It means that copyrightable property would likely not exist in a competitive market. Therefore, the incentive to create (so called *ex ante* efficiency) must be fostered by the introduction of some market power in the form of a monopoly over how the creation is to be exploited<sup>5</sup>.

However, in order to bring the work to the market, in such a form as CD, the primary owner of rights to the creative work might assign the rights to intermediaries (traditionally to the publisher or to a management or production company and then to the record company (copyright holders)) against some specific competences (music production; market knowledge; global and multipurpose competences)<sup>6</sup>. A CD gives rise to mechanical copyrights that entitle copyright owners and holders to a fee. Another potential income source is created when a recording is performed on the media or in public places. These public performances entitle the same copyright owners and holders to a performance fee. Mechanical and performance rights are described in literature as the primary rights which secure ownership of original work of music to the authors. These rights are stronger in legal terms to so-called neighboring rights, which secure ownership of sound recording to the producing company and the performing artists<sup>7</sup>.

But, in order to benefit from the entire range of rights that protect music works, its owners have to be able to actually administer them. Ernest Bourget, a French composer of popular chansons was the first individual who realized that he would never be able to monitor usage of his music. After he refused to pay a bill at the fashionable Paris café where one of his pieces was being played (arguing “You consume my music, I consume your beverages”) he was

---

<sup>4</sup> For more on the process of bringing music to the market and the current music industry structure see: M. Kretschmer, M.G. Klimis, R. Wallis, “Music in Electronic Markets: An Empirical Study” (2001) 3–4 *New Media & Society*.

<sup>5</sup> R.Watt, “The Past and the Future of The Economics of Copyright” (2004) 1(1) *Review of Economic Research on Copyright Issues* 156.

<sup>6</sup> M. Kretschmer, G.M. Klimis, R. Wallis, “The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates” (1999) 17(2) *Prometheus* 170.

<sup>7</sup> R. Wallis, Ch. Baden-Fuller, M. Kretschmer, M. Klimis, “Contested Collective Administration of Intellectual Property Rights in Music. The Challenge to the Principles of Reciprocity and Solidarity” (1999) 14(1) *European Journal Of Communication* 9.

summoned before the *Tribunal de Commerce de la Seine*. The court case of 1847 (decided in favour of the author) confirmed that the composer could not contact directly all users of his music to get due payment and so, with the help of a publisher, Bourget set up a collective that become in 1851 the *Société des Auteurs, Compositeurs et Editeurs de Musique* (SACEM) – the first modern copyright collecting society in the world<sup>8</sup>.

Nowadays, CCS act on behalf of a range of rights owner and holders – authors and publishers, as well as performers and production companies. Its economic function is to license the use of copyrighted works (by negotiating a license fee), to collect and distribute royalties and to monitor the use of copyrighted works. Many national CCS administers both performance and mechanical reproduction rights. However, in some countries there are separate collective agencies to administer each type of rights<sup>9</sup>. But despite these variations, it is possible to generalize that the main economic function of CCS is to enable a market to function for the use of copyright works in a situation, in which the copyright owners and holders cannot enter into contract directly with users (e.g. broadcasters, owners of pubs, clubs, shops, aircrafts). These societies operate on the principle of reciprocity, linking monopolistic national societies.

We must mention that the traditional structure of the music industry presented by Figure 1. has been changing over recent years. These changes are being stimulated by digital communication and distribution technologies. For example, the development of MIDI (musical instrument digital interface) has significantly reduced costs of record production giving rise to digital home studios. As well as a cheaper and more flexible server infrastructure which is changing the distribution network. It allows artists to retain their rights to their works by setting up their own commodification intermediary, such as a publishing company or a record label. In addition, new monitoring technologies (DRM – a digital right management) have an effect on the current ways of administrating copyrights. Big multinational media groups, which dominate the global music market, are now in a technological position to monitor music usage and collect mechanical and performance royalties themselves, diminishing the position of CCS at the music market<sup>10</sup>.

---

<sup>8</sup> Ibidem, p. 11.

<sup>9</sup> R. Towse, Ch. Handke, *Economics of Collective Management of Copyright*, Ediciones Autor, Datautor, 2007, p. 13.

<sup>10</sup> M. Kretschmer, M.G. Klimis, R. Wallis, “Music in Electronic Markets...”, p. 13, 22, 26.

### III. Economic function of copyright collective societies

From the economic perspective, the basic rationale of CCS is to overcome the problem of high transaction costs of administering copyrights. The best way to identify sources of high transaction costs in music licensing is to recall Coase's description of transaction costs: "in order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost" (Coase 1960).

Following the theoretical characteristic of transaction costs, their main categories in music licensing can be identified. The first one is the "search and information" cost concerning potential contracting partners (e.g. radio stations, broadcasters, record labels). Collecting and processing information about them and their needs and conditions is time consuming and generates costs (the use of telephone and/or Internet). Moreover, additional costs must be incurred to inform potential partners that one is ready for the conclusion of the contract (e.g. costs of advertising or of website creation). Search and information costs reflect also actions taken to detect illegal use of copyrighted works. The second group of transaction costs in music licensing are "bargaining and decision" costs incurred during the process of negotiation and conclusion of the contract<sup>11</sup>. Usually, the negotiation process is time consuming and sometimes necessitates cost-intensive legal advice. Successful conclusion of the contract creates 'enforcement' costs of monitoring the compliance with the terms of the contract. Finally, long term contracts may need a periodical review, which generates 'adjustment' costs. It can happen, for example, when a copyright owner or holder tries to renegotiate with the licensee (for example with a record label) to participate in an unexpectedly successful commercial exploitation of his/her music work.

The transaction costs of music licensing can be so high that they can make it difficult or even impossible for copyright owners to enforce their own rights. For example, the variety of possible parallel uses of musical work (e.g. public performance, reproduction) makes tracking every individual use of such work

---

<sup>11</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic functions of collecting societies – collective rights management in the light of transaction cost and information economics* – a conference paper for Society for Economic Research on Copyright Issues Annual Congress 2007, Draft Version, 18.10.2007, p. 5–6.

unfeasible for an individual copyright holder. Furthermore, a problem of significant transaction costs arises when each individual use of copyrighted works has a relatively small value to users. If only a small license fee is to be expected in individual cases, then the individual enforcement of rights would simply not be economically feasible. In these circumstances, no copyright owner will find it economical to collect fees and pursue infringements unless one can cooperate with other rights owners to economize on transaction costs<sup>12</sup>.

Thus, copyright collective societies reduce transaction costs, in order to guarantee creators the income that encourage them to continue producing additional works and, at the same time, to facilitate access to creative works for its users.

A reduction in transaction costs when incurred by CCS results from substantial economies of scale and scope in the administration, licensing and enforcement of copyrights. For example, the reduction of “search and information” costs is achieved by the creation of central contact and information agencies. Most CCS exist as national, natural monopolies as they lower costs for users as well as for right owners and holders. To use copyrighted works, potential users need to approach only one CCS. Thus creators, who granted an exclusive right to their work to a CCS, do not need to search for people interested in using their creative works. The search by users just substitutes the search by right owners and holders<sup>13</sup>.

By using standardised contractual terms and tariff rates, CCS can also reduce “bargaining and decision” costs of licensing agreements and confer greater legal certainty upon all involved parties. A further reduction of those costs is achieved by offering a single product (a bundle of copyrights; so-called “blanket licenses”<sup>14</sup>) – the administration of one specific bundle of copyrights (usually public performance rights) on behalf of all rights holders<sup>15</sup>.

Furthermore, CCS reduce costs of record keeping, payment collection, and royalty disbursement (“enforcement” costs) by administrative facilitation of handling of payments. On the basis of their experience of repetitive activities, CCS are able to reduce not only detection costs of illegal use of copyrighted

---

<sup>12</sup> S. M. Besen, S. N. Kirby, *Compensating Creators of Intellectual Property. Collectives That Collect*, The RAND Publication Series, March 1989, p. 6.

<sup>13</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic Functions...*, p. 9.

<sup>14</sup> More on economic aspects of blanket licenses see: R. Towse, Ch. Handke, *Economics...*; A. Hollander, “Market Structures and Performance in Intellectual Property. The Case of Copyright Collectives” (1984) 2 *International Journal of Industrial Organization*; S. M. Besen, S. N. Kirby, *Compensating Creators...*; R. Watt, “The Past and the Future of The Economics of Copyright” (2004) 1(1) *Review of Economic Research on Copyright Issues*.

<sup>15</sup> R. Towse, Ch. Handke, *Economics...*, p. 25–26.

work but also costs of the adjustment of existing contracts (“adjustment” costs)<sup>16</sup>.

As mentioned above, a reduction in transaction costs associated with CCS can also result from economies of scope. It happens when CCS manage several rights at once within their field of activity. For example, ZAiKS administers a combination of performing, reproduction and synchronization rights to music. Such a combination constitutes an additional source of income for CCS profiting from specialization and learning curve advantages. It is also attractive for users who are interested in purchasing licenses to rights in complimentary relations at the same time (*one-stop-shop*).

Due to the mentioned reduction of transaction costs copyright collective societies are often regarded as an indispensable mechanism for the licensing, administration and enforcement of public performance rights in music. When one realizes that a single radio station may use over 6.000 works per year airing them around a 100 times each<sup>17</sup>, the costs of gaining authorization from their individual owners seem to be enormous in comparison to the value of each individual work. When additionally one considers that in many cases the copyright in one work is shared by several different right owners and holders (e.g. lyricist, composer, publisher), then collective licensing of public performance rights not only generates substantial cost savings but also overcomes potential hold-ups that might occur in negotiations with several parties.

The latter problem is also overcome by collective licensing where mechanical reproduction rights are at stake. However, there is no common agreement in the literature on the economic rationale of collective licensing of mechanical rights. On the one hand, a CCS dealing with mechanical rights is more effective than an individual right owner in the monitoring of reproduction or other uses of creative works (lower enforcement costs). Furthermore, users of music (record labels, broadcasters) prefer to have one agreement covering all repertoire of a CCS, rather than several agreements with different copyright owners and holders<sup>18</sup>. By reducing in particular the “search and information” costs, a CCS facilitates an access for users to licenses<sup>19</sup>.

On the other hand some authors perceive collective licensing of mechanical rights as not feasible due to low transactional cost for individual owners associated with the exercise of their copyright in the case of reproduction, publication and adaptation<sup>20</sup>. Lack of economies of scale in collective licensing

---

<sup>16</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic Functions...*, p. 6.

<sup>17</sup> A. Hollander, “Market Structures...”, p. 203.

<sup>18</sup> M. Kretschmer, G. M. Klimis, R. Wallis, “The Changing Location...”, p. 170.

<sup>19</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic Functions...*, p. 18.

<sup>20</sup> A. Hollander, “Market Structures...”, p. 200.

and its monitoring, due to the absence of large volumes (in transactions with users) is a basic feature of so called “major rights”, like opera performances. Therefore the easily controllable rights should be administrated on an individual basis<sup>21</sup>. There is a common agreement in literature that so-called “small” performing rights should be administrated by a CCS. However it is hard to establish a common view on mechanical right management due to the lack of empirical economic studies on the topic.

The complex nature of potential economies associated with the activity of CCS definitely makes its economic analysis challenging. However, when a competitive relation between collective and individual right management is verified, it is important to determine if a competitive option is viable i.e. if it is attractive to some users and to owners of the music. If so, if it has lower total transaction costs than CCS, then individual right management can be an alternative to CCS, as it can exert competitive pressure.

#### IV. CCS and overall social welfare

The total savings in transaction costs are an important part of the welfare analysis of CCS. If they are higher than the monopoly price charged by CCS, then there is an overall welfare gain<sup>22</sup>. However, sometimes scrutiny of economic efficiencies within a welfare analysis is unnecessary as CCS power to set a monopoly price can be limited. For example, in some jurisdictions CCS rates are regulated and could be set below the monopoly level<sup>23</sup>. Besides, the price level is also determined by the structure of the users’ market. If users also act collectively on the buying side of the market (countervailing buying power), they can reduce CCS monopoly power and approximate prices to a socially efficient level<sup>24</sup>.

An interesting example on diminishing CCS market power by the fact that users (being right holders at the same time)<sup>25</sup> mostly bargain collectively with

---

<sup>21</sup> G. Hansen, A. Schmidt-Bischoffshausen, *Economic Functions...*, p. 8. Performances of operas and ballets, as well as live performances are commonly classified as the major (grand) rights, see: C. Crampes, D. Encaoua, A. Hollander, *Competition and Intellectual Property in the European Union*, unpublished revised version, February 2005; H. C. Jehoram, “The Future of Copyright Collecting Societies” (2001) 23 *E.I.P.R.*

<sup>22</sup> R. Towse, Ch. Handke, *Economics...*, p. 52.

<sup>23</sup> *Ibidem*, p. 53.

<sup>24</sup> A. Hollander, “Market Structures...”, p. 201.

<sup>25</sup> It refers to multinational companies, such as Bertelsmann, Sony, Universal and Warner, which have integrated most intermediating activities in the music industry under one corporate roof; for more see: M. Kretschmer, M. G. Klimis, R. Wallis, “Music in Electronic...”.

CCS to set the price was presented by Kretschmer et al.<sup>26</sup>. They draw attention to an increasing power of the multinational companies in the global music industry. As these companies account for 80% of global record sales and publishing revenue, thus they pay royalties for the use of mechanical rights mainly to themselves – from the recording to the publishing arm of the same company. In these circumstances, they have economic incentives to by-pass existing copyright society structures<sup>27</sup>. At the end of 90ies they threatened CCS in Europe with a withdrawal of their repertoire in order to obtain better terms. Final agreement offered multinationals a reduction in commission, which was previously set at 8% of received royalties, to 6%, when at the same time smaller right holders were charged a handling fee of 12% and more<sup>28</sup>.

One should note that countervailing buying power of multinationals *vis-à-vis* CCS has its foundation in the transaction costs of mechanical right licensing, which are rather low for these companies as the royalties are quite easy to identify and to collect. This raises a question whether small right holders can also be better off if they attempt to engage in individualized transactions concerning mechanical rights. Besen and Kirby<sup>29</sup> specified two reasons why non-collective pricing may not be suitable. Firstly, users may not find it attractive to deal with a system in which they face different prices for each of the licenses that they might acquire. Secondly, the profit of right holders can often be increased if license fees are set collectively. Under individual licensing right owners and holders just compete to have their work licensed, which pushes the license fees down. Therefore, individual licensing seems attractive only to multinationals and the very top superstars who would benefit from using their relatively strong bargaining position<sup>30</sup>. Moreover, the existence of a trade-off in royalties paid to gain access to complementary rights pertaining to the same work<sup>31</sup> can make an increase in a license fee for a single right unfeasible. For example, when a broadcaster, as the user of the music, is concerned about the sum of payment for all the rights he must clear, then an increase in the price of an individually set license to reproduce the work (needed to copy a song on hard disk in order to perform it in public) should

<sup>26</sup> M. Kretschmer, G. M. Klimis, R. Wallis, “The Changing Location...”, p. 170.

<sup>27</sup> Polygram estimated its potential annual savings of \$US 2.5 million in Europe alone, see *ibidem*.

<sup>28</sup> M. Kretschmer, G. M. Klimis, R. Wallis, “The Changing Location...”, p. 171.

<sup>29</sup> S. M. Besen, S. N. Kirby, *Compensating Creators...*, p. 5.

<sup>30</sup> Ch. Handke, R. Towse, *Economics...*, p. 55.

<sup>31</sup> For example, a public performance sometimes requires clearing a right to a complementary reproduction right or a synchronization right, for more see: C. Crampes, D. Encaoua, A. Hollander, *Competition...*; M. A. Einhorn, “Transaction costs and administered markets: license contracts for music performance rights” (2006) 3(1) *Review of Economic Research on Copyright Issues*.

be accompanied by some decrease in the price of complementary, collectively set licenses to public performance<sup>32</sup>.

From the competition point of view, one has to ask what effect individual licensing will have on welfare. It seems that competition between right owners and holders will decrease the level of license fees and will offer welfare benefits. However, it is hard to predict if a lower license fee will affect consumer price or will just benefit multinationals.

Furthermore, consumer price level loses its importance in the case of a welfare analysis of creative works. In that case more important is if the consumers' marginal valuation of the product variety guarantees the income that encourages the creation of additional works<sup>33</sup>. Thus, the antitrust analysis of CCS should not focus narrowly on monopoly power, as it risks dissipating the expected rewards that are essential to provide adequate creative incentives (*ex-ante* efficiencies). As Régibeau and Rockett pointed out each individual competition law decision on CCS might seem to have only a small effect on expectations of reward but their combined effect can be devastating<sup>34</sup>.

## V. The *Brathanki v. ZAiKS* decision and economic function of CCS

The Polish Society of Authors (ZAiKS) is the nation's major copyright collecting society<sup>35</sup>. It was spontaneously founded by a group of Polish lyricists and composers of popular music in 1918. The creators were not receiving any material remunerations even though their well known songs were illegally copied and performed all over the whole country.

Nowadays, ZAiKS collectively administers copyrights to literary, musical, choreographic and pantomime works in areas such as recording, reproduction, digitization and public performance. It manages copyrights of more than 8000 Polish artists and music producers. Moreover, within the Polish territory it administers a worldwide repertoire (more than 14 mln works) made up of works assigned to them under reciprocal representation agreements with foreign copyright collectives ZAiKS, like most copyright collecting societies, operates as *de facto* natural monopoly in Poland, which sometimes results in

<sup>32</sup> C. Crampes, D. Encaoua, A. Hollander, *Competition...*, p. 30–31.

<sup>33</sup> A. Hollander, "Market Structures...", p. 201.

<sup>34</sup> P. Régibeau, K. Rockett, "The relationship between intellectual property law and competition law" [in:] S.D. Anderman (ed.), *The Interface between Intellectual Property Rights and Competition Policy*, Cambridge University Press, 2007.

<sup>35</sup> The collective management of rights to musical works in Poland is also held by the Folk Creators Society in Lublin and the Independent Radio- and TV- Authors Society in Warsaw.

antitrust scrutiny. ZAiKS' activity has been the subject of an antitrust action undertaken by the President of UOKiK in 2002. The case dealt with the strong position of ZAiKS *vis-à-vis* users, i.e. music producers. In the *Brathanki v. ZAiKS* decision the President of UOKiK for the first time scrutinized the abusing practices of ZAiKS towards its members.

The investigation conducted by the President of UOKiK revealed that ZAiKS had abused its dominant position by demanding on its members that public performance and mechanical rights will be managed by ZAiKS on an exclusive basis and by administering a specific right only on condition that right holders hand over other rights (either performing or mechanical) pertaining to the same works.

According to the President of the UOKiK the collective management of rights to creative works is reasonable only when one specific bundle of rights (a single product, so-called "blanket license") is offered to the users. As the common feature of agreements on mechanical rights is giving permission to users to exploit specified works of specified authors, thus it is possible to replace CCS by individual management carried out by an artist. Therefore collective management of phonographic reproduction of music works is not justified, because authors can efficiently manage these rights individually.

When the above line of reasoning is confronted with the economic function of CCS it looks as if approach to mechanical right management presented in the *Brathanki v. ZAiKS* decision concentrates on the process of negotiation between users and individual right holders. Thus, it disregards other important tasks of CCS, i.e. monitoring of the use of works in its repertoire and taking legal actions against those who infringe copyrights.

Generally, the economic analysis of potential savings in "transaction costs" in the collective enforcement of reproduction rights to music was disregarded in the *Brathanki v. ZAiKS* decision. It looks like the President of UOKiK in the decision neglected to analyze if all characteristics of reproduction rights management make economies of scale rather impossible, what would exclude the need for collective activity.

Some explanation of the approach of the President of UOKiK can be found in the statement made by ZAiKS, which basically concentrates on the process of negotiation between users and individual right holders. According to ZAiKS the huge repertoire, that it manages, makes individual consulting with authors of a license terms unviable. Furthermore, it would cause a huge increase in ZAiKS' costs. Besides, there is very little room for changes in the license fee and terms of licensing as there are set by collective bargaining between international associations of societies representing authors (BIEM) and phonographic producers (ZPAV).

Unfortunately, neither the ZAiKS' statement nor the decision taken by the President of UOKiK had been supported by some economic analysis verifying if a competitive option is viable, i.e. if it is or is not attractive to some users and to owners of the music.

The approach to copyright management in the *Brathanki v. ZAiKS* decision also ignores some other features of ZAiKS i.e. economies of scope and reduction in 'search and information' costs. Although, according to ZAiKS, the administration of a specific right only on condition that right holders hand over other rights (either performing or mechanical) pertaining to the same works is justified by the need of reducing costs of collecting royalties and its distribution. But again the ZAiKS' statement did not demonstrate any economic analysis on the issue.

Besides, economic literature suggests that the importance of the reduction on these transaction costs by CCS is determined mainly by its users. If, for example, the complementary relationship between performance and reproduction rights is not attractive to them, then this kind of economies of scope cannot be achieved by CCS. In contrast, if users are interested in removal of bargaining costs of direct negotiation with music right owners and holders, then the potential economies of scale of collective negotiation can be significant. Thus, direct licensing of a right may be appealing only to a user who needs limited and planned access to specific repertoire of copyrighted works<sup>36</sup>. Unfortunately, a proper economic analysis on transaction costs is hardly found in the *Brathanki v. ZAiKS* decision.

## VI. The *Brathanki v. ZAiKS* decision and welfare analysis

As already mentioned in the part 4 of the paper the analysis of the costs savings (so-called "productive efficiency") is important, but not the only one part of the welfare analysis of CCS. The second part should investigate if the expected rewards of individual licensing provide better creative incentives than collective licensing, resulting in a wider product variety. Unfortunately, neither ZAiKS nor the President of UOKiK verified the issue. Although the President of UOKiK shortly mentioned that the collective management of copyrights is justified only if individual licensing is uneconomical.

Certainly, the welfare analysis of individual *versus* collective licensing of copyrights is challenging as it should also consider conflicting interest between different members of CCS (creators and intermediaries; young creators and

---

<sup>36</sup> C. Crampes, D. Encaoua, A. Hollander, *Competition...*, p. 30.

top stars) and a bargaining power of users. But all these questions seem relevant when effects of the *Brathanki v. ZAiKS* decision are considered and the challenge should be taken by the President of UOKiK.

## VII. Concluding remarks

Copyright collective societies have always raised challenging questions from an antitrust perspective. The near monopolistic position of CCS, collective pricing, blanket licensing and requirements that authors assign all their rights to the collective or stay out of it altogether certainly seem to have an anti-competitive potential. Therefore, the market practices of CCS have repeatedly come under scrutiny of antitrust authorities. However, because of the specifics of the markets in which CCS operate, they have often been allowed to engage in conduct that would otherwise infringe competition rules.

Certainly, the existence of CCS creates many dilemmas. But some of them seem to arise from *an agency problem*, i.e. from the divergence of the interests of managers of CCS and members of CCS<sup>37</sup>. In this case, steps to improve the governance systems of copyright collecting societies<sup>38</sup> seem to be the proper way forward rather than antitrust actions.

## Literature

- Besen S.M., Kirby S.N., *Compensating Creators of Intellectual Property. Collectives That Collect*, The RAND Publication Series, March 1989.
- Besen S.M., Kirby S.N., Salop S.C., “An Economic Analysis of Copyright Collectives” (1992) 78 *Virginia Law Review*.
- Coase R.H., “The Problem of Social Cost” (1960) 15(3) *Journal of Law and Economics*.
- Crampes C., Encaoua D., Hollander A., *Competition and Intellectual Property in the European Union*, unpublished revised version, February 2005.
- Einhorn M.A., “Transaction costs and administered markets: license contracts for music performance rights” (2006) 3(1) *Review of Economic Research on Copyright Issues*.
- Handke Ch., Towse R., “Economics of Copyright Collecting Societies” (2007) 38(8) *International Review of Intellectual Property and Competition Law*.

<sup>37</sup> More on an agency problem within CCS: F. Rochelandet, *Are copyright collecting societies efficient? An evaluation of collective administration of copyright in Europe*, Preliminary version, The Society for Economic Research on Copyright Issues, Inaugural Annual Congress Universidad Autónoma de Madrid 2002, p. 6–7.

<sup>38</sup> Even by establishing legal supervision, see *ibidem*.

- Hansen G., Schmidt-Bischoffshausen A., *Economic Functions of Collecting Societies – Collective Rights Management in the Light of Transaction Cost- and information economics* – a conference paper for Society for Economic Research on Copyright Issues Annual Congress 2007, Draft Version, 18.10.2007
- Hui K-L., Png I.P.L., “On the Supply of Creative Work: Evidence from the Movies” (2002) 92(2) *American Economic Review*.
- Hollander A., “Market Structures and Performance in Intellectual Property. The Case of Copyright Collectives” (1984) 2 *International Journal of Industrial Organization*.
- Jehoram H.C., “The Future of Copyright Collecting Societies” (2003) 23 *E.I.P.R.*
- Kretschmer M., Klimis G. M., Wallis R., “The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates” (1999) 17(2) *Prometheus*.
- Kretschmer M., Klimis M.G., Wallis R., “Music in Electronic Markets: An Empirical Study” (2001) 3–4 *New Media & Society*.
- Landes W., Posner R.A., “The Economic Analysis of Copyright Law” (1989) 18(2) *The Journal of Legal Studies*.
- Landes W., Posner R.A., *The Economic Structure of Intellectual Property Law*, Cambridge 2003.
- Motta M., *Competition Policy: Theory and Practice*, Cambridge 2004.
- Prawo autorskie i prawa pokrewne [Copyright and related rights]* (wprowadzenie J. Barta, R. Markiewicz), Warszawa 2007.
- Régibeau P., Rockett K., “The relationship between intellectual property law and competition law” [in:] S.D. Anderman (ed.), *The Interface between Intellectual Property Rights and Competition Policy*, Cambridge 2007.
- Rochelandet F., *Are copyright collecting societies efficient? An evaluation of collective administration of copyright in Europe*, Preliminary version, The Society for Economic Research on Copyright Issues, Inaugural Annual Congress, Universidad Autónoma de Madrid 2002.
- Tirole J., *The Theory of Industrial Organization*, MIT Press, 1988.
- Towse R., Handke Ch., *Economics of Collective Management of Copyright*, Ediciones Autor, Datautor, 2007.
- Varian H.R., “Copying and Copyright” (2005) 19(2) *Journal of Economic Perspectives*.
- Wallis R., Baden-Fuller Ch., Kretschmer M., Klimis M., “Contested Collective Administration of Intellectual Property Rights in Music. The Challenge to the Principles of Reciprocity and Solidarity” (1999) 14(1) *European Journal Of Communication*.
- Watt R., “The Past and the Future of The Economics of Copyright” 2004 1(1) *Review of Economic Research on Copyright Issues*.