JUDGMENT

DISTRICT COURT HAARLEM

Civil law section

case number / cause-list number: 148418 / KG ZA 08-410

in the action between

THE PERFORMING RIGHT SOCIETY LIMITED,
a legal entity under the law of the United Kingdom,
having its registered office in London,
claimant,
procurator *litis Mr.* L. Koning,
lawyers *Mrs.* D.P. Kuipers and *Mr.* O.G. Trojan in The Hague,

and

VERENIGING BUMA,
an association incorporated under Dutch law,
having its corporate seat in Hoofddorp,
defendant,
procurator *litis Ms.* M. Middeldorp,
lawyer *Mr.* E.A.P. Engels in Amsterdam.

Hereinafter, the parties will be referred to as PRS and BUMA.

1. The Proceedings

1.1. The course of the proceedings is shown by:
- the writ of summons
- the hearing
- PRS' pleading notes
- the change of claim
- BUMA's pleading notes.

1.2. Finally, judgment has been given.

2. The Facts

2.1. PRS and BUMA both are collecting societies for copyrights, which ensure, on behalf of (music) writers members of them, the exploitation of the copyrights of their members. For this, they provide – on behalf of their members – licences to third parties that use music in their company or undertaking. Pursuant to section 30a Dutch Copyright Act, BUMA has a licence for the professional exploitation, collection and repartition of the publication and/or transmission of music of writers members (Buma-repertoire).

2.2. In 1973, PRS and BUMA concluded a Contract of Reciprocal Representation (CRR). This is a reciprocal agreement, in which the parties give each other the right – on a non-exclusive basis – to exploit the copyrights of entitled parties that are member. Clause 6 CRR contains a territorial delineation. In this, BUMA's right to exploit the rights on PRS's repertoire is limited to the Netherlands (and a number of countries beyond the European Economic Area (EAA)), hereinafter to be called the Netherlands c.a., and PRS's exploitation right to exploit the rights on the BUMA-repertoire is limited to the United Kingdom (and a number of countries beyond the EEA), hereinafter to be called the United Kingdom c.a.

2.3. Clause 1 CRR *inter alia* stipulates the following:

I. […]
II. Reciprocally, by the present contract PRS grants to BUMA in the territories specified and defined in Article 6,I, hereafter, the right to issue the authorizations exigible in respect of all public performances (as defined in paragraph III of the present Article) of musical works, with or without words, which are protected under the terms of national laws, bilateral treaties and multi-lateral international conventions on authors' rights (copyright, intellectual property, etc) which now exist or which may come into existence and enter into force during the terms of the present contract.
[…]
III. […].

Clause 6 CRR *inter alia* stipulates the following:

I. For the application of the present contract, BUMA's territories of operation are as follows:
Indonesia; Irian Barat, Netherlands Antilles; Surinam.
For the application of the present contract, PRS's territories of operation are as follows:
(i). United Kingdom;
(ii) British Commonwealth (excluding Canada and the territory of APRA – Australasian Performing Right Association Ltd.);
(iii). Republic of Ireland
(iv). Territory of SAMRO (South African Music Rights Organization Ltd.)
II. […]

2.4. PRS and BUMA are both members of the International Confederation of Societies of Authors and Composers ('CISAC') just like their sister organisations in the other EEA member states. Their reciprocal, bilateral CRR is based on a model contract that was first drawn up by CISAC in 1936.

2.5. In 2000, the CISAC-members arranged in the so-called Santiago Agreement to include in their reciprocal, bilateral agreements that the territorial limitation for the granting of licences would not apply to online exploitations. The collecting society of the country where the licensee has its economic principal place of business, could grant an online licence for the whole world.

2.6. Under the Santiago Agreement, PRS and BUMA concluded a supplementary agreement (*Amendment)* on 2 September 2002. Clause III of that agreement *inter alia* stipulates the following:

The licence granted to BUMA in relation to the PRS repertoire for online exploitation shall be for the world.

Clause VI includes the following stipulation:

This Amendment shall be valid until June 30, 2003 (or earlier, if the Agreement terminates earlier) and shall apply to all licences for online exploitation concluded during the term hereof, provided that no such licence shall be granted for a period of more than three years unless only with respect to the grant of a licence by BUMA for BUMA's repertoire and with respect to the grant of a licence by PRS for PRS's repertoire, otherwise directed by a court or other governmental or administrative agency. No later than January 15, 2003, the parties hereto shall together evaluate the effects of this Amendment and agree modifications, if any, and an extension hereof.

2.7. The parties did not renew the supplementary agreement of 2 September 2002 after 30 June 2003.

2.8. By the end of 2000, the European Commission started an investigation into the collaboration between the CISAC-members in the EEA. In January 2006, the Commission sent a so-called Statement of Objections to all collecting societies in the EEA, including PRS and BUMA, in which the Commission made the preliminary results of its investigation known to the parties and also the intention to take a decision in which the system of bilateral licence contracts between the CISAC-members is declared to be contrary to article 81 EC Treaty.

2.9. In the beginning of 2006 BUMA provided a pan-European licence to eMusic, an online music shop in the United States, for the world repertoire, including the PRS-repertoire.

2.10. On 16 July 2008, the European Commission took the decision in the CISAC-case (case no. COMP/C2/38.698-CISAC) (hereinafter also to be referred to as: CISAC-decision). In article 3 of the decision, the following is provided:

The fol1owing undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by coordinating the territorial delineations in a way which limits a licence to the domestic territory of each collecting society: […] BUMA […] PRS […].

Article 4(2) of the decision provides the following:

The undertakings listed in Article 3 shal1, within 120 days of the date of notification of this Decision, bring to an end the infringement referred to in that Article and shall, within that period of time, communicate to the Commission all the measures they have taken for that purpose.

In particular, the undertakings listed in Article 3 shall review bilaterally with each other undertaking listed in Article 3 the territorial delineation of their mandates for satellite, cable retransmission and internet use in each of their reciprocal representation agreements and shall provide the Commission with copies of the reviewed agreements.

2.11. In paragraph 201 and further of the decision, the European Commission considered the following:

(201) In examining each of the different issues relating to this topic, it is important to bear in mind the scope of the Commission's objections. This Decision does not take issue with the mere fact of delineating the scope of the mandate, but rather with the coordinated approach by all EEA CISAC members as regards such delineation. From the outset, it has to be noted that, in isolation, the granting of a licence limited to a certain territory, even to the domestic territory, is not automatically restrictive of competition. A licensor is normally entitled to limit a licence to a particular territory without falling foul of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(202) In the assessment of the effects of the bilateral reciprocal representation agreements concluded by collecting societies, it is necessary to take into account the actual conditions in which they function, the economic context in which the undertakings operate, the products and services covered by those agreements and the actual structure of the market concerned.

7.6.2.1. Territorial delineation and exclusivity

(203) […] limiting the territorial delineation of the authority to licence to the domestic territory (that is to say, the national territory) of the collecting society amounts to the granting of exclusivity to the domestic collecting society and the segmentation of the market into national monopolies.

(204) The uniform territorial delineation has the effect of indirectly granting exclusivity insofar as it standardises the reciprocal representation between the EEA CISAC members: each collecting society's authority to licence is limited in the sense that it can on1y grant access to its portfolio of works for exploitation in its "domestic" territory (regardless of where the user is located). By including this territorial delineation in all such agreements, the end result is that on1y one collecting society per country is able to grant multi-repertoire licences for the use of the covered music in that country.

[...]

(212) In the absence of concerted practices on territorial delineations, collecting societies would be more likely to compete against each other by finding the most efficient means of rights administration. This would create differences between them in the territorial delineation of their licensing areas as well as in the number of collecting societies asked to administer their rights in another territory. The authors would consequently have an incentive to become members of those collecting societies which have found more efficient means of rights administration.

[...]

(221) [...] the practice at issue is not objectively necessary, in that there are less restrictive methods for ensuring that collecting societies have incentives to grant reciprocal mandates to licence.

2.12. On 17 July 2008, BUMA entered into a pan-European licence agreement with Beatport.com, an online music shop for electronic music in the United States. This licence covers the whole world repertoire, including PRS's repertoire, and applies to the whole European Union.

2.13. By letter of 23 July 2008, PRS warned BUMA to refrain from the granting of licences for the PRS-repertoire beyond the Netherlands.

2.14. By letter of 24 July 2007, BUMA filed a complaint with the European Union against music publisher EMI and CELAS (a collaboration between PRS and GEMA, the German collecting society) because of the harmful consequences according to BUMA of the concentration of licence granting for the most important part of the world´s online music repertoire in one body, which it deems contrary to article 81 EC Treaty.

2.15. By letter of 1 August 2008, BUMA insisted on a swift treatment of its complaint with the European Commission.

3. The Dispute

3.1. After the change of claim which BUMA did not oppose, PRS claims:
I. primarily, to prohibit BUMA with immediate effect to provide or conclude music licences for online (satellite, cable or internet) usage of the PRS-repertoire beyond the Netherlands, or to put them into effect,
alternatively, to prohibit BUMA with immediate effect to provide or conclude music licences for online (satellite, cable or internet) usage of the PRS-repertoire both in and beyond the Netherlands, or to put them into effect,
II. to order BUMA to provide, within three days after the service of the judgment to be rendered in this matter, PRS with a copy of the pan-European licence agreement which BUMA concluded with Beatport.com,
III. to order BUMA to, within seven days after the service of the judgment to be rendered in this matter,
a. to provide PRS with an overview certified by a registered accountant of all the royalties which BUMA has received with respect to the usage of the PRS-repertoire on the basis of licence agreements for online usage beyond the Netherlands, this subdivided into individual music users mentioned by name,
b. to make a written statement to PRS of all music users to whom BUMA has made an offer for a licence agreement for online usage of the PRS-repertoire beyond the Netherlands or with whom it is holding consultations on this,
IV. to order BUMA to pay the costs of these proceedings.

4. The Assessment

4.1. The single judge charged with urgent cases first determines that the parties did not choose an applicable law in the CRR. As the parties have chosen Dutch law at the hearing of the current preliminary relief proceedings, the single judge charged with urgent cases will apply Dutch law to the assessment of the CRR.

4.2. BUMA has put forward as defence that the urgent interest is missing in the reliefs sought by PRS.

4.3. The urgent interest is one of the interests which the single judge charged with urgent cases must take into account pursuant to section 254 Dutch Code of Civil Procedure when answering the question whether it is wise to anticipate the decision in proceedings on the merits, if any, by giving a preliminary relief. The single judge charged with urgent cases must also realise that both the facts and the legal value thereof may be uncertain, the points of dispute complicated and the relief itself sometimes drastic. As the degree of uncertainty or the pros and cons respectively of (the absence of) the preliminary relief may continue to be different for the parties, also the urgent interest of each relief claimed is of an ever changing weight. This is why BUMA's appeal to the alleged missing of an urgent interest does not necessarily obstruct an assessment as regards contents of PRS's claim beforehand. The weighing up of all the interests involved including the alleged urgency of the requested preliminary relief will therefore be postponed, until hereinafter a forecast that is as good as possible will have been given of the assessment of the court adjucating the merits of the facts and the law to be applied to this.

4.4. PRS has based its claims, in brief, on the fact that BUMA does not have the power to grant licences for online music usage of the PRS-repertoire beyond the Netherlands. BUMA has put forward the defence that it does have the power to do this.

4.5. BUMA has based its standpoint on the fact that a reasonable interpretation of the contract implies that the territorial limitation in the CRR does not apply to licences for online music usage, because the CRR would be meaningless and senseless with respect to online music usage, as online music usage is cross-border by definition, according to BUMA.

4.6. In view of the year of the conclusion of the CRR, it is very probable that when the parties granted mutual licences of their repertoire for the territory of each other's countries they did not also think of online music usage. A reasonable interpretation of the contract, as advocated by BUMA, can never imply though that this is why (only) the territorial limitation as arranged in the CRR does not apply to online music usage. For, this would mean that parties would start to grant each other considerably more rights for online music usage, i.e. a licence valid for the whole world instead of limited to the territory of each other's countries, than they intended to for offline music usage in any case. To the extent to which the territorial limitation would turn the CRR for online music usage to a senseless contract as advanced by BUMA, whatever may be, a reasonable interpretation of the contract would sooner imply that the CRR does not apply to online music usage at all. The parties would then have to make other arrangements on the granting of mutual licences for their repertoire for

online music usage and possibly on the areas where these licences would apply. The parties do not dispute that at this moment there is no such (supplementary) agreement.

4.7. BUMA has furthermore based its standpoint on the fact that in the CISAC-decision the European Commission has judged that the territorial limitation in the reciprocal contracts of the CISAC-members, including the CRR between PRS and BUMA, is contrary to article 81 EC Treaty and is therefore prohibited. This is why according to BUMA the territorial limitation in the CRR is null pursuant to article 3:40 Dutch Civil Code and has therefore never been part of the agreement between the parties.

4.8. The single judge charged with urgent cases assesses that the CISAC-decision of the European Commission does not lead to nullity of the CRR by law. Different from what BUMA has argued, the Commission has not judged the individual agreements of the CISAC-members as such, including the territorial limitation to the national territory, contrary to article 81 EC Treaty, but exclusively the concertation between the CISAC-members that has lead to a system of identical reciprocal agreements in the EEA. In paragraph 201 and further of the decision, as represented under 2.11, the Commission clearly explained the scope of the decision. In it, the Commission has also explicitly indicated that it does not object to the mere fact that the application area of the licence is delineated, but that it does object to the concerted approach of all CISAC-members in the EEA with regard to that delineation. The granting of the licence limited to a particular territory does not automatically restrict competition at itself, even if it concerns the national territory, according to the Commission. As the judgment of the Commission does not directly refer to the reciprocal contracts themselves, the CISAC-decision does not provide any ground for the nullity of the CRR or the territorial limitation included therein as advocated by BUMA. BUMA's argument that review by the CISAC-members of their reciprocal contracts on bilateral level for online music usage cannot lead to the same territorial delineation in the CRR cannot alter the above, apart from the fact that the Commission does not rule out that parties can grant each other licences (again) on a bilateral level limited to each other's national territory without violating article 81 EC Treaty. For, it comes down to the negotiations which the parties will have to conduct with each other on a bilateral level on the instructions of the Commission, without any concertation among the CISAC-members, in the period to come.

4.9 The single judge charged with urgent cases furthermore assesses that, even if the conclusion must be that the territorial delineation in the CRR is null, BUMA does not have the right to transfer licence rights of the PRS-repertoire, which it has not been transferred from PRS, itself. For, it is an established fact that PRS has never transferred its rights for music usage beyond the Netherlands c.a. to BUMA. Nullity of the territorial delineation in the CRR cannot have as legal consequence either that BUMA has the power to decide on non-transferred rights. For, this would mean that BUMA would have considerably more rights for online music usage, i.e. a licence valid for the whole world instead of limited to the territory of each other's countries c.a., than PRS has transferred to BUMA pursuant to the CRR. Nullity of the territorial delineation in the CRR could merely result in the licence granting by PRS to BUMA for online music usage for its repertoire as a whole, i.e. also as far as this refers to the Dutch territory c.a., having been made without a valid title. In other words: BUMA has obtained *less* rights in that case instead of *more.*

4.10. Furthermore, it is not disputed by the parties that the supplementary agreement of 2 September 2002 which the parties concluded pursuant to the Santiago Agreement, and in which PRS did explicitly grant a worldwide licence for the PRS-repertoire for online music to BUMA, has ended by now, so that BUMA cannot derive any rights herefrom either. BUMA has not made the fact plausible that the parties have nevertheless maintained the practice afterwards by granting licences of each other's repertoire without territorial limitation for online music usage to third parties, as BUMA has asserted, in any case with respect to the licence granting by PRS. BUMA has not made it plausible either that PRS is currently granting licences of the BUMA-repertoire for online music beyond the United Kingdom c.a.

4.11. The above implies that PRS is right to have adopted the standpoint that BUMA does not have the power to grant licences for online music usage of the PRS-repertoire beyond the Netherlands c.a. The single judge charged with urgent cases furthermore concludes that BUMA has not advanced any convincing arguments that can at least call into question BUMA's power to grant licences for the rights of online music usage that accrue to PRS of the PRS-repertoire beyond the Netherlands c.a. Departing from the assumption represented under 4.3 there is a sufficiently urgent interest in this respect to allow PRS' claim under I in its relief sought in preliminary relief proceedings. That the consequences of that relief made will be far-reaching for BUMA, as advanced by it, cannot alter this, already because the consequences for PRS of not making a relief will also be considerable. Not only BUMA will be able to continue the right accruing to PRS to grant licences for the PRS-repertoire beyond the Netherlands c.a., PRS has furthermore indisputably advanced that in that case also other music rights organisation in the EEA will start exploiting the rights accruing to PRS beyond their national territory before they have reached agreement on this with PRS.

4.12. In addition, there is no ground for the conclusion advocated by BUMA that allowance of the abovementioned claim is contrary to article 10 EC Treaty, already because the claim to be allowed concerns a preliminary relief. The fact that BUMA has filed a complaint with the European Commission does not make the allowance of the claim contrary to article 10 EC Treaty or article 16(1) of Regulation 1/2003/EC either. Apart from the question whether the complaint filed by BUMA refers to the question at stake in the current preliminary relief proceedings, a procedure in view of the determination of a decision instituted at the Commission pursuant to article 2(2) of Regulation 773/2004/EC and made known by it has not been demonstrated. From the fact asserted by BUMA that a public relations official of the European Commission has stated to it that BUMA's complaint will be handled it cannot be concluded that there is an instituted procedure. For, instituting a procedure implies an authoritative act by the Commission, expressing its will to give a decision (see judgment by the EC Court of Justice, case 48/72, Case law 1973, p. 77, point 16).

4.13. As the single judge charged with urgent cases has concluded that the territorial limitation included in the CRR is not null, the primary claim of the relief sought by PRS under I will be allowed and the single judge charged with urgent cases does not get round to the assessment of the alternative claim.

4.14. The single judge charged with urgent cases does not get round to the assessment of the claim under II, as PRS has withdrawn this claim after the hearing after BUMA had sent it a copy of the licence agreement which it concluded with Beatport.com.

4.15. The single judge charged with urgent cases will reject the claim under III(a), as BUMA has argued in a sufficiently motivated way that it is practically impossible to fulfil the claim because the licence fees it receives are calculated by means of repartition and distributed under entitled parties without a distinction being made between music usage home and abroad and between BUMA- and PRS-repertoire. PRS has furthermore not contradicted that it has never objected to the payments it received from BUMA.

4.16. The single judge charged with urgent cases will also reject the claim under III(b), as the conducting of conversations on the granting of licences at itself is not unlawful, as long as BUMA does not proceed to the providing of licences for online music usage of the PRS-repertoire beyond the Netherlands c.a. or the conclusion of agreements in which it grants these licences. This last act is already prohibited for BUMA by the allowance of the claim under I.

4.17. Being the mainly unsuccessful party, BUMA will be ordered to pay the costs of these proceedings. The costs at PRS's side are estimated at:

- summons	EUR 85.44
- court registry fee	254.00
- salary procurator *litis*	816.00
Total	EUR 1,155.44

5. The Decision

The single judge charged with urgent cases

5.1. prohibits BUMA with immediate effect to provide or conclude music licences for online usage (via satellite, cable or internet) of the RPS-repertoire beyond the Netherlands c.a. or to put them into effect,

5.2. orders Buma to pay the costs of these proceedings, until now estimated at EUR 1,155.44 on PRS' side,

5.3. declares that this judgment has immediate effect as regards the above,

5.4. rejects the other claims.

This judgment has been rendered by A.J. van der Meer and pronounced in open court on 19 August 2008.