European Commission
DG Competition
Media

**AXMEDIS 2007 Conference**

# The application of European competition rules in the media sector

## An overview of EC case-law and precedents


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# Summary

- EC competition rules
- EC internal market rules
- Intellectual Property Rights (IPRs)
- Territoriality of IPRs
- Collective rights management
- Refusal to licence IPRs
- Joint selling of sports rights

# EC competition rules

- Article 81(1) EC: all agreements and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited
- Article 81(3) EC: the application of paragraph 1 is excluded if an anti-competitive agreement has positive effects that outweigh the restraints of competition
- Article 82 EC: any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it
- Both Art. 81(1) and Art. 82 apply if trade between Member States (MS) is affected

# EC internal market rules

- Article 28 EC: quantitative restrictions on imports and all measures having equivalent effect are prohibited between MS
- Article 30 EC: the application of Article 28 is excluded if restrictions on imports are justified by the protection of "industrial and commercial property" (including copyright) provided that such restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between MS
- Article 43 EC: restrictions on freedom of establishment of nationals of a MS in the territory of another MS are prohibited
- Article 49 EC: restrictions on freedom to provide cross-border services between different MS are prohibited
- Derogations to both provisions are admissible by laws providing for special treatment for foreign nationals on grounds of public policy, public security or public health (Articles 46 and 55 EC)

# Intellectual Property Rights (IPRs)

- **Are granted by national law**
- **Are exclusive**
- **Have limited duration**
- **Have limited territorial effect**
- **Might be used in such a way that may lead to:**
  - limitations of the free movement of goods and services based on IPRs
  - Artificial partitioning of the common market
  - Abuses of dominant position

- **Despite EU copyright harmonisation so far (8 directives), the market for copyright services (including the management of copyright) is fragmented along national borders**

# Territoriality of IPRs

- **Existence/exercise of IPRs**
  - **Existence of an IPR falls outside Article 81(1) EC**
  - **Exercise of exclusive rights can have the effect of partitioning the market (Art. 81 EC)**

- **Specific subject-matter of an IPR**
- **Some examples:**
  - **A right to decide on the first placing of a work on the market (ECJ: *Musik-Vertrieb Membran* – 1981)**
  - **A right to require fees for public performance (ECJ: *Coditel I* – 1980)**
  - **A right to rent out a work (ECJ: *Warner and Metronome v. Christiansen* – 1988)**

# Territoriality of IPRs

- The Community "exhaustion" principle

- ECJ: *Deutsche Grammophon* (1971)
  - Existence - exercise of IP rights
  - Exhaustion principle for sale of records (in view of Articles 28, 30, 81 and 82 EC)
- ECJ: *EMI v. Patricia* (1989)
  - Case where the Court tolerated a ban on imports from one MS to another because of the different terms of copyright protection between the two MS
- Principle embodied in EC copyright „acquis"

# Territoriality of IPRs

- **Further developments of the EC "exhaustion" principle**
- **In view of Articles 28 and 30 EC the principle:**
  - **Applies to the sale of music recordings within the EU (ECJ: *Musik-Vertrieb Membran* - 1981)**
  - **Does not apply to the rental of video cassettes or discs (ECJ: *Warner and Metronome v. Christiansen* - 1988)**
    - **Also this latter principle has been embodied in EC copyright *acquis***

# Territoriality of IPRs

- **Further developments of the EC "exhaustion" principle**
- **In view of Articles 28 and 49 EC, the principle does not apply:**
  - **To the public performance of a film by a cable company received from a broadcaster from another Member State (ECJ: *Coditel I* - 1980)**
  - **To the public performance of recorded music in a discothèque (ECJ: *Tournier* - 1989)**
    - **Also this latter principle has been embodied in EC copyright *acquis***

# Territoriality of IPRs

- **Further developments of the EC "exhaustion" principle**

- **Exclusive national exhibition licence and Article 81 EC (ECJ: *Coditel II* - 1982)**
  - **Given the characteristics of the cinematographic industry, an exclusive licence is not as such contrary to Article 81 EC**
  - **But: exercise of exclusive right might restrict competition**
    - **E.g. if it creates barriers which are artificial and unjustifiable in view of the needs of the cinematographic industry**

# Territoriality of IPRs

- *iTunes* case: Statement of Objections of Commission of April 2007
- Distribution agreements between Apple and some major record companies contain territorial sales restrictions which partition the market and violate Article 81 EC
- As a consequence, consumers can only buy music from the iTunes' on-line store in their country of residence. iTunes controls consumers' residence through their credit card details
- Consumers are thus restricted in their choice of where to buy music, and consequently what music is available, and at what price

# Collective rights management

- ***GEMA* decision of Commission (1971)**
  - **GEMA abuses its dominant position according to Article 82 EC, inter alia by**
    - Discriminating against authors of other Member States
    - Tying in its members (agreement only for all uses and the whole world)
    - Discriminating against importers of discs
- **ECJ: *GVL* (1982) confirming a Commission decision**
  - **GVL abused its dominant position by refusing its services to authors established outside Germany**
  - **Article 86 EC does not apply**

# Collective rights management

- ECJ: *Lucazeau* and *Tournier* (both 1989)
  - Reciprocal representation contracts of collecting societies are not in themselves caught by Article 81(1) EC
  - Might be different if they established exclusive rights
  - Local presence necessary to monitor uses
  - Fees appreciably higher than those charged in other Members State are indicative of abuse under Article 82 EC

# Collective rights management

- Loss of territoriality due to the Internet and to the digital format of products
- Territorial restrictions in the administration of rights for online uses are not indispensable anymore

- Recent cases (albeit no decision from Commission)
  - IFPI Simulcasting Agreement (Exemption, 2002)
  - Santiago Agreement (SO, April 2004; Expiration, December 2004)
  - Barcelona Agreement (Expiration, December 2004)

# Collective rights management

- CISAC case: Statement of Objections of Commission of February 2006. Some clauses of reciprocal representation agreements infringe Article 81 EC:
  - Membership restriction which obliges authors to transfer their rights only to their own national collecting society
  - Territorial restrictions, which oblige commercial users to obtain a licence only from the domestic collecting societies and limited to the respective domestic territory

- Consequence: de facto monopoly of each collecting society in its own national market
- Territorial delineation cannot be justified for certain new forms of exploitation such as internet, satellite and cable retransmission

# Collective rights management

- Parties offered commitments to remove competition concerns in March 2007
  - Undertake to delete membership clause and exclusivity clause
  - Undertake to grant each other multiterritorial licence provided certain criteria are fulfilled
- Publication of market test notice in OJ on 9 June 2007
- Commission is currently evaluating responses from market players

# Refusal to licence

- ECJ: *Magill* (1995), *IMS Health* (2004)
- Refusal is only exceptionally an abuse of a dominant position according to Article 82 EC if
  - IPR is indispensable input for activity on downstream market
  - Foreclosure effects downstream for the supply of new services/product for which consumer demand exists
  - No objective justification (e.g. capacity constraints, inverstments) for the refusal

# Refusal to licence

- **In view of the indispensability criterion, in *IMS Health* the ECJ clarified that it is sufficient that a potential or even hypothetical upstream market is identified**
- **These criteria were also confirmed by the Court of First Instance (CFI) in Microsoft (2007)**
- **In Microsoft the CFI clarified that the sole fact that the technology concerned is IP-protected cannot constitute objective justification for the refusal**

# Joint selling

- **Three Commission decisions**
  - ***UEFA Champions League* (exemption, 2003)**
  - ***Bundesliga* (commitment decision, 2005)**
  - ***FA Premier League* (commitment decision, 2006)**
- **Restriction according to Article 81(1) EC**
  - **Bundling of offer of clubs**
  - **Uniform price**

# Joint selling

- Joint selling can be exempted according to Art. 81(3) EC
  - Effeciencies by single point of sale
  - Creation of league product, improved branding
- Remedies were necessary, e.g.
  - Tender procedures
  - Limitation of duration of the contracts (3 years)
  - Limitation of the scope – unbundling
  - Fall back of unsold rights

# Joint selling

- Remedies are not exhaustive
- Case-by-case approach, e.g.
  - No-single buyer rule (*Premiere League*)
  - Separate package for internet rights (*Bundesliga*) – „technology neutral basis“ (= TV+internet in case of *Premiere League*)
  - Definition of downstream markets important (pay-TV, free-TV, new media (internet, mobile))

# Thank you!

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