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

- 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

- 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, investments) 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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