

European Commission Closes Pay-TV Antitrust Investigation of Paramount Following Acceptance of Commitments

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On 26 July, the European Commission (EC) announced that it was closing its antitrust investigation of Paramount Pictures, following its acceptance of binding commitments from Paramount not to enforce certain restrictions in its licensing agreements with pay-TV operators. A formal commitments decision involves a party under investigation changing its practices to address the EC's competition concerns, in return for the investigation against it being closed without any adverse finding or admission of liability. While this decision does not mark the end of the EC's pay-TV investigation, which continues against other studios and broadcasters, the history of the case to date, and the terms of this settlement, provide an interesting insight into the EC's current views on the interaction between competition law and copyright. This is especially relevant when viewed in the context of the EC's wider efforts to reform copyright law to facilitate cross-border licensing, as part of its wider 'Digital Single Market' strategy.

The Commission's case

As summarised in the press release accompanying the EC's July 2015 Statement of Objections (SO) (a formal statement of case that must precede an infringement decision), the EC objects to clauses contained in licensing agreements between UK pay-TV broadcaster Sky and each of six major movie studios that:

1. prevent Sky from responding to unsolicited requests for access to its pay-TV service from consumers located within the European Economic Area (EEA, ie the 28 Member States of the European Union (EU) plus Norway, Iceland and Liechtenstein) but outside the licensed territory (the UK and Ireland); and
2. require each studio to include provisions in their agreements with other pay-TV broadcasters, located in other Member States, that prohibit those broadcasters from responding to unsolicited requests for access to their pay-TV services from consumers located within the UK and Ireland.

In the EC's view, by effectively preventing any passive sales by broadcasters between territories within the EEA, these clauses grant Sky absolute territorial exclusivity within the UK and Ireland and grant other broadcasters equivalent protection in their home territories. By eliminating cross-border competition between pay-TV broadcasters in this way, and thereby partitioning the EU Single Market along national lines, the EC claims that the clauses constitute a "serious violation" of Article 101 of the Treaty on the Functioning of the European Union (TFEU). Agreements that infringe Article 101 are void and unenforceable, while serious infringements are punishable by substantial fines

Paramount's commitments

The commitments offered by Paramount, and subsequently accepted by the EC on 26 July, oblige Paramount not to enter into any pay-TV output licence agreements containing any restriction on licensed EEA broadcasters' ability to respond to unsolicited requests for their pay-TV services from consumers located within the EEA, but outside the broadcaster's territory, or to enforce such clauses in existing agreements. In addition, Paramount has committed not to include or honour any contractual obligation in a

licence agreement with any EEA broadcaster to include similar clauses in its agreements with other broadcasters in other territories, thereby protecting the first broadcaster's absolute territorial exclusivity. In essence, therefore, Paramount has agreed to remove all clauses to which the EC took exception, without reservation, thereby entirely addressing the EC's competition concerns.

Paramount's commitments apply irrespective of whether a licensed broadcaster's services are offered via satellite or online. Consistent with the fact that restrictions on active sales into another distributor's territory are generally permitted under EU competition law, the commitments make it clear that Paramount may still prohibit licensed broadcasters from actively marketing pay-TV services that include its content to customers located outside of their exclusive territory. In addition, the commitments confirm that Paramount may continue to prevent sales of pay-TV services to customers located outside of the EEA.

Paramount's commitments will remain in force for five years, with its adherence to their terms being subject to supervision by a monitoring trustee. Any breach of the commitments may lead to enforcement action by the EC and ultimately fines. Following the EC's acceptance of the commitments, the case against Paramount will be closed. Since Sky and the remaining five studios have offered no commitments at the time of writing, the case against them continues.

Commentary

The EC's case appears at first sight to be closely aligned with an extensive body of case law concerning the illegality of absolute territorial protection stretching back to the early days of the European Economic Community (the predecessor of the EU), and its public pronouncements have clearly been drafted to emphasise this. They nevertheless largely duck the central issue here, namely the role of copyright in the licensing model adopted by the movie studios.

The 1966 European Court of Justice (ECJ) judgment in *Consten and Grundig v. Commission* clearly established that outright bans on the sale of goods between EU Member States will infringe EU competition law. That case also confirmed that, while EU law did not interfere with the existence of trade marks in national law, ownership of a trade mark cannot be used to interfere with such cross-border trade. The right conferred on the trade mark holder to control distribution of goods bearing its mark is thus 'exhausted' (and so can no longer be asserted) from the point at which a product is placed on the market in the EU with the holder's consent.

The application of these principles to the sale of intangible content protected by copyright such as movies and software is less clear cut, however. The 1980 ECJ judgment in *Coditel v. Ciné-Vog Films* ('*Coditel 1*') confirmed that the exclusive licensee of the copyright in a film for theatrical presentation in one country was entitled to prevent the redistribution of that film on cable TV in the same country, by operators who had received the film when it was broadcast in a neighbouring country, without infringing EU rules on free movement. This was because the court recognised that the copyright holder's (and hence its licensee's) right to protection from such cross-border transmissions was essential for the effective commercial exploitation of the film and hence was inherent in the essential function of copyright (which could not be challenged by EU law). A later judgment concerning the compatibility of such action with what is now Article 101 ('*Coditel 2*') upheld the same principle in the antitrust context by holding that a contractual prohibition on showing a film in an exclusive territory licensed to another did not inherently infringe Article 101 TFEU.

Copyright grants its owner the exclusive right to communicate the protected work to the public. Since (unlike with goods) this right is not exhausted when the work is first exhibited, copyright permits a high degree of continued control over a work's exploitation. Until recently, it had generally been accepted (applying the *Coditel* judgments) that an agreement conferring the exclusive right to exploit a copyright work in a specified territory, supported by agreements preventing others from communicating the same work to the public in that territory, protects the essential function of copyright and thus should not infringe Article 101.

The EC pay-TV case appears to challenge this principle head on, given that the movie studios concerned own the copyright in their films, which grants them the exclusive right to communicate those works to the public and to license that right on to broadcasters, including Sky, on an exclusive territorial basis. In challenging restrictions on licensees' ability to exploit licensed works outside of their licensed territories, the EC appears to be relying on the ECJ's 2011 judgment in *FAPL v. QC Leisure* (otherwise known as the

Karen Murphy case). That case arose from attempts by Sky and the FA Premier League to assert their rights under UK copyright and criminal law to prevent the sale by parallel importers of Greek satellite decoders to British pubs, as this enabled landlords to show (Greek) coverage of English Premier League football to their customers without paying the FAPL's exclusive UK licensee Sky for the privilege.

The ECJ's hard-line judgment in that case imposed limits on rights holders' ability to use terms in their licences to control the cross-border exploitation of their programmes, ruling that an agreement prohibiting licensees from selling decoder boxes and cards outside their home territory infringed Article 101. The judgment nevertheless confirmed the basic principle that a copyright holder retains the exclusive right to authorise the communication of its own copyright works to members of the public and can assert that right to prevent infringing acts. The issue before the ECJ in that case was not whether the Greek broadcaster holding the FAPL rights for Greece could stop UK publicans receiving its broadcasts but rather whether the FAPL could use its licensing terms alone to *force* the Greek broadcaster to prohibit such use.

The EC is maintaining this distinction between (permitted) reliance on copyright and (prohibited) contractual restrictions in its public pronouncements on the new pay-TV case. Notably, its July 2015 press release states that its pay-TV investigation focuses on "*contractual* restrictions on passive sales" (emphasis added) and goes on to acknowledge that "at the same time, broadcasters also have to take account of the applicable regulatory framework beyond EU competition law ... [which] includes, for online pay-TV services, relevant national copyright laws". While this language rather downplays the fact that copyright may permit the very territorial segmentation to which the EC takes objection when it is reinforced by contract, the EC at least recognises the existence of copyright and hence (at least implicitly) acknowledges that it cannot rely on the EU's competition rules to prohibit actions that flow from the essential function of copyright, which after all remains a matter of national law.

Given that copyright law currently enables rights holders to continue to license their works on an exclusive basis in defined territories, and thus entitles their licensees to protect those exclusive rights by preventing access to those works from outside their territories, it is unclear what taking action against contractual restrictions that reinforce this underlying framework really achieves. Indeed, it is questionable whether a restriction that simply reinforces an underlying position under intellectual property law can infringe Article 101 at all, given that the counterfactual in the absence of the restriction would continue to be a lack of cross-border competition, through enforcement of the underlying national rights. While it is true that the EC is looking at "modernising the EU copyright rules" as part of its wider Digital Single Market agenda, which could potentially lead to dilution of the territorial basis of copyright, concrete changes to the law have not yet been proposed, let alone implemented. In any event, any future changes will not change the prevailing legal position during the period covered by the EC's investigation. The EC's case could therefore be viewed as an attempt to use competition law retrospectively to achieve changes to the copyright regime that have not yet happened.

In light of this fundamental legal uncertainty, and the continued importance of the territorial licensing model for studios and pay-TV broadcasters, it is unsurprising that Sky and the other five studios continue to contest the EC's case. While it could equally be seen as surprising that Paramount has settled, it is interesting to note the clause in Paramount's commitments stating that nothing in them "shall be interpreted as limiting or waiving Paramount's rights to engage in licensing or enforcement practices in the EEA that are legally permissible under EU law". Although the meaning of this rather vague phrase is not entirely clear, it could open the door to Paramount continuing to maintain its territorial distribution model simply by enforcing its copyrights, rather than through reliance on the contractual restrictions to which the EC objected. Such a direct challenge to the logic of the EC's case would be brave, given that the commitments contain an anti-circumvention clause. Nevertheless, the impact of the commitments still seems questionable, given the commercial context. Specifically, Sky will retain the right unilaterally to decide not to provide its UK channels to customers located outside of the UK and Ireland, even in response to unsolicited requests. Indeed, given that those channels carry movies from all studios, it is hard to see a situation arising in which Sky would exercise its newly won contractual freedom to offer Paramount movies in other countries on a passive sales basis when it cannot do so for other movies on the same channel. Paramount's licensees (who are not bound by the commitments) will also presumably retain the ability to enforce their rights under those agreements to protect their exclusivity, even if they are no longer forced to do so by Paramount.

On this basis, the commitments appear to be a rather Pyrrhic victory for the EC. The main battle remains to be fought another day, most likely before the General Court in Luxembourg in two or three years' time. The fact that the UK may no longer be a Member State of the EU by that time simply complicates the picture still further.

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