



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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How should "geo-blocking" practices be assessed from a competition law and IP perspective in light of the European Commission's e-commerce sector inquiry and Paramount Studios commitments decision, and what are the proposals for reform?

Speakers: Thomas Kramler ("TK"), Head of the Digital Single Market Task Force in the European Commission's Directorate General for Competition, Stephen Wisking ("SW"), Partner at Herbert Smith Freehills and Nicholas Saunders ("NS"), Barrister at Brick Court Chambers

Date: 6 April 2017 at 6.00 pm

Venue: Watson Farley & Williams LLP

The purpose of the seminar was to learn more about how 'geo-blocking' practices should be assessed from a competition law and IP perspective.

Mr Thomas Kramler's presentation

1. TK began by introducing the background to geo-blocking in the EU. He explained that the Commission's interest in geo-blocking stems from its objective to enhance the digital single-market across Europe. TK cited that whilst intra-state e-commerce has grown rapidly, growth of cross-border e-commerce has been slow and although 50% of people now shop online only 15% of online shopping is cross-border. He suggested that this is mainly due to language, culture and legislative barriers.

Geo-blocking

2. TK observed that despite 60 years of EU case law a large amount of contracts still contain territorial restrictions. He spoke about the differences between geo-blocking, geo-filtering and personalised pricing, but observed that personalised pricing is not often used despite companies having the capability. He suggested that this is due to the potential negative consumer reaction.
3. TK introduced the Commission's e-commerce sector enquiry launched in 2015 to look inter alia at geo-blocking in both the goods and content markets. He explained that the enquiry found that in the goods markets territorial restrictions are primarily implemented by re-routing customer access, or by preventing delivery to certain countries. Prevention of access is not common in the goods market, but is much more common in the content market. TK reasoned that this is due to copyright issues. TK argued that there are differences between member states, with prevention of access not being common in Spain and Italy, which shows that geo-blocking may not be necessary for the market to function.

Absolute Territorial Protection and IP

4. TK explained that case law draws a distinction between exclusive licences and absolute territorial protection and gave the example of patents and the distinction between active and passive sales. He argued that this distinction makes sense in the digital world.
5. TK explained the background to the Coditel II case. He argued that the Coditel case is authority that you have to look at all the surrounding circumstances to decide whether a restriction goes beyond exclusivity and amounts to a prohibited absolute territorial restriction. TK then went on to explain the background to the Murphy case. TK acknowledged there is a debate on the scope of Murphy. .

Commission Workstreams

6. TK gave an overview of the current Commission workstreams and the legislation being discussed on geo-blocking, such as the portability regulation and the geo-blocking regulation. He concluded

by saying that geo-blocking is nothing new in the EU, but the problem has grown because digital technology has given everyone the potential to be a parallel trader but has also made geo-blocking easier than ever before.

Mr Stephen Wisking's presentation

7. SW began by giving an overview of the Movies case. He explained that the Commission's press releases relied on a direct application of the Murphy case. SW noted that the portability issues raised by the Paramount case have been dealt with by legislative reform and the remaining issue is the validity of the territorial restrictions in the agreements.

The Commission's View

8. SW explained that the agreements contained provisions which prevented broadcast availability outside of the licensed territories. He explained the Commission found that this amounted to absolute territorial restrictions which went beyond copyright protection, that the broadcasters were forced to geo-block and that there were territorial restrictions by object.

Legal and Economic Context

9. SW argued that territorial restrictions are necessary to enable broadcasters to have exclusivity which enables them to distinguish their content and to put content creators in the best position to monetise their content and finance future content. He observed that content creators also maximise their return by windowing and removal of territorial restrictions would remove control over the timing of windows. He gave the example that it would not be possible to have a pay per view window in a territory if that content was already available via another window from another territory.
10. SW argued that preventing territorial restrictions would lead to either a reduction in content created because of the impact on revenue flowing to content creators or other measures being employed by content creators to address the reduction in revenue. He gave the example that content creators may require dubbing in order to control the availability of their content. He argued that the Coditel case is authority that you need to look at the circumstances of the restrictions and in this case the restrictions are justified.

Paramount Commitments

11. SW gave an overview of the Paramount commitments. He argued that it is debateable whether these commitments will have any effect because they still allow Paramount to enforce its copyright and Paramount's content remains tied up with content from other providers in existing movies channels which will effectively remain subject to the restrictions.

The Wider Debate

12. SW suggested that the wider issue was how the case will impact European film production. He reasoned that a reduction in pay per view revenue would reduce the creation of marginal films and this is a particular issue for European independent films with cultural significance. SW concluded by raising the question of whether competition law is the right tool to deal with these issues. He argued that it would be better to deal with these issues by way of legislation. He reasoned that this would allow all interested parties' views to be represented.

Mr Nicholas Saunders' presentation

13. NS began by addressing SW's conclusion and argued that harmonising copyright law by legislation is very difficult and there have been numerous international treaties just to ensure some basic level of harmonised protection. NS explained that the issue is that there are different approaches to copyright, with the UK taking an economic approach and civil law countries focusing on moral rights and intellectual creation. He argued that this makes copyright very difficult to harmonise and the Court of Justice instead harmonises around the edges.

The Digital Single Market Package

14. NS noted that the digital single market package only gives a series of checks and balances and doesn't tidy up the disparity in the approach to copyright. NS suggested that harmonisation might be easier once the UK leaves the EU but explained that there is currently only a piecemeal application of copyright law in the field of geo-blocking. He suggested that this is due to intense lobbying on copyright law.

The Portability Regulation

15. NS gave an overview of the Portability Regulation. He said that beyond portability there is no block on copyright enforcement.

Conclusions

16. NS concluded by agreeing with SW that there are special considerations in the film industry. NS explained that in the film industry financing is precarious and independent productions want territorial licences in order to ensure their funding. NS noted that the Commission has relied quite heavily on the Murphy and Coditel cases. He argued that it is questionable whether Murphy is authority for the Commission's position. He suggested that subsequent cases have distinguished aspects of Murphy, but acknowledged that it is an area for debate.
17. NS concluded by raising the issues of VPNs and their impact on geo-blocking. NS noted that VPNs were banned in Australia and it would be interesting to see whether the approach in the EU would change in the future.

Questions

Is Competition Law the right tool to deal with geo-blocking?

TK argued that there was no rule of reason in EU competition law. He suggested that a rule of reason should not be introduced through the back door.

TK reasoned that remedies available in IP can work in parallel with competition law. He argued that there should not be any obstacles to prevent the Commission from enforcing competition law.

Why does the Commission distinguish intra-state windowing from windowing across member states?

TK replied that the Commission is concerned with integration between member states and the very raison d'être of competition law is to remove barriers. TK explained that and if there were barriers then the single market would not work.

Is the Commission concerned with territorial restrictions from outside of the EU?



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TK responded that the Commission is only concerned with integration in the single market. TK explained that if restrictions are within the EEA then there is an issue, but the Commission would not take issue with restrictions from outside of the EEA because there are no single market issues.

By taking on interesting cases is the Commission undermining self-assessment?

TK responded that it is important for the Commission to take cases and move the law forwards. He argued that the Commission should develop the law. He explained that the Commission takes into account where the law is novel when giving fines and he highlighted the Motorola case where there was no fine imposed.