

Workshop AGCM – IIC

Convergence in Electronic Communications Markets.
Competitive Scenarios for Networks, Services and
Content in an International Perspective

***Services Innovations and Broadband
Distribution: Access to Content,
Copyright and Market Competition***

Rome, 21 January 2009

Peter Alexiadis
Gibson, Dunn & Crutcher LLP

Table of Contents

- I. Introduction
- II. Access to Next Generation Networks
- III. Access to Content
- IV. Access to Internet Search
- V. Putting the “Right” Into Copyright
- VI. Conclusions

I. Introduction

- The combined use of the Internet Protocol and the deployment of fibre-based networks (FTTH) threatens to change the structure of the telecoms industry radically. Market definitions will become blurred and notions of market power will become more elusive to identify clearly.
- The effectiveness of the response of *ex ante* regulation and *ex post* competition rules to such fundamental changes in industry structure is questionable. The anticipated shift from *ex ante* to *ex post* might never be able to materialise, as the tools of competition law are arguably not suited to an NGN broadband environment. Moreover, the tools of symmetric regulation are becoming so prominent that the traditional concept of individual market power runs the risk of being diluted in such an environment. *Ex post* practice is equally handicapped in its assessment of complex oligopolies falling short of outright collusion.
- The aim is to run through the legal and regulatory value chain which has an impact on Next Generation Access, starting from policies relating to network access, discussing existing doctrines regarding access to content, and finishing with proposed changes to the copyright regime.

II. Access to Next Generation Networks

- 1. Is the market definition mechanism in the EU Regulatory Framework able to address emerging market definition issues generated by NGA?**
- 2. Is the EU Regulatory Framework sufficiently flexible and clear to be able to efficiently target remedies to address access-related market failures? Is further clarification required to overcome any “enforcement gap” in light of increased fibre-based deployment?**

II. Access to Next Generation Networks (2)

3. Are there other ancillary measures that might be required to facilitate technological migration to NGA?
4. Where and how can *ex post* rules fill emerging regulatory gaps?

II. Access to Next Generation Networks (3)

- Migration to IP networks and fibre deployment in the local access network has far-reaching implications for existing network architectures and services
- Foreseen in 2003 *Relevant Markets Recommendation*
- No possibility of a “regulatory holiday”

II. Access to Next Generation Networks (4)

- Intervention to be driven by following principles:
 - encouraging innovation and stimulating new investment in ECNS
 - safeguarding of services-based competition until network competition takes off
 - no reduction in incentives for competitors to invest in new networks
 - *ex ante* still with a role to play to counteract vertical integration

II. Access to Next Generation Networks (5)

- observe principle of technology neutrality
- service innovation and differentiation turn on technical limitations of the access product
- form of access provided should not require new investments to accommodate new entry

II. Access to Next Generation Networks (6)

- Nature of possible abusive practices:
 - refusal to deal?
 - margin squeeze?
 - predatory pricing?
 - discrimination?
 - long term contracts?
 - bundling?
- Does the answer lie in taking *ex post* action further upstream?

III. Access To Content

- Important aspect of new generation “access” in a converged environment
- Content-related issues fall outside the ECNS regulatory framework
- Differences in upstream and downstream levels

III. Access To Content (2)

- **Narrow market definition broken down by reference to the nature of the content and different platforms (*e.g.*, cable, free-to-air, new media platforms)**
- **Importance of IP regime in evaluating pros and cons of access**
- **National scope of markets**

III. Access To Content (3)

Essential inputs in the form of sports-rights and « blockbuster » movies (30-65% of right expenditure)

Exclusivity

“Windows” system of distribution

Restrictions on delivery over certain platforms

Use of holdback and pre-emption rights

Rights can relate to one or more platforms

Joint selling commonplace in sports industry

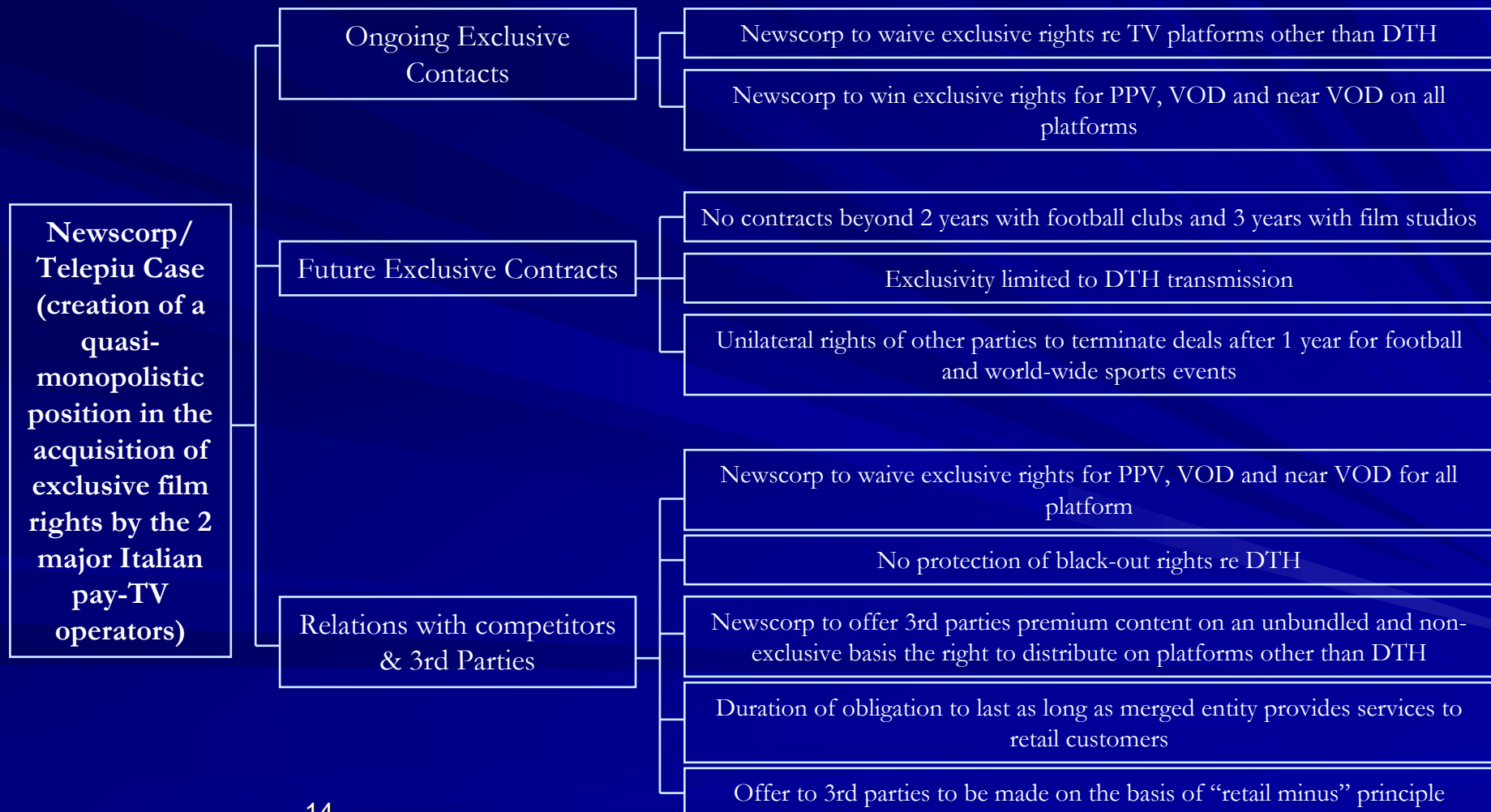
“Must carry” obligations on CATV operators in the *Universal Service Directive* and “major importance” category for free-to-air broadcasting in the *Audiovisual Without Frontiers Directive*

III. Access To Content (4)



* *Subject to different “embargo” conditions as between UEFA, Premier League and Bundesliga Cases*

III. Access To Content (5)



III. Access To Content (6)

- The vicious circle of lack of scale
- Exclusivity and dominance
- Wholesale offers?
- Holdback offers?
- Duration of offers/remedies
- Specific issues relating to:
 - movie industry
 - sports industry
- Access to TV channels

III. Access To Content (7)

- The OFCOM Proposals for a HD premium channels must-offer regime
- The traditional role of price control regimes for wholesale services
- The appropriate mechanism for arriving at a wholesale access price
- The promotion of “innovation” in the context of a must-offer regime for HD channels
- Consumer welfare implications

IV. Access to Internet Search

The Commission has looked at platforms, and exchanges, gatekeepers, and on-line advertising through various cases over the years.

➤ **Commodity exchanges**

- A series of cases (*ASNEF* and *Volbrokers*) at the end of 1990s raised three key principles:
 - The principle of “no foreclosure and no discrimination”
 - No unlawful exchange of information
 - Significance of the activity on the exchange in terms of overall volumes and market share

IV. Access to Internet Search (2)

➤ “Gatekeeper” Cases

The Commission looked at the media value chain due to concerns that the telecoms-Internet-media-content-portals model could result in market foreclosure due to difficulties in obtaining access to content (see *AOL/Time Warner*, *Bild.de/T-Online*, *Vodafone/Vivendi/Canal+*, *T-Online*)

IV. Access to Internet Search (3)

- Many of the above cases were decided at a time when the Commission was undertaking a period of activism on one hand, but had relatively little experience with the concept of “efficiencies” on the other. As a result, the Commission identified a number of efficiencies as being “offensive” by identifying any upstream input, the ability to and opportunity to harm consumers and to foreclose, and the identification of relatively narrow markets

IV. Access to Internet Search (4)

➤ Microsoft Internet Explorer

- Commission objected to Microsoft's tying of Internet Explorer from head-to-head competition with other browsers. This was thought to be detrimental to the place of product innovation and the quality of products for consumers
- Commission was concerned that the ubiquity of Internet Explorer created artificial incentives for content providers and software developers to design websites and software primarily for Internet Explorer. This undermined competition and innovation in the provision of other services to consumers
- Case demonstrates the evolution in the way the Commission analyses the issues by focusing on innovation in adjacent markets

IV. Access to Internet Search (5)

- On-line advertising is a two-sided market that is both orthodox and different
 - Orthodox: can be compared to traditional newspapers, where the economic model is based on a balance between cover price and price the readers are willing to pay and the advertising revenues, which often subsidise the cover price
 - Competition law unconcerned with balance between cover price and subsidy provided as long as the outcome is efficient

IV. Access to Internet Search (6)

- Unorthodox/different: 3 key reasons why on-line advertising or search advertising is different:
 - The search is free
 - The amount of data generated by on-line search for the purposes of search advertising is in a different league to that experienced before with publishing
 - Growing evidence that the search is not “neutral”

IV. Access to Internet Search (7)

- There are 3 parts to a search screen which are relevant to the issue of on-line advertising:
 - First, the set of results on a search screen that are the result of traditional, organic search
 - Second, search ad results which are typically described as “sponsored links”
 - Third, an increasing degree of other commercial activities on that screen, such as shopping results, results for books, maps, *etc.* (this has received increasing attention over the past 24 months both in US and EU.)

IV. Access to Internet Search (8)

- *Google Books Settlement (ongoing)*
 - The main concerns are the creation of a *de facto* monopoly for digital access to orphaned works, the creation of barriers to entry, that exclusive access to a vast amount of data will place competitors in search and on-line advertising at a disadvantage, and that the exclusivity in pricing provisions would foreclose market entry to the detriment of customers

IV. Access to Internet Search (9)

- *US DOJ*: Google's competitors are unlikely to be able to obtain comparable rights independently. The competitors will face the same problems – identifying and negotiating with millions of unknown individual rights holders – that Google is seeking to surmount with the Settlement Proposal
 - Competitor could not enter the market by copying books en masse without permission with the hope of prompting a class action suit that would be settled on terms comparable to the Settlement Proposal
 - This would also promote copyright violations and additional litigation as a means of obtaining approval for licensing provisions which could otherwise not be negotiated lawfully

IV. Access to Internet Search (10)

- **National Investigations**
 - There are a number of ongoing national investigations, including in Italy and Germany
 - In Italy, the association of Italian newspaper publishers, the FIEG, has complained to the Italian Competition Authority about the unauthorised use of copyrighted materials, the lack of transparency, the bundling of services, and the lack of an effective appeals process
 - In Germany, Ciao has complained that Google has undertaken retaliatory action against a vertically integrated competitor

IV. Access to Internet Search (11)

- **AdMob**

- Recently announced that Google intended to acquire AdMob, a mobile technology provider, for US\$759 million. AdMob is a market leader in mobile advertising, a market which in the US is proposed to top US\$1 billion by 2012
- Various competitors concerns:
 1. Concern that bundling, by giving technology tools away for free, of ad-serving software with display advertising, will bind advertiser to that platform and provide unfair competitive advantages to vertically integrated platforms

IV. Access to Internet Search (12)

2. Concern that the network of restrictive and/or exclusive agreements entered into by certain search engines with publishers will prevent other search engines from having access to those sites (*Brasserie de Haecht* case)
 3. Concern over the toolbar default settings
 4. Recent concern about the neutrality and objectivity of organic search results (*i.e.*, whether the results are being manipulated in order to facilitate the entry of the search engine onto neighbouring markets)
- Customers concerned that the Internet is generally not a friendly place for those with IP rights, copyrights or trademarks. Also concerns over pricing and transparency issues related to AdWords

IV. Access to Internet Search (13)

- What does “transparency” mean in the context of the Internet?
 - Economic actors depend on information to make their choices. Perfect markets rely on perfect information as well as unlimited numbers of buyers and sellers
 - Perfect markets display a number of symmetries, but if those symmetries are absent, competition concerns arise. The White Paper by the Commission looks at the asymmetries in the market and tries to identify how more transparency will correct the competition problems

IV. Access to Internet Search (14)

- Remedies to promote transparency and openness are not the most obvious solution regarding matters of on-line advertising
 - Online-search is a global business
 - Remedies have not been applied in on-line advertising cases before
- The following could be included amongst remedy options
 - Transparency obligations;
 - Price & non-price discrimination obligations;
 - Search neutrality commitments;
 - Interoperability/data portability obligations;
 - Licensing/FRAND access to data;
 - Appeals process/ timeliness;
 - Structural remedies in the case of systemic abusive behaviour; and
 - *Ex ante* regulation.

V. Putting the « Right » Into Copyright

- **Objective: laid out in Reflection Document by DG INFSO and DG MARKT (22 October 2009)**
 - **Creating in Europe a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online, particularly by:**
 - Creating a favorable environment in the digital world for creators and right holders, ensuring appropriate remuneration for their creative works;
 - Encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use;
 - Promoting a level playing field for new business models and innovative solutions for the distribution of creative content.
 - **Debates are also taking place on a national level**

V. Putting the « Right » Into Copyright (2)

- **Evolution of Technology and Content Markets**
 - **Digital technology has changed how creative content is created, exploited, and distributed. User-created content is playing a new and important role alongside professionally produced content.**
 - **The traditional practices for licensing rights are not adapted to digital distribution.**

V. Putting the « Right » Into Copyright (3)

- **Bringing professionally produced creative content available online is proving to be a high-risk business due to market fragmentation, high development and production costs**
- **Different difficulties arise depending on the type of digital content (e.g., music, publishing, audiovisual)**

V. Putting the « Right » Into Copyright (4)

➤ Recent EU Level Initiatives

- **A number of actions at EU level since the Commission's 2008 Communication on Creative Content Online in the Single Market.**
 - The Final Report on the Content Online Platform (12 May 2009)
 - International Confederation of Societies of Authors and Composers (CISAC) decisions – aimed at promoting competition and pan-European licensing.
 - Online Commerce Roundtable – solutions to overcome territorial restrictions in licensing of musical works.
 - The Commission has commenced a study to assess options relating to the licensing of audiovisual works – available early 2010.
 - Commission recently adopted Communication on Copyright in the Knowledge Economy

V. Putting the « Right » Into Copyright (5)

➤ **Most Recent Developments**

- **Single online music licensing**
 - Spanish EU Presidency intends to tackle digital copyright and online piracy in 2010. Ongoing discussions on the introduction of a pan-European licensing system.
 - Industry and consumers groups submitted responses to an EU paper Creative Content in a European Digital Single Market: Challenges for the Future, a paper suggesting merging the right of reproduction and performance into one copyright license.
 - This will be discussed amongst the 27 Telecoms Ministers in May 2010 in Madrid.

V. Putting the « Right » Into Copyright (6)

➤ Copying levies

- Talks regarding private copying levies have been ongoing since July 2008. The EU stakeholder platform, comprised of collecting societies, industry representatives, and consumer organizations, failed to find common ground on which products should have copyright levies and how they should be priced.
- Current EU copyright rules do not provide guidelines on which products are subject to levies and how much is charged, resulting in varying levies from country to country.
- This goes against the nature of the single market.

VI. Conclusion

- **There are many open questions about whether or not *ex post* competition rules can apply effectively in an NGN environment. There are nearly as many open questions as to whether the current *ex ante* regulatory regime can address the problems raised by NGNs.**
- **Access to content is becoming an increasingly important issue in anticipation of a converged environment but, in the absence of remedies accepted in merger reviews, there are few legal norms going beyond what is prescribed in the case-law for football rights.**

VI. Conclusion (2)

- **Actions vs Google/YouTube by Telecinco (Spain), Mediaset (Italy), and Viacom (US) suggest that the enforcement of copyright rules will become an increasingly important element in the battle for supremacy in the Internet space. These copyright skirmishes need to be seen, however, within the broader context of a broader dissemination of copyright material across the EU, both in geographic and platform terms. The European Commission has also shown an increasing appetite for adopting a "regulatory" approach in establishing FRAND conditions for the licensing of key Information Society-related technologies.**
- **Access to search is increasingly becoming a key antitrust agenda item, given the importance of the on-line advertising industry to the future growth of the Internet. Whether or not regulation or competition can address the range of issues raised is a matter of debate, and needs to be resolved on an international level.**