Chicago-Kent Law Review

Volume 72
Issue 2 *Symposium on Global Competition and Public Policy in an Era of Technological Integration*

Article 11

December 1996

The Competition Law Approach to Global Intellectual Property and Telecommunications Market Integration - The Implications of the New Regime for Global Competition Policy

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A COMPETITION LAW APPROACH TO GLOBAL INTELLECTUAL PROPERTY AND TELECOMMUNICATIONS MARKET INTEGRATION

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My subject is "A Competition Law Approach to Global Intellectual Property and Telecommunications Market Integration." I would like to point out that I am really not an expert on intellectual property rights. Also, my experience with competition law in practice is relatively recent. During the five and one-half years when I was in charge of DGIV, I was never particularly concerned with global intellectual property rights. We were concerned with intellectual property rights, but not global intellectual property rights. Unlike all other participants, I will not present original ideas. I will limit myself to discussing potentially relevant elements of my experience as head of DGIV.

Let us take intellectual property as the first subject, and here we can turn to the new group exemption, which is almost ready for adoption. There will no longer be one group exemption for patents and another one for knowhow. There will be only one. We had difficulties basing our decisions on relevant data—what are we really regulating? What is the reality? And it is probably the last time that DGIV will put out a legal text without first doing a Green Paper or White Book and asking for submissions and discussions. By the way, that seems to me to be the only way for the regulator to respond to this dilemma—what is the factual basis? One has to listen to opposing views.

The final version of the group exemption will be less ambitious than the initial one, as we have made an attempt to move closer to economic reality. The most important innovation in the current draft is that the group exemption will not apply to licensees who already have forty percent market share overall. This is intended to avoid the strengthening of dominant positions and, as the official explanation notes, the facilitating of exclusionary practices. I am sure that this aspect will be subject to debate.

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Let me now switch to individual cases. The first case which comes to mind here is the *Magill* judgment, where, contrary to what many of us expected, the Court of Justice upheld a decision by the Court of First Instance. The Court of First Instance had approved a Commission decision declaring a specific practice of television broadcasters to be abuse of a dominant position. The television broadcasters had used a copyright theory to deny to Magill, the Applicant, the possibility of publishing a weekly survey of the television programs they broadcast. The court's decision thus represents a direct interference with the role of a copyright and goes beyond earlier cases involving intellectual property rights.

I suppose that the intellectual property rights community was pretty upset by the judgment, and if the Commission were to make mass use of this new jurisprudence, I think it would have important consequences. Personally, however, I do not expect the Commission to make frequent use of the *Magill* possibilities, simply because *Magill* seemed to me to be a borderline case. Moreover, one of the elements which is not addressed at all, but seems to me important in the understanding of what is going on, is whether there was any serious justification for applying copyright principles in the first place. The copyright was in a list of programs that a TV station produced, and I do not consider that really an original work that intellectual property rights should protect. That is at least my personal position. My view has been "Let's not exploit this judgment to the full," and the Commission probably will not.

As I mentioned, however, there are also earlier cases. In the *Ford* case, for example, the issue involved rights relating to body parts for automobiles. The Court had to deal with two factors. First, was there really dominance? And second, was the refusal to allow others to produce these parts an abuse? Whether there was dominance is a very difficult question. It is necessary to distinguish between two kinds of dominance. The first is what I call horizontal or market dominance: Microsoft is, for example, horizontally dominant with respect to all its competitors on certain markets. There was a tendency in DGIV to apply, more or less mechanically, the principles used in horizontal cases to another type of dominance, what I call family or system dominance. This occurs where a firm controls a system, like an automobile, and you have suppliers and distributors that are part of that family, and who depend, of course, as members of the family, on the producer of the car. I consider it fundamentally wrong to apply to

that situation mechanically, automatically, concepts which competition lawyers apply in cases of horizontal dominance.

The *Kodak* case in the United States addressed this dilemma a couple of years ago, and it is one of the most difficult ones I have come across in my five and one-half years. Nobody will convince me that this is a pure competition issue. It depends very much on what notion of competition you have, what notion of restriction of competition you have, and whether you are a single-goal follower or one who believes that competition policy should pursue several goals. European competition law, contrary to at least part of American competition law theory, pursues several different objectives. At least if one is honest, protecting small and medium-sized companies is based on the theoretical underpinning of freedom of contract, and that is totally contrary to the Chicago School.

This leads me to a different consideration. We have had arguments within the Commission about whether problems of this kind should be addressed by case law or whether one should legislate. You may be astonished to hear that I am in favor of legislation. I was very happy that on the automobile body-part issue, the Commission proposed a directive (which—miracle of miracles—sought protection for three years and not for seven, or twelve, or thirty). Why am I in favor of legislation? Basically because it increases predictability. There is an element of uncertainty with respect to the determination of both dominance and abuse, and all these issues involve not only delicate economic considerations, but also value judgments. As a result, the outcomes are hardly foreseeable by economic operators. That is something which industry clearly does not like, and it should be avoided.

Another group of cases involves pooling—of films, of rights to records, disks, etc. It comes close to David Gerber's concept of networks and the role of intellectual property in these networks. I do not remember the name of the joint venture which was being discussed between the United States Department of Justice and DGIV when Diane Wood was still with the Justice Department, and where, for once, we were not totally on the same line. MTV complained about a pool of very powerful worldwide producers and owners of intellectual property with respect to records. It illustrates the delicacy of the situation. On the one hand, small and medium-sized owners of copyrights need to pool in order to be able to reasonably license their rights. But, is the same true for giants like Philips? The respective impacts on competition are likely to be very different.

1. Mergers

The Commission is known for being relatively generous with respect to research and development. It has been criticized in Germany for being too generous. According to one of the arguments, the Commission does not realize that there is a separate market for R&D technology. Now, as far as I remember, the first merger case in which a separate market for research and development technology was identified was *Shell Montacatini*, where two dominant technologies were being combined. The solution was to separate the technology market, which was considered world-wide, from the rest of the joint venture, and not to allow the joint venture to pool the two dominant technologies.

Another interesting case, which you might want to look at, is *Glaxo-Wellcome*. Glaxo bought Wellcome, apparently because of interesting research going on there. Again, the two markets were considered to be separate. The drug market is traditionally national, while, the decision says, the intellectual property market is probably worldwide. The problem was solved because Glaxo has a very important position on certain national markets for a migraine drug which it was willing to license. And, in addition, the Commission said the dominant position was vulnerable because there are other drug companies working on, and probably putting on the market before the end of the century, a similarly powerful drug.

I will close this chapter by drawing your attention to a significant sentence in one of the relatively few prohibition decisions on mergers that happens to be on the telecommunications side. It is the *MSG Media* decision, the second after the famous *De Havilland* decision. The sentence reads:

> Although a monopoly in a future market that is only just beginning to develop should not necessarily be regarded as a dominant position within the meaning of the merger regulation, the assumption that no market dominance exists presupposes that the future market in question remains open to future competition, and therefore the monopoly is only temporary.

2. Telecommunications

It is useful to distinguish here between two separate developments which are nevertheless strongly interrelated. The first is demonopolization. I prefer this term to deregulation because a demonopolized situation might require more regulation than you need under the monopoly. You know probably that there are Council

resolutions which provide for the abolition of all monopoly rights, both for services and for infrastructure, from January 1, 1998, with an exception for peripheral, less-developed networks—Spain, Portugal and Greece, where an additional five-year period would bring it to 2003, and a two-year possibility for Luxembourg as a very small network. The Commission adopted in July of this year a draft directive under Article 90, the famous provision which addresses state-owned enterprises and enterprises with special rights, exclusive rights. This draft is very, very interesting for all those who are concerned, not only with telecommunications, but also with regulated industries in general. The directive, once adopted, will consolidate the legal situation for telecommunications services and infrastructure, plus the exemptions, from January 1, 1998. Until then we will remain in a transitional period of partial liberalization.

If time permitted, I would love to compare telecommunications with other regulated sectors like transport, particularly air transport, postal services and electricity. In none of these sectors do we see a similar movement. Airlines are the most comparable. The legal road pursued has been different—not Commission but Council action. The area which is most frustrating, most disappointing, is electricity. It is not because of the greater economic insight and wisdom of European politicians that liberalization has occurred in telecommunications. It is because of the technological revolution. If we had a similar technological revolution in electricity, and similar worldwide exchanges, the electricity markets would not remain what they are. And here one sees clearly the benefits of technology, evolving with extraordinary speed, and evolving worldwide, and not only on national markets.

Very briefly, with respect to restructuring in the telecommunications industries. In the Union, there are two dimensions—one is the opening of national markets in view of the internal market, and the other is worldwide competition. Europe traditionally has had too many operators, because all these markets were national monopolies. Therefore, some of them have to join together within Europe. In addition, if you are not linked to other players in other parts of the world, you will not be a world player on the telecommunications market. This brings to mind three groupings—one is Unisource, which brings together telecommunications firms from Spain, the Netherlands, Sweden and Switzerland, with AT&T as their potential business partner. A second one that was approved by the Commission after long and difficult negotiations is called Concert, a joint venture between British Telecom ("BT") and MCI. The third one, which is giv-

ing rise to the biggest problems, technical and political, is Atlas, a joint venture between Deutsche Telekom and France Télécom; their American partner is Sprint. The problems are with Atlas, not with Atlas+Sprint. These are restructuring operations among existing telecommunications operators, but you also have, of course, the entry of new operators. All member states, I think, have now given a second or even a third license for mobile communications operations.

Then you have joint ventures focused on services to the business community—data communications, internal communications, etc., with a view to moving later into public voice communications. The main players in Germany are utilities, which have their pockets full of money, monopoly rents—regional electricity companies, because Germany does not have a national electricity monopoly. They are all doing extremely well, and they are putting their money, of course, into telecommunications—satellites, media software. Their international partners are very often the Baby Bells.

From a competition point of view, these joint ventures are, on the one hand, extremely beneficial, because the number of players is increased. But, at least during this transitional phase, there is a danger that they will strengthen existing monopoly positions, because even if you take away the legal monopoly right, you do not immediately eliminate the factual monopoly. A firm that has its network in place and has its infrastructure remains dominant. And that is very much the issue with Atlas (Deutsche Telekom and France Télécom). The Commission is seeking to open up the market more rapidly through parallel networks, but that might not be enough. One also has to control restraints on competition agreed to by the parties; this cannot be done by creating possibilities on other networks. For inspiration, the best example is what has been done by MCI and BT in discussions with the Commission.

There have also been some decisions prohibiting mergers. It is interesting that after *DeHavilland*, the only prohibition decisions from the Commission have been in the telecommunications sector. The first of these (second after *DeHavilland*) is Media Service, a company formed by Deutsche Telekom, Bertelsmann (after Warner, I think the biggest producer of boxed films, etc. in the entertainment business) and Kirch, which holds the most rights to films. Bertelsmann and Kirch are both in pay TV, and the idea was to establish together techniques to control access to pay TV, a sort of gatekeeper function, and the assumption of the Commission was that if these three together do

that, there will be no other competition on the German market, you can forget about it. Therefore, the prohibition.

In another recent prohibition three Nordic companies—the Norwegian and Danish telecommunications operators and the Swedish conglomerate Kinnevik—agreed to set up a satellite system just for Scandinavia. It would have created a dominant position on the Scandinavian market.

And the last one which the Commission has forbidden (at the request, by the way, of the Dutch government, which does not have merger control, but which asked the Commission to step in, as otherwise Community rules would not apply) is a grouping between the Luxembourg RTL and Radio Monte Carlo, both of them very important on the publicity side for private television, plus the most important producer of films. It is a little like the situation in *MSG Media Service*. That is a very recent decision. These then are the structural cases.

On the behavioral side, this transition in the telecommunications area requires frequently the application of Article VIII, because all tools are used, or potentially useable by the dominant incumbents, to try to prevent newcomers from attaining a market share, and this can be done with the help of the state through the licensing process. There is a case in the pipeline with respect to Italy in which the government has asked for something like a billion deutschmarks from Omnitel, the second mobile telephone operator, but has asked for no money from the incumbent Italian telecommunications operators. This means a high entrance fee for the newcomer, and no fee for the incumbent—it should be the other way around. And you can use other devices as well, such as numbering, telephone directories, rights-of-way, interconnects and lines (in the beginning, at least, newcomers need the lines of the incumbent telecommunications operators). Remedies are transparency, unbundling, separate accounting, and, of course, competitive infrastructure. The decision to open up infrastructure recognizes that as necessary to prevent abuses. Privatization is, of course, not a suitable remedy, because it merely replaces a public monopoly with a private one. According to the newspapers, the latest offer of the Europeans at the WTO with respect to telecommunications is subject to certain ownership restrictions imposed by the French, the Belgians, and, I think, the Spanish. It is also said that they would be willing to waive those restrictions in return for elimination of certain ownership restrictions that still exist in the United States. In any event, I do not believe that ownership restrictions will be intro-

duced at the level of the Community. The deregulatory forces in telecommunications are much stronger than the regulatory forces, because of the weakness of the European Union's political system and the difficulties of reaching decisions among fifteen member states. Therefore, it is perfectly possible that the deregulatory process in Europe will lead to a freer market than anywhere else.