

EBU Comments

to the Public Consultation on the
EC Commission's (DG Competition) discussion paper
on the application of Article 82 of the EU Treaty to exclusionary abuses

The EBU emphasizes that the present comments are limited to point 9.2.3. only, and that it reserves its position with regard to any other issues in the Commission's consultation paper.

THE NEED FOR INTEROPERABILITY FOR DIGITAL BROADCASTING AND POSSIBLE ABUSES OF DRM SYSTEMS

Under point 9.2.3 "REFUSAL TO SUPPLY INFORMATION NEEDED FOR INTEROPERABILITY" of the above-mentioned consultation, the EC Commission states that a special case (i.e. of a refusal to supply) arises "when an undertaking refuses to supply information in a way that allows it to extend its dominance from one market to another. This is the case for information necessary for interoperability between one market and another. Although there is no general obligation even for dominant companies to ensure interoperability, leveraging market power from one market to another by refusing interoperability information may be an abuse of a dominant position."

For the reasons set out below, the EBU fully endorses that general principle, as the refusal to supply interoperability information is, or at least will be in the near future, highly relevant for digital broadcasting, and particularly in the field of Digital Rights Management (DRM) schemes.

1. Inherent risks of DRM schemes for interoperability

The EBU considers that interoperability among consumer devices of today and tomorrow which are used for the enjoyment of broadcast and similar media services is of prime importance. In addition to traditional devices for receiving broadcast services, recent developments have shown a dramatic increase in new (digital) platforms and devices (such as set-top-boxes, PVRs, mobile phones and other hand-held "media centres") to receive programme services, allowing for optimal use of the specificities of such new platforms and devices (such as time-shifted use, mobility and interactivity) and to meet the changing media consumption habits of consumers. Consequently,

unrestricted interoperability among all such platforms and devices is crucial, and particularly in the light of the upcoming transition ("switch-over") from analogue to digital broadcasting.¹ Similar concerns exist with respect to electronic communications and services.² In today's reality, however, key players in the digital broadcasting and (related) IT industries have shown insufficient readiness to cooperate on that objective.

It may be assumed that new forms of distribution via digital media platforms will increasingly use DRM schemes, which could include technical *anti-copying protection* measures. Such measures are intended to set limits on digital copying, such as on the number of copies, the storage or redistribution thereof and, where necessary, even on the making of any such copies. However, it needs to be realized that the keyword DRM also encompasses the electronic *administration of contractual rights*, and these contractual terms and conditions can also be enforced by certain technical measures.

This obviously raises the question of how, and to what extent, it can be ensured that incorporating such DRM schemes in new distribution methods does not hamper the normal capacity of consumer devices to "work" with any content received via digital media platforms. This special role of DRM systems for the importance of interoperability among various media reception/recording/play-back devices for the consumer can easily be illustrated by the "home networking" concept. Sharing digital data on the same network not only requires the applied DRM scheme to allow for transport compatibility but also necessitate file format compatibility and the possibility of connecting different operating systems from multiple devices. The household wishing to buy a HD television set may already have a digital cable or satellite connection, as well as both a desktop and laptop PC, a portable PVR, a PDA, an iPod or MP3 player and several 3G mobile phones. The same home may have access to DSL and possibly wireless Internet. Would the household not be frustrated if the documentary offered by a broadcaster via the DSL service could be viewed on neither the HD TV nor the portable PVR? Consequently, if the embedded DRM systems do not guarantee interoperability between those platforms and devices, even the members of the same household would be able to interact with their audio, video and other digital data only on a device-by-device (and possibly room-by-room) basis.

Another example has already given rise to complaints. Apple's FairPlay DRM system used for the iTunes on-line music download service is often cited as an example of the use of DRM as a basis for a competitive advantage on related markets. In 2004, VirginMega requested a licence from Apple, in exchange for royalty payments, with a view to integrating the FairPlay DRM system into the VirginMega music download

¹ For further details see the 2004 EBU Comments on the Commission Staff Working Paper on the Interoperability of Digital Interactive Television Services (including what is to be understood by "interoperability"), at www.ebu.ch, under "Position Papers".

² See the recent EBU contribution on the Revision of the Telecommunications Package, at www.ebu.ch, under "Position Papers".

platform. This request arose from the incompatibility between the Microsoft DRM system used by the VirginMega platform and the *iPods* offered by Apple, which are compatible only with Apple's FairPlay DRM. Apparently, the non-interoperability of the FairPlay DRM system was used by Apple to leverage its market power in the field of on-line music sales to the market of portable hard-disk devices. As Apple refused to grant a licence, VirginMedia brought the case before the French competition authority, which ultimately dismissed the complaint.³

Consequently, whatever the legal merits of this decision may be,⁴ it is self-evident that the outcome of the case will not accelerate the development of interoperable DRM systems for consumer media devices.

2 Abuses of DRM schemes beyond the subject matter of copyright

A possibly anti-competitive effect of DRM schemes, which is similar or at least comparable to extending a dominant position from one market to another, occurs when the DRM scheme would "bundle" a technical copy protection measure to a (conditional) *access* regime. Using a DRM scheme beyond the mere protection of material from legitimate threats of piracy and extending it to unrestrained monopoly control over anyone's legitimate access to that material for a particular (lawful) use could effectively circumvent the delicate balance of interests embedded in copyright law itself (as that does not deal with access as such). It would thereby constitute behaviour which falls outside the scope of the specific subject matter of copyright.

This is particularly the case when such a DRM scheme would practically overrule, or otherwise prejudice the enjoyment of, an exception or limitation under the relevant copyright law (e.g. for quotations, criticism or review or other types of "fair dealing" under copyright). For example, broadcasters need regularly to change the format of certain audio material in order to prepare for production, editing and transmission of their programmes as part of their digital services. Consequently, if the DRM scheme also controlled the accessibility of such audio files, it might render this format-shifting technically impossible or might otherwise prevent interoperability with the usual broadcast production or transmission equipment. That would not only make obsolete the exception to the right of reproduction for the purpose of broadcasting but would also create a serious impediment to the broadcaster's digital service concerned. Competition law must be able to prevent such abuses, in order to avoid any undesired "gatekeeping" effects following on from DRM systems.

³ The full text of the decision by the Conseil de la Concurrence is available (in French) at <http://www.conseil-concurrence.fr/pdf/avis/04d54.pdf>.

⁴ For example, contrary to the view at the time of the French decision, the practice of transferring music from a download platform to an MP3 player is now widespread, and the development was easily predictable. Moreover, iTunes is the clear market leader for on-line music sales in France today; see the BSA Study on DRM-Enabled Online Content Services in Europe and the USA, October 2005, page 16.

It may also be worthwhile recalling that Recital 48 of the 2001 Copyright Directive stipulates that technical protection measures should not prevent the normal operation of electronic equipment and its technological development, and that technical measures should not be required in products or services as long as they do not otherwise fall within the prohibition of Article 6 of that Directive. This reflects the principle that the DRM system must always be appropriate for, and proportionate to, the actual piracy threat concerned. That would not be the case, for example, if the DRM system were designed with the intention of (or resulting in) imposing the *encryption* of a free-to-air broadcast signal or enforcing *geographical restrictions* for the reception of such signals. In such cases the DRM system would be abused for purposes other than to protect against unlawful acts under copyright law, which would be particularly harmful to competition if those DRM systems were implemented by companies with a dominant position.

3. Conclusions

In the light of the foregoing, the EBU fully supports the view, expressed in the Commission's consultation paper (page 68) that, even if interoperability information could be considered a trade secret, it would not be appropriate to apply in these cases, i.e. concerning refusals to supply such information, the same (high) standards for intervention by competition law as those for, for instance, the refusal of licensing of IPR. In particular, to assess the possible abuse of a dominant position more weight should be given to the possible detrimental effect of abusing DRM systems on the level of competition in the "downstream" market for digital media devices for consumers.

In this context, consideration may be given to whether the so-called "*essential facilities*" doctrine can provide (more) assistance in the issue of interoperability. For example, in the March 2004 decision of the European Commission concerning Microsoft's Windows operating system, the firm was compelled to disclose the interoperability information, as this was regarded as indispensable for Microsoft's competitors in the market for work group server operating systems.⁵ Although this was not an issue of the interoperability of DRM systems, it would seem appropriate to apply the same or similar reasoning as in that decision to proprietary DRM schemes which have negative effects on competition in interrelated markets.

The EBU is, of course, aware that this consultation process refers only to Article 82 of the EC Treaty, and its concerns related to the issue of (a refusal to supply information for) interoperability are certainly not limited to situations where a dominant position is abused. In fact, the non-interoperability element may well be the main reason why a player has become dominant in the market(s) concerned. It is therefore important for the

⁵ The text of the 2004 *Microsoft* decision of the EC Commission is available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf>.

competition law assessment always to take account of future developments which are likely to occur. Otherwise, broadcasters could be confronted with unreasonable impediments to making their services available via new devices, and digital convergence runs the risk of remaining a utopia. Particularly in view of the current lack of a regulatory framework which guarantees (rather than merely encourages) the full interoperability of digital broadcast services and platforms, it should at least be ensured that such interoperability is not (further) jeopardized by dominant (or likely to be dominant) players, notably by the abuse of DRM schemes.
