DOJ to review *ASCAP* and *BMI* consent decrees

The Antitrust Division of the U.S. Department of Justice (DOJ) announced on June 4 that it had opened review proceedings of the 1941 consent decrees entered against the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), which are Performance Rights Organizations that pool the public performance rights for member songwriters and music publishers to license those rights, monitor for unlicensed performances, distribute royalties, and enforce members’ copyrights. The consents were entered following Section 1 suits related to the market power of these organizations. The consents were amended in 1994 (BMI) and 2001 (ASCAP), but changes in the music industry, particularly with respect to how music is distributed and listened to by listeners, has led to the current review.

As part of this review, DOJ is soliciting public comments regarding the continued need for the consents in order to protect competition, including whether the consents are needed at all and what modifications could be made to reflect the changed music landscape. For example, DOJ has requested comments on whether members should be able to authorize licensing to some listeners, but not others, rather than “all or nothing” license grants. DOJ has also requested comments on the “rate court” dispute resolution system, including whether that system should be modified to one based on arbitration.

The comment period runs through August 6, 2014.

Source:


House subcommittee holds hearing on “Media Ownership in the 21st Century”

On June 11, the House Energy & Commerce Subcommittee on Communications and Technology held a hearing -- “Media Ownership in the 21st Century.” The witnesses were:

- David Bank - Managing Director, Global Media Equity Research, of RBC Capital Markets
- Paul Boyle - Senior Vice President, Public Policy, of Newspaper Association of America
- Jessica Gonzalez, Executive Vice President/General Counsel, of National Hispanic Media Coalition
- William Lake, Chief of FCC Media Bureau
- Bernard Lunzer, President of Newspaper Guild-CWA
- Jane Mago, Executive Vice President/General Counsel of National Association of Broadcasters

The hearing dealt with issues of media ownership, focusing on recent FCC rulemaking, such as the new joint sales agreements (JSA) rules, and the FCC’s quadrennial review of media ownership rules, including the cross-ownership ban. Chairman Greg Walden (R-OR), for example, wondered whether the existing media regulatory framework for broadcast and newspaper reflects the current competitive and technological environment.

Mr. Lake provided an overview of the FCC’s actions at its March Open Meeting, which included recent rulemaking, and context for the Media Bureau’s license transfer guidance. The guidance, Mr. Lake testified, was designed to provide transparency to the industry regarding how television license transfers are reviewed with respect to the FCC’s public interest standard.

Mr. Bank described consumer habits in different parts of the media landscape, including radio, television, and print. He testified that digital media has become “a powerful competitor to the [traditional] media ecosystem,” but existing regulations fail to take this into account. Mr. Boyle also testified that the current media ownership rules were outdated. He explained previous concerns about promoting competition had disappeared as “there are no longer any barriers to entry in local journalism, and newspapers face more competition than ever.” The current cross-ownership ban, according to Mr. Boyle, only hinders existing publications and broadcasters by cutting off investment.

Ms. Gonzalez, however, criticized deregulation for the effect it supposedly has had on diversity, both of ownership and of content. Without structural rules to limit ownership, she fears that existing inequalities of ownership by and portrayal of minority groups and women will

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1 See the March 22-April 7, May 6-May 19, and May 20-June 2 editions of the e-Bulletin for more information about the FCC’s recent rulemaking.
get worse with new media outlets and digital media unable to rectify these issues. She praised the FCC’s JSA rules as a step in the right direction to promote diversity.

Mr. Lunzer also praised the JSA rules, testifying that JSAs reduce diversity of coverage, cost jobs, and diminish competition. He expressed a preference for less consolidation to promote more diverse ownership and more news coverage, which JSAs can consolidate by using common personnel among multiple outlets. He too was pessimistic about new media sources’ ability to address the effects of consolidation.

Like Messrs. Bank and Boyle, Ms. Mago offered criticism of the FCC’s recent regulatory efforts as outdated and no longer reflective of the current media landscape. She described the NAB’s challenge to the FCC’s JSA rules. She also emphasized the importance of the FCC’s quadrennial review, calling on Congress to direct the FCC to issue a review every four years.

Source:

**FCC investigating ISP and content provider exchange traffic**

On June 13, Chairman Tom Wheeler of the FCC released a statement announcing that the FCC had begun collecting information about recent disputes between Netflix and Internet Service Providers (ISPs). These disputes involved exchange traffic between the ISPs and other networks as well as a recent complaints by Verizon customers about Netflix quality degradation. Chairman Wheeler emphasized that at this point, the FCC is only gathering information to determine what has happened and how it has affected consumers. As part of this process, the FCC has reviewed the exchange contracts between Netflix and Comcast and Netflix and Verizon, but is seeking additional agreements.

Chairman Wheeler also stated that, if adopted, the proposed Open Internet rule “would prohibit bad acts such as blocking content or degrading access to content.”

Source:

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2 See the May 6-May 19 and May 20-June 2 editions of the e-Bulletin for more information.
Intel fine upheld by EU General Court

On June 12, the General Court of the European Union denied Intel’s appeal of a €1.06 billion fine levied by the European Commission (EC) in 2009. The EC fined Intel following an investigation of Intel’s sales practices. The EC alleged Intel provided rebates to customers who purchased 95% Intel products, but required certain restrictions on the remaining 5% supplied by rival AMD. The EC found these rebates to be illegal.

The General Court agreed that the rebates were “exclusivity rebates,” which are an abuse of market position in the EU when these rebates are used in conjunction with “a dominant position” because they reduce competition and foreclose competitors. The General Court found that the EC was not required to demonstrate whether the rebates had restricted competition, but only whether Intel, given its market share, had “granted a financial incentive which was subject to an exclusivity condition.”

Source:


PRIVATE ANTITRUST LITIGATION

Second Circuit upholds dismissal of USB SEP claims under FTAIA

On June 4, the Second Circuit upheld the dismissal of a Taiwanese electronics manufacturer’s claim that five competitors used their ownership of certain standard-essential patents pertaining to USB connectors to monopolize the USB market through refusal to license the U.S. and Chinese patents and filing separate infringement actions in China against plaintiff-appellant Lotes Co. The court’s decision interpreted the Foreign Trade and Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, as substantive and non-jurisdictional because it goes to the merits. The requirements of that statute are therefore waivable, the court found, but
may not be waived by contract, as the plaintiff-appellant alleged. The Second Circuit found that the “direct, substantial, and reasonably foreseeable effect” on U.S. commerce required by the Act may be satisfied if there is a “proximate causal nexus” between the conduct and its U.S. effect, rather than an requiring that the effect be an “immediate” result of the conduct. In so holding, the court favored the position of, among other amici, the DOJ and the FTC, who had advocated for a less stringent directness test.

However, despite this less demanding interpretation of directness, the domestic effect of the conduct at issue did not “give rise to” the claim as the FTAIA requires and on that basis, the Second Circuit upheld the district court’s dismissal. Rather, the alleged patent hold-up purportedly excluded Lotes from the U.S. market, reducing competition and raising prices. The Second Circuit found that “Lotes injury thus precedes any domestic effect in the causal chain.” The court also found unpersuasive Lotes’ argument that because defendants had U.S. patents, defendants’ failure to license those patents gave rise to Lotes’ claim.

Source:


**German appellate court issues preliminary ruling in directory data case**

On June 11, Judge Jürgen Kühnen issued a preliminary assessment of the appeal of a lower court’s decision to dismiss a €612 million suit alleging Deutsche Telekom had abused its market position as a directory-service provider. Klaus Harisch and Peter Wünsch, the founders of Telegate, a directory-assistance company, alleged Deutsche Telekom overcharged Telegate for directory data, which reduced Telegate profits and share prices. As a result, Harisch and Wünsch sold their shares at a lower price.

Judge Kühnen observed during the hearing that “[t]he founders didn’t buy the data, only Telegate did. . . . Antitrust rules only protect consumers or buyers, not shareholders of the buyers.” Consequently, the injury the founders’ allegation is not recognized by German antitrust law.

Because this is a preliminary ruling, it is still open to change in the final ruling. A suit by Telegate itself also is pending on appeal following its dismissal by a lower court.

Sources:

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