Access to Audio-visual Contents, Exclusivity and Anticommons in New Media Markets (*)

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Abstract: Media markets are characterized by strong peculiarities that often call for long-term exclusivity contracts between content providers and distributors or for vertical or horizontal integration. This paper analyzes and compares the economic effects of existing alternative systems of access to valuable content for new media platforms, under the lens of technological convergence and 'network neutrality'. The analysis suggests the increasing need for a coordinated regulatory framework aimed at balancing costs and benefits of the different models in order to ensure that the development of new markets and new technologies in the age of media convergence is not hindered by "anticommons" tragedies.

Key words: contents, new media, anticommons, antitrust.

This paper refers to the growing policy debate concerning access to valuable contents (*premium content*), which distinguishes the current stage of the evolution of European markets for pay-TV and the development of new media platforms and services.

The current prominence of this debate can be attributed, on one side and to a large extent, to the remarkable asymmetry existing between the regulation of access to physical networks (fixed line, cable, x-DSL, Broadband, IP, DTH, DTT and so on) and the regulation of access and distribution of content to final customers; and, on the other to a growing attitude by contents' owners to split property rights according to the transmission platform and/or to the temporal distance from theatrical show.

In recent decades a constant pressure has been exerted by European Directives on national regulators in order to adopt legislation aimed at encouraging entry in network industries through mandatory access to

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incumbents' essential facilities. In communication industries this process has led to clear asymmetric regulation, generally coupled with antitrust remedies, aimed at encouraging immediate entry in the market. The main rationale for these policy developments was to design a regulatory system capable of limiting longstanding dominant positions through entry of both resellers and facility-based operators. Entry policies pursued in most European countries had the effect of developing alternative platforms in the perspective of favouring the so-called process of convergence among alternative systems of technological transmission. In the course of this process, telecommunications models have been rapidly transformed into convergent communication models where traditional voice and data services are increasingly coupled with audiovisual contents delivered through fixed and wireless networks.

However, regulation of access to contents has not kept up with the pace of network regulation, being mainly limited to sectoral intervention (as in the case of the regulation of rights over soccer events) and to antitrust remedies both at the national and European level (MENDES PEREIRA, 2003; NICITA & RAMELLO, 2005; HARRISON & WOODS, 2007). The continuous process of technological convergence among alternative transmission platforms has thus recently faced, in European countries, a dramatic hurdle: building alternative infrastructures to deliver contents to final customers is not the end of the story (HARRISON & WOODS, 2007). The process of technical convergence is characterized by an intense dynamics and offers unlimited ways to create new competitive opportunities in which different variables come into play – price, quality, programming – all to the advantage of consumers' welfare. In such a context, access to contents or, more specifically, to competitive packages of premium ('must have') contents has become the main competition and regulatory issue for communications industries. Since many valuable contents constitute the object of long-term exclusivity arrangements signed by vertically integrated incumbent operators, premium contents become new bottlenecks in media markets that have the potential to foreclose competition in communications markets and to inhibit any further development of the convergence processes.

In this paper we discuss a number of the approaches currently adopted in some developed countries, outlining the main trade-offs they involve in terms of incentives and competition dynamics. Moreover, we highlight the risk that the overlapping of the models we consider may result in a situation akin to what is called, in the Law&Economics literature, an "anticommons", namely an excessive degree of fragmentation of property rights that may distort incentives to invest in the production/exploitation of content. We conclude that, whatever is the model or the set of models selected, it seems necessary to devise a coordinated approach at the European level explicitly devoted to the issue of access to contents and of its impact on the process of convergence in the media sector.

■ Regulatory and competition puzzles on access to premium contents

The notion of audiovisual content encompasses a wide range of economic goods characterized both by an intangible nature and by the nature of experience goods. A distinction is usually traced between "basic contents" and "premium contents" on the basis of the degree of substitutability with other contents. *Premium* contents can be defined as special information goods characterized by a limited degree of substitutability with other contents from the consumers' perspective. They are usually represented by key sporting events and blockbuster movies. Production of premium contents generally takes place within firms dedicated to content production such as, for instance, Hollywood majors whereas "basic contents" are often produced within a vertically integrated free-to-air or pay-TV firm[1].

The characteristics of audiovisual content production call for various forms of public policy intervention. The public good nature of audiovisual information goods (i.e., their non-rivalness and non-excludability) implies the existence of a market failure in the form of a lack of incentives to invest[2] that justifies both intellectual property protection, Digital Rights Management (DRM) rules and, eventually, some form of public sponsorship of contents production (e.g., direct funding of cinema productions).

Incentive problems have generally been particularly acute for premium contents as compared to basic contents. Indeed, production of premium contents is a capital-intensive business that involves substantial sunk costs

[1] To this traditional distinction should now be added the category of "user-generated contents", indicating audiovisual contents that represent the outcome of consumers' creative effort, usually not directly aimed at earning a profit. The focus of this paper is on premium contents as it is only with respect to this type of content that an issue of efficient access emerges.

[2] See ARROW, 1962. For a survey of the debate on this topic see SALOKANNEL, STROWEL & DERCLAYE (2000).

and economies of scale (high fixed costs of production and low marginal costs of reproduction). The experience good nature of contents, i.e. the fact that their value can be assessed by consumers only upon purchase implies that, given the heterogeneity and dispersion of consumers' tastes, the market is characterized by a highly polarized demand: there are high rates of failures and most of the willingness to pay inheres just a few "stars". This might add to the incentive problem to the extent that it implies a high degree of market uncertainty and therefore lowers the expected returns to investment in content production.

Other *ex ante* forms of public policy intervention address issues more specific to the audiovisual content industry. Regulations in the form of advertising quotas, national and original production quotas and rules to protect public decency have been devised to pursue social objectives such as pluralism, democracy and the promotion of national identity and also affect investment choices of content producers.

Of crucial importance, especially as far as premium contents are concerned, is the set of *ex ante* and *ex post* rules and regulations affecting content distribution. The vertical chain of content distribution comprises essentially the following stages and main economic actors: (a) production of content, which involves content producers such as Hollywood Majors and content rightholders such as sports clubs and associations; (b) packaging of content (in Pay-TV, packaging implies the creation of channels and may be accompanied by the bundling of channels into packages), which has historically involved mainly editors and broadcasters; (c) delivery through a physical system or a technological platform.

Distribution agreements constitute a means through which the marketing risk associated to content production is shared between content producers and distributors, so that the way distribution contracts are disciplined deeply influences both producers' and distributors' incentives to invest. Delivery systems can be of a physical or virtual nature. Physical distribution systems are constituted by theatrical distribution systems and by video rentals. Virtual delivery networks can be wireline or wireless, terrestrial transmission networks (analogic or digital), satellite transmission networks (*point-to-point*, *point-to-multipoint*, or *direct broadcast*), or cable transmission networks (here the scenario is even more confused due the possibility to use digital telephone lines such as ISDN, ADSL e xDSL) [3]. The final consumer may have access to contents distributed through virtual platforms by using at least three types of terminal equipment, to which correspond various business models: TV sets (Free-to-Air, Pay-TV, Pay-per-View, Video-on-Demand), mobile phones and personal computers (IPTV, Internet TV, P2P).

Regulation of these two broad categories of distribution systems – physical and virtual – is asymmetric. To some extent, this asymmetry seems to reflect historical accident more than a specific public policy objective. This is the case, for instance, of the provisions existing in many countries requiring theatrical distributors to provide detailed data on the success of individual titles to national film agencies or equivalent public policy bodies. These provisions do not apply to other distribution systems, such as video rental or providers of PPV or VoD services. Other differences in regulation reflect differences in salient public policy objectives. Indeed, virtual networks possess characteristics calling for more careful public policy scrutiny than physical networks.

In the world of traditional media, the most pressing issue concerning virtual distribution networks was one of scarcity. Access of content owners to the delivery layer was constrained by the limited availability of distribution networks due to the high degree of concentration and high barriers to entry (partly endogenous, as explained below) of the traditional media industry. In such a context, the distribution layer enjoyed greater bargaining power with respect to the production layer in so far as the latter confronted, in many countries, a situation akin to monopsony or oligopsony. These characteristics of the market constitute the rationale for provisions such as for instance the imposition of "must carry" obligations on network operators.

In the world of technological convergence and new media platforms, the distribution of bargaining power has shifted to some extent towards content right-holders so that, while the question of efficient incentives to invest in content production has become relatively less pressing, the crucial public policy issue has become the need to ensure efficient incentives to invest in the development of competing delivery networks, according to principles of network neutrality (See MENDES PEREIRA, 2002). The two issues – that of the incentives to produce content and that of the incentives to invest in

[3] For a technical survey see PARSONS & FRIEDEN (1998).

network development – are strictly intertwined because of the network effects that characterize virtual content distribution systems.

Network effects imply that the marginal value of each system to any consumer increases with the number of subscriptions. They therefore have roll out dynamics according to which a sufficient amount of subscriptions is needed to make development of the network profitable. Content pricing deeply impacts on network roll-out because the utility a consumer draws from access to a given network critically depends on the type and quantity of premium contents he has access to through the network. In order to compete effectively, access to a sufficiently rich bundle of rights to content is needed. This gives rise to a sort of chicken-and-egg problem residing in the fact that, in order to gain market share and invest in network development access to a sufficiently wide bundle of rights to premium content is needed but, to gain access to such content, it is necessary to have large enough networks and market shares. The Commission seems aware of this interdependence between network and content regulation, as it appears from reading the Framework Directive [4].

The implications of convergence have still to be ascertained to their full extent, but a few elements – all concurring to enhance the role of premium contents as critical bottlenecks – can be pointed out. The first is that the increase in network capacity due to digitalization determines an increase in the demand for content that opens up the possibility of new (often niche) markets. The second is that with technological advancement, the transmission quality of different networks tends to become more and more homogeneous. Moreover, technological barriers to the merging of networks tend to be erased, giving rise to a convergent basis for data transmission. Both of these developments imply that consumers' preferences tend to be driven by content rather than technology much more than before.

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[4] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108/33, 24.4.2002. Recital 5 starts by saying: "The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework". Moreover it asserts that even if "it is necessary to separate the regulation of transmission from the regulation of content", however "the separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection".

In this changing scenario *ex post* public policy intervention in the form of antitrust scrutiny has played and continues to play a pivotal role. Incumbent market players in the delivery layer have in many cases adopted strategies – such as vertical integration, exclusivity and restrictive distribution clauses – exacerbating the chicken-and-egg problem described above. Exclusive contracts undermine new entrants' incentives to make the large sunk and/or specific investments needed to gain access to a given delivery platform and/or to build their own infrastructure: if you do not have contents, why invest in a delivery platform? At the same time, without any access to competitive delivery platforms, there aren't sufficient incentives to invest in content exclusivity.

To sum up, the preceding analysis has identified the following objectives of both *ex ante* and *ex post* regulation. First, the combination of *ex ante* laws and regulations and antitrust intervention should be aimed at preserving content producers' incentives to invest. Strictly linked to the issue of providing incentives to the production of contents is the issue of providing incentives to invest in the delivery of contents. Content distribution involves various sorts of investments, often made by different parties. In particular, three forms of investment are particularly relevant: investment in the packaging of content, investment in marketing and promotion of content, investment in branding content and signaling quality to consumers. All of these forms of investments are important from a public policy perspective in light of the fact that the choices relating to the packaging of content are a crucial dimension of the satisfaction of consumers' preferences and in light of the informational asymmetries present in the market for audio-visual content and of the 'experience good' nature of content. Second, public policy should take into account the need for providing sufficient incentives to invest in the development of distribution networks. What the preceding discussion underlines is that attention should be devoted to both incumbent operators' incentives and new entrants' incentives. Finally, given incumbents' incentives to adopt market foreclosure strategies, a third public policy objective worth consideration is the restraint of incumbents' dominant position.

■ A capsule overview of recent competition policy developments favouring access to content

Although the four public policy objectives identified in the previous paragraph might appear rather uncontroversial, the recent history of antitrust intervention in Europe shows, on one side, that ackowledgement of all four objectives has required some time and, on the other side, that the policy measures adopted in their pursuit have often had unintended consequences.

NCAs have for a long time paid scant attention to the need to ensure a level playing field for competing platforms so as to provide incentives to the development of alternative delivery networks. The characteristics of the media sector were interpreted to imply the existence of a "natural oligopoly", an ineliminable high degree of concentration, so that the competition model adopted was one of *competition for the market*. The choice of this model has been apparent in the antitrust treatment of both vertical integration and exclusive distribution contracts.

Content exclusivity has long been interpreted as the only way to guarantee, on one side, the remuneration of investments in content production (thus preserving ex-ante incentives to invest in content production) and, on the other side, the remuneration of investments in the building of infrastructures (thus preserving the associated investment incentives). The rationale for content exclusivity was mainly supported by the high costs of producing and, consequently, accessing contents.

It is worth noting that producers' and distributors' interests might diverge with respect to exclusivity. While producers/owners aim of maximizing revenues net of distribution costs might entail the maximization of the diffusion of contents across all platforms, distributors' profit maximization entails the interest to acquire contents exclusively and raise entry barriers. The choice of exclusivity thus depends on the level of penetration of different technological platforms in different countries. In countries where a single platform has a satisfactory geographic coverage, it is more likely to observe exclusive contracts. In countries where, by contrast, no platform enjoys universal coverage, exclusive contracts will generally not be observed, if anything because to reach the entire geographic market agreements with multiple operators have to be reached [5].

Exclusivity agreements have been accorded the presumption of being a pro-competitive device in both European and international law. This approach, restated at the European level by the law for exemption by category (no. 2790/99) [6], identifies several precise circumstances (among which the market shares of the interested parties and the barriers to entry in the respective markets) requiring a case by case antitrust analysis of their possible anti-competitive effects.

A regulatory framework of this sort – that allows premium contents to be acquired on an exclusive basis – promotes competition *for* the market to the detriment of competition *in* the market because it creates a competitive environment whereby the first comer has a privileged access to subscribers, while new comers have to compete for gaining access to the residual supply of contents. Since subscribers are attracted by premium, in turn, they address their demand to the 'best' contents selected by the incumbent. As a consequence, being the first comer gives to the content buyer an extraordinary competitive advantage over competitors. Again, this means that competitors may succeed in the market (especially on the Pay-TV market) only if they are able to compete for content exclusivity in the first instance, rather than compete in the market by having access only to the residual contents disregarded by the incumbent. The rationale underlying this approach implies that, in order to improve competition for the market it might be sufficient to reduce exclusivity duration and to allow for frequent bids.

The favourable treatment of exclusivity clauses has had some unintended consequences that have recently had the effect of suggesting a revision of NCAs' original position [7] in favour of content exclusivity. The competition model based on competition for the market has soon led, on one side, to monopolistic markets and, on the other side, to an extraordinary growth of programming costs. Since the only way to compete was to bid for

[5] This is the case, for instance, of the French market for VoD services where no single operator covers the entire geographic market.

[6] Commission Regulation (EC) No. 2790/99 on the application of Article 81(3) of the Treaty to Vertical Agreements and Concerted Practices7, OJ [1999], L336/21.

[7] A summary of this attitude could be traced in WACHTMEISTER (1998).

content exclusivity, incumbent operators raised their offers as a raising rivals' costs strategy (Salop and Schefman, 1993) in order to preserve their market power and their client base. In other words, by raising their bids for premium content, incumbents have been able to make information goods scarce and increase their access costs, thus implementing a pre-emption strategy to increase costs for existing and potential competitors. In other words, while the high costs of access to contents had been interpreted as a reasonable justification for a lenient antitrust treatment of exclusivity, the very diffusion of exclusive contracts has led to the explosion of such costs, raising barriers to entry.

In recent years, the European Commission as well as National Competition Authorities (NCAs) in Europe and elsewhere have started to ackowledge the drawbacks of the adoption of a model of competition for the market, experiencing a remarkable change in the antitrust treatment of exclusivity clauses and vertical integration (NICITA & RAMELLO, 2005). Indeed, the main drawback of a competition for the market approach lies in the fact that it is mainly based on the analysis of the incentives held by the first comer, and it completely neglects the incentives of potential competitors. NCAs have thus only recently started to broaden their perception of the issue of incentives to invest in the development of content delivery networks so as to take into account the incentives to invest in the development of new media platforms, in a perspective of network neutrality and have taken steps to restrain incumbents' dominant position, especially in cases of vertical integration.

Important European antitrust decisions (MENDES PEREIRA, 2003a, 2003b; HARRISON & WOODS, 2007) that reflect this trend include *BskyB / OFT* [8], *Vodafone / Vivendi / Canal Plus* [9], *Vivendi / Canal Plus / Seagram* [10], *Sogecable / CanalSatélite / Via Digital* [11], *NewsCorp / Canal Plus* [12], *UEFA Champion's League* [13]. Rather than

8 OFT (1996), "The Director General's Review of BSkyB's Position in the Wholesale Pay TV Market," December 1996. A second review has been started in 2002.

9 Vodafone/Vivendi/Canal Commission Decision, COMP/JV 48, 20th July 2002.

10 Case COMP/M. 2050 Vivendi/Canal Plus/Seagram, decision of 13.10.2000, OJ C 311/3, 31.10.2000.

11 COMP/M.2845 Sogecable/Canalsatélite/ViaDigital, case decided by the Spanish Competition authorities following a referral by the European Commission.

12 Case COMP/M. 2876 Newscorp/Telepiù, OJ C 255/20, 23.10.2002.

13 Case COMP/C2/37.398 UEFA Champions League, Notice published pursuant to Article 19(3) of Regulation 17, OJ C 196/3, 17.8.2002. See also Press Release IP/02/806 of 3.6.2002.

focusing on each of these cases separately, we will discuss the implications of the new rationale behind them and behind some relevant non-European cases by identifying a number of stylized regulatory models (actual or potential) that may result from the combination of the set of remedies that have been adopted in each of them.

■ Concurring stylized models for access to contents

In this section we outline the main features surrounding a number of stylized models for access to contents resulting from the combination of some form of antitrust or regulatory intervention and business strategies, with respect to the four dimensions that we have outlined in the previous paragraphs and that we deem key to evaluate their effects: (a) right-holders' incentives to invest in producing/distributing contents; (b) incumbents' incentives to invest in dominant platforms; (c) new entrants' incentives to invest in alternative platforms; and (d) ability to discipline incumbents' dominant position.

Prohibition of exclusive selling/purchasing

The first model that it is worth describing is one based on the total absence of exclusive selling or purchasing of valuable contents. This model constitutes an ideal-type benchmark, very difficult to envisage in real markets, although perhaps US markets display some of its elements in consequence of both market forces and aspects of the regulatory framework. In US markets, the existence of many competing platforms creates strong incentives for right-holders to sell their contents to all competing platforms, without discriminating among them. Moreover, *ex ante* regulations aimed at limiting the negative effects of exclusivity have been implemented on at least two occasions. In 1992, the *Cable Television Consumer Protection and Competition Act* [14] has introduced a *Programme Access and Carriage Rule* that explicitly prohibits to platforms vertically integrated to a channel to distribute the channel under an exclusive contract and disallows discriminatory practices in the sale of television channels by

[14] Cable Television Consumer Protection and Competition Act , Public Law 102-385-- CT. 5, 1992, 106 STAT. 1460.

editors vertically integrated with a platform. In 1999, the *Satellite Home Viewer Improvement Act* [15] introduced for Free-to-Air operators a must offer obligation and a prohibition to stipulate exclusive agreements for the retransmission with a single platform.

The advantages of this benchmark model concern two of the regulatory dimensions highlighted above. In particular, this model provides new entrants with best incentives to invest in alternative platforms and thus complies with the principles of "network neutrality" because it allows effective competition for subscribers by different platforms. In addition to this, if platforms are symmetrically developed, a model characterized by the absence of any exclusivity may induce competition to turn on the ability to satisfy consumers' preferences in terms of packages of content and may thus stimulate investments in the packaging of bundles that achieve this aim. It also has the effect, of course, of disciplining the dominant position of vertically integrated operators. However, this model may dampen incumbent network operators' incentives because of the lack of any exclusivity. Moreover, the impact of this regime on right-holders' incentives to invest in the production of valuable content is difficult to assess since it clearly depends on the effective development of alternative platforms. While ex-post, in a world of mature and developed competing platforms, right-holders could benefit from the removal of any exclusivity, they could suffer some short-term losses in a world characterized by under-developed platforms.

Multi-Platform Exclusivity with mandatory wholesale offer

This model was first introduced in the UK, when the dominant firm *BskyB* was forced by OFT's moral suasion to promote a wholesale offer based on retail minus pricing to competitors in alternative platforms [16]. In this case, the dominant firm which purchased on an exclusive basis the premium contents assumed the role of a market gate-keeper (namely, of a firm able to exercize a significant influence on the premium contents market) delivering contents to its own platform and to competing platforms on a non discriminatory basis. Under this model, a single firm possesses exclusive rights on premium contents for all platforms but cannot broadcast them exclusively, being forced to distribute such contents non-discriminatorily. Competitors may

[15] Satellite Home Viewer Improvement Act, 106th Congress, 1st Session, S. 1948.

[16] OFT (1996), "The Director General's Review of BSkyB's Position in the Wholesale Pay TV Market", December 1996. A second review has been started in 2002.

therefore increase their market share with respect to the incumbent according to their compared efficiency in economizing on avoidable distribution costs, rather than on the nature and availability of the premium contents delivered to final customers.

This model has thus positive effects in terms of investments in innovative and more efficient platforms. This is because the innovative features of the delivery system constitute the main competitive tools. Moreover, these tools are used by new entrants to discipline incumbents' market power. Thus, to some extent, this model also has some positive effects in terms of the ability to discipline incumbents' dominant position, even if through indirect means. The effects on incumbents' incentives to invest in dominant platforms are more difficult to assess and depend on the effective development of competitive dynamics. The effects on right-holders' incentives are, by contrast, clearer and more positive.

A partially different model of this sort has been designed by the European Competition Commission in the *NewsCorp/Telepiù* [17] merger. In that case, the dominant firm assumed the obligation to provide an unbundled wholesale offer to competitors operating on alternative platforms for premium contents. The wholesale offer was intended to allow competitors of the new entity on platforms other than DTH to subsist or to enter in the Italian pay-TV market. The underlying idea was that by allowing non-DTH pay-TV operators to gain access through the wholesale offer to premium contents that would otherwise be too costly to purchase directly or that were locked away by means of long-duration exclusivity agreements, short-term entry would be encouraged in the Italian pay-TV market. As a consequence, the competitors had the possibility to choose and unbundle specific contents from the incumbent's offer and to promote its own package to final customers.

This version of the model has the effect of increasing competitors' incentives not only to invest in the efficiency of the alternative platform as a strategic tool to differentiate their services from the incumbent's but also of inducing competitors to innovate on the packaging of contents delivered to customers, disciplining market power in a more effective way.

[17] Case COMP/M. 2876 Newscorp/Telepiù, OJ C 255/20, 23.10.2002.

Platform Exclusivity with Prohibition of hold-back clauses

This model can be considered the outcome of a series of remedies imposed on dominant firms in several competition cases in Europe (HARRISON & WOODS, 2007). The remedy – the prohibition of hold-up clauses – consists of preventing dominant firms from extending exclusivity clauses on platforms other than those they currently serve. The main purpose of this remedy is that of preventing market pre-emption by incumbent firms at the expenses of new operators investing in alternative platform. At the same time, this model implicitly designs a market system characterized by platform exclusivity, thus suggesting a progressive segmentation of the wide pay-TV market into a monopolistic competition market with a local monopoly for each platform.

This model thus increases incentives to invest in both dominant and alternative platforms but only does so for those operators who win the competition for gaining exclusive access to premium contents. For these operators, this model also offers incentives to invest in the packaging of contents to the extent that multiple platforms develop. At the same time, the incentives for right-holders, as in case (a) above, are ambiguous since they really depend on the degree of development of alternative platforms. Also, it is questionable whether this model is sufficiently strong to discipline incumbents' dominant position as long as there is a substantial asymmetry between the dominant and competitors' platforms penetration in the market. This is the reason why, generally, this remedy has been coupled with a mandatory duty on dominant firms to provide competitors with a wholesale offer, as in the *NewsCorp/Telepiù* case.

'Time Windows' exclusivity

Time windows exclusivity represents the traditional way in which premium contents have been commercialized since the birth of the media industry. Releasing content within well-defined subsequent 'time windows' constitutes a form of price discrimination based on customers' impatience, i.e. on customers' preferences about the time of consumption of a given content. When the time interval between theatrical exhibition and release on alternative delivery platforms discriminates among different groups of customers it determines different markets or market segments. These have generally been theatrical release in cinemas, Video-DVD rental, pay-TV and free-to-air TV. More recently, technological innovation has further enhanced right-holders' ability to promote temporal price discrimination. Pay-per-view *(PPV)* and near-video-on-demand (NVOD) represent recently developed modalities of consumption that allow customers to have access to a given content (particularly movies) before appearance on pay-TV. Thus a 'pay per view' or a 'NVOD' window has been added to the portfolio of right-holders who can actually sell, for instance, the same content as a "Pay per view right" to an operator and as a "pay-TV right" to another one. Fiber optic cable and advanced x-DSL allows video on demand consumption and some right-holders have also started offering this kind of rights. Even if these rights are linked somewhat to a specific technology (as in the case of VOD, which could not be delivered by a satellite operator given the need for two-way transmission of data) they could generally be bought by alternative platforms.

Since 'time windows' rights are a sort of umbrella rights (because they cover, for instance, pay per view consumption under any platform) they act, in fact, as a form of multi-platform exclusivity, providing the purchaser with powerful incentives to invest, while inhibiting non-owners' access and investments. Right-holders could benefit from this form of rights definition as long as they are able to extract all the potential rents from buyers. An important issue to be addressed in this regard, however, concerns the opportunity to modify the sequence of time windows, especially as regards the priority accorded to home video with respect to VOD. New media platform operators complain, in fact, that the fact that content is available on the home video time window before it is available as VOD significantly reduces the number of subscribers to their platforms and thus decreases their incentives to invest.

Content sharing and purchasing pools

Content sharing in the form of joint buying pools is the most recent model of gaining access to content. The primary example of this model is observable in the Australian pay-TV market and has been adopted as a way to control the huge price increase for premium contents. Aspects of this model have also come into play in a couple of European cases. One case in point is the notification to the European Commission by Sogecable and Telefonica [18] of a joint purchasing agreement relating to the broacasting

18 COMP/M.2845 Sogecable/Canalsatélite/ViaDigital, case decided by the Spanish Competition authorities following a referral by the European Commission.

rights to Spanish First League Football matches. The case was closed following the Via Digital/Sogecable merger, although in the meantime the Commission had imposed the termination or the substantial modification of the agreement. Another case in point is the decision of the Commission concerning the European Broadcasting Union. In that case, the joint purchasing arrangement was allowed under strict sub-licensing rules. The decision was, however, later annulled by the Court of First Instance.

In the Australian case, the joint purchasing agreement concerned the major pay-TV operators in the market, namely Foxtel, Optus, Telstra and Austar. In particular, the agreement took the form of a content supply agreement whereby Foxtel acted as a content reseller, buying rights under exclusive contracts and then reselling to competitors. The horizontal agreement was authorized by the Australian Competition and Consumers Commission subject to a number of undertakings [19].

The Australian experience suggests that this model may give rise to relevant antitrust concerns and result in the formation of anti-competitive cartels when it involves dominant operators or oligopolistic markets. More specifically, joint purchasing agreements of this form may have negative effects on the incentives of the operators taking part in the agreement different from the content reseller (especially if the agreement is coupled with provisions restraining their freedom to package channels and content) but also on the incentives of potential entrants into the market. In addition to this, it is highly likely for this model to have only limited effects in terms of discipline of incumbents' dominant position. It may even have perverse effects, depending on the specification of the agreement. Conversely, when limited to new entrants this model could encourage entry, abating the costs of rights acquisition. The Australian example thus shows that this sort of purchasing agreement could work only to the extent that it is not enacted in order to reduce downstream incentives to compete on prices and it is extended to new entrants. Moreover, in order to avoid its drawbacks, it is important for it to be coupled with a wholesale offer or with specific sublicensing provisions.

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[19] Relevant documents are downloadable at: http://www.accc.gov.au/content/index.phtml/itemId/269329

Selling partitioning

This model has been recently adopted by competition and regulatory authorities in order to enhance competition in accessing premium sport contents when right-holders are grouped in a unique selling unit. The reference case in this regard is the European Commission's UEFA decision, concerning the joint selling of commercial rights to the events of the UEFA Champions League [20]. On that occasion, the Commission deemed the joint selling arrangement liable to restrict competition at the upstream level and exempted it only under a number of relevant modifications. In particular, the re-notified agreement included provisions attributing the football clubs the rights to sell specific media rights to the matches in which they participate in parallel to the UEFA, to provide video content on the internet with a delay of one and a half hours from the match, and to provide audio/video content on UMTS platforms with a technical delay of 5 minutes.

A more extreme form of selling partitioning has been the prevalent model in the Italian market for premium soccer starting from 1999. In that year, following an intervention of the Italian Antitrust Authority [21] and a Government legislative initiative, TV rights were attributed to the single football clubs that were left ample room to fix prices to their own content. The freedom of maneuver of large football clubs, holders of the rights to the most valuable content, gave rise to an extraordinary increase in prices, which rose from 112 million euros in the season 1998/1999 to 408 million euros in the season 1999/2000. More recently, a legislative proposal has been approved that will reintroduce [22] centralized selling of rights by the Lega Calcio but with the joint attribution of rights to football clubs.

The two mentioned circumstances suggest that the evaluation of this model along the four dimensions we consider necessarily gives rise to very mixed results. On one side, centralized selling might allow the realization of important efficiencies through the reduction of transaction costs. This, in turn, may have a positive impact on both incumbents' and new entrants' incentives. On the other side, however, it seems safe to conclude that centralization is not to be considered, *per se*, a greater source of barriers to entry than partitioning of the rights. Indeed, the price inflation generated by

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[20] Case COMP/C2/37.398 UEFA Champions League, Notice published pursuant to Article 19(3) of Regulation 17, OJ C 196/3, 17.8.2002.

[21] AGCM, Provvedimento n. 10985,(I362B), Vendita Diritti Televisivi.

[22] Law n.106/2007.

the separate selling of rights by Italian football clubs from 1999 on had the effect of raising barriers to entry and thus of reducing incentives to the investment in alternative platforms. In other words, it seems that the relevant issue is not so much whether sale is centralized or decentralized but rather what kind of arrangements are devised for the unbundling (in terms of time and scope) of the different media rights relating to each match. Incentives to the production of valuable content are also difficult to assess, in light of the above, although it is perhaps worth noting that this issue might be slightly less relevant in the case of sports events than in the case of other premium content. A clear conclusion can be drawn, by contrast, with regard to the extremely limited effects of this model in terms of potential to discipline incumbents' dominant position.

Table 1 - Cost/Benefit analysis of alternative models of access to contents

	Incentives to invest in alternative platforms	*Incentives to invest in the dominant platform*	*Incentives to invest in content production*	*Ability to discipline incumbents' dominant position*
No exclusivity	+	-	-	+
Multi-platform exclusivity with mandatory wholesale offer	+	+/-	+	+/-
Platform exclusivity and prohibition of hold-back clauses	+	-	+/-	+
'Time windows' exclusivity	-	+	+	-
Content sharing and purchasing pools	+	-	-	+/-
Selling partitioning (Sport rights)	+/-	+/-	+/-	-

■ Fragmentation of property rights: a new regulatory issue?

The previous paragraphs have hinted at the fact that the recent history of the antitrust treatment of content issues has mainly been concerned with issues of excessive aggregation of rights to valuable digital content following from the fact that an amount of rights that is deemed excessive according to some relevant metrics is held or may be acquired exclusively by a single agent in the market.

The remedies adopted to address the excessive degree of aggregation of rights to content have gone in the direction of limiting exclusivity along three dimensions: (a) duration; (b) scope and (c) degree of unbundling of the rights. These remedies have been imposed in the context of very different legal actions and through widely diverging means (moral suasion, imposition of undertakings etc.). The combination of these scattered interventions, occurring at different times and in different geographic markets has resulted in anything but a coherent picture. The outcome of the process is a landscape in which the nature of the rights enjoyed by different players in the market might be very heterogeneous. Exclusive rights might be defined geographically, by platform, refer only to a specific transmission mode (VOD, NVOD etc.) and refer only to a subset of the supply of a given content provider.

This suggests the possibility of the emergence of what, in the L&E literature is called an "anticommons", i.e. a property regime characterized by a degree of definition of property rights excessive or incoherent at the point of inducing a sub-optimal exploitation of the resource. More precisely, an "anticommons" may arise in circumstances in which the rights to exclude from access to a given resource are defined in a way that is incoherent with the design that would maximize the productive use of the resource: there is lack of conformity between the right to use and the right to exclude from access. When this is the case, the transaction costs required to maximize the use value of the resource are so high that bargaining to access the resource may be discouraged, leading to underutilization of the resource.

Incoherent fragmentation of rights to valuable content raises problems both from a supply side perspective and from a demand side perspective. The problem from the supply side resides in the fact that effective entry by competing platform operators in any platform depends on the operators' ability to secure access to a significant bundle of premium contents. The fragmentation and heterogeneity of the rights granted by content providers to different market players may constitute an additional hurdle to this end because of the transaction costs that need to be incurred to aggregate the rights corresponding to the minimum bundle necessary for accessing the market. Moreover, rights fragmentation might also be an obstacle to an efficient integration of transmission modes, in cases in which a single operator may want to exploit sinergies from the joint offer of different services to consumers.

From the demand side, it is clear that fragmentation has significant drawbacks. Consumers' welfare increases as the amount and variety of premium contents available for consumption increase and as their price decreases. Fragmentation has negative consequences with regard to both availability and prices. Even setting aside the exacerbation of the chicken-and-egg problem leading to increased entry barriers just described, the emergence of an "anticommons" has the effect of limiting the availability of contents available through any single technological platform. This is relevant from the consumer's point of view in that it implies the need to access multiple platforms in order to consume the desired bundle of premium contents. Moreover, a clear consequence of the existence of an "anticommons" highlighted by the law&economics literature is the increase in the costs of acquiring the complementary rights. This is due both to the transaction costs associated to the multiplication of the required bargains and to the problem of complementary monopolies mentioned above. The increase in acquisition prices, in turn, in a market characterized by a relatively low elasticity of demand, tends to translate into price increases.

It might thus be opportune for regulators to devote their attention not only to granitic exclusivities accorded to single operators but also to the consequences of the observed tendency towards sub-optimal fragmentation of the rights to valuable content.

■ Conclusions: towards an integrated European approach to Access to premium contents?

The emergence of a multiplicity of approaches to access to premium contents and the possible drawbacks of increasing property rights fragmentation sketched out in this paper might be taken to suggest the opportunity to develop a coherent and coordinated European regulatory approach to the problem. Of course, this does not mean that responsibility for the elaboration of such an approach should necessarily be attributed to a specific institution of the European Union, as greater coordination among national regulatory authorities may suffice to this end.

Ideally, such a coordinated approach should be characterized by three basic features. First, it should be homogeneous, i.e. it should treat different sorts of rights to premium content in an analogous way. Second, it should be non-discriminatory as regards different operators. In particular, it should take seriously into account both incumbents' and new entrants' incentives to invest. Finally, it should be conceived as a set of transitory measures, meant to be in force within a pre-defined time frame or, alternatively, only as long as a pre-defined level of new/old platform penetration is achieved.

Moving in this direction would surely have the advantage of reducing inconsistencies in a market that is global to a significant extent at the upstream level (i.e. at the level of production of premium contents such as blockbuster movies) and has been so far disciplined through scattered antitrust interventions. While we are aware of the difficulties of devising sector-specific regulatory models in contexts characterized by rapid technological evolution and change of business models, it seems nonetheless important to stimulate debate on the opportunity to confront a broad set of issues related to the question of access to content in an informed and technically competent arena.

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