

# ALLEN & OVERY



*Competition, copyright  
licensing and the EU Digital single  
market a fairness conundrum*

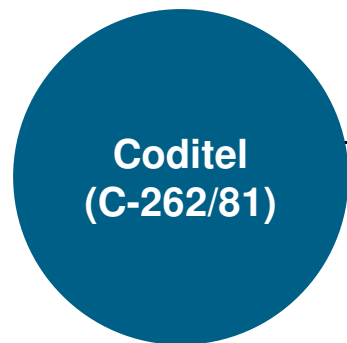
Dirk Arts

## Identifying the issue?



- Can the concept of “fairness” be a guiding principle for determining the competition law rules applicable to copyright licences?
- What does fairness mean?
  - Vague concept, with a strong subjective colouring
    - *“Implies a proper balance of conflicting economic interests”*
    - *“Impartial and just treatment or behaviour without favouritism or discrimination”*
    - Something is fair when it is perceived by those involved to be a *“proper balance of conflicting economic interests”*
- In the context of the EU Digital Single market, the offering or not offering of cross-border (performance) services seems to be a central issue in the current debate. Should or can fairness play a role in that debate?

# Coditel (C-262/81)



Coditel  
(C-262/81)

## Territorial exclusivity

No restriction of competition

– *“(T)he mere fact that the owner of the copyright in a film has granted to a sole licensee the exclusive right to exhibit that film in the territory of a Member State and, consequently, to prohibit during a specified period, its showing to others, is not sufficient to justify the finding that such a contract must be regarded as the purpose, the means or the result of an agreement, decision or concerted practice prohibited by the Treaty”*

Why?

- Characteristics of the film industry, system of financing
- No explicit reference to “fairness”

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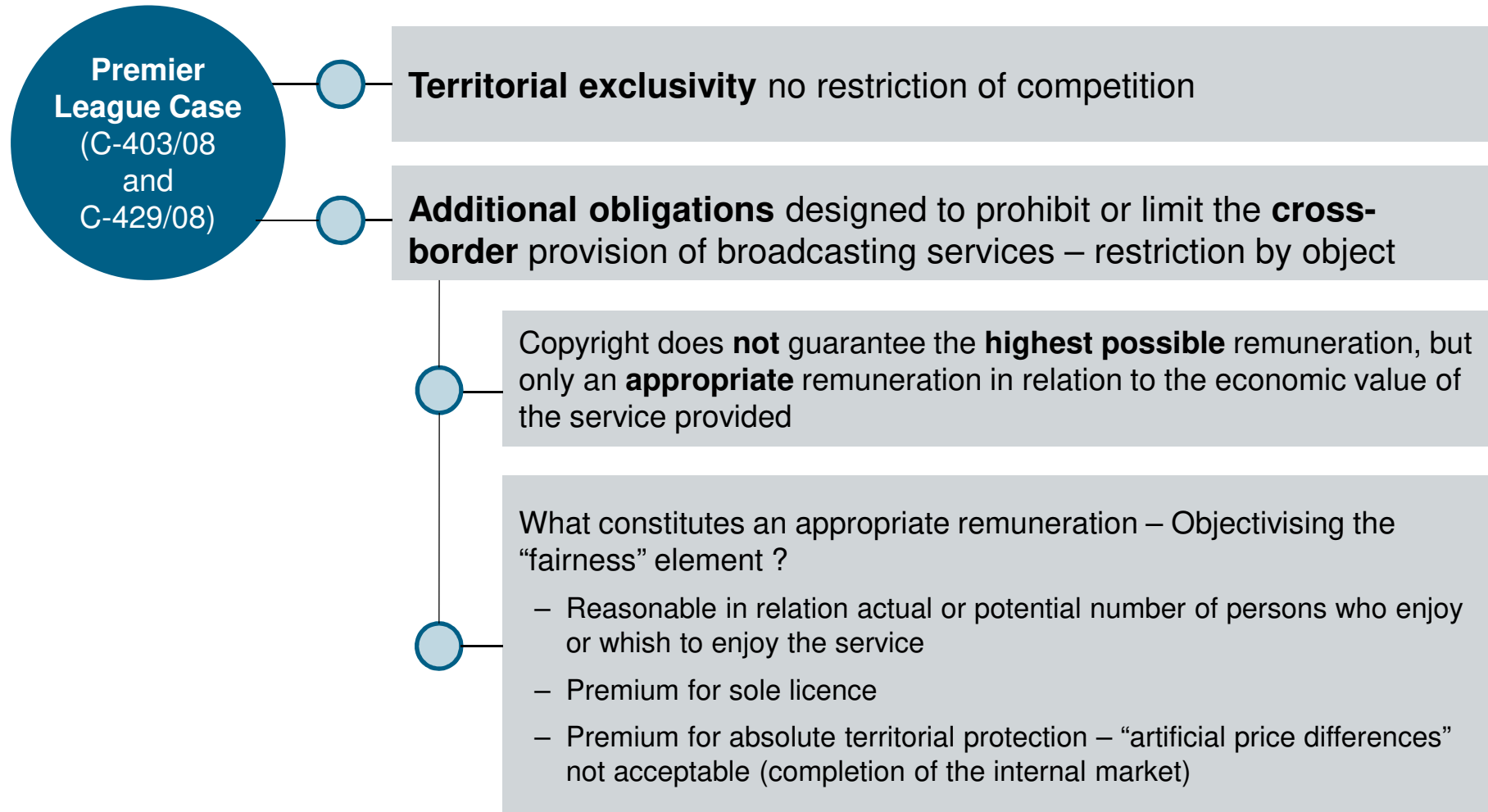
The **exercise of the right** exhibiting a film may restrict competition

*“the exercise of the exclusive right to exhibit a ... film creates barriers which are artificial and unjustifiable in terms of needs of the cinematographic industry or the possibility of charging fees which exceed the **fair return on investment** or an exclusivity the duration of which is disproportionate to those requirements”*

Does the Court rely on the concept of “fairness” ?

No specific guidance as to what a **fair** return on investment is.

# Premier League Case (C-403/08 and C-429/08)



**Pending  
investigation  
Pay TV**

Blocking of unsolicited requests from customers established in the EEA but outside the broadcaster's licensed territory

**Final Report  
on E-  
commerce  
sector  
inquiry**

- Single licence for a territory is not restrictive
- Geo-blocking does potentially raise a competition law issue (amongst others)

# Territorial protection in the EU Digital Single Market : the issue

Territorial scope of copyright is still linked to the territory of a Member State.

License agreements regularly mirrors territorial scope of the copyright involved.

Holder of a copyright has right to receive “appropriate remuneration” compared to the economic value of the service.

“Value” of a work protected copyright may significantly differ from Member State to Member State, which almost naturally should result in significant differences in the appropriate remuneration received.

Can in a digital context consumers established outside the territory covered by the licence easily (from a technical perspective) and arguably lawfully (from a copyright perspective) get access to content in the licensed territory?

If so, significant “risk” or “opportunity” of arbitrage by migration of consumers from “high value” territory” to “low value” territory.

## Does “absolute” territorial protection constitute an infringement ?

- What could be the “classic” assessment?
- Could considerations of “fairness” add anything?



## Questions?

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