



Beyond the Book

A podcast series on the business of writing and publishing

Interview with Dr. Jessica Sanger,

Recorded at London Book Fair 2016

For podcast release

Monday, May 16, 2016

KENNEALLY: Copyright around the world is in a race to keep up. Technology has the fast track, while legislators, lobbyists, and the public are going to the inside and looking to make their move. Welcome to Copyright Clearance Center's podcast series. I'm Christopher Kenneally for Beyond the Book, reporting from the London Book Fair. In the digital age, this race is going to be not a sprint, but a marathon. And because digital is always global, developments in one region may potentially affect others.

Dr. Jessica Sanger is legal counsel and deputy head of the legal department at the German Publishers and Booksellers Association. She watches closely the German courts and has a front-row seat on legislation across the European Union. Welcome to Beyond the Book, Dr. Sanger.

SANGER: Thank you very much for the invitation.

KENNEALLY: We're looking forward to chatting with you, because we don't get a chance to really hear from someone directly involved about the latest news from Europe when it comes to publishing. You gave a presentation at the recent Digital Book World conference that looked particularly at some of the antitrust activities and the accusations regarding monopolistic behavior that have drawn attention in Europe. These would have possibly global implications for the book business. The expected name comes up of Amazon, and the German Book Publishers Association brought an action, a complaint, to the antitrust authorities in Germany against Amazon in June 2014. What was that about?

SANGER: The complaint was made on the grounds that some of our members had come to us with serious concerns about Amazon's behavior in the context of ebook distribution. The difficulty here was that during renegotiations of discounts for ebooks with one or two of our larger members, when Amazon wasn't achieving the discounts it was hoping for with these partners in negotiations, these partners suddenly found that the delivery of their physical books through Amazon was being delayed, despite the fact that these books were, in fact, in stock, and there was no actual difficulty behind the delay. That was a very serious concern and was felt by those publishers to be coercive behavior, essentially, by a dominant player in the downstream retail market. That is a concern under competition law.

KENNEALLY: That's a behavior that we have seen in the US as well. The complaint is that this was an abuse of Amazon's really dominant market position in the book



Copyright
Clearance
Center

Beyond the Book

A podcast series on the business of writing and publishing

business. As well as it's in Europe, it's in the United States likewise. So you brought this complaint, and the European Commission launched a formal probe a year later on that. So where do things stand, and what were they looking into, exactly?

SANGER: Yes, it's interesting. The European Commission did take this up. We complained to the German authorities, but also to the European antitrust authorities. In Europe, that is a usual route to take. It makes sense, because most antitrust actions of this scale will have cross-border implications. If that is the case, then the European antitrust authority, which is the European Commission, is able to start an investigation. That's what they've done.

They have focused not so much on the abuse that we initially complained about and that was one main focus – the main focus of our complaint, but not the only complaint we had. In fact, the European Commission is currently engaged in a broader attempt to tackle most favored nation clauses under the rules concerning not abuse of dominant position, but restrictive practices. There are most favored nation clauses in Amazon's contracts, and so when we complained about the abuse of dominant position, there was a broader approach to looking at all these contracts. They chose the most favored nation clause as their avenue of investigation.

KENNEALLY: For those listening who may not be familiar, most favored nation sounds like something in a trade agreement, but in fact it's a clause in contracts that sort of puts the particular corporation in the driver's seat. Tell us briefly what it means.

SANGER: Most favored nation clause basically requests of the contracting partner to always give the company imposing this clause the best possible treatment in their terms. This partner will be treated as the most favored nation and will always get the best deal and the best prices.

KENNEALLY: So if I were to do a deal with a separate ebook distributor, and it was somehow better than Amazon's deal, I would have to make the same offer to Amazon, as well.

SANGER: Indeed. That is then a requirement under contract.

KENNEALLY: What was it about the MFN clause, the most favored nation clause, that the European Commission was looking into?

SANGER: Well, they're looking at this in a far broader context. They're looking at it in the context of other industries and are developing some doctrine around these clauses – when are they permissible? How far can they go? What about their being imposed by strong partners? There is a question here also of market power, not necessarily of dominance. There is a difference there. The commission is developing a broader policy around this and has wanted to make the book sector



Copyright
Clearance
Center

Beyond the Book

A podcast series on the business of writing and publishing

case part of that. The focus is not really on our industry in this investigation, but more on a more general question of restrictive practices.

KENNEALLY: There was another activity in antitrust that you've been following closely, which is a complaint, again, to the German antitrust authorities around the Audible and audiobook distribution contracts that Amazon has with publishers. Tell us about that.

SANGER: In the audiobook case, it was small publishers of audiobooks who came to us as their association extremely worried, because their contracts with Audible, who is an extremely important distribution channel for them, not to say nearly their only distribution channel in some contexts, was canceling – sorry, was renegotiating contracts. So was terminating existing contracts, renegotiating for new terms, and those terms included clauses that were very difficult for these small publishers to accept, because they required them to grant streaming rights, which not all publishers have, and also to agree to flat rate models, so all-you-can-read deals, basically, for the consumer that not all publishers or authors were prepared to agree to. Also, there were difficulties, especially with these flat rate models, concerning transparency of remuneration.

In effect, these small publishers were being told, either you grant us streaming rights and the flat rate model for all your titles, and you may not choose which titles they will apply to – it has to be all your titles – or you will be completely delisted, so there will be no more contract or relationship between us. That was terrifying to some of those smaller publishers.

KENNEALLY: With regard to the Audible investigation, the German Cartel Office has taken it up themselves just in November of 2015. Where do things stand there?

SANGER: The German antitrust authority has chosen to investigate the Audible book case. Again, we see that they're looking at restrictive practices rather than concentrating on the abuse of dominant position. Of course, it's very welcome that they have tackled the case at all. They're looking at the exclusive deal that Audible has with the Apple iTunes Store, which could have fairly broad repercussions worldwide if that were deemed to be unacceptable under restrictive practices. But really it is important that the abuse of dominant position side of these cases does get addressed, and I understand that there are concerns around having – for the antitrust authority having to go into broader investigations of market definition. That, of course, is a certain deterrent, and antitrust authorities have a choice as to what to investigate. But we do need them to look at this angle, because it is so essential to what's going on in our sector.

KENNEALLY: Finally, Dr. Sanger, for those in the audience from the United States who are familiar, if they're familiar with antitrust activities, it's usually brought by the government with regards to price. The government is concerned about



Beyond the Book

A podcast series on the business of writing and publishing

consumers paying more than they should be paying for. Is that the same approach that the antitrust authorities in Europe have, very generally?

SANGER: Very generally speaking, I would say that in Europe the focus has shifted from pure protection of competition as a concept far more towards the protection of competition in the consumer interest. European antitrust policy is looking very much at the effects that any restrictive practice or any abuse may have on consumers' interests. And we certainly feel that in these two cases, the consumers' interest is very much at the heart of this matter in the long term.

KENNEALLY: So the consumers' interest isn't only about price.

SANGER: No, certainly not. The consumer interest is also about choice, but it depends which timeframes you look at. Abuse of dominant position, as well as restrictive practices, can put a kind of pressure into the market that will, over time, exclude competitors, will reduce diversity, reduce choice, and then long term raise prices for the consumer, too. So it's always about consumer interests, always about price. But the question is which mechanisms, exactly, do you tackle, and which ones do you look at, and which prognosis are you making for the future development in that market? That is quite a complex exercise.

KENNEALLY: Very complex and very challenging, particularly in a world where digital players like Amazon, Google, Apple, and Facebook are really the dominant players, and it's hard to imagine them being displaced, at least for a very long time, indeed. Appreciate the chance to get the European perspective from Dr. Jessica Sanger, legal counsel and deputy head of the legal department at the German Book Publishers and Booksellers Association. Thanks for joining us on Beyond the Book.

SANGER: Thank you.

KENNEALLY: Beyond the Book is produced by Copyright Clearance Center, a global rights licensing technology and content workflow organization. At CCC, we serve more than 35,000 customers and 15,000 copyright-holders worldwide and manage more than 950 million rights from the world's most sought-after journals, books, blogs, movies, and more. You can follow Beyond the Book on Twitter, like us on Facebook, and subscribe to the free podcast series on iTunes or at our website, beyondthebook.com.

Our engineer and co-producer is Jeremy Brieske of Burst Marketing. I'm Christopher Kenneally. Join us again soon on Beyond the Book.

END OF FILE