

fladgate

**Confronting the realities
of digital change:**

**Legal minefields:
'agency' and territoriality**

Eddie Powell

30 November 2010

Structure

- Agency Model
 - Why do we need the “agency” model?
 - What does it do?
 - Does it work?
- Territoriality
 - Where the problems come from
 - Conflicting pressures

fladgate

Agency Model

fladgate

Why do we need the agency model?

- Wholesale/distributor model - Discounting possible
- Control of pricing
- Competition law constraints

What does the agency model do?

- Agent is someone with power to negotiate or conclude contracts on behalf of principal
- Sale is direct by publisher to consumer
- Publisher sets prices
- Retailer follows publisher's instructions – no discounting
- Retailer deducts commission

fladgate

Does the agency model work?

- Nothing intrinsically wrong with agents – App Store
- Move away from reseller model provoking ‘price fixing’ allegations
- a genuine agency relationship required
- Key issue is risk – agent takes none
- Each case determined on its own merit
- Effect of “Most Favoured Nation” clauses

fladgate

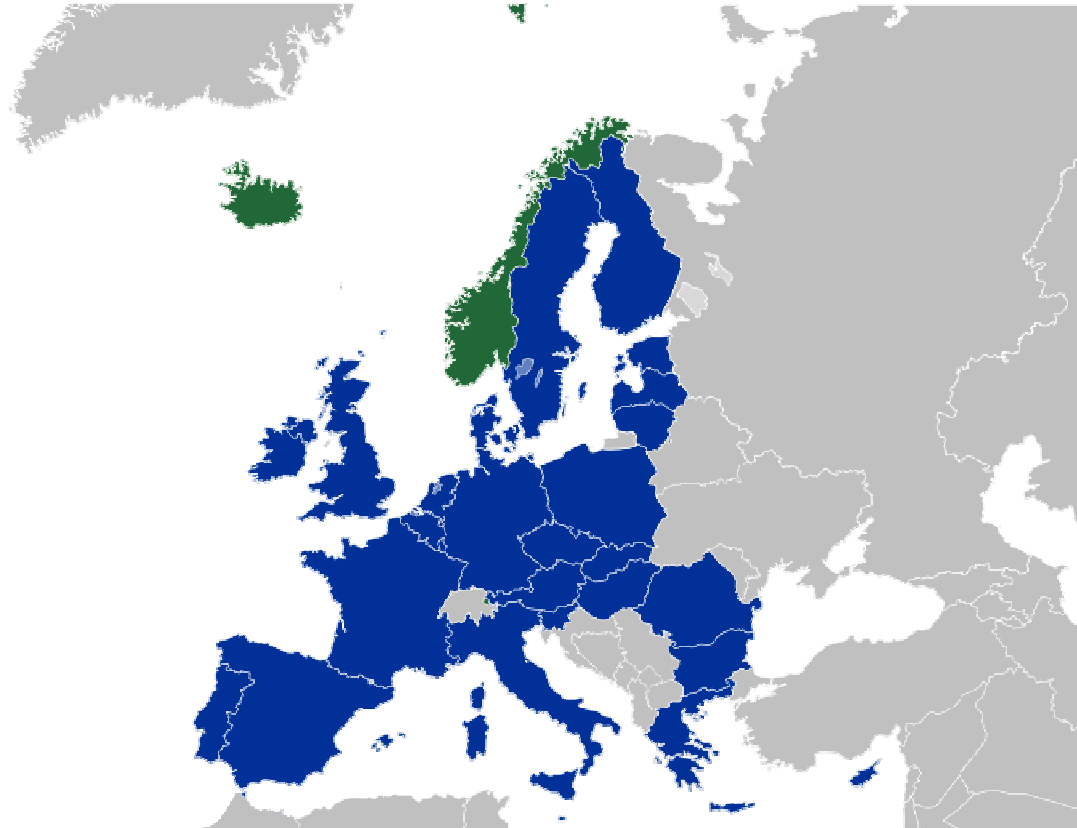
Territoriality

Territoriality – where do the problems come from?

- Traditional licence model
- Exhaustion/free movement
 - Within EEA
 - From outside EEA
- Online availability

fladgate

European Economic Area



Territoriality – competing pressures

- Exhaustion not applicable to “services”?
- But overriding general rules about EEA market partitioning
- Issue of where infringing act occurs:
 - where uploaded?
 - where downloaded?
- Importance of Publisher licence scope and terms

fladgate

Conclusion/questions

Eddie Powell

Partner

Fladgate LLP

16 Great Queen Street | London WC2B 5DG

Direct Dial: +44 (0) 20 3036 7362

Direct Fax: +44 (0) 20 3036 7862

epowell@fladgate.com | www.fladgate.com