

Extending the SatCab Model —— to the Internet ——

Study commissioned by BEUC
Prof. Dr. P. Bernt Hugenholtz

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND

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STATEMENT OF INDEPENDENCE

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1. Introduction

Despite some 25 years of copyright harmonization the law of copyright in the EU has remained, essentially, national and territorial. As a consequence: (1) copyright can be (and will be) fragmented along nationally defined territorial lines, and (2) an act of streaming or uploading content on the Internet will generally amount to ‘communication to the public’ or ‘making available’ in all EU states where the content can be received or downloaded. Therefore, an online content provider who wishes to reach out to all consumers in the EU needs to acquire licenses for all 28 Member States – often from different (nationally operating) right holders and collecting societies. For many online content providers, especially in the audio-visual field, these licensing hurdles are unsurmountable, and instead will resort to technical measures aimed at restricting access to content on the basis of the users’ geographical location, such as ‘geo-blocking’ and ‘geo-filtering’.

For the world of tangible (physical) goods a similar problem of market fragmentation was solved decades ago by the ECJ establishing a rule of ‘Community exhaustion’ of the right of distribution. Ever since, goods incorporating intellectual property, such as records, books and trademarked clothing, may circulate freely across the EU after their initial authorized marketing in a Member State. Why not introduce a similar rule for the world of non-physical distribution? If such a rule is already justifiable, and viable, in the analogue world, it could make even greater sense in the borderless world of the Internet.

We do have an interesting precedent. In 1993 the European legislature adopted the Satellite and Cable Directive – a directive far ahead of its time by focusing not on harmonizing substantive rights, but on the problems of rights clearance for cross-border audiovisual services. In those days, the fledgling satellite broadcasting market suffered from similar copyright problems as the online content services market today. Providers of trans-border satellite broadcasting services had to clear rights for all countries within the “footprint” of the satellite transponder. The solution offered by the Directive was both elegant and simple: satellite broadcasting is a relevant act for copyright purposes only in the *country of origin* of the signal. As a consequence, a license to broadcast audiovisual content by satellite would be needed only in the Member State from where the satellite signal was uplinked.

Why not extend this model to the internet? Previous Commissions have played with the idea on several occasions, but each time stakeholders firmly rejected the idea. The ongoing EC Consultation on the review of the Satellite and Cable Directive, more forcefully, suggests that the time now may be ripe for extending the Directive’s country of origin approach to audiovisual services offered online. This short report, commissioned to the Institute for Information Law by BEUC (the umbrella group of consumers’ organizations in Europe) examines the legal and practical ramifications of such an extension. The report commences with a general description of the rule of territoriality in copyright law; it goes on to examine and possibly solve various legal problems raised by such an extension; thereafter briefly speculates on how such a rule might affect consumers, audio-visual content owners, collecting societies, broadcasters and content providers; and then concludes.

2. Geo-blocking and territorial rights

Despite the promise and potential of the Internet as a medium that ‘knows no borders’, location-based restrictions of access to online services have in recent years become a common occurrence. A European Parliament study published in 2013¹ distinguishes two types of geographical discrimination: ‘geo-blocking’² (i.e. refusal to sell) and ‘geo-filtering’ (i.e. conditioning of sales or re-routing of services) – in both cases based on the geographical location of the consumer. In the area of audiovisual services both types of geographical restrictions regularly occur.³ For example, international sports content provided by national broadcasters online – whether in real time or as ‘catch-up’ service – is frequently geo-blocked,⁴ whereas Netflix – the dominant video-on-demand streaming service in Europe – applies geo-filtering to automatically adjust its catalogue of available films and television series to the current location of its subscribers.

The present European Commission has identified ‘unjustified’ geo-blocking and other forms of geographical discrimination as an obstacle to attaining the Digital Single Market in multiple policy documents,⁵ and has recently launched a public consultation in order to gather (further) evidence, presumably in preparation of a package of policy initiatives.⁶ The European Parliament has also on several occasions expressed its concern about these practices.⁷

¹ European Parliament study, *Discrimination of Consumers in the Digital Single Market*, 2013. See N. Helberger, «Refusal to Serve Consumers because of their Nationality or Residence – Distortions in the Internal Market for E-commerce Transactions?», Briefing Note for the European Parliament’s Committee on Internal Market and Consumer Protection, January 2007, PE 382.180.

² Geo-blocking is “the practice of restricting access to content based upon the user's geographical location” (Wikipedia, entry ‘Geo-blocking’, consulted October 14, 2015; see also ‘A Digital Single Market Strategy for Europe - Analysis and Evidence’, EC Working Paper, SWD(2015) 100 final, Brussels, 6 May 2015, p. 21.

³ Estrella Gomez and Bertin Martens, ‘Language, copyright and geographic segmentation in the EU Digital Single Market for music and film’, JRC/IPTS Digital Economy Working Paper, 2015-04, available at https://ec.europa.eu/jrc/sites/default/files/JRC92236_Language_Copyright.pdf.

⁴ EC Working Paper, p. 26.

⁵ See European Commission, Directorate General Internal Market and Services Directorate D – Intellectual property, D1 – Copyright, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014 [EC Report on EU Copyright Rules Consultation], p. 6-7; EC President J.-C. Juncker, Mission Letter to Commissioner Oettinger, 1 November 2014, available at https://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/oettinger_en.pdf; European Commission, A Digital Single Market Strategy for Europe Digital Market Strategy Communication. Brussels, 6.5.2015, COM(2015) 192 final.

⁶ European Commission - Press release, ‘Have your say on geo-blocking and the role of platforms in the online economy’, Brussels, 24 September 2015, http://europa.eu/rapid/press-release_IP-15-5704_en.htm.

⁷ See European Parliament, Resolution of 21 June 2007 on consumer confidence in the digital environment, Strasbourg, 21 June 2007, A6-0191/2007, sec. 30 : «it is unacceptable that certain entrepreneurs who supply goods or provide services and content via the internet in several Member States deny consumers access to their website in certain Member States and force consumer to use their websites in the State in which the consumer is resident or whose nationality he or she holds”.

Geo-blocking and geo-filtering of audiovisual services are usually, but not solely,⁸ related to the territorial allocation of copyrights and neighboring rights. Copyright creates exclusive rights in works of literature, science and art. In the European Union, despite almost twenty-five years of harmonization of copyright, copyright has remained essentially national law, with each of the Union's 28 Member States having its own national law on copyright and neighboring (related) rights. The exclusivity that a copyright confers upon its owner is, in principle, limited to the territorial boundaries of the Member State where the right has been granted. This is a core principle of copyright and related rights, enshrined in the Berne Convention and other international treaties, which – because of the obligation under the EEA for Member States to adhere to the Berne Convention – can be described as 'quasi-acquis'.⁹ In its *Lagardère* ruling¹⁰ the CJEU has confirmed the territorial nature of copyright and related rights.

The territorial nature of copyright has several legal consequences. One is that due to the rule of national treatment found *inter alia* in art. 5(2) of the Berne Convention, works or other subject matter protected by the laws of the Member States are protected by a bundle of 28 parallel (sets of) exclusive rights. A direct consequence of territoriality is, therefore, that copyright in a single work of authorship can be 'split' into multiple territorially defined national rights, which may be individually owned or exercised for each national territory by a different entity.

The other consequence follows from the rule of private international law enshrined in the Rome Regulation, that the law of the country where protection is sought governs instances of copyright infringement.¹¹ This rule implies that making a work available online affects as many copyright laws as there are countries where the posted work can be directly accessed. In other words, copyright licenses for such acts need to be cleared normally in all countries of reception, that is, in case of a service aimed at the entire European Union, in all 28 Member States.¹²

Prima facie, the EU Services (or 'Bolkestein') Directive of 2006 seems to prohibit geo-blocking. The Directive, *inter alia*, establishes various 'rights of recipients of services'. According to art. 20:

⁸ Another reason for applying location-based restrictions in the realm of audiovisual services may relate to broadcasting law (e.g. the remit of public broadcasters may be limited to services offered to national residents). See European Commission, Directorate General Internal Market and Services Directorate D – Intellectual property, D1 – Copyright, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014 [EC Report on EU Copyright Rules Consultation], p. 8-9.

⁹ J. Gaster, ZUM 2006/1, p. 9.

¹⁰ *Lagardère Active Broadcast*, ECJ 14 July 2005, case C-192/04, par. 46: 'At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.'

¹¹ Art. 8 of the Rome II Regulation.

¹² See generally P. Bernt Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis', in: A. Ohly & J. Pila, *The Europeanization of Intellectual Property Law*, Oxford: Oxford University Press 2013, p. 57-73

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1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.
2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

The Services Directive thus prohibits discrimination in the provision of services based on nationality or place of residence. However, the provision does allow for differential treatment of recipients that is ‘justified by objective criteria’.¹³ Although the Directive does not specify this, it is likely that the proper exercise of intellectual property rights by content providers would amount to such a justification.¹⁴ In other words, geo-blocking for ‘justifiable’ copyright-related reasons cannot be prohibited by direct reference to the Directive.

¹³ EC Staff Working Paper, p. 24.

¹⁴ Note that art. 17 generally excludes “copyright, neighbouring rights [...] as well as industrial property rights” from the scope of the Directive’s general provision on freedom to provide services enshrined in art. 16. This derogation, however, does not apply to art. 20.

3. Extending the Satellite and Cable Directive's country of origin rule

Apart from the codification of the rule of Union-wide exhaustion, which permits the further circulation of copyrighted goods within the European Union upon their introduction on the market in the European Union with the local right holder's consent, the only structural legislative solution to the problem of EU market fragmentation by territorial rights can be found in the Satellite and Cable Directive of 1993. According to article 1(2)(b) of the Directive, a satellite broadcast will amount to communication to the public only in the country of origin of the signal, i.e. where the 'injection' ('start of the uninterrupted chain') of the program-carrying signal can be localised. Thus the Directive departs from the so-called 'Bogsch theory', which held that a satellite broadcast requires licenses from all right holders in all countries of reception (i.e. within the footprint of the satellite). Since the transposition of the Directive only a license in the country of origin (home country) of the satellite broadcast is needed. Thus, at least in theory, a pan-European audiovisual space for satellite broadcasting is created, and market fragmentation along national borders is avoided, by avoiding the cumulative application of several national laws to a single act of satellite broadcasting.

Why not extend, or apply by analogy, to the Internet the 'injection right' model of the Satellite and Cable Directive? This is by no means a novel idea. Already in the 1995 Green Paper that paved the way to the Information Society Directive,¹⁵ the European Commission played with the idea of applying the Directive's country of origin approach to the Internet. But this suggestion was immediately and unequivocally discarded by all right holders consulted. In a Staff Working Document that accompanied the Communication of the Commission on 'Creative Content Online', the possibility of extending the Satellite and Cable Directive's country-of-origin approach to the Internet was once again extensively discussed,¹⁶ without however resulting in an EC policy initiative.

The ongoing EC Consultation on the review of the Satellite and Cable Directive, yet again, contemplates extending the Directive to the online world, in particular to radio and television services offered online. According to the accompanying press announcement, "The Commission wants to assess, first, to what extent the Satellite and Cable Directive has improved consumers' cross-border access to broadcasting services in the Internal Market, and, also, what would be the impact of extending the Directive to TV and radio programs provided over the Internet, notably broadcasters' online services."¹⁷

The following section first describes the current country of origin rule enshrined in the Satellite and Cable Directive, and thereafter addressed a number of legal issues that an extension of this rule to audiovisual services offered online would give rise to.

¹⁵ European Commission, "Copyright and Related Rights in the Information Society", Green Paper, COM(95) 382 final, Brussels, 19 July 1995, p. 41 ff.

¹⁶ Commission staff working document - Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market, COM(2007) 836 final, Brussels, 3 January 2008, p. 25-26.

¹⁷ <https://ec.europa.eu/digital-agenda/news-redirect/25008>.

Current legal framework for satellite broadcasting

Art. 1(2)(b) of the Satellite and Cable Directive establishes a country of origin rule for acts of satellite broadcasting. Communication to the public by satellite is a relevant act only in the Member State where the signals originate, as set out in Art. 1(2)(a).¹⁸ A broadcasting organisation will need to acquire licences only from right holders in the Member State of origin of the signal. However, Art. 1(2)(b) does not rule out that licence fees and other contractual conditions take into account the size of the footprint (*i.e.* number of countries reached) of the satellite broadcast. On the contrary, recital 17 instructs the parties concerned to “take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version”. Art. 1(2)(c) confirms that communication to the public takes place even if the programme-carrying signals are encrypted. Therefore, transmitting copyright protected works over satellite-based pay television services is a restricted act.

Art. 1(2)(d) extends the definition of communication to the public by satellite (Art. 1(2)(b)) to cover two situations where the communication actually occurs outside the European Union. The provision seeks to discourage broadcasting organisations from relocating their operations outside the European Union to avoid the application of the Directive (recital 24). If an act of communication to the public occurs outside the European Union, but either the signal is up-linked from within the EU or a broadcasting organisation established in the EU has commissioned the transmission, the communication shall be deemed to have occurred in the Member State where the uplink has taken place or where the broadcasting organisation is established. This legal fiction, however, applies only if the non-EU State where the communication actually occurs does not offer the level of protection provided under Chapter II (most importantly, an exclusive right of communication to the public by satellite). For example, if a broadcaster established in Luxembourg were to use a satellite network owned and operated by an African State to broadcast to European audiences, the broadcast would be deemed to occur in Luxembourg unless the copyright law of the African State provided for an exclusive right of communication to the public by satellite. With respect to satellite broadcasts from outside the EU not covered by Art. 1(2)(d), Member States remain free to apply the “Bogsch” (country of reception) theory.

Art. 2 instructs Member States to provide for an exclusive right, under copyright law, to communicate to the public by satellite. This provision is the counterpart to the country-of-origin rule of Art. 1(2)(b). If in the country of origin of the satellite broadcast no such right existed, right holders across the European Union would have no right to authorise or prevent it. Art. 2 has been largely superseded by Art. 3 of the Information Society Directive,¹⁹ which provides for a general right of communication to the public that includes acts of satellite broadcasting.

¹⁸ See P.B. Hugenholtz, ‘SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive’, IRIS plus 2009-8, p. 7-19.

¹⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167/10 of 22 June 2001.

Extending the country of origin rule to the Internet: legal issues

Extending the Satellite and Cable Directive's satellite provisions to the Internet would give rise to various legal issues.

A preliminary question is whether the Directive's provisions allow an extensive interpretation without the need for amending or revising the Directive. Might the Directive's country of origin rule already apply to services offered over the Internet? The answer is, patently, no.²⁰ The country of origin rule enshrined in the Directive applies only to acts of 'communication to the public by satellite'. Art. 1(2)(a) of the Directive defines this as "the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth." Moreover, art. 1(1) defines 'satellite' as "any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication." These definitions are highly technology-specific and preclude any extension by way of legal construction to acts of transmitting content over the (wired) Internet. Any extension of the scope of the Directive's country of origin rule to the Internet would, therefore, have to be effectuated by amending the provisions of the Directive, or by amending the Information Society Directive, or by another EU legislative act.

Another preliminary observation is that an 'extended' Directive would not require a complimentary rule harmonizing the right of communication to the public, as does the present Satellite and Cable Directive for the right of communication to the public by satellite (art. 2). Art. 3 of the Information Society Directive has broadly harmonized a general right of communication to the public, which includes a right of making works available to the public online; this general right has by now been implemented by all Member States. Moreover, all Member States have for several years implemented the EU Enforcement Directive of 2004 that establishes minimum standards of enforcement of IP rights, including copyright and neighboring rights, throughout the Union. The current EU legislative framework thus rules out the existence within the EU of 'copyright havens' where online content providers seeking lower levels of copyright protection might seek refuge.

Amendment of the Satellite and Cable Directive with the aim of extending its scope to Internet-based services might take different shapes and forms, depending on the intended reach of an extension. Any extension would require, at the very least, the following amendments and revisions:

1. Definitions

Clearly, an extension of the Directive's country of origin rule would necessitate a thorough rewriting of most or all of the current technology-specific rules of (in particular) art. 1 of the Directive. Depending on the extent of the extension desired, the rule would have to be revised to apply to acts of communication to the public [of

²⁰ Th. Dreier, 'The Cable and Satellite Analogy', in P.B. Hugenholtz (ed.), *The future of copyright in a digital environment*, Den Haag: Kluwer Law International 1996, p. 61-62.

works or other subject matter] committed by broadcasting organizations, or – if the focus were on audiovisual services – to acts of communication to the public of audiovisual works.

2. Place of act of communication to the public

The present Directive locates the place of the relevant act of communication to the public by satellite “in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth” (art. 1(2)(b)). Transforming this satellite-specific rule into a more general country of origin rule that would apply to all audiovisual services, including those offered online, is not an easy task. Whereas with satellite broadcasting, the locus of the ‘uplink’ that designates the Member States where the ‘uplink’ right is to be cleared, can relatively easily be identified, determining the ‘place of upload’ of an Internet-based service is by no means a straightforward task, and would probably require a set of more complex – possibly highly technical – rules of attachment.²¹

Alternatively, one could imagine replacing the present ‘place of uplink’ approach by a rule solely focusing on the *place of establishment* of the entity ‘under the control and responsibility’ of which the online communication occurs. The country of origin rule would thus be available only to service providers that are duly established in one of the Member States of the EU.²² Such a rule of application based on place of establishment of the responsible content provider rather than on the locus of ‘uplink’ would also make redundant a special rule for content services originating from outside the European Union, as is currently laid down – in a rather complicated fashion – in art. 1(2)(d) of the Directive. Indeed, art. 1(2)(d)(ii) effectively incorporates a rule based on place of establishment of the broadcasting organization in case no ‘uplink station’ in a Member State is being used.

Either way, for any provider to invoke the country of origin rule the provider would need to be easily identifiable. Here, an amended version of the Directive could refer to art. 5 of the E-Commerce Directive, which requires that providers of information services make available to its recipients, and to competent authorities, information regarding its name and place of establishment.

3. ‘Uninterrupted chain’

Art. 1(2)(b) presently requires that an ‘uninterrupted chain’ of communications is preserved from broadcaster to earth receiver. This chain may not be interrupted, for instance by adding content (e.g. advertisements) to the signals, or by storing the signals and retransmitting them after a certain delay. Normal technical procedures relating to programme-carrying signals are, however, not deemed interruptions.

The underlying reason for this rule is to avoid that downstream intermediaries add value to content, and thereby exploit, content originating from a (foreign) content provider under a country of origin rule, without incurring liability for copyright

²¹ IViR, Recasting study, p. 29.

²² Note that this would not prevent duly established European affiliates of non-European providers (such as Google or Netflix) from benefiting from this provision.

infringement. Obviously, a similar rule guaranteeing that the country of origin rule only apply to the transmitted content service ‘as is’, would have to be developed for audiovisual services offered online. In particular, it should be made clear that downstream intermediaries may not, without further permission of the (local) right holders, dub or add local language subtitles to audiovisual content services offered online.²³

4. Exclude ancillary rights of reproduction

Another problem with extending the ‘satellite’ rule to the Internet is that transmission over digital networks usually involves not only acts of communication to the public, but also acts of reproduction. This concerns not only the initial act of uploading a work to a server, but also various subsequent acts of temporary or transient copying, as well as acts of downloading works on the users’ end.

Presumably, the mandatory transient copying exception of art. 5(1) of the Information Society Directive would preclude downstream copyright claims by local holders of reproduction rights, but the language of art. 5(1), which is phrased as an exception or limitation, is not very clear.²⁴

As to the reproduction rights involved in the act of uploading works to the Internet, no need to subject these rights to a country of origin rule seems to exist, since the act of uploading is a local act that (normally) does not occur in multiple jurisdictions. By contrast, an ‘extended’ country of origin rule would need to accommodate acts of reproduction on the end users’ side, or else local right holders in individual Member States could invoke their reproduction rights to restrict downloading of content (legally) offered by a foreign content provider – thus frustrating the entire operation of a country of origin rule. One way to solve this problem would be to introduce a mandatory exception permitting lawful users of (audiovisual) services offered online to download and view the content thus offered. Another solution would be to extend the country of origin rule to any rights of reproduction directly ancillary to the use by end users of the works communicated to the public by (qualified) service providers.

5. Homogenize limitations and exceptions

Yet another problem associated with extending the SatCab approach to the internet is that exceptions and limitations that apply locally to works made available online may differ significantly from Member State to Member State.²⁵ For example, fragments of copyright protected audiovisual content posted on YouTube might qualify as legitimate ‘quotations’ in one Member State, while being held illegal in others. Note that art. 5 of the Information Society has failed to provide for full harmonization in this respect. An extension of the country of origin rule to audiovisual services offered online should therefore ideally coincide with full harmonization of those limitations and exceptions most relevant to such services, notably art. 5(3)(a) [teaching and research], art. 5(3)(c) [media uses], art. 5(3)(d) [quotation], art. 5(3)(i) [incidental uses], and art. 5(3)(k) [parody].

²³ See p. 16 below.

²⁴ IViR, Recasting study, p. 29.

²⁵ Th. Dreier, ‘The Cable and Satellite Analogy’, in P.B. Hugenholtz (ed.), *The future of copyright in a digital environment*, Den Haag: Kluwer Law International 1996, p. 63.

6. Flanking measures: effectively dealing with DRM

Art. 1(2)(b) of the Directive precludes that right owners divide the right of communication to the public by satellite into territorially fragmented parts. However, parties do remain free to contractually agree on obligations to apply encryption or other technical means so as to avoid reception by the general public of programme-carrying signals in countries for which the broadcast is not intended. Thus territorial exclusivity and fragmentation can still be achieved, notwithstanding the clear aim of the Directive to create an internal market for transfrontier satellite broadcasting. This has proven to be the Achilles heel of the Directive, as the Commission readily admitted in the 2002 review of the Directive. While praising its success as a mechanism to effectively promote rights clearance across the EU, the Commission observed that in the field of satellite broadcasting – despite the new rules of the Directive – fragmentation along territorial lines has persisted:

A trend is thus emerging whereby producers sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure that they cannot be received beyond national borders. This encryption enables producers to negotiate the sale of the same programmes with broadcasting organisations in other Member States.²⁶

As the Commission correctly concluded, the satellite model will work effectively only in combination with certain flanking measures, such as rules conditioning (or even prohibiting) territorial licensing and/or geo-blocking.

How to shape such rules in a revised Directive that would extend the country of origin rule to audiovisual services offered online? One way to do this would be to more strictly apply, or possibly further develop, the anti-trust rules of 101 and 102 TFEU.²⁷ Indeed, judging from recent news reports the European Commission is already pursuing a policy more critical of territorial market partitioning in competition proceedings instigated against Sky UK and several Hollywood studios.²⁸ In line with this stricter policy, one could envision the codification by the European Commission of more refined rules on territorial partitioning in the form of a Commission Regulation, somewhat similar to the ‘block exemptions’ that prohibit in technology licenses between competitors (inter alia) the exclusive territorial allocation of markets, subject to certain well-defined exceptions.²⁹

However, unjustified geo-blocking and similar market fragmentation will probably not in all cases amount to uncompetitive behavior sanctionable under the EU’s competition rules. A more sophisticated solution therefore would be to base such guidelines not only, or not primarily, on the EU’s competition rules, but also on the

²⁶ Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM (2002) 430 final, Brussels, 26 July 2002, p. 7.

²⁷ See CJEU Premier league case.

²⁸ Financial Times, July 23, 2015: ‘Brussels in antitrust case against Sky and six Hollywood studios’.

²⁹ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements Text with EEA relevance. Note as well Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, which prohibits clauses in vertical distribution contracts prohibiting passive sales outside the exclusive territory.

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general rule of non-discrimination enshrined in art. 18 TFEU, and reiterated notably in art. 20 of the Services Directive.

Such rules on (prohibited, or conditionally permitted) geo-blocking and territorial licensing could take the shape of ‘black’ and ‘grey’ lists well known from the field of consumer law. Listing all the instances of supposedly (il)legitimate geo-blocking and territorial licensing would exceed the scope of this report. One example of a conditionally permitted territorial restriction might be geo-blocking by national public broadcasters that operate under a mandate not to offer content services to audiences outside their national territories.³⁰

³⁰ See p.16. below.

4. Possible impact on stakeholders

While presumably beneficial to the emerging Digital Single Market at large, extending the Satellite and Cable Directive's country of origin rule to audio-visual services offered online would affect the interests of the main stakeholders in various ways – both negatively and positively. In addition, such an extension might have cultural ramifications. Obviously, it would require extensive empirical study to precisely assess the impact of such an extension on the European cultural economy. Such analysis being well outside the scope of the present study, this chapter will only briefly indicate some possible positive and negative effects on the stakeholders most directly concerned: consumers, audio-visual content owners, collective rights management societies, broadcasters and content providers.³¹

Consumers

European consumers of content-related online services are directly affected by geo-blocking and other forms of geographical discrimination.³² Consumers are therefore most likely to benefit from applying a country of origin rule to audiovisual services offered online. Nevertheless, the positive impact on consumers of such a measure should not be overstated. One reason is that a country of origin rule makes it more difficult for content providers to engage in territorial price discrimination. Assuming that audiovisual content services are currently offered at lower prices to consumers in Member States with lower average consumer spending power, this might result in price increases in these states. Note however that to my knowledge no research has been published demonstrating that such territorial price discrimination actually occurs in respect of audiovisual services offered across Europe.³³

Another caveat is that the country of origin rule will apply only to the versions of audiovisual works that are licensed at source by the online content provider invoking this rule. For example, if a film streaming service based in Ireland acquires a license to stream a James Bond movie in its original un-dubbed and non-subtitled version, only this version will become generally available to audiences across the EU. Licenses for language-dubbed or sub-titled versions could still be sold to local providers on local markets on an exclusive basis. By implication, price discrimination between different language (e.g. French, Spanish, German or Dutch) markets would still remain possible.

Audiovisual content owners

Extending the country of origin rule to audio-visual services offered online is likely to have an impact on the owners of audio-visual content, and on the business models they employ. If copyright licenses for online services only need to be cleared in the

³¹ The EC report on InfoSoc consultation, p. 6 ff., summarizes the main stakeholders' positions regarding the need to confront the issue of territoriality in copyright.

³² See EC report on InfoSoc consultation, p. 6 ff.

³³ Netflix, the dominant provider of VoD services in Europe, seems to adhere to an (almost) homogenous pricing strategy across the EU Member States. See 'Netflix is launching in Spain, Italy, and Portugal from October 20 costing €8 per month', <http://venturebeat.com/2015/09/30/netflix-is-launching-in-spain-italy-and-portugal-from-october-20-costing-8-euros-month/>.

country of origin, and geographical discrimination is no longer permitted, right holders will no longer be in the position to assign or exclusively license online rights in audio-visual content on a country-by-country basis. As a consequence, for example, content delivered by an online video-on-demand service originating in Germany will be accessible across the European Union, notwithstanding any online rights that a local right holder in, say, Austria will have acquired. This is likely to affect current contractual practices in the audio-visual sector. Granting exclusive rights to film distributors per territory is an important tool for right holders to secure film financing, particularly at the pre-production stage.³⁴ Note however that for the time being in the audio-visual realm the proceeds from online film distribution will remain relatively small as compared to revenues deriving from traditional media such as cinema and television broadcasting.³⁵ In other words, the possibly negative impact on film financing should not be overstated.

Moreover, as mentioned before, an extended country of origin rule would apply only to the versions of audio-visual works originally licensed at source. Exclusive rights in dubbed or subtitled versions owned by local distributors would not be affected;³⁶ the impact of such a rule on current business models in the film industry would therefore not be as great as sometimes is assumed. This might however be different for the realm of international sports, where language barriers are perhaps less relevant, and mono-linguistic versions of sports broadcasts might attract a wider trans-European audience.³⁷

Collective rights management societies

Most collective rights management societies currently derive their existence from rights granted or entrusted to them on a national, territorial basis – sometimes protected by a government license or monopoly. Proceeds from the collective exploitation of these rights flow not only to entitled right holders, whereby local authors are sometimes favoured over foreign right holders, but are also channelled to a variety of cultural and social funds, mostly to the benefit of local authors and performers and local cultural development. By protecting and promoting local authors and performers, collecting societies thus play an important role in fostering ‘cultural diversity’ in the EU. Removing the territorial aspect of communication rights would probably affect these de facto cultural subsidies. Another fear on the part of the CMOs, and the authors they represent, is that an extension of the country of origin rule to the online realm would result in a ‘race to the bottom’ between national CMO’s competing for union-wide online licenses.

However, here too the impact of extending the country of origin rule to the online world should probably not be overstated. With the recent adoption of the Collective Rights Management Directive, collecting societies are already obliged to collaborate

³⁴ EC Report, p. 7.

³⁵ See Heritiana Ranaivoson a.o., Analysis of the legal rules for exploitation windows and commercial practices in EU Member States and of the importance of exploitation windows for new business practices. Study prepared for the European Commission DG Communications Networks, Content & Technology (2014), <http://ec.europa.eu/digital-agenda/en/news/analysis-legal-rules-exploitation-windows-and-commercial-practices-eu-member-states>.

³⁶ See p. 11 above.

³⁷ Since television reporting of major sports events is at the core of the national public broadcasters’ public service mandate, this could be an additional reason for condoning territorial restrictions.

in offering multi-territorial licensing schemes. So a more likely future scenario seems to be that a relatively small number of large pan-European CMO's will compete for the online licensing market – rather than a multitude of small national CMO's. Note as well that collective rights management in the audiovisual realm is still fairly underdeveloped in most Member States. Unlike the music sector, where primary rights (e.g. broadcasting and online rights) are mostly exercised collectively, in the audiovisual sector collective rights management plays a role at best at the secondary level (e.g. in respect of rights of cable retransmission and home copying).

Broadcasters

Broadcasters play a dual role as right holders and users of copyright works. Over time broadcasters have been increasingly confronted by territoriality-related problems, as terrestrial transmissions are increasingly complemented or even substituted by broadcasting media that more easily transcend national borders. Whereas the Satellite and Cable Directive has brought some relief to broadcasters using satellite platforms, no similar legal solution presently exists in respect of web-based broadcasting services. As a consequence, providers of such services are compelled to clear rights for all the countries where such broadcasts are received,³⁸ or, if this is infeasible, to restrict access to their services to local audiences. Extending the Directive's country of origin rule to broadcasting services online would clearly alleviate these problems.

On the downside, it should be noted that many national broadcasters presently have no mandate, and often no economic incentive, to extend their services beyond the territory of their remit. This could be a reason to conditionally allow territorial restrictions by broadcasters in a future legal regime extending the country of origin rule to audiovisual services offered online.

Providers of online audiovisual content services

Arguably, providers of online audio-visual content services have a lot to gain by the introduction of a country of origin rule. The current fragmentation of online rights along the national borders of Member States requires such providers to clear *a priori* all relevant rights for all Member States for which these services are made available. Offering content online across the European Union therefore necessarily entails huge transaction and licensing costs.

On the downside, service providers operating primarily on local markets might be negatively affected in that license fees could be raised because all content offered online would, by legal necessity, become available across the European Union. In practice this will be a problem primarily for providers offering content in languages that are widely understood across Europe, such as English, and to a lesser degree French and German. A possible solution could be to introduce a 'bagatelle' provision, allowing smaller providers to conditionally opt out of the country of origin rule.

³⁸ See EBU Response to the EC Commission Communication on the Management of Copyright and Related Rights in the Internal Market, 24.6.2004, available at http://ec.europa.eu/internal_market/copyright/docs/management/consultation-rights-management/ebu_uer_en.pdf/.

5. Summary and conclusion

This study has examined a possible extension of the Satellite and Cable Directive's country of origin rule to audio-visual content services provided online. As Section 2 of this report demonstrates, current forms of geographical discrimination of audio-visual services, by way of geo-blocking or geo-filtering are usually, but not solely, related to the territorial allocation of copyrights and neighboring rights. This, in turn, has its roots in the territorial nature of copyright in the EU, which despite wide scale harmonization has remained largely intact.

The Satellite and Cable Directive of 1993 offers an interesting model for solving the problems of EU market fragmentation by territorial rights. A satellite broadcast will amount to communication to the public only in the country of origin of the signal, i.e. where the 'injection' of the program-carrying signal can be localised. As discussed in Section 3, extending this model to audio-visual services offered online raises a number of legal issues. Apart from the merely technical-legal problems identified, the main issues appear to be (1) identifying the *locus* of the originating service, (2) dealing with downstream reproduction rights, and (3) preventing the persistence of unjustified contractual and/or technical territorial restrictions. Section 3 suggested solutions to all these problems: (1) by replacing the present 'place of uplink' approach by a rule focusing on the place of establishment (within the EU) of the entity 'under the control and responsibility' of which the online communication occurs; (2) by either creating a special limitation for, or by extending the country of origin rule to, any rights of reproduction directly ancillary to the use by end users of the works communicated to the public by (qualified) service providers; and (3) by introducing a flanking instrument in the form of a 'black' and a 'grey' list, identifying instances of (un)justified, and therefore (il)legitimate, geographical discrimination.

An 'extended' Directive would not require a complimentary rule of substantive copyright law. The Information Society Directive has broadly harmonized a general right of communication to the public, which includes a right of making works available to the public online. Moreover, all Member States have implemented the Enforcement Directive of 2004 that prescribes minimum standards of enforcement of copyright and neighboring rights. The current EU legislative framework thus ensures that no 'copyright havens' inside the EU exist, where online content providers seeking lower levels of copyright protection might seek refuge.

Finally, Section 4 speculated about possible positive and negative effects of extending the country of origin rule on the stakeholders most directly concerned: consumers, audio-visual content owners, collective rights management societies, broadcasters and content providers. While such an extension is likely to have some impact on current business models and practices, especially in the field of film financing, this impact must not be overstated, since a country of origin rule would apply only to the (language) versions of audio-visual content originally licensed at source. Moreover, the proceeds from online film distribution are still relatively small compared to revenues deriving from traditional media such as cinema and television broadcasting. Finally, in cases where content owners, broadcasters or providers do have legitimate reasons to maintain geographical restrictions, these concerns might be accommodated in the 'grey' list of conditionally permitted territorial restrictions.



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