Another breach in the wall: copyright territoriality in Europe and its progressive erosion on the grounds of competition law

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Abstract

Purpose – *This paper aims to show how the European Commission is seeking to solve the problems of market fragmentation and inaccessibility of copyright content in the Digital Single Market. The analysis draws on a still unresolved conflict between the enforcement of national copyright titles and the European Union (EU) policy objective to ensure pan-European access to copyright works.*

Design/methodology/approach – *First, the paper focuses on the causal relationship between national copyright systems and the existing territorial partitions in the online content markets. Second, the paper reviews the piecemeal approach followed by the Commission in its recent legislative initiative aimed at ensuring the cross-border "portability" of online content services. Third, the paper points out how a much more radical approach the Commission has undertaken in an ongoing antitrust case against the territorial partitions created by major film producers and the biggest EU broadcasters might revisit the principle of copyright's territoriality.*

Findings – *In particular, the paper explains why the application of Article 101 TFEU with regard to the licensing agreements creating areas of absolute territorial exclusivity might have potentially disruptive effects on the existing models of online distribution. While pointing out that this outcome will largely depend on how the ongoing antitrust case will be settled, the paper concludes that the liberalization of so-called "passive sales" might force content owners and broadcasters (or content suppliers) to re-structure markets for online content and to replace territoriality with other criteria that might help them differentiate their offerings and packages.*

Originality/value – *The modernization of copyright rules that the Juncker Commission has advocated since the start of its mandate aims to ensure that consumers can access services, music, movies and sporting events on their electronic devices wherever they are in Europe and regardless of borders. In May 2015, this pledge was transposed in the first pillar of the Commission Communication "A Digital Single Market Strategy for Europe". In particular, the Commission announced its intention to propose, before the end of 2015, legislation to reduce differences and friction between national copyright regimes and prevent "unjustified" geo-blocking. In parallel, DG Competition of the European Commission in its capacity as antitrust authority is conducting a formal antitrust investigation aimed to examine whether territorial licensing agreements concluded by several US film studios with the largest European pay-tv broadcasters could be regarded as incompatible with Article 101 TFEU. For the first time, a paper aims to compare the expected outcome of the ongoing reform of the EU copyright framework* vis-à-vis *the potential outcome of the antitrust investigation led by DG Competition and identify the pros and cons of the two approaches followed by the Commission.*

Keywords *Copyright, Competition, Portability, Antitrust, Digital single market*

Paper type *Research paper*

1. Introduction

The modernization of copyright rules that the Juncker Commission has advocated since the start of its mandate in November 2014 aims to ensure that consumers can access services, music, movies and sporting events on their electronic devices wherever they are in Europe

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and regardless of borders. In May 2015, this pledge was transposed in the first pillar of the Commission Communication "A Digital Single Market Strategy for Europe", which seeks to enable a better access for consumers and businesses to online products and services across Europe (European Commission, 2015a). In particular, the Commission announced its intention to propose, before the end of 2015, legislation to reduce differences and friction between national copyright regimes and prevent "unjustified" geo-blocking. In early December 2015, the Commission kept its promise by issuing a proposal for a regulation aiming to enable the so-called cross-border "portability" of online content services (European Commission, 2015b). Portability, in the lexicon of the proposed regulation, refers to the possibility for consumers having lawful access to online services in their country of residence to use the same services also when they are in another Member State for a limited period of time. As outlined in the Communication to the Parliament and the Council entitled "Towards a modern, more European copyright framework" accompanying the proposed regulation, this is supposed to be only the first step towards a modernisation of the copyright framework and the progressive creation of a Digital Single Market in the field of copyright (European Commission, 2015c).

In parallel, DG Competition of the European Commission in its capacity as antitrust authority is conducting a formal antitrust investigation aimed to examine whether territorial licensing agreements concluded by several US film studios with the largest European pay-tv broadcasters could be regarded as incompatible with Article 101 TFEU[1] in light of their partitioning effects on the Single Market (European Commission, 2014). While the investigation is still underway for Canal Plus, Sky Deutschland, DTS and Sky Italia, in July 2015, a Statement of Objections (SO) was sent to Sky UK and six major US film studios for putting in place contractual restrictions creating an area of "absolute territorial exclusivity" in favour of the British broadcaster in the UK and Ireland (European Commission, 2015d). If the Commission's preliminary position was confirmed and became a binding decision (and were upheld, in the future, by European Union [EU] courts), the creation of a Digital Single Market in the field of copyright might be disruptively accelerated, in stark contrast with the gradual approach outlined in the December 2015 Communication on copyright.

This paper aims to compare the expected outcome of the ongoing reform of the EU copyright framework *vis-à-vis* the potential outcome of the antitrust investigation led by DG Competition and identify the pros and cons of the two approaches followed by the Commission. Is an antitrust case the most appropriate tool to overcome the persistent political impasse and achieve a Digital Single Market for copyright content?

Against this background, the paper is structured as follows. Section 2 identifies the main problems affecting the functioning of the Digital Single Market in the field of copyright and estimate the number of Europeans affected. Section 3 discusses the new regulation on copyright portability, as well as its expected outcomes and restrictions in terms of scope and enforcement. Section 4 shows that the cautious and piecemeal approach followed by the proposal for an EU portability regulation might soon be contradicted by the attempt of the Commission, acting as antitrust authority, to revisit the principle of territoriality through the enforcement of EU competition law. Concluding remarks are included in Section 5.

2. Policy problem

As widely recognised by EU institutions, the online distribution of audiovisual content in the EU is dominated by territorial licensing agreements that partition the Internal Market along national borders (European Commission, 2015a; KEA and MINES Paris Tech, 2010). Such a territorial fragmentation persists also in the music sector (European Commission, 2012)[2] in spite of a significant attempt of the EU Commission to discourage (European Commission, 2005) and, at a later stage, outlaw the firmly territorial segmentation of online music rights management in the Internal Market caused by the so-called mutual

representation agreements concluded by national collecting societies (European Commission, 2008)[3].

Territorial licensing agreements generate a twofold impact on the functioning of the Digital Single Market for online copyright works. First, they limit the cross-border portability of such works in a way that consumers who lawfully subscribe to online services in a certain Member State (e.g. to stream music or audiovisual content) are often unable to access the same service when moving, even temporarily, to another Member State[4]. Second, territorial exclusivity limits cross-border trade. This means that consumers living in a certain Member State are not able to subscribe to online content services in another Member State. This specific situation has two types of consequences. On the one hand, consumers in certain countries are unable to access copyrighted content that is instead available to other EU consumers[5]. On the other hand, even though the same service is provided in several EU Member States, consumers are generally obliged to access their own "national" content offering, at local conditions and prices[6].

Limited cross-border portability and accessibility significantly harm EU consumers. According to a study carried out by Plum Consulting for the European Commission, portability issues may affect up to five million Europeans per day including short-term migrants and travellers (Plum Consulting, 2012). As for accessibility, cross-border demand of copyright content in the audiovisual sector is usually generated by Europeans who are permanently away from their country of origin (14 million in 2014; Eurostat, 2016), linguistic minorities speaking another EU official language (four million in 2012; Plum Consulting, 2012) and, to some extent, people with adequate foreign language skills (between 90 and 220 million in 2012; TNS Opinion and Social, 2012)[7].

Besides consumers, also content creators, right-holders and commercial users might be damaged by this situation insofar AS transaction costs hamper the exploitation of cross-border business opportunities. This of course does not extend to all those cases in which territorial licensing schemes are the result of deliberate commercial decisions (CEPS and Economisti Associati, 2015)[8]. In this context, the current EU copyright framework plays a dual role in the fragmentation of the Internal Market for online copyright content.

On the one hand, the current copyright system facilitates territorial licensing and the partitioning of the EU market along national borders. In fact, the combined effect of the principle of territoriality[9] and the application of the principle of exhaustion only to the realm of tangible goods makes the online exploitation of copyright and related rights in intangible works on a national basis entirely legitimate[10]. As a result of territoriality, the copyright holder can license his/her work on a country-by-country basis. In doing so, the copyright holder can legitimately prevent both non-licensed parties from giving access to the same copyright work in any territory and licensed parties from offering the same work in a territory *outside* of the scope of their license[11]. This means that commercial users that are granted territorial exclusivity can also resort to geo-blocking practices (i.e. technological measures preventing online consumers from accessing online content based on geographic location) to avoid copyright infringement, as well as breach of territorial licensing agreements. In this respect, geo-blocking measures may also protect consumers from copyright infringements resulting from using online content in territories not covered by the license they have purchased[12].

On the other hand, the current EU copyright framework creates cost barriers to the development of pan-European offerings. In this respect, copyright law poses obstacles to the Internal Market for online copyright content by increasing transaction costs for the clearance of online exploitation rights on a pan-European basis. In particular, online commercial users might be required to negotiate licenses with a wide range of stakeholders located in various Member States rather than clearing all the required rights for all the territories of the EU in a single transaction (so-called "one-stop shop" effect). Difficulties are exacerbated because the transmission of copyright content through digital networks involves two different rights:

1. the reproduction right; and
2. the making available right.

As a result, any single act of exploitation requires the clearing of two autonomous and independent rights, which might raise transaction costs and make clearance more complex and burdensome, especially in sectors where rights are held by different entities[13].

3. Cross-border portability: proposal for a new regulation

As mentioned above, in December 2015, for the first time in the history of EU copyright law, the Commission proposed the enactment of a regulation (and not a directive) to remove the obstacles to cross-border portability of online content services. The assumption is that an effective dismantlement of territorial barriers to service portability can only be achieved through an instrument ensuring the application of identical rules on a pan-European basis. The proposed regulation aims to enable subscribers of portable online services giving access to music, films, games and sporting events to enjoy these services also when they happen to be – for a limited time – in an EU country other than their Member State of residence. The services whose cross-border portability should be guaranteed, according to the Commission's proposal, are those provided for payment of money or those rendered without payment of money on condition that the provider verifies the Member State where the subscriber habitually resides.

The mechanism the proposed regulation relies upon consists of a statutory restriction of copyright's territoriality and of a pan-European extension the law would grant to the copyright licenses that the providers of online content services still acquire on a rigid country-by-country basis, especially in the audiovisual and premium sports content sectors. The mechanism is, in essence, a legal fiction: the regulation provides that from a legal standpoint, the supply, access and use of an online content service should be regarded as occurring not where the subscriber is present, on a temporary basis, but where he or she resides[14]. For example, if a subscriber of Netflix in the UK travels for a limited number of days to Spain or Germany, the online films streamed by this subscriber when she is in, for example, Madrid or Berlin will have to be considered, from a legal point of view, as having been streamed in London. This means that a service provider acquiring the rights to exploit certain works online in a given EU country (e.g. UK) would have these rights automatically extended – by mere operation of the regulation – to the countries where its subscribers would happen to be travelling or residing on a temporary basis (e.g. Spain or Germany). Interestingly, the regulation is designed to have retroactive effects and to make contractual terms contrary to the above-mentioned mechanism unenforceable.

What is still uncertain, as things now stand, is the magnitude of the impact of the proposed regulation. Unfortunately, this legislative proposal leaves some unsettled issues. In particular, according to Article 2 of the regulation, "temporarily present" abroad means a presence in a Member State other than the subscriber's country of residence. However, it is not clear how service providers should verify the country of residence of their subscribers. In this respect, the preamble of the regulation (as well as the Impact Assessment accompanying the proposal; European Commission, 2015e) mention the kind of information that such verification could be based upon. For instance, the subscriber's IP address could be taken as a proof of residence, as well as his or her banking details, subscriptions to other services provided in the Member State of residence or a contract for internet or telephone connection[15]. What appears clear from the proposed regulation – considering its intent not to increase bureaucracy or raise transaction costs – is the fact that online content service providers will have to be put in a position to verify the consumer's country of residence in a smooth and preferably automated way. The proposed regulation also fails to define the maximum duration of a "temporary presence" abroad and how the limited duration of a stay abroad should be computed (e.g. number of days abroad per year, number of days spent in a certain country, number of consecutive days abroad).

If the Parliament and the Council did not make these definitions clearer and immediately applicable while enacting this new piece of legislation, it would be up to copyright holders and providers of online content services to contractually identify the beneficiaries of online portability. However, such a bargain might prove to be uneasy because of the potentially conflicting interests of the contractual parties. Some right-holders have an incentive to preserve territoriality to maximize their revenues through price discriminating their licensing fees and, in this respect, are concerned by possible problems in determining and monitoring a "temporary presence" in another Member State. Such players would require strict authentication procedures to verify the country of residence and limit the duration of the "temporary presence" abroad. Service providers – instead – have an interest in making their services as successful and popular as possible and to increase the number of subscribers. Hence, they would prefer a broader definition of "temporary abroad", especially when content suppliers operate just in one or few EU countries and cannot benefit from price discrimination strategies on a territorial basis. The priority of consumers, finally, would be that of accessing the services they need at the lowest price. Subscribers that frequently travel abroad would certainly prefer contracts, including a looser definition of temporariness. Contracts subject to less strict verification mechanisms might become appealing also for EU consumers that are willing to pay for content provided in a Member State other than their actual country of residence.

Considering that the amount and categories of internet users who will benefit from portability might eventually depend on the agreements concluded by the concerned parties; it is likely that a strict application of the proposed regulation will prevail[16]. This means that this measure would apply (just) to short-term migrants, travellers and tourists, with a subsequent small number of beneficiaries. According to the Impact Assessment accompanying the proposal, 29 million Europeans would currently benefit from cross-border portability when they travel abroad. Beneficiaries would go up to 72 million Europeans in 2020 in light of the growing demand for online content services and increase in tourism. The Impact Assessment also reveals that Europeans who travel at least once a year spend abroad on average 11.6 days. Combining these figures, the proposed regulation is expected to affect some 900,000 Europeans per day in 2015 (0.2 per cent of the EU population on a daily basis) and some 2.5 million Europeans in 2020 (0.5 per cent of the EU population). All in all, in spite of the ambiguity of certain important provisions that might affect its scope and effectiveness, the new legislation has the full potential to resolve the issue of portability. However, it is likely to apply just to a small number of beneficiaries in a way that this measure could be viewed as a sort of "roaming" for online content providers such as Spotify and Netflix.

The quantitatively modest dimension of the regulation on portability and, the recent, firm opposition to the end of territoriality expressed by the European Parliament in a non-legislative resolution approved in July 2015 suggest that the EU will not be able to satisfy a much higher demand for cross-border access to copyright works on the Internet through a regulatory intervention (European Parliament, 2015)[17]. As next paragraph shows, a breach in the wall of territoriality might be opened soon as a result of the enforcement of EU competition law in the context of licensing agreements creating areas of absolute territorial exclusivity for the exploitation of copyright content.

4. Cross-border trade: Can the enforcement of European Union competition law ultimately overrule copyright territoriality?

EU antitrust and judicial authorities have already started assessing the compatibility with EU law of licensing agreements creating areas of territorial exclusivity in the market for services giving access to sporting events and audiovisual content. More specifically, the *Premier League* judgment of the CJEU pointed out that the application of EU competition law in the market for sporting events might trigger unexpected consequences for territorial licensing[18]. The case concerned an agreement under which a Greek broadcaster had

acquired exclusive rights in the broadcasting of football matches while committing to prevent the public from receiving the broadcasts outside Greece. In this business sector, in the same way as in the film sector, content owners and commercial users have traditionally agreed upon territorial exclusivity as a contractual condition of exploitation aimed to protect the remuneration opportunities of TV broadcasters in a given country. In *Premier League*, in response to the referral coming from the national court, the CJEU did not assess whether the territorial exclusivity for the transmission of sporting events was compatible with Article 101 TFEU. Rather, the issue was almost entirely confined to the offline world because the question was whether the owner of rights in UK football matches (i.e. Premier League) could legitimately restrict bar and restaurant owners in the UK from buying cards and decoding devices enabling them to receive satellite broadcasts of Premier League's content from the Greek broadcaster in their commercial premises. Interestingly, the CJEU provided a negative answer, holding that on the grounds of Article 101 TFEU, the above-mentioned agreement had unlawfully restricted the cross-border supply of decoding devices giving access to the protected content. As emphasized by the Court in its reasoning, un-licensed uses of the Greek broadcasts of protected content in UK pubs and restaurants aimed to reach a new public and to attract more customers with a clearly profit-making purpose. Even though the *Premier League* judgment did not deal with consumer sales and did not concern web-based content transmissions, it did stress, among other things, that the exclusivity sought on a territorial basis through licensing agreements should *not* enjoy absolute protection.

As anticipated above, more recently, the Commission launched a formal antitrust investigation to assess territorial licensing agreements concluded by some US film production and distribution companies with the largest European pay-tv broadcasters. Such investigation culminated in a SO sent to Sky UK and six US studios (Disney, NBC Universal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros) in July 2015. Although the SO is not publically available, the disclosure of Paramount's commitments by the Commission in April 2016 revealed that the main anticompetitive concerns relate to contractual restrictions preventing Sky UK from allowing EU consumers based in other Member States to access (both online and via satellite) the pay-tv services provided in UK and Ireland (European Commission, 2016b). In addition, such agreements appear to embody contractual terms which oblige the US studios under investigation to include comparable restrictions in their licensing agreements with pay-tv broadcasters based in other countries. This may lead to a partition of the Internal Market along national frontiers.

From different perspectives, both the *Premier League* case and the Sky UK case raise the issue of so-called "passive sales", i.e. sales made in response to unsolicited requests coming from individual customers. Requests can be regarded as "unsolicited" when they come from consumers who reside in Member States where the seller does not perform any marketing activity with regard to its products or services. In the specific case of content services, as pointed out by the CJEU in the *Premier League* case, passive sales would consist of a TV service offered by a provider based in Member State A (e.g. Greece) to buyers residing in Member State B (e.g. UK), where the provider does not market and/or advertise its services. As shown in the Sky UK case, the fact that these sales do not materialize in Europe is likely to be a direct consequence of contractual provisions that prevent content providers (e.g. TV broadcasters) from selling their content packages outside of the territory for which they have obtained a license from the copyright content owners.

It is worth remarking that under the EU competition law framework, contractual limitations to passive sales are regarded as "hardcore" restrictions, i.e. those restrictions that are anticompetitive "by object"[19]. As a result, any vertical agreement preventing passive sales is presumed to fall within Article 101(1) TFEU and very unlikely to fulfil the conditions to apply the exception provided for in Article 101(3). In this respect, the European

Commission might consider sanctioning under Article 101 TFEU the absolute character of territorial exclusivity agreements between Sky UK and the US film studios.

Interestingly, in the online environment, the difference between "active sales" (i.e. when the seller carries out marketing activities outside its territory) and passive sales is rather blurred. More specifically, while in the pre-internet era the distinction between these two types of sales was a good compromise, as passive sales represented a marginal share of total sales, in the internet, potentially everything could be considered a passive sale. It has to be considered that internet users can easily find and instantaneously access appealing content services and offerings irrespectively of the place or Member State where they reside. As acknowledged by the European Commission in its Guidelines on vertical restraints, which for the first time have provided clarifications that apply to the online environment, the fact that the internet is quintessentially borderless allows easy access to online services from everywhere (European Commission, 2010).

In spite of any difference between the online and offline market, the European Commission generally confirmed that vertical agreements preventing online passive sales are anticompetitive "by object"[20]. More specifically, no vertical agreement should prevent the downstream party (e.g. a broadcaster such as Sky UK) from having a website and using it to sell its products and/or services. In this respect, online sales are generally considered a form of passive rather than active sale because the customer has to take initiative to visit a given website. According to the above-mentioned guidelines, even cases where the downstream party of the agreement translates its website in several languages and/or sends automatic update to customers that requested to be kept informed on its products and services fall within the passive sale category. *A fortiori*, the fact that such a website and its content is automatically indexed on search engines or comparison websites addressing customers outside of its territory does not entail any active sale. In this context, the guidelines on vertical restraints provide examples of hardcore restrictions of online passive selling which include geo-blocking (e.g. preventing customers located in another territory from viewing the distributor's website), re-routing (e.g. directing the customers to the website of another distributor), geographical discrimination (e.g. terminating transactions when credit card data reveal that the customer is based in territory outside of the distributor's exclusive territory) and discrimination between the online and offline market (e.g. limiting the maximum amount of online sales or charging the distributor a higher price for goods or services sold online).

Against this background, if the anticompetitive concerns included in the SO were reflected in the final decision of DG Competition in the SKY UK case, copyright holders and service providers would no longer be entitled to lawfully restrict access to pay-tv services to individual customers residing outside of the territory covered by a certain licensing agreement. In principle, such a decision would allow for a generalized cross-border access to online content services and pave the way for an accelerated end of the era of copyright territoriality in the EU digital market. In other words, consumers would be entitled to access online content services available in Member States other than their country of residence if they found such services appealing in terms of content offerings and easily accessible with regard to languages, translations and/or subtitles. For instance, in the case of Sky UK, this outcome would not only be beneficial to British and Irish citizens residing in Spain or Italy on a permanent basis wishing to access the same TV services and films made available in their own language to their fellow nationals in London and Dublin but also allow Spanish and Italian viewers with adequate foreign language skills residing in Madrid or Rome to access the same content packages in English. As mentioned above, this would have an impact on up to 200 million Europeans.

The supporters of a Digital Single Market for copyright content should temper their enthusiasm, anyhow. In fact, in the press release accompanying the SO, the European Commission explains that broadcasters have to take into account the relevant regulatory framework beyond EU competition law when selling their services to consumers based in

different Member States. This framework indeed includes EU copyright law. The meaning of this statement is unclear in a way that two scenarios can be sketched.

In a "big bang" scenario, contractual restrictions to passive sales, as well as any measure having similar object or effect, would be prohibited; hence, content producers would need to make it possible for broadcasters to provide their services in response to unsolicited requests from consumers based in different EU Member States. As mentioned above, this scenario would lead to a generalized cross-border access to online copyright content, with a subsequent restriction of the freedom of copyright holders to license and enforce their rights on strictly territorial basis. In the same way as the principle of free movement of goods prevails over the exercise of national intellectual property rights in offline (i.e. physical) markets – as a result of the exhaustion principle – the freedom to provide (and access) online services on a EU-wide basis would prevail over the exercise of territorial online rights. In this respect, market players should quickly adapt their business models and licensing strategies to make room for the free movement of copyright products and services[21]. In line with the spirit of Article 26 of the TFEU, fragmenting the Internal Market along national frontiers would no longer be possible. Yet, right-holders would be free to differentiate their licenses based on, for example, content language or other features (subtitles, dubbing, etc.) as done for instance in the book publishing industry. The impact of this scenario cannot be easily estimated and would require a comprehensive impact assessment exercise that goes beyond the scope of an antitrust investigation.

In a "much ado about nothing" scenario, while film producers and content suppliers would not be able to *explicitly* include contractual restrictions to passive sales in their licensing agreements, copyright works could still be distributed on a strict country-by-country basis as a result of the territorially limited scope of the rights granted to broadcasters (or other content suppliers). However, this would be just a formalistic solution because – in spite of the non-restriction of cross-border sales – broadcasters would still be unable to respond to unsolicited request from consumers based outside of the territory covered by their license. This is the scenario that seems to arise from the above-mentioned commitments offered by Paramount, which consist of a mere repeal of the obligations to restrict passive sales and to enforce such restrictions, with regard to both linear pay-tv and video-on-demand services, and a re-statement of Paramount's freedom to engage in licensing and enforcement practices that are legally permissible under EU law (Paramount, 2016)[22]. In short, in this scenario, copyright's territoriality would remain untouched, as well as the freedom of content owners to license their rights on a territorially exclusive basis. This means that broadcasters would not be in a position to provide the requested content or service package because they might not have cleared *all* the relevant rights in the country where the unsolicited request comes from (i.e. the so-called "country of destination"). Hence, this scenario would *not* have any immediate impact on the functioning of the Internal Market. The free movement of copyright content services would still require a comprehensive reform of the EU copyright framework.

5. Conclusions

This paper has shown how the European Commission intends to solve problems of market fragmentation and inaccessibility of copyright content in the Digital Single Market. On the one hand, the Commission decided to follow a piecemeal approach with regard to cross-border portability, with a view to preserving copyright territoriality, and, on the other hand, the DG Competition of the Commission seems to be pursuing a more radical approach and using Article 101 TFEU to dismantle the "national silos" created by national copyright systems with potentially disruptive effects on the existing models of online content distribution and, inevitably, on the current EU copyright framework. Yet, this outcome will largely depend on the way the Sky UK case will be put to an end. At any rate, the interplay between copyright and competition law is clearly at stake and outcomes are not easy to predict.

While the economic effects of territoriality and its removal should be carefully measured, additional benefits of a well-functioning Digital Single Market for copyright content, such as the creation of a European cultural identity, should be duly taken into account. If digital markets for copyright content had developed efficiently, the territorial partition of Europe into national digital markets would not have been a major problem because every internet user in Europe would have had the possibility of accessing content and the related services under consumer-friendly conditions that would reflect local factors, from both economic and cultural perspectives. In this hypothetical scenario, there would be no European country where content would prove to be unavailable or just too pricy for consumers to be able to pay for it. Nonetheless, as things now stand, entire portions of the European population are not able to access content legitimately and widely resort to illegal content distribution channels to get what they might have accessed through lawful online content services. In this respect, internet users gained a significantly higher interest in accessing content on a cross-border basis and acquiring technical tools such as Virtual Private Networks (for which they show a certain willingness to pay) to get content which is unavailable, at least lawfully, in their own countries of origin/residence. This fast-changing scenario and the evolution in the content demand side seem to compel a more ambitious reform of the EU copyright framework, which should promptly accompany, rather than resisting, any DG Competition decision. A more coordinated and less ambiguous approach by the European Commission would certainly allow to achieve a full-blown market integration while mitigating the side-effects, if any, of a Digital Single Market for copyright content, which by its very nature should have no borders in Europe.

Notes

1. Article 101 TFEU applies *inter alia* to vertical agreements, i.e. those agreements that are signed by companies operating at different levels of the production or distribution chain.
2. In particular, for a discussion on the difficulties in the supply of multi-territorial licenses and the aggregation of the repertoire of musical works see Section 3.2 (European Commission, 2012).
3. Interestingly, a much later judgment of the General Court of the European Union (see T-442/08 *CISAC* vs *Commission*, and all related/joined cases, 12 April 2013) annulled the Commission's decision with regard to the finding of the concerted practice which caused the above-mentioned territorial fragmentation.
4. Certain service providers that operate in more than one Member State allow for cross-border portability in geographic areas covered by their services. This is for instance the case of Spotify, which ensures full portability to premium users across 25 EU countries (Croatia, Romania, and Slovenia are still excluded). In this context, cross-border portability is not because of an EU copyright framework that facilitates the creation of a Digital Single Market. Rather, full portability is the result of the business ability of some international companies that are able to meet a pan-European demand by acquiring licenses in more than one Member State, thus bypassing the obstacles posed by territorial licensing. In fact, Spotify ensures portability in 60 countries worldwide.
5. For instance, in the Impact Assessment of the 2014 Directive on collective rights management, the European Commission reported that the availability of online music services largely varied between EU countries: in 11 Member States less than five services were available in 2012; in seven Member States, between five and nine, only in nine Member States were more than ten services accessible (European Commission, 2012).
6. For instance, Apple iTunes covers all Member States but consumers can purchase contents only from their national store and content availability varies between national web-stores. Local versions of YouTube are available in some EU countries and provide tailored content not accessible by consumers located in another Member State. Xbox Live filters content based on the consumer's location. When it comes to Spotify, although the premium service is fully portable, consumers can lawfully subscribe only their national service and this is reflected in price discrimination across EU: the monthly price for a premium account in euro ranges from €4.99 in Bulgaria to €9.99 in, for example, Belgium, France, Germany, Ireland, Italy and Spain, going up to £9.99 in the UK.
7. In 2012, 44 per cent of Europeans (about 223 million) were able to follow the news on radio or television in a language different from their mother tongue. Interestingly, 54 per cent (about 274 million) were able to hold a conversation in at least one additional foreign language and 34 per

cent of them (about 93 million) regularly used their first other language to watch films and television and to listen to the radio (TNS Opinion and Social, 2012).

8. As discussed in CEPS & Economisti Associati (2015, see Section 2.2.2), right-holders and service providers may autonomously decide to partition the Internal Market on the grounds of commercial motivations, irrespectively of obstacles that national copyright systems may raise for multi-territorial licenses. As pointed out below (Section 4), whereas territorial licensing practices reflect lawful commercial strategies, competition policy issues may still arise, especially when licensing agreements are based on absolute territoriality exclusivity [cf. C-403/08, Football Association Premier League Ltd and Others v. QC Leisure and Others (2012)].

9. By way of example, Article 2(a) of the InfoSoc Directive does not provide the author of a musical work with a reproduction right that immediately covers all the territory of the EU. The author is in fact entitled to 28 separate national reproduction rights, each of which covers the territory of a single Member State. As a result, a right-holder can separately exercise each of these 28 rights on a strictly territorial basis.

10. Article 4 of the InfoSoc Directive confines the scope of the exhaustion principle to the sole distribution right, which concerns only physical media embodying copyright works. This means that, in the legislative framework created by the InfoSoc Directive, the online delivery of intangible works, which is covered by the exclusive right of making content available to the public (cf. Article 3) should be regarded as a supply of services. The principle according to which exhaustion applies only to the physical dissemination of copyright goods, without extending it to intangible forms of commercial exploitation, such as TV broadcasts, was relied on for the first time in a case concerning a cross-border re-transmission of a film: see C-62/79, *Coditel and others* v. *Ciné Vog Films and others*, [1980] ECR 881. In that case, the Court rejected the idea that the principle of free movement of goods and services could allow a Belgian trans-border cable re-transmission of a copyright movie, broadcast in Germany, without the authorisation of the copyright owner of the film.

11. Interestingly, the interplay between the existing limitation to the scope of the principle of exhaustion and Article 20(2) of the "Services Directive" (Directive 2006/123/EC), which aims at "limiting discriminatory provisions relating to the nationality or place of residence of the recipient", should be further investigated. Yet, audiovisual services are excluded from the scope of application of the Services Directive.

12. It is worth stressing that geo-blocking measures are adopted also in e-commerce of non-copyright goods or services to discriminate among consumers located in different Member States or territories. Nonetheless, whereas for non-copyright goods or services geo-blocking reflects only commercial motivations, for services concerning copyright works this measure may also reflect the territorial scope of copyright and related rights (European Commission, 2016a).

13. This problem is perceived, in particular, in the music sector, where the application of different types of rights (i.e. the reproduction and public performance rights) and the existence of multiple right-holders (i.e. authors or co-authors and music publishers, performers and record producers) oblige online commercial users to conduct numerous parallel negotiations before launching an online music service in a given Member State or in a region of Europe.

14. EU law has already relied upon legal "fictions" in order to limit the scope of copyright's territoriality for certain cross-border businesses. EU directives covering satellite broadcasts and digital TV services incorporate a "country of origin" principle to make such cross-border content exploitations subject to one single national law: see Audiovisual Media Services Directive, Art. 2; see also Directive 2007/65 of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. L 322/27, 18.12.2007; and Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, O.J. L 248, 6.10.1993. Under these directives, to simplify rights clearance and strengthen the freedom to provide services on a multi-territorial basis, the principle of "country of origin" ends up treating cross-border satellite broadcasts and digital TV services as occurring just in the country where the service provider is established.

15. According to Article 5 of the proposed regulation, right holders are entitled to require the service providers to make use of effective means to verify the country of residence. At any rate, authentication tools have to be reasonable and not to go beyond what is necessary to achieve the purpose of the regulation.

16. A loose application of the regulation would instead lead to a significant erosion of the principle of copyright territoriality. If residents of certain countries wishing to access services rendered in another Member State, on the grounds of the uncertainty caused by the regulation, were regarded

as "temporary present" in the EU countries where they live and work at the moment, the accessibility of online services on a cross-border basis might be extended to a much broader population (see Section 2 above).

17. In particular, the Parliament called for a reaffirmation of copyright territoriality as a principle enabling each Member State to preserve the logic of fair remuneration within the framework of its own cultural policy (see paragraph 6 and 7; European Parliament, 2015).
18. See, respectively, Joined cases C-403/08 *Football Association Premier League* v. *QC Leisure and Others* and C-429/08 *Karen Murphy* v. *Media Protection Services Ltd*, Joined cases, judgment of 4 October 2011 (hereinafter "*Premier League*").
19. See Article 4 OF the Comission Regulation" rather than Article 4 or the Commission Regulation.
20. See paragraph 52 (European Commission, 2010).
21. For instance, remuneration schemes might be based on a cost-per-subscriber license fee rather than on a flat fee; this would ensure fair remuneration to right-holders based on the *actual number* of subscribers rather than on the estimated number of subscribers in a given territory. In this respect, the number of subscribers accessing an online service can be accurately calculated.
22. In particular, article 2.5 of Paramount Commitments states "Nothing in the Commitments shall be interpreted as limiting or waiving Paramount's right to engage in licensing or enforcement practices in the EEA that are legally permissible under EU law" (Paramount, 2016).

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