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Abstract

From the perspective of the ‘Digital Single Market’ geo-blocking widely frustrates the increasingly high expectations of European citizens to access culture, services and entertainment on a EU-wide basis. Geo-blocking also makes hugely demanded content such as films and TV series inaccessible in a legitimate way, with a consequential rise in appeal of online piracy. This article identifies the barriers raised by such technical restrictions and explains why the licensing of copyright works on a country-by-country basis may still be justified, on objective grounds. It also argues that the current emphasis on geo-blocking solely in relation to copyright is misleading since copyright is not the only reason why the exploitation of creative works (in particular films) is still rigidly territorial in Europe. On the one hand, the need to adapt and make content accessible to Europe’s culturally and linguistically diverse audiences may justify a separate exploitation on a territorial basis. On the other hand, factors such as a persisting digital divide, a different availability of bandwidth across the EU and a significant difference in the purchasing power of European consumers have a partitioning effect of the Single Market. This article takes the view that a progressive reduction of geo-blocking measures and an effective Europeanization of markets for digital content would urgently require a clarification of the conditions under which territorial restrictions may still be considered as a necessary tool to preserve cultural diversity and the remuneration of opportunities (e.g. advertising) associated with a particular territory. In all other cases EU policy makers should feel free to let the logic of the Digital Single Market progressively prevail.

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The paper draws upon two studies the author carried out with Andrea Renda and Felice Simonelli (Centre for European Policy Studies, CEPS), Giacomo Luchetta and Alberto Bolognini (Economisti Associati) at the request of the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament:

1. “Ex-Post Impact Assessment on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc) Directive and of its related instruments”;
2. “The Internal Market aspects of EU Copyright: The added value and options for improving the functioning and efficiency of the Single Market in the field of copyright”.

These works are part of a larger, 3-part study entitled *Review of the EU Copyright Framework: European Implementation Assessment*, EPRS, European Parliament, Brussels (2015), available at <http://www.europarl.europa.eu/thinktank>.

The opinions expressed in this paper are the sole responsibility of the author.

Keywords

Geo-blocking, copyright, territoriality, Digital Single Market, remuneration, cultural diversity

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Introduction

In its current review of EU copyright rules the European Commission has placed great emphasis on geo-blocking measures, which make it impossible for Internet users located in a given European country to access websites and to subscribe to online services that are offered to users and consumers based in another country, on an exclusive basis.¹ As emphasized by the Commission, the current territoriality of digital markets can also be ensured by commercial and technical practices that end up re-routing the consumer to a local website, where the same company can provide its products and services at different prices.² In a recent policy document entitled ‘A Digital Single Market Strategy for Europe’ the Commission announced that *unjustified* geo-blocking measures should be prevented since they are a significant cause of consumer dissatisfaction and of fragmentation of the Internal Market.³ A public consultation on the EU copyright rules launched by the European Commission in 2013 evidenced that the vast majority of consumers considered geo-localised content services and the related technical restrictions as one of the major copyright-related problems that should be fixed in the near future.⁴ In spite of this, the Commission has surprisingly excluded copyright works from the scope of an on-going public consultation on geo-blocking and announced that restrictions triggered by copyright will be taken into consideration at a later stage.⁵

From a copyright-related perspective the term 'geo-blocking' refers to technical measures that disable access to online content services outside of a geographical area or a Member State where the content owners have licensed the commercial exploitation of their works. Geo-blocking measures are therefore designed to make territorial licensing agreements effective by limiting access to copyright works to a national public or a linguistically homogenous audience located in a given territory.⁶ From the perspective of the ‘Digital Single Market’ and of the related strategy the Commission unveiled in early May 2015, these practices widely frustrate the increasingly high expectations of European citizens to access culture, services and entertainment on a EU-wide basis and, while making hugely demanded content inaccessible in a legitimate way, do not help reduce the appeal of online piracy. The European Parliament also contributed to the debate on geo-blocking, acknowledging the necessity to find adequate solutions for better cross-border accessibility of creative works and arguing that this objective may require different interventions, both regulatory and market-led.⁷

¹ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*”, COM(2015) 192 final, Brussels, 6.05.2015, p. 6 ss.

² *Ibidem*, p. 6.

³ *Ibidem*.

⁴ See European Commission, “Report on the responses to the Public Consultation on the Review of the EU Copyright Rules”, July 2014, available at:

http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf (last visited 6 Nov. 2015).

⁵ See European Commission, “Public consultation on geo-blocking and other geographically based restrictions when shopping and accessing information in the EU”, 24.09.2015, available at <https://ec.europa.eu/digital-agenda/en/news/public-consultation-geo-blocking-and-other-geographically-based-restrictions-when-shopping-and> (last visited 6 Nov. 2015).

⁶ See Madiaga, “Digital Single Market and geo-blocking”, European Parliamentary Research Service, 13.05.2015, available at: <http://epthinktank.eu/2015/05/13/digital-single-market-and-geo-blocking/> (last visited 6 Nov. 2015).

⁷ See European Parliament Resolution of 9 July 2015 on the implementation of 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, 2014/2256(INI), para. 9 and 10, available at <http://europa.europa.edu> (last visited 6 Nov. 2015).

This article explains why the promise of the EU Commission to remove geo-blocking for copyright works in Europe will be very hard (if not impossible) to keep, at least in the near future. Section 2 briefly explains why, from the perspective of content accessibility on a multi-territorial basis, the audiovisual sector raises more problems than the music sector. Section 3 briefly recalls the conditions under which the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’) allows for a derogation of copyright’s principle of territoriality and for the constitutional principle of freedom of movement (and the policy goal of market integration) to prevail over national protection of intellectual property. This section examines briefly whether the principle of exhaustion of intellectual property rights is applicable to the online environment. Section 4 raises a distinction between unjustified and justified geo-blocking. It explains why territoriality of markets is still relevant in sectors, such as the film sector, where licensing copyright works on a country-by-country basis is more profitable than multi-territorial exploitations. It also clarifies the justification for mono-territorial licensing, attributable to the need to make content accessible to Europe’s culturally and linguistically diverse audiences. Section 5 focuses on the legitimacy of territorial licensing agreements from the angle of EU competition law and the freedom to provide EU-wide services and draws briefly on recent cases of enforcement of Article 101 TFEU in the field of TV services. Section 6 identifies a number of future scenarios that might materialize as a result of policy decisions that could be undertaken in order to facilitate the emergence of genuinely multi-territorial or EU-wide exploitations of creative works. In its conclusive remarks Section 7 draws on the main findings of the article, expressing a preference for what seems to be the most suitable and realistic policy solution that would make the logic of the Digital Single Market compatible with the need for copyright owners to preserve their main sources of funding and the remuneration opportunities associated with a particular territory.

Territoriality of markets in the music and audiovisual sectors

In the domain of access to creative content, the European Commission increasingly looks at online restrictions based on territoriality of markets as a result of the reluctance and/or inability of the creative industries to change and adapt their business models to a borderless environment. Policy makers are aware of the fact that, irrespective of geographical restrictions that content creators and online content platforms can impose to their customers, Internet users can easily access all content they like anyway, using virtual private networks or resorting to file sharing networks or illegal streaming sites.⁸ In spite of that, geo-blocking is still a widely pre-dominant practice in Europe, not only in the traditional broadcasting sector and in the context of the on-demand services that broadcasters have progressively extended to the Internet, but also in purely web-based markets for digital content, where the acquisition and exploitation of online rights is still developed on a country-by-country basis.

Even though geo-blocking measures restrict accessibility of all kinds of copyright works, the reasons that make online exploitations of audiovisual works, and in particular films, rigidly territorial are different from those which have affected the digital music sector. By virtue of the fact that they own *all* rights in every EU Member State, owners of copyright films and TV series would already be in a position to treat the EU as a digital single area and to license such rights for pan-European exploitations. In spite of that, content owners still do not find a cross-border licensing of their audiovisual works convenient, with the consequence that they cannot satisfy (at least through the intermediation of licensed content services) a huge and genuinely cross-border consumer demand. For the licensing of online music rights, instead, at least until 2005 multi-territorial licensing was technically impossible because of the structural restrictions created by the exclusivity rights that collective rights management organizations (which jointly represent music authors and publishers)

⁸ A virtual private network (VPN) extends a private network across a shared or public network, such as the Internet. A VPN therefore enables Internet users to bypass territorial restrictions by connecting their computers directly to servers located in countries where the desired copyright works are made available.

granted each other by virtue of mutual representation agreements. On the grounds of these agreements, which included online rights, each collecting society ended up administering all rights in the global music repertoire in its own country of establishment, where it holds a legal or de facto monopoly. In the last decade, a number of EU policy and legislative interventions that culminated with the adoption of a comprehensive directive in 2014 brought a significant change to this scenario and paved the way for the emergence of new multi-territorial licensing schemes whose implementation has increased the accessibility and portability of online music services.⁹ Due to the specificity and complexity of this sector, this article will not take it into further consideration.¹⁰

Copyright's territoriality and the (limited) role of the exhaustion principle

Territoriality is a basic principle of copyright protection at international level¹¹ and has been widely relied on by the CJEU in its case law.¹² Territoriality entails that copyright and the rights related to copyright are conferred and enforced at national level on the basis of the law of the place where protection is claimed (*lex loci protectionis*).¹³ This means that copyright is granted by national laws and is limited – geographically - to the territory of the granting State. Despite the broad harmonisation efforts that led to the adoption of many EU directives in the last two decades, there are still core aspects of copyright that are defined and implemented in different ways at national level.¹⁴ Due to the principle of copyright's territoriality, any aspect of copyright that is not harmonised at the EU level remains, therefore, regulated by domestic law. In a recent resolution the European Parliament called for a reaffirmation of the principle of territoriality, which enables each Member State to protect the principle of fair remuneration for creators within the framework of its own cultural policy.¹⁵ As a result, copyright holders own and are entitled to exercise and enforce 28 different national bundles of rights separately, to such an extent that – without the implementation of a corrective measure – these rights could be used to prevent parallel imports and block a EU-wide circulation of copyright goods on the grounds of Article 36 TFEU (i.e., former Article 30 of the Treaty establishing the European Community, hereinafter 'EC Treaty').

The so-called 'exhaustion' of intellectual property rights was the corrective measure through which, in the pre-digital era, the EU resolved (or at least mitigated) the conflict between national protection of intellectual property and the principle of free movement of goods in the 'Common Market'. The

⁹ See Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, O.J. L 84, 20.3.2014. The directive (which will have to be transposed by Member States by April 2016) creates obligations for Member States seeking to ensure higher standards of efficiency and transparency for collecting societies and forcing these institutions to modernize their licensing activities. Even more importantly, from a Digital Single Market perspective, the directive embodies a chapter setting out rules that – by identifying the technical conditions under which collecting societies are permitted to issue multi-territorial or EU-wide licenses for musical works – aim at facilitating and encouraging the aggregation of repertoires in the process of online rights clearance, with the subsequent creation of 'hubs' and one-stop shops for commercial users.

¹⁰ For an in-depth analysis of the new multi-territorial licensing practices of major music publishers and EU collecting societies from 2005 onwards, see Mazziotti, "New licensing models for online music services in the European Union: from collective to customized management", 34 *Columbia Journal of Law and the Arts*, Volume (2011), pp. 757-808.

¹¹ Cf. Article 5 of the Berne Convention for the Protection of Literary and Artistic Works, last amended on 28 September 1979, available at: http://www.wipo.int/treaties/en/text.jsp?file_id=283698 (last visited 6 Nov. 2015).

¹² See for instance Case C-192/2004, *Lagardère Active Broadcast v. Société pour la Perception de la Remuneration Equitable (SPRE) and Others*, judgment of 14 July 2005.

¹³ See Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), O.J. L 199/40, 31.7.2007, Art. 8 ('Infringement of intellectual property rights').

¹⁴ For instance, the moral rights of authors, the notion of 'author' with regard to cinematographic works and the concept of 'derivative work' are (still) mainly governed by national copyright laws.

¹⁵ See the European Parliament Resolution of 9 July 2015, cit. *supra* note 7, para. 7.

principle of exhaustion was defined and implemented for the first time in *Deutsche Grammophone v. Metro-SB-Grossmärkte*,¹⁶ where the Court of Justice found that, although the EC Treaty (cf. former Article 295) reserved the creation and definition of the subject matter of an intellectual property right (i.e., the existence of the right) to national law, the exercise of such a right should have been made subject to EU law and, in particular, to the core principle of free movement of goods (cf. Article 34 TFEU, formerly Article 28 of the EC Treaty). The ECJ pointed out that, if a copyright-holder exercised his or her exclusive right of distribution by putting a copyright work on the market for the first time, his or her right should have been ‘exhausted’, in a way that the right-holder could no longer use his or her intellectual property right to block parallel imports and restrict EU-wide trade.¹⁷

When it comes to the removal of barriers in the Digital Single Market, one might legitimately wonder whether the exhaustion principle can be extended from the realm of physical goods to that of intangible goods. In principle, if this doctrine were applied in the digital environment, geo-blocking measures could instantaneously be outlawed and be considered as the equivalents of unlawful restrictions placed on parallel imports in the circulation of physical goods. At an early stage, before the adoption of copyright directives that aimed at regulating use of information goods or creative works in digital formats, the ECJ had made it clear in a case concerning a cross-border re-transmission of a film - *Coditel and Others v. Ciné Vog Films and Others*¹⁸ - that the principle of EU-wide exhaustion applied only to the physical dissemination of copyrighted goods, without extending it to intangible forms of commercial exploitation such as TV broadcasts. 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 copyrighted movie, broadcast in Germany, without the authorisation of the copyright owner of the film.

With the advent of the Internet and, more broadly, of digital networks, the so-called ‘Information Society’ Directive codified the conclusion of *Coditel* and explicitly restricted the scope of the exhaustion principle to the sole distribution right, which concerns just physical media.¹⁹ A complementary legislative measure, which was taken also to implement Article 8 of the 1996 WIPO Copyright Treaty, was the extension of the right of communication to the public under Article 3 of the Information Society Directive through the creation of a specific right to make copyright works available through digital networks.²⁰

Despite the clarity of the provisions of the InfoSoc Directive that confine the applicability of exhaustion (just) to physical media, a recent judgment of the CJEU raised confusion on the applicability of this principle to the online distribution of computer programs.²¹ According to the CJEU, if customers, having purchased a computer program under a license granted for an *unlimited*

¹⁶ See Case C-78/70, *Deutsche Grammophone v. Metro-SB-Grossmärkte* [1971] ECR 487. In this case a German manufacturer of sound recordings sought to enforce its copyright in Germany in order to block the import by a third party of copies of the records manufactured and sold in France by its local subsidiary.

¹⁷ After having been coined and implemented by the European Court of Justice, the principle of exhaustion progressively found legislative recognition in Art. 4(c) of the 1991 Software Directive, which concerns the right of distribution: see now Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, O.J. L 111, 5.5.2009 (which replaced Directive 91/250/EEC, hereinafter ‘Software Directive’). A similar provision is embodied in Art. 5(c) of the 1996 Database Directive: see Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J. L 077, 27.03.1996.

¹⁸ Case C-62/79, *Coditel and others v. Ciné Vog Films and others*, [1980] ECR 881.

¹⁹ Cf. Art. 4, 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 O.J. L 167, 22.6.2001 (hereinafter ‘InfoSoc Directive’).

²⁰ See WIPO Copyright Treaty, signed in Geneva on the 20th of December 1996 (a special agreement under the Berne Convention which deals with the protection of works and of the rights of their authors in the digital environment), available at <http://www.wipo.int/wipolex/en/details.jsp?id=12740> (last visited 6 Nov. 2015).

²¹ Case C-128/11 *UsedSoft GmbH v. Oracle International Corp.*, judgment of 3 July 2012, hereinafter ‘*UsedSoft*’.

period of time, download a copy of the program, the contract in question should be regarded as a *sale* (and not as a service supply) in a way that the copyright owner can no longer control and block a second-hand sale of those copies. This means that, under the aforementioned conditions, third parties are entitled to acquire software licenses from the original users and to sell them while transferring also the related right to download updated copies of the computer program to their own customers without infringing the right of distribution of the copyright owner. In *UsedSoft* the CJEU clarified that, for the distribution right to be exhausted, the first acquirer should delete or make the original copy of the computer program downloaded onto his/her computer unusable at the time of resale.²²

Even though the *UsedSoft* judgment helps to point out a relevant source of inconsistency under EU copyright rules, this judgment is not expected to impact negatively on the online distribution of creative works that do not fall (or do not fall entirely: let us think of videogames or mobile phone applications) under the definition of ‘computer program’. The main reason why the CJEU found the exhaustion principle applicable in that particular case is that, unlike the InfoSoc Directive, the Software Directive provides the owner of a computer program with a mere right of distribution of their works that, according to the CJEU, applies in both offline and online environments in the same way. Due to its enactment at a time (i.e., 1991) when the online environment did not exist and distribution occurred exclusively through physical formats, this sector specific directive does not oblige Member States to grant a right of making computer programs available on-line, as Article 3 of the InfoSoc Directive provides with regard to the generality of copyright works. In a rather formalistic way, the CJEU stressed that, to avoid a different a legal treatment that was not reflected in the wording of the Software Directive, the limit posed by exhaustion to the distribution right should be equally applied irrespectively of whether computer programs are distributed through tangible or intangible formats. In that specific case, this conclusion meant that the copyright owner could not legitimately control and restrict second-hand sales of her programs, to the detriment of a re-seller and its customers.

In spite of *Usedsoft*, there are several reasons that make the applicability of exhaustion to online distribution of content unlikely. The fact that the European Commission intervened in *UsedSoft* to endorse the arguments of Oracle and to claim (unsuccessfully) the non-applicability of the exhaustion principle in the online environment shows that the Commission is aware of the inconsistencies and contradiction which exist between the EU Software Directive and the InfoSoc Directive. This means that, to fix the problem, the Commission might consider proposing a legislative amendment in order to update the Software Directive in the near future. As regards the immediate effects of *UsedSoft*, it should also be considered that the impact of this judgment was somehow ‘exhausted’ in a relatively short time because of the prompt reaction of major software developers and suppliers, who re-drafted the existing licenses with their customers in order to make it sure that their contractual relationships could be regarded as services and not as sales, rendering *Usedsoft* inapplicable. Last but not least, as acknowledged by the CJEU, the application of the exhaustion principle is conceivable, in the abstract, only with regard to online deliveries that grant users the permission to make permanent copies of copyright works (i.e. downloads), on condition that the original copy has been deleted or made unusable by the first buyer. Without meeting such a factual requirement, which is very difficult if not impossible to meet and prove outside of ‘wall gardens’ created by proprietary content platforms such as Apple’s iTunes or Amazon’s, the possibility for third parties to freely resell second-hand digital works would deprive the right to make copyright works available to the public of much of its substance.

²² See *UsedSoft*, cited *supra* note 21, para. 78-79. In this judgment the CJEU, acknowledges that ascertaining whether a sold copy has been made unusable may prove to be difficult. Still, the Court emphasised that copyright owners who distribute computer programmes through physical media (e.g. CD-ROM or DVD) have to face the same problem, since it is only with great difficulty that they can make sure the original acquirer has not made copies of the program that she continues to use after having sold her material medium. The CJEU concluded that, to solve that problem and to make copies traceable, the software owner is allowed to use technological protection measures such as product keys for the distribution of both tangible and intangible formats.

In conclusion, it is very unlikely that the exhaustion doctrine may provide a limit to the absolute territorial exclusivity stemming from licensing of digital copyright works on a purely national basis and pave the way for a ban of geo-blocking measures. The exception to the principle of territoriality in the exercise of copyright, which the exhaustion doctrine entails, is likely to remain confined to the realm of physical formats also in the digital era.

Justified and unjustified geo-blocking measures

Geo-blocking measures raise two kinds of obstacles to the formation of pan-European markets.²³ On the one hand, such restrictions may easily limit cross-border portability and accessibility of copyright works for short-term migrants and travellers who have subscribed to online content services in their country of residence or domicile and are not able to access the same service when moving to another Member State.²⁴ On the other hand, geo-blocking can create trade barriers by restricting some EU consumers from accessing works that, instead, are available to other EU consumers or obliging them to access works just in their country of residence or location, even though the same services or products are available in other Member States.²⁵ A well-known example of such barriers is given by the impossibility for consumers in certain EU countries of subscribing to Netflix, an online movie service that has been available for years to consumers located in the UK and Ireland.²⁶ Another example is the obligation of Apple's customers to buy content just from their own national iTunes stores while being restricted from accessing the different contents and repertoires made available on Apple's stores in other countries.²⁷

The Digital Single Market strategy of the European Commission requires the progressive dismantlement of the aforementioned barriers and urges EU policy makers to ascertain the lawfulness of licensing practices that aim at partitioning online markets along national borders (see Sect. 5 below). As briefly recalled above, the fact that copyright consists of a bundle of exclusive rights granted under national copyright laws inevitably encourages an exploitation and enforcement of such rights on a territorial basis. As things stand, therefore, forcing copyright holders to license their rights on a pan-European basis would negatively impact on freedom of contract, which is a constitutional

²³ See CEPS & Economisti Associati, "Ex-Post Impact Assessment on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc) Directive and of its related instruments" in Reynolds (ed), *Review of the EU Copyright Framework: European Implementation Assessment*, EPRS, European Parliament, Brussels (2015), available at <http://www.europarl.europa.eu/thinktank>, at 109-110.

²⁴ See Plum Consulting, *The economic potential of cross-border pay-to-view and listen audiovisual media services*, Executive Summary for the European Commission (2012), available at http://ec.europa.eu/internal_market/media/docs/elecipay/plum_tns_summary_en.pdf (last visited 6 Nov. 2015).

²⁵ See Plum Consulting, *The economic potential of cross-border pay-to-view*, op. cit. *supra* note 24.

²⁶ For instance, in a big country like Italy Netflix's services became available just in October 2015.

²⁷ Apple's iTunes Music Store, in light of its operation in almost all EU countries, is probably the best example to measure the cross-availability, sales and (different) prices of digital music and films in Europe. Empirical evidence on the accessibility of content on a cross-border basis within Apple's content platform shows that, because of the geographical restrictions implemented by Apple, less than a half of the all songs and music albums are available in all of the 27 country music stores: see Gomez & Martens, *Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Film*, European Commission, Joint Research Centre, JRC Technical Reports (2015). Moreover, the study found that – due to commercial strategies that draw on the major drivers of content demand (i.e., language and home market bias) – music availability is somewhere between 73 and 82 per cent of what it could be in an "open" Digital Single Market, where all music contents would be available in all Member States. The situation is worse for digital movies, whose overall availability is estimated at 40 per cent.

principle enshrined in the Charter of Fundamental Rights of the EU and should be treated accordingly.²⁸

To strike a balance between the preservation of the freedom of contract of copyright holders and the logic of the Digital Single Market, one has to understand whether or not geo-blocking and the territorial licences these measure seek to implement are justified by the pursuit of a policy goal. As witnessed by industry representatives in the context of a multi-stakeholder dialogue on EU copyright rules, the online supply of creative works (and of other types of protected content such as sporting events) on a rigidly territorial basis can be the consequence of autonomous commercial decisions of right-holders and commercial users aimed at adapting their offerings to culturally and linguistically diverse audiences.²⁹ Europe's strong linguistic diversity requires local adaptations of internationally appealing films that subtitles, dubbing and other forms of content versioning make possible. Dubbing, in particular, is still indispensable for film releases in four of the five largest European markets (i.e. France, Germany, Italy and Spain).³⁰ Moreover, national business models give copyright holders and commercial users the opportunity to price discriminate in order to enable consumers having a very different purchasing power in the various Member States to buy their products or subscribe to their services. This means that mono-territorial licensing schemes and the implementation of geo-blocking measures can often be justified on the basis of commercial motivations such as a lack of demand for EU-wide licenses by commercial users who still find the EU an excessively heterogeneous area to be treated, commercially, as a single market.

Another factor unrelated to copyright that must be taken into consideration in order to understand whether the territorial exploitation of audiovisual works may give rise to a case of justified geo-blocking is the necessity of content producers to protect the sources of funding for their creations.³¹ Film production entails a complex fund-raising activity in both the studio system developed by the US film majors and in the European film sector, which is significantly subsidised by public bodies at both national and EU level. The reason why territoriality matters for film majors is that it allows these content producers to gather a substantive part of a film budget by pre-selling exclusive rights to sales agents, distributors, or television broadcasters by territory, by linguistic version and – sometimes - on a multi-territorial basis. This business is based on a strong cross-border penetration rate of US movies, which have a market share higher than 50% of all cinema admissions all over Europe.³² Pre-production arrangements aim at placing a film in the best competitive position to cover costs (i.e., pre-sales occur in exchange for upfront payments) and gain profits. To do so, the Hollywood studio system has traditionally relied on the creation of windowed releases through subsequent exploitations of movies via DVDs, pay TVs and free-to-air TV broadcasts after release in cinemas.³³ For European film productions, instead, territoriality is not an asset *per se*; it is rather an intrinsic dimension and

²⁸ See *A Digital Agenda for Europe*, op. cit. *supra* note 1; see also the European Parliament Resolution of 9 July 2015 on the implementation of Directive 2001/29/EC, op. cit. *supra* note 7, para. 13 and 29.

²⁹ See Mazziotti, *Copyright in the EU Digital Single Market*, CEPS Report, Brussels (2013), available at <http://www.ceps.eu/publications/copyright-eu-digital-single-market> (last visited on 6 Nov. 2015).

³⁰ See CEPS & Economisti Associati, “Ex-Post Impact Assessment on the implementation, application and effects of Directive 2001/29/EC [...]”, op. cit. *supra* note 23, at 114-115.

³¹ See European Parliament Resolution of 9 July 2015 on the implementation of Directive 2001/29/EC, op. cit. *supra* note 7, para. 13, where it is pointed out that ‘...the ability, under the principle of freedom of contract, to select the extent of territorial coverage and the type of distribution platform encourages investment in film and television content and promotes cultural diversity [...]’.

³² See CEPS & Economisti Associati, “Ex-Post Impact Assessment on the implementation, application and effects of Directive 2001/29/EC [...]”, op. cit. *supra* note 23, at 114-115.

³³ As acknowledged by the film majors, windows are currently shrinking in order to meet consumer expectations and different release systems (e.g., premium on-demand services) might emerge soon as a result of the progressive involvement of prominent online film service providers (e.g. Netflix) in the context of pre-production arrangements: see Mazziotti, *Copyright in the EU Digital Single Market*, op. cit. *supra* note 29.

condition of exploitation associated to the non-international appeal of most of European films and of their subject. In addition to that, administrative regulations that apply to funding or co-production agreements with public sector institutions (e.g. public broadcasters) do not facilitate cross-border licensing for online exploitations. From a regulatory angle, it should be recalled that, unlike US movies, the European film sector has widely benefited from subsidies granted at national level by governments and other public bodies and, at European level, through the Commission's 'Creative Europe' program.

Finally, it should be considered that territoriality of content production is also indirectly encouraged by EU media policy, in particular by Article 13(1) of Directive 2010/13/EU.³⁴ This provision requires Member States to ensure that media service providers - in their respective jurisdictions - 'promote, where practicable, and by appropriate means, the production of and access to European works'. In some Member States, such obligation has been extended to providers of video-on-demand services.³⁵ These obligations aim at preserving the cultural specificities of the various markets in Europe and at supporting creativity across Europe by making audiovisual productions targeted at a diverse national public economically sustainable.³⁶ At the same time, the bounds of these works to national contexts (e.g. history, politics, popular characters, stories, humour and so forth) make them appealing just for a limited part of the European population in a way that multi-territorial licences for such works might never become commercial convenient.³⁷

Is territorial licensing legitimate under EU law?

The aforementioned remarks suggest that copyright's territoriality and the mono-territory licensing schemes that have been developed so far are somehow justified by reasons that are not related to copyright's national dimension. In the same way as in the videogames or in the sport industry, film copyright poses no significant obstacle to pan-European licensing because of the concentration of all rights granted at national level in the hands of film producers. Despite such a centralisation of rights, territorial licensing schemes and on-demand services relying on geo-blocking measures are still the prevalent and probably most profitable way of exploiting copyright in this sector.³⁸

In consideration of the policy objective of market integration set out by the European Commission, the lawfulness of licensing agreement which partition the Internal Market and grant exclusivity – for all the above-mentioned reasons - on a country by country basis has been increasingly scrutinised. On the

³⁴ See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (hereinafter 'Audiovisual Media Services Directive') (codified version), O.J. L 95/1, 15.4.2010, replacing (with no substantive changes) Directive 2007/65.

³⁵ As reported by KEA and MINES Paris Tech., *Multi-Territory Licensing of Audiovisual Works in the European Union*, Final Report prepared for the European Commission, DG Information Society and Media (2010), this obligation exists in Poland, Germany, Slovakia and Romania. The study is available at <http://www.keanet.eu/docs/mtl%20-%20full%20report%20en.pdf> (last visited on 6 Nov. 2015).

³⁶ Cf. the European Parliament Resolution of 9 July 2015 on the implementation of Directive 2001/29/EC, *op. cit. supra* note 7, para. 13.

³⁷ Available data show that, in 2013, four viewers of a European film out of five were based in the same country where the film was produced. Moreover, cross-border penetration of EU films is lower than 10% of the overall cinema admissions in the majority of national markets. As emphasized by CEPS & Economisti Associati, "Ex-Post Impact Assessment on the implementation, application and effects of Directive 2001/29/EC [...]", *op. cit. supra* note 23, at 114, the same situation occurs in the broadcasting sector where multi-national companies such as MTV created country-specific TV channels in order to adapt contents to their diverse audiences.

³⁸ See European Commission, "Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market", COM(2011)427final, Brussels, 13.7.2011, available at http://ec.europa.eu/internal_market/consultations/docs/2011/audiovisual/green_paper_COM2011_427_en.pdf (last visited on 6 Nov. 2015).

grounds of the existing primary and secondary laws of the European Union, one can reasonably assume that competition law provisions and the freedom to provide cross-border services embodied into the so-called 2006 ‘Services Directive’ are the fronts over which the legality of territorial licensing will be challenged.

As far as the tension with competition law is concerned, after having started a formal antitrust investigation in January 2014,³⁹ the European Commission sent a formal statement of objections to six US film studios and Sky UK for a supposed breach of Article 101 TFEU in July 2015.⁴⁰ The Commission, acting as the EU’s antitrust authority, took a preliminary view that the contracts that the six studios bilaterally concluded with Sky prevented the broadcaster from enabling consumers located outside of the UK and Ireland to access, via satellite or online, pay-tv services available in that geographical area. The Statement of Objections takes the unprecedented view that the absolute territorial exclusivity stemming from the above-mentioned licensing agreements is an unlawful restriction of competition in so far as it extends to unsolicited requests for Sky’s pay-tv services by consumers located *outside* of the territory covered by Sky’s license. The unsolicited requests (or ‘passive sales’) that the Commission is challenging through this investigation occur whenever customers residing in a certain Member State seek to buy a product or to access a service that is not actively promoted or advertised in that country. If these requests were excluded in the near future from the scope of territorial exclusivity, as a result of the enforcement of Article 101 TFEU, online content deliveries based on national exploitations, especially in the audio-visual and sport sectors, might easily end up being eroded, with a subsequent re-definition and re-structuring of such markets. In web-based environments, requests coming from consumers located in a geographical area that is not the one where the service supplier advertises and promotes its offerings (and gains a license to do so from the copyright holders) are likely to have a broader impact on the overall market, from a quantitative perspective, than the passive sales that occurred in the physical world. As pointed out in the relevant literature, in online markets the role of physical distance between consumers and the place where digital content is made available to the public has sharply diminished.⁴¹ Distance can be interpreted as a measure of cultural difference between countries and as preference for cultural proximity.⁴² This means that, unlike the pre-digital world, where products and services would hardly have been requested in a country without an adequate commercial promotion or advertising strategy (e.g. pursued through tangible means), the online environment might easily make digital content services successful irrespectively of the country where the content supplier is located, provided that the distributed content is accessible (also from a linguistic point of view) and appealing to multiple (i.e., diverse) audiences. If the above-mentioned antitrust initiative were successful, the liberalisation of online passive sales might become the Trojan horse through which the Commission would reform copyright laws and eventually revisit its principle of territoriality.⁴³

In the relevant case law a judgment of the CJEU has shown that the application of EU competition law in digital settings might trigger unexpected consequences for territorial licensing in commercially

³⁹ See European Commission, Press Release “Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services”, 13.1.2014, available at: http://europa.eu/rapid/press-release_IP-14-15_en.htm (last visited on 6 Nov. 2015).

⁴⁰ See European Commission, Press Release “Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland”, Brussels, 23.7.2015, available at http://europa.eu/rapid/press-release_IP-15-5432_en.htm (last visited on 6 Nov. 2015).

⁴¹ See Gomez and Martens, *Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Film*, op. cit. *supra* note 27, p. 12.

⁴² *Ibidem*.

⁴³ See Ibañez Colomo, *Copyright reform through competition law? The Commission’s statement of objections in the pay TV investigation*, Chillin’ Competition, 24.7.2015, available at <http://chillingcompetition.com> (last visited on 6 Nov. 2015), who takes a similar view.

significant sectors such as the market for sporting events.⁴⁴ In *Premier League* the CJEU was asked to assess the compatibility with EU law of an agreement under which a Greek broadcaster had acquired exclusive rights in the transmission of football matches while undertaking the promise to prevent the public from receiving the broadcasts outside of Greece. In this business sector, in the same way as in the film sector, exclusivity on a territorial basis is a contractual condition of exploitation that content owners have traditionally agreed upon in their licensing activities in order to protect the remuneration opportunities of TV broadcasters in a given country. In *Premier League* the CJEU was *not* asked to evaluate whether territorial exclusivity for the broadcasting of sporting events was lawful under the TFEU. Rather, the CJEU focused on whether the content licensor could legitimately restrict the owners of restaurants and bars located in the UK from purchasing cards and decoding devices which allowed them to receive satellite channel broadcasts of Premier League's football matches from a Greek broadcaster (who had the permission to exploit those football matches just in Greece). The answer of the Court to this question was negative. It was held on the basis of Article 101 TFEU that the above-mentioned agreement unlawfully restricted the cross-border supply of the decoding devices that gave access to the protected content. While reaching its conclusion the Court clearly raised a distinction between individual (i.e. private) and profit-making uses of satellite broadcasts, arguing that, in that specific case, the pub owners in the UK had made an unauthorised commercial use of the Greek broadcasts aimed at reaching a new public and attracting more customers. This means that the *Premier League* judgment did not deal with consumer sales, as the recent antitrust initiative of the Commission against Sky UK and the Hollywood studios does.

On a distinct front, from a consumer perspective, a basic tension exists between territorial licensing arrangements and the 'Services Directive',⁴⁵ whose Article 20(2) requires EU Member States to 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'. It seems evident that the compatibility of territorial business models with the principle of non-discrimination of access to services on national and/or territorial grounds deserves more attention.

A very important feature of the provisions of Article 101 TFEU and Article 20(2) of the Services Directive is that both leave room for exceptions to their own prescriptions. Article 101(3) makes it clear that business deals having partitioning effects on the Internal Market could be authorized or exempted from the main prohibition to cartel if they pursue efficiency-related goals and are beneficial to consumers.⁴⁶ In a similar way, the Services Directive does not preclude the possibility of providing for differences in the conditions of access to a given service if those differences '... are directly justified by objective criteria'. These provisions clearly indicate that restrictions to competition in the Internal Market and a cross-border accessibility of services can be justified – on the basis of objective criteria – in order to pursue alternative goals. As suggested more in depth below, one of the policy goals for which territorial restrictions could continue to be permitted - as a result of a new set of guidelines or a list of exemptions to adopted by law - is that of supporting cultural creations targeted at national audiences and having no (or little) international appeal.

⁴⁴ 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*').

⁴⁵ See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. L 376, 27.12.2006 (hereinafter '*Services Directive*').

⁴⁶ Cf. Article 101(3) TFEU, which provides that, under certain conditions, the main prohibition embodied under Article 101(1) may, however, be declared inapplicable in case of agreements or concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

Fostering pan-European licensing of audiovisual works while preserving sustainability of content production and cultural diversity: how?

It seems evident that uncertainties about the conditions under which copyright works can be legitimately licensed in the online environment will not help a Digital Single Market form and develop. To keep their promises about making copyright works more accessible on a pan-European basis, EU policy makers might consider clarifying the circumstances under which geo-blocking measures can be implemented or used to improve market conditions. Such a clarification would also contribute to a better comprehension of whether and how geo-blocking, under certain conditions, may benefit content creators, online intermediaries and consumers. To solve the problems created by geo-blocking, it is worth bearing in mind its positive effects. For instance, territorial restrictions ensured by geo-blocking are designed to protect online content suppliers and consumers from infringing copyright by accessing unauthorized works. Moreover, geo-blocking helps right-holders and content suppliers to price discriminate in order to meet a highly diverse consumer demand in the EU. For example, if access to films and TV series were provided on a pan-European basis, with a subsequent removal of all forms of geo-blocking in Europe, would Romanian or Bulgarian viewers be given an incentive to subscribe to lawful online content services? Would they be willing to pay higher fees, which might be closer to the price that German, British or Scandinavian consumers currently pay for the same offerings? Would this change discourage or foster online piracy? If online content suppliers had to set out a single, optimal price for all EU audiences, the economic value of digital content would decrease and, yet, a vast number of consumers with a low purchasing power would find these offerings too pricy for their budget.

There are a number of policy options and related scenarios that would be worth exploring in order to facilitate and improve the conditions of cross-border access to creative works, especially in the audiovisual sector, where territoriality of exploitations – as it has been argued - still has sound justifications.⁴⁷

a) As shown by CJEU judgments like *Premier League* and by the rationale of existing provisions under the TFEU and secondary legislation such as the Services Directive, the present situation might easily evolve even in the absence of further policy interventions at EU level. As evidenced in the relevant literature, CJEU rulings in the field of copyright have gone beyond mere interpretation and clarification of existing laws.⁴⁸ The CJEU has progressively set out new standards and EU-wide concepts whose definition was made necessary, according to the Court, on the grounds of the harmonisation goals of all EU copyright directives. If EU policy and lawmakers decided not to undertake any legislative action, the activity of the CJEU would continue anyway, at a pace that has proven to be increasingly fast and with largely unpredictable results.⁴⁹

In addition to that, even in the absence of a specific copyright policy action, other factors (which have nothing to do with copyright) might influence and facilitate the formation of multi-territorial or pan-European digital markets. From a legal point of view, for instance, a stronger and more effective harmonisation of contract, consumer and tax laws applicable in the context of online media services could certainly help pursue this goal. From a technological and societal perspective,

⁴⁷ These policy options are also spelt out in CEPS & Economisti Associati, “The Internal Market aspects of EU Copyright: The added value and options for improving the functioning and efficiency of the Single Market in the field of copyright”, in Reynolds (ed), *Review of the EU copyright framework*, op. cit. *supra* note 23, at 288-297.

⁴⁸ See, for instance, Griffiths, “The Role of the Court of Justice in the Development of European Union Copyright Law”, in Stamatoudi & Torremans (eds), *EU Copyright Law. A Commentary*, Edward Elgar, Cheltenham (2014).

⁴⁹ This also entails the consideration of past rulings of the CJEU on crucial aspects of copyright, such as originality of creative works, the scope of the exclusive rights of reproduction, communication to the public and distribution and copyright exceptions and limitations; the need to secure the enforcement of constitutional principles enshrined in the Charter of Fundamental Rights (especially when it comes to copyright enforcement measures) and in the TFEU: see CEPS & Economisti Associati, “The Internal Market aspects of EU Copyright”, op. cit. *supra* note 47, p. 288-289.

moreover, policies aimed at ensuring a wider access to broadband services in all EU countries, the achievement of higher degrees of computer literacy across the EU, a broader diffusion of electronic payment services and a substantive decrease of online piracy could make market conditions more homogenous than now. It is also evident that an increasing diffusion of Virtual Private Networks (VPNs), which enable Internet users to easily bypass geo-blocking measures and make such measures even more ineffective, shows the emergence of a multinational audience that could foster and make pan-European advertisement-based services sustainable.

- b) An alternative solution for the purpose to foster the emergence of digital single markets could be a soft law initiative undertaken by EU institutions, especially the European Commission, with the aim to define better/common standards in the implementation of existing EU laws. A Commission recommendation could provide guidance on the above-mentioned interplay between copyright law and EU competition law in order to resolve or mitigate the conflict between exploitation of intellectual property rights at national level and the principles of free movement and of freedom to provide cross-border services. Such a recommendation could incorporate and define best licensing practices that would help copyright holders, especially in the audiovisual sector, to identify *ex ante* the conditions under which they could legitimately continue to exploit their exclusive rights on a mono-territorial basis without infringing Article 101 TFEU and the principle of free movement. Even though the non-legislative initiatives the Commission has developed in the area of copyright management (e.g., on collective management of online music rights) did not result in significant improvements, they might be useful enough to show that a proper legislative intervention is needed. This is what happened with the 2005 Commission Recommendation on multi-territorial licenses of musical works, which failed to achieve the objective of increasing the diffusion of pan-European licenses and persuaded the Commission to start a legislative action that resulted in Directive 2014/26/EU.⁵⁰
- c) A new legislative measure that clarified *ex ante* what territorial restrictions should be regarded as compatible with the Internal Market could be a more effective alternative to the above-mentioned soft law initiative. Such a measure would look like, in terms of objectives and structure, the existing block exemption regulations, which complement Article 101(3) TFEU when it comes to vertical agreements and concerted practices and, in the field of intellectual property rights, technology transfer agreements.⁵¹
- d) If EU lawmakers opted for a broader reform of copyright law in order to ensure more consistency and uniformity of today's legislative framework, especially for cross-border exploitations of digital works, the issue of territorial exclusivity might be tackled through the implementation of a principle of 'country of origin' (or 'country of emission') for online transmissions of audiovisual works.⁵² Such a remedy would extend (and adapt to online content deliveries) a rule that has already been implemented under EU law for the determination of the applicable law to satellite

⁵⁰ See European Commission, "Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005", O.J. L 276, 21.10.2005.

⁵¹ See Commission Regulation (EU) N. 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, O.J. L 102/1, 23.4.2010; and Commission Regulation (EU) N. 316/2014 of 21 March 2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements, O.J. L 93/17, 28.3.2014 (which replaced Commission Regulation (EC) N. 772/2014, expired on 30 April 2014). The advantages of an *ex ante* approach with regard to unjustified territorial limitations and the possibility of regulating online copyright licences with an instrument similar to the technology transfer block exemption regulation are pointed out by Strowel, "Towards a European Copyright Law: Four Issues to Consider" in Stamatoudi & Torremans (eds), *EU Copyright Law. A Commentary*, op. cit. *supra* note 48, p. 1134.

⁵² This solution was already considered in European Commission, "Green Paper on the Online Distribution of Audiovisual Works in the European Union", op. cit. *supra* note 38, pp. 11-14.

broadcasts and digital TV services.⁵³ The purpose of such a measure would be that of making online transmissions of audiovisual works subject to one single national law, i.e., the law of the country where the service provider is established or where the content is materially uploaded. At the moment, in accordance with a criterion that the CJEU has recently clarified and relied upon to determine the law applicable to online infringements, online transmissions should be deemed to be subject to the laws of all EU countries where the content transmission is accessible.⁵⁴ In order to be applied fairly, such a provision should not deprive content owners and commercial users of the possibility of defining the territorial scope of their agreements in a way that allows them to calculate the licence fees on the basis of the audiences and territories effectively reached by online deliveries. The fact that the European Commission recently launched public consultations for the review of both the 1993 Satellite and Cable Directive and the 2010 Audiovisual Media Services Directive suggests that the extension of the principle of country of origin for the determination of the applicable law to the realm of online content deliveries might be taken into consideration in the near future.⁵⁵

- e) The most ambitious solution, which is also the most demanding and politically unrealistic, at least for now, is the creation of a digital single area for pan-European exploitations of audiovisual works and the related ban of geo-blocking measures. This creation of such area might be ensured by the availability of genuinely EU-wide copyright titles. The creation of a new type of copyright title would entail either (i) a proper unification of national laws through the adoption of a uniformly applicable regulation across the EU or, alternatively, (ii) the setup of an optional system of EU-wide copyright protection that would become applicable to creative works registered at a EU specialised office or agency (e.g. the Office for the Harmonisation of the Internal Market) by copyright holders wishing to exploit and to enforce their rights on an genuinely pan-European basis.⁵⁶

(i) The first solution, which would be based on the provision of the TFEU allowing for the creation of pan-European intellectual property entitlements (Article 118), would entail a complete unification of copyright law with a subsequent replacement of national laws in this

⁵³ 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 (hereinafter ‘Satellite and Cable Directive’), O.J. L 248, 6.10.1993.

⁵⁴ To determine the law applicable to torts committed online, the CJEU recently applied the so-called ‘accessibility’ criterion, according to which an infringement action can be validly brought before the courts of the place where the damage occurs or where the act causing such damage takes place: see Case C-170/12, *Peter Pinckney v. KDG Mediatech AG*, judgment of 3 October 2013, para. 42-43. It is evident that the criterion of accessibility in the domain of digital copyright paves the way for a multiplication of courts, on the assumption that a copyright enforcement action can be brought in each Member State where the infringed work can be accessed, in accordance with the applicable national rules and in relation to the damages occurred in each single jurisdiction: see Case C-387/12, *Hi Hotel v. Uwe Spoering*, judgment of 3 April 2014, para. 35 and 38-39 (where the CJEU held that the courts of the Member States where the damage occurs are ‘best placed, first, to ascertain whether the rights of copyright guaranteed by the Member State concerned have in fact been infringed and, secondly, to determine the nature of the damage caused’).

⁵⁵ European Commission, “Consultation on the review of EU Satellite and Cable Directive”, 24.08.2015, available at <https://ec.europa.eu/digital-agenda/en/news/consultation-review-eu-satellite-and-cable-directive>; and European Commission, “Public consultation on Directive 2010/13/EU on Audio-Visual Media Services (AVMSD) – A media framework for the 21st century”, 6.7.2015, available at <http://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st> (last visited on 6 Nov. 2015).

⁵⁶ See CEPS & Economisti Associati, “The Internal Market aspects of EU copyright”, op. cit. *supra* note 47, p. 295-297.

field.⁵⁷ A replacement would be a necessary outcome of such a reform since - unlike patents, trademarks and industrial designs - copyright subsists independently of examination and/or registration and must continue to subsist by mere operation of the law because of a ‘no formalities’ principle laid down under international copyright law.⁵⁸ This means that for copyright a co-existence of EU-wide (i.e., unitary) and national titles would be difficult to conceive since it would be hard or impossible to understand what layer of protection applies to a single work, in the absence of a registration or an explicit choice by the copyright holder. What makes this policy intervention rather unrealistic for now is that it would require the EU to dismantle national copyright systems, with a subsequent loss for the Member States of the prerogatives they still enjoy under the current system of EU copyright directives and territorial protection. Such a new EU regulation would need to deal with *all* aspects of copyright law, including the ones that are not harmonised yet and which would certainly raise contrasts between common law and civil law countries.

- (ii) A second and slightly more realistic solution might be based on the creation of a EU-wide layer of protection that copyright holders would have access to on an optional basis (i.e., through a registration of their works). This system might become appealing for those who wished to effectively exploit copyright on a pan-European basis and take advantage of unified and simplified rules, including access to EU-wide enforcement measures. An optional registration system for works being exploited on a multi-territorial or EU-wide basis might prove to be compatible with the aforementioned ‘no formalities’ principle under international copyright law (cf. Article 5 Berne Convention) insofar as registration of copyright works were shaped not as a formality for the protection to subsist, but as a procedural step for the copyright holder to choose the desired layer of protection.

Conclusion

As this article has sought to emphasize, geo-blocking in Europe is not a cause for concern by itself. Technical restrictions of access to copyright works, especially in a sector, like the film sector, where territoriality is a key factor for commercial exploitation, might still be necessary to protect sustainability of content production and the various forms of adaptation and versioning of creative content to local and culturally diverse audience. Even though EU copyright directives have been enacted mostly for purposes of market integration, such integration is expected to occur without depriving authors, content producers and the whole creative industry of the support that their creative endeavor and professional content creations deserve. While thinking of copyright’s Europeanization, lawmakers should always bear in mind that, institutionally, they are compelled to take the impact of new policies and legislative measures on Europe’s cultural and linguistic diversity into account (cf. Article 167 TFEU). This means that, for the sake of cultural diversity, an integration of markets for creative content might never become a reality in Europe, at least not fully. In addition to that, the transition towards a unification of national copyright systems at EU level and the process of creation of genuinely pan-European entitlements might be very long. The aforementioned scenarios show that an effective Europeanization of the conditions of legitimate online access to culture and entertainment and the subsequent removal of geo-blockings might happen in different ways and at different speeds. It would be surprising if, after having repeatedly announced measures against geo-blocking at the beginning of its mandate, the European Commission headed by Jean-Claude Juncker decided not to

⁵⁷ See Ullrich, “Harmony and unity of European intellectual property protection”, in Bently & Vaver (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*, Cambridge University Press, Cambridge (2004), at p. 20.

⁵⁸ See Berne Convention for the Protection of Literary and Artistic Works, Art. 5(2).

undertake any action in this field and to wait for another groundbreaking judgment of the CJEU. Among the above-mentioned policy interventions, for the reasons that this article has tried to summarize, the most suitable and realistic one, at least in the near future, would be that of fostering pan-European or multi-territorial online content deliveries, especially in the film sector, by detailing and codifying (somehow) the conditions under which content owners should remain free to license their works on a country-by-country basis without infringing EU law. As pointed out above, this might happen either through a soft law initiative of the European Commission or by virtue of a new legislative measure which could enact a list of exemptions clearly indicating the circumstances under which territorial licensing of online rights would still be compatible with the logic of the Digital Single Market. Such a policy intervention would give EU lawmakers the opportunity to fill an existing gap by creating a useful interface between copyright, Internal Market legislation, cultural policy and EU media law, which still obliges audiovisual media service providers to invest in the production of local and diverse creative works whose remuneration opportunities might be closely associated with a particular territory.