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The Future of Copyright Law in the Digital Single Market: extending the Satellite & Cable Directive to content services online.

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The Future of Copyright Law in the Digital Single Market: extending the Satellite & Cable Directive to content services online.*

Prof. Dr. P. Bernt Hugenholtz

I. Introduction

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

For the world of tangible (physical) goods a similar problem of market fragmentation was solved decades ago by the ECJ establishing a rule of 'Community exhaustion' of the right of distribution. Ever since, goods incorporating intellectual property, such as records, books and trademarked clothing, may circulate freely across the EU after their initial authorized

* This article is partly based on a study conducted for BEUC, the umbrella group of European consumer unions.

marketing in a Member State. Why not introduce a similar rule for the world of non-physical distribution? If such a rule is already justifiable, and viable, in the analogue world, it could make even greater sense in the borderless world of the Internet.

We do have an interesting precedent. In 1993 the European legislature adopted the Satellite and Cable Directive¹ – a directive far ahead of its time by focusing not on harmonizing substantive rights, but on the problems of rights clearance for cross-border audiovisual services. In those days, the fledgling satellite broadcasting market suffered from similar copyright problems as the online content services market today. Providers of trans-border satellite broadcasting services had to clear rights for all countries within the “footprint” of the satellite transponder. The solution offered by the Directive was both elegant and simple: satellite broadcasting is a relevant act for copyright purposes only in the *country of origin* of the signal. As a consequence, a license to broadcast audiovisual content by satellite would be needed only in the Member State from where the satellite signal was uplinked.

Why not extend this model to the internet? Previous Commissions have played with the idea on several occasions, but each time stakeholders firmly rejected the idea. The ongoing EC Consultation on the review of the Satellite and Cable Directive, more forcefully, suggests that the time now may be ripe for extending the Directive’s country of origin approach to audiovisual services offered online. This article examines the legal ramifications of such an extension. It commences with a general description of the rule of territoriality in copyright law; it goes on to examine and possibly solve various legal problems raised by such an extension; and then concludes.

¹ See appendix (p. 20)

II. Geo-blocking and territorial rights

Despite the promise and potential of the Internet as a medium that 'knows no borders', location-based restrictions of access to online services have in recent years become a common occurrence. A European Parliament study published in 2013² distinguishes two types of geographical discrimination: 'geo-blocking'³ (i.e. refusal to sell) and 'geo-filtering' (i.e. conditioning of sales or re-routing of services) – in both cases based on the geographical location of the consumer. In the area of audiovisual services both types of geographical restrictions regularly occur.⁴ For example, international sports content provided by national broadcasters online – whether in real time or as 'catch-up' service – is frequently geo-blocked,⁵ whereas Netflix – the dominant video-on-demand streaming service in Europe – applies geo-filtering to automatically adjust its catalogue of available films and television series to the current location of its subscribers.

² European Parliament study, *Discrimination of Consumers in the Digital Single Market*, 2013. See N. Helberger, «Refusal to Serve Consumers because of their Nationality or Residence –

Distortions in the Internal Market for E-commerce Transactions?», Briefing Note for the European Parliament's Committee on Internal Market and Consumer Protection, January 2007, PE 382.180.

³ Geo-blocking is "the practice of restricting access to content based upon the user's geographical location" (Wikipedia, entry 'Geo-blocking', consulted October 14, 2015; see also 'A Digital Single Market Strategy for Europe - Analysis and Evidence', EC Working Paper, SWD(2015) 100 final, Brussels, 6 May 2015, p. 21.

⁴ Estrella Gomez and Bertin Martens, 'Language, copyright and geographic segmentation in the EU Digital Single Market for music and film', JRC/IPTS Digital Economy Working Paper, 2015-04, available at https://ec.europa.eu/jrc/sites/default/files/JRC92236_Language_Copyright.pdf.

⁵ EC Working Paper, p. 26.

Geo-blocking and geo-filtering of audiovisual services are usually, but not solely,⁶ related to the territorial allocation of copyrights and neighboring rights. Copyright creates exclusive rights in works of literature, science and art. In the European Union, despite almost twenty-five years of harmonization of copyright, copyright has remained essentially national law, with each of the Union's 28 Member States having its own national law on copyright and neighboring (related) rights. The exclusivity that a copyright confers upon its owner is, in principle, limited to the territorial boundaries of the Member State where the right has been granted. This is a core principle of copyright and related rights, enshrined in the Berne Convention and other international treaties, which – because of the obligation under the EEA for Member States to adhere to the Berne Convention – can be described as 'quasi-acquis'.⁷ In its *Lagardère* ruling⁸ the CJEU has confirmed the territorial nature of copyright and related rights.

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

⁶ Another reason for applying location-based restrictions in the realm of audiovisual services may relate to broadcasting law (e.g. the remit of public broadcasters may be limited to services offered to national residents). See European Commission, Directorate General Internal Market and Services

Directorate D – Intellectual property, D1 – Copyright, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014 [EC Report on EU Copyright Rules Consultation], p. 8-9.

⁷ J. Gaster, ZUM 2006/1, p. 9.

⁸ *Lagardère Active Broadcast*, ECJ 14 July 2005, case C-192/04.

The other consequence follows from the rule of private international law enshrined in the Rome Regulation, that the law of the country where protection is sought governs instances of copyright infringement.⁹ This rule implies that making a work available online affects as many copyright laws as there are countries where the posted work can be directly accessed. In other words, copyright licenses for such acts need to be cleared normally in all countries of reception, that is, in case of a service aimed at the entire European Union, in all 28 Member States.¹⁰

The present European Commission has in multiple policy documents identified geo-blocking and other forms of geographical discrimination as obstacles to the Digital Single Market,¹¹ and on December 9, 2015 proposed a Regulation “on ensuring the cross-border portability of online content services in the internal market” that would oblige content providers to guarantee so-called *content portability* to subscribers ‘temporarily present’ in other Member States.¹² While the proposed Regulation deserves applause for

⁹ Art. 8 of the Rome II Regulation.

¹⁰ See generally P. Bernt Hugenholtz, ‘Is Harmonization a Good Thing? The Case of the Copyright Acquis’, in: A. Ohly & J. Pila, *The Europeanization of Intellectual Property Law*, Oxford: Oxford University Press 2013, p. 57-73

¹¹ See European Commission, Directorate General Internal Market and Services

Directorate D – Intellectual property, D1 – Copyright, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014 [EC Report on EU Copyright Rules Consultation], p. 6-7; European Commission, A Digital Single Market Strategy for Europe

Digital Market Strategy Communication. Brussels, 6 May 2015, COM(2015) 192 final; European Commission, ‘Towards a modern, more European copyright framework’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 9 December 2015, COM(2015) 626 final.

¹² European Commission, Proposal for a Regulation of the European Parliament and of the Council

on ensuring the cross-border portability of online content services in the internal market, Brussels, 9 December 2015, COM(2015) 627 final.

offering a practical solution to a problem that has aggravated travelers within the EU for several years, its scope is extremely limited. It does not address geo-blocking or geo-relocation of content in non-subscriber relations. More generally, it does not solve the licensing problems associated with copyright's territorial nature, which have caused or enhanced market fragmentation, inflicted unnecessarily transaction costs, and raised barriers to entry to the digital content markets in the EU. What the Digital Single Market really needs are more ambitious measures.

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

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

Why not extend, or apply by analogy, to the Internet the 'injection right' model of the Satellite and Cable Directive? This is by no means a novel idea. Already in the 1995 Green Paper that paved the way to the Information Society Directive,¹³ the European Commission played with the idea of applying the Directive's country of origin approach to the Internet. But this suggestion was immediately and unequivocally discarded by all right holders consulted. In a Staff Working Document that accompanied the Communication of the Commission on 'Creative Content Online', the possibility of extending the Satellite and Cable Directive's country-of-origin approach to the Internet was once again extensively discussed,¹⁴ without however resulting in an EC policy initiative.

The ongoing EC Consultation on the review of the Satellite and Cable Directive, yet again, contemplates extending the Directive to the online world, in particular to radio and television services offered online. According to the accompanying press announcement, "The Commission wants to assess, first, to what extent the Satellite and Cable Directive has improved consumers' cross-border access to broadcasting services in the Internal Market, and, also, what would be the impact of extending the Directive to TV and radio programs provided over the Internet, notably broadcasters' online services."¹⁵

The following section first describes the current country of origin rule enshrined in the Satellite and Cable Directive, and thereafter addressed a

¹³ European Commission, "Copyright and Related Rights in the Information Society", Green Paper, COM(95) 382 final, Brussels, 19 July 1995, p. 41 ff.

¹⁴ Commission staff working document - Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market, COM(2007) 836 final, Brussels, 3 January 2008, p. 25-26.

¹⁵ <https://ec.europa.eu/digital-agenda/news-redirect/25008>.

number of legal issues that an extension of this rule to audiovisual services offered online would give rise to.

1) Current legal framework for satellite broadcasting

Art. 1(2)(b) of the Satellite and Cable Directive establishes a country of origin rule for acts of satellite broadcasting. Communication to the public by satellite is a relevant act only in the Member State where the signals originate, as set out in Art. 1(2)(a).¹⁶ A broadcasting organisation will need to acquire licences only from right holders in the Member State of origin of the signal. However, Art. 1(2)(b) does not rule out that licence fees and other contractual conditions take into account the size of the footprint (*i.e.* number of countries reached) of the satellite broadcast. On the contrary, recital 17 instructs the parties concerned to “take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version”. Art. 1(2)(c) confirms that communication to the public takes place even if the programme-carrying signals are encrypted. Therefore, transmitting copyright protected works over satellite-based pay television services is a restricted act.

Art. 1(2)(d) extends the definition of communication to the public by satellite (Art. 1(2)(b)) to cover two situations where the communication actually occurs outside the European Union. The provision seeks to discourage broadcasting organisations from relocating their operations outside the European Union to avoid the application of the Directive (recital 24). If an act of communication to the public occurs outside the European Union, but either the signal is up-linked from within the EU or a broadcasting organisation established in the EU has commissioned the transmission, the

¹⁶ See P.B. Hugenoltz, ‘SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive’, IRIS plus 2009-8, p. 7-19.

communication shall be deemed to have occurred in the Member State where the uplink has taken place or where the broadcasting organisation is established. This legal fiction, however, applies only if the non - EU State where the communication actually occurs does not offer the level of protection provided under Chapter II (most importantly, an exclusive right of communication to the public by satellite). For example, if a broadcaster established in Luxembourg were to use a satellite network owned and operated by an African State to broadcast to European audiences, the broadcast would be deemed to occur in Luxembourg unless the copyright law of the African State provided for an exclusive right of communication to the public by satellite. With respect to satellite broadcasts from outside the EU not covered by Art. 1(2)(d), Member States remain free to apply the "Bogsch" (country of reception) theory.

Art. 2 instructs Member States to provide for an exclusive right, under copyright law, to communicate to the public by satellite. This provision is the counterpart to the country-of-origin rule of Art. 1(2)(b). If in the country of origin of the satellite broadcast no such right existed, right holders across the European Union would have no right to authorise or prevent it. Art. 2 has been largely superseded by Art. 3 of the Information Society Directive,¹⁷ which provides for a general right of communication to the public that includes acts of satellite broadcasting.

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

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

¹⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167/10 of 22 June 2001.

A preliminary question is whether the Directive's provisions allow an extensive interpretation without the need for amending or revising the Directive. Might the Directive's country of origin rule already apply to services offered over the Internet? The answer is, patently, no.¹⁸ The country of origin rule enshrined in the Directive applies only to acts of 'communication to the public by satellite'. Art. 1(2)(a) of the Directive defines this as "the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth." Moreover, art. 1(1) defines 'satellite' as "any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication." These definitions are highly technology-specific and preclude any extension by way of legal construction to acts of transmitting content over the (wired) Internet. Any extension of the scope of the Directive's country of origin rule to the Internet would, therefore, have to be effectuated by amending the provisions of the Directive, or by amending the Information Society Directive, or by another EU legislative act.

Another preliminary observation is that an 'extended' Directive would not require a complimentary rule harmonizing the right of communication to the public, as does the present Satellite and Cable Directive for the right of communication to the public by satellite (art. 2). Art. 3 of the Information Society Directive has broadly harmonized a general right of communication to the public, which includes a right of making works available to the public online; this general right has by now been implemented by all Member States. Moreover, all Member States have for several years implemented the

¹⁸ Th. Dreier, 'The Cable and Satellite Analogy', in P.B. Hugenholtz (ed.), *The future of copyright in a digital environment*, Den Haag: Kluwer Law International 1996, p. 61-62.

EU Enforcement Directive of 2004 that establishes minimum standards of enforcement of IP rights, including copyright and neighboring rights, throughout the Union. The current EU legislative framework thus rules out the existence within the EU of 'copyright havens' where online content providers seeking lower levels of copyright protection might seek refuge.

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

a) Definitions

Clearly, an extension of the Directive's country of origin rule would necessitate a thorough rewriting of most or all of the current technology-specific rules of (in particular) art. 1 of the Directive. Depending on the extent of the extension desired, the rule would have to be revised to apply to acts of communication to the public [of works or other subject matter] committed by broadcasting organizations, or – if the focus were on audiovisual services – to acts of communication to the public of audiovisual works.

b) Place of act of communication to the public

The present Directive locates the place of the relevant act of communication to the public by satellite "in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth" (art. 1(2)(b)). Transforming this

satellite-specific rule into a more general country of origin rule that would apply to all audiovisual services, including those offered online, is not an easy task. Whereas with satellite broadcasting, the locus of the 'uplink' that designates the Member States where the 'uplink' right is to be cleared, can relatively easily be identified, determining the 'place of upload' of an Internet-based service is by no means a straightforward task, and would probably require a set of more complex – possibly highly technical – rules of attachment.¹⁹

Alternatively, one could imagine replacing the present 'place of uplink' approach by a rule solely focusing on the *place of establishment* of the entity 'under the control and responsibility' of which the online communication occurs. The country of origin rule would thus be available only to service providers that are duly established in one of the Member States of the EU.²⁰ Such a rule of application based on place of establishment of the responsible content provider rather than on the locus of 'uplink' would also make redundant a special rule for content services originating from outside the European Union, as is currently laid down – in a rather complicated fashion – in art. 1(2)(d) of the Directive. Indeed, art. 1(2)(d)(ii) effectively incorporates a rule based on place of establishment of the broadcasting organization in case no 'uplink station' in a Member State is being used.

Either way, for any provider to invoke the country of origin rule the provider would need to be easily identifiable. Here, an amended version of the

¹⁹ P. Bernt Hugenholtz a.o., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, report to the European Commission, DG Internal Market, November 2006, http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf

[IViR, Recasting study], p. 29.

²⁰ Note that this would not prevent duly established European affiliates of non-European providers (such as Google or Netflix) from benefiting from this provision.

Directive could refer to art. 5 of the E-Commerce Directive, which requires that providers of information services make available to its recipients, and to competent authorities, information regarding its name and place of establishment.

c) 'Uninterrupted chain'

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

The underlying reason for this rule is to avoid that downstream intermediaries add value to content, and thereby exploit, content originating from a (foreign) content provider under a country of origin rule, without incurring liability for copyright infringement. Obviously, a similar rule guaranteeing that the country of origin rule only apply to the transmitted content service 'as is', would have to be developed for audiovisual services offered online. In particular, it should be made clear that downstream intermediaries may not, without further permission of the (local) right holders, dub or add local language subtitles to audiovisual content services offered online.

d) Exclude ancillary rights of reproduction

Another problem with extending the 'satellite' rule to the Internet is that transmission over digital networks usually involves not only acts of

communication to the public, but also acts of reproduction. This concerns not only the initial act of uploading a work to a server, but also various subsequent acts of temporary or transient copying, as well as acts of downloading works on the users' end.

Presumably, the mandatory transient copying exception of art. 5(1) of the Information Society Directive would preclude downstream copyright claims by local holders of reproduction rights, but the language of art. 5(1), which is phrased as an exception or limitation, is not very clear.²¹

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

e) Homogenize limitations and exceptions

²¹ IViR, Recasting study, p. 29.

Yet another problem associated with extending the SatCab approach to the internet is that exceptions and limitations that apply locally to works made available online may differ significantly from Member State to Member State.²² For example, fragments of copyright protected audiovisual content posted on YouTube might qualify as legitimate 'quotations' in one Member State, while being held illegal in others. Note that art. 5 of the Information Society has failed to provide for full harmonization in this respect. An extension of the country of origin rule to audiovisual services offered online should therefore ideally coincide with full harmonization of those limitations and exceptions most relevant to such services, notably art. 5(3)(a) [teaching and research], art. 5(3)(c) [media uses], art. 5(3)(d) [quotation], art. 5(3)(i) [incidental uses], and art. 5(3)(k) [parody].

f) Flanking measures: effectively dealing with DRM

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

²² Th. Dreier, 'The Cable and Satellite Analogy', in P.B. Hugenholtz (ed.), *The future of copyright in a digital environment*, Den Haag: Kluwer Law International 1996, p. 63.

that in the field of satellite broadcasting – despite the new rules of the Directive – fragmentation along territorial lines has persisted:

A trend is thus emerging whereby producers sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure that they cannot be received beyond national borders. This encryption enables producers to negotiate the sale of the same programmes with broadcasting organisations in other Member States.²³

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

How to shape such rules in a revised Directive that would extend the country of origin rule to audiovisual services offered online? One way to do this would be to more strictly apply, or possibly further develop, the anti-trust rules of 101 and 102 TFEU.²⁴ Indeed, judging from recent news reports the European Commission is already pursuing a policy more critical of territorial market partitioning in competition proceedings instigated against Sky UK and several Hollywood studios.²⁵ In line with this stricter policy, one could envision the codification by the European Commission of more refined rules on territorial partitioning in the form of a Commission Regulation, somewhat similar to the

²³ Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM (2002) 430 final, Brussels, 26 July 2002, p. 7.

²⁴ See *Football Association Premier League Ltd and Others v QC Leisure and Others*; and *Karen Murphy v Media Protection Services Ltd*, ECJ 4 October 2011, joined cases C-403/08 and C-429/08, ECR [2011] I-9083.

²⁵ *Financial Times*, July 23, 2015: 'Brussels in antitrust case against Sky and six Hollywood studios'.

'block exemptions' that prohibit in technology licenses between competitors (inter alia) the exclusive territorial allocation of markets, subject to certain well-defined exceptions.²⁶

However, unjustified geo-blocking and similar market fragmentation will probably not in all cases amount to uncompetitive behavior sanctionable under the EU's competition rules. A more sophisticated solution therefore would be to base such guidelines not only, or not primarily, on the EU's competition rules, but also on the general rule of non-discrimination enshrined in art. 18 TFEU. Such rules on (prohibited, or conditionally permitted) geo-blocking and territorial licensing could take the shape of 'black' and 'grey' lists well known from the field of consumer law.

IV. Conclusion

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

²⁶ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements Text with EEA relevance. Note as well Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, which prohibits clauses in vertical distribution contracts prohibiting passive sales outside the exclusive territory.

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

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

V. Appendix – Satellite and Cable Directive

COUNCIL DIRECTIVE 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

(1) Whereas the objectives of the Community as laid down in the Treaty include establishing an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community and ensuring the economic and social progress of the Community countries by common action to eliminate the barriers which divide Europe;

(2) Whereas, to that end, the Treaty provides for the establishment of a common market and an area without internal frontiers; whereas measures to achieve this include the abolition of obstacles to the free movement of services and the institution of a system ensuring that competition in the common market is not distorted; whereas, to that end, the Council may adopt directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons;

(3) Whereas broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing these Community objectives, which are at the same time political, economic, social, cultural and legal;

(4) Whereas the Council has already adopted Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (4), which makes provision for the promotion of the distribution and production of European television programmes and for advertising and sponsorship, the protection of minors and the right of reply;

(5) Whereas, however, the achievement of these objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; whereas this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration

or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; whereas the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the Community;

(6) Whereas a distinction is currently drawn for copyright purposes between communication to the public by direct satellite and communication to the public by communications satellite; whereas, since individual reception is possible and affordable nowadays with both types of satellite, there is no longer any justification for this differing legal treatment;

(7) Whereas the free broadcasting of programmes is further impeded by the current legal uncertainty over whether broadcastings by a satellite whose signals can be received directly affects the rights in the country of transmission only or in all countries of reception together; whereas, since communications satellites and direct satellites are treated alike for copyright purposes, this legal uncertainty now affects almost all programmes broadcast in the Community by satellite;

(8) Whereas, furthermore, legal certainty, which is a prerequisite for the free movement of broadcasts within the Community, is missing where programmes transmitted across frontiers are fed into and retransmitted through cable networks;

(9) Whereas the development of the acquisition of rights on a contractual basis by authorization is already making a vigorous contribution to the creation of the desired European audiovisual area; whereas the continuation of such contractual agreements should be ensured and their smooth application in practice should be promoted wherever possible;

(10) Whereas at present cable operators in particular cannot be sure that they have actually acquired all the programme rights covered by such an agreement;

(11) Whereas, lastly, parties in different Member States are not all similarly bound by obligations which prevent them from refusing without valid reason to negotiate on the acquisition of the rights necessary for cable distribution or allowing such negotiations to fail;

(12) Whereas the legal framework for the creation of a single audiovisual area laid down in Directive 89/552/EEC must, therefore, be supplemented with reference to copyright;

(13) Whereas, therefore, an end should be put to the differences of treatment of the transmission of programmes by communications satellite which exist in the Member States, so that the vital distinction throughout the Community becomes whether works and other protected subject matter are communicated to the public; whereas this will also ensure equal treatment of the suppliers of cross-border broadcasts, regardless of whether they use a direct broadcasting satellite or a communications satellite;

(14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a Community level;

whereas this definition should at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; whereas communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organization into an uninterrupted chain of communication leading to the satellite and down towards the earth; whereas normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;

(15) Whereas the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;

(16) Whereas the principle of contractual freedom on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned;

(17) Whereas, in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version;

(18) Whereas the application of the country-of-origin principle contained in this Directive could pose a problem with regard to existing contracts; whereas this Directive should provide for a period of five years for existing contracts to be adapted, where necessary, in the light of the Directive; whereas the said country-of-origin principle should not, therefore, apply to existing contracts which expire before 1 January 2000; whereas if by that date parties still have an interest in the contract, the same parties should be entitled to renegotiate the conditions of the contract;

(19) Whereas existing international co-production agreements must be interpreted in the light of the economic purpose and scope envisaged by the parties upon signature; whereas in the past international co-production agreements have often not expressly and specifically addressed communication to the public by satellite within the meaning of this Directive a particular form of exploitation; whereas the underlying philosophy of many existing international co-production agreements is that the rights in the co-production are exercised separately and independently by each co-producer, by dividing the exploitation rights between them along territorial lines; whereas, as a general rule, in the situation where a communication to the public by satellite authorized by one co-producer would prejudice the value of the exploitation rights of another co-producer, the interpretation of such an existing agreement would normally suggest that the latter co-producer would have to give his consent to the authorization, by the former co-producer, of the communication to the public by satellite; whereas the

language exclusivity of the latter co-producer will be prejudiced where the language version or versions of the communication to the public, including where the version is dubbed or subtitled, coincide(s) with the language or the languages widely understood in the territory allotted by the agreement to the latter co-producer; whereas the notion of exclusivity should be understood in a wider sense where the communication to the public by satellite concerns a work which consists merely of images and contains no dialogue or subtitles; whereas a clear rule is necessary in cases where the international co-production agreement does not expressly regulate the division of rights in the specific case of communication to the public by satellite within the meaning of this Directive;

(20) Whereas communications to the public by satellite from non-member countries will under certain conditions be deemed to occur within a Member State of the Community;

(21) Whereas it is necessary to ensure that protection for authors, performers, producers of phonograms and broadcasting organizations is accorded in all Member States and that this protection is not subject to a statutory licence system; whereas only in this way is it possible to ensure that any difference in the level of protection within the common market will not create distortions of competition;

(22) Whereas the advent of new technologies is likely to have an impact on both the quality and the quantity of the exploitation of works and other subject matter;

(23) Whereas in the light of these developments the level of protection granted pursuant to this Directive to all rightholders in the areas covered by this Directive should remain under consideration;

(24) Whereas the harmonization of legislation envisaged in this Directive entails the harmonization of the provisions ensuring a high level of protection of authors, performers, phonogram producers and broadcasting organizations; whereas this harmonization should not allow a broadcasting organization to take advantage of differences in levels of protection by relocating activities, to the detriment of audiovisual productions;

(25) Whereas the protection provided for rights related to copyright should be aligned on that contained in Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (5) for the purposes of communication to the public by satellite; whereas, in particular, this will ensure that performers and phonogram producers are guaranteed an appropriate remuneration for the communication to the public by satellite of their performances or phonograms;

(26) Whereas the provisions of Article 4 do not prevent Member States from extending the presumption set out in Article 2 (5) of Directive 92/100/EEC to the exclusive rights referred to in Article 4; whereas, furthermore, the provisions of Article 4 do not prevent Member States from providing for a rebuttable presumption of the authorization of exploitation in respect of the

exclusive rights of performers referred to in that Article, in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;

(27) Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright; whereas the cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted; whereas, pursuant to this Directive, the authorizations should be granted contractually unless a temporary exception is provided for in the case of existing legal licence schemes;

(28) Whereas, in order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorization right to the extent that this is required by the special features of cable retransmission; whereas the authorization right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorize a cable retransmission can still be assigned; whereas this Directive does not affect the exercise of moral rights;

(29) Whereas the exemption provided for in Article 10 should not limit the choice of holders of rights to transfer their rights to a collecting society and thereby have a direct share in the remuneration paid by the cable distributor for cable retransmission;

(30) Whereas contractual arrangements regarding the authorization of cable retransmission should be promoted by additional measures; whereas a party seeking the conclusion of a general contract should, for its part, be obliged to submit collective proposals for an agreement; whereas, furthermore, any party shall be entitled, at any moment, to call upon the assistance of impartial mediators whose task is to assist negotiations and who may submit proposals; whereas any such proposals and any opposition thereto should be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents, in particular as set out in existing international conventions; whereas, finally, it is necessary to ensure that the negotiations are not blocked without valid justification or that individual holders are not prevented without valid justification from taking part in the negotiations; whereas none of these measures for the promotion of the acquisition of rights calls into question the contractual nature of the acquisition of cable retransmission rights;

(31) Whereas for a transitional period Member States should be allowed to retain existing bodies with jurisdiction in their territory over cases where the right to retransmit a programme by cable to the public has been unreasonably refused or offered on unreasonable terms by a broadcasting organization; whereas it is understood that the right of parties concerned to

be heard by the body should be guaranteed and that the existence of the body should not prevent the parties concerned from having normal access to the courts;

(32) Whereas, however, Community rules are not needed to deal with all of those matters, the effects of which perhaps with some commercially insignificant exceptions, are felt only inside the borders of a single Member State;

(33) Whereas minimum rules should be laid down in order to establish and guarantee free and uninterrupted cross-border broadcasting by satellite and simultaneous, unaltered cable retransmission of programmes broadcast from other Member States, on an essentially contractual basis;

(34) Whereas this Directive should not prejudice further harmonization in the field of copyright and rights related to copyright and the collective administration of such rights; whereas the possibility for Member States to regulate the activities of collecting societies should not prejudice the freedom of contractual negotiation of the rights provided for in this Directive, on the understanding that such negotiation takes place within the framework of general or specific national rules with regard to competition law or the prevention of abuse of monopolies;

(35) Whereas it should, therefore, be for the Member States to supplement the general provisions needed to achieve the objectives of this Directive by taking legislative and administrative measures in their domestic law, provided that these do not run counter to the objectives of this Directive and are compatible with Community law;

(36) Whereas this Directive does not affect the applicability of the competition rules in Articles 85 and 86 of the Treaty,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I DEFINITIONS

Article 1

Definitions 1. For the purpose of this Directive, 'satellite' means any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case.

2. (a) For the purpose of this Directive, 'communication to the public by satellite' means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent.

(d) Where an act of communication to the public by satellite occurs in a non-Community State which does not provide the level of protection provided for under Chapter II,

(i) if the programme-carrying signals are transmitted to the satellite from an uplink station situated in a Member State, that act of communication to the public by satellite shall be deemed to have occurred in that Member State and the rights provided for under Chapter II shall be exercisable against the person operating the uplink station; or

(ii) if there is no use of an uplink station situated in a Member State but a broadcasting organization established in a Member State has commissioned the act of communication to the public by satellite, that act shall be deemed to have occurred in the Member State in which the broadcasting organization has its principal establishment in the Community and the rights provided for under Chapter II shall be exercisable against the broadcasting organization.

3. For the purposes of this Directive, 'cable retransmission' means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.

4. For the purposes of this Directive 'collecting society' means any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes.

5. For the purposes of this Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

CHAPTER II BROADCASTING OF PROGRAMMES BY SATELLITE

Article 2

Broadcasting right Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.

Article 3

Acquisition of broadcasting rights 1. Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement.

2. A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that:

- the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and

- the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively.

3. Paragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography.

4. Where the law of a Member State provides for the extension of a collective agreement in accordance with the provisions of paragraph 2, that Member States shall inform the Commission which broadcasting organizations are entitled to avail themselves of that law. The Commission shall publish this information in the Official Journal of the European Communities (C series).

Article 4

Rights of performers, phonogram producers and broadcasting organizations

1. For the purposes of communication to the public by satellite, the rights of performers, phonogram producers and broadcasting organizations shall be protected in accordance with the provisions of Articles 6, 7, 8 and 10 of Directive 92/100/EEC.

2. For the purposes of paragraph 1, 'broadcasting by wireless means' in Directive 92/100/EEC shall be understood as including communication to the public by satellite.

3. With regard to the exercise of the rights referred to in paragraph 1, Articles 2 (7) and 12 of Directive 92/100/EEC shall apply.

Article 5

Relation between copyright and related rights Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.

Article 6

Minimum protection 1. Member States may provide for more far-reaching protection for holders of rights related to copyright than that required by Article 8 of Directive 92/100/EEC.

2. In applying paragraph 1 Member States shall observe the definitions contained in Article 1 (1) and (2).

Article 7

Transitional provisions 1. With regard to the application in time of the rights referred to in Article 4 (1) of this Directive, Article 13 (1), (2), (6) and (7) of Directive 92/100/EEC shall apply. Article 13 (4) and (5) of Directive 92/100/EEC shall apply mutatis mutandis.

2. Agreements concerning the exploitation of works and other protected subject matter which are in force on the date mentioned in Article 14 (1) shall be subject to the provisions of Articles 1 (2), 2 and 3 as from 1 January 2000 if they expire after that date.

3. When an international co-production agreement concluded before the date

mentioned in Article 14 (1) between a co-producer from a Member State and one or more co-producers from other Member States or third countries expressly provides for a system of division of exploitation rights between the co-producers by geographical areas for all means of communication to the public, without distinguishing the arrangement applicable to communication to the public by satellite from the provisions applicable to the other means of communication, and where communication to the public by satellite of the co-production would prejudice the exclusivity, in particular the language exclusivity, of one of the co-producers or his assignees in a given territory, the authorization by one of the co-producers or his assignees for a communication to the public by satellite shall require the prior consent of the holder of that exclusivity, whether co-producer or assignee.

CHAPTER III CABLE RETRANSMISSION

Article 8

Cable retransmission right 1. Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.

2. Notwithstanding paragraph 1, Member States may retain until 31 December 1997 such statutory licence systems which are in operation or expressly provided for by national law on 31 July 1991.

Article 9

Exercise of the cable retransmission right 1. Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.

2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.

3. A Member State may provide that, when a rightholder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable

retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.

Article 10

Exercise of the cable retransmission right by broadcasting organizations Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights.

Article 11

Mediators 1. Where no agreement is concluded regarding authorization of the cable retransmission of a broadcast. Member States shall ensure that either party may call upon the assistance of one or more mediators.

2. The task of the mediators shall be to provide assistance with negotiation. They may also submit proposals to the parties.

3. It shall be assumed that all the parties accept a proposal as referred to in paragraph 2 if none of them expresses its opposition within a period of three months. Notice of the proposal and of any opposition thereto shall be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents.

4. The mediators shall be so selected that their independence and impartiality are beyond reasonable doubt.

Article 12

Prevention of the abuse of negotiating positions 1. Member States shall ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorization for cable retransmission in good faith and do not prevent or hinder negotiation without valid justification.

2. A Member State which, on the date mentioned in Article 14 (1), has a body with jurisdiction in its territory over cases where the right to retransmit a programme by cable to the public in that Member State has been unreasonably refused or offered on unreasonable terms by a broadcasting organization may retain that body.

3. Paragraph 2 shall apply for a transitional period of eight years from the date mentioned in Article 14 (1).

CHAPTER IV GENERAL PROVISIONS

Article 13

Collective administration of rights This Directive shall be without prejudice to the regulation of the activities of collecting societies by the Member States.

Article 14

Final provisions 1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before

1 January 1995. They shall immediately inform the Commission thereof. When Member States adopt these measures, the latter shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

3. Not later than 1 January 2000, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the audio and audiovisual sector.

Article 15

This Directive is addressed to the Member States.

Done at Brussels, 27 September 1993.

For the Council

The President

R. URBAIN

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