

Audiovisual Archives across Borders – Dealing with Territorially Restricted Copyrights

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I. Introduction

Since the late 1980s the European Community has carried out an ambitious programme of harmonisation of the law on copyright and related (neighbouring) rights, with the primary aim of fostering the Internal Market by removing disparities between the laws of the member states. This programme has resulted in no fewer than seven directives on copyright and related rights that were adopted in a 10-year interval between 1991 and 2001.¹ While the seven directives have indeed created a measure of uniformity between the laws of the member states, they have largely ignored the single most important obstacle to the creation of an Internal Market in content-based services: the territorial nature of copyright. Despite extensive harmonisation, copyright law in the European Union is still largely linked to the geographic boundaries of sovereign member states. Consequently, copyright markets in the European Union remain vulnerable to compartmentalisation along national borderlines. Even in 2010, content providers aiming at European consumers need to clear rights covering some 27 member states.

Audiovisual archives aiming at European audiences are regularly confronted with problems associated with territoriality in copyright. Licences allowing archives to make available online audiovisual content are more often than not restricted to national territories. This is usually the case for licences granted by collecting societies that almost without exception operate on the basis of territorially restricted mandates. As a consequence, audiovisual archives offering content online are often not accessible for viewers residing in foreign countries. For example, the BBC Archive² does not make its archive available online to visitors to its website with IP addresses registered outside the United Kingdom.

1) Computer Programs Directive (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42, 17 May 1991), Rental Right Directive (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, OJ L 346/61, 27 November 1992), Term Directive (Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9, 24 November 1993), 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, OJ L 248/15, 6 October 1993), Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20, 27 March 1996), Information Society Directive (Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22 June 2001), Resale Right Directive (Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272/32, 13 October 2001).

2) The BBC Archive, available at: <http://www.bbc.co.uk/archive/>

Territorial fragmentation appears to be particularly rampant in respect of online television sports coverage. Whereas, for example, many national broadcasters transmitted the 2010 Winter Olympic Games online on multiple broadband channels, access to these channels from abroad was usually restricted, apparently for copyright-related reasons. Clearly, for consumers of such services, the Internal Market has yet to materialise.³

This article juxtaposes the territorial nature of copyright with the ambitions of holders of audiovisual archives aspiring to offer transnational services. It commences with a description of the rule of territoriality in copyright law; goes on to discuss various existing legal doctrines that mitigate its detrimental effect on the Internal Market; describes in which way territoriality affects audiovisual archives; and concludes by contemplating possible solutions.

II. The territorial nature of copyright

Copyright creates exclusive rights in works of literature, science and art. In the European Union, despite almost 20 years of harmonisation of copyright, copyright has remained essentially national law; each of the Union's 27 member states boasts its own national law on copyright and neighbouring (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 is granted. This is a core principle of copyright and related rights, enshrined in the Berne Convention and other international treaties,⁴ which – because of the obligation under the EEA for member states to adhere to the Berne Convention – can be described as “quasi-acquis”.⁵ In its *Lagardère* ruling,⁶ the Court of Justice of the European Union (ECJ) has recently confirmed the territorial nature of copyright and related rights.

The territorial nature of copyright has various legal consequences.

1. Disparities in national law

In the first place, since copyright is granted autonomously by each member state for its own territory, rules on copyright may vary from one member state to the other. Although the seven harmonisation directives in the field of copyright and related rights have removed these disparities in distinct fields (e.g. computer programmes, rental and lending, satellite broadcasting and cable retransmission, term of protection, databases, artists' resale right, etc.), important areas have remained largely or completely unharmonised. This is the case in particular for limitations and exceptions to copyright. While the Information Society Directive of 2001 provides a “shopping list” of some 21 limitations and exceptions, all but one of these limitations are optional. Member states may implement at their own discretion any or all of the limitations on the Directive's list. As a consequence, audiovisual archives may enjoy relatively broad statutory freedoms to digitise broadcast content in one member state, while in another member state no similar freedom may exist.⁷

2. Territorial application of the law

A second and related aspect of territoriality is that, according to the rule of private international law, the law of the country where protection is sought (the so-called *Schutzland*) governs instances

3) See European Parliament, Resolution of 21 June 2007 on consumer confidence in the digital environment, Strasbourg, 21 June 2007, A6-0191/2007, sec. 30.

4) European Commission, “Green Paper on Television without Frontiers”, COM(84) 300 final, Brussels, 14 June 1984, p. 301.

5) J. Gaster, ZUM 2006/1, p. 9.

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

7) Institute for Information Law, “Study on the Implementation and Effect in member states' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society”, report to the European Commission, DG Markt, February 2007.

of copyright infringement.⁸ This rule implies that making a film or other audiovisual work available online affects as many copyright laws as there are countries where the posted work can be accessed. In other words, copyright licences for such acts need to be cleared in all countries of reception – normally, all 27 member states of the EU.

3. Territorially fragmented rights

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 27 parallel (sets of) exclusive rights. A third consequence of territoriality is, therefore, that copyright of a single work of authorship can be “split up” into multiple territorially defined national rights, which may be owned or exercised for each national territory by a different entity.

This is the case, for instance, with copyrights in musical works. In practice, composers, song writers and music publishers grant their copyrights to collective rights management organisations that operate on the basis of strictly nationally defined legal mandates. While these collecting societies usually represent, by means of reciprocal contracts with other societies, most composers and songwriters in the world, the copyrights granted or entrusted to them are strictly national, so they lack the legal mandate to license uses that exceed national borders, such as online download services that operate transnationally.

III. Judicial and legislative responses

Over time, ECJ and the EU legislature have responded to the problems of territoriality, by mitigating its consequences in various ways. These responses, however, have been uneven and remain incomplete, particularly with regard to making works available online.

1. Community exhaustion

The ECJ has recognised early on that the territorial exercise of rights of intellectual property negatively affects the free circulation of goods, which is a core characteristic of the Internal Market. In a series of decisions preceding the harmonisation of copyright and related rights, the ECJ held that the right to control the distribution of copyright protected goods is exhausted following the putting on the market of these goods inside the Community with the consent of the rightsholder(s).⁹ This so-called rule of “Community exhaustion” was codified, much later, in Art. 4(2) of the Information Society Directive.

As a consequence, markets for copyright protected goods can no longer be partitioned according to national borders; parallel (or “grey”) importing of copyright protected goods, such as books or DVDs that originate from other EU member states, is legitimate. No similar rule of exhaustion, however, has been developed in respect of the provision of audiovisual content-related services, as Art. 3(3) of the Information Society Directive makes clear. “The rights referred to in paragraphs 1 and 2 [i.e. right of communication and making available to the public] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.” Audiovisual services, therefore, remain vulnerable to the concurrent exercise of rights of public performance, communication to the public, cable retransmission or making available in all the member states where the services are offered to the public.

Consequently, content-related services that are offered across the European Union require licences from all rightsholders covering all the territories concerned. If a service is offered to all consumers residing in the European Union, as will be the case for many services offered over the Internet, rights for all 27 member states will have to be cleared. This will be particularly problematic if the rights in

8) Art. 8 of the Rome II Regulation.

9) See for instance *Deutsche Grammophon v. Metro SB*, ECJ 8 June 1971, Case 78/70, ECR [1971] 487.

the member states concerned are in different hands. This may be the case, for instance, for rights in musical works that are exercised by national collecting societies, or for rights in cinematographic works that are often split up for reasons related to film financing.

2. The satellite broadcasting solution

Apart from the rule of Community exhaustion, the only structural legislative solution to the problem of market fragmentation by territorial rights can be found in the Satellite and Cable Directive of 1993. According to Art. 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 programme-carrying signal can be localised. Thereby the Directive has departed from the so-called "Bogsch theory", which held that a satellite broadcast requires licences from all rightsholders in all countries of reception (i.e. within the footprint of the satellite). Since the transposition of the Directive, only a licence 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 has been created and market fragmentation along national borders through the cumulative application of several national laws to a single act of satellite broadcasting was avoided.

The satellite broadcasting rule of the Directive does not, however, apply to audiovisual content services offered online. Audiovisual archives wishing to offer transborder online services across the European Union will therefore have to clear the rights from all rightsholders concerned for all the member states of reception.

IV. Possible solutions

Clearly, to audiovisual archives with transnational ambitions copyright territoriality presents a serious impediment. While the difficulties of securing licences from thousands or even millions of – often hard to identify – rightsholders are already monumental at the national level, these problems are multiplied for digitisation projects with transnational ambitions. In cases where these problems become insurmountable, remote access to digitised collections will necessarily be restricted to national audiences.

Disparities in national copyright protection, particularly as regards limitations of copyright, may result in additional impediments. While digital archiving may be perfectly legitimate in some member states, the same activities may require licences in others, thereby raising obstacles to the establishment of transnational audiovisual archive services.

The harmonisation directives in the field of copyright and related rights adopted by the European legislature since 1991 have largely ignored the territorial nature of the economic rights. As a consequence, even in 2010, content providers aiming at European consumers need to clear rights covering some 27 member states. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States, where copyright is regulated not by the single states, but at the Federal level.

The Google Book Settlement that presumably allows Google to digitise and make available online on the American market tens of millions of books, illustrates – perhaps better than any other recent development – the comparative disadvantages of a European market still divided by national copyrights and divergent copyright limitations, and the urgency of pursuing solutions.¹⁰

The question, therefore, should be addressed whether solutions can be found in respect of copyright-related online services. Three different approaches might be considered.

10) See "It is time for Europe to turn over a new e-leaf on digital books and copyright", joint Statement of EU Commissioners Reding and McCreevy on the occasion of the Google Books meetings in Brussels, 7 September 2009, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/376&format=HTML&aged=0&language=EN&guiLanguage=en>

1. Extending the satellite broadcasting model to the Internet

One possible solution would be to extend to the Internet the "injection right" model of the Satellite and Cable Directive. This is not a new idea. Already in the 1995 Green Paper that preceded the Information Society Directive,¹¹ the European Commission toyed with the idea of applying to the Internet the country of origin approach that typifies the Satellite and Cable Directive. But this suggestion was immediately discarded by all rightsholders consulted. Rightsholders feared they would lose control of copyrighted content once it was offered online, under a licence, somewhere within the European Union. It was also pointed out that transmission of works over the Internet is not merely an act of communication to the public, as is satellite broadcasting, but also concerns the right of reproduction. Works made available online are stored on servers and copied repeatedly on their way from the content provider to the end user.

Similar concerns are reflected in a more recent European Commission Staff Working Document that accompanies the Communication of the Commission on "Creative Content Online".¹²

2. Promoting multiterritorial licensing

A much less ambitious approach would be to keep the territorial nature of copyright intact as a matter of principle, but to promote multiterritorial licensing. This is the approach apparently advocated by the Commission in its Communication on Creative Content Online. While recognising the problems of multiterritorial licensing in the audiovisual sector, the Commission no longer discusses the country-of-origin approach of the Satellite and Cable Directive as a viable solution. Instead, the Commission suggests a more modest solution that would allow broadcasters to simulcast over the Internet primary broadcasts for which only local rights have been cleared.

3. Unification of European copyright law

Nevertheless, if the European Union is really serious about achieving an Internal Market for content-related goods and services, the problem of territoriality in copyright must be confronted in a more fundamental way. As the Institute for Information Law has suggested in a major study on the future of European copyright law that was carried out for the European Commission,¹³ a truly structural and consistent solution, which would immediately remove all copyright-related territorial obstacles to the creation of a Single Market, would be the introduction of a unified European Copyright Law. The idea of a European (or Community) Copyright is gradually receiving the attention it deserves, both in scholarly debate and political circles. For example, in one of her last public speeches on copyright, former Commissioner for Information Society and Media, Viviane Reding, expressly endorsed the idea of a European Copyright Law:

"Last, but not least, one could think of a more profound harmonisation of copyright laws in order to create a more coherent licensing framework at European level. A 'European Copyright Law' – established for instance by an EU regulation – has often been mooted as a way of establishing a truly unified legal framework that would deliver direct benefits. This would be an ambitious plan for the EU, but not an impossible one."¹⁴

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

12) "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.

13) P.B. Hugenholtz *et al.*, "The Recasting of Copyright & Related Rights for the Knowledge Economy", Report to the European Commission, DG Internal Market, November 2006, p. 210.

14) Viviane Reding, speech delivered at Visby/Gotland on 9 November 2009, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/519&format=HTML&aged=0&language=EN&guiLanguage=nl>. Similar ideas are expressed in a "Reflection paper" on "Creative Content in a European Digital Single Market: Challenges for the Future", which was jointly issued by the DGs InfoSoc and Markt, available at: http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf

Importantly, the Lisbon Reform Treaty has introduced a specific competence for Community intellectual property rights in Art. 118 TFEU: "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorization, coordination and supervision arrangements."¹⁵

As former Commissioner Reding has suggested, devising a European Copyright Law would be an ambitious undertaking – at best a project of the very long term. This distant perspective has not, however, discouraged a group of European copyright scholars (the so-called Wittem Group) to jointly work on the drafting of a model *European Copyright Code* since 2002. In April 2010 the Wittem Group published its annotated code; it is available online at www.copyrightcode.eu.¹⁶

15) The "ordinary procedure" that Article 118 refers to is the co-decision procedure. The European Parliament has to agree to a proposal, and the Council must adopt the proposed law with a qualified majority vote.

16) The author of this article is a member of the Wittem Group.