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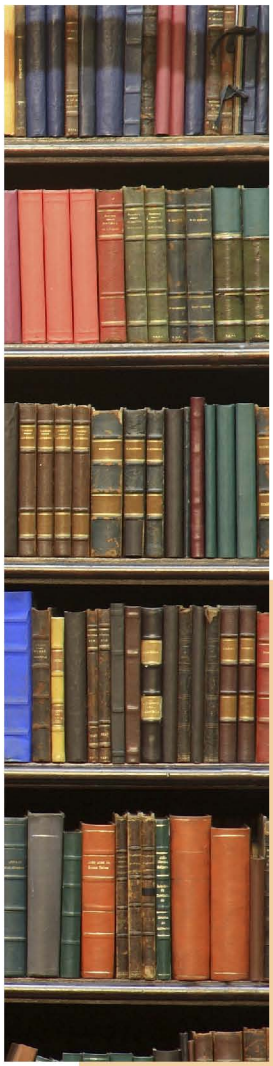
POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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Copyright Territoriality in the European Union

NOTE

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2010

EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

COPYRIGHT TERRITORIALITY IN THE EUROPEAN UNION

NOTE

Abstract:

In the European Union, despite almost twenty years of harmonization of copyright, copyright has remained essentially national law. Each Member States has its own national regime on copyright and neighbouring (related) rights. Taking into consideration the territorial nature of copyright in the EU, this briefing note provides an analysis of the impacts of copyright territoriality on the main stakeholders concerned, on the Internal Market at large as well as on the emerging knowledge economy in the European Union.

In addition, this briefing note suggests some recommendations and solutions aiming at tackling problems raised by copyright territoriality, such as: the fragmented structure of the market; the competitive disadvantage faced by European content providers in comparison with competitors in the United States; as well as denials to access to content services on geographical grounds experienced by consumers. In its conclusion, the briefing note proposes, as an ambitious solution, the introduction of a unified European Copyright Law on the basis of Article 118 of the Treaty on the Functioning of the European Union.

PE 419.621

EN

This document was requested by the European Parliament's Committee on Legal Affairs

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LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

Manuscript completed in February 2010

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CONTENTS

EXECUTIVE SUMMARY

Copyright creates exclusive rights in works of literature, science and art. In the European Union, despite almost twenty years of harmonization of copyright, copyright has remained essentially national law. Each Member States has its own national regime 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 has been granted.

Territoriality has several legal consequences. First, rules on copyright vary from one Member State to the other, especially in areas where no or little harmonization has occurred. Second, the law of the country where protection is sought, governs instances of copyright infringement. As a consequence, making a work available online affects as many copyright laws as there are countries where the posted work can be accessed. Third, copyrights may be 'split up' into multiple territorially defined national rights, which may be owned or exercised for each territory by a different entity.

The practical impact of copyright territoriality on the main stakeholders concerned, and the Internal Market at large, can be precisely assessed only in an empirical study, which this briefing note is not. However, it is likely that territoriality raises transaction and enforcement costs for authors, rights holders and users alike. Territorial fragmentation requires users aspiring to offer content-related services across the European Union to secure multiple licenses. Differences in national law, particularly as regards limitations and exceptions, create additional legal costs and lead to legal uncertainty. On the other hand, the territorial nature of copyright undeniably offers specific benefits to certain stakeholders concerned, by permitting price discrimination between national markets, controlling competition and, as regards collective administration of rights, by protecting a structure of national monopolies and cultural subsidies. Nonetheless, with European consumers increasingly being denied access to content services on geographical grounds, there is reason to believe that, viewed as a whole, territoriality negatively affects the Internal Market and the emerging knowledge economy in the European Union, and puts content service providers at a disadvantage compared to, for instance, competitors in the United States, where copyright is regulated at the Federal level.

Whereas EU law has tackled the problem of territoriality head-on for the distribution of physical goods, by establishing a rule of Community exhaustion incorporating intellectual property, policies in respect of Internet-based services have left the territorial nature of rights of communication basically intact. While the Commission's recent Online Music Recommendation does address some of the problems caused by territoriality in the field of collective rights management of musical works, even the Recommendation does not question the territorial nature of copyright and related rights as such.

In search of solutions, three different approaches might be considered. One approach would be to extend to the Internet the model of the Satellite and Cable Directive. According to this model, an act of communication to the public would

occur only in the Member State where the communication originates. Such a solution might, however, be difficult to implement, since transmissions over the Internet implicate not only the right of communication, but also the reproduction right. Moreover, localizing the country wherefrom a transmission originates might be difficult, or even impossible, due to the technical structure of the Internet.

A second approach to consider would be to promote multi-territorial licensing, perhaps by operation of (soft law) recommendations like the Online Music Recommendation. Whether such policies are capable of solving the problems of territoriality *in toto*, however, remains to be seen.

A third, and far more ambitious solution would be the introduction of a unified European Copyright Law. Article 118 of the TFEU, introduced by the Lisbon Reform Treaty, creates a specific competence for the European legislature to establish Community intellectual property rights. Arguably, this provision not only allows for the introduction of Community-wide copyright titles, but also for the simultaneous abolishment of national titles, which would be necessary for such an initiative to take its full effect.

The potential advantages of such an initiative, although admittedly a project of the long term, are undeniable. A European Copyright Law would establish a truly unified legal framework, replacing the multitude of, sometimes conflicting, national rules of the present. A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights, both online and offline. A Community copyright would enhance legal security and transparency, for right owners and users alike and greatly reduce transaction costs. Unification by regulation could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights, but merely permits limitations.

1. Introduction

Since the late 1980's the European Community has carried out an ambitious program of harmonization 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 program has resulted in no fewer than seven directives on copyright and related rights that were adopted in a ten year interval between 1991 and 2001. 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.

This briefing note, which was prepared at the invitation of the Working Group on Copyright of the European Parliament, describes the territorial nature of copyright in the light of the emerging European market for copyright-based 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; then examines in which way territoriality affects authors, other right holders, service providers and consumers; and concludes by recommending possible solutions.

2. The territorial nature of copyright

Copyright creates exclusive rights in works of literature, science and art. In the European Union, despite almost twenty years of harmonization of copyright,[1] copyright has remained essentially national law, with each of the Union's 27 Member States having 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 has been granted. This is a core principle of copyright and related rights, enshrined in the Berne Convention and other international treaties,[2] which – because of the obligation under the EEA for Member States to adhere to the Berne Convention – can been described as 'quasi-acquis'.[3] In its *Lagardère* ruling[4] the ECJ has recently confirmed the territorial nature of copyright and related rights.

The territorial nature of copyright has various legal consequences.

2.1.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 harmonization directives in the field of copyright and related rights have removed these disparities in distinct fields (e.g. computer programs, rental and lending, satellite broadcasting and cable retransmission, term of protection, databases, artists' resale right, rights of reproduction and

[1] Computer Programs Directive (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42, 17.05.1991), 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, 27.11.1992), 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, 24.11.1993), 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, 6.10.1993), 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, 27.03.1996), 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, 22.06.2001), 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, 13.10.2001).

[2] European Commission, Green Paper on Television without Frontiers, COM(84) 300 final, Brussels, 14 June 1984, p. 301.

[3] J. Gaster, ZUM 2006/1, p. 9.

[4] 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.'

communication), important areas have remained largely or completely unharmonized. This is the case, for example, for the notion of a 'work of au thorship'. While the Dutch Supreme Court has qualified the fragrance of a perfume as a 'work of literature, science or art', the French Cour de Cassation has excluded fragrances from the domain of copyright altogether, holding that "a perfume fragrance, which is the result of the simple application of know-how, does not constitute the creation of a form of expression […] capable of benefiting from the protection afforded to intellectual works by copyright". [5] As a consequence of such differences, 'smell-a-like' perfumes that are perfectly legal in some EU countries are illegal in others. Other unharmonized areas include: moral rights, rules on authors' contracts and rules on the collective administration of rights. Moreover, the limitations and exceptions to copyright have only partially been harmonized. While the Information Society Directive of 2001 provides a 'shopping list' of some twenty-one limitations and exceptions, all but one of these limitations are optional. Member States may implement at their own discretion any or all limitations on the Directive's list. In practice therefore, the domain of limitations remains largely unharmonized.[6]

2.2. 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 of copyright infringement.[7] This rule implies that making a work available online (i.e. over the Internet) affects as many copyright laws as there are countries where the posted work can be accessed. In other words, copyright licenses for such acts need to be cleared in all countries of reception – normally, all 27 Member States of the EU.

2.3. 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 in 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 organizations that operate on the basis of strictly nationally defined legal mandates.

[5] Kecofa v. Lancôme, Dutch Supreme Court (Hoge Raad) 16 June 2006, Case C04/327HR, [2006] ECDR 26; Bsiri-Barbir v. Haarmann & Reimer, Cour de Cassation 13 June 2006, 210 R.I.D.A. 348 (2006).

[6] 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.

[7] Art. 8 of the Rome II Regulation.

3. Judicial and legislative responses

Over time, the European Court of Justice (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.

3.1. Community exhaustion

The ECJ has recognized 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 harmonization of copyright and related rights, the ECJ held that the right to control the distribution of copyright protected goods is exhausted following the initial putting on the market of these goods inside the Community with the consent of the right holder(s).[8] This so-called rule of 'Community exhaustion' was codified, much later, in article 4(2) of the Information Society Directive, which reads:

> *The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.*

As a consequence, markets for copyright protected goods can no longer be partitioned according to national borders; parallel importing of goods that incorporate copyrighted works, such as books or CD's, that originate from other EU Member Sates, is legitimate. No exhaustion, however, occurs if these goods have their origin outside the European Union, e.g. from the United States; in such cases, right holders in the EU may legitimately oppose parallel imports.

No similar rule of exhaustion, however, has been developed in respect of the provision of content-related services. Such 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. In its Coditel I decision, the European Court of Justice expressly refused to recognise a rule of Community exhaustion in respect of acts of secondary cable transmission.9 The right holder in a neighbouring Member State (in this case Belgium) could legitimately oppose the unauthorised retransmission of a film broadcast in another State (Germany) via cable networks, without unduly restricting trade between Member States. The EU legislature has, much later, codified the Coditel I in respect of the rights of communication and making available to the public in article 3(3) of the Information Society Directive:

> *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*

[8] See for instance Deutsche Grammophon v Metro SB, ECJ 8 June 1971, Case 78/70, ECR [1971] 487.
[9] Coditel v Ciné Vog Films, ECJ 19 March 1980, Case 62/79, ECR [1980] 881.

communication to the public or making available to the public as set out in this Article.

Consequently, content-related services that are offered across the European Union require licenses from all right holders 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 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 owned by locally operating distributors.

3.2.The satellite broadcasting solution

Apart from the codification of the rule of Community exhaustion, which permits the further circulation of copyrighted goods within the Community 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 market fragmentation by territorial rights can be found in 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[10] (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 departed 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 has been 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.

Paradoxically, in those markets where the problem of territoriality has now become acute, [11] no similar legislative solution has been achieved. But unlike in the realm of satellite broadcasting, content providers offering trans-border online services across the European Union will have to clear the rights from all right holders concerned for all the Member States of reception.

3.3. The Online Music Recommendation

Providers of online services comprising musical works may find some comfort in the Online Music Recommendation, which was adopted by the European

[10] OJ L 248, 6.10.1993, p. 15.
[11] See Communication from the Commission to the European Parliament, the Council, rhe European Economic and Social Committee and the Committee of the Regions, on Creative Content Online in the Single Market, Brussels, 3 January 2008, COM(2007) 836 final.

Commission in 2005.[12] This non-binding recommendation seeks to facilitate the grant of Community-wide licenses for online uses of musical works by requiring collective rights management societies to allow right holders to withdraw their online rights and grant them to a single collective rights manager operating at EU level.

Nevertheless, the Recommendation does not address the more fundamental problem of territorially divided rights. Moreover, its scope is limited to musical works, phonograms and performances – subject matter that is traditionally exploited through collecting societies. The Recommendation does not concern existing contractual arrangements between, for instance, film producers and distributors or broadcasters, or writers and publishers.

In view of its non-binding status it is difficult to assess whether the Recommendation has had any real effect on the behaviour of right holders and rights managers. Nevertheless, there is a noticeable tendency amongst holders of large catalogues of music copyrights, particularly music publishers, to withdraw their 'online rights' from smaller national collecting societies, and entrust these to larger societies that operate on a European scale.

3.4. EU Competition law

Even less structural, but sometimes effective nonetheless, are the remedies found in EU competition law, notably articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), formerly articles 81 and 82 of the EC Treaty, against the exercise of intellectual property rights along national borders that result in the unjustified partitioning of the internal market. The European Court of Justice has produced extensive case law on the issue, applying both former articles 81 (anti-trust) and 82 (abuse of dominant position). With regard to the former article, the Court has held in *Coditel II* that a contract providing for an exclusive right to exhibit a film for a specified time in the territory of any Member State may well be in violation of that provision if it has as its object or effect the restriction of film distribution or the distortion of competition on the cinematographic market.[13] In *Tiercé Ladbroke* the Court of First Instance ruled that an agreement by which two or more undertakings commit themselves to refusing third parties a license to exploit televised pictures and sound commentaries of horse races within one Member State 'may have the effect of restricting potential competition on the relevant market, since it deprives each of the contracting parties of its freedom to contract directly with a third party and granting it a licence to exploit its intellectual property rights and thus to enter into competition with the other contracting parties on the relevant market.'[14] The *GVL* case demonstrates that article 102 TFEU may also serve as a remedy against the territorial exercise of copyright. According to the European Court of

[12] Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54, 21 October 2005. See also European Parliament Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, T6-0064/2007.

[13] Coditel II, para. 17 et seq.

[14] Tiercé Ladbroke SA v Commission, CFI 12 June 1997, case T-504/93 ECR [1997] II-923, para. 157 et seq.

Justice, "a refusal by a collecting society having a *de facto* monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of Article [82] of the Treaty."[15]

Issues of territorial exclusivity are also at the heart of several more recent competition cases concerning licensing practices of collecting societies.[16] In the *Santiago Agreement* case, the European Commission prohibited a large number of European collecting societies, members of CISAC, from restricting competition as
regards the conditions for the management and licensing of authors public performance rights for musical works. The collecting societies were found to have restricted the services they offer to authors and commercial users outside their domestic territory.[17]

In the field of technology transfer, which includes computer software distribution contracts, the European Commission has provided for express normative guidance by issuing so-called 'block exemptions', which prohibit in technology licenses between competitors (inter alia) the exclusive territorial allocation of markets, subject to certain well-defined exceptions.[18]

[15] GVL v Commission, European Court of Justice 2 March 1983, case 7/82, ECR [1983] 483, para. 5.
[16] Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 [IFPI Simulcasting].
[17] Commission Decision of 16 July 2008, Case COMP/38698 (CISAC).
[18] Commission Regulation (EC) No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements of 27 April 2004, OJ L 123/11, 27.4.2004.

4. Economic and cultural impact of territoriality

The territorial nature of copyright, and the fragmentation of the Internal Market that it fosters, affect the emerging 'knowledge economy' in the EU in various ways – both negative and positive. In addition, territoriality in copyright has certain cultural ramifications. It would however require extensive empirical study to precisely assess the impact of copyright territoriality on the European cultural economy. Such analysis being well outside the scope of the present briefing note, this chapter will content itself with briefly indicating some possible positive and negative effects on the stakeholders most directly concerned.

4.1. Authors

For authors territoriality implies that they need to ascertain, and enforce, their copyrights in all Member States of the EU concurrently. For some authors this may entail increased transaction and enforcement costs, although in practice copyright enforcement will often be left to publishers, broadcasters and other intermediaries that have contractually secured the rights to sue.

In book publishing, authors will hardly be affected by territoriality. Licenses are normally not granted on a per-country basis; instead, licensing practices differentiate between language editions. For example, a German writer is likely to grant publishing rights in the German (original) language to a German publisher, while licensing English language translation rights to a British publisher. The Community exhaustion rule will guarantee that these various book editions can be freely distributed across the entire EU territory.

For composers and song writers, territoriality does have more immediate consequences. Although EC competition law has forced collecting societies to accept membership from foreign (non-national) authors, membership in practice is still largely determined by local circumstance. In practice, composers and song writers have little alternative but to join a national, often monopolistic collecting society.

4.2. Other right holders

The impact of territoriality on publishers, film producers, music publishers and other derivative right holders is much greater. On the positive side, territoriality allows these intermediaries to engage in certain practices that might be beneficial to their commercial interests. In the first place, territorial compartmentalisation facilitates price discrimination. If average price levels for a product or service varies from one Member State to the next, a provider might maximize profits by offering the same content in different states at different prices. Market segmentation, including territorial segmentation, can also be a way to influence competition. By restricting the provision of goods or services to the territory of one country, providers can avoid competition with services or goods outside the country.[19] In the third place, marketing cultural goods in

[19] See N. Helberger (IViR), 'Refusal to Serve Consumers because of their Nationality or Residence - Distortions in the Internal Market for E-commerce Transactions?', Briefing

foreign countries will sometimes call for territorial licensing, for instance, when the good needs to be customized to cater for local audiences. This may be the case, in particular, for the cinema release and broadcasting of foreign films.

On the negative side, territoriality entails increased costs of licensing and enforcement. If right holders own rights for multiple territories, they will need to ascertain, and enforce, their copyrights in all Member States of the EU concurrently. The existing disparities in national law, particularly as to subject matter and scope of protection, create additional costs, as right holders are forced to seek legal counsel per country as to the exact state of the law.

Right holders are also affected by the territorial practices of collecting societies, not only in the field of music performance rights, but also regarding reprography (photocopying), cable retransmission rights and private copying remuneration rights (levies). In all but a few exceptional cases, collective administration of rights and remunerations is undertaken at the national levels.

4.3. Collecting societies

Most collective rights management societies currently derive their existence from rights granted or entrusted to them on a national, territorial basis – sometimes protected by a government license or monopoly. Proceeds from the collective exploitation of these rights flow not only to entitled right holders, whereby local authors are sometimes favoured over foreign right holders, but are also channelled to a variety of cultural and social funds, mostly to the benefit of local authors and performers and local cultural development. By protecting and promoting local authors and performers, collecting societies thus play an important role in fostering 'cultural diversity' in the EU. Removing the territorial aspect of performance and communication rights would not only affect these de facto cultural subsidies, but also undermine the societies' very existence, except for a handful of societies that are large enough, or sufficiently efficient, to compete at the European level. Indeed, under the influence of the Commission's Online Music Recommendation a 'struggle for survival' among collecting societies is already visible.

4.4. Broadcasters

Broadcasters play a dual role both as owners of copyrights and neighboring rights, and as users of copyright works. Over time broadcasters have been increasingly confronted by territoriality-related problems, as terrestrial transmissions are increasingly complemented or substituted by broadcasting media that more easily transcend national borders. Whereas the Satellite and Cable Directive has brought some relief to broadcasters using satellite platforms, no similar legal solution presently exists in respect of web-based broadcasting services. As a consequence, providers of such services are compelled to clear rights for all the countries where such broadcasts are received,[20] or, if this is infeasible, restrict access to their services to local audiences.

Note for European Parliament Committee on Internal Market and Consumer Protection, January 2007.

[20] See EBU Response to the EC Commission Communication on the Management of Copyright and Related Rights in the Internal Market, 24.6.2004, available at

Disparities in national copyright protection, particularly as regards limitations of copyright, may cause additional impediments for transnational broadcasters. Statutory limitations permitting, for instance, incidental uses of audiovisual content for news reporting or quotation purposes may vary significantly from country to country.

4.5. Libraries and archives

Libraries and audiovisual archives engaged in mass digitization also suffer from problems associated with copyright territoriality. While the problem of securing licenses from thousands or even millions of – often hard to identify – right holders are already monumental at the national level, these problems are multiplied for digitization projects with transnational ambitions, such as *Europeana*. In cases where these problems become insurmountable, remote access to digitized collections will necessarily be restricted to national audiences.[21]

Limitations and exceptions relevant to libraries and archives differ spectacularly between Member States. While digital archiving or document delivery on demand may be perfectly legitimate in some Member States, the same activities may require licenses in others, thereby raising impediments to the establishment of trans-national library services.

The Google Book Search case illustrates – perhaps better than any other recent development – the shortcoming of a European market still divided by national copyrights and divergent copyright limitations, and the urgency to pursue supranational solutions.[22]

4.6. Providers of online content services

Arguably, providers of content-related services are the most hard-hit by copyright's rule of territoriality. The fragmentation of online rights along the national borders of Member States requires such providers to clear *a priori* all relevant rights for all Member States (and other non-EU countries) for which these services are made available. Offering content online across the European Union therefore necessarily entails huge transaction and licensing costs. This puts European content service providers at a large competitive disadvantage, particularly when compared to competitors in the United States, where copyright is regulated at the federal level and no state-by-state licensing is required.

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http://ec.europa.eu/internal_market/copyright/docs/management/consultation-rights-management/ebu_uer_en.pdf/.

[21] See, for example, the BBC Archive, http://www.bbc.co.uk/archive/index.shtml.

[22] 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, 07.09.2009, available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/376&format=HTML&aged=0&language=EN&guiLanguage=en.

4.7. Consumers

Consumers of content-related online services are increasingly confronted with access denials on grounds associated with territoriality. For example, online music stores based in Member States routinely deny sales to consumers from other Member States,[23] presumably because licenses granted by phonogram producers or collecting societies do not allow extraterritorial sales. For similar reasons, as explained above, consumers will often be denied access to audiovisual services abroad, either transmitted by satellite or offered online. Territorial fragmentation appears to be particularly rampant in respect of online television sports coverage. Whereas, for example, many national broadcasters transmit this year's Winter Olympic Games online on multiple broadband channels, access to these channels from abroad is usually restricted, apparently for copyright-related reasons. Clearly, for consumers of such services, the Internal Market has yet to materialize.[24]

[23] See N. Helberger (IViR), 'Refusal to Serve Consumers because of their Nationality or Residence - Distortions in the Internal Market for E-commerce Transactions?', Briefing Note for European Parliament Committee on Internal Market and Consumer Protection, January 2007.

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

5. Conclusions and recommendations

As this briefing note demonstrates, the territorial nature of copyright, while undeniably offering specific benefits to certain stakeholders concerned, profoundly affects the Internal Market. Despite decades of harmonization, territoriality, as an essential characteristic of copyright and related rights, remains a common instrument for partitioning markets within the EU – a practice 'repugnant to the essential purpose of the treaty, which is to unite national markets into a single market', according to the ECJ.[25] As a consequence, as long as national copyrights and related rights persist, no single market will be attained, not even if total harmonization of national laws is achieved.

The harmonization 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 at the federal level.

Whereas European (case) law has tackled the problem of territoriality head-on for the distribution of physical goods, by establishing a rule of Community exhaustion incorporating intellectual property, the territorial nature of rights of communication online has been left intact. While the Commission's recent Online Music Recommendation does address some of the problems caused by territoriality in the field of collective rights management of musical works, even the Recommendation does not question the territorial nature of copyright and related rights as such.

The question, therefore, must be addressed whether similar solutions can be found in respect of copyright-related online services. In search of such solutions, three different approaches might be considered.

5.1. Extending the satellite broadcasting model to the Internet

One possible solution would be to extend, or apply by analogy, to the Internet the 'injection right' model of the Satellite and Cable Directive, which was explained above. This is by no means a novel idea. Already in the 1995 Green Paper that preceded the Information Society Directive, [26] 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 and unequivocally discarded by all right holders consulted. Right holders 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

[25] Deutsche Grammophon v Metro SB, ECJ 8 June 1971, Case 78/70, ECR [1971] 487.
[26] European Commission, "Copyright and Related Rights in the Information Society", Green Paper, COM(95) 382 final, Brussels, 19 July 1995, p. 41 ff.

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.

In a Staff Working Document that accompanies 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 is once again extensively discussed:

> *Some stakeholders, including representatives from the broadcasters suggest that the country-of-origin principle should be considered for online services along the lines of the Satellite and Cable Directive. They consider that in particular, Internet streaming/simulcasting is comparable to the case of satellite broadcasting. While internet streaming and indeed simulcasting may indeed be structurally similar to broadcasting, this is less true for a host of 'on-demand' services and 'online retail' of music or film. In the case of online purchases, legal doctrine has established that the relevant act under copyright laws takes place in the country where the consumer has access to the relevant services. In depth analysis will be needed before considering the extension of a technology specific solution. […] Furthermore, the extension of the country of origin principle raises a number of concerns, such as the difficulties of locating the relevant act of transmission in the digital environment, the risk of devaluation of copyright if a single tariff and licence were to be applied to the whole Internal Market, or of a 'race to the bottom' both regarding the emergence of the protection and the scope of the protection. Hence, the question of whether or not the Satellite and Cable Directive (93/83/EEC) should be made technologically neutral by extending the country-of-origin principle to online services should be addressed through a review of this Directive*.[27]

5.2. Promoting multi-territorial licensing

A much less ambitious approach would be to keep the territorial nature of copyright as a matter of principle intact, but to promote multi-territorial licensing. This is the approach apparently advocated by the Commission in its Communication on Creative Content Online of 2008. While recognizing 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:

> *Developing a system where right holders would be encouraged to grant, next to the main licence, a second multi-territory licence would be one of the issues to be covered in the public consultation in respect of the*

[27] 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.

> *preparation of a proposal for a Recommendation, as well as an issue for discussion within the Content Online Platform.*

The discussions with stakeholders, as reflected in the Commission's Final Report on the Content Online Platform[28] that was published in May 2009, have obviously not led to a consensus on this issue. In the Report, the Commission concludes that a study on the legal, economic and cultural aspects of multi-territorial licensing will be undertaken: "Looking beyond this study, whose final results should become available by early 2010, the Commission's services intend to continue the debate in the course of 2009 by consulting all stakeholders, Members of the Parliament and Member States."

5.3. Unification of EU Copyright Law

Nevertheless, if the European Union is serious about achieving a single 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 our for the European Commission,[29] 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. Long considered taboo in copyright circles, the idea of a European (or Community) Copyright is gradually receiving the attention it deserves, both in scholarly debate[30] and political circles. For example, in one of her last public speeches on copyright, former Commissioner Vivian Redding 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.*[31]

Importantly, the Lisbon Treaty has introduced a specific competence for EU intellectual property rights. Article 118 TFEU provides:

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[28] European Commission, "Final Report on the Content Online Platform", May 2009, available at: http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm.
[29] 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.
[30] In 2002–2003 a group of European copyright scholars formed the 'Wittem Group', which regularly convenes with the aim of drafting a 'European Copyright Code'.
[31] 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 our expressed in a 'Reflection paper' on 'Creative Content in a European Digital Single Market: Challenges for the Future', which was jointly issued by the DG's InfoSoc and Markt, available at http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf.

> *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.*[32]

Arguably, article 118 TFEU would allow not only for the introduction of EU-wide copyright titles, but also for the simultaneous abolishment of national titles, which would be necessary for such an initiative to take its full effect and remove territorial restrictions.[33]

The potential advantages of such a EU copyright are undeniable. A European Copyright Law would immediately establish a truly unified legal framework, replacing the multitude of – sometimes conflicting – national rules of the present. A EU copyright title would have instant EU-wide effect, thereby creating a single market for copyrights and related rights, both online and offline. A EUcopyright would enhance legal security and transparency, for right owners and users alike and greatly reduce transaction costs. Unification by regulation could also restore the asymmetry that is inherent in the current acquis, which *mandates* basic economic rights, but merely *permits* limitations.

As Commissioner Reding has suggested, devising a European Copyright Law would be an ambitious undertaking – at best a project of the long term. With copyright law today in a state of immediate crisis, due in particular to the problems of mass infringement associated with the Internet, the question arises whether time would allow the EU legislature to embark on such an undertaking. The answer, in the opinion of this author, is yes. Work on a European Copyright Law could be undertaken in parallel with improvement, at the national level or in the form of further harmonization, of copyright in the EU. Indeed, such work could be less dependent on the mood of the day, and might allow sufficient reflection, thereby enhancing the quality of the final legislative product. In this respect, the slow but certain development of a body of European contract law in an institutionalized cooperation between the Commission and a group of qualified academic experts might serve as an example.[34] Ideally, such an 'unhurried' drafting process could produce the technologically neutral norms that make up a transparent, consistent, supranational legal framework, free from territorial restrictions, for many years to come.

[32] 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.

[33] See Mireille van Eechoud, P. Bernt Hugenholtz a.o., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*, Alphen aan den Rijn: Kluwer Law International, 2009, p. 317 ff.

[34] See Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the Acquis: The Way Forward, COM (2004) 651 final (Brussels, 11 Oct. 2004).

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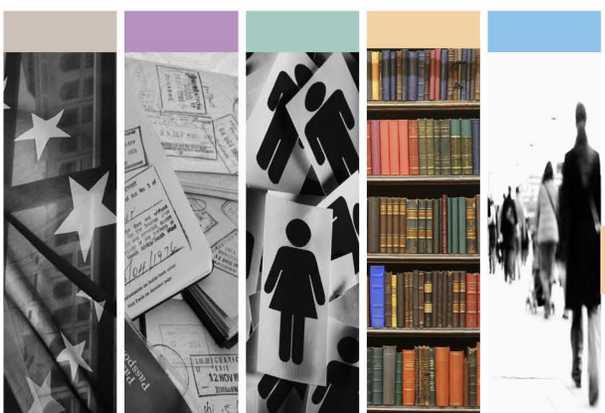

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