ReCreating Europe

Rethinking digital copyright law for a culturally diverse, accessible, creative Europe

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Executive Summary

As part of the Recreating Europe project, one strand of work focuses on how the territorial nature of copyright and related rights can hinder the realisation of the digital single market. While for e.g. trademarks and designs the EU have legislated community wide rights that extend across borders of individual Member States, copyright and related rights remain national at heart. Authors, performers, phonogram producers, database producers, broadcasters, press publishers, film producers all acquire bundles of national rights in their respective (intellectual) productions. Despite far-reaching harmonization of the subject-matter, scope and duration of national right, these rights remain restricted in their existence and exploitation to the geographic boundaries of the Member State under whose law they arise, i.e. they are territorial.

This paper sets out 'the problem with territoriality' in the context of the digital single market, analyses the friction with the idea of a single market, and categorizes the various techniques employed by the legislature and courts to curb its adverse effects. In doing so, it prepares the ground for further research to be undertaken as part of the Recreating Europe project.

There are different mechanisms currently used to overcome certain drawbacks of territorial rights in a single European market. They are dispersed throughout the acquis communautaires but can be grouped as:

- Limitations to the exercise of distribution rights (exhaustion doctrine)
- Fictive localisation of acts in one particular place ('country of origin principle')
- Mutual recognition and pan-European licensing
- Harmonization of private international law rules (we discuss this but signal that these are at best second order solutions).

What is clear is that it is to a large extent the development of communication technologies, and the possibilities these bring for cross-border provision and use of services, that drives the need for solutions overcoming territorially organized copyright. The solutions seek to reduce legal uncertainty primarily for (professional) users of materials protected by copyrights and related rights by clarifying which national laws must be taken into account. They also generally make it easier to acquire permissions or meet remuneration obligations by reducing the number of territories and thus (potentially) rightsholders involved. It is much less clear what the solutions bring right holders; who as we shall see in the next section on the music and film industries by and large prefer the system of territorial rights. From the fact that the solutions tend have a narrowly defined scope of application, and in the process of lawmaking from proposal to law are toned down sooner than expanded, it may be deduced that right holders see more threats than opportunities.

With respect to the mechanisms deployed, there is a clear preference on the part of lawmakers so far to opt for reducing the liability of (professional) users for copyright claims arising in different Member States through the presumption that the user only performs relevant acts at her place of establishment. Of the measures described in the paper, six are instances of such fictive localization. The exhaustion doctrine can be regarded as a carve out from the exclusive distribution right. There is only one instance of a true mutual recognition rule, i.e. the obligation for Member States to recognize the orphan work status acquired in another Member State. Close to this in its effect are the rules on the exception for the visually impaired, which essentially give national exceptions extra-territorial (pan-European) effect for both providers and users of materials. Direct interference with the territorial scope of licenses is also rare, the one example being the out of commerce extended collective licensing model. The music industry is a sector where collective licensing traditionally plays a major role, and where the EU legislative framework has been substantially adapted to promote efficient multi-territorial licensing. Territorial rights however remain the cornerstone of the system. This is also true for the film industry, despite the rise of cross-border broadcasting and streaming services.

1 Introduction

As part of the Recreating Europe project, one strand of work focuses on how the territorial nature of copyright and related rights can hinder the realisation of the digital single market. While for e.g. trademarks and designs the EU have legislated community wide rights that extend across borders of individual Member States, copyright and related rights remain national at heart. Authors, performers, phonogram producers, database producers, broadcasters, press publishers, film producers all acquire bundles of national rights in their respective (intellectual) productions. Despite far-reaching harmonization of the subject-matter, scope and duration of national right, these rights remain restricted in their existence and exploitation to the geographic boundaries of the Member State under whose law they arise. In this paper, when speaking of territoriality in EU copyright, it is in that sense.

This paper sets out 'the problem with territoriality' in the context of the digital single market, analyses why the notion of territoriality is so a powerful and persistent in EU copyright law despite its obvious friction with the idea of a single market, and categorizes the various techniques employed by the legislature and courts to curb its adverse effects. In doing so, it prepares the ground for further research to be undertaken as part of the Recreating Europe project. The methods used are desk research of legal sources (laws, cases, legislative record), (academic) literature and policy documents.

A common criticism of territorial copyright is that it facilitates the partitioning of markets, which potentially harms the interests of consumers, new entrants, and professional users whether commercial or public organisations. Consumers may not have access to certain services, or face (objectively unjustified) differential terms and conditions from one country to the next. Businesses seeking to develop innovative services on the back of permitted uses (e.g. in the field of text or datamining) may find that the costs of having to comply with different national copyright laws simultaneously is prohibitive. Distributors looking to satisfy demand for new ways of service delivery can run into the complexities of geographically organized exclusive licensing models, a maze too risky to navigate.

Surveying the debate, in industries, policy circles and legal scholarship, it is clear that discussions on territoriality in relation to creative sector business models are most frequent and perhaps intense where it concerns music and film industries. This is due in part because traditional collective rights management systems (music) and financing models (film) put a premium on maintaining geographical markets. Book publishing is another sector where territorial exploitation is traditionally strong. But presumably because publishers often acquire worldwide rights from authors and subsequently (sub)licence 'foreign' publishers for co-editions or translations (e.g. international partners, subsidiaries) and other producers (e.g. for dramatization), the actual distinction between a territorial copyright and the geographical scope of an (exclusive) licence or transfer is of less importance.[1]

In other —younger— sectors territoriality seems to be perceived less of a necessary foundation for successful exploitation, or even as a problem. The online game industry for example relies on large online transnational (often global) audiences that either have free-to-play access –with in game purchases of e.g. virtual goods— or take out subscriptions to a single game[2] or to a collection of games (e.g. Microsoft's GamePass). For publishers of games with high production costs (e.g. Ubisoft, EA) multi-territorial exploitation is necessary to recoup investment, but the online game industry does not rely on a system like traditional film distribution with tiered distribution where release in local theatres and local marketing play an important role.

[1] Leaving aside remuneration rights arising from limitations and exemption e.g. for public lending, private copying and educational uses, which typically are collected and distributed through national mechanisms (with reciprocal agreements between national collective management organizations).
[2] Dillon & Cohen 2013.

Copyright and related rights are important tools across a range of creative sectors, and as we will detail below, in some sectors the territorial exercise is more prominent than in others. But apart from differences across creative sectors, territoriality has different dimensions also at the level of stakeholders. For right holders, the territorial nature of copyright raises three types of issues. One is the acquisition of rights: who is initial owner for a particular territory, and by that token stands at the beginning of the exploitation chain; what is required to consolidate (or perhaps federate) ownership. The second dimension concern exploitation, which may take place through individual or collective licensing, or the exercise of statutory rights to remuneration for legally permitted use. The third dimension is about enforcement: especially in case of infringements across multiple jurisdictions right holders may face challenges.

For information service providers and distributors more generally, the ability to reliably acquire multi-territorial authorization (licenses) from the proper source is a key issue. For those relying on exceptions and limitations, having to deal with divergences across member states is a stumbling block. For professional end-users of copyrighted materials this is also true but will depend on the geographic market they operate on (local or not). From the consumer perspective, access is a key issue, notably having the ability to access 'foreign' services that are not offered in the consumer's home country, and being able to access content or services acquired in the country of residence abroad (sometimes called 'portability').

All these dimensions surface in policy debates. Generally speaking, because territoriality is the default and conflicting interests exists, legislative intervention to overcome disadvantages of territoriality tend to be ad-hoc and highly specific to certain situations.

It is important to clearly distinguish (political) ambitions to improve the creation and availability of cross-border information products and services with a view to promoting a well-functioning internal market, from the actual legal situation of right holders and their licensees, i.e. what the current framework allows or enables them to do. This becomes especially clear when one considers the interface of intellectual property ownership and competition law.

1.1 The internal market, national rights and the role of competition law

The partitioning of the internal market, which creates undue barriers to free trade, is a key outcome that EU competition rules seek to prevent. Indeed, the legislative competence of the EU in this field is informed by the ultimate objective of ensuring a proper functioning internal market. The competence to legislate copyright, by the way, is too.[3] What the optimal intellectual property protection is in terms of subject-matter, duration and scope of rights is a complex matter and the topic of continuous –often sharp—public debate; tied closely to the various economic and cultural policy objectives copyright law is supposed to serve. It is a matter beyond the scope of this paper. We would however stress that it is a basic tenet of copyright law that it bestows exclusive (property like) rights, which owners are in principle free to exercise as they see fit. This also implies that the exercise of national rights on a territorial (national) basis is fundamentally in keeping with the nature of the right itself.

Although competition law as such is not a topic of this paper, it has through the early case-law of the CJEU had an impact on EU copyright policy, notably through the development of the community exhaustion doctrine and other limitations to the exercise of 'national' copyrights. We therefore briefly set out the relationship between competition law and intellectual property here.

Especially the territorial exercise of IP rights can in theory constitute abuse of dominant position, or run afoul of the prohibition on cartels. The primary competition rules of the EU that address these anti-competitive conducts have gone unchanged since their introduction in the 1957 EEC Treaty (Rome Treaty). Article 101 TFEU (ex Art. 81 TEC) bans "...as incompatible with the internal market: all agreements between

[3] Van Eechoud 2009.

undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Article 102 TFEU (ex Art. 82 TEC) provides that "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

For intellectual property article 102 TFEU is of particular relevance, because of the exclusive nature of copyright or related rights. The legal 'monopoly' that copyright and other intellectual property rights provide can contribute to the existence of a dominant position for the right holder in a particular market. Owning an exclusive right per se does not create a dominant position.[4] It is more likely the exercise of the rights can lead to the finding that there is unjustified anti-competitive behaviour. From the caselaw of the CJEU it is however clear that this will only be the case in exceptional circumstances. Already in 1971, the European Commission issued a decision that German's GEMA, the German collective management organization for music, had a dominant position and abused this position by requiring companies that imported legally authorized copies of records from the UK to pay royalties, even though royalties had already been paid in the UK.[5] The underlying question —can a right holder prohibit imports from other Member States on the basis of a national intellectual property right— was the subject of various ECJ judgments given in response to preliminary references by national courts. In those judgments the ECJ adopted the doctrine of 'community exhaustion' as a means to reconcile territorial IPRs and the free flow of goods, see further below.

Competition cases involving copyright and related rights have mostly involved refusals to deal (the right holder not wanting to license). The freedom to decide when, to whom and how to license copyright is an essential characteristic of copyright and intellectual property rights more generally. Therefore, a refusal to license does not —as such— constitute an abuse of a dominant position.[6] For copyright, this was confirmed in Magill and IMS Health.[7] But nor is intellectual property law a competition law free zone.[8] Where it concerns not a refusal to license outright, but the practice of imposing strict geographical limits through licensing, the situation seems hardly different. Arguably, given that copyright is territorially limited to one particular Member State, it cannot be held against the right holder that she licenses it only for that territory.[9] More fundamentally, on a strict territorial reading of copyright, there is no other way for the owner than to license it for (parts of) the territory under the laws of which it arises. Because it does –on this account— not legally exist anywhere else; the 'Dutch' copyright is a distinct legal entity from say the 'Slovenian'. We do not support such a strict reading, if only because the continued harmonization efforts of the EU (and the international community more broadly) show that copyrights are viewed as essentially very similar across jurisdictions, certainly as regards subject-matter, scope of rights and duration.

[4] Sganga & Scalzini, 2017.

[5] Commission decision 2 June 1971 (nr. 71/224/EEC, OJ 1971, L 134).

[6] The situation is somewhat different in case of collective rights management, see e.g. the CJEU Tournier judgment on reciprocal arrangements between music collecting societies, where the court holds that if copyright management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad, or have a concerted practice to that effect, this would constitute a prohibited restriction of competition (ex Art. 85 EEC Treaty); CJEU 13 July 1989, Case C-395/87, ECLI:EU:C:1989:319 (*Ministère Public v Tournier*).

[7] CJEU 6 April 1995, Joined Cases C-241 and 241/91 P, ECLI:EU:C:1995:98 (*Radio Telefis Eireann v. Commission* (*Magill*)); CJEU 29 April 2004, Case C-418/01, ECLI:EU:C:2004:257 (*IMS Health).*

[8] Drexl 2004; who rightly warns however against assuming too easily that it is the existence of a (territorial) intellectual property right as such that is the root cause of a dominant position.

[9] Note however that distribution agreements can be vetted by the EC for breach of Art. 101 TFEU. For example, in the case against major studios and pay-tv providers, Disney, Sky and others undertook to refrain from agreeing to contractual obligations which prohibit passive sales outside the licensed (EU) territory. See Anti-trust case 40023 Cross-border access to pay-TV, Commission Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40023 - Cross-border access to pay-TV), Brussels, 7.3.2019 C(2019) 1772 final. See Cabrera Blázquez 2020 for a discussion.

1.2 Territoriality in EU copyright policy making

From its inception, the EU has dealt with intellectual property law because trademarks, copyrights, designs and other rights affect trade in goods and services. As a consequence EU copyright policy and law making has a rich and long history, spanning more than six decades. From the special place accorded to intellectual property in the original EEC treaty's key provisions that establish the principle of free flow of goods (1957), to tailormade provisions aimed at facilitating cross-border access to certain online broadcast works (2019), internal market policy has produced a plethora of directives, regulations and recommendations, which have given rise to a rich body of case-law. Taken together, the bits and pieces –sometime large chunks—of harmonization have resulted in an acquis that unifies a very substantial part of Member states' copyright and related rights law. Lacunas that remain concern mostly issues around (collective) authorship, initial ownership, transfer and other proprietary aspects.

Throughout, the principle that copyright and related rights are territorial in nature has remained a cornerstone of EU policy. The reasons for this are historic, lie partly in the international intellectual property system, and are informed by industry practices and business models that rely on territorial exploitation of rights. We shall elaborate on this important point below, when describing the traditionally territorially organized music and film sectors. From the start, there has been tension between the existence of exclusive exploitation rights that (in theory at least) are limited by national borders, and the foundational idea of a single or common European market.

The idea of a single common market presupposes that goods and services flow as freely as possible across borders. In several policy domains and sectors, harmonization of the laws of Member States coupled with the notion of mutual recognition (country of origin) has become a dominant way to organize the single market. The idea is that providers of goods and services need only comply with laws in their home-country, to be able to serve customers in other Member States.[10] In reality, businesses rarely ever find themselves in that attractive situation, for example because not all aspects of a trade are the subject of EU harmonization and Member States retain some discretionary power to impose requirements. However, with respect to trade in goods and services that involve copyright and related rights, it is by definition the case that industries and customers run into borders. Because by default, EU law respects the territorial nature of intellectual property rights.

One early established exception is the doctrine of exhaustion mentioned above, under which intellectual property rights cannot be invoked to restrict intra-community trade of goods that have entered the EU with authorization of the (local) right holder. This doctrine was first developed under then article 35-36 of the 1957 EEC treaty, but has since become enshrined in secondary EU law. For copyright and related rights, it is made explicit in article 4 Copyright Directive on the exclusive distribution right. The limits of the exhaustion doctrine are set out further below. At this point, suffice to say that the turn from analogue to digital, from goods to services,[11] combined with the wide scope of copyright and related rights law, means territoriality as a potential hindrance to the single market is very much alive. Copyrights are used to control all links in the value chains from production to final consumption. And because so many types of interactions with

[10] For lawfully marketed goods, a key piece of legislation that is meant to iron out problems that still exist as regards the application of the principle of mutual recognition is Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008, *OJ 2019 L 91 (Mutual recognition regulation).*

[11] E.g.in the music sector, income from the 'sale' of digital music is by now nearly 90% from streaming, and only 10% from the sale of downloads. See Procee 2020.

protected materials require either prior authorization or are subject to (national) remuneration obligations, this complicates matters.

2 Mechanisms addressing territoriality problems

The primary objective of harmonization is removing barriers to the free flow of information goods and services. By approximating the laws of the Member States these laws are made more consistent and transparent to (foreign) providers of cross-border goods or services. This enhances legal certainty and creates a level playing field to a certain extent, in turn that promote the internal market. But removing disparities in national laws does not do away with the territorial effect that remains an obstacle to the establishment of a single market. In the end users will still need to clear authorization for different territories. This puts smaller parties (eg. SME's, cultural heritage organisations and other local cultural organisations) at a disadvantage compared to multinationals.

Looking at the copyright and related rights acquis record, it is relatively rare for the European legislature to problematize the continued existence of territorial copyright and related rights as such. Rather, the main stay of legislative intervention has been to reduce divergences in national substantive norms. Over time however, a number of exceptions to territoriality have been legislated. These can be grouped on the basis of shared characteristics.

In this section we describe the different mechanisms that are currently used to overcome certain drawbacks of territorial rights in a single European market.

- Limitations to the exercise of distribution rights (exhaustion doctrine)
- Fictive localisation of acts in one particular place ('country of origin principle')
- Mutual recognition and pan-European licensing
- Harmonization of private international law rules (we discuss this but signal that these are at best second order solutions).

2.1 The exhaustion doctrine

To gauge the field of application of the exhaustion doctrine, it is necessary to consider its context and specifically, the scope of the distribution right because it is constructed as a carve-out to the latter. Distribution rights are contained in various directives. With respect to neighbouring rights, Article 9 Rental and Lending directive sets out the distribution right for performers, phonogram producers, film producers and broadcasters. It grants the exclusive right to make available these objects, including copies thereof, to the public by sale or otherwise. For software and databases, distribution rights are laid down in the respective directives.[12] It was the 2001 Information Society Directive (also known as Copyright directive) that introduced a broad distribution right for authors in general. Article 4 sets out the exclusive right to authorize 'any distribution to the public by sale or otherwise' of the original or copies of a work. This right is limited by article 4(2) which provides that 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 right holder or with his consent."

2.1.1 Analogue and digital copies

There has been some controversy over the question whether the distribution right only applies to protected subject matter marketed as physical copies (a print book, a CD with sound recordings), or should be

[12] Article 4 sub c of the Computer Programs Directive and Article 5 sub c of the Database Directive ('any form of distribution to the public').

interpreted broader to include at least digital copies. This has direct impact on the exhaustion rule. Arguably, as more and more protected subject-matter is disseminated electronically online, substituting traditional dissemination of digital copies on physical carriers (CD, DVD etc.), the significance of the exhaustion doctrine as a mechanism to promote the internal market shrinks.

In the first case on article 4 heard by the CJEU, the Court looked to article 6 of the WIPO Copyright Treaty (WCT) because the distribution right was designed to be in conformity with this article. The CJEU held[13] that it covers 'acts which entail, and only acts which entail, a transfer of the ownership of that object .'[italics added]. The implication is that the distribution right indeed applies only to physical copies embodying a work. And indeed, recital 29 of the Directive says that the 'question of exhaustion does not arise in the case of services and online services in particular'.

Since that first judgment, the picture has become a bit less clear. It is beyond the scope of this paper to analyse the details,[14] but important to note that UsedSoft and Ranks, the two judgments that seem to broaden the possibility of applying exhaustion to digital copies, arose under the distribution right for software.[15] In the subsquent TomKabinet case on trade in secondhand ebooks, the CJEU again acknowledged that where an 'online transmission method is the functional equivalent of the supply of a material medium...in the light of the principle of equal treatment justifies the two methods of transmission being treated in a similar manner.'(para. 57). However, the Court considered an ebook to be not functionally and economically equivalent to a print book (because it does not deteriorate), so saw no place for applying the exhaustion rule.[16]

Since the exhaustion doctrine has become secondary law, whether national copyright laws are in keeping with it must be evaluated under the Copyright directive and not the provisions of the TFEU on the free flow of goods and the exceptions it allows in the interest of protecting ' commercial and industrial property' which includes copyright and related rights.[17] This further reduces the potential role of the exhaustrion doctrine, because article 4 Copyright Directive is clearly conceived for physical copies.

2.1.2 Goods versus services

So while the European Court of Justice and the EU legislature have tackled the problem of territoriality for the dissemination of goods embodying protected subject matter, EU policies in respect of internet-based services have left the territorial nature of rights of communication to the public essentially intact. This is not only evident from the recent case-law described above in TomKabinet, Usedsoft and Ranks, but also from earlier case-law.

The Coditel I judgment of 1980 concerned the territorial licensing of rights to broadcast a protected film via television and cable. It made clear that the 'rules of the treaty [on the freedom to provide services] cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organized in the Member States largely on the basis of legal broadcasting monopolies,

[13] CJEU 17 April 2008, Case C-456/06, ECLI:EU:C:2008:232 (*Peek & Cloppenburg KG v Cassina SpA*).
[14] For a discussion see Geiregat 2017.
[15] CJEU 3 July 2012, Case C-128/11, ECLI:EU:C:2012:407 (*UsedSoft*) and CJEU 12 October 2016, Case C-166/15, ECLI:EU:C:2016:762 (*Ranks and Vasiļevičs*). In the latter the Court held that: [t]he exhaustion of the distribution right... concerns the copy of the computer program itself and the accompanying user licence, and not the material medium on which that copy has, as the case may be, been first offered for sale in the European Union by the copyright holder or with his consent. It thus did not limit exhaustion to software distributed on material carriers (here: CD-ROM).
[16] CJEU 19 December 2019, Case C-263/18, ECLI:EU:C:2019:1111 (TomKabinet), reported in Hohmann 2020.
[17] See judgments in Gysbrechts and Santurel Inter, C-205/07, ECLI:EU:C:2008:730, paragraph 33, and in Commission v Belgium, C-421/12, ECLI:EU:C:2014:2064, paragraph 63.

which indicates that a limitation other than the geographical field of application of an assignment is often impracticable.'[18]

This judgment is often invoked to highlight that the territorial exercise of copyright along national borders is in principle allowed; but one should not overlook the specific observation of the court that legal (national) broadcasting monopolies make it impractical to license in other ways than on a national basis. At the time, before the liberalisation of television markets in Europe and the rise of commercial television this may have been so. However, since the introduction of the Television without frontiers directive of 1989 (since replaced by the Audiovisual Media Services Directive)[19], the country of origin principle applies to broadcasting and later to audiovisual media services more generally, i.e. Member States must ensure freedom of reception and may not restrict retransmissions on their territory of services originating from other Member States. From that perspective the Court's 1980 observation that for television 'limitation other than the geographical field of application of an assignment is often impracticable' quickly became outdated.

It must be noted that the rules aimed at an internal market for goods can affect services. This became clear in the FAPL and Murhpy cases involving the cross-border sale of decoders that enable access to encrypted broadcast services.[20] In this case involving broadcast licenses for sports events, the broadcasters obtain territorial exclusivity for a certain market but are also prohibited by the rightsholder from supplying or using decoders that enable access outside the licensed territory (e.g. the licensee with exclusive rights for broadcasting in Greece cannot be engaged in supplying decoders to expats elsewhere so that they access the broadcasting service).

There is an indirect effect of Art. 56 on the ability of right holders to compartimentalize markets for (audiovisual) services in such a way. Member States can not ban the import, sale and use of foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State. It is not relevant that the decoder is meant to be used to circumvent territorial access restrictions. The right holder can also not prohibit its exclusive licensees from supplying decoding devices for use outside the territory for which the licensee is granted an exclusive license. Such an agreement constitutes an unlawful restriction on competition under Art. 101 TFEU.[21]

2.1.3 CJEU interpretations localizing cross-border acts

It should come as no surprise that while the level of harmonization of copyright and related rights law was still limited, territoriality as a key organizational principle in intellectual property retained a large impact. There is some indication that Court too has sought to limit the effects of a strict territorial reading of copyright in cross-border situations, albeit in a modest way. The wholesale use of new dissemination technologies in contemporary society, such as satellite and the web seem to drive this. Below we discuss four judgments: Lagardère, Football Dataco, Opus/Thuiskopie, and FAPL Murphy.

The 2005 Lagardère[22] judgment can be viewed as an early signal that the Court is inclined to avoid excesses of a strictly territorial approach in situations where the use of communication technologies causes spill-over to other territories.

A French satellite broadcaster that also makes use of a support (terrestrial) transmitter located just across the border in Germany, to be able to reach French audiences. As a result, the programmes broadcast in the French language could also be received in a small area on German soil, but this was for technical reasons and

[18] CJEU 18 March 1980, Case C-62/79, ECLI:EU:C:1980:84 (*Coditel v Ciné Vog Films*), para. 15 .
[19] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, *OJ L 2018/303.*
[20] CJEU 4 October 2011, joined cases C403/08 and- C429/08, ECLI:EU:C:2011:631 (*Football Association Premier League & Murphy)*-.
[21] EAO 2020; Cabrera Blázquez 2020.
[22] CJEU 14 July 2005, Case C-192/04, ECLI:EU:C:2005:475 (*Lagardère Active Broadcas*t).

not because the broadcaster sought to reach a German audience. A conflict arose over whether the payment of performance royalties for the use of phonograms in the broadcasts (collectively managed) was due in both France and Germany. The issue before the Court was whether the particular broadcast constellation qualified as a satellite broadcast to which the fiction of the Satellite and Cable Directive applies, i.e., that communication to the public only takes place at the place of 'injection' of the broadcast signal. The answer to that question was no, which then triggered the subsequent question of whether remuneration for the use of the sound recordings in the tv programmes was due in both France and Germany. The Court stressed that the Satellite and Cable directive only seeks minimal harmonisation and therefore does not detract from the territorial nature of rights. Therefore, payment was indeed due for both territories, but the level of the German royalties would have to reflect that a potential or actual audience in Germany was almost but 'not entirely absent'.[23]

Considering the wording and objective of the Satellite and Cable directive, it was hardly possible for the Court to reach another conclusion. In the 2013 *Football Dataco/Sportradar* case this was different. There, one question was how an act of 're-utilisation' of the contents of a database protected under the Database Directive's sui generis regime must be localized. When data is transmitted over the web, does the transmitter 're-use' it in all places where it can be accessed? German company Sportradar operates a website (hosted on servers in the Netherlands and Austria) with live sports data. Football Dataco maintained that the sports data infringed its sui generis database rights under UK law. Leaving aside whether there is a protected database at all and whether Sportradar used it as a source, the Court ruled that by transmitting data from abroad to internet users in the United Kingdom, Sportradar does not yet 're-use' data in the United Kingdom. For that to occur, it is necessary that Sportradar also intends to reach the public there.

In *Thuiskopie/Opus*,[24] the Court had to elaborate whether in cases of cross-border distance selling, the commercial seller of blank media can be made to pay levies for private copying on media sold to consumers in other countries. In many EU countries, commercial sellers of blank media are the ones legally obliged to pay the levies, which they pass on to end users. This is also the case in the Netherlands and in Germany. Germany based company Opus sells blank media via the internet. Its operations target consumers in the Netherlands. Under the contract of sale however, the goods are held to be delivered to the consumer in Germany (the consumer being the one formally engaging the carrier that delivers the media to the Netherlands, although in fact Opus facilitates delivery).

The Court reasons that the private copy levy is meant to compensate harm suffered by right holders, and that "it can be assumed that the harm for which reparation is to be made arose on the territory of the Member State in which those final users reside." The Netherlands must therefore ensure the effective recovery of the fair compensation for the harm suffered by the authors on its territory. That the party owing the compensation is established abroad is of no consequence. As a result, national law cannot be applied on a strict territorial basis but must extend to suppliers acting abroad.[25]

2.2 Fictive localisation of acts ('country of origin')

If one considers the history of the exhaustion doctrine it can be characterised as a solution that initially was external to copyright. It was the interpretation of the treaty provisions on the free flow of goods in relation to the permissible restraints on the free flow of goods in the interest of intellectual property that gave rise to the exhaustion doctrine. Once the exhaustion doctrine was included in secondary EU law it became one might say a restriction on copyright that is internal; it limits the exercise of the exclusive distribution right.

[23] The Court based this reduced payment the fact an '*equitable* remuneration' is due under the Satellite and Cable Directive for broadcasting phonograms.
[24] CJEU 16 June 2011, C-462/09, ECLI:EU:C:2011:397 (T*huiskopie/Opus Supplies Deutschland GmbH*).
[25] The Dutch Supreme Court achieved this by qualifying Opus as an 'importer' of blank media under the relevant provisions of the Dutch copyright act, an exceptionally broad reading of the term 'import'. HR 12 oktober 2012 (*Thuiskopie/Opus)*, AMI 2013/6 nr. 11.

The use of a fictional localization of acts is another type of internal solution. What fictional localization achieves is that it creates a non-rebuttable presumption that a particular act which might be construed as taking place across borders, is in effect by law situated in one particular Member State. This means that a party engaging with protected subject matter will only have to seek clearance of the right holders, or pay (statutory) remuneration, for the place where he or she is presumed to perform the act. This does not necessarily impact the level of remuneration that is due for the use, because that might well be based on the market value off the intellectual property in multiple jurisdictions. What it does do is simplify authorization.

There is a range of such localization fictions in the acquis. The term 'country of origin' is often used to denote localization presumptions, e.g., the injection rule of the Satellite and Cable Directive is routinely referred to as a home country rule or country of origin rule. We think it is more precise to speak of localization, because 'country of origin' can refer to many places: the place of use, to the place of establishment of a certain party (right holder, professional user, end consumer), to the Member State in which certain conditions have been met, etc. Below we describe the various instances. In two cases localization fictions are tied to other rules (on the use of out of commerce subject matter, and provisions for the visually impaired); these are described in section 2.3.

2.2.1 Place of communication for satellite broadcasts

The earliest and perhaps best-known instance of fictive localization is in the Satellite and Cable directive of 1993. For authors, this directive provides the exclusive right to authorize satellite broadcasts of copyrighted works (Art. 2 Satellite and Cable Directive). Broadcasting rights for performers, broadcasting organizations and phonogram producers were detailed in the 1992 Rental and Lending rights directive.[26] The subsequent Copyright directive extended broadcasting rights for authors as part of a general right of communication to the public.

When the Satellite and Cable directive was conceived, broadcasts via satellite where not routinely encrypted. The geographic footprint of satellite broadcasts could well cover a larger area than where the intended audience was located. If, however, all places where satellite signals could be received were to constitute places where there is communication to the public, this meant that a party engaging in satellite broadcasts would need authorization for all these territories.

To avoid the cumulative application of several national laws to one single act of broadcasting, the fiction was introduced that an act of communication to the public by satellite occurs solely in the Member State where the broadcast signals are introduced in an uninterrupted chain of communication leading to the satellite and down towards the earth.[27] This localizes the copyright relevant acts for the purpose of licensing. For the broadcast of encrypted signals, there is only a 'communication to the public' in those territories where the "means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent" (Art. 1(1) sub c Satellite and Cable directive). This too is a mechanism which reduces the number of territories for which rights need to be cleared, but to a lesser degree.

2.2.2 Place of use in secure electronic education networks

A second fiction introduced to facilitate rights clearance is contained in the Digital Single Market directive (DSM directive).[28] Here the problem addressed is that educational institutions engaging in digital teaching

[26] Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *OJ* 2006, L376/28. Replaced: 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* 1992 L 346/61.

[27] Art. 1(2) sub b Satellite and Cable Directive: "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."

[28] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, *OJ L 2019/130. ('DSM Directive')*.

and distance learning across borders face legal uncertainty with respect to the modalities of the permitted uses they can make of protected materials. If they work with digital learning environments for example, students situated abroad (e.g., living there or on an exchange programme, taking an internship or doing fieldwork) may need to have access to these.

This raises questions as to whether the institutions must act in conformity with all copyright laws of Member States from where students can access materials. So in addition to mandating that all Member States "allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved" (Art. 5 DSM directive), the directive stipulates that "The use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments [...] shall be deemed to occur solely in the Member State where the educational establishment is established." (Art. 5(3)). The use must be in compliance with the provisions of national law that implement the exception. Member states have some discretionary powers, e.g., to exclude certain works from the exception and impose remuneration.

2.2.3 Place of access and use consumer content services

A third example of a localization fiction concerns consumer access to (paid) content services outside the country of residence under the Online content portability regulation.[29] It applies to audio-visual media services (e.g. streaming video on demand, tv broadcasting) and other services primarily aimed at the provision of access to, and the use of content that is protected by copyright or related rights. The modern consumer equipped with mobile devices and (at least pre-Covid) eager to travel increasingly expects to have access to information services everywhere.

In a nutshell, service providers are obliged to ensure that (paid) subscribers that are normally resident in a EU Member State, retain access to the service when they are temporarily in another Member State (Art. 3).[30] To fix questions around rights clearance this raises for said service providers because they may not have the necessary rights to provide access beyond a particular territory, the regulation lays down the fiction that the consumer who is temporarily present in another Member State, accesses the content in its normal country of residence (Art. 4). The main goal of the regulation is to promote 'seamless access throughout the Union to online content services...' because this is 'important for the smooth functioning of the internal market and for the effective application of the principles of free movement of persons and services' (recital 1). A consequence of the obligation to ensure access abroad is that service providers are to a certain extent prohibited from engaging in geo-blocking.

Geo-blocking technologies enable right holders to enforce territorial exploitation restrictions.
Generally, the use of such technologies in copyright industries is allowed because of the territorial nature of rights and the freedom of right holders to exploit their intellectual property. This is why it took legislative intervention to ensure the (limited) access abroad for consumers of online content services.

The Geo-blocking regulation of 2017 aims to limit the use of geo-blocking technologies and localisation obligations across different parts of the internal market. It has only very limited relevance for copyright and related rights. Essentially, copyright-based services are excluded from its scope,[31] although as part of the regulation's review extension to copyright protected subject-matter is being considered.[32] A possible extension to copyright industries could have far-reaching consequences, especially as it may lead to less price-differentiation, changes in available works, and additional costs for smaller (local) service providers

[29] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, *OJ L 2017168 ('Online content portability Regulation').*
[30] For a more detailed analysis (also of the provision for non-paid services), see Engels & Nordemann 2018.
[31] Vasala 2019, Mazziotti 2019.
[32] See also R. Procee et al, 2020, Study on the impacts of the extension of the scope of the Geo-blocking Regulation to audiovisual and non-audiovisual services giving access to copyright protected content, EC Brussels 2020.

having to engage in passive sales (i.e. when they cannot refuse to accept customers from Member States outside of the geographic region they target). In any event, it would seem that to effectively prevent geo-blocking, an exhaustion doctrine for services is needed, or another mechanism that would ensure providers can acquire the multi-territorial licenses they need to be able to legally supply consumers. An extensive study for the European Commission on the possible economic impact of an extension of the Geo-blocking regulation, highlights that there exists substantial controversy. It also stresses that data on consumer demand is missing, even though this would be crucial evidence to estimate consumer response to a change in the legal framework that would prevent geo-blocking in the delivery of audio-visual content, games, e-books and music.[33]

2.2.4 Place of communication for ancillary broadcasts

The internet and the convergence of different communication infrastructures (satellite, cable, terrestrial networks) have changed how broadcasting services are delivered. To facilitate the operation of broadcasters, the Online broadcasting directive introduces a presumption that acts of communication to the public take place in the Member State where the broadcasting organisation has its principal place of establishment. This presumption is different from the one in the Satellite and Cable directive in that it does not localize the act itself technically (the place of 'injection') but connects to the party using the intellectual property. The presumption is limited in two ways, the scope of application of the final directive having been substantially reduced compared to the initial plans under pressure from right holders.[34] First, it only applies to radio programmes, and for tv only to a broadcasting organization's own productions (fully financed) and to news and current affairs programmes, broadcasting of sports events excluded. Second, it only applies to communications to the public that are ancillary to the (main) broadcast, i.e. it covers services like catch-up tv and simultaneous webcasting.

2.3 Mutual recognition and pan-European access

Although most solutions in the acquis concern fictive localization of acts, there are also a number which operate differently. In the dedicated chapter on licensing in the music industry we will discuss the measures aimed at multi-territorial licensing for online music use. The section here focuses on other instances.

2.3.1 Mutual recognition of orphan work status

The first is contained in the Orphan works directive. This 2012 instrument is aimed at increasing access and use to (copyright) works and other protected subject-matter of which the right holder is unknown or cannot be localized despite a diligent search. Since the rights have not yet expired, the materials are not free to use. This hinders for example digitization projects in cultural heritage institutions, and activities aimed at preserving collections of older works. The directive sets up a system whereby (public) libraries, public services broadcast archives and similar institutions parties wanting to use orphan works for their public interest missions, can go through a process that culminates in a work obtaining 'orphan work' status. The details of this process are determined by Member States. The outcome —and details of the search— must be registered in a publicly accessible online database (hosted by the OHIM, the EU agency which also operates EU intellectual property registries for e.g. trademarks). Once a work or phonogram has obtained orphan work status under a national Member State's regime, this status must be recognized in other Member States. This system of mutual recognition means that the work or phonogram may be used and accessed in all Member States (Art. 4 Orphan works directive).[35]

[33] Procee 2020. Study on the impacts of the extension of the scope of the Geo-blocking Regulation to audiovisual and non-audiovisual services giving access to copyright protected content, EC Brussels 2020.
[34] Compare Article 2 of the original proposal COM/2016/0594 (Online broadcasting regulation).
[35] Art. 4 "...A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States.''..'

2.3.2 Pan-European license out of commerce works

The out of commerce provisions of the DSM directive (article 8-11) address a broader category of materials than the Orphan works directive does. They enable the extended collective licensing for the reproduction and communication of out of commerce works and other protected subject matter in the collections of cultural heritage institutions. The aim is to facilitate better online access to such collections, also across the EU. If there is no representative collective management organisation to license with, then as a fall-back option the cultural heritage institution can provide access to its collection online (for non-commercial uses only). An important precondition is that the institution has made a reasonable effort to determine that the work is indeed out of commerce. The right holder can always opt-out.

For our purposes, what is interesting about the directive is its provision on cross-border uses. For out of commerce works that are collectively licensed, Member States must ensure that such a license is pan-European. To enable multi-territorial non-commercial use where no collective licensing is available, the cultural heritage institution that relies on the fall-back option is presumed to only engage in copyright relevant acts at its place of establishment. This is another example of a localization fiction described in section 2.2.

2.3.3 Pan-European access for blind and visually impaired persons

Specific limitations to copyright and related rights for the benefit of blind persons and the visually impaired are prescribed in a dedicated directive, which implements the WIPO Marrakesh treaty of 2014.[36] The directive creates a system of national authorized institutions ('entities') that are allowed to reproduce and disseminate works in a format that is accessible for the blind and visually impaired. Member states must ensure that eligible institutions and persons from other EU Member States have access to accessible formats created by authorized entities. To what extent this means providers are prohibited from geo-blocking based on geographic indicators is unclear. Local entities must also be allowed to produce and disseminate accessible formats for eligible persons or organizations from other Member States. It creates a system of mutual recognition of eligible entities. By imposing this cross-border dimension, the directive effectively gives extra-territorial effect to the exception that is created in each Member State. This enables pan-European services by authorized entities (arguably a form of mutual recognition), and pan-European access for beneficiaries.

2.4 Private international law

Considering that overall, copyright or related rights conferred remain limited to the territorial boundaries of the Member State under whose laws rights arise, rules of private international law continue to play a role. These are a world unto themselves and compared to the mechanisms described above which operate at the level of copyright law itself, a second-order solution. We highlight some key characteristics here, primarily to show how the territorial nature of intellectual property rights filters through in rules of private international law. Currently, private international rules and especially rules determining the applicable law to copyrights and related rights (property aspects, infringements, territorial scope) do not offer a solution to mitigate negative effects of territorial rights in the single market.

[36] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* 2017/L 242; Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, WIPO 2014.

The question which court is competent to hear a claim in copyright is governed by the Brussels Ibis Regulation,[37] in cases where the defendant(s) are domiciled in an EU Member State.[38] The regulation recognizes various heads of jurisdiction. The main principle is that courts of the place of domicile of the defendant have jurisdiction. A court chosen by parties is competent, and exclusively so by default. Alternative heads of jurisdiction are specific to the type of legal issue involved: thus, for infringements the place where the harmful event occurred or where damage materialized determines jurisdiction. For contractual obligations, e.g. a breach of licensing terms, the place where the obligation must be performed creates alternative jurisdiction. The Brussels Ibis Regulation is highly relevant for enforcement of copyright. The broad reading that the CJEU traditionally has of infringement jurisdiction (Art. 7(2) Brussels Ibis, which creates alternative jurisdiction for torts) means that in the online environment, the fact that access to the (infringing) subject-matter is possible from a particular place already creates jurisdiction for the local court(s).[39] As a consequence, right holders can choose the forum they consider to be most expedient, while for (professional) users of works it is unpredictable for which court they will be sued.

Of note, jurisdiction rules are always needed to resolve the question which court can hear a claim, regardless of the territorial scope of an intellectual property right involved. So international jurisdiction rules per se do not offer a 'solution' to curb any detrimental effects of the territorial nature of IPRs. The interpretation of specific rules can however aggravate or diminish problems arising from territoriality. For example, the regulations on the EU trademark and Community design right, both contain some special rules that take priority over their equivalent jurisdiction rules in Brussels I bis. The interpretation of the specific infringement jurisdiction rules in those instruments is narrower than the one used for copyright and related rights under the generic tort rule of Art. 7(2) Brussels I regulation. This reduced the number of competent courts and thus enhanced predictability.[40]

Distinct from jurisdiction is the question of applicable law in international cases. Here, for copyright and related rights EU law offers less guidance. For the infringement of rights, Article 8(1) of the Rome II Regulation on the law applicable to non-contractual obligations[41] prescribes as applicable the law of the country for which protection is claimed (the so-called lex protectionis). This means that the question whether a particular act constitutes infringement, who is liable, the existence, nature and size of damage, the availability of remedies etc. is governed by the lex protectionis. This leads to a 'mosaic approach' in cases where it is claimed that the particular use of say a work infringes copyright in multiple jurisdictions: for each territory the respective law must be applied. How to fashion appropriate relief then can become very difficult to determine.

Note that questions involving copyright as such, e.g. whether it exists to begin with, who qualifies as author, its transferability, duration etc. do not fall under article 8(1) Rome II. Because substantive copyright law has not been fully harmonized, especially not with respect to authorship, ownership and transfer, it can still matter for the outcome of a case which national law is applied. Since EU law provides no conflicts rule on this, it is for the competent court to decide based on its national law (including private international law rules) which law governs such matters. The lex protectionis is however widely –but not universally-- regarded as the proper conflict rule for these questions too, because it fits with the territorial nature of copyright as enshrined in the multinational conventions like the Berne Convention.[42] The application of the lex

[37] Regulation (EU) No 1215/2012 on court jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ibis Regulatoin).

[38] A 'sister' instrument is the Lugano Convention, which contains largely the same rules, for EU and EFTA countries. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2009 L 147.

[39] For an in-depth discussion see Kur 2015.

[40] See e.g. CJEU 5 September 2019, C-172/18, ECLI:EU:C:2019:674 (*AMS Neve);* Dreyfuss & van Eechoud 2020.

[41] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*), *OJ* L 2007/199.

[42] Basedow, J., Kono, T., and Metzger, A. (eds) (2010). *Intellectual Property in the Global Arena - Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US*, Mohr Siebeck, pp.229-233; van Eechoud 2003. The supreme courts in various Member States have also made this explicit, see e.g. German Bundesgerichtshof 2 October 1997, I ZR 88/95, (1999) IIC 227; French

protectionis tends to be problematic in the networked online environment, however. This may give rise to divergences in interpretation and the development of additional (national) conflict rules. It is beyond the scope of this paper to treat choice of law issues in depth. A rich body of work by various (international) committees has been produced in recent times, which also addresses internet related aspects. So, the groundwork is being done.[43]

For the purposes of this paper it is noteworthy that the mechanisms described above do not fit easily in the framework of private international law. A classic conflict rule is multisided: it provides an answer to the question which of a multiple potentially applicable laws, does in fact govern the cross-border issue at hand. Localization fictions give an interpretation of the rule of substantive (domestic) law they refer to. They could be regarded as hybrid rules: they are not proper multisided conflict rules, not one-sided scope rules (which only dictate whether a particular act or provision of national law applies in a certain international context), not normal rules of substantive law but something in between the latter two. This does not promote legal certainty.

2.5 Interim conclusions

Leaving aside rules of private international law, which operate at different level, the solutions described above have several things in common. What is clear is that it is to a large extent the development of communication technologies, and the possibilities these bring for cross-border provision and use of services, that drives the need for solutions overcoming territorially organized copyright. The solutions seek to reduce legal uncertainty primarily for (professional) users of materials protected by copyrights and related rights by clarifying which national laws must be taken into account. They also generally make it easier to acquire permissions or meet remuneration obligations by reducing the number of territories and thus (potentially) rightsholders involved. It is much less clear what the solutions bring right holders, who as we shall see in the next section on the music and film industries by and large prefer the system of territorial rights. From the fact that the solutions tend have a narrowly defined scope of application, and in the process of law making from proposal to law are toned down sooner than expanded, it may be deduced that right holders see more threats than opportunities.

With respect to the solutions, in terms of numbers there is a clear preference on the part of lawmakers so far to opt for reducing the liability of (professional) users for copyright claims arising in different Member States through the presumption that the user only performs relevant acts at her place of establishment. Of the measures described above, six are instances of fictive localization. The exhaustion doctrine can be regarded as a carve out from the exclusive distribution right. There is only one instance of a true mutual recognition rule, i.e. the obligation for Member States to recognize the orphan work status acquired in another Member State. Close to this in its effect are the rules on the exception for the visually impaired, which essentially give national exceptions extra-territorial (pan-European) effect for both providers and users of materials; it possibly also means that providers of works for the visually impaired cannot engage in geo-blocking beneficiaries from other EU Member States. Direct interference with the territorial scope of licenses is also rare, the one example being the out of commerce extended collective licensing model.

Cour de Cassation 10 April 2013, *ABC News Intercontinental*, ECLI:FR:CCASS:2013:C100347, *IER* 2014/60 reported in Tristan Azzi. La loi applicable à la titularité initiale des droits de propriété littéraire et artistique (droit d'auteur et droits voisins). *Recueil Dalloz*, Dalloz, 2013, p. 2004.

[43] See e.g. the International Law Association's Kyoto Guidelines (Guidelines on Intellectual Property and Private International Law, adopted on 13 December 2020), and the accompanying Final Conference Report of the ILA Committee on "Intellectual Property and Private International Law (Nov.2020); American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes*, ALI Publishers, 2008; European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property (Text and Commentary)*, OUP, 2013; Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property, see the English text in Basedow, J., Kono, T., and Metzger, A. (eds) (2010), pp. 394-402 and Joint Proposal by Members of the Private International Law Association of Korea and Japan, see *The Quarterly Review of Corporation Law and Society*, 2011, pp.112-163.

3 Licensing in the music industry

3.1 Introduction

The collective management of rights in music is a field marked by regulatory turbulence in recent years. The development of new types of music services that the internet allowed has foregrounded the need to reform the ways in which music copyrights are managed and licenced within Europe. Over the past twenty years, this has culminated in EU law on the governance of CMOs and on multi-territorial licencing. The 2014 Collective rights management directive[44] is up for review in 2021, which undoubtedly will reignite discussion around the effectiveness of collective rights management as opposed to individual licensing (especially by the major media conglomerates), and the impact that concentration of CMO power has on licensing markets and the cultural and social roles of CMOs.

Because the music industry is such a powerful example of a sector which has long sought to manage the drawbacks of territorial rights through cooperation (paradoxically by relying heavily on territoriality), we sketch the current collective licensing framework and how it came to be. For better understanding, it gives an overview of the traditional CMO system. The focus will be on the current legal framework for multi-territorial licensing as laid down in Title III of the Collective rights management directive. With a view to better understanding how the interests of different stakeholders come into play, we describe how the Collective rights management directive supposedly affects them where it concerns multi-territorial licensing. This will allow us at a later stage to compare the situation in the music sector with other sectors and solutions as described in the previous sections.

3.2 Collective rights management organizations

A licence from the relevant holder of any copyright or related right is required when providing a service which includes the exploitation of the protected work of an author, e.g. a song or musical composition or other protected material, such as a phonogram or performance.[45] The use can be offline – staging a concert, playing music in a dance venue— or online. Note that authorization to use the music is required from all relevant right holders of copyrights and neighbouring rights (i.e. authors, music publishers, performers, phonogram producers). In contrast to for example the film sector, games and software where licensing takes place at an individual level, copyright in musical works is typically licensed collectively.[46]

Collective management is the system, whereby a collecting organization as an administrator collectively manages rights – which include granting licences to users- and monitors, collects and distributes the payment of royalties on behalf of multiple right holders.[47] Although not strictly necessary, it is common for Member States to accord CMOs a monopoly for the collective management of particular rights (e.g. reproduction / mechanical rights, public performance).[48] The CJEU has held that although a (national) monopoly granted to

[44] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, *OJ* L 84/72, 20.03.2014, pp.72-98.
[45] European Commission (2012). Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. COM(2012)372 final, Brussels, 11.07.2012, p.2.
[46] In the context of certain permitted uses of works, e.g. public lending or private copying, for which remuneration is due, collective 'licensing' also takes place. With respect to music, the mandatory collective licensing of remuneration for retransmission of broadcasts via cable and other means is another example (Satellite and Cable Directive, Online broadcasting directive).
[47] COM (2004) 261 final, p.4; Article 3(a) of Directive 2014/26/EU.
[48] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, *OJ* L 84/72, 20.03.2014, pp.72-98.

a copyright CMO restricts the freedom to provide services (Art. 56 TFEU), it is justified because necessary to effectively protect territorial copyrights.[49]

The CMOs act as intermediaries in a two-sided market by providing services to both right holders and to licensees, typically professional / commercial users.[50] CMOs usually grant 'blanket licences' which means that the entire catalogue of the represented repertoire is made available for a specific use in a single transaction.[51] Moreover, they play an important role in protecting and promoting the diversity of cultural expression by providing market access for small and specialized repertoires. They are also a crucial in terms of efficiency, where negotiations between users and individual creators or right holders would be impractical and involve very high transactions costs.[52]

3.3 Obstacles in the traditional CMO system

Traditionally, the CMO of a specific country grants licences for the use of works of the 'national' authors it represents in that country ('national' or 'domestic' repertoire).[53] In addition, national CMOs can —on the basis of a system of reciprocal representations agreements between CMOs— grant licences for non-domestic repertoire of other CMOs.[54] Through such agreements, licences can be obtained from one single CMO for the use of music from an extensive 'worldwide' repertoire (so-called blanket licences).[55] However, these mandates were typically territorially limited, i.e. the CMO who is given permission to represent certain repertoire managed by a sister organization may only do so within its own territory.[56] Since a large proportion of the reciprocity contracts contain these territorial restrictions, a national CMO could never grant a licence for the use of the entire world repertoire outside its own territory. It can at most license use in other countries of the repertoire of right holders directly affiliated with it.

The traditional rationale behind the implementation of these restrictions is that CMOs are unable to efficiently enforce and exploit the rights entrusted to them outside their own territories, so they rely on sister organizations to do this.[57] The licensing structure caused fragmentation in the EU single market, as those who wished to exploit copyright protected musical works in all or several EU Member States were forced to apply for and negotiate a single license for each of the national territories in which they operated.[58] By and large, the restrictions regarding licensing of foreign repertoire were less of a problem in the analogue world. Music providers —e.g. radio stations— usually operated only within the borders of a particular country and therefore only needed one license from the local CMO.

Digitization and the development of the internet led to a growing demand for multi-territorial licences, because of the growing opportunities for providing cross-border access to content.[59] Because of the territorial nature of copyright and neighbouring rights, different national rules apply where exploitation extends to more than one EU Member State.[60] The conditions for the collective management of rights also differed across Member States. The lack of common rules on the governance, transparency and legal certainty of CMOs was detrimental to both the users and right holders. The greater the difference in such rules, the more difficult it would be to grant or obtain licences across borders and to establish licences for the territory of several or all EU Member States. The existing system was no longer deemed adequate.

[49] CJEU 27 February 2014, Case C-351/12, ECLI:EU:C:2014:110 (*OSA*), para.73 and 82-83. This judgment predates the introduction of the Collective rights management directive.
[50] Schwemer 2019, p.43.
[51] Schwemer 2019, p.43.
[52] COM(2012)372 final, p.2.
[53] Wiebe 2014, p.32.
[54] Wiebe 2014, p.32
[55] Arezzo 2015, p.537.
[56] Engels 2013, p.179; Schwemer 2019, p.124.
[57] CJEU 12 April 2013, T-442/08, ECLI:EU:T:2013:188 (*CISAC*), para.120.
[58] Mazziotti 2013; Hilty & Nérisson 2013; CEPS 2013; Schwemer 2019.
[59] Schwemer 2019, p.37.
[60] COM (2004) 261 final, p.7.

3.4 Industry reciprocal agreements on multi-territorial licensing

Collective rights management organizations and right holders were already looking for contractual and technological solutions to ensure adequate access to protected works and other subject matters at EU and at the global level. This resulted in the Santiago agreement (for public performance of music on the internet) and the Barcelona Agreement (for the mechanical reproduction of music on the internet).[61] European CMOs were important partners in the system, but the agreements had a global reach. Under the aegis of international umbrella associations (CISAC and BIEM), CMOs concluded these model agreements to facilitate the multi-territorial licensing of certain online rights.

The reciprocal agreements enabled CMOs to grant online multi-territorial licences, both for their own repertoire and for the repertoire of their sister organizations with whom they had an agreement on an EU and worldwide basis.[62] They represented each other in licensing and the monitoring of their respective repertoires.[63] This model was thus an attempt to overcome territoriality, while safeguarding the monopoly position of the CMOs in their home territories.[64] The advantage for users and rightsholders is that they would have a one-stop shop.

The Santiago and Barcelona agreements raised competition law concerns in the EU, notably because their economic residency clauses forced users seeking a multi-territorial license to turn to the CMO of their country of residence.[65] Following the launch of EU antitrust proceedings, these agreements were abandoned.[66] However, that it was in the interest of right holders, users, and society at large to have an effective system for multi-territorial licensing remained the case. It was now for the European Commission to figure out how copyright policy could achieve this.

3.5 EU soft law efforts for regulating multi-territorial licensing

Since the publication of the Green Paper of 1995, the creation of a level of playing field for CMO's at EU-level has been on the EC's agenda.[67] For the first ten years since the Green Paper, the management of rights remained marginally addressed in the EU acquis and was largely left to the laws of the EU Member States. While some of the EU acquis contained references to the management of rights by collecting organizations, none of them addressed separate rules on the modus operandi of the organizations.[68] Decisions taken by the Commission and Court on the basis of EU competition law addressed the alleged anti-competitive behaviour

[61] Notification of cooperation agreements (Case COMP/C2/38.126- BUMA, GEMA, PRS,SACEM) *OJ* C 145/2, 17.05.2001; Notification of cooperation agreements (Case COMP/C/C-2/38.377- BIEM Barcelona Agreement) *OJ* C 132/18, 04.06.2002.
[62] Schwemer 2019, p.82.
[63] Hilty 2013b, p.224.
[64] Schwemer 2019, p.82.
[65] Wiebe 2013, p.32.
[66] Wiebe 2013, p.32, Schwemer 2019, p.83. A similar development took place in respect of neighbouring rights (phonogram producer rights) with the so-called IFPI Simulcasting Agreement on simulcasting and webcasting. Through a system of reciprocical representation, it enabled users to obtain multi-territorial and multi-repertoire licences. An economic residency clause was initially part of the agreement but removed as part of the procedure to obtain an exemption under Art. 81 TEC (now 101 TFEU). The EC eventually granted a temporary exemption: Commission Decision 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"), *OJ* L 107/58, 30.04.2003, pp.58-84. See also Guibault & Van Gompel 2005 for an analysis of the case.
[67] European Commission (1995). *Green Paper on Copyright and Related Rights in the Information Society.* COM(95) 382 final, Brussels, 19.07.1995.
[68] COM(2005)15 final, p.12.

of CMOs.[69] The European Parliament (EP) and Commission meanwhile moved forward with formulating a regulatory framework.[70]

Between 1995 and 2002, the EC consulted widely on the issue of the collective management rights, as there has been a call for multi-territorial licensing, especially by commercial users due to the growing online music market. In 2001, the EU legislator referred in the Copyright (Information Society) directive to the need for a regulatory framework for collecting societies.[71] In 2003 parallel to the DG Competition's activities surrounding reciprocal representation agreements, the EP instructed its Committee on legal Affairs and Internal Market to draw up a report, which resulted in the Parliaments resolution of 2004.[72] The EP criticised the current state of collective rights management in the EU, focusing on shortcomings with respect to governance, dispute settlement and oversight.[73]

In 2004, the EC announced legislative intervention to ensure a functioning internal market.[74] Relying on soft law, such as codes of conduct agreed by the market actors, did not seem to be a suitable option.[75] While recognizing that competition rules remain an effective tool for regulating the market and behaviour of CMOs, the EC considered that an internal market in collective rights management can best be achieved if the supervision of CMOs under competition rules is complemented by the creation of a legislative framework.[76] Furthermore, the EC considered that EU-wide licensing was necessary for new internet-based services and blamed the lack thereof as one of the factors that made it difficult for these new internet-based music services to develop their full potential.[77]

Nevertheless, the EC initially opted for a soft law instrument: its Online Music Recommendation 2005/737/EC.[78] This called on EU Member States to promote a regulatory environment suitable for the management of copyright and related rights for the provision of legitimate online music services, and to improve the governance and transparency of collecting organizations. It advocated the introduction of multi-territorial licences; since any service offered online can be viewed and accessed across the EU, online content providers need 'a licence for more than one territory, which gives legal certainty and insurance against infringements suits for all territories'.[79]

In order to reach this objective the EC considered several policy options, and landed on an approach whereby right holders had the choice, with respect to multi-territorial licensing of rights, of authorizing a CMO of their

[69] Guibault 2010, p.137.

[70] European Parliament (2004). *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights* (2002/2274(INI)), P5_TA(2004)0036, Strasbourg, OJ C 92E, 15.01.2004; European Commission (2004), '*Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market.* COM/2004/261 final, Brussels, 16.04.2004; European Commission (2005). *Communication from the President in agreement with Vice-President Wallström – Commission Work Programme for 2005*, COM/2005/15 final, Brussels, 26.02.2005; European Commission (2005). *Commission Staff Working Document – Study on a Community Initiative on the Cross-Border Collective Management of Copyright. SEC/2005/1254, Brussels, 07.06. 2005.*

[71] 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, *OJ* L 167/10, 22.06.2001, recital 17.

[72] European Parliament (2003). *Report on a Community framework for collecting societies for author's rights* (2002/2274(INI. Committee on Legal Affairs and the Internal Market, Rapporteur: Raina, A., A5-0478/2003 final, Brussels, 11.12.2003; European Parliament (2004). *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights* (2002/2274(INI)). P5_TA(2004)0036, Strasbourg, OJ C 92E, 15.01.2004.

[73] Guibault 2010, p.19.

[74] European Commission (2004). Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market. COM/2004/261 final, Brussels, 16.04.2004, p.19.

[75] European Commission (2014). *The European Union explained: Digital Agenda for Europe.* Luxembourg: Publications Office of the European Union, p.19.

[76] Guibault 2010, p.20.

[77] Schwemer 2019, p.124.

[78] European Commission (2005). Recommendation of 18 October 2005 on Collective Cross-border Management of Copyright and Related Rights for Legitimate online Music services. OJ L 276, 21.10.2005.

[79] European Commission (2005). Commission Staff Working Document – Impact assessment reforming cross-border collective management of copyright and related rights for legitimate online music services. SEC(2005)1254, Brussels, 11.10.2005, p.5.

choice to manage their works throughout the EU.[80] Moreover, under the Recommendation right holders were free to withdraw any of the online music rights, and if they so wished, to transfer the multi-territorial management of their rights to another CMO.[81] Neither the nationality of the right holder nor the country of establishment of the CMO was to be a factor limiting the choice for a particular CMO.[82] The result of this approach was that although a CMO may be able to grant online licences for several territories; this is only so for the repertoires of the right holders directly represented. To be able to license multiple repertoires or even the world repertoire the CMO would need to have agreements with other CMOs in place.[83]

Being just a non-binding Recommendation, perhaps not surprisingly, it did not get much traction. It was also heavily criticised by nearly all types of stakeholders and by legal scholars.[84] The European Parliament was a staunch critic, adopting two Resolutions.[85] The EP stated that the EC failed to consult interested parties, the Council and the Parliament. Moreover, the EP criticized the negative impact on cultural diversity, the lack of precision and the abandonment of reciprocal representation agreements for online uses.[86]

An important and predictable consequence of the unrestricted freedom was that large powerful right holders (multinational music publishers) withdrew their online rights from the regular CMOs. Instead, the publishers entrusted these rights to hybrid entities that managed them individually. However, their management was now no longer collective, as each entity engaged in multi-territorial licences for works of the large publisher it represented. This development undercut the collective management system and still required users to seek licences from multiple right holders instead of having a one-stop shop.[87]

3.6 Current legal framework

In response to the criticism and the still unsatisfactory situation, the EC submitted a proposal for a Directive on Collective Management and Multi-territorial licensing in 2012, which was adopted with modifications in 2014.[88]

The Directive was part of the EC's Digital Agenda for Europe and the Europe 2020 Strategy for smart, sustainable and inclusive growth.[89] It is one of a set of measures aimed at improving the multi-territorial licensing of rights and the access to digital content. The Directive introduced rules on good governance and transparency for the collective management of copyright and related rights, which are not of particular relevance for the issue of territoriality that is the focus of this paper. What is of importance, is the set of provisions aimed at facilitating the development of multi-territory and multi-repertoire licensing by CMOs of music (Title III of the CRMD). The idea is that the new provisions will ensure cross-border services provided

[80] Article 3 of the Online Music Recommendation 2005/737/EC; European Commission (2005). Commission Staff Working Document – Impact assessment reforming cross-border collective management of copyright and related rights for legitimate online music services. SEC(2005)1254, Brussels, 11.10.2005, p.18.
[81] Article 5(c) of the Online Music Recommendation 2005/737/EC.
[82] Wiebe, A. (2014) p.32.
[83] See also Schwemer 2019, p.127.
[84] Schwemer 2019, p.128.
[85] European Parliament (2007). 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 (2005/737/EC) (2006/2008(INI)). P6_TA(2007)0064, Brussels, OJ C 301 E/64, 13.12.2007, pp.64-69; European Parliament (2010). Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services. P6_TA(2008)0462, Brussels, *OJ* C 8E, 14.01.2010, pp.105-107.
[86] P6_TA(2007)0064.
[87] Hilty 2013a, p. 228.
[88] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, *OJ* L 84/72, 20.03.2014, pp.72-98.
[89] European Commission (2014). The European Union explained: Digital Agenda for Europe. Luxembourg: Publications Office of the European Union, 2014; European Commission (2010). Communication form the Commission Europe 2020 – A strategy for smart, sustainable and inclusive growth. COM(2010)2020 final, Brussels, 03.03.2010.

by CMOs adhere to minimum quality standards.[90] Moreover, it aims to support the creation of a Single European Digital Market for online music services, responding to 'the rapidly growing consumer demand for access to digital content and contributing to the fight against online copyright infringement.[91]

3.6.1 European licensing passport

Title III of the Directive sets out minimum principles deemed necessary to make an effective and modern licensing system workable in the digital era.[92] In this section we focus the "European licensing passport",[93] that are of particular importance to multi-territorial licensing of online rights in musical works by CMOs. This system is based on a voluntary (re-)aggregation of repertoire for multi-territory licensing. CMOs that do not offer multi-territorial licences themselves can tag-on to a CMO that does, meaning that CMO will license their rights for multi-territorial purposes on their behalf.[94] The licensing passport system requires CMOs to have sophisticated IT-systems, including repertoire databases. As a result, smaller CMOs will either have to cooperate (pool resources to be able to make the necessary investments) or tag-on their rights to larger CMOs, making them economically more advantageous and allowing them to increase their scale, scope and networks.[95] The system is supposed to reduce the number of licences a user needs to operate a multi-territory, multi-repertoire service.[96] It also aims to promote the development of new online services, and reduce transaction costs that would otherwise typically be passed on to consumers.[97] Finally, the passport system is meant to provide legal certainty and lead to better quality licensing services.

Articles 24-28 of the Directive lay out a comprehensive list of the minimum requirements that a CMO must fulfil in order to demonstrate its ability to engage in multi-territorial licensing services. These provisions aim at ensuring the necessary minimum quality of cross-border licensing by CMOs in terms of their capacity to process multi-territorial licenses, the transparency and accuracy of the repertoire presented, and the accuracy of financial flows related to the use of online rights.[98] Only CMOs that have sufficient capacity to process data electronically necessary for the administration of multi-territorial licences for online rights in musical works, are entitled to provide such services.[99] CMOs should therefore be able to process such detailed data 'quickly and accurately', in an 'efficient and transparent manner', using unique identifiers and adequate databases that should 'continually' and 'without undue delay' be updated and aligned with the databases of other CMOs granting multi-territorial licences.[100] Moreover, CMOs should have the ability to (1) remotely monitor use of the works, (2) invoice users for such use, [101] (3) collect revenues in a timely manner, and (4) distribute to each right holder the exact amount due.[102]

3.6.2 The 'tag-on' mechanism

An important part of the framework is the so-called 'tag-on' regime,[103] that is of particular importance to (smaller) CMOs that do not have the resources to meet above requirements. The main provisions of Title III are articles 29 and 30, which stipulate that CMOs 'that are not willing or able to grant multi-territorial licenses directly' for the online rights in musical works in its own repertoire, can on a voluntary basis mandate another

[90] Ross 2015, p.132.
[91] Recital 38 and 40 of Directive 2014/26/EU.
[92] Guibault 2015, p.167.
[93] The notion of EU licensing passport model does not appear in the final Directive 2014/26/EU. It was only used in the EC's working documents and the Explanatory Memorandum of the proposal for the Directive.
[94] Schwemer 2019, p.152.
[95] Schwemer 2019, p.167.
[96] Recital 40 of Directive 2014/26/EU.
[97] Recital 44 of Directive 2014/26/EU.
[98] Articles 24-26 and recital 40 of Directive 2014/26/EU.
[99] Article 25 of Directive 2014/26/EU.
[100] Article 25 and Recital 41 of Directive 2014/26/EU.
[101] Article 27 of Directive 2014/26/EU.
[102] Article 28 of Directive 2014/26/EU.
[103] Arezzo 2015, p.541.

CMO (that does meet the requirements for multi-territorial licensing) to represent/manage those rights for them, on a non-discriminatory basis.[104] Consequently, the CMO will have the choice to grant multi-territorial licenses of its repertoire itself or entrust it to other CMOs.[105]

The representation agreement should be concluded on a non-exclusive basis —so that competition between different CMOs is not hindered—[106] and should ensure that CMOs can engage different CMOs for the licensing of their repertoire, and that users seeking multi-territorial licences have the choice of obtaining licences from different licensing CMOs.[107] Any CMO that mandated another CMO to grant multi-territorial licences may continue to grant licences for 'its own music repertoire and for any other music repertoire it may be authorized to represent' in its own territory (i.e. single or 'mono' territory licenses).[108]

The requested CMO must honour a tag-on request, if it already offers or provides 'multi-territorial licenses for the same category of online rights in musical works' from the repertoire of another CMO.[109] However, the request should not be disproportionate and should not go beyond what is necessary.[110] The representation obligation does not apply to CMOs that grant multi-territorial licences only for their own repertoire.[111] Therefore, all CMOs could theoretically meet the provisions of Title III of this Directive by offering their own repertoire on a multi-territorial basis.[112] Moreover, this representation obligation does not apply to CMOs aggregating rights in the same works in order to jointly license the rights of reproduction (mechanical rights) and of communications to the public (performance rights) in respect of such works.[113]

According to the EC, this system would provide more protection for small and medium-sized CMOs, by ensuring that their repertoires is included in the scope of multi-territorial licences issues by the mandated CMOs.[114] It is likely that the investments required to manage multiple repertoires, e.g. in terms of data management and IT systems, have a large impact on the strategies of individual CMOs. When the Directive was proposed this was seen as a factor making it hard to predict how many CMOs would license the repertoire of other CMOS multi-territorially and to what extent other CMOs would join the multi-territorially licensing CMOs.[115]

The Directive also sets out the conditions for representation. It contains a non-discrimination principle and provides that a mandated CMO must manage the mandated CMO's repertoire under the same conditions as its own repertoire.[116] The mandated CMO is also obliged to include the mandated CMO's represented repertoire in all offers it makes to online service providers.[117] Moreover, the management fee for the services provided by the mandated CMO may 'not exceed the costs reasonably incurred by the requested CMO'.[118] In addition, the mandating CMO is required to provide repertoire information to the requested CMO. If not, the mandated CMO may either exclude the respective repertoire or charge for the costs reasonably incurred to comply.[119]

In addition, it contains a legal mechanism that prevents right holders from being locked into a CMO that does not grant online licenses or has not authorized another CMO to license the respective repertoire on a multi-

[104] Article 29 and 30 and Recital 44 of Directive 2014/26/EU.
[105] Guibault 2015, p.168.
[106] Article 29(1) of Directive 2014/26/EU.
[107] Recital 44 of Directive 2014/26/EU.
[108] Recital 46 of Directive 2014/26/EU.
[109] Article 30(1) of Directive 2014/26/EU.
[110] Recital 46 of Directive 2014/26/EU.
[111] Recital 46 of Directive 2014/26/EU.
[112] Schwemer 2019, p.153.
[113] Recital 46 of Directive 2014/26/EU.
[114] SWD(2012)204 final, p.165.
[115] Engels 2013, p.184.
[116] Article 29(1), 30(3) and 30(4) of Directive 2014/26/EU.
[117] Article 30(4) of Directive 2014/26/EU.
[118] Article 30(5) and Recital 46 of Directive 2014/26/EU.
[119] Article 30 (6) of Directive 2014/26/EU.

territorial basis.[120] This right therefore protects right holders' interest and allows them to withdraw their online rights from the CMO that does not offer multi-territorial licences to their rights, and transfer them to their preferred CMO. They can leave the same rights with the (first) CMO for the purposes of mono-territorial licensing.[121] The idea is that in this manner digital markets for different kinds of (online) uses of musical works are facilitated.[122]

3.7 Intended impact of the CMO Directive

The stated aim of this directive was to simplify rights clearance for services operating in more than one Member State, to stimulate the development of EU-wide music services for consumers and to ensure that right holders rights are better protected.[123] When the review of the Directive gets under way, more information will become available to assess its impact. Currently, there is not much literature on the impact the Directive has had in its first years. The positive impacts described below are therefore largely those that the EC itself expected to materialize.[124] We do however highlight a number of reservations voiced by stakeholders and scholars made during the legislative process and after the adoption.

3.7.1 Right holders

The EC assumes that the new regime gives authors and other right holders more real choice as to how their rights are licensed (directly or through a CMO). They have right to withdraw and the freedom to entrust their rights, categories of rights or types of works of their choice.[125] Publishers and authors are presumed to welcome the opportunity to aggregate their rights in the best performing CMO. Because of the standards the Directive sets, there will be licensing and distribution efficiencies, and payments would be faster, more accurate and more regular.[126] The competition among passport holders to attract repertoire would lead to improvements in the process of licensing and rights management. More multi-territorial licensing will result in increased royalties for authors and music publishers, as music is listened to in a larger territory.[127] Moreover, the EC expects that the obligation to accept repertoires from other CMOs would avoid the risk of creating 'a two-tier licensing infrastructure'. The interests of smaller CMOs and the right holders they represent would be served by the tag-on regime, again leading to more income.[128] Smaller CMOs could have their rights managed by other CMOs (passport holders) through the tag-on regime, which would enable passport holders to offer a large repertoire, including local or niche repertoire.[129] However, the tag-on regime does not cure the problem of the further weakening of the position of smaller CMOs who may end up serving only right holders of local music, and the adverse effects this may have on the fulfilment of their cultural role and on promotion of culturally diverse repertoire across the EU.

It is difficult to assess the extent to which the new framework for multi-territorial licensing drives change, and to what extent changes are driven by market developments. As was pointed out above, collective management of mechanical and performance rights in copyrighted music is just one -albeit important-factor in how multi-territorial licensing is organized, service providers also need to clear neighbouring rights. The Recommendation and subsequent Directive's explicit recognition of copyright holder's choice to remove

[120] Article 31 of Directive 2014/26/EU; Guibault 2015, p. 170.
[121] Schwemer 2019, p.155; Guibault 2015, p. 171.
[122] Arezzo 2015, p.542.
[123] Recital 1 of Directive 2014/26/EU.
[124] Article 40 of Directive 2014/26/EU states "By April 2021, the Commission shall assess the application of this Directive and submit to the European Parliament and to the Council a report on the application of this Directive. (….)''. The EC has initiated but not completed the review process at the time of writing of this paper.
[125] Mazziotti 2013, p.38.
[126] Recital 43 of Directive 2014/26/EU.
[127] SWD(2012)204 final, p.164.
[128] SWD(2012)204 final, p.164.
[129] SWD(2012)204 final, p. 164.

online rights in order to license them individually, facilitates the already existing move towards more individual licensing. This is perhaps an unintended consequence.[130]

An important trend in online licensing is that large music conglomerates license to (large) streaming platforms and other digital service providers individually. CMOs have pooled data, technical and management expertise and have created subsidiaries that handle multi-territorial licensing for partner CMOs. German GEMA, British PRS and Scandinavian STIM do this through ICE, its collective multi-territorial licensing scheme called ICE-CORE. Importantly, ICE also provides (license) processing services not just to other CMOs, but also to right holders that opt for individual licensing, e.g. Sony and Warner Chappel music publishing, Solar (Anglo-Saxon repertoire of EMI and Sony/ATV), and BMG (through a GEMA subsidiary).[131] On the side of record labels (phonogram producers) individual licensing also takes place. For example, Spotify has direct licensing deals with the major labels Universal Music Group, Warner Music Group and Sony entertainment.[132] We see therefore a convergence of processing services for collective and individual licensing, but at the same time a development towards limited-repertoire (i.e. the catalogues controlled by major publishers) multi-territorial online licensing, and less towards multi-repertoire (the old 'blanket' licence) and multi-territorial licensing.

3.7.2 Impact on online providers (commercial users)

The requirements in Title III of the Directive would aim to encourage voluntary aggregation, combined with a level of service what is consistent with the demands of commercial users. The EC assumed that a reasonable number of CMOs would facilitate the task of users in obtaining licences and reduce their transaction costs, and that the new regime would avoid (near) monopoly situations.[133] CMOs, who are able and willing to grant multi-territorial licences, are expected to be able to attract a broad part of the EU repertoire. Consequently, online service provider should be able to use a larger number of musical works in a larger number of territories on the basis of just one licence. The online service provider must be able to reach new services and areas and therefore reach more users. This aggregation would be driven by market forces, i.e. the choice of right holders. According to the EC, this system would therefore encourage and build on the current level of aggregation and market trends.[134] Commercial users will have some certainty about the licensing standards they can expect at EU-level. Moreover, in the Commission's view, there will be more legal certainty and confidence in the operational capacities of multi-territory licencing CMOs, rather than a model based purely on the competitive pressures created by non-exclusive mandates.[135]

Requiring those involved in multi-territory licensing to accurately identify their repertoire and invoice users promptly and accurately, would also increase the transparency of the licensing process. It would also help avoid duplicate invoices.[136] Furthermore, the EC assumes that innovative services could be launched more easily due to flexibility in licensing terms, as CMOs would not be required to follow the terms of prior licences.[137] All in all, the improvements for licensees are supposed to materialize on the back of competitive pressures generated by right holders seeking CMOs. A criticism levelled early on is that the directive focuses on competition in the market for right holders but does not really aim to achieve more competition in the market for licensees (users).[138]

[130] Klobučník 2021.
[131] See information on https://www.gema.de/en/about-gema/organisation/subsidiary-companies/, https://www.iceservices.com/company/about/.
[132] On agreements between Spotify and rightholders https://investors.spotify.com/financials/default.aspx (Spotify annual reports).
[133] Recital 40 of Directive 2014/26/EU.
[134] SWD(2012)204 final, p.162.
[135] SWD(2012)204 final, p.163.
[136] SWD(2012)204 final, p.163.
[137] SWD(2012)204 final, p.163.
[138] Drexl & Nérisson 2013, para.9.

A recent market analysis performed in preparation of the interim review of the Geo-blocking regulation suggests that paid streaming is by now the dominant form of income in the music sector in Europe (almost 60% of the turnover). The largest market shares are for limited number of platforms such as Spotify, Apple Music, YouTube and Amazon Music. Large streaming providers are more active cross-border while smaller ones tend to focus on local audiences.[139] The implication is that the large streaming providers have an interest in obtaining licenses for multiple repertoires and multiple territories, but smaller service providers mostly seek multiple repertoire licenses for one or a few territories. With respect to the large providers however, it should be noted that their primary interest is in individual licensing with the major music conglomerates, because these control the vast majority of Anglo-American catalogues and the online copyright and neighbouring rights in them.

3.7.3 Impact on consumers

The EC assumes that the expected emergence of well-equipped CMOs capable of providing online services, would facilitate the scaling up of existing services to a multi-territory level, and the launch of new services. This would provide consumers with a wider choice of services and allow them to benefit from increased competition between online service providers.[140] Moreover, since all right holders would in certain circumstances have the right to withdraw (part of) their repertoire and transfer it to another CMO, the breadth of available repertoire would eventually expand. This would give consumers access to a wider choice of music.[141] Consumer groups fear that the system may not boost the availability of cross-border music services, because it only addresses copyright and not neighbouring rights, leaves intact the separate collective management that exists for mechanical and performance rights, and does not address further obstacles.[142]

3.8 Interim conclusion

The music industry is the only sector where collective licensing traditionally plays a major role, and where the EU legislative framework has been substantially adapted to promote efficient multi-territorial licensing. Territorial rights remain the cornerstone of the system. The intervention of the EU legislator does affect the territorial exclusivity that collective rights management organizations in music copyright historically have because for authors and use(r)s they were the only shop in town. It does this by making explicit that right holders are free to choose which CMO represents them, should they want their online rights to be collectively managed in the first place. The territorial exclusivity of CMOs is further affected by the minimum requirements imposed on CMOs to be allowed to engage in multi-territorial licensing of online rights, and by the tag-on system which ensures that all CMOs have the opportunity to make their repertoire (catalogue) available to providers seeking multi-territorial licenses. This new regime partly steps away from the traditional reciprocity agreements, and instead focusses on limiting transaction costs as a way to increase access to repertoire. [143] However, it is still uncertain whether (re-)aggregation will occur. Strong fragmentation will remain if multi-territorial licensing CMOs will only be able to offer a portion of the repertoire for online use.[144]

How successful the system will depend also on how many rights are licensed collectively. Here we see the trend towards individual licensing of large catalogues. On the side of right holders there is a strong concentration of copyright (and phonogram rights) in the hands of a few multinational players, who will typically own all EU (even global) rights. On the side of music streaming services, intense competition and the need to have access to the catalogues of the major music right holders creates its own dynamic. Arguably,

[139] Procee 2020,pp.183-184.
[140] SWD(2012)204 final, p.163.
[141] SWD(2012)204 final, p.163.
[142] Schwemer 2019, p.167.
[143] Schwemer 2019.
[144] On the challenges of ensuring access to multi-repertoire, multi-territorial licenses see i.a. Engels 2013, Schwemer 2019, Guibault 2015, Mondini 2016.

where there is a concentration of rights on the one hand, and an increasing demand from streaming providers to be able to license pan-European if not globally, coupled with a shift to individual licensing, the territorial nature of music copyrights (and neighbouring rights) becomes less relevant for these catalogues.

4 Licensing in the audio-visual sector

4.1 Introduction

Territoriality of rights is considered vital to the European audio-visual industry,[145] because funding in the audio-visual (film) industries in Europe is based on territorial exploitation.[146] As we shall see, the pre-funding of works through the pre-sale of rights to broadcasters and distributors on a territorial basis is considered by the EU audio-visual industry to be crucial for film and other audio-visual productions. Digitalization has brough affordable broadband access to consumers in many parts of the EU and has had profound impact on EU audio-visual markets.[147] Moreover, the audio-visual market is converging and thus becoming more complex.[148] As the internet has a potential to eliminate national barriers and provides broader access to content, digitization has also allowed new global players to enter the EU markets.[149] Digitization has put pressure on existing business practices and models of (film) distribution and financing.[150] Nevertheless, copyright remains inherently territorial, and as we have seen every right holder has in principle the right to grant a licence with a limited scope, including a limited territorial scope.[151] This allows right holders and licensees to share markets along national borders and structure their financing model accordingly.[152] Barriers to the trade in audio-visual services may result.

4.2 Audio-visual industry structure

Based on traditional distribution channels for audio-visual content, a distinction can be made between television products, film works and products intended for web distribution.[153] TV products like crime and reality series, news programmes, and game shows are designed predominantly for broadcasting.[154] The revenue models in the television industry have been fairly straightforward during the era of public service broadcasters up to the 1970s and the public-private "duopolies" in many EU markets in the 1980s and 1990s.[155] The distribution of television signals was initially organized as a public monopoly.[156] Public broadcasters were financed through subsidies (licence fee or direct government subsidy) and some advertising income. Private broadcasters mostly relied on advertising and sponsoring revenues,[157] later also on subscriptions for pay-tv. On the production side, the rise of format catalogues has been important for production, bringing economies of scale, professionalization and innovation; but also posing a threat to local production in terms of diversity and original production.[158]

[145] Cabrera Blázquez 2019, p.1.
[146] Commission Staff Working Document (2015). A Digital Single Market Strategy for Europe – Analyses and Evidence. Brussels, 06.05.2015, SWD(2015) 100 final, p.27.
[147] Hugenholtz 2020, p.168.
[148] Evens 2018, p.178.
[149] SWD(2015) 100 final, p.42.
[150] Hugenholtz 2020, p.168.
[151] SWD(2015) 100 final, p.27.
[152] Hugenholtz 2020, p.168.
[153] La Torre 2019, p.26.
[154] La Torre 2019, p.2
[155] Bleyen 2012, p.57.
[156] Evens 2018, p.168.
[157] Bleyen 2012, p.57.
[158] Keinonen 2018.

Historically, for film works the cinema has been the foremost distribution channel, followed by the sale and rental of copies to consumers (DVDs mainly) and broadcasting.[159] However, the distribution models for TV and film are becoming less distinct.[160] The internet and the ongoing digitization have transformed the audio-visual landscape profoundly, as inter alia online global streaming services and platforms have acquired a powerful position within this landscape.[161] A number of digitization-related trends have changed the audio-visual industry both in terms of its structure and its business models.[162]

As a consequence, there is no longer a typical primary distribution channel for many products. The production, distribution and consumption of content is shifting from television broadcasting (i.e. linear services or push technology) to on-demand services (i.e. non-linear services or pull technology). Moreover, the rise of broadband networks and mobile devices change viewing patterns.[163] The evolution of the market has encouraged the distribution of hybrid products.[164] There is a growing tendency to produce a number of specific adaptations of one product for different types of distribution channels.[165] Also, increasingly hybrid products are designed for distribution on different platforms, without the need for special adaptations.[166] New entrants in the media markets such as over the top service providers (OTT) like Netflix and Amazon secure their own original content,[167] so they remain attractive to viewers. Having their own content also decreases new media players' dependence on traditional broadcasters and media conglomerates, who hold many exploitation rights in audio-visual content in Europe.[168]

The same trends are also visible in the film industry. While cinemas, terrestrial and satellite broadcast and cable distribution remain important channels for the exploitation of films, online services and platforms have rapidly gained a significant market share, while DVD rentals and sales are simultaneously declining.[169] The traditional windowed release, with cinema first, then DVD release, then pay-tv and ultimately free tv, the timing of which would be tailored to local demand to maximize revenue, is under pressure. Per capita cinema attendance in the EU has been decreasing for years, [170] but (Covid-19 epidemic and Brexit effects aside) admissions are rising in various countries.[171] Film consumption is shifting towards streaming pay per view (transactional) video-on-demand (TVOD), and in particular to subscription video-on-demand (SVOD) (e.g. Netflix, Disney+, Amazon Prime Video),[172] with subscription revenue rising fast.[173] For content owners, this means that it is increasingly important to have a sophisticated distribution/window strategy. They must determine where to release, when, on which platform and using which business model.[174] Digital platforms active in these sectors tend to operate globally and prefer global or multi-territorial licence agreements.[175]

4.3 Territoriality in audio-visual film works

From a copyright and neighbouring rights perspective, films are complex productions, involving many potential authors (screen writers, directors, designers, etc.) and holders of related rights (actors, musicians, film producer, owners of rights in sound recordings used in the film, etc.). The producer will typically ensure

[159] Hugenholtz 2020, p.168.
[160] La Torre 2019, p.26.
[161] Schäfer 2019, p.84.
[162] Bleyen 2012, p.57.
[163] SWD(2015) 100 final, p.42.
[164] La Torre 2019, p.26.
[165] La Torre 2019, p.26.
[166] La Torre 2019, p.26.
[167] La Torre 2019, p.26.
[168] La Torre 2019, p.31.
[169] Hugenholtz 2020, p.168.
[170] EAO 2019, p.14.
[171] UNIC Annual report 2020.
[172] Hugenholtz 2020, p.170.
[173] EAO 2018.
[174] OD Media and Media Perspectives 2019.
[175] Poort 2020, p.599.

that all necessary rights are concentrated in one entity. This way they can be safely and optimally exploited. Part of this complexity is that the rights acquired are territorial, so they must be secured for all countries where the film work is to be commercialized. Absent a Community copyright, this is also true for the rights in EU Member States.[176] Right holders can transfer rights or grant licences for each territory separately under different conditions. Traditionally, the exploitation of film rights takes place on a territorial basis, whereby distributors obtain exclusive mono-territorial licences. The exception is the licencing for cultural and linguistic linked regions, where distributors usually buy licences for several markets or regions (e.g. Scandinavia and the Nordic countries, Germany and Austria).[177]

The exclusive licensing for single territories is often complemented by applying geo-blocking technologies to ensure the licensed work is only available to viewers within the licensed territory. The system of exclusivity means that different distributors simultaneously hold rights to the same audio-visual work, but for different EU Member States.[178] A service provider willing to offer content online in several EU Member States need to obtain a licence for all the different territories in which the content is made available.[179] Formally, nothing prevents the right holder of the audio-visual work from granting multi-territorial or pan-European licences.[180] However, it is not common practice, which is due to certain characteristics of the film industry.

4.4 Characteristics driving territorial exploitation

The distribution of audio-visual works is fragmented, essentially along national borders, for a number of reasons. Mono-territorial licencing practices can be partly explained by linguistic and cultural diversity that trail national borders, as well as by preferences of the EU public.[181] Audio-visual productions are often aimed at a specific national audience.[182] For works to gain an wider audience, their distribution must be adapted to different national tastes, which requires different advertising and marketing strategies, subtitling or dubbing. Territorial exclusivity provides the possibility of recouping investment made to serve local audiences. As a result of this need to tailor films to local audiences, compared to e.g. American films, many European films lack economies of scale and are more dependent on territorial licences.[183]

A further important reason why territorial exclusivity is so important, lies in funding structures. High upfront investments are required, as the whole process of production, marketing and rights clearance has to be financed during the creation process.[184] The distribution rights of audio-visual works (and the corresponding value of territorial exclusivity) are a means of obtaining the necessary funding and may serve as collateral for investors.[185] The great uncertainty about commercial success of the work is at the heart of the challenge of audio-visual (film) funding. The possibility to recoup costs depends on the success of the work. Engaging a successful producer, well-known director, star cast, or other reputable parties increases the chances of success, but this of course also drives up costs.[186] For commercial investors the success prospects are crucial to the decision whether or not to invest.[187]

The conclusion of pre-sale agreements —which before the film is actually made already grant exclusive distribution rights for a particular distribution channel, time period and territory— is a common way to finance a significant part of the budget of audio-visual works. For the distributors this ensures them that they

[176] Hugenholtz 2016, pp.51-52.
[177] Grece 2017, p.32.
[178] Hugenholtz 2020, p.174.
[179] SWD(2015) 100 final, p.27.
[180] Mazziotti 2013, p.27.
[181] Poort 2019, p.8; Mazziotti 2013, p.53.
[182] Mazziotti 2013, p.53.
[183] Poort 2019, p.8.
[184] Hugenholtz 2020, p.169; SWD(2015) 100 final, p.27.
[185] Poort 2020, p.600.
[186] Hugenholtz 2020, p.169.
[187] Hugenholtz 2020, p.169.

face no competition.[188] The main purpose of these agreements is to put a film in the best competitive position to cover costs, secure a return on investment and make a profit with a view to creating new work.[189] In the case of European films, the amount of pre-sale investment is typically around 40% of the total investment needed.[190] European content production is also dependent on government funding. Such funding is usually provided at a national level, or by a combination of national funders.[191] The pre-sale of rights based on territorial licences is a common approach to cover high production costs from the beginning. The financing mechanism is an important aspect of licensing practice.[192]

The traditional window-release system also plays a role here. Cinemas, broadcasters, pay-TVs and VOD channels usually require exclusive rights (for a certain period at least) for their distribution channel in order to reduce the risk of competitors undermining the value of their rights.[193] What is more, in the EU, cinema distributors and many (public service) broadcasters generally operate on a national level and are therefore mainly interested in exclusive rights within their own territory/market.[194] Their interest in rights outside their market is limited and it will be more advantageous for the producer to sell such rights to others on a territorial basis.[195] Territorial exclusivity may also help to prevent competitors from benefitting from their investments and efforts in the marketing expenditure (i.e. free-riding).[196] Here it should be noted that the rise of large commercial broadcasters that operate across Europe (e.g. Sky, RTL), and consolidation of cinema theatre ownership in international chains (e.g. Vue, Kinepolis, Pathé Gaumont) nuances this somewhat. A final reason why a producer may prefer to sell rights on a territorial basis is the possibility of differentiating prices for high- and low-income countries.[197]

4.5 Measures overcoming territoriality

As has already been indicated, individual licensing is the norm in markets for audio-visual works. There are no EU rules that facilitate multi-territorial licensing comparable to what is in place for the music sector. Of the measures described in section 2 above, three are of particular relevance to audio-visual works, albeit with limited impact.

The fictive localization clause in the Online broadcasting directive does not seem to affect the rights of e.g. producers or distributors of (other) audio-visual works affected in any substantial way (see section 2.2.4). This is because the fiction that a broadcasting organization is only presumed to engage in acts of communication to the public in its place of establishment, basically only applies to its own programmes, and is also limited to dissemination that is secondary to the main broadcast (catch up tv, etc.).

The fictive localization provision for satellite broadcasts in the Satellite and Cable Directive (described in 2.2.1) loses practical significance because it only applies to unencrypted broadcasts. What is more, because of technological developments in the industry and the entry of OTT providers, the situation that distribution takes place via an uninterrupted transmission from injection to satellite and back to earth becomes less frequent. For encrypted satellite broadcasts, the localization provision limits the liability of satellite broadcasters to territories for which they have authorized the supply of decoding devices.

Finally, the third measure to overcome territoriality lies in the duty of service providers to ensure that end-users of audio-visual content retain access to the (subscription) content when they are temporarily based

[188] Poort 2020, p.599; SWD(2015) 100 final, p.27.
[189] Mazziotti 2013, p. 53.
[190] Cabrera Blázquez 2019, p.7.
[191] Evens 2018, p.180.
[192] Cabrera Blázquez 2019, p.7.
[193] Hugenholtz 2020, p.170.
[194] Hugenholtz 2020, p.170.
[195] Hugenholtz 2020, p.169.
[196] Poort 2019, p.15.
[197] Poort 2020, p.599.

elsewhere in the EU (see section 2.2.3). This limits the ability of right holders to impose strict geo-blocking requirements on distributors but does not really undermine the possibility to engage in territorial licensing.

Of note, the provisions on out of commerce works (see section 2.3.2) also seem to have little impact, especially as the rise of streaming platforms facilitates 'long tail' availability of contemporary films and tv products, which means the out of commerce provisions do not kick in. In the case of audio-visual works, it is primarily the historic archives of e.g. film institutes that may become available in case no extended collective licensing scheme becomes available to the cultural heritage institutions with out of commerce audio-visual works in its collections.

4.6 Interim conclusions

If we compare the music sector with the film sector, three things stand out: first, exclusive licensing for a particular territory is the norm for films, whereas music licenses are typically not exclusive but granted to a large number of 'distributors'. Second, collective management of rights traditionally plays a major role in the exploitation of music, whereas it is near absent in the film sector.[198] A third difference lies in the factors that drive exclusivity in exploitation: in the film industry funding mechanisms and the high upfront investments needed are important reasons why territorial licensing of European films is traditionally so dominant.

From the perspective of new entrants in the market for audio-visual works, parties wishing to include audio-visual content in their services face difficult circumstances. They must seek licences for each territory where content can be accessed through their services and will have to deal with whoever is exclusively licensed for an individual territory. The process of licensing is time-consuming and costly, and the whole process may not be successful due to territorially exclusive licensing practices. Exclusive mono-territorial licensing thus constitutes an obstacle to the cross-border availability of audio-visual content. In theory, it is also contrary to the interest of consumers seeking access to a wider range of content, or to particular content that is offered to niche audiences, e.g. due to language barriers.

5 Overall findings

Bringing together the strands of the interim conclusions presented above, we can summarize the dealings of EU law makers with the territorial nature of copyright and neighbouring rights as follows.

The importance of copyright for the realization of the internal market has been grasped from the early days of the (then) European Economic Community. The European Court of Justice initially put some limits on the territorial exercise of rights by developing Community exhaustion. From the 1990s onwards efforts of the EU law makers focussed on harmonizing substantive copyright norms, detailing the duration of protection, type of economic rights, permitted limitations and exceptions to such rights, etc. That intellectual property rights due to their territorial nature are well-suited to partitioning the internal market along national borders, has received relatively little attention from policy makers throughout the years. The Commission and Court in their role as guardians of compliance with EU competition law have occasionally prohibited arrangements which, having territorial rights as their foundation, overly curbed the freedom of right holders or service providers to deal with collective management organizations outside of their own place of establishment.

Measures designed to overcome adverse effects of territoriality have been undertaken since the 1993 Satellite and Cable directive. They are tailored to specific situations, and generally aimed at reducing risk for professional users (intermediaries) of protected subject-matter. A favourite tool to accomplish this is the fictive localization of acts, which ensures the user that if rights are cleared for (typically) the territory in which

[198] Art. 9 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, 06.10.1993, pp.15-21.

it is established, holders of rights for other territories cannot enforce their rights against the user for the acts covered by the fiction. Considering the limited number of measures as well as their scope, it is fair to say they have no significant impact on territorial exploitation of rights. Since the EU's private international rules on copyright infringement follow the logic of territoriality, they do not curb adverse effects of territorial rights on the single market either. It can be said however, that the use of fictive localization mechanisms and mutual recognition create a kind of hybrid rules: they are not multisided conflict rules, nor one-sided scope rules, and not normal rules of substantive law; but something in between. This does not promote legal certainty. The fact that the approach of the EU law maker has been piecemeal further complicates copyright law. There is no sign that this piecemeal approach will be traded in for a more fundamental rethink of territoriality, as has been the case in other areas of intellectual property law.

For the music sector, the framework of the Collective rights management directive facilitates multi-territorial collective licensing of online rights by setting quality requirements for CMOs wanting to run licensing hubs, and through the tag-on regime for (smaller) CMOs that can thus benefit from the hubs. However, to what extent it will become easier for service providers to obtain licenses for all the repertoire they seek and for all the Member States in which they want to offer their services remains uncertain. Individual licensing of online rights is the preferred way for especially large right holders. They can benefit from the expertise and data that collective management organisations have accumulated over the years, since the latter are eager to offer their services by setting up special vehicles for this. Where this leaves smaller CMOs, who do have a legal right to have their repertoire managed by sister CMOs with an EU licensing passport, and what the impact will be on their role in the local musical culture is also uncertain. Presumably, the EC's review of the Collective rights management directive that is due in 2021 will address such questions.

Despite profound changes in the way audio-visual content is being consumed, territorial exclusivity remains a bedrock of distribution models in much of the audio-visual sector. This is driven by multiple persistent factors, funding mechanisms and language and cultural preferences being among the more important ones. In both the music and audio-visual sectors, historical structures and entrenched practices seem to drive the continued attachment to territorial rights. Typically, no distinction is made between the territorial scope of the right itself (i.e. copyright in the EU being a bundle of rights, each limited to the boundaries of the individual Member State), and the territorial scope of the grant or (exclusive) license. These are however different issues. It is of course very well possible to license a copyright for a particular geographic territory, when that right itself covers a larger territory.

As part of the review of the Geo-blocking regulation, which currently does not cover services involving copyright and neighbouring rights, the Commission has announced its intention to talk to businesses in the audio-visual sector to see if the Geo-blocking regulation could be extended to the provision of audio-visual services.[199] However, the review clause explicitly states that a scope-extension will need to respect the fact that a service providers must have 'the requisite rights in the relevant territories'. Consequently, there seems little prospect that the Geo-blocking regulation can be extended in a meaningful way, since right holders will determine who gets licenses for which territories.

Going forward in the next stages of the WP4.1 task, the findings of this paper will be used to address a number of issues:

- In the context of exploring the room that multilateral treaties in copyright and neighboring rights leave the EU (and its Member States) to deviate from territorial rights, which are the less or more challenging mechanisms that can be used to curb adverse effects on the single market?
- In the context of exploring adverse effects of territoriality on the development of cross-border services that rely on exceptions and limitations to copyright (e.g. text- and datamining based; criticism & review), and the usefulness of the existing mechanisms to help remedy these.

[199] EC 2020, COM(2020)766 final.

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