ReCreating Europe

D4.3 TERRITORIALITY POLICY RECOMMENDATIONS

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EXECUTIVE SUMMARY

These policy recommendations are both the outcome and a starting point for further work on the complex issue of how the EU can navigate the territorial nature of copyright and related rights while pursuing a digital single market for creative industries.

In the strand of work produced on territoriality, a scoping exercise was done of the various mechanisms in EU copyright law introduced specifically to overcome certain drawbacks of territorial rights in a single European market. That analysis showed that apart from the so-called exhaustion doctrine (which ensures the freedom of circulation of tangible copies of works), the most used mechanism in fictive localization, i.e. the use of a legal fiction that regards a particular act as taking place in one particular Member State. The recommendations regarding the existing acquis focus on rules using fictive localization.

The more forward looking recommendations to come out of this project are based on the idea that considering the advanced level of harmonization and the needs of the internal market, the idea of a unitary copyright title (and titles for neighbouring rights) merits serious consideration. The recommendations address various steps to take and matters to consider.

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1 TERRITORIALITY IN EU COPYRIGHT – THE ISSUES

1.1 INTRODUCTION

These Policy recommendations are both the outcome and a starting point for further work on the complex issue of how the EU can navigate the territorial nature of copyright and related rights while pursuing a digital single market for creative industries. By territoriality we mean the legal construct that separate rights exist for each Member State with respect to the same intellectual productions, e.g. copyright works, collections of data, film recordings, performances of artists, broadcasts, press publications and the like.

The Recommendations result from three specific (research) activities undertaken as part of the strand specifically addressing the issue territoriality in the ReCreating Europe project.[1] However, they also take on board the recommendations made in other parts of the project, where relevant to problems of territoriality. The three stages focused on the current situation in the acquis (what measures have been taken), on the larger international copyright framework in which EU copyright law sits, and on a forward looking exercise entertaining the idea of a unitary title for copyright. In this document, copyright is used as short-hand for copyright and neighbouring rights (of phonogram producers, performing artists, etc.).

1.2 MEASURES OVERCOMING TERRITORIALITY IN THE EU ACQUIS

First came an analysis of 'the problem with territoriality' in the context of the digital single market. A scoping paper (D.4.1)[2] was drafted, setting out where the friction lies of territorially organized intellectual property rights with the idea of a single market. It shows that despite far-reaching harmonization of Member States' copyright law since the early 1990s, gaps remain. What is more, over the years, the EU law maker introduced various mechanisms

[1] For an overview of the projects outputs see the Communities repositoy on Zenodo: https://zenodo.org/communities/recreatingeurope/search?page=1&size=20

[2] Mireille van Eechoud, & Romy van Es. (2021). D4.1 Territoriality scoping paper. Zenodo. https://doi.org/10.5281/zenodo.5040173

specifically to overcome certain drawbacks of territorial rights in a single European market. Because even although in large part, the subject-matter, scope and duration of rights are harmonized, due to territoriality it is a challenge to clear the necessary rights especially for cross-border uses. The mechanisms are found in the various harmonization directives and in regulations and generally address very specific issues. They can be grouped as:

- Limitations to the exercise of distribution rights (exhaustion doctrine, first laid down by courts on the basis of freedom of goods as enshrined in the TFEU and its predecessor, since codified in directives).
- Fictive localization of acts in one particular place (sometimes described as 'country of origin principle')
- Mutual recognition of the special status of works or beneficiaries, coupled with pan-European licensing.
- Harmonization of private international law rules, notably Rome II Regulation rules on applicable law to infringement of intellectual property. The latter are in fact largely unhelpful because generally speaking for copyright and related rights these too are based on the idea of territoriality, i.e. the law applicable to an infringement is/are the law(s) of the Member State(s) for which protection is sough. This easily results in multiple laws governing a dispute, or in uncertainty about which laws apply to begin with, especially where internet communication is involved.

Mostly, when the legislator took measures to overcome issues with territoriality, it was in the form of so-called fictive localization: the liability of (professional) users for copyright claims arising in different Member States is reduced by the introduction of a presumption that the user only performs relevant acts in one place, e.g., the place of establishment. This approach was first followed for satellite broadcasting (in the early 1990s) and more recently for e.g. uses of protected subject-matter by educational institutions in the course of (cross border) distance learning. Other instances address access for consumers to content services when temporarily abroad and rights clearance for so-called ancillary broadcasts.

Viewed over time, there is a rise in the number of these solutions, which tend to have a narrowly defined scope of application. Taken together, it creates a more complicated legislative landscape.

1.3 THE INTERNATIONAL FRAMEWORK

Since the EU are bound by international copyright treaties, in a **second strand** of the project the policy-making space of the EU was assessed in light of these treaties, especially the Berne Convention for the protection of literary and artistic property (Berne Convention), the WIPO Copyright Treaty (WCT), WIPO Phonograms and Performances Treaty (WPPT), Beijing Treaty (BTAP) and Marrakesh Treaty.[3] The outcome of this second strand[4] is that there is ample room for 'anti-territoriality' measures in the EU, as long as their territorial scope is limited to the EU geographically. Such measures must also respect the minimum protection guaranteed by the treaties. Effectively this means that if anti-territoriality measures are embedded in a system of harmonized norms, and the latter are in keeping with the obligations of the treaties, no particular problems need arise. To date the EU have ensured that any substantive (minimum) norms in new copyright treaties are negotiated are already in the acquis or acceptable to have.

On the assumption that this will also be the strategy going forward, there is no immediate danger that future EU copyright provisions aimed at overcoming adverse effect of territoriality within the internal market will run counter to the international obligations of the EU and its Member States. Indeed, some mechanisms deployed in the EU have an international equivalent. The latest example is the mutual recognition provision in the Marrakesh treaty that allows so-called (domestically recognized) authorized entities to supply visually impaired in other countries with copies made accessible for visually impaired persons.

The analysis of the international framework also concluded that with respect to the exhaustion principle (i.e. right holder can not prevent the further sale of copies once these have been lawfully put into circulation), international copyright law as it stands offers no room

[3] Berne Convention for the Protection of Literary and Artistic Works, 1971 Paris Text, 1161 U.N.T.S. 3**;** WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 2002); WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002), 2186 U.N.T.S. 121.; Beijing Treaty on Audiovisual Performances (adopted 24 June 2012, entered into force 28 April 2020); Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (adopted June 27, 2013, and entered into force on September 30, 2016).

[4] Van Eechoud, Mireille, & van Es, Romy. (2021). D4.2 Report on EU policy space in light of international framework. Zenodo. https://doi.org/10.5281/zenodo.5069608.

for a functional equivalence doctrine which would treat digital copies of works the same whether the copy is on a (movable) tangible carrier (printed material, CD, USB) or not. Of note, there is no sign that the Court of Justice is poised to develop a full-fledged digital exhaustion right when interpreting the distribution right under the Information Society Directive.[5] Nor is the European Commission contemplating changes in this regard. Having said that, considering that in certain cases tangible copies are functionally equivalent to digital (online) copies of works, it is advisable for the legislature to provide clarity on how limitations and exceptions for cultural uses can be adapted to cover functionally equivalent copies; see the policy recommendations on the future of EU flexibilities.

There is one particular challenge that will surface should the EU embark on legislating a uniform copyright title: the prohibition on formalities. These are 'formal requirements that the law imposes on authors and copyright owners for the purpose of securing or maintaining copyright protection or enforcing this right before the courts. Examples include registration, deposit and notice requirements'.[6] Strictly speaking, the Berne Convention only prohibits formalities for foreign authors and works, that is, a Berne State can impose formalities with respect to works for which it classifies as the country of origin (Article 5(4) BC). But in practice countries refrain from imposing formalities for domestic works.[7] If the EU were to consider the introduction of a uniform title, it is conceivable that this cannot be achieved without putting in place some conditions (e.g. notification or registration systems) that manage the transition from national copyrights to EU titles. These would either need to be consistent with the formalities prohibition, or initiatives will need to be taken to modify the existing prohibition. Pursuing a revision of the Berne Convention itself however will not be a feasible path due to the unanimity required of all Union members to change the instrument, and the EU not being a contracting state.

[5] Directive (EC) 2001/29 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 2001 L 167/10.

[6] Van Gompel S. (2011), *Formalities in Copyright Law – An Analysis of their History, Rationales and Possible Future,* Alphen aan den Rijn: Kluwer Law International, p.10, see also World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), p.33.

[7] Compare Ricketson, S, and Ginsburg, J. (2005), *International Copyright and Neighbouring Rights – The Berne Convention and Beyond – Volume 1,* Oxford: Oxford University Press, at 6.94, who note the US as an exception as for US works, registration is a prerequisite to institute infringement proceedings.

1.4 THE PROSPECT OF A UNITARY COPYRIGHT

The territorial organization of copyright and related rights as such is not addressed by policy makers at the EU level. Harmonization in the area of substantive copyright norms and enforcement has been continuing at pace, for 30 years now, but the territorial character of rights remains the proverbial elephant in the room. As Spuznar, Advocate General to the Court of Justice of the European Union observed, territoriality stands in the way of achieving the internal market in the cultural domain that the internet enables:

''If I had to do it again, I would begin with culture', Jean Monnet is supposed to have said about the process of European integration. However, culture, in any event from its economic aspect, is to a large extent regulated by copyright. And one element stands in the way of progress towards integration in that field and helps to entrench the fragmentation of the internal market according to national borders: the immutable principle of territoriality (in the sense of national territory) of copyright, and also the practices of the market players, including those of the collective management organisations which have been set up on the basis of that principle. Paradoxically, the more that technology, in particular satellite broadcasting – at issue in the present case – and, more recently, the internet permit inter-State cultural exchanges, the more the obstacle of the principle of territoriality of copyright makes itself felt.'[8]

It makes sense to ask the question whether the introduction of EU wide titles for copyrights and related rights should now be seriously considered. After all, for intellectual property rights such as trademarks and designs rights with unitary character and equal effect throughout the European Union have been in existence for many years (trademarks were registered from 1996, designs since 2003). Almost 20 years ago, the so-called Wittem group

[8] Opinion of Advocate General Szpunar delivered on 22 September 2022, case C-290/21 (AKM/Canal+ Luxembourg Sàrl). https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62021CC0290

of copyright scholars drafted a European Copyright Code, but the idea of creating a uniform title for copyright (or related rights) has since not been taken up.

In the context of the *ReCreating Europe* project, we seek to analyse what the advantages and disadvantages are of having a uniform title, and create a first inventory of what issues would need solving should the legislator consider the introduction of EU titles. Two expert roundtables where convened as part of this effort.[9] The first roundtable focused on (dis)advantages of unitary rights, the second roundtable on the relationship to intellectual property as a fundamental right protected under the EU Charter of Fundamental Rights (Article 17(2)), on identifying various models and on key issues to be resolved. The outcomes of the roundtables feed into the recommendations set out in the next section. However, the experts had no direct involvement in drafting the recommendations as made here; the responsibility rests with the author.

[9] Mireille van Eechoud. (2022). D4.4 Territoriality Roundtables (combined report). Zenodo. https://doi.org/10.5281/zenodo.7564660.

2 RECOMMENDATIONS

2.1 ON CURRENT MECHANISMS IN THE COPYRIGHT ACQUIS

As is set out in the previous deliverables of the strand of work on territoriality, the various mechanisms deployed in the EU acquis to address adverse effects of territorial copyright and neighbouring rights, taken individually, help resolve isolated problems. Taken together, they complicate what is already a complex landscape.

If one considers the specific provisions in the context of the legislative instruments it is not always clear why a particular mechanism was chosen. With respect to fictive localization the rules essentially designate one (national) copyright law as governing the issue at hand. This can for example address the issue of authorization (ancillary broadcasts online), whether an act is lawful (use for online education). Mutual recognition rules also lead to application of a single law to a particular issue, e.g. whether a work has orphan work status.[10]

To clarify: we use the term fictive localization here because it more directly captures what the rules try to achieve, whereas the use of the term 'country of origin' principle is more vague. Also, it may cause confusion because country of origin is also a term of art in international copyright and related rights treaties, used to determine the scope of application and the operation of reciprocity rules.

It is noteworthy that most instances of fictive localization look to the place of establishment or habitual residence of the party that can directly benefit from the provision. This is in itself a sensible approach, as the place of establishment of the 'beneficiary' can be relatively easy determined and will likely coincide with the place that on the whole has the closer connection to the use. In EU private international law, a central tenet is that connecting factors which

[10] Stakeholders see the principle of mutual recognition as a key feature because it provides legal certainty, see European Commission, Directorate-General for Communications Networks, Content and Technology (2022), McGuinn, J., Sproǵe, J., Omersa, E., et al., *Study on the application of the Orphan Works Directive (2012/28/EU) : final report*, Publications Office of the European Union, https://data.europa.eu/doi/10.2759/32123, p.71.

lead to identification of the (single) applicable law, in normal-typical cases reflect a close connection between factual-geographical elements and the designated law.[11]

The 'injection' rule of the 1993 Satellite and Cable Directive is the only instance of a technological solution. Such a technology oriented solution has been avoided in later instruments and rightly so. After all, factors like the place where communication signals are introduced in an uninterrupted chain of communication to the public, or where servers are located do not necessarily reflect a close connection with a country, right holders or users. The more communication takes place over the internet and with the use of cloud services, the less meaningful technological connecting factors become.

As the overview in the Appendix illustrates, the level of precision as regards the definition of the place of establishment (or habitual residence in the case of natural persons) varies. This may contribute to legal uncertainty for rightsholders (including collective rights management organizations tasked with issuing licenses) as well as for educational establishments, cultural heritage institutions, entities authorized to provide access to protected works/subject matter to the visually impaired, broadcasting organizations and to providers of online content services. The recommendations below focus on fictive localization.

1. When introducing specific provisions aimed at identifying a single governing law, seek consistency with existing provisions in the copyright acquis, i.e. preferably use as connecting factor the habitual residence of the party whose direct benefit the provision mainly serves.
2. Assess whether in cases of fictive localization, legal certainty can be strengthened and consistency in the law improved by using connecting factors of the Rome I and II regulations, especially the concept of habitual residence (i.e. for legal persons: place of central administration).
3. To clarify the situation where a beneficiary may have more than one place of activity, consider the specifications used in the Rome I and II regulation's definition of place of habitual residence.

[11] One important exception to factual-geographical closest connection is the principle of party autonomy, which allows parties to a legal relationship to chose the applicable law themselves, but the party autonomy principle is not really relevant in the copyright context discussed here.

4. Rather than introducing more piecemeal ‘fixes’ to overcome adverse affects of territoriality, seek unification of copyright and related rights (see next section).

2.2 ON A UNITARY TITLE

The more forward looking recommendations to come out of this project are based on the idea that considering the advanced level of harmonization and the needs of the internal market, the idea of a unitary copyright title (and titles for neighbouring rights) merits serious consideration. In this light, the key recommendation is to develop a policy agenda that maps out the road towards the introduction of a uniform title. Specifically with regards to what elements to include in such a roadmap, the following recommendations are made:

1. Articulate a clear vision on what European copyright aspires to, i.e. a vision that goes beyond seeking a ‘high level of protection’ or achieving a well-functioning internal market. What role must copyright play in the EU legal order, underpinned by which fundamental principles?
2. Comprehensively identify for which areas of copyright law shared norms are still to be developed, and develop them (e.g. as regards authorship and initial ownership, exclusion of official texts from protection), at the same time establishing where unification is not needed (e.g. outside the core of copyright proper such as perhaps for copyright contract law).
3. Consolidate and simplify the existing acquis (now spread over more than 15 instruments), with special attention for unification of limitations & exceptions.
4. Elaborate various models for the introduction of a unitary copyright, so as to be able to assess their feasibility, e.g. a) Uniform title for all works, existing and new; b) Uniform title for new works, with continuation of national rights for pre-existing works, c) Uniform title with supplementary national rules (e.g., for some limitations & exceptions for off-line use), d) National rights with a trigger point for transformation into a uniform title.

5. Assess the impact of a unitary title on transaction costs for stakeholders in creative industries (through the value chain) through economic analysis.
6. When elaborating the models, also analyse how the design of a unitary title could be made compliant with the prohibition on formalities to which the EU and its Member States are bound under international copyright law, or alternatively what course of action is open to the EU to achieve the necessary changes to the formalities clause.
7. Consider what if any institutional structures at EU level are needed to ensure stakeholders have meaningful agency (especially creators) and to ensure rights are transparently managed.
8. Have particular attention for the role of copyright in safeguarding cultural diversity, in terms of linguistic diversity, the incentive rationale of copyright in local cultural production and exchange. Recognize that culture is a shared space and that culture as such is not 'owned' by any particular persons or groups.
9. When considering any changes to the acquis, carefully consider the interplay with other areas of law, especially in the fields of media, AI, access to information and digital markets.

3 APPENDIX: EXAMPLES OF FICTIVE LOCALIZATION IN EU LAW

Below are excerpts of the various legislative instruments that set out a fictive localization or mutual recognition rule. To compare, the common 'localization factor' used in private international law instruments in the EU is also listed (in private international jargon, 'connecting factor' is the usual term).

Article 4 Online content services regulation[12]

Localization of the provision of, access to and use of online content services

The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence.

Definition: Member State of residence 'means the Member State, determined on the basis of Article 5, where the subscriber has his or her actual and stable residence' (Article 2(3)).

Comment: To establish residence, the content service provider can rely on a set of 11 factors listed in Article 5, such as where the customer has a bank account, or a telephone contract, or has to pay local taxes, is registered on the local electoral roll, uses an IP address linked to the state, customer postal address, declaration by customer as to state of residence. Of note, the provider can use only two of these to establish residence (for privacy reasons).

Article 5(3) DSM Directive[13]

'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.'

[12] 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 2017, L 168.

[13] 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.

Comment: The Directive contains no further definition of what an educational establishment is beyond that it covers those 'recognised by a Member State, including those involved in primary, secondary, vocational and higher education' (recital 20). It does not elaborate how to determine the place of establishment, e.g. in case an institution has multiple branches in more than one member state.

Article 8-9 DSM Directive

Article 8

Use of out-of-commerce works and other subject matter by cultural heritage institutions

[…]

Article 9

Cross-border uses

1. Member States shall ensure that licences granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State.

2. The uses of works and other subject matter under the exception or limitation provided for in Article 8(2) shall be deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established.

Definition: A cultural heritage institution is defined as: 'a publicly accessible library or museum, an archive or a film or audio heritage institution' (Art. 2(3) DSM).

Comment: The Directive does not elaborate how to determine the place of establishment, e.g. in case an institution has multiple branches in more than one member state.

Article 3 Online broadcast directive[14]

Application of the country of origin principle to ancillary online services

1. The acts of communication to the public of works or other protected subject matter, by wire or wireless means, and of making available to the public of works or other protected subject matter […] in an ancillary online service by or under the control and responsibility of a broadcasting organisation, as well as the acts of reproduction of such works or other protected subject matter which are necessary for the provision of, the access to or the use of such online service for the same programmes shall, for the purposes of exercising copyright and related rights relevant for those acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.

Definition: No definition is given of what constitutes the principal place of establishment in the Directive itself (not in the definitions of Article 1, nor is there guidance in recitals).

Article 2 jo 1(2) sub b Satellite and Cable directive[15]

Broadcasting right

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

The definition of this place is set out in Article 1(2) sub b: The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

[14] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ 2019, *L 130.*

[15] 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 1993, L:1993.

Habitual residence as connecting factor in EU private international law

The rules above all seek to simplify matter by using a legal fiction to 'allocate' a particular issue to one Member State. This is reminiscent of what rules of private international law do, albeit that the relevant instruments tend to focus on habitual residence. The two main EU regulations on applicable law relevant to intellectual property matters are the Rome II regulation on the law applicable to non-contractual obligations (including infringement of copyright and related rights), and the Rome I regulation on the law applicable to contractual obligations, which also covers contracts dealing with intellectual property. Both have essentially the same definition of habitual residence (Art. 23 Rome II regulation, Art. 19 Rome I regulation).

Rome II regulation[16]

Article 23

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

[16] 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 2007 L 199.

The ReCreating Europe project aims at bringing a ground-breaking contribution to the understanding and management of copyright in the DSM, and at advancing the discussion on how IPRs can be best regulated to facilitate access to, consumption of and generation of cultural and creative products. The focus of such an exercise is on, inter alia, users' access to culture, barriers to accessibility, lending practices, content filtering performed by intermediaries, old and new business models in creative industries of different sizes, sectors and locations, experiences, perceptions and income developments of creators and performers, who are the beating heart of the EU cultural and copyright industries, and the emerging role of artificial intelligence (AI) in the creative process.

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