

# Digital Single Market: a long way to go

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## Abstract

This paper provides an overall assessment of recent initiatives devised by the European Commission as part of the Digital Single Market Strategy (“DSMS”) and beyond. A connecting thread running through various policy documents and legislative proposals is the principle of copyright territoriality. Copyright’s territorial nature is identified as a great hindrance to the establishment and smooth functioning of an internal market for digital content and services, since it contributes to the cumbersomeness of rights clearance, territorial exclusivity and geo-blocking practices. Nonetheless, the initial policy options, geared towards a substantial erosion of copyright territoriality, have not been articulated in concrete legislative measures. The Commission has finally opted for a considerably less ambitious approach, which purports to mitigate some minor side effects of territoriality. The proposal seeking to mandate full accessibility of content across the EU was watered down to accommodate concerns expressed by the majority of stakeholders in the creative industry. The efforts to tackle geo-blocking are not addressed to providers of audio-visual content and copyright-protected works. The extension of the “country of origin” principle is limited to services ancillary to broadcasts. Likewise, cross-border “portability” of content does not offer a real solution to dismantling national barriers in the European digital environment. Hence, copyright will remain territorially grounded and a full integration of markets for creative content will not become a reality, at least in the near future. This paper discusses the potential lack of continuity between the overarching aims expressed in the DSMS and subsequent legislative steps, and criticises the use of terminology leading to legal uncertainty. The newly introduced neighbouring right for press publishers might represent an additional source of territorial fragmentation. The (general monitoring) obligation imposed on information society service providers requires strict scrutiny. This paper, however, values the adoption of regulations, entailing a deeper level of harmonisation, and the provision of mandatory exceptions and limitations.

## Keywords

Digital Single Market, geo-blocking, portability, press publishers, online intermediaries, content recognition technologies

## Topic

Intellectual Property Law, Copyright

## Mercado Único Digital: un largo camino por recorrer

### Resumen

Este artículo presenta una evaluación global de las recientes iniciativas elaboradas por la Comisión Europea en el marco de la Estrategia para el Mercado Único Digital (Digital Single Market Strategy, SGDS) y más allá. El principio de territorialidad de los derechos de autor es un hilo conductor que atraviesa varios documentos políticos y propuestas legislativas. El carácter territorial de los derechos de autor se identifica como un gran obstáculo para el establecimiento y el buen funcionamiento de un mercado interior de contenidos y servicios digitales, ya que contribuye a la complejidad de la liquidación de derechos, la exclusividad territorial y las prácticas de bloqueo geográfico. Sin embargo, las opciones políticas iniciales orientadas a una erosión sustancial de la territorialidad de los derechos de autor no se han articulado en medidas legislativas concretas. La Comisión ha optado finalmente por un enfoque considerablemente menos ambicioso, que pretende mitigar algunos efectos secundarios menores de la territorialidad. La propuesta que pretendía imponer la plena accesibilidad de los contenidos en toda la UE se diluyó para dar cabida a las preocupaciones expresadas por la mayoría de las partes interesadas en la industria creativa. Los esfuerzos para hacer frente al bloqueo geográfico no están dirigidos a los proveedores de contenidos audiovisuales y obras protegidas por derechos de autor. La ampliación del principio del «país de origen» se limita a los servicios auxiliares de las emisiones. Del mismo modo, la «portabilidad» transfronteriza de los contenidos no ofrece una solución real para eliminar las barreras nacionales en el entorno digital europeo. Por lo tanto, los derechos de autor seguirán estando arraigados territorialmente y la plena integración de los mercados de contenidos creativos no será una realidad, al menos en un futuro próximo. Este artículo aborda la posible falta de continuidad entre los objetivos generales expresados en el DSMS y los pasos legislativos subsiguientes, y cuestiona el uso de una terminología que conduce a la inseguridad jurídica. El derecho de vecindad recientemente introducido para los editores de prensa podría representar una fuente adicional de fragmentación territorial. La obligación (de supervisión general) impuesta a los proveedores de servicios de la sociedad de la información exige un examen riguroso. Este artículo, sin embargo, valora la adopción de reglamentos, lo que implica un nivel más profundo de armonización y la disposición de excepciones y limitaciones obligatorias.

### Palabras clave

Mercado Único Digital, bloqueo geográfico, portabilidad, editores de prensa, intermediarios en línea, tecnologías de reconocimiento de contenidos

### Tema

derecho de la propiedad intelectual, derechos de autor

## 1. Introduction

The following inquiry aims to provide an overview of recent initiatives taken by the EU Commission in the field of copyright and related rights. It purports to outline what the trend has been in recent years as far as EU copyright policy is concerned.

A particular focus in the policy debate is laid on the modernisation of the European framework of copyright and related rights, in order to make it fully fit for the digital world.

Widespread Internet access, high-speed Internet transmission, ubiquitous devices, increased memory of storage devices, new online services – such as video and content-sharing sites, social networks, news aggregators and search engines – have revolutionised the way creative content is produced, distributed and used.

Thus, EU policy-making in the area of copyright is geared towards meeting the new-fangled challenges posed by new media tools and Internet-based communication technologies. It aims to achieve a wide availability of creative content across

the EU, whilst providing a high level of protection for right-holders, and maintaining a good balance with other public policy goals, such as education, innovation, and research.<sup>1</sup>

Likewise, the need for a more harmonised copyright regime – particularly by tackling specific side effects of copyright territoriality – is constantly evoked in the EU policy agenda.

As explained below, this focus is reflected in the Communication of 2015, *A Digital Single Market Strategy for Europe* (“DSMS”),<sup>2</sup> where the Commission acknowledges that the transmission and consumption of digital content across borders bears significant potential for economic growth. Yet, the territorial application of copyright rules creates a major barrier to the access and use of such online content services.

Before entering into the details of recent initiatives taken by the European legislator, it is important to outline, first of all, the major challenges that the principle of copyright territoriality poses to the establishment and the smooth functioning of an internal market for digital content.

## 2. The Principle of Territoriality

Copyright shares with other IPRs an essential feature: territoriality. This principle, enshrined in Article 5 of the Berne Convention, has been reaffirmed in more recent case law from the CJEU.<sup>3</sup>

There is no such thing as a uniform EU copyright law. Works and other subject matter are protected on the basis of 28 national laws on copyright and related rights that apply respectively within the territorial boundaries of each Member State.

Thus, the exclusive rights that copyright confers are acquired and enforced at national level on the basis of the law of the place where protection is claimed (*lex loci protectionis*).<sup>4</sup>

Notwithstanding the process of copyright harmonisation has been on-going for more than twenty years, national copyright laws continue to present significant differences on substantial issues, such as authorship, ownership, moral rights, transformative uses of a work (ie, adaptation), limitations and exceptions, and enforcement.

The dematerialisation of content distribution has prompted discussion on the negative effects that copyright territoriality exerts on the free movement of services in the internal market.

In fact, for a world of tangible goods, the problem of EU market fragmentation caused by the territorial application of copyright is easier to tackle; it was first handled by the CJEU’s case law establishing the principle of Community exhaustion of the distribution right.<sup>5</sup>

The online environment, however, receives a different treatment. With the sole exception of software, given the *lex specialis* nature of the Software Directive,<sup>6</sup> the principle of exhaustion is not analogically applicable to the transmission of digital content.<sup>7</sup>

Indeed, a textual interpretation of Recital 29 of the InfoSoc Directive rules out the possibility of recognizing a general principle of “online exhaustion”. Furthermore, online transmission of copyright works does not imply a distribution, but both a reproduction and an act of making available the work to the public, within the meaning of Article 2 and 3 of the InfoSoc Directive respectively; these two rights, however, are not subject to exhaustion.

One should also note that the act of “making available to the public” is relevant in each of the EU countries where the work can be directly accessed, plus, potentially, the country in which the content is uploaded. This implies that online content providers aiming to provide services across the whole of Europe first need to clear rights covering all 28 Member States.

1. EC Communication, *Towards a Modern, more European Copyright Framework*, COM(2015)626 final, 1 (hereinafter “Communication of 2015”).

2. COM(2015)192 final, 2.4.

3. Case C-192/2004 *Lagardère Active Broadcast v SPRE and GVL* (14 July 2005), [46].

4. Regulation 864/2007, Article 8.

5. Joined Cases 55/80 & 57/80 *Musik-Vertrieb Membran GmbH v GEMA* (20 January 1981). See Hugenholtz (2016).

6. Case C-128/11 *UsedSoft GmbH v Oracle Int’l Corp* (3 July 2012).

7. Case C-419/13 *Art & Allposters International BV v Stitching Pictoright* (22 January 2015).

As a consequence of this, in case the right-holder has not granted a licence for the online transmission of content in the whole of Europe, the service provider will have to use technologies to limit or deny access to the website from the territories that are not covered by the licence.

A distinction can be made between two forms of geographical discrimination that a service provider can put in place: geo-blocking (ie, restricting access to online content based on the user's geographical location); and geo-filtering (ie, automatically re-routing users to different sites).

For all these reasons, on the one hand, the principle of territoriality - that inevitably encourages territorial licensing and geo-blocking practices - has been denounced to constitute a major hurdle for achieving internal market goals and, in more recent years, the establishment of a unified digital market in Europe.

On the other hand, territoriality is often perceived as the cornerstone of cultural, educational and linguistic heterogeneity. For the sake of cultural diversity, the need of preserving autonomy, through state-specific rules, becomes critical.

Moreover, within the audio-visual industry, territorial licensing and exclusivity continue to play a key role in the financing, production and distribution of works.

### 2.1. Policy options to overcome or mitigate copyright territoriality

Prior to the launch of the DSMS, various approaches have been suggested to address the negative effects ensuing from the territorial application of copyright law.<sup>8</sup>

In order to overcome obstacles hindering the accessibility of content across borders, it has, first, been proposed to extend the principle of exhaustion to online transmitted works.

Nonetheless, right-holders appeared to be reluctant to such an option, arguing that enabling the online resale of digital content would undermine investment in the copyright content.<sup>9</sup>

As compared to their analogue counterparts, digital works exist in perpetuity and can be duplicated in exact replicas at a very low price. Thus, if physical copies depreciate in value and quality over time, digital content will always remain in its original state.

Moreover, in case of digital transmission of content, it is also extremely complicated to determine whether the online seller has deleted the original copy of the work. For all these reasons, the risk of mass-scale infringement is considerable. The second possible route delineated by the Commission to enhance cross-border distribution of content is to address the uncertainty surrounding the territorial reach of the "making available" right.<sup>10</sup>

In fact, the provision set out in Article 3 of the InfoSoc Directive does not state what elements of the act of making available should be considered relevant for its application (ie, the availability on a server, the actual transmission, the accessibility by the public, the reception by the public), nor does it determine the place where the act occurs.

To remedy this issue, one possibility would be to extend to all online communications the "country of origin" principle, enshrined in the Satellite and Cable Directive 93/83/EEC ("*SatCab Directive*").<sup>11</sup>

According to this legal fiction, the act of satellite broadcasting takes place, for copyright purposes, in the country where the signal originates, although it has effects beyond the Member State of origin. Hence, in order to broadcast audio-visual content, the rights need to be cleared only in the country where the signal is first uplinked, rather than in the countries where the signal is received. The side effects of territoriality are thus mitigated.

8. *Public Consultation on the Review of the EU Copyright Rules*, launched by the previous Commission in December 2013. Available at: <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultationdocument\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultationdocument_en.pdf)>.

9. EC Report, *Responses to the Public Consultation on the Review of the EU Copyright Rules* (July 2014). Available at: <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf)>, p. 21.

10. EC White Paper, *A Copyright Policy for Creativity and Innovation in the European Union* (2014).

11. Article 1(2)(a). A similar principle is also contained in Article 2 of the AVSM Directive 2010/13/EU and Article 3 of the ECD 2000/31/EC.

It follows that, if the “country of origin” approach were followed in the online environment, the “making available” of a copyright-protected work would take place in the Member State where the work is uploaded or where the uploader has its centre of activities. Thus, a service provider would have to obtain a licence from the right-holder solely in such a country (ie, country of upload or centre of interests).<sup>12</sup>

As outlined below, in the aftermath of the DSMS, the discussion about the applicability of the “country of origin” principle to online communications converged into a public consultation on the review of the SatCab Directive,<sup>13</sup> followed by a proposal for a *Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmission of broadcasting organisations and retransmissions of television and radio programmes* (“Broadcasting Regulation”),<sup>14</sup> published on 14 September 2016.

Finally, the third policy option discussed by the previous Commission is the introduction of a unitary European copyright title, eradicating the principle of copyright territoriality.

The creation of a pan-European title, on the grounds of Article 118 TFEU, is a radically different process from the harmonisation of national laws. The former entails the introduction of a new title, through a Regulation, that is directly applicable in all Member States. By contrast, harmonisation is aimed at adjusting and approximating existing national laws, primarily through Directives.

The automatic operation of a unitary European title may necessitate the simultaneous replacement of national titles, as opposed to the case of Community designs and Community trademarks.

A smoother approach would be to make such European copyright title an option for right-holders, which would not replace but co-exist in parallel to national copyright titles.<sup>15</sup>

In this respect, it should be noted that, contrary to other IPRs, copyright in the EU subsists independently of registration, in accordance with the “no-formalities” principle enshrined in Article 5(2) of the Berne Convention.

Thus, the viability of a softer solution depends mostly on whether the EU can implement an optional registration system - on top of national copyright systems - that will, nonetheless, comply with the abovementioned “no-formalities” principle.

For the moment, the idea of introducing a single European copyright title has not been concretised, but vaguely postponed to the future. It constitutes a very difficult task to achieve, in a context where harmonisation of national laws is far from being fully achieved.

The EU would need to adopt a Regulation dealing with all aspects of copyright, including those for which there is still significant disparity in Member States’ legislations.

In the Commission’s view, albeit not in a reasonable time, uniform application of the rules would also call for a single copyright jurisdiction with its own tribunal, so that inconsistent case law does not lead to more fragmentation.<sup>16</sup>

By way of comparison, discussions surrounding the adoption of the unitary patent system commenced many decades ago (in 1962); even so, the new system is expected to be up and running by the end of 2017.

### 3. Digital Single Market Strategy and beyond

On 6 May 2015, the European Commission adopted its DSMS, envisaging three main areas of intervention, as far as copyright law is concerned: 1) ensuring access to - and the provision of - copyright-protected content across

12. Following the approach endorsed by the CJEU in recent case law, the act of making available can be localised in the Member State or several Member States where the public is targeted (“targeting approach”), through advertisements, promotions, or choice of language, rather than in the country of origin. See Case C-173/11, *Football Dataco v Sportradar* (18 October 2012).

13. Available at: <<https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive>>.

14. COM(2016)594 final.

15. Derclaye and Cook (2011, p. 260).

16. Communication of 2015, *supra* note 1, 6.



borders, and tackling geo-blocking; 2) reviewing some exceptions and limitations to copyright, and discussing the possibility to introduce an exception for text and data-mining for commercial and non commercial purposes alike; 3) discussing the role of intermediaries and whether enforcement of copyright and IPRs could be ameliorated at the EU level.

To achieve these objectives, the Commission proposed a step-by-step or “incremental” approach;<sup>17</sup> it presented proposals for the very short term (ie, the draft *Regulation on ensuring the cross-border portability of online content services in the internal market*, from now on “Portability Regulation”),<sup>18</sup> a set of proposals planned for 2016, and a “long-term vision” that was vaguely postponed to the future.

In 2016, there was a sudden flood of legislative proposals. On 23 March 2016, the European Commission launched a “public consultation on the role of publishers in the copyright value chain and on the panorama exception”. In that occasion, it came as a surprise that the Commission was considering the introduction of a neighbouring right for publishers, since this possibility was not contemplated in the DSMS.

On 25 May 2016, the European Commission adopted a new legislative proposal for a Directive amending Directive 2010/13/EC concerning the provision of audiovisual media services.<sup>19</sup> In the meantime, it published a *Communication on Online Platforms and the DSM*.<sup>20</sup>

Thereafter, on 14 September 2016, the Commission unveiled a new set of proposals, including the draft Broadcasting Regulation and the proposal for a *Directive on Copyright in the Digital Single Market* (“Copyright Directive”).<sup>21</sup>

### 3.1. Draft regulation on the portability of online content services

The proposed Portability Regulation would represent “a dynamic shift towards a new legislative tactic which aims to have a stronger, full and direct effect”, being the first Regulation in the field of copyright law.<sup>22</sup>

It should, however, be noted that the scope of the intervention is very narrow, since it is aimed at tackling a very specific side effect of copyright territoriality: the barrier to “portability” of legally acquired content (such as films, music, e-books, games, and sporting events) within Europe.

The broader question of cross-border “access” to content (ie, the possibility for a consumer to subscribe to an online service provided in another Member State) is addressed by the draft Geo-Blocking Regulation.<sup>23</sup>

Yet, despite what was originally announced in the DSMS: 1) the Geo-Blocking Regulation excludes from its scope audio-visual services; 2) the prohibition on traders applying different conditions of access to goods and services does not cover “services the main feature of which is the provision of access to and use of copyright-protected works or other protected subject matter” (Article 4(1)(b)).

Hence, the Commission’s ambitious plan to prohibit unjustified geo-blocking was doomed at the outset to partial failure, as the most frequently “geo-blocked” online content (ie, audio-visual and copyright-protected works) is outwith the scope of the proposed Regulation.

As a consequence, right-holders will still be able to license content on a territorial basis, and service providers will limit access to such content, depending on the customer’s country of residence.

17. *Id.*

18. COM(2015)627 final.

19. COM(2016)287 final.

20. COM(2016)288 final.

21. COM(2016)593 final.

22. Synodiniou (2016). Research Paper commissioned by the EU Parliament, DG for Internal Policies, *EU Portability. Regulation, In-Depth Analysis of the Proposal*.

23. COM(2016)289 final.

In fact, the proposal seeking to mandate full accessibility of content across the EU was watered down to accommodate concerns about the potential negative effects on territory-based content distribution models, expressed by the majority of right-holders, producers, distributors and broadcasters operating in the creative industry.<sup>24</sup>

From the latter's perspective, it remains crucial that territoriality is not undercut, being considered a principle that contributes to securing adequate financing of high-quality and independent content, preserving cultural and linguistic diversity, and safeguarding creative freedom. In fact, pre-sale distribution agreements, which are usually associated with exclusive territorial licences, continue to represent a prominent financial tool in the audio-visual sector.

Going back to the issue of "portability" of subscriptions across borders, this objective is primarily accomplished by Article 3(1) of the Portability Regulation, which imposes a mandatory obligation on service providers to ensure that users, who have subscribed to an online content service<sup>25</sup> (audio-visual services and services that provide access to any type of work, such as Netflix, iTunes or Sky Go) in their home territory, can access and use it, while temporarily present in another Member State.

To this purpose, Article 4 of the Portability Regulation restricts the effects of copyright territoriality by introducing a legal fiction whereby the provision of, and the access to, an online content service shall be deemed to occur solely in the subscriber's "Member State of residence", and not in the place where the act physically occurs.<sup>26</sup>

Noteworthy, the Regulation shall apply retroactively to contracts concluded before the date of its application and render any contractual provision contrary to cross-border portability unenforceable.<sup>27</sup> Thus, territorial restrictions cannot be imposed any longer, neither contractually (ie, by

a licensor on the service provider) nor technologically (ie, geo-blocking measures).

The Council of the European Union and the European Parliament have completed their review of the draft Regulation and proposed a number of amendments. It remains to be seen what will be the final text on which the legislative organs will agree.

A certain degree of uncertainty surrounds the "hybrid" nature of portability, as both a mandatory exception to the making available right - which is subject to the three-step test - and a user's right - which cannot be overridden by contractual clauses.

In a similar vein, the nature of the service provider's obligation, the legal consequences, as well as the mechanisms of enforcement remain rather obscure.<sup>28</sup>

Moreover, key to the actual scope of the Regulation is the definition of the "temporarily present" requirement (Article 2(d)).

Scholarship suggests that a strict definition would be applicable only to tourists, travellers and most probably short-term migrants, in a way that the proposed Regulation can be viewed as a sort of "roaming for Netflix" that does not erode the principle of territoriality.<sup>29</sup>

On the contrary, if the same definition were construed more broadly, as meaning "any length of presence other than permanent presence", it would benefit a much larger share of the EU population - including long-term migrants - thereby contributing to the creation of a DSM for copyright content.<sup>30</sup>

Likewise, the concept of "Member State of residence" (Article 2 (c)) needs further clarification, since the notion of "habitual residence" is not clearly defined in EU law.

24. European Audiovisual Observatory (2015).

25. Are providers hosting user-generated content included within this definition? Would it be possible to reconcile Article 3 of the proposed Regulation with Article 15 of the ECD?

26. The term "solely", as opposed to "shall be deemed to occur", is also contained in Article 1(2)(b) of the SatCab Directive.

27. Articles 5 and 7.

28. *Supra* note 22, p. 28.

29. Mazziotti and Gimonelli (2016).

30. EU Parliament (2016).

Moreover, under the Commission's proposal, the Regulation shall apply to online content services that are purchased or offered for free, on the basis of a contract, and that can be accessed by streaming, download or any other technique that allows use of that content.

However, the line between paid or unpaid services is somewhat blurred. What if a user does not have to pay at the time of subscription, but only at a later stage (for instance, in order to have an additional service)?

Finally, the Regulation enables right-holders and service providers to identify, on a purely contractual basis, the most effective means to verify the subscriber's Member State of residence. This means that different verification measures may be implemented for different content. Moreover, right-holders may have incentives to require stricter verification mechanism, such as constant monitoring of the location, in order to preserve territoriality and benefit from price discrimination strategies, whereas service providers may prefer "softer" mechanism, such as periodic checking of the IP addresses, billing addresses, bank details, etc.<sup>31</sup>

Arguably, making the verification means dependant on the parties' bargaining power is at odds with the objective of the Regulation, namely to introduce a common approach to ensuring cross border portability at the Union Level (Recital 29; Article 1).

### 3.2. Regulation on broadcasters' online transmission and retransmission

Despite fierce opposition from right-holders,<sup>32</sup> the draft Broadcasting Regulation purports to enhance a wider online access to TV and radio programmes by users across the EU.

To this end, it extends the "country of origin principle" to broadcasters' "ancillary online services" made available by or under the control or responsibility of the broadcaster.<sup>33</sup>

Online services ancillary to broadcasts include simulcasting (online services that are simultaneous to the broadcast) and catch up services (online services provided within a defined time period after the broadcast), whereas on-demand services of a broadcasting organisation and other online services of a third party are not covered (Recital 8).

In order to mitigate the risk of forum shopping, the EU legislator refrained from establishing the country of origin "where the server is located"; rather, it is the country where the broadcaster has its "principal establishment".<sup>34</sup>

It follows that a broadcasting organisation, making its simulcast or catch up services available online, has to be granted a licence from the content owner solely in one country (ie, that of its principal establishment).

As for the digital retransmissions of TV and radio programmes, the proposed Regulation provides for the application of a mandatory collective management of right. Retransmissions shall include retransmissions provided over "closed" electronic communication networks (such as IPTV), and not offered on the open Internet.<sup>35</sup>

Looking at the broader picture, in the first place, the principle of country of origin laid down in the draft Regulation is targeted to cover very specific segments of the Market (ie, online transmissions that are related to the broadcast).

Thus, the scope of its application is very limited, as it does not extend to stand-alone online services, nor does it apply to any subsequent communication to the public or reproduction of content (Recital 9).

Second, the proposed Regulation does not affect the contractual freedom of right-holders and broadcasters, insofar as they will still be able to license their rights on a territorial basis, provided that any territorial restriction conforms to EU competition rules (Recital 11).

31. *Id.*, 33.

32. In the view of right-holders and commercial broadcasters, an extension of the country of origin principle to online communications: 1) restricts the ability to license rights on a territorial basis and reduces creators' revenues; 2) poses the risk of forum shopping; 3) is not needed, as voluntary multi-territorial licences already exist.

33. See Article 2(1) referring to the acts of communication to the public, making available and reproduction.

34. This principle departs from the *SatCab* Directive (ie, the place where the signal is transmitted) and Directive 2010/13/EC (the place of the broadcaster's establishment, not "principal" establishment).

35. Recital 12, Articles 1, 3, and 4.



In fact, the proposal does not oblige broadcasters to provide their services across borders, or right holders to grant pan-European licenses. Hence, the possibility of geo-blocking is not ruled out.

When agreeing licensing fees, the parties shall take into account all aspects of the ancillary online service, including its “functionality, audience and language” (Article 2(2); Recital 10).<sup>36</sup> Hence, the broadcaster may be required to pay a higher price to guarantee the right-holder concerned an appropriate remuneration.

It seems that the Commission worked out a compromise solution for reconciling conflicting views among major stakeholders. As for the Impact Assessment accompanying the draft Regulation, this intervention is expected to “facilitate the development of the market without disruption of the existing business models and distribution strategies” (ie, facilitate the clearance of rights for certain services only, whilst guaranteeing a high level of protection of right-holders).<sup>37</sup>

It is, however, questionable whether the very limited scope of the reform, mingled with the considerable discretion left to the parties over the possibility to grant territorial licences and geo-block online content, will prove effective.

Arguably, the proposed Regulation does not significantly contribute to enhancing cross-border accessibility of content. On the contrary, it seems that, after many years of intense legislative activity, the Commission has finally acknowledged the key role that territoriality plays for the long term viability of the audio-visual sector, and reconsidered its strong political will to create an internal market for digital content and services.

### 3.3. Directive on copyright in the Digital Single Market

The proposed Copyright Directive presents some peculiar characteristics different from earlier Directives in the field of copyright law.

First, contrary to the structure of Article 5 InfoSoc Directive, the proposed Directive *mandates* upon Member States to introduce some exceptions or limitations, such as text and data mining (“TDM”) carried out by research organisations for “commercial” and “non-commercial” purposes alike. (Article 3). Thus, for the first time, certain exceptions and limitations to copyright infringement cease to be optional.<sup>38</sup>

Moreover, the Directive is designed to make contractual clauses contrary to the TDM exception “unenforceable” (Article 3(2)). A similar requirement can be found only in the Software Directive 2009/24/EC<sup>39</sup> and in the Database Directive 96/9/EC.<sup>40</sup>

Noteworthy, notwithstanding the public consultation of March 2016, “freedom of panorama” does not form part of the proposed Directive. What was initially perceived as a fundamental issue has just vanished in the mists of time.

Contrariwise, the highly controversial neighbouring right for publishers has been finally introduced under Article 11 Copyright Directive. This provision provides publishers of press publications with a neighbouring right (not an ancillary right, but an exclusive right that Member States “shall” implement) for the digital use of their press publications (from now on “RPPP”).

More precisely, press publishers will have control over the rights provided for in Article 2 and 3(2) InfoSoc Directive, meaning that they will be entitled to oppose any reproduction and making available to the public of the published version of the articles (not including hyperlinking).<sup>41</sup>

36. See Joined cases C-403/08 *FAPL v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services* (4 October 2011), [107]-[110].

37. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0302&from=EN>>, p. 3.

38. See also Articles 4 and 5.

39. Contractual provisions contrary to the “decompilation exception” (Article 6) are unenforceable.

40. Article 15.

41. Hyperlinking does not constitute a communication to the public (Recital 33).

Only press publishers as defined in national legislation will be granted the new RPPP, lasting for 20 years from the date of the publication of the press publication.

For other publishers in general, Article 12 provides that Member States “may” provide that these publishers have a claim to share the compensation that the author receives when the work is being used on the grounds of an exception or limitation under national law (ie, private copying or reprography).

Therefore, contrary to the goal of maximum harmonisation, not only does Article 12 leave to Member States the option of granting other publishers a share in the author’s revenues, but it also lacks any indication of how the sharing would need to be done (ie, 40:60 or 50:50?).<sup>42</sup>

Going back to the RPPP, in the Explanatory Memorandum of the proposed Directive, the Commission highlights that the reason for introducing such right is to “*facilitate online licensing of their publications, the recoupmnt of their investment and the enforcement of their rights*”.

Moreover, in Recital 31 of the proposed Directive, the Commission alludes to the importance of preserving a high-quality, free and pluralist press. To this end, an improved legal enforcement and additional sources of revenues for press publishers are needed.

A comprehensive assessment of the beneficial or unfortunate effects that such reform may cause exceeds the scope of the present inquiry. It should however be noted that, in general terms, the call for introducing a neighbouring right was triggered by the fact that press publishers have incurred a substantial loss of revenue to be attributed to the emergence of new sources of information through digital media.

Hence, the backers of the proposed Directive - mostly large publishing houses - are interested in getting shares of revenues generated by search engines, news aggregators and social networks that allegedly free ride on their investments by providing the public with short fragments

of newspaper articles, such as headlines, snippets and thumbnail, without paying a licence fee.

Furthermore, the adoption of a RPPP is underpinned by the assumption that press publishers occupy a similar role to that of film or phonogram producers, and the latter are already entitled to neighbouring rights.

Many arguments against the proposal to introduce a RPPP can be put forward. For present purposes, it is important to stress that such proposal fails to explain how 28 additional national rights might help achieving the objective of creating a DSM for online content, instead of increasing the risk of territorial fragmentation.

As noted by Xalabarder, a criticism that one could make is that publishers have been, until now, the assignees of the authors’ exclusive rights, thus having an exclusive right to bargain with the online platforms.

As she suggests, another layer of exclusive rights is unnecessary.<sup>43</sup> It may constitute an additional source of fragmentation, making the clearance of rights more burdensome and increasing transaction costs. It may also weaken the position of authors, who would not be able to claim a share of the additional revenues secured by publishers.

Legal uncertainty ensuing from the introduction of a new right and its unpredictable interplay with (national) exceptions and limitations equally jeopardises internal market goals.<sup>44</sup>

In addition, the RPPP is a major cause for concern because it may: 1) restrict cross-border flow of - and access to - information, thus threatening the fundamental right enshrined in Article 10 ECHR and Article 11 of the Charter; this is somewhat paradoxical, given that the rationale underlying the legislative intervention is to safeguard a free and pluralist press; 2) reduce the possibility for authors to benefit from maximum exposure of their works; 3) considerably affect research and education institutions, start-ups and other smaller online businesses, as well as

42. Xalabarder (2016, p. 6).

43. *Id.*, p. 9.

44. Ramalho (2016).

open access publishers; 4) hinder the emergence of new business models; 5) promote non-European publications, that would be accessible without restrictions.

Moreover, the rationale for granting neighbouring rights to phonogram producers, broadcasters and film producers was mainly economic, ie, to foster investments in the production of phonograms, films, and broadcasts - that back in the days were particularly high and risky - by granting temporary exclusive rights.

The proposed publisher's right seems to ignore the reality that, nowadays, publishing does not require a considerable up-front investment in technical infrastructure. The type of investment that is usually made is directed towards advertising, marketing, branding, and content aggregations; these activities do not, however, justify the introduction of an additional and autonomous right.<sup>45</sup>

Additional questions surround the compatibility of the RPPP with the Berne Convention and, in particular, the provision on quotations. In fact, Article 10(1) of the Convention sets out a mandatory limitation for the so-called "*revue de presse*"<sup>46</sup> that it is compatible with fair practice.

One may argue that search engines and news aggregators provide a service that is functionally equivalent to a "*revue de presse*",<sup>46</sup> ie, a collection of quotations from a range of newspapers and periodicals.<sup>47</sup>

Hence, the importance of distinguishing between copyright-protected "expression" and "information" that is available in the public domain.

Germany<sup>48</sup> and Spain<sup>49</sup> have implemented new "ancillary rights" in their national legal systems, demonstrating that such rights do not constitute an efficient measure to fill the gaps and deficiencies along the value chain.<sup>50</sup>

In fact, online distribution of information presupposes a symbiotic relationship between content suppliers and other online services, such as search engines and news aggregators, that enable this content to be more easily retrieved and accessed.

Most visits to news websites come from users accessing the page from other online players. Moreover, hyperlinks coming with snippets make it easier for users to find the news content they are looking for, thus increasing online traffic to newspapers.<sup>51</sup>

The economic justification behind this reform, therefore, remains rather obscure. What is missing is an appropriate and all-embracing assessment of how the RPPP would actually serve social needs, whilst reflecting market reality. It is instead argued that the proposed publisher's right has clear potential to affect the vast majority of stakeholders along the value chain.

It seems that the policy response to an alleged non-functioning market place is the recognition of a right that will restrict the enjoyment of Internet freedoms, undermine the visibility of authors and contradict European open access policies.

This is even more worrisome considering that earlier experiments in Spain and Germany have proved unsuccessful. The same draft Copyright Directive contains two other highly contentious provisions: Article 13 and Recital 38.

The objective of "sharing the value in the Internet chain" is a driver in the European debate. In fact, "*there is a growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared*".<sup>52</sup>

This has prompted a growing debate on the scope of the liability exemptions set forth in Articles 12 to 15 of the

45. Kretschmer et al. (2016, p. 6). p. 6.

46. See the French version.

47. Peukert (2016, p. 177).

48. Section 87f-h of the German Copyright Act.

49. Article 32.2 of the Spanish Copyright Act.

50. Peukert, *supra* note 47.

51. Hilty et al. (2016).

52. *Supra* note 1, Communication of 2015, 4.

e-Commerce Directive 2000/31/EC (hereinafter "ECD"), and their application to activities of new players, and on whether these go beyond simple hosting or mere conduit of content.<sup>53</sup>

The Commission's concerns are twofold. In the first place, there is a risk that unlicensed online intermediaries, providing access to aggregated or user-uploaded content (YouTube, Facebook and DailyMotion), shrink their responsibility, by claiming the safe harbour immunities without the conditions for their application, and refuse to negotiate licences with the right-holders concerned.

This may lead to an imbalance ("value gap") in the online marketplace in favour of these "false" intermediaries.<sup>54</sup>

On the other hand, *"some infringing intermediaries have refrained from setting up cooperation mechanism with right-holders, fearing that this intervention would render them no longer neutral and, therefore, eligible for safe harbour protection"* ("non-sufficiently collaborative" intermediaries).<sup>55</sup>

To tackle the "value gap", the Copyright Directive imposes a series of alternative obligations on what it imprecisely defines as *"information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users"* (hereinafter "targeted providers").<sup>56</sup>

This definition does not clearly identify the targeted providers. In particular, the reference to "large amounts of works" leads to potential ambiguity. It purports to differentiate Internet giants from small-scale actors, given that only the former are liable to exert a significant impact on the online content market.<sup>57</sup>

Yet, where to draw the line between large, medium and small amounts of works remains obscure. As this blurred definition

is susceptible of more than one reasonable interpretation, it may induce SMEs and start-ups not to grow in the current set up of the market; should they expand their activities, they would have to abide by the obligations under Article 13.<sup>58</sup>

Moreover, the proposed Directive does not illustrate with sufficient clarity the notion of providers that *"store and provide to the public access"* to copyright-protected content. This definition appears to be narrower than "hosting providers" within the meaning of Article 14 ECD (that consists solely of *"the storage of information provided by a recipient of the service"*).

Thus, at first glance, it would be logical to consider that targeted providers belong to the category of "hosting providers" under Article 14 ECD and, therefore, are *prima facie* eligible for the liability exemption provided therein. However, the Commission forgot to specify that the Copyright Directive should in no way affect existing rules laid down in the ECD.<sup>59</sup> According to the report of MEP Comodini Cachia, it is thus crucial to specify that Article 13 complements, instead of amending, the liability regime already established in the ECD.<sup>60</sup>

Recital 38 of the Copyright Directive adds uncertainty to an already vague definition, suggesting that: 1) targeted providers perform an act of communication to the public within the meaning of Article 3 of the InfoSoc Directive and, therefore, are obliged to conclude licensing agreements with right-holders, unless they fall within the liability exemption under Article 14 ECD; 2) the fact that targeted providers optimise the presentation of or promote the uploaded works, irrespective of the means used thereof, is in itself a sufficient ground for concluding that they are "active providers", falling outside the scope of Article 14 ECD.

This provision is open to several important criticisms. In the first place, the CJEU has not taken a clear stance on

53. *Id.*

54. Rosati (2016).

55. *Id.*, p. 4.

56. Article 13(1).

57. Copyright Directive, [2].

58. The question whether it is advisable to substitute the requirement of "large amounts of works" with "user uploaded content" will become increasingly more crucial. See the Report of the EU Parliament 2016/0280(COD), March 10th, 2017, Rapporteur: Comodini Cachia.

59. Article 1(2) makes no reference to the ECD.

60. *Supra* note 58.

whether ISPs facilitating access to copyright-protected works perform an act of communication to the public.<sup>61</sup> National courts have sometimes taken the view that ISPs could be found liable as secondary or indirect infringers.<sup>62</sup>

Moreover, Recital 38 introduces a non-rebuttable presumption that service providers carrying out certain types of activities (ie, optimisation or promotion of uploaded content) are not of a mere technical, passive or automatic nature; this is so “irrespective of the means used thereof” (ie, even if the content is automatically optimised), and regardless of whether they have actual knowledge or control over the information they store.<sup>63</sup> Such an approach, however, contradicts the reasoning of the CJEU in *Google v Vuitton*<sup>64</sup> and in *L'Oréal v eBay*.<sup>65</sup>

As for the alternative obligations imposed by Article 13(1), targeted providers shall: a) in cooperation with right-holders, take measures to ensure the functioning of agreements concluded with right-holders for the use of their works or other subject matter; b) prevent the availability on their services of works or other subject-matter identified by right-holders through cooperation with the service providers.

A plausible interpretation of Article 13 is that the obligation under letter (a), read in conjunction with Recital 38, should not extend to hosting providers eligible for the liability exemption under Article 14 ECD, given that the latter are not obliged to conclude licensing agreements. Thus, for this latter category of ISPs, the obligation under letter (b) comes into place.

In order to comply with Article 13, targeted providers are required to implement content recognition technologies (such as fingerprinting and watermarking), and to be sufficiently transparent towards right-holders with regard to the type of technologies used, the way they are operated and their success rate for the recognition of right-holders' content (Recital 39).

Thus, the proposed Directive makes it mandatory for service providers to scan users' content for protected material by means of filtering measures (such as “Content ID” developed by YouTube), and increase transparency, so that revenues that derive from creators' content can be more easily identified.

A group of scholars voiced criticism over Article 13, arguing that it imposes a general monitoring obligation, since it requires a great number of intermediaries to actively monitor data of *all* users.<sup>66</sup>

Google's vice President Caroline Atkinson warned that YouTube has paid € 53 million to create its Content ID software.<sup>67</sup> Thus, the obligation to implement content recognition technologies may have negative effects for competition in the market and create barriers to entry.

Moreover, such technologies are not clever enough to access content and verify whether an exception or limitation to copyright infringement may apply in a given case.

It follows that the imposition of such broad obligation as it stands: 1) contradicts Article 15 ECD and the CJEU's established case law interpreting it;<sup>68</sup> 2) is not proportionate (ie, a measure strictly necessary to achieve a legitimate aim); and 3) does not strike a fair balance between the protection of IP (Article 17(2) of the Charter), and other fundamental rights, enshrined in Articles 7 (privacy), 8 (protection of personal data), 11 (freedom of expression), and 16 (freedom to conduct business) of the Charter, that are fundamental pillars of any democratic society.

## Conclusions

Policy options, initially put forward for achieving a DSM, included the eradication of copyright territoriality by means of a unitary European copyright title, the recognition of online exhaustion, and the extension of the Country of Origin

61. Going in this direction, see the CJEU's decision in Case C-527/15, *Stichting Brein v Jack Frederik Wullems* (26 April 2017).

62. For an overview of intermediary liability in the UK, France and Germany, see: Angelopoulos (2017).

63. *Id.* See also Stalla-Bourdillon et al. (2016a).

64. Joined Cases C-236/08 to C-238/08 (23 March 2010).

65. Case C-324/09 (12 July 2011).

66. Stalla-Bourdillon et al. (2016b).

67. Eriksson (2016).

68. Case C-360/10 *SABAM v Netlog NV* (16 February 2012).



principle to all online communications. None of these options have been expressed in concrete legislative measures, but all have been vaguely postponed to a later date.

The Commission has finally opted for a less ambitious and more gradual approach to removing obstacles to cross-border access to content and circulation of works. A number of specific legislative proposals have been put forward for this purpose.

I have maintained that the Commission's initial overarching aim to tackle geo-blocking was scaled down to accommodate (the sound) concerns about the potential detrimental impact on the audiovisual market.

Likewise, the extension of the "country of origin" principle, set out in the Broadcasting Regulation has a very limited scope, thus leaving a wide variety of services, for which consumers' demand is considerable, unaffected. Although the proposed reform offers an additional instrument for facilitating the clearance of rights, overall it does not change the current scenario to a considerable extent.

In a similar vein, there is a tendency to focus on attention-grabbing issues, such as cross-border "portability" of content, which do not offer a real solution to dismantling national barriers in the European digital environment.

Therefore, I have suggested that a full integration of markets for creative content online is not likely to happen, at least

in the near future. The call for modernising the copyright framework resulted in sector-specific regulation, not necessarily in continuity with the Commission's vision on current important policy topics.

The EU legislature has, in fact, reached a compromise, which limits considerably the overarching goals set forth in the DSMS.

Moreover, for reasons that I have put forward, doubts persist as to the opportunity and necessity to introduce a neighbouring right for press publishers, and impose on certain service providers what closely resembles a general monitoring obligation, in conflict with Article 15 ECD.

It is questionable whether the Commission struck a fair balance between different fundamental rights, such as the protection of IPRs and freedom of expression.

The Commission adopts terminology (for example "large amounts of works") neither technical nor clear and uses notions that are not harmonised at EU level ("the country of habitual residence").

On the other hand, I value the adoption of Regulations in the field of copyright and related rights, entailing a deeper level of harmonisation.

Moreover, the provision of mandatory exceptions and limitations, such as the exception for TDM, is to be welcome.

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