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<cn>13.<ct>Achieving a Digital Single Market for online distribution of content: when would extending the Geo-blocking Regulation be justified?

<fs:lrh>Online distribution of content in the EU

<fs:rrh>Achieving a Digital Single Market for online distribution of content

<p:au>Juha Vesala¹

<p:a>1. INTRODUCTION

<p:text>The European Commission has made efforts to create a Digital Single Market (DSM) in which goods and services are offered online throughout the European Union (EU). As regards online distribution of content, these include legislative action in copyright and internal market law as well as enforcement measures in competition law. These efforts are now starting to bear fruit as legislative proposals have been – or are close to being – adopted.

Despite ambitious aims, the policies adopted fall short of realizing EU-wide distribution of copyright-protected content online. This is partly because a key regulation seeking to address unjustified geo-blocking does not fully apply to services featuring audiovisual or copyright-protected content. Additionally, the other pieces of legislation – adopted and proposed – do not generally enable or require cross-border provision of copyright-protected content to new customers. However, the Geo-blocking Regulation provides for a review as to whether its scope should be expanded to fully cover audiovisual and copyright-protected content. Expansion could accomplish EU-wide supply of content but raises complicated questions, particularly about its impact on content creation.

This chapter examines whether extending the Geo-blocking Regulation to cover copyright-protected and audiovisual content would achieve EU-wide distribution and seeks to determine when it would be justified. In principle, such expansion could be justified where harm to financing and creation of content can be avoided, for example by allowing territorial exclusivity for a certain period before the geo-blocking rules become fully applicable or by determining specific categories of content subject to

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the rules. However, in order to succeed, the extension would need to be accompanied by a country-of-origin or comparable rule to resolve copyright obstacles that could prevent provision of content in accordance with the regulation. Revision of the Geo-blocking Regulation along these lines would not be drastic as it would effectively align treatment of online content distribution with that of content distributed in tangible form and of satellite broadcasts, while recognizing the need for exclusivity of content distribution, production and financing of content.

The chapter proceeds as follows. After first laying out the possibilities to limit provision of content online territorially within the EU (Section 2), the main features of Commission measures seeking to limit the effectiveness of territorial restraints are presented (Section 3). Then the impact of measures on territorial limitations in online content distribution is examined (Section 4) and the case for extending the scope of the Geo-blocking Regulation evaluated (Section 5), followed by conclusions (Section 6).

2. TERRITORIALLY EXCLUSIVE LICENSING OF CONTENT FOR ONLINE DISTRIBUTION

Availability of copyright-protected content online is frequently territorially limited within the EU. Often the reason is that content has been licensed on a territorially limited basis so that online content services are not permitted under their agreements or under copyright law to offer the service to consumers in other territories in the EU. To ensure compliance with copyright and contracts, the services often technically and practically limit sales and access solely to customers that have been determined as residing and located in licensed territories.²

Generally, EU and national law both allow licensing in this territorially limited scope, exclusively or non-exclusively. This means that the licensee can offer content within the licensed area but doing so outside of that area could infringe copyright or breach an agreement. Additionally, if licensed exclusively, neither the licensor nor any other licensee may offer that content in the licensed area

² See eg Sari Depreeuw and Jean-Benoit Hubin, 'Study on the Making Available Right and Its Relationship with the Reproduction Right in Cross-Border Digital Transmissions' (2014)

http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf, accessed 16 February 2018; Giuseppe Mazziotti, 'Is Geo-blocking a Real Cause for Concern in Europe?' (2016) 38 EIPR 365; Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 Michigan State International Law Review 595, 597–599.

because that may infringe copyright. Consequently, only an exclusive licensee is able to serve the area for which it has been licensed and no competition takes place with respect to that content within that territory.³

The free movement of services (Article 56 TFEU) and EU competition law (Articles 101 and 102 TFEU) do not categorically or generally preclude exclusive territorial licensing despite its possibly separating national markets and preventing competition between undertakings located in different Member States. However, arrangements to further bolster territorial exclusivity may preclude copyright protection in cross-border situations under the free movement of services rules or result in infringement of EU competition law. Combining the grant of an exclusive licence with a passive sales restraint that entirely prevents sales to other territories is an example of such an agreement that likely violates EU competition law and may also constitute an unjustified restraint of free movement of services by creating absolute territorial protection.⁴ It can be lawful, though, to use arrangements such as geo-blocking if they are confined to preventing unlicensed, copyright-infringing practices by distributors.⁵

Accordingly, licensing agreements can be used to limit online distribution of copyright-protected content to a certain area of the EU in a way that is valid and protected against infractions by parties to agreements or third parties. These licensing practices may result in absence of cross-border competition and inability of consumers to access or purchase content from other territories. Indeed, in some sectors this often occurs, as discussed next.

3. COMMISSION INITIATIVES TO PROMOTE ONLINE DISTRIBUTION OF CONTENT WITHIN THE EU

³ *ibid.*

⁴ See eg Joined Cases C-403 and C-429/08 *Football Association Premier League and Others v QC Leisure and Others* EU:C:2011:631; Case C-262/81 *Coditel v Ciné-Vog Films* EU:C:1982:334. See also Pablo Ibáñez Colomo, ‘Copyright Licensing and the EU Digital Single Market Strategy’ in Roger D Blair and D Daniel Sokol (eds), *Handbook of Antitrust, Intellectual Property and High Technology* (CUP 2017); Mazziotti (n 2); Vesala (n 2); Jonathan D C Turner, *Intellectual Property and EU Competition Law* (2nd edn, OUP 2015). See for discussion of these issues also Chapter 12 by Mazziotti and Chapter 14 by Cantero in this volume.

⁵ See eg Pablo Ibáñez Colomo, ‘The Commission Investigation into Pay TV Services: Open Questions’ (2014) 5 *Journal of European Competition Law & Practice* 531; Vesala (n 2).

The Commission has observed that licensing practices of undertakings can hinder realization of a DSM for digital content and competition within that market. Especially in distribution of premium content – such as sports, television series and movies – territorially exclusive licensing practices are often used with the result that supply and access are limited to a certain area.⁶ This may unjustifiably limit trade, competition and access within the EU in ways that may not be desirable for economic integration, competition or other goals of the EU.

To address unjustified private and public obstacles preventing the emergence of an EU-wide market for online content services, the Commission is tackling specific problems in several areas of law, as outlined next.

3.1 Copyright Law: Exclusive Rights and Their Limitations

Within copyright law, the Commission has proposed a directive on copyright in the DSM⁷ that seeks to enable (1) text and data mining,⁸ (2) online educational activities⁹ and (3) preservation of works by cultural heritage institutions¹⁰ by means of exceptions and limitations allowing these activities without a licence and partly also unrestrained by agreements.¹¹ These mandatory limitations/exceptions would reduce uncertainty caused by the scope and optionality of existing limitations and exceptions.¹²

Additionally, the proposed directive would task collective management organizations with granting licences to cultural heritage institutions for certain uses beyond the exception/limitation in cross-border

⁶ Commission, ‘Final report on the E-commerce Sector Inquiry’ COM(2017) 229 final, paras 50–52.

⁷ Proposal for a Directive on copyright in the Digital Single Market, COM(2016) 593 final (Proposed Directive on Copyright in DSM).

⁸ *ibid* art 3.

⁹ *ibid* art 4.

¹⁰ *ibid* arts 7–8.

¹¹ *ibid* art 3(2).

¹² *ibid* p. 2.

situations as well.¹³ The directive also seeks to promote cross-border supply of audiovisual content by a proposed mechanism to help on-demand services negotiate licensing agreements.¹⁴

While the proposal seeks to promote these activities within and across borders,¹⁵ it would not significantly affect online content services offered commercially as the activities targeted are mostly non-commercial and the means used as regards commercial activities, such as facilitation of negotiations, are moderate.

3.2 Internal Market Legislation: Exercise of Copyright and Distribution Practices

The Commission has also proposed regulations that seek to address obstacles that stem from exercise of copyright and conduct of undertakings involved in distribution of content. First, the Commission has proposed a regulation that would localize provision of online services ancillary to broadcasts at the place of establishment of the broadcasting organization.¹⁶ This would allow broadcasters to offer ancillary online services – such as catch-up and simulcast services – in all other EU Member States, as that would be deemed to occur where the organization has its place of establishment.¹⁷ However, the scope of that possibility has narrowed during the legislative process so that only some broadcasts may ultimately end up being covered.¹⁸ In addition to the country-of-origin

¹³ *ibid* arts 7–8.

¹⁴ *ibid* art 10.

¹⁵ *ibid* p. 2 and recs 3 and 5.

¹⁶ Commission, Proposal for a Regulation of the European Parliament and of the Council 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, COM(2016) 594 final (Commission Proposal for a Broadcast Transmissions Regulation), art 2.

¹⁷ *ibid* rec 10.

¹⁸ European Parliament, ‘Report on the proposal for a regulation of the European Parliament and of the Council 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 (COM(2016)0594 – C8-0384/2016 – 2016/0284(COD))’ (1st reading) A8-0378/2017 (27 November 2017); European Council Presidency, ‘Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online

rule, the proposed regulation would subject retransmissions of broadcasts to collective management. This would permit broadcasts to be retransmitted online in other EU Member States by using certain technologies.¹⁹

Second, a regulation on portability of online content services has now entered into force.²⁰ The regulation entitles subscribers to online content services to access services while temporarily present in an EU Member State other than the one in which they habitually reside and purchased the subscription.²¹ Additionally, this regulation localizes relevant copyright activity in providing and accessing services in a single Member State – that is, the one which the subscription covers – so that providing portability elsewhere in the EU does not constitute copyright infringement.²²

Finally, a regulation against unjustified geo-blocking was recently adopted and becomes applicable in late 2018.²³ The regulation will secure access by consumers to goods and services offered online as well as online interfaces, such as web shops, listing them for sale by banning discrimination based on

transmissions of broadcasting organisations and retransmissions of television and radio programmes – Presidency compromise proposal with a view to agreeing on a General Approach’ ST 15479 2017 INIT (8 December 2017).

¹⁹ Commission Proposal for a Broadcast Transmissions Regulation (n 16) art. 3. Both of the above measures would, in particular, extend beyond the existing EU rules currently limited to satellite broadcast and cable retransmissions. 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 [1993] OJ L248/15.

²⁰ Council and Parliament Regulation 2017/1128 on cross-border portability of online content services in the internal market [2017] OJ L168/1 (Portability Regulation). See for more extensive discussion Chapter 12 by Mazziotti and Chapter 14 by Cantero in this volume.

²¹ *ibid* art 3.

²² *ibid* art 4. This benefit is also available voluntarily to online content service providers that are not required to offer portability. Art 6.

²³ European Parliament and Council Regulation (EU) 2018/302 of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L60I/1 (Geo-blocking Regulation). See for more details Chapter 12 by Mazziotti and Chapter 14 by Cantero in this volume.

consumer nationality or place of residence.²⁴ In effect, this introduces mandatory EU-wide distribution on non-discriminatory terms in the specified situations. However, the regulation currently does not apply to audiovisual services, and its key provision against discrimination in general conditions of access only applies to online services whose main purpose is other than provision of access to copyright-protected content.²⁵ This means that most online content distribution – as it typically features audiovisual or copyright-protected content – is not affected. The regulation does provide, though, for a Commission review of whether these limitations should be scrapped.²⁶

3.3 Competition Law: Licensing and Distribution Agreements

Besides legislative measures, the Commission seeks to address cross-border issues in online distribution through its competition law powers. The Commission has carried out a sector inquiry into e-commerce which examined practices that may threaten competition in online distribution. As regards online distribution of content, territorial restraints, such as those requiring geo-blocking, may in particular raise concerns.²⁷

The Commission has also initiated antitrust investigations into potentially problematic territorial restraints in online content distribution.²⁸ The most significant case concerns agreements on satellite and online distribution of pay-TV content that require distributors to refrain from sales to and access from non-licensed areas. The Commission's position in the case is that these restrictions are presumptively unlawful passive sales or other 'by object' restrictions and are unjustified by efficiencies

²⁴ *ibid* arts 3 and 4.

²⁵ *ibid* arts 1(3) and 4(1)(b); European Commission, 'Impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place' SWD (2016) 173 final, 5.

²⁶ Geo-blocking Regulation (n 23) art 9.

²⁷ Commission, 'Final report on the E-commerce Sector Inquiry' COM(2017) 229 final, paras 65–67.

²⁸ See for an overview eg Lars Kjølbye, Alessio Aresu and Sophia Stephanou, 'The Commission's E-Commerce Sector Inquiry – Analysis of Legal Issues and Suggested Practical Approach' (2015) 6 *Journal of European Competition Law and Practice* 465.

or otherwise.²⁹ This position would mean that licensing agreements could not require distributors to refrain from passively selling and offering content services to non-licensed areas in the EU, leaving the decision to the distributor.

Several other investigations are pending that could clarify to what extent territorial restraints and differentiation are acceptable in online distribution. One concerns whether requiring consumers to purchase access codes – sold separately in Member States for playing video games offered online – amounts to unlawful partitioning of the market.³⁰ The other ongoing investigations deal with online distribution of products other than copyright-protected content but will likely have implications for online content distribution.³¹

4. IMPACT OF COMMISSION MEASURES ON TERRITORIAL EXCLUSIVITY IN ONLINE DISTRIBUTION

These Commission measures would limit the possibilities and effects of exclusive territorial licensing outlined in Section 2.³² The measures would promote EU-wide supply by removing copyright

²⁹ Commission, ‘Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services’ (Press release) IP/14/15 (13 January 2014); *Cross-border access to pay-TV* (Case AT:40023) Commission Decision 2016/C 437/04 [2016] OJ C437/25. One undertaking has entered into a commitment decision removing such clauses from agreements (*Cross-border access to pay-TV* (Case AT:40023) cited earlier in this footnote) but the investigation is ongoing with respect to other undertakings and an action against the commitment decision is pending before the General Court (‘Case T-873/16: Action brought on 8 December 2016 — Groupe Canal + v European Commission’ [2017] OJ C38/50).

³⁰ Commission, ‘Antitrust: Commission opens three investigations into suspected anticompetitive practices in e-commerce’ (Press release) IP/17/201 (2 February 2017).

³¹ Commission, ‘Antitrust: Commission opens formal investigation into distribution of clothing company Guess’ (Press release) IP/17/1549 (6 June 2017); Commission, ‘Antitrust: Commission opens formal investigations into Nike’s, Sanrio’s and Universal Studios’ licensing and distribution practices’ (Press release) IP/17/1646 (14 June 2017).

³² See for discussion on the legal implications on territoriality of the initiatives eg Alain Strowel, ‘From Content Portability to Data Portability: When Regulation Overlaps with Competition Law and Restrictions Can Be Justified by Intellectual Property’ (2016) 2 Competition Law and Policy Debate 63; Thomas Riis and Jens Schovsbo, ‘The Borderless Online User – Carving Up the Market for Online and Streaming Services’ in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (2nd edn, Edward Elgar Publishing 2017); Giuseppe Mazziotti and Felice Simonelli, ‘Another Breach in the Wall: Copyright Territoriality in Europe and its Progressive Erosion on the Grounds of Competition Law’

liability where covered by proposed exceptions/limitations³³ or localization rules of portability³⁴ or broadcast transmissions regulation,³⁵ by requiring EU-wide supply in cases of geo-blocking and portability duties³⁶ and by limiting the effectiveness of agreements that limit cross-border supply.³⁷ When covered by the rules, a rightholder would thus no longer be able contractually to require distributors to limit access to content on a territorial basis or by asserting copyright, and it would even be unlawful for distributors to do so independently.³⁸

However, the impact of the rules on provision of online content services is limited because the new requirements and possibilities hardly ever apply to provision of online content services. First and foremost, although the obligation under the Geo-blocking Regulation to provide electronically supplied services in a non-discriminatory manner could realize EU-wide distribution of content by mandating provision of services to any consumer regardless of their location or residence, even so most online content services will not be affected since audiovisual and copyright-dominant services are not covered by this requirement.³⁹ For example, online services featuring movies, television series, music, e-books and sports broadcasts are not subject to this requirement.

(2016) 18 *Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 55; Dimitrios Doukas, 'The Sky Is Not the (Only) Limit: Sports Broadcasting Without Frontiers and the Court of Justice: Comment on Murphy' (2012) 37 *European Law Review* 605; Juha Vesala, 'Regulation Complementing EU Competition Law in the Digital Economy: Impact of the Proposed Digital Single Market Rules on Online Distribution Practices' in Björn Lundqvist and Michal Gal (eds), *Competition Law For the Digital Economy* (Edward Elgar Publishing) (forthcoming).

³³ Proposed Directive on Copyright in DSM (n 7) arts 3, 4 and 7–8.

³⁴ Portability Regulation (n 20) art 4.

³⁵ Commission Proposal for a Broadcast Transmissions Regulation (n 16) art 2.

³⁶ Portability Regulation (n 20) art 3; Geo-blocking Regulation (n 23) art 4(1)(b).

³⁷ Portability Regulation (n 20) art 7; Geo-blocking Regulation (n 23) art 6.

³⁸ See eg Portability Regulation (n 20) arts 3 and 7; Geo-blocking Regulation (n 23) arts 4(1)(b) and 6; Vesala (n 32).

³⁹ Geo-blocking Regulation (n 23), arts 1(3) and 4(1)(b). See also Vesala (n 32). See for these and other limitations also Chapter 12 by Mazziotti and Chapter 14 by Cantero in this volume.

Second, while removing copyright obstacles from engaging in certain cross-border activities in providing access, the Portability Regulation does not enable provision or sales of online content services to new customers in other EU Member States – the duty and right to offer portability only concerns existing subscribers. Moreover, while the proposed broadcast transmissions regulation would allow distributors to offer EU-wide access to ancillary online content services – such as allowing catch-up of television series – to both existing and new customers, at the current stage of the legislative process the most sought-after types of broadcasts – such as sports broadcasts, licensed television series and movies – have been excluded from the scope of this rule.⁴⁰ Additionally, the regulation would not oblige broadcasters to offer access or free them from contractual restraints. Broadcasters could therefore be prevented by agreements or could independently decide not to offer cross-border or EU-wide access even when possible.⁴¹ These regulations would therefore not significantly promote EU-wide sales and supply of content to new customers.⁴²

Additionally, the Commission's competition law efforts to condemn passive sales or territorial restraints have limited the potential to accomplish EU-wide supply of content. A key reason here is that distributors would rarely be entitled or obliged under competition law to provide content beyond the scope of their licences. Even when contractual restraints requiring distributors to limit supply territorially are restrictive of competition, limiting the territorial scope of licences under copyright law remains possible under EU competition law.⁴³ Unless the free movement of services or the previously

⁴⁰ European Parliament, 'Report on the proposal for a regulation of the European Parliament and of the Council 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 (COM(2016)0594 – C8-0384/2016 – 2016/0284(COD))' (n18); European Council Presidency, 'Proposal for a Regulation of the European Parliament and of the Council 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 – Presidency compromise proposal with a view to agreeing on a General Approach' (n18).

⁴¹ Commission Proposal for a Broadcast Transmissions Regulation (n 16) rec 11.

⁴² See also Vesala (n 32); Chapter 12 by Mazziotti and Chapter 14 by Cantero in this volume.

⁴³ See above Sections 2 and 3.3. For a more optimistic view of ability of competition law to resolve the issues see Chapter 12 by Mazziotti in this volume.

discussed regulations eliminate copyright infringement (which they only exceptionally do),⁴⁴ distributors may thus still be prevented or deterred from providing content outside the licensed territories as that likely infringes copyright. Even if copyright infringement did not prevent provision of content beyond the territorial scope of the licence, distributors do not necessarily choose to do so but may for various reasons prefer not to compete throughout the EU.⁴⁵ EU competition law generally does not require distributors, even dominant ones, to offer online content services throughout the EU.⁴⁶

5. A CASE FOR EXTENDING THE GEO-BLOCKING REGULATION TO AUDIOVISUAL AND COPYRIGHT-PROTECTED CONTENT?

As explained above, efforts by the Commission to promote EU-wide and cross-border provision of online content do not realize EU-wide provision of and access to online content services. The situation could be different if the Geo-blocking Regulation had fully covered online content services featuring audiovisual and copyright-protected content. Nonetheless, the Geo-blocking Regulation does provide for Commission review of whether the scope of the regulation should be expanded by lifting these limitations.⁴⁷ The forthcoming review raises the question whether fully subjecting online content services to the Geo-blocking Regulation would achieve EU-wide distribution and under what circumstances it would be warranted.

5.1 Consequence of Extending Coverage of the Geo-blocking Regulation

⁴⁴ See above Sections 2 and 4; Vesala (n 2) 612–616.

⁴⁵ See eg European Commission, ‘Impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place’ SWD (2016) 173 final, 15–16.

⁴⁶ Vesala (n 32). Moreover, the introduction of specific internal market regulations adds to the complexity and fragmentation of the rules that in competition law govern the exercise of copyright and distribution practices. In addition, uncertainty and potential for conflicts is increased by the fact that competition law and geo-blocking rules can be enforced by different Member State authorities. This is despite similar practices and even identical concepts (eg ‘passive sales’ restraints) being involved. *ibid.*

⁴⁷ Geo-blocking Regulation (n 23) art 9(2).

<p:text>Extending the Geo-blocking Regulation to fully cover services featuring audiovisual and copyright-protected content would result in online content services being obliged to offer their services across the EU without discriminating directly or indirectly on the basis of consumer nationality or place of residence. In their general conditions of access, service providers would not be permitted to refuse sales or supply on these grounds or to apply different prices.⁴⁸ This would in principle allow consumers in the EU to access and purchase content offered by online content services operating anywhere in the EU.

However, extending the scope of the regulation alone would not prevent content suppliers and service providers from limiting supply and access territorially. First, if the extension of the ban against discrimination is limited to situations where the distributor has the necessary rights – an option primarily to be considered in the Commission review⁴⁹ – it would still be possible to prevent EU-wide supply by granting territorially limited licences to separate distributors, as then no distributor would have the requisite licences to offer content in other, non-licensed parts of the EU. By dividing rights among separate legal entities, the geo-blocking rules could thus be evaded and might even be intentionally circumvented.

Second, even if the extension were not conditioned upon service providers having the necessary licences, the duty to engage in non-discriminatory EU-wide supply still might not apply if a distributor does not have a licence covering the entire EU. That is, where EU law – or national law compliant with EU law – prevents provision of services, the ban against discrimination in general sales conditions does not apply.⁵⁰ Therefore, online content services might not be required to offer their services to unlicensed EU Member States when doing so violates national copyright legislation which in the relevant aspects is presumptively compliant with EU law due to being extensively harmonized by EU legislation. Thus content suppliers might be able to maintain territorial exclusivity by limiting licences territorially. To overcome this would require provision for a country-of-origin rule or a comparable

⁴⁸ *ibid* art 4(1)(b).

⁴⁹ *ibid* art 9 and attached Statement by the Commission.

⁵⁰ *ibid* art 4(5).

mechanism to resolve copyright issues raised when service providers supply content outside licensed territories within the EU.⁵¹

Even if these copyright issues were resolved, applying geo-blocking fully to online content services would not eliminate territorial exclusivity entirely as semi- and de facto exclusivity could still be achieved. First, it would remain possible under the regulation, as well as EU competition law, to limit active sales of online content services.⁵² Thus online content services operating in different Member States could be limited to competing only by means of passive sales outside their explicitly licensed territories, without engaging in active marketing and sales efforts. The stricter stance against passive sales under the regulation than under EU competition law⁵³ does not considerably change the status quo because passive sales restrictions are rarely permitted in EU competition law.⁵⁴ Second, content suppliers, by tailoring the content offered, would be able to achieve partial, de facto territorial differentiation and exclusivity where content consumption preferences are territorial. For instance, by only providing audio and subtitles in a certain language, a service may only be attractive in areas where that language is used.⁵⁵

Accordingly, extending the Geo-blocking Regulation to cover audiovisual and copyright-protected content alone would not realize EU-wide provision of content services. A country-of-origin or similar rule would be required to ensure that copyright does not prevent distributors from offering online content services throughout the EU. This would bring legal and commercial conditions close to those

⁵¹ The existing or proposed rules do not do so except for very limited circumstances. See above, Section 4.

⁵² Geo-blocking Regulation (n 23) art 6 and rec 26; Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, art 4(b)(b)(i) (Vertical Block Exemption Regulation); *Cross-border access to pay-TV* (Case AT:40023) Commission Decision (n 29).

⁵³ Geo-blocking Regulation (n 23) art 6.

⁵⁴ See eg Commission, ‘Guidelines on Vertical Restraints’ [2010] OJ C130/1, para 61 (passive sales can be lawful for two years, for instance, when necessary for introduction of a new product).

⁵⁵ OXERA and O&O ‘The impact of crossborder access to audiovisual content on EU consumers’ (May 2016) <https://www.oxera.com/Latest-Thinking/Publications/Reports/2016/The-impact-of-cross-border-access-to-audiovisual-c.aspx>, accessed 16 May 2018, 66–67.

governing physical goods, online services not featuring copyright-protected content, and satellite broadcasts of content. In particular, this would mean that once content is offered online in the EU, consumers could acquire and access it from anywhere in the EU without suppliers being permitted to block access or limit passive sales or to discriminate in sales conditions.

5.2 Circumstances Possibly Meriting Extension in Terms of Economic Welfare

Extending the scope of the Geo-blocking Regulation, accompanied by a country-of-origin or comparable rule, could enable EU-wide supply of online content services by enabling and requiring online content distributors to offer their services within the entire EU. However, whether and when that would be desirable in terms of its economic effects raises complex questions.⁵⁶ In particular, mandating EU-wide supply could harm the expected rewards of content production, or subvert the mechanisms used to finance production of content, such as presales of exclusive territorial licences, or to efficiently distribute content. Limiting the possibilities and effects of territorially exclusive licensing could in these ways impair production and supply of new content and thus ultimately also harm consumers by means – or in terms – of reduced content production, availability or competition.

However, the threats are not omnipresent and inevitable but could be avoided under some circumstances and conditions, as discussed below.

5.2.1 Conditions allowing maintenance of financing and incentives to create

In circumstances where harm to content creation is avoided, expanding geo-blocking could promote consumer welfare by improving availability of content and enhancing competition between online content services.

This seems possible at least in principle as audiovisual and copyright-protected content are currently already being distributed without territorial exclusivity. First, territorially exclusive licensing and distribution is not used in all categories of copyright-protected content within the EU, but mostly in the

⁵⁶ See eg European Commission, 'Impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place' SWD (2016) 173 final; J. Scott Marcus and Georgios Petropoulos 'Extending the scope of the geo-blocking prohibition: An economic assessment' (In-depth analysis) IP/A/IMCO/2016-15 (February 2017).

audiovisual sector and for premium content.⁵⁷ Second, EU legislation already provides for EU-wide distribution of copyright-protected and audiovisual content embodied in tangible products such as books and DVDs, and in satellite broadcasts.⁵⁸ Third, premium audiovisual and copyright-protected content, such as television series, is already being acquired and made available online – even globally – by some online services.⁵⁹

In any event, territorial exclusivity might not be necessary perpetually. Temporal windows of exploitation are frequently used in licensing, so that the most profitable uses are licensed before other less profitable distribution methods are offered. Providing for EU-wide provision only after the period of exclusivity in which most revenue is typically reaped, say 12–24 months, thus might not significantly undermine expected revenues or incentives to create as only a minor part of revenues would be denied the premium of territorial exclusivity and price differentiation.⁶⁰ However, while expected rewards might not be significantly affected, the impact of such an approach to production models and financing arrangements needs closer scrutiny. In principle, avoiding a negative impact on rewards could allow those arrangements in modified form, but eliminating exclusivity can also increase

⁵⁷ See eg Commission, ‘Final report on the E-commerce Sector Inquiry’ COM(2017) 229 final, paras 65–66; European Commission, ‘Impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place’ SWD (2016) 173 final, 100–101; Georgios Alaveras, Estrella Gomez-Herrera and Bertin Martens, ‘Geo-blocking of Non Audio-visual Digital Media Content in the EU Digital Single Market’ (2017) JRC Digital Economy Working Paper, <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc106520.pdf> accessed 14 February 2018; Marcus and Petropoulos (n 56) 26–28.

⁵⁸ European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, art 4(2) (providing for exhaustion of distribution rights); 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 [1993] OJ L248/15 (country of origin rule applicable to satellite broadcasts); Joined Cases C-403 and C-429/08 *Football Association Premier League and Others v QC Leisure and Others* EU:C:2011:631 (free movement and competition law limitations on satellite broadcast services).

⁵⁹ See eg Emily Steel, ‘In Quest for Global Presence, Netflix Acquires Rights to 3 More Shows’, *New York Times* (28 September 2015); Netflix Media Center, <https://media.netflix.com/en/only-on-netflix#/new?page=1>, accessed 16 May 2018 (listing titles currently distributed globally).

⁶⁰ Marcus and Petropoulos (n 56) 12 and 47–49.

transaction costs as more complex arrangements might be needed or could make workable arrangements impossible if arrangements alternative to exclusivity are not effective.⁶¹

When considering the necessity of exclusivity for maintaining incentives to create and for achieving efficient cooperation, it should be noted that even fully applying the Geo-blocking Regulation to online content services would not entirely preclude territorial exclusivity.⁶² While the regulation would effectively establish a right for consumers to – at least passively – purchase and access services, agreements and practical arrangements could still be used to achieve semi- or de facto exclusivity. First, EU-wide exclusive licensing to a single distributor would be possible, allowing for the benefits of exclusivity to copyright holders and the distributor. The premium from exclusivity (but not necessarily for territorial price differentiation⁶³) could thus still be obtained. Second, the Geo-blocking Regulation and other relevant rules would allow active sales restraints, thus enabling limitation of active marketing and sales efforts to a particular territory, and only allow passive sales to other areas.⁶⁴ Third, content and services could be tailored to specific languages, cultures and other preferences so as to achieve corresponding territorial exclusivity.⁶⁵ Consumers may prefer familiar, domestic service providers for

⁶¹ See eg Gregor Langus, Damien Neven and Sophie Poukens, ‘Economic Analysis of the Territoriality of the Making Available Right in the EU’ (March 2014) http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf, accessed 16 May 2018, 62.

⁶² See on necessity of territorial exclusivity for various economic benefits eg Langus, Neven and Poukens (n 61) 54–63, 76–77 and 105–118. As comparison, active sales restraints are in other circumstances deemed sufficient for achieving some types of efficiencies in the case of exclusive distribution and only, eg, in order to launch new products does the Commission accept restrictions of passive sales. Vertical Block Exemption Regulation (n 52) art 4(b)(i); Commission, ‘Guidelines on Vertical Restraints’ (n 54) paras 61 and 107. However, allowing only passive sales could be detrimental when consumers can easily find content online. See, eg, Marcus and Petropoulos (n 56) 47; Langus, Neven and Poukens (n 61) 105.

⁶³ The Geo-blocking Regulation (n 23) art 4(1)(b) would ban discrimination in prices and other conditions of access.

⁶⁴ *ibid* art 6 and rec 26.

⁶⁵ See, eg, OXERA and O&O (n 55) 66–67.

several reasons, such as being able to obtain customer support in their own languages.⁶⁶ Moreover, exclusivity and differentiation based on other than geographic factors can be used as alternatives.⁶⁷

Finally, it is not clear that not serving a territory – or doing so only after a considerable delay – is always in the interest of copyright holders. To illustrate, copyright holders lose revenue by not selling content to consumers who are willing to pay but who may resort to illegal sources or pay less if accessing content only later, for example, for free on television. Therefore, facilitating access might in some circumstances increase the rewards of copyright holders by better meeting demand and alleviating the effects of piracy.⁶⁸ Content producers are not necessarily privately able to achieve a desirable outcome as setting up a system featuring semi-exclusivity akin to the Geo-blocking Regulation can be complicated, and coordinating cross-border competition between distributors could raise competition law concerns.⁶⁹ The Geo-blocking Regulation could thus in some circumstances overcome transaction costs and competition law issues that prevent socially desirable arrangements from being attained privately.

Accordingly, it appears possible to achieve EU-wide supply of online content services in a way that does not significantly threaten production and distribution of content. Instead of entirely excluding copyright-protected and audiovisual content from the key provisions of the Geo-blocking Regulation, it seems possible to delineate standards that better reflect the need of exclusivity for incentives, financing

⁶⁶ See, eg, *ibid* 17.

⁶⁷ These include, eg, dynamic or personalized pricing. See, eg, Inge Graef, ‘Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination Towards End Consumers?’ (2017) <https://ssrn.com/abstract=3090360>, accessed 14 February 2018.

⁶⁸ See, eg, Marcus and Petropoulos (n 56) 11 and 35–43. The economic potential of unmet demand for audiovisual content has been estimated to be in the range of hundreds of millions of euros, *ibid* 11–12; PLUM Consulting, ‘The economic potential of cross-border pay-to-view view and listen audiovisual media services’ (2012) http://ec.europa.eu/internal_market/media/docs/elecpay/plum_tns_final_en.pdf, accessed 16 May 2018, 9–10. An industry-funded study, though, estimates that producer revenues would fall by billions if territorial exclusivity were abolished. OXERA and O&O (2016) (n 55) 4–6.

⁶⁹ Langus, Neven and Poukens (n 61) 107.

and cooperation arrangements.⁷⁰ Negative effects could be avoided by allowing territorial exclusivity for a certain period before the geo-blocking rules become fully applicable, defining categories of content or distribution methods to which the duties apply, or with more nuanced rules to assess the need for exclusivity in particular situations.⁷¹ However, determining the circumstances and conditions under which the Geo-blocking Regulation should fully apply requires extensive analysis of the sectors concerned to dispel the various threats to incentives, financing and cooperation posed by reduced territorial exclusivity. Another challenge, examined next, is that the benefits of mandating EU-wide supply are not always unambiguously positive.

5.2.2 Potential benefits of mandating EU-wide supply of content

Justifying extension of the scope of the Geo-blocking Regulation would, in addition to excluding major negative effects, require creation of sufficient economic or other benefits. Extending the scope may in particular expand availability of content and otherwise benefit consumers.⁷² From a static perspective, competition between online distributors would be increased as services operating in other EU territories became competitors and a broader catalogue of content would become available to consumers due to complementary selections of content.

However, the static perspective can be deceptive. This is because changes to the legal framework are likely to alter licensing and distribution practices.⁷³ Reducing territorial exclusivity would likely prompt undertakings involved in content production and distribution to consider alternative ways of protecting their interests. For instance, content producers could favour exclusive EU-wide licensing to fewer distributors, and withdraw content from some territories or distribution channels if they become

⁷⁰ For an overview see, eg, *ibid* 54–63.

⁷¹ Categorizations of content based on their nature and production origin have been introduced during the legislative process into the proposed rules governing broadcast transmissions. See legislative documents cited above (n 40).

⁷² See on the potential benefits, eg, Marcus and Petropoulos (n 56) 60–62; Alaveras, Gomez-Herrera and Martens (n 57).

⁷³ Langus, Neven and Poukens (n 61) 118.

accessible throughout the EU.⁷⁴ These reactions can limit the extent to which benefits are achieved and may result in outcomes that are not ideal from competition policy and consumer welfare perspectives.

While availability of content is the main reason why consumers desire cross-border access to content,⁷⁵ enabling cross-border access does not guarantee increased availability. If online distribution methods easily accessible to consumers throughout the EU, such as online catch-up services, are exposed to the Geo-blocking Regulation, content suppliers could withdraw content from them and favour distribution channels, such as cable television, in which cross-border access is not as convenient.⁷⁶ For example, it might remain impossible to access a popular TV series currently offered without payment online in another Member State, as the series could be removed from these types of services if the Geo-blocking Regulation becomes applicable.

As regards competitive effects, it is not obvious either that expanding the scope of the Geo-blocking Regulation enhances competition between online distributors. First, when content is licensed exclusively for the entire EU – which would be an attractive licensing strategy for copyright holders in order to capture the maximum value of content⁷⁷ – only a single undertaking would still supply that content. This scenario would not give rise to more competition with respect to content. Second, it is not clear whether companies would compete more effectively when licensing is explicitly EU wide or due to the Geo-blocking Regulation effectively resulting in that situation. On the one hand, competition could be less effective if fewer undertakings can afford to obtain EU-wide licences and the market could ultimately become more concentrated if national level distributors are marginalized.⁷⁸ On the other hand, undertakings could compete more vigorously on the EU level as stakes are higher and

⁷⁴ OXERA and O&O (n 55) 5 and 58–74.

⁷⁵ Alaveras, Gomez-Herrera and Martens (n 57) 6–7.

⁷⁶ *ibid* 8; OXERA and O&O (n 55) 66–74.

⁷⁷ See eg OXERA and O&O (n 55) 59–61.

⁷⁸ See, eg, Langus, Neven and Poukens (n 61) 112–113 (changes to the legal framework may prompt rightholders to grant fewer licences and only to larger players).

resources to compete greater. Facilitating acquisition of EU-wide licences could also reduce barriers to entry.⁷⁹

Accordingly, the impact on availability of content and competition of mandating EU-wide supply of content might not be as unequivocally positive when examined from a dynamic perspective. This is not to say that promoting EU-wide supply of content online would not be desirable; on the contrary, increased access, competition and efficiency appear plausible and appreciable in many scenarios. However, in order to justify extending the Geo-blocking Regulation to audiovisual and copyright-dominant services, the likelihood of obtaining benefits should be ascertained. For example, it might not be desirable to adopt rules realizing EU-wide access to content if this results in a concentrated market or reduced selection of content available.

6. CONCLUSIONS

The legislative and other measures that the European Commission has taken to promote EU-wide online distribution do not drastically affect online distribution of content. This is because services featuring copyright-protected or audiovisual content are not fully subject to provisions enabling and mandating EU-wide supply. For instance, it remains possible in licensing agreements to limit online distribution of content to a specific Member States and to prevent sales to and access from other Member States.

Extending the coverage of the Geo-blocking Regulation, combined with a new country-of-origin rule, could accomplish EU-wide provision of online content services. However, the circumstances where that is justified may be limited to those where harm to incentives and financing of content production can be avoided. Avoiding such harm might be possible, for example, by allowing an initial period of territorial exclusivity allowing content producers to capture most of their rewards before subjecting content to EU-wide distribution or by determining specific categories of content or specific online distribution methods to which the geo-blocking rules apply. While specifying rules specific to particular types of content or distribution methods would add to the fragmentation that subjecting

⁷⁹ Langus, Neven and Poukens (n 61) 119 (noting that transaction costs could be reduced with certain policies but also noting that not allowing for exclusivity could increase transaction costs by increasing uncertainty). But see Chapter 14 by Cantero in this volume (arguing that even the current regime may increase the transaction costs of non-EU undertakings).

online distribution of content to various fields of law already entails, it may be warranted in order to avoid negative effects on creation of content. The specifics of approaches to extending the scope of the regulation require extensive analysis in order to dispel concerns about harming content production and to ensure that sufficient benefits to access, competition and trade are achieved.

Finally, extending the scope of the Geo-blocking Regulation is not the only – or indeed necessarily the best – way to attain increased EU-wide trade, competition and availability. Instead of mandating EU-wide supply, an alternative that could be less risky to benefits associated with exclusive territorial licensing might be to facilitate EU-wide licensing and to clarify what kinds of distribution arrangements are acceptable.

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