



A publication series of the
European Audiovisual Observatory

Territoriality and its impact on the financing of audiovisual works

IRIS Plus 2015-2



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

IRIS Plus 2015-2

Territoriality and its impact on the financing of audiovisual works

European Audiovisual Observatory, Strasbourg, 2015
ISSN 2079-1062

Director of publication – Susanne Nikoltchev, Executive Director

Editorial supervision – Maja Cappello, Head of Department for Legal Information

Editorial team – Francisco Javier Cabrera Blázquez, Sophie Valais

European Audiovisual Observatory

Authors

Francisco Javier Cabrera Blázquez, Maja Cappello, Christian Grece, Sophie Valais
European Audiovisual Observatory

Translation / Proofreading

Christina Angelopoulos, Aurélie Courtinat, Barbara Grokenberger, Stefan Pooth, Erwin Rohwer, Roland Schmid, Nathalie Sturlese, Anne-Lise Weidmann

Editorial assistant – Olivier Mabilat

Marketing – Markus Booms, markus.booms@coe.int

Press and Public Relations – Alison Hindhaugh, alison.hindhaugh@coe.int

European Audiovisual Observatory

Publisher

European Audiovisual Observatory
76, allée de la Robertsau, 67000 Strasbourg, France
Tel. : +33 (0)3 90 21 60 00
Fax : +33 (0)3 90 21 60 19
iris.obs@coe.int
<http://www.obs.coe.int>

Cover layout - P O I N T I L L É S, Hoenheim, France

Please quote this publication as

Cabrera Blázquez F., Cappello M., Grece C., Valais, S., *Territoriality and its impact on the financing of audiovisual works*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015

© European Audiovisual Observatory (Council of Europe), Strasbourg, 2015

Opinions expressed in this publication are personal and do not necessarily represent the views of the Observatory, its members or the Council of Europe.

Territoriality and its impact on the financing of audiovisual works

Francisco Javier Cabrera Blázquez

Maja Cappello

Christian Grece

Sophie Valais



Foreword

The legal question of territoriality is at the heart of the discussions at EU level for the audiovisual sector. On the one hand, the territoriality of copyright is being questioned and presented by certain stakeholders as an obstacle to the access to audiovisual works in the Digital Single Market. On the other hand, the concept of territorial jurisdiction, which is enshrined as the country of origin principle in the Audiovisual Media Services Directive (AVMSD), is being challenged at least from two sides: foreign-owned pan-European operators are directing their services towards the EU and EU-based operators have often other member states as their target countries. Based on the country of origin principle, the services provided by these operators are likely to escape the regulatory mechanism of the target countries.

Territoriality will be addressed by two legislative revisions that are on the agenda of the European Commission in the coming months: the review of EU copyright rules and the revision of the AVMSD. These discussions intervene in the midst of a transformation phase for the audiovisual sector due to digital technologies and convergence, where new ways of consumption of audiovisual works are already a reality and major distribution platforms emerge.

These two aspects affect the traditional value chain in this sector and may also impact the production and financing of audiovisual works. In fact, territoriality plays a key role in the financing of the audiovisual sector.

This is first of all true from the perspective of the territoriality of copyright: in this domain, territoriality contributes directly to the financing of, for example, feature films through the pre-sale of rights. But it is also true from the perspective of the AVMSD: several national funding mechanisms involve operators from the broadcasting and distribution sector in the production of audiovisual works. The question is, what to do with services originating from outside the EU or targeting members states different from the country of origin, since territorial jurisdiction cannot be claimed over those services.

Three issues are relevant for the scope of this report: the type of financing of audiovisual works; the type of works that are being financed; and the implications of the digital single market for the concept of territoriality.

Firstly, when it comes to financing, the sources can be public or private, the latter being either voluntary or imposed by regulatory intervention. In the first case, it is an issue of state aid related with direct funding or fiscal incentives. In the case of investments by audiovisual media service providers, these may stem from investment obligations deriving from the discretion left to Member States by the AVMSD or from business-related choices connected to pre-sales or licensing, which rely on the copyright package.

Secondly, the copyright rules define the concept of “audiovisual work” quite broadly,¹ whereas the AVMSD tends to identify it with a “programme”.² As examples, the AVMSD mentions

¹ “A work which appeals at the same time to the ear and to the eye and consists of a series of related images and accompanying sounds recorded on suitable material (audiovisual fixation), to be performed by the use of appropriate devices. It can be seen and heard only in an identical form, unlike the performance of dramatic works which appeal to the eyes and the ears in ways depending on the actual stage



“feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama”, but for calculating the time devoted to European works under the programming and investment obligations (“quotas”), the concept becomes narrower and does not include “news, sports events, games, advertising, teletext services and teleshopping”. Considering the financial specificities of the production of fiction – including films and series – this report focuses mainly on the impact of the principle of territoriality on this type of audiovisual works.

The third aspect to consider is that a fully implemented digital single market introduces new actors, business models and eco-systems and that the European Commission expressed a strong political will to facilitate access to audiovisual works also on a transfrontier level. What will be explored here is whether the “portability of contents” is something different from “transfrontier access” to online services and how ongoing regulatory discussions address “geo-blocking” and territorial restrictions to the access to online content.

This report builds on earlier Observatory publications³ and aims to interpret the results of previous research in the light of the concept of territoriality. It focuses in parallel on copyright and media regulation, in order to take a closer look at the impact of the two leading concepts of “territoriality of copyright” and “country of origin” on the financing of audiovisual works in the digital single market, offering insights both into business contractual practices and the investment obligations of the different operators of the value chain.

production. Examples of audiovisual works are films with sound, television productions or productions for the Internet”, see the Glossary of WIPO (2011), *From Script to Screen – The importance of Copyright in the Distribution of Films*, p. 117, http://www.wipo.int/edocs/pubdocs/en/copyright/950/wipo_pub_950.pdf.

² “A set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama”, see Article 1(b) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (AVMSD) [2010] OJ L95/1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:en:PDF>.

³ On public funding see Newman-Baudais S., *Public funding for film and audiovisual works in Europe*, European Audiovisual Observatory, Strasbourg, 2012, www.obs.coe.int/press/individual-press-releases/2012/-/asset_publisher/WZG5qzdbE32H/content/pr-film-funding-in-europe-tops-the-2-billion-euro-mark?_101_INSTANCE_WZG5qzdbE32H and on fiscal incentives see Olsberg J. and Barnes A., *Impact analysis of fiscal incentive schemes supporting film and audiovisual production in Europe*, European Audiovisual Observatory, Strasbourg, 2014, www.obs.coe.int/-/pr-fiscal-incentives-report.

On audiovisual media services see Nikoltchev S. (Ed.), *Jurisdiction over Broadcasters in Europe - Report on a Round-table Discussion & Selection of Background Materials*, European Audiovisual Observatory, Strasbourg, 2002, www.obs.coe.int/documents/205595/2284366/LA_COMPETENCE_EN.pdf/05c700a1-f8ab-4507-abbc-c63725a87cc9; Nikoltchev S. (Ed.), *Audiovisual Media Services without Frontiers – Implementing the Rules*, IRIS special, European Audiovisual Observatory, Strasbourg, 2006, www.obs.coe.int/web/obs-portal/shop/legal/-/asset_publisher/L8rv/content/iris-special-2006-2?_101_INSTANCE_L8rv; Nikoltchev S. (Ed.), *Broadcasters' obligations to invest in cinematographic production*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2006, www.obs.coe.int/en/shop/irisspecial/-/asset_publisher/A0cy/content/iris-special-2006-1?_101_INSTANCE_A0cy; Nikoltchev S. (Ed.), *Editorial Responsibility*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2008, www.obs.coe.int/web/obs-portal/shop/legal/-/asset_publisher/L8rv/content/iris-special-2008-1?_101_INSTANCE_L8rv; Nikoltchev S. (Ed.), *Video on Demand and the Promotion of European works*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2014, www.obs.coe.int/en/shop/irisspecial/-/asset_publisher/A0cy/content/iris-special-2014-?_101_INSTANCE_A0cy and Grece C., Lange A., and Valais S., “The role of providers of VoD services and distribution platforms in the financing of film and audiovisual production”, Section IV in Grece C., Lange A., Schneeberger A. and Valais S., *The development of the European market for on-demand audiovisual services*, European Audiovisual Observatory, Strasbourg, 2014, p. 243 ss, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=9273.

On copyright see Hugenholtz P.B., “SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive” in Nikoltchev S. (ed.) *Convergence, Copyrights and Transfrontier Television*, IRIS plus 2009-8, European Audiovisual Observatory, Strasbourg, 2009, www.obs.coe.int/documents/205595/264587/IRIS+plus+2009en5LA.pdf; Capito R., “EU - Regulation of market power in a converged and connected audiovisual media sector at EU level” in Nikoltchev S. (ed.), *Converged Markets – Converged Power? Regulation and Case Law*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2012, www.obs.coe.int/web/obs-portal/shop/legal/-/asset_publisher/L8rv/content/iris-special-2013?_101_INSTANCE_L8rv; Cabrera Blázquez F.J., *An Introduction to Music Rights for Film and Television Production*, IRIS plus 2009-3, European Audiovisual Observatory, 2009, www.obs.coe.int/documents/205595/264587/IRIS+plus+2009en3LA.pdf.



After setting the scene with background information on the European audiovisual sector (chapter 1), this *IRIS Plus* looks into the international and European (chapter 2) and national legal framework (chapter 3), before exploring the initiatives from the industry (chapter 4), European and national case-law (chapter 5) and the state of play as to future revision processes (chapter 6).

Strasbourg, September 2015

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

European Audiovisual Observatory





Table of contents

1. Setting the scene	9
1.1. The EU audiovisual sector in 2013	9
1.1.1 Overview	9
1.1.1.1. New players, increased competition and new viewing patterns	9
1.1.1.2. New areas of growth with potential new revenue streams for right-holders	10
1.1.1.3. Different dynamics of growth among the different segments of the industry	10
1.1.2. A structural change underway	12
1.1.2.1. More competition from global players	12
1.1.2.2. “Content Is King”: Evolution of licensing deals in TV shows	12
1.1.2.3. The use of “big data” by global players	13
1.1.2.4. A shift in content production strategy	14
1.1.2.5. A fierce competition field for television broadcasters	15
1.1.2.6. Where does traditional TV stand in this nascent transformation process?	16
1.1.2.7. Which perspectives for the future?	17
1.2. The role of territoriality in film financing	18
1.2.1. The role of copyright in the territorial exploitation of films	18
1.2.1.1 The traditional value chain in the film sector	18
1.2.1.2. The mechanism of pre-sales of rights	20
1.2.1.3. Case studies	21
1.2.1.4. New business models emerging for film online distribution and financing?	22
1.2.2. The country of origin principle and film financing in the EU	23
1.2.2.1. Overview	23
1.2.2.2. Some figures	23
1.2.3. Which perspectives for the financing of European films in the new ecosystem?	24
1.2.3.1. New threats for the financing structure of the film sector	24
1.2.3.2. Cross-border accessibility to audiovisual works in the Digital Single Market	25
1.2.3.3. Territoriality or cross-border portability of legally acquired content?	26



2. International and EU legal framework.....	27
2.1. Territoriality and copyright.....	27
2.1.1. The Single Market and the freedom to provide services.....	27
2.1.2. The principle of territoriality in copyright law	28
2.1.2.1. Territoriality of copyright and international treaties	28
2.1.2.2. Territoriality of copyright in the EU.....	30
2.1.3. Territoriality and competition law	32
2.2. Territoriality and audiovisual media services.....	34
2.2.1. Territoriality rules for audiovisual services at international level	35
2.2.1.1. The WTO framework and the NAFTA.....	35
2.2.1.2. The Transatlantic Trade and Investment Partnership (TTIP).....	37
2.2.2. Territoriality rules for audiovisual services at EU level	37
2.2.2.1. The Audiovisual Media Services Directive (AVMSD)	37
2.2.2.2. The e-Commerce Directive	40
3. National legal framework	43
3.1. The clearance of rights in the EU audiovisual sector	43
3.1.1. The particularities of the audiovisual work.....	43
3.1.2. The clearance of rights and the special case of musical rights	43
3.1.3. The role of collective management organisations (CMOs).....	45
3.2. The country of origin principle in the financing of audiovisual works	46
4. Self-initiatives from the industry to facilitate cross-border access and portability of services	51
4.1. Licences for Europe: “Ten pledges to bring more content online”	51
4.1.1. Problems identified and proposed solutions	52
4.1.2. Joint statement on cross-border portability of lawfully-acquired audiovisual content	53
4.1.3. Joint statement of independent VoD platforms	54
5. Case law and interpretative issues	55
5.1. The principle of territoriality in the jurisprudence of the CJEU	55
5.1.1. From <i>Coditel</i> to <i>Sportradar</i> : territoriality reaffirmed.....	55
5.1.2. Premier League: territoriality revisited	56
5.2. The principle of the country of origin in the jurisprudence of the CJEU.....	59



6. State of play	63
6.1. Intellectual property rights and copyright reform	63
6.1.1. State of play at the European Commission level	63
6.1.1.1. The public consultation on the review of the EU copyright rules	63
6.1.1.2. A Digital Single Market Strategy for Europe.....	64
6.1.1.3. The public consultation on the review of the Satellite and Cable Directive	65
6.1.2. State of play on the European Parliament’s side	66
6.1.2.1. Report from the European Parliament on copyright reform	66
6.1.2.2. The Working Group on Intellectual Property Rights and Copyright Reform.....	67
6.2. The planned revision of the AVMSD	68





1. Setting the scene

1.1. The EU audiovisual sector in 2013

1.1.1 Overview

The overall value of the EU audiovisual market⁴ experienced a slight decline of -0.4% in 2013 to EUR 132.7 billion, after already having stagnated in 2012 (0%). The stagnation and slight decrease of revenues generated by the audiovisual sector, on a pan-European level, is caused by multiple factors.⁵ In parallel, a disruption of the European audiovisual landscape⁶ may be on its way, as a result of the increased competition between traditional European audiovisual players and new, often international,⁷ entrants into the European audiovisual market.

1.1.1.1. New players, increased competition and new viewing patterns

The entrance of these new players, enabled by the Internet and the “Over-the-Top” (hereafter “OTT”) distribution of audiovisual content, increases competition for the attention of the audience⁸ (relevant for paid entertainment and the advertising market), as content (not only audiovisual content, but entertainment options in general, ranging from music to games to social networks and e-books) is more abundant and easily accessible. Also, an increased offer of various connected devices⁹ multiplies the screens¹⁰ available to audiences, further diverting audiences’ attention in this

⁴ The value of the audiovisual market of the EU is defined by the European Audiovisual Observatory as the sum of 6 segments: broadcasters’ net revenues (public broadcasters and radios, advertising TV, thematic channels, home shopping channels, local TV and private radios), consumer expenses for audiovisual media distribution services (cable, satellite, IPTV, DTT), cinema gross box office, revenues of physical video (DVD retail and rental, Blu-ray disc retail and rental), Video-on-Demand online revenues and revenues of video games (offline and online, excluding mobile games and applications). See the Yearbook 2014 of the European Audiovisual Observatory, www.obs.coe.int/en/shop/yearbook/-/asset_publisher/ip2j/content/yearbook-2014.

⁵ Lower ad spend by advertisers due to weak economic conditions and the shift of TV advertising budgets towards the Internet and, therefore, decreasing advertising revenues of commercial broadcasters, stagnation of licence fees and commercial income for public broadcasters, falling box-office revenues for cinema theatres as admissions decline, rapidly declining revenues for physical video due to the digitisation of content and increased competition by digital video formats.

⁶ It should be noted that huge differences exist in the EU in broadband equipment, connected devices equipment and usage of the web by the population. Western Europe is hardly comparable to Central and Eastern Europe in these equipment figures. Also, differences exist between North and South Europe. Therefore, the explanations and views given in this section are rather general and apply to the more digitally advanced economies in Europe, such as the United Kingdom, the Nordic countries, the Netherlands, Belgium, France and Germany. See for more information: “Where the Digital Economy is Moving the Fastest”, *Harvard Business Review*, 19 February 2015, <http://hbr.org/2015/02/where-the-digital-economy-is-moving-the-fastest>.

⁷ Apple, Google, Netflix, Facebook, Amazon, Microsoft, Sony, Rakuten and Yahoo for example.

⁸ See Goldhaber M., “The Attention Economy and the Net”, *First Monday*, Vol. 2, Number 4, 7 April 1997, <http://firstmonday.org/article/view/519/440>.

⁹ Mobile devices such as smartphones and tablets, Smart TVs, set-top boxes, HDMI dongles, media players, game consoles.



new multi-screen environment. Audiences are therefore no longer “captives” of a single screen with a limited amount of content/entertainment and audiovisual players are in competition with new entrants to attract and captivate the attention of their audiences. This shift in paradigm in the audiovisual market from a closed and regulated media environment, where content was under the control of right-holders, to an open one that’s difficult to regulate, poses challenges to traditional players, who have to adapt to this ongoing transformation in order to secure their market positions and, often, their survival.

The increased competition for eyeballs and audiences has also led to stress on the prices commercial broadcasters can demand from advertisers and on prices distributors of paid entertainment (physical video, pay TV) can demand from audiences. As Internet advertising is cheaper than traditional TV advertising (but aiming at reaching the same level), prices for advertising spots in linear broadcasting are being increasingly compared to the prices practiced on the Internet. Paid entertainment in the traditional audiovisual ecosystem on the other hand is more expensive than paid entertainment in digital formats, whether we are comparing subscription costs for SVoD services to traditional pay-TV or prices for digital formats, retail and rent to physical formats (DVD and Blu-ray). This price gap between digital and traditional formats adds to the intensification of competition between the incumbents of the audiovisual market and new entrants, which could adversely impact bottom lines.

1.1.1.2. New areas of growth with potential new revenue streams for right-holders

However, not all segments of the European audiovisual market are undergoing the same changes and new areas of growth are appearing, enabled by the digitisation of content, the widespread availability of broadband (fixed and, increasingly, mobile) and the changing content consumption patterns of audiences. On-demand audiovisual services, which allow for content consumption according to the audience’s own agenda (ATAWAD consumption – anytime, anywhere, any device), open new revenue streams for creators, producers and right-holders, as traditional ones stagnate or decline. Traditional European audiovisual players are trying to adapt by launching on-demand services in reaction to the entrance of new tech players into their respective home markets, intensifying competition for the attention of audiences.

1.1.1.3. Different dynamics of growth among the different segments of the industry

Taken individually, the 6 different segments¹¹ composing the European audiovisual market show different dynamics. Traditional audiovisual markets, mainly broadcast television (year-to-year decline of -1% in 2013 to EUR 71.6 billion), cinema exhibition (-4.3% to EUR 6.3 billion) and physical video distribution (-11.3% to EUR 5.9 billion) have entered a phase of stagnation and decline. Audiovisual distribution services (cable, satellite, DTT and IPTV), which grew by 2.7% in 2013 to EUR 36.3 billion, resist the overall tendency of stagnation of the European audiovisual market, mainly driven by the growth of Internet-Protocol Television subscriptions (IPTV), with a growth of +12.3% to

¹⁰ In France for example, on average a household had 6.5 screens in 2013, according to Médiamétrie, “L’année Internet 2013”, www.mediametrie.fr/internet/communiqués/telecharger.php?f=5d616dd38211ebb5d6ec52986674b6e4.

¹¹ Broadcasters’ net revenues, consumer expenses for audiovisual distribution services, cinema gross box-office, physical video, OTT VoD revenues and video games. For more information, please refer to the Yearbook 2014 of the European Audiovisual Observatory, www.obs.coe.int/en/shop/yearbook/-/asset_publisher/ip2j/content/yearbook-2014.



EUR 4.5 billion. Other distribution services experienced a rather modest growth, with consumer expenses for cable growing by only 0.6% in 2013 to EUR 12.8 billion, those for satellite subscriptions growing at a rate of 2% to EUR 17.2 billion and consumer expenses for pay-DTT by 1.7% to EUR 1.7 billion. As these distribution services (with the exception of DTT and to some extent satellite) allow for Internet access, their resilience towards the downward trend of the other segments should be seen in this light.

Table 1 - Size of the audiovisual market of the European Union in 2013 – an overview

EUR million							
	2009	2010	2011	2012	2013	2013/12	Sources
Broadcasters net revenues	69 594	72 622	74 158	72 284	71 596	-1,0%	OBS
Public broadcasters (incl. radio)	33 474	33 851	33 724	32 664	32 547	-0,4%	OBS
Advertising TV	19 613	21 163	21 713	21 151	20 656	-2,3%	OBS
Thematic channels (est.)	9 341	10 047	10 996	10 733	10 835	0,9%	OBS
Home shopping channels	2 453	2 610	2 719	2 792	2 813	0,8%	OBS
Local TV (est.)	1 326	1 395	1 350	1 278	1 138	-10,9%	OBS
Private radio (est.)	3 388	3 556	3 656	3 665	3 607	-1,6%	OBS
Consumers expenses for AVMS distribution services (incl. taxes) ⁽¹⁾	27 950	31 417	33 362	35 427	36 374	2,7%	OBS
Cable	11 212	11 844	12 201	12 790	12 869	0,6%	IHS
Satellite	13 874	15 689	16 336	16 913	17 255	2,0%	IHS
IPTV	1 785	2 375	3 222	4 029	4 525	12,3%	IHS
DTT	1 080	1 509	1 602	1 694	1 724	1,7%	IHS
Cinema gross box-office	6 087	6 373	6 445	6 570	6 285	-4,3%	OBS
Physical video (incl. taxes)	8 359	8 037	7 405	6 758	5 991	-11,3%	OBS
DVD retail ⁽²⁾	6 691	6 180	5 512	4 868	4 215	-13,4%	IHS
DVD rental ⁽²⁾	1 154	1 024	876	722	563	-22,0%	IHS
Blu-ray disc retail ⁽²⁾	499	807	980	1 118	1 170	4,6%	IHS
Blu-ray disc rental ⁽²⁾	14	27	38	49	44	-10,0%	IHS
VoD online revenues (incl. taxes)	248	462	648	1 045	1 526	46,1%	OBS
Online on demand TV revenues	189	345	462	673	938	39,4%	IHS
Online on demand film revenues	59	117	186	372	588	58,0%	IHS
Games (offline and online, excluding mobile and Apps)	10 642	11 146	11 264	11 141	10 936	-1,8%	IHS
TOTAL	122 881	130 057	133 281	133 223	132 708	-0,4%	OBS
Growth		5,8%	2,5%	0,0%	-0,4%		

(1) Includes TV subscription, PPV and TV VoD revenues.

(2) Data related to 16 countries.

Source – European Audiovisual Observatory, Yearbook 2014.



1.1.2. A structural change underway

1.1.2.1. More competition from global players

As can be seen from the market and growth figures, the audiovisual sector has entered a phase of change, passing from a state of relative equilibrium, where revenue streams were relatively stable among the players on the market, to a state of uncertainty, where business models are redefined as new players arrive on the market and technology disrupts the traditional rules of the play. The trend is towards “OTT” video distribution, which favours tech players with the required technical know-how and consumer insights (think “Big data”) to take advantage of this situation.

The shift in paradigm is underlined by the relatively rapid adoption of SVoD services in digitally mature EU countries, with OTT video gaining more market importance and traditional players being confronted with aggressive competitors, often non-national and tech players.

Global revenues of OTT video will pass from USD 20.7 billion in 2014 to USD 51.1 billion in 2020, more than doubling in the considered time period. Global OTT SVoD revenues are expected (estimates by Digital TV Research¹²) to grow from USD 7.5 billion in 2014 to USD 21.6 billion in 2020, making SVoD services the largest source of revenue for OTT video, with advertising-financed OTT video a close second, as estimated video revenues grow from USD 9.3 billion in 2014 to USD 20.9 billion in 2020.¹³

1.1.2.2. “Content Is King”¹⁴: Evolution of licensing deals in TV shows

An analysis released in October 2014 by RBC Capital Markets¹⁵ has estimated that the three main US SVoD services (Netflix, Amazon and Hulu) will spend USD 6.8 billion on content produced by the main US studios in 2015, an increase of 30% over the content spend of USD 5.2 billion projected for 2014. The analysis also forecasts that content spend will increase in the next few years at double-digit rates, as SVoD services bid against one other to secure the most attractive content in SVoD syndication deals. The increase in content spend is also driven by the international expansion of SVoD players, who need to secure rights for new markets.

As Netflix and others will be present on several international markets, it can be expected that these companies will make multi-territory licensing deals with right-holders. Netflix has made such a deal with CBS Studios International and Showtime¹⁶ (the pay-TV channel of CBS) for TV shows. Another example is the acquisition of worldwide exclusive rights by Netflix through Warner Bros TV Worldwide Distribution for the TV show *Gotham*¹⁷ after its first season. The international expansion

¹² BroadbandTV News, “OTT TV and video revenues to rocket to \$51 billion”, 15 June 2015.

www.broadbandtvnews.com/2015/06/15/ott-tv-and-video-revenues-to-rocket-to-51-billion/.

¹³ Electronic sell-through services are estimate to grow from USD 2.6 billion in 2014 to USD 5.6 billion in 2020 and rental VoD services from USD 1.3 billion in 2014 to USD 2.8 billion in 2020.

¹⁴ See the article “Content Is King”, by Bill Gates (1/3/96),

<http://web.archive.org/web/20010126005200/http://www.microsoft.com/billgates/columns/1996essay/essay960103.asp>.

¹⁵ See <http://variety.com/2014/digital/news/svod-syndication-to-pump-6-8-billion-into-studios-in-2015-1201337738/>.

¹⁶ See <http://variety.com/2014/digital/news/netflix-pacts-with-showtime-and-cbs-studios-intl-to-feed-new-european-markets-1201328386/>.

¹⁷ See <http://variety.com/2014/digital/news/foxs-gotham-goes-to-netflix-after-first-season-1201296494/>.



of SVoD services will increase the acquisition of multi-territory licences by the services. It can be expected that these deals will be on the first pay-TV window and that they will be exclusive.

The licensing deals, on the first pay-TV window mostly for exclusive rights, have also had the effect of raising the acquisition price of TV shows per episode. The RBC Capital Markets report provides interesting figures on the acquisition price per episode for popular and premium TV shows commissioned or acquired by US SVoD services. It should also be noted that, even though the increased competition for TV shows has raised prices, this is not the only reason. The costs of producing TV shows have risen considerably in recent years, with HBO's *Game of Thrones* topping the list of the most expensive TV shows with a cost of USD 6-8 million per episode, *Mad Men* costing USD 2.5 million per episode and *The Big Bang Theory* USD 2 million. The increase in acquisition costs therefore not only comes from an increased competition for premium content among SVoD services, but also from the higher production costs of TV shows in general. The question of the access of smaller or national SVoD services to premium content from studios remains open, as the cost associated with the acquisition of these shows is almost certainly prohibitive for a large number of smaller SVoD players¹⁸ that operate only in a limited territory. Also, the multi-territory and exclusive deals made by the major SVoD services with US and international studios will *de facto* exclude smaller players from access to this premium content.

1.1.2.3. The use of “big data” by global players

Another shift in content acquisition strategy is initiated by the use of “big data” by SVoD services in order to identify which shows and movies will interest their subscribers (and therefore make them stay loyal in the future). While at the launch of SVoD services bulk library deals were the norm, the use of “big data” has reduced the willingness of SVoD services to acquire content in bulk deals, as they prefer to focus on content identified as appealing to their subscribers. The fact that the three main SVoD services bid against each other on individual “big ticket shows” (the analysis cites *Gotham* and *Blacklist* as examples) has counterbalanced the impact of the reduced acquisition of bulk library rights.

“Big data” is also used, as already pointed out, for the production of original content by SVoD services. Netflix, Amazon and Hulu all invest in original content. Even if the investment in original content is still far below the cost of content acquisition through syndication deals (Netflix, for example, spends only 10% of its budget on original programming, an estimated USD 400 million a year), original content is becoming yet another differentiation factor for SVoD services. The buzz created around the releases of *House of Cards* and *Orange is the new Black*, Netflix's best-known original shows, has certainly attracted new subscribers.

Analysing data in order to acquire and commission content is certainly a major shift away from the traditional pilot model used in television for years. However, as international SVoD services are entering new markets, the need for “national” content is often mentioned. The issue of having enough local content is raised especially in countries like France and Germany. Netflix commissioned its first original production in French, *Marseille*,¹⁹ which will be available internationally to all its subscribers. Another important fact is that a country-specific original production can be made available to the entire subscriber base, thus ensuring that production and acquisition costs are

¹⁸ Netflix outspend the BBC, ProSiebenSat.1 Group, Discovery, HBO on content in 2014 and even Sky, if sports rights are excluded.

¹⁹ See <http://variety.com/2014/film/news/netflix-unveils-marseille-first-french-drama-commission-1201292688/>.



amortised on a broad basis. A larger subscriber base allows for more investments, even in local content, a strategy that most national and smaller SVoD services cannot pursue – it is doubtful whether national European SVoD players, often operating in one country, will in the future be able to match the subscriber bases of giants such as Netflix and Amazon.

1.1.2.4. A shift in content production strategy

A major shift in content producing strategy was revealed with the announcement by Netflix that it would also invest in original movies, in particular a sequel to *Crouching Tiger, Hidden Dragon* with the Weinstein Company²⁰ and four movies produced by Adam Sandler, in which he will also star. The announcement was roundly criticised by US theatre exhibitors,²¹ who fear for their revenue stream and one could expect a similar reaction from European theatre operators.

As of 30 September 2014, Netflix had overall content streaming obligations of USD 8.9 billion, representing growth by USD 1.6 billion compared to 31 December 2013, when the corresponding figure was USD 7.3 billion. For the international segment, streaming content costs increased by USD 66.4 million in Q3 2014, mainly driven by the international expansion into European markets and the costs associated with securing content for these new markets. Another important factor was high marketing expenses at the launch.

The recent announcement by legacy players HBO²² and CBS²³ that they would provide a stand-alone OTT service for their channels (and content) has further increased the competitiveness of the SVoD markets in the acquisition for exclusive rights to content. HBO, already present in the European market (Nordics and CEE) and, more importantly, the owner of premium content (TV shows like *Game of Thrones*, the most pirated show ever)²⁴ could change the SVoD landscape dramatically by launching a trend which other pay-TV channels could follow (unbundling their channel offering from the typical cable bundle in the USA through an OTT stand-alone service). Up to now, the only true stand-alone SVoD service operated by HBO has been HBO Nordic, whereas in Central Eastern European countries HBO Go is part of the subscription to the pay-TV channel HBO. However, with the announcement of a stand-alone OTT service in the USA, this might change sooner than most industry analysts expected.

The announcement made by the two US pay-TV channels, the quest for premium content in the first pay-TV window by SVoD services and the fact that European pay-TV operators are increasingly also launching OTT SVoD services will lead to a situation of increased competition for premium content under exclusive licensing deals, which might lead to the fragmentation of the offering²⁵ of premium content. Subscribers wishing to watch multiple premium TV shows (and other content) produced and licensed by different right-holders will not be able to find all of them in one place or one SVoD service. As even early adopters rarely subscribe to more than two SVoD services,²⁶

²⁰ See <http://blogs.wsj.com/digits/2014/09/30/netflixs-coup-the-next-crouching-tiger/?mod=ST1>.

²¹ See www.hollywoodreporter.com/news/regal-cinemark-slam-imax-weinstein-736692.

²² See <https://variety.com/2014/tv/news/hbo-to-launch-over-the-top-service-in-u-s-next-year-1201330592/>.

²³ See <http://recode.net/2014/10/16/now-cbs-is-selling-web-subscriptions-to-its-shows-too/>.

²⁴ See www.forbes.com/sites/emmawoollacott/2014/06/17/game-of-thrones-finale-sets-new-piracy-record/.

²⁵ See www.wired.com/2014/10/cbs-hbo-unbundling/ and

www.salon.com/2014/10/20/theyre_going_to_start_destroying_each_other_why_tvs_new_golden_age_is_doomed/.

²⁶ According to Gartner, early adopters spend USD 15 in the USA and USD 17 in Germany on SVoD services.



the battle for subscribers will intensify and, with it, the battle for exclusive content. The implications of this intensified competition could be drastic for smaller European players.

1.1.2.5. A fierce competition field for television broadcasters

The conclusion that can be drawn from these projections is that traditional audiovisual players will have to defend their revenue streams as these are challenged by new entrants.

Commercial television broadcasters will have to endure competition from online advertising-financed video and websites, to which brands and advertisers continue to allocate advertising budgets. The advertising pie allocated to broadcast television is stagnating or even shrinking on most European markets, whereas advertising budgets steered towards the Internet (and increasingly the mobile Internet) keep rising. The giants of advertising financed videos are clearly Google's YouTube and Facebook,²⁷ with respectively 1.4 billion and 1.3 billion monthly active users, unrivalled by any other advertising financed media sites, and with numbers of users/watchers a national broadcaster can only dream of. Coexisting among these two giants is a challenge for each video site which relies mainly on advertising revenues, as ad technology (permitting user targeting, the exploitation and use of "big data", cross-device tracking and mobile location advertising) improves and these two players are at the forefront of innovation in ad technologies. With Internet advertising almost at the level of TV advertising in Europe in 2014 and rising (+11.6% compared to 2013 to EUR 30.7 billion, according to IAB Europe)²⁸ commercial broadcasters have to adapt to this new setting.

Paid entertainment, whether cinema or physical video distribution is also challenged by digital forms of paid entertainment – electronic sell-through (EST) challenging the retail of physical media and to a lesser extent cinema theatres, transactional video on-demand challenging the rental of home videos. The undisputed champion, in the USA and Europe of EST is Apple's iTunes, taking for example a share of over 80% of the British digital retail market²⁹ (the second market player being, the now sold EST service of Tesco, Blinkbox, with only 11% of market volume in 2013). Pay-TV seems, for now, to be resisting the confrontation with more affordable SVoD services well. Deloitte³⁰ claims that in 2015 SVoD services will only represent 3% of the global pay TV market. SVoD services are expected to generate globally GPB 5 billion, whereas pay-TV will generate GBP 168 billion in 2015.

The audiovisual markets of EU member states are changing. Still, online audiovisual services, representing the future for content distribution, are not generating the same level of revenues as traditional players. However, as tech players benefit from network effects and economies of scale in the distribution of audiovisual content on their respective markets and are in a position to collect data on their users (of major importance for ad targeting, personalisation of content, commissioning and buying of new content), the risk of having a few players dominate the new audiovisual landscape is high. Apple (paid entertainment), Facebook (advertising), Google (advertising) and

²⁷ Reuters, "Facebook gaining ground on YouTube in video ads, report says", 22 June 2015, www.reuters.com/article/2015/06/22/advertising-facebook-google-idUSL8N0Z80XU20150622.

²⁸ IAB Europe, "IAB Europe AdEx Benchmark 2014 results", www.iabeurope.eu/research-and-papers/iab-europe-adex-benchmark-2014-resul.

²⁹ British Video Association Yearbook 2014.

³⁰ Digital TV Europe, "SVoD to account for just 3% of pay TV market, claims Deloitte", 14 January 2015, www.digitaltveurope.net/304042/svod-to-account-for-just-3-of-pay-tv-market-claims-deloitte.



Netflix (subscription video) are already dominating their respective markets. European players will need to find successful strategies in order to exist in the online landscape.

1.1.2.6. Where does traditional TV stand in this nascent transformation process?

The transformation is underway, but still, in absolute values, at a starting point. The gap between the revenues and consumer expenses of traditional audiovisual markets (pay-TV, commercial broadcasting, and physical distribution of audiovisual works) and of digital audiovisual markets is still large: the traditional markets dwarf the online ones. OTT SVoD services generated EUR 520 million in 2013 in consumer spend, when thematic channels generated EUR 10.8 billion in revenues. Online video advertising generated EUR 1.03 billion in 2013 according to IAB, when television advertising generated revenues of EUR 20.6 billion (but Internet advertising, as a whole, already generated EUR 23.7 billion in 2013). OTT VoD revenues (SVoD included) amounted to EUR 1.5 billion in 2013, compared to revenues of physical video of EUR 6 billion. But when growth rates are compared, the traditional sectors begin to pale. TV advertising fell by -2.3% in 2013, whereas Internet advertising rose by 11.9% and online video advertising rose by 45.1% (mobile Internet advertising even rose by 259% compared to 2012). The same is true for physical video (-11.3%) and online VoD revenues (+46.1%). The revenues of thematic channels increased by only +0.9% compared to 2012, whereas SVoD services increased by 147.5% compared to 2012. The market dynamics are clearing steering revenues towards the online landscape.

TV is still the main medium in Europe in 2014, according to a study released by the European Commission entitled “Standard Eurobarometer 82: Media Use in the European Union³¹”. 94% of the panel representing the 28 member states of the EU watches television at least once a week on a traditional TV set, whereas only 20% of the same panel claims to watch television on the Internet. When looking closer at age groups, fundamental differences appear, as consumption habits vary strongly with age. Only 72% of the 15 to 24-year-olds claim to watch traditional television at least once per week, whereas 40% of the same age group watch TV on the Internet. By contrast, 93% of the panel’s oldest age group, that of 55 years and over, watches traditional TV at least once a week and only 8% of the same age group claim to do so on the Internet. As the EU population ages, consumption habits of TV content will reflect this shift. Younger generations, “digital natives”, who have grown up with on-demand services, will permanently alter the way TV and audiovisual content is consumed: from a linear broadcast to on-demand viewing on the audiences own schedule and screen of choice.

On a global basis, traditional TV viewing was on the decline in 2014 in media consumption, as found by ZenithOptimedia.³² Between 2010 and 2014 TV’s share of overall consumption fell from 42.4% to 37.9%. It will shrink further to 34.7% by 2017, according to Zenith’s projections. But, as catch-up TV and TV services online and SVoD services are not taken into account, the effect of the shift towards online consumption is not reflected in the decrease. According to Zenith, the Internet is the second medium worldwide for media consumption and this year’s rise in overall media consumption from 485 minutes a day in 2014 to 492 minutes a day in 2015 will be driven by the Internet, while usage of the medium will increase by 11.8% this year.

³¹ See http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_media_fr.pdf.

³² Digital TV Europe, “Traditional TV viewing on the decline, Digital TV Europe”, 1 June 2015, www.digitaltveurope.net/375491/traditional-tv-viewing-on-the-decline.



This does not mean that Europeans or the world population are watching less TV content, but that TV content will be watched on other services or devices. The content is not changing that much (except for newer forms of web series and interactivity), it is the distribution (Internet) and consumption (multi-device and multi-screen) of TV content that has changed and will further change. As equipment in connect devices and broadband penetration rises among EU population, this shift in consumption will continue, putting players that have not adapted to this evolution at risk. Tech players, who are already dominating the space and find themselves in a unique position to act as a platform between right-holders and creators of audiovisual content on the one side and the audience on the other side, are set to benefit from this change.

1.1.2.7. Which perspectives for the future?

The future holds further innovations in technologies (e.g. cloud for audiovisual content distribution, ad tech innovations for programmatic advertising, improved cross-device tracking) and new forms of content consumption that will pose challenges to audiovisual companies in Europe and worldwide. As the shift of content consumption moves towards the Internet, the traditional TV set (i.e. linear broadcasting) loses its importance in the media consumption patterns of audiences. The new audience landscape is a fragmented one, where almost each user carries with him a little screen (smart phone or tablet) allowing for content consumption on his own schedule.

The European audiovisual landscape has seen the entry of new players coming from the technology sector for which, in the most cases, audiovisual distribution or production is not a core business. They have the technological know-how to improve user experiences with their services and the reach necessary to profit from economies of scale, thus giving them a competitive advantage over traditional players who have still to adapt to these new settings. The audiovisual landscape is changing and market powers are being redistributed, but fundamentally the audience still desires quality content and entertainment. Players who will deliver quality content, taking advantage of the distribution enabled by the Internet, and at the same time know how to attract the attention of the fragmented audiences will continue to thrive in the future. Resisting the inevitable change in media distribution and consumption habits in order to secure still existing revenue streams will be detrimental in this new competitive landscape, as the digital economy will transform once for all how content is distributed and consumed, in Europe and elsewhere.



1.2. The role of territoriality in film financing

Territoriality and the country of origin principle have been at the basis of the financing of the audiovisual film industry³³ in Europe. However, as previously explained, the audiovisual sector is currently undergoing important transformations due to digital technology and convergence, which modify the way audiovisual works are produced, distributed and exploited. This section will present the traditional film sector value chain and highlight the role played by territorial licensing and exclusivity in the financing of films through the pre-sales of rights, as illustrated by case studies. It will then examine how the country of origin principle intervenes in the financing of EU film production and identify how the new ecosystem will affect the current balance, as well as economic transfers between the different players of the audiovisual chain.

1.2.1. The role of copyright in the territorial exploitation of films

Films are risky investments, which involve very high fixed costs and unit production costs, as well as important marketing costs. They require the intervention of numerous players of different sizes and expertise along the value chain,³⁴ who interact and coordinate in various ways towards the final release of the film on the screens. The whole process of creation of a film can last up to several years and the final demand for each film is mostly uncertain. Although each film can be considered as a prototype³⁵ and has its own business model, these characteristics have a direct impact on the film financing structure, as it is often difficult for producers to obtain financing at the very early stages of development. The territorial sale of rights and exclusivities plays an important role in the financing and distribution of European films in this context.

1.2.1.1 The traditional value chain in the film sector

The following table describes the main stages of the traditional value chain in the film sector³⁶ and the financing structure associated to each stage of this process.

³³ This publication will focus on the film industry, as other sectors of the audiovisual industry, such as the videogames sector, a “born-digital creative industry”, have a different access to financing and implement different business models. For more information, see Benghozi P-J, Salvador E., Simon J-P, Models of ICT Innovation, “A Focus on the Cinema Sector”, Joint JRC Science and Policy Report, (2015), <http://is.jrc.ec.europa.eu/pages/ISG/EURIPIDIS/documents/JRC95536.pdf>.

³⁴ These include the creative team (screenwriters, directors, actors) and their business representatives (agents, managers), the business entrepreneurs and company players (producers, distributors, sales agents, exhibitors), the finance players (financiers and investors, banks, subsidy bodies, broadcasters, distributors), the technical industries (production, distribution, archiving, storage and restauration), the theatrical (exhibitors) and non-theatrical delivery players (broadcasters, telecom players, home video retailers and renters, internet content service providers).

³⁵ Benghozi, P.-J., “Good bye Mr. Lumière!”, in *Cultural Economics*, Special issue, *A European Perspective*, 1989.

³⁶ Charles River Associates, “Economic Analysis of the Territoriality of the Making Available Right in the EU?” (2014), p. 18, http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf.



Table 2 - The traditional value chain in the film sector

DEVELOPMENT (up to several years)	
<i>Activities</i>	<i>Financing</i>
Screenplay development, acquisition of rights to material, search for creative team	Too risky for loans / some development funding is available from public subsidy at national and EU level / pre-financing from distributors and commercial exploiters / often conditioned on territorial exclusivity.
↓	
PRE-PRODUCTION / FINANCING AND PRE-SALES (up to a few months)	
<i>Activities</i>	<i>Financing</i>
Final script, casting, crew hiring, sets construction, transportation, preparation of shooting, budgeting, business planning, rights clearance, negotiation, etc., commercial issues.	This stage is the most complicated of the process, as multiple stakeholders intervene to give their final agreement to the financing of the film. Possibility of acquiring additional financing in the form of loans.
↓	
PRODUCTION (up to 3 months appx.)	
<i>Activities</i>	<i>Financing</i>
Production design and organisation. Shooting and generation of publicity material.	Risks of delays with direct impact on film's budget / may be supervised by pre-sales buyers.
↓	
POST-PRODUCTION (4-12 weeks)	
<i>Activities</i>	<i>Financing</i>
Editing film to match picture and sound, introduction soundtrack, subtitles or special effects, generation of marketing and publicity material.	Possibility to consult pre-sales buyers.
↓	
INTERNATIONAL SALES AND LICENSING	
<i>Activities</i>	<i>Financing</i>
International sale agents and producer market and sell the completed film at international film markets and festivals and deliver it to those who have pre-bought it.	Marketing and selling the unsold distribution rights licenses to the completed film / receiving sales commission and sales expenses recoupments.
↓	
INTERNATIONAL DISTRIBUTION	
<i>Activities</i>	<i>Financing</i>
Sales to distributors for each territory in the world (or for only certain territories or for portion of them). Marketing and release of the film on a territorial basis.	Financing package already set up for in the previous stages.
↓	
DISTRIBUTION (/EXHIBITION)	
<i>Activities</i>	<i>Financing</i>
Delivery of the audiovisual work to the public according to windows of exploitation (cinema/theatre, Video/DVD/Blu Ray (rental / sales) / VOD / pay-TV / free-to-air-TV) / marketing and promotional investments.	The money paid by the consumer for a cinema ticket, DVD purchase or online download is subject to revenue shares, marketing cost deductions and commissions, as it passes back to the financiers and producers.



1.2.1.2. The mechanism of pre-sales of rights

The World Intellectual Property Organisation (WIPO) identified three major finance trends for films:³⁷ the subsidy finance model, where direct public finance (grants, loans or tax credit) is the main source of funding;³⁸ the pre-sale model, where the sale of distribution rights to territorial distributors forms the collateral for a production loan from a bank; and the pure equity model, where investors provide the funds.³⁹ In practice, distribution and finance are linked and most films' budgets are the result of a combination of these three models. This section describes the role of territoriality in the up-front financing of feature films through the mechanism of the pre-sales of rights.

Film production and distribution are generally two sides of the same business model. Thus, at the development stage of a film it is a common practice for producers – or sales agents or local territorial distributors – to pre-sell rights to major television broadcasters, distributors/publishers by platform, language and/or territory as a way to obtain financing at a very early stage of the project. The pre-sale of rights makes it possible to cover high up-front production costs and often forms the collateral for a production loan from a bank. A combination of these sales, plus private investment, subsidies and gap financing from a bank often complete the financing package.

Under a territorial pre-sales agreement, a distributor in a particular territory agrees to pay an advance against a negotiated royalty (or a flat price) upon completion and delivery of the film. Pre-sales are often associated with licensing on a territory-by-territory basis, as financial advances are secured against exclusive local distribution rights before the film enters into production. This exclusivity provides the distributor with the possibility of recoupment on each investment. When it refers to the cross border distribution of films across the EU, these investments are particularly relevant as, contrary to the US market, the EU market is heterogeneous and highly fragmented – as a result of different languages, cultures and tastes of the public – and requires that distributors adapt to different national specificities and put into place specific marketing and distribution efforts on all platforms: advertising, subtitling and dubbing, etc.

According to producers and distributors,⁴⁰ the up-front investment of distributors and publishers through pre-sales and strategic alliances enables and stimulates the distribution of European films across national boundaries, as it gives them the expertise on how to make films reach foreign audiences, adapt their distribution strategies to each film and help them circulate. For other experts,⁴¹ as pre-sales are linked to the value which can be generated by the film on each release window, the characteristics of this organisational principle may evolve in the future due to the arrival of new stakeholders and new audiovisual delivery models in multiple territories, in particular through on-demand platforms.

³⁷ WIPO, see above note 1.

³⁸ State film funding systems are mainly based on a territorial approach, as they are directly related to box office revenues collected on the domestic market in movie theatres.

³⁹ Often as part of a tax advantaged programme, such as for example SOFICA in France.

⁴⁰ See e.g. position of organisations representing this sector at the Licences for Europe dialogue or the answers to the Public Consultation on the Review of the EU Copyright Rules,

http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.

⁴¹ See Ranaivosom H., De Vinck S., Van Rompuy B., Analysis of the legal rules for exploitation windows and commercial practices in EU Member States and of the importance of exploitation windows for new business practices, Final Report, Study prepared for the European Commission DG Communications Networks, Content & Technology by iMinds and Smit, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=6354.



1.2.1.3. Case studies

According to the Independent Film & Television Alliance⁴² some interesting case studies on the financing of recent European films illustrate the importance of pre-sales and exclusive territorial licensing in film financing strategies.

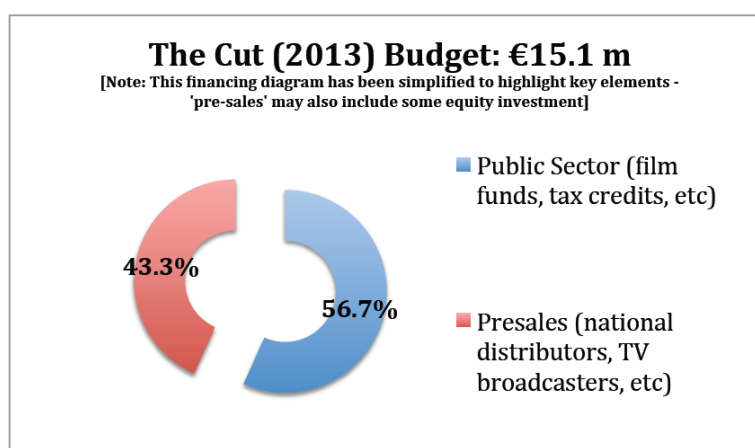
■ *The Cut*

The example of the European film *The Cut* illustrates how distribution into multiple territories is key in European film producers' approach to planning and financing ambitious projects. It requires the active collaboration of national film distributors all over Europe.

The Cut, by German film director of Turkish origin Fatih Akin tells a broader story about the previous century as an era of violent dislocation, exile and loss. As explained in the IFTA report, *The Cut* "combined two challenges that are familiar to EU-based film companies committed to a culturally-meaningful cinema". On the one hand, the film treats a grave subject and does not gather known international stars, downgrading therefore its mainstream commercial appeal. On the other hand, an epic tale of this kind requires a significant budget (EUR 15.1 million) obliging producers to secure considerable working capital in order to finance creative development as an indispensable pre-requisite for attracting production investment in the project – over EUR 900.000 in development costs before starting production.

The financing was the result of an official co-production agreement between a German company and a French film production and distribution company. As such, state funding was accessible in both countries and amounted to around 46% of the total budget, with the Council of Europe film fund Eurimages contributing an additional 5%. In total, contributions made by the pre-selling of exclusive territorial rights on *The Cut*, including TV sales, allowed the production to cover over 43% of the budget. More precisely, *The Cut* had distribution guarantees in a dozen European countries before it was even completed.

Figure 1 – “*The Cut*”



Source: IFTA Case Studies on the financing of recent European films, p. 3

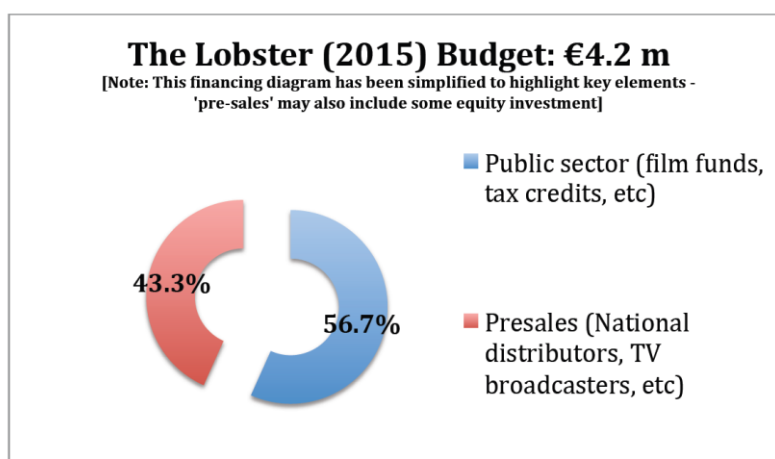
⁴² Independent Film and Television Alliance, “Case studies on the financing of recent European films”, June 2015 (not yet published).



■ *The Lobster*

The Lobster, by film director Yorgos Lanthimos, is an ambitious science-fiction fantasy film selected among 11 European films for the Official Selection at the 2015 Cannes Festival, where it was awarded the Jury Prize. Its budget of EUR 4.2 million was covered through a complex mix of national and European public sector funding and the pre-selling of territorially exclusive rights to distributors and TV channels in the European and global marketplace. In particular, according to IFTA report, 36% of the final budget of *The Lobster* was covered from such sales. A further 20% came from the international film distributor Sony Pictures Worldwide Acquisition, which put up a minimum guarantee payment against the anticipated value of licensing distribution rights to national distributors in the EU and the world at large. An additional 4% came from a contribution by French pay-TV platform Canal+, against exclusive pay-TV rights on its French service. Finally, 12% came from a similar deal with UK free-to-air film channel Film4, against exclusive rights for the UK.

Figure 2 – “*The Lobster*”



Source: IFTA Case Studies on the financing of recent European films, p. 5

1.2.1.4. New business models emerging for film online distribution and financing?

Some new business models are emerging in the digital environment that are worth pointing out. For example, EuroVoD platforms⁴³ is a right-holders' initiative, where independent producers, distributors and sales agents work together in order to create new channels of distribution of audiovisual content and provide new financial resources for the production of European films. Created in 2010, EuroVoD is a network of independent European Video-on-Demand platforms specialising in art-house films⁴⁴ and independent cinema, which adopted a collaborative management model, where small and medium enterprises pool resources and exchange know-how to increase the transnational circulation of European films. EuroVoD offers a consolidated catalogue representing 18000 titles online, from the most recent hits of independent cinema to patrimonial

⁴³ See EuroVoD, www.eurovod.org.

⁴⁴ Univers Cine (France), Univers Ciné (Belgium), Flimmit (Austria), filmin (Spain), Volta (Ireland), leKino.ch (Switzerland), netcinema.bg (Bulgaria), distrify (UK).



works, which addresses niche markets in Europe and also represents an interesting offer for global players and Over-The-Top platforms.

The EuroVoD platforms are “anchored” in their national territories, as they are designed in accordance with the expectations and needs of their respective audiences. In terms of financing of European production, according to EuroVoD sources, Minimum Guarantees are already the practice for sales and pre-sales and, in some cases, the platforms buy exclusive VoD rights for 10 years or more (e.g. *Cosmopolis*, by David Cronenberg – EUR 150.000 on the finished film 1 month before Cannes 2012 or *Au bout du conte / Under the Rainbow* – EUR 200.000 on screenplay and cast). Although these models may open new horizons for the film industry, it is still unknown to what extent they will be able to play a significant role in the financing of films in the future.

1.2.2. The country of origin principle and film financing in the EU

1.2.2.1. Overview

The EU rules for the provision of audiovisual media services across Europe are based on the concept of territorial jurisdiction or the country of origin principle, which was aimed at mitigating territoriality issues and facilitating the emergence of a single market for television services. This establishes that audiovisual media services are allowed to provide their services across Europe while only respecting the rules of the country where they are established. These rules include issues such as the promotion of European works, commercial communications and the protection of minors or product placement. As far as the promotion of European works is concerned, broadcasters must reserve a majority proportion of their transmission time for European works and at least 10% of their transmission time or at least 10% of their programming budget for European works created by producers who are independent of broadcasters.⁴⁵ Since 2007, on-demand audiovisual media services shall also participate in the promotion of European production, either through financial contributions to the sector’s support funds or by ensuring a share and/or prominence of European works in catalogues of programmes.

As EU law leaves the choice of how to promote European works to national law, audiovisual players are subject to more or less stringent rules depending on their country of establishment. The interpretation of “established” is based on the location of the head office, on the origin of editorial decisions, on the location of a significant part of the workforce involved in the pursuit of the audiovisual media service activity and/or the use of satellite capacity. Whereas this interpretation reflects the place of main activities in the case of most broadcasters, for online operators it may become a purely technical factor of the location of the server chosen for fiscal reasons and not connected to the location of the economic activity.

1.2.2.2. Some figures

At national level, member states are free to lay down more detailed or stricter rules with regard to the broadcasters, distributors and VoD providers under their jurisdiction.⁴⁶ Based on this, various

⁴⁵ For more details, see paragraph 2.2.2.1 of this publication.

⁴⁶ See also paragraph 3.2 of this publication.



member states have established regulatory instruments in order to encourage or even require contributions from providers of on-demand audiovisual services and/or of operators of distribution platforms (e.g. Belgium). Financial obligations are often accompanied by other measures, such as the obligation to guarantee proportions of European works in catalogues of on-demand audiovisual platforms (e.g. Spain or Portugal) or promotion tools (e.g. the French Community of Belgium). National rules can also combine all these measures and thus translate into sophisticated mechanisms for the promotion of European production (e.g. France).⁴⁷

The following table illustrates the diversity of schemes for direct production investment available in EU member states.

Table 3 – Registered mandatory contributions of AVMS providers and distributors

EUR million

	Year of reference	Categories of contributors	Contribution to fund	Direct investment in production	Total
BE (CFR)	2012	Distributors of AVMS (*)	1.8	2.3	4.2
DE	2013	Video distributors and VoD providers	17.4	n.a.	17.4
ES	2011	Pay-TV distributors (*)	n.a.	61.2	61.2
FR	2011	On-demand AVMS	n.a.	16.1	16.1
FR	2014	Television service distributors	n.a.	n.a.	n.a.
HR	2014	Distributors of AVMS (*)	0.5	n.a.	0.5
PL	2013	Cable TV operators	5.6	n.a.	5.4
PL	2013	Digital TV operators	12.4	n.a.	12.4

(*) Some of them being also providers of AVMS

Source: European Audiovisual Observatory

1.2.3. Which perspectives for the financing of European films in the new ecosystem?

1.2.3.1. New threats for the financing structure of the film sector

According to a study carried out for the French CNC in 2013 on the financing of cinematographic production and distribution in the digital era,⁴⁸ the financing of feature films production is jeopardised in France for a set of different reasons. Although the report addresses the specific situation of France, many of the causes put forward may apply at European level.

As previously described, as far as the theatrical exploitation is concerned, cinema attendance tends to decline with fewer “box office hits” and the evolution of purchasing power. The duration of

⁴⁷ For more details, see Grece C., Lange A., Schneeberger A., Valais S., see above note 3.

⁴⁸ Bonnell, R., *Le financement de la production et de la distribution cinématographiques – A l'heure du numérique*, Rapport pour le CNC, Décembre 2013, www.cnc.fr/web/fr/rapports/-/ressources/4484808.



the commercial life of films tends to shorten as a direct effect of the development of digital distribution technologies, the presence of multiple distribution channels which intensify their use and the abundance of films on offer, which weakens their commercial impact. In addition, as indicated in the JRC report on Models of ICT Innovation, “A Focus on the Cinema Sector”,⁴⁹ “the new digital environment is jeopardizing a funding system based on box office revenues collected on the domestic market structure [...] with the growth of alternative distribution channels and services provided by suppliers located outside the national territories or even outside the EU.”

As far as television is concerned, pay-TV revenues are stagnating, as this sector has reached maturity and needs now to adapt its economic model. In parallel, the economic crisis impacts free-to-air TV, whose advertising revenues are diminishing, not least due to growing competition from the Internet and DTT channels. This drop in revenues leads, in turn, to a general reduction in how much broadcasters invest in film production. DTT channels don’t compensate for this loss.

On the video market side, the DVD film market is dropping constantly and steadily, devastated by piracy and the emergence of VoD and catch-up TV. Because of lower profit margins, this decrease is not compensated for by the sales of Blu-ray or by VoD. Furthermore, the emergence of global players that are able to pursue aggressive commercial methods in order to penetrate the market and to achieve fiscal optimisation and economies of scale completely transformed the VoD and SVoD sector. As a result, local players face extreme difficulties in competing. These major players tend to establish themselves in countries with low or no obligations as to investment into European production.

Last but not least, the EU audiovisual industry continues to suffer from high levels of piracy, whose impact on the different markets and in particular on the video market is still difficult to anticipate.

1.2.3.2. Cross-border accessibility to audiovisual works in the Digital Single Market

Given this downward trend of long term revenues that may be expected from film exploitation and as the average funding for a film decreases, the perception that territorial exploitation and exclusive rights might be a potential obstacle to cross-border accessibility to content in the digital single market puts the economic mechanism of financing European film production as such into question. At the same time, the increasing importance of OTT players challenges legislation which – based on the country of origin principle – obliges broadcasters and distributors to participate in the financing of audiovisual production.

In the digital environment, subscribers to online audiovisual services and consumers of movies offered by Internet service providers or web-stores want to access the content they legally bought from any location and on multiple devices. However, not all online services are available in all member states and access to online services from another EU country is often impossible.⁵⁰ Consumers complain of being frequently confronted with messages indicating that a given content or service is not available in their country or that they cannot listen to content of their home country

⁴⁹ See above note 33.

⁵⁰ European Commission, “Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules”, Directorate General Internal Market and Services, July 2014, p. 5-11,

http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.



from another EU country.⁵¹ In their view, the separation of markets along national borders negatively impacts their freedom of choice and often leads to price discrimination and different conditions for identical products depending on the member state. They also report that digital rights management and technological protection measures (DRM/TPM) used by service providers to enforce territorial restrictions prevent them from accessing their own (paid-for) national services or products when travelling.

These so-called “geo-blocking” measures refer to commercial practices that prevent online customers from accessing and purchasing a product or a service from a website based in another member state or which automatically re-routes them to a local site. As a result, consumers may be charged more for products or services purchased online on the basis of their IP address, their postal address or the country of issue of their credit card. Geo-blocking can also restrict customers’ access to online services purchased in their home country, such as TV channels via Internet, when abroad.

1.2.3.3. Territoriality or cross-border portability of legally acquired content?

Some VoD service providers argue that geo-blocking results from the territoriality of rights and the difficulties associated with the clearing of rights in different territories. They also invoke the contractual clauses in licensing agreements between right-holders and distributors and between distributors and end-users as the origin of the problem. On the other hand, online platforms recall the fundamental principle that guarantees the freedom to conduct business.

For right-holders, film producers and distributors, this is less an issue of copyright than of the business models of the platforms, which are not interested in offering the same content everywhere. According to them, increasing the portability of content will not answer the question of the cross-border circulation of audiovisual works, as this issue only concerns a very limited proportion of the EU population. According to Eurostat, less than 3% of the EU population resides in a member state other than their country of origin. The same proportion applies if mobility for less than one year is taken into account. Instead, right-holders highlight that territorial licensing with exclusive distributors per territory helps them secure adequate financing at the pre-production stage and allows the possibility of a return on investment. They consider that removing territoriality would only benefit major global players, who based on their strong market position can close pan-European licensing deals against lump-sum payment, instead of territory-by-territory licences.

Right-holders, some providers of audiovisual services, film producers and broadcasters also emphasise the role territoriality plays in maintaining cultural and linguistic diversity in Europe and in guaranteeing a high level of quality in the films on offer to consumers and end-users. European films need fine-tuned distribution campaigns adapted to each market in order to circulate across border.⁵² Only films which find their audience on a global scale, such as US movies or certain European blockbusters, may be exceptions to this rule. Therefore, the European film industry fears that the removal of territoriality would mainly benefit major platforms and lead towards more concentration to the detriment of cultural diversity in the sector.

⁵¹ See European Commission, “Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules”, see above note 50, p. 6.

⁵² KEA & Mines Paris Tech (2010), *Multi-Territory Licensing of Audiovisual Works in the European Union*, p. 30, www.keanet.eu/docs/mtl%20-%20full%20report%20en.pdf.



2. International and EU legal framework

2.1. Territoriality and copyright

The principle of territoriality in copyright law means essentially that, within the framework of international treaties and relevant EU directives, each country can regulate copyright in a different way. Therefore, copyright rules may vary from one member state to the other. More importantly for the purposes of this publication, according to this principle right-holders have the right to (but are not obliged to) grant territorial licences to different licensees in different countries.

This principle may constitute an exception to the freedom to provide services included in the EU treaties. Opponents of the principle argue that it raises transaction and enforcement costs for authors, right-holders and users alike, since territorial fragmentation requires those wanting to offer content-related services across the EU to secure multiple licenses. Moreover, differences in national law, particularly as regards limitations and exceptions, may create in their view additional legal costs and lead to legal uncertainty.⁵³ Finally, the use in concrete cases of a copyright may raise competition issues. However, as mentioned in chapter 1 of this publication, various stakeholders in the audiovisual industry consider that the possibility of providing territorial licences is fundamental to the financing of European audiovisual works.

2.1.1. The Single Market and the freedom to provide services

The EU Single Market is based on the so-called “four freedoms” included in the EU Treaties: the free movement of people, goods, services and capital. Of all these, the freedom to provide services (coupled with the right of establishment) is the most relevant for the audiovisual sector.

Article 56 of the Treaty on the Functioning of the European Union (TFEU)⁵⁴ contains a general prohibition concerning restrictions on the freedom to provide services within the Union in respect of nationals of member states who are established in a member state other than that of the person for whom the services are intended. Article 49 TFEU contains the general prohibition on restricting the freedom of establishment of nationals of a member state in the territory of another member state. It is also prohibited to restrict the setting-up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state.

⁵³ See e.g. Hugenholtz, P.B., “Copyright Territoriality in the European Union”, Note, 2010, PE 419.621, [www.europarl.europa.eu/RegData/etudes/note/join/2010/419621/IPOL-JURI_NT\(2010\)419621_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2010/419621/IPOL-JURI_NT(2010)419621_EN.pdf).

⁵⁴ Consolidated version of the Treaty on the Functioning of the European Union: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:12012E/TXT>.



The Services Directive (SD)⁵⁵ is the main EU legal instrument to implement the freedom to provide services and the right of establishment. It aims at achieving the full potential of service markets in Europe by removing legal and administrative barriers to trade. However, the Services Directive does not apply to “audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting” (Article 2(2)(g) SD).

With regard to copyright in general, the rules on the freedom to provide services included in Article 16 SD⁵⁶ do not apply to, among other things, copyright and neighbouring rights (Article 17 (11) SD), confirming thereby the principle of territoriality in copyright law. Moreover, member states are allowed to impose requirements with regard to the provision of a service activity for reasons of public policy, public security, public health or the protection of the environment (Article 16(3) SD). Recital 40 SD includes among a long list of “overriding reasons relating to the public interest” the protection of intellectual property, cultural policy objectives, the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language, as well as the preservation of national historical and artistic heritage.

The Services Directive also protects the rights of recipients of services. Article 20 SD prohibits discriminatory requirements based on the nationality or place of residence of the recipient of the service. Furthermore, member states shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient. However, differences in the conditions of access are allowed where those differences are directly justified by objective criteria. According to the European Commission,⁵⁷ an objective reason that would justify the refusal of a service to consumers in a given territory is the lack of the required authorisation from the right-holders for the territory in question. Other reasons, in particular those not related to copyright, would have to be justified on a case-by-case basis. But, as mentioned before, in its current version the Services Directive does not apply to audiovisual and cinematographic services.⁵⁸

2.1.2. The principle of territoriality in copyright law

2.1.2.1. Territoriality of copyright and international treaties

The principle of territoriality in copyright law has a long history. Until the 19th century, the protection of copyright was a strictly national matter. A work protected in a given country was not necessarily protected elsewhere. This resulted in the unauthorised and unremunerated reprinting of e.g. books written by British authors in other European countries and especially in the US.⁵⁹ Various attempts to

⁵⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0123>.

⁵⁶ Article 16 SD lists the principles to be respected by member states when making access to or exercise of a service activity in their territory (non-discrimination, necessity and proportionality). It also includes a list of prohibited requirements for providers established in another member state.

⁵⁷ Commission Staff Working Document with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market (‘the Services Directive’), http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_146_en.pdf.

⁵⁸ See paragraph 6.1.1.2 of this publication for a description of the measures announced by the European Commission which could include a modification of the SD.

⁵⁹ For a depiction of Charles Dickens’ fight against the unauthorised publishing of his books in the US see e.g. Allingham P.V., “Dickens’s 1842 Reading Tour: Launching the Copyright Question in Tempestuous Seas”, www.victorianweb.org/authors/dickens/pva/pva75.html.



curtail this problem were made at bilateral level during the 19th century,⁶⁰ but it was not until the adoption in 1886 of the Berne Convention for the Protection of Literary and Artistic Works⁶¹ that a truly multilateral solution was introduced at an international level.

The Berne Convention is based on the principle of national treatment, expanding the territorial application of the regulatory framework to nationals of the contracting parties of the Convention. According to Article 5(2), the enjoyment and the exercise of the rights protected therein “shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed”. The Convention provides authors with a set of minimum rights which states have to recognise, extending thereby copyright protection to authors beyond the borders of their own countries.⁶² Nevertheless, the protection is awarded by each individual member state of the Convention for its sole territory.

At the beginning of the second half of the 20th century and in view of the emergence of new players on the global scene (in particular China), intellectual property (IP) issues entered into the field of trade negotiations. This first started at a bilateral level with the conclusion by the US of a number of free trade agreements (FTAs) with some East-Asian and Eastern European States, in which the parties subscribed to a high level of IP protection in exchange for certain trade advantages.⁶³ Subsequently, the issue of the effective international protection of IP was introduced as part of the Uruguay Round of GATT⁶⁴ negotiations, as a response to the rising surge of pirated and counterfeit goods distorting international trade flows. When the WTO Agreement was concluded in Marrakesh in 1994, the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) became an integral part of the Treaty.⁶⁵

With the TRIPS, the standards of the internationally mandatory protection for IPRs were elevated to a much higher level than what had been prescribed by the Berne Convention and new obligations were imposed. In particular, the national treatment principle was endorsed by Article 3 of the TRIPS and complemented by the Most Favoured Nation Treatment (MFN), according to which member states must extend trade benefits that were granted to certain trading partners to other parties to the Agreement as well. Part III of TRIPS contains a detailed description of obligations of WTO member states to provide effective enforcement rules, regarding civil and administrative procedures, provisional measures, border measures and criminal proceedings.

Further treaties adopted at WIPO level, such as the WCT⁶⁶ and WPPT,⁶⁷ and agreements at the international level that brought copyright and neighbouring rights into line with the demands of

⁶⁰ See Drahos P., “The universality of intellectual property rights: origins and development”, www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf.

⁶¹ Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (with amendments), www.wipo.int/treaties/en/text.jsp?file_id=283698.

⁶² Triaille J-P., (ed.), “Study on the application of Directive 2001/29/EC on copyright and related rights in the information society”, p. 46, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

⁶³ Kur A., Dreier T., *European intellectual property law, Text, cases & materials*, (Edward Elgar, USA 2013).

⁶⁴ General Agreement on Tariffs and Trade, see paragraph 2.2.1.1. of this publication.

⁶⁵ TRIPS is Annex 1 C to the WTO Agreement.

⁶⁶ WIPO Copyright Treaty (adopted in Geneva on 20 December 1996), www.wipo.int/treaties/en/text.jsp?file_id=295166.

⁶⁷ WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996): www.wipo.int/treaties/en/text.jsp?file_id=295578.



digitisation and the Internet were built on this principle of territoriality. The Court of Justice of the European Union (CJEU) has confirmed the principle in several judgments.⁶⁸

2.1.2.2. Territoriality of copyright in the EU

Although copyright law lies in principle with the member states, since the late 1980s the EU has engaged in harmonising certain aspects of copyright and related rights by introducing directives on several copyright-related issues.⁶⁹ Of these, the most relevant for the exploitation of audiovisual works is the directive on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive).⁷⁰ The InfoSoc Directive aims to adapt legislation on copyright and related rights to reflect technological developments and to transpose into EU law the main international obligations arising from the WCT and WPPT. It harmonises the rights of reproduction, distribution, communication to the public, as well as the legal protection of anti-copying devices and rights management systems. Another important piece of legislation is the Satellite and Cable Directive (SatCab Directive),⁷¹ which aims to facilitate the cross-border transmission of audiovisual programmes, notably via satellite and retransmission by cable.

EU law limits the principle of territoriality in copyright law only in two aspects. Firstly, the SatCab Directive introduces the “country of origin” principle for communications to the public by satellite. Yet, the application of this principle can be (and usually is) overruled via contractual licensing practices and signal encryption techniques.⁷² Secondly, the InfoSoc Directive introduces the “exhaustion” principle for the distribution right. This principle applies only to the distribution of the work incorporated in a tangible article, that is, it does not apply to e.g. the right of communication to the public of works and the right of making available.⁷³ As a result, the territoriality principle mostly prevails and any service provider offering e.g. copyrighted works online in more than one member state will have to clear licences covering all of these countries. This is not a problem if all right-holders involved in the creation of the work retain the required rights for all countries in question. Nothing in national or EU law precludes e.g. a film or a music producer from giving a multi-territorial licence for more than one country, as long as s/he holds these rights. This is the theory, of course. In practice, rights in audiovisual works are usually pre-sold by producers to national distributors in order to finance the production of the work in question⁷⁴ and, in the case of musical works, rights are exercised by national collective management organisations (CMOs), which play a fundamental role.

In particular, right-holders in musical works entrust the management of their rights to CMOs, which enter into reciprocal representation agreements with each other, so that each CMO can

⁶⁸ See paragraph 5.1.1. of this publication.

⁶⁹ See The EU legal framework (“acquis”), http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm.

⁷⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32001L0029>.

⁷¹ 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, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0083>.

⁷² See Hugenoltz P.B., “SatCab Revisited (...)”, see above note 3.

⁷³ See Article 3(3) and Recitals 28 and 29 of the InfoSoc Directive.

⁷⁴ See paragraph 1.2.1.2. of this publication.



provide multi-repertoire licences in its territory of establishment.⁷⁵ At EU level, the adoption of the Directive on collective management⁷⁶ is the latest attempt to date to overcome national barriers to the free provision of copyrighted works online.⁷⁷ It aims to improve the way all CMOs are managed by establishing common governance, transparency and financial management standards. Other objectives of the Directive are to set common standards for the multi-territorial licensing by authors' CMOs of rights in musical works for the provision of online services and to create conditions that can expand the legal offer of online music.⁷⁸

The audiovisual industry is, however, not as well collectively organised as the music industry.⁷⁹ In recent times, different solutions have been proposed to foster the digital Single Market for audiovisual works. Some of them are explained in chapter 4 of this publication. But probably the most radical one consists of the introduction of a European Community copyright law. According to its proponents, this would be a “truly structural and consistent solution, which would immediately solve the disparate treatment of goods and services in the realm of copyright”.⁸⁰ A concrete application of this idea is the *European Copyright Code*,⁸¹ which resulted from the Wittem Project, a collaboration project between certain copyright scholars in Europe.

The introduction of a single EU copyright title has received praise and criticism among stakeholders⁸² and an appraisal of its opportunity and feasibility goes beyond the scope of this publication.⁸³ Nonetheless, among many other challenging questions, this proposal raises the issue of the EU competence in copyright matters. Traditionally, the EU competence for the harmonisation of copyright and related rights has been based on two main objectives: the proper functioning of the internal market and the improvement of the competitiveness of the European economy.⁸⁴ But since

⁷⁵ As these agreements forbade collective management societies from granting EU-wide licenses, the European Commission took an antitrust decision in 2008 prohibiting 24 European collecting societies from restricting competition by limiting their ability to offer their services to authors and commercial users outside their domestic territory. CISAC appealed to the General Court, which concluded that the Commission did not prove the existence of concertation between the collective management societies as regards the territorial scope of the mandates which they grant each other and that the parallel conduct of the collective management societies at issue was not the result of concertation, but rather of the need to fight effectively against the unauthorised use of musical works. See Judgment of the General Court (Sixth Chamber) of 12 April 2013, Case T-442/08, *International Confederation of Societies of Authors and Composers (CISAC) v European Commission*, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136261&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=357698>.

⁷⁶ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.084.01.0072.01.ENG.

⁷⁷ The European Commission had already adopted in 2005 a recommendation on the management of online rights in musical works. The recommendation put forward measures for improving the EU-wide licensing of copyright for online services. See Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005H0737&from=EN>.

⁷⁸ See European Commission, “Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions”, [http://europa.eu/rapid/press-release MEMO-14-79_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm).

⁷⁹ See paragraph 3.1.3. of this publication for a description of the role of collective management of rights in the EU audiovisual sector.

⁸⁰ See Hugenoltz P.B. and others, “The Recasting of Copyright & Related Rights for the Knowledge Economy”, Final report, http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

⁸¹ See www.copyrightcode.eu.

⁸² See Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, p. 89, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.

⁸³ For an in-depth criticism of the Wittem Project’s Copyright Code see e.g. Ficsor F., “The hurried idea of a ‘European Copyright Code’ in the light of the EU’s (desirable) cultural and copyright policy”, www.copyrightseesaw.net/data/documents/documents/d/9/c/d9ce1c99e3014eedd61c16279356cb93.doc.

⁸⁴ See Van Eechoud M., Hugenoltz P.B., Van Gompel S., Guibault L., Helberger N., “Harmonizing European Copyright Law - The Challenges of Better Lawmaking” (Kluwer Law International, 2009) p.11.



the adoption of the Treaty of Lisbon,⁸⁵ the EU has had a specific competence regarding the protection of intellectual property rights. According to Article 118 TFEU, “[i]n the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.” It has been argued that Article 118 TFEU would therefore empower the EU not only to introduce Union-wide copyright titles, “but also for the simultaneous abolishment of national titles, which would be necessary for such an initiative to take its full effect and remove territorial restrictions”.⁸⁶

The question remains as to whether the removal of the principle of territoriality in copyright law would have the desired effect of removing territorial restrictions. In the absence of copyright-related territorial barriers, right-holders could still limit the scope of licences via contractual practices, as the case of satellite broadcasting shows.⁸⁷ Such licensing practices should however conform to EU competition rules.

2.1.3. Territoriality and competition law

Title VII Chapter 1 Section 1 TFEU contains the EU competition rules applying to undertakings. Article 101 TFEU contains a general prohibition on agreements between undertakings which restrict competition. This provision covers both horizontal and vertical agreements. A limited exception is provided for with regard to agreements and other actions which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Article 102 TFEU prohibits the abuse of a dominant position, for example by imposing unfair purchase or selling prices, limiting production, markets or technical development to the prejudice of consumers, placing competitors at a competitive disadvantage or making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such contracts.

The Antitrust Regulation (AR)⁸⁸ implements Articles 101 and 102 TFEU. The Antitrust Regulation replaced the centralised notification and authorisation system by an enforcement system based on the direct application of Articles 101 and 102 TFEU in their entirety. According to Article 11(6) AR, the initiation of proceedings by the Commission relieves the competition authorities of the member states of their competence to also apply EU competition rules to the practices concerned. Article 16(1) AR provides that national courts must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.

The European Commission has traditionally defined the geographic scope of broadcasting markets for the licensing/acquisition of audiovisual TV content (film and other content) as national

⁸⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT>.

⁸⁶ See Van Echoud M., Hugenholtz P.B., Van Gompel S., Guibault L., Helberger N., see above note 84, p.353.

⁸⁷ See Hugenholtz P.B., “SatCab Revisited (...)”, see above note 3.

⁸⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R0001>. See also Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0773>.



or relating to linguistically homogeneous areas.⁸⁹ Particularly as regards broadcasting rights to premium films, the market investigation in the *NewsCorp/BskyB* case⁹⁰ confirmed that these rights are only rarely negotiated simultaneously for different territories. According to stakeholders, broadcasting rights are generally negotiated and concluded on a country-by-country basis, with the only exceptions appearing to be licensing in relation to a linguistic area (for example rights for Germany, Austria and the German speaking parts of Switzerland and Luxembourg) or in relation to areas with a particular common socio-cultural background (for example Scandinavia). Also factors mentioned by stakeholders which prevent cross-border negotiation/licensing include the availability of materials in each language; differences in the availability dates for content in different territories; and the fact that each country and region reflects local preferences in programming.

The fact that licensing agreements are generally concluded on a country-by-country basis does not mean that they cannot have anti-competitive effects and be an obstacle to the completion of the Single Market. As the most outstanding example of this, the CJEU delivered a judgment in the so-called Premier League cases concerning the issue of licensing restrictions granting broadcasters an exclusive live broadcasting right for Premier League matches on a territorial basis, generally corresponding to the territory of a member state.⁹¹ Following this judgment, the Commission conducted in 2012 a fact-finding investigation to examine whether licensing agreements for premium pay-TV content contain absolute territorial protection clauses which may restrict competition, hinder the completion of the Single Market and prevent consumers' cross-border access to premium sports and film content.⁹² In January 2014, the European Commission opened formal antitrust proceedings to examine certain provisions in licensing agreements between several major US film studios (Twentieth Century Fox, Warner Bros., Sony Pictures, NBCUniversal, Paramount Pictures) and the largest European pay-TV broadcasters, such as BSkyB of the UK, Canal Plus of France, Sky Italia of Italy, Sky Deutschland of Germany and DTS of Spain.⁹³ The Commission's aim was to investigate whether these provisions prevent broadcasters from providing their services across borders, for example by turning away potential subscribers from other member states or blocking cross-border access to their services. The Commission examined whether provisions of licensing arrangements for broadcasting by satellite or through online streaming between US film studios and the major European broadcasters, which grant to the latter "absolute territorial protection", may constitute an infringement of EU antitrust rules that prohibit anti-competitive agreements according to Article 101 TFEU. "Absolute territorial protection" clauses prohibit licensees from selling both actively and passively into other licensees' territories, including responding to unsolicited demands from customers located in other countries.⁹⁴ As a result of these antitrust proceedings, on 23 July 2015 the European Commission sent a Statement of Objections to Sky UK and six major US film studios: Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros.⁹⁵ According to the Commission's preliminary view, each of the six

⁸⁹ See Capito R. see above note 3.

⁹⁰ European Commission, Decision D/C(2010) 9684, Case COMP/M.5932 - NewsCorp/BSkyB, 21 December 2010, http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf.

⁹¹ This judgment is described in detail in paragraph 5.1.2. of this publication.

⁹² See Report from the Commission on Competition Policy 2012 (COM(2013) 257 final), Commission Staff Working document, 7 May 2013, SWD(2013) 159 final, http://ec.europa.eu/competition/publications/annual_report/2012/part2_en.pdf.

⁹³ See press release of the European Commission, "Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services", 13 January 2014, http://europa.eu/rapid/press-release_IP-14-15_en.htm.

⁹⁴ OECD, Global Forum on Competition, "Competition issues in television and broadcasting", www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf.

⁹⁵ See press release of the European Commission, "Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland", http://europa.eu/rapid/press-release_IP-15-5432_en.htm.



studios and Sky UK have bilaterally entered into licensing agreements that restrict Sky UK's ability to accept unsolicited requests for its pay-TV services from consumers located abroad, i.e. from consumers located in member states where Sky UK is not actively promoting or advertising its services (so-called "passive sales"). Moreover, some agreements contain clauses requiring studios to ensure that, in their licensing agreements with broadcasters other than Sky UK, these broadcasters are prevented from making their pay-TV services available in the UK and Ireland. The Commission reminds, however, that these antitrust investigations focus solely on contractual restrictions on passive sales outside the licensed territory in agreements between studios and broadcasters. At the same time, broadcasters also have to take account of the applicable regulatory framework beyond EU competition law (including a.o. relevant national copyright laws) when considering sales to consumers located elsewhere.⁹⁶

Another recent Commission antitrust enquiry concerns the e-commerce sector.⁹⁷ This sector enquiry was launched on 6 May 2015 pursuant to Article 17 of Regulation 1/2003 and is currently carried out in the framework of the Commission's Digital Single Market strategy.⁹⁸ The Commission wishes to gather data on the functioning of e-commerce markets so as to identify possible competition concerns, focusing particularly on potential barriers to cross-border online trade in goods and services, where e-commerce is most widespread (e.g. electronics, clothing and shoes), as well as in digital content. The Commission acknowledges the existence of several reasons for the trend of trade between member states relating to the e-commerce sector, including language barriers, consumer preferences and differences in legal frameworks between member states. However, it has noticed indications that undertakings active in the e-commerce sector may be engaged in anti-competitive agreements, concerted practices or abuses of a dominant position. The Commission plans to publish a preliminary report in mid-2016. A public consultation on the preliminary report will follow, and after that the Commission will publish a final report, planned to be released in the first quarter of 2017.

2.2. Territoriality and audiovisual media services

In the case of media regulation territoriality may take the shape of the principle of the country of origin or of the country of destination.

The principle of the country of origin ensures that any audiovisual media service originating from a provider established in one state can freely circulate across other states, without the need for any further authorisation and for following the rules of the latter. Any attempt to restrict such circulation would be against this principle, as well as any imposition of further obligations on the providers with whom the audiovisual content originates. The opposite is the principle of the country of destination, according to which it is up to the country where the services are delivered to determine which rules are applicable and which bodies are competent for monitoring and enforcement.

⁹⁶ According to the Commission, the length of this antitrust investigation is uncertain, and depends on a number of factors, including the complexity of the case, the extent to which the undertaking concerned cooperates with the Commission and the exercise of the rights of defence.

⁹⁷ Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003, C(2015) 3026 final, http://ec.europa.eu/competition/antitrust/e-commerce_decision_en.pdf.

⁹⁸ See paragraph 6.1.1.2 of this publication.



EU rules show mixed approaches, depending on the horizontal rules that are at stake. In the case of audiovisual media services what applies is the country of origin, whereas under the e-commerce directive, which applies to audiovisual content not falling under the editorial responsibility of an audiovisual media service provider, but under the concept of information society services, the key principle is the country of destination.

At international level it is mostly the principle of non-discrimination which determines the applicability of the regulatory framework of the country of destination. This principle takes the form of the Most-Favoured Nations (MFN) principle according to which, independently of the origin of the service, any country has to apply the same juridical framework to any similar service derived by a provider stemming from another country.

2.2.1. Territoriality rules for audiovisual services at international level

At international level audiovisual services are mainly dealt with by treaties concerning trade relations. Being an economic activity, the issue of free circulation is at the centre of most international agreements. In parallel, various forms of exceptions have been introduced in order to allow national legislation to provide for specific rules in the name of culture.⁹⁹

2.2.1.1. The WTO framework and the NAFTA

As is the case for most international treaties, under the General Agreement on Tariffs and Trade (GATT)¹⁰⁰ and the General Agreement on Trade in Services (GATS),¹⁰¹ the key principle is the Most-Favoured Nations (MFN) principle.¹⁰² Whereas the GATT provides explicitly for provisions on cinematographic works as a standing exception to the MFN principle, provided certain conditions are met,¹⁰³ the GATS, which includes audiovisual media services in its scope¹⁰⁴, foresees the possibility for its members to introduce exemptions to the MFN principle by following a specific procedure.¹⁰⁵

⁹⁹ For example, see the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, signed in Paris, 20 October 2005, <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>. Audiovisual services would fall under the notion of “cultural services”, as long as they “embody or convey cultural expressions, irrespective of the commercial value they may have”. The interconnection clause with other treaties which is embodied in the Convention is however not particularly stringent: on the one hand Article 5 gives the member the right to adopt its own cultural policies, but on the other hand the Convention never prevails should a conflict with any other international agreement arise.

¹⁰⁰ General Agreement on Tariffs and Trade (GATT) signed in Geneva, 30 October 1947, https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

¹⁰¹ General Agreement on Trade in Services (GATS), signed in Marrakech, 15 April 1994, https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

¹⁰² On the WTO framework see Herold A., “European Public Film support within the WTO Framework”, IRIS plus, European Audiovisual Observatory, Strasbourg, 2003, www.obs.coe.int/documents/205595/264575/IRIS+plus+2003en3LA.pdf/846a8556-cc1e-4606-bd1a-823cbd39ec44.

¹⁰³ Article I of the GATT on “General Most-Favoured-Nation Treatment”: “(...) any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

Article IV of the GATT on “Special Provisions relating to Cinematograph Films”: “If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:



The GATT exception and the GATS exemptions¹⁰⁶ are key concepts for the compatibility of the WTO framework with the Treaty on European Union. These circumstances allow the EU and, consequently, its member states, to adopt specific obligations, including provisions on content quotas.

A sort of cultural exception¹⁰⁷ has been introduced in the North-American Free Trade Agreement (NAFTA).¹⁰⁸ Article 2107 provides a definition of cultural industries where both linear (“radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services”) and non-linear (“the production, distribution, sale or exhibition of film or video recordings”) audiovisual media services are included, together with publishing, press and music.¹⁰⁹

Audiovisual services, as part of the cultural industries, benefit from a specific Annex¹¹⁰ and here again territoriality plays a role: the subordination clause foreseen by the cultural exception in

a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof; (...)

¹⁰⁴ The WTO classification of Audiovisual Services (2.D) according to the W/120 includes motion picture and video tape production and distribution services, motion picture projection services, radio and television services, radio and television transmission services and sound recording.

¹⁰⁵ Article II of the GATS on “Most-Favoured Nation”:

“1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

(...)”

¹⁰⁶ For further details on commitments and exemptions related to audiovisual services see:

https://www.wto.org/english/tratop_e/serv_e/audiovisual_e/audiovisual_e.htm and the background note by the Secretariat for the WTO Council for Trade in Services, S/C/W/310, 12 January 2010,

[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(\(%40Symbol%3d+s%2f*+and+%40Title%3d+\(audiovisual\)\)or+%40Symbol%3d+mtn.gns%2faud%2f*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=((%40Symbol%3d+s%2f*+and+%40Title%3d+(audiovisual))or+%40Symbol%3d+mtn.gns%2faud%2f*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

¹⁰⁷ A cultural exception was never adopted, but came to advanced stages of discussion amongst OECD Member States, in the draft Multilateral Agreement on Investment (MAI). During the negotiations a concern was raised with regard to the cultural industries, which led to the drafting of an exception clause stating that “[n]othing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity”. The effect of such a clause would have been to overcome the limits of the Most-Favoured Nation principle and the standstill clause adopted during the GATS negotiations, in the sense that members would have been allowed to ensure differentiated treatments depending on the country of origin of an audiovisual media service or of an audiovisual work, notably in the case of co-production agreements. For the draft text of the MAI as negotiated among OECD countries up to the point they had arrived in April 1998, when they were discontinued, see: <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.

¹⁰⁸ North-American Free Trade Agreement (NAFTA), signed 17 December 1992, www.sice.oas.org/Trade/NAFTA/NAFTATCE.ASP.

¹⁰⁹ Article 2107 of the NAFTA on “Definitions” states that:

“For purposes of this Chapter: cultural industries means persons engaged in any of the following activities:

(a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

(b) the production, distribution, sale or exhibition of film or video recordings;

(c) the production, distribution, sale or exhibition of audio or video music recordings;

(d) the publication, distribution or sale of music in print or machine readable form; or

(e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.”

¹¹⁰ Article 2106 of the NAFTA provides that “Annex 2106 applies to the Parties specified in that Annex with respect to cultural industries” and, according to the Annex, “[n]otwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff



the NAFTA ensures that in trade relations between certain countries the specific rules adopted to rule their economic relations apply.

2.2.1.2. The Transatlantic Trade and Investment Partnership (TTIP)

Despite the set-up of dedicated pages on the Transatlantic Trade and Investment Partnership on the European Commission's website,¹¹¹ apart from a leaked text of the whole agreement¹¹² and the proposals tabled by the EU on regulatory cooperation,¹¹³ no official text as to the treatment of audiovisual services in the most discussed free trade agreement between the EU and the USA exists.

The European Commission has made available a set of factsheets. The one devoted to services states that “[w]e don't make commitments in areas such as film, radio and television. This allows member states to take any measures they wish e.g. to impose quotas for EU productions.”¹¹⁴ This issue is developed further in a specific factsheet on culture: “In both multilateral and bilateral trade negotiations the EU traditionally excludes the audiovisual sector from any commitments it makes to open its markets to foreign competition. So, when it comes to audiovisual services, almost none of the EU's FTAs allow foreign (non-EU) companies access to the EU market or the right to be treated the same as their EU counterparts. The result is that the EU and its member states may discriminate against foreign providers of audiovisual services. The best example is the quota system. TV quotas were first regulated in the Television without Borders Directive of 1989, which in 2007 became the Audiovisual Media Services Directive (AVMSD). Today, this Directive is the main EU-wide law regulating the sector.”¹¹⁵

Discrimination can occur in two ways in cases where non-EU companies provide services without establishing themselves in a member state: firstly, these companies may be excluded from positive measures, such as access to film funds or fiscal incentives. Secondly, they may not be obliged to respect quotas. The latter case gives an economic advantage that may lead to concerns in terms of a level playing field with regard to audiovisual media service providers who actually are subjected to quota rules.

2.2.2. Territoriality rules for audiovisual services at EU level

2.2.2.1. The Audiovisual Media Services Directive (AVMSD)

Article 13 and Articles 16-17 AVMSD oblige all audiovisual media service providers to reserve a certain amount of programming time or budget for European works. Based on the so-called

Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada - United States Free Trade Agreement. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.”

¹¹¹ See the Info hub on TTIP, <http://ec.europa.eu/trade/policy/in-focus/ttip>.

¹¹² Modified EU draft proposals on trade in services, investment and electronic commerce, text of 3 July 2013, http://eu-secretdeals.info/upload/EU-Investment-Text-TTIP-v_July2nd-2013_v1.pdf.

¹¹³ The European Union's proposal for a legal text on "Regulatory Cooperation" in TTIP, tabled for discussion with the US in the negotiating round of 20-24 April 2015, http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf.

¹¹⁴ Factsheet on "Services in TTIP", http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_152999.2%20Services.pdf.

¹¹⁵ Factsheet on "Culture in TTIP", http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf.



“graduated approach”, the AVMSD differentiates these obligations according to the type of service. Whilst for linear programming¹¹⁶ the obligations are harmonised to a wider extent, member states have more discretionary powers for defining the obligation of on-demand services¹¹⁷ to contribute to the promotion of European works.

What is crucial in order to determine which rules apply to what audiovisual media services is the definition of territorial jurisdiction – that is, which member state is allowed to regulate. For this purpose the principle of the country of origin, which is at the heart of the AVMSD as it is for any EU provision aimed at ensuring the free circulation of goods or services, is introduced with Article 2(1) AVMSD: “Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State”.

Recital 33 helps with interpreting this article: “The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.”

The criteria determining a member state’s jurisdiction are defined by the following paragraphs (Article 2(2-3) AVMSD), which require considering, in order of priority:

- the state where the media service provider has its head office and where the editorial decisions are taken (if the two coincide);
- if they do not coincide, the state where a significant part of the workforce involved operates;
- if a significant part of the workforce is split among the two, the state where the media service provider has its head office;
- if a significant part of the workforce operates in neither of the two, the state where the media service provider first began its activity in accordance with the law of that member state, provided that it maintains a stable and effective link with the economy of that member state.

¹¹⁶ Article 16(1) of the AVMSD: “Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Article 17 of the AVMSD: “Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to the broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria. It must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within 5 years of their production.”

¹¹⁷ Article 13(1) of the AVMSD: “Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”



In the case of media services originating in third countries, two further criteria are foreseen (Article 2(4)):

- the state where a satellite up-link used by the media service provider is situated;
- if none, the state to which the satellite capacity used by the media service provider appertains.

If none of these criteria are satisfied, according to Article 2(5) AVMSD the residual criteria of establishment according to the TFEU are applicable. As clarified by Recital 40: “Articles 49 to 55 of the TFEU lay down the fundamental right to freedom of establishment. Therefore, media service providers should in general be free to choose the Member States in which they establish themselves”.

The abundance of criteria expresses a clear will to identify the one and only member state that exercises territorial jurisdiction over the concerned media service provider: “[i]n order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the Union, only one member state should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the Union” (Recital 34).

If the main purpose of the principle of the country of origin is to provide legal certainty in identifying the rules applicable to established media service providers, the need to ensure that services that comply with the provisions applicable to them can freely circulate in other member states is its corollary. This is explicated by Article 3(1) AVMSD: “Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other member states for reasons which fall within the fields coordinated by this Directive.”

To counterbalance the risk that the service of a media provider established elsewhere, but received also in another member state may engage in severe and repeated violations of the law of the receiving country, Article 3, paragraphs (2) to (6) foresees a specific procedure to handle such situations, thereby consequently restricting retransmission.

On the other hand, as this is a directive of minimum harmonisation, “Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law” (Article 4(1) AVMSD). Again, the following paragraphs of the Article foresee a procedure to handle conflicts arising from cases of potential circumvention, i.e. media services originating from other member states, but wholly or mostly directed towards the territory of another member state – in other terms cases of abuse of law.¹¹⁸

Given their status as exception clauses, the procedures of Articles 3 and 4 have to be interpreted restrictively.¹¹⁹ Regarding on-demand services, no parallel provision for the

¹¹⁸ The conditions for the application of circumvention procedures have been codified by the CJEU. See e.g. Case C-212/97, *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61997CJ0212>; Case 33/74, *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61974CJ0033>; Case C-23/93, *TV10 SA v Commissariaat voor de Media* [1994] ECR I-4795, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0023>.

¹¹⁹ See the CJEU on the requirement of interpreting the exception restrictively, e.g. Case C-355/98, *Commission v Belgium* [2000] ECR I-1221: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0355>; Case C-348/96, *Calfa* [1999] ECR I-11, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61996CJ0348>.



circumvention of stricter national rules exists; however, the general principles developed by the CJEU also apply to these services.

Due to their complexities, these procedures have been applied in only a handful of cases and most conflicts of jurisdictions are handled on an informal bilateral basis.¹²⁰

2.2.2.2. The e-Commerce Directive

As audiovisual content is delivered over electronic communications networks, the AVMSD might not apply to certain cases, notably because the criteria for editorial responsibility are not fulfilled. In these cases the rules might be determined by the so-called e-Commerce Directive.¹²¹

Again, as in the AVMSD, the country of origin is king. Article 3(1-2) of the Directive establishes that “1. Each Member State shall ensure that the information society services established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field. 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.”

However, contrary to what happens in the AVMSD, Article 3 (3) of the e-Commerce Directive¹²² lists the sectors where this principle is reversed in favour of the country of destination. This is the case for copyright, e-payments, consumer protection and commercial communications.¹²³ As a result, the issue of territoriality is treated differently according to the rights to be protected: in the case of copyright infringement the competent member state is the country where the services are delivered, whereas in the case of content-related issues the member state of establishment has the right to intervene.

As in the AVMSD, specific procedures are foreseen in Article 3 (4) of the e-Commerce Directive in order to allow the country of reception to restrict retransmission on its territory in cases

¹²⁰ For an overview of possible cases of conflict solved on an amical basis, see the reports on the application of the AVMSD and the TVWF: <http://ec.europa.eu/digital-agenda/avmsd-application-reports>. See also the background paper prepared for the EPRA meeting in 2011, Donde M., “Terms of Reference Working Group 1: Jurisdiction”, www.epra.org/attachments/portoroz-wg1-jurisdiction-introduction.

¹²¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 17/1, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>.

¹²² Article 3(3) of the e-Commerce Directive: “3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.”

¹²³ According to the Annex to the e-Commerce Directive:

“As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(1) and Directive 96/9/EC (2) as well as industrial property rights,
- the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC(3),
- Article 44(2) of Directive 85/611/EEC(4),
- Article 30 and Title IV of Directive 92/49/EEC(5), Title IV of Directive 92/96/EEC(6), Articles 7 and 8 of Directive 88/357/EEC(7) and Article 4 of Directive 90/619/EEC(8),
- the freedom of the parties to choose the law applicable to their contract,
- contractual obligations concerning consumer contacts,
- formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated,
- the permissibility of unsolicited commercial communications by electronic mail.”



of severe violations concerning “the protection of minors, the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons”.

But, again, these procedures are particularly complex and time-consuming and, i.a. because of the presence of a devoted network (the “CPC-Network”) dealing with possible conflicts, the relevant cases have been very limited in number.¹²⁴

¹²⁴ Commission staff working document, “Online services, including e-commerce, in the Single Market”, SEC(2011) 1641 final, 11 January 2012, http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf.





3. National legal framework

3.1. The clearance of rights in the EU audiovisual sector

3.1.1. The particularities of the audiovisual work

The way audiovisual works are produced and marketed is quite different from other copyrightable works such as musical works. Firstly, they involve a potentially large number of original right-holders. Depending on the country, this may include the screenwriter, film director, composer of the original music soundtrack as authors. Furthermore, this also includes all artists involved as holders of neighbouring rights. Secondly, audiovisual works are normally more expensive to produce than musical works. Thirdly, the audiovisual work as a product suffers from cultural barriers to circulation (in particular language). Finally, the audiovisual industry is not as well-organised collectively as the music industry.

In theory, the producer of an audiovisual work should be in a position to give multi-territorial licences. But in Europe this is rarely the case for different reasons that are not always of a strictly legal nature. As mentioned in chapter 1 of this publication, in Europe financing methods often include pre-sales of broadcasting and online rights on a country-by-country basis, so very often exploitation rights for a given country have already been presold and are not in the hands of the producer anymore. Also, in co-productions it is common that each co-producer retains exploitation rights for its respective country.¹²⁵

3.1.2 The clearance of rights and the special case of musical rights

In order to produce an audiovisual work, a producer usually has to clear all rights needed for the production and exploitation of the work. To this end, s/he has to reach agreements with all the creative parties involved in the production (e.g. film director, cinematographer, composer of the soundtrack, actors), as well as with all the right-holders of works used in the film (e.g. the author of a novel adapted for the screen). After this clearance process, s/he is in a position to negotiate licensing agreements with third parties for the distribution and exploitation of the work.

The contractual agreements between producer and participants in the production of an audiovisual work are normally made on a personal basis. There is a main exception to this principle:

¹²⁵ See Enrich E., "Legal Aspects of International Film Co-Production", European Audiovisual Observatory, Strasbourg, 2005.



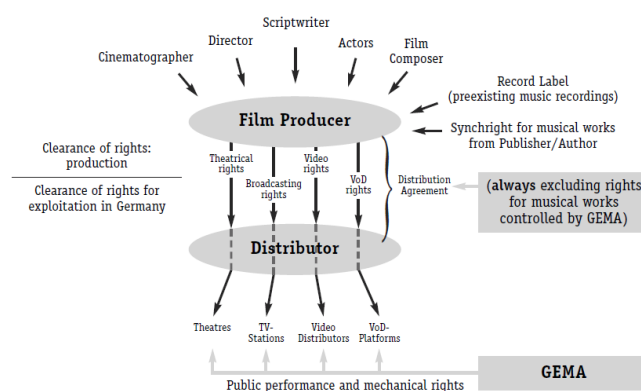
musical works included in an audiovisual work.¹²⁶ Here the intervention of a CMO has become the rule. In order to provide a film with a music soundtrack, a film producer has two basic options:

- to use pre-existing music, such as songs, classical music or production music; or
- to have a composer write original music for the film.

Composers (and music publishers) are remunerated through the Synchronisation Licence fee¹²⁷ paid by the film producer and record companies are remunerated through the Master Use License fee.¹²⁸ Otherwise, national CMOs are usually in charge of granting licences, collecting remuneration for the different uses of the musical work included in the film and distributing them to the right-holders they represent.¹²⁹ In the case of television programmes, CMOs provide broadcasters with blanket licences to facilitate the use of their entire repertoire (for broadcasting purposes only). Given that broadcasters use an enormous amount of music in their programmes, it would be highly complicated for both broadcasters and CMOs to negotiate the use of each musical work separately.

For example, in Germany, composers, songwriters and music publishers assign on an exclusive basis their rights to the GEMA.¹³⁰ The following graphs show the rights clearance process for a German cinematographic work:

Figure 3 – Rights clearance process for a German cinematographic work



Source: Ventroni S., *Copyright Clearance and the Role of Copyright Societies, IRIS Special, Legal Aspects of Video on Demand, European Audiovisual Observatory, 2007.*

¹²⁶ For further information on this topic see Cabrera Blázquez F.J., above note 3.

¹²⁷ The Synchronisation Licence gives the licensee the right to use a musical composition as part of the film soundtrack. The licence must be obtained from the original copyright owner, that is, the composer of the musical work, as well as the writer of the lyrics. Since most composers/lyricists have their work administered by a publishing company through a music publishing agreement, the right to grant Synch licences is usually vested in the publishing company.

¹²⁸ The Master Use licence provides the licensee with the right to incorporate a sound recording into the film soundtrack and defines, inter alia, the modes of exploitation of the sound recording, the geographical scope of the licence and its duration. The Master Use right belongs to the producer of the recording, who has previously obtained all rights in the recording from performing artists through a recording agreement. In cases where the performing artists have produced their own recordings themselves, they are the owners of the sound recording.

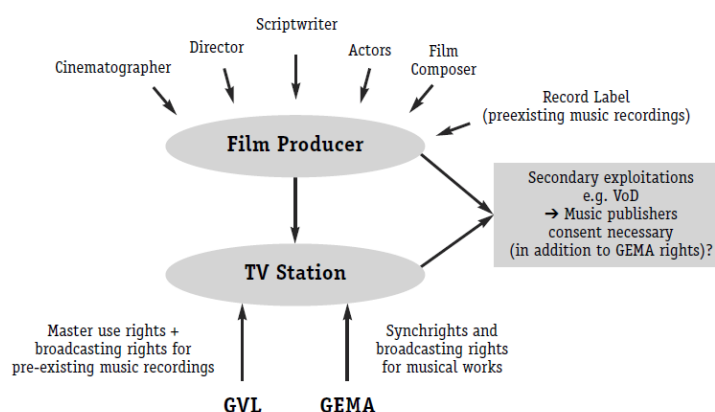
¹²⁹ See *infra* note 130.

¹³⁰ Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (<https://www.gema.de>). Since not all composers are GEMA members, some film productions actually use so-called "GEMA-free music". In such cases, producers do not have to ask GEMA for permission to use the music nor to pay any royalties to GEMA. However, according to the case law of the Bundesgerichtshof (German Federal Supreme Court), the producer has to prove that the music used in the film is actually GEMA-free. If the legal situation is not clear, it is presumed that the music belongs to the GEMA repertoire. This is called the *GEMA-Vermutung* (GEMA-presumption).



The way rights are cleared for a TV film in Germany differs because the synch rights for the TV stations owned or commissioned productions, as well as the rights for broadcasting and other exploitation, are granted by GEMA and the master use rights and broadcasting rights in the music recordings are granted by another CMO, the Gesellschaft zur Verwertung von Leistungsschutzrechten (GVL) (i.e. not by the record labels themselves).¹³¹

Figure 4 – Rights clearance process for a German TV film



Source: Ventroni S., *Copyright Clearance and the Role of Copyright Societies*, IRIS Special, Legal Aspects of Video on Demand, European Audiovisual Observatory, 2007.

3.1.3. The role of collective management organisations (CMOs)

The authors of an audiovisual work can join a variety of different organisations to collectively defend their interests: unions, guilds, associations and/or CMOs. National CMOs have a special role since they act on behalf of their members, negotiate rates and terms of use with users, issue licences authorising uses and collect and distribute royalties.¹³² According to the Society of Audiovisual Authors (SAA),¹³³ which represents the interests of the collective management societies and their audiovisual authors members at the European level, the two major rights that are currently managed collectively which result in payments for audiovisual authors¹³⁴ in Europe are cable retransmission and private copying, in the countries where levies exist. Depending on the country,

¹³¹ If these TV productions are exploited on DVD or offered on VoD platforms (secondary exploitation), it is unclear under German law (and not yet decided by the German Supreme Court) whether such secondary exploitations require the authors/music publishers' consent. See Ventroni S., "Copyright Clearance and the Role of Copyright Societies" in Nikoltchev S. (ed.), *Legal Aspects of Video on Demand*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2007, http://www.obs.coe.int/en/shop/irisspecial/-/asset_publisher/A0cy/content/iris-special-2007-2?_101_INSTANCE_A0cy.

¹³² According to WIPO, this is the definition of a traditional CMO. There are various kinds of CMOs or groups of such organisations, depending on the category of works involved (music, dramatic works, "multimedia" productions, etc.) that will collectively manage different kinds of right. See www.wipo.int/copyright/en/management.

¹³³ See www.saa-authors.eu.

¹³⁴ The collective management organisations of SAA represent two key author groups: screenwriters and directors. But under various pieces of legislation, music composers, cinematographers, designers, editors and, in the case of common law countries, even producers can also be considered authors. There is currently only limited harmonisation of authorship in audiovisual works at European level, so the definition and identification of the authors of audiovisual works can vary from country to country. See, SAA White Paper, "Audiovisual authors' rights and remuneration in Europe", www.saa-authors.eu/dbfiles/mfile/7500/7566/SAA_White_Paper_2015.pdf.



other secondary rights, like the rental and public lending rights, are collectively administered and result in additional payments for audiovisual authors. In addition, in a few countries (e.g. France, Belgium or Bulgaria) collective management organisations representing audiovisual authors are contractually entitled to collect on behalf of their members for the TV broadcasting of their works. In some other countries (e.g. Spain, Italy, Poland) the final distributor, usually the broadcaster, is considered by law to be responsible for payments to the author. These are also paid through a collective management organisation.

3.2. The country of origin principle in the financing of audiovisual works

How member states shape their policies for the promotion of audiovisual works is decisive for their financing. Some national rules result directly from implementing the AVMSD; others express national specificities and contain more detailed obligations. The question is whether or not the country of origin principle allows a member state to exercise its jurisdiction over all services that are provided on its territory and whether this has an impact on the financing of audiovisual works and the promotion of European culture.

Considering linear services, the obligations may have various sources: primary law, secondary regulation, specific public service obligations, the licence itself. The type of obligation can also vary considerably: some countries may decide to stick to what is stated in Articles 16 and 17 of the AVMSD (minimum harmonisation), whereas others may introduce stricter rules, e.g. specific quotas for certain types of audiovisual works, such as films or documentaries, or for programmes in a certain original language. As outlined above, this is allowed under Article 3 AVMSD.¹³⁵

The picture is quite fragmented across Europe when it comes to the choices for involving on-demand providers and/or distributors of pay-TV services in film financing. Many EU countries impose legal obligations to contribute to funds or to directly invest in production, but short of a specific EU-wide required scheme, this is a non-harmonised zone. Just to mention a few models:

- Italy¹³⁶ and Spain,¹³⁷ have opted for investment obligations;
- Germany¹³⁸ has introduced contribution obligations to the Filmförderungsanstalt;
- The French Community of Belgium¹³⁹ has left the choice open between investment obligations and contributions to the Centre du cinéma et de l'audiovisuel;

¹³⁵ See paragraph 2.2.2.1. of this publication.

¹³⁶ *Decreto Legislativo 15 marzo 2010, n. 44, "Attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive", <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig=>.*

¹³⁷ *Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, BOE Núm. 79 de 1 de abril de 2010, www.boe.es/buscar/pdf/2010/BOE-A-2010-5292-consolidado.pdf.*

¹³⁸ *Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz–FFG) in der Fassung der Bekanntmachung vom 24. August 2004 (BGBl. I S. 2277) zuletzt geändert durch das Sechste Gesetz zur Änderung des Filmförderungsgesetzes vom 31. Juli 2010 (BGBl. I S. 1048, in Kraft getreten am 6. August 2010: <http://www.ffa.de/ffg.html>.*

¹³⁹ *Arrêté du Gouvernement de la Communauté française portant coordination du décret sur les services de médias audiovisuels du 26 mars 2009, published at the Moniteur belge of 24 July 2009, CSA consolidated version,*

gesetzwww.francophonie.org/IMG/pdf/decret_sur_les_services_de_medias_audiovisuels.pdf.

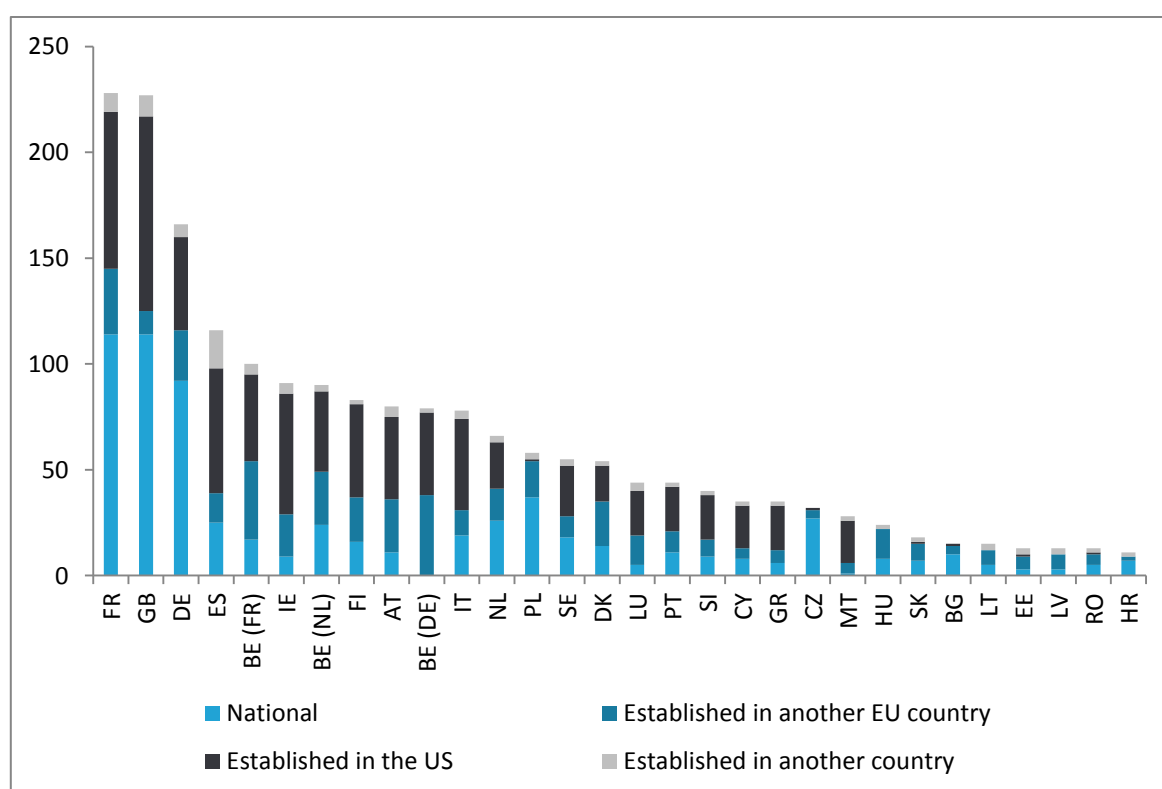


- France¹⁴⁰ has opted for a combination of the two, foreseeing both investment obligations and contributions to the Centre national du cinéma et de l'image animée.

These mandatory obligations, both in the case of linear and non-linear services, are laid down in film support legislation, tax law or in the laws transposing Article 13 AVMSD and they rely on the principle of territorial jurisdiction over the services to which they apply. In other words, because a given service originates in a given country, this country's rules apply to the service. Furthermore, it is again the country of establishment (of origin) that determines which sanctions follow in case of non-compliance.

The development of pan-European on-demand services, such as iTunes, Netflix, Amazon or Instant Video, established in EU countries that do not impose on them obligations to promote European works may jeopardise these mechanisms, though being formally legitimate.

Figure 5 - Number of VoD services available in the EU by country of establishment

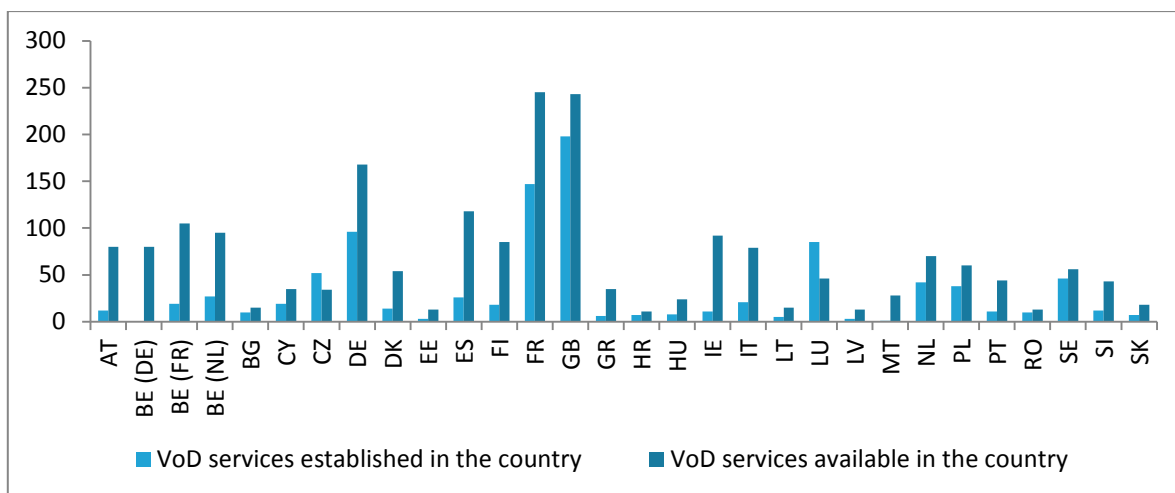


Source: European Audiovisual Observatory elaboration on MAVISE database, June 2015.

¹⁴⁰ Décret n°2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande, www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023038244&categorieLien=id.

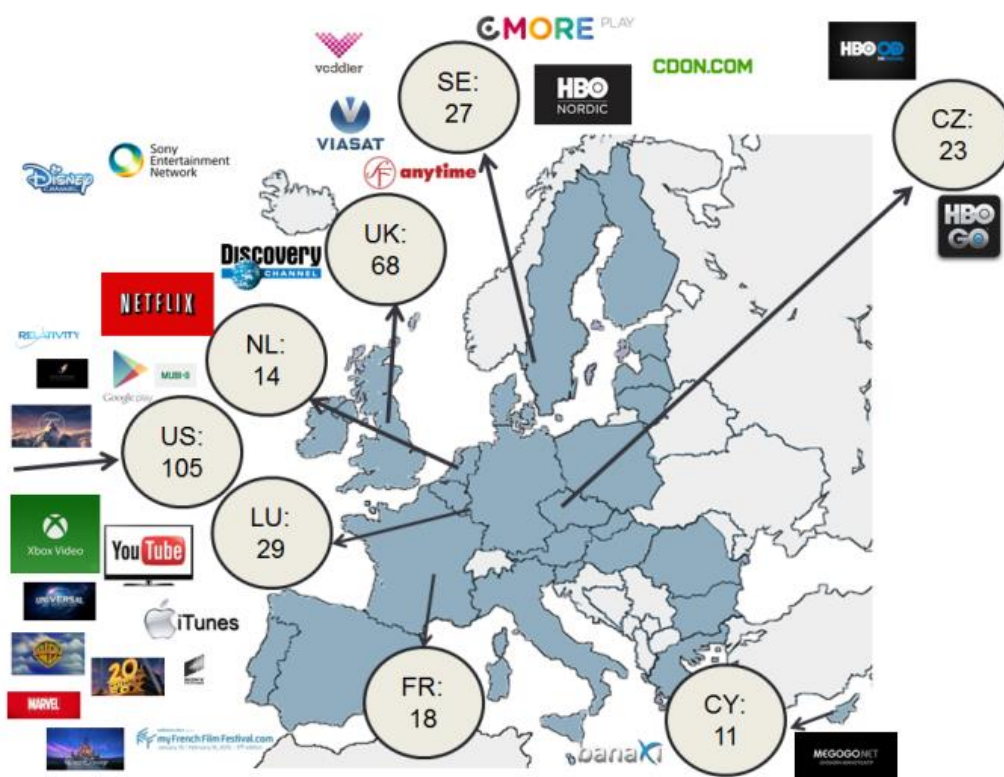


Figure 6 - VoD services established and available in each country



Source: European Audiovisual Observatory elaboration on MAVISE database, June 2015.

Figure 7 - Multi-country approach of VoD services



Source: European Audiovisual Observatory elaboration on MAVISE database, June 2015.



Jurisdiction shopping is not an unfamiliar concept, in the sense that operators might wish to choose the country of establishment, and thus of jurisdiction, according to the rules that would become applicable and be most beneficial to them.¹⁴¹ For this reason some countries have started to adopt specific rules aimed at bringing these services under their regulatory framework.

This has so far been the case of Germany and France.

In Germany cinema operators, broadcasters, video distributors and on-demand service providers are required to financially contribute to the promotion of the film industry through the *Filmförderungsgesetz*, which requires the payment of a special levy (*Filmabgabe*) to the German film support agency (Filmförderungsanstalt) based on their income from film exploitation. In July 2013, the law was amended and Section 66a(2) now stipulates that VoD service providers not established in Germany will be subjected to the film levy in respect of income that they derive from selling services on German-language websites to customers in Germany, provided that these transactions are not subject to any comparable financial contribution to the promotion of cinematographic works by a film funding institution in the service's country of origin.¹⁴²

As required, the new measure was notified to the European Commission. By letter of 17 October 2014, the Commission expressed its "doubts as to the compatibility with the internal market of the notified amendment", as it could be "in contravention of Article 13(1) AVMSD in combination with Articles 2 and 3 AVMSD".¹⁴³

Since this measure involves para-fiscal charges, the Commission also questioned the compatibility of the measure under Article 110 TFEU, according to which no member state shall impose on the products of other member states a tax which it does not impose on similar domestic products. As the foreign providers of German language films would apparently benefit indirectly from the support of film production in Germany in the same way as their German competitors, this is another path of investigation for the Commission.

France has acted in a similar way, also taxing the revenues of foreign video retailers. The budget law 2013 expanded the scope of the general rule applicable to VOD providers not established in France, but providing their services on the French territory.¹⁴⁴ More precisely, the tax concerns

¹⁴¹ Machet E. and Dupont C., "Content regulation and New Media: Jurisdiction Challenges in a VOD environment", background document prepared for the EPRA meeting in 2011, <http://www.epra.org/attachments/brussels-2011-plenary-1-jurisdiction-vod-background-paper>. On the year-long conflict between Belgium and Luxembourg, see Laurent P. and Sasserath O., "RTL Group Wins Battle against the CSA", IRIS 2009-4/5, European Audiovisual Observatory, Strasbourg, 2009, <http://merlin.obs.coe.int/iris/2009/4/article5.en.html>.

¹⁴² Section 66a(2) of the *Filmförderungsgesetz*: "Für Anbieter von Videobrufdiensten, die weder einen Sitz noch eine Niederlassung im Inland haben, gilt die Abgabepflicht nur für Angebote über einen Internetauftritt in deutscher Sprache in Bezug auf die Umsätze, die sie mit Kunden in Deutschland erzielt haben, und nur wenn diese Umsätze nicht am Ort des Unternehmenssitzes zu einem vergleichbaren finanziellen Beitrag zur Förderung von Kinofilmen durch eine Filmförderungseinrichtung herangezogen werden", www.gesetze-im-internet.de/ffg_1979/_66a.html.

¹⁴³ State aid SA.38418 (2014/N) (ex 2014/N) – Germany, *Filmförderungsgesetz*, Decision of the European Commission to initiate the formal investigation procedure of 17 October 2014, http://ec.europa.eu/competition/state_aid/cases/254981/254981_1599283_12_2.pdf.

¹⁴⁴ Article 1609 sexdecies B of the Code général des impôts, as amended by Article 30 of *Loi de finances rectificative pour 2013* (Law no. 2013-1279 of 29 December 2013) (Supplementary budget law for 2013): "Il est institué, à compter du 1er juillet 2003, une taxe sur les ventes et locations en France, y compris dans les départements d'outre-mer, de vidéogrammes destinés à l'usage privé du public.

Pour l'application du présent article, est assimilée à une activité de vente ou de location de vidéogrammes la mise à disposition du public d'un service offrant l'accès à titre onéreux à des oeuvres cinématographiques ou audiovisuelles, sur demande individuelle formulée par un procédé de communication électronique.

Cette taxe est due par les personnes, qu'elles soient établies en France ou hors de France, qui vendent ou louent des vidéogrammes à toute personne qui elle-même n'a pas pour activité la vente ou la location de vidéogrammes. (...)", http://legifrance.gouv.fr/affichCodeArticle.do;jsessionid=41DBBDD3BFAB7313DFE1D6D27BF8926A.tpdila07v_2?idArticle=LEGIARTI00002_8448150&cidTexte=LEGITEXT000006069577&categorieLien=id&dateTexte=22220222.



sales and rentals of videograms for private use of members of the public and the provision of a paid service providing individual access to cinematographic or audiovisual works in response to an individual request made by electronic means.

The law has been notified to the European Commission and will enter into force only after the response of the Commission.¹⁴⁵ No official texts are available at the date of publication of this report.

These two national initiatives appear as countermeasures to the limits shown by the principle of the country of origin in a technological context, which is quite different from the one at the time of the adoption of the AVMSD in 2007. The provision of audiovisual media services over IP protocols does not fall under the classical categorisation allowed by services delivered over terrestrial or satellite networks and leads to questioning the exclusion clause foreseen by Article 2(6) AVMSD: "This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more member states."

Even though broadband connections for streaming video do not fall under the concept of universal service under the e-communications package, it can be argued that they eventually can be "received with standard consumer equipment". Therefore the issue of which audiences are targeted by certain services is not always self-explanatory. Still it is difficult to conclude that the provision of VOD catalogues by non-EU companies qualifies as a universal service.

¹⁴⁵ *NOTA: Loi n° 2013-1279 du 29 décembre 2013 de finances rectificative pour 2013, art. 30 IV B : "[Cette disposition] entre en vigueur à une date fixée par un décret, qui ne peut être postérieure de plus de six mois à la date de réception par le Gouvernement de la réponse de la Commission européenne permettant de regarder le dispositif législatif lui ayant été notifié comme conforme au droit de l'Union européenne en matière d'aides d'Etat."*



4. Self-initiatives from the industry to facilitate cross-border access and portability of services

In its Communication on Content in the Digital Single Market of 18 December 2012¹⁴⁶ the European Commission sets out two parallel courses of action with the aim of easing the cross-border circulation of content in the Digital Single Market. One sought to facilitate practical industry-led solutions through the stakeholder dialogue “Licences for Europe”,¹⁴⁷ the other one consists of reviewing the EU copyright legislative framework in order to decide on whether or not to table legislative reform.

The objective of the “Licences for Europe” dialogue was to discuss among industry stakeholders issues on which rapid progress was deemed necessary and feasible and to reach agreements or commitments whenever possible. This section will describe the main discussions and achievements obtained through this initiative with respect to cross-border access and the portability of audiovisual services in the EU.

4.1. Licences for Europe: “Ten pledges to bring more content online”

The Commission launched the “Licences for Europe” stakeholder dialogue in February 2013. One of the thematic working groups – Working Group 1 – of this dialogue discussed “Cross-border access and portability of services: how to foster cross-border online access and ‘portability’ of content across borders, taking into account new developments like cloud computing and cross-border legal access to cloud-stored content and services. How to deliver practical solutions to promote multi-territory access and to eliminate cross-border sales restrictions.”

Following this initiative, which was held under the auspices of the European Commission,¹⁴⁸ stakeholders agreed on a series of actions to be carried out, that were summarised in the document published by the Commission, “Ten pledges to bring more content online”¹⁴⁹ that was presented at the plenary meeting on 13 November 2013. With respect to the cross-border portability of subscription services, representatives of the audiovisual sector¹⁵⁰ issued a statement affirming their

¹⁴⁶ See Communication from the Commission on content in the Digital Single Market, COM/2012/0789 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0789&from=EN>.

¹⁴⁷ See <http://ec.europa.eu/licences-for-europe-dialogue/>.

¹⁴⁸ Internal Market Commissioner Michel Barnier, Digital Agenda Commissioner Neelie Kroes and Education, Culture, Multilingualism and Youth Commissioner Androulla Vassiliou.

¹⁴⁹ “Licences for Europe - Ten pledges to bring more content online”, http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

¹⁵⁰ Association of Commercial Television (ACT), European Coordination of Independent Producers (CEPI), Europa Distribution, EUROVOD, Federation of European Film Directors (FERA), International Federation of Film Distributors Associations (FIAD), International Federation of



willingness to continue to work towards the further development of cross-border portability, so that consumers will increasingly be able to watch films, TV programmes and other audiovisual content to which they have subscribed at home when travelling in the EU on business or holidays, as this is already largely the case with music, e-books, magazines and newspapers.

4.1.1. Problems identified and proposed solutions

During the discussions, cross-border portability was defined as the ability for users of subscription-based services to access these services also when physically in a member state other than that of the subscription.

Some stakeholders highlighted that some level of cross-border availability of content already exists and that some services enable consumers to technically view audiovisual content on different devices (tablets, TV, etc.) anywhere they are. They pointed out that technology and solutions allowing the matching between users and rights have emerged and that allowing cross border portability would not break the value chain, as long as there is a closed environment that allows tracking all usages accurately. The group had some discussion as to whether and to what extent these solutions combined with a more targeted approach to licences could facilitate the cross-border portability of content.

Collective management organisations presented on-going initiatives to facilitate multi-territorial licences, particularly through aggregation of rights onto a common platform.¹⁵¹ At the same time, territorial (national or regional) exploitation continued to be seen by a number of participants as instrumental to gathering the financial resources necessary for the production of films in the EU.

Some participants observed that there are no legal obstacles to multi-territorial licensing. They considered that multi-territorial licensing happens rarely, because of a choice of the different market players. In some cases, film distribution is actually licensed across borders, for example in linguistically homogeneous areas or in specific regions of Europe, such as Nordic countries.

Film Producers Associations (FIAPF), Independent Film & Television Alliance (IFTA), International Video Federation (IVF), Motion Picture Association (MPA), Sports Rights Owners Coalition (SROC), Society of Audiovisual Authors (SAA).

¹⁵¹ Some initiatives were already launched previously with a view to facilitating the multi-territory licensing of audiovisual works. This is the case, for example, of the FRAME working group (“Facilitate Authors’ Rights Access for Audiovisual Media in Europe”), an initiative by 15 European audiovisual authors’ CMOs which was created in order to provide a simple, easy-to-use portal for authors, digital service providers and ultimately consumers and to promote the multi-territory licensing of audiovisual works in Europe. The platform was meant to:

- Manage the online rights of several European audiovisual authors CMOs’ repertoires;
- Offer digital service providers multi-territorial agreements for the use of these aggregated repertoires;
- Ensure remuneration for screenwriters and directors for the use of their works by DSPs;
- Efficiently and accurately claim and distribute remuneration for online exploitation.

FRAME would only clear authors’ rights with providers that have already acquired the exploitation rights from the legal holders of these rights. According to FRAME, there are several problems for the multi-territory licensing of audiovisual works:

- The wholesale global assignment of audiovisual authors’ rights to the audiovisual producer has the effect that few audiovisual authors (via their CMOs) retain the right to authorise the online dissemination of their works – cross-border or otherwise;
- Different regimes prevail in different member states in respect of the collection and distribution of secondary remuneration intended to reward audiovisual authors for ongoing exploitation;
- Lack of a harmonised tax regime across the Union makes cross-border licences expensive because of double taxation.

FRAME remains uncertain concerning the extent to which EU competition law may prejudice cross-border solutions being sought between CMOs.

For more information of the FRAME working group, see, www.saa-authors.eu/en/209/FRAME.



Commercial broadcasters also mentioned the importance of exclusive territorial distribution. They highlighted that the level of cross-border online availability depends on the type of content (news, own-productions, sport, premium content) and the tendency is to geo-block content with higher commercial value. They also pointed out that consumer demand for cross-border services remains marginal.

4.1.2. Joint statement on cross-border portability of lawfully-acquired audiovisual content

A final Joint Statement¹⁵² was eventually issued by representatives of the audiovisual sector,¹⁵³ in which they affirmed their “continued interest in the development of cross-border portability of lawfully acquired audiovisual content through relevant services when travelling abroad and their willingness to continue to work towards its further development where economically sustainable, provided that content can be made secure and taking into account cultural diversity”.

The signatories made successful developments in cross-border portability of lawfully-acquired audiovisual content subject to the following requirements:

- a voluntary, market-led approach with the freedom for market operators to experiment with new business models, taking into account the fast moving evolution in digital EU marketplaces;
- industry initiatives that depend on clear market signals, rooted in actual and demonstrable consumer demand, as well as secure technology enabling and managing individual access by authorised users;
- commercial and contractual freedoms;
- differentiated financing and distribution strategies for each type of audiovisual content, stressing the importance of raising and maximising distribution revenues in order to maintain the sustainability and competitiveness of the audiovisual content industries in Europe; and
- full compliance with EU competition law and principles governing consumer information.

Accordingly, the signatories proposed to “engage with the Commission at a mutually agreed time to continue the review of future market developments regarding cross-border portability of lawfully acquired audiovisual content”.

¹⁵² Licences for Europe – Structured Stakeholder Dialogue 2013 - WG 1 Audiovisual Subgroup- Joint Statement on Cross-border Portability of lawfully-acquired Audiovisual Content,

<http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/1-AV-portability.pdf>.

¹⁵³ The signatories are the Association of Commercial Television (ACT), European Coordination of Independent producers (CEPI), Europa Distribution, EUROVOD, Federation of European Film Directors (FERA), International Federation of Film Distributors Associations (FIAD), International Federation of Film Producers Associations (FIAPF), Independent Film & Television Alliance (IFTA), International Video Federation (IVF), Motion Picture Association (MPA), Sports Rights Owners Coalition (SROC) and Society of Audiovisual Authors (SAA).



4.1.3. Joint statement of independent VoD platforms

The network of independent Video on Demand platforms EuroVoD also expressed in a statement¹⁵⁴ its interest in developing and implementing solutions for cross-border access of Subscription VoD offers, as well as availability of several language versions, in accordance with rights granted. The EuroVoD platforms recognised that they can propose to their subscribers the possibility of having access to films available within their SVoD offers when travelling abroad and that this type of access is technically possible for the web-based services developed and operated by them.

In order to do so, the EuroVoD platforms can apply a combined identification system for subscribers using their IP (geolocation) and their user account (bank card used for payment). According to EuroVoD, when subscribing to the service, users declare their country of residence as the same as the territory where the platform operates and accept the terms and conditions of use of the service. At this stage, users are identified through their IP and they can also pay with a foreign bank card. When travelling abroad, users can have access to the SVoD offer they have subscribed to, thanks to identification through their user account and bank card. As further detailed in the statement, if consumption is done exclusively from abroad for a certain period of time, users receive alerts and warnings for not respecting the terms and conditions of use. Access to the service can be shut down. EuroVoD platforms also highlighted that SVoD offers already propose this type of access to their premium subscribers and that for films they have specific exploitation rights.

¹⁵⁴ See <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/EuroVoD%20Statement.pdf>.



5. Case law and interpretative issues

5.1. The principle of territoriality in the jurisprudence of the CJEU

5.1.1. From *Coditel* to *Sportradar*: territoriality reaffirmed

The Court of Justice of the European Union has confirmed in several judgments the principle of territoriality in copyright law. The first two of those judgments were made before the onset of the harmonisation process of copyright law in the EU. The CJEU (at the time still called the Court of Justice of the European Communities) had to decide on two cases (the *Coditel* cases) concerning territorial exclusivity in broadcasting. In the *Coditel I* case (C-62/79),¹⁵⁵ the Court held that the provisions of the Treaty concerning the freedom to provide services did not preclude an assignee of the performing right in a cinematographic film in a member state from relying upon his right to prohibit the exhibition of that film in that state when the film is picked up and retransmitted via cable after being legally broadcast in another member state by a third party. In the *Coditel II* case (Case 262/81),¹⁵⁶ the Court ruled that a contract granting an exclusive right to exhibit a film for a specific period in the territory of a member state is not, as such, subject to the prohibitions concerning agreements between undertakings contained in Article 85 of the Treaty of Rome (now Article 101 TFEU), an exception made of special cases in which an exclusive right is exercised in such a way that prevents or restricts the distribution of films or distorts competition on the cinematographic market, “regard being had to the specific characteristics of that market”.

Further judgments in more recent years have confirmed the principle of territoriality with regard to the application of different copyright-related directives:

- In the *Lagardère* case (C-192/04)¹⁵⁷ the CJEU emphasised that Directive 92/100/EEC on the rental right and lending right provides for minimal harmonisation regarding rights related to copyright and therefore “it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory”.

¹⁵⁵ Judgment of the Court of 18 March 1980, Case 62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61979CJ0062>.

¹⁵⁶ Judgment of the Court of 6 October 1982, Case 262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others*, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61981CJ0262>.

¹⁵⁷ Judgment of the Court (Third Chamber) of 14 July 2005, Case C-192/04, *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*, <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=60584&occ=first&dir=&cid=488130>. For a full description of the judgment see Rossini M., “Court of Justice of the European Communities: Judgment in *Lagardère Active Broadcast V. SPRE & GVL*”, IRIS 2005-7:Extra, European Audiovisual Observatory, Strasbourg, 2005, <http://merlin.obs.coe.int/iris/2005/7/article110.en.html>.



- In the *Stichting De ThuisKopie* case (C-462/09),¹⁵⁸ the CJEU delivered a preliminary ruling concerning the interpretation of the private copying exception included in Art. 5(2)(b) of the InfoSoc Directive. The Court concluded that “if a Member State has introduced an exception for private copying into its national law and if the final users who, for private use, reproduce a protected work reside on its territory, that Member State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the authors on the territory of that State.”
- In the *Donner* case (C-5/11),¹⁵⁹ the CJEU decided that “a trader who directs his advertising at members of the public residing in a given member state and creates or makes available to them a specific delivery system and payment method, or allows a third party to do so, thereby enabling those members of the public to receive delivery of copies of works protected by copyright in that same member state, makes, in the member state where the delivery takes place, a ‘distribution to the public’” under Article 4(1) InfoSoc Directive.
- In the *Sportradar* case (C-173/11),¹⁶⁰ the CJEU confirmed the principle of territoriality for the *sui generis* right: the objective of Directive 96/9 “requires all the Member States to make provision in their national law for the protection of databases by a *sui generis* right. In that context, the protection by the *sui generis* right provided for in the legislation of a member state is limited in principle to the territory of that member state, so that the person enjoying that protection can rely on it only against unauthorised acts of re-utilisation which take place in that territory.”

5.1.2. Premier League: territoriality revisited

These judgments confirm, or at least do not fundamentally challenge, the principle of territoriality in copyright law. However, the judgment of the CJEU in the *Premiere League* cases¹⁶¹ has been identified by some as constituting the first crack in the wall of territorial exclusivity agreements in the audiovisual sector. The case involved the acquisition and use of foreign decoder cards in the UK providing access to encrypted satellite transmissions from Greece of British Premier League football matches. These foreign decoder cards are very popular in the UK, since they make it possible to watch Premier League football matches on TV and they are much cheaper than those commercially available in the UK. People living in the UK who want to acquire these cards have to resort to tricks, such as giving a false identity and a false address, with the intent of circumventing the territorial restrictions put in place. The right-holder of the Premier League’s broadcasting rights, the Football Association Premier League (FAPL), concludes licence agreements with broadcasters that grant them

¹⁵⁸ Judgment of the Court (Third Chamber) of 16 June 2011, Case C-462/09, *Stichting de ThuisKopie v Opus Supplies Deutschland GmbH and Others*: <http://curia.europa.eu/juris/document/document.jsf?docid=85089&doclang=en>. For a full description of the judgment see Breemen V., “Court of Justice of the European Union: Preliminary Ruling in Dutch ‘ThuisKopie’-Case”, IRIS 2011-7/2, European Audiovisual Observatory, Strasbourg, 2011: <http://merlin.obs.coe.int/iris/2011/7/article2.en.html>.

¹⁵⁹ Judgment of the Court (Fourth Chamber) of 21 June 2012, Case C-5/11, Criminal proceedings against Titus Alexander Jochen Donner, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=124189&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=494654>.

¹⁶⁰ Judgment of the Court (Third Chamber) of 18 October 2012, Case C-173/11, *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG*, <http://curia.europa.eu/juris/document/document.jsf?docid=128651&doclang=en>.

¹⁶¹ Judgment of the Court (Grand Chamber) of 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*, <http://curia.europa.eu/juris/document/document.jsf?docid=110361&doclang=en>.



exclusive broadcasting rights for the live transmission of the Premier League matches on a territorial basis. The licence agreement includes the broadcaster's obligation to encrypt its satellite signal and prohibits broadcasters from supplying decoder cards to persons not living in the member state for which the licence was granted.

The FAPL initiated judicial proceedings in order to stop the import of decoder cards from Greece into the United Kingdom. Case C-403/08 concerns civil law actions brought by the FAPL against the use of foreign decoder cards. Case C-429/08 concerns criminal proceedings brought against the landlady of a pub that used a Greek decoder card to show Premier League football matches. The High Court of England and Wales referred several questions concerning both sets of proceedings to the CJEU on the interpretation of EU law. In her opinion of 3 February 2011¹⁶² Advocate General Juliane Kokott stated that the imposition of exclusivity has the effect of segmenting the internal market into national markets, something which constitutes a restriction of the freedom to provide services. She insisted on the fact that the economic exploitation of the rights in question does not require a partitioning of the internal market, as the charges corresponding to the foreign decoder cards had been paid. According to the Advocate General, it forms part of the logic of the internal market that price differences between the member states should be offset by trade.

In its judgment the CJEU held that provisions in UK law that prohibit the import, sale or use of foreign decoder cards conflict with the freedom to provide services enshrined in Article 56 TFEU and cannot be justified by the objective of protecting intellectual property rights, since the Greek broadcasts were duly licensed by the Premier League and charges for the foreign decoder cards were being paid. Such foreign cards were held not to be "illicit devices" within the meaning of the Conditional Access Directive.¹⁶³ According to the CJEU, the definition of an "illicit device" does not cover foreign decoding devices procured or enabled by the provision of a false name and address or foreign decoding devices which have been used in breach of a contractual limitation permitting their use only for private purposes. Article 56 TFEU precludes legislation of a member state which makes it unlawful to import into and sell and use in that state foreign decoding devices which give access to an encrypted satellite broadcasting service from another member state that includes subject-matter protected by the legislation of that first state.

But probably the most important part of the decision concerns the system of territorial exclusive licence agreements put in place by the FAPL. The CJEU held that clauses that forbid the broadcaster from supplying decoding devices that would enable access to the right-holder's subject-matter (protected against use outside the territory under the licence agreement) constitute a restriction on competition prohibited by Article 101 TFEU. According to the Court, "the mere fact that the right-holder has granted to a sole licensee the exclusive right to broadcast protected subject-matter from a member state, and consequently to prohibit its transmission by others, during a specified period is not sufficient to justify the finding that such an agreement has an anti-competitive object". However, partitioning markets with the sole aim of creating artificial price differences between member states and thereby maximising profits (price discrimination) is irreconcilable with the Treaty. In this case such territorial restrictions do not qualify for an exemption under Article 101(3) TFEU (contributing to improving the production or distribution of

¹⁶² Opinion of Advocate General Kokott, Cases C-403/08 and C-429/08, 3 February 2011,

<http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=1&part=1&mode=lst&docid=84316&occ=first&dir=&cid=678351>.

¹⁶³ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0084:EN:HTML>.



goods or to promoting technical or economic progress). According to the Court, copyright law does not guarantee right-holders the opportunity to demand the highest possible remuneration. They are ensured only appropriate remuneration for each use of the protected subject-matter. In order to be appropriate, such remuneration must be reasonable in relation to the economic value of the service provided. In particular, it must be reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service. Licence income from encrypted satellite transmissions can be based on actual audiences both in the member state of the broadcast and in other states where the broadcasts are received. But in this case, the right-holders received a premium payment in exchange for the guarantee of an absolute territorial exclusivity. This, in turn, led to artificial price differences between the partitioned national markets.

Is this case a game changer? This judgment was initially considered by some as “groundbreaking” and “likely to have far-reaching ramifications for current business practices in the broadcasting sector”, not only concerning sports, but also motion pictures and other premium content offered by satellite pay-TV services and even web-based television services and other online content services that are territorially restricted through the use of geo-blocking technical measures.¹⁶⁴ However, according to a report on sports organisers’ rights prepared for the European Commission,¹⁶⁵ so far little seems to have changed. The Premier League responded to the judgment by introducing new contractual conditions that could leave consumers everywhere in the EU worse off.¹⁶⁶

- Licensees are no longer allowed to offer an optional English language feed to their consumers. They can only transmit Premier League matches with the commentary in the language of that country. The English language feed is now limited to UK and Irish licensees.
- Non-UK licensees are no longer allowed to transmit more than one live Premier League match on Saturday afternoon. Italian broadcasters were even forced to stop the live broadcasting of any match kicked off on a Saturday at 3 pm, because the Fox Sport Italia signal kept being used by British pubs.

Less enthusiastic voices also argue that the Premier League judgment concerns only the distribution of premium sports content via satellite and therefore leaves the question of whether it could be applied to the distribution of premium films or to distribution of either type of content via the Internet open.¹⁶⁷

An assessment of the applicability of the Premier League judgment to other types of content or forms of distribution is subjective by nature and goes beyond the scope of this publication. There are certain facts, however, which make the exploitation of sports rights different from other audiovisual works. While in sports the video aspect of the broadcast is predominant, so that e.g. a Premier League football match can be watched even with commentary in a language not understood by the TV viewer (or with the commentary switched off altogether), films and other audiovisual works normally require the understanding of the audio part in order to be fully enjoyed. A film in e.g.

¹⁶⁴ See e.g. Hugenholtz P.B., “Europe 1 – Premier League 0”, Kluwer Copyright Blog, 9 October 2011, <http://kluwercopyrightblog.com/2011/10/09/europe-1-premier-league-0/>.

¹⁶⁵ Van Rompuy B., Margoni T. *et al*, “Study on sports organisers’ rights in the European Union”, Final Report, February 2014, http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf.

¹⁶⁶ Van Rompuy B., “Premier League fans in Europe worse off after Murphy judgment”, <http://kluwercompetitionlawblog.com/2014/05/06/premier-league-fans-in-europe-worse-off-after-murphy-judgment/>.

¹⁶⁷ See OECD, see above note 94, at p.92



German won't be interesting to viewers that do not understand the language of Goethe, unless it is dubbed or subtitled into a language that the viewer understands. This language barrier (not to mention other cultural obstacles to the circulation of European audiovisual works) explains (if not justifies) why until today broadcasting and film rights in the EU were generally concluded on a country-by-country basis, with the only exceptions being precisely licensing in relation to a linguistic area or in relation to areas with a particular common socio-cultural background.¹⁶⁸ That is why a licensing agreement for an audiovisual work for each country of the EU requires the inclusion of clauses relative not only to the territorial scope of the licence but also to its linguistic scope, as well as clauses concerning the dubbing and/or subtitling of work in question. For example, the Independent Film & Television Alliance's International Standard Terms¹⁶⁹ make reference to licensed rights "throughout the territory for the term in the authorized languages". The licence extends only to "authorized dubbed, subtitled, parallel-tracked or edited versions".

5.2. The principle of the country of origin in the jurisprudence of the CJEU

As the country of origin is related to trans-frontier access to audiovisual content, jurisprudence has developed only at EU level and this especially during the first years of application of the Television without Frontiers Directive (TWFD).¹⁷⁰

While establishing the principle of the country of origin, the TWFD did not specify any other connection criteria than that of establishment. According to Article 2 TWFD, "[e]ach Member State shall ensure that all television broadcasts transmitted – by broadcasters under its jurisdiction, or – by broadcasters who, while not being under the jurisdiction of any Member State, make use of a frequency or a satellite capacity granted by, or a satellite up-link situated in, that Member State, comply with the law applicable to broadcasts intended for the public in that Member State."

The absence of connection criteria led to a few judgments which can still be considered valid with regard to the general principles they have recognised on the country of origin and circumvention.

A first group of judgments concern the determination of territorial jurisdiction as to the applicable law.

Before the harmonisation process of the applicable law started with the TWFD, the milestone cases *Sacchi*¹⁷¹ and *Debauve*¹⁷² stated that the broadcasting of televised messages comes under the rules of the Treaty relating to the provision of services and that, in the absence of harmonisation of the rules applicable to television broadcasting, all member states are competent to

¹⁶⁸ See paragraph 2.1.3 of this publication.

¹⁶⁹ IFTA International Standard Terms, www.ifta-online.org/sites/default/files/IFTA%20International%20Standard%20Terms%20-%20MILA%205th%20Edition.pdf.

¹⁷⁰ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] Official Journal L298/23, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0552:EN:HTML>.

¹⁷¹ Case 155/73, Criminal proceedings against Giuseppe Sacchi, reference for a preliminary ruling [1974] ECR 409, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61973CJ0155&from=EN>.

¹⁷² Case 52/79, *Procureur du Roi v Marc J.V.C. Debauve and others*, reference for a preliminary ruling [1980] ECR 833, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61979CJ0052>.



regulate, restrain or prohibit advertising messages, for reasons of general interest and without discrimination.

In *Bond van Adverteerders*,¹⁷³ the Court further reasoned that national regulations which are not indiscriminately applicable to the provision of services, whatever their origin, and which are therefore discriminatory, are not compatible with Community law.

These statements expressed the country of origin already *in nuce*, but could not go as far as considering cases of possible conflicts of jurisdiction. Analogue terrestrial transmission by definition would not allow any further spill-over than in the proximity of borders, but the situation changes with cable re-transmission. The CJEU condemned, for example, Belgium¹⁷⁴ for the introduction of a preliminary licence system for cable re-transmission of televised programmes broadcast from other member states, since this second control system amounts to a denial of freedom of circulation: in other words, the law of the first state applies and default restrictions are not allowed.

Belgian legislation was scrutinised also in the *Denuit* case,¹⁷⁵ where the Court held that the state cannot object to the re-transmission on its territory of programmes broadcast by a television broadcaster body within the jurisdiction of another member state where it considers that the programmes of the latter state are compliant with the Directive, since this is a matter the assessment of which is within the field of control of the state of origin.

Satellite broadcasts were considered in an infringement procedure against UK,¹⁷⁶ where the Court confirmed the principle that a broadcaster is within the jurisdiction of the member state of establishment (in the concrete case the place of the uplink connection). The Court also condemned the control exercised over programmes retransmitted by a broadcaster within the jurisdiction of another member state.

A second group of judgments concern cases of circumvention. In the *Veronica* case¹⁷⁷ the Court stated that a member state cannot be denied the right to take measures to prevent a person whose activity is entirely or principally directed towards its territory from exercising the freedom guaranteed by Article 59 of the Treaty, in order to evade the rules of conduct which would be applicable to him if he were established within that state.

Similarly in the *TV10* case,¹⁷⁸ the Court held that a member state may take measures against a broadcaster established in another member state, but whose activity is entirely or principally directed towards its own territory, when this establishment has been set up with a view to circumventing the rules which would be applicable to it if it were established on the territory of the first member state.

¹⁷³ Case 352/85, *Bond van Adverteerders and others v The Netherlands State*, Reference for a preliminary ruling [1988] ECR 2085, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61985CJ0352>.

¹⁷⁴ Case C-11/95, *Commission of the European Communities v Kingdom of Belgium* [1996] ECR I-4115, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61995CJ0011>.

¹⁷⁵ Case C-14/96, *Criminal proceedings against Paul Denuit*, reference for a preliminary ruling [1997] ECR I-02785, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61996CJ0014>.

¹⁷⁶ Case C-222/94, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1996] ECR I-4025, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61994CJ0222>.

¹⁷⁷ Case C-148/91, *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media*, Reference for a preliminary ruling [1993] ECR I-487, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61991CJ0148>.

¹⁷⁸ Case C-23/93, *TV10 SA v Commissariaat voor de Media*, Reference for a preliminary ruling [1994] ECR I-4795, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61993CJ0023>.



In order to determine the territorial jurisdiction of a member state, the Court explained in the VT4 case¹⁷⁹ that a broadcaster falls within the jurisdiction of the member state in which it is established, and, if it is established in more than one state, of the member state within whose jurisdiction the broadcaster has its centre of activity, that is to say where, in particular, its scheduling decisions are taken.

All this jurisprudence is quite old and predates the first revision of the TWFD. After the introduction of the territorial jurisdiction criteria to determine the competent member state, no further conflicts were brought to the attention of the CJEU. Existing issues were rather solved bilaterally.

¹⁷⁹ Case C-56/96, *VT4 Ltd v Vlaamse Gemeenschap*, reference for a preliminary ruling [1997] ECR I-3143, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61996CJ0056>.





6. State of play

6.1. Intellectual property rights and copyright reform

6.1.1. State of play at the European Commission level

6.1.1.1. The public consultation on the review of the EU copyright rules

The European Commission carried out, between December 2013 and March 2014, a public consultation on the review of the EU copyright rules,¹⁸⁰ which covered a broad range of issues, including territoriality in the Internal Market.¹⁸¹ In this document, the Commission describes the differences remaining between member states with respect to copyright, despite the high level of harmonisation achieved at EU level.

In particular, the Commission outlines the need, for the dissemination of copyright-protected content on the Internet, of requiring authorisation for each national territory in which the content is communicated to the public, as the geographical scope of the rights is limited to the territory of the member state granting them. The Commission however recognises that right-holders can grant multi-territorial or pan-European licences. The Commission inquired whether stakeholders had faced problems when trying to access/seeking to provide online services across borders and asked them to share their views as regards multi-territorial licensing and territorial restrictions. Views were also sought on whether further measures (legislative or non-legislative, including market-led solutions) beyond recent initiatives, such as the Collective Rights Management Directive¹⁸² and the Licences for Europe dialogue,¹⁸³ would need to be taken at EU level to increase cross-border availability of content services in the single market.

The public consultation generated a broad interest with more than 9500 replies to the consultation document.¹⁸⁴

¹⁸⁰ European Commission Public Consultation on the review of the EU copyright rules, Directorate General Internal Market and Services, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.

¹⁸¹ The other issues identified in the Commission communication on content in the digital single market and addressed in the public consultation were: harmonisation; limitations and exceptions to copyright in the digital age; the fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement, while underpinning its legitimacy.

¹⁸² See paragraph 2.1.2.2 of this publication.

¹⁸³ See paragraph 4.1. of this publication.

¹⁸⁴ European Commission Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, Directorate General Internal Market and Services, July 2014,

http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.



With respect to territoriality and access to works, end-users and consumer respondents insisted on the lack of transparency as to the possibilities of accessing content cross-border and on territorial restrictions. They wish to access all content from any online stores whether or not directed to the member state in which they reside.

Authors and performers, as well as a large part of broadcasters, on the other hand, saw a need to restrict rights on a territorial basis and to guarantee full exclusivity to distributors who are pre-financing productions in order to enable them to make return on their investment. The vast majority of them did not identify any legal obstacles to trade in audiovisual productions on a multi-territorial basis.

Film producers, in general, pointed out that service providers mostly cater to national or specific linguistic audiences and are not interested in multi-territorial licences, except for territories in which the same language is spoken.

Collective management organisations in the audiovisual sector, on their side, highlighted that in some instances territorial limitations in granting licences are a necessary consequence of the exclusive territorial distribution of audiovisual works. Some of them argued that imposing multi-territorial licensing could endanger services that cater for the specificities of local customers.

On the service providers' side, those distributing digital content pointed to the lack of information on content – which rights are represented by whom and for which territories – as a major problem for the clearance of rights and licensing in the single market. Some service providers – VoD platforms – indicated that they were contractually required to prevent cross-border access to their content as a result of territorial licensing. They also referred to other factors not related to copyright, such as taxation, release windows, private copying regulations, protection of minors, etc.

Providers of audiovisual services pointed to insufficient demand for cross-border services, such demand being limited to areas with a common language and to migrant populations. The vast majority of service providers believed that further measures are needed to increase cross-border availability of content and called for the simplification of the licensing process in the single market.

The member states who responded to the consultation considered that there was no major problem and insisted on finding market-based solutions to increase content portability and in general to enhance legal offer.

6.1.1.2. A Digital Single Market Strategy for Europe

The European Commission has identified the completion of the Digital Single Market (DSM) as one of its ten political priorities.¹⁸⁵ In order to achieve this, the Commission's President, Jean-Claude Juncker, announced at the beginning of his mandate his intention to "break down national silos" in copyright legislation, among other areas. More specifically, he declared that he would intend to take, within the first six month of his mandate, ambitious legislative steps towards a connected digital market, "notably by modernising and simplifying consumer rules for online and digital purchases".

¹⁸⁵ "Political Guidelines for the next Commission – A new Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change" 15 July 2014, http://europa.eu/rapid/press-release_SPEECH-14-546_en.htm.



Accordingly, one of the main objectives of the Digital Single Market Strategy announced by the Commission on 6 May 2015¹⁸⁶ is to ensure better access for consumers and businesses to digital goods and services across Europe. The Commission is of the opinion that barriers to cross-border access to copyright-protected content services and their portability are still common, particularly for audiovisual programmes. It reports that 45% of companies considering selling digital services online to individuals stated that copyright restrictions preventing them from selling abroad are a problem. Less than 4% of all legally available Video-on-Demand content in the EU is accessible cross-border, according to the Commission. Territoriality of copyright and the difficulties associated with the clearing of rights appears to be one of the reasons for this situation, together with contractual restrictions between right-holders and distributors and business decisions taken by distributors – although the Commission recognises at the same time the role territorial exclusivity plays in the financing of certain types of audiovisual works.

To this end, the Commission announced two sets of measures, in order to achieve portability of content and to ensure cross-border access to legally purchased online services. On the one hand, the Commission called for a “modern, more European copyright framework” and announced legislative proposals before the end of 2015 aimed at reducing the differences between national copyright regimes and allowing for wider online access to works by users across the EU, including through further harmonisation measures.

On the other hand, the Commission is seeking to remove barriers to e-commerce across Europe, such as “geo-blocking”. According to the Commission, sometimes restrictions on supply and ensuing price differentiation can be justified, for example where the provider of services has to comply with specific legal obligations (e.g. consumer law) or when it is due to acceptable business practices (e.g. higher delivery costs). Other “unjustified” geo-blocking practices are considered to be barriers to cross-border e-commerce in the EU and should, in view of the Commission, be prohibited.

Whether the Commission will consider that “geo-blocking” practices in the audiovisual sector are unjustified and should end remains open. The Commission plans to make legislative proposals in the first half of 2016 to stop “unjustified” geo-blocking. To that end, it could amend the applicable EU legislation (in particular the e-Commerce Directive and the Services Directive). A possible inclusion of audiovisual and cinematographic services in the scope of the Services Directive, that so far does not apply to them,¹⁸⁷ could have an impact on the licensing and marketing practices of providers of audiovisual services in Europe.

6.1.1.3. The public consultation on the review of the Satellite and Cable Directive

Among the announcements made in the Communication on a Digital Single Market Strategy for Europe, the Commission stated its intention to review the Satellite and Cable Directive (93/83/EEC) in order to assess the need to enlarge its scope to broadcasters' online transmissions and the need to tackle further measures to ensure enhanced cross-border access to broadcasters' services in

¹⁸⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Digital Single Market Strategy for Europe”, COM(2015) 192 final of 6 May 2015, http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf.

¹⁸⁷ For more information on the Services Directive see paragraph 2.1.1 of this publication.



Europe. Following up on this, on 24 August 2015 the Commission launched a public consultation¹⁸⁸ with the aim of, on the one hand, gathering input for the evaluation process in order to assess the current rules and, on the other, seeking views on a possible extension of the Directive in light of market and technological developments.

Territoriality is at the heart of this consultation, as the Commission is enquiring, among other things, about the country of origin principle for communications to the public by satellite. In particular, the Commission wants to assess whether the country of origin principle has facilitated the clearance of copyright and related rights for cross-border satellite broadcasting and if it has increased consumers' access to satellite broadcasting services across borders. The Commission wants to determine whether the application of this principle leads to a lower protection of authors or holders of neighbouring rights and if it has resulted in any specific additional costs (e.g. administrative). The Commission asks for the views of stakeholders about a possible extension of this principle, as applied to satellite broadcasting, to TV and radio transmissions by other means than satellite (e.g. by IPTV, webcasting), online services ancillary to initial broadcast (e.g. simulcasting, catch-up TV), any online services provided by broadcasters (e.g. VoD services) and any online content services provided by any service provider, including broadcasters. The objective of such an extension would be to increase the cross-border accessibility of online services for consumers.¹⁸⁹

This consultation, which is open until 16 November 2015, complements the Commission's Green Paper on the online distribution of audiovisual works of July 2011 and the consultation on the review of the EU copyright rules of December 2013. In parallel, the Commission is conducting a study to assess the functioning and relevance of the Directive, as well as the legal and economic aspects of the evolving broadcasting landscape. The results of the study will be made public in spring 2016 and will feed into the review.

6.1.2. State of play on the European Parliament's side

6.1.2.1. Report from the European Parliament on copyright reform

The improvement of the cross-border accessibility of services and copyrighted content is also on the agenda of the European Parliament, which adopted a report presented on the implementation of the InfoSoc Directive.¹⁹⁰ (Rapporteur Julia Reda)¹⁹¹ on 9 July 2015.

¹⁸⁸ Consultation on the review of the EU Satellite and Cable Directive, <https://ec.europa.eu/digital-agenda/en/news/consultation-review-eu-satellite-and-cable-directive>.

¹⁸⁹ For more information on the Satellite and Cable Directive and the challenges posed by new technologies, see IRIS Plus, 2014-4, p 20, http://www.obs.coe.int/documents/205595/7944996/IRIS+plus+2014-4_EN_LA.pdf.

¹⁹⁰ European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)),

www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0273+0+DOC+XML+V0//EN&language=EN.

¹⁹¹ Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)), Committee on Legal Affairs, Rapporteur Julia Reda,

www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0209+0+DOC+PDF+V0//EN.



The Parliament recognises in the report that copyright reform is necessary and calls on the Commission to consider a wide variety of measures to bring copyright law up to speed with changing realities and improve cross-border access to works.

The Parliament reaffirms the principle of territoriality, “enabling each member state to safeguard the fair remuneration principle within the framework of its own cultural policy”. It recommends an evidence-based approach to improve the current legal framework in order to facilitate cross-border access to the diversity of uses that technological progress offers to consumers. Concerning the issues related to portability and geo-blocking, the Parliament recalls that consumers are too often denied access to certain content services on geographical grounds and urges the Commission to propose adequate solutions for better cross-border accessibility of services. The report stresses, however, that both regulatory and market-led solutions may be required.

On the other hand, the Parliament insists on the role of territoriality in the financing of European works. In particular, it points out that financing, production and co-production of films and television content depend to a great extent on exclusive territorial licences granted to local distributors on a range of platforms, reflecting the cultural specificities of the various markets in Europe. It also recalls the role of territorial licences with regard to broadcasters’ pre-purchase or pre-financing systems and emphasises that the ability under the principle of freedom of contract to select the extent of territorial coverage and the type of distribution platform encourages investment in films and television content and promotes cultural diversity.

In this sense, the Parliament calls on the Commission to ensure that any initiative to modernise copyright will be preceded by a wide-ranging study of its likely impact on the production, financing and distribution of films and television content and also on cultural diversity.

6.1.2.2. The Working Group on Intellectual Property Rights and Copyright Reform

In order to pave the way to the upcoming reform of the EU legal framework on copyright and to reflect on IPR issues, the Committee on Legal Affairs of the European Parliament decided at its meeting on 25 September 2014 to set up a Working Group on Intellectual Property Rights and Copyright Reform,¹⁹² made up of members of the Committee, with participation of members from other Committees (Culture and Education; Industry, Research and Energy, and Internal Market and Consumer Protection).

The Working Group met once a month and exchanged views with a wide range of stakeholders and civil society. As far as audiovisual works are concerned, different issues were raised at the meeting of the Working Group of 23 June 2015, notably the financing aspects of the production of works and cross-border access to works for consumers.

The result of the work of the Working Group will serve as a starting point for future legislative review in the field and will enable Members of the Parliament to present concrete and innovative proposals to the European Commission.

¹⁹² European Parliament Committees, legal Affairs, Working Group on Intellectual Property Rights and Copyright Reform, www.europarl.europa.eu/committees/en/juri/subject-files.html;jsessionid=981594D4F790C7F41DD17CB439E0442F.node2?id=20150128CDT00182.



6.2. The planned revision of the AVMSD

In the Communication on the Digital Single Market cited above, the EU Commission has also announced a revision initiative with regard to the AVMSD. More precisely, the “Commission will examine whether the current system of rules applying to broadcast and to on-demand services should be adapted. It will also consider whether the current scope or the rules should be broadened to encompass new services and players that are currently not considered as audiovisual media services under the Directive and/or providers that fall outside its current geographical scope. The Commission will also work on measures to promote catalogues of European works on Video on Demand platforms.”

A review of the AVMSD was already foreseen in the EU Commission’s Work Programme 2015, in order to “modernise” EU legislation on audiovisual media services.¹⁹³ Annex 3 to the Work Programme explicitly mentions that an “evaluation” of the AVMSD is on-going and that results are expected in 2016.¹⁹⁴ According to the Work Programme of the Commission, within a relatively short timeframe – a proposal will be tabled in 2016 – what will be scrutinised is the scope of the Directive and the nature of the rules applicable to all market players, in particular measures for the promotion of European works and the rules on the protection of minors and on advertising.

Preliminarily, a REFIT exercise¹⁹⁵ will be carried out and benefits and downsides of the AVMSD will be evaluated. Through REFIT, the Commission will identify burdens, gaps and inefficient or ineffective measures, including possibilities for simplification or for the repeal of existing regulation according to the REFIT Communication.¹⁹⁶ In this exercise the Commission has opted for a strong involvement of the regulators in the realisation of national surveys in four main areas of intervention.¹⁹⁷

After having identified “problems and problem drivers” linked with the AVMSD in general, when explaining the “policy steps taken so far” with regard to the issue of territoriality, the accompanying document to the DSM Communication¹⁹⁸ points out that the “AVMSD thus allows media service providers to decide whether they want to transmit their content to other Member States, while only having to respect the rules of the Member State where they are established. On that basis, the geographical scope of transmission of media service providers is often determined by contractual arrangements with content producers or advertisers or by other considerations, such as the remit of public service media.”

When it comes to the “way forward”, the Commission mentions territoriality explicitly, by stating that “the evaluation exercise [...] will also consider whether its current scope should be

¹⁹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Commission Work Programme 2015 – A New Start”, COM(2014) 910 final of 16 December 2014, http://ec.europa.eu/atwork/pdf/cwp_2015_en.pdf.

¹⁹⁴ Annex 3 to COM (2014)910 final of 16 December 2014, http://ec.europa.eu/atwork/pdf/cwp_2015_refit_actions_en.pdf.

¹⁹⁵ Commission Staff Working Document, “Regulatory Fitness and Performance Programme (REFIT): Initial Results of the Mapping of the Acquis”, SWD(2013) 401 final of 1 August 2013, http://ec.europa.eu/smart-regulation/docs/reg_fitn_perf_prog_en.pdf.

¹⁹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “EU Regulatory Fitness”, COM(2012) 746 final of 12 December 2012, http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2013_en.pdf.

¹⁹⁷ Minutes of the 3rd ERGA plenary meeting, Paris, 14 April 2015, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=9589.

¹⁹⁸ European Commission, Staff working document, “A Digital Single Market Strategy for Europe - Analysis and Evidence”, SWD(2015) 100 final of 6 May 2015, http://ec.europa.eu/priorities/digital-single-market/docs/dsm-swd_en.pdf.



broadened to encompass services that are outside of the definition of audiovisual media services given by the Directive and/or providers that fall outside its geographical scope.”

In order to involve all interested stakeholders in the revision process, the European Commission additionally launched a public consultation on 6 July 2015, containing a set of questions aimed at assessing the need for revising the provisions of the AVMSD.¹⁹⁹ Regarding the issue of the geographical scope of the AVMSD, the following questions are raised:

- Are the provisions on the geographical scope of the Directive still relevant, effective and fair?
- Are you aware of issues (e.g. related to consumer protection problems or competitive disadvantage) caused by the current geographical scope of application of the AVMSD?
- Preferred policy option:
 - a) Maintaining the status quo
 - b) Extending the scope of application of the Directive to providers of audiovisual media services established outside the EU that are targeting EU audiences. This could be done, for example, by requiring these providers to register or designate a representative in one member state (for instance, the main target country). The rules of the member state of registration or representation would apply.
 - c) Extending the scope of application of the Directive to audiovisual media services established outside the EU that are targeting EU audiences and whose presence in the EU is significant in terms of market share/turnover.

The regulators are also exploring the matter during their regular meetings within ERGA (European Regulators’ Group for Audiovisual Media Services). They recently adopted a scoping paper on territorial jurisdiction,²⁰⁰ which analyses the possible consequences of the evolution of the audiovisual sector and the operation of the current regulatory framework for the question of territorial jurisdiction and attempts to identify possible solutions to these challenges.

Together with the revision of the AVMSD, the Commission plans, as stated above, a revision of the copyright rules. This could be a unique opportunity to have a look into both regulatory frameworks, keeping in mind how the principle of territoriality is currently treated by each regulatory family, the difficulties that have possibly arisen during their years of application and how to possibly bundle them in order to address in the same spirit the issues that concern the online world.

¹⁹⁹ European Commission, Consultation on Directive 2010/13/EU on audiovisual media services (AVMSD) - A media framework for the 21st century,

<https://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st>.

²⁰⁰ ERGA scoping paper on territorial jurisdiction in a convergent audiovisual world,

https://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=9387.

