

*What should the business community
expect from the 'Digital Single
Market' in Europe?*

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Main questions

- ◆ What should we expect from **regulation** at a time when consumer choices have radically changed?
- ◆ Who is expected to **benefit** from the DSM?
- ◆ Do national **borders** matter, in online environments?
- ◆ How do borders impact on online business opportunities?
- ◆ Under which circumstances are **geo-blocking** measures *justified* from a business-related perspective and, as a result, legitimate?

Notion of 'Digital Single Market'



The policy objective is that of
'... removing all barriers that might hamper the free flow of online services and entertainment across member state borders, thus fostering a European market for online content, establishing a single area for online payments and protecting EU consumers in cyberspace.'

28 EU Member States



EU 'Digital Agenda' (2010)

- The development of a '**Digital Single Market**' for online content has become a key objective for the EU
- Broader and easier **access to culture, knowledge and entertainment** produced in the EU should be ensured with regard to both commercial and non-commercial initiatives (e.g. digital libraries and 'Europeana')
- Improvements in the legal conditions of access to and use of cultural resources are regarded as indispensable

Three areas of interest for lawyers and entrepreneurs

- Copyright
- Liability of online intermediaries
- Media law (audiovisual media services, in particular)

Copyright and geography: issues to consider

- ◆ Copyright's **territoriality** v the purpose of market integration of EU directives: there is an unresolved conflict
- ◆ For distribution of *physical media* the CJEU and then EU lawmakers created (and relied on) the **exhaustion** principle
- ◆ No EU-wide copyright titles, for now
- ◆ Geo-blocking measures are designed to make territorial licensing agreements *effective* by limiting access to protected works to a **national public or a linguistically homogenous audience** located in a given territory

Objectives of EU copyright rules

- **EU market integration:** achieved, little by little, through the enactment of specific measures aimed at removing barriers to internal trade
- **Adequate support to cultural creation:** pursued through the adaptation and harmonization of exclusive rights to the digital environment (i.e., the 2001 EU “Information Society” directive)
- **Access to knowledge and dissemination of creative works:** the EU initially considered that a high level of copyright protection was an *intrinsic guarantee* of support to diversified cultural content

Copyright & cultural diversity

- ◆ In 2001 the **Information Society Directive** did not take Europe's cultural diversity into specific consideration. 'Culture' was mentioned just *once*, in the directive's preamble: 'Adequate protection of copyright works [...] is also of great importance from a cultural standpoint' (cfr. Recital 12)
- ◆ Art. 167.4 TFEU (formerly Art. 151.4) obliges the EU to take **cultural aspects** into account in its action

Ensuring broader access to digital content: what has been achieved?

- i. Use and dissemination of '**orphan works**' by certain public sector institutions are facilitated/encouraged (directive 2012/28)
- ii. Public libraries, museums and archives are required to make their **public domain resources** available (and re-usable, also for commercial purposes) through open, interoperable and machine-readable formats, with their own metadata, in exchange for a fee (directive 2013/37)
- iii. Aggregation of **diverse musical repertoires** licensed by collecting societies for digital uses on a multi-territorial basis is strongly encouraged (art. 30 directive 2014/26 creates a 'tag-on' regime)

Geo-blocking of audiovisual works

- From the perspective of the ‘Digital Single Market’, geo-blocking frustrates the increasingly high expectations of European citizens to access hugely demanded audiovisual works **in a legitimate way**
- Geo-blocking also increases the appeal of **online piracy**
- Internet users can easily access restricted works *anyway* if they wish to do so: e.g. using virtual private networks or through file sharing software or illegal streaming sites

Justifications for geo-blocking

- ◆ Copyright's territoriality is still important in certain sectors, like the **film sector**, where the licensing of works on a territorial basis is the most profitable way for content producers because of the way productions are funded
- ◆ Territorial licensing might also be a necessity for films given by Europe's **culturally and linguistically diverse audiences**
- ◆ In this respect, one has to think that, in **four of the five biggest markets in Europe** (Germany, France, Italy and Spain) dubbing and subtitles (together with other forms of content versioning) are still indispensable to market audiovisual works

A EU regulation on portability of online content services?

- **Services:** portable online content services (music, games, films, sporting events, etc.) provided for payment of money or without payment of money, provided that the subscriber's Member State of residence is verified by the service provider
- **Beneficiaries:** travelers, tourists, and other short-term migrants who are temporarily present in a Member State other than their Member State of residence
- **Legal fiction:** Access and use of online services service are deemed to occur solely in the country of origin/residence of the subscriber
- **Contractual terms** contrary to the regulation would become unenforceable (i.e., the regulation would apply retroactively)

A quantitatively modest proposal...

- ◆ **29 million** Europeans would currently benefit from cross-border portability when they travel abroad (Commission Impact Assessment)
- ◆ Beneficiaries would go up to 72 million Europeans in 2020 in light of the growing demand for online content services and increase in tourism
- ◆ Europeans who travel at least once a year spend abroad on average 11.6 days
- ◆ As a result, the proposed regulation is expected to affect approximately **900,000 Europeans per day in 2015** (0.2% of the EU population on a daily basis) and some 2.5 million Europeans in 2020 (0.5% of the EU population)

Absolute territorial exclusivity

- ◆ The CJEU's judgment in *Premier League/Murphy*: sale of TV decoders enabling access to Greek broadcasts showing football matches outside of Greece (i.e., in the UK)
- ◆ Commission's antitrust review under **Article 101 TFEU** of the agreements concluded by Hollywood studios and national broadcasters like Sky UK
- ◆ Should territorial exclusivity - if it were regarded as legitimate - be extended to 'passive sales' (i.e. sales occurring in Member States where the licensed broadcaster does not actively promote or advertise its services)?

Today's emphasis on geo-blockings is misleading

- ◆ Copyright and its territorial regulation is not the only reason why the exploitation of creative works (in particular films) is still rigidly territorial in Europe
- ◆ There are **other factors** that have even stronger partitioning effects of the Internal Market: e.g. a persisting digital divide and a different availability of bandwidth across the EU; different consumer, contract and tax laws; different accessibility of payment methods, diverging piracy rates, etc

Liability exemptions for online intermediaries: main issues

- Articles from 12 to 15 of Directive 2000/31 ('e-Commerce' directive)
- Definition of 'mere conduit', 'caching', and 'hosting' providers
- Main goal and the rationale of 'notice-and-takedown' mechanisms
- How should ISPs gain knowledge of infringements occurring on their digital networks for them to be obliged to remove illegal content?
- Does an obligation of online monitoring exist for intermediaries?

Main goal and the rationale of 'notice-and-takedown' mechanisms

- ◆ When the EU adopted Directive 2000/31, the main policy objective was that of granting Internet service providers and telecom companies strong incentives to build up a network infrastructure (i.e., the backbone of all Internet transactions and communications)
- ◆ The main purpose of the liability exemptions was that of making sure that activities such as browsing, caching, and hosting content could be carried out without running the risk of infringing the law (i.e., especially copyright)

Does an obligation of online monitoring exist for intermediaries?

- ◆ Art. 15 e-Commerce Directive provides the principle that online intermediaries should **not** be obliged to monitor online activities carried out by users of their services
- ◆ Nonetheless, intermediaries are legally forced to promptly remove access to illegal content when they gain knowledge of an infringement
- ◆ ‘Illegal content’ here is horizontally defined (i.e., all types of content that infringes the law: e.g., defamatory content, child pornography, copyright infringements, and so forth)

How should ISPs gain knowledge of infringements occurring on their digital networks?

- ✓ Notice and takedown mechanisms
 - ✓ An informal notice, e.g., an email?
 - ✓ An automated message generated and delivered by anti-piracy bodies?
 - ✓ A court injunction (e.g. Italy, Spain)?

Scope of the liability exemptions in the case law of the CJEU (copyright and trademark law)

- ◆ **Copyright infringement claims:** C-360/10 – *SABAM v Netlog*; C-70/10 – *Scarlet Extended SA v SABAM*; C-128/11 - *UsedSoft v Oracle*; C-429/08 - *Football Association Premier League Ltd and Others v QC Leisure and Others* C-403/08 *Karen Murphy v Media Protection Services Ltd*
- ◆ **Trademark infringement claims:** C-324/09 – *L'Oréal and Others v eBay International AG and Others* C-236/08, C-237/08, C-238/08 – *Google France and Google v Louis Vuitton and others*

EU media law and policy

- ◆ Scope of application of the AVMS Directive and its historical predecessor, i.e., the 1989 ‘Television without Frontiers Directive’.
- ◆ Media monitoring and the policies of the Council of Europe and of the EU to preserve and enhance media freedom and pluralism
- ◆ The EU Commission’s public consultation and the 2013 Green Paper ‘Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values’

Contents and purposes of the Audiovisual Media Services Directive (AVMS)

- The AVMS Directive (2010/13/EU) applies not only to TV and broadcasting services
- The directive applies to ***all content relevant services***, including Internet online platforms offering video-on-demand services
- This directive re-states a few ‘traditional’ obligations created by EU media law: for instance, Article 13(1) of the AVMS Directive obliges Member States to ensure that media service providers in their jurisdictions ‘promote, where practicable, and by appropriate means, the production of and access to European works’

Copyright works & DSM

- ◆ The best way to **preserve cultural diversity** and remuneration opportunities associated to a particular territory seems to be that of clarifying the conditions under which certain territorial restrictions may be regarded as *legitimate*
- ◆ In all other cases policy makers should let the logic of the **multi-territorial licenses** progressively prevail

Review of the liability exemptions

- The EU Commission might consider proposing an amendment (or, as it seems more likely, a specification) of the liability exemptions embodied in the e-Commerce Directive targeted at **online content platforms**
- The objective is to regulate the activities of new types of online intermediaries that materialised after the entry into force of the e-Commerce directive ...

EU media law at a time of media convergence

Technology-centred approaches

Technology-neutral approach

Deregulation

Mange tak!

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