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Copyright Licensing and the EU Digital Single Market Strategy

Pablo Ibáñez Colomo [*]

Abstract: In May 2015, the European Commission launched an ambitious Digital Single Market Strategy. One of the objectives of this agenda is to ensure that copyright-protected content is accessible across borders by end-users. The achievement of this goal requires the review of national copyright regimes to ease the cross-border transmission of content and the enforcement of EU competition rules. This piece explains the principles applying to the territorial licensing of copyright-protected content against the background of the Strategy and the proposals for legislative reform. As a matter of principle, it is lawful under EU competition law to grant an exclusive territorial licence to a single operator in a given Member State, and thus to prohibit the transmission of the same content by others in the territory subject to the licence. In certain circumstances, however, these agreements may be found to be contrary to Article 101(1) TFEU. The piece places an emphasis on the analysis of the *Murphy* case and provides the context to understand the ongoing proceedings against the 'Big Six' Hollywood major studios and Sky UK.

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1. INTRODUCTION

There is no such thing as an EU-wide copyright regime. Titles remain national in scope. In spite of the efforts towards the harmonisation of Member States' legislation,[1] the fragmentation of intellectual property protection along national borders is at odds with the logic of the internal market that the EU is expected to establish.[2] In the current state of copyright law in the EU, consumers are indeed not able to subscribe to the streaming service of their choice and may not be able to access content from a Member State other than the one where it was subscribed. The creation of a borderless market for digital services is one of the priorities of the current European Commission (hereinafter, the 'Commission'), which took office in November 2014 (Juncker 2014). The so-called Digital Single Market Strategy (hereinafter, the 'DSMS'), launched in May 2015, encompasses several legislative and non-legislative initiatives, which span the regulation of the media, e-commerce and data protection (European Commission 2015a).[3] The overarching aim is to ensure that EU citizens fully benefit from the possibilities opened by the Internet and, in general, digital technologies.

Ensuring access to – and the provision of – copyright-protected content across borders, in particular via the Internet, has emerged as one of the key areas of action in the context of the DSMS. Geo-blocking (that is, the use of technologies to limit the accessibility of a website from certain locations) is the most obvious obstacle limiting the choice and availability of online services.[4] If there is tension between geo-blocking technologies and the objectives of the Strategy this is due, first and foremost, to the fact that the copyright titles have a limited territorial scope. Content providers may not hold the rights to offer content across the whole of the EU, but only in one or several Member States. Against this background, it is not surprising that, shortly after the DSMS was announced, the Commission launched a consultation concerning the review of the principles applying, inter alia, to the online transmission of copyright-protected content. It seeks views, in particular, on whether it would be appropriate to allow the copyright holder in one Member State to lawfully offer content across the whole of the EU (European Commission 2015b).

Right holders' strategies contribute to the fragmentation of markets along national borders. They tend to license their rights to a single provider in each territory. The terms and conditions found in these exclusive licensing agreements are being closely scrutinised by the Commission on grounds that they may be in breach of EU competition law. It has been clear since the 1960s that agreements

[1] A list of some of the most representative legislative instruments harmonising national copyright regimes is included in the bibliography.

[2] Article 3 TEU.

[3] The document in which the DSMS is sketched will be hereinafter referred to as the 'DSMS Communication'.

[4] Ibid. The Commission defines geo-blocking as a set of 'practices used for commercial reasons by online sellers that result in the denial of access to websites based in other Member States'. In the DSMS Communication, the Commission announced that it would 'make legislative proposals in the first half of 2016 to end unjustified geo-blocking'.

giving absolute (that is, 'airtight') territorial protection to distributors within the EU are in principle restrictive of competition by object under Article 101(1) TFEU (Stothers, 2007). In its 2011 ruling in *Murphy*, the Court of Justice of the EU (hereinafter, the 'Court' or the 'ECJ') held that this line of case law is also 'fully applicable' to the cross-border provision of television services.[5] Following the judgment, and in parallel with the launch of the DSMS, the Commission initiated a Sector Inquiry[6] into e-commerce (Kjølbye, Aresu and Stephanou 2015). The Commissioner for Competition openly acknowledged that the purpose of the initiative is to explore the potential contribution that EU competition law could make to the policy objectives of the DSMS (Vestager 2015a).[7] She also identified access to digital content as one of the areas of focus.

Shortly after the launch of the Sector Inquiry, in July 2015, the Commission sent a Statement of Objections to the 'Big Six' Hollywood major studios and to Sky UK (European Commission 2015c). The authority has come to the preliminary conclusion that the licensing agreements concluded between the right holders and the pay TV operator provide for territorial restraints that are contrary to Article 101(1) TFEU. The Statement of Objections relates to the transmission of content both via satellite and online. The preliminary view of the Commission is that geo-blocking provisions limiting access to Sky UK's content outside of the territory covered by the licence amounts to a restriction of competition, and this insofar as they prevent the pay TV provider to respond to unsolicited requests from consumers based in Member States other than the UK and Ireland, for which Sky UK holds a licence.

This chapter provides an overview of the principles that apply to the territorial licensing of copyright under Article 101(1) TFEU. It does so against the background of the DSMS. The purpose of the piece is to show how EU competition law is enforced by the Commission to address concerns that are, first and foremost, the consequence of the nature and scope of national copyright regimes. The chapter paper is organised as follows. Section 2 explains that, as a matter of principle, it is not anticompetitive to grant an exclusive territorial licence to a content provider, even when it amounts to absolute territorial protection. Section 3 shows how this conclusion might change depending on the underlying regulatory context and the nature of the restrictions at stake. This analysis is conducted in light of the *Murphy* ruling of 2011, without which ongoing administrative action by the Commission cannot be understood. Finally, Section 4 addresses the two-prong strategy to ensure that copyright-protected content is accessible across borders. The objectives of the DSMS cannot be achieved through the reform of national copyright regimes alone. The enforcement of EU competition law is also necessary.

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[5] Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd ("Murphy")*, EU:C:2011:631.
[6] Commission Decision of 6 May initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003. C(2015) 3026 final.
[7] The Commissioner explained in her speech that 'the inquiry initiative is closely linked to the overall digital strategy of the European Commission' and added that '[s]everal Commission departments are working on the Digital Single Market at the moment. Understanding and facilitating cross-border online commerce is an important part of the contribution of the competition department'.

2. COPYRIGHT LICENSING UNDER EU COMPETITION LAW: PRINCIPLES

2.1. THE EXHAUSTION DOCTRINE AND THE RIGHT OF COMMUNICATION TO THE PUBLIC

Even though copyright is national in scope, the exhaustion (or 'first sale') doctrine applies at the level of the EU (and the EEA at large). Accordingly, it is not possible for an author to control subsequent sales of a copy of her work within the EU once it has been put on the market in that territory by her or with her consent.[8] The case law of the ECJ has clarified that the exhaustion doctrine applies to the exploitation of the copyright in some forms, but not in others. It is clear, for instance, that it applies to the distribution of the tangible copies of a work.[9] This principle is enshrined in the InfoSoc Directive, which provides for a right of distribution, which is deemed exhausted with the first sale within the EU.[10]

The exhaustion doctrine does not apply when the work is shown on television or in a cinema theatre. This principle stems from the ECJ ruling in *Coditel I*.[11] The Court held in that case that the right to require fees for any showing of a film is part of the essential function of the copyright.[12] As a result, the exercise of the right of communication to the public by a licensee is not an infringement of the Treaty provisions dealing with the freedom to provide services, even when it leads to the partitioning of the internal market along national borders.[13] The logic of *Coditel I* is captured in Article 3 of the InfoSoc Directive. This provision requires Member States to provide for a right of communication to the public (which comprises, in turn, a right of 'making available').[14] Article 3(3) clarifies that this

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[8] See in particular Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, EU:C:1971:59; Case 16/74, *Centrafarm BV and Adriaan de Peijper v Winthrop BV*, EU:C:1974:115; and Case 15/74, *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc*, EU:C:1974:114.

[9] The extent to which the doctrine applies to non-tangible copies of works remains an open question in EU law. The Court has held that this is the case for software, Case C-128/11, *UsedSoft GmbH v Oracle International Corp*, EU:C:2012:407. The exhaustion of rights subject to the InfoSoc Directive has been addressed by the Court in Case C-419/13, *Art & Allposters International BV v Stichting Pictoright*, EU:C:2015:27, which can be (and has been) interpreted as suggesting that the exhaustion doctrine only applies to tangible objects. For a discussion, see Rosati (2015).

[10] 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 OJ (2001) L 167/10 (hereinafter, the 'InfoSoc Directive'). Pursuant to Article 4(2), '[t]he distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent'.

[11] Case 62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others ('Coditel I')*, EU:C:1980:84.

[12] Ibid., para 14.

[13] Ibid., para 16.

[14] Pursuant to Article 3(1) of the InfoSoc Directive, 'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or

right is not exhausted by 'any act of communication to the public or making available to the public' (Bently and Sherman 2014).[15]

2.2. Implications for EU competition law

It has been mentioned in the introduction that agreements partitioning the internal market along national borders are in principle contrary to Article 101(1) TFEU. Thus, agreements that give absolute ('airtight') territorial protection to a distributor are prima facie prohibited as restrictive of competition by their very nature.[16] The same is true of agreements that provide for an export prohibition or that have an equivalent effect.[17] As a matter of principle, the fact that the product covered by the agreement incorporates an intellectual property right does not make a difference in this regard. This seems clear since *Consten-Grundig*, in which this principle was laid down. That case concerned the distribution of products bearing a trademark. In spite of this fact, the Court found the agreement gave absolute territorial protection and thus was in breach of Article 101(1) TFEU. That agreements aimed at limiting parallel trade within the EU are in principle prohibited has been confirmed in a long line of case law, which includes rulings like *Miller International*[18] (concerning the distribution of records), *Nungesser*[19] (concerning seed protected by plant breeders' rights) and *Glaxo Spain* (about restraints aimed at limiting the parallel trade of patented drugs).

The judgments mentioned in the preceding paragraph concerned the distribution of goods incorporating intellectual property rights. However, the restraints introduced in the agreement fell outside the scope of the protection afforded by the relevant intellectual property regime. As already explained, the right of distribution only covers the first sale of a product incorporating a copyright, a patent or a trademark. This fact explains why the Court held them to amount to a restriction of competition by object within the meaning of Article 101(1) TFEU. In all four cases, the agreements hindered trade between Member States without their being necessary to preserve the essential function of the relevant intellectual property right.

Where the right of distribution is not exhausted, on the other hand, an agreement that provides for absolute territorial protection and/or an export prohibition will not be found to restrict competition under Article 101(1) TFEU. In such a case, the agreement remains within the scope of the relevant intellectual property right. This conclusion stems clearly from *Javico*, where the Court ruled that an agreement prohibiting the re-importation of the products into the EU is

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wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them'.

[15] Article 3(3) of the InfoSoc Directive provides that the right of communication to the public 'shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article'.

[16] Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* ('*Consten-Grundig*'), EU:C:1966:41.

[17] For export prohibitions, see Case 19/77, *Miller International Schallplaten v Commission* [1978] EU:C:1978:19. For practices having an equivalent effect, see Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission ('Glaxo Spain')*, EU:C:2009:610.

[18] See preceding note.

[19] Case 258/78, *LC Nungesser KG and Kurt Eisele v Commission*, EU:C:1982:211.

not contrary to Article 101(1) TFEU where the distributor is based in a non-member country.[20] Because the exhaustion doctrine only applies at the EU-EEA level, the supplier in this case was in a position to achieve by means of an agreement what it would have been able to achieve through the exercise of its intellectual property right.

The same conclusion applies in the case of rights that are not subject to the exhaustion doctrine. In *Coditel II*,[21] the Court held that an agreement providing for absolute territorial protection is not as such contrary to Article 101(1) TFEU if it concerns the right of communication to the public. As a result, and as a matter of principle, a licensee is in a position to invoke its rights against a cable operator importing a foreign signal that offers the film covered by the exclusive territorial licence (Anderman and Schmidt 2011). An agreement of this nature is only contrary to Article 101(1) TFEU if it is shown to have restrictive effects in the context in which it is implemented.[22] In *Murphy*, the Court confirmed that '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'.[23]

3. THE CABLE AND SATELLITE DIRECTIVE AND THE *MURPHY* CASE

3.1. Copyright aspects of transmission via satellite

The copyright aspects of transmissions via cable and satellite are harmonised at the EU level. The fundamental objective of the Cable and Satellite Directive[24] is to ease the cross-border transmission of copyright-protected content. The mechanism that is relevant for the purposes of this chapter relates to the provision of television services via satellite. The potential of satellite transmissions to reach viewers based in more than one territory was obvious at the time when the Directive was adopted. The legislator had to make a choice about the regime to which these transmissions would be subject. One option was to follow the principle that the act of communication to the public is deemed to take place in every Member State reached by the satellite. An alternative approach was to make the transmission subject only to the law of the Member State from which it originates. By endorsing the so-called 'country of uplink' principle (or 'country of

[20] Case C-306/96, *Javico International and Javico AG v Yves Saint Laurent Parfums SA*, EU:C:1998:173.
[21] Case 262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others ('Coditel II')*, EU:C:1982:334.
[22] Ibid., paras 14 and 17-19.
[23] *Murphy*, para 137.
[24] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ (1993) L 248/15 (hereinafter, the 'Cable and Satellite Directive').

origin' principle, as it will be referred to hereinafter), the Directive opted for the latter.[25]

Insofar as the communication to the public is only deemed to take place in the 'country of origin', a satellite operator based in one Member States is in a position to reach viewers based in other Member States without infringing the exclusive rights of a licensee based in the second Member State. The principle enshrined in the Directive thus allows two different television operators to offer the same content to the same viewers without this leading to a dispute similar to the one underlying the *Coditel* saga. On the other hand, it is clear from the Directive that the 'country of origin' principle does not affect the possibility of limiting the exploitation of the rights by licensees.[26] In other words, nothing in the text prevents right holders from granting territorial licences to different television operators.

In a report reviewing the application of the Cable and Satellite Directive, issued in 2002, the Commission observed that the generalisation of encryption technologies in satellite transmissions was frustrating the emergence of a single market for television services and, more generally, the provision of these services across borders (European Commission 2002). The expectation of the Commission was that the adoption of the 'country of origin' principle would allow television operators to offer copyright-protected content to viewers based in other Member States, and that right holders would negotiate compensation corresponding to the potential audience reached by the satellite footprint.[27] This is not the reality that emerged in the years that followed the adoption of the Directive. With the rise of encryption technologies, right holders licensed content to a local broadcaster in each Member State, thereby leading to the partitioning of the internal market along national borders.[28] This is the technological and regulatory background against which the facts and the ruling in *Murphy* must be understood.

[25] Article 1(2)(b) of the Cable and Satellite Directive provides that 'the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth'.

[26] Recital 16 of the Directive reads: 'Whereas the principle of contractual freedom on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned'

[27] Ibid.: 'Complete application of the principle of the Directive, which involves moving beyond a purely national territorial approach, should therefore be encouraged in order to allow the internal market to be a genuine market without internal frontiers for rightholders, operators and viewers alike. The Commission will therefore conduct research and engage in consultations, in particular with the various sectors concerned, in order to determine how to reconcile the different interests involved with the principle of the free movement of television services'.

[28] Ibid.: 'A trend is thus emerging whereby producers sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure that they cannot be received beyond national borders. This encryption enables producers to negotiate the sale of the same programmes with broadcasting organisations in other Member States'.

3.2. THE *MURPHY* CASE

3.2.1. Facts and ruling

The ECJ examined two closely related questions in *Murphy*. First, it assessed the compatibility with Article 56 TFEU[29] of national legislation prohibiting the import of foreign decoding devices giving access to satellite television services. Secondly, it ascertained whether a set of contractual provisions prohibiting a satellite television operator from selling decoding devices outside of the territory covered by the exclusive licence was compatible with Article 101 TFEU. The Court ruled that national legislation such as the one at stake in the case amounts to a restriction on the freedom to provide services. More importantly, it took the view that it would not be possible to justify this restriction on grounds that the relevant content is protected by intellectual property rights.[30] As far as Article 101 TFEU is concerned, the Court concluded that obligations relating to the export of decoding devices amount, by their very nature (that is, 'by object'), to a restriction of competition, and that this restriction cannot be justified under Article 101(3) TFEU.[31]

The activities of the television operator on which the export prohibition was imposed were subject to the Cable and Satellite Directive. This aspect of the case seems to have proved determinant in its outcome. When examining the compatibility of national legislation with Article 56 TFEU, the Court took the view that the factual scenario at stake in the case could be distinguished from the one examined in *Coditel I*. In the latter, the cable provider had not acquired the rights to offer the film in question in the Member State in which it operated. In *Murphy*, by contrast, the satellite provider had been authorised by the right holder to perform an act of communication to the public in the 'country of origin'. The fact that its services reached viewers based in another Member State did not amount to an infringement of the copyright in the Member States reached by the satellite footprint. In addition, and in line with what has been pointed out above, nothing in the Directive prevents right holders and television operators from taking into account, when calculating the compensation, the potential audience reached by the operators in Member States other than the one where the communication originates.[32]

The analysis of the contractual restrictions under Article 101(1) TFEU is interesting insofar as the Court clarified that *Coditel II* remains good law.[33] Accordingly, prohibiting television operators from transmitting the licensed content in territories allocated to other licensees is not in itself contrary to Article 101(1) TFEU. At the same time, the Court made it clear that it was not ruling on the compatibility of an exclusive territorial licence as such, but on whether providing for 'additional obligations' (such as a prohibition to export decoding devices outside the territory covered by the licence) amounts to a restriction of

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[29] Article 56 TFEU deals with the freedom to provide services within the internal market.
[30] *Murphy*, paras 106-121.
[31] Ibid., paras 141-145.
[32] Ibid., paras 112-113.
[33] Ibid., para 137.

competition by object.[34] In this regard, it noted that restrictions such as the one at stake in the case are in principle contrary to Article 101(1) TFEU by their very nature, and that the parties had not put forward any evidence relating to the 'economic and legal context' of the agreement that would lead to a different conclusion.[35]

3.2.2. Open questions

Commentators have struggled to make sense of the scope of the *Murphy* ruling. It is not surprising that some of them have interpreted some of its passages as suggesting that something akin to the exhaustion doctrine now applies to the right of communication to the public. It is not unreasonable to infer from the analysis of the Court a general principle according to which an operator having received a license to offer copyright-protected content in one Member State is entitled to offer the same content anywhere in the EU (Batchelor and Jenkins 2012). The fact that the same content has been licensed to other operators in other Member States would not make a difference in this regard. According to this interpretation of *Murphy*, the right of communication to the public has now ceased to exist as an exclusive right to authorise or prohibit any communication to the public. It would merely exist as a right to receive remuneration. In this regard, the Court noted, moreover, that the said right cannot be equated with the right to receive the 'highest possible remuneration', but only 'appropriate' remuneration.[36]

It is also possible to interpret the ruling as applying narrowly to the facts of the case (Graf, 2011; Doukas, 2012). From this perspective, the fundamental reason why the Court ruled the way it did has to do with the fact that, in accordance with the principles of the Cable and Satellite Directive, the act of communication to the public is only deemed to take place in the 'country of origin'. In such circumstances, it would not be possible to justify, on intellectual property grounds, any acts aimed at limiting the ability of the television operator to reach its potential audience. Any such restraints would fall outside the scope of the copyright. Subsequent developments suggest that this narrow interpretation of the ruling is accurate in the sense that EU institutions do not appear to have understood *Murphy* as creating something akin to the exhaustion doctrine in relation to the right of communication to the public. It would seem from the legislative proposals advanced in the context of the DSMS that the Commission is of the view that it is necessary to amend copyright legislation before extending the logic of *Murphy* to the online transmission of content.

The implications of the ruling for Article 101 TFEU are equally difficult to interpret (Alexiadis and Wood, 2012; Ibáñez Colomo, 2014). The Court appears to suggest in some passages that the exclusivity given to a television operator cannot go as far as to lead to absolute territorial protection, irrespective of the underlying economic and legal context. Accordingly, it would be possible for a right holder to prohibit television operators from engaging in active selling in the territories allocated to other licensees, but it would not be possible to ban passive sales (that

[34] Ibid., para 141.
[35] Ibid., para 143.
[36] Ibid., para 108. This was in fact the outcome suggested by the Commission in *Coditel I* (Keeling 2004).

is, to respond to unsolicited orders by end-users based in other territories).[37] This position would be problematic for several reasons. In particular, it would contradict the very principle laid down in *Coditel II*. In that case (which was deemed to remain good law by the Court), the licensee was entitled to prevent the import of television signals by cable operators, insofar as the transmission of content via cable would amount to a breach of its exclusive rights to authorise or prohibit any communication to the public of the film in question. Against the background of that precedent, it would seem that the statement made by the Court in *Murphy* needs to be qualified. It would seem that an agreement providing for absolute territorial protection is only restrictive of competition by object where the transmission of content across borders would not amount to a copyright violation in the 'country of destination'.

There are indeed good reasons to believe that the ruling in *Murphy* cannot as such be extended without qualification beyond the specific facts of the case. It was clear before the judgment that agreements providing for absolute territorial protection are restrictive of competition by object only 'in principle'.[38] Thus, it is possible for the parties to explain why, in the economic and legal context in which the agreement is implemented, the agreement does not violate Article 101(1) TFEU by its very nature.[39] As pointed out above, the parties had not put forward any evidence in this sense. In line with the above, this fact suggests that, in a different regulatory context (and, in particular, where the 'country of origin' principle would not apply) the Court would not have ruled in the same way. This, however, remains an open question at the time of writing. The boundaries of *Murphy* are being tested by the Commission in the context of the ongoing proceedings against Sky UK and the major studios. As will be explained in greater detail below, these proceedings are based on the idea that the principles set out by the Court in the judgment can be extended to online transmissions and thus to a different economic and legal context.

4. TOWARDS A DIGITAL SINGLE MARKET: A TWO-PRONGED STRATEGY

4.1. COPYRIGHT REFORM

4.1.1. The review of EU copyright rules

EU institutions have long been concerned about the fragmentation of national markets resulting from the limited territorial scope of intellectual property rights. Prior to the launch of the DSMS, the Commission discussed the approaches that could be taken to address obstacles hindering the accessibility of copyright-protected content across borders. In the Green Paper on the online distribution of

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[37] These are the principles that apply to the sale of tangible goods. See in this sense Guidelines on vertical restraints, OJ (2010) C 130/1.
[38] See in particular *Glaxo Spain*, para 59.
[39] *Murphy*, para 140.

audiovisual works (European Commission 2011), it explored different legislative options, including the creation of an EU-wide copyright title. In particular, it discussed the possibility of extending to the online world the 'country of origin' principle enshrined in the Cable and Satellite Directive. The Green Paper, which was issued some months before the *Murphy* ruling, does not dispute the possibility for the right holders and content providers to limit the territorial scope of their licences.[40]

4.1.2. Towards the 'country of origin' principle for online transmissions

In the aftermath of *Murphy*, DG Markt commissioned an economic analysis of the territorial aspects of the exploitation of copyright online (Langus, Neven, and Poukens 2014). The different options contemplated by the authors are useful to understand the strategy that the Commission would follow at a subsequent stage. The study discusses several policy options to promote the cross-border provision of online works. One of the options is based on the extension of the logic *Murphy*, to the online world. Absolute territorial protection for content providers would be unlawful. According to this approach, the right holder would only be entitled to provide contractual protection against active sales from content providers based in other Member States. On the other hand, the latter would be able to respond to unsolicited orders (that is, passive sales) from end-users based in other Member States.

The other options discussed by the authors involve a regulatory shift towards the 'country of origin' principle, in line with the position sketched in the Green Paper. A first possibility is one that combines the adoption of the said 'country of origin' principle with freedom of contract. Pursuant to this approach, the communication to the public – and any other acts protected by copyright – would be deemed to take place in the Member State where the communication originates. On the other hand, it would be possible for the right holder to limit by means of an agreement, inter alia, the territorial scope of the licence. This approach would make it easier, but not indispensable, for the right holder to grant licences covering the whole of the EU (the so-called pan-EU licences). Instead of licensing its content on a territory-by-territory basis, the whole territory of the EU could be covered by means of a single transaction. The other two options contemplated by the authors involve curtailing the parties' freedom of contract, at least to some extent. Thus, not only would the 'country of origin' principle apply but contractual restrictions limiting the cross-border provision of services would be prohibited, at least to some degree. Under these approaches, content would always be licensed on a pan-European basis.

The study concludes that the adoption of these policy options would not yield any obvious benefits for end-users. For instance, the adoption of the 'country of origin' principle, coupled with the ability to impose contractual restrictions, is deemed to be a source of potential benefits. This policy option would make it easier for expatriates to access content provided by an operator based in their home Member State. On the other hand, some of the efficiency gains resulting from the ability of the supplier to control the conditions of distribution could be

[40] In this regard, the Green Paper is in line with the principles of the Cable and Satellite Directive, which, in its Preamble, clarified that the Directive is based on the principle of contractual freedom.

lost. Overall, the authors fail to see a clear gain in departing from the status quo. The study is more critical towards models resulting in the outright abolition of territorial licensing. Any potential gains, the authors argued in the study, would not be sufficiently robust to justify the adoption of an approach that is understood to be very risky.[41]

4.1.3. The DSMS and the consultation on the reform of EU copyright

In the DSMS Communication (2015) the Commission identified 'unjustified geo-blocking' and 'better access to digital content' as two of the areas requiring action. Geo-blocking is seen with concern not only for reasons that relate to the exploitation of copyright-protected content. Practices such as re-directing an end-user towards another website or limiting the use of payment systems based on geographic criteria (in particular, the country in which a credit card is issued) are also deemed to require intervention. The Commission announced that the aspects of the DSMS that do not relate to cross-border access to content will be addressed both by means of legislative proposals and through the enforcement of competition rules.[42] This is one of the key objectives of the Sector Inquiry into e-commerce launched by the Commission (Vestager 2015a).

Regarding more specifically copyright-protected content, the Commission announced, inter alia, legislative proposals to ensure the portability of lawfully acquired content across borders and, similarly, the accessibility of services provided by operators based in other Member States.[43] Subsequent developments give a more clear idea of the form that these proposals could take in practice. In August 2015, the Commission launched a consultation on the review of the Cable and Satellite Directive. In line with the position at which it already hinted in the Green Paper, it is seeking views on whether it is appropriate to extend to the online world the 'country of origin' principle that applies to satellite transmissions.[44]

In December 2015, the Commission presented a proposal for a Regulation to ensure the cross-border portability of online content in the internal market (European Commission 2015d). This piece of legislation would only apply to subscribers to online services that are temporarily present in a Member State other than the Member State of residence. It would provide for an obligation on content providers to enable the portability of subscriptions across borders. The copyright implications would be addressed by means of a limited expansion of the 'country of origin' principle. Thus, the provision of copyright-protected services is deemed to take place only in the country where the subscriber is a permanent resident, and this includes acts subject to the InfoSoc Directive.

[41] In this regard, the Green Paper is in line with the principles of the Cable and Satellite Directive, which, in its Preamble, clarified that the Directive is based on the principle of contractual freedom.
[42] DSMS Communication, p. 6.
[43] DSMS Communication, p. 8.
[44] See European Commission (2015b). A set of questions included in the consultation document relates to the 'extension of the principle of country of origin'. See https://ec.europa.eu/eusurvey/runner/SatCabReview2015.

4.2. Competition law intervention

4.2.1. From the pay TV investigation to the Statement of Objections

Competition law intervention addressing contractual restrictions limiting the cross-border provision of copyright-protected content predates the launch of the DSMS. In January 2014, Commissioner Almunia announced the launch of an investigation into pay TV services (Almunia 2014). The investigation was originally directed at five of the Hollywood major studios and the leading satellite pay TV operators in the five largest EU Member States. The declared purpose of the investigation was to determine whether there were clauses in the agreements giving 'absolute territorial protection' to pay TV operators. Commissioner Almunia's statement is notable in that it clarified that the purpose of the investigation was not to question the award of licences on a territorial basis, or to promote pan-European licensing. Its more modest scope was to determine whether there are contractual arrangements between right holders and content providers preventing the latter from responding to unsolicited requests from end-users based in other Member States and, by the same token, whether end-users are prevented from accessing the services from Member States other than the one where they subscribed to them.

The Statement of Objections sent in July 2015, when the DSMS had already been announced, clarified several aspects about the scope of the case, which was still ongoing when this chapter was being completed. In a sense, the Statement of Objections is narrower than the original investigation, insofar as it is confined to a single pay TV operator, Sky UK. In another sense, it is broader, as it is addressed to all six Hollywood major studios. The Commission has now clarified that the scope of the investigation covers both online and satellite transmissions. In line with what has been pointed out above, the investigation seems to be based on the idea that *Murphy* is relevant beyond the scope of the Cable and Satellite Directive. In other words, the Commission seems to be of the view that 'absolute territorial protection' is contrary to Article 101(1) TFEU irrespective of whether the 'country of origin' principle applies to the underlying communication to the public. In a similar vein, it seems now clear that the case is based on the idea that 'geo-blocking' provisions are restrictive of competition within the meaning of Article 101(1) TFEU. More precisely, such provisions are considered to be 'additional obligations' within the meaning of *Murphy*.

4.2.2. The interplay between competition law and the underlying regulatory context

The relatively broad understanding of the *Murphy* ruling in the case raises important issues about the interplay between competition law and intellectual property and more precisely about how much the former interferes with the latter. In the press release issued when the Statement of Objections was sent to the firms, the Commission openly acknowledged that competition law intervention addressing geo-blocking provisions may not be enough to ensure that copyright-protected content can be accessed and provided across borders. Even if the said restrictions were removed, content providers may not be able to lawfully offer their services to end-users based in other Member States. Doing so may amount to a breach of copyright in the 'country of destination'. This same point was openly acknowledged by Commissioner Vestager in a speech given shortly after the Statement of Objections was issued (Vestager 2015b).

The Commission is in fact careful not to claim that geo-blocking provisions prevent Sky UK from offering its services across borders. It merely argues that such provisions are a source of concerns insofar as they do not allow Sky UK to decide 'on commercial grounds' whether to offer its services outside the UK and Ireland. Such a decision by the content provider would have to consider different factors, including the regulatory framework, and in particular national copyright laws.[45] This clarification suggests, in line with the interpretation of the ruling suggested above, that the principles of *Murphy* cannot be extended as such to the transmission of content online. The Commission acknowledges that, where the 'country of origin' principle does not apply, the provision of content across borders would not be lawful. If it is accepted that the 'country of destination' applies to the online transmission of copyright-protected content,[46] then Sky UK would not be able to offer its services across borders without the authorisation of the licensee in other Member States. As a result, it would only be possible to achieve the objectives of the DSMS by means of the reform and harmonisation of copyright systems. This is something that the Commissioner pointed out in the speech mentioned above.[47]

[45] The issue was expressed in the following terms in the press release (European Commission 2015c): 'Without these restrictions, Sky UK would be free to decide on commercial grounds whether to sell its pay-TV services to such consumers requesting access to its services, taking into account the regulatory framework including, as regards online pay-TV services, the relevant national copyright laws'.

[46] Competition law enforcement before the Statement of Objections was based on the idea that the 'country of destination' principle applies to the exploitation of content online. See in particular Commission Decision 2003/300/EC (Case No COMP/C2/38.014 – *IFPI 'Simulcasting'*) OJ (2003) L 107/58. In para 24 of the decision, the Commission acknowledged that the 'country of destination' principle 'appears to reflect the current legal situation in copyright law'. Competition lawyers typically assume, in the same vein, that the 'country of destination' principle applies to the online transmission of content (Graf 2011; Alexiadis and Wood 2012; Batchelor and Montani 2015). There is support for this interpretation. Since the InfoSoc Directive does not address the issue, and since copyright remains national in scope, it would seem that the issue remains subject to the legislation of each Member State (Triaille and others 2013). In the same vein, it seems clear that, where the 'country of origin' principle has been introduced in national legislation, the endorsement of the principle has been made explicit, as is true of the provisions transposing the Cable and Satellite Directive into national law (Shapiro 2011). It should be mentioned, in addition, that there are technical aspects that plead against the application of the 'country of origin' principle to online transmissions. This is in part due to the fact that it is not always easy to identify the 'country of origin' in this context (Aplin 2005). In addition, activities such as streaming involve acts that could qualify not only as a communication to the public within the meaning of Article 3 of the Directive, but also as reproductions within the meaning of Article 2 (Batchelor and Jenkins 2012). Similarly, some services may qualify as a rental within the meaning of the relevant Directive. On the other hand, there is case law on the online exploitation of protected works online that suggests that the relevant criterion is whether the website 'targets' a particular country of group of customers. From this perspective, the communication to the public would only take place in the country of destination (Ginsburg 2014; Depreeuw, Sari, and Jean-Benoit Hubin. 2014a). This has led some authors to propose the targeting approach to identify where the 'communication to the public' within the meaning of the Directive takes place (Depreeuw, Sari, and Jean-Benoit Hubin. 2014b).

[47] The Commissioner (Vestager 2015b) explained the following in her speech: 'If such clauses did not exist, broadcasters would no longer be contractually prevented from responding to unsolicited requests coming from consumers from other countries. At the same time, broadcasters also have to take account of the applicable regulatory framework, such as, for online services, relevant national copyright laws.

4.2.3. Challenges raised from a competition law standpoint

The expansion of *Murphy* to cover online transmissions is not uncontroversial from an EU competition law perspective. By accepting that simply removing 'geo-blocking' provisions would not as such allow for the lawful provision of copyright-protected content across borders, the Commission is implicitly conceding that operators based in different Member States are not potential competitors – or at least not so as far as online transmissions are concerned. The regulatory framework – and more precisely the territorial scope of copyright as enshrined in the InfoSoc Directive – would not allow for the emergence of intra-brand competition even in the absence of the contractual restraints challenged by the Commission. The question raised in this regard is therefore whether 'geo-blocking' provisions can be said to amount to a restriction of competition in the technological and legal context of which they are part.

The position advanced by the Commission in the case seems to be difficult to reconcile with some well-established principles in the case law. It has been clear since *Societe Technique Miniere* that an agreement is only caught by Article 101(1) TFEU where it restricts (actual or potential) competition that would otherwise have existed. For instance, a distribution agreement cannot be said to be anticompetitive if it would not have been possible for the supplier to enter the relevant market in its absence. The Commission has expressed the view in the past that this principle applies even when an agreement gives absolute territorial protection to a distributor. In the Guidelines of vertical restraints, it takes the view that such agreements fall outside the scope of Article 101(1) TFEU altogether where they are necessary for the supplier to enter the market, and this, for a period of two years.[48] Against this background, it is not obvious how the Commission will be able to justify that 'geo-blocking' provisions restrict competition that would otherwise have existed or, alternatively, why the said provisions are in breach of Article 101(1) TFEU even though no lawful cross-border provision would have existed in their absence.

In a similar vein, the Commission would have to explain how administrative action in this case can be reconciled with the *Coditel* saga. In *Coditel I*, the Court held that the right of communication to the public is not subject to the exhaustion doctrine. As a result, it seems clear that a licensee based in one Member State would be entitled to prevent a communication to the public from a licensee based elsewhere without this leading to a breach of Article 101(1) TFEU. In *Murphy*, the Court unambiguously held that an agreement whereby an operator is allowed to prohibit the transmission of the content subject to the licensee does not amount in itself to a restriction of competition by object.[49] It remains to be seen how 'geo-blocking' provisions are distinguished from the mere prohibition of the transmission by the Commission, and why that qualifies them as 'additional obligations' within the meaning of *Murphy*.

These aspects may need to be tackled by changes to copyright rules, for example as part of the copyright initiatives included in the Commission's Digital Single Market Strategy'.

[48] Guidelines on vertical restraints, paras 60-64.

[49] *Murphy*, para 137.

5. CONCLUSIONS

It is not unusual to read that EU competition law is enforced to achieve regulatory objectives (Larouche 2000; Dunne 2014 and 2015; Drexl and Di Porto 2015). However, it is difficult to draw a clear line between the proper and improper interpretation and application of open-textured provisions like Article 101 TFEU, in particular considering the broad range of factual scenarios and industries that are potentially subject to scrutiny. Any boundaries defining the appropriate reach of EU competition law are likely to prove artificial or to be based on pre-conceptions about the nature and scope of the discipline. Without addressing these matters, the present chapter provides a concrete example showing how EU competition law may be applied alongside legislation to contribute to a particular policy outcome. Officials has openly stated that the Commission is exploring how the enforcement of Articles 101 can contribute to the objectives of the DSMS.

The policy aims of the DSMS seem clear. The Commission seeks, inter alia, to ensure that digital content can be accessed and provided across borders. This objective cannot be meaningfully achieved through the enforcement of EU competition law alone. As conceded by Commissioner Vestager, it appears that it is necessary to harmonise national copyright regimes to extend the 'country of origin' principle to online transmissions. Only in such a way would it be possible to lawfully transmit content across borders. The converse is also true. The reform of copyright rules would be insufficient if right holders and operators continue to include 'geo-blocking' provisions in their licensing agreements. Declaring that such provisions are unlawful under Article 101(1) TFEU therefore looks like an indispensable ingredient of the DSMS. This symbiotic relationship between copyright and EU competition law is interesting in itself. The second issue discussed in this chapter relates to the impact that this relationship may have on the substance of Article 101 TFEU. It would seem that action by the Commission is grounded on a relatively expansive interpretation of the provision. It remains to be seen whether it will survive judicial scrutiny.

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