

Is geo-blocking a real issue for concern in Europe?

European Policy for Intellectual Property
10th Annual Conference - University of Glasgow
Dr. Giuseppe Mazziotti
Trinity College Dublin, School of Law
2nd of September 2015



What is geo-blocking?

- ◆ The term indicates practices and technical measures used for commercial reasons by online sellers that result in a **denial of access** to websites or online services based in a Member State where a consumer is not physically located
- ◆ In a recent policy document entitled '**A Digital Single Market Strategy for Europe**' (May 2015) the Commission announced that *unjustified* geo-blocking measures should be prevented since they are a significant cause of consumer dissatisfaction and of fragmentation of the Internal Market

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 (it was the main legal basis for EU copyright rules)
- **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:** EU policy makers initially considered that a high level of copyright protection was an *intrinsic guarantee* of support to diversified cultural creation in Europe

A turning point: the 'Digital Agenda for Europe' (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 dissemination (e.g. digital libraries and 'Europeana')
- Improvements in the legal conditions of access to and use of cultural resources are regarded as indispensable

Ensuring broader access to Europe's cultural resources in the digital age

- i. Use and dissemination of '**orphan works**' by certain public sector institutions are facilitated through harmonisation of the concepts of 'diligent search' and the establishment of a principle of EU-wide recognition of such works (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 on re-use of public sector information)
- 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)

What about 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**
- ◆ Online restrictions based on **territoriality of markets** are due to the reluctance and/or inability of the creative industries to change and adapt their business models to a borderless environment where 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)

Will the EU Commission be able to keep its promise?

- ◆ When is geo-blocking **justified**?
- ◆ 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 (i.e., the business model of film majors)
- ◆ 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

Lawfulness of absolute territorial exclusivity

- ◆ The CJEU's judgment in *Premier League*: 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**' (occurring in Member States where the licensed broadcaster is not actively promoting or advertising 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

Distinct scenarios for EU policy makers

- ◆ The present situation might easily evolve even in the absence of further policy interventions at EU level (cf. *Premier League*)
- ◆ A **soft law initiative** or a **new legislative measure** could be useful to clarify what territorial restrictions should be regarded as incompatible with the Internal Market rationale (i.e., a ‘black list’ of licensing practices)
- ◆ A broader copyright reform could lead to the implementation of either a **country of origin/upload** principle for the application of one single law in the Digital Single Market or **pan-European copyright titles**

Copyright & cultural diversity

- ◆ In 2001 the **Information Society Directive** did not take Europe's cultural diversity into specific consideration ('Adequate protection of copyright works [...] is also of great importance from a cultural standpoint': cfr. Recital 12)
- ◆ The EU is obliged to take **cultural aspects** into account in its action (as required under Art. 167.4 TFEU – formerly Art. 151.4)

Conclusion

- ◆ For a progressive reduction of geo-blocking measures and an effective Europeanization of access to online works, the **best policy option** for now seems that of clarifying the conditions under which territorial restrictions should still be regarded as legitimate (i.e., a necessary tool to preserve cultural diversity and the remuneration of opportunities associated to a particular territory)
- ◆ In all other cases policy makers should let the logic of the **Digital Single Market** progressively prevail