”Content is not available in your country” – Is Geo-Blocking Compatible with the Internal Market?

Pauli Kataja, 501247

Turun Yliopisto

Oikeustieteellinen tiedekunta

Eurooppaoikeus

2.3.2017

Tiivistelmä

TURUN YLIOPISTO - Oikeustieteellinen tiedekunta
Pauli Olavi Kataja
”Content is not available in your country” – Is Geo-Blocking Compatible with the Internal Market?
75 s.
Eurooppaoikeus
3/2017
Turun yliopiston laatujärjestelmän mukaisesti tämän julkaisun alkuperäisyys on tarkastettu Turnitin Originality Check -järjestelmällä.

Tutkielma käsittelee maarajoitusten ja EU:n sisämarkkinoiden välistä suhdetta. Maarajoituksilla tarkoitetaan teknisiä keinoja, joilla estetään pääsy tekijänoikeudella suojattuun audiovisuaaliseen materiaaliin lisensoidun alueen ulkopuolelta. Maarajoitukset johtuvat tuottajien ja palveluntarjoajien välisistä sopimuksista sekä tekijänoikeuden aluekohtaisuudesta. EU:n digitaalisten sisämarkkinoiden toteuttamisen strategia ja Euroopan komission kilpailuoikeusosaston tutkinta ovat pyrkineet maarajoitusten poistamiseen.

Työn tarkoituksena on selvittää rikkovatko maarajoituksia edellyttävät sopimukset EU:n kilpailuoikeutta. Kysymyksen selvittämiseksi tutkielma käsittelee myös palveluiden vapaan liikkumisen ja maarajoitusten välistä suhdetta. Tutkielmassa perehdytään immateriaalioikeuksia sekä sisämarkkina-aluetta koskevaan oikeuskäytäntöön ml. *Coditel*-tapaukset ja *Murphy.* Tutkielmassa käytetään tekijänoikeuden sisällölliseen ja maantieteelliseen ulottuvuuteen perustuvaa oikeudellista kehystä maarajoitusten kilpailuoikeudenmukaisuuden arviointiin.

Tutkielman päälöydös on tekijänoikeuslainsäädännön vaikutus kilpailuoikeudenmukaisuuteen. Tutkielman mukaan maarajoitussopimukset eivät riko kilpailuoikeutta, kun tekijänoikeutta hallinnoidaan nykyisen ns. kohdemaaperiaatteen mukaisesti. Toisaalta kilpailuoikeutta rikotaan lähtökohtaisesti, jos tekijänoikeuslainsäädäntöä muutetaan noudattamaan ns. alkuperämaaperiaatetta. Tällöin maarajoitukset voi oikeuttaa vain taloudellinen konteksti. Tutkielma perustelee, että audiovisuaalisiin tuotteisiin liittyvät taloudelliset seikat voivat oikeuttaa maarajoitukset.

Asiasanat

Kilpailuoikeus, EU-oikeus, immateriaalioikeus, tekijänoikeus, DRM.

Abstract

University of Turku – Faculty of Law
Pauli Olavi Kataja
”Content is not available in your country” – Is Geo-Blocking Compatible with the Internal Market?
75 p.
European Law
3/2017
The dissertation has been inspected for plagiarism using the Turnitin Originality Check system in accordance with the standard quality assurance system of the University.

This study assesses the relationship between geo-blocking and the internal market. Geo-blocking refers to technical measures, which restrict access to copyright protected audiovisual content from outside of the licensed territory. Territorial nature of copyright and agreements between right holders and service providers are main reasons behind geo-blocking. Digital Single Market Strategy and related competition law investigation aim to abolish geo-blocking practices.

Aim of this study is to assess whether or not such agreements infringe competition law of the EU. In order to answer the question, the relationship between free movement of services and geo-blocking is also examined. Relevant case law, including *Coditel* cases and *Murphy,* is profoundly scrutinized. A legal test based on substantial and geographical dimensions of copyright is used to assess compatibility.

Relevancy of underlying regulatory context is one of the main findings of the study. The study concludes that geo-blocking agreements do not infringe competition law as long as copyright is regulated by the "country of destination" approach. However, if copyright is regulated by the "country of origin" principle, there is a breach of competition law in principle. In that case, only economic context can justify geo-blocking. The study maintains that there is a chance that economic characteristics of audiovisual products can justify such restrictions.

Asiasanat

Competition law, EU law, intellectual property law, copyright law, Digital Single Market, DRM.

Table of Contents

References ... v

Table of Cases ... xii

Table of Legislation ... xiii

1. Introduction ... 1

  1.1 Spannungsverhältnis: The Relationship of Tension Between Intellectual Property and the Internal Market ... 1

  1.2 Research Questions, Methods, and Sources ... 4

  1.3 Structure and Limitations ... 6

2. Copyright, the Freedom to Provide Services, and Competition Law ... 8

  2.1 EU Copyright Law or Lack Thereof… ... 8

  2.2 The Freedom to Provide and Receive Services ... 9

  2.3 Non-competitive Agreements ... 11

3. The Internal Market, Intellectual Property, and Absolute Territorial Protection ... 13

  3.1. Early Cornerstones: Consten-Grundig and Deutsche Grammophon ... 13

  3.2 Absolute Territorial Protection Revisited: Coditel I and II ... 21

4. Murphy´s Law: Bye-bye Coditel? ... 28

  4.1 Kick-off: Factual Background ... 28

  4.2 First Half: Opinion of Advocate General Kokott ... 29

  4.3 Second Half: Remuneration Is the Key? ... 32

  4.4 Post-match Analysis: Assessment, Practical Consequences, and Scope of Murphy's Law ... 36

5. Is Geo-Blocking Compatible with TFEU 56 and 101? ... 42

  5.1 Digital Single Market and Pay-TV Investigation ... 42

  5.2 Construction of the Legal Test: Substantive and Geographic scope ... 44

  5.3 Application of the Legal Test to Geo-Blocking Agreements ... 46

6. Economic Background to Territorial Protection and Geo-Blocking Practices ... 53

  6.1 Characteristics of Audiovisual Sector and Sport Broadcasting ... 53

  6.2 Benefits of Territoriality: Necessary Evil? ... 57

  6.3 Possible Industry Responses to Erosion of Territoriality ... 62

  6.4 No Easy Way Out: Economic Reasons in Context of Competition Law ... 66

7. Conclusions ... 72

References

Literature

Alexiadis P and Wood D, 'Free Market 1: Copyright 0 - UK Premier League Loses Away from Home' (2011) 18 243

Analysys Mason, 'A Study on The Potential Impact of The Digital Single Market on the Sports Audiovisual Ecosystem in Europe' (Sports Rights Owners Coalition 2016)

Anderman S. and Schmitt H, *EU Competition Law and Intellectual Property Rights: The Regulation of Innovation* (2011)

Andreangeli A, 'Weathering the Storm: Domestic IP Litigation and Industrial Consolidation as Pragmatic Responses to the Court of Justice's Decision?' (2016) 8 Journal of Media Law 173

Bailey D, 'Restrictions of Competition by Object Under Article 101 TFEU' (2012) 49 Common Market Law Review 559

Barnard C, The Substantative Law of the EU: The Four Freedoms (5th Edition, Oxford University Press 2016)

Batchelor B and Jenkins T, 'FA Premier League: The Broader Implications for Copyright Licensing' (2012) 33 European Competition Law Review 157

Batchelor B and Montani L, 'Exhaustion, Essential Subject Matter and Other CJEU Judicial Tools to Update Copyright for an Online Economy' (2015) 10 Journal of Intellectual Property Law & Practice 1

——, 'Exhaustion, Essential Subject Matter and Other CJEU Judicial Tools to Update Copyright for an Online Economy' (2015) 10 Journal of Intellectual Property Law & Practice 1

Bergh RVD, 'Vertical Restraints: The European Part of the Policy Failure' (2016) 61 The Antitrust Bulletin 167

Borghart M, 'An Antitrust Perspective', *The Intersection of IPR and Competition Law: Studies of recent developments in European and U.S. law* (Swedish Competition Authority 2009)

Bruegel, 'Extending the Scope of the Geo-Blocking Prohibition: An Economic Assessment' (the European Parliament' Committee on the Internal Market and Consumer Protection) <http://bruegel.org/wp-content/uploads/2017/02/IPOL_IDA2017595364_EN.pdf> accessed 27 February 2017

Bumbak DR, 'Industrial Property Rights and the Free Movement of Goods in the European Communities' (1984) 16 Case Western Reserve Journal of International Law 381

Charles River Associates, 'Economic Analysis of the Territoriality of the Making Available Right in the EU' (Commissioned by European Commission 2014)

Colino SM, *Vertical Agreements and the Competition Law* (Hart Publishing 2010)

Craig P and De Burca G, *EU Law: Text, Cases and Materials* (6th edition, Oxford University Press 2015)

Csongor IN, *EU and US Competition Law, Divided in Unity?: The Rule on Restrictive Agreements and Vertical Intra-Brand Restraints* (Ashgate Publishing 2013)

De Vries S, 'Sport,TV and IP Rights: Premier League and Karen Murphy Joined' (2013) 50 Common Market Law Review 591

Doukas D, 'European Law Review Case Comment the Sky Is Not the (Only) Limit: Sports Broadcasting without Frontiers and the Court of Justice: Comment on Murphy' (2012) 37 European Journal of Communication 605

FIAPF and others, 'Case Studies on the Financing and Distribution of Recent European Films & Television Series' (2015) http://www.ivf-video.org/new/public/media/FIAPF_IFTA_IVF_MPA_Case_Studies_July_24_2015.pdf

Geradin D, 'Access to Content by New Media Platforms: A Review of the Competition Law Problems' [2005] The Global Competition Law Centre Working Papers Series 1

Giles C, 'Broadcasting: Post-Murphy: The Territorial TV Sports Licensing Landscape' (15 April 2014) <https://www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licensing-landscape> accessed 10 February 2017

Graf T, 'The Court of Justice Speaks on Licensing of Satellite' [2011] Kluwer Competition Law Blog http://kluwercompetitionlawblog.com/2011/10/10/the-court-of-justice-speaks-on-licensing-of-satellite-broadcasting/

Gurin A and Peeperkorn L, 'Vertical Agreements' in Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (3rd edn, Oxford University Press 2014)

——, 'UK Pubs and Greek Decoders – The Implications of the Premier League Case for the Dissemination of Digital Content' <http://kluwercompetitionlawblog.com/2011/08/15/563/?print=pdf> accessed 10 February 2017

Guibault L, Salamanca O and van Gompel S, 'Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances. A Study Prepared for the European Commission DG Communications Networks, Content & Technology' (European Commission 2015)

Haas U and Kahlert H, 'Cases C-403/08 and C-429/08 Murphy, Judgment of 4 October 2011' (2012) 19 Maastricht Journal of European and Comparative Law 110

Hoecke M van (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011)

Hornsby S, 'Case Comment FAPL v QC Leisure & Karen Murphy: What's Wrong with the "Exclusivity Premium" and Why Can't It Be Protected' (2012) 23 Entertainment Law Review 157

Hugenholtz B., 'Satcab Revisited: The Past, Present and Future of the Satellite and Cable Directive', *Convergence, Copyrights and Transfrontier Television* (European Audiovisual Observatory 2009)

——, 'Extending the SatCab Model to the Internet' (BEUC 2015)

——, 'Europe 1 - Premier League 0 - Kluwer Copyright Blog' <http://kluwercopyrightblog.com/2011/10/09/europe-1-premier-league-0/> accessed 9 February 2016

Janssen A, 'Copyright Licensing Revisited' (2012) 13 German LJ 124

Ibáñez Colomo P, 'The Commission Investigation into Pay TV Services: Open Questions' (2014) 5 Journal of European Competition Law & Practice 531

——, 'Towards More Competition in Pay TV Services? The Commission Investigates Agreements between Hollywood Major Studios and Broadcasters' [2014] LSE Law Policy Briefing Series

——, 'Article 101 TFEU and Market Integration' [2016] LSE Law, Society and Economy Working Papers 1

——, 'Copyright Licensing and the EU Digital Single Market Strategy' in Roger Blair and Daniel Sokol (eds), *Handbook of Antitrust, Intellectual Property and High Technology* (Cambridge University Press 2016)

——, 'Advocate General Kokott Reinvents (K)opyright' <https://chillingcompetition.com/2011/02/11/advocate-general-kokott-reinvents-kopyright/> accessed 11 February 2017

Jones A and Sufrin B, *EU Competition Law* (4th edition, Oxford University Press 2011)

Kaburakis A, Lindholm J and Rodenberg R, 'British Pubs, Decoder Cards, and the Future of Intellectual Property Licensing after Murphy' (2011) 18 Columbia Journal of European Law 307

Katsarova I, 'The Challenges of Copyright in the EU' (European Parliamentary Research Service 2015)

KEA European Affairs and Mines Paristech, 'Multi-Territory Licensing of Audiovisual Works in the European Union' (Prepared for the European Commission, DG Information Society and Media 2010)

Keeling D, 'Intellectual Property Rights in EU Law. David T. Keeling. © Oxford University Press 2003. Published 2003 by Oxford University Press.'

Korah V, 'Exclusive Licenses of Patent and Plant Breeders' Rights under EEC Law after Maize Seed' (1983) 28 Antitrust Bull. 699

——, *Introductory Guide to EC Competition Law and Practice* (6th edition, Hart Publishing 1997)

——, 'The Interface Between Intellectual Property and Antitrust: The European Experience' (2001) 69 Antitrust Law Journal 801

——, *Intellectual Property Rights and the EC Competition Rules* (Hart Publishing 2006)

Korah V and O'Sullivan D, *Distribution Agreements Under the EC Competition Rules* (Bloomsbury Publishing 2002)

Madiega T, 'EU Copyright Reform: Revisiting the Principle of Territoriality' (European Parliamentary Research Service 2015) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568348/EPRS_BRI(2015)568348_EN.pdf> accessed 28 February 2017

Marenco G and Banks K, 'Intellectual Property and the Community Rules on Free Movement: Discrimination Unearthed' (1990) 15 European Law Review 224

Mastromanolis E, 'Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law' (1995) 15 University of Pennsylvania Journal of International Business Law

Mazziotti G, 'Is Geo-Blocking a Real Cause for Concern in Europe?' [2015] EUI Working Papers 365

Mazziotti G and Simonelli F, 'Another Breach in the Wall: Copyright Territoriality in Europe and Its Progressive Erosion on the Grounds of Competition Law' (2016) 18 Digital Policy, Regulation and Governance

McGrath B, 'European Commission Closes Pay-TV Antitrust Investigation of Paramount Following Acceptance of Commitments' <https://www.cooley.com/news/insight/2016/2016-08-05-ec-closes-pay-tv-antitrust-investigation-of-paramount> accessed 11 February 2017

Osborne Clarke, 'Cross-Border Accessibility of Broadcasts' (20 September 2016) <http://www.osborneclarke.com/insights/cross-border-accessibility-of-broadcasts/> accessed 11 February 2017

Oxera and Oliver & Ohlbaum, 'The Impact of Cross- Border Access to Audiovisual Content on EU Consumers Industry' (2016)

Petit N, 'Parallel Trade: Econ-Oclast Thoughts on a Dogma of EU Competition Law' in Govaere, Inge, Quick, Reinhard and Bronkers, Marco, *Trade and Competition Law in the EU and Beyond* (Edward Elgar publishing 2011)

Ramírez Pérez, Sigfrido M. and van de Scheur, Sebastian, 'The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and Its Keynesian Challenge' in Kiran Klaus Patel and Heike Schweitzer, *The Historical Foundations of EU Competition Law* (Oxford Scholarship Online 2013)

Ranaivoson H, Van Rompuy B and De Vinck S, '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.' (European Commission DG Communications Networks, Content & Technology 2013)

Seville C, *EU Intellectual Property Law and Policy* (Edward Elgar 2009)

Simonelli F, 'Combating Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and Other Forms of Geo-Discrimination.' (CEPS Special Report 2016)

Smith S and Maxwell A, 'Premier League Football Cases: Linguistic Tactics, Non-Naked Match Feeds and the Away Goals Rule' <http://documents.lexology.com/55df8a34-a5dd-423f-a766-d3a6a7950b69.pdf> accessed 10 February 2017

Smits JM, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (2015) 6 Maastricht European Private Law Institute Working Paper

Stothers C, *Parallel Trade in Europe—Intellectual Property, Competition and Regulatory Law*, (Hart Publishing 2009)

Szyszczak E, 'Karen Murphy: Decoding Licences and Territorial Exclusivity' (2012) 3 Journal of European Competition Law & Practice 169

The CLIP Board, 'A Decision of Paramount Importance to Independent Film Financing…?' (22 December 2016) <http://www.bristowsclipboard.com/post/a-decision-of-paramount-importance-to-independent-film-financing> accessed 11 February 2017

TNS Opinion & Social, 'Cross-Border Access to Online Content Report.' (European Commission 2015)

Tritton G, *Intellectual Property in Europe* (Sweet and Maxwell 2008)

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/> accessed 11 February 2017

Weeds H, 'Territorial Licensing of AV Rights, Geoblocking & PSB' <http://blogs.lse.ac.uk/mediapolicyproject/2015/05/06/the-ecs-digital-single-market-strategy-implications-for-territorial-licensing-of-audio-visual-rights-geo-blocking-and-public-broadcasting/> accessed 11 February 2017

Whish, Richard and Bailey, David, *Competition Law* (7th edition, Oxford University Press)

Wood A, 'The CJEU's Ruling in the Premier League Pub TV Cases - the Final Whistle Beckons: Joined Cases Football Association Premier League Ltd v QC Leisure (C-403/08) and Murphy v Media Protection Services Ltd (C-429/08)' 34 European Intellectual Property Review 203

Other sources

BBC News, 'Premier League in Record £5.14bn TV Rights Deal' (10 February 2015) <http://www.bbc.com/news/business-31379128> accessed 11 February 2017

European Broadcasting Union, 'Copyright Licensing' (2015) <https://www.ebu.ch/files/live/sites/ebu/files/Publications/Policy%20sheets/Copyright%20 Licensing_EN.pdf> accessed 25 February 2017

——, 'Satellite and Cable Licensing Solutions: The Key to Enhancing Cross-Border Access to Online TV and Radio Content' (9 December 2015) <https://www.ebu.ch/news/2015/12/satellite-and-cable-directive-li> accessed 25 February 2017

European Commission, 'Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1'

——, 'Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges Towards a Digital Single Market' [2011]

——, 'Antitrust: Commission Investigates Restrictions Affecting Cross Border Provision of Pay TV Services' <http://europa.eu/rapid/press-release_IP-14-15_en.htm> accessed 9 February 2017

——, 'A Digital Single Market Strategy for Europe' (2015) COM (2015) 192 final

——, '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> accessed 11 February 2017

——, Antitrust: Commission Accepts Commitments by Paramount on Cross-Border Pay-TV Services (2016) <http://europa.eu/rapid/press-release_IP-16-2645_en.htm> accessed 9 February 2017

——, 'Preliminary Report on the E-Commerce Sector Inquiry' (2016) SWD (2016) 312

——, 'Press Release - State of the Union 2016: Commission Proposes Modern EU Copyright Rules for European Culture to Flourish and Circulate' <http://europa.eu/rapid/press-release_IP-16-3010_en.htm> accessed 11 February 2017

——, 'Digital Single Market – Portability of Online Content Services' <http://europa.eu/rapid/press-release_MEMO-17-243_en.htm> accessed 11 February 2017

——, ‘The Modernisation of the Copyright Legislation and the Satellite and Cable Directive’ <https://ec.europa.eu/digital-single-market/en/satellite-and-cable-directive> accessed 11 February 2017

Financial Times, ‘Premier League: Football’s Game Changer’ (1 January 2016) <https://www.ft.com/content/4f78e368-b072-11e5-b955-1a1d298b6250> accessed 11 February 2017

‘How to Get Sky Sports and BT Sport: Best Premier League Deals and Bundles’ (8 July 2016) <http://uk.pcmag.com/premier-league/82829/news/how-to-get-sky-sports-and-bt-sport-best-premier-league-deals> accessed 11 February 2017

FIAPF, ‘Letter to Juncker and Commissioners’ (11 June 2016) <http://crossborderaccessreport.eu/wp-content/uploads/2016/07/Letter-to-Juncker-and-Commissioners_FINAL.pdf> accessed 26 February 2017

The Guardian, ‘Rupert Murdoch Confirms £11.7bn Sky Bid’ <https://www.theguardian.com/business/2016/dec/15/rupert-murdoch-sky-bid-pay-tv> accessed 11 February 2017

The Parliament Magazine, ‘EU Copyright Reform: Contractual Freedom under Attack Magazine’ (9 February 2017) <https://www.theparliamentmagazine.eu/articles/partner_article/sroc/eu-copyright-reform-contractual-freedom-under-attack> accessed 25 February 2017

Variety, ‘Commission’s Oettinger Defends Territory Licensing at Venice’ (4 September 2016) <http://variety.com/2016/digital/news/commission-oettinger-territory-licensing-at-venice-1201852000/> accessed 11 February 2017

——, ‘MPAA’s Chris Dodd on E.U. Digital Plans’ (15 February 2017) <http://variety.com/2017/digital/news/christopher-dodd-mpaa-e-u-digital-plans-1201989074/> accessed 21 February 2017

——, ‘Margrethe Vestager Signals Conciliation in Hollywood Anti-Trust Probe’ (25 January 2017) <http://variety.com/2017/film/global/margrethe-vestager-signals-conciliation-hollywood-anti-trust-probe-1201969407/> accessed 11 February 2017

Vestager M, ‘Intellectual Property and Competition’ (2015) <https://ec.europa.eu/commission/2014-2019/vestager/announcements/intellectual-property-and-competition_en> accessed 11 February 2017

——, ‘Celebrating European Culture’ (An Evening with Nordic Drama, Brussels, 24 January 2017) <http://ec.europa.eu/commission/2014-2019/vestager/announcements/celebrating-european-culture_en> accessed 11 February 2017

Table of Cases

EU

Joined cases 56 and 58-*64 Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* (1966) ECLI:EU:C:1966:41

Case 56/65 *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU)* (1966) ECLI:EU:C:1966:38

Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* (1971) ECLI:EU:C:1971:59

Case 258/78 *LC Nungesser KG and Kurt Eisele v Commission of the European Communities* (1982) ECLI:EU:C:1982:211

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

Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* (1982) ECLI:EU:C:1982:334

Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* (1988) ECLI:EU:C:1988:183

Case C-384/93 *Alpine Investments BV v Minister van Financiën (2005) ECLI:EU:C:1995:126*

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)* (2005) ECLI:EU:C:2005:475

Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities and Commission of the European Communities v GlaxoSmithKline Services Unlimited and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities* (2009) ECLI:EU:C:2009:610

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* (2011) ECLI:EU:C:2011:631

Case C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním o.s v Léčebné lázně Mariánské Lázně a.s* (2014) ECLI:EU:C:2014:110

Case C-67/13 P *Groupement des Cartes Bancaires v European Commission* (2014) EU:C:2014:2204.

Advocate General´s Opinions

Joined cases 56 and 58-64 Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, Opinion of Advocate General Roehmer ECLI:EU:C:1966:19.

Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others, Opinion of Advocate General Warner* ECLI:EU:C:1979:291.

Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others, Opinion of Advocate General Reischel* ECLI:EU:C:1982:334.

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, Opinion of Advocate General Kokott ECLI:EU:C:2011:43

UK

The Football Association Premier League Ltd v QC Leisure & Ors [2008] EWHC 44 Ch

US

Continental TV, Inc v GTE Sylvania, Inc (1977) 433 U.S. 36

Table of Legislation

Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 248/15)

Proposed Legislation

Proposal for a Regulation of European Parliament and the Council on ensuring the cross-border portability of online content services in the internal market COM (2015) 627 final

Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes COM (2016) 594

1. Introduction

1.1 *Spannungsverhältnis*: The Relationship of Tension Between Intellectual Property and the Internal Market[1]

The relationship between intellectual property ("IP") and the internal market of European Union is tensional, it is often noted that there is an innate strain between the two ideologies. Free movement is the foundation of the Union: aim of the European Union is to establish a internal market. Free movement and competition law articles maintain that goods, services, capital, and workers should be able to move freely within the confines of the Union.

The goal of such market integration can be defined as an elimination of economic boundaries between Member States.[2] The theory maintains that parallel trade between Member States would lead to integrated single market.[3] Elimination of economic borders refers to abolishing state measures and private agreements, which partition markets and restore borders between Member States. Any attempt to restrict trade flows is condemned if not properly justified. Thus, in principle, it should be possible to obtain services from all over Europe.

Traditionally, EU competition law has been very critical on agreements that partition markets and restrict cross-border trade, specifically agreements that grant *absolute territorial protection* to stakeholders. Ban of absolute territorial protection is not usually dependent of economic effects, such agreements might plausibly increase total welfare but be nevertheless against competition provisions of the Treaty.[4]

Protection of intellectual property can, nevertheless, justify restrictions to a cross-border trade. For example, copyright protects the author´s or creator´s original literacy, scientific or artistic works and/or the interests of other right holders such as publishers and broadcasting organizations who contribute to making the works available to the public.[5]

---

[1] David Keeling, 'Intellectual Property Rights in EU Law. David T. Keeling. © Oxford University Press 2003. Published 2003 by Oxford University Press.' 22.
[2] Roger Van Den Bergh, 'Vertical Restraints: The European Part of the Policy Failure' (2016) 61 The Antitrust Bulletin 167, 177.
[3] ibid 11.
[4] ibid.
[5] Ivana Katsarova, 'The Challenges of Copyright in the EU' (European Parliamentary Research Service 2015).

Granting such exclusive right is supported economic objective.[6] Without protection to investment, it would not be worthwhile, for example, produce audiovisual content, like film or TV-series, as those products are costly to make but are easily copied.

Principle of territoriality means that intellectual property law confers exclusive right to right holders in particular territory, i.e. Member State-by-Member State.[7] Territoriality is difficult to reconcile with the market integration.[8] Crucial question is when, if at all, needs of the single market should override intellectual property law.[9] Extreme propositions does not lead to reasonable outcomes. Adherent following of territoriality of intellectual property would mean that exercise of such rights could restore boundaries between Member States.[10]

But the opposite is not economically feasible. If intellectual property laws always yield before the needs of the single market, there would be less incentives to create or invent. Classic example is a scenario where a company has obtained patent in Germany but not in Italy. The patented invention is used in Italy and then imported to Germany. Should the company be able to rely on its patent to restrict cross-border movement? If not, incentives to invent would decrease.[11] Thus, delicate balancing between two objectives is needed.

Throughout this study, the distinction between *ex ante (*static) and *ex post (*dynamic) point of views is central. If looked *ex post,* after an investment to create or to invent has been made, territoriality might be difficult to reconcile with the single market objective. However, if looked *ex ante,* at the time when the decision to create or to invent was made, such rights encourage investment as intellectual property protection ensures that investors, not free riders, benefits from possible success of the investment. If looked at this manner intellectual property can be combined with the internal market as it leads to innovation and more competitive economy.[12]

Subject matter of this study, geo-blocking, is also about the relationship between intellectual property and the internal market. The statement included in title of this study is

---

[6] Keeling (n 1) 266.
[7] Majorie Borghart, 'An Antitrust Perspective', *The Intersection of IPR and Competition Law: Studies of recent developments in European and U.S. law* (Swedish Competition Authority 2009) 28.
[8] ibid.
[9] Whish, Richard and Bailey, David, *Competition Law* (7th edn, Oxford University Press) 770.
[10] Valentine Korah, *Intellectual Property Rights and the EC Competition Rules* (Hart Publishing 2006) 3.
[11] Keeling (n 1) 22.
[12] Korah, *Intellectual Property Rights and the EC Competition Rules* (n 10) 3.

familiar to many internet users. At first glance, geo-blocking clearly infringes free movement principle of the internal market: if aim of the Union is free movement of services, why access to services in internet is so often blocked? Why can't consumer in Finland access Spanish video-on-demand ("Vod") service?

Geo-blocking, use of technologies to limit the accessibility based on the location of user, is obvious impediment restraining choice and availability of online services.[13] The most prevalent geo-blocking technique is IP-address validation, i.e. geo-blocking in *stricto sensu*, but other techniques contain for example credit card validation. Geo-filtering is closely related to geo-blocking: geo-filtering does not prevent access itself but the catalogue offered by service provider depends on location of the user.[14]

Usage of geo-blocking or geo-filtering techniques in general stems from two interrelated factors. First aspect is territorial licensing. Right holders tend to grant broadcasting licenses limited to a particular territory, usually to individual Member State or to other territory with a common language and/or similar economies (for example Scandinavia). Almost 60% of digital content providers have contractually agreed with right holders to geo-block.[15] Stakeholders maintain that territorial licensing leads to efficiency gains: it prevents free riding and allows efficient pricing.

Second factor is intellectual property law itself. Copyright in EU remains territorial, no EU-wide copyright scheme exists. Thus, content providers may not have requisite copyright authorization to offer content across the EU. Such offering would infringe copyright.[16] Thus, ability to offer cross-border access is limited by copyright itself.[17] These two combined factors lead to geo-blocking.

To "ensure that EU citizens fully benefit from the possibilities opened by the Internet", European Commission (the "Commission") launched the Digital Single Market Strategy

[13] Pablo Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy' in Roger Blair and Daniel Sokol (eds), *Handbook of Antitrust, Intellectual Property and High Technology* (Cambridge University Press 2016) 1.
[14] Felice Simonelli, 'Combating Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and Other Forms of Geo-Discrimination.' (CEPS Special Report 2016) 12–13 <http://aei.pitt.edu/id/eprint/80216> accessed 13 February 2017.
[15] European Commission, 'Preliminary Report on the E-Commerce Sector Inquiry' (2016) SWD (2016) 312 11.
[16] Simonelli (n 14) 18.
[17] Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy' (n 13) 1.

(“DSMS”) in May 2015. Communication has a clear definition of the objective: “Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition… irrespective of their nationality or place of residence.”[18]

One of the main goals is to tackle the problem of availability of digital content via online by reforming copyright legislation.[19] Although majority of the DSMS reform package is legislative in nature, the Commission has also started investigation (“pay-TV investigation”) on major Hollywood studios and broadcasting companies to assess if geo-blocking stipulations in contracts between producers and broadcasters are compatible with completion law articles of the Treaty.[20] As so, DSMS covers both bases: contractual and copyright factors of geo-blocking.

1.2 Research Questions, Methods, and Sources

Aim of this study is corresponding with pay-TV investigation: does geo-blocking clauses infringe competition law? My approach is twofold. Firstly, my aim is to examine how the question should be answered on basis of the current case law? What would European Court of Justice (“ECJ” or the “Court”) do? I additionally assess how the problem should be solved by applying economic rationale. As so, this study is both positive and normative. Positive part examines law as it is. The current case law is evaluated in order assess how question should be answered. Normative part questions what law *should* be. Thus, normative side goes beyond constraints of case law. Firstly, my aim is to criticize the current case law and assess how it could be improved. Secondly, I use normative approach to assess how issue of geo-blocking should be solved.

Main research question is divided to sub-questions. First part is to assess is geo-blocking in current legal context. Secondly, I consider the DSMS and possible legislative changes.

---

[18] European Commission, ‘A Digital Single Market Strategy for Europe’ (2015) COM (2015) 192 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192>.
[19] European Commission, ‘A Digital Single Market for Europe: Commission Sets out 16 Initiatives to Make It Happen’ [2015] <http://europa.eu/rapid/press-release_IP-15-4919_en.htm>.
[20] European Commission, ‘Antitrust: Commission Investigates Restrictions Affecting Cross Border Provision of Pay TV Services’ <http://europa.eu/rapid/press-release_IP-14-15_en.htm>. See also: Pablo Ibáñez Colomo, ‘The Commission Investigation into Pay TV Services: Open Questions’ (2014) 5 Journal of European Competition Law & Practice 531, 532.

What is the status of geo-blocking if copyright legislation is amended as part of DSMS? Thirdly, it must be evaluated *could* relevant economic context justify geo-blocking in the eyes of competition law. Fourthly, I assess *should* economic reasons excuse geo-blocking, at least in some circumstances. Does it lead to increase in market integration and consumer welfare?

It would be possible to assess the question on basis of competition law alone, but I also assess relationship between the free movement and intellectual property. I tend to think that omitting the freedom to provide services would significantly impair understanding of the relationship between the internal market and intellectual property. Free movement case law is interlinked with competition case law as the "specific subject matter" of relevant intellectual property right (free movement law) heavily influences the status of intellectual property agreement (competition law). I also include economic analysis as a tool to evaluate case law and as a background to geo-blocking. Free movement law and competition law is so closely linked to economics that formalistic legal analysis would not be sufficient to understand underlying issues.

My main method is traditional legal dogmatic method. Core business of legal doctrine is interpretation.[21] Smits describes method as a "research that … analyses the relationship between principles, rules and concepts with a view to solving unclarities and gaps in the existing law."[22] That is exactly what I try to do: to derive answer to a new situation by interpreting the Court´s case law and related literature. Legal doctrine can be also used for normative analysis, specifically to take normative positions and make choices among values and interest. In other words, legal doctrine can be used to find a better law. Additionally, in order to "look a for better law" non-dogmatic method is required for a critical evaluation.[23] Thus, economic analysis of law, law and economics in broad sense, is needed to assess the economic efficiency.

As so, my primary sources are unsurprisingly text of the Treaty and the case law itself. Main secondary sources include academic commentary on the case law and general EU law

[21] Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011) 3.
[22] Jan M Smits, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (2015) 6 Maastricht European Private Law Institute Working Paper 5.
[23] Hoecke (n 21) 10.

literature. Colomo´s articles have helped me significantly to understand relevancy of underlying regulatory framework and economical aspects of copyright. Korah opened my eyes to importance of *ex ante* analysis. For developments of DSMS and pay-TV investigation, I have also browsed official sources, news articles, and speeches. As for economic part, economical and empirical research are included.

1.3 Structure and Limitations

As for the structure of this study, I like to think that this study is based on "three pillars" in pre-Lisbon Treaty sense. First pillar examines the Court´s case law on vertical restraints and intellectual property. Second pillar assesses legality of geo-blocking in both current and amended legal context. Third pillar is economic as I provide an economic background to why stakeholders is fond of geo-blocking and assess merits of those arguments.

In first main chapter I quickly review copyright legislation of EU (or lack of it?), article 56 of Treaty on Functioning of European Union (the "Treaty" or "TFEU") on the freedom to provide services and TFEU 101 on agreements that restrict competition. I review the case law in chronological in order to show gradual development of the Court´s case law. The first main case, *Consten-Grundig,* provides good foundation to absolute territorial protection and intellectual property. *Coditel I* and *II* are studied extensively as both are main cases to this study as those cases explain why territorial licensing with absolute protection exist.

The *Murphy* case warrants its own main chapter as the most relevant and recent case. As the pay-TV investigation relies on that precedent, intensive examination is warranted. Understanding "Murphy´s law" is critical to assess geo-blocking itself. Particular focus is on the legal context, consequences of the case and how to interpret the case. Sufficient to say, it is not easy… Fourth main chapter presents timeline of the pay-TV investigation so far. A legal test is constructed by using substantial and territorial dimensions of copyright. After that the test is applied to assess geo-blocking in the current legal context and in possible amended version of copyright law.

The final part of this study assesses economic side of territorial licensing and absolute territorial protection. Main arguments for geo-blocking are derived from economic

researches. I then assess those arguments purely by economic standards and then on context of competition law. Lastly, I advocate for flexible approach.

Length of this study requires certain limitations to the scope. As a practical point, application of competition law to non-dominant firms requires contract. I am focusing on instances where a contract imposes geo-blocking. This is important as significant number of instances in which geo-blocking is imposed unilaterally by content provider itself is outside of the scope of this study. No competition law issue arises if BBC decides to geo-block content in BBC iPlayer, which the itself company has produced. Emphasis is on geo-blocking clauses, other issues related exclusive contracts, namely duration and bundling, is outside of the scope. As I focus on the Court´s case law, competition law regulations and guidelines are only secondary in importance, as those are not binding on the Court.

As for subject matters, I will focus on audiovisual products, namely films and TV-series, and sport broadcasting. Music could have very well been included but the differences on the management of rights, on the system of remuneration to creators, and the case law would require too much space. As in pay-TV investigation my concentration is on digital content delivered via internet. My particular interest includes all platforms, which are funded by subscriptions, thus including video-on-demand services (Netflix, HBO Nordic, and Amazon etc.) and simulcasting services of broadcasters (ViaPlay). I will not completely exclude free-to-air ("FTA") services, including advertisement funded and public service broadcasters, but it is useful to notice that so far DSMS has not targeted such services.

Physical goods, DVDs, books, video games etc., are not included. However, competition law investigations have pursued online retailers. Much of the economic reasoning considered later can be also applied to physical goods and music. I have followed developments of DSMS and pay-TV investigation until 21th of February 2017.

Although entire bookshelves have been written on the relationship of the internal market and intellectual property, including copyright and the internal market, geo-blocking as rather new phenomena has yet not been evaluated to death by academics. Colomo has assessed geo-blocking in several occasions but combability of geo-blocking in amended

legal context and merits of economic justification remains largely uncharted territory.[24] Thus, overall, the task is not easy, as the case law or legal literature don´t provide clear answers to research questions posed. On the other hand, that gives me great freedom and opportunity as earlier commentary doesn´t limit me. Field is free.

2. Copyright, the Freedom to Provide Services, and Competition Law

2.1 EU Copyright Law or Lack Thereof…

The European Union doesn´t have EU-wide copyright regime. Despite decades of effort, each Member State has its own copyright regime. Copyright remains national in nature although case law on exercise of those rights exist and harmonization has partially synchronized substantial element of copyright.

Thus, copyright in EU is ruled by principle of territoriality, which was confirmed by the Court as a core principle of the EU copyright law in *Lagardère* ruling.[25] Principle of territoriality means that within the framework of international treaties and relevant EU directives, each country can regulate copyright in a different way and each copyright regime has the jurisdiction in relevant Member State: “each Member State grants and recognizes copyright protection in its own territory by virtue national legislation.”[26] Even if substantial scope of national laws is very close with each other after harmonization efforts, copyright is still granted territory-by-territory basis.

Other main principle of EU copyright policy is the freedom of contract, which maintains simply that copyright holders can freely decide about the terms and conditions under which they wish to exploit their works. Usually this is done by licensing, which gives a right to exploit to broadcasters and other service providers. License authorizes third party to carry

---

[24] Lack of writings probably stems from present-day nature of the topic: scope and ramifications of both DSMS and pay-TV investigation is still uncertain. However, number of commentary will probably increase once situation becomes clear.

[25] Case C-192/04 *Lagardère Active Broadcast v. Société pour la perception de la rémunération équitable (SPRE) ja Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)* (2005) ECLI:EU:C:2005:475.

[26] Tambiama Madiega, ‘EU Copyright Reform: Revisiting the Principle of Territoriality’ (European Parliamentary Research Service 2015) 3 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568348/EPRS_BRI(2015)568348_EN.pdf> accessed 28 February 2017.

out certain acts, generally for a specific period, for a specific geographic area and for a specific purpose, but right holder retains ownership of copyright. In audiovisual sector, license gives broadcaster or VoD-service provider right to communicate film, TV-series or sport content to public.[27]

It is useful think that copyright contains substantive and geographic dimensions. Copyright protection ensures that those who have created or invested in content can determine how those works can be reproduced, distributed, or communicated to the public. Other way to put it is that copyright regimes define the range of acts that the right holder is entitled to authorize or prohibit. That is the substantive part. Geographic dimension is usually territorial under principle of territoriality in absence of sector specific legislation.[28]

2.2 The Freedom to Provide and Receive Services

Article 3 of the Treaty on European Union provides that "the Union shall establish an internal market." Basic objective of the internal market is to promote optimal allocation of resources in EU. Provisions of the free movement of goods, services, workers, and capital combined with competition law provisions aim to ensure that resources can move freely without unjustified Member State and private interference.[29] In general, free movement provisions are designed against state measures, competition law is aimed against private contracts.

Article 56 TFEU establishes the freedom to provide and receive services. Articles TFEU 57(3) and 61 creates principle of non-discrimination. Three critical elements to application of TFEU 56 are:

1. Need for inter-state element
2. Concept of service
3. The commercial nature of services

[27] Katsarova (n 5) 7.
[28] Pablo Ibáñez Colomo, 'Article 101 TFEU and Market Integration' [2016] LSE Law, Society and Economy Working Papers 1, 14.
[29] Paul Craig and Grainne De Burca, *EU Law: Text, Cases and Materials* (6th edition, Oxford University Press 2015) 608.

The Court has confirmed that the right covers also situations where neither provider nor recipient travels i.e. the service itself travels. (phone, email, the internet etc.).[30] TFEU 57(1) gives examples of what is meant by service, but the case law has significantly expanded that list, for example transmission of television signal is included.[31] Services must be commercial in nature, they must be provided for remuneration.[32] It is easy to conclude that audiovisual services provided in internet effortlessly fulfills all requirements.

After establishing three basic elements of article TFEU 56, next question is that what kind of measures the article catches? It is clear from Treaty text that discriminatory state measures contradict article 56 TFEU. However, in field of the free movement of services the Court has maintained that discrimination is not necessary if the measure impedes access to market in another Member State.[33] *Alpine Investments*[34] case is a great example of low threshold: the Court maintained that a restriction on "cold calling"[35] which applied in same manner to domestic and foreign commercial operators was deemed to impede the free movement of services as the operators were deprived of marketing technique and potential clients.[36]

As large number of state measures is potentially caught by TFEU 56, issue of justification becomes increasingly important. Apart from statutory justifications contained in TFEU 62[37], derogations from the principle of free movement can be justified by objective justification. The Court has recognized that there are some national interests that can overrule the free movement provisions. These justifications include protection of intellectual property.[38] All justifications must be applied in non-discriminatory manner, be

---

[30] Catherine Barnard, *The Substantive Law of the EU: the Four Freedoms* (5th Edition, Oxford University Press 2016) 294.
[31] ibid 295.
[32] Craig and De Burca (n 30) 825.
[33] ibid 839.
[34] *Case C-384/93 Alpine Investments BV v Minister van Financiën [2005] ECLI:EU:C:1995:126*.
[35] Refers to making unsolicited telephone calls without prior consent to individuals. See.Craig and De Burca (n 30) 840.
[36] ibid 841.
[37] "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on **grounds of public policy, public security or public health**."
[38] 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* (2011) ECLI:EU:C:2011:631 [94].

justified by imperative requirements in the general interest, be suitable for securing attainment of the object which they pursue and not go beyond what is necessary.[39]

2.3 Non-competitive Agreements

As the free movement law is mostly concerned with state measures, main objective of the competition law is to abolish restrictive private practices impeding consumer welfare.[40] However, in EU competition law also promotes the integration of the internal market. Abolishing state measures that restricts trade would be exercise in futile if private parties could replace state measures by cartels or other similar practices.[41]

The main article is TFEU 101. TFEU 101(1) prohibits agreements, decisions by associations of undertakings and concerted practices that are restrictions of competition. TFEU 101(2) deems illegal parts of agreements void and 101(3) offers justification. TFEU 101(1) contains three essential elements:

1. Collusion between undertakings
2. Which affects trade between Member States
3. Has as its object or effect the prevention, restriction or distortion of competition within the internal market[42]

Collusion refers to agreements between undertakings, decisions by associations of undertakings and concerted practices. TFEU 101(1) prohibits both horizontal and vertical agreements. Horizontal agreements refer to agreements between actual or potential competitors. Vertical agreements mean agreements between undertakings operating at different levels of the production chain.[43]

Second point means that an agreement must have appreciable effect on trade between Member States. Usually this requirement is fulfilled easily. It only requires that "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, **direct or**

[39] Barnard (n 31) 483.
[40] Valentine Korah, *Introductory Guide to EC Competition Law and Practice* (6th edn, Hart Publishing 1997) 1.
[41] Craig and De Burca (n 30) 1002.
[42] Korah, *Introductory Guide to EC Competition Law and Practice* (n 41) 41.
[43] Whish and Bailey 117.

indirect, actual or potential, on the pattern of trade."[44] (Emphasis added) The concept is familiar from the free movement of goods.

Agreements can restrict competition by object or effect. These are alternative, non-cumulative methods of infringing TFEU 101(1). Idea is that if the object of the agreement is to restrict competition, it is unnecessary to prove anti-competitive effects. Only after it is clear that the object of an agreement is not to restrict competition, it is necessary to consider whether it might have the effect of doing so.[45] On the effect-side, true effects of the agreement must be examined. One tool is to establish counterfactual situation: what the position would have been in the absence of the agreement?[46]

The Court tends to regard vertical agreements that amounts to an absolute territorial protection as having a restrictive object.[47] In essence, the absolute territorial protection means that a commercial operator has protection from all competition regarding certain brand in particular territory both domestically and from imports. Such protection leads to restriction of parallel trade and elimination of intrabrand competition.[48] Strict treatment of any kind of agreement, which partitions market by Member State borders, stems from the internal market integration, which is one of the main objectives of Union´s competition law policy.[49] In *Glaxo Spain*[50], the ECJ held that the integration of markets is an objective of EU competition law worthy of being protected itself.[51] In the market integration cases, the Court reverts to "sui generis" approach: agreements can be restriction by object even with plausible pro-competitive aim or effects.[52] As stated earlier the market integration objective states that private agreements should not rebuild those walls that were eradicated by

---

[44] Korah, *Introductory Guide to EC Competition Law and Practice* (n 41) 55. *Case 56/65 Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU)* (1966) ECLI:EU:C:1966:38 249.
[45] Whish, Richard and Bailey, David (n 9) 118.
[46] ibid 127.
[47] Craig and De Burca 1018.
[48] Ulrich Haas and Heiner Kahlert, 'Cases C-403/08 and C-429/08 Murphy, Judgment of 4 October 2011' (2012) 19 Maastricht Journal of European and Comparative Law 110, n. 6.
[49] Craig and De Burca (n 30) 1018–1020.
[50] *Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission of the European Communities and Commission of the European Communities v GlaxoSmithKline Services Unlimited and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities* (2009) ECLI:EU:C:2009:610.
[51] ibid 61–64.
[52] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 6.

abolishing state measures. In the Union, promotion of parallel trade is a tool to encourage market integration by price equalization.[53]

TFEU 101(3) provides that an agreement that infringes Article 101(1) of the Treaty is not necessarily unlawful if it can, *inter alia,* increase consumer welfare and such restrictions are indispensable. Burden of the proof is on the defendant.[54] However, it is unlikely that object restrictions fulfill 101(3) requirements.[55]

3. The Internal Market, Intellectual Property, and Absolute Territorial Protection

3.1. Early Cornerstones: *Consten-Grundig* and *Deutsche Grammophon*

Ultimately balancing job between intellectual property and internal market has fallen to European Court of Justice, which has tried to strike that balance from 1960s through various cases and doctrines. On early days of the Union, it was widely thought that the holder of industrial property rights could divide the internal market by relying on intellectual property legislation and licenses. However, those hopes or fears evaporated quickly as the Court developed on the 1960-1970s that the single market imperative can impose restrictions on intellectual property rights. The Court´s case law overlaps with period of political stagnation in Union. Alongside IP cases, the Court made also numerous critical decisions in other areas of law in order to promote the single market objective.[56]

The Court´s approach can be traced to ground-breaking case of *Consten-Grundig*.[57] As early as 1966, issues of protection of intellectual property and contractual clauses that established absolute territorial protection were in question. As such, despite its old age, *Consten-Grundig* case is good starting point to issues regarding subject matter of this study.

---

[53] István Nagy Csongor, *EU and US Competition Law, Divided in Unity?:The Rule on Restrictive Agreements and Vertical Intra-Brand Restraints* (Ashgate Publishing 2013) 181.
[54] Whish, Richard and Bailey, David (n 9) 152.
[55] ibid 772.
[56] See Valentine Korah, 'The Interface Between Intellectual Property and Antitrust: The European Experience' (2001) 69 Antitrust Law Journal 801, 805.
[57] Joined cases 56 and 58-64 *Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* (1966) ECLI:EU:C:1966:41.

Grundig established a network of exclusive dealers in Member States other than Germany. Two important points ascend from facts. Firstly, all its dealers, both exclusive distributors and the German wholesalers, agreed not to export the goods. Secondly, the exclusive dealer in each country could register to his own name the national trade mark "Gint" (Grundig International), which at that time was placed on all Grundig machines in addition to the widely known "Grundig" mark. Two large retailers from France, UNEF and Leissner, bought large quantities of Grundig apparatus far more cheaply from German wholesalers than it was possible through the network set up by Consten, Grundig's distributor in France.[58] UNEF had applied to the Commission for declaration that the agreement between Consten and Grundig was contrary to the Treaty. The Commission agreed and the case was appealed to the Court. I will first assess contractual part of the case first, then intellectual property.

Advocate General ("AG") Roehmer noted in his Opinion that the Commission has erred when it deemed the contract as an object restriction and did not engage in a further economic analysis.[59] Two situations should be compared: that which arises after making of an agreement and that which would have arisen had there been no agreement. AG Roehmer argues that there could be situations where supplier might not find distributor without offering exclusive dealership and absolute protection. As the Opinion notes, that situation usually arises when penetrating a new market and economical risks for the distributor are high. In *Consten-Grundig,* Consten was responsible for promotion activities and after-sale services of Grundig products in French market.

For promotion of competition it is better have deal than no deal at all. In other words, it is not suitable to only look at the situation which has already occurred *ex post*, but one should also look *ex ante* why the deal was done in such manner in first place: the distributor might not have done the deal if it could not be protected against parallel importers free riding on efforts of Consten.

Also, the Opinion makes important note on interbrand and intrabrand competition. Former relates to competition between different producers, latter to competition between

[58] ibid 303.
[59] Joined cases 56 and 58-64 *Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, Opinion of Advocate General Roehmer* (1966) ECLI:EU:C:1966:19 358.

distributors of same product. In Advocate General´s view, elimination of intrabrand competition is not enough to infringe TFEU 101(1) if significant interbrand competition exists. Rationale behind this is that elimination of intrabrand competition cannot lead to excessive prices as other competing products would likely to keep prices of Grundig products competitive. If anything, entrance of Grundig products to French market increased competition.[60] Argument is familiar from across the pond, in *Sylvania*[61] US Supreme Court declared:

> "Interbrand competition… is the primary concern of antitrust law… when interbrand competition exists… it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product."[62]

The Court maintained that granting exclusive licenses was not *per se* against TFEU 101(1)[63] but the reason for the strict treatment of the agreement was that it went beyond grant of exclusive distribution rights in France by conferring absolute territorial protection against parallel imports from other Member States.[64] The Court reasoned that a restriction of intrabrand competition is enough to deem a contract as a restriction of competition, even if it might increase the interbrand competition. After that the Court decided that if object of agreement is to restrict competition, there is no need to consider its actual effects. Finally, the Court stated that *object* of the agreements was to eliminate competition at wholesale level as it resulted to isolation of French market and made it possible to charge prices sheltered from all competition.[65] On TFEU 101(3) justification the Court sided with the Commission. Absolute territorial protection was not indispensable to achieve the efficiency gains.

---

[60] ibid 359.
[61] *Continental TV, Inc v GTE Sylvania, Inc* (1977) 433 U.S. 36.
[62] ibid 19.
[63] *Société Techique Miniére* (n 45). "The Court of Justice said that a conferring exclusivity on a distributor might not infringe Article 101(1) where this seemed to be 'really necessary for the penetration of a new area by an undertaking'." Whish, Richard and Bailey, David (n 9) 128.
[64] Whish, Richard and Bailey, David (n 9) 774.
[65] Alison Jones and Brendan Sufrin, *EU Competition Law* (4th edn, Oxford University Press 2011) 208.

Thus, *Consten-Grundig* initiated long line of case law, which has condemned attempts to isolate markets by national borders.[66] As Whish and Bailey notes: "there is no better illustration of the impact of the 'single market imperative.'"[67] Because EU competition policy is designed to promote the integration of the national markets of Member States, schemes contrary to that goal are not tolerated, regardless of effects.[68]

However, the market integration objective was not the only reason for the Court´s decision.[69] Unlike Advocate General, the Court was concerned with the elimination of intrabrand competition. The Court assessed that the likelihood of interbrand competition compensating for a loss of intrabrand competition is not great by stating that "the more producers succeed in their efforts to render their own makes of product individually distinct in the eyes of the consumer, the more the effectiveness of competition between producers tends to diminish."[70] Furthermore, underlying economic theory maintains that alternative sources of supply, parallel trade and passive sales, works as a safety valve. If exclusive distributor without absolute protection tries to charge excessive prices, parallel traders and other distributors can exploit possibilities of arbitrage.[71]

As the Opinion of Advocate General Roehmer notes that there is not a bulletproof viable economic justification for a ban of absolute territorial protection. However, the Court does not lack economic understanding regarding the rationale for restriction of free riding or for importance of interbrand competition. Quite contrary, the ECJ understood and accepted those arguments in a case decided just a few weeks before *Consten-Grundig*.[72] It is just that once the tension between the free rider rationale and the market integration objective "reaches an appreciable level, the single market imperative prevails."[73]

---

[66] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 28) 9.
[67] Whish, Richard and Bailey, David (n 9) 128.
[68] Emmanuel Mastromanolis, 'Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law' (1995) 15 University of Pennsylvania Journal of International Business Law 565.
[69] Ramírez Pérez, Sigfrido M. and van de Scheur, Sebastian, 'The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and Its Keynesian Challenge' in Kiran Klaus Patel and Heike Schweitzer, *The Historical Foundations of EU Competition Law* (Oxford Scholarship Online 2013) 42.
[70] *Consten-Grundig* (n 58) [343].
[71] Andrei Gurin and Luc Peeperkorn, 'Vertical Agreements' in Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (3rd edn, Oxford University Press 2014) 1365.
[72] *Société Techique Miniére* (n 45).
[73] Csongor (n 54) 164.

However, it can be contested that in circumstances comparable to *Consten-Grundig,* absolute territorial protection might actually promote market integration. The main point of criticism of the Court´s *Consten-Grundig* decision and subsequent case law is that absolute territorial protection is sometimes needed to penetrate a new market. Basic premise to this argument is that normally intrabrand competition is in the interest of supplier as competition between distributors drives prices down and/or distributors compete with each other on other qualities like after-sale service. Thus, intrabrand competition promotes sale. Therefore, no business would institute territorial restrictions merely to enrich its distributors.[74]

When distributors are not willing to distribute without protection then the protection is in the interest of supplier to penetrate a new market.[75] This point of view is closely linked with need of *ex ante* view on the agreement. Korah likes to provoke that supplier and distributor might have better knowledge on protection required than a bureaucrat in Brussels or a judge in Luxembourg.[76] End game of all this is that if absolute protection cannot be upheld, the supplier might not be able to penetrate a new market at all, thus actually damaging the market integration objective. Other way to put it, absolute territorial protection can improve market integration at supply level.[77]

Both the Commission and the Court tends to suppose that parallel trade promotes consumer welfare through downward price equalization. However, empirical evidence of price equalization is weak at best.[78] Parallel trade can be especially effective if prices fluctuate among territories, in case of the EU that usually means Member States. When parallel trade is not restricted, economic stake holders might have to converge prices between Member States thus promoting objective of market integration.[79] In a sense, the free riding parallel

---

[74] Mastromanolis (n 69) 599.
[75] ibid 598.
[76] Korah, *Introductory Guide to EC Competition Law and Practice* (n 41) 63.
[77] Mastromanolis (n 69) 614.
[78] Nicolas Petit, 'Parallel Trade: Econ-Oclast Thoughts on a Dogma of EU Competition Law' in Govaere, Inge, Quick, Reinhard and Bronkers, Marco, *Trade and Competition Law in the EU and Beyond* (Edward Elgar publishing 2011) 335.
[79] Mastromanolis (n 69) 565.

trader is the hero to this story. As AG Kokott has put it*: "*price differences should be offset by trade." [80]

However, objective of price equalization in order to integrate markets via competition law can also lead to obstinate effects. Price equalization is a two-way tool. It is entirely possible that if absolute protection or more precisely underlying price discrimination scheme cannot be upheld, the suppliers or producers aims either to raise prices in low-price territories or not to enter or supply to low-price territories at all as it is difficult to find a willing distributor. In both cases, consumers in low-price countries would be worse off in terms of range of products and ultimately the Union in terms of market integration.[81] In other terms, price discrimination can help to open and uphold more territories. [82] Korah and O´Sullivan suggest that the Union is trying to cure the symptoms, not the cause, when enforcing price converge thru competition law: price differences does not stem from private agreements but from differences between Member States such as taxation, price controls, cost of living etc.[83]

This does not mean that absolute protection should always be allowed *per se.* It merely maintains that when entering new market or when promoting new product protection could and perhaps should be granted when supported by economic reasons as it does not in those cases even impede market integration. However, on instances where interbrand competition is weak, intrabrand restraints are legitimate concern. Additionally, aim of this chapter is not dispute the fact that market integration is an objective of competition law in the Union. It tries merely to show to that in certain cases it adherent following of the objective can damage achievement of the objective itself.

So, what about the trademark side of *Consten-Grundig?*[84]Advocate General Roehmer opinioned that registration of GINT trademark was an abuse of trademark law and,

---

[80] *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, Opinion of Advocate General Kokott* ECLI:EU:C:2011:43 [192].
[81] Petit (n 79) 337.
[82] Csongor (n 54) 189–190.
[83] Valentine Korah and Denis O'Sullivan, *Distribution Agreements Under the EC Competition Rules* (Bloomsbury Publishing 2002) 23.
[84] Keeling points out that trademark part of the case was really about free movement of goods as the case relied on French trademark law: "If the case were to arise now, the parallel importer would invoke Article 28

therefore, ineffective. Grundig trademark was sufficient to indicate the origin of the apparatus.[85] The Court decided that:

> "That agreement therefore is one which may be caught by the prohibition in Article 85 (1). **The prohibition would be ineffective if Consten could continue to use the trade-mark to achieve the same object as that pursued by the agreement which has been held to be unlawful**." (Emphasis added)[86]

In the next paragraph the Court famously reasoned that the union law cannot question the existence of intellectual property but is capable of restricting exercise of such right:

> "The injuction… …to refrain from using rights under national trademark law in order to set an obstacle in the way of parallel imports does not affect the **grant** of those rights but only limits their **exercise** to the extent necessary to give effect to the prohibition under Article 101(1) TFEU" (Emphasis added)[87]

Indeed, as Keeling commentates, if manufacturers were allowed to assign trademarks to their distributors in each Member State and each distributor were allowed treat parallel imports as trade mark infringements, national markets could be sealed off in airtight manner.[88] As the paragraph above states, the decision made about contractual clauses required that the trademark could not be used to achieve the same results as the already condemned contract. The intent of the trademark in the Court´s opinion was to deter parallel imports. Thus, the trademark agreement too was unlawful, because it chased the same object as the exclusive distribution agreement.[89]

The dichotomy between existence and exercise of intellectual property right has been ridiculed by academics so extensively that it´s not even funny anymore.[90] For the purposes of this study it´s sufficient to say that exercise of intellectual property right cannot be divided from its existence. Existence of the intellectual property right is the ways it can be

---

before national court in which the proprietor of the trade mark brought infringement proceedings against him and that court would have to apply the exhaustion doctrine established by the ECJ" Keeling (n 1) 80–81.

[85] *Opinion of Advocate General Roehmer* (n 60) [366].

[86] *Consten-Grundig* (n 58) [345].

[87] ibid.

[88] Keeling (n 1) 312.

[89] Catherine Seville, *EU Intellectual Property Law and Policy* (Edward Elgar 2009) 374.

[90] Keeling (n 1) 54–55.

exercised. The dichotomy is more or less a tool that the Court uses to achieve the results it desired, as analytical tool it is almost useless.[91]

Deutsche Grammophon[92] assessed the relationship between intellectual property legislation and the free movement law. In a sense, rules of free movement prohibit national laws to the extent that they empower right holders of intellectual property. In the free movement side, the very power granted by the law to undertakings must be struck down.[93] On the other hand, derogations from the free movement rules are justified for safeguarding rights, which constitute the "specific subject-matter" of intellectual property.[94] Additionally, national law must not constitute to arbitrary discriminations or to disguised restrictions on trade.[95]

In *Deutsche Grammophon*, the Court developed the "exhaustion principle" for physical goods. The outcome is, in fact, comparable to *Consten-Grundig.* The exhaustion doctrine provides that when tangible good protected by intellectual property right is placed on the internal market by the right owner or with right owner's consent, the right owner cannot object any movement of such physical good around the Union.[96] The Court´s reasoning warrants full citation:

> ”If a right related to copyright is relied upon to prevent the marketing in a member state of products distributed by the holder of the right or with his consent on the territory of another member state on the sole ground that such distribution did not take place on the national territory, such a prohibition, **which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the treaty, which is to unite national markets into a single market.**" (emphasis added)[97]

---

[91] Valentine Korah, 'Exclusive Licenses of Patent and Plant Breeders' Rights under EEC Law after Maize Seed' (1983) 28 Antitrust Bull. 699, 701.
[92] Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* (1971) ECLI:EU:C:1971:59.
[93] ibid 11; Giuliano Marenco and Karen Banks, 'Intellectual Property and the Community Rules on Free Movement: Discrimination Unearthed' (1990) 15 European Law Review 224, 225–226.
[94] Marenco and Banks (n 94) 229.
[95] ibid 235.
[96] Guy Tritton, *Intellectual Property in Europe* (Sweet and Maxwell 2008) 652–653.
[97] *Deutsche Grammophon* (n 93) [12].

The exhaustion principle stems from the single market objective of the Union as did the decision in *Consten-Grundig*. A right holder cannot control subsequent sales of products after the first sale. For example, if product is lawfully sold in France with consent of the right holder, the right holder cannot restrict import to Germany on basis of IP protection. Opposite could lead to partition of markets in European Union by Member State borders, which is quite clearly against the whole idea of the European single market: the right holder in Germany could prevent parallel trade by relying on legislation.[98] The doctrine also has solid economic reasoning. When the goods protected, by for example copyright, are placed on the market, the right owner has received an economic return for the investment, by that realizing the "specific subject matter" of intellectual property.[99] Concept is similar to first sale doctrine of US.

Both cases show that early on the Court took a strong stance against partitioning of the internal market. Contractual agreements, licensing agreements and national legislation cannot be relied to grant absolute territorial protection and to restrict parallel trade. While significant parts of vertical restraints policy and intellectual property policy have undergone major modernization, ground stones laid by *Consten-Grundig* and *Deutsche Grammophon* are still solid.

3.2 Absolute Territorial Protection Revisited: *Coditel I* and *II*

The Court evaluated exclusive licensing in *Nungesser*[100], which was about exclusive license of plant breeders' rights. The case itself did not amend the case law in a significant way. The Court decided that it´s acceptable to grant "open" exclusive licenses, but "closed" exclusive licenses, namely absolute territorial protection was still condemned. The Court defined an open exclusive license as an agreement between the licensor and licensee under

[98] Keeling (n 1) 82.
[99] Thomas Graf, 'UK Pubs and Greek Decoders – The Implications of the Premier League Case for the Dissemination of Digital Content' <http://kluwercompetitionlawblog.com/2011/08/15/563/?print=pdf> accessed 10 February 2017.
[100] Case 258/78 *LC Nungesser KG and Kurt Eisele v Commission of the European Communities* (1982) ECLI:EU:C:1982:211.

which the licensor agrees not to grant other licenses for the same territory and not to compete there himself.[101]

However, the main development was the Court´s willingness to examine scope of intellectual property in more nuanced and analytical manner. The Court focused on adequate incentives to producer and on the extent of protection needed against risks that was necessary to achieve reproduction instead of applying simple existence/exercise dichotomy.[102]

The Court´s more nuanced and less formalistic approach is visible in *Coditel I*[103] and *II*[104] cases. Although the exhaustion principle and restrictions on exercise of rights makes single market imperative and economic sense regarding tangible goods, should that apply to non-tangible goods such as film? One will see that, in fact, that ban of market partitioning is not absolute.

Facts to *Coditel I* and *II* are fairly simple: film and TV-broadcasting rights of French film Le Boucher were sold to Cine Vog in Belgium and to Filmedis in Germany. The Belgian contract stated that film could be shown in TV in Belgium only after forty months after its first showing in a cinema. The German contract did not contain such stipulation. The German licensee broadcasted the film in TV in Germany. Belgian TV-company Coditel picked up that signal and used cable diffusion to broadcast the film in Belgium. Thus, the film was shown earlier in Belgium than the contact stipulated. Cine Vog had not authorized the broadcast in Belgium and had not received remuneration from Coditel. Cine Vog sued Coditel for copyright infringement.[105]

In *Coditel I*, the Court considered the facts on basis of the free movement of services. Coditel company argued that the exhaustion principle should apply as in *Deutsche Grammophon.* The Commission suggested that broadcasting in such manner should be

---

[101] Korah, 'Exclusive Licenses of Patent and Plant Breeders' Rights under EEC Law after Maize Seed' (n 92) 730.
[102] Steven Anderman and Hedvig Schmitt, *EU Competition Law and Intellectual Property Rights: The Regulation of Innovation* (2011) 244.
[103] Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* (1980) ECLI:EU:C:1980:84.
[104] Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* (1982) ECLI:EU:C:1982:334.
[105] Keeling (n 1) 273.

allowed, if a broadcaster remunerates a right holder accordingly: "As the owner has consented to the initial broadcast, legitimate interest is satisfied if national law entitles him to receive fair remuneration from the cable diffusion company which made the simultaneous re-transmission. "[106] Advocate General Warner was in the opinion that the exhaustion principle should not apply: "it is of the essence of a performing right that it enables the owner of it to authorize or forbid each and every performance of the work to which it relates to."[107]

The Court ruled that the exhaustion principle does not apply to a performance right of non-tangible goods. As the right was not exhausted, the right holder could rely on copyright law to prohibit broadcasting of the film as copyright remained territorial in scope. Exclusive film and TV licensee in one country was entitled to prevent unauthorized redistribution of the film on cable TV in the same country. Key paragraph is number 14:

> ”On the one hand, **they highlight the fact that the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work**. On the other hand, they demonstrate that the exploitation of copyright in films and the fees attaching thereto cannot be regulated **without regard being had to the possibility of television broadcasts of those films.**" (Emphasis added)[108]

As put forward by Advocate General Warner, the right to authorize any showing of a film and require remuneration is within substantial scope of copyright.[109] The difference from material goods is that film is a performance work, which can be indefinitely repeated. Economical reasoning is simple: whereas the author obtains fair remuneration when the book is sold, fair remuneration from audiovisual product requires fees for any showing of the film.[110] Consequently, if the right holder is not able to bar the territories in which its content is broadcasted, the right holder is at risk of being grossly undercompensated. What

---

[106] *Coditel I* (n 104) [388–389].
[107] Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others, Opinion of Advocate General Warner* 879.
[108] *Coditel I* (n 104) [14].
[109] ibid 14.
[110] Graf (n 100).

the right holder thought it gave was just a limited territorial license, but if the content is retransmitted around in cross-border manner then showing of the film in television would undercut value of film rights in Belgium.[111]

In *Coditel II* it was argued that territorial licensing itself was against competition law. Even though Cine Vog could rely on a copyright protection to deny the transmission of the film (*existence* of right), competition law could still be applied as granting exclusive licenses amounts to improper *exercise* of copyright.[112] In here, the Court faced a difficult question. *Coditel I* maintained that the right holder or the appointed licensee could rely on non-exhaustion of copyright to deny cross-border transmissions. Findings of *Coditel I* mean that approving exclusive licenses would constitute absolute territorial protection for broadcasters. A point not missed by the Advocate General Reischel.[113]

In his written Opinion, Advocate General Reischel suggested that exclusive licenses should be upheld nonetheless. The Opinion focused on special characteristics of audiovisual industry particularly on how to obtain the finance for film production at the first place. The film industry uses pre-sales, which means that producers sale rights to distributors before the product is produced and licensees disburse producers in swap for exclusivity in a certain territory. Advocate General took an *ex ante* view: absolute territorial protection is requisite for the agreement to be completed. A distributor would not make such deal if other distributors could free ride on the investment made by the distributor:

> "a distributor will be prepared to advance a lump sum for financing a film only if he is accorded an exclusive right of exhibition on one particular market. If it were not for such a facility, many films would not be produced at all, which would impoverish the market and depress competition."[114]

Advocate General Reischel also had an interesting view on the "specific subject matter" of copyright. The Opinion commented on *Coditel I* by arguing that the "specific subject

---

[111] Bill Batchelor and Luca Montani, 'Exhaustion, Essential Subject Matter and Other CJEU Judicial Tools to Update Copyright for an Online Economy' (2015) 10 Journal of Intellectual Property Law & Practice 1, 7.
[112] 'Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others, Opinion of Advocate General Reischel* [3415].
[113] ibid 3410.
[114] ibid 3412.

matter" does not only contain right to authorize each and every showing of the film but also "the right to have it exploited by a single person, whether it be the owner of the right himself or an exclusive licensee." In Advocate General Reischel´s opinion, *Coditel I* was not only about mode of calculating remuneration but also about *proper* remuneration. In his Opinion multiple licenses in same territory would undercut remuneration to a right holder as "various distributors would have to undercut one another in price in order to attract customers, so that the financial returns passed on to the original owner of the rights might be lower than those he could have obtained by exploiting the film himself."[115]

The ECJ did not depart from the Opinion and decided that exclusive territorial licenses do not *per se* infringe competition law:[116]

> ”However, the mere fact that the owner of the copyright in a film has granted to a sole licensee the exclusive right to exhibit that film in the territory of a member state and, consequently, to prohibit, during a specified period, its showing by others, is not sufficient to justify the finding that such a contract must be regarded as the purpose, the means or the result of an agreement, decision or concerted practice prohibited by the Treaty."

The Court also followed Advocate General Reischel by referencing to specific characteristics of the film industry. The Court recognized two features, need for subtitling and dubbing and system of financing film production in Europe, as reasons why exclusive licenses are not liable to distort the market.

However, it is perhaps useful to notice that the *Coditel II* decision was restricted to particular legal and economic circumstances, i.e. territoriality of copyright and specific characteristics of the film industry. [117] The judgment did contain a backdoor to revisit the decision in case of different context:

> "The exercise of those rights may, none the less, come within the said prohibitions **where there are economic or legal circumstances the effect of**

---

[115] ibid 3411–3412.
[116] *Coditel II* (n 105) [15].
[117] Keeling (n 1) 322.

which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market."[118]

Perhaps unfortunately the Court left the issue for the national court to decide. The Court gave the national court four factors to consider:

1. Whether a copyright holder or his assign's exercise of the exclusive showing rights in a film create "artificial and unjustified" barriers, given the characteristics of the European film industry.

2. Whether the remuneration exceeded a fair return relative to the investment in the film.

3. Whether the time period of the exclusive agreement is excessive.

4. Whether the exercise of this right "within a given geographical area is such as to prevent, restrict or distort competition" within the Community.[119]

Logic of *Coditel I* apply to *Coditel II*. In a sense, *Coditel II* is a natural consequence of *Coditel I*: "if the right holder is entitled to invoke the right of communication to the public to control the cross-border provision of services, an agreement giving the licensee the same right does not restrict competition that would have existed in its absence."[120] It would be illogical to put usage of licenses in worse position in comparison to situation where copyright holder exercises the right directly.[121] In other words, the license agreement remains within the "specific subject matter" of copyright as decided already in *Coditel I*. Such an agreement just allows copyright to perform its essential function.[122]

In a sense, the Court´s ruling in *Coditel II* is two-fold. First part is generally well recognized: essential function of copyright requires non-exhaustion and exclusive licenses are, in principle, outside of the scope of TFEU 101. Second part is that legality of absolute

[118] *Coditel II* (n 105) [17].
[119] ibid 19. David R Bumbak, 'Industrial Property Rights and the Free Movement of Goods in the European Communities' (1984) 16 Case Western Reserve Journal of International Law 381, 432.
[120] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 16.
[121] *Opinion of Advocate General Reischel* (n 113).
[122] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 11.

protection depends on certain parameters as maintained by the Court. It should be noted that the Court did not provide bulletproof exception for absolute territorial protection of audiovisual services.

Anderman and Schmidt maintain that the case was more about the fact that protection was needed to penetrate markets than about appropriate remuneration to producers. The Court was willing to confer absolute territorial protection because the investment in the copyright protected product could only be secured against full territorial protection.[123]

Overarching theme of Keeling's criticism is that both Advocate General and the Court were too concerned with needs of audiovisual industry instead of balancing such needs with the single market objective. It is certainly true that production of films and TV-series is a risky business, but in reality, many other businesses are also risky. Is it objective to pick out audiovisual sector from other sectors? It´s at least mildly surprising that the Court showed great respect for the film industry while considering the Court´s observable reluctance to approve such protection in its case law before and after the *Coditel* judgments.

The Court also accepted absolute territorial protection of plant breeders´ rights in *Erauw-Jacquery*[124]. The Court maintained that the export restrictions in that case were necessary to protect the investment made by the licensor to the development of new varieties.[125] Overall the Court´s case law from 1980s show understanding of economic underpinnings of intellectual property starting from *Nungesser*.[126] Furthermore, *Coditel* cases and *Erauw-Jacquery* seems to imply greater reference to underlying economic and legal circumstances even when the sole aim of the agreement is to partition markets.[127]

[123] Anderman and Schmitt (n 103) 245.
[124] Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* (1988) ECLI:EU:C:1988:183.
[125] ibid 10.
[126] Anderman and Schmitt (n 103) 242.
[127] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 12. See also about whole period of 1980s: Anderman and Schmitt (n 103) 242–247.

4. Murphy´s Law: Bye-bye *Coditel*?

4.1 Kick-off: Factual Background

Coditel I and *II* lead to the *Murphy* case, which is alongside those cases the main case of this study. *Murphy* was decided approximately 30 years after *Coditel* cases but is, in a sense, exactly what the Court left open in *Coditel II*: different legal and economic circumstances. What should be noted early on is that the case is multi-layered one with a specific legislation and even the best and the brightest legal experts disagree on scope and ramifications of the case.

As for the factual background, the Football Association Premier League (the "FAPL"), right holder of broadcasting rights of English Premier league, auctioned rights to broadcasters on exclusive territorial basis. In exchange for lump-sum licensee fee, broadcasters were protected from cross-border competition. Broadcasters were contractually obligated to encrypt their satellite signals and were prohibited from supplying decoder cards to outside of the licensed territory. Additionally, UK legislation condemned acquisition of foreign decoder cards. As a result, territorial exclusivity was truly "watertight."[128]

Karen Murphy, UK pub keeper, nevertheless purchased a satellite decoder card from a third-party dealer to receive broadcasts of English Premier League from Greek pay-TV broadcaster to her pub. The reason for such action was the fact that a Greek subscription was significantly cheaper than a British subscription. Murphy chose to subscribe to the less expensive service of the Greek broadcaster NOVA, costing £118 per month, compared with a British package of £480 per month. However, the Nova subscription was for domestic use only, instead of commercial.[129]

The FAPL brought copyright infringement action against the pub keeper and dealers of decoders. In national proceedings, the British court decided to make a preliminary request to the ECJ. Background to the preliminary request by the UK court is that the defendant

---

[128] Stephen Hornsby, 'Case Comment FAPL v QC Leisure & Karen Murphy: What's Wrong with the "exclusivity Premium" and Why Can't It Be Protected' (2012) 23(6) Entertainment Law Review 1, 1.
[129] Erika Szyszczak, 'Karen Murphy: Decoding Licences and Territorial Exclusivity' (2012) 3 Journal of European Competition Law & Practice 169, 170.

applied for what is called the euro defense. The allegation was that licensing practice of the FAPL was against the free movement provisions and competition law of the Union. The FAPL argued that the case should be decided on basis of *Coditel*-cases. Instead, the UK Court decided to make a preliminary request to the ECJ to clarify the scope of the *Coditel* cases and its application to national proceedings.[130]

What must be noted early on is that *Murphy* was about satellite transmission, which is subjected to sector specific copyright legislation, namely the Satellite and Cable Directive ("SatCab").[131] Unlike in traditional copyright doctrine, SatCab operates on the "country of origin" principle. Per the Directive, communication to the public by satellite is a relevant act only in the Member State where the signals originate. If copyright is obtained in one Member State, it is possible for broadcasters to reach end-users based in other Member States without copyright infringement. Contrary to traditional the "country of destination" approach where copyright must be obtained in every Member State where the transmission can be watched. On the other hand, nothing in the Directive itself prevents right holders from granting territorial licenses to television operators. The principle of contractual freedom, on which Directive is based on, makes it possible to limit the exploitation of rights.[132]

4.2 First Half: Opinion of Advocate General Kokott

The Court had to consider two related questions: First, it had to assess compatibility of national legislation, which criminalized the use of foreign decoder cards, with Article 56 TFEU. Secondly, it had to decide whether contractual provisions that prohibited satellite television operators from selling decoders to outside of the territory covered by the exclusive license was compatible with Article 101 TFEU.[133] In order to understand

[130] Judge Barling in national proceedings: "As I have said, I incline to the view that *Coditel II* does not provide the answer to this case." *The Football Association Premier League Ltd v QC Leisure & Ors* [2008] EWHC 44 Ch.
[131] Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 248/15).
[132] ibid Recital 16.
[133] Batchelor and Montani (n 97) 7.

Murphy, throughout examination of parties' arguments, Advocate General's Opinion, and finally the decision is needed.

The defendant in national proceedings alleged that the territorial limits placed by the licensor conflicted with the rules on free movement of services and genuine competition enshrined in the Treaty. It was also argued that the licensing agreements, with clauses upholding absolute territorial protection, were incompatible with article 101(1) TFEU by object as it led to the "artificial maintenance" of national boundaries within the internal market. Additionally, it was argued that the exhaustion principle should apply to the case because decoder cards are essentially same as DVDs as aim of the both was to control access to content. Therefore, the party argued that FAPL's copyright in the decoder card was exhausted by authorized and remunerated sale in Greece.

The FAPL relied on the *Coditel* case law. The FAPL argued that the analogy with DVDs was inappropriate and decoder cards should be compared to *Coditel* cases, namely to require appropriate fees from every showing of copyrighted content. Additionally, the FAPL argued that exclusive licensing and territorial protection by restricting decoder sale is needed ensure IP protection. The FAPL argued that cross-border sales of decoders are harmful to its interests because sales undermine the exclusivity of the rights granted by license in each territory and hence the value of those rights. The broadcaster selling the cheapest decoder cards has the potential to become the broadcaster at European level. Naturally, that would lead to a significant loss of revenue for all other stakeholders and right holder itself.

AG Kokott first recognized infringement of TFEU 56. Contractual clauses clearly impeded the free movement of services as clauses restricted cross-border movement of decoders. Impairment of freedom to provide services was particularly intensive as the restrictions not only rendered the exercise of freedom to provide services more difficult, but also had the effect of partitioning the internal market into separate national markets.[134]

Analysis then turned on a justification of such restriction. The Opinion stated that restrictions can be justified if restrictions were necessary to safeguard rights which constitute the "specific subject-matter" of such property. Essential question was, did the

[134] *Opinion of Advocate General Kokott* (n 81) [175].

"specific subject matter" require market partitioning?[135] In her opinion, the "specific subject matter" of the broadcast was commercial exploitation, which materialized by charging payments for the decoder cards.

Advocate General Kokott argued that "such exploitation is not undermined by the use of Greek decoder cards, as charges were paid for those cards."[136] The fact those charges were not as high as the charges imposed in the United Kingdom did not matter for Advocate General Kokott because "there is no specific right to charge different prices for a work in each Member State." In AG Kokott´s view, cross-border trade should offset such price differences. Thus, Advocate General Kokott went on to conclude that partitioning of the market was unnecessary to protect the "specific subject matter" of commercial exploitation as fees were paid of Greek decoders. In other words, the Opinion preferred defendant's DVD analogy. The exhaustion principle prevents restrictions to circulation of decoder cards.[137]

Advocate General Kokott then went on to distinguish the case from *Coditel I.* Firstly, Advocate General Kokott noted that in *Murphy* the broadcast was transmitted as agreed between the rights holders and the Greek broadcasting organization. In addition, a fee was charged for each showing of the broadcast, albeit on the basis of Greek rates.[138] By contrast, in *Coditel I* the film was transmitted on television without a fee having been paid.[139]

Other thought was that in *Coditel* cases the television showing could impair the exploitation of the rights as it would have damaged the value of cinema exploitation.[140] Whereas the *Murphy* was about simultaneous live broadcast by same transmission technology. It was not about protection of one form of exploitation over another. In Advocate General Kokott´s view, the FAPL just tried to partition the market to optimize the commercial exploitation of the same content.[141]

---

[135] ibid 179.
[136] ibid 190–191.
[137] ibid 192.
[138] ibid 195.
[139] ibid 199.
[140] ibid 196.
[141] ibid 197.

After that analysis, issue of TFEU 101 infringement became relatively easy for Advocate General Kokott. Without a reference to *Coditel II,* the Opinion stated briefly that decoder restrictions constituted absolute territorial protection prohibited by the Treaty. TFEU 101(3) justification could not be applied because the agreement went beyond protectable subject matter.[142]

Interestingly, the Opinion confessed that free decoder circulation might lead to decrease in consumer welfare. Advocate General Kokott noted the possibility that the FAPL would "offer transmission rights only in the most lucrative market in the European Union – the United Kingdom – or make the service offered on other markets conditional on the charging of prices similar to those in the United Kingdom."[143] The Opinion also correctly predicted changes to language options as tool for the right holder.[144]

4.3 Second Half: Remuneration Is the Key?

The Court first assessed the situation under TFEU 56. One might wonder why the article is applicable to a case where the dispute arises purely from contractual clauses as the Court recognized.[145] Two reasons can be found to application of the free movement of services. Firstly, the national law offered the FAPL certain rights and remedies against importers and end-users. In other words, although the basis of action is in contractual clauses, national legislation itself restricted the freedom, as it conferred legal protection to those restrictions. Second reason is procedural. In preliminary rulings, the Court answers to questions referred. In *Murphy*, national court emphasized on the national legislation conferring legal protection to contractual restrictions.[146] De Vries maintains that the whole case could have been decided by applying TFEU 101 only.[147]

Understanding the Court´s TFEU 56 argumentation is important as the rest of the case flows from there.[148] The Court did not follow Advocate General Kokott´s exhaustion

[142] ibid 247–250.
[143] ibid 201.
[144] ibid 202.
[145] *Murphy* (n 39) [88].
[146] Sybe De Vries, 'Sport,TV and IP Rights: Premier League and Karen Murphy Joined' (2013) 50 Common Market Law Review 591, 606.
[147] ibid 616.
[148] "The CJEU's explanation of why the absolute territorial restriction in the licence agreement could not be objectively justified permeates the remainder of the judgment." Adrian Wood, 'The CJEU's Ruling in the

principle reasoning, but eventually came to a same practical conclusion using a different route. The Court focused on the premium paid on exclusive licenses.

The Court maintained that the right to remuneration is the "specific subject matter" of copyright in spirit of *Coditel I* and thus protectable. The "specific subject-matter" comprises "the right to exploit commercially the marketing or the making available of the protected subject-matter, by the grant of licenses in return for payment of remuneration". However, such remuneration does only contain an appropriate remuneration, not the highest possible remuneration.[149] The remuneration must be "reasonable in relation to parameters of the broadcasts concerned, such as their actual audience, their potential audience and the language version."[150]

Against that background the Court went on to state that imposing a premium in exchange for absolute territorial exclusivity goes beyond what is necessary to ensure a fair remuneration for the right holder. Such practice results to partitioning of the internal market along national lines and thereby create artificial price differences, which are "irreconcilable with the fundamental aim of the Treaty."[151] The ECJ simply stated that the UK provision resulted in artificial price differences between the national markets and was therefore an unjustified restriction.

In other words, in the ECJ´s opinion payment mechanisms in the license agreements regarding satellite broadcasting could be drafted to reflect the actual and potential audience of broadcasts. Thus, dividing the market is not indispensable for appropriate remuneration as remuneration could be achieved thru means that restrict the free movement of services less than the FAPL´s licensing practice. The Court´s decision echoes of "possibility of charging fees which exceed a fair return on investment" as stated by the Court in *Coditel II.*[152]

Premier League Pub TV Cases - the Final Whistle Beckons: Joined Cases Football Association Premier League Ltd v QC Leisure (C-403/08) and Murphy v Media Protection Services Ltd (C-429/08)' 34 European Intellectual Property Review 203, 204.

[149] *Murphy* (n 39) [108].

[150] ibid para 110.

[151] ibid. para 115. *Opinion of Advocate General Kokott* (n 81) [192].

[152] On similar idea: Peter Alexiadis and David Wood, 'Free Market 1: Copyright 0 - UK Premier League Loses Away from Home' (2011) 18 243, 246.

The ECJ´s "fair but not maximum remuneration" reasoning is perhaps the most difficult part of the judgment. It can be respectfully argued that the ECJ´s reasoning is perhaps little backwards in fact. Haas and Kahlert maintain that the ECJ´s conclusion is actually based on the fact that absolute territorial protection is itself irreconcilable with fundamental aim of the TFEU.[153] The ECJ started its argumentation on the relationship between services rendered and remuneration paid even though decisive factor was that how services were provided violated the Treaty.

The Court´s reasoning can be understood by applying more analytical framework proposed by Haas and Kahlert. Instead of simply stating that the territorial protection leads to artificial price differences between Member States, it would have been more suitable to "first look into the specific characteristics of the relevant market and the effects of the UK law on the market situation before weighing these effects against the interests of the rights holders as a second step."[154] The specific characteristics of the market differs from *Coditel* cases: broadcasting is no longer based on state monopolies, legislation had moved toward pan-European model and sport broadcasting is not naturally based on language as films are.[155]

Balancing act should be the needs of commercial stake holders versus the restriction on the free market. Haas and Kahlert conclude that remuneration without absolute territorial exclusivity would still be financially viable. Thus, the end situation is similar to the Court´s decision but with more precise reasoning: "the premiums which rights holders could derive from absolute territorial exclusivity are not so essential that they could justify tolerating the negative effects for the internal market."[156]

After "fair but not maximum remuneration"- issue, the Court distinguished between *Coditel*-cases and *Murphy* on basis of the fact that in *Coditel I* the film was broadcasted without a proper license and remuneration to the right holder. In *Murphy,* the right holder was duly compensated (though less than the UK license) and satellite technology allows

[153] Haas and Kahlert (n 49) 115–116.
[154] Haas and Kahlert (n 49) 116.
[155] ibid 117.
[156] ibid 118.

precise calculation of audience.[157] The right holder was not in a danger to get undercompensated or to receive no remuneration as in *Coditel I and II.* In *Murphy,* the Court stated that "doubt is not cast on this conclusion by the judgment in *Coditel I*." Subsequently: "those statements were made in a context which is not comparable to that of the main proceedings."[158] Unfortunately, the Court did not further elaborate does the statement refer to legal context only or to context offered in the Opinion.

After deciding issues under TFEU 56, assessment of TFEU 101 infringement became relatively easy for the Court, like it did for Advocate General Kokott. The Court decided that clauses in exclusive license agreement concluded between holder of intellectual property rights and broadcaster constitute to restriction of competition prohibited by Article 101 TFEU in so far as they oblige the broadcaster not to supply decoding devices in cross-border basis as it leads to absolute territorial protection.[159]

Unlike Advocate General Kokott, the Court re-affirmed in spirit of *Coditel II* that exclusive licenses are not against competition law[160] but the problem lies in "additional obligations", which maintain absolute territorial exclusivity and eliminate all competition between broadcasters in Member State.[161] In *Murphy*, contractual restrictions on cross-border sale of decoders constituted such "additional obligations." Curiously, the Court maintained that presumption of illegality could be rebutted by evidence about exceptional circumstances falling within the economic and legal context. However, the FAPL failed to make such case.[162] Statement by the Court is similar to one in *Coditel II:*

---

[157] *Murphy* (n 39) [120–121]. See also: Bill Batchelor and Tom Jenkins, 'FA Premier League: The Broader Implications for Copyright Licensing' (2012) 33 European Competition Law Review 157, 158.
[158] *Opinion of Advocate General Kokott* (n 81) [116].
[159] *Murphy* (n 39) [146].
[160] ibid 137:*"As regards licence agreements in respect of intellectual property rights, it is apparent from the Court's case-law 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"*
[161] *Murphy* (n 39) [142]: "Such clauses prohibit the broadcasters from effecting any cross-border provision of services that relates to those matches, which enables each broadcaster to be granted absolute territorial exclusivity in the area covered by its licence and, thus, all competition between broadcasters in the field of those services to be eliminated."
[162] ibid 139-140.

> "it must be held that, where a license agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, **unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition."** *(Emphasis added)*[163]

Like Advocate General Kokott, the Court bypassed TFEU 101(3) argumentation by referring to TFEU 56 argumentation. The agreement could not be exempted under Article 101(3) because the absolute territorial restriction went beyond what was necessary to protect the intellectual property at issue as assessed under TFEU 56 already.[164]

4.4 Post-match Analysis: Assessment, Practical Consequences, and Scope of Murphy's Law

The Court´s decision comes to logical conclusions but some commentators maintain that the judgment failed to see "woods from the trees."[165] Clearly, market integration objective is very visible in the judgment.[166] Both Advocate General and the Court seem to envisage sport broadcasting market in which broadcasters compete with each other as in other businesses.[167]

Exclusive licenses with absolute protection was and still is the prevalent industry practice. Critics assert that the Court failed to see why. In their view, the Court could and should have applied *Coditel* cases in which the Court understood specific elements of film industry.[168] Even though sport differs from films in some points, underlying rationale is still equivalent: absolute protection is needed to make broadcasting deals. Without it broadcasters would not be interested in buying broadcasting rights.[169] Additionally, criticism is aimed at the Court´s failure to see positive side of price discrimination, which

---

[163] ibid 140. See footnote 74.
[164] ibid para 145.
[165] Alexiadis and Wood (n 153) 245.
[166] De Vries (n 147) 618.
[167] Anastasios Kaburakis, Johan Lindholm and Ryan Rodenberg, 'British Pubs, Decoder Cards, and the Future of Intellectual Property Licensing after Murphy'' (2011) 18 Columbia Journal of European Law 307, 321.
[168] Alexiadis and Wood (n 153) 245–246.
[169] Pablo Ibáñez Colomo, 'Advocate General Kokott Reinvents (K)opyright' <https://chillingcompetition.com/2011/02/11/advocate-general-kokott-reinvents-kopyright/> accessed 11 February 2017.

was preserved by absolute territorial protection. It was thought that the decision would lead to uniform pricing, closure of low-demand territories, or pan-European licenses in order to mitigate the consequences.[170]

In my opinion criticism offered is valid. The Court was relatively straightforward in its reasoning to achieve the market integration objective it desired. Perhaps the ECJ should have taken more broad view to consider underlying economic principles like in *Coditel II.* However, in my opinion, aftermath of *Murphy* shows that critics might have been at least partly wrong. Drastic changes have not occurred after *Murphy* judgment even though the ruling was hailed as "groundbreaking" and having "far-reaching ramifications" on business practices beyond sport.[171]

Partly this stems from the fact that the judgment also contained what can be described as valuable away goal for the FAPL.[172] The Court maintained that even though the FAPL cannot object circulation of decoders, it can rely on unauthorized use of copyright protected parts of the broadcast such as theme songs, logos, and graphics in proceedings against publicans to object communication to public.[173] In simple way, the foreign decoder card for domestic purposes cannot be used in a commercial fashion in UK. Copyright related aspects of the ruling allows the FAPL to sue publicans for copyright infringement.[174]

The league did, however, make two changes in contractual agreements to decrease demand of non-UK decoders:

1. "Licensees are no longer allowed to offer an optional English language feed to its consumers. They can only transmit Premier League matches with the commentary in the

---

[170] Dimitrios Doukas, 'The Sky Is Not the (only) Limit: Sports Broadcasting without Frontiers and the Court of Justice: Comment on Murphy' (2012) 37 European Journal of Communication 605, 623.
[171] Bernt Hugenholtz, 'Europe 1 - Premier League 0 - Kluwer Copyright Blog' <http://kluwercopyrightblog.com/2011/10/09/europe-1-premier-league-0/> accessed 9 February 2016.
[172] "the judgment seems more likely to result in a victory for the Premier League on the judicial equivalent of the away goals rule" Stephen Smith and Andre Maxwell, 'Premier League Football Cases: Linguistic Tactics, Non-Naked Match Feeds and the Away Goals Rule' <http://documents.lexology.com/55df8a34-a5dd-423f-a766-d3a6a7950b69.pdf> accessed 10 February 2017.
[173] Szyszczak (n 130) 171.
[174] About recent UK case law: Craig Giles, 'Broadcasting: Post-Murphy: The Territorial TV Sports Licensing Landscape' (15 April 2014) <https://www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licensing-landscape> accessed 10 February 2017..

language of that country. The English language feed is now limited to UK and Irish licensees.

2. 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 Saturday at 3 pm because the Fox Sport Italia signal kept being used by British pubs.[175]"

So, in a sense, Premier League fans in Europe are actually worse off after the judgment in terms on language options and content availability.[176] This should be remembered: right holders can and will use other measures to offset the impact of legal rulings.

Apart from modest contractual alternations, not much has changed. True single market for sport broadcasting has not emerged. It is hard to assess how prevalent is the usage of foreign decoder cards for domestic purposes in Europe, but certainly prevalence has not been enough to destroy the business model of the FAPL or other sport leagues. Broadcasting rights are still sold on territorial basis and price of those rights continues to sky rocket in the UK.[177] Additionally, one of the fears following the judgment was that the FAPL would impose uniform pricing or close low-priced territories altogether.[178] It is hard to assess how much the judgment has affected pricing but differences in consumer prices seems to be the case even after the judgment. Most certainly, the FAPL continues to serve low-priced territories such as Greece.

This is good point to bear in mind as audiovisual sector is vehemently against any erosion of territoriality but example of *Murphy* shows, at least in context of sport broadcasting, that consequences of cross-border access has not been very drastic after all. Although couple of factors must be noted. It is not easy to assess how much aforementioned contractual

[175] This clause refers to British legislation that bans broadcasting football matches during 3 pm to 5 pm in order to encourage attendance to football matches. *Murphy* (n 39) [122–125].
[176] Ben Van Rompuy, '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/> accessed 11 February 2017.
[177] Arianna Andreangeli, 'Weathering the Storm: Domestic IP Litigation and Industrial Consolidation as Pragmatic Responses to the Court of Justice's Decision?' (2016) 8 Journal of Media Law 173, 188.
[178] Alexiadis and Wood (n 153) 249.

alternations have mitigated cross-border demand. Also, obtaining necessary equipment for satellite transmissions is relatively expensive in contrast to internet access.

Comprehending actual scope of *Murphy* ruling is complicated.[179] Most views can be classified broadly into two categories: broad or narrow interpretation of *Murphy*. The main questions are: Did *Murphy* overrule *Coditel*? Can it be applied in different legal context? Is the scope broader than sport broadcasting?

The broad interpretation views, in accordance with case law regarding non-tangible goods[180], that contractual clauses or underlying national legislation cannot prohibit passive sale of services but can rule out active sale. The concept of passive sale refers to instances where the provider of goods or services responds to unsolicited requests from individuals, as opposed to instances where it actively approaches consumers.[181] In other words, absolute territoriality protection that prohibits parallel trade is condemned in field of audiovisual services.[182] This view is backed by some paragraphs of the judgment, which implies that exclusivity given to a television operator cannot lead to absolute territorial protection, irrespective of the underlying economic and legal context.[183] That would, in theory, mean that consumer would be able to access audiovisual services from all over Europe.[184]

This interpretation is based on analysis that suggest that the Court created something akin to the exhaustion principle in area of audiovisual services. The "specific subject matter" does not contain the right to communication anymore, only the right to fair remuneration.[185] In essence, this interpretation means that the right holder cannot prohibit broadcasting as long as transmission is authorized by the right holder and the right holder is fairly compensated. Furthermore, it could be argued that *Coditel* cases are bit outdated as they were about organization of cable television during 1980s and *sui generis* judgments applied

---

[179] Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy' (n 13) 9; Alexiadis and Wood (n 153) 245.
[180] Doukas (n 173) 616; Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy' (n 13) 9.
[181] European Commission, 'Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1' para 51.
[182] The Commission seems to comprehend Murphy in this manner. Ibáñez Colomo, 'The Commission Investigation into Pay TV Services: Open Questions' (n 20) 536; 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> accessed 11 February 2017.
[183] Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy' (n 13) 9.
[184] Doukas (n 173) 622.
[185] Batchelor and Jenkins (n 159) 160.

to narrow set of facts. In that sense, *Murphy* is a more powerful precedent as a contemporary case in context of modern technology. That would imply that the Court did in fact overrule the *Coditel* case law.[186]

The proponents of narrow interpretation, however, remind that one must have caution before applying too much weight on the shoulders of *Murphy*. Main statement is that *Murphy* does not have broad impact beyond specific factual and legal characteristics of the case.[187] Unlike proponents of broad view, narrow interpreters hold that the *Coditel* case law is still the main precedent and *Murphy* is a special case, which applies to specific set of legal and economic facts. Proponents maintain that narrow interpretation is backed by the fact that the Court expressly upheld *Coditel I* and *II*.

Main reason why the Court seems to think that cases are compatible with each other stems from different legal background of *Murphy*, namely the aforementioned "country of origin" principle of SatCab Directive: "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.'"[188] Graf comes into similar conclusion:

> "It was therefore consequent for the Court to conclude that an interest in securing a premium for exclusivity in the UK cannot justify blocking the sale of Greek decoders since such an interest goes beyond the IP exclusivity afforded by the Satellite Broadcasting Directive." [189]

The FAPL could not fully rely on intellectual property protection to restrict circulation of decoders as the copyright was not breached under principles of SatCab. Any such restraint would fall outside of the substantial and geographical scope of the copyright. Where as in *Coditel*-system*,* the German right holder did not have copyright clearance in Belgium. Thus, right to restrict broadcasting was in the scope of the "specific subject matter" of the

---

[186] ibid 157; Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 535.
[187] Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy' (n 13) 10.
[188] ibid.
[189] Thomas Graf, 'The Court of Justice Speaks on Licensing of Satellite' [2011] Kluwer Competition Law Blog <http://kluwercompetitionlawblog.com/2011/10/10/the-court-of-justice-speaks-on-licensing-of-satellite-broadcasting/>.

copyright, and there was no need for "additional obligations" to ensure territorial protection.

One way to illustrate the difference is by thinking of a proverbial wall that restricts cross-border provision of services. In *Coditel* cases the wall was the copyright itself. The film could not be transmitted to Belgium as the broadcaster did not have copyright clearance to show it as the right was not exhausted. In *Murphy*, the broadcaster had the right but wall was built up by additional obligations restricting decoder sale.

Also, arguably remuneration is not the reason why *Murphy* was distinguished from *Coditel I* by the Court. Paying remuneration was technically possible even in *Coditel I* and was in fact suggested by the Commission in that case. Additionally, the Court has subsequently rejected *Murphy*-doctrine in circumstances where copyright remains territorial in nature.[190]

Instead of underlying legal context, there is also one other way to separate the two lines of case law: by distinguishing between films and sport broadcasting. This argument was not expressly used by the Court but implied by AG Kokott. The idea maintains that absolute territorial protection is essential in film industry in order to protect the investment made by the distributor in pre-sale financing. Also, films can be exploited in many ways. As so, elimination of cross-border provision is needed to preserve value of different forms of exploitation. Without it, the right holder would not be properly compensated. In sport broadcasting, pre-sale financing is not needed and live broadcasting is the primary form of exploitation. Therefore, profit maximization scheme used by the FAPL was outside of what was needed to ensure fulfillment of the "specific subject matter" of the right.[191] If interpreted in this manner, specific characteristics of product in question is the key, not the underlying legal context. As a conclusion, this interpretation can be described as a third way between the narrow and the broad view. Its scope is not as far-reaching as the broad interpretation but it´s not confined to the legal context as in the narrow view.

---

[190] See Bill Batchelor and Luca Montani, 'Exhaustion, Essential Subject Matter and Other CJEU Judicial Tools to Update Copyright for an Online Economy' (2015) 10 Journal of Intellectual Property Law & Practice 1, 8; *C-351/12 Ochranný svaz autorský pro práva k dílům hudebním o.s v. Léčebné lázně Mariánské Lázně a.s* (2014) ECLI:EU:C:2014:110 [73].

[191] Astrid Janssen, 'Copyright Licensing Revisited' (2012) 13 German LJ 124, 131–132; Arianna Andreangeli, 'Weathering the Storm: Domestic IP Litigation and Industrial Consolidation as Pragmatic Responses to the Court of Justice's Decision?' (2016) 8 Journal of Media Law 173, 184–185.

As a conclusion, it is not easy to comprehend the *Murphy* case. Outcome of the case is not in question, but I don`t think that anyone surely knows the exact scope of the case. Depending on focus, one could make multiple interpretations from the Court´s decision. Perhaps further clarification is needed. Luckily, one might just get that if the decisions made in the Commission´s pay-TV investigation eventually makes their way to the ECJ.

5. Is Geo-Blocking Compatible with TFEU 56 and 101?

5.1 Digital Single Market and Pay-TV Investigation

In 2015 the Commission officially launched DSMS. Ambitious strategy includes several legislative and non-legislative initiatives, which span to the regulation of the media, e-commerce, and data protection. The aim is to ensure that EU citizens fully benefit from the possibilities opened by the internet and, in general, digital technologies.

Access to copyright protected content across borders, in particular via the internet, is one of the key areas.[192] One of the components of DSMS legislative package is the portability Regulation.[193] One of the complications of the current copyright framework is that consumer cannot enjoy his or hers legally paid services when travelling abroad. Portability Regulation allows consumers to travel with the digital content they have purchased or subscribed. The Regulation will come into force in early 2018.[194]

DSMS is not only a legislative strategy, there is also role for competition law. Commissioner Vestager acknowledges that "understanding and facilitating cross-border online commerce is an important part of the contribution of the competition department." Role of competition law became more concrete when the Commission opened formal proceedings against several major US film studios and the largest European pay-TV

---

[192] European Commission, 'State of the Union 2016: Commission Proposes Modern EU Copyright Rules for European Culture to Flourish and Circulate' <http://europa.eu/rapid/press-release_IP-16-3010_en.htm> accessed 11 February 2017.

[193] Proposal for a Regulation of European Parliament and the Council on ensuring the cross-border portability of online content services in the internal market COM (2015) 627 final.

[194] European Commission, 'Digital Single Market – Portability of Online Content Services' <http://europa.eu/rapid/press-release_MEMO-17-243_en.htm> accessed 11 February 2017.

broadcasters such as Sky to examine certain provisions in licensing agreements.[195] Statement of objections delivered on July 2015 clarified that the investigation is concerned with satellite and online services.[196] The statement highlights two problems about contractual clauses: 1) lack of portability: consumer cannot access legally obtained service when travelling to another Member State 2) Ban of passive sales: clauses restrict service provides ability to accept unsolicited requests for its pay-TV services from consumers located abroad. Initial opinion of the Commission is that such clauses infringes TFEU 101. Portability Regulation should take care of the issue number one, so focus is on the issue number two.

The press release of investigation and the subsequent statement of objections specifically refer to the *Murphy* ruling. The investigation seems to try to test borders of *Murphy.* From "tea leaves" of aforementioned documents, it can be suggested that the Commission is proponent of broad interpretation of *Murphy*: it has effectively overruled *Coditel II* and exclusive licenses themselves can be challenged in so far so they give "absolute territorial exclusivity" to broadcasters even outside of the legal context of *Murphy*. In precise terms, the Commission is relying on "fair remuneration" doctrine of *Murphy* and seems to view geo-blocking obligations as "additional obligations."

What should be noted early on is that prevailing consensus is that online transmission of audiovisual products is not subjected to the "country of origin" principle.[197] Nevertheless, the Commission is adamant of pushing on even though legal background seems to differ from *Murphy*. That seems to imply that the authority is not relying only on *Murphy*, but also on "traditional" *Consten-Grundig* case law.

Other possible explanation is that the Commission is simply ahead of the curve and anticipating future changes in EU copyright regime such as extending the "country of

---

[195] European Commission, 'Antitrust: Commission Investigates Restrictions Affecting Cross Border Provision of Pay TV Services' <http://europa.eu/rapid/press-release_IP-14-15_en.htm> accessed 9 February 2017.

[196] The provisions granting "absolute territorial protection" ensure that the films licensed by the US studios are shown exclusively in the **Member State where each broadcaster operates via satellite and the internet. These films cannot be made available outside that Member State, even in response to unsolicited requests from potential subscribers in other Member States.** European Commission, 'Antitrust: Commission Sends Statement of Objections on Cross-Border Provision of Pay-TV Services Available in UK and Ireland' (n 185).

[197] Bernt Hugenholtz, 'Extending the SatCab Model to the Internet' (BEUC 2015) 9.

origin" principle to online services.[198] This is further implied by the fact that the Commission seems to acknowledge that competition law intervention might not be enough to ensure that copyright protected content can be accessed and provided across borders.[199]

In July 2016, the Commission accepted commitments offered by US Film studio Paramount. In short, Paramount committed to strip geo-blocking provisions from license agreements. The commitment decision has been appealed by a third party and is pending before the General Court.[200] Other segments of the investigation is finally expected conclude in early 2017. Other appeals might be then forthcoming so it is plausible to suggest that the case will end up before the General Court or the ECJ in way or another. Against that background, I will next chapters assess what options the Court has and how the legal context might be the most important factor.

5.2 Construction of the Legal Test: Substantive and Geographic scope

In order to assess combability of geo-blocking with the internal market, legal framework is needed. Even though the amount of case law about licensing of intellectual property is substantial, surprisingly few academic efforts to provide coherent systemic approach to the Court´s case law has been made. Although partition of markets usually is typically contrary to Article 101(1) TFEU as *Consten-Grundig* case law states, the prohibition is not absolute as evidenced by *Coditel I and II and Erauw-Jacquery.* Boundaries of the rule remains elusive. It is not easy to comprehend when and why the presumption of unlawfulness can be rebutted.[201]

Analytical legal framework based on *Consten-Grundig, Coditel I* and *II* and *Murphy* is required. But how to reconcile ban of absolute territorial protection of *Consten-Grundig*

---

[198] European Commission, 'The Modernisation of the Copyright Legislation and the Satellite and Cable Directive' <https://ec.europa.eu/digital-single-market/en/satellite-and-cable-directive> accessed 11 February 2017.

[199] "These antitrust investigations focus 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 when considering sales to consumers located elsewhere. **This includes, for online pay-TV services, relevant national copyright laws**." European Commission, 'Antitrust: Commission Sends Statement of Objections on Cross-Border Provision of Pay-TV Services Available in UK and Ireland' (n 185).

[200] European Commission, *Antitrust: Commission Accepts Commitments by Paramount on Cross-Border Pay-TV Services* (2016) <http://europa.eu/rapid/press-release_IP-16-2645_en.htm> accessed 9 February 2017.

[201] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 3.

with *Coditel I and II* while also considering *Murphy?* I will recall from earlier that copyright, like other intellectual property rights, has territorial and substantial scopes. From those dimensions Colomo has constructed a legal test, which can be used to explain the Court´s case law.[202]

Substantial scope refers to the "specific subject matter" of copyright. Basic premise is that agreement must be within substantial scope of copyright to satisfy requirements of either TFEU 56 or TFEU 101.[203] Intellectual property regime outlines acts that the right holder is permitted to approve or forbid.[204] Restriction of competition exist if the agreement allows to authorize or prohibit acts that are not covered by the underlying intellectual property right. For instance, an agreement that allows distributor to control the resale of tangible goods falls outside of the substantive scope of the right of distribution as explained by the ECJ in *Deutsche Grammophon*.[205] On the other hand, in *Coditel II* agreement was within substantial scope as performance right was not exhausted in order to protect the "specific subject matter" of copyright. In *Murphy*, legislative decoder restrictions relied on by the FAPL infringed TFEU 56 as they went beyond the "specific subject matter."

From the case law, it can be derived that TFEU 56 is interlinked with TFEU 101. When agreement is within substantial scope of copyright in eyes of the freedom to provide services, it does have a good chance to survive TFEU 101 assessment. As Hornsby says "it should be borne in mind that the EU competition and the free movement provisions are "branches of the same tree"; legal coherence requires that an agreement or practice which is acceptable under the competition rules should not fall foul of free movement provisions."[206] When substantial scope of relevant intellectual property right is assessed in the context of internal market freedoms, risk of contradiction between the free movement and competition law provisions is reduced. In my opinion, this is coherent and sensible way of making sense of the case law.

---

[202] ibid 17–18.
[203] ibid 17.
[204] Pablo Ibáñez Colomo, 'Article 101 TFEU and Market Integration' [2016] LSE Law, Society and Economy Working Papers 1, 14.
[205] ibid 17.
[206] Stephen Hornsby, 'Case Comment FAPL v QC Leisure & Karen Murphy: What's Wrong with the "Exclusivity Premium" and Why Can't It Be Protected' (2012) 23 Entertainment Law Review 157, 2.

Although nothing restricts the Court from applying TFEU 101 only where the origin of dispute derives from contractual agreement. That would not change assessment of substantial scope part of the test. The test can be applied even if the Court does not engage in the free movement of goods or services argumentation as the Court would still have to assess substantial scope of the intellectual property. In a sense, the test is flexible enough to evaluate different situations.

Admittingly, weakness of this test is the unambiguous meaning of "specific subject matter", which is heavily criticized by some scholars. Main problem of the term is that it can be used merely as tool to achieve the result desired by the Court.[207] On the other hand, core of the "specific subject matter" is relatively well-defined. Furthermore, it is suggestable that the principle is now codified in the Charter of Fundamental Rights of the European Union (the "CFR"), which states that "intellectual property shall be protected." Article 52 of the CFR upholds that any limitation to a right must respect the essence of the particular right. As so, it can be suggested that EU law cannot infringe the core of particular intellectual property right. In here, in my opinion, it is sufficient to say that the "specific subject matter" test is not perfect, but is still applicable for the purposes of this study.

Second part of the test must be also considered: it is necessary to consider the geographic dimension. Intellectual property rights are attached to a particular territory. In here test based on counterfactual is needed. Would competition exist in absence of the agreement?[208] In exhaustion principle cases answer is yes. Because right is exhausted, agreement restricts competition that would exist without agreement. In the absence of exhaustion, on the other hand, the underlying regulatory regime precludes competition, not the agreement. That's the main difference between *Consten-Grundig* and *Coditel I and II.*

5.3 Application of the Legal Test to Geo-Blocking Agreements

Assessing substantial scope of copyright in audiovisual products is perhaps the most difficult part of this study because of the opaque case law. I will first briefly discuss could the exhaustion principle apply to online transmissions as implied by Advocate General

[207] Keeling (n 1) 65.
[208] Ibáñez Colomo (n 204) 17.

Kokott in *Murphy.* The main part is to assess the "specific subject matter" of copyright. This is where *Murphy's* additional obligations and only fair remuneration must be balanced with *Coditel I.* Did the Court create something in *Murphy* that can be applied beyond specific circumstances of that case?

Applying the exhaustion principle to provision of audiovisual services was suggested as mentioned earlier by Advocate General Kokott in *Murphy.* The Court did not follow Advocate General Kokott and did not apply the exhaustion principle in *Coditel I.* In my opinion there is little to no sense for the Court to change that stance completely. As discussed earlier, there are perfectly sensible economic reasons why the exhaustion principle should not apply to audiovisual services.

As for substantial scope, it can be derived from *Coditel I* and *Murphy* that core of copyright is the right of communication to the public, which encompasses the right to authorize or prohibit any communication to the public.[209] In other words, as the underlying right is not exhausted and remains territorial, right holder can prohibit any unlicensed acts of communication to the public i.e. online streaming which is not duly licensed territory.[210] That was not disputed in *Murphy* as the Court seemed to distinguish between *Coditel I* and *Murphy* on basis of regulatory context as proponents of narrow view maintain. In *Murphy*, UK law imposed decoder restrictions that prohibited consumers from enjoying authorized broadcast, under the "country of origin" principle, from another Member State. That is, in essence, the main difference between *Murphy* and geo-blocking assessed in the investigation.

Online streaming and related geo-blocking obligations is comparable to situation in *Coditel I.* If the service provider is not duly licensed to stream in Member State, the right holder or the licensee in that Member State can rely on copyright legislation to prohibit streaming. It is within the "specific subject matter" of copyright to prohibit such transmission. Key idea is that such prohibition does not prevent transmission of content which is lawful copyright-wise. Decoder restrictions or "additional obligations" like in *Murphy* does not exists, geo-blocking is merely a tool to enforce copyright. In that sense, geo-blocking agreements that

[209] ibid 21.
[210] ibid 16.

rely on the “specific subject matter of” copyright does seem to be in substantial scope of copyright and thus should fulfil first part of the legal test.

What muddies the picture is the Court´s analysis of “fair but maximum remuneration” in *Murphy.* It can be suggested that the “specific subject matter” of copyright does not entail right to prohibit each and every communication to public anymore but just a right to obtain “fair remuneration.” If *Murphy* is interpreted in this manner, the investigation might have legs. Once again, crucial factor is the unclear scope of *Murphy.*

As so, application of *Murphy* in different legal context cannot be out ruled completely as proponents of broad view and the Commission suggest. It is entirely possible to argue that situation in which for example British consumer obtains subscription for Premier League football transmissions (by using virtual private network) from cheaper country is equivalent to situation in *Murphy.* As in *Murphy,* the consumer remunerates the service. Furthermore, it possible to calculate number of subscribers in very precise manner in internet services.

However, this cannot be fully applied to films as territorial restrictions in that context are more or less about protecting one form of exploitation over another. In such case, geographical limits might necessary for a right holder to receive a proper remuneration for his exclusive right. In here, it is good recall that the Court expressly upheld *Coditel I and II* in *Murphy.* It can be argued that remuneration is not the key issue in *Murphy-Coditel* dichotomy at least as far films are concerned. Remuneration was plausible even in *Coditel I and II* but the Court rejected that and emphasized on right to prohibit act of communication. So, I think that it is possible that third way described earlier can be applied in context of internet in so far as sport broadcasting is concerned but it is hard to suggest that *Murphy* can be applied in current legal framework to enforce cross-border “movement” of films.

As conclusion, I incline to view that, in so far as geo-blocking prohibit unauthorized online streaming it remains in substantial scope of copyright. Only back door is to follow the Court´s “fair remuneration” reasoning. Such application is possible but not wholly consistent with the case law. As suggested earlier, agreements that remains in substantial scope test of TFEU 56, have a good chance of fulfilling requirements of TFEU 101 as agreements merely transfer some rights to licensees. However, test of territorial scope must be also assessed.

One of the main findings of *Murphy* case is that exclusive licenses themselves are not against TFEU 101. Similarly to decoder restrictions of national legislation, additional obligations in private agreements were deemed unlawful by the Court. The question is, regarding territorial scope, are geo-blocking agreements "additional obligations" in sense of *Murphy*?

In geo-blocking agreements, licensee is permitted to stop the transmission by out-of-state service providers, as far as the transmission of content via internet would amount to a copyright infringement. Geo-blocking as such is not a restriction of competition by object if the transmission of content across borders amounts to a copyright violation in the "country of destination."[211] Using the logic of *Coditel* cases, such agreements are merely an extension of underlying copyright.

In here, counterfactual analysis can be applied: do geo-blocking provisions restrict competition that would exist in absence of the agreement? In other words, what prohibit service providers from offering online services in cross-border manner: geo-blocking provisions or regulatory context? [212] It is plausible to suggest that latter is suitable answer. Even without geo-blocking agreements service providers could not offer services outside of the licensed territory without infringing copyright.

Of course, there is a room for "pyrrhic victory" for the Commission.[213] It might be possible to rule that geo-blocking provisions are "additional obligations" in sense of *Murphy* and thus invalid but service providers are still able to use geo-blocking tools on copyright grounds. This can be described as "much ado about nothing" scenario.[214] In fact, that is the scenario that seems to arise from the abovementioned commitment decision of Paramount, which consist of a mere repeal of the obligation to restrict passive sales.

---

[211] Pablo Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy' in Roger Blair and Daniel Sokol (eds), *Handbook of Antitrust, Intellectual Property and High Technology* (Cambridge University Press 2016) 10.

[212] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 23.

[213] Becket McGrath, 'European Commission Closes Pay-TV Antitrust Investigation of Paramount Following Acceptance of Commitments' <https://www.cooley.com/news/insight/2016/2016-08-05-ec-closes-pay-tv-antitrust-investigation-of-paramount> accessed 11 February 2017.

[214] Giuseppe Mazziotti and Felice Simonelli, 'Another Breach in the Wall: Copyright Territoriality in Europe and Its Progressive Erosion on the Grounds of Competition Law' (2016) 18 Digital Policy, Regulation and Governance 1, 9.

If agreement does not restrict competition by object, it must be assessed whether the agreement does restrict competition by effect. In here, the Commission argues that in the absence of the 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."[215] Although it must be noted that the subsequent commitments decision does not contain restriction by effect argumentation. However, that might be only because the Commission deemed such restrictions to be by object against TFEU 101 so effect analysis was not needed.

The Commission has suggested a similar argument in *Coditel II* and *Nungesser*. However, constraining the freedom of action of the parties is neither necessary nor sufficient condition to establish a restriction of competition.[216] In a sense, restraint of freedom is inherent part of each and every contract. Duration of contracts and other aspects could amount to restriction by effect, but such evaluation is outside of the scope of this study. In conclusion, it does seem that in current legal context geo-blocking provisions fulfill requirements of TFEU 56 and 101.

Competition law is perhaps not the key to eliminating geo-blocking in the current legal context as implied also by the Commission.[217] Revisions to copyright framework is needed. In September 2016, the Commission unveiled draft Regulation that would extend the "country or origin" principle to certain internet transmissions.[218] Extension would cover simulcasting of TV-broadcast over the internet and catch-up services but draft Regulation excludes independent internet transmissions and standalone video-on-demand services such as Netflix.

The "country of origin" principle would make copyright clearance of internet transmissions straightforward as only one license would be needed. Service providers would have to follow just one set of copyright rules in country of origin, instead of multiple set of rules which can also include advertising rules and consumer protection laws. Simple fact of

---

[215] 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> accessed 11 February 2017.
[216] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 23.
[217] See also Simonelli (n 14) 34.
[218] Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes COM (2016) 594.

administrative burden renders it extremely complex to clear all the necessary rights.[219] Similar law has worked well in framework satellite-TV industry as noted by European Broadcasting Union ("EBU"). EBU maintains that SatCab has successfully facilitated satellite broadcasting across Europe, and has significantly increased cross-border availability of TV channels.[220] It has provided legal certainty for rights clearance for both encrypted and unencrypted satellite services. Ideally, the Regulation alone could make Estonian football available to Commissioner Ansip and matches of *Die Nationallmannschaft* to PhD-student in Finland.

What would the Regulation mean for geo-blocking? Would the Regulation uphold contractual freedom? That's the big question mark for audiovisual industry.[221] Recital 11 of the Regulation states that "through the principle of contractual freedom it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in the Regulation*."* Recital implies that the Regulation would be merely a tool to make cross-border broadcasting easier in terms of copyright clearance. However, last sentence of the recital makes it clear that contractual provisions must be comply with other parts of the Union law, thus including competition law. One can found similar construction in SatCab Directive from which the draft Regulation is derived.[222]

It could very well mean that "common practice of licensing content on a territory-by-territory basis would come under increasing threat if this Regulation is adopted."[223] In other terms, the legal background would shift towards *Murphy.* Thus, "pyrrhic victory" referred earlier would become more concrete if the legal background changes. As already assessed,

---

[219] European Broadcasting Union, 'Copyright Licensing' (2015) <https://www.ebu.ch/files/live/sites/ebu/files/Publications/Policy%20sheets/Copyright%20Licensing_EN.pdf> accessed 25 February 2017.
[220] European Broadcasting Union, 'Satellite and Cable Licensing Solutions: The Key to Enhancing Cross-Border Access to Online TV and Radio Content' (9 December 2015) <https://www.ebu.ch/news/2015/12/satellite-and-cable-directive-li> accessed 25 February 2017.
[221] The Parliament Magazine, 'EU Copyright Reform: Contractual Freedom under Attack' (9 February 2017) <https://www.theparliamentmagazine.eu/articles/partner_article/sroc/eu-copyright-reform-contractual-freedom-under-attack> accessed 25 February 2017.
[222] Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (n 132) recital 34.
[223] Osborne Clarke, 'Cross-Border Accessibility of Broadcasts' (20 September 2016) <http://www.osborneclarke.com/insights/cross-border-accessibility-of-broadcasts/> accessed 11 February 2017.

the Court has upheld in context of sport broadcasting that absolute territorial protection cannot be maintained if copyright is regulated by the "country of origin" principle.

The scenario would be similar but not identical to *Murphy.* In that case, it was deemed that right to authorize or prohibit the import of decoding devices is not within substantial scope of the copyright. However, it could be argued that geo-blocking remains within substantial scope of the right as it merely relates to range of acts that are covered by the right of communication to the public as already assessed.[224]

Besides that, this is where *Murphy* adds on one extra level to framework. There can be restriction by object if there is a mismatch between the territory covered by the license and the geographic scope of the underlying right. This is the one of the differences between *Coditel I* and *II* and *Murphy.* If the agreement allows the licensee to authorize or prohibit any broadcast or showing in territories covered by license, the agreement remains in territorial scope of copyright.[225] This was the situation in *Coditel* cases: the licensee had the right to prohibit TV transmission in Belgium. The agreement would be a restriction of competition by object if the licensee was given the right to control any communication to the public outside of the licensed territories. This was the case in *Murphy* as the licensee tried to prohibit acts taking place out-of-territory. One must remember that under the "country of origin" principle of SatCab Directive the satellite transmission took place in Greece in legal sense. As such the agreement restricts competition that would have existed in its absence. The agreement builds the above-mentioned metaphorical wall.[226]

Simply put, in the "country of origin" scenario geo-blocking agreement remains within the substantive scope of the license but goes beyond its geographic scope. The question is whether an agreement prohibiting a service provider or a broadcaster from communicating content to the public outside of the "country of origin" is in principle a restriction of competition by object. Counterfactual analysis in that case reveals that an agreement is in principle capable of restricting competition that would have existed in its absence. Namely the contract restricts the competition. Not copyright itself. The agreement aims to prohibit

[224] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 22.
[225] ibid 17–18.
[226] Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy' (n 13) 8.

transmission outside of the licensed territory. In other words, it does not matter whether or not geo-blocking is deemed to be within substantial scope.[227]

Would the "country of origin" principle be the end of the road for geo-blocking? It suggestable, as implied by the narrow interpretation of *Murphy,* that absolute territorial protection cannot be upheld if copyright is covered by the "country of origin" principle. However, the Court stated in *Murphy* that economic context might justify that agreement is not liable to impair competition.[228] Also, it is possible, at least in theory, to use TFEU 101(3) justification. If one maintains that legal context is not key to issue, then the question is that do economic reasons lead to the *Coditel*-doctrine or to the *Murphy*-case law. In other words, is market partitioning justified? In any case, it is time to assess economic groundworks of geo-blocking.

6. Economic Background to Territorial Protection and Geo-Blocking Practices

6.1 Characteristics of Audiovisual Sector and Sport Broadcasting

Although the market integration is perhaps the primary aim of the DSMS, it is also part of wider industrial policy of the Union. Despite a few European success stories (for example Spotify), digital markets in Europe are dominated by U.S based firms. The idea is that abolishment of unnecessary regulation and harmonization of national laws would make it easier for European startups and digital companies to expand to pan-European companies:

> "Today, we lay the groundwork for Europe's digital future. I want to see pan-continental telecoms networks, digital services that cross borders and a wave of innovative European start-ups. I want to see every consumer getting the best deals and every business accessing the widest market."

Objective of cross-border access does not differ in this manner. American films and TV-series dominates audiovisual market of Europe. Also, at the moment, only U.S based firms have managed to offer audiovisual products in pan-European manner, namely Netflix, HBO and Amazon. Conversely, it is hard for European films to get pan-European distribution as

[227] ibid.
[228] *Murphy* (n 39) [140].

noted by Commissioner Vestager: "on average, European films appear to be only released in two countries, or less than five countries in the case of co-productions involving several countries."[229] Furthermore, European VoD-services tend to be regional, for example Scandinavian ViaPlay. It is not out of the question to suggest that similarly to other areas of law, complexity of regulation hinders growth of European audiovisual sectors. Global companies have the muscle power to zig and zag through 28 copyright regimes, but similar is too burdensome to regional stakeholders.

Funnily enough, audiovisual stakeholders, especially European ones, are vehemently against imposed cross-border access.[230] Opposition of obligatory cross-border access unites producers and distributors. In a letter to Commissioner Juncker undersigned companies and individuals maintained that:

> "erosion of territorial rights licensing would actually undermine the value of audiovisual rights as well as the diversity of offers damaging growth, employment and investment, harming consumers and threatening one of Europe's biggest economic and cultural success stories"[231]

The core theme of this chapter is to assess statement above, why stakeholders, in general, prefer the *status quo*. Other way to put it, to examine what would probably happen if principles of *Murphy* and prohibition of restrictions to passive sales is applied to online transmissions. I try to focus on consumer welfare. Would consumers be better or worse off? Other issue is: does geo-blocking actually promote market integration? As so, viewpoint is about whether or not geo-blocking *should* be allowed?

Other theme is point of view competition law. How could the industry try to justify geo-blocking? *Could* geo-blocking survive even if the Court deems it being *prima facie* against TFEU 101(1)? For sport broadcasting this chapter is perhaps more about what arguments the Court should have considered in *Murphy.* For film industry, chapter is more about what

---

[229] Margrethe Vestager, 'Celebrating European Culture' (An Evening with Nordic Drama, Brussels, 24 January 2017) <http://ec.europa.eu/commission/2014-2019/vestager/announcements/celebrating-european-culture_en> accessed 11 February 2017.
[230] FIAPF, 'Letter to Juncker and Commissioners' (11 June 2016) <http://crossborderaccessreport.eu/wp-content/uploads/2016/07/Letter-to-Juncker-and-Commissioners_FINAL.pdf> accessed 26 February 2017.
[231] ibid.

arguments stakeholders could use in pay-TV investigation and in possible subsequent court proceedings.

Before going into possible benefits of territoriality, it is perhaps beneficial to assess what kind of market audiovisual and sport broadcasting industry is, especially regarding "premium products." Those include most popular sporting events either nationally or pan-European wide, Hollywood films and TV-shows. Audiovisual service providers include platforms such as Netflix, HBO, Viaplay and Amazon. Also, platforms offering simulcast or catch up services can be included, furthermost SKY Go, BT Sport app, which both offer premium content via internet.

If looked at one title at time, for example Hollywood blockbuster film, it does look like competition is eliminated as distribution of the film is operated by mini-monopoly in each territory without any competition. However, such view would not catch true essence of the situation. Although intrabrand competition, competition within single title, is excluded, interbrand competition in audiovisual sector is vigorous.

Competition between service providers. can be described as competition *for* market. In simple terms, *for* market means that providers compete for content in auctions. Exclusive premium products differentiate platforms from other platforms.[232] A platform which includes premium rights, for example Premier League, is more interesting to significant number of consumers than a platform without Premier League. Same can be said for popular films or TV-series. Industry is different from traditional competition *within* market where different downstream players competes within same product by price or other factors. Current form of competition has not impeded market entry or created barriers to entry, demonstrated by the success of Netflix, Amazon, and others.

Why is this important? In basic terms, idea is that audiovisual sector does not suffer from lack of competition or innovation. Fundamental question is this: should competition law even be applied where workable and innovative competition exist? [233]

---

[232]Ibáñez Colomo, 'The Commission Investigation into Pay TV Services: Open Questions' (n 20) 537.
[233] ibid 539.

Other issue to consider is the fragmentation that characterizes European audiovisual sector. Broadcasters are generally catering content to specific group of consumers.[234] Broadcasting in Europe is steeped in national culture, language, and tradition.[235] As a result, demand for audiovisual works vary across countries. European languages demand that the distribution of audiovisual works needs to be adapted along several dimensions - such as advertising, subtitling and dubbing - to fit national specificities.[236]

As so, there is little incentive for a broadcaster to pay a higher license fee to acquire "European" rights. Cost of purchasing content for those territories, costs of adapting business model to obtain revenue from users in those territories and insufficient consumer demand were identified by broadcasters as main reasons why digital content providers do not to make its services accessible in Member States other than those in which it currently operates.[237] Thus, territorial licensing does not only stem from right holders, for example the FAPL has offered pan-European right to auction but did not receive single bid. Demand for such licenses seems to be low.

In short, there is clear industry preference for exclusive territorial licenses, even with seemingly high transactions costs.[238] Nothing in the copyright system prevents stakeholders from engaging in "within" market competition or from licensing on pan-European basis. Conversely, current system does not preclude pan-EU operators from offering pan-European service (Eurosport, Netflix, Amazon).

Thirdly, the production of films and TV-series can be characterized by high sunk costs at an early stage of the lifecycle i.e. development and production stages. Production includes a very large 'first copy' cost and negligible marginal cost after. Also, great uncertainty surrounds the financial return of the film project as it is difficult to predict the success of product until it is shown in cinemas or in TV.[239] Many projects ends up being financial

---

[234] KEA European Affairs and Mines Paristech, 'Multi-Territory Licensing of Audiovisual Works in the European Union' (Prepared for the European Commission, DG Information Society and Media 2010) 3.
[235] Bernt . Hugenholtz, 'Satcab Revisited: The Past, Present and Future of the Satellite and Cable Directive', *Convergence, Copyrights and Transfrontier Television* (European Audiovisual Observatory 2009) 11.
[236] Charles River Associates, 'Economic Analysis of the Territoriality of the Making Available Right in the EU' (Commissioned by European Commission 2014) March 17.
[237] European Commission, 'Preliminary Report on the E-Commerce Sector Inquiry' (n 15) 227.
[238] Ibáñez Colomo, 'The Commission Investigation into Pay TV Services: Open Questions' (n 20) 539.
[239] Lucie Guibault, Olivia Salamanca and Stef van Gompel, 'Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances. A Study Prepared for the European Commission DG Communications Networks, Content & Technology' (European Commission 2015) 85;

failures. Sunk costs means that those investments cannot be used in any other activity if the product in question fails i.e. the film or TV-series is not popular.

6.2 Benefits of Territoriality: Necessary Evil?

Fundamental question is that does absolute territorial protection offer improvements in total welfare and particularly in consumer welfare. Perhaps good starting point to economic analysis is to point out that absolute territorial protection of audiovisual services leads inherently to loss in static welfare. Welfare loss comes simply from the fact that consumers cannot access services and products they wish because of the geo-blocking agreements and/or territoriality of copyright. So, to overcome that, territorial exclusivity must generate dynamic efficacy gains that prevails over inherent static welfare loss. Such gains include increase of total product production and lower prices.

Multiple studies have examined this exact question, some of them directly connected to stakeholders of audiovisual sector[240] but the Commission has also funded one study.[241] From those researches three main arguments can be derived. Firstly, absolute territorial protection prevents free riding. Secondly, absolute territorial protection is tool that enables price discrimination between Member States. Additionally, I assess geo-blocking and "windowing". These arguments are also interlinked. The free riding argument is more effective if prices vary amongst Member States so price-oriented consumers can seek out to cheaper products or if releasing patterns of films and other products fluctuate greatly.

Price discrimination is the main economic argument for territorial licensing.[242] Price discrimination in simple terms means that same product is offered in different prices to distinct groups of customers based on group´s overall aggregate demand, namely willingness to pay. Price discrimination is not inherently bad, in fact it´s everywhere in everyday life. Students frequently benefit from student discounts. Students, in general, won't want to pay a full price, but might be willing to pay discounted price. Price

---

Helen Weeds, 'Territorial Licensing of AV Rights, Geoblocking & PSB' <http://blogs.lse.ac.uk/mediapolicyproject/2015/05/06/the-ecs-digital-single-market-strategy-implications-for-territorial-licensing-of-audio-visual-rights-geo-blocking-and-public-broadcasting/> accessed 11 February 2017.

[240] Analysys Mason, 'A Study on The Potential Impact of The Digital Single Market on The Sports Audiovisual Ecosystem In Europe' (Sports Rights Owners Coalition 2016).

[241] Charles River Associates (n 227).

[242] ibid 78.

discrimination in audiovisual sector enforced by territorial licensing works in a similar manner. Consumers in high demand or high income territories pay higher prices than those in low demand or low income territories. Price for example Premier league football varies, combined demand and price is higher in UK than in Greece, where demand overall is lower.[243]

Effective price discrimination requires two conditions. Firstly, groups of consumers with diverging aggregate demand must be identified. In geo-blocking that means usually consumers in certain territories, i.e. consumers in Germany overall from which aggregate demand can be calculated. Secondly, arbitrage must be prevented, which means that goods or services cannot be transferred from low-value countries to high-value countries. Geo-blocking is a tool to prevent such arbitrage. Sometimes transport costs and other inconveniences works as a natural prevention. No reason to transport Big Macs from a low-priced territory to a high-priced one! Similar natural tool is not applicable to a fundamentally free internet commerce without any transportation costs.

In principle, the current system allows right holders to sell exclusive territorial rights based on an aggregate consumer demand in certain territory which in turn reflects to a consumer price. Thus, price discrimination increases revenue as pricing is corresponding with demand, such pricing system is called "Ramsey pricing".[244]

Premium quality football[245] is a great example: the cheapest UK package is 75 euros per month[246], whereas a similar package in Finland cost consumers modest 30 euros per month.[247] Similarly broadcasting rights in UK were sold for period of 2016-2019 for staggering amount of £5.14 billion[248], whereas non-UK rights in the whole world combined for a "modest" sum of £3 billion.[249] On average same is also true for subscription based

---

[243] ibid 79.
[244] ibid 85.
[245] Includes for example UEFA Champions League and English Premier League
[246] 'How to Get Sky Sports and BT Sport: Best Premier League Deals and Bundles' (8 July 2016) <http://uk.pcmag.com/premier-league/82829/news/how-to-get-sky-sports-and-bt-sport-best-premier-league-deals> accessed 11 February 2017.
[247] https://checkout.viaplay.fi/
[248] BBC News, 'Premier League in Record £5.14bn TV Rights Deal' (10 February 2015) <http://www.bbc.com/news/business-31379128> accessed 11 February 2017.
[249] Financial Times, 'Premier League: Football's Game Changer' (1 January 2016) <https://www.ft.com/content/4f78e368-b072-11e5-b955-1a1d298b6250> accessed 11 February 2017.

video-on-demand platforms. Average price of such services is three times higher in Denmark than in Romania.[250] As for sport broadcasting, there are examples where the right holder offers content for free for promotion purposes to territories with low demand.

The positive side of price discrimination is that the scheme allows serving different markets with suitable prices.[251] If arbitrage, namely cross-border access, is allowed price-oriented consumers could seek out to cheaper products. If such exodus is significant, the supplier has two choices to preserve economic value of the product: raise prices or stop supplying a low-value territory altogether.[252] However, the Eurobarometer suggests that a price is only the 6th most relevant factor for those seeking cross-border access to content.[253]

On the other hand, availability of content is deemed as the most important factor to cross-border access in the abovementioned Eurobarometer.[254] Right holders also control availability of content by what is called "windowing" in audiovisual industry. Audiovisual product "are typically distributed following a specific timeline release pattern based on different media windows."[255] Traditional example for a feature film, is the cinema release first, then video/DVD/Blu Ray, VoD, pay-TV and finally Free-to-Air TV.[256] Content is typically distributed in a sequence that starts with the window that generates the highest revenue in the shortest period of time and ends with the window that creates the lowest one. Aim of such practice is similar to price discrimination. Consumers are targeted by offering different versions of the work according to their willingness to pay. [257]

---

[250] Oxera and Oliver & Ohlbaum, 'The Impact of Cross- Border Access to Audiovisual Content on EU Consumers Industry' (2016) 36 <http://www.oxera.com/getmedia/5c575114-e2de-4387-a2de-1ca64d793b19/Cross-border-report-(final).pdf.aspx?ext=.pdf>.
[251] Christopher Stothers, *Parallel Trade in Europe—Intellectual Property, Competition and Regulatory Law*, (Hart Publishing 2009) 20.
[252] ibid 18–19.
[253] TNS Opinion & Social, 'Cross-Border Access to Online Content Report.' (European Commission 2015) 100 <http://bookshop.europa.eu/uri?target=EUB:NOTICE:KK0415295:EN:HTML> accessed 11 February 2017.
[254] ibid.
[255] Charles River Associates, 'Economic Analysis of the Territoriality of the Making Available Right in the EU' (Commissioned by European Commission 2014) March 18–19.
[256] European Commission, 'Green Paper on the Online Distriubtion of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market' [2011] Europe 9.
[257] Charles River Associates (n 227) 18–19.

Release pattern varies by territory in accordance with local demand and even national legislative measures.[258] Average delay from theatrical release to release on pay-TV services can vary up to by 144 days, or 52% between individual European countries.[259] As in *Coditel I,* the film can be in a cinema circulation in country A but be already available in a VoD service in country B. If cross-border access would be granted, potential cinema goers could access film from the country B service. Geo-blocking is a tool to preserve a lucrative cinema window in country A while effectively serving country B.[260]

Both windowing and price discrimination are first and foremost revenue maximization strategies. But, it is important to realize that it is the promise of profits that encourages investment and innovation.[261] Only few audiovisual projects actually make profit and sunk costs are high so obtaining the maximum value of few lucrative products is financially important. As so, there is a loss of static efficiency (as there is limitation in access to existing works), but it would be hard to dismiss central role of profit maximization in dynamic welfare, which considers incentives to invest in a new content.[262]

Price discrimination and windowing are mostly at interest of right holders, whereas free riding is a concern for distributors, broadcasters, and service providers. As for free riding argument, it is good to start from economic underpinnings of audiovisual product financing. In film and TV-production, "pre-selling" is used to raise finance. Pre-sale means that the producers sales the right to the distributor before the product is produced and the licensee disburses the producer in swap for exclusivity in certain territory. Case study on recent European films shows that pre-sale financing can account for around 40% of the budget.[263]

---

[258] Heritiana Ranaivoson, Ben Van Rompuy and Sophie De Vinck, '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.' (Publications Office 2013) 18 <http://bookshop.europa.eu/uri?target=EUB:NOTICE:KK0214636:EN:HTML> accessed 15 February 2017.
[259] Oxera and Oliver & Ohlbaum (n 250) 37.
[260] Charles River Associates (n 227) 56.
[261] ibid 198.
[262] ibid 45.
[263] FIAPF and others, 'Case Studies on the Financing and Distribution of Recent European Films & Television Series' (2015) <http://www.ivfvideo.org/new/public/media/FIAPF_IFTA_IVF_MPA_Case_Studies_July_24_2015.pdf>.

However, this cannot be fully applied to sport broadcasting, which does not use pre-sale financing and revenue sharing. Value of for example Premier League rights is non-risky. British people won't suddenly stop watching domestic football! On the other hand, acquisition of premium sport content is expensive and financial risk is on a broadcaster. A licensee usually reimburses whole license fee upfront independently of the number of subscribers the licensee manages to obtain.[264] After an auction whole risk is on a distributor. Secondly, dubbing and subtitling, promotion of audiovisual products and sport broadcasting requires a lot of effort and money, which is usually the task of a distributor.

With exclusivity and absolute protection, a distributor can recover sunk costs and reap benefits after taking on the financial risk in presale financing or lump-sum payment in sport rights and in subsequent promotion activity. These efforts are financially impracticable if some other distributor could "free ride" on such efforts, whether by offering same product cheaper (price differences between territories) or earlier (windowing). Would distributors agree to distribute film in cinemas in particular Member State if it is possible that interested consumers would already watched the film from video-on-demand service from another Member State?[265]

One should take an *ex ante* view. It is possible, even likely, that the distributor would not agree to finance film or engage in promotional activity without promise of exclusivity. It is not sufficient just to look the agreement *ex post.* It is important to understand why the deal was done in such manner in first place. It is better to have an agreement that to not have agreement at all. Usually such protection is not in the interest of supplier, so it plausible to suggest that there are reasons for exclusivity.

Study funded by the Commission concludes that prevention of free riding, windowing and price discrimination might lead to more products overall as:

> "Audiovisual producers seem to benefit from territorial exploitation of their content, in particular as it helps them to obtain pre-financing in exchange for exclusivity. More generally, territorial restraints may help them efficiently

[264] Damien Geradin, 'Access to Content by New Media Platforms: A Review of the Competition Law Problems' [2005] The Global Competition Law Centre Working Papers Series 1, 11.
[265] Charles River Associates (n 227) 55.

> extract value of their content, which promotes entry and in turn means that more content is likely to be produced."[266]

6.3 Possible Industry Responses to Erosion of Territoriality

Aim of the DSMS is to ensure cross-border access to digital content. The objective is political one stemming from market integration objective. As a secondary objective, the Commission is trying to induce more intrabrand competition to decrease license fees and consumer prices. Exclusivity drives up prices, without it prices could be lower as envisioned in *Murphy.* Service providers would not have to pay premium for exclusivity anymore. Strong intrabrand competition could in theory lead to lower consumer prices as broadcasters would have compete in price. However, this vision might be little short-sighted as it relies on the scenario where the industry would not make any changes to current practice.[267]

As the industry is fond with territorial licensing, it is plausible that audiovisual sector stakeholders will try to mitigate the consequences of erosion of territoriality as seen after *Murphy.*[268] On the other hand, *Murphy* did not after all lead to wholesale changes. From empirical evidence and researches three scenarios can be derived: firstly, vertical integration of stakeholders, secondly, downstream market adjustments including uniform pricing, foreclosure of low-demand or income markets and language amendments and thirdly, pan-European licensing.[269]

Vertical integration is a distribution strategy, which be used instead of distribution by individual separate companies. Instead of appointing distributors contractually, one company is responsible the production and the sales and distribution functions itself.[270]As for the competition law, vertically integrated company is outside of the scope of the competition law as an agreement between two or more companies does not exists anymore.[271] In fact, Grundig decided to vertically integrate in France after the *Consten-*

[266] ibid 77.
[267] Pablo Ibáñez Colomo, 'Towards More Competition in Pay TV Services? The Commission Investigates Agreements between Hollywood Major Studios and Broadcasters' [2014] LSE Law Policy Briefing Series 3.
[268] Oxera and Oliver & Ohlbaum (n 248) 58.
[269] ibid 5.
[270] Whish, Richard and Bailey, David (n 9) 619.
[271] Sandra Marco Colino, *Vertical Agreements and the Competition Law* (Hart Publishing 2010) 15–16.

Grundig judgment to escape the ruling and remain outside of the reach of competition law.[272] However, vertically integrated company is still subjected to TFEU article 102 regarding abuse of dominant position.

Vertical integration option might be available to pay-TV stakeholders. Indeed, 21th Century Fox is currently planning to take over pay-TV broadcaster Sky, which operates in UK, Germany, and Italy.[273] It has been suggested that the takeover would happen partly because of the pay-TV investigation.[274] In a sense, services like Netflix, HBO and Amazon are already at least partially integrated in so far as they produce their own programs. Vertical integration for the FAPL was also suggested after *Murphy* judgment.[275] The move would not be unprecedented as many professional leagues in North America have own TV-channels and internet platforms. Vertical integration is not perhaps an option for all stakeholders[276], but for products with European-wide appeal it might be a viable option. Vertical integration would allow stakeholders to continue geo-blocking practices and price discrimination.

Adjustments to downstream market is perhaps the most probable option. Wide ranged modifications would aim to make cross-border demand as low as possible to mitigate arbitrage and economical losses. The most powerful tool would be uniform prices across the continent to decrease the flow to cheaper priced territories. In that scenario price for example Premier League football would be similar across the EU. To preserve the lucrative UK market, the price would probably correspond with the UK consumer price. However, such mechanism, that aims to regulate prices on Member State basis, would risk another competition law infringement as resale price maintenance is forbidden in EU competition law.

Another option is to not license non-lucrative territories at all. That would preserve profitable markets as consumers could not outflow to lower priced platforms anymore.

---

[272] Csongor (n 54) 140.
[273] The Guardian, 'Rupert Murdoch Confirms £11.7bn Sky Bid' <https://www.theguardian.com/business/2016/dec/15/rupert-murdoch-sky-bid-pay-tv> accessed 11 February 2017.
[274] The CLIP Board, 'A Decision of Paramount Importance to Independent Film Financing…?' (22 December 2016) <http://www.bristowsclipboard.com/post/a-decision-of-paramount-importance-to-independent-film-financing> accessed 11 February 2017.
[275] Szyszczak (n 130) 173.
[276] Sandra Marco Colino, *Vertical Agreements and the Competition Law* (Hart Publishing 2010) 16.

Negative side of this scenario is that consumers in non-lucrative territories face higher prices and content is not tailored locally. Similar modification is to offer only lower quality content or holdback releasing of content to low-demand territories. Perhaps the most drastic option is to impose dubbing in all products. This would make products interesting only for those with adequate language proficiency.[277]

One option is to alternate windowing mechanism. Simple tool to mitigate cross-border demand would be to hold all online rights until revenues from cinema release window ends. That would preserve cinema window and mitigate free riding concern. On FTA content, equal release windows would decrease demand for cross-border access significantly. Similarly, in a drastic response, sport right holders could also decide not to grant online rights at all. Broadcasting would be concentrated to satellite and cable only.

Final option is to move towards pan-EU licensing to preserve exclusivity. This option is available to content with pan-European appeal.[278] For consumers, big question is could pan-European licensee unilaterally engage in price discrimination and use geo-blocking without infringing TFEU 102. If not, the content would probably be available in uniform price. Although the licensee could offer different versions with variable quality. It has been suggested that pan-European licensing could lead to decrease in competition as only few companies have the financial strength to pay for pan-EU licensee fees. Additionally, some studies point out that pan-European licensing would lead to fewer language options and decrease in locally tailored content.[279] However, that might not be the case: for example, pan-European operator Eurosport uses local commentators.

As a conclusion, all the responses from the industry would probably lead to welfare loss, particularly to consumers in low-demand territories: "it has to be considered that changes to the licensing model could likely be adopted in response to the reform of the copyright framework and that such changes may also deny the gains that policy-makers hoped to achieve."[280]

It could be argued, based on independent researches, that territorial licensing may indeed generate increase in total welfare in some cases. All the studies generally point to same

[277] Oxera and Oliver & Ohlbaum (n 224) 66.
[278] ibid 59.
[279] Analysys Mason (n 208) 25.
[280] Charles River Associates (n 227) 277.

direction: absolute territorial protection can help to obtain investments for film and TV-series, as it is powerful in preventing free riding. Additionally, windowing and price discrimination might help to serve and open different markets effectively. As so, geo-blocking might actually be beneficial to consumer welfare and market integration.[281] Thus, I tend to think that geo-blocking, if assessed economically, *should* be upheld.

However, I incline to think that significance of cross-border access is at least slightly overestimated and responding scenarios are a bit doomsdayish. Essential question for validity of price discrimination, windowing, and partly for free riding arguments is magnitude of demand of cross-border access. For example, how much value film dubbed in German has outside of German speaking population? Cross-border demand for such film would not be very significant. Would Estonians stop going to cinema if movie is available in obscure Spanish VoD-platfrom? Small price discrepancies between pay-TV broadcasters between, for example France and Germany, would probably not lead to exodus of consumers from a high-priced territory to a low-priced territory.

On the other hand, English language content is a bit problematic in this manner. Non-dubbed English language films certainly have value in territories with a high level of English proficiency.[282] Research suggest that almost 40% of Europeans watch content with English audio and/or subtitles. Although, majority of Europeans are interested in content only if dubbed or subtitled to native language.[283] Additionally, sports differ from audiovisual products as value of the sport broadcast is in the sporting event itself. Although native language commentary certainly has some value, it is suggestable that language options are secondary to price for many consumers.

Eurobarometer from 2015 indicates that only 8% of Europeans have tried to access content in cross-border manner.[284] The industry likes to use this low number to point out that there is not sufficient demand for cross-border access. But on the other hand, doesn't that also imply that passive sales would not lead massive consequences as the demand is limited? However, same barometer also reveals that half of respondents are interested in cross-

[281] Ibáñez Colomo, 'Towards More Competition in Pay TV Services?' (n 256) 4.
[282] Oxera and Oliver & Ohlbaum (n 248) 26.
[283] TNS Opinion & Social (n 244) 81.
[284] ibid 94.

border access, so it is possible that passive sales would lead to significant increase in cross-border access.[285]

Additionally, situation cannot be fully assessed without a comment on Virtual Private Network ("VPN") usage. Unfortunately, it is very difficult to obtain the precise data on a VPN usage. VPN providers in the Eurobarometer disclosed that "up to 20 % of the traffic generated by users on their service is likely to relate to video, audio or audio-visual streaming, while two said it was between 21 and 40 % and one between 61 and 80 %."[286] It is at least *possible* to contend that significant amount of those interested of gaining cross-border access are already doing so or at least can do so. Even the industry seems to concur that allowing passive sales while upholding territorial licensing in general would not lead to significant consequences. It would merely legitimize current situation of grey market of expat audience using VPN services to achieve cross-border access. Its impact for studios would be "minimal."[287]

Assessing true merits of geo-blocking is complicated. I incline to agree that practice is economically legitimate in current landscape of European Union. Yes, there are frustrating factors involved in geo-blocking but abolishment of geo-blocking might lead to even worse situation in terms of consumer welfare and ultimately in achieving market integration. However, those economic aspects must be balanced against what I call "real life factors", namely the fact that cross-border access is technically easily achievable by VPN technology.

6.4 No Easy Way Out: Economic Reasons in Context of Competition Law

One of the great debates of EU competition law is that should economic justifications be considered under TFEU 101(1) as "rule of reason" analysis or under the true justification

[285] TNS Opinion & Social (n 244) 107.
[286] European Commission, 'Preliminary Report on the E-Commerce Sector Inquiry' (n 15) 250.
[287] Variety, 'Margrethe Vestager Signals Conciliation in Hollywood Anti-Trust Probe' <http://variety.com/2017/film/global/margrethe-vestager-signals-conciliation-hollywood-anti-trust-probe-1201969407/> accessed 11 February 2017.

article of TFEU 101(3).[288] In here it is sufficient to just say that agreement which *prima facie* infringes TFEU 101 can survive by providing right economic context as stated in *Murphy* or, at least in principle, by applying justification provision of TFEU 101(3).[289]

It can be said from the outset that justification by applying TFEU 101(3) is unlikely.[290] In order to achieve such justification defendants would have to prove that restrictions are indispensable and does not eliminate all competition. Additionally, the Court did not really engage to justification argumentation in similar circumstances in *Murphy.* Also, *Coditel II* was decided by applying TFEU 101(1) only. Therefore, I conclude that justification would probably occur by providing right economic context.

The Court elaborated in *Murphy* that economic context must provide that "clauses are not liable to impair competition and therefore do not have an anticompetitive object."[291] In *Cartes Bancaires,* the Court maintained that context refers, in particular, "to the nature of the services at issue, as well as the real conditions of the function and structure of the markets."[292]

For the competition law, relevant question is that do economic reasons offer requisite "economic context?" In here, it useful, once again, to understand role of the market integration imperative in competition law. Even if geo-blocking leads to increase in consumer welfare and might be even beneficial to market integration, it does not mean that agreements can´t still infringe TFEU 101 under current doctrine.[293]

As for price discrimination argument, it is safe to assume on basis of *Murphy,* that it alone does not have a good chance to justify geo-blocking. In that regard, subject matter of pay-TV investigation does not differ from *Murphy* as aim of territorial licensing is to maximize profits. However beneficial it might be for consumers in low-demand territories market integration objective would likely trump it.

---

[288] Jones and Sufrin (n 66) 189–247.
[289] David Bailey, 'Restrictions of Competition by Object Under article 101 TFEU' (2012) 49 Common Market Law Review 559, 593.
[290] Bailey (n 278) 593.
[291] *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* (2011) ECLI:EU:C:2011:631 [143].
[292] *Case C-67/13 P Groupement des Cartes Bancaires v European Commission* (2014) EU:C:2014:2204.
[293] Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (n 29) 2.

As for other arguments, sport broadcasting and audiovisual products must be assessed separately. For sport broadcasting, it is easy to conclude that economic reasons are not viable enough to depart from *Murphy.* Pre-sale financing is not used in sports, less restrictive means could achieve some objectives and price discrimination itself is not suitable. Sport broadcasting is not about preserving value of one form of exploitation over another. Thus, the "specific subject matter" of sport broadcasting does not require market partitioning. Additionally, if anything, aftermath of *Murphy* shows that passive sales have not destroyed business models of sport leagues. It would make no sense to make U-turn from *Murphy* decision at least as far premium products are concerned.

Are special characteristics of audiovisual products good enough reason to depart from standard approach? I mean, audiovisual industry is not the only industry with risk, it could be asserted that any economic activity is risky! Essential question is how indispensable pre-sale financing and windowing are for the industry. In my opinion, there are reasons to believe that the Court might assess audiovisual products differently than it did sport broadcasting in *Murphy.*

The Court did approve pre-sale financing as suitable justification on *Coditel II* as a mean to achieve film financing. Also, the Court understood need for dubbing and subtitling. Aim of absolute protection is to ensure that other distributors could not free ride on those efforts. In *Coditel I* windowing mechanism was deemed to be a legitimate mean to obtain the *proper* remuneration. Even Advocate General Kokott implied that windowing is a legitimate business practice in order to preserve value of films. Also, in *Murphy* the Court maintained it is within the right of copyright holder to "prohibit transmission by others, during a specified period."[294] In other words, object of geo-blocking in such instances isn´t to impair competition. Therefore, geo-blocking could survive as similar arguments are still valid even in different legal context.[295]

On the other hand, I´d like to emphasize that above-mentioned is just a speculation. It is also possible that any economic argument is not viable in the framework of "country of origin." It is near impossible to know exactly what the Court meant by "economic context" and what such justification requires.

---

[294] *Murphy* (n 291) [137].
[295] Andreangeli (n 180) 183.

Lastly, I wonder if simple yes-or-no answer is fit to all instances of geo-blocking, more flexible case-by-case framework could be needed if the "country of origin" principle is extended. Hugentoltz and Mazziotti promotes similar idea.[296] Economic circumstances might diverge too much to have one size to fit all. Product market ranges from Hollywood box-office hits to regional TV-series. Similarly, audiovisual firms span from global companies to provincial FTA broadcasters and small independent producers. If geo-blocking cannot be upheld, there might be room for some exceptions.

Also, official sources suggest that flexible approach might be desired. Similar approach is suggested in the Commission preliminary report on e-commerce: "The Commission will therefore assess on a case-by-case basis, having regard to the characteristics of the specific product and geographic markets, whether certain licensing practices may restrict competition and whether enforcement is necessary in order to ensure effective competition."[297]

Most recently, in her speech in January 2016 Commissioner Vestager hinted that film financing and free riding are legitimate concern:

> "We understand that selling exclusive rights can be important to raise the money that film makers need. Our rules recognize that barriers between national markets may be justified under certain conditions, in particular when they are necessary to launch new products. So, in the pay TV case, as in every case we do, we're carefully examining whether the restrictions in the contracts we're looking at are necessary for the studios."[298]

What would constitute justified geo-blocking? Guidelines on Vertical Restraints ("Guidelines"), referenced by Vestager in her speech, could help to identify justified and unjustified instances of geo-blocking and form basis to "guidelines of geo-blocking." Guidelines maintain that absolute territorial protection may fall outside the scope of Article 101(1) TFEU altogether if such protection is necessary for the supplier or new product to

---

[296] See also: Hugenholtz, 'Extending the SatCab Model to the Internet' (n 198) 12–13.Giuseppe Mazziotti, 'Is Geo-Blocking a Real Cause for Concern in Europe?' [2015] EUI Working Papers 365, 366.
[297] European Commission, 'Preliminary Report on the E-Commerce Sector Inquiry' (n 15) 289.
[298] Margrethe Vestager, 'Celebrating European Culture' (An Evening with Nordic Drama, Brussels, 24 January 2017) <http://ec.europa.eu/commission/2014-2019/vestager/announcements/celebrating-european-culture_en> accessed 11 February 2017.

enter the market.[299] It could be stated that each and every new film or TV-series is a new product, prototype in a sense. Guidelines mentions substantial investment by a distributor and sunk costs as relevant factors, both relevant in audiovisual industry.[300] As so, flexible approach would offer some protection to risk-taking distributors in initial exploitation period of product but would abolish geo-blocking of relatively old products. Similar approach is sketched in study for the European Parliament, which suggest that geo-blocking could be applied for two years counting from the first cinema release. [301]After initial period, films or TV-series could circulate freely, thus fulfilling initial policy objective defined as increased circulation of European products.

One parameter could also be the magnitude of cross-border demand. Flexible approach can be applied to products with relatively low cross-border demand, dubbed films and other regional products. It is hard to suggest that cross-border access in those cases would lead to significant changes to economic eco-system. Although extension of the “country of origin” principle could make those products available without competition law enforcement.

Variety reports that the aforementioned speech by Vestager has started speculation on whether or not “the commission may seek to favor independent and smaller content in its continued support for territory-by-territory licensing.”[302] It is not of the question to suggest that territorial licensing is more essential to small European producers than big Hollywood studios. Mazziotti suggests that territoriality “is not an asset per se; it is rather an intrinsic dimension and condition of exploitation.”[303]

It is good note that, so far, the Commission has only targeted big producers and broadcasters, status of European producers and FTA broadcasters is thus far unclear. It remains to be seen if that´s even a policy priority of Commission. However, that would contradict the policy goal stated above. Although, it is suggestable that strong lobbying from European stakeholders might have been effective:

---

[299] European Commission, ‘Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1’ (n 184) 61.
[300] ibid.
[301] Bruegel, ‘Extending the Scope of the Geo-Blocking Prohibition: An Economic Assessment’ (the European Parliament’Committee on the Internal Market and Consumer Protection) <http://bruegel.org/wp-content/uploads/2017/02/IPOL_IDA2017595364_EN.pdf> accessed 27 February 2017.
[302] Variety, ‘Margrethe Vestager Signals Conciliation in Hollywood Anti-Trust Probe’ (n 276).
[303] Mazziotti (n 296) 370.

"Going forward, it looks as if the commission and Europe's industry will work far more closely to identify where in film and TV there can be larger cross-border access, rather than the commission imposing one size fits all regulation on Europe's film and TV sectors."[304]

Flexible approach can be also used to support small and regional European stakeholders. In here, test proposed by Haas and Kohlert is suitable in context of abovementioned Guidelines: Is absolute territorial licensing essential for production of Hollywood films when balanced against objective of market integration?[305] I think it is not out of the question to suggest that Hollywood films would be produced even without absolute territorial protection, i.e. protection is not necessary to enter the new product to market. However, more information is needed to make definitive assessment on protection needed for Hollywood films. In here, I merely to try to point out possibilities of flexible approach, the approach can be used to protect European sector, if that's indeed the new or secondary policy goal. Hugenholtz mentions that one example of justified geo-blocking could be "national public broadcasters that operate under a mandate not to offer content services to audiences outside their national territories."[306]

As for the enforcement, in reality, flexible approach would ultimately require some kind of block exemption Regulation or at least guidelines.[307] Administrability of the approach is, admittingly, a legitimate concern. In a real world, such approach might be utopist. Is it possible to construct such instrument, guidelines or block exemption, that would catch all parameters, products and service providers, of geo-blocking in fair *ex ante* manner? For example, how significant should the cross-border appeal be?

Aim of the flexible approach is to strike balance between needs of stakeholders and the single market. It would maintain that free riding and windowing are legitimate concerns and protection might sometimes be warranted in order to break in a new product. Territoriality is maintained but does not grant all-encompassing get-out-of-jail-free-card to audiovisual sector but would maintain that geo-blocking might be economically justified in

---

[304] Variety, 'Commission's Oettinger Defends Territory Licensing at Venice' (4 September 2016) <http://variety.com/2016/digital/news/commission-oettinger-territory-licensing-at-venice-1201852000/> accessed 11 February 2017.
[305] For similar test see Anderman and Schmitt (n 103) 247.
[306] Bernt. Hugenholtz, 'Extending the SatCab Model to the Internet' (BEUC 2015) 13.
[307] ibid 12.

some cases. Combined with portability Regulation, the approach would mitigate some of the frustrating effects of geo-blocking while upholding core of principle of territoriality.

7. Conclusions

Time has come to answer the research question of this study: is geo-blocking compatible with the internal market of the EU? In my opinion, in current legal context, answer is yes. In current context competition law is not the answer for tackling geo-blocking as it stems more from territoriality of copyright than contractual clauses. As the things stand now, the legal background is similar to *Coditel I* and *II.* Therefore, geo-blocking agreements should fulfill both substantial and territorial scopes of the test. However, it is not wholly out of the question that *Murphy* can be applied in different legal context. At least, in context of sport broadcasting some facts are similar to *Murphy.*

Understanding relevancy of legal context is one of the main findings of this study. That means, if the "country of origin" principle is extended to internet transmission, the legal context shifts towards *Murphy.* In that scenario geo-blocking does not have good chance to survive territorial part of the test as geo-blocking agreements would restrict transmissions outside of the licensed territoriality. In context of counterfactual, agreements restrict competition that would have otherwise existed.

Last part of the study picks up from the extension of the "country of origin" principle. If the legal context changes, stakeholders would have to rely only on economic justification. Such justification could be based on either 101(1) "rule of reason" analysis or TFEU 101(3) justification. Relevant question is that is territorial licensing indispensable for audiovisual sector and sport broadcasting. In here, another main finding of this study is crucial. Namely the different economical underpinnings of audiovisual products and sport broadcasting. The "specific subject matter" of those services is slightly different.

Main arguments are prevention of free riding, price discrimination and windowing. I conclude that arguments have merits as absolute protection induces investment and promotes content production. As prevalent throughout this study I advocate for a *ex ante* view. Protection is needed to effectively secure investment in audiovisual products. If assessed purely from economic perspective, geo-blocking increases economic welfare and

even promotes the market integration in broad sense. Thus, in my personal view, geo-blocking *should* be allowed. Yet, questions remain over prevalence of VPN usage.

As for the merits of those arguments in the eyes of competition law, it can be concluded that price discrimination alone is not suitable because of the market integration objective. For audiovisual industry, absolute territorial protection as a tool to prevent free riding and achieve proper remuneration has been approved by the Court in *Coditel II.* For sport broadcasting things look rather dim as arguments have been already assessed in *Murphy.* Thus, answer to research question in amended legal context is reserved yes for audiovisual products and no for sport broadcasting. The reservation is that it is not sure what "economic context" actually means.

Lastly, I advocate for flexible approach because one rule cannot grasp all instances of geo-blocking in fair manner. Flexible approach would be loosely based on current Guidelines*:* is absolute territorial protection essential to break in new product? I suggest that it is not out of the question that Hollywood productions would not be protected in same manner than European film, if that´s indeed the new policy goal. If flexible approach is used to answer research question posed, the answer is: it depends.

In order to answer research questions, I have also assessed the relationship of intellectual property and internal market by reviewing relevant case law. For the first part, the main theme is to understand gradient development of the Court´s case law from *Consten-Grundig* to *Murphy.* I conclude that *Consten-Grundig* can be criticized on multiple points, it can be asserted that the decision was ultimately damaging to market integration.

In *Coditel* cases, the Court laid the foundation of non-exhaustion of performance rights and upheld territorial licensing even if it meant absolute territorial protection. *Coditel* cases can be hailed as economically feasible decisions departing from formalistic approach. Besides the *Coditel*-saga, *Murphy* case is the most important case to this study. As I assessed, one can derive multiple interpretations of the case. The main lines are narrow and broad interpretation, but until similar case comes before the Court it is difficult to have conclusive answer.

The legal test is constructed by using territorial and substantial dimensions of the copyright. Latter part is roughly equivalent to the "specific subject matter" – test used by the Court.

Main finding is that if an agreement remains in the substantial scope of the intellectual property, it does have a good chance of fulfilling requirements of articles TFEU 56 or 101. As for territorial side of the test, counterfactual analysis is needed: does an agreement restrict competition that would exist in absence of the agreement?

I also reviewed three possible industry responses to cross-border access. Firstly, audiovisual stakeholder and sport leagues could integrate vertically. Secondly, wide-ranging downstream market modifications are available: uniform pricing, closure of low-demand territories, lower level quality to low-demand territories, holdback periods, and compulsory dubbing. Aim of these modifications is to mitigate cross-border demand. Third option is to use pan-EU licensing in order to preserve benefits of exclusivity. However, I question would cross-border demand be significant enough in all instances to warrant the most drastic alternations.

Overall, issue of geo-blocking is delicate issue as it is interlinked with copyright protection, political objective of market integration and economics of audiovisual sector. In short, fight against geo-blocking is about market integration: freedom of European Union citizen to freely obtain services across the Union. On the other hand, the objective must be balanced against economical aspects of copyright protection. There must be products in order to have cross-border access in first place! As so, geo-blocking actually goes into very heart of the single market.

No one knows for sure what the future holds for digital content in EU. Certainly, big question mark is the possible changes to a copyright law. Interestingly, recent developments reveal potential change-of-pace in cross-border access strategy.[308] It is impossible to measure what will be the ultimate scope of cross-border strategy and what are current policy goals as Commissioners have given multiple contradictory statements, but it is at least possible that instead of one sweeping change which might lead to unintended consequences, the Commission might try to build up cross-border access to content gradually. Portability Regulation is good start as it addresses one of the prominent problems of geo-blocking while respecting territoriality. Tools to facilitate, but not impose,

[308] Variety, 'Commission's Oettinger Defends Territory Licensing at Venice' (4 September 2016) <http://variety.com/2016/digital/news/commission-oettinger-territory-licensing-at-venice-1201852000/> accessed 11 February 2017.

cross-border access would be also useful. The “country of origin” principle with true contractual freedom could be one such tool. Furthermore, several Member States have resisted the extension of “country of origin” principle.[309] Proposal is currently debated by legislative organs of the Union. Thus, future of the “country of origin” extension is firmly up in the air.

Recent developments of possible change-of-pace and opposition by Member States also affect competition law side. The Commission has not backed off from the stance that passive sales should be allowed. However, it is far from certain that the investigation would achieve its objectives without amendments to copyright law as assessed in this study. Also, it remains to be seen what is ultimate scope of the Commission´s competition law enforcement strategy? Will the Commission move beyond big players and chase European producers and FTA-broadcasters? The biggest question is naturally how the pay-TV investigation concludes and what happens in possible subsequent court proceedings. Stay tuned.

---

[309] Variety, ‘MPAA’s Chris Dodd on E.U. Digital Plans’ (15 February 2017) <http://variety.com/2017/digital/news/christopher-dodd-mpaa-e-u-digital-plans-1201989074/> accessed 21 February 2017.