

# The territoriality of literary and artistic property rights, an anachronism in the single digital market?

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## **Abstract:**

The principle of the territoriality of the law must come under review in the Internet era. The European Union has recently tried to make several, possibly contradictory, objectives compatible: the free circulation of works of intellectual property in the EU and the preservation of copyright holders' interests. Several initiatives have tried to perform this sensitive balancing act. Some have been motivated by a preoccupation with reinforcing the position of the rightful owners (which has sometimes been weakened owing to piecemeal legislative arrangements for protecting them). Others have come out of a philosophy oriented toward competition for improving public access to contents.

According to Giraudoux in *La Guerre de Troie n'aura pas lieu*, the law is “*the imagination's most powerful school*”. He poked fun of “reality” when it thwarted the settlement of difficulties that had to be legally qualified. If justified by a legitimate interest, the law might even consider that countries have, or do not have, borders, that invisible things inhere in an object, that these things become exclusive before entering the public domain, and so forth.<sup>1</sup>

“Works of the mind” typify a dual exercise in legal fictions. First of all, they are qualified in relation not to their material grounds (the medium) but to their “immaterial” essence. They are endowed with the ubiquity of nonrivalrous goods, their economic value mainly arising out of their simultaneous presence in several places. People in various countries hum a certain pop song or watch a given movie on the Internet. To qualify this value, literary and artistic property rights have been created, distinct from property rights over tangible goods. Secondly, these intellectual works are a matter of national law, which grants them a protection that does not reach beyond the dominion of the state that safeguards this protection. National by origin, they are recognized as a matter of law in each state — even though international legal instruments (from the Berne Convention for the Protection of Literary and Artistic Works to the World Trade Organization) have authorized extending protection outside the work's country of origin.

As a consequence, these “literary and artistic property rights” are the hub of a contradiction centered on their territorial application. They have a protection that is narrowly geographical but are meant to be applied to objects that circulate widely in space and time! This circulation has no inherent restriction save human attention. These works are naturally shared and multiplied through exchanges between human beings. The law alone allows for this circulation to be subject to rules of exclusivity that artificially create economic rivalry, rules with a limited, geographical scope of application owing to their legal grounds.

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<sup>1</sup> This article has been translated from French by Noal Mellott (Omaha Beach, France). The translation into English has, with the editor's approval, completed a few bibliographical references. All websites were consulted in February 2021.

## **Property rights to literary and artistic works: Geographically segmented**

In virtue, and within the limits, of the will of legislative bodies, borders have been set up: the borders of states, each of which freely determines the scope of the protection it grants to intellectual works. From this sovereign decision ensues several consequences. The Netherlands protects perfume with the equivalent of a copyright whereas France considers that a fragrance is too volatile for a monopoly. Each nation is still the master who chooses the beneficiaries of the rights that it grants: in one place, the director of a film but elsewhere the producer. Existing remedies under the conventional system allow, however, for major differences. From the territoriality principle can be inferred a diversity of legal systems and a segmentation of the law.

A more indirect consequence is that distribution rights, too, are defined in terms of geographical exclusivity. While the geographical segmentation of rights ensues from the very nature of legal protection, it substantially depends on the prospects for optimizing the distribution of the work in question on various markets. Let us take the example of cinema. Movies are regularly distributed through contracts with clauses of territorial exclusivity. This enables producers to amortize as best possible their investments following a chronology specific to each market. To the geographical segmentation of rights derived from legislative texts is added a territorial organization of distribution through exclusive clauses in contracts. Underlying this segmentation is a territorial organization of the systems for managing intellectual property rights and collecting royalties for rights holders.

This system was suitable when national operators controlled distribution channels that were oriented toward a public eager for local productions. It has now come up against a wave of political, technical and sociological changes, among them: economic globalization and regional integration, a potentially universal access to digital contents on the Internet, the marginal (near zero) cost of reproducing digital property, and public demand for immediate access. Furthermore, trends in uses and in industry are concentrating attention on international products while turning attention away from other products. Given this context, geographically segmented offers apparently no longer suit current needs and demands. They no longer reply to the demand from a public who, looking for immediate satisfaction, is now used to platforms or networks of worldwide distribution. Meanwhile, an essentially national form of protection is doing its legal best to oppose international counterfeiting.

All this pleads in favor of reconsidering the territoriality principle, especially in the age of the Internet. The European Union has been trying to make potentially contradictory objectives compatible: on the one hand, the free circulation of literary and artistic works within the EU and, on the other hand, the protection of the interests of copyright holders. Several efforts have been made to perform this sensitive balancing act: some of them motivated by a preoccupation with strengthening the position of rightful owners (which has sometimes been weakened owing to piecemeal legislative protections); others derived from a philosophy oriented toward competition and seeking to improve the public's access to cultural contents.

## The difficulty of moving beyond the territoriality principle for the sake of copyright holders

Barriers stemming from the principle of territoriality impede the circulation of literary and artistic works. A first way to lift them without curtailing the protection of copyright holders is to standardize the contents of this protection via a top-down approach. Over the past thirty years, the EU has adopted more than a dozen directives in view of harmonizing national laws (e.g., about which works to protect or which rights to grant). With regard to territoriality however, these efforts have been stymied from the very start. Although regulations have been made for recognizing brands and models in the EU, nothing equivalent exists for literary and artistic works. This domain of law adamantly remains national. As a consequence and despite definite advances on harmonization, legal systems in Europe are thriving in all their diversity. In the case of “moral rights” and ownership, for example, each member state plays on the borderline of the harmonization achieved through directives so as to preserve its own legal system. The European Commission’s program for 2015 mentioned that a single copyright title was not to be excluded in the long run — a prospect that, we are forced to admit, still exists in 2020.<sup>2</sup> As a consequence, the territoriality principle is still segmenting the single market, and the protection guaranteed to copyright holders is not uniform.

Since the EU has not harmonized systems of law enforcement, this segmentation has also given rise to problems when intellectual property rights are to be enforced. The Berne Convention refers to the territorial principle: “Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”<sup>3</sup> The EU hardly says anything else: “The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.”<sup>4</sup> And according to the Court of Justice of the European Union (CJEU), this protection and violations thereof can be evaluated only in view of the laws of the member state where counterfeiting occurs: “it is true that copyright, like the rights attaching to a national trade mark, is subject to the principle of territoriality.”<sup>5</sup> The mechanical result of all this is to add up the number of applicable sources of law in any case of pan-European counterfeiting. Furthermore, the decision by the Court of Justice on violations committed via the Internet does not allow rights holders to lodge before a single jurisdiction a claim for full damages to cover the losses resulting in all member states. It forces plaintiffs to file complaints with several jurisdictions, at great expense.

The only convincing attempt to diminish, in favor of copyright holders, the complexity stemming from territoriality is the EU directive on satellite broadcasting. It provides for an original, “materialistic” mechanism of enforcement: “The act of communication to the public by satellite occurs solely in the member state where, under the control and responsibility of the broadcasting organization, the program-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.”<sup>6</sup> This specification of a single applicable source of law mutes the territoriality principle. This is consistent with the high level of protection required under the directive. Furthermore, this provision is completed with a series of references indicating which member state is to be the source of law (when a third-party state

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<sup>2</sup> EUROPEAN COMMISSION (2015) “Towards a modern, more European copyright framework”, 9.12.2015, COM(2015)0626 final, p. 12, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A626%3AFIN>.

<sup>3</sup> Article 5 of the convention, available at [https://en.wikisource.org/wiki/Convention\\_for\\_the\\_Protection\\_of\\_Literary\\_and\\_Artistic\\_Works](https://en.wikisource.org/wiki/Convention_for_the_Protection_of_Literary_and_Artistic_Works).

<sup>4</sup> Article 8 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007R0864>.

<sup>5</sup> Point 39 of the opinion in Case C 170/12 Pinckney v KDG of 3 October 2013, available via <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0170>.

<sup>6</sup> Article 12(b) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0083&from=EN>.

implicated in the broadcasting does not ensure the protection of rights holders at the level stipulated in the directive). Regardless of where they are located, operators have no other choice than to abide by the exclusive conditions obtained through contract for the whole area covered by broadcasting. Rights holders are reassured that they do not have to undertake formalities with several jurisdictions where less protection might be offered. The barrier of territoriality is, in this case, lifted to their benefit.

Unfortunately, the European Union is still lagging about whether to broaden the territoriality rights of literary and artistic property rights to the whole Union. It has not staked out a bold position about naming a single source of law for cases related to the distribution of intellectual works across borders. Conflicts of law and jurisdictions give rise to many a difficulty for rights holders and increase the opacity of rules and regulations for users (especially in cases of exceptions).

## **The difficulty of moving beyond the territoriality principle in online access to intellectual works**

Instead of allowing literary and artistic works to circulate freely, digital technology seems, paradoxically, to signal a return to the principle of territoriality. Market segmentation is even more pronounced insofar as it is not countered by the doctrine of the “exhaustion of remedies” that applies to the “tangible” distribution of protected goods. This doctrine forbids the rights holder from opposing (once he has agreed to its commercialization within the EU) the free circulation of merchandise that incorporates a “component” subject to an intellectual property right. In contrast, the exhaustion of remedies in cases of digital distribution is outright excluded under Article 3 of Directive 2001/29 on copyrights in the information society.<sup>7</sup> Furthermore, this directive grants copyright holders “*the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means*”. Rights holders may, therefore, oppose the digital circulation within the EU of their literary or artistic works.

Consumers feel that digital distribution has done more to reduce uses than to offer opportunities for access. For instance, technical procedures for zoning or blocking uses have spawned actions for circumventing the so-called “legal offers”, especially those that do not satisfy the public. Mass counterfeiting (or piracy) is all the more uninhibited insofar as the public does not understand why certain works are unavailable (or available at a very high price) in these legal offers while they can so easily be accessed for free (or nearly so) on the Internet.

Aware of these issues, the European Union recently sent several signals for alleviating certain territorial restrictions so as to allow better crossborder access to offers of culture and entertainment, and thus contribute to the emergence of a digital single market for creative works. These signals have repeatedly invoked competition or consumer law in cases related to copyright law.

According to the so-called “Premier League decision” by the CJEU, a territorial exclusivity for the purpose of distribution should not ensure rights holders “*the opportunity to demand the highest possible remuneration*” but, instead, “*only appropriate remuneration for each use of the protected subject-matter*”.<sup>8</sup> As a consequence, any restriction on access beyond this objective is unjustified, and any such contracts may be sanctioned under competition law.<sup>9</sup> Meanwhile, the Directorate-General of the European Commission has sought to fight against “territorial clauses”

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<sup>7</sup> Article 3 (3) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, available at <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:32001L0029>.

<sup>8</sup> CJUE 4 October 2011, C-403/08 and C-429/08, point 108 available at <http://curia.europa.eu/juris/liste.jsf?num=C-403/08&language=en>.

<sup>9</sup> Contrary to the decision in Coditel I and II (18 March 1980, C-62/79 and 6 October 1982, C-262/81). The full texts can be found on <http://curia.europa.eu/juris/recherche.jsf>.

that allow only one organization to manage intellectual property rights (the organization where the rights holder has his headquarters) and deliver authorizations (licenses) for use, including for uses on the Internet. Following a long battle, the directive on harmonizing the “*collective management*” of copyrights finally opted in favor of the deliverance of pan-European licenses for the distribution of music on line, thus deeply reconfiguring the territorial management of rights in this field,<sup>10</sup> even though the results have not been very convincing for users or rights holders.

Consumer law has, till now timidly so, echoed the demand for crossborder access to works of intellectual property. For instance, an EU regulation forbids clauses, regardless of the law applicable to the contract, that prohibit or limit the “*cross-border portability of online content services*”.<sup>11</sup> Consumers are thus reassured that any clauses of territorial exclusivity in matters of copyright may not keep them from accessing the protected contents (in the relatively narrow case as foreseen, namely users who travel within the EU). However a regulation on geoblocking allows for a differentiated distribution of copyrighted contents by user’s place of residence; and it does not condemn territorial exclusivity for audiovisual works.<sup>12</sup> Nonetheless this possibility for geoblocking copyrighted material is to be reexamined soon. The results in terms of accessibility are shades of gray, since lawmakers have been prudent owing to the risk of destabilizing audiovisual markets were they to abolish clauses of territorial exclusivity.

The idea of an intra-European “deconfinement” of artistic and literary works — a gradual abandonment of the territoriality principle — is slowly but surely advancing even in copyright law. Indirect evidence of this figures among the objectives formulated in two recent directives about harmonization adopted on 17 April 2019, which seek, respectively, to improve crossborder access to copyrighted material and to establish a digital single market by allowing for the crossborder exercise of harmonized exceptions.<sup>13</sup> Digital technology is, for sure, a catalyst that stimulates thought about the need to review the territoriality principle. This opens interesting perspectives for a genuinely European copyright law.

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<sup>10</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0026>.

<sup>11</sup> Article 7 of EU Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2017%3A168%3ATOC&uri=uriserv%3AOJ.LI.2017.168.01.0001.01.ENG>.

<sup>12</sup> See, in particular, Article 4 on “Access to goods or services” of EU Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geoblocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2018%3A060%3ATOC&uri=uriserv%3AOJ.LI.2018.060.01.0001.01.ENG>.

<sup>13</sup> Respectively: Article 1 of EU Directive 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0789>; & EU Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0790>.