TILBURG LAW SCHOOL
MASTER'S THESIS

Geo-blocking of the audiovisual services in the EU: an indispensable measure or a barrier to a modern Europe?

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Table of Contents:

List of abbreviations

(DSMS) Digital Single Market Strategy

(IPRs) Intellectual Property Rights

(IIPL) International Intellectual Property Law

(WIPO) World Intellectual Property Organization

(IP) Internet Protocol Address

(EU) European Union

(B2C) Business to Consumers

(B2B) Business to Business

(AV) Audiovisual

(UK) United Kingdom

(VOD) Video-on-demand

(AVMSD) Audiovisual Media Services Directive

(TFEU) Treaty on the Functioning of the European Union

(FAPL) Football Association Premier League

(CJEU) Court of Justice of the European Union

(EEA) European Economic Area

Abstract

On December 2018 a new Regulation started applying to all the Member States of the European Union. This Regulation became known with the name "Geo-blocking Regulation 2018/302" and brought significant changes on the field of e-commerce within Europe. More specifically it prohibits the use of geo-blocking methods on the electronic commerce within EU and bans the discrimination among the European citizens based on their nationality, place of residence of place of establishment. The geo-blocking techniques are very widely used methods which can prevent the access of a user to websites or online services based on the location of the user. Even though from now on these techniques will belong to the past as far as most of the electronic services are concerned there is still a sector which will remain a subject of geo-blocking; the audiovisual sector. The European Commission decided to exclude the services which provide access to audiovisual content from the scope of the Regulation 2018/302 and this decision will be evaluated again by the end of 2020. This paper analyzes the new Regulation and its exception as well as it studies for which possible reason(s) this decision was takes but also the implication of such an exclusion. The main question which this Master Thesis aims to answer is whether it is necessary the European Commission to evaluate and possibly include in the provisions of the Regulation also the audiovisual sector.

Chapter 1

Introduction

Although the Internet is considered global and borderless, the following message contradicts the general idea about the internet: "We are sorry, this content is unavailable in your region/country". This is one of the messages that every person who uses online platforms or shops has read at least one time in his/her life. In other words, this is the way in which online consumers face well-known geo-blocking methods. Geo-blocking, in a few words, is all the technology methods which do not allow a user from a certain geographic location to access a website, to buy a product online or to use an online service. [1]

In the internal market of the European Union (EU) the geo-blocking method has created obstacles to cross-border sales of services and goods. On May of 2015 the European Commission launched the Digital Single Market Strategy ("DSMS")[2] and geo-blocking was one of the issues which needed to be solved. Accordingly, the European Commission decided to enter into force a new Regulation[3] which will prohibit the unjustified geo-blocking on the cross-border sales of goods and services within the Internal Market of the European Union.[4] However, the Commission decided to exclude the copyright protected works and services.

This Master thesis will study in a thorough way the new Regulation as well as the exception mentioned above. Before the disclosure of the exact subject of this Thesis it is crucial to briefly analyze the main parts of this paper in order to understand better the problem statement of this thesis.

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[1] Schmidt-Kessen, Maria José, EU Digital Single Market Strategy, Digital Content and Geo- Blocking: Costs And Benefits Of Partitioning EU's Internal Market (January 6, 2019). Copenhagen Business School, CBS LAW Research Paper No. 19-05; Columbia Journal of European Law, Vol. 24, No. 3, Fall 2018. Available at SSRN: https://ssrn.com/abstract=3311110

[2] European Commission: Digital Single Market https://ec.europa.eu/commission/priorities/digital-single-market_en

[3] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (Text with EEA relevance) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R0302&from=EN

[4] Geo-blocking: A new Regulation enters into force https://eur-lex.europa.eu/content/news/geo-blocking-regulation-enters-into-force.html

1.1. Copyrights

Copyrights and related rights belong to exclusive intellectual property rights (IPR). They are limited-term exclusionary rights and they protect the creators' original literary, scientific or artistic work.

It is worth mentioning at this point that there is not an "International Copyright Law" which protects a work throughout the world. However, there are some fundamental principles concerning the International Intellectual Property Law (IIPL) and these principles have been enriched in many International treaties, agreements and conventions.

In the European Union, the copyright law has largely been based on the principles of the Berne Convention, but it also consists of a number of directives. To name but a few of these directives are the Copyright Directive (InfoSoc Directive)[5], the SatCab Directive[6] and other legislations. Some of these directives will be mentioned and explained further later in this paper.

1.1.1. Audiovisual and non-audiovisual works

This paper will focus on two categories of works which are copyright protected; the audio-visual and non-audiovisual works.

The World Intellectual Property Organization (WIPO), defines an audiovisual work as being a series of related images which are capable of being shown by some device, such as a projector, along with any sounds which accompany the visual portion of the work. The nature of the material object embodying the work (film, tape, etc.) does not matter.[7] The most common example of audiovisual works are the films (cinematographic motion picture). On the other hand, the non-audiovisual works do not have a specific definition but in the literature around the world is mentioned that non-audiovisual works consist of music, e-books and games. These two categories have some significant legal differences under the meaning of copyright protection since the moral and exclusive rights of a creator differ in

[5] 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 https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

[6] 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 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0594

[7] J. S. Marcus & G. Petropoulos, 'WIPO Intellectual Property Handbook: Policy, Law and Use Geo-Blocking of Audiovisual Services' (Bruegel.org, 2017), pp. 110

each category. In the following chapter of this paper these differences will be analyzed and studied extensively.

However, before the explanation of the new Geo-blocking regulation it is necessary at this point to mention for which reason this thesis will focus only on these two categories of copyright protected works. The answer has been already given briefly in the introduction of this paper; the new Regulation of EU, which prohibits the unjustified online sales discrimination based on customers' nationality, place of residence or place of establishment within the internal market, applies differently on the audiovisual and non-audiovisual works.

According to the recital 8[8], the non-audiovisual electronically supplied services should be considered, inter alia, as a subject of the new Geo-blocking regulation, except to the specific exclusion which the Regulation provides in Article 4[9] and more specifically on paragraph 1 (b). On the mentioned paragraph it is defined, inter alia, that a trader is allowed to apply different general conditions of access to goods and services where the customer seeks to access and use of copyright protected work thought electronically supplied services which the trader provides. That is to say, that the non-audiovisual works remain a subject to the rest provisions of the Regulation.

On the contrary, the audiovisual sector has been excluded completely from the Geo-blocking Regulation. This discrimination triggered the interest of the author of this paper and it led to the main research question of this Thesis which is expressed in the following paragraphs.

1.2. Geo-blocking

1.2.1. What is geo-blocking and how does it work?

As it is mentioned on the first lines of this paper geo-blocking is the technology which does not allow a user from a certain geographic location to access a website, to buy a product online or to use an online service.

In technical terms, the way how geo-blocking technology applies is connected with the Internet Protocol Address (IP) of every computer. An Internet Protocol address (IP address)

[8]Regulation 2018/302, recital (8) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0302&rid=4
[9] Regulation (EU) 2018/302

is a numerical label assigned to each device connected to a computer network that uses the Internet Protocol for communication. An IP address serves two principal functions: host or network interface identification and location addressing. In other words, every time a user requests access to a site, this IP number is sent along with the request and this is how the site can identify the location of the user.[10]

Geo-blocking is most commonly used in order to protect the copyrights of the right holders according to the territorial licensing. For example, the content of the famous video-on-demand platform Netflix varies between regions because of the licenses which have been legally offered to each region. Also, in some countries the service may not even be available at all. The location of each user becomes visible each time and in that way the publicity of each copyrighted work in every region is controllable.

Moreover, geo-blocking is also used to enforce price discrimination within the online market. More specifically, the prices may differ between the countries and a user on a country A may have to spend unnecessarily a bigger amount of money to buy a product from an online store which belongs to the country B compared to the residents of the country B.

Finally, Geo-blocking can be used for other purposes as well, such as blocking from a country the access to a website of another country which contains illegal content or services under local laws or also to control malicious traffic. [11]

Within the Member States of the European Union, the use of the geo-blocking method was used to cause all the above-mentioned results. However, on 22 March 2018 a new Regulation (Regulation (EU) 2018/302) entered into force and all the EU Member States applied this Regulation since the 3rd of December 2018. The new Regulation will change the until recently dominant situation in which the geo-blocking methods caused the e-commerce field within the EU.

1.2.2. The new (Geo-blocking) Regulation

On the 22nd of March 2018 the Regulation 2018/302 entered into force and all the European Member States had to apply this new legislation on the 3rd of December 2018. This new Regulation is part of a series of new rules which apply on the e-commerce field and more specifically aim to help on the cross border online sales in the European Union.

[10] "Geo-blocking guide: What is it and how do you get around it?", by Lavanya Rathnam https://www.cloudwards.net/geoblocking-guide/
[11] Wikipedia, Geo-blocking, https://en.wikipedia.org/wiki/Geo-blocking

As it is mentioned previously, before this new Regulation, online sellers were able to force barriers, price discrimination and impose restrictions to online consumers based on their nationality or place of residence. Mentioning a few results of this old strategy: the access to websites across borders was blocked, different prices and conditions were provided to the customers depending on their country, customers were denied the option to complete an order or to purchase some goods and services.

European Commission took into consideration the justified reasons which traders might have, and they do not want to sell their products cross-border however the discrimination among European Citizens within the internal market of EU and the importance of the right of the free movement of services led the European Commission to create this new Regulation.

The regulation addresses unjustified online sales discrimination based on customers' nationality, place of residence or place of establishment within the internal market. In other words, traders will not have the right to apply the geo-blocking methods which they were used to, and they have to adjust their businesses and their sale policy according to the provision of the new Regulation.

However, this new Regulation makes an exception and leaves out of its scope the copyright protected work. In particular, the legislators decided the audiovisual works (such as films) to be entirely excluded from the Regulation's scope while the non-audiovisual works (such as music, e-books, games) to remain a subject of the Regulation. Although it seems that the new Regulation applies to the non-audiovisual works the Art.4 §1 (b) declares that a trader is allowed to apply different general conditions of access to electronically supplied services which give the right to the customer to access and use non-audiovisual works.

Article 9 of the Regulation provides for a review clause that stipulates that the Commission should regularly evaluate the Regulation and the first review will take place by 23 March 2020. Among other issues one of the main issues which will be studied is the possibility to extend the scope of the Regulation in sectors not covered by the Services Directive such as audiovisual and transport.

The provision of article 9 triggered the research of the Master Thesis. The core question of this this Thesis is whether the extension of the scope of the new Geo-blocking regulation to the audiovisual field should take place after the first evaluation of the European Commission.

In order to answer to this question this Thesis will mainly focus on the film industry among the audiovisual sector since this industry seems to be more legally and economically complicated and engenders more complications.

1.3. Core question/sub-questions

The long-term goal of this Master Thesis is to answer the following questions:

1) **Core research question:**

   "How necessary is the re-examination of the extension of the scope of the new Geo-blocking Regulation to the audiovisual services giving access to this online copyright protected content?"

2) **Sub-questions:**

   a) *"What kinds of discrimination does the regulation tackle among goods and services?"*

   b) *"Which is the possible reason(s) for which the European Commission decided to exclude the audiovisual sector of the Regulation 2018/302?*

   c) *"Is this decision in contrary to other fundamental rights or other fields of the European Law or was the most efficient way to protect the copyrights?"*

1.4. Structure of the Thesis

According to the above formulated question, Chapter 2 deals with the discriminations which the Regulation (Regulation EU 2018/302) tackles through its articles and recitals. First of all, it is crucial to clarify in this Chapter to whom this new regulation will apply? Will it be applicable only on traders? What is a trader for this new Regulation? Moreover, there are three articles within the Regulation which seem to be really interesting: the articles 3,4,5 declare the obligations, the rights and the prohibitions that traders have. However, article 4 is the one which mentions a very important exemption and at this article is identified the first category of discrimination between all the goods and services and some other categories, like the copyright protected works (Art.4 §1(b)).

The second discrimination among the works which are protected by the copyright law the is entered through the recital 8 of the Regulation which explains that the non-audiovisual electronically supplied services remain a subject of this Regulation except the provision of art.4 §1(b). On the other hand, at the same recital it becomes clear that audiovisual services are entirely excluded from the scope of this Regulation. In addition, the services which have

as principal purpose to provide access to broadcasts of sports events on the basis of exclusive territorial licenses are also an exclusion from the Regulation. All the above are explained analytically in the 2nd Chapter of this Thesis.

In Chapter 3, there is extended research about the possible reason(s) which led to the exclusion of audiovisual works from the new Regulation. One of the main reasons was probably the principle of territoriality which is dominant in the copyright law but also the economic aspect of the production of the audiovisual works.

The reasons which are mentioned in Chapter 3 of this paper need to be evaluated and tested in order to see whether they were in accordance with other aspects of the European Law and also if the decision which was justified under these reasons was sufficient for the protection of the copyrights. This evaluation takes place in Chapter 4 of this Master Thesis and more specifically it is analyzed; Is this exclusion of audiovisual works in contrary with the right of the free movement of services which is the main fundamental right which is protected under the new Regulation? Which is the relation between the absolute territorial protection which is the main goal of the geo-blocking techniques on the one hand and the European Competition Law on the other hand? These answers are given through the analysis of relevant European cases.

As far as Chapter 5 is concerned, it includes all the conclusions of this Master Thesis. In this Chapter, the aforementioned chapters will lead to the answer of the core question regarding whether there is a necessity to evaluate and extend the current provisions of the new Regulation to the audiovisual services or not.

1.5. Methodology

The methodology for researching the present topic is the doctrinal and theoretical method. More specifically, a theoretical framework has been taken into account that consists of existing legal concepts in the European Union Legislation, definitions, and relevant scholarly literature (mainly legal materials) in order to extend a bit further the existing knowledge regarding the new Regulation.

That is accomplished by analyzing primary law in combination with secondary law; notably the Berne Convention, the InfoSoc directive and cases which have been the cornerstone of the legal protection of audiovisual works. More specifically in Chapter 4 there

is a comparison between two really famous cases, CineVlog case and FAPL case, and also a study of the Pay Tv case.

With respect to the theoretical perspective, this paper also uses other sources such as scientific and journal articles as well as academic papers that illustrate every issue separately and collectively.

Chapter 2: A general overview of the Regulation

2.1 Why has the Geo-blocking Regulation been introduced?

Considering the digitalization of the economy as well as the impact of the technology in modern innovative economic systems in the European Union, the European Commission decided to create a single digital market.[12] The definition of Digital Single Market according to the Commission is a market in which is ensured that right of free movement of goods, persons, services and capital is respected and also that in this market the individuals as much as the businesses can seamlessly access and exercise online activities under conditions of fair competition. Moreover, the Commission defines that in the DSM there is a high level of consumer and personal data protection, irrespective of their nationality or place of residence."[13].

The Digital Single Market Strategy (DSMS), which was suggested in 2015, was built in three pillars. First of all, it aims to provide to consumers and businesses better access to online goods and services across Europe. Moreover, it intends to create the right conditions for digital networks and services to flourish and finally to maximize the growth potential of the European Digital Economy.[14]

According to the first pillar, which aims to access for consumers and businesses to online goods and services, there are many areas of access according to the Commission in order to fulfill this purpose. One of these sub-areas of action is the prevention of unjustified geo-blocking. The Commission on the one hand recognizes that there are some occasions where the justified geo-blocking is essential in order for one seller to comply with specific legal

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM(2015) 192 final, Brussels 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0192&from=EN

[13] Id. at 3-4

[14] Id. at 4,9,13.

requirements. However, on the other hand is concerned about the unjustified geo-blocking practices which can set limits to the choices and purchase of European citizens on the cross-border trade.[15] Accordingly, on 3 December 2018 the new Geo-blocking Regulation 2018/302/EU came into force on addressing unjustified geo-blocking and all the other ways of discrimination based on the nationality or the place or residence or place of establishment of customers.[16]

2.2 General Overview of the Regulation

The new Regulation 2018/302 applies to traders and at this point it would be worth mentioning the definition of the term "trader" according to article 2 (18) of the new Regulation: *"trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in the name or on behalf of the trader, for purposes relating to the trade, business, craft or profession of the trader."*[17]

Moreover, the rules of the Geo-blocking Regulation apply to traders who sell goods and services to both consumers and businesses. That is to say, the application takes place in both business-to-consumer (B2C) and to business-to-business (B2B) transactions. However, the latter only in their capacity as end users which means that the transaction made without any intention to re-sell, transform, process, rent or subcontract.[18] There is a wide range of businesses which are subject to the Regulation such as small, medium-sized enterprises and also micro-enterprises. [19]

The purpose of this new Geo-blocking Regulation is to prohibit unjustified geo-blocking methods practicing by the traders within the European Union. As it has been mentioned before there is a variety of geo-blocking methods and they are used on many occasions, some of which are justified by legal obligations. The Regulation 2018/302 in particular prohibits from traders to discriminate the customers of European Union and apply to them different conditions based on their nationality, place of residence or place of establishment.

[15] Id. at 6
[16] Regulation EU 2018/302 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R0302&from=EN
[17] Ibid,
[18] Commission, Geo-blocking regulation – Questions and Answers, 2018, https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers
[19] Id. Recital 2

There are three articles of the Regulation which address the exact geo-blocking practices which are not allowed since 3 December 2018 according to the new legislation. More precisely, the articles 3, 4 and 5 of the Regulation 2018/302 consist of the main components of the Regulation and it would be necessary at this point to briefly mention these provisions.

In particular, article 3 bans the blocking of access to online interfaces based on the customer's nationality. By the term "online interfaces" it refers to any software which provide the customer the ability to access the goods and services of the trader. In the category of software are included website, either all of it or even only a part of it, but also many applications, such as mobile applications, which the trader operates, or they are operated on behalf of him/her. The first two paragraphs clarify that a trader has no right to block the access to an online interface or redirect the customer to a different version of it without the explicit consent of the customer.[20] However, article 3 mentions that these prohibitions shall not apply when the trader has a legal obligation to practice geo-blocking methods.

The discrimination on the payment method was another way of traders to limit the purchase of customers within the Member States of the European Union. The provision of article 5 on the new Regulation includes a prohibition of this discrimination too. More specifically it accepts the freedom of traders to accept any kind of payment means they want but it is not allowed for them to apply different conditions on a payment transaction as a result of the customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment services provider or the place of issue of the payment instrument.

Finally, article 4 is the one which refers to access to goods and services and it includes many occasions. In other words, it defines certain situations of sales of goods and services where there can be no justified geo-blocking methods based on nationality, establishment or residence of customers. In particular, the first paragraph of article 4 defines that a trader should not apply different conditions based on the reasons mentioned above when there is a situation of a sale of goods without physical delivery outside the area served by the trader (art. 4 §1 (a)). That is to say, a trader is not obligated to deliver goods in other Member States or different collecting locations than those which are offered as an option in the general conditions of access, but consumers from another Member States have the legal right to

[20] Ronan Daly Jermyn, Geo-blocking: A Step in the Right Direction, Lexology.com, 2018, https://www.lexology.com/library/detail.aspx?g=4e1156a2-70c1-49b6-a210-3797f322c133

receive the goods in the Member State where the trader offers delivery in an exact way as the local consumers and the trader cannot deny this.

Another occasion where the provision of article 4 applies is when there is a sale of electronically supplied services (art.4 §1 (b)). In this case the situation is similar to the previous one and according to this provision if a customer wants to access and buy an electronically supplied services from a trader established in another Member State is able to do so in the same way as local customers and the trader is not allowed to apply different conditions.

Finally, the trader is not allowed to do the same when there is a sale of services provided in a specific physical location (art.4 §1 (c)). To put it differently, if a customer from a Member State purchase a service that is supplied on the trader's premises or in a physical location where the trader operates, and these locations of trader are in a different Member State the customer is also entitled to equal treatment to those consumers located in the country of the trader. This category consists among other things the purchase of concert tickets, accommodation or car rental. The European Commission uses a very accurate example[21] to make this occasion more understandable: if a Greek family visits a theme park in Germany and they wish to receive the family discount price on tickets then they are entitled to be treated on the same way of the German families.[22]

Notably, the European Commission, on the same paper where the previous example was given, mentions also that these situations which are mentioned in the previous paragraphs include both online and offline sales of goods and services, as well as cases where these two channels are integrated (omni-channel).[23]

However, article 4 contains also an exception in paragraph 1 (b) about the sale of electronically supplied services. This exception raises a very important issue about some exclusions of this new Regulation, and it triggered the topic of this paper. Further analysis of this exception lies in the following paragraphs.

[21] Commission, Geo-blocking regulation – Questions and Answers, 2018, pp.16, https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers
[22] Ibid., page 8
[23] Ibid., page16

2.3. The exceptions of the Geo-blocking Regulation

In the light of article 4 it should be mentioned a very important exception of the new Regulation 2018/302. More precisely, article 4 refers to the services on which a trader shall not apply different general conditions of access to goods or services based on a customer's nationality. The paragraph 1(b) of this article defines that a trader does not have the mentioned obligation where the customer seeks to receive electronically supplied services from the trader *the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form*.[24]

According to this point of article 4 it raises the question of whether the copyright protected works are a subject of the Geo-blocking Regulation. However, the recital 8[25] of the Regulation explains that is not all the copyright protected work treated in the same way in this Regulation, but there is a distinction between the audiovisual and non-audiovisual services.

That is to say, the recital clarifies that the non-audiovisual electronically supplied services which have as main characteristic that they provide the ability to access and use copyright protected works and other protected subject matter remain under the scope of this Regulation. As it was mentioned earlier the works which falls under the non-audiovisual category are e-books, online music, software and videogames[26]. Nonetheless, the non-audiovisual services are specifically excluded from the Regulation's prohibition of art. 4§1. This means that a trader of services which provide access to non-audiovisual works is allowed to apply different general conditions of access according to customer's nationality, residence or establishment but it is prohibited for the trader to follow this exception also in cases of access on its online interfaces (art.3) or payment methods (art.5).

On the other hand, the audiovisual services, including broadcasts services of sports events and which are provided on the basis of exclusive territorial licenses, are excluded from the scope of this Regulation. Accordingly, the audiovisual services are not a subject of any provision of this Regulation and a trader in those cases is still allowed to apply geo-blocking

[24] Regulation 2018/302, article 4 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R0302&from=EN

[25] Id. recital 8

[26] Commission, Geo-blocking regulation – Questions and Answers, 2018, pp.16, https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers

methods and treat European customers in a different way based on their nationality or place of residence.

The audiovisual media services can be either a television broadcast or an on-demand audiovisual media service as both are defined on article 1 of the Audiovisual Media Services Directive (Directive 2010/13/EU) and some famous contain of these services are films, sports events and documentaries.[27] Giving an example of our days, video-on-demand platforms such as Netflix[28] will not get affected by the Regulation 2018/302 and the geo-blocking practices will remain active for the users of this platforms around the EU. To put it in other words, a customer who is a resident of Greece and wants to subscribe Netflix to watch movies and TV-series will be able to access only the content which is available in Greece.[29] Even if the customer/subscriber is aware of the fact that the Italian version of the same platform includes a bigger variety of audiovisual content it won't be possible for him/her to access on it. This is the application of a geo-blocking method in practice. The reason for this, is the exclusive territorial licensing method which is still dominant in Copyright law, and it will be analyzed on the next Chapter of this paper.

In addition, except the exclusion of some copyright protected services, the Geo-blocking regulation excludes in a complete way also other sectors such as transport services and financial/retail services. The services of the field of transport are excluded due to the fact that there is another Regulation which governs this sector and it already prohibits discrimination among EU citizens for some types of transport. The same reason led to the exclusion of financial services too since the Regulation 2018/302 excludes from its scope activities that are also excluded from the scope of the Services Directive (Directive 2006/123/EC)[30] which also includes this type of services. The last two categories which are excluded from the scope of the Geo-blocking Regulation will not be studied in this Thesis. The main focus of this paper is the first two sectors, the non-audiovisual and audiovisual services as well as the possible inclusion of them in the scope of the Regulation after the first evaluation of this new legislation by 2020.

[27] Audiovisual Media Services Directive (Directive 2010/13/EU), art 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN

[28] Netflix Platform, https://www.netflix.com/nl-en/

[29] Jack Rear , "How EU geo-blocking rules will impact Netflix's European expansion", Verdict, 2018 https://www.verdict.co.uk/eu-geo-blocking-rules-will-impact-netflixs-european-expansion/

[30] Directive 2006/123/EC on services in the internal market https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0123&from=EN

2.4. The Review Clause of Regulation

According to article 9 of the Regulation 2018/302, by March of 2020 the European Commission will evaluate the Regulation and will file a report to the European Parliament, the Council and the European Economic and Social Committee.[31] This first review, as the paragraph 2 of article 9 defines, it should be carried out in order to decide whether the scope of the Regulation should be assessed by including sectors which are not a subject of the Regulation now, such as the audiovisual services and services of transport.

Moreover, this first evaluation, will examine the possibility to extent the non-discrimination obligation which is defined by article 4 of the Regulation 2018/302. The main purpose is the extension of this provision also to electronically supplied services which make accessible the non-audiovisual services such as e-books, music or online-video games.

Based on this upcoming evaluation and the possibility of making broaden the scope of this Regulation this Thesis will examine in the next Chapters whether this potential change is indeed necessary or the reason which led to the current situation were adequate enough.

2.5. An indeterminate occasion of this Regulation

As it was mentioned at the beginning of this Chapter, this new Geo-blocking Regulation applies to traders and affects their commercial policy and methods on consumers among the Member States of EU. Moreover, it has been clarified in the last few paragraphs that copyright protected works consist of a special category of goods and services and they are treated in a different way from the provisions of this Regulation.

The European Commission published paper[32] with many questions and answers about the new Regulation lmost all the possible implications of the new legislation in the European Union. However, it seems that there is an occasion where there is no specific clarification about which the rights and the obligations of traders are; the question is how the traders who are at the same time licensees (rightsholder) of copyright protected works should act given this new Geo-blocking Regulation.

[31] European Commission, Policies – Geo-blocking, https://ec.europa.eu/digital-single-market/en/policies/geoblocking

[32] Commission, Geo-blocking regulation – Questions and Answers, 2018, pp.16, https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers

Unfortunately, the already existent literature is not able to answer this question yet and it seems that according to the provisions of the new Regulation a licensee who wants to sell his/her copyright protected work is still able to apply geo-blocking practices on the customers within EU.
In any case, this undetermined occasion might need to be examined and answered in the future through research and publications.

2.6. The implications of the Regulation 2018/302 and the main focus of this paper

Regulation 2018/302 as a part of the general Digital Single Market Strategy of the European Commission is related to many aspects of legal science.

One of the fields which will be affected the most is the e-commerce law of the European Union.[33] The Regulation 2018/302 deals with the trade of goods and services among the citizens of the Member States of EU and it is obvious that will affect and change the way the e-commerce was working until before December 2018. Although the new Regulation does not apply only to online products the electronic form commercial practices will change the most.

In addition, it is worth mentioning that there will be implications from the Geo-blocking regulation also to the Competition Law. For example, one of the most famous practices in Competition Law is price discrimination, always without infringing Article 102 TFEU.[34] However, this method is prohibited now in many occasions according to the new Regulation and the Competition Law might need to change some basic of its rules.

Although the impact on some fields of the European Law is really obvious and significant, there is also the Intellectual Property Law which is involved in this new Regulation. European IP law there will be some implications on the part of copyright protected works, the non-audiovisual services, but this new Geo-blocking Regulation can be a great opportunity to examine in a thorough way the audiovisual sector and the provisions of IP around it.

[33] E Schmidt-Kessen, Maria José, EU Digital Single Market Strategy, Digital Content and Geo- Blocking: Costs And Benefits Of Partitioning EU's Internal Market (January 6, 2019). Copenhagen Business School, CBS LAW Research Paper No. 19-05; Columbia Journal of European Law, Vol. 24, No. 3, Fall 2018. Available at SSRN: https://ssrn.com/abstract=3311110

[34] "Competition Law", Richard Whish & David Bailey, page 777, OXFORD UNIVERSITY PRESS, ninth edition 2018.

The main focus of the next Chapter of this Thesis will be the research and analysis of all the possible reasons which led the European Commission to the exclusion of audiovisual services from the new Regulation. Moreover, it will be examined how the current provisions of European Copyright Law affected this decision and whether it is necessary to harmonize the Copyright Law among the European Union so the audiovisual services can also be included in the general scope of the new Geo-blocking regulation.

Chapter 3: The possible reason(s) which led to the exclusion of the audiovisual sector

Introduction

Studying carefully the provisions of the new Geo-blocking Regulation 2018/302 as well as the exceptions which are mentioned analytically in the above chapter, there is a question which comes naturally in mind: for which reason(s) the audiovisual sector has been chosen to not be a subject of the new Regulation? The European Commission has not given specific reasonings about its choices regarding this new piece of legislation but the answer on the raised question might lied on the basic principles of Copyright Law as well as on other fields except the legal. In this chapter there will be an attempt to identify the most possible reason(s) which led the Commission to formulate the Regulation 2018/302 in the current way.

The film, broadcasting (television and radio) as well as the video and multimedia industries constitute the notion of the audiovisual (AV) sector.[35] The AV sector is really complex and multidimensional because there are many factors which contribute to the production of the works of this sector. For instance, on a production of a film there are different players who are getting involved such as rightsholders or content distributors and others. For the scope of this study, the analysis about the audiovisual sector will focus mostly on the film and broadcasting industries. With the purpose of discovering the main reason(s) which led to the exclusion of audiovisual sector of the Geo-blocking Regulation it is necessary to study the sector both from a legal perspective and the business model of the field.

[35] The European Audiovisual Industry: an overview, European Investment Bank, 2001, pp. 10, https://www.eib.org/attachments/pj/pjaudio_en.pdf

3.1. The Legal Framework for the Audiovisual Industry

The Audiovisual sector is protected under the Copyright law and that means that it depends on copyrights and neighbouring rights. Both Term Directive (Art. 2)[36] and Rental and Lending Rights Directive[37] (Art. 2 (c)) protect cinematographic or audiovisual works or moving images, whether or not accompanied by sound, as authorial works.[38] Under copyright law the rightsholders obtain moral rights but also exclusive economic rights on their works. However, in audiovisual works is not always easy to determine the initial authorship and ownership since the works are products of collaboration of many individuals.[39] Although this issue has a degree of complexity, the European Intellectual Property Law has provided some guidance through the two Directives mentioned above. In the provisions of both these legislations it is mentioned that *the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors and also that Member States may provide for others to be considered as its co-authors*. Accordingly, also in practice each country has identified different individuals as authors except the principal director and for example the French Intellectual Property Code provides that authorship of the audiovisual work should belong to the natural person or persons who have carried out the intellectual creation of the work while the UK law consider as an author also the producer.

According to the main principles of the European Intellectual Property Law the moral rights of a work are non-transferable and belong always to the author of the work.[40] On the contrary, the authors are able to transfer their economic rights through assignment, where the assignee becomes the new owner of the copyright or through licensing, where the copyright holder retains ownership of the rights but contractually grants permissions for certain acts.[41]

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[36] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0116&from=EN

[37] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006eL0115&from=EN

[38] "PILA, J. and Torremans, P. (2016). European Intellectual Property Law. [S.l.]: OXFORD UNIV PRESS, pp.275,285.

[39] Cecile Despringre & Suzan Dormer, "Audiovisual Author's Rights and Remuneration in Europe", SAA White Paper, 2011, https://www.cedar.nl/uploads/10/FileManager/SAA_white_paper_english_version.pdf

[40] PILA, J. and Torremans, P. (2016). European Intellectual Property Law. [S.l.]: OXFORD UNIV PRESS, pp.245

[41] PILA, J. and Torremans, P. (2016). European Intellectual Property Law. [S.l.]: OXFORD UNIV PRESS

The InfoSoc Directive defines in its articles which are that the right of reproduction, the right of distribution and the right of communication to the public are the economic rights.

Therefore, also in the Audiovisual sector in most European countries the authors choose to transfer their economic rights to the producer. More specifically, the authors sign contracts with the producer where they tent to convey a full transfer of their economic rights and the fees are negotiated between the two parties of the contract. Although there are some standard contracts throughout Europe most of the times each contract is individually negotiated. With this policy the authors usually receive a buy-out or lump-sum that also covers commissioning the authors' contribution[42] and in some countries they do not receive further payment from the producer depending on the commercial success of the film.

3.1.1. The Principle of Territoriality in Audiovisual works

At this point it is necessary to clarify that the copyright holders of audiovisual sector, like the authors or/and producers, they have the right to grand license for the exploitation of their economic rights of the audiovisual works on a territorial basis. In copyright law there is the principle of territoriality in which this practice is based on. The principle of territoriality is one of the foundational principles of International Intellectual Property Law (IIPL). According to this principle, intellectual property rights are limited to the territory of the country where they have been granted.[43] Therefore, this is the current framework under which the rightsholders in European Union operate their business. That is to say, they provide licenses, they proceed their negotiations they buy the exclusive rights of audiovisual works on a territorial basis and more specific country by country.[44]

However, it is notable the fact that this territorial licensing method is not applicable in all the copyright protected works. For instance, music licensing, unlike audiovisual content, is almost always made on a non-exclusive basis. In addition, in the licensing of musical and recording rights there is a significant number of parties who are involved. This fact makes the

[42] Prof. Raquel Xalabarder, "International Legal Study on implementing an unwaivable right of audiovisual authors to obtain equitable remuneration for the exploitation of their works", Universitat Oberta de Catalunya (UOC), 2018, https://www.cisac.org/Media/Studies-and-Reports/Publications/AV.../AV-Study

[43] Emmanuel Kolawole Oke, "Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset", Volume 15, Issue 2, October 2018 https://script-ed.org/article/territoriality-in-intellectual-property-law-examining-the-tension-between-securing-societal-goals-and-treating-intellectual-property-as-an-investment-asset/

[44] Francisco Javier Cabrera Blazquez et al. Territoriality and its implications on the financing of audiovisual works, IRIS PLUS 2015-2: pages 132-33 (2015), http://www.obs.coe.int

process in music licensing more laborious than in audiovisual licensing.[45] Music belongs to the non-audiovisual sector which is a subject of the Geo-blocking regulation 2018/302. Thus, is obvious that the European Commission has already considered the licensing method before the decision to leave the audiovisual works completely outside of the scope of the Regulation.

Opponents of the territorial licensing argue that this practice generates some really important legal consequences. First of all, they claim that the diversity of copyright regimes among countries makes the compliance more complex, a fact which might lead to legal uncertainty and additional legal costs.[46] Secondly, the rightsholders who want to offer their work in multiple territories they burden with extra transaction costs both their license-acquire and their consumers.[47] Finally, another argument of the critics is that many rightsholders must be very careful to avoid let their respective rights to get violated and that demands really high monitoring and enforcement costs.[48]

3.1.2. Cross-border nature and Harmonization of EU Copyright Law.

As the technology is developing through the years, the audiovisual works are communicated to the public in an easier way. Until a few decades ago the Television was the only mean of communication for these works. However, today the situation has changed, and the area of distribution is growing fast. Nowadays there are cable and satellite services and also the Internet provides so many alternatives such as streaming video platforms or video-on-demand platforms (VOD). Undoubtedly these new media which distribute the audiovisual works are growing really fast. The video-on-demand services and the streaming services along with the Internet, the cable and the satellite transmission services have started generating really significant revenues globally. Moreover, today the audience is able to watch movies even with the use of a mobile phone and that proves the cross-border nature of the audiovisual works.

As a result of such an ascertainment the European Union seek the harmonisation some aspects of the national rules of copyright law within the Members of EU in order to rebut the negative consequences of the territoriality in the law. This effort has been made with the

[45] "Multiterritorial licensing in audiovisual works in the European Union" Final Report Prepared for the European Commission, DG Information Society and Media, October 2010 http://www.keanet.eu/docs/mtl%20-%20full%20report%20en.pdf

[46] P. Bernt Hugenholtz, Copyright Territoriality in the European Union 2(Eur. Parliament Directorate Gen. for Internal Policies, Policy Dep't C: Citizens' Rights and Constitutional Affairs ed., 2010),

[47] Ibid,at 2,12

[48] Ibid at 2,11

adoption of many European Directives. In addition, the EU tried also, through these legal changes, to promote a unified internal market within Europe.

In the first place, with the Information Society directive[49], the EU managed to harmonize the way in which some basic legal rights are treated. More analytically, the rights of reproduction, distribution, the rights of management systems and rights of anti-copying devices are legally treated with a fair and harmonized way in the provisions of this Directive.[50] Secondly, another legislation introduced a principle for the transmission of audiovisual works through satellite; "the country of origin principle". According to the "country of origin" principle, the providers of audiovisual services are able to operate in any Member State of Europe they wish. However, the only rules which are binding for them are only those of the Member State where these providers are established.[51] This principle was first introduced by the Satellite and Cable Directive (SatCab Directive)[52] but it was also applied to all audiovisual media services, including television broadcasts and on-demand services by the provisions of the Audiovisual Media Services Directive ("AVMSD")[53]. The most important aspect of the "country of origin" principle is that with this principle the providers can be legally protected when they decide to distribute their audiovisual work in another Member State, except the one where they are established, without being obliged to comply with these other states' rules.

In 2016 the European Commission proposed the Online Broadcasting Regulation[54]. This proposed legislation aims at extending the country of origin principle also to the online broadcasts of radio and television.

According to the current legal framework, if the broadcasters want to transmit their audiovisual content by using the internet then they must obtain licenses from all the relevant rightsholders in all the territories where the content is made available. In the Explanatory Memorandum of tis proposed Regulation the Commission clarifies that: *"This requires a*

[49] 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 https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

[50] Francisco Javier Cabrera Blazquez et al. Territoriality and its implications on the financing of audiovisual works, IRIS PLUS 2015-2: pager 132-33 (2015),

[51] Commission Staff Working Document

[52] Council Directive 93/83/EEC of 27 September 1993 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0083&from=EN

[53] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0013&from=EN

[54] 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 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0594

complex clearance of rights with a multitude of right holders. Often, the rights need to be cleared in a short time-frame, in particular when preparing programs such as news or current affairs. In order to make their services available across borders, broadcasting organisations need to have the required rights for the relevant territories and this increases the complexity of the rights' clearance."[55]

3.2. The business model of the Audiovisual Industry

Even though the European Union seeks to harmonize the copyright law within Europe and also focuses on making a united Digital Single Market for EU citizens, the principle of territoriality and the territorial licensing method is still present in the audiovisual sector. Nevertheless, the territoriality of copyrights is blocking the creation of a united market since it sets too many requirements on the movement of copyright content from one country to another. The preservation of territoriality in copyright has the roots on its economic necessity.

Most of the films and television shows are funded by territorial licensing for many rightsholders in the audiovisual industry it is an essential business framework.[56] As it is mentioned also above under the current EU law the negotiation for the copyrights of audiovisual works take place on a country-by-country basis.

Audiovisual works are a unique category among other copyrightable works because their production is much more complex and expensive.[57] In other words, in the audiovisual sector there are many rightsholders like the director, the screenwriter, the composer of the music who work on the same film. Because of the high production and the costs of the investments of films, among other audiovisual works, are riskier and they also need more time to generate income to its members since it often needs a few years to develop and complete the production of the film.

It is a common strategy for many filmmakers to finance the production of their films by selling the territorial exclusive rights of distribution. In particular, many producers, at the first stages of the film, they chose to agree with broadcasters and distributors on a pre-sale of

[55] Id., Explanatory Memorandum, part 1 paragraph 2 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0594
[56] Territoriality and its impact on the financing of audiovisual works European Audiovisual Observatory, Strasbourg, 2015, IRIS Plus 2015-2 https://rm.coe.int/168078347f
[57] [57] Francisco Javier Cabrera Blazquez et al. Territoriality and its implications on the financing of audiovisual works, 132-33 (2015), at 43

these territorial rights in order to obtain some profit and then invest it to their films[58]. According these pre-sale agreements, a distributor who is established in a specific territory pays in advance the content producer. In return the later provides the distributor with a license of distribution on a territorial basis. That practice allows the distributor to gain some profit from the investment. This is a strategy that has been applied in the biggest European films as well as in big American blockbuster films such as the trilogy of the famous film The Hunger Games.[59]

Apart from the financial support of their films, there are also commercial reasons which lead the producers of these audiovisual works to prefer the policy of exclusive distribution licenses in a territorial basis. First of all, the chosen distributors are aware of their territories and they know better the best strategy to distribute a film in markets where some producers are not really famous, and the audience is not familiar with their works.[60] Within European Union there are many differences among the audiovisual market of each country because of the variety of cultures and languages. The language barriers and cultural differences are two factors which are taken into consideration by the producers before the release of a film because the rightsholders aim the maximum profit of the distribution of their work.[61]

Accordingly, there are many European films which broadcast only in their domestic market due to lack of a strong marketing campaign of these films throughout other Member States of the EU. Such films with low budget, need to rely more on building their reputation through nominations or winning awards or because they have a really big success in their domestic market. The problem in those cases is that these results are available only through recommendations and reviews which cannot take part before the completion of the production of the movie. This might be a very lengthy procedure and it may take a few months or even a whole year from the day of the first release of the movie. However, commercial success is asked very often as a requirement for a film to start broadcasting in

[58] Charles.E. Renault & Rob H. Aft, From Script To Screen; The Importance Of Copyright In The Distribution Of Films (World Intellectual Property Organization 2011) http://www.wipo.int/edocs/pubdocs/en/copyright/950/wipo-pub_950

[59] Scott Roxborough, Can Europe Set Up a Digital Single Market Without Killing Copyrights? (Analysis), The Hollywood Reporter, 2015, https://uk.movies.yahoo.com/europe-set-digital-single-market-without-killing-copyrights-171152873.html

[60] Geoblocking and the Legality of Circumvention, Tal Kra-Oz, Hebrew University of Jerusalem Legal Research Paper, https://ipmall.law.unh.edu/sites/default/files/hosted_resources/IDEA/kra-oz_formatted.pdf

[61] "Research for CULT Committee – Film Financing and the Digital Single Market: its Future, the Role of Territoriality and New Models of Financing", Institute for Information Law (IViR): Joost POORT, P. Bernt HUGENHOLTZ, Peter LINDHOUT, Gijs van TIL, https://www.ivir.nl/publicaties/download/IPOL_STU2019629186_EN.pdf

theaters of other European countries and for being licensed in channels in those countries.[62] In contrast, really large blockbusters are able to avoid all this long process due to their very strong marketing strategy. As a result, all this time the smaller yet successful EU productions which are not qualified to grand territorial licenses could lead to the lack of willingness of distributors to invest in licenses and recoup some of the investments.

In addition, based on these considerations the producers and distributors have the opportunity to sale their works in different prices in different territories according to the demand for the content in each territory.[63] For instance, in sports programs the value of media rights might be significantly higher within a team's main market than in other markets. Furthermore, the advertising of audiovisual works can be adjusted to every territory according to the interest of each local audience.[64] Accordingly, this flexibility of the prices and the content which the territoriality causes it also provides ground for a market even more efficient.

In the digital world the broadcasters prefer also the territorial licenses based on similar commercial considerations. More particularly, worldwide famous online streaming platforms such as the Netflix follow also the policy of the territorial exclusivity. The broadcasters release the audiovisual content, either films or TV series into these platforms with licenses which ensure this geographical exclusivity.

Therefore, the territorial exclusivity offers the chance to the rightsholders to constantly invest within the promotion of the content. According to the territorial exclusivity scheme, if an audiovisual work was sold to EU today, it would be licensed independently twenty-eight times for the twenty-eight different territories of EU. The distributors who buy these licenses, whether they are film distributors, television channels or video-on-demand platforms (VOD), they have to be assured the exclusivity of their rights. In order to achieve that, these legal agreements which they sign with the producers of the audiovisual works may include some clauses which restrict the capacity of producers to license their work to other national or

[62] Id.
[63] Commission Staff Working Document: A Digital Single Market Strategy for Europe-Analysis and Evidence, SWD (2015) 100 final, Brussels, 2015,pp.26-27 europa.eu/rapid/attachment/IP-15-4919/en/DSM_Staff%20Working%20doc.pdf
[64] Tom Scourfield et al, The EUs Portability Proposal- an Attainable Step Towards a Digital Single Market, (CMS: LAW-NOW 2015) http://www.cms-lawnow.com/ealerts/2015/12/the-eus-portability-proposal--an-attainable-step-towards-a-digital-single-market?cc_lang=en&ec_as=6E0F481B193C496FBEAD1607B9176A9C

cross-border distributors.[65] Without the enforcement of such exclusivity, there is a risk that competitive distributors can gain some profit from the exploitation of a really costly promotion campaign of a film[66]. Thus, this would be really unfair in cases where these marketing campaigns have been supported financially from low budget local distributors. That means that if territorial exclusivity were to be eliminated then this business model would face really important difficulties.

3.2.1. The position of European Union

The European Union considering on the one hand all the above and on the other hand the need for a Digital Single Market Strategy decided to attempt a small change in the business model by introducing the Portability Regulation 2017/1128[67] in 14 June 2017. This Regulation enables consumer when they travel in the EU, to have access in the online content, for which they have paid a subscription, in the same way they access them at home.

To put it in other words, for instance a Belgian subscriber of the platform Netflix, if he travels in Italy, he will be able to access his account and watch the same content as in Belgium. However, for the rightsholders (film producers and distributors) this creates a business model issue of the platforms, which do not wish to make available the same content in all the countries. According to their point of view, the issue of cross-border circulation will not be resolved by increasing the portability of the copyright protected content. Based on a statistic analysis by Eurostat, more than 97% of the EU population resides in their country of origin which means that less than 3% of them can actually benefit from the portability of their online content Moreover, it should be taken into account that the same proportion applies to the citizens who are moving around the EU Member States for no more than one year.[68]

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[65] Estrella Gomez & Bertin Martens, Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Film (Eur. Comm. Digital Economy Working Paper, 2015), https://ec.europa.eu/jrc/sites/jrcsh/files/JRC92236_Language_Copyright.pdf

[66] Commission Staff Working Document, SWD (2015) 100 final ,pp. 28, http://ec.europa.eulpriorities/digital-single-marketen

[67] Regulation (EU) 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, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017R1128&from=EN

[68] Cabrera Blázquez F., Cappello M., Grece C., Valais, S., Territoriality and its impact on the financing of audiovisual works, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015, pp. 26 https://rm.coe.int/168078347f

Therefore, it seems that EU wishes to introduce some small changes in the current business model of Audiovisual sector in order to help the creation of a united digital European market. The Portability Regulation attempts to keep a balance between the territorial licensing method and the cross-border circulation of audiovisual works. However, the Geo-blocking Regulation will have a completely different impact on the territorial licensing. If the audiovisual sector becomes a subject of this legislation it means that in the previous example of the Belgian subscriber, he will be able to watch the same online content as all the other European citizens regardless his country of origin principle. That is to say, it will be essential the producers to abolish the territorial licenses and grant a pan-European license so all the citizens of Europe to have access on the same content.

Instead, rightsholders underline that the territorial licensing method with exclusive distributors on a territory basis is essential for them to secure adequate financing their works the pre-production stage and allows them to gain some profit of the investment after the exploitation. Thus, they argue that removing territoriality to make a Digital Single Market strategy would only benefit the major global distributors. In other words, those who are have a strong market position are able to purchase a pan- European licensing agreement against lump-sum payment, instead of country-by-country licenses.[69]

3.3. Conclusions of this Chapter

In conclusion, after considering all the above it becomes obvious how essential is the principle of territoriality and the territorial licensing methods for the rightsholders on the audiovisual sector.

It is obvious that the current legal framework supports financially the production of audiovisual works in the most efficient way. The European Union is aiming to demolish all the obstacles in order to create a Digital Single Market within its Member States. However, it seems that in the case of Geo-blocking Regulation 2018/302 it is necessary to change and harmonize fundamental principles of current copyright law. That is to say, there should have been found a way of abolishing the absolute territorial licensing method and making the online content free accessible within Europe on the one hand and protecting the legal and economic rights of stakeholders on the other hand.

[69] Ibid.

As a result, the European Commission probably considering that this change is really complex for all the factors of audiovisual works and the ground is not ready yet for such a change, chose to exclude the audiovisual content of the Regulation 2018/302.

However, the fact that the European Commission was not ready to introduce such a change with this Geo-blocking Regulation it does not mean necessarily that the decision of excluding the audiovisual content does not have negative consequences.

In the next Chapter it will be discussed and analyzed which fundamental right(s) or other parts of Law are affected by this exclusion.

Chapter 4: The implications of the exclusion on fundamental rights and European Competition Law.

Introduction

Considering the possible reasons which led the European Commission to exclude the audiovisual services from the provisions of the Regulation 2018/302, it is understandable that geo-blocking methods and the exclusive territorial licensing provide to the rightsholders in the film industry serious protection of their works.

However, the writer of this Thesis believes that geo-blocking in the audiovisual sector is possible to bring also negative consequences. To illustrate this position, we will examine in the following sections the two main reasons why geo-blocking and the exclusive territorial licensing in the audiovisual sector should be evaluated more carefully.

In the first section of this chapter it will be analyzed the impact of this decision in the legal field. More specifically, this paper focuses on some negative consequences which are the result of the geo-blocking methods in the audiovisual services within European Union.

The first section of the chapter will be the study of the decision of the Commission to exclude the audiovisual sector from the Regulation under one of the main principles of the European Union: the freedom to provide services. During this part of the analysis some case law of the Court of Justice of the European Union will be used to refer to the principle of free movement.

In the second section, a case study is presented again but in this part the chapter focuses on the EU Competition which seems to get affected by the exclusive territorial licensees which are a result of the geo-blocking methods.

4.1. Absolute territorial protection

Before starting the analysis of this chapter, it is very important to explain briefly the difference between the territorial protection which is assured with the licensing agreements and the **absolute** territorial protection which some of these agreements provide and the geo-blocking methods help further with. The European Commission mentions the following definition: *"Practice by manufacturers or suppliers relating to the resale of their products and leading to a separation of markets or territories. Under absolute territorial protection, a single distributor obtains the rights from a manufacturer to market a product in a certain territory and other distributors are prohibited to sell actively or passively into this territory."*[70]. In our case the analogy of the terms of this definition is as follows: the product is any audiovisual work, the manufacturer is usually the producer, and the distributor is the broadcaster.

The absolute territorial protection seems to be the most preferable practice in the filming industry among the rest of the audiovisual sector. This can be justified under the findings of the previous Chapter where the cost of the production of a film or a TV-series is sufficiently higher that other audiovisual works such as a simple video or a music video-clip.

The focus of this chapter will mainly be the absolute territorial protection and not in the territoriality of licensing methods in general because the first mentioned is basically the type of protection that the geo-blocking methods mostly focus on. This blocking techniques can be seen as an extra method of protection of the copyrights except the licensees between the rightsholders and the broadcasters.

Some of the negative consequences of the use of these methods which aim to the absolute territoriality will be analyzes in the following paragraphs.

4.1.1. The freedom to provide services of TFEU in the European Union and the copyrights.

[70] European Commission: Glossary of terms used in EU competition policy: antitrust and control of concentrations, Directorate-General for Competition, Brussels, July 2002

The freedom to provide services is protected by the Treaty on the Functioning of the European Union[71]. According to this principle *"the person providing a 'service' may, in order to do so, temporarily pursue her or his activity in the Member State where the service is provided, under the same conditions as are imposed by that Member State on its own nationals".*[72]

The Article 56[73] of the TFEU states that it is prohibited to restrict the freedom to provide services within the European Union for the citizens of a Member States who are established in a different Member State than the person for whom the services are intended. However, in the case of exercise of government authority, public security or public health the freedom to provide services can be restricted.

In 2006 in order to strengthen this freedom even more, the European Parliament and the Council adopted the Services Directive[74] (Directive 2006/123/EC of 12 December 2006 on services in the internal market). This Directive regulates the services in the internal market and within its provisions declares that the Member States have the obligation to not obstruct the right of service providers who are established in a Member State and they wish to provide their services in a different Member State.

Nonetheless, this Directive distinguishes between types of services and according to Article 17,[75] the freedom to provide services, which is mentioned in the article 16[76] of the same Directive, does not apply to all services. In addition, in the same article it is mentioned that this freedom does not apply to the exercise of copyrights and neighboring rights which are protected by other Directives.

Even though the copyright and neighboring rights may infringe upon the freedom to provide services, it is true that the European Commission tries to prevent this with the adoption of all the new Regulations and Directives to create a Digital Single Market where there will be free movement of services and goods within the European Union. One of these Regulations is the Geo-blocking Regulation and the exclusion of the copyright protected

[71] Treaty on the Functioning of the European Union https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

[72] Fact Sheets of the European Union: Freedom of establishment and freedom to provide services paragraph A,1 https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services

[73] Article 56 TFEU https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN

[74] Directive 2006/123/EC of the European Parliaments and of the Council of 12 December 2006 on services in the internal market, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0123&from=EN

[75] Ibid, section 1.

[76] Ibid, section 1.

works seems to be in contrary with the general concept of creating a united internal market for all the Member States. It is crucial to examine whether the protection of intellectual property rights has more value than the right to freedom of services.

As it has been mentioned earlier in this paper, there are mainly commercial reasons for which the online traders and the rightsholders choose to use the geo-blocking methods. Their main purpose is to prevent the access to websites which based in Member States different than the one in which the consumer is established. These methods are used in order to protect the exploitation rights of the rightsholders.

Accordingly, from this point of view the geo-blocking can be considered as restriction on free movement of services on the ground of that restriction aims to protect the copyrights. However, the real question which arises here is whether the geo-blocking method is the most proportional way to protect the copyright interest without violating other fundamental rights such as the right to free movement of services and goods. The most important similarity between those two rights is that none of them is an absolute right which should be always protected.

4.1.2. Study of European cases and their relation to the geo-blocking methods.

The answer to the question of whether the geo-blocking methods are adequate to protect the copyrights without be in contrary to the free movement of services should be examined through some of the most important relevant European cases.

(a) The FAPL case[77]

The famous case of the Football Association Premier League (FAPL) and Others v. Karen Murphy was the first case of the Court of Justice of the European Union (CJEU) in which the Court needed to deal with technological means which reinforce exclusive territorial copyright licensing.

[77] C-403/08 Football Association Premier League Ltd and Others v QC Leisure and C-429/08 Others and Karen Murphy v Media Protection Services Ltd
http://curia.europa.eu/juris/document/document.jsf?text=&docid=110361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7641349

In a few words it would be crucial to mention the facts of this case. The Football Association of Premier League was responsible to organize the filming of Premier League matches and transmit the signal to the broadcasters which have the rights for those matches. These rights had been concluded with exclusive territorial licensing agreements between FAPL and broadcasters from different Member States in order to allow them to film and broadcast its football matches. Each of these agreements were limited to the territory of the broadcaster and to ensure this territoriality the FAPL had included a clause that obliged the broadcasters to encrypt the broadcasts, and to offer decryption devices only to subscribers in their own territory. In the UK, Ms. Karen Murphy, owner of a pub, bought a card and a decoder box from the Greek broadcaster (NetMed Hellas) which cost less than the British one of BSkyb Ltd.

The FAPL claimed that this action was harmful to its interests due to the exclusivity of rights which were granted with a territorial license, were undermined and therefore it was undermined also the value of those rights. More specifically, FAPL argued that its interest have been adversely affected because the broadcaster who sells the cheapest decoder cards has the potential to become, in practice, to become the broadcaster at European level and that would result in broadcast rights in the European Union having to be granted at European level. This situation, according to FAPL, would lead to a significant loss in revenue for both FAPL and the broadcasters, and would thus undermine the viability of the services that they provide.

The Court in this case, stated that when a justification needs to be examined for a restriction it must be taken into consideration that fundamental freedoms of TFEU, like the free movement of services, must not go beyond to what is necessary[78]. The Court found that the national legislation of UK had interpreted the Directive 98/48/EC on Conditional Access in such a way that it was prohibited to sell and possess unauthorized decoding devices for commercial purposes[79]. According to the Court, the UK legislation was contrary to the free movement of services provision under Article 56 TFEU.[80]

Moreover, the Court ruled that the restriction of free movement of services could be justified on the grounds of protecting the copyrights if the national legislation protects the

[78] Consolidated version of the Treaty on functioning of the European Union, OJ 26.10.2012 C 326, Article 56. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN
[79] UK Copyright, Designs and Patents Act 1988, §297 https://www.legislation.gov.uk/ukpga/1988/48/section/297 and §298 https://www.legislation.gov.uk/ukpga/1988/48/section/298
[80] Football Association Premier League v. Karen Murphy, Joined Cases C-403/08 and C-429/08

sporting events under copyright law, but even in this occasion it cannot go beyond what is necessary to achieve this goal.

In more details the Court in this case concluded that FAPL cannot claim copyright in the Premier League matches themselves, as they cannot be classified as intellectual creation and works under the meaning of Copyright Directive. Therefore, according to the Court, the restriction which prohibits the use of foreign coding devices cannot be justified, in principal, under the reason of protection intellectual property rights.

In addition, FAPL argued that the same restriction can be justified by the objective of encouraging people to watch football matches at the stadiums. The Court did not accept this argument either.

Lastly the Court concluded that according to Article 56 TFEU any legislation of a Member State which does not legally allow to import into this State and to sell and use in that State decoding devices which give access to encrypted satellite broadcasting services from other countries that consist subject matter protected with the legislation of the first State.

In other words, in this case the licenses which were signed by FAPL and the broadcasters were sufficient to secure the copyrights at stake and imposing an export ban on the decoding devices (technological measures) went beyond what was necessary and therefore violated the freedom to provide services.

It is worth mentioning at this point that also the Advocate General Kokott of the case argued that there is a serious violation of freedom to provide services[81]. He claims that the free movement comes under pressure because of the hard partitioning of the internal market into different national markets by the rightsholders.[82]

(b) Coditel case[83]

A few years before FAPL case, the Court ruled in another case, the Coditel case in regard to cable retransmissions of a film. In a nutshell Ciné Vog was a company which distributed cinematographic films and owned also the company "La Boétie". Ciné Vog had the exclusive right to broadcast in public, in cinema as well as in the television the movie "Le Boucher" in

[81] Opinion of Advocate General Kokott delivered on 3 February 2011, paragraph 176 http://curia.europa.eu/juris/document/document.jsf?text=&docid=84316&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7641349
[82] Ibid. Paragraph 175
[83] C-62/79 Coditel v. Ciné Vog Films http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90350&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7642436

the country of Belgium. Since the first day of the cinematographic release of the movie in Belgium, Ciné Vog was able to use this exclusivity for seven more years. Moreover, the company was allowed to distribute the film on television only after the first 40 months of the first performance in Belgium.

Later on, without specifying the exact day the company La Boétie obtained the right through assignment to broadcast the film to the German television broadcasting station. When that happed, the Belgian cable television companies Coditel received through their aerial space the movie from the Federal Republic of Germany and they offered it to their own subscribers. The film was already a part of the German program and was diffusing in that way regularly.

The Court of First Instance ruled that the three cable television companies were infringing the copyrights of Ciné Vog since they proceed to the transmission of the movie without the previous consent of the rightsholder Ciné Vog. However, the three companies appealed against that judgement and one of their arguments was that there was an incompatibility between the exclusive right and the freedom to provide services.

In this case the Court ruled that these restrictions which were imposed to licensees of broadcasting were no violating the freedom to provide services. More analytically, the Court ruled that even though there is a restriction of the free movement of services, it is justified since the main goal of these territorial restrictions is to protect the copyrights and related rights.[84] Even though according to Article 56 TFEU the restrictions on freedom to provide services are prohibited this does not mean that it prohibits also other kind of restrictions. As the Court mentioned that also the when the exercise of certain economic activities which are a result of national legislation for the protection of intellectual property rights, are activities as means of arbitrary discrimination or disguised restriction on trade within Member States then it is not prohibited under article 56 TFEU. That would be the occasion if this application was offering the opportunities to the parties to create artificial barriers of trade between Member States by the use of assignment of copyrights. Therefore, that means that copyright leads to the obligatory remuneration for any performance or showing and the geographical limits which are part of the agreement between the partied cannot in principle be prohibited by the TFEU.

Sometimes these geographical limits may be the same as the national borders but that does not mean that this needs a different solution especially after taking into consideration

[84] Ibid. paragraph 18.

that the television is organized in a way where there are many legal broadcasting monopolies in most of the Member States. That indicates that very often is impossible to have any other limitation except the one which defines the geographical field where the assignment applies.

Accordingly, the exclusive assignee of the broadcasting right of a film for the entire Member State can rely upon his legal right against any cable television companies which transmits the film on their diffusion network while the film has been received from a television broadcaster which is established in another Member State.

The Court ruled that the assignee of the broadcasting right cannot be prevented to enjoy his mentioned above legal right by the article of TFEU, which protects the freedom to provide services.

Hence, the Court concluded that in this case the free movement of services was not violated since this fundamental right cannot be in contrast with the geographical limits which has been agreed by the parties in order to protect the author and its works.

After studying carefully the above mentioned cases and the decision of the Court in both of them, it necessary at this point of the chapter to connect them with the geo-blocking issue.

First of all, in the FAPL case the Court even though does not refer specifically to the geo-blocking methods which are imposed to the online copyright protected works and the right to freedom of movement of services the case could be parallelized to these issues. The use of decoding devices in the FAPL case were the technological means which gave access to the copyright protected content and it could be parallelizes to the intermediary services we use today to access online copyright content.

Second of all, after examining also the Coditel case, we could wonder what the main difference between the two cases is and led the Court to decide that the FAPL case was against the free movement of services while the Coditel case was not. The most important difference appears to be the technology, which is involved in the FAPL case, but it is absent from the Coditel.[85] This technology, the decoding devices, offered to FAPL territorial protection and as was mentioned before, the ban of passive sales of these devices was the action which led FAPL to go beyond what was necessary to secure the copyrights and therefore to have an **absolute** territorial protection. There is a clear distinction between the territorial licensing agreements which can legally protect the copyrights and the technology

[85] Pablo Ibáñez Colomo, The Commission Investigation into Pay TV Services: Open Questions, 5 J. OF EUR. COMPETITION L. & PRAC. 531, 540 (2014). https://antitrustlair.files.wordpress.com/2017/06/ibanez-colomo-copyright-reform-against-the-background-of-pay-tv-and-murphy.pdf

which aims to enforce them and does not seem to be legal too. The question is if the agreements are adequate to protect the rights then which is the reason to use technological means to enforce this protection? It does not that there is a good reason for that, and this is how the action can go beyond what is necessary for the aim of the protection of the copyrights.[86] The Geo-blocking technology and the absolute territorial licensing methods which are applicable in the audiovisual sector seem to cross this line of necessity and therefore we could argue that possibly in many cases is in contrast with the free movement of services. Accordingly, this kind of technology does not seem to be in harmony with the main goal of the European Commission to create a Digital Single Market Strategy.

4.2. The Competition Law and the geo-blocking methods of the audiovisual sector

Except the main principles of European Union, such as the freedom of movement, there is also a serious impact of the geo-blocking methods to the European Competition Law. Starting from the FAPL case, which is mentioned above, the Court of Justice of the European Union examined the case also under the provisions of the European Competition Law and more specifically under article 101 of the TFEU[87].

The Court noted that the prohibition of passive sales of the decoding devices, which were included at the licenses, was restricting competition. One of the most important functions of copyrights is to provide remuneration to the relevant rightsholder. The Court in FAPL case emphasized at the significant value which the negotiation process of FAPL had about the "appropriate remuneration" the copyrights. According to the Court, FAPL which was the rightsholder in this case was able to ask for an amount of money which would have considered both the actual and the potential audience not only in the country of broadcast but also in any other country which also received the broadcasts. However, as the Court decided in this case FAPL sought to receive higher remuneration in the UK which crossed the lines of the necessity to protect the copyrights at stake.

This policy of FAPL, as the Court concluded, led to the division between national markets and had as result price discrimination. More specifically the Court mentioned: *"such partitioning and such an artificial price difference to which [the premium] gives rise are*

[86] Ibid.
[87] Consolidated version of the Treaty on the Functioning of the European Union, Part three, Chapter 1, Section 1, Article 101: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML

irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market."[88]

(c) Pay-Tv case

In the last few years we can see the same reason of violation of European Competition Law in the famous Pay-Tv case.

Briefly mentioning the background of the case, the six major Hollywood studios (20th Century Fox, Disney, Paramount, Warner Bros., Sony and NBCUniversal) concluded licensed agreements with the UK broadcaster Sky. The broadcaster Sky was legally bound by these agreements to geo-block its content and not permitting the access to its platform to customers who were established outside the UK and Ireland. In July of 2015 the European Commission sent a statement of objection to Sky because according to the Commission these geo-blocking clauses are offering to Sky an absolute territorial protection and hence it resulted to a prohibition of passive sales in the meaning of Article 101 of the Treaty on the Functioning of the European Union (TFEU).[89] One year later the studio of Paramount offered a commitment not to enforce any of these geo-blocking clauses in the existing films with any broadcaster in the European Economic Area (EEA).[90] The same strategy has been followed also by Disney which offered similar commitments in November 2018[91]. Except these two studios the case is still pending, and it still remains to see the actions of the rest of Hollywood studios.

Even though there is no decision yet on the rest of the case, the recent decision of the General Court in a relevant case proves that geo-blocking methods in the audiovisual sector violates the European Competition Law.

As the Pay-Tv case was pending a French broadcaster, Canal+ argued that the opinion of European Commission on this case was not right the way it concerned the compatibility of

[88] Cases C-403/08 and C-429/08 Football Association Premier League v. Karen Murphy, Joined, paragraph 115 http://curia.europa.eu/juris/document/document.jsf?text=&docid=110361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7643431

[89] Commission, Antitrust: Commission sends Statement of Objections on cross-border provision of Pay-TV services available in UK and Ireland, , 2016 http://europa.eu/rapid/press-release_IP-15-5432_en.htm

[90] Commission, Antitrust: Commission seeks feedback on commitments offered by Paramount Pictures in Pay-TV investigation, 2016. https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/antitrust-commission-seeks-feedback-commitments-offered-paramount-pictures-pay-tv-investigation_en

[91] Commission, Antitrust: Commission seeks feedback on commitments offered by Disney in Pay-TV investigation, 2018 http://europa.eu/rapid/press-release_IP-18-6346_en.htm

the geo-blocking clauses with the provision of Article 101 TFEU and the influence of the commitments[92]. According to the French broadcaster these clauses are essential in order to protect efficiently the intellectual property rights which are naturally territorial. Moreover, according to the Canal+ commitments of Paramount would jeopardize the audiovisual sector in the EU because pan-European licensees can come into force and therefore the financing of the movies as it is today will stop existing.

The General Court on December 2018 published its judgment on the arguments of Canal+ and it confirmed the position of the European Commission on the Pay-Tv case.[93] The most important parts of the analysis of the General Court in this case was the claims of the Court saying: 1) the rightsholders are not prevented from granting exclusive territorial licenses but they cannot grant **absolute** territorial exclusivity. For example, they cannot pose a ban on passive sales from markets which are not under the scope of the license as it happened in the FAPL case because this leads to the partitioning of national markets and therefore to restriction of the competition by object, 2) *Geo-blocking clauses are not necessary to ensure the protection of IP rights*[94]. As the Court ruled the aim of IPRs is not to ensure the highest remuneration but simply an appropriate one, 3) The Article 101(3) TFEU cannot exclude the geo-blocking clauses merely on the ground that they promote the production and cultural diversity because the clauses go beyond what is necessary to achieve their main goal which is the preservation of the production and the distribution of audiovisual works.

Considering all the above my belief that geo-blocking methods need to be evaluated more carefully becomes stronger. According to the analysis of the previous cases from the perspective of the Competition Law is obvious that the use of geo-blocking clauses in agreements and absolute exclusive territorial protection and lead to the restriction of the competition. That is to say, that strategies of monopolies and dominant companies will become the main issue in the audiovisual sector in the EU. Allowing the film studios to enforce geo-blocking technologies in their content through their agreements with the broadcasters will benefit only the dominant market companies which are in a position to adjust their financial needs in every occasion. On the other hand, the smaller and financially

[92] T-873/16 Groupe Canal + v. European Commission, Judgment December 12, 2018. http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=T-873/16
[93] Judgement of the General Court (Fifth Chamber), 12 December 2018. http://curia.europa.eu/juris/document/document.jsf?text=&docid=208860&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7644316
[94] Ibid.

wicker broadcasters will not be able to be competitive in the market and offer the biggest variety of audiovisual content in the Member State of their establishment.

4.3 Conclusions of the Chapter

The decision of the European Commission was to exclude the audiovisual services from the scope of the Geo-blocking Regulation 2018/302. This decision was based in legal but mostly economic reasons which are relevant with the audiovisual sector. However, the remaining of geo-blocking methods in the copyright protected services triggers some problematic consequences.

The comparison between the geo-blocking methods and the main principle of free movement of services concluded that in some occasions is very possible the protection of copyrights with the use of these methods to go further than it is necessary. The case law of the Court of Justice of the European Union helped me a lot to make a significant distinction between the importance of the territorial licensing agreements and the geo-blocking technological methods. The territorial licensing agreements are legal ways which protect sufficiently the intellectual property rights of the rightsholders and are able to keep everything into the boundaries of necessity. On the other hand, the technology which is used to enforce these agreements can lead to the absolute territorial restriction which is the problematic and illegal version of territorial licensing because the absolute territoriality goes beyond to what is necessary for the protection of the copyrights.

Moreover, the absolute territorial restrictions are also those which violate the article 101 of TFEU according to the European Competition Law. These policies have really negative results for the competition in the market of the audiovisual sector within EU and therefore are illegal and should be prevented.

In my opinion, based on the analysis of the previous chapters and considering all the factors which are mentioned, I believe that the territorial licensing itself should remain as a legal tool for the protection of the copyrights. However, the geo-blocking technology which is still allowed in the audiovisual sector according to the new Regulation is inextricably linked with the **absolute territorial protection** which brings all the problematic impacts which are mentioned in this chapter.

Chapter 5

Conclusions

The main goal of this Thesis was to answer to the question "*How necessary is the re-examination of the extension of the scope of the new Geo-blocking Regulation to the audiovisual services giving access to this online copyright protected content?".*

After considering carefully the analysis of the Chapters of this paper we can summarize a few conclusions which draw the answer to the main question mentioned above.

Summarizing briefly on May of 2015 the European Commission launched the Digital Single Market Strategy ("DSMS") in order to create a united market within the Member States of the European Union where all the citizens of these Members will be treated equally. In order this goal to be achieved many pieces of legislation, such as Directives and Regulations, came into force in Europe. On 22 March 2018 the Regulation 2018/302[95] or as it is more famous the Geo-blocking Regulation came into force. To be more specific, this Regulation, which started applying since December 3 of 2018 in all the Member States of EU, aims to provide to consumers and businesses better access to online goods and services across Europe. In other words, it is a Regulation which prohibits the enforcement of geo-blocking methods in the electronic commerce. However, the European Commission decided to exclude the audiovisual sector from the provisions of this new Regulation. That is to say, the geo-blocking methods will remain applicable to the services which provide access to copyright protected content. On the second Chapter of this Thesis was mentioned the distinction between the copyright protected work and the paper focus on the absolute exclusion of the audiovisual works.

Nevertheless, within two years from the enforcement of this new Regulation the European Commission will evaluate again the provisions of this legislation and one of the issues which will be examined again is the possible extension of the prohibition of the geo-blocking methods also to the audiovisual services. This intention of the European Commission triggered the main question of this Thesis.

According to the conclusions of the writer of this Thesis it is absolutely necessary the re-examination of the current exclusion because although the decision of the European Commission can be justified under some economic reasons, there are also serious negative

[95] Regulation (EU) 2018/302

legal consequences from the application of the geo-blocking methods in the audiovisual sector.

In order to make the study of this condition narrower this Thesis focused mainly on one of the most famous types of audiovisual works: the films. This choice was made because the filming industry is one of the most complicated audiovisual sectors from both a legal and an economic perspective. The third Chapter was the part of this paper where the study from these two perspectives took place.

After the analysis on Chapter three it was obvious that the producers in the film industry choose to protect their exclusive intellectual property rights with the use of exclusive territorial licensees. The main reason why producers prefers that way of protection is the economic reason since they are able to pre-sale their rights to broadcasters on a territory-by-territory base and obtain some money for the production of the film. This aspect possibly is one of the main grounds on which Commission decided to exclude the audiovisual sector from the Regulation 2018/302. Although this reason can partly justify the decision of the Commission it does not mean that the preservation of the geo-blocking methods on the audiovisual works is the most efficient way to protect the intellectual property rights of the relevant rightsholders. The truth is that the geo-blocking techniques not only assure the preservation of the territorial licensing method but can also lead to **absolute** territorial protection in order to ensure the economic interests of the rightsholders.

The absolute territorial protection, as it is mentioned on Chapter 4, is achieved with a prohibition: when a broadcaster obtains the rights from a producer to market an audiovisual work in a Member State then other broadcasters are prohibited to sell actively or passively this work into the territory of this Member State. Even though some people could think that this policy protects even better the copyrights and the interests of the rightsholders, the writer of this Thesis believes that this behavior violates other legal rights.

More specifically, on the previous chapter it was proved through relevant European case law that the fundamental right of free movement of services[96] is not allowed to be restricted when the reason for this restriction goes beyond the necessary. In one of the most famous cases of broadcasting (FAPL case)[97] in the EU, the Court decided that the measures to protect the interest of the broadcasters went beyond the necessity and were in contrary with the right of free movement of services.

[96] Treaty on the Functioning of the European Union, Article 56,
[97] C-403/08 and C-429/08

Moreover, except the mentioned fundamental right, the absolute territorial protection which is the main goal of the geo-blocking violates some provisions of the European Competition Law because they restrict the competition within EU and lead to monopolies in the market of broadcasters.

Therefore, the preservation of geo-blocking in the audiovisual sector not only does not seem that is the most effective way to protect the intellectual property rights but also can lead to absolute territorial protection which has a negative impact to other aspects of the European Law.

The paradox in this situation is that the European Commission by addressing the Digital Single Market Strategy aims to create a unique, equal and fair market for all the European citizens where the European Law and its fundamental rights will be abided.

In conclusion, based on this analysis, the answer to the main question of this Thesis is that not only is extremely necessary for the European Commission to evaluate the exclusion of the audiovisual sector from the Geo-blocking regulation but preferably should change its current decision. The preservation of the geo-blocking methods in the audiovisual sector is not proved that is the most efficient way to protect the relevant copyrights and moreover does not help to the creation of the Digital Single Market Strategy.

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