

# GEOBLOCKING REQUIREMENTS IN ONLINE DISTRIBUTION OF COPYRIGHT-PROTECTED CONTENT: IMPLICATIONS OF COPYRIGHT ISSUES ON APPLICATION OF EU ANTITRUST LAW

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## I. INTRODUCTION

The e-commerce sector inquiry and investigations by the European Commission (the “Commission”) into pay-tv and video games present

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the question of whether requiring online distributors of copyright protected content to prevent sale and provision of their services on the basis of a user's technically determined location ("geoblocking") unlawfully restricts competition under European Union ("EU") antitrust law.<sup>1</sup> While it is well-established in case law of the Court of Justice of the European Union ("CJEU") that creating "absolute territorial [protection]" (eliminating any competition between distributors operating in different EU member states) is presumptively restrictive of competition,<sup>2</sup> it is not apparent how this applies to online distribution, where distributors may already be prevented by copyright from offering services outside their licensed territories.<sup>3</sup>

This article examines whether requiring the use of geoblocking in online distribution of copyright protected content may run afoul of EU antitrust law. The focus is on the extent to which geoblocking requirements are capable of restricting competition and are likely to do so in a context where the limited territorial scope of licenses can prevent competition due to copyright risks. The article proceeds as follows. First, it examines whether and, if so, when in the context of licensing of copyright protected content for online distribution, creation of absolute territorial protection by requiring geoblocking could violate Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). The article examines legal bases under which distributors could exceptionally avoid copyright infringement when offering content to

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1. Eur. Comm'n, *Final Report on the E-Commerce Sector Inquiry*, at 16, SWD (2017) 154 final (May 10, 2017) [hereinafter Final E-commerce Report]; European Commission Press Release IP/15/5432, Antitrust: Commission Sends Statements of Objections on Cross-Border Provision of Pay-TV Services Available in UK and Ireland (July 23, 2015) [hereinafter EC Press Release in Pay-TV Case]; Margrethe Vestager, Commissioner for Competition, Speech at the Bundeskartellamt International Conference on Competition: Competition Policy for the Digital Single Market: Focus on E-Commerce (Mar. 26, 2015, SPEECH/15/4704). This article focuses on potential infringements of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") that prohibits agreements that restrict competition where they produce restrictive effects (by "effect") or are presumed to do so (by "object"). Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

2. Joined Cases C-403 & 429/08, *Football Ass'n Premier League v. QC Leisure*, 2011 E.C.R. I-9083, ¶¶ 139–142.

3. See, e.g., Pablo I. Colomo, *The Commission Investigation into Pay TV Services: Open Questions*, 5 J. of Eur. Competition L. & Prac. 531, 531–32 (2014).

non-licensed territories and the relevance, in terms of competition law application, of potential copyright infringement by distributors.

Second, the article examines whether the free movement of services, a fundamental freedom protected under the TFEU, could render online distributors capable of competing outside their licensed territories by precluding copyright protection against distributors doing so. Indeed, this can be the case, particularly when licensing arrangements create absolute territorial protection (i.e., elimination of cross-border competition between distributors in different member states). At the same time, licensing agreements resulting in absolute territorial protection are presumptively restrictive of competition (“by object”) and difficult to justify by efficiencies. Consequently, this line of argumentation could allow cross-border competition to be promoted within the EU by enabling some competition by online distributors outside of their exclusively licensed territories. However, uncertainty over when free movement of services would allow distributors to avoid copyright infringement may limit the viability of establishing competition law violations on the basis of this reasoning – something that the CJEU or the EU legislator could address.

Finally, the article concludes with a brief discussion of the findings.

## II. GEOBLOCKING IN TERRITORIALLY-BASED LICENSING OF COPYRIGHT FOR ONLINE DISTRIBUTION AS A POTENTIAL RESTRICTION OF COMPETITION (ABSOLUTE TERRITORIAL PROTECTION)

Offering copyright-protected content to customers online via the Internet may involve activity falling under the exclusive rights of copyright and related-rights holders. For instance, in streaming copyright-protected works, copies may be made at different points of the distribution channel (e.g., first when placed on a server for streaming) and works are communicated (made available) to the public by the distributor.<sup>4</sup> This means that, in order for an online distributor to avoid

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4. Directive 2001/29 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, arts. 2, 3(1)–(2), 2001 O.J. (L 167) 10 (EC) [hereinafter *Parliament and Council Directive on Copyright and Related Rights in the Information Society*]; Case C-607/11, *ITV Broad. Ltd. v. TVCatchup Ltd.*, (Mar. 7, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=134604&pageIndex=0>

infringing copyright law, authorization for the service in the form of a licensing agreement or consent from the copyright holder is normally required.<sup>5</sup>

Licensing of copyright-protected content, particularly the commercially most valuable kind, often takes place on a geographically and otherwise limited basis in the EU.<sup>6</sup> A licensee can operate its services without infringing copyright by remaining within the scope of the license. However, if the licensee steps outside the scope of the license, such as by offering content to customers in non-licensed territories, the license may no longer offer a defense against copyright infringement.<sup>7</sup> In order to ensure that licensees comply with their licenses, licensees may themselves choose to, and are often required to, use technical tools that prevent access to content from non-licensed territories.<sup>8</sup> This kind of geoblocking reduces the risk of a distributor infringing copyright as well as breaching the licensing agreement.

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&doclang=en&mode=lst&dir=&occ=first&part=1&cid=72492; Case C-306/05, *Sociedad General de Autores y Editores de España v. Rafael Hoteles*, 2006 E.C.R. I-11543, ¶¶ 40–42. See, e.g., Sari Depreeuw & Jean-Benoît Hubin, *Study on the Making Available Right and Its Relationship with the Reproduction Right in Cross-Border Digital Transmissions* (2014), [http://ec.europa.eu/internal\\_market/copyright/docs/studies/141219-study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf).

5. See, e.g., *Joined Cases C-431 & 432-09, Airfield v. SABAM*, ¶ 72 (Oct. 13, 2011), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=111226&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=73263> (discussing the need for authorization). See generally *ITV Broad. Ltd. v. TVCatchup Ltd.; Rafael Hoteles*, 2006 E.C.R. I-11543.

6. See, e.g., Final E-commerce Report, *supra* note 1, at 224; Commission Decision of 26.7.2016 Relating to a Proceeding Under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40023 Cross-border access to Pay-TV), (C 2016) 1, 5-6, ¶ 20–24 (EC) [hereinafter EC Commitment Decision in Pay-TV Case (Paramount)], [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40023/40023\\_5273\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_5273_5.pdf).

7. In the case of certain IPRs other than copyright, the CJEU has held that a breach of a licensing agreement may result in an IPR infringement. Case C-140/10, *Greenstar-Kanzi Europe v. Hustin*, 2011 E.C.R. I-10077 (regarding plant variety right); Case C-59/08, *Copad v. Christian Dior Couture*, 2009 E.C.R. I-3421 (concerning trademarks). In the field of copyright law, the CJEU has held that lacking consent from a copyright holder may result in copyright infringement. See cases cited *supra* note 4.

8. See, e.g., Final E-commerce Report, *supra* note 1, at 237–43 (relating to the use of geoblocking and its requirement with respect to licensing agreements); *Mystery Survey on Territorial Restrictions and Geo-Blocking in the European Digital Single Market*, COM (2016) final (May 2016) (discussing types and use of geoblocking practices in the EU).

However, geoblocking provisions conceivably may not merely ensure compliance with copyright licenses, but may also unlawfully restrict competition, such as by eliminating cross-border competition between distributors in different EU member states, as discussed below.<sup>9</sup>

A. Prohibited absolute territorial protection in CJEU case law and its applicability to geoblocking requirements in online distribution.

Requirements in licensing agreements as to the use of geoblocking measures might, in particular, restrict competition between licensees operating in different EU member states. This concern is raised, for instance, in the ongoing Commission investigation into agreements between major movie studios and Sky UK. The Commission is concerned that requirements to use geoblocking in online distribution of content restrict passive sales to non-licensed territories and result in absolute territorial protection, hence, restricting cross-border competition.<sup>10</sup> The Commission has also raised concerns about geoblocking restricting competition in the context of a sector inquiry.<sup>11</sup>

EU competition law prohibits vertical agreements that create absolute territorial protection as presumptive restrictions of competition, but online distribution of copyright protected content may differ from existing case law as competition between exclusive licensees may be precluded by the limited territorial scope of their licenses. The applicability of relevant CJEU case law to online distribution is examined below against this backdrop of copyright issues.

1. *CJEU case law on absolute territorial protection in distribution of goods and broadcasts embodying copyright protected works.*

It is well established in CJEU case law that eliminating cross-border competition between distributors each operating in different member states (absolute territorial protection) in vertical agreements is a

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9. See discussion *infra* Sections II.A, II.B.

10. EC commitment decision in Pay-TV case (Paramount), *supra* note 6; EC Press release in Pay-TV case, *supra* note 1.

11. Final E-commerce Report, *supra* note 1.

presumptive restriction of competition.<sup>12</sup> In the case of tangible goods, agreements that restrict passive sales (sales in response to unsolicited requests) are considered hardcore restrictions of competition, whereas exclusive distribution restrictions on active sales may be permitted under certain conditions.<sup>13</sup> While the mere grant of an exclusive distributorship or license (open exclusivity) normally does not violate Article 101(1) TFEU, restrictions imposed on distributors that further restrict their ability to engage in passive sales to other territories may be restrictive of competition.<sup>14</sup> Were it not for additional restraints, products could be sold or redistributed to other member states by virtue of the exhaustion of distribution rights where copies of copyright-protected works (e.g., CDs, DVDs or books) are released on the market within the EU or the European Economic Area (EEA) by or with the consent of the copyright holder.<sup>15</sup>

As for distribution of copyright protected works in an intangible form (e.g., broadcasts), exclusive licensing of copyright is not in itself restrictive of competition. This is despite the fact that the mere grant of an exclusive license may in practice only allow a single distributor to operate in a member state (akin to absolute territorial protection) as other

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12. See *supra* note 2 and accompanying text.

13. Commission Regulation 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, art. 4(b)(i), 2010 O.J. (L 102), 1, 5 [hereinafter Block Exemption Regulation on Vertical Agreements].

14. See, e.g., *id.* art. 4(b); Commission Regulation 316/2014 of 21 March 2014 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Technology Transfer Agreements, art. 4(2)(b), 2014 O.J. (L 93) 17, 22 (passive sales restrictions as hardcore restrictions in licensing of technology). See, e.g., Premier League, 2011 E.C.R. (absolute territorial protection); Joined Cases 56 & 58/64, *Grundig & Consten v. Comm'n*, 1966 E.C.R. 299 (absolute territorial protection); Case 258/78, *L.C. Nungesser KG and Kurt Eisele v. Comm'n*, 1982 E.C.R. 2015 (closed exclusivity and absolute territorial protection); Joined Cases C-501, 513, 515 & 519/06, *GlaxoSmithKline Servs. Unlimited v. Comm'n*, 2009 E.C.R. I-9291 (restrictions of parallel trade).

15. See, e.g., Parliament and Council Directive on Copyright and Related Rights in the Information Society, *supra* note 4, art. 4(2); Case C-419/13, *Art & Allposters Int'l BV v. Stichting Pictoright*, (Jan. 22, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161609&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=102521>.

distributors may infringe the exclusive right of communication to the public if they offer access to content in that area.<sup>16</sup> According to the CJEU, exclusive licensing may be justified by the characteristics of the movie industry and markets relating to the financing of productions and translations (dubbing and subtitles).<sup>17</sup> However, where such exclusivity is not justified by industry needs or goes too far (e.g., in its duration or by enabling excessive returns on investment), exclusive licensing can be restrictive of competition where restrictive effects result.<sup>18</sup>

As in the case of tangible goods, additional restrictions beyond the grant of an exclusive license to a distributor may be restrictive of competition in the case of broadcasts or other intangible transmissions. Notably, in *Football Association Premier League v. QC Leisure*, the CJEU held that limiting sales of satellite broadcast decoder devices to other EU member states was such a presumptive restriction of competition (by object) because it resulted in absolute territorial protection in distribution of satellite broadcasts of certain sports events.<sup>19</sup>

2. *Applicability of CJEU case law to online distribution: copyright risks of communicating to the public in non-licensed territories as a distinguishing factor?*

On the basis of the reasoning in the CJEU case law outlined above, requiring the use of geoblocking in copyright licensing agreements could unlawfully restrict competition under Art 101(1) of the TFEU when it results in the elimination of cross-border competition between online distributors operating in different EU member states (absolute territorial protection).<sup>20</sup> However, online distribution of copyright-protected content

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16. Case 262/81, *Coditel v. Ciné-Vog Films*, 1982 E.C.R. 3382, ¶ 15 [hereinafter *Coditel II*]; *Premier League*, 2011 E.C.R. ¶ 137.

17. *Coditel II*, 1982 E.C.R. ¶¶ 16.

18. *Id.* ¶¶ 16-20.

19. *Premier League*, 2011 E.C.R. ¶¶ 141-142.

20. This is essentially argued by the European Commission in its Pay-TV investigation. See EC Commitment Decision in Pay-TV case (Paramount), *supra* note 6, ¶¶ 38-39; EC Press release in Pay-TV case, *supra* note 1. In its reasoning, the Commission relies on the two cases related to broadcasts mentioned above. See *Premier League*, 2011 E.C.R.; *Coditel II*, 1982 E.C.R. Geoblocking requirements may also result in other types of antitrust violations. For instance, where differentiated sales prices across EU member states are imposed by agreement with help of geoblocking, concerns could



differs from the cases discussed above in that, in the latter, copyright or other national legislation did not prevent the ability of distributors to compete with each other.<sup>21</sup> As noted above, distributors of tangible products may rely on the exhaustion of distribution rights to avoid copyright infringement when engaging in sales to other territories.<sup>22</sup> The situation in *Premier League* is different from online distribution because it involved communication to the public by satellite, which is deemed to take place solely in the member states where the broadcast originates, meaning that licenses for other member states are not required.<sup>23</sup> In *Premier League*, free movement of services also precluded national protection against distribution of decoding devices to other member states.<sup>24</sup>

By contrast, online distributors may not similarly be able or likely to compete outside their licensed territories as they may, or even typically, infringe copyright by engaging in communication to the public in non-licensed territories. For instance, an online distributor with a license to offer access only in France would likely infringe copyright by selling and providing the service to customers in Sweden. This would generally mean that even though a presumptively restrictive restraint of passive

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arise. *See, e.g.*, European Commission Press Release IP/01/1212, Commission Closes Inquiry into CD Prices after Changes to Business Practices (Aug. 17, 2001) (investigation concerning, among other things, if territorial code systems of DVDs could raise concerns); European Commission Press Release IP/08/22, Antitrust: European Commission Welcomes Apple's Announcement to Equalise Prices for Music Downloads from iTunes in Europe (Jan. 9, 2008) (investigation into whether differentiated sales prices were imposed on the basis of consumers' residence). *See generally* Lars Kjøbye et al., *The Commission's E-Commerce Sector Inquiry – Analysis of Legal Issues and Suggested Practical Approach*, 6 J. OF EUR. COMPETITION L. & PRAC. 465 (2015) (discussing other potential issues).

21. *See, e.g.*, EC Press release in Pay-TV case, *supra* note 1; Pablo I. Colomo, *Article 101 TFEU and Market Integration* (London Sch. of Econ. and Political Sci., LSE Law, Society and Economy, Working Paper No. 07/2016).

22. *See* Parliament and Council Directive on Copyright and Related Rights in the Information Society, *supra* note 4, art. 4(2).

23. *Premier League*, 2011 E.C.R. ¶ 14.

24. *Premier League*, 2011 E.C.R. ¶¶ 72, 117, 125; *see* Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) art. 1(2). *See also* Colomo, *supra* note 21, at 21.



sales appears concerned when purchases from Sweden are required to be blocked, characterization as a restriction of competition (by object) is not warranted when a geoblocking requirement does not restrict competition beyond what results from copyright protection.

It can be argued, though, that in some situations online distributors exceeding the scope of their license may avoid infringement. However, this would not appear to permit online distributors to engage in full-scale passive sales in non-licensed territories. First, when content is provided for consumers in non-licensed territories, arguably this concerns communication to a “new public,” which requires a separate authorization for transmissions to other regions.<sup>25</sup> No exhaustion or comparable consequences result from the copyright holder authorizing the initial communication to the public that would allow communication to the public in non-licensed territories.<sup>26</sup> Second, no country of origin rule applies to copyright infringement in online distribution that would prevent copyright infringement in non-licensed territories.<sup>27</sup> The European Commission’s recent proposal to extend the country of origin rules to online transmissions could, though, end up allowing broadcasters in some situations, such as ancillary online broadcasts, to offer access to

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25. See, e.g., Premier League, 2011 E.C.R. ¶ 197 (authorization required for communication to a new public); Case C-466/12, *Svensson v. Retriever Sverige*, ¶ 24 (Feb. 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=104200>. The ability to authorize instances of communication to the public falls within the essential function of copyright that may justify restrictions on free movement of services. Case 62/79, *Coditel v. Ciné Vog Films (Coditel I)*, 1980 E.C.R. 882, ¶¶ 13–14.

26. See, e.g., Parliament and Council Directive on Copyright and Related Rights in the Information Society, *supra* note 4, art. 3(3) & recital 29. See also Case 158/86, *Warner Bros. v. Christiansen*, 1988 E.C.R. 2625, ¶¶ 15-18; Case C-128/11. *UsedSoft GmbH v. Oracle Int’l Corp.*, (July 3, 2012), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0128&from=EN> (despite exhaustion occurring in online distribution of software, (downloaded) tangible copies were involved).

27. See, e.g., Council Directive on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, *supra* note 24, art. 1(2) (only applicable to satellite broadcasting); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, art. 1(4) and annex, 2000 OJ (L 178) 1, 8, 16 [hereinafter Directive on Electronic Commerce] (not applicable to private international law rules and, with respect to a country of origin provision in art. 3(2), to copyright).

content online in non-licensed territories.<sup>28</sup> This would mean that broadcasts could in certain situations be made available online elsewhere in the EU without infringing copyright and, hence, that requiring geoblocking to limit that possibility is capable of restricting competition.

Fourth, while some targeting of consumers in a member state may be required in order for infringement to fall under the laws of that member state, copyright infringement would not appear to be generally avoided when passive sales to non-licensed territories are concerned.<sup>29</sup> When a service in which access to copyright protected content is provided, this may involve registration of users, accepting payments, and monitoring usage, which in turn tends to make the distributor aware of copyright relevant activity occurring in non-licensed member states.<sup>30</sup>

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28. *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*, art. 1, COM (2016) 594 final (Sept. 14, 2016) (applicable only to ancillary online services “consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation as well as of any material produced by or for the broadcasting organisation which is ancillary to such broadcast”). A proposed Portability Regulation would not, though, appear to allow passive sales to new consumers but would only allow existing customers temporarily residing in a non-licensed territory to continue use. *Proposal for a Regulation of the European Parliament and of the Council on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market*, arts 3–4, COM (2015) 627 final (Dec. 9, 2015).

29. The CJEU has emphasized the difficulties of predicting which laws may apply to infringement online if mere accessibility of content were a basis to determine under which national law an infringement of a *sui generis* database is examined in Case C-173/11, *Football Dataco v. Sportradar*, ¶¶ 36–37 (Oct. 18, 2012), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0173&from=EN>. In that context, the CJEU has noted that infringement would occur at least in the member state at which the content is intentionally targeted in view of the content itself, its language and other conduct by the alleged infringer. *Id.* ¶¶ 39–43. One reading of this judgment is that merely offering access, without a sufficient degree of targeting, would effectively prevent findings of infringement in those non-targeted territories. It could thus be argued that access taking place without “active sales” of content to non-licensed territories could not be objected to because those infringements would not occur under any national law. *See also* Case C-324/09 *L’Oréal v. eBay*, 2010 E.C.R. I-6073, ¶¶ 60–64 (whether consumers in a territory targeted under trademark law).

30. The caveat that infringement may occur at least in intentionally targeted states and assessment of when targeting occurs (a potentially quite minimal effort

Finally, the geoblocking regulation proposed by the European Commission excludes from its scope services in which copyright protected content plays a significant role. The proposed regulation thus does not make lawful the provision of access to copyright-protected content to non-licensed territories, or otherwise prevent the use of geoblocking technologies or contractual requirements to use them where copyright-intensive services are concerned. However, the proposal provides that its extension be evaluated in the future for services where a distributor has requisite copyright licenses. Such an extension could prohibit the use of geoblocking within licensed territories and bar corresponding restraints on contractual passive sales.<sup>31</sup>

#### B. Impact of copyright risks of competition law assessment of geoblocking requirements.

Generally, as discussed above, online distributors granted a license covering a certain territory in the EU are not able to offer the service to customers in non-licensed territories without likely infringing copyright.<sup>32</sup> This significantly affects the capability and likelihood of a geoblocking requirement restricting competition as the risk of copyright infringement may be enough, let alone court decisions putting such

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required), and weighing of both the interests of predictability and the ability to protect rights may mean that this legal basis would not be very broad. *L'Oréal*, 2010 E.C.R., ¶¶ 60–64. *See also* Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199), art. 8(1); Case C-192/04, *Lagardère Active Broadcast v. SPRE*, 2005 E.C.R. I-7218, ¶ 46 (territoriality of copyright protection). For jurisdiction of courts, accessibility may be sufficient. Case C-170/12, *Pinckney v. KDG Mediatech*, (Oct. 3, 2013), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0170&from=EN>. *See generally* PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* 137–39, 317–30 (2d ed. 2010) (on private international law issues relating to online distribution).

31. *Proposal for a Regulation of the European Parliament and of the Council on Addressing Geo-blocking and Other Forms of Discrimination Based on Customers' Nationality, Place of Residence or Place of Establishment Within the Internal Market and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*, COM (2016) 289 final (May 25, 2016), arts 4(1)(b), 9(2). However, avoidance of copyright infringement in non-licensed territories might still under the proposed regulation justify distributor use of geoblocking. *Id.* art. 4(3).

32. *See discussion supra* Section II.A.2.

infringements to an end, for distributors to refrain from selling and providing services in non-licensed territories.

It is illustrative to begin with the simplest scenario. Where the risk of copyright infringement inexorably prevents distributors from engaging in any cross-border competition in non-licensed territories, a requirement to use geoblocking appears incapable of producing restrictive effects on competition. If a distributor did not compete in non-licensed territories absent a licensing agreement, because copyright would be infringed without a license, and absent the geoblocking requirement, because exceeding the scope of the license would infringe copyright, then no requirement to use geoblocking could prevent competition.<sup>33</sup> For the same reason, due to the absence of restrictive effects, characterization of such an agreement as a restriction of competition (by object) is not warranted.<sup>34</sup>

However, as will be discussed below, the capability and likelihood of geoblocking requirements to restrict competition by online distributors is not automatically eliminated by copyright law, but depends on the agreement and the likelihood of distributors avoiding copyright risks.<sup>35</sup>

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33. Two counter-factuals are relevant under EU competition law when considering whether competition is restricted. The main counter-factual is the situation but for the agreement. *See, e.g.*, Case T-328/03, O2 v. Commission, 2006 E.C.R. II-1234; Case T-360/09, E.ON Ruhrgas v. Comm'n, (June 29, 2012), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009TJ0360&from=EN>. Second, the situation but for the challenged restraint needs to be considered (at least in the case of intra-brand restrictions). *See* Commission Communication, Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) [hereinafter Guidelines on the application of Article 81(3) of the Treaty], 97, 99, ¶ 18 (EC).

34. GlaxoSmithKline Servs. Unlimited v. Comm'n, 2009 E.C.R., ¶ 58; Case C-67/13 P, Groupement des Cartes Bancaires v. Comm'n, ¶¶ 50–58 (Sept. 11, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0067&from=EN>; Case C-345/14, SIA Maxima Latvija v. Konkurences Padome, ¶¶ 18–20 (Nov. 26, 2015), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0345&from=EN>. *See generally* on the scope of IPR protection and (“by object”) restrictions in the context of internal market restrictions. Colomo, *supra* note 21.

35. *See* discussion *infra* Sections II.B, II.C.

1. *Relationship of geoblocked activities to potential copyright infringement by an online distributor.*

Copyright protection does not automatically preclude geoblocking requirements from being capable of restricting competition. First, geoblocking provisions may be drafted to restrict sales and provision of services that a distributor could undertake without infringing copyright. Whether the geoblocking requirement limits distributors' competitive conduct beyond what they are permitted to do without infringing copyright depends on the licensing agreement, particularly the territorial scope of license granted and the reach of the geoblocking requirement. For instance, it appears that in the European Commission pay-tv investigation, obligations imposed on a licensor to ensure that licensees in other territories use geoblocking are capable of restricting competition that is not already prevented by copyright law (i.e., as copyright does not require copyright holders to use such contractual provisions or result in similar effects).<sup>36</sup>

Moreover, whether non-compliance with the agreement results in copyright infringement or only in breach of contract would also depend on the licensing agreement and national copyright law. If no copyright infringement results, distributors could be deemed capable of competing in other EU member states were it not for the geoblocking provision, which itself is void when distributors infringe Article 101 of the TFEU.<sup>37</sup>

2. *Likelihood of a distributor competing despite a risk of copyright infringement.*

Even when the scope of required geoblocking corresponds with the territorial scope of a license, distributors could still, were it not for the geoblocking requirement, be capable and likely to compete despite significant risks of copyright infringement involved in operating outside the scope of a license. First, a distributor could accept the risk of infringement and offer the service in non-licensed territories. As noted above, there may be legal arguments on the basis of which providing

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36. EC Commitment Decision in Pay-TV Case (Paramount), *supra* note 6, ¶¶ 27(b), 30(b).

37. Article 101(2) TFEU voids restrictive agreements.

access in non-licensed territories could in some situations avoid infringement, and it is possible that the copyright holder does not assert its rights against infringement.<sup>38</sup> In this vein, in its pay-tv investigation, the European Commission considers sufficient for establishing a restriction of competition that geoblocking provisions remove the ability of distributors to choose whether to use geoblocking.<sup>39</sup> This entails that competition between distributors, thought to be restricted by a geoblocking requirement, could arise when distributors, if not subject to a geoblocking obligation, are expected to choose to allow access to and offer a service for sale in non-licensed territories. Some such distributor activities could plausibly avoid copyright infringement or action taken against them by the copyright holder, whereas others may infringe copyright. As to potential distributor activities that infringe copyright, the Commission seems to expect that licensors (copyright holders) initiate infringement proceedings against distributors that infringe copyright (e.g., by operating outside licensed territories).<sup>40</sup>

While this approach by the Commission can unlock some additional cross-border competition (competition that is prevented by a geoblocking requirement), it does not appear entirely consistent with the general EU competition policy approach towards intellectual property rights (IPRs). It is true that in some contexts, undertakings are treated under competition law as at least potential competitors even though it is alleged that IPRs of another firm cover their activities. However, this has mostly concerned situations where doubts have been raised about infringement

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38. See discussion *supra* Section II.

39. EC Press Release in Pay-TV Case, *supra* note 1 (“Without these restrictions, Sky UK would be free to decide on commercial grounds whether to sell its Pay-TV services to such consumers requesting access to its services, taking into account the regulatory framework including, as regards online Pay-TV services, the relevant national copyright laws.”). See also Pablo I. Colomo, *Copyright Licensing and the EU Digital Single Market Strategy* 13–15 (London Sch. of Econ. and Political Sci., LSE Law, Society and Economy, Working Paper No. 19/2015).

40. Cross-border Access to Pay-TV, Case AT.40023, Final Commitments, § 2.5 (July 26, 2016) (EC) [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40023/40023\\_5274\\_2.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_5274_2.pdf) (“Nothing in the Commitments shall be interpreted as limiting or waiving Paramount’s right to engage in licensing or enforcement practices in the EEA that are legally permissible under EU law.”).

and/or the validity of the IPRs.<sup>41</sup> Absent such doubts, blocking IPRs, at least in the context of licensing of technology, would turn undertakings into non-competitors.<sup>42</sup> Since no specific doubts about infringement are present in the context of copyright licensing IPRs for online distribution, it would appear warranted, as a starting point, to consider that distributors are not actual or potential competitors in non-licensed territories.

Requiring copyright holders to protect copyright and to ensure compliance with licenses granted by resorting to infringement litigation, instead of contractually preventing infringement, also appears to complicate and raise the costs of copyright protection significantly.<sup>43</sup> In the end, the issue of whether geoblocking is problematic is not avoided since if a copyright infringement suit is settled, geoblocking provisions may be needed to put the infringement to an end. Furthermore, forcing licensors to tolerate to some extent the use of copyright protected materials in non-licensed territories may also curtail freedom of contract and protection of copyright in a way that is not necessarily justified by competition policy interests.<sup>44</sup> In competition law, such limitations on contractual freedom and protection of IPRs are limited to certain exceptional circumstances where significant competition concerns are present and IPR protection does not appear justified in the

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41. See, e.g., Case T-472/13, *Lundbeck v. Comm'n*, (Sept. 8, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183148&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=93561>, ¶¶ 122, 166, 254, 329, 368; Commission Decision of 9.7.2014 Relating to a Proceeding Under Article 101 and Article 102 of the Treaty on the Functioning of the European Union (Case AT.39612 Perindopril (Servier)), COM (2014) 4955 final (July 9, 2014) [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39612/39612\\_12422\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39612/39612_12422_3.pdf), ¶¶ 159, 1168–83.

42. Commission Communication, Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements, 2014 O.J. (C 89) 3, 10, ¶¶ 28–29 [hereinafter Technology transfer guidelines].

43. For comparison, the necessity of restraints for monitoring compliance with a license may justify certain otherwise potentially restrictive clauses. *Id.* ¶ 102.

44. Here, the ability of licensors and licensees to contract on terms desired by them is limited. Licensees are effectively compelled to obtain a territorially broader license than they are interested in and may thus be required to pay a higher price for it. Similarly, licensors cannot limit the territorial scope of license as desired.



circumstances.<sup>45</sup> No comparable circumstances appear to prevail in the case of geoblocking.

C. Capability of geoblocking requirements to restrict competition and the risk of copyright infringement by an online distributors.

As discussed above, geoblocking requirements are capable of restricting competition, but this depends particularly on the scope of the license, the extent of geoblocking required and the likelihood of distributors accepting the risk of copyright infringement.<sup>46</sup> To summarize, first, if a contractual geoblocking requirement extends beyond what distributors may do under the license without infringing copyright, the geoblocking requirement is capable of restricting competition that in principle could otherwise arise. As noted above, the European Commission's pay-tv case would in part appear to fall into this category, as the case involved the Commission challenging provisions that do not appear to be confined to the scope of exclusive rights (e.g., obligations to demand geoblocking in agreements with other licensees—something that the licensor is not under copyright law required to do).<sup>47</sup>

Second, when required geoblocking only limits distributor activities that would in any event likely infringe copyright, the requirement might still be capable but not generally likely to restrict competition. In this regard, the European Commission position of already regarding the contractual removal from distributors of the choice whether to use geoblocking as potentially restrictive of competition appears problematic in that it can identify as restrictive of competition agreements that would not actually produce any restrictive effects or, alternatively, that competition thought to be restricted likely infringes copyright.<sup>48</sup>

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45. In EU competition law, forcing IP holders to allow access to IPRs has been recognized in certain exceptional circumstances. *See, e.g.*, Case C-418/01, *IMS Health v. NDC Health*, 2004 E.C.R. I-5039, ¶ 52; Case C-170/13, *Huawei Technologies Co. v. ZTE Corp.*, ¶ 46 (July 16, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=87122>.

46. *See* discussion *supra* Sections II.A, II.B.

47. EC commitment decision in Pay-TV case (Paramount), *supra* note 6, ¶¶ 27(b), 30(b).

48. To be sure, the European Commission considered, with regard to Paramount, which settled the case, whether there were circumstances to justify a finding that there is

III. ABSOLUTE TERRITORIAL PROTECTION AS A BASIS FOR  
CONCURRENTLY ENABLING DISTRIBUTOR SERVICE OF NON-LICENSED  
TERRITORIES AND ESTABLISHING AN ARTICLE 101 INFRINGEMENT?

Targeting requirements to use geoblocking with the instruments of antitrust law would not appear capable of significantly promoting cross-border competition in online distribution of copyright-protected content in the EU. This is because lack of cross-border competition may stem from the territorially limited scope of the underlying licensing agreement.<sup>49</sup> This means that distributors may be unable to compete with each other as they may infringe copyright if they operate outside their licensed territories. Under the CJEU case law reviewed above, although requirements to use geoblocking could be seen as *prima facie* antitrust infringements when cross-border competition is prevented, this characterization is avoided or rebutted in circumstances where copyright protection prevents restrictive effects.<sup>50</sup>

Even where the scope of a copyright license does not allow provision of access in blocked territories, in some situations, geoblocking requirements may be capable of restricting competition. This is the case, in particular, when free movement of services precludes copyright protection against distributors engaging in cross-border provision of services to non-licensed territories in the EU. Where copyright protection is precluded because licensing agreements result in absolute territorial protection, the agreements are at the same time presumptively restrictive

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no restriction of competition. *Id.* ¶ 49. Therefore, it does not seem that the Commission would deny copyright protection as a factor that could prevent impairment of competition. *See also* EC Press Release in Pay-TV Case, *supra* note 1 (noting copyright protection as part of the relevant regulatory framework affecting distributor ability to compete). Since both online and satellite distribution is involved in the case, some statements and findings might not apply when only online distribution is concerned. This is because the country of origin rule discussed above in Council Directive 93/83/EEC, *supra* note 24, concerning satellite broadcasts makes geoblocking more capable of restricting competition as licenses effectively cover the entire EU so that distributors can without infringing copyright offer services in the entire EU.

49. Moreover, for instance, distributors may lack interest in offering services in non-licensed or even licensed territories for a host of other reasons. *See* Final E-commerce Report, *supra* note 1, ¶¶ 726–31.

50. *See* discussion *supra* Part II.A.2.

of competition and difficult to justify with efficiencies, as explained below.<sup>51</sup>

A. Criteria for the free movement of services to preclude cross-border copyright protection.

Free movement of services can provide a legal basis for distributors of copyright-protected content to be able to provide content to non-licensed territories without infringing copyright. Copyright protection in cross-border situations can be precluded by the free movement of services where copyright protection results in a restriction of cross-border access or provision of services that cannot be justified on the basis of the public interest underlying protection of IPRs.<sup>52</sup> The justified specific subject matter of copyright includes that each communication to the public may be authorized by a copyright holder in exchange for remuneration.<sup>53</sup> However, this does not justify the possibility to obtain the “highest possible remuneration” because only copyright protection allowing “appropriate remuneration” reflecting the economic value and the actual and potential audience can be justified.<sup>54</sup> A premium based on exploiting price differences achieved by means of partitioning the market (in

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51. Copyright licensing within the European Union may be significantly affected by the Premier League judgment and pending legislative proposals. Giuseppe Mazziotti, *Is Geo-Blocking a Real Cause for Concern in Europe?*, 38 EUR. INTELL. PROP. REV. 365 (2016); Dimitrios Doukas, *The Sky is not the (only) Limit: Sports Broadcasting Without Frontiers and the Court of Justice: Comment on Murphy*, 37 EUR. L. REV. 605 (2012); Andreas Wiebe, *Geoblocking im Lichte von europäischem Recht und europäischer Rechtsprechung*, ZEITSCHRIFT FÜR ÜRHEBER- UND MEDIENRECHT 932 (2015); Benjamin Farrand, *The EU Portability Regulation: One Small Step for Cross-Border Access, One Giant Leap for Commission Copyright Policy?*, 38 EUR. INTELL. PROP. REV. 321 (2016).

52. Premier League, 2011 E.C.R., ¶¶ 93–94; Case C-351/12, *OSA v Léčebné lázně Mariánské Lázně*, ¶¶ 68-71 (Feb. 27, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=148388&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=87706>.

53. Premier League, 2011 E.C.R. ¶ 107; Case 62/79, *Coditel v. Ciné Vog Films (Coditel I)*, 1980 E.C.R. 882, ¶¶ 13–14.

54. Premier League, 2011 E.C.R. ¶ 108. The specific subject-matter of IPRs also includes protection of rights where they are infringed. Case C-170/13, *Huawei Technologies Co. v. ZTE Corp.*, ¶ 46 (July 16, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=87122>.

contrast to a premium based only on the value of the content) cannot form part of appropriate remuneration.<sup>55</sup>

In *Premier League*, the CJEU held that the free movement of services precluded national legislation that prevented customers gaining access to broadcast services by limiting availability of decoding devices.<sup>56</sup> Protection was not justified on the basis of protecting the specific subject matter of intellectual property rights, applied by analogy to sports events, since appropriate remuneration for the content could have been secured through less restrictive means by granting licenses to satellite broadcasts on terms that account for the expected audience reached by satellite broadcasts.<sup>57</sup> Therefore, the more restrictive licensing arrangement that further partitioned distribution of decoding devices (which allow access to broadcasts) could not be justified.<sup>58</sup> In particular, remuneration involving a premium based on absolute territorial protection could not be justified as protection allowing for appropriate remuneration.<sup>59</sup>

#### B. Justifiability of licensing arrangements requiring geoblocking under free movement of services.

The criteria outlined above for determining whether the exercise of copyright precludes copyright protection due to unjustifiably restricting the free movement of services may also apply where copyright-protected content is licensed for online distribution. The requirements to use geoblocking in licensing arrangements may, in particular, result in partitioning the market in the EU so that copyright exercised is no longer protected under copyright; hence distributors would be able to provide the service in non-licensed member states without infringing copyright. Ambiguities nevertheless remain that limit the prospects of deeming

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55. This inappropriate premium based on absolute territorial protection and the “artificial” pricing differences it enables between member states was considered irreconcilable with the aims of the Treaty and hence not forming part of “appropriate” remuneration. *Premier League*, 2011 E.C.R. ¶ 115. However, the CJEU recognized that the premium for exclusivity can also reflect the value of the broadcast. *Id.* ¶ 114.

56. *Id.* ¶ 117.

57. *Id.* ¶¶ 111–13.

58. Since the arrangements employed went beyond what was necessary, they were no longer justified as restrictions on free movement of services. *Id.* ¶¶ 116–17.

59. *Id.* ¶ 115.

online distributors capable of competing in non-licensed territories, as next discussed.

1. *Appropriate remuneration for copyright holders for communication to the public.*

Licensing agreements that require geoblocking might, as in the case of decoding card restrictions mentioned above, exceed what is justified to obtain appropriate remuneration. It would even appear that in the case of online distribution the actual audience of content (e.g., even particular transactions and individual views or plays) could be accounted for with greater accuracy than in the case of satellite broadcasts. It could thus be argued that in licensing content to online distributors, appropriate remuneration could be secured so as to account for an EU-wide audience that actually purchases and accesses the content. Consequently, more restrictive licensing arrangements would become unjustified restrictions of free movement of services.<sup>60</sup>

Nevertheless, it is not clear at which point expected remuneration meets the level of appropriateness.<sup>61</sup> Hence, it is also hazy at which point licensing arrangements become too restrictive by going further than allowing for appropriate remuneration. For instance, appropriateness of remuneration could justify some exclusivity for the economic value of

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60. See Premier League, 2011 E.C.R. ¶ 108. In one case, Advocate General Bot has discussed the appropriateness of remuneration in a distribution context. Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, Opinion of Advocate General Bot, ¶ 83 (Apr. 24, 2012), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CC0128&from=EN> (suggesting that the first sale of software appropriately rewards a copyright holder and that, therefore, remuneration from resales is not justified). As noted above, the Court indeed held that exhaustion under certain conditions applies to downloaded software. Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, (July 3, 2012), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0128&from=EN>.

61. The CJEU's references to economic value and actual/potential audience are too vague to allow for administrable tests. Case law provides some examples on the approaches in competition determining excessive prices. See, e.g., Case C-52/07, *Kanal 5 Ltd v. Föreningen Svenska Tonsättares Internationella Musikbyra UPA*, 2008 E.C.R. I-9275. (whether a more accurate remuneration model for taking into account the economic value of copyright capable of achieving a legitimate aim); Case 395/87, *Ministere Pub. v. Tournier*, 1989 E.C.R. 2565 (appreciable difference to royalty level in another member state as indication of excessiveness).

content to be appropriately captured. In other situations, even global and non-exclusive licensing might secure appropriate remuneration. It also appears difficult to separate appropriate remuneration based on the value of content from inappropriate remuneration based on exploiting artificial price differences achieved by partitioning the market along member state borders.<sup>62</sup>

2. *Unjustifiable remuneration based on absolute territorial protection.*

As in the case of restrictions on sales of decoder cards, discussed above, geoblocking requirements can enable absolute territorial protection characterized by elimination of cross-border competition between distributors.<sup>63</sup> This is possible if geoblocking requirements, potentially alongside other aspects of licensing arrangements, prevent sales to non-licensed territories with that outcome. When such absolute territorial protection is created, the CJEU deems copyright protection no longer a justified restriction on free movement of services.<sup>64</sup> Free movement of services may thus preclude copyright protection in certain cross-border situations where licensing arrangements go beyond what is necessary to secure appropriate remuneration by creating absolute territorial protection. Therefore, geoblocking does not categorically render copyright protection unavailable against distributors wishing to offer services to non-licensed territories, but may especially do so when absolute territorial protection is created. However, this is by no means automatically or even generally the case, but requires that the contractual, technical, and commercial circumstances be such that cross-border competition is eliminated. Since these assessments depend on factual details and economic assessments, establishing as sufficiently likely that copyright protection is precluded by free movement of services is subject to considerable legal uncertainty.<sup>65</sup> Moreover, as the European Commission does not have jurisdiction to determine whether free movement of services disqualifies copyright protection,

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62. See Premier League, 2011 E.C.R. ¶¶ 114–15.

63. See discussion *supra* Section II.A.1.

64. *Id.* ¶¶ 115–16.

65. Additionally, as noted above, the legal concepts (e.g. appropriate remuneration) and factors mentioned (e.g. economic value) are also vague.

determinations in antitrust decisions that this would likely be the case would add to the legal uncertainty.<sup>66</sup>

C. Absolute territorial protection as a presumptive restriction on competition potentially lacking efficiency justification.

When absolute territorial protection is created by a licensing arrangement, geoblocking requirements may become capable of restricting competition as copyright protection against distributors offering a service in non-licensed territories is precluded by the free movement of services. Since agreements creating absolute territorial protection are at the same time presumptively restrictive of competition, as discussed above, absolute territorial protection at the same time offers a basis for establishing an antitrust infringement.<sup>67</sup>

1. *Presumptive restriction on competition of geoblocking requirements creating absolute territorial protection.*

If it has been established that, due to a licensing agreement creating absolute territorial protection, free movement of services precludes copyright protection, the licensing agreement may at the same time become capable and even presumptively likely to restrict competition. As noted above, if a geoblocking requirement in a licensing agreement eliminates cross-border competition, it is presumptively restrictive of

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66. See e.g. Case T-472/13, *Lundbeck v. Comm'n*, (Sept. 8, 2016) ¶ 140. This would be, in particular, part of considering, once absolute territorial protection has been established, whether there are circumstances falling within the economic and legal context of the challenged restrictions that would justify the finding that they are not liable to impair competition. A national court, by contrast, may determine the issue directly and could also refer the issue to the CJEU for a preliminary ruling. The latter was done in *Premier League* in which the CJEU indeed found there to be an unjustified restriction of free movement of services. *Premier League*, 2011 E.C.R. ¶¶ 117, 124.

67. However, absolute territorial protection is not necessarily established simultaneously in the two fields of law. Although both fields of law focus on the market outcome (elimination of competition between distributors), they consider different mechanisms underlying it. For instance, Article 101 TFEU only captures restrictions of competition resulting from agreements or other coordinated conduct between undertakings, whereas unjustified restrictions on the free movement of services can result from purely public (state) measures or unilateral conduct of undertakings that are given state protection (e.g., the exercise of IPRs). *Id.* ¶ 142.



competition (by object).<sup>68</sup> However, it remains possible to rebut the presumption by showing that no restriction of competition results in the legal and economic context.<sup>69</sup> Here, copyright would not preclude geoblocking from restricting competition since copyright protection for licensing arrangements is prevented by the free movement of services.<sup>70</sup> However, despite avoiding copyright infringement, distributors may still be prevented from providing a service in non-licensed areas (e.g., because distributors are not willing to organize customer service in other territories or do not wish to antagonize the licensor) so that the presumptive characterization as a restriction might be maintained.<sup>71</sup>

Arguably, geoblocking provisions could in some circumstances be necessary for concluding a licensing agreement in the first place. If no licensing would take place without the geoblocking provision, then but for the provision there would be no competition that could be restricted as the distributor would have no license at all. If geoblocking is such a prerequisite for the grant of a license, a restriction of competition may be avoided.<sup>72</sup>

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68. See *supra* notes 2, 14 and accompanying text.

69. *Id.* ¶¶ 140, 143. This legal reasoning is followed by the Commission. See EC Commitment Decision in Pay-TV Case (Paramount), *supra* note 6, ¶¶ 38–39.

70. Interestingly, also, the Commission refers to free movement of services potentially rendering copyright protection unjustified. EC Commitment Decision in Pay-TV Case (Paramount), *supra* note 6, ¶¶ 36–38. This could suggest that the Commission is taking such a possibility into account when considering whether there is a presumptive restriction of competition.

71. Final E-commerce Report, *supra* note 1, ¶¶ 232–34 (noting various reasons for distributors of digital content not providing the content in other member states). The burden to rebut the presumption that a restriction of competition based on absolute territorial protection is concerned would fall on the party seeking to avoid antitrust infringement. The Commission has suggested that “convincing justification” is needed to avoid infringement. EC Press Release in Pay-TV Case, *supra* note 1.

72. In the European Union, licensing of some types of content takes place without geoblocking, whereas in others it is more common. Final E-commerce Report, *supra* note 1, ¶¶ 242–43. If a certain type of content is commonly licensed without geoblocking being required, it would be difficult to argue that geoblocking would be necessary for licensing such content. Where geoblocking typically is almost always required (e.g., premium content in English), geoblocking could be deemed necessary for licenses to be granted. If that is the case, a restriction of competition can be avoided on the basis of the objective necessity of a restraint (generally required for conclusion of certain types of agreements) or due to being an ancillary restriction (necessary in the circumstances for conclusion of an agreement). See, e.g., Coditel II, 1982 E.C.R. I-3381,

2. *Uncertainties in justifying geoblocking requirements with efficiency benefits.*

Geoblocking requirements may produce efficiencies that can justify associated restrictions on competition. These efficiencies include benefits of higher expected rewards to incentives to invest in content creation<sup>73</sup> and those based on addressing inefficiencies generally associated with vertical agreements (e.g., free-riding on marketing efforts by distributors).<sup>74</sup> There does not appear to be anything specific in the context of online distribution of content that would render these efficiencies implausible.

The extent to which geoblocking requirements, in contrast to less restrictive alternatives such as the mere restriction of active sales to other territories or the mere grant of an exclusive license, remain reasonably necessary for attaining efficiencies may pose a greater obstacle. Arguably, in particular, it is plausible that incentives to create are greater when geoblocking allows higher rewards than under less restrictive alternatives. In this respect, in *Premier League*, the CJEU rejected alleged efficiencies, but it is not clear whether this is a matter of law or due to the facts of the case.<sup>75</sup> The CJEU merely refers to lack of justification for restricting free movement of services and sports interest recognized in the TFEU, without explaining why it rejected an efficiency justification.<sup>76</sup> This short shrift given to efficiencies could mark a categorical rejection of justifiability of absolute territorial protection, but other case law does not suggest that as a strict stance.<sup>77</sup>

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¶¶ 15, 19 (recognizing needs of exclusivity in the movie industry as justification for exclusivity); Guidelines on the Application of Article 81(3) of the Treaty, *supra* note 33, ¶ 18.

73. *See, e.g.*, *GlaxoSmithKline Servs. Unlimited v. Comm'n*, 2009 E.C.R., ¶ 301–03.

74. *See generally* Commission Notice: Guidelines on Vertical Restraints (EC), 2010 O.J. (C 130) 1, ¶ 107.

75. *Premier League*, 2011 E.C.R., ¶ 145.

76. *Premier League*, 2011 E.C.R., ¶ 145. Conceptually justifying exercise of IPRs under these areas of law is not comparable: both the interests protected (free movement vs. competition) and the types of justification accepted (protecting IPR holders appropriately vs. efficiency benefits potentially arising in different ways) differ fundamentally.

77. *See, e.g.*, *GlaxoSmithKline Servs. Unlimited*, 2009 E.C.R., ¶¶ 309–10.

Finally, the impact of geoblocking on consumer welfare can be ambiguous and, thus, difficult to establish as overall positive, which is required when efficiencies are invoked as a defense. Whether the potentially negative effects of restrictions, which may be ambiguous themselves when territorially based price discrimination is involved, are outweighed by the established efficiency benefits of geoblocking (e.g., availability of content and increased content creation) may be hard to determine, let alone establish as likely.<sup>78</sup> In order to avoid harming consumer welfare in antitrust applications to geoblocking, the impact of territorial exclusivity, especially on creation of content, should be carefully studied to determine to what degree exclusivity is beneficial.<sup>79</sup>

Accordingly, geoblocking within the EU can become capable of restricting competition when the free movement of services eliminates copyright protection against provision of services to non-licensed member states. At the same time, requirements to use geoblocking would become presumptively restrictive of competition and may also be difficult to justify by efficiencies. This approach would in practice mean that even in the case of exclusive copyright licensing licensors could not require distributors to refrain from passively offering the service in other EU member states. That would, however, only rarely be the case because geoblocking in licensing agreements would only occasionally result in absolute territorial protection precluding copyright protection and antitrust infringement may still be avoided for reasons discussed above

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78. See, e.g., GREGOR LANGUS ET AL., ECONOMIC ANALYSIS OF THE TERRITORIALITY OF THE MAKING AVAILABLE RIGHT IN THE EU (2014), available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/1403\\_study1\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf) (discussing of consumer welfare and other effects of geoblocking and territorial licensing); Commission Staff Working Document, *Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Addressing Geo-blocking and Other Forms of Discrimination Based on Place or Establishment or Nationality Within the Single Market*, COM (2016) 289 final, SWD (2016) 173 final (May 25, 2016), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0173&from=EN>; *The Economic Potential of Cross-border Pay-to-view and Listen Audiovisual Media Services*, PLUM CONSULTING (Mar. 2012), [http://ec.europa.eu/internal\\_market/media/docs/elecipay/plum\\_tns\\_final\\_en.pdf](http://ec.europa.eu/internal_market/media/docs/elecipay/plum_tns_final_en.pdf); HELI KOSKI ET AL., MAARAJOITUSTEN TALOUDELLISET VAIKUTUKSET SUOMALAISSA YRITYKSISSÄ JA KOTITALOUKSISSA (2015), available at <https://www.etla.fi/wp-content/uploads/VNK-raportti-2015-19.pdf>.

79. See, e.g., LANGUS ET AL., *supra* note 78 (expressing reservations about policies seeking to reduce territoriality in licensing).

(e.g., distributors still remaining unlikely to compete or the efficiency benefits of geoblocking associated with greater investment in creation of content).

#### IV. CONCLUSION

The European Commission is currently investigating whether requiring online distributors of copyright-protected content to use geoblocking may unlawfully restrict cross-border competition between distributors operating in different EU member states. This represents a challenge for EU antitrust law since, even though geoblocking requirements may restrict competition by preventing sales and provision of access to other member states, their likelihood to do so depends significantly on the risks of copyright infringement that online distributors would face were they to compete in non-licensed territories.

Where required geoblocking extends further than what a distributor could do without infringing copyright (e.g., by remaining within the territorial scope of a license), competition is presumptively restricted when passive sales to other member states are limited. By contrast, requiring geoblocking when licensing copyright-protected works for online distribution is unlikely to restrict competition when copyright law already prevents distributors from lawfully selling and offering a service in a territory subject to a geoblocking requirement (i.e., a non-licensed territory). In this case, absence of competition stems from the limited scope of a copyright license, not a requirement to technically prevent access and purchases from other territories. Finding merely the removal of distributors' freedom to choose whether to use geoblocking, as advocated by the European Commission, restrictive of competition may be problematic in that it may erroneously identify restrictions where none in reality arise or the competition thought restricted may infringe copyright.

Thus, EU antitrust law cannot, by targeting only geoblocking, engender cross-border competition much beyond what underlying licensing agreements permit—it generally remains possible to limit the territorial scope of licenses and to require access from non-licensed territories to be geoblocked. However, in rare circumstances, competition law can condemn requirements to use geoblocking even when they concern access to and purchases from non-licensed territories. The free movement of services can preclude copyright protection in cross-border

situations particularly when licensing arrangements create absolute territorial protection. That allows online distributors to offer services in non-licensed territories without infringing copyright and such licensing arrangements are also presumptively restrictive of competition and difficult to justify with efficiencies. This approach would, in practice, mean that, in the case of exclusive licensing of copyright, passive sales to other parts of the EU would still need to be permitted and the copyright holder could not require them to be blocked. However, the criteria for establishing that cross-border copyright protection in online distribution is precluded on the basis of free movement of services may currently be too unclear in order for it to be practical to establish in an antitrust case that online distributors could compete in non-licensed territories were it not for geoblocking requirements. Moreover, an antitrust infringement may be avoided although absolute territorial protection is created by a licensing agreement (e.g., due to efficiency benefits justifying the restriction).

Finally, the European Commission has recently proposed several pieces of legislation that may significantly affect geoblocking and its competition law status. In particular, a proposed regulation allowing distributors to provide access to certain online services ancillary to broadcasts without needing a license in all EU member states would render geoblocking requirements which limit that possibility capable of restricting competition. As a consequence of such proposals, copyright holders might no longer be permitted under antitrust law to require distributors to prevent access to online services from non-licensed EU member states, even in the case of exclusive licensing.











