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MASTER EUROPEAN STUDIES

Free Movement of Creative Content

Policy options for dealing with the territorial nature of copyright for online services

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Abstract

The European Union wants to complete the Single Market. One of the niches of this market is content related services on the internet. This market offers a huge diversity of creative and cultural services like Video-on-Demand, file-sharing, streaming and downloading of music, videos and other copyright protected content.

The creators and producers of creative content can give licenses to service providers who want to use this content for their services. These licences are awarded on a territorial basis. The territoriality of copyright can be seen as an obstacle to the completion of the Single Market. In this thesis the question "*How can the problem of territoriality in the field of copyright and related rights in the European Union be solved for content related services offered over the internet?"* is raised and answered.

It shows that the market is homogeneous, and therefore the demand for the types licenses varies. Sometimes there is demand for national based licenses, but from other providers demands for pan-European licences come.

For this research I made use of the contributions to public consultation of the European Commission on the Green Paper on the online distribution of audiovisual works in the European Union. This gave a valuable insight to the different positions of stakeholders and experts, from all over Europe.

This reseach concludes with suggestions for a flexible copyright regime, whereby market demands can be fullfilled.

Preface

In front of you, you have my master thesis, written for the study program European Studies. This is the final part of the double degree program at the University of Twente and the Westfälische Wilhelms Universität Münster.

I would like to use this opportunity to thank all people who supported me and contributed to this research and thesis. First of all I would like to thank my supervisors, Prof. dr. N.S. Groenendijk and Prof. Dr. G.J. Hospers, who guided me during the process and gave valuable tips. I also would like to thank my parents, family and Bas for their support and patience.

I hope you enjoy reading my thesis.

Kind regards,

Marc Sytse Bakker

Enschede, August 2012

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Abbreviations

BC	Berne Convention for the protection of Literary and Artistic Works 1886
CMO	Collective rights management organization
EC	European Community
ECJ	European Court of Justice
ECL	Extended Collective Licensing
EU	European Union
IPDA	Independent Performer Database Association
IPR	Intellectual property right
ISAN	International Standard Audiovisual Number
ISBN	International Standard Book Number
ISO	International Standardisation Organization
OHIM	Office for Harmonization in the Internal Market
P2P	Peer-to-Peer
TEC	Treaty establishing the European Community
TFEU	Treaty on the functioning of the European Union (Lisbon Treaty)
VoD	Video-on-Demand
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Introduction

The protection of intellectual property rights (IPRs) has drawn much attention over the last decades. In the European Union harmonization of these rights has often been discussed. Markets have expanded, while national governments continue to deal with regulation. Minimum standards were introduced internationally, giving national governments the possibility to set higher national standards if they deemed it necessary. This way of organizing regulations causes not only local differences between countries, but also difficulties in claiming IPRs.

One type of IPRs is copyright and related rights. Copyright is the right of the author or any assignee of a work of literature, science or art to determine how, where and when his work is published or reproduced. The copyright arises by operation of law. One needs not to deposit or register a copyright, contrary to for example patents. Law grants authors the copyrights to their creations. In order to monetize these rights and distribute his or her work, an author will regularly enter into a contract with a publisher, and assign the latter the exploitation rights.

Related rights are similar rights, but are not connected with the actual author of the work. The rights of performers, phonogram producers and broadcasting organizations are certainly covered by these related rights.

Harmonization of copyright and related rights in the European Union have been inspired by two main principles, first the proper functioning of the internal market and second, the improvement of the competitiveness of the European economy, in relation to the EU's trading partners (Eechoud, 2009).

In May 2004, the European Commission announced the opening of proceedings regarding collective licensing of music copyrights for online use, issuing a statement in which it recognized that "*the loss of territoriality brought about by the Internet, as well as the digital format of products such as music files, are difficult to reconcile with traditional copyright licensing schemes, which are based on purely national procedures*" (Commission, 2004b).

At present seven European Community directives in the field of copyright and related rights are in place. The first one, on computer programs, was adopted in 1991. The most recent ones were adopted in 2001 and deal with artist's resale rights and copyright and related rights (Eechoud, 2009).

The seven directives have smoothed out some of the main disparities between the laws of the Member States, but largely ignored one of the main obstacles to the creation of an internal market in products of creativity: the territorial nature of economic rights. As a consequence, even in 2006 content providers aiming at European consumers need to clear rights covering 27 Member States. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States. The European Community has left the territorial nature of rights of communication intact. Community (case) law has tackled the problem of territoriality for the distribution of physical goods by establishing a rule of Community exhaustion.

Even though the Commission's recent Online Music Recommendation does address some of the problems caused by territoriality in the field of collective rights management of musical works, even that Recommendation does not question the territorial nature of copyright and related rights as such. As long as this territorial nature is left intact, harmonisation can achieve relatively little(B. Hugenholtz, 2006).

The exclusivity that a copyright confers upon its owner is strictly limited to the territorial boundaries of the Member State where the right is granted. This is a core principle of copyright and related rights, which has been enshrined in the Berne Convention and other treaties(B. Hugenholtz, 2006).

The problems with territoriality and copyrights and related rights are:

- No specific legal basis in the treaties for establishing community IPR

  Until the Lisbon Treaty there was no competence rule specific to intellectual property. Copyrights and related rights were regulated at European Level, based on more generable competences on the internal market (article 95 EC) and on residual competence (article 308 EC). Based on arguments that harmonization was needed for the functioning of the internal market measures could be taken. Often this was accompanied by Articles 47(2) TEC and 55 EC which allow these measures for the functioning of the internal market in regard to freedom of establishment and the freedom to provide services.

  The Lisbon Treaty (TFEU) has brought significant change in the problem of competence. This treaty has introduced a special legal basis for community intellectual property titles (B. Hugenholtz, 2006).

- Differences between the realm of copyright and trademark law and design protection

  For trademark law and design protection a Community title was introduced with the regulation on the Community Trade Mark, the Regulation on Community Plant Variety Rights, and the Community Designs Regulation. With this title the protection of IPRs in the field of trademarks and designs is dealt with in a unitary way instead of 27 different ways as it is done for copyrights and related rights.

- Current situation: asymmetry in current acquis communautaire

  Harmonization by means of the functioning of the internal market means the removal of barriers and mandates basic economic rights. But it hardly permits limitations which are needed to protect the rights of the copyrights holders. Barriers to trade are allowed only very limited; most of the current allowed barriers are for the protection of consumers and not for the protection of certain parts of the market.

Why is it interesting to do this research?

European economic integration is an ongoing process. The renewed Lisbon agenda (Europe 2020) aims at fostering economic prosperity, jobs, and growth, in particular by boosting the knowledge-based economy and by enhancing the quality of Community regulation. Clearly, a consistent and transparent legislative framework for copyright and related rights in the information society, that fosters growth of the knowledge-based economy in the European Union, is a crucial element in any strategy leading towards that goal.

With new technologies and the internet, the world faces new policy issues concerning copyright and related rights. Protection of copyrights gets more difficult with increasing popularity of uncontrolled peer-to-peer file-sharing, cloud-based file-sharing and unauthorised streaming websites. Fragmented legislation will make is even harder to fight the infringements.

The internet offers in that way new opportunities for content related services. With different rules in different Member States it could be more expensive to offer those services on a pan-European scale. The European Market of digital content, because of its legal, cultural and linguistic particularities, is highly fragmented. From a technical point of view, the internet is without frontiers, but the online market is impeded by multiple barriers, which affect the internal market for services over the internet. It limits the development of and the access to pan-European services and content (Parliament, 2011).

State-of-affairs

The 'first generation' directives concerning copyright and related rights have their roots in the Green Paper on Copyright and the Challenge of Technology that was published by the Commission in 1988. As stated in the Green Paper, EC intervention in the realm of copyright would be required based on four 'fundamental concerns' of the Community.

A second generation of directives followed in 1995 with the Green Paper on Copyrights and related rights in the Information Society. The Commission focused on 'the application of copyright and related rights to the content of the new products and services in the information society'. A first concern – also present in the 1988 Green Paper – was that differences between national laws would cause obstacles to the free circulation of content related goods and the freedom to provide services. Harmonization would have to overcome these effects. A second concern was to strengthen intellectual property rights because these were viewed as an important instrument to stimulate artistic production and thus serve to protect European cultural heritage. The third major concern was with ensuring the competitiveness of Europe's economy which was already a concern in 1988, especially by providing the cultural industries with proper levels of protection (Eechoud, 2009).

The EU also has external competences, that is, it can enter into agreements with third countries. Such competence can either be explicit or implicit (flowing from internal competences of the EC Treaty such as Article 95), and can be exclusive or shared. Member States may also have pre-existing international obligations towards third countries, some of which may be in conflict with EC law. Article 307 TEC (Article 351 TFEU) allows Member States to honour previous obligations, but also instructs them to take all appropriate steps to eliminate any incompatibilities with EC law. In its legislative actions, the EU itself also aims to respect international obligations of Member States under existing intellectual property treaties. In the multilateral setting the primary ones are:

- The Berne Convention for the protection of Literary and Artistic Works 1886 (BC Paris Act 1971).
- The Rome Convention: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (RC).
- Geneva Convention: Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms of 1971 (GC).
- World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs).
- WIPO Performances and Phonograms Treaty 1996 (WPPT).
- WIPO Copyright Treaty 1996 (WCT).

As explained above territoriality forms a problem for the harmonization of European copyright law. There are several ideas on how to deal with this problem. This research will focus on different

possible policy solutions, it will examine what the possible the possible implications can be and what needs to be done in order to get them in practice.

The last frontier: Territoriality

The process of harmonization of copyright and related rights in the European Union has been motivated strongly by the removal of disparities between national laws which could pose barriers to the free movement of goods and services. Many of those disparities between national laws have been removed over the years. But a serious impediment to the creation of the internal market is the territorial nature of copyrights and related rights. This means that "the exclusivity that a copyright or related right confers upon its owner is strictly limited to the territorial boundaries of the Member Stated where the right is granted" (B. Hugenholtz, 2006). The basis for this principle can be found in the Berne Convention.

Most collective rights management organizations derive their existence from rights granted or entrusted to them, by authors and producers. These rights are based on a national (territorial) basis. The somewhat fragmentary model according to which a cloud of collecting societies has been operating in the European Union does bring some benefits to both consumers and rights-holders. Hugenholtz's study has identified at least two territoriality-related positive effects: cultural diversity and economic efficiency. Cultural diversity is a consequence of collecting societies naturally protecting and promoting local authors and performers. Economic efficiency happens because territoriality makes it easier for right holders to define, and split up, markets along national borders, and set different prices and conditions for identical products or services in different Member States.

The Bern Convention is the basis of the territorial nature of copyright and related rights. Works or other subject matter are protected by a bundle of 27 sets of exclusive rights. If content related services are offered across the European Union, this will require licences from all right holders in all territories concerned.

For the scope of Satellite and Cable broadcast the problem of territoriality was solved in 1993. For broadcasting copyrighted content, only a licence in the country of origin of a satellite broadcast is needed.

The question arises whether the problem of territoriality can be solved for other types of copyright, the same way as it was solved for satellite broadcasting. Especially when we are dealing with new media, like internet (B. Hugenholtz, 2006). In the public debate on copyright harmonization, right holders play an important role. The country of origin approach as used in the Satellite and Cable directive as a solution for territoriality and internet is strongly opposed by right holders, they fear that Member States offer lower levels of copyright protection or enforcement, or some Member States will become 'copyright havens' for service providers at the expense of right holders.

1. Research

Although the laws of the Member States have been unified in specific areas, major fields have been left untouched or are only 'quasi-harmonized', making the quality of the Union's legislative product suspect and the administrative costs of the harmonization process enormous. Arguably, the law of copyright and related rights in the Member States of the EU would benefit from a renewed dedication on the part of the EU to the principles of subsidiarity and proportionality.

1.1. Research question

The primary objective of harmonization is removing barriers to the free movement of information goods and services. Although the seven harmonization directives have indeed smoothed out some of the disparities among the laws of the Member States, the ground rule that the geographic scope of the economic rights granted under the laws of the Member States coincides with their national borders has remained intact. As a consequence, even today content providers (e.g., an online music store) aiming their services at consumers across the EU are compelled to clear rights covering twenty-seven Member States. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States. As the European Commission notes in its Communication on Creative Content Online: "*as a result of copyright territoriality, a content service provider has to obtain the right to make content available in each Member State. The costs incurred, may be detrimental to the exploitation of a vast majority of European cultural works outside their national markets" (European Commission, 2009, p. 5.)*

This leads to the central question for this research:

How can the problem of territoriality in the field of copyright and related rights in the European Union be solved for content related services offered over the internet?

This central question cannot be answered directly. In order to give a proper answer, first a good understanding of copyright and related rights for content related services on the internet is needed. This leads to the first and second sub questions.

SQ 1: What is the variety of content related services on the Internet?

SQ 2: In what way does the territorial nature of copyright and related rights restrict content related services?

After having a good understanding of the problem different solutions can be looked at. This can be done by looking at similar policy fields where already has been dealt with the problem of territoriality, for example for satellite broadcasting. But there are also different policies of which can be thought of. A good way of getting an overview of policy options is by looking at others policies which deal with protection of certain rights. One could think of other forms of intellectual property, like patents and trademarks, but also of consumer protection. This leads to a third sub-question:

SQ 3: What are the options for solving the territoriality problem?

After looking at different policy options I will look at which option will be most favourable. It is likely that each solution will have its own strong and weak points. This leads to the final sub-question:

SQ 4: Which solution is most favourable?

1.2. Methodology

1.2.1. Research design

The research strategy used is a comparative policy study. This means that similar policy fields where harmonization is in a further stage, will be chosen, and taken as example for how it will work for solving the problem of territoriality. Next to this comparative part the results of a consultation, carried out by the European Commission will be used to get an overview of the stakeholder and expert opinions on different solutions.

1.2.2. Methods and data collection

The methods and techniques used for gathering, organizing and analyzing data for this research are predominantly qualitative ones. Typical for qualitative research is the use of different data sources and the emphasis on understanding of individuals, groups or situations, in this case policies. The use of a flexible research design which can still change during the research is part of its characteristics. Central to qualitative research is that a phenomenon preferably must be studied within its own context.

Often in qualitative research, data, and therefore the results and conclusions, are characterized as subjective. It is difficult for a qualitative study to repeat the same circumstances, because research is conducted on a location where many factors are not under control. Moreover, with the exception of pure experimental studies in a laboratory setting, this also applies, although to a lesser extent, to quantitative research. In the field of studies of international relations and political science it is difficult to do a study which is truly experimental in its design.

Validity and reliability of data and statements are typical quality criteria for quantitative research. But these concepts can still be used in qualitative research (Baarda, 2009). Some say that in the field of social research the validity of qualitative research can be stronger than that of quantitative. In conducting open interviews a better understanding can be achieved of what one means by a certain concept. The possibility for a researcher to go into depth of the meaning of concepts for quantitative research is less available than for qualitative research(Babbie, 2001). The problem of reliability in qualitative research is much bigger. In-depth research measurements are often very personal, and are strongly influenced by the reference-framework of the researcher. To limit the problem of reliability, it is important to worry for purely descriptive measurements.

In this study the analysis will be based on data, predominately collected submissions by authorities, stakeholder organizations and experts to the consultation about the Green Paper on the online distribution of audiovisual works in the European Union, and also on official government documents. Furthermore academic literature, news articles and reports from international organizations have been used.

1.2.3. Data

The most important source of data for this research is the consultation of the European Commission, on the Green Paper on the online distribution of audiovisual works in the European Union. This Green Paper was published in July 2011, which was followed by a consultation round. There were 14 contributions by public authorities, like national parliaments and governments, and 193

contributions by stakeholder organizations like broadcasters, collective rights management organizations, author's representation organizations and expert organizations.

Since the analysis of all these contributions would take too much time, a selection had to be made. There are different techniques on choosing a sample. Two possible sample techniques are the convenience sample and the judgement sample.

In the convenience sample the most accessible subjects are selected. This is of course an easy way and least costly in terms of money, time and effort. But it is also the worst technique (Marshall, 1996). Flick states that convenience sampling should be avoided, since this way of selecting is a threat to both internal as external validity (Flick, 2007). A convenience sample can be used in some cases, like early explorative studies, but even when used, other techniques of sampling should be used at a later stage of data collection, to improve the quality. A convenience sample can give useful insights, but it is not suitable for generalization (Babbie, 2001). Since the accessibility of the samples in the consultation are equal, this technique is not suitable, except for a first selection based on language. Contributions to public consultations can be answered in all official EU languages. Most contributions however, were in English, but some were in French, Italian, Finish, Spanish or Hungarian. Only contributions in English were used for this research.

The judgment sample is a widely used technique. It is also known as a purposive sample. In this case the sample is selected on the basis of knowledge of a population. A researcher can be interested in certain characteristics of the subjects (Babbie, 2001).

There are different forms of a judgment sample, depending on the purpose of the research. A researcher may choose for a broad range of subjects (maximum variation sample), subjects with specific experiences (key informant sample) or subjects who are outliers (critical case sample). Using this technique can help understand complex situations and give new insights. Sometimes subjects can also recommend useful potential candidates for study. This type of sample is called a snowball sample (Marshall, 1996).

A judgment sample is also not the best sample for generalizations. But it can be helpful in explaining for example deviant cases. It can thus provide insights which are hard to be gained trough random sampling.

Since the purpose of this research is not to get a general understanding of European integration, but rather to get a good understanding of possible policies for a certain problem, a judgement sample may very well be used for this research. The contributions were selected for the sample based on a diversity of organizations. Of course there are different types of stakeholders, but there is also a difference based on whether the contributions come from national organizations, European federations or international organizations. The sample used for this research tries to give a good overview of all these differences.

1.3. Outline of the research

This report follows the before mentioned sub questions. First an overview of the variety of content related services over the internet will be given in chapter 2. Some of the problems of territoriality will be illustrated in this chapter.

Chapter 3 deals with the question on how the territorial nature of copyright and related rights restricts content related services and which problems are faced. An overview of the steps taken at EU level will be discussed. In the end of this chapter a list of problems which have to be tackled is given. This list leads directly to possible solutions.

Chapter 4 gives an overview of possible solutions, and how these policy options will help in creating a solution. These solutions will be further discussed in chapter 5. The feasibility of the options is a first criterion which should be met. Also efficiency and effectiveness of the measures are important. In the second part of chapter 5 the remaining solutions will be discussed on basis of legitimacy. And long term views of the European Commission.

Chapter 6 finally tries to answer the central question and will give policy recommendations and ideas for further research.

2. The Scope of Content Related Services

When discussing content related services, a first step must be to get an understanding of what these services are. This chapter provides an answer to the first sub question: “What is the variety of content related services on the Internet?”

The internet and the development of digital technologies and convergence of several media provide possibilities of offering services concerning copyright protected works, like music, video and text documents. With the internet a new market for content related services has been created. A special characteristic of the internet is the easy cross-border nature it offers to service-providers.

When service-providers deal with copyright protected works, they face problems with different copyright regimes. The European market of digital content, as result of its legal, cultural and linguistic particularities, is highly fragmented. One could say that the internal market for digital content has not been completed yet. The issues to be overcome before completion is reached do not lie in the technical possibilities, but in legislation and regulations which impose multiple barriers to the internal market for services (European Parliament, 2011, p.6). In this chapter the variety of content related services on the internet will be explored.

From a technical point of view, the internet is without frontiers, but the online market is impeded by multiple barriers, which affect the internal market for services over Internet. This limits the development of and the access to pan-European services and content.

In this chapter, different types of services will be discussed. This overview will start with online stores, followed by audio-visual media services like video-on-demand. These services have different forms, but they have some common denominators. These two forms are mainly legal forms of content related services. Of course there are also forms where illegal use of content is possible, these services can usually be provided legally as well,examples of these forms are streaming, cloud computing and social networks. Only legal ways of distribution will be discussed, since dealing with illegal distribution of content related services is out of the scope of this research.

2.1. Legal content related services

Traditionally, creative content was created by players such as authors, producers and publishers. But the internet provides possibilities to new types of producers to distribute their own creative content. A distinction can be made between professionally produced content and user-created content. The European Commission defines user-created as “*content made publicly available through telecommunication networks, which reflects a certain amount of creative efforts, and is created outside of the professional practices” (Commission, 2009b).* The European Commission is aware of the challenge this distinction offers to the framework of regulating the copyright which should guarantee both the freedom of expression and an appropriate remuneration for professional creators.

Creative content providers offer their services in different ways. The most common ones will be discussed below. First there are the online stores. These are most similar to traditional service providers. Second the audio-visual media services providers will be discussed who offer on-demand services like interactive television. Third, there is streaming, which can be live or on demand. After

these forms of content related services, two more recent developments will be discussed, social networks and cloud computing.

2.1.1. Online stores

Consumers can buy copyright protected content such as music, films, videos and pictures in the form of electronic data files on the internet in online stores. These are digital stores, where consumers buy the content in a digital form, like mp3-files. For online stores where consumers buy content in the form of for example books and CD's different rules apply.

The market for digital content is highly fragmented, because of the territorial nature of copyright and related rights. One of the largest online stores at this moment is the iTunes stores. Example 1.1 illustrates the difficulties Apple has to deal with on the European market for creative digital content.

Example 2.1: iTunes stores

Apple offers music and audiovisual content via its iTunes stores online. Since December 2011 this service is available in all 27 EU member states. There is not just one store for the entire EU, the operation of the online stores is territorially limited. Consumers are not allowed to buy content from other iTunes stores, but the one of their own country of residence and all national stores have their own specific catalogues. The reason for this fragmentation of the European Market lies in territorial nature of copyright and related rights. Just like publishers of traditional musical and audiovisual works, iTunes must first obtain rights to sell the content in all 27 member states and cope with different national legal requirements. Because of the costs iTunes stores have to make for this, it will determine for each member state whether the benefits are likely to cover the costs of distributing the content (European Parliament, 2011).

At this moment iTunes offers musical works and books in all 27 member states, but it does not offer movies in Romania. Only in the United Kingdom, France and Germany iTunes Stores offer TV shows, and only in 9 member states it offers music videos. The reason for this is, as Apple stated during the European Commission's Online Commerce Roundtable: *"because many countries do not offer a large enough marketplace to justify the expense and effort required to sell in that country" (*DG COMP, 2008).

Of course there is no obligation for a service provider to offer the products in all member states, but the main reason why service providers don't sell in some member states is that the current legislation, with 27 different copyright regimes, alters transaction cost and forms a barrier to free trade.

2.1.2. Audiovisual media services

A distinction can be made between two types of Audi-visual media services. Firstly there are linear audiovisual media services. This means that the receiver has no influence on when a service is broadcasted. Examples of this are analogue and digital television and live streaming.

Secondly, there are non-linear audiovisual media services, of which Video-on-Demand (VoD) is the most common form. VoD "*covers a wide range of technologies, all of which allow the selection of rental- or remote purchase in a non-physical form- of video content for immediate or later viewing on various types of devices (computer, television, mobile players) for limited or unlimited periods of time*" (Parliament, 2011)

The market for VoD services is a rapidly growing one. The revenues in the EU increased from €644 million in 2008 to an expected €2.2 billion in 2013 (KEA, 2010).

There are large differences between member states in the level of services offered. Most VOD platforms operate on a territorial basis. Kea expects that EU rights holders could benefit from an international rights licensing infrastructure. An important characteristic of this infrastructure is a "*network of stakeholder-driven solutions rather than one ambitious top-down EU initia*tive". Such infrastructure should provide one-stop shopping solutions where possible.

2.1.3. Streaming

Streaming is a way of watching or listening to content like videos or music via a computer. With streaming the information is send directly to the computer or device, without the need to safe files on the hard disk of the user's computer. A life stream is available only once, while on demand streams are available for extended amounts of time. Examples of legal streaming websites are: YouTube, Spotify, and Dailymotion.

Of course the stream providers have to acquire the rights to provide the content legally to consumers. Some of these services are available only on subscription or after purchase, but many are for free. Example 1.2 shows hoe YouTube deals with copyright protected content.

Example 2.2: YouTube

YouTube is a video-sharing website. Users can upload and view videos. Users can also upload videos of which the copyright is not owned by the user, but for example publishers. In 2006 YouTube concluded agreements with Universal Music Group, Sony BMG Music Entertainment and CBS, for the use of copyright protected content, though specific revenue deals between YouTube and these companies. These deals made it possible to use this content worldwide. If infringements of copyright are found on YouTube, the unauthorised video can be muted or blocked, either in some countries or worldwide. In theory, this could mean that content can be blocked in some Member States, while the video will still be available in other Member States (European Parliament, 2010).

Other service providers have similar deals with the copyright owners or the collective rights management organizations. Some providers, however, have blocked content for some member states.

Peer-to-peer (P2P) are networks which connect individual computers across the Internet and, thanks to specific file sharing protocols, allow users to exchange files. P2P networks have been developed to allow quick and efficient information sharing and data exchange in a professional context (i.e. sharing files which cannot be sent by email). However, these networks can also be used by users and

consumers to participate in the unauthorised sharing of a wide variety of digital content, including the distribution of live broadcasts of sport events. The most well known P2P websites today are BitTorrent, eDonkey or Gnutella.

Megaupload and RapidShare are popular cloud-based file-sharing and storage services, offering distance storage space, which allows for unauthorised direct downloading. Such websites are often used to store movies which are still protected by copyright. Once the content has been uploaded by a user, any other user can download it from anywhere as long as he got the access link to the file. Today, specialised search engines exist to find links to such specific content, for example FilesTube or DDL Search. Free of charge access to these websites is possible but with limited applications and services. Premium subscriptions allow users to benefit from fast downloading or simultaneous downloading.

Megavideo and Allostreaming are unauthorised streaming websites as they did not legally acquire the rights to give access to the content they put on offer. Such websites are free of charge but in order to benefit fully (transfer speed) a subscription is required.

2.1.4. Cloud computing and Social networks

The importance of cloud computing is growing. Cloud computing allows users to employ a variety of protocols, applications, and transmission technologies to store data to and to harness the processing power of remote servers, often controlled by third-party providers. The "cloud" enables Internet users to store, disseminate and share content with other Internet users. Such services are used by any businesses today because cloud computing is an affordable, flexible and mobile solution: IT-providers host services of many companies, which reduces costs and the access to content is possible from anywhere at any time. Most computer and Internet users currently use methods of cloud computing on a daily basis in their activities.

Many internet users are members of social networks such as Facebook, MySpace, Twitter or YouTube. Social networks have become the primary means of communication among many individuals, in particular the young generation, who can share and exchange information in a simple way. However, most users may be unaware of potential copyright issues related to their posting of copyright protected works, such as a video or a music clip on their personal space online. Once online, it must be assumed that such works are available to all parties, both in an intended and unintended way.

2.2. Conclusion

The market for online creative content is a various, but highly integrated one. There are different ways content providers can offer their services online. Most comparable with traditional ways of offering services are online stores. Here consumers can buy digital content like mp3-files and videos in a similar way as they can buy CD’s and DVD’s in normal shops. Consumers buy in this case the files and they can use them again and again. To offer these products, the online stores have to get licences. These licences give them the right to sell content legally for a certain territory.

Another way of offering services is by Video-on-Demand or by streaming. In this case a consumer does not actually get the files, but can access the files for a specific time or pay per view. Some providers offer this content for free, as YouTube does for example. Also for these types of services, providers need to obtain licences before they can offer the services.

For these types of services the use of content can be easily territorial limited. Otherwise for new developments like cloud-computing, peer-to-peer networks and social media the use of territorial limited services are more difficult. New ways of dealing with such developments should be found, in order to get remuneration for the copyright owners.

3. . Territoriality and content related services.

This chapter focuses on the territoriality problem with which content providers have to deal when offering creative services. The question which will be addressed is: *In what way does the territorial nature of copyright and related rights restrict content related services?*

The European Court of Justice (ECJ) and the EU legislature have tackled the problem of territoriality for the distribution of physical goods by establishing a rule of Community exhaustion for goods. This rule of exhaustion means that with the legal first sale of each single copy of a product, protected by copyright, this right, with respect to further distribution of the copy, is exhausted. Once the owner of a copyright has first sold a copy of his protected product, he loses his control over the further vicissitudes of this copy on the market. For EU policies in respect to online services this rule of exhaustion does not apply and the territorial nature of rights of communication to the public are left intact. Even the Commission's Online Music Recommendation, which purports to promote a pan-European market for online music delivery services, does not question the territorial nature of copyright and related rights as such.

Nevertheless, in the long run the EU must confront the problem of territoriality in a more fundamental way. This chapter will first examine how the European Union has dealt with the problem of territorially in the single market. Strategies so far have included the introduction of the exhaustion doctrine, the use of competition law and a largely failed experiment to overcome territoriality by way of introducing country of origin rule for satellite broadcasting.

The most important directive which deals with copyright and content related services is the Information Society Directive. In the next paragraph the objectives of this directive will be explained. In the second paragraph the green paper and communication on copyright in the knowledge economy will be discussed.

The current discussion in the European Union focuses on the Green Paper on the online distribution of audiovisual works. This Green Paper was published in 2011 and it raised a number of questions related to copyright and the use of protected (audiovisual) content online. The reactions to this consultation give a good overview of the problems that ought to be dealt with, in order to widen the opportunities for the online distribution of content.

In the last two sections of this chapter the competition law and WIPO treaties are being discussed since they are also playing a significant role in dealing with.

3.1. Directive on the harmonisation of certain aspects of copyright and related rights in the information society

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society entered into force on 22 June 2001. The objectives of the Directive were twofold: first, it aimed at the adaption of legislation on copyright and related rights to reflect technological developments, the second goal was to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996

Although the harmonisation of exclusive rights in the digital networked environment was high on the agenda of the European Union, until the adoption of the Information Society Directive, only limited harmonisation of copyright and related rights had taken place. True harmonization is yet to be achieved and most likely on a horizontal basis. The directive was strongly influenced by the Green Paper of 1995. A Green Paper is a discussion document, which should guide and stimulate public discussion and consultation of the European Commission on a particular topic. A Green Paper is one of the early steps in the legislation process, it can be followed by a White Paper, which are proposals for European Union Action, or the Commission will propose new legislation. In the Green Paper of 1995 much attention was paid to the need to harmonise the existing rights of reproduction and communication to the public. The Green Paper also examined the possibility to introduce a right of "digital dissemination or transmission right", as well as a "digital broadcasting right".

Through the adoption of the Information Society Directive the European legislator pursued several objectives in the area of rights and limitations among which was the creation of a harmonised legal framework that was consistent with international norms, which would provide legal certainty to market players, would be sustainable and would preserve an equilibrium between protecting the rights of rights holders and the freedoms of users. Let us now examine whether the implementation of the Information Society Directive has yielded the expected results (Guibault, 2007).The question of territoriality despite EU efforts to create an Internal Market will also be considered.

Exclusive rights are still drawn along national borders and participants were asked if this was a matter for the European lawmaker to address in the interest of promoting new business models. Content providers and users expressed their enthusiasm for Community-wide licensing which also extended to the idea of a European copyright. A European licence for Internet and mobile services would facilitate the emergence of innovative business models as diverging local laws were found to hinder effective cross-border licensing. Cultural differences in copyright such as different regimes governing the private copy exception from country to country were cited as obstacles to be overcome. On the other hand, some participants stressed the importance of protecting cultural diversity, as reflected in copyright system drawn along national borderlines.

It was questioned whether such a unified copyright regime made sense, since it is doubtful it would really change corporations' commercial practices of exploiting intellectual property on a territorial basis. Others insisted that a European copyright would enhance the provision of cross border services, while the remuneration would vary from country to country. Lastly, it was argued a unified European copyright regime would not solve all complications as many legal aspects relevant to the provision of content-based services would remain in the realm of national law, such as fiscal matters. Also, though not averse to the idea of a unified regime, one participant preferred the status quo to a European regime that may turn out to be detrimental to consumers (Guibault L., 2007).

3.2. Copyright in the Knowledge Economy

In 2008 the European Commission published its Green Paper on Copyright in the Knowledge Society (Commission, 2008). This Green Paper deals with exceptions to exclusive rights. Issues concerning the limitations of content use in libraries and archives, teaching and research and for persons with disabilities in the era of digital spread. But it also raised questions concerning orphan works and user-created content.

The results of the consultation on the Green Paper on showed different views. Libraries, achieves and universities favour a more accommodating copyright system, which is in the public interest. On the other hand, Publishers, collecting societies and other rights holders focus more on licensing agreements (Commission, 2009a).

The focus of the Green Paper and the Communication which followed is not on the use of copyright protected materials and content related services on the internet, focussed on the possibilities to spread knowledge. One of the actions to be taken, resulting from the consultation, was aimed at improving the open access to publicly-funded research results. The way by which universities acquire usage rights to scientific journals is fragmented. This means that licensing of such works will be harmonised.

3.3. Green Paper on the online distribution of audiovisual works.

In 2011 the European Commission published its Green Paper on the online distribution of audiovisual works. The Green Paper on the online distribution of audiovisual works assesses the extent to which there are problems for the online distribution of audiovisual media services. But it also deals with audiovisual rights holders' remuneration for the online use of their works and with certain special uses of audiovisual works and beneficiaries of exceptions.

The framework of the cross-border transmission and reception of broadcasting services across the EU is two-folded at this moment. The Audiovisual Media Services Directive formulates the principle of freedom to transmit and receive TV programs in the EU. Next to this, the 1993 Satellite and Cable Directive (93/83/EC) attempts to simplify the clearing of copyright and related rights for cross-border satellite broadcasting and cable retransmission services. Currently there is no legal instrument which addresses this clearing of copyright and related rights for cross-border on-line services (Commission, 2011a).

Recently the ECJ reaffirmed, in its Premier League-ruling[1], that national legislation, which prohibits the import, sale and use of foreign decoding devices is contrary to the freedom to provide services and thus cannot be justified. This means that service providers who have obtained the broadcasting, reproduction and the making available rights in one member state, can in some situations provide these services in another member state, without obtaining the rights for the second member state as well(Commission, 2011a). The implications of this ruling are not clear yet, but could affect business models for online distribution of copyright protected content.

The Premier League-ruling however, deals with satellite broadcasting and not with online audiovisual services. The Satellite and Cable directive only applies to “the simultaneous, unaltered and unabridged retransmission by a cable or microwave system of an initial transmission from another Member State” Art1 (3)(Union, 2011).

For VoD services the member states themselves can regulate the distribution of audiovisual works, which means that they are licensed on a national basis.

The focus of this Green Paper on the online distribution of audiovisual works lies on rights clearance of audiovisual works. The European Commission wants to create a European framework for online

[1] Cases C-403/08 and C-429/08 Football Association Premier League and Others v QC Leisure and Others Karen Murphy v Media Protection Services Ltd

copyright licensing of multi-territorial and pan-European services(Commission, 2011b). The most important questions the European Commission puts forward in the context of territoriality are:

1. "What are the main legal and other obstacles – copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities? (question 1)
2. What practical problems arise for audiovisual media services providers in the context of clearing rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses? (question 2)
3. Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment? (question 3)
4. How will further technological developments (e.g. cloud computing) impact upon the distribution of audiovisual content, including the delivery of content to multiple devices and customers' ability to access content regardless of their location? (question 8)
5. What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code? (question 13)
6. What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights? (question 14)"(Commission, 2011a).

These questions show that the European Commission is aware of problems concerning territoriality and providing content related services.

3.4. Results of consultations on Green Paper on the online distribution of audiovisual Works

The call of the European Commission to answer the questions formulated in the Green Paper raised a response of 225 organizations, public authorities and citizens. The reactions in the group of citizens were often of low quality and the background of these citizens is often not known. Therefore these reactions will not be used. More interesting are the reactions of the public authorities and (stakeholder-) organizations. In this paragraph will be dealt with the problems these authorities and organizations see with the territorial nature. Some authorities and organizations also came up with solutions how to solve these issues; next chapter will deal with these.

The responses public authorities' which will be dealt with here came from the Danish Government, the Dutch Government, the Estonian Government, the Government of Cyprus, the Hungarian Government, the Ministry of Culture of the Slovak Republic, the Swedish Government, the Swedish Parliament and the UK Government. These responses were the only ones submitted in English.The problems these authorities mentioned are:

1. *Territorial nature of licences*

The most obvious obstacle for the cross-border distribution of audiovisual works are the different national regulations concerning copyright (Slovak, 2011). For use of copyright protected works in more member states, the service provider has to obtain authorisation and licences from the

representatives of rights holders in each state. This is a complicated and time-consuming way of dealing with legal content (Estonia, 2011; Hungary, 2011; Sweden, 2011).

Rights holders who try to introduce new music services across multiple territories face problems and difficulties with licensing, which lead to increased transaction costs and unnecessarily high barriers to entry (UK, 2011).

The Swedish government states that the national copyright frameworks as they currently stand, do not pose an obstacle to rights clearance. The country-of-origin principle for satellite broadcasts did not lead to the development of Pan-European services. Instead, much of the services are language based and show a broad cultural diversity. The Swedish government warns for a system of compulsory European licences. Such a system could eliminate parties from smaller member states and result in a situation with only a limited number of dominant parties. This will harm the cultural diversity within the European Union Instead a flexible and transparent system is needed, in such a system it would be possible to obtain a licence for the whole single market, but also for just one or several member states (Sweden, 2011).

Cyprus focuses in its response on the institutional infrastructure. There is a lack of coordination between the copyright authorities in the member states. A new European framework should be developed, which should contain a technical an practical control system for the protection of rights holders (Cyprus, 2011). This means that a future system of licensing can still be territorial based.

The Estonian Government points towards an issue which occurs in smaller member states. Due to high transaction costs it is more expensive for service providers in these member states to obtain the rights for distribution. This leads to scarcity of legal content offered (Estonia, 2011). Furthermore, Estonia states that a copyright system based on territoriality is not appropriate for online use. The European Union should work towards a system of cross-border licensing, even if the nature of copyrights were to stay territorial.

2. *Rights owner and clearance*

For musical works the collective rights management societies own the exploitation rights, and therefore they are entitled to grant licences. These licences are granted on a national basis. For audiovisual works the situation is more complex. In practice the exploitation rights in all member states are owned entirely by the producer. The problem in this situation is that the rights of the use of the sound-track are owned by the collective rights management societies, which grant only national based licences and the other rights of the audiovisual work are owned by the producer, who could grant a pan-European licence (Netherlands, 2011). The UK would welcome a simplification of the rights clearance system as well, since the technological changes over the past two decades have speeded-up and increased the volumes of copyright protected content used over the internet. A system of rights clearance is needed to deal with this (UK, 2011). The UK points to the possibility of the emergence of new business models that fit for the digital age and the development of new products and services.

For a system of pan-European or multi-territorial licences it should be assesses to what extent multi-territorial licensing, when for example it only covers one or two language versions, would involve rights covering each country and the language versions for the given countries (Hungary, 2011).

Many of the authorities support the Commission's goal to simplify cross-border clearance and the licensing of copyrights (Danmark, 2011; P. o. Sweden, 2011). But they also say that the regulation at EU level should not lead to unnecessary rules which restrict the possibilities for service providers.

It is difficult to trace right owners in cases of infringement of copyright. In a multi-territory situation this can become even more difficult for a provider to follow, trace down and give additional information on copyright violation (Cyprus, 2011).

The current system focuses much on the protection of interests of rights holders and neglects thereby the interests and the rights of users in the opinion of the Estonian government. The conditions should contribute to the creation and growth of new business models(Estonia, 2011).

3. Collective rights management

Collective rights management societies are organizations which licence the use of copyright protected content on behalf of the rights owners. The way in which the Collective rights management societies are organized differs in each member state. In some member states the scope of rights they manage is large, in other member states there are many small societies. It may also be the case that a certain category of creators is represented by a society in one member states, while in another it is not represented at all. This situation makes it unclear for service providers to deal with licences, and they can be confronted with an unexpected claim from a foreign country (Netherlands, 2011).

The supervision on the collective rights management societies is another problem. This supervision is regulated on a national level. The Dutch government suggests that all collective rights management societies should comply with a set of criteria on transparency in setting fees and management costs. This should result in a situation in which a user has a clear overview of the licensing system(Netherlands, 2011). A known complaint about audiovisual services is that the content licensing fees are excessively high (Hungary, 2011). The European Commission has announced a proposal for a directive to improve the collective management of copyright by means of greater transparency and better management of collective copyright management societies.

4. Central database

There is no database of rights holders of audiovisual works. Such a database could help in rights clearance. Several major US film studios are currently working on a global rights database, known as the Entertainment Identifier Registry, and audiovisual producers are working on the International Standard Audiovisual Number (ISAN). This ISAN is similar to the International Standard Book Number (ISBN), but at this moment participation in ISAN is still on a voluntary basis and the standard does not yet contain all necessary information (Netherlands, 2011). These types of databases could create better preconditions for the cross-border management of copyrights. The government of the Slovak Republic suggests a synoptic database for the EU, containing an exhaustive repertoire of works, including the given right holders (Slovak, 2011).

5. Cloud computing

Technological developments like cloud computing, will promote the distribution of audiovisual content. Users want to be able to use content on multiple devices and regardless of the place they are at a certain moment (Cyprus, 2011). It also promotes non-linear use of content(Hungary, 2011).

A problem which increases with the possibilities of cloud computing is the unauthorised upload and download of protected content. The responsibilities for copyright infringement is difficult, due to the fact that monitoring the use of it is virtually impossible.

Technological developments go fast. In the current regulatory system each new type of digital media and technology is treated as a completely new method of use of works, but often it is just designed for use on different types of devices(Estonia, 2011). Therefore, Estonia pleads for technology neutrality, which should make it easier for service providers to offer services for new technology.

The authorities see a lot of potential in audiovisual services on the internet. New business models can be developed and more services can be offered. Especially the smaller member states focus on the protection of cultural diversity. But also opening the markets of these smaller member states for content from other member states and from outside the EU, by reducing transaction costs.

3.5. Competition Law

Less structural, but sometimes effective nonetheless, are the remedies found in the competition law, of the EU, against the exercise of intellectual property rights along national borders that might result in the obstacles to and partitioning of the internal market (Articles 81 and 82 EC Treaty). The European Courts and the European Commission have ruled in many cases and produced case law on this issue, applying both Articles 81 (anti-trust) and 82 (abuse of a dominant position). With regard to the former article, the Court has held in the Coditel II case "*that a contract providing for an exclusive right to exhibit a film for a specified time in the territory of any Member State may well be in violation of that provision if it has as its object or effect the restriction of film distribution or the distortion of competition on the cinematographic market*". In Tierce´ Ladbroke the Court of First Instance (CFI) ruled that an agreement by which two or more undertakings commit them to refusing to third parties a licence to exploit televised pictures and sound commentaries of horse races within one Member State: "*may have the effect of restricting potential competition on the relevant market, since it deprives each of the contracting parties of its freedom to contract directly with a third party and granting it a licence to exploit its intellectual property rights and thus to enter into competition with the other contracting parties on the relevant market*" (Eechoud, 2009).

3.6. WIPO treaties

The World Intellectual Property Organization (WIPO) is the United Nations agency which deals with the use of intellectual property (IP). One of the goals of this organization is to develop an international legal framework for the use of IP. Since copyright and related rights are a form of IP, WIPO is the international organization dealing with this subject.

It is a well-established principle that copyright is territorial in nature, that is, that protection under a given copyright law is available only in the country where that law applies. In the mid-nineteenth century bilateral agreements between European countries were concluded to protect works which are used out of the country of origin. The first international agreement for the protection of copyrights was concluded and adopted on September 9, 1886, in Berne, Switzerland: the Berne

Convention for the Protection of Literary and Artistic Works. With this convention, the Bern Union was formed, which ensured that copyright was recognized and protected in all member states of the convention (WIPO, 2005).The convention provides minimum standards for the protection of copyright.

3.7. Conclusion

Copyright regulation in the EU is based on traditional media, such as books, CD's, DVD's and linear transmission via cable and satellite. There is awareness of the technological changes and opportunities.

In the current system copyright is for a large extend regulated at national level. This results in a situation in which there are 27 different systems of licensing, collective rights management and clearance of fees. Service providers, who want to offer their services in different member states, need to get licences in each member state separately. This means higher trans-action costs. Especially for smaller member states this can mean that fewer services can be offered.

A fist problem which has to be tackled is the licensing system. This system has to become a flexible system, which should make pan-European licences possible. But in some of the reactions to the Green Paper on the online distribution of audiovisual works it was stated that not all service providers want to offer their services in all member states. This can be the case with audiovisual works in a specific language, the market for these works is often limited to member states in which this language is spoken. Therefore a licensing system should make it also possible to grant licence for cross-border distribution in just a limited number of member states.

A second problem is the situation with rights clearance. Rights clearance is important for the rights owners. Since each member state has its own system of rights clearance this should be more transparent. At this moment it is very difficult for users, because they have to pay fees in different member states to different organizations. The ownership of the rights is also organized in a different way in each organization.

Collective rights management organizations licence content on behalf of the creators. The way in which these organizations are organized differs also between the member states. Often these societies lack transparency and fees are high. A system in which societies are organized in a similar way and proper supervision can be organized is needed to improve the possibilities for cross-border content related services.

A Central database can be of great use for easy identification of rights holders of audiovisual works. At this moment several organizations try to set-up such a database. The best solution for this would be a global system which contains all necessary information.

The European single market is a diverse market. Especially when dealing with creative content, this often has a cultural dimension. Cultural diversity is also something the European Union wants to promote. In a system of such products one cannot always speak of a single market. The market for Hungarian movies is often limited to Hungary. Therefore the harmonisation of copyright for online use should not only focus on the creation of one single market, but also keep in mind that Europe has to deal with a huge cultural diversity.

Cloud computing is rapidly growing technological development. One of its characteristics is that users can use their content on multiple devices, but also in multiple countries. For dealing with copyright it is important that rights can be cleared, but at the same time that users don't have to deal with this when they want to use the content on different devices and on different locations.

4. Policy options

In the previous chapter a number of practical problems with copyright and the online use of copyright protected content were identified. In this chapter options will be discussed to tackle these problems. This will lead to the answer of the third sub-question: *What are options for solving the territoriality problem?*

First the options for a cross-border licensing system will be discussed. Possible options for this are a pan-European licence, or a more flexible licensing system with the possibility of multi-territorial licensing. The next paragraph will deal with the organizations of collective rights management in Europe, followed by a section which deals with rights clearance. In this section the possibility of a "country of origin rule", similar to the one introduced by the Cable and Satellite directive, will be discussed, as well as the option of extended collective licensing.

In some comments about the Green Paper on the online distribution of audiovisual works in the European Union the need for a central database of audiovisual works was mentioned. The form of such a database will be discussed shortly.

The official motto of the European Union is "Unity in Diversity". In creative content this diversity manifests itself in the European Union. Some contributions to the consultation about the Green Paper called for a copyright regime in the EU which does not restrict but embraces this cultural diversity. The demands for such a characteristic of policy will be discussed in the fifth section.

The internet is a great challenge for policy makers. New technological developments ask for a flexible regulatory framework. New developments like cloud computing should fit in such a framework. This will be discusses in the sixth section of this chapter

4.1. Cross-border Licensing system

Many possible solutions to the rights clearance and licensing issue have been suggested. Among the options available are the introduction of an exception or of statutory licence, mandatory collective licensing, a legal presumption of representation and contracts with indemnity clauses. An exception would mean that a work in certain, pre-defined cases, could be used without the prior permission from the right holder. Such a rule could lead to a situation whereby a rights owner does not receive remuneration.
With a statutory licence, a work can be used whereby remuneration is paid to the right holder, the level of which is decided by a government body or authority. Under a system of mandatory collective licensing it is defined by law that right owners can exercise their rights only through a collective management organization (CMO), in such system there is no possibility for individual claims or prohibitions. In a system based on a legal presumption, it is presumed by law that a CMO has a general authorization to represent the right holders in a given field. Finally, in a system based on contracts with compensation clauses, the CMO assumes the financial liability for any claim made by a copyright owner who is not represented by the CMO (J. Axhamn, 2011).

In this section different cross-border licensing systems will be discussed. One of the often called options is the extension of the country of origin rule for the Cable and Satellite directive (section 4.1.1). But also systems like pan-European and multi-territorial licensing (section 4.1.2), and extended collective licensing (section 4.1.3) will be discussed.

4.1.1. Country of origin rule

Copyright and related rights are regulated at national level for a large extend. The only structural solution to the territorial nature of copyright and the clearance of rights can be found in the Satellite and Cable Directive (Directive 93/83/EEC). This directive deals with the he coordination of certain rules concerning copyright and rights related to copyright applicable to satellite and cable retransmission. This directive introduced a country of origin rule. This rule means that rights have to be cleared only in the country from which the content is transmitted to the satellite. Before this directive was introduced, a broadcaster who wanted to broadcast a certain audiovisual work, required licences from all right holders in the countries of reception, meaning the 'footprint' of the satellite. The Directive meant lower transaction costs for the service providers on the satellite broadcast market and the creation, in theory, of a European market for satellite broadcasting (B. Hugenholtz, 2006).

The extension of the country of origin principle to online services of audiovisual content has been discussed as a possible legislative way forward in the Reflection Document (Commission, 2009b). The object was to stimulate the circulation of audiovisual content in the EU. This "*could imply that once an online service is licensed in one EU territory […] then this licence would cover all Community territories.*"

There are several considerations that need to be taken into account when considering the option of adapting the country of origin principle to online services.

First, if providers can choose a regime they can and probably will choose for the member state with the lowest remuneration and lowest costs for service providers. This will result in a race to the bottom. Therefore rights holders need to be assured of equal protection of, and remuneration of their rights in all member states.

Second, it should be taken into account that there remain several legal and technical difficulties linked to the differences between satellite and online transmission. Satellite transmission requires the right of communication to the public. Online services also require the acquisition the reproduction right, which makes the application far more complex than for satellite transmission.

Finally and more importantly, there are serious doubts on whether the extension of the country of origin principle to online services would result in the desired creation of the internal market for online services. After all, the satellite and cable directive has not achieved this aim in satellite broadcasting. It is highly unlikely that merely establishing the law applicable to rights acquisition will be sufficient to create a digital single market (KEA, 2010).

4.1.2. Pan-European or multi-territorial licensing

The territorial nature of copyright in itself does not prevent or impede multi-territorial licensing. Even under existing law, rights holders can already determine the scope of the licences they grant. Therefore it is possible to grand licences for multiple member states at once, but also on local, pan-European or even international scale. (ICMP, 2011)

The possibility of a licence for the whole single market can lower transaction costs for users of content. The Swedish government sees this as a necessary option for a flexible and transparent system (Sweden, 2011).

European collecting societies have tried to conclude cross-border reciprocal representation agreements. These agreements deal with the collective management of the licensing and enable each collecting society to offer on its domestic territory the works of all the authors, represented by the other collecting societies which participate in the agreements (Guibault, 2005).

The licensing process in audiovisual is different and less complex than in music. This is the case because commercial users of audiovisual works usually have to negotiate with only one party which concentrates all the commercial exploitation rights of a film: the producer. In most cases, audiovisual producers can therefore decide for example whether to licence on a territorial or on an international basis. This allows them to maximise revenues on behalf of the entire creative value chain (film directors, screen writers, actors, etc.).

Audiovisual producers have little history of mandating collective rights management organizations with the management of their rights. This is caused by the fact that film producers usually negotiate fewer transactions (KEA, 2010).

4.1.3. Extended collective licensing

The Nordic countries (Sweden, Norway, Finland, Denmark and Iceland) have a background in cooperation in the field of copyright legislation. In the beginning of the 1960s the first extended collective licensing (ECL) schemes were introduced. These schemes aimed at decreasing the transaction costs associated with the licensing and identification of each right holder to each work protected by copyright. The first ECL acts focused primarily on the broadcasting of music. The broadcasting organizations had collective agreements with national collective rights management organizations (CMO), but not all authors are member of these CMOs.

The essential component of the ECL model is that an agreement between the CMO and the broadcasting organization conferred the right to broadcast a published work, also for works from authors who are not represented directly by the CMO. The author was given a right to remuneration (J. Axhamn, 2011). The definition Axhamn uses for ECL is: "*extension effect of a collective agreement beween a represeantative CMO and a user, principle of equal treatment, right to claim individual remuneration, a possibility to opt out, and provisions on mediation*".

4.1.3.1. ECL experiences from the Nordic countries

In the early period of ECL it dealt only with musical works. Later the ECL model was extended to other types of work, such as photocopying for educational purposes, reprography, simultaneous cable retransmission of radio and television programs and recording of radio and television broadcast for educational purposes (J. Axhamn, 2011; KEA, 2010).

4.1.3.2. ECL for the European Union

In its reaction to the Green Paper on the online distribution of audiovisual works in the European Union the Swedish government states: "*it is essential that the measures taken do not complicate the situation for those operational rights-clearance systems that have been developed at national level. In Sweden, just as in the other Nordic countries, there is a well-developed system for the mass*

management of rights, in the form of extended collective licences. The extended collective licence system has the potential to simplify the rights-clearance process also in the digital environment. The system operates well and is appreciated by both rights-holders and users. It is therefore of the utmost importance to Sweden that the collective-licence system be maintained and developed further" (Sweden, 2011).

Fitting the ECL model to the needs of online content providers would include the general features of the ECL model that are common to all ECL provisions and that form the core of the ECL model. This means an extension of a collective agreement between a CMO and users to creators which are not directly represented by the CMO (J. Axhamn, 2011).

4.2. Organization of collective rights management

The organization of collective rights management usually administers monitors, collects and distributes the payment of royalties for an entire group of rights holders. They can do this on the basis of the national law of its territory, with respect to that territory.

CMOs can do this in the area of music, literary and dramatic works as well as audiovisual works, productions and performances for activities such as communication to the public and cable retransmission of broadcasting programs, mechanical reproductions, reprography, public lending, artist's resale right, private copying or certain educational uses. Most of these organizations are member of a network of interlocking agreements, by which rights are cross-licensed between societies in different member states.

CMOs play an important role in the licensing of certain rights in so far as they provide access to a global catalogue of rights. CMOs can function in this respect as a one-stop-shop of licensing. "*Collective management also allows particular rights holders, whether corporate or not, within a less lucrative or niche market and those who do not dispose of sufficient bargaining power, to manage their rights efficiently. From this perspective, collecting societies carry the joint social responsibility of rights holders to make sure that all of them benefit from their intellectual property rights at a reasonable cost"* (Commission, 2004a)

The way in which the CMOs are organized in different member states varies. Due to a lack of transparency it is unclear how rights holders get remuneration. The differences between the member states make it difficult to get multi-territorial licences.

4.3. Central database

As stated in the previous chapter, there is no single database of rights holders of audiovisual works. Such a database would make it easier to identify rights owners. For books and book-like products the International Standard Book Number (ISBN) is used. The ISBN is used worldwide, and is recognized by the International Standardisation Organization (ISO). The International Standard Audiovisual Number (ISAN), which is also recognized by ISO "identifies an audiovisual work throughout its life and is intended for use wherever precise and unique identification of an audiovisual work would be desirable" (ISO, 2012).

A central database is an economic instrument, designed to simplify transaction traffic between partners. It has a defined structure according to international agreements. It can identify a work by one or more authors, but it could also identify a certain edition of a work

4.4. Cloud computing

The development of cloud computing services for creative content can bring new challenges for copyright protection and licensing. The convergence of technologies is likely to increase the range content related services. Consumers want to access content everywhere and from different platforms. This asks for a licensing system that is not territorial or otherwise based on global licenses. Hargreaves expects that technological development will make it possible to monitor the use of content in the future: "*Improvements in machine to machine learning, for example, may create the possibility for further automation in transfer of content. Interactions may therefore become implicitly as well as explicitly monitored and measured. This data will form new and valuable content to be traded within and between systems in the delivery of new services"* (Hargreaves, 2011) .

The development of new technologies stresses the importance of a flexible system for licensing content. The demands for services will continue to change. A strict regulatory framework won't fit for this.

4.5. Harmonisation of other forms of intellectual property

Other forms of intellectual property have been harmonized to a certain level. Examples of these are patents and trademarks and designs. Such harmonisations could give some ideas on how to deal with territoriality for copyright and related rights.

4.5.1. Patents and trademarks

For the creation of a unitary patent, the use of the enhanced cooperation procedure was proposed by twelve Member States in December 2010.In early 2011, twenty-five member states have requested to the European Commission to participate. Only Spain and Italy remained outside the enhanced cooperation process. These member states have concerns over translation issues. On 15 February, the European Parliament approved the use of this procedure, followed in March 2011 by the Council.

Since 1996 trademark can be registered for the entire territory of the European Union via the Office for Harmonization in the Internal Market (OHIM) in Alicante, Spain.

There are some differences in the nature of copyright and patents and trademarks. Whereas Community trademark and patents can to a certain extent coexist with national titles. Trademarks and patents require an affirmative act of deposit and subsequent registration, a similar coexistence would be hard to imagine for copyright. With trademarks and designs, companies are offered a choice between relative cheap protection at national level or more expensive, but extensive, EU-wide coverage.

Copyright and related rights, by contrast, are granted by law. There is no need for registration. Each creation of a work would automatically be protected by a national right and a Community right in the same subject matter. If national rights would continue to survive side by side with Community rights, the existing obstacles to the free flow of goods and services would therefore remain.

Effectively, providers of content related services would be even worse off. The introduction of a Community copyright would create another layer of rights to be cleared. In sum, a Community Copyright would make sense only if it replaces national copyrights (Eechoud, 2009).

4.6. Conclusions

In this chapter different policy options for dealing with territoriality are identified and discussed. To tackle the identified problems, three different categories of options, are suggested.

- The first category deals with solutions for a cross-border licensing system. Within this category three different options are viable.
  The first possibility is the extension of the country of origin rule, as it is used in the cable and satellite directive. By this way service providers only need to get a licence in one member state.

  The second possibility is the pan-European or multi territorial licences. In such a system licences for the whole European Union or multiple states at once will be awarded to service providers. This will result in lower transaction costs.

  The third possibility is extended collective licensing. This is a way in which a collective management organization has the possibility to licence works from other authors, than it officially represents. The ECL is a self-regulating system, without government interference.
- The second category of policy options deals with the organization of collective rights management. Different systems of collective rights management in different member states result in high transaction costs.

- The third policy options category looks at the possibilities of a central database for copyright protected works. Such possibilities do already exist, but it is on voluntary basis.

In the last section of this chapter the harmonization of other forms of intellectual property is used as an example. The harmonization of patents and trademarks is in a further stage than the harmonization of copyright. The main difference between patents and trademarks and copyright is that an author is rights holder starting at the moment of creation, patents and trademarks have to be registered before the holder can claim its entitlements. Therefore the problem of territoriality does not lie with the registration procedure, like it did with the patens harmonization.

5. Choosing a solution

After selecting different policy options as a solution for the considered problems with territoriality for online use of copyright protected content, in this chapter I will propose the *most favourable solution*. Consequently, this chapter will answer the fourth sub-question.

Before selecting the best solutions criteria, on which the selection is based have to be chosen. The first criterion for selection of the options is the effectiveness and efficiency of the suggested solutions. Important in this part are the opinions of different stakeholders and experts. A selection of contributions to the public consultation to the Green Paper on the online distribution of audio-visual works in the European Union is used for this part.

After this first selection round the remaining solutions will be judged on the legitimacy, since all European Union policies need a legal basis in the treaties. For some solutions new competences may be needed. In such cases also the opinions of the member states need to be taken into account.

The third step is to go back to the long-term views of the European Commission, as formulated in earlier Communications, Green Papers and White Papers.

In the end decisions will have to be made at political level. A political decision cannot be made solely based on economic or legal arguments. Also normative issues need to be taken into account. The fourth section of this chapter will look at some of the normative issues, raised by the contributions to the public consultation on the Green Paper.

5.1. Feasibility stakeholders

In this section a first selection of the policy options will be made, based on the feasibility as seen by experts and stakeholders. Both effectiveness and efficiency will be important criteria.

First the cross-border licensing systems will be discussed, followed by the organization of collective rights management and finally a central database.

5.1.1. Cross-border licensing systems

In the previous chapter three different types of cross-border licensing systems were explained. All these systems could solve parts of the territoriality problem. First the country of origin rule will be discussed, followed by pan-European or multi-territorial licensing, and third the extended collective licensing.

5.1.1.1. Country of origin rule

The Nordic Public Service Broadcasters favour an extension of the country of origin rule. The Audiovisual Media Services Directive does not cover copyright and the Satellite and Cable Directive does not cover online services. This means that there is need for European legislation on this specific issue. *"It would be a natural progression to extend this principle to all acts of communication to the public of copyright protected material over the Internet" (PSB, 2011)*.

The European Consumers' organization would welcome a technology neutral approach. A country of origin rule for online and on-demand services could reduce transaction costs and enhance the availability of audiovisual works cross-border. BEUC does, however, recognize the risk of a race to the

bottom among VoD services to establish themselves in the country with the lowest levels of remuneration. But rights clearance in the country of origin should also take into account remuneration for all countries wherein the content can be accessed (BEUC, 2011).

Telefónica encourages the extension of the country of origin rule to online services, but before that can be done, tariffs across the EU need to be harmonized first. By this way a race to the bottom can be prevented. Furthermore, such a model should also entail a reflection of the true economic position of member states. "*Consumers' economic power is very different across the EU, and one could face a situation where – as it happens with the US labels – terms are set up in such a way that there is a single price for all and every territory, making the access to cultural goods too expensive for consumers in some member states"* (Telefónica, 2011).

ANGA foresees problems with the application of a country of origin rule when national service providers will have to deal with the same remuneration system as international online providers have to do. Therefore an exception should be made for cable re-transition in the context of distribution processes on a purely domestic level (ANGA, 2011).

RTL Group opposes the extension of the country of origin rule to online services, since it would result in pan-European licenses. Exclusive use of content by commercial users in one or more territories is an important perquisite for recouping the significant investment in audiovisual productions (RTL, 2011).

AEPO-ARTIS stresses that not only technological elements involved in making a work available online or on-demand differs from satellite broadcasting, but also legal acts differ. It would be too simplistic to suggest that extending the country of origin rule could work for online services (AEPO-ARTIS, 2011).

Microsoft expects negative implications, for both rights owners and for market-based contractual licensing. Online retransmission could override existing contractual arrangements within the EU. The country of origin rule would also entail compulsory licensing, which would increase the administration expenses (Microsoft, 2011).

The British Copyright Council fears that the application of a country of origin rule to licensing online services may decrease the ability for rights owners to enforce rights. There is less of a link to the national regulatory frameworks that are relevant for companies, who wish to become licensed to operate services within member states (Council, 2011).

The Cable and Satellite directive did not result in a single market for linear broadcasting. It is not likely that the extension of the country of origin rule will result in a digital single market. But it can of course contribute.

In summary, many stakeholders oppose to the idea of the extension of the country of origin rule for online services, since this will mean a situation of pan-European licences. Such a system does not reflect the flexibility for which is asked by the market and industry. The cultural aspect of creative content and the heterogeneous demands from the EU member states ask for a more flexible system. The country of origin rule would only be favourable if the demand for creative services was homogeneous across the EU. Transaction costs will rise if this rule would be applied for online services.

5.1.1.2. Pan–European or multi-territorial licensing

The possibility of a licence for the whole single market can lower transaction costs for users of content. The Swedish government sees this as a necessary option for a flexible and transparent system (Sweden, 2011).

European collecting societies have tried to conclude cross-border reciprocal representation agreements. These agreements deal with the collective management of the licensing and enable each collecting society to offer within its domestic territory the works of all the authors, represented by the other collecting societies which participate in the agreements (Guibault, 2005). In this way the possibility for multi-territorial licences can be created.

The British Film Distributors' Association opposes to a system which forces rights holders to licence directly pan-European for online services. They fear the effects such a licensing system could have on other forms of distribution like theatrical release, DVD and television. Under the current rules a distributor can choose to release a film in cinemas in only one or some member states first, before it is released in other member states in cinemas. After playing it in one or several member states a distributor can choose to licence service providers to broadcast the film by VoD services. If this licence would be pan-European, it would be impossible to release the film in other member states at a later stage (Association, 2011).

IFPI, the international federation of the recording industry, believes that a pan-European licensing system would raise more questions than it would solve. For trademarks and patents, the single European title results in lower costs of obtaining rights in multiple countries. For copyright, IFPI believes, such an incentive does not exist.

IFPI states in its response that the current system includes possibilities for multi-territory licences. The possibilities for this have been regulated by the IFPI reciprocal representation agreements. This makes it possible to provide cross-border licences whenever necessary (IFPI, 2011).

RTL Group, one of the largest entertainment networks, is against a system of pan-European licences and states that the territoriality of copyright should be preserved. This makes it possible to licence audiovisual works with contractual freedom. RTL stresses that territoriality is not the reason for fragmentation of the European audiovisual services marked, but rather the fact that the audience is not homogenous. "*In other words, the European Commission should not take a narrow view of audiovisual works, reducing them to "film and video on demand". There should be no obligation for broadcasters to acquire all rights on a multi-territory or pan-European basis"* (RTL, 2011).

BEUC, the European Consumers' Organisation, believes that multi-territorial or even pan-European licences are needed to reduce transaction costs, which will make it cheaper for consumers to use these services (BEUC, 2011).

The British Equity Collecting Society (BECS) states that licences should support demand. Therefore it is not always necessary to use pan-European or multi-territorial licences (BECS, 2011). The Association of European Performers' Organisations (AEPO-ARTIS) supports this and states that commercial users may be unwilling to pay a premium to clear rights on a multi-territorial basis, when demand is purely national (AEPO-ARTIS, 2011).

ANGA, the Association of German Cable Operators, believes that multi-national licenses can be useful. But such a system should apply a "country of destination principle". This is simply the remuneration for all territories.

Another important aspect, stressed by ANGA is the need for an effective judicial remedy against excessive remuneration claims by foreign right holders. It should not become more difficult than it is at present (ANGA, 2011).

Microsoft encourages the development of voluntary 'one stop' pan-European licenses, but this should not result in new remuneration rights for various participants (Microsoft, 2011).

The British Copyright Council stresses that possibilities for multi-territorial licences should not remove flexibility for the sector to use new technology and the ways to secure revenue from all forms of exploitations (Council, 2011).

Telefónica strongly supports multi-territory licensing, but this should not imply that in cases where a service provider wants to get the license only for its own territory that its forced into buying licences for all other territories as well. Multi-territorial licences are best kept as an option (Telefónica, 2011).

HOTREC, the European hospitality industry representation, considers that a pan-European licence, or even a unitary EU Copyright Title would enhance the transparency for the user to choose which rights they can use at which level (HOTREC, 2011).

Europa Distribution, a European network of independent distributors, opposes pan-European licences. Territorial promotion is a necessity because the distribution of European films is generally progressive, territory by territory, with different release dates. With pan-European licences the release of content would be also pan-European (Distribution, 2011).

FERA, an international federation of directors' associations, is in favour of national one-stop shops. This should make it possible to get national, multi-territorial and pan-European licenses in one transaction (FERA, 2011).

To summarize, most organizations are in favour of multi-territorial or even pan-European licences. These types of licenses should not be mandatory, so national licensing should also still be possible. The different organizations all ask for flexibility, whereby ideas like national one-stop-shops can be a good effective and efficient way of dealing with the licenses is.

5.1.1.3. Extended collective licensing

In the contributions to the Green Paper only organizations from Nordic countries are in favour ECL. This does not mean that the other contributors oppose ECL, but rather don't see it as an important solution. For the Nordic Public Service Broadcasters (PSB) ECL is important since: *"ECL is a pragmatic system for mass use of copyright protected material where individual licences fail"* (PSB, 2011). PSB stresses that ECL shouldn´t be mandatory, but is should be a possibility at least for member states.

RTL Group is the only contributor which opposes to ECL. They also oppose to other new forms of mandatory collective licensing. RTL group believes that these proposals would undermine copyright and the *acquis communautaire* (RTL, 2011). Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society states in article 18: "*This Directive is without prejudice to the arrangements in the Member States concerning the management of rights*

such as extended collective licence". The fear of RTL group is not based on facts. But the fear seems to be based on the possible extension of ECL as a community wide way of licensing.

In terms of efficiency and effectiveness, the ECL system would be a very good system, since the procedure for licensing is relatively easy and quick. The clearing of rights in other systems is often much more complicated, especially when not all right-owners are known.

To sum up, there is no evidence that there is great support in the whole EU for the introduction of ECL at community level, but the Nordic countries want to remain the possibility to use it.

5.1.2. Organization of collective rights management

The European Commission has announced a proposal for a framework Directive on Collective Rights Management, which will include a simplification of copyright clearance. This initiative is welcomed by many respondents (AEPO-ARTIS, 2011; RTL, 2011; Telefónica, 2011). There are different ideas about the way the issues tackled in this proposal should be addressed.

Association of European Performers' Organisations, AEPO-ARTIS, supports the extension of compulsory collective management of performers' rights only for non-interactive use. This means that the rights for use online could be organized in a different, non compulsory, way. They don't state on how this should be organized (AEPO-ARTIS, 2011).

Telecommunications company Telefónica, which operates in six member states, states that it is important to make the licensing structure of audio-visual works less complex. In 2005 in the Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services the industry was given the opportunity to reduce the number of collective rights management organizations (CMOs), but this did not result in a less complicated and time consuming system. Telefónica supports any measure that would enhance the governance and transparency of collective rights management organizations (Telefónica, 2011).

The British Copyright Council believes in a system where CMOs, through reciprocal agreements, provide cross-border licences in the EU, internationally, and at national level as well. This means that no new legislation is needed for the organization of collective rights management. Instead, the cooperation between CMOs need to be supported, as well as the development of Principles of Good Practice to assist in the promotion of transparency and mandates for the operation of CMOs (Council, 2011).

There is no consensus on whether There is a need for more rules for the organization of collective rights management. Many organizations will await the announced proposal of the European Commission. Not in all contributions to the consultation the organization of collective rights management was mentioned. Especially the CMOs themselves did not comment on this issue.

5.1.3. Cloud computing

BEUC asks for rules which allow consumers to transfer legally acquired content when they decide to stop using a specific cloud service. Many cloud services are based on Digital Rights Management systems (DRMs). These DRMs can prevent for example that a purchased movie will be watched more than a fixed number of times. These DRMs have been rejected by consumers, who want to have more freedom to use legal content. There are significant privacy concerns, given that different

stakeholders can have access to information about consumers' purchases and preferences thus tailoring adverts to them through behavioural advertising or product placement (BEUC, 2011).

BECS focuses on the remuneration and fair compensation of rights holders. Therefore article 6 of directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society should apply to licences for copies of audiovisual works to be stored, accessed and electronically communicated within cloud computing services. Article 6 asks for further harmonization of Copyright and related rights which respond to the technological challenges, in order to prevent a refragmentation of the internal market (BECS, 2011).

AEPO-ARTIS argues that using cloud computing is an act of reproduction. Therefore, private copying remuneration should be paid. Currently the laws relating to private copying are not sufficiently clear to establish that private copying remuneration must be paid for cloud computing usage. AEPO-ARTIS asks for legislation which ensures these payments (AEPO-ARTIS, 2011).

Microsoft states that it is important that the copyright and liability rules are applied consistently across the EU, changes in these rules are not necessary at the EU level to deal with these new technologies. Existing rules are sufficient while dealing with cloud computing (Microsoft, 2011).

Telefónica believes that the best solution is to regard cloud services as just another device and cover it by the exemption of private copies (Telefónica, 2011).

GESAC calls for clarification regarding cloud services. In cases of copyright infringements the hosting service provider's liability is limited, therefore it is difficult to get remuneration for rights holders (GESAC, 2011).

Dealing with cloud computing is difficult since it is changing rapidly. Respondents all agree that consumers should be able to access legal content by cloud computing, on a device and territorial neutral basis. Therefore no national limitations should be allowed to these services, as long as at EU or international level agreement is reached on the private copying status of cloud computing.

5.1.4. Central database

In the consultation, the European Commission asked if the development of identification systems for audiovisual works and rights ownership databases would facilitate the clearance of rights for online distribution of audiovisual works. Many of the respondents welcome the development of such a system. RTL group stresses that such a database is a challenging objective that requires good cooperation amongst rights holders (RTL, 2011).

BEUC states that the database, if well organized, could facilitate the identification of rights holders, thus reducing transactional costs. Such a database should be an open-platform and open-source, by which the identification of digital content files is allowed (BEUC, 2011).

The role of the EU in the further development of such databases is limited. None of the respondents suggest legislation on this topic. CMOs like BECS participate in the development of databases, such as ISAN, and promote the use of internationally recognized performer databases, such as the Independent Performer Database Association (IPDA)(BECS, 2011).

The EU can of course facilitate the promotion of the use of these databases. Similar, already existing databases, of which ISBN is the best known, aren't regulated by governments and are working fine.

Microsoft states that the European Commission has taken initial steps in stakeholder dialogues to encourage music rights societies in particular to develop and integrate better databases for music copyright information. It should also do this for the audiovisual sector (Microsoft, 2011).

The Association of German Cable Operators puts some remarks forward. There is a need for clarity to what extent the relevant information is verified before being put into the database. Faulty information in the databases could lead to a devaluation of the system, and even lead to higher transaction costs (ANGA, 2011).

Another point of critique comes from AEPO-ARTIS. For new works it is easy to be put in the databases, but for older works much information is held back by producers and as AEOP-ARTIS states: *" it ought to be freely available to relevant third parties including performers' collective rights management organisations, not only for rights clearance purposes and the collection and distribution of statutory payments (including private copying levies), but also to identify which performers ought to be remunerated in respect of a specific work"* (AEPO-ARTIS, 2011).

Europa Distribution foresees another problem that centres around small producers. Many European film companies are independent companies with usually very little staff, so they basically Lack time to put their information online. Producers have to understand the value of such databases, In order for them to invest time in delivering the necessary information, to make it successful (Distribution, 2011).

Telefónica would like the European Commission to play a more active role. The EU could set the minimum legal standards in order to ensure the supply of any data necessary to any party involved in the chain of the online distributions of audiovisual works to consumers (Telefónica, 2011).

The British Copyright Council stresses that different databases already exist and new systems are under development. *"Use of rights databases and the importance of their being kept up to date will significant in enabling the diligent search processes linked to searching for ownership of orphan works to become more efficient"* (Council, 2011).

To summarize, the use of databases for the identification of audiovisual works and rights ownership can be a very efficient system. But at this moment different voluntary systems exist. There is almost no support for a role of the EU in setting standards. On the other hand the EU can be an important promoter for the use of these databases.
The use of different systems makes it less favourable. The industry clearly wants a system based on self-regulation, which can be an effective way of dealing with it. The EU can support the cooperation between the different databases which may result in the creation of fewer databases.

5.2. Legitimacy

In previous paragraph different policy options were discussed based on the comments of different contributors to the consultation of the European Commission on the Green Paper on the online distribution of audiovisual works in the European Union. Especially effectiveness and efficiency of the options were discused. Options which did not get sufficient support or appeared to be not effective or efficient will not be discussed furter. The remaining options are: Flexible multi-territorial licences and Extended Collective Licensing for the cross-border licensing systems, and cloud computing and central databases for the other issues. Since the European Commission will propose further plans for

the organization of collective rights management and many stakeholders choose to await this proposal it is difficult to say much about this issue.

In this paragraph the remaining options will be judged on the legitimacy. First the competences of the European Union will be discussed, followed by an overview of the opinions of the member states.

5.2.1. Competence Issues

The EC Treaty (TEC) does not provide a specific legal basis for the establishment of a Community copyright. Existing directives focus on the creation of a single market and the removal of barriers. But the Lisbon Treaty (TFEU) provides in article 118:

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union wide authorization, coordination and supervision arrangements.

European legislation on this topic can be adopted by the co-decision procedure; the European Parliament has to agree to a proposal by simple majority and the Council must adopt directives by a qualified majority vote (Eechoud, 2009).

5.2.1.1. Flexible multi-territorial licenses

Flexible multi-territorial licences are based on voluntary measures by the CMOs, and essentially means that the CMOs would give each other a mandate to issue multi-territory licences. This solution is realistic considering the support it currently receives from the Commission and the fact that it would not deprive the right holders in the countries of reception of their rights. For this solution to work in practice, it would need to be supported by legislative intervention regarding both licensing practice and rules on good governance and transparency. To stimulate the coming into being of mandates between the CMOs similar to the IFPI Simulcasting Model Agreement model, the national ECL provision could be made conditional on such mandates (J. Axhamn, 2011).

5.2.1.2. Extended Collective Licensing

Article 5 of Directive 2001/29/EC contains a “closed list” of exceptions and limitations to the exclusive rights of reproduction and making available to the public online. ECL provisions can probably be qualified as limitations a preliminary assessment would be that ECL provisions are in conflict with the closed list in article 5. However, this concern was deliberately addressed during the negotiations of Directive 2001/29/EC. At the proposal of one of the Nordic countries, article 18 of the Directive states that the text “is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences”. It appears that the closed list of limitations does not encompass ECL provisions and related ECL agreements. Presumably, the notion “arrangements in the Member States concerning the management of rights” encompasses also provisions on mandatory collective licences. More generally, the notion of “arrangements in the Member States concerning the management of rights” seems to take aim at “limitations” to the exclusive right stating that rights may only be exercised in a certain way, e.g. collectively through a CMO (J. Axhamn, 2011).

5.2.1.3. Cloud computing

The most important issue raised in the the consultation is the need for appliance of the private copying rule for cloud computing services.

Under the Information Society Directive (2001/29/EC), only activities such as making back-up copies, passing copies to family and friends , downloading for personal use and uploading to digital storage facilities can possibly fall only under the reproduction right (Kretschmer, 2011). Cloud computing of course is a form of digital storage, but service providers can offer more than just digital storage space. For just storage the private copying rule will apply, but for other additional services normal licence schemes apply.

5.2.1.4. Central databases

As stated in section 5.1.4, there is no need for legislation for the establishment and working of a central database. So there is no competence issue for this solution. However, the European Commission can promote the use of the databases.
The existing databases are based on voluntary cooperation of rights holders and users of content. These databases have to be transparent and need to be accessible for all interested parties.

5.2.2. Member states

For the position of the member states I will look again at the contributions of the governments of the member states to the consultation on the Green Paper. Not all governments have contributed to this consultation, but there are no signs that the opinions of the other member states do point towards a different direction.

Most governments don't take a strong position for the solution they prefer. They have focused on the underlying problems and ask for action by the European Commission. This could also be a strategy of the governments. If ones position is unclear, a government may have an advantage in the negotiations in the Council. Nevertheless, by addressing certain problems at EU level, you may expect that the governments won't oppose a European solution.

On the issue of **multi-territorial licensing**, the government of Sweden opposes a unitary European Copyright code. Smaller solutions can be more flexible and are more appropriate for the use for content related services (Sweden, 2011).

The Slovak government also asks for a flexible regime, whereby the licensing system must have a high level of transparency and effectiveness of protection of rights (Slovak, 2011).

The Hungarian government opposes a pan-European licensing model, since the audiovisual industry won't benefit from it. But a new system would require simple forms of licensing for online distribution, remuneration for use that is adjusted to the extent of use and the allocation system for any remuneration for use collected under collective management to be transparent (Hungary, 2011). Estonia even states that one-stop-shopping would be an acceptable solution (Estonia, 2011).

This means that these governments would favour a flexible system of licensing, whereby market demands can be fulfilled. The proposed system flexible multi-territorial licences could fit in these wishes.

The extended **Extended Collective licensing schemes** find wide support of the member states. The British government states that is should make "*extended collective licensing available to those collecting societies that would like to use it"* (UK, 2011).

One of the member states which promote ECL most is Sweden. For this member state, as for the other Nordic member states very little would change if these types of schemes would be introduced at European level.

Most governments acknowledge the need for a **database of rights holders** in audiovisual works (Cyprus, 2011; Netherlands, 2011; Slovak, 2011). Hungary states: "*There is a need for databases indicating works, performance, and rights holders in an up to-date manner. However, these cannot be created by legal constraint, only on a voluntary basis therefore we currently do not see a role for EU institutions in this"* (Hungary, 2011).

The governments recognize the fact that the development of cloud computing asks for new approaches. They describe the problems which are risen by this development, but don't suggest real solutions. It seems that they await proposals of the European Commission to regulate these problems.

The member states agree for the most part that copyright harmonization is needed for online use. This does not directly mean new directives or even a unitary European Copyright code. Rather, they favour a flexible regime which enables the industry and consumers to deal with it in an appropriate way depending on the demands of the situation.

5.3. Long-term views of the EC

The goal of the European commission is to achieve an internal market for both the offline and online exploitation of intellectual property. More common ground on several features of collective management is required. The objective of this is to safeguard its functioning throughout the Community and permit it to continue to represent a valuable option for the management of rights that benefits rights holders and users alike.

Developments of collective rights management and licensing should be guided by copyright principles and the needs of the Internal Market. It should result in more efficiency and transparency and a level playing field on certain features of collective management.

The European Commission stated in the Communication on the Management of Copyright and Related Rights in the Internal Market: "*The conclusions of the consultation process have confirmed the need for complementary action on those aspects of collective management, which affect cross-border trade and have been identified as impeding the full potential of the Internal Market*."

Such an action would respect the subsidiarity and proportionality principles and would harmonise certain features of collective management. Following this consultation and in order to achieve the objectives, the Commission will propose a legislative instrument on certain aspects of collective management and good governance of the collecting societies in 2012. (Commission, 2004a).

The Digital Agenda for Europe stresses that any new policies which facilitate cross-border and pan-European licensing in the audiovisual sector *"should preserve the contractual freedom of rights holders. Rights holders would not be obliged to licence for all European territories, but would remain*

free to restrict their licences to certain territories and to contractually set the level of licence fees" (Commission, 2010).

5.4. Conclusions

In this chapter the fourth sub-question was answered, this was done in two stages. The first stage made a selection based on the opinions of stakeholders and experts and focused on the effectiveness and efficiency of the options in relation to the problems. The second stage focused on the legitimacy of the options.

The first option for licensing is the extension of the country of origin rule to online services. Many stakeholders oppose the idea of the extension of the country of origin rule for online services, since this will mean a situation of pan-European licences. Such a system does not reflect the flexibility for which is asked by the market and industry. The cultural aspect of creative content and the heterogeneous demands from the EU member states ask for a more flexible system. The country of origin rule would only be favourable if the demand for creative services was homogeneous across the EU. Transaction costs will rise if this rule would be applied for online services.

The second option is a multi-territorial or even pan-European licensing scheme. These types of licenses are not meant to be mandatory, so national licensing Is still a viable option. The different organizations all ask for flexibility, whereby ideas like national one-stop-shops can be a good effective and efficient way in dealing with the licenses.

The third policy option is the extended collective licensing. In terms of efficiency and effectiveness, the ECL system would be a very good system, since the procedure for licensing is relatively easy and quick. The clearing of rights in other systems is often much more complicated, especially when not all right-owners are known.

There is no evidence that there is great support in the whole EU for the introduction of ECL at community level, but the Nordic countries want to remain the possibility to use it. There is, however, support of many member states to introduce ECL systems at European level, when collective management organizations want to use these.

The fourth policy option discussed is the need for change of the organization of collective rights management organizations. There is no consensus on whether there is a need for more rules in organizing the collective rights management more rules for the organization of collective rights management. As stated before, many organisations and stakeholders are waiting for the announced proposal of the European Commission.

The last policy option dealt with cloud computing. Dealing with cloud computing is difficult since it is changing rapidly. Respondents all agree that consumers should be able to access legal content by cloud computing, on a device and territorial neutral basis. Therefore no national limitations should be allowed to these services, as long as at EU or international level agreement is reached on the private copying status of cloud computing.

6. Conclusion

In this thesis policy options for dealing with the territorial nature of copyright for online services were discussed. This final chapter is divided in three parts, in the first part I will discuss and answer the central. I will do this by following the sub questions which will ill cumulate and give an answer to the aforementioned central question of this thesis. In the second section I will make some explicit policy recommendations, based on this research. In the third section of this final chapter I will reflect on the research and give some ideas for further future research.

6.1. Research question

The central question in this research is: *How can the problem of territoriality in the field of copyright and related rights in the European Union be solved for content related services offered over the internet?*

To answer this question I will first shortly summarize the answers to the four sub-questions as described in previous chapters

SQ 1: What is the variety of content related services on the Internet?

The market for online creative content is a various, but highly integrated one. There are different ways content providers can offer their services online. It can be the case that a consumer buys a file, but it can also be that the consumer only gets access to a movie, music or another work. The market for digital content is a non-stop developing market. New developments like cloud computing ask for flexible approaches.

Service providers need licences for the online distribution of works. These licences are rewarded by collective management organizations, producers and artists.

SQ 2: In what way does the territorial nature of copyright and related rights restrict content related services?

For copyright regulation in the EU there are 27 different systems of licensing, collective rights management and clearance of fees. Each member state has its own legislation which applies for copyright. This means for service providers who want to offer their services in more member states, that they have to get licences in each member state separately. This leads to higher transaction costs. Especially for smaller member states this can mean that fewer services are offered.

Different problems with the territorial nature of copyright can be identified.

- The first problem which has to be tackled is the **licensing** system. This system has to be a flexible system, which should make pan-European licences possible.

- A second problem is the situation with **rights clearance**. Rights clearance is important for the rights owners. But since each member state has its own system of rights clearance this could be more transparent. At this moment it is very difficult for users to get an easy overview of costs, since they have to pay fees in different member states to different organizations. The ownership of the rights is also organized in a different way in each organization.

  Collective rights management societies licence content on behalf of the creators. The way in

which these organizations are organized also differs between the member states. Often these societies lack transparency and fees are high. A system in which societies are organized in a similar way and proper supervision can be organized is needed to improve the possibilities for cross-border content related services.

- The European Commission asked in the Green Paper on the online distribution of audiovisual works in the European Union if a **central database** of audiovisual works and the identification of rights holders is needed. At this moment several organizations try to set-up such databases. The best solution for this would be a global system which contains all necessary information.

  Cloud computing is rapidly growing technological development. One of its characteristics is that users can use their content on multiple devices, but also in multiple countries. For dealing with copyright it is important that rights can be cleared, but at the same time that users not have to deal with this when they want to use the content on different devices and on different locations.

SQ 3: What are the options for solving the territoriality problem?

Different options for dealing with distinguished aspects of territoriality have been discussed.

- Three different possibilities for **licensing** works at European level were compared.

  The first possibility is the extension of the country of origin rule, as it is used in the cable and satellite directive. By this way service providers only need to get a licence in one member state.

  The second possibility is the pan-European or multi territorial licences. In such a system licences for the whole European Union or multiple states at once will be awarded to service providers. This will result in lower transaction costs.

  The third possibility is extended collective licensing. This is a way in which a collective management organization has the possibility to licence works from other authors, than it officially represents. The ECL is a self-regulating system, without government interference.

- The second category of policy options dealt with the organization of **collective rights management**. Different systems of collective rights management in different member states result in high transaction costs.

- The third policy options category looks at the possibilities of a central **database** for copyright protected works. Such possibilities do already exist, but it is on voluntary basis.

In the last section of the chapter on this sub-question the harmonization of other forms of intellectual property is used as an example. The harmonization of patents and trademarks is in a further stage than the harmonization of copyright. The main difference between patents and trademarks and copyright is that an author is rights holder right at the moment of creation, patents and trademarks have first to be registered before the holder can claim its entitlements. Therefore

the problem of territoriality does not lie with the registration procedure, like it did with the patens harmonization.

SQ 4: Which solution is most favourable?

This sub-question was answered in two stages. The first stage made a selection based on the opinions of stakeholders and experts and focused on the effectiveness and efficiency of the options in relation to the problems. The second stage focused on the legitimacy of the options.

The first option for licensing discussed is the extension of the country of origin rule to online services. Many stakeholders oppose to the idea of the extension of the country of origin rule for online services, since this will mean a situation of pan-European licences. Such a system does not reflect the flexibility for which is asked by the market and industry. The cultural aspect of creative content and the heterogeneous demands from the EU member states ask for a more flexible system. The country of origin rule would only be favourable if the demand for creative services was homogeneous across the EU. Transaction costs will race if this rule would be applied for online services.

The second option is a multi-territorial or even pan-European licences. These types of licenses should not be mandatory, so national licensing should also still be possible. The different organizations all ask for flexibility, whereby ideas like national one-stop-shops can be a good effective and efficient way of dealing with the licenses is.

The third policy option is the extended collective licensing. In terms of efficiency and effectiveness, the ECL system would be a very good system, since the procedure for licensing is relatively easy and quick. The clearing of rights in other systems is often much more complicated, especially when not all right-owners are known.

There is no evidence that there is great support in the whole EU for the introduction of ECL at community level, but the Nordic countries want to remain the possibility to use it. There is, however, support of many member states to introduce ECL systems at European level, when collective management organizations want to use these.

The fourth policy option discussed is the need for change of the organization of collective rights management organizations. There is no consensus on whether there need to be more rules for the organization of collective rights management. But many organizations will await the announced proposal of the European Commission. Not in all contributions to the consultation was the organization mentioned. Especially the CMOs themselves did not comment on this issue.

The last policy option dealt with cloud computing. Dealing with cloud computing is difficult since it is changing rapidly. Respondents all agree that consumers should be able to access legal content by cloud computing, on a device and territorial neutral basis. Therefore no national limitations should be allowed to these services, as long as at EU or international level agreement is reached on the private copying status of cloud computing.

Central question: How can the problem of territoriality in the field of copyright and related rights in the European Union be solved for content related services offered over the internet?

The problem of territoriality is a varied problem triggered by the 27 different copyright regimes in the European Union. One of the main problems can be found in the licensing structure. Licences for offering services with copyright protected content are given for a specific territory or member state.

By looking at the contributions to the consultation about the Green Paper on the online distribution of audiovisual works in the European Union there can be concluded that there is no solution which will solve the problem at once, nor is there a solution which is supported by all stakeholders.

What can be learned is that options which are supported by a large group of stakeholders and experts, are flexible systems. There is no need for a European Copyright Code, which will replace the 27 copyright regimes and will transform the 27 territories into one large territory.

The flexibility which is requested, means that there have to be different types of licenses possible, like traditional licences for one member state, but also multi-teritorial licences and pan-European licences. The type of licence for which will be chosen depends on the situation and subject.

A flexible copyright regime will reflect the heterogene market for music, movies and other creative content. Local producers can have a local market, and also large multinational firms can offer services.

The fast technological developments ask for transparancy. A database of audiovisual works and rightsholders is an example of a way of achieving this. Rights holders want remuneration for the use of their works, but for users it has to be clear on how and to whom to pay.

For functioning of the internal market there is no need for complete elimination of territoriality. There may be a single market, but this singel market is a heterogene market. This is the result of the different languages spoken by the people in the European Union, and also because of the large cultural diversity.

6.2. Policy recommendations

There is no direct need for new legislation at European level. A flexible approach to the development of the market for digital content is necessary.

There is a need for a flexible system for licensing of creative content, depending on the type of content and type of services which can be offered. A work can be licensed based on a certain territory, a set of member states or the whole European Union. The different parties involved in this process can deal with this themselves. No special licensing authority is needed, nor is there need for a European Copyright code.

The introduction of a one-stop shop for licences is necessary. Transaction costs can be decreased if service providers don't have to get licenses in 27 member states, but will be given the opportunity to get all these licences at once in one of the member states.

Extended collective licensing is used in the Nordic countries. The possibility for the introduction in other EU member states is an option. There is no direct evidence that collective rights management organizations are in favour of the introduction of such systems in other member states. If this wish develops, it can easily be introduced at member state level. The co-existence of such systems, with other licensing systems has not resulted in problems.

Databases for audiovisual works do already exist. The industry has developed these databases, because it felt need for it. These databases are on voluntary basis and different databases with equal purposes exist. The European Union can play an important role in the promotion and the use of these databases. If the use of these databases increases, transaction costs can decrease.

Cloud computing and other technological developments stress the importance of flexible legislation. For cloud computing service providers the need for licenses based on users, instead of territory might be a solution. Rights holders do have the right for remuneration, when their content is used.

6.3. Reflection on research

The issue of territoriality of copyright and content related services is complex. Therefore a good understanding of the topic was necessary before the research could be conducted. Since this research was done to finish a master program in European Studies the scope of the research had to be limited.

By conducting this research in a structured way, I did get a good understanding of the complexity of online creative services and how to deal with copyright. This made it possible to give clear conclusions and give policy recommendations for dealing with the territorial nature op copyright for online services.

The source of data was the response to the consultation about the Green Paper on the online distribution of audiovisual works in the European Union. One of the advantages of this data set is the large response. The response of other ways of collecting data from these organizations would probably have been lower if it was conducted just for this research.

One of the disadvantages of the use of this dataset was that the questions had been set in the context of the Green Paper. Therefore it was impossible to ask further questions or go into more detail on the answers given. For further research it can be interesting to focus on collective rights management organization, producers or consumers, in order to get a more detailed understanding of their positions.

Not all problems which stakeholder organizations face have been discussed in this thesis. In the contributions to the consultation on the Green Paper, some other problems have been mentioned by the stakeholders. One of these problems is that for the release of movies, producers use different release windows. This means that a movie can be released in cinema's first, followed by DVD release and VoD services. The last release window can be broadcasting at public TV. Producers can choose to release a movie in one or more member states, before releasing it in other member states. There are several reasons why providers might choose to do so. With the creation of a single market for online services these release windows might be limited. If a movie is offered in one member state by VoD and consumers in other member states would have access, the value of releasing the movie in cinemas in other member states at that moment in time will be limited. Further research should be done to the consequences of pan-European VoD services. This was not part of this research, since the focus was put on the problems with the territorial nature of copyright.

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