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# Media Policy and Copyright in Europe: the Progressive Expansion of the Law for Broadcasters to Online Platforms

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# Media Policy and Copyright in Europe: the Progressive Expansion of the Law for Broadcasters to Online Platforms

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**Abstract**

This paper draws upon the evolution and EU harmonisation of media regulations and copyright in the last three decades. The piece shows the EU's attempt to support its own creative industries not only through very broad creators' rights but also through a law tailored for broadcasters' needs. From the outset, this special legal regime included special responsibilities and privileges that, especially in the pre-digital era, made public and private television the most important vector to fund audio-visual productions, protect the value of cultural creation and preserve Europe's cultural diversity and national identities. The paper critically reviews the progressive expansion of these intertwined areas of law at a time when television's productions and content deliveries increasingly compete with those of online content platforms such as Netflix, Amazon and YouTube.

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## 1. Introduction

Even though millennials cannot fathom it, there was a time when television was the most important medium for large audiences to have access to information, education, culture and entertainment. Before the Internet, there was no alternative to television to watch the most appealing programs and films and to access news. By 1980s, at least in Western Europe, there was a widely shared societal expectation that broadcasting activities should pursue essential public policy goals, such as supporting cultural creation and content diversity, as well as media pluralism and consumer protection.

Media law emerged as a regulatory framework requiring broadcasting organizations to produce and disseminate programs, films and other audiovisual works to achieve public interest goals in a culturally and linguistically diverse context such as Europe. The European Community started regulating television in 1989, at a time when broadcasting activities were no longer the sole prerogative of publicly owned enterprises.[1] TV broadcasting stopped being confined into the public sector from the early 1980s, when liberalisation opened up this sector to private television.[2] Even though countries such as the United Kingdom, Italy, Luxembourg and Finland had already allowed commercial broadcasting before 1989, the 'Television without Frontiers' directive officially ended public broadcasters' monopolies.[3]

At a time when the European Community had no specific competence to legislate in the domain of cultural policy, the 1989 directive was adopted and justified mainly as a form of 'Internal Market' legislation. This measure aimed to create a uniform legal treatment for *all* broadcasters operating in Europe and therefore prevent distortions of competition between these enterprises on a cross-border basis. First, this directive established a deadline (3rd of October 1991) for member states to liberalise their television market. Second, the directive set out limits to television advertising and obliged broadcasters to protect minors from harmful content. Finally, it created quotas and other

[1] See Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23 (hereinafter 'Television without Frontiers' Directive).
[2] C. Pauwels C. and K. Donders (2013), 'Opening Up Europe to Private Television — Harmonisation and Liberalisation for the Benefit of All?', in K. Donders, C. Pauwels, J. Loisen (eds) *Private Television in Western Europe*. Palgrave Macmillan, pp. 20-36.
[3] *Ibidem*.

content-related requirements to promote and subsidize European audiovisual productions.

As a form of content regulation and an expression of cultural and industrial policies, copyright law has been inherently linked to, and intertwined with, the development of EU media regulation. Consistent with its traditional objectives, copyright law provides incentives and rewards to broadcasters as well as to authors, performers and content producers who license or assign their work to television networks. Since the early 1990s, the EU has introduced measures that simplified the (otherwise very complex and burdensome) rights clearance activities that TV broadcasters are expected to carry on as large users of pre-existing copyright works they incorporate into their broadcasts.

This paper aims to clarify the role of EU copyright law for broadcasters in supporting cultural creation and ensuring cultural diversity in a fast-changing audiovisual sector. The main purpose of this piece is to assess how EU law evolved in pursuing these goals at a time when TV-like services, video-on-demand providers and social media platforms give access to the same works and compete with each other to attract the same audiences. Section 2 explains how the evolution of a EU copyright system affords protection to TV broadcasts and audiovisual works and expands the related rights of content creators into the online environment. This section points out that a high level of copyright protection seeks to support audiovisual production as a whole, granting broad rights to authors, performers, film producers and TV broadcasters. Section 3 explains how EU law helps broadcasters use and include pre-existing copyright works in their TV programs and transmissions. This section emphasizes the relevance of collective bargaining, copyright exceptions and regulatory privileges granted to broadcasters for transmission of their programs on a cross-border basis. In particular, this section focuses on the enactment of a principle of private international law - known as 'country of origin' - that greatly facilitates multi-territorial content transmissions, making broadcasters' activities and transmissions subject to the single law of their countries of origin (and not, simultaneously, to all laws of the countries where their signal is transmitted and perceived). Section 4 critically reviews the EU law attempt to protect the commercial value of cultural creation at a time when audiovisual works are made available through a broad variety of online content services. To this end, the paper shows that new EU legislative initiatives in the field of media law and copyright seek to enable individual

creators and content creators such as TV broadcasters to enforce their rights against video-on-demand services and providers of social media platforms.

## 2. Relevance of copyright for television: broadcasters as content creators

The ongoing harmonisation of national copyright systems in the EU started slightly after the adoption of the 1989 'Television without Frontiers' Directive. From 1991 onwards, several regulatory measures harmonized the subject matter of copyright in order to facilitate cross-border exploitations in all business sectors where national law divergences could have raised barriers to free movement of goods and distortions to trade.[4] All the directives enacted from then onwards aimed to make territorial copyright rules compatible with multi-territorial (possibly EU-wide) exploitations of creative works. Legislative harmonization of copyright has always taken broadcasting organizations into special consideration, given the crucial role they have played in both *creation* and *distribution* of creative works.

The following subsections explain how the EU copyright system has contributed to media regulation in Europe treating broadcasters primarily as content creators and, therefore, copyright holders.

### 2.1. Evolution of the law

The main goal of early European copyright directives was adjusting legislative disparities at national level that raised barriers to free movement of goods and caused distortions in intra-Community trade relying on copyright.[5] European Court of Justice (now Court of Justice of the European Union: hereinafter 'ECJ' or 'CJEU') case law triggered the EU

[4] See for instance Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 14.6.1991, p. 42 (replaced, without substantive changes, by Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, p. 16, hereinafter 'Software Directive'); Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, p. 61 (replaced, without substantive changes, by Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28); Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, p. 9.

[5] See A. Renda, F. Simonelli, G. Mazziotti, A. Bolognini and G. Luchetta, 'The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society', Centre for European Policy Studies (CEPS), November 2015, p. 6-8.

regulatory intervention.[6] By paving the way for the development of an area of free trade, the early directives also strengthened copyright protection through creation of new rights such as the rental and lending rights and, in 1993, the extension of the term of copyright protection from 50 to 70 years after an author's death.

From the mid-1990s onwards, the priorities in this field changed dramatically. The fact that digital technologies led to a multiplication of vectors for creation, production and exploitation of creative works urged EU lawmakers to expand the copyright scope and to strengthen its enforcement in response to the emergence of new economic scenarios and technological challenges. The assumption was that, without a harmonised legal framework on copyright and related rights, it would have been difficult to foster substantial investment in creativity and innovation especially at a time when technological development triggered new forms of content exploitation. The response to these concerns was the adoption of Directive 2001/29, the most horizontal and comprehensive among the copyright directives the EU has adopted so far.[7] The main goal of this directive was to adapt copyright to the digital environment through a re-definition of the scope of exploitation rights.

### 2.2. Harmonisation and expansion of the copyright scope: the standard of originality

The implementation of the InfoSoc Directive ended up harmonising copyright law beyond the expectations of its drafters. The directive triggered harmonisation of the standard of originality across the EU without containing an explicit provision on what should be protected by copyright. Originality is a basic notion under copyright law that defines, in the absence of a unitary concept under international copyright conventions, what elements an intellectual work should possess in order to obtain copyright protection.[8]

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[6] For instance, the adoption of Directive 92/100/EEC can be easily linked to the judgment rendered by the Court of Justice in *Warner Brothers and Metronome Video* v *Erik Viuff Christiansen*, C-158/86, 1988, ECR 2605; the genesis of Directive 93/88/EEC is strictly related to the findings of the Court in *EMI Electrola* v *Patricia and others*, C-341/87, 1989, ECR 79.

[7] See Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10 (hereinafter 'InfoSoc Directive').

[8] J. Ginsburg and E. Treppoz, *International Copyright Law – U.S. and E.U. Perspectives*, Edward Elgar, Cheltenham (2015), p. 278, point out that the Berne Convention does not provide for a minimum threshold of creativity; however, Article 2(3) refers to "original works" whereas Article 2(5) refers to works that constitute "intellectual creations" by reasons of the selection and arrangement of their contents.

This requirement identifies the type of contribution that makes an intellectual work original.[9]

In its attempt to fill a gap and to ensure consistency of basic notions in the (ongoing) EU copyright harmonisation process, the CJEU found that the notion of copyright 'work' the InfoSoc Directive relies on must be the same as the one spelt out under earlier sector-specific copyright provisions on the legal protection of software, databases, and photographs.[10] According to such earlier EU law provisions, a work is original in so far as it is the author's own intellectual creation. In the CJEU's opinion this means that originality depends on whether or not a given piece of work expresses an author's creative freedom and choices.[11] In cases concerning types of works whose protectability under copyright had raised doubts at national level, the Court found that originality should have been assessed through the prism of creative freedom and an analysis of whether or not authors had given those works their personal touch. For instance, in the first judgment where the CJEU spelt out the notion of originality for the generality of creative works, the case concerned extraction of 11-word sentences from newspaper articles.[12] The Court found those isolated sentences '[...] suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article [...]". In subsequent cases, originality was regarded as subsisting in a case concerning portrait photographs - given that the author could make free or subjective choices and stamp the work with her personal touch - and

[9] See J. Ginsburg, 'The Concept of Authorship in Comparative Copyright Law', 52 De Paul L. Rev. 1063, (2003), at p. 1070 (where the author emphasizes that originality is synonymous with authorship).
[10] See C-05/08 *Infopaq International A/S* v *Danske Dagblades Forening* (2009), hereinafter '*Infopaq*'. The above-mentioned sector-specific directive were, respectively: the Software Directive (replaced by Directive 2009/24/EC); Council Directive 93/98/EEC of 29 October 1993, harmonizing the term of protection of copyright and certain related rights, OJ L 290, p. 9 (replaced by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 2006 OJ L 372, p. 12: Art 6 of this directive set out the standard of originality for photographs) and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Council Directive 96/9, 1996 OJ L 77, p. 20 (hereinafter 'Database Directive').
[11] In addition to *Infopaq*, the judgments that generalized the standard of originality are C-145/10 *Painer* v *Standard Verlags* (2011), hereinafter '*Painer*'; and Joined cases C-403/08 *Football Association Premier League* v *QC Leisure* and C-429/08 *Karen Murphy* v *Media Protection Services Ltd* (2011), hereinafter '*Premier League*'.
[12] See *Infopaq*, par. 47.

not subsisting in football matches, where the rules of the game leave no room for creative freedom.[13]

2.3. Plurality of rights granted to or owned by broadcasters

The open notion of copyright 'work' and the relatively low threshold of creativity required under the EU standard of originality ensure a broad and strong protection of intellectual works, including the audiovisual works created for television and acquired or produced by broadcasting organizations. Even though the InfoSoc Directive made just a short reference to the obligation for the EU to take cultural aspects into account in its action, EU policymakers clearly conceived a high level of protection of copyright and related rights as an intrinsic guarantee of support to cultural creation, diversity and content pluralism in the media sector.[14]

TV broadcasters simultaneously own (or exercise) a plurality of rights, which include exclusive rights in fixations of their broadcasts. Rights in fixations of their own transmissions - for which broadcasters are *original* copyright owners - were harmonized at the EU level in 1992, together with other rights related to copyright. Directive 92/100 defined and harmonised the prerogatives of broadcasters, granting them exclusive rights on fixation and reproduction of their broadcasts; re-broadcasting and communication to the public; and distribution of broadcast fixations.[15]

The rights of broadcasters in their own transmissions should not be confused, in terms of subject matter, with distinct rights in programs, films, documentaries and TV series that are incorporated into TV transmissions. The rights of broadcasters in their own broadcasts are rights whose subsistence does not depend on originality and whose purpose is, logically, not that of rewarding authorship. In the same way as rights in sound recordings, rights in broadcasts are established for the sole purpose of protecting the value of investments made by TVs from slavish copying. Broadcasters' rights follow, in

[13] See, respectively, *Painer*, par. 89-92, and *Premier League*, par. 97-99.
[14] See, respectively, recital 12 of the InfoSoc Directive and Article 167(4) of the Treaty on the Functioning of the European Union (TFEU). In the relevant literature it was stressed that the broad and lengthy exclusive rights the directive grants to authors and other copyright holders, including broadcasting organizations, while adequately protecting and economically rewarding creativity, concretely avoid a negative impact on diversity of content made available through digital networks: see E. Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies*, Brill Nijhoff (2007), p. 184.
[15] See Directive 92/100, Art 6 to 9.

this respect, the rationale of so-called 'neighbouring' rights codified internationally under the 1961 Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations.[16] Audiovisual works (for instance films or programs) created and communicated to the public via TV transmissions, instead, fall under the scope of a full copyright, insofar as such works meet the originality requirement.[17] Depending on pre-production or post-production contractual agreements (i.e., assignments or licenses), TV broadcasters of such contents own rights either as film or content producers - having acquired the rights of audiovisual authors and performers - or as licensees, often under a regime of absolute territorial exclusivity. The fact that EU media law establishes strict requirements regarding proportions and quotas of TV transmission time to be reserved to European works has given broadcasters a strong incentive to directly produce (or co-produce) local audiovisual works and to acquire exploitation rights in works created by independent local producers.[18]

The InfoSoc Directive is relevant for the whole audiovisual sector in so far as it provides a EU-wide harmonisation and an adaptation to the digital environment for the plurality of rights granted to and owned by broadcasters. Notions that the 2001 directive and then the case law of the CJEU have defined in depth encompass the broad scope of such rights: *(i)* reproduction; *(ii)* distribution and *(iii)* communication to the public.[19]

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[16] See International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 19 ILM 1492, available at http://www.wipo.int/export/sites/www/treaties/en/ip/rome/pdf/trtdocs_wo024.pdf

[17] As the CJEU held in *Premier League*, par. 98, sport events (in particular football matches) cannot be regarded as intellectual creations classifiable as copyright 'works' since their subjection to rules of the game leaves no room for creative freedom.

[18] See Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.04.2010, p. 1 (hereinafter 'AVMS Directive'). Article 16 of this directive requires the member states to ensure that broadcasters reserve for European works a majority proportion of their transmission time (excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping). Article 17 aims at reserving for European works created by producers who are independent of broadcasters at least 10% of their transmission time (or, at the discretion of each member state, 10% of the broadcasters' programming budget).

[19] The InfoSoc Directive defines the original rights of broadcasting organizations in fixations of their own transmissions, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite, as follows: "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" (Art 2(e)); and "the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them" (Art 3(2)(d)).

## 2.4. Reproduction right

The notion of 'reproduction' is very protective of copyright holders and is so broad as to include temporary copying of protected works and reflect the same concept embodied in earlier sector-specific directives on legal protection of software and databases.[20] Inclusion of temporary copying in the copyright scope, in an environment where reproductions are a technical necessity to enable mere use of digital content such as browsing, caching and transmissions of data over networks, blurs the distinction between use and exploitation of protected works.[21] Such an all-encompassing definition of 'copy' would have challenged all web-based communications if certain temporary acts (for instance caching and routing) enabling online intermediaries to temporarily store and copy digital packets of protected works via their networks had not been expressly exempted from the copyright scope.[22] The implementation of this exemption by the CJEU helped clarify when a copy of protected works should be viewed as 'transient or incidental' and, as a result, be excluded from the copyright scope.[23]

## 2.5. Distribution and communication to the public

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[20] See Article 4(a) of the Software Directive and Articles 5(a) and 7(2)(a) of the Database Directive.

[21] See, for instance, S. Dusollier, 'Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work', *European Intellectual Property Review*, p. 201 (2005), at 203-204; B. Hugenholtz, 'Caching and Copyright: The Right of Temporary Copying', *European Intellectual Property Review*, Vol. 11, p. 482 (2000). 'Caching' (from the French 'cacher', i.e. 'to hide') means automatic creation of temporary copies of data in order to make data immediately available for subsequent uses; 'routing', instead, is a mode of transmission by which each whole of digital content is fragmented into many packets, each of which is sent electronically to the required destination through the shortest way.

[22] The exemption is created under Article 5(1) of the InfoSoc Directive: "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2." By 'lawful use' the Directive means a use either authorised by the copyright holder or not restricted by law: see InfoSoc Directive, Recital 33; see also C-302/10 *Infopaq International A/S* v *Danske Dagblades Forening* (2012), hereinafter '*Infopaq II*', par. 43-44.

[23] In particular, the CJEU pointed out that, for this exemption to apply (see *Infopaq*, par. 55): *(i)* duration of the act of copying must be limited to what is necessary for the proper completion of a technological process (*Infopaq*, par. 64); *(ii)* copying should be an integral and essential part for the correct and efficient functioning of the technological process (*Infopaq II*, par. 30); *(iii)* copying should aim at enabling either a transmission in a network between third parties by an intermediary or a lawful use (such as ephemeral acts of reproductions enabling a satellite decoder and a television screen to function correctly); *(iv)* copying must not have an independent economic significance, which means that copying itself should not be able to generate an autonomous economic advantage and should not entail modification of the transmitted content.

As far as 'distribution' is concerned, Article 4 of the InfoSoc Directive defines this right as the right to control distribution of the work incorporated into a *tangible* article, ensuring that the application of this right is confined to the realm of physical formats embodying copyright works. Even though this provision does not formally touch upon the right of distribution of fixations of TV broadcasts,[24] the express reference to physical objects is very important to avoid confusion and to keep different types of authors' rights in audiovisual works distinct: on the one hand, 'distribution' rights, which are subject to exhaustion after first sale of the object embodying a copyright work; on the other hand, rights of 'communication to the public', which cover dissemination of (intangible) copies over digital networks. Similarly to the right of reproduction, the scope of 'communication to the public' is also very broad and takes as a model a definition embodied in Article 8 of the 1996 WIPO Copyright Treaty.[25] The right is designed to cover "all communication to the public not present at the place where the communication originates" and to include "any such transmission or re-transmission of a work to the public by wire or wireless means, including broadcasting".[26] This right is essential for broadcasters because it enables them to control transmissions and re-use of their broadcasts and contents in both offline and online environments.

### 2.6. Re-transmission in offline settings

In offline settings, several cases scrutinized by the CJEU targeted commercial exploitations of TV broadcasts. The Court examined cases where users such as a hotel, a spa establishment and a pub owner deliberately intervened in re-transmitting TV broadcasts to their customers through installation of TV screens and/or speakers in their own premises.[27] These judgments found that this kind of interposition by a profit-seeking

[24] See Directive 92/100, Art 9.
[25] Article 8 of the 1996 WIPO Copyright Treaty reads as follows: '*Right of Communication to the public*: "Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at the time chosen by them.' Article 3 of the InfoSoc Directive grants authors, performers, film producers and broadcasters the exclusive right '...to prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time chosen by them.'
[26] See InfoSoc Directive, recital 23.
[27] See, respectively, C-306/05 *SGAE* v *Rafael Hoteles SA* (2006), par. 37-39 and 42; C-351/12 *OSA* v *Lecebne lazne Marianske Lazne* (2014), par. 29-32; and *Premier League*, par. 194-197.

user gave rise to a distinct act of exploitation that, for the act of communication to be lawful, required an individual authorisation from the copyright owner. In reaching this conclusion, the Court emphasised that, in giving customers access to broadcasts and other copyright works, the technical means used for re-transmissions did not matter. What mattered was the fact that the aforementioned users ended up targeting and reaching a 'new public' the copyright owners had not taken into account when licensing (and pricing) the original acts of exploitation.

2.7. Online retransmission, hyperlinks and indirect copyright liability

In the online environment, the CJEU case law is more complex than it is for offline cases. In a pure digital re-transmission case, where a company enabled its customers to watch streams of a third party's TV broadcasts without the broadcaster's authorisation, the provider of a 'catch-up' service technically enabled its customers to ensure or to improve their reception of the terrestrial TV signals. This use was regarded as a new and separate form of communication to the public, which gave rise to a distinct exploitation and required an individual authorisation from the copyright owner.[28]

A separate and hefty chapter of the CJEU case law concerns hyperlinks. First, the CJEU found that supplying a link to a copyright work is a form of communication to the public.[29] However, to assess lawfulness of this form of communication, the Court developed a set of criteria, not expressly contemplated under EU law, which took into consideration a variety of elements and factual circumstances emerging from each case. Initially, the Court found that hyperlinks to newspaper articles that were already made freely available on another site were lawful since, in the absence of technical restrictions to access those materials, the suppliers of hyperlinks did not communicate the works to a 'new' public.[30] The CJEU reached the same conclusion in another case where a video, freely accessible on YouTube, was not linked-to but embedded into another webpage,

[28] See C-607/11 *ITV Broadcasting Ltd* v *CatchupTV Ltd* (2013), par. 26-27 and 38-39. The CJEU reached this conclusion without the necessity of examining whether the user intended to target or reach a new public.

[29] C-466/12 *Svensson* v *Retriever Sverige AB* (2014), hereinafter '*Svensson*', par. 20-23.

[30] See *Svensson*, par. 26-28: "The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them [...] Therefore, since there is no new public, the authorisation of the copyright holders is not required [...]"

without the right-holder's authorisation.[31] In this case the Court also found the act lawful. This judgment argued that the embedded video was neither made available to a 'new public' nor transmitted through a specific technical means enabling a distinct form of exploitation.[32]

While continuing to rely on elements such as 'deliberate intervention' in content re-transmission and reach of a 'new public' through distinct acts of communication, the Court elaborated criteria of indirect liability for online copyright infringement that filled an existing gap under EU law. In a case where a Dutch tabloid posted on its website clickable links giving direct access to fashion photographs protected by a paywall - before their public disclosure in a popular magazine - the Court added subjective criteria to its analysis.[33] Given that hyperlinking enabled circumvention of a technical restriction and access to the photographs occurred through an unlawful source, the Court held that, to infringe the copyright owner's right, a user must be aware of the illegal nature of the linked-to content. Moreover, the *GS Media* judgment found that, if the supplier of the hyperlink pursues a financial gain, knowledge of the infringing nature of the act of communication should be presumed.

From then onwards, the CJEU considered *(i)* knowledge of illegal nature of the linked-to contents and *(ii)* a for-profit character of the user's conduct as essential elements to verify whether the right of communication to the public is being infringed. The CJEU implemented these criteria in later judgments where defendants were not only making unauthorised copyright works available to the public but also providing technologies or devices facilitating copyright infringement.[34] In *Filmspeler* the defendant was distributing a device ('Filmspeler'), to be plugged into TVs, with add-ons containing links to websites that enabled access to free and unauthorised streams of copyright-protected movies. In *Ziggo* the infringing activities consisted of creating, maintaining and supplying a system based on peer-to-peer software, operation of a website dedicated to the downloading of files (*The Pirate Bay*) and acts of indexing and categorizing dispersed segments of data that, after having been re-assembled, gave access to copyright works. In

[31] C-348/13 *Bestwater International GmbH* v *Michael Mebes* (2014).
[32] *Bestwater International*, par. 19.
[33] C-160/15 *GS Media BV* v *Sanoma Media Netherlands BV and Others* (2016), hereinafter '*GS Media*'.
[34] C-527/15 *Stichting Brein* v *Jack Frederik Wullems* (2017), hereinafter '*Filmspeler*', and C-610/15 *Stichting Brein* v *Ziggo BV and XS4All Internet BV* (2017), hereinafter '*Ziggo*'.

both cases the CJEU found that the defendants had infringed the right of communication to the public.[35]

International copyright law experts criticized such an interventionist approach followed by the CJEU because of its reliance on additional requirements to obtain copyright protection that run contrary to EU obligations under international copyright agreements.[36] This is particularly evident with regard to the 'new public' and the 'technical restriction' requirements, none of which is contemplated as a permissible limitation of the right of communication to the public (or the right of broadcasting) under binding international agreements.[37] Both the aforementioned criteria have the potential of excluding a broad range of online exploitations from the reach of Article 3 of the InfoSoc Directive, to the advantage of online intermediaries being able to capture the commercial value of copyright works.

### 2.8. Persisting Uncertainties (in spite of broad creators' rights)

The very broad scope of the rights held or acquired by broadcasters, in both offline and online environments, show how much copyright law seeks to protect the commercial value of cultural creation. However, at a time when new forms of online exploitation constantly become available, it is hard to guarantee legal certainty as far as the amount of protection is concerned. The CJEU case law on hyperlinking and the ensuing uncertainties are an evidence of that difficulty. In particular, protection of the value of broadcasts has become a crucial issue in an environment where TV broadcasts and

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[35] See J. Ginsburg and L. A. Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives', 41 *Columbia Journal of Law and the Arts*, 153, (2018), pp. 174-176.

[36] See for instance ALAI (*Association Littéraire et Artistique Internationale*), Opinion on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public, 17.09.2014, hereinafter 'ALAI Opinion', available at http://alai.org. The ALAI Opinion emphasized the irrelevance of the 'new public' criterion under international copyright conventions and its inconsistency with obligations created in favour of authors and other copyright holders under the Berne Convention for the protection of literary and artistic property, the TRIPS Agreement signed under the shield of the World Trade Organization (WTO), the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

[37] See the ALAI Opinion, p. 2, where it argues that, if the 'new public' requirement does not apply if restrictions accompany the work's making available, this requirement creates an obligation to reserve the right or to protect works through technical measures that is in violation of Article 5(2) of the Berne Convention. This provision ensures that copyright protection subsists independently of formalities that condition the exercise of exclusive rights.

audiovisual contents are made available through on-demand content services and via social media platforms (see *infra*: Sect 4).

### 3. Broadcasters as Users of Pre-existing Copyright Works

TV broadcasting is, by definition, a multifaceted business. Transmission of programs is the criterion identifying television broadcasting and audiovisual media services under the current EU regulatory framework.[38] The current notion of 'broadcasting' includes analogue and digital television, live streaming and webcasting as well as audiovisual media (or 'TV-like') services. The main, common characteristic of these services is their function to inform, entertain and to educate the general public. Broadcasters accomplish this mission through linear transmission of programs such as news programs, short films, sport events, sitcoms, documentaries, children's programs and original drama.[39] Production of TV programs entails use and incorporation of a variety of pre-existing copyright works and, as a result, large and complex rights-clearance activities.

This section shows that rights clearance and compliance with a multiplicity of rights created by copyright would be much more costly and time-consuming (if not impossible) for broadcasters - as producers and suppliers of audiovisual content - without a number of EU legislative solutions. First, EU law ensures that collective rights management facilitates rights clearance and payment of remuneration to authors, artists and producers whose contents are used in broadcasting activities (Sect 3.1). Second, the EU copyright system harmonised copyright exceptions that are specifically targeted at broadcaster uses and/or are useful for production of TV programs (Sect 3.2). Third, several directives and regulations introduced and relied on a principle of private international law - known as 'country of origin' - that extends the geographical scope of national rules, including copyright law. This principle greatly facilitates broadcasting, satellite and cable transmissions, audiovisual media services and portability of online content services whenever content transmissions go beyond national borders (Sect 3.3).

[38] AVMS Directive, Recitals 22-24.
[39] See Art 1(b) of the AVMS Directive, according to which a TV program is a "set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting".

3.1. Rights clearance and collective rights management

In 1992 EU law harmonised the so-called neighbouring rights of performers, record producers and broadcasters.[40] Directive 92/100 instructed the member states on the type of rights to be granted to performers and record labels for the broadcasting of their fixations of performances and phonograms. Art 8(2) of this directive opted for codification of a right to a single equitable remuneration. This measure consciously replaces exclusive rights (which are typical of copyright law) with a right to remuneration, handled via collective bargaining, aimed at protecting the economic value of music performances and sound recordings in TV transmissions. As a result, performers and record producers whose works are used in TV broadcasts are remunerated in accordance with agreements negotiated, concluded and performed by their respective collecting societies. This mechanism and its harmonisation at EU level entail significant savings in transaction costs for TV broadcasters, who can more easily remunerate artists and labels through a limited number of transactions.

Broadcasters also benefit from a much later and more complex EU initiative aiming to ensure a cost-effective and more transparent management of copyright for large-scale uses of musical works.[41] To encourage competition and increase efficiency in this sector, Directive 2014/26 harmonised national rules applicable to collecting societies. This directive allows composers and lyricists to entrust their rights to a society of their choice, irrespective of their country of residence, and to split the assignment of their rights between different societies (Article 5). At the same time, the directive (Title II) harmonised the criteria of governance and the main obligations of collecting societies, imposing high standards of transparency and fairness towards right-holders and commercial users of copyright works. Regarding online licensing of music rights, the directive sets out requirements for these societies to be entitled to license cross-border digital uses.[42]

[40] See Council Directive 92/100/EEC, Art 6–9.

[41] Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and on multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, 72.

[42] To be entitled to issue licences for pan-European or cross-border digital uses, EU law provides that collecting societies shall meet a number of requirements, all of which are of a technical nature and impose high standards of service when it comes to processing the data needed for the exploitation of the licences;

The functioning of these societies is particularly relevant in the media sector since broadcasters traditionally rely on a licence with local collective rights management organizations in order to clear rights in musical works they incorporate in their TV and radio broadcasts.[43] These licenses also cover simultaneous and delayed online transmissions of TV broadcasts and supply of materials having a clear and subordinate relationship to the original broadcasts, such as supplements, previews and reviews of TV programs. EU law creates a privilege for broadcasters in this field in order to let them keep their well-established partnerships with rights-management organizations based in their countries of origin and licensing strictly local uses of musical repertoires. Such a special treatment consists of derogation from the principle that online uses should be licensed only by collecting societies that comply with high standards of service and technical requirements set out under Directive 2014/26 (for instance: use of time-sensitive and authoritative databases; processing usage reports and invoicing, etc). This derogation permits broadcasters to obtain territorial licenses for online uses from *all* EU collecting societies, including those that do not meet the aforementioned requirements and should be excluded from this business.

### 3.2 Copyright exceptions beneficial to broadcasting

EU copyright exceptions are relevant to the activities of broadcasters and audiovisual media services. Even though the main sources of exceptions, such as Directive 92/100 (replaced, without substantive changes, by Directive 2006/115/EC) and, more importantly, the InfoSoc Directive, do not make their provisions mandatory for the member states, certain exceptions enabling or facilitating production of TV programs and their broadcasting are widely implemented at national level.

EU directives embody exceptions which are highly beneficial to broadcasters' activities, such as: uses of protected works for purposes of news reporting (or use of short excerpts in connection with the reporting of current events);[44] ephemeral records

identifying the licensed repertoires through time-sensitive and authoritative databases; and processing usage reports and invoicing (Directive 2014/26, Art 23 to 28).

[43] See Directive 2014/26, Recital 48.

[44] InfoSoc Directive Directive, Art 5(3)(c); Directive 92/100/EEC, Art 10(1)(b). A special exception for the purpose of short news report is granted to any broadcaster established in the EU by Article 15 of the AVMS Directive, with regard to events of high interest to the public another broadcaster transmitted on an exclusive basis. The exception obliges the member states to give access to such events on a fair, reasonable

broadcasters make of their own broadcasts, also for preservation of such records in official archives;[45] quotations for purposes of criticism and review;[46] use of political speeches as well as extracts from public lectures or similar works to the extent justified by their informational purpose;[47] caricatures, parodies or pastiches.[48]

In its ongoing contribution to the harmonisation of national copyright laws, the CJEU touched upon the scope of exceptions, such as 'quotation' and 'parody', which greatly enhance freedom of expression in broadcasting activities.

The Court shed light on the notion of quotation in a rather unusual case of unauthorised use of a copyright photograph. The case concerned Austrian newspapers and magazines which had published, without the photographer's permission, news reports incorporating a photo portrait made available by a news agency for the search of a kidnapped girl in Austria in 1998.[49] The Court clarified that the InfoSoc Directive does not preclude the application of this exception when quotation of copyright works occurs *not* in a literary work but in the context of another type of work (such as a news report or, by analogy, a news program). The CJEU pointed out that quotations can legitimately occur also in the absence of an editorial intervention showing the user's intent to criticise and/or to review the work. The decisive factor consists of whether or not a free quotation strikes a fair balance between the user's freedom of expression and the interest of the author to prevent reproduction of extracts from a protected work.[50]

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and non-discriminatory basis and allows other broadcasters to freely choose - solely for general news programs - short extracts from the transmitting broadcaster's signal, with at least the identification of their sources.

[45] InfoSoc Directive, Art 5(2)(d); Directive 92/100/EEC, Art 10(1)(c).

[46] InfoSoc Directive, Art 5(3)(d).

[47] InfoSoc Directive, Art 5(3)(f).

[48] InfoSoc Directive, Art 5(3)(k).

[49] See *Painer*, par. 129-137.

[50] *Painer*, par. 134-135. Recently, the CJEU restated this principle in two cases where online news portals published articles that gave-unauthorized access to works for purposes of information and criticism. In one case, these works were military reports of the German Federal Armed Forces (known as "Afghanistan Papers"), obtained by unknown mean: see C-469/17, *Funke Medien NRW Gmbh* v *Bundesrepublik Deutschland* (2019). In the second case the quoted work was a 1988 manuscript on criminal policy authored by a member of the German parliament, who decided to publish it on his own website, at a much later time (2013), to dissociate himself from the contents of this work: see C-516/17, *Spiegel Online Gmbh* v *Volker Beck* (2019). In both judgments the CJEU found that the copyright exception of quotation should be interpreted in light of fundamental rights, such as freedom of information and media freedom, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union. In particular, the Court held that quotations (which can also be provided through a hyperlink to a file to be downloaded independently: see *Spiegel Online*, par. 83-84) should strike a fair balance between copyright protection and the competing

The CJEU reached a similar conclusion on the notion of 'parody' in a Belgian case where the publisher of a calendar distributed by a radical right party invoked this exception to excuse unauthorised use of a cartoon character taken from a well-known comic book.[51] The original cartoon, representing a 'Compulsive Benefactor', was modified and replaced with the image of the mayor of the city of Ghent, displayed while throwing coins to people wearing veils and to people of colour. The CJEU held that 'parody', whose notion is not defined at all in the InfoSoc Directive, should be understood in accordance with its meaning in everyday language, characterised by *(i)* evocation of a pre-existing work in a significantly different way and *(ii)* expression of humour or mockery.[52] The CJEU judgment, once again, rejected the claim that a unitary notion of parody should be narrowed down through additional elements the cartoonist's heirs sought to use to prove copyright infringement.[53] As in the previous quotation case, the judgment concluded that parody, once a work (like a cartoon) fulfils the essential elements of the exception, should aim at preserving a fair balance between the author's rights and the user's right to freedom of expression.[54]

An overview of the exceptions beneficial to broadcasting would not be complete without a short reference to Directive 2012/28/EU on certain uses of orphan works.[55] Public broadcasters - together with other public bodies - are beneficiaries of a mandatory exception permitting free reproduction, digitisation and communication to the public of works whose right-holders are unknown or, if identified, cannot be located despite a diligent search having been carried out.[56] The directive restricts the room for manoeuvre

goal of enabling free expression, especially on subjects particularly relevant to political discourse and matters of public interest (see *Spiegel Online*, par. 57-59, and *Funke Medien*, par. 72-76).

[51] C-201/13, *Johan Deckmyn* v *Helena Vandersteen and Others* (2014), hereinafter '*Deckmyn*'.

[52] See *Deckmyn*, par. 19-20.

[53] The main argument of the author's heirs was that, in addition to the above-mentioned essential elements, parody should have displayed an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work. Moreover, the copyright holders argued that a parodist work should reasonably be attributed to a person other than the author of the original work and should relate to the original work itself or mention the source of the parodied work: see *Deckmyn*, par. 33.

[54] *Deckmyn*, par. 34-35.

[55] Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, 5 ('Orphan Works Directive'). The other beneficiaries of the exception are public bodies such as accessible libraries, educational establishments and museums, archives, film or audio heritage institutions: see Art 1.

[56] The Orphan Works Directive harmonises the above-mentioned process of diligent search (which certifies that a work or phonogram is orphan: see Art 3) and embodies a principle of mutual recognition (Art 4), according to which a work that is considered orphan in a Member State should be considered likewise in

of its beneficiaries by obliging them to use orphan works only for the pursuit of their public interest missions: preservation, restoration and supplying of works contained in their collections and archives. However, the public sector institutions at issue are expressly allowed to enter public-private partnerships to foster digitisation of their collections and to ensure broader access to and use of their cultural heritage.

Notwithstanding its praise of the directive adoption, the organization representing European public broadcasters (EBU) criticised its limited scope, arguing that the 2012 Orphan Works Directive was a far too modest attempt to unlock the European cultural heritage materials embodied into television and radio archives.[57] The EBU complained that the Orphan Works Directive was just a first step towards the implementation of rights management solutions that could facilitate online dissemination of cultural content across Europe.[58] As emphasized above, in 2014 the EU adopted a directive in order to improve and streamline collective rights management of online rights. However, it is still to be seen whether this directive will help public broadcasters have access to licensing systems allowing them to clear rights for their cross-border online content deliveries. As the next subsection shows, only a small portion of the broadcasters' on-demand services is expected to benefit from recent extensions of the principle of the law of the country of origin.

3.3 The 'country of origin' principle and its progressive (although limited) extension

Since the 1989 directive on 'TV without Frontiers' was entered into force, broadcasters have had the privilege to have their activities regulated just by the single law of their country of origin, even when their signal is transmitted and perceived outside of their jurisdiction.[59] This provision was a visionary 'Internal Market' measure enacted at a time

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the whole EU (unless the owner of the work puts the orphan status to an end). It is provided that beneficiaries of the exception maintain records of their diligent searches and, via the competent national authorities, deliver all this information to a single publicly accessible online database created and managed by the European Union Intellectual Property Office (Art 3(6)). For an analysis of the EU directive see M. Favale, F. Homberg, M. Kretschmer, D. Mendis and D. Secchi, *Copyright, and the Regulation of Orphan Works: A comparative review of seven jurisdictions and a rights clearance simulation*, Report commissioned by the UK Intellectual Property Office (2013), p. 24 ss.

[57] See European Broadcasting Union (EBU), 'Adoption of EU Orphan Works Directive: First Step Towards Copyright Modernization', Press release, 13.9.2012, available at http://ebu.ch.

[58] *Ibidem*.

[59] See 'Television without Frontiers' Directive, Art 2(a)(1).

when cross-border free-to-air TV transmissions were still very limited and happened mostly at geographical borders between member states. From a legal standpoint, in spite of its weaknesses, the provision was relevant since it reduced national sovereignty in obliging the member states to ensure unhindered reception of foreign broadcasts lawfully transmitted in their state of origin.[60] With respect to copyright, without the 'country of origin' rule, territoriality of rights granted under copyright law would make all the (still distinct) laws of the countries where a broadcaster signal is transmitted and perceived simultaneously applicable, with a subsequent increase of rights clearance and compliance costs.

Legislative history shows that the country of origin principle has been a successful mechanism to enable freedom to provide EU-wide services while complying just with one national law. First, EU directives restated and extended the principle of country of origin to the activities of satellite and cable TV operators (1993), clarifying the criteria that determine jurisdiction over a broadcasting organisation in the revision of the 'Television without Frontiers' Directive in 1997.[61] Second, the country of origin principle was extended to 'TV-like' (i.e. linear) transmissions of audiovisual media services through directives enacted in 2007 and 2010.[62] Third, a new directive pursues the same objective by simplifying rights clearance for broadcasters' web-based ancillary services and content

[60] See I. Katsirea, 'The Television Without Frontiers Directive', in K. Donders, C. Pauwels and J. Loisen (eds), *The Palgrave Handbook of European Media Policy*, Palgrave Macmillan (2014), p. 297, at 298-29, where the author recalls that the 1989 directive did not provide criteria to determine jurisdiction over broadcasting activities. This lacuna gave rise to litigation and, in the 1997 revision of the directive, codification of the place of establishment (and not the place of transmission) as the principal criterion to identify the country of origin of a broadcaster.

[61] See Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993 (hereinafter 'Satellite and Cable Directive'); see also Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202, 30.7.1997, p. 60. To identify the country of origin, Directive 97/36 introduced hierarchical criteria based on the place *(i)* where a broadcaster's head office is located; *(ii)* where editorial decisions about programming are taken; *(iii)* where a significant part of the workforce involved in broadcasting activities operates and *(iv)* where the broadcaster first began broadcasting (these criteria are now incorporated into Art 2 of the AVMS Directive).

[62] See Directive 2007/65 of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 322/27, 18.12.2007; and AVMS Directive, Art 2.

re-transmissions offered on a cross-border basis.[63] To this end, the 2019 Broadcasting Directive complements the existing 1993 Satellite and Cable Directive in making certain online transmissions of radio and TV broadcasts, as well as their cross-border re-transmissions, subject solely to the law of the country of establishment of the broadcaster.[64] Last but not least, a recent EU regulation implemented a variant of the principle of the country of origin - the law of the consumer's country of residence - with the aim to guarantee a EU-wide access, for a limited period, to online content services offering music, games, films and sporting events in exchange for a fee (or without payment of money, if the service provider verifies the subscriber's place of residence).[65] To avoid geo-blocking of content services for tourists and short-term travellers, this regulation considers online content transmissions reaching the consumers in any of the EU countries as occurring, legally speaking, solely in the consumer's country of residence.[66] From a rights-clearance perspective, this mechanism means that the rights of the content service providers (which include also pay-tv broadcasters) are automatically extended to EU countries where service subscribers happen to be, on a

[63] See Directive 2019/789 of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130, 17.5.2019, p. 82 ('Broadcasting Directive'). Recital 8 of this directive refers to 'ancillary services' as those services offered by broadcasting organizations which have a clear and subordinate relationship with the broadcaster's transmissions.

[64] Services falling within the scope of application of the Broadcasting Directive include transmissions of radio and TV programmes simultaneously to the broadcast; services giving access, within a defined period after the broadcast, to radio and TV programmes which have previously been transmitted by the same organization (so-called 'catch-up' services); services providing access to material that enriches or otherwise expands radio and TV broadcasts (for instance: previewing, reviewing).

[65] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168/1, 30.06.2017 ('Portability Regulation'). For an analysis and a critique of the Portability Regulation and its (modest) scope see G. Mazziotti, 'Allowing Online Content to Cross Borders: is Europe Really Paving the Way for a Digital Single Market?', in T. Pihlajarinne, J. Vesala and O. Honkkila (eds), *Online Distribution of Content in the EU*, Edward Elgar (2019), p. 187, at 189-194.

[66] To ensure its functioning from a legal point of view, the Portability Regulation does not specify the length of the traveller's or short-term migrant's stay outside of her country of residence. Moreover, copyright holders and online content service providers are expressly restricted from contractually limiting, in terms of scope and/or duration, the right of European consumers to cross-border portability of their content (cf. Article 7). Rather, the Regulation provides consumers with the above-mentioned access right by establishing a duty for providers of online content services to check the Member State of residence of their subscribers through verification means showing a clear link between the consumer and a certain EU Member State (for instance, an Internet protocol address check; payment details or credit card numbers; an Internet or phone service supply contract, etc).

temporary basis, and for which the providers have obtained a licence from the copyright holders.

Despite its relevance for the broadcasting sector, the introduction and extension of the country of origin principle should be correctly understood in its (still limited) dimension. The essence of this principle lies in flexibility and regulatory privileges granted to TV, cable and satellite broadcasters as well as digital TV service providers. These operators and service providers are free to decide where to transmit their signal and how to exploit their contents. This means that broadcasters are still free to limit their transmissions and content deliveries on a strictly territorial basis. In spite of the borderless character of online content distribution and the aspiration of the EU to build up a Digital Single Market, for both cultural and political reasons the whole audiovisual sector is still reluctant to embrace a multi-territorial dimension. In the film sector, in particular, the broadcasters' freedom to decide where to broadcast (and webcast) is hindered by how films can be effectively marketed in a linguistically diverse Union.[67] Another kind of limit is contract-induced and descends from how audiovisual content production works in both the Hollywood studios system and the European cinema. The film producers' licensing freedom is normally restricted as a result of pre-production sales or assignments of territorially exclusive rights in distribution and communication to the public of films to certain commercial exploiters.[68] The same restriction occurs with regard to transmission of sports events, for which content owners establish areas of territorial exclusivity and restrict broadcasters from giving access to their events outside of the broadcasters' countries of origin.[69] Such contractual practices inevitably condition European broadcaster policies on territorial openness of their services and an effective implementation of the principle of 'country of origin'.

[67] Territorial licensing can be a necessity on the grounds of Europe's culturally and linguistically diverse audiences and the fact that, commercially speaking, content adaptation through dubbing and subtitles (together with other forms of content versioning) is still indispensable in four of the five biggest markets in Europe (Germany, France, Italy and Spain): see A. Renda, F. Simonelli, G. Mazziotti, A. Bolognini and G. Luchetta, 'The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society', *supra* note 5, p. 60-64.

[68] G. Langus, D. Neven and S. Poukens, 'Economic Analysis of the Territoriality of the Making Available Right in the EU', Charles River Associates (2014), Study prepared for the European Commission, DG Internal Market, p. 18-20.

[69] See G. Mazziotti, 'Allowing Online Content to Cross Borders', *supra* note 65, p. 193-194.

The actual predominance of a strictly territorial dimension should not come as a surprise if one considers the audiovisual sector from an EU regulatory perspective. Audiovisual services are classified as services of general economic interest that are subject to specific public service obligations and to regulatory powers exercised by national authorities.[70] These services, with other services of general interest, are expressly excluded from the scope of application of a 2018 EU regulation aimed at prohibiting geo-blocking and other forms of territorial consumer discrimination.[71] Through such explicit exclusion, the regulation clarifies that in the audiovisual sector, where legal requirements or forms of regulation are still to be enforced at national level, geo-blocking and other forms of territorial discrimination of consumers should be viewed as *legitimate*.

It is evident that national regulatory measures would be ineffective if consumers could easily circumvent or elude them by resorting to foreign audiovisual content providers through cross-border online sales or subscriptions to on-demand film services such as Netflix or Hulu. This explains why, in spite of its progressive extension to new types of online content deliveries, the country of origin principle is still confined to the broadcasting sector and is not applied - if not in a very limited way, as in the case of online TV ancillary services - to on-demand content services. For those services the principle of territoriality, which characterises both media and copyright regulations, still holds a position of uncontested dominance.

## 4. Ensuring fairness at a time of media convergence

EU lawmakers recently reformed the intersection of media law and copyright in order to cope with significant changes that materialised in the online content market in the past

[70] See, for instance, Directive 2006/123/EC of 12 December 2006 on services in the Internal Market, L 376, 27.12.2006, p. 36 (hereinafter 'Services Directive'). According to Art 2(2), non-economic services of general interest, transport services, audiovisual services, retail financial services, electronic communications services and networks, gambling, healthcare and certain social services fall outside of the scope of the directive and cannot be freely provided on an EU-wide basis.

[71] Regulation 2018/302 of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation No 2006/2004 and Directive 2009/22/EC, OJ L 601, 2.3.2018, 1–15 ('Geo-blocking Regulation'). The Regulation outlaws restriction of access to websites and applications as well as redirection of customers to other websites and apps on the grounds of their nationality, residence or establishment. As provided under Art 1(3), the Geo-blocking Regulation does not apply to sectors referred to in Art 2(2) of the Services Directive.

few years. A revised version of the AVMS Directive[72] and a new EU directive on 'Copyright in the Digital Single Market',[73] in their respective fields, create new duties for newly emerged players and digital content services.

As emphasized in the preamble of the 2018 directive revising the AVMS Directive (Recital 1), even though traditional TV content still accounts for a major share of the average daily viewing time, the media services market has evolved significantly and rapidly due to the ongoing convergence of television and Internet services. The emergence of this new environment is the reason why EU law seeks a more balanced allocation of duties and responsibilities and the involvement of video-on-demand (hereinafter 'VoD') service providers and social media platforms in the enforcement of certain media law and copyright provisions.

### 4.1 Video-on-demand (VoD) services

The quick rise and global success of video on-demand services such as Netflix, Hulu and Amazon in the last decade made these content platforms compete with free-to-air and pay-tv broadcasters for the same or similar audiences. Unlike TV broadcasters, VoD services (or, according to the EU law lexicon, 'on-demand audiovisual media services') give access to programs and other audiovisual works each user chooses on the basis of a catalogue created and made available by the service provider. The main difference between the two services consists in the type of content transmission. Whereas broadcasting provides a simultaneous viewing of programs on the basis of a program schedule (so-called 'linear' transmission), VoD services enable their users to choose the time of viewing and the content at their individual request ('non-linear' transmission).[74]

As of the revision of the 'Television without Frontiers' directive in 2007, media law obligations started targeting VoD services given their potential to partially replace

[72] Directive 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69.
[73] Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/6/EC and 2001/29/EC, OJ L130, 17.5.2019 (hereinafter '2019 Copyright Directive').
[74] Cf. AVMS Directive, Art 1(g).

television broadcasting.[75] However, in consideration of the different impact these kinds of content deliveries have on society, EU law subjected them to a lighter regulatory burden.[76] Directive 2007/65 and, three years afterwards, the newly enacted AVMS Directive (which replaced the pre-existing regulatory framework) imposed just a few basic rules on such new players. These provisions obliged VoD service providers to protect minors in their service supplies;[77] to bear an editorial responsibility and to exercise effective control over the selection of contents in their catalogues; and to promote production of, and access to, European audiovisual works through financial contributions or acquisitions of rights or by sharing or giving prominence to such works in their catalogues.[78]

The approach to these issues in the 2018 revision of the AVMS Directive fundamentally remains the same. However, the obligation to promote cultural diversity and to contribute to European audiovisual productions has significantly grown in scope and prescriptive force. The new version of Article 13 is much more detailed in imposing a minimum share (30%) of European works to VoD catalogues and ensuring prominence in the display of those works. The same provision allows the member states to require VoD services to contribute financially to European content production, also via direct investment and contribution to national funds. EU policy makers were aware of the fact that VoD service providers invested much less than TV broadcasters in production and promotion of European works.[79] One more reason to opt for a stricter definition of these rules was the fact that several VoD services attempted to escape national burdens by establishing themselves in a member state (A) with lighter or no content regulation while targeting audiences located in another member state (B). In this situation, the 2018 version of the AVMS Directive allows country B to impose its financial contributions also on providers incorporated, opportunistically, in country A.[80]

[75] Directive 2007/65, Recital 48. Recital 6 of this directive also mentioned the need to ensure compliance with basic principles of EU law such as fair competition and equal treatment.
[76] The AVMS Directive (2010/13/EU) justifies the imposition of a lighter regulatory burden on VoD services providers in light of the weaker impact an information society service has on society in comparison to a media service accessed by the general public: see Recital 58.
[77] AVMS Directive (2010), Art 12.
[78] AVMS Directive (2010), Art 13.
[79] See AVMS Directive (Directive 2018/1808), recital 37.
[80] AVMS Directive (2018), Art 13(2).

Article 13 of the 2018 version of the AVMS Directive and its cultural protectionism came together with a remarkable effort, in the 2019 Copyright Directive, to make VoD services more supportive of cultural diversity and European audiovisual content production. The new Copyright Directive seeks to broaden online access to European works by obliging the member states to establish impartial bodies or mediators assisting right-holders and VoD platforms in negotiations and agreements on online rights.[81] The main target of this provision is the actual lack of online accessibility for a significant portion of European audiovisual productions and their territorially limited distribution. The fact that audiovisual producers and VoD services will be able to rely on State-backed negotiation mechanisms is expected to help them change or improve current licensing practices in order to make the European cinema and other audiovisual works more easily accessible, and in more than one given territory. This measure is clearly supportive of cultural diversity and of the European creative sector if one considers that internationally appealing productions, such as the US film majors' or Netflix's and Amazon's, do not face the problem of not being available or being territorially restricted on VoD services.[82]

To support cultural creation, the 2019 Copyright Directive imposes duties of cooperation on VoD service providers (and other licensees or transferees of copyright works) by introducing a set of unprecedented measures that significantly strengthen copyright holders' bargaining power. This new legislation codifies a principle of fair and proportionate remuneration, including in the audiovisual sector, and in particular with regard to online content exploitations.[83]

To pursue this goal, the new directive creates a right for authors and performers to receive, on a regular basis, timely, accurate, relevant and comprehensive information on modes of exploitation of their works, direct and indirect revenues generated, and remuneration due.[84] After the implementation of the directive in national systems, this right to transparency will be actionable, including via voluntary dispute resolution procedures, not only against content producers - which are traditional contractual

[81] See the 2019 Copyright Directive, Art 13.
[82] See, for instance, European Audiovisual Observatory, *On-Demand Audiovisual Markets in the European Union*, Final report, Study prepared for the European Commission DG Communications Networks, Content & Technology (2014).
[83] 2019 Copyright Directive, Art 18 ('Principle of appropriate and proportionate remuneration').
[84] See Art 19 ('Transparency obligation').

partners of authors and performers - but also against further licensees or assignees, such as TV broadcasters, digital TV service providers and VoD services, which buy or clear rights from film or audiovisual producers.[85]

The right to transparency of information is functional to the enforcement of two, newly codified rights, each of which is expected to trigger significant reforms of national copyright contract laws. The first is a right to contractual adjustments, when author or performer remuneration is disproportionately low when compared to subsequent relevant direct or indirect revenues deriving from exploitation.[86] The second is a right to revocation of licences or transfers of copyright where there is an absence of exploitation of the work, taking into account the specificities of different sectors and different types of works and performances.[87]

These new rights are a clear attempt to remedy a situation in which copyright is concentrated, for the most part, in the hands of the cultural industries. A right to fair remuneration and a subjective right to revocation of unfair or harmful rights transfers are expected to strengthen the bargaining power of authors and artists and to enable them to

[85] See 2019 Copyright Directive, Art 19(2), which provides that authors, performers or their representatives shall, at their request, receive from sub-licensees additional information, in the event their contractual counterparts do not hold the information that would be necessary to make the right to transparency effective.

[86] See Art 20.

[87] See Art 22. In obliging EU member states to introduce a right to revocation under their laws, the 2019 Copyright Directive leaves national lawmakers with the freedom to set out specific circumstances under which this right can be exercised. For instance, Art 22 of the directive allows for the exclusion of certain types of works from the application of revocation mechanisms if these works usually contain contributions of a plurality of authors or performers and revocation by an individual author or performer would affect the legitimate interests of all authors and performers. Moreover, the EU member states are also required *(i)* to quantify the "reasonable time" after which an author or a performer can request revocation of a licence or a right transfer and *(ii)* indicate specific time frames within which the right to revocation can be exercised in different content sectors. The new EU right is similar to the termination right US law has conferred to authors as of the 1976 reform of the US Copyright Act. As explained by J. Ginsburg, 'Foreign Author's Enforcement of U.S. Reversion Rights', 41 *Columbia Journal of Law and the Arts*, p. 459 (2018), p. 461-462, the US non-waivable author's right to termination of the grant of her rights replaced a previous system (of 'reversion') where rights were automatically re-assigned to the author after expiration of the first term of copyright protection (this right was based on a two-term copyright system). Given that the 1976 reform introduced a unitary copyright term - in order to make US law comply with the minimum term of protection required by the Berne Convention (life of the author + fifty years) - the Copyright Act replaced the reversion right with a *termination* right. The main difference is that today's US right is not automatic and requires the author, after thirty-five years from the grant, to properly notify the grantee and to record the notification in the Copyright Office within statutory deadlines. In the absence of such formalities the author loses her termination right. Another relevant difference is that the termination right is enforceable "notwithstanding any agreement to the contrary", whereas the previous right to reversion upon renewal could be overridden through contract by the publisher: see J. Ginsburg, op. cit., p. 462.

take advantage of the commercial success and diffusion of their works, especially in the online environment.[88] Giving authors and performers better tools to negotiate their rights transfer and to ensure higher remuneration is also a way to support the creative endeavour of individuals, who ultimately guarantee, more than cultural industries, diversity of cultural creation.[89] However, it is still unclear how realistic disclosure of such a vast array of data, on a sector-by-sector basis, will be. To spur such a transparent and fair allocation of earnings along the creative content value chain, producers and exploiters of copyright works (such as TV broadcasters and VoD service providers) will have to take measures whose costs will depend concretely on how authors' and performers' rights will be transposed under national laws.[90]

### 4.2. Social media platforms

The 2019 Copyright Directive also seeks to protect the commercial value of copyright works on social media and user-generated content platforms.[91] Until recently, it was very unclear how copyright owners could enforce their rights on platforms such as YouTube, Vimeo, Daily Motion, Facebook, and Instagram. These are platforms where users upload and share not only their own works – under a condition of gratuity or the service's monetisation scheme - but also unauthorized materials which are professionally produced, such as TV programs, documentaries, short films and photographs.[92]

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[88] The newly codified rights, if effectively implemented, are likely to raise a barrier to alienability of copyright interest and the practice of cultural industries to take advantage of freedom of contract and of their bargaining positions and market power to gather as many copyright interests as possible: see F. Macmillan, ''Are You Sure/That We Are Awake?': European Media Policy and Copyright', in K. Donders, C. Pauwels and J. Loisen (eds), *The Palgrave Handbook of European Media Policy*, op. cit., p. 382, at 388.

[89] See G. Mazziotti, 'Cultural Diversity and the EU Copyright Policy and Regulation', in E. Psychogiopolou (ed), *Cultural Governance and the European Union*, Palgrave Macmillan (2015), p. 91, at 95.

[90] For instance, before the adoption of the 2019 Copyright Directive the European Broadcasting Union (EBU) complained that an obligation to systematically inform all authors and performers about use of their works and performances would have raised unprecedented burdens for creative industries, at a time when such industries are already facing significant market disruption: see EBU, *European Parliament Fails to Provide a Realistic Solution on Copyright Contract Law Provisions*, Press release, 20.6.2018.

[91] Art 2(6) of the 2019 Copyright Directive defines social media and user-generated content platforms as 'online content sharing services', that is, information society services one of the purposes of which is "to store and give public access to a large amount of copyright-protected works [...]" uploaded by their users, which the service provider "organises and promotes for profit-making purposes."

[92] The number of users of social media services evidences a central role of their providers in online distribution of creative works. For instance, recent estimates show that Facebook has gained 1.7 billion users, whereas YouTube has 1.3 billion users. Available figures also show that these platforms have become increasingly relevant and competitive for online content *creation*. For instance, by 2017 more than 3 million YouTube creators received some form of remuneration from their upload contents, worldwide; the top 5000

At the beginning of the Web 2.0 era, social media service providers took advantage of a liability exemption created by Directive 2000/31/EC in order to protect neutrality of interactive content services and foster their online communications.[93] Beneficiaries of this exemption are providers of 'hosting' services, who should not be liable for activities carried out by their users if, after gaining knowledge of unlawful conduct, they promptly remove the illegal contents.[94] The implementation of this exemption made online copyright enforcement largely dependent on 'notice-and-takedown' mechanisms, which are effective mostly for right-holders who are resourceful enough to monitor what is being published online and to notify each service provider. The transposition of this principle into the interactive environment created by social media, which did not exist at the time the e-Commerce Directive was adopted, inevitably transformed these services into *de facto* media services which give access to undifferentiated types of materials.[95]

The 2019 Copyright Directive provides remedies in a technological context where right-holders easily lose control over the exploitation of their works and cannot enforce or fairly license their rights. In the European Commission's legislative proposal from September 2016, Article 13 identified (and at the same time limited) the types of content-sharing services that would have been subject to a duty to make unauthorized copyright works inaccessible ("providers that store and provide to the public access to large amounts of works or other subject matter uploaded by their users").[96] The original text

YouTube channels reached the amount of 250 billion video viewings in aggregate; 4000 channels of "professionalizing amateur" creators reached at least one-million subscribers. All these figures are provided in S. Cunningham and D. Craig, *Social Media Entertainment – The New Intersection of Hollywood and Silicon Valley*, New York University Press, New York (2019).

[93] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.07.2000, p. 1 (hereinafter 'e-Commerce Directive'), Art 14. Before the adoption of the 2019 Copyright Directive, the EU legal framework on online intermediary liability still had a patchy character and had not found a common answer to the question of how Internet service providers should have been involved in copyright enforcement: see C. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Kluwer Law International (2017), p. 3-7.

[94] The notion of 'illegal activity and information' under Art 14 of the e-Commerce Directive is horizontally defined and goes beyond copyright-infringing materials (to include, for instance, defamatory content).

[95] It is also on this assumption that the 2018 revision of the AVMS Directive extended its scope of application by targeting 'video-sharing' platforms (i.e. social media). The AVMS Directive now obliges these platforms to take appropriate measures to protect minors (from programs, videos and commercial communications which may impair their physical, mental or moral development) and the general public from dissemination of hate. Art 28(b) of this directive defines hate speech as "communications containing incitement to violence or hatred directed against a group of persons or a member of a group [...]" on any of the grounds referred to in Article 21 ('Non-discrimination') of the Charter of Fundamental rights of the European Union.

[96] See Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, Brussels, 14.9.2016.

also made a direct reference to the availability and increasingly broad implementation of effective content recognition technologies - such as Google's Content ID, currently used on YouTube[97] - that were viewed as appropriate and proportionate measures to filter unauthorised contents. As stressed by the European Commission in its impact assessment, Article 13 was expected to target just large user-generated-content platforms, whose size was estimated on the grounds of both the number of users and visitors and the amount of materials uploaded over a given period of time.[98]

Inevitably, this approach raised much controversy among national governments, in the European Parliament debate and among interest groups and academics.[99] For instance, the emphasis of the original text on 'filtering' obligations and the attempt to impose certain technologies to identify and remove unauthorised contents were regarded as an attack to Internet freedom of communication and speech.[100] Moreover, a mechanism of prevention of copyright infringement through installation of filtering measures seemed to contradict the liability exemptions enshrined in the e-Commerce Directive and judgments of the CJEU where such systematic filters were found to be incompatible with freedom of speech and freedom to do business online.[101]

After a long debate, the European Parliament and the Council approved a definitive version of the directive where former Article 13 - re-numbered as Article 17- sets out an equation between activities carried out by online content sharing services and acts of communication to the public, as defined under Article 3 of the InfoSoc Directive.[102] This means that, to make their online communications lawful under copyright law, providers of such services should obtain right-holders' permission and conclude fair and

[97] See YouTube, *How Content ID works*, available at support.google.com.
[98] Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright Rules, Part 1/3, SWD (2016) 301 final, Brussels, 14.9.2016 (hereinafter 'Commission's Impact Assessment'), p. 146.
[99] See, for instance, the European Parliament debate reported by J. Reda (ed), *Better Regulation for Copyright - Academics Meet Policy Makers*, University of Southampton & The Greens/EFA in the European Parliament, Brussels, 6th of September 2017.
[100] S. Stalla-Bourdillon, 'Filtering Obligations and Fundamental Rights: Can the EU Eat the Cake and Have It Too?' and T. Rendas, 'Form and Substance in the Value Gap Proposal' in J. Reda (ed), *Better Regulation for Copyright, supra* note 99, at p. 23 and 39.
[101] See C-70/10, *Scarlet Extended SA* v *Sabam* (2011) and C-360/10, *Sabam* v *Netlog* (2012).
[102] See 2019 Copyright Directive, Art 17(1). A very important consequence of this definition is that, as 'licensees' of rights, providers of content-sharing services have an obligation to disclose data to authors and performers about use of their works, modes of exploitation and direct and indirect revenues generated by their works.

appropriate licensing agreements. Article 17 expressly requires these agreements to cover liability for copyright works that platform users make available online while acting on a non-commercial basis or not generating significant revenues.[103] The equation also makes the activities carried on content-sharing platforms subject to the case law of the CJEU on the scope of the right of communication to the public, especially with regard to hyperlinks, linked-to or embedded content and the indirect liability of suppliers of technologies or devices enabling access to unauthorised copyright works.[104] The emphasis of this provision is, therefore, no longer on filtering technologies but on how to boost and finalise licensing agreements in order to restore the commercial value of copyright in the social media landscape.

Article 17 embodies a wide array of measures that establish a duty for content-sharing platforms to cooperate with copyright holders in restricting availability of works right-holders do not intend to license.[105] First, this provision clarifies that content-sharing services are not entitled to benefit from the aforementioned liability exemption created under Article 14 of the e-Commerce Directive.[106] Second, the Copyright Directive makes these service providers directly liable for copyright infringement if they make copyright works available to the public without obtaining an authorisation from right-holders or making best efforts to do so. Article 17 mitigates this stricter regime of copyright liability by specifying that a service provider's 'best efforts' to avoid copyright infringement should be evaluated in accordance with high standards of professional diligence, taking into consideration whether or not suitable and cost-effective content recognition technologies are effectively available within a given sector.[107] The directive clarifies that this new algorithmic approach to copyright enforcement must not end up over-blocking and preventing availability of non-infringing works.[108] Moreover, Article 17(7) provides that platforms' technologies should not prevent the availability of works

[103] See Art 17(2).
[104] See *supra* Sect 2.7.
[105] The directive expressly provides that copyright holders should make available relevant and necessary information that ensure unavailability of specific works (see Art 17(4)(b)).
[106] Article 17(6) excludes from this new and stricter copyright liability regime those providers whose content services have been available to the public in the European Union for less than three years and whose annual turnover is lower than EUR 10 million.
[107] Art 17(4) and 17(5).
[108] Art 17(7).

that copyright exceptions - such as quotation, caricature or parody – make legitimate. To this end, member states shall put in place effective and expeditious complaint and redress mechanisms to ensure that users can react to unjustified removals of their content.[109]

The main intent of Article 17 is to ensure EU-wide uniformity in understanding whether and how social media platforms should be liable of copyright infringement.[110] In a landmark decision issued years before the publication of the directive proposal, the CJEU emphasized the need to grant the exemption stemming from the e-Commerce Directive only to merely technical and automatic activities.[111] The Court held that services whose functionalities include content categorization, recommendations, playlists or the ability to share contents are clearly distinct from the kind of passive and unaware service providers the drafters of the 2000 e-Commerce Directive had in mind. The preamble of the 2019 Copyright Directive restates this conclusion in recalling that on-demand services which play an active role in giving access to user-generated content (by optimising the presentation of the uploaded works or promoting them) should not escape the obligations copyright law entails when copyright-protected works are communicated to the public.[112]

The final version of Article 17 goes beyond the attempt to remove (or at least reduce) uncertainties on indirect liability of online intermediaries by making content-sharing platforms *directly* responsible for communication of their users' uploads to the public. This new liability regime is designed to strengthen the bargaining power of copyright holders and to restore the value of their works, especially with regard to TV broadcasts. As the European Commission stressed at the time of its directive proposal, social media platforms offered to rights-holders mostly 'monetization agreements',

[109] Art 17(9).

[110] For instance, lack of uniformity in the understanding of the activities of one of the largest content-sharing services (YouTube) emerged from the German and French case law: see the *GEMA* v *YouTube* cases in Germany (Higher Regional Court Hamburg, July 2015; Higher Regional Court Munich, January 2016), where the courts considered that, while YouTube presents itself as an alternative to Spotify and similar services, it does *not* carry out an act of communication to the public (which is carried out, instead, by the uploaders). See also the case *Kare Productions* v *YouTube* settled by Court of Paris (January 2015), which reached a similar conclusion. These cases were mentioned in the 2016 Commission's Impact Assessment, p. 143.

[111] See C-324/09, *L'Oreal and Others* v *eBay International AG and Others* (2011), par. 116-124.

[112] See 2019 Copyright Directive, recital 62, which clarifies that Article 17 applies to information society services that optimise and organise content (by displaying, tagging, curating and sequencing uploaded works) for profit making purposes. The same recital also specifies that the notion of online content-sharing services does *not* cover micro- and small-size enterprises, non-commercial initiatives such as online encyclopaedias (for instance, Wikipedia) and educational or scientific repositories, where content is uploaded with the authorisation of all the right-holders concerned.

concluded on a voluntary basis, and not as a result of an obligation of these platforms to clear copyright (an obligation that is now clearly stated under Article 17).[113] Furthermore, these deals do not reflect the value (and the price) of the licensing agreements copyright holders enter into with on-demand content suppliers such as Spotify, Deezer, Netflix and with TV broadcasters, who are therefore placed in a disadvantaged position vis-à-vis the content-sharing platforms.

From a media policy perspective, the fact that online content-sharing platforms are no longer viewed as passive actors but as on-demand media services that increasingly control and determine how a relevant share of the public has access to copyright works is of great relevance. This means that TV broadcasters will have a better chance to enforce their rights in their broadcasts and audiovisual works they produce and disseminate thorough their own websites or by licensing them to film or television content services. The role content-sharing services are expected to play seems to be a good reason, at least from a EU law perspective, to regulate these services. Recent developments in policy-making suggest that the existing sector-specific obligations that online content-sharing platforms already have under EU law regarding protection of minors, hate speech and copyright enforcement might soon be expanded through more comprehensive regulation targeted, horizontally, at all illegal content online. The EU already sought to respond to the challenge of illegal content online through directives on child pornography and content inciting to commit terrorist acts as well as a number of non-legislative measures targeted at terrorist propaganda, sale of counterfeit goods, wildlife trafficking, etc.[114] However, it is still unclear how the strategy and guidelines enshrined in a Commission recommendation issued in March 2018 will be developed in the close future.[115] To tackle all types of illegal content the Commission envisages forms of smooth communications and cooperation between providers of online content services, national authorities and Internet users. From a broad regulatory perspective, this piece of soft law openly

[113] See Commission's Impact Assessment, p. 139.
[114] European Commission, Communication from the European Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, *Tackling Illegal Content Online - Towards an Enhanced Responsibility of Online Platforms*, COM(2017), Brussels, 28.9.2017, p. 3-4.
[115] European Commission, *Recommendation of 1 March 2018 on measures to effectively tackle illegal content online*, C(2018) 1177 final, Brussels, 1.3.2018.

encourages removal of illegal materials and prevention of their re-appearance online through automated means of content detection.

## 5. Conclusion

EU copyright law has evolved and adapted to a fast-changing technological environment by providing unitary notions (such as 'originality', 'communication to the public', 'parody') and a very broad array of uniform intellectual property rights across the EU. The aim of these provisions has been granting a high level of protection to European cultural industries, especially in the digital environment. Media law has evolved not only by imposing traditional forms of consumer protection and public service requirements to broadcasters (and now to providers of digital TV services) but also extending rules and obligations that aim to protect the economic value of cultural creation for new market players.

In spite of a deeply harmonised regulation at EU level, the European audiovisual sector's governance is still firmly under the control of the member states. National policy makers have broad room for manoeuvre in reaching the objectives set out under EU regulations. The duty to promote the European audiovisual industry and to preserve cultural diversity has become more specific, especially for providers of video-on-demand services. Nonetheless, member states are still free to determine how these new services are expected to contribute to local cultural creation and to join traditional broadcasters in this endeavour.

This multilevel regulation reflects a predominantly territorial dimension of television, films and audiovisual productions whose transmission and online deliveries remain within national or linguistically homogeneous borders. The EU has made significant efforts to expand the territorial reach of national broadcasting by granting freedom to transmit TV broadcasts on a cross-border basis while having to comply just with the (harmonised) laws of the broadcaster's country of origin. However, this freedom has faced different kinds of limitations and contractual restrictions descending from both commercial and linguistic considerations. Audiovisual content producers and TV broadcasters still find more profitable to establish areas of absolute territorial exclusivity for film transmissions in a way that justifies the geo-blocking of digital TV services. This country-by-country licensing approach is even stronger and more evident in the market

for video-on-demand services, which is not covered by the law of the country of origin (if not in a very limited way: i.e. for ancillary TV services). Even the latest EU initiatives aimed at building up a 'Digital Single Market' in Europe (especially the 2018 Geo-blocking Regulation) seem to have fully recognised a 'cultural exception' for the audiovisual sector.

More open questions derive from attempts to improve enforcement of copyright and to give content creators a real chance to protect the value of their work and to take advantage of booming online content services, social media and user-generated content platforms. The tools EU copyright law relies on are both legal and technological. The EU has adopted regulatory measures that foster modernization of collective rights management and implementation of technologies that can make it easier for right-holders and on-demand media service providers to estimate the value of content online, to price their (now necessary) licenses and to allocate revenues in light of effective use of the works communicated to the public. However, it still impossible to estimate how these measures will impact on a fast-changing media sector where, for more than a decade, creative works were under-remunerated or shared for free.

Access to vast amounts of data (a significant part of which might still continue to be protected by confidentiality) has become crucial for authors and performers to exercise their newly codified rights to fair remuneration and revocation of unfair rights transfers. These rights will have to be exercised against content producers and, possibly, TV broadcasters and online media companies such as video-on-demand service providers and social media platforms. However, it still unclear how these old and new exploiters of professionally created content will handle the unprecedented regulatory burden created by the 2019 Copyright Directive. Also unclear is whether and how the right-holders and their collecting societies will process all the information they will receive from a broader media sector.

Will all these rights be managed in an efficient and transparent way, with a subsequent fair allocation of revenues, including to individual creators and small and medium-size content producers? The EU policy makers' attempts to bring more fairness and to avoid free riding in the current online content sector rely – in the same way as media regulations – on multi-level governance. In the 2019 Copyright Directive all regulatory measures aiming to promote and broaden access to the European films and other audiovisual productions presuppose the establishment of state-backed negotiation

mechanisms. Moreover, the provisions guaranteeing transparency and fair remuneration for authors and performers presuppose a decisive (and potentially very different) intervention of member states. National law is expected to define, in a sector-specific way, the types of data that will have to be made accessible for the sake of creators' transparency and fair remuneration rights. National law will also have to determine the amount of time after which authors will be entitled to exercise their rights to revocation of licences or transfers of copyright. It goes without saying that not all the member states have the same incentives in transposing these obligations and ensuring that media and technology companies end up cooperating with right-holders for the exercise of the above-mentioned rights.

EU law is moving towards the idea of a comprehensive form of online platform regulation, aimed at tackling all types of illegal content, from copyright infringing materials to hate speech, harmful content for minors, child pornography, terrorist content and propaganda, and more. In a 2018 recommendation, the European Commission clearly showed its intent to establish a legal framework where the largest content-sharing platforms bear enhanced responsibilities and play a decisive role in preventing, removing and keeping offline a broad variety of illegal content, horizontally defined. It remains to be seen whether the new European Parliament and the Commission starting its term in November 2019 will endorse and strengthen the Juncker Commission's approach.