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"THE EFFECTS OF DIGITIZATION, GLOBALIZATION, AND NATIONALISM ON COMPETITION LAW"

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Title:

The Effects of Broadcasting Digitization on EU Competition Law: A Tale of EU Copyright Policies

Abstract
In recent years, buzzwords such as 'geo-blocking', 'online content portability', 'platform competition' and 'digital copyright' have been making rounds in EU policy circles. This is attributed to several initiatives the EU has undertaken in order to create a digital single market where barriers to the cross-border provision of content will no longer exist. The most notable of these initiatives is the 'Digital Single Market Strategy', an ambitious reform the objective of which is to ensure seamless access to online services. Pursuit of this objective is partly based on the European Commission's conviction that breaking down national frontiers will strengthen the competitiveness of the EU vis-à-vis third countries and appears to be largely driven by the assumption that limiting the exclusivity of copyright would stimulate competition in content markets. Against the background of EU competence limitations in the field of copyright, the unwillingness of the Member States to permit significant EU interference with national copyright policies, and the popularity of global US firms in European audiovisual markets, this paper will demonstrate that EU Competition Law has vainly been instrumentalized to complete a single market for copyright-protected broadcast content. Based on *developments*, such as the *Murphy* judgment, the *pay-TV* case, and the E-Commerce Sector Inquiry, which may either challenge widespread licensing practices or extend the ill-founded reasoning underlying past decisional practice to online transmissions; *sector-specific economics*; and *the case law* that deals with whether and if so, under what conditions competition enforcement can introduce limits to copyright protection, this study will show that, in an attempt to create a single market for content, the EU has stretched the boundaries of competition law in an excessive manner *and* that unjustified interference with copyright is simply inadequate to promote competition or market integration.

1. Introduction

Over the past few years, the broadcasting[1] sector has been undergoing significant changes. Due to the penetration of new technologies and the dynamic effects of convergence,

[1] NB: This study is based on a broad definition of 'broadcasting' that reflects regulatory initiatives and technological and market developments that have marked the sector in recent years. 'Broadcasting' refers to both traditional television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services) and

broadcast content is now made available on multiple platforms through various distribution practices, most notably IPTV and OTT.[2] In addition to the 'traditional' television set, numerous wireless portable devices are used to access broadcast content, which is now provided in ways that can accommodate all kinds of time preferences and budget constraints. 'Linear' free-to-air broadcasting and expensive pay-TV subscriptions are not the only options anymore; along with live streaming, Europeans now regularly consume catch-up TV and Internet VOD and SVOD services.[3] This trend is only expected to grow with the increasing use of smartphones and tablets. However, despite the borderless nature of the Internet, access to broadcast content has remained geographically limited, often due to the national nature of copyright and the widespread practice of 'territorial licensing', that is, the practice whereby the copyright owner grants to a licensee the exclusive right to commercialize the protected work in a specific territory only.

In view of the above legal and market realities and the (current and future) contribution of the content industry to the European economy,[4] it may come as no surprise that the *cross-border* provision of digital content is one of the key priorities of the EU.[5] In recent years, buzzwords such as 'geo-blocking', 'online content portability', 'platform competition' and 'digital copyright' have been making rounds in EU policy circles. This is attributed to the adoption of a Communication on 'A Digital Agenda for Europe',[6] which paved the way for the so-called 'Digital Single Market Strategy' (DSMS).[7] The DSMS is an ambitious reform which was launched by the European Commission in 2015 and which is driven by the objective to ensure *seamless access to online activities 'under conditions of fair competition […] removing*

the term is used interchangeably with the term 'audiovisual'. Where the analysis concerns a specific type of broadcast services, namely satellite broadcasts (see in particular Par 3.a.), this will be clarified to avoid confusion

[2] IPTV is a traditional way of delivering content over a managed, fully-provisioned network. OTT (over-the-top) video services use the publicly accessible Internet to deliver video streams. For an overview of developments that have defined the provision of broadcast content in recent years see, for instance, OECD. *Competition Issues in Television and Broadcasting, Background Note*. DAF/COMP/GF(2013)2. Retrieved from: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2013)2&docLanguage=En

[3] European Commission (2015). *Cross-border Access to Online Content*, pp. 18 et seq. Flash Eurobarometer 411.

[4] According to the European Commission, the EU is the largest e-commerce market in the world, with digital content accounting for 33% of online trade. NB: This figure refers to online trade by individuals *only*. See European Commission. *Preliminary Report on the E-commerce Sector Inquiry*, paragraphs 6 and 12. SWD(2016) 312 final. Retrieved from: http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf See also Tera Consultants (2014). *The Economic Contribution of the Creative industries to the EU in terms of GDP and Employment*. Retrieved from: http://www.teraconsultants.fr/en/issues/The-Economic-Contribution-of-the-Creative-Industries-to-EU-in-GDP-and-Employment

[5] Information about the Commission's priorities for 2015-2019 are available at: https://ec.europa.eu/commission/priorities_en

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Digital Agenda for Europe', COM(2010) 245 final/2. Retrieved from: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0245R(01)

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Digital Single Market Strategy for Europe', COM(2015) 192 final. Retrieved from: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192

copyright issues'.[8] To that end, the EU has recently undertaken a number of regulatory initiatives, including the adoption of the Portability Regulation[9] and the preparation of a proposal for a Copyright Regulation.[10] In the field of antitrust, the Commission launched in 2015 the E-Commerce Sector Inquiry, an industry investigation into the main e-commerce market trends and competition concerns, which led to the publication of a Preliminary and a Final Report setting out the main findings of the audit it conducted. [11]

The above initiatives are driven by the same objective, that is, the creation of a digital single market where barriers to the provision of content across borders will no longer exist.[12] Pursuit of this objective is partly fuelled by the Commission's conviction that breaking down national frontiers will strengthen the competitiveness of the EU vis-à-vis third countries, most notably the US.[13] The idea underlying these initiatives is hardly new. Ever since broadcasting markets were liberalized, global firms, such as 21st Century Fox and NBC, have occupied a central position in the EU audiovisual ecosystem.[14] Based on the internal market provisions of the Treaty, the EU adopted regulation to mitigate concerns over 'Americanization' of EU broadcasting markets. However, regulation intended to support the production and distribution of 'European works' has not managed to create a single market for content.[15] This is ascribed to

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8 Retrieved from: https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market

9 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 [2017] OJ L 168/1. This is an instrument which will enable consumers to access their portable online content services when they travel in the EU in the same way they access them at home. For more information see https://ec.europa.eu/digital-single-market/en/cross-border-portability-online-content-services

10 Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmission of broadcasting organizations and re-transmissions of television and radio programs. COM(2016) 594 final. Retrieved from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0594 This tool is expected to simplify copyright clearance for broadcasters and operators of retransmission services (e.g. IPTV providers) that wish to offer wider access to TV and radio programs across borders. For more information see: https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-laying-down-rules-exercise-copyright-and-related-rights-applicable-certain

11 The E-Commerce Sector Inquiry is an industry investigation into the main e-commerce market trends and competition concerns. For more information see: http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

12 See, for instance, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Digital Single Market Strategy for Europe', COM(2015) 192 final, pp. 7 and 4: 'Barriers to cross-border access to copyright-protected content services and their portability are still common, particularly for audiovisual programmes. […] Immediate action is […] required to break down barriers to cross-border online activity including differences in […] copyright law'.

13 See, for instance, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Digital Agenda for Europe', COM(2010) 245 final/2, pp. 5 and 7: 'Europe is lagging behind its industrial partners. ***Today there are four times as many music downloads in the US as in the EU because of the lack of legal offers and fragmented markets***. […] For instance, to set-up a pan-European service an online music store would have to negotiate with numerous rights management societies based in 27 countries. Consumers can buy CDs in every shop but are often unable to buy music from online platforms across the EU because rights are licensed on a national basis. This contrasts with the relatively simple business environment and distribution channels in other regions, ***notably the US***' [emphasis added]

14 For more information about the position these and other US media conglomerates occupy in the EU Member States see the MAVISE database of the European Audiovisual Observatory: http://mavise.obs.coe.int/

15 I am referring to the 'European works' quota rules laid down in the Audiovisual Media Services Directive. See Directive 2010/13/EU of the European Parliament and of the Council 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

numerous parameters, such as the lack of EU competence to harmonize the media policies of its Member States,[16] a general trend towards de-regulation, including the abolishment or relaxation of ownership restrictions on foreign media firms,[17] and large economies of scale that powerful media conglomerates can reap by penetrating new markets.[18] The EU's concerns over a 'US takeover' of European audiovisual markets appear to have increased in recent years with the emergence and increasing popularity of new service providers (Netflix, whose subscriber numbers have more than tripled since 2012 when it first launched its services in the UK and Ireland, currently holds a leadership position in the provision of OTT services in the EU[19]). In the context of the revision process of the Audiovisual Media Services Directive, the EU is currently considering the introduction of a rule that would oblige major VOD providers to offer European works in accordance with a quota.[20]

The Commission's attempt to eliminate barriers to cross-border content provision is not an easy undertaking, for there are significant legal hurdles to overcome. More particularly, while the EU has adopted some harmonizing instruments over the past three decades, copyright

[2010] OJ L 332/27, Articles 16(1) and 17. On why the EU's attempts to regulate this area have not been successful see Bania, K. (2015). *The Role of Media Pluralism in the Enforcement of EU Competition Law*, 29-31. PhD Thesis, European University Institute.

[16] Treaty on the Functioning of the European Union [2012] OJ C 326/1, Articles 6(c) and 167(1) TFEU. These Articles lay down that the EU may carry out actions to support, coordinate or supplement action taken at the national level in order to contribute to the flowering of the cultures of the Member States. Moreover, Article 167(5) TFEU provides that, to fulfill the aforementioned objective, the EU may adopt incentive measures and recommendations, but not instruments that would harmonize national media laws and regulations. The *rationale* that lies behind assigning the EU subordinate tasks in this domain is that the Member States are better placed to develop the relevant legal tools in accordance with their traditions, community needs, and specificities of domestic markets.

[17] Since the early 1980s, the governments of several European countries such as the UK, Finland, Greece, Italy and Bulgaria have been promoting deregulation in the media industry. For more information on the process of liberalization and deregulation see, for instance, ELIAMEP (2010). *MEDIADEM background information report on media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe*. Retrieved from: http://www.mediadem.eliamep.gr/wp-content/uploads/2010/05/BIR.pdf For example, during the consultation on media ownership rules that preceded the adoption of the Communications Act 2003, the UK government stated that '[w]hilst the need for a plurality of media sources remains clear, we are committed to a deregulatory approach to media markets. From a commercial point of view, further liberalization would benefit existing and potential new investors, providing for further consolidation, greater efficiency, more scope for investment, and a more significant international presence'. See UK Department for Culture, Media, and Sport (2001). *Consultation on Media Ownership Rules*, paragraph 1.8. The European Commission has been supportive of this approach on the grounds that '***too restrictive ownership rules might hinder European companies from competing globally***'. See Commission Staff Working Document on Media pluralism in the Member States of the European Union, SEC (2007) 32, 9

[18] For an overview of media sector-specific economics see Bania, K. (2015), *supra* n. 15, 60-64

[19] Based on data provided by Frost Perspectives (2017). *Growth of Over-the-Top (OTT) Video Market in Europe*. Retrieved from: https://ww2.frost.com/frost-perspectives/growth-over-top-ott-video-market-europe/ See also Oxera (2016). The impact of cross-border access to audiovisual content on EU consumers, 18. Retrieved from:
https://www.oxera.com/getmedia/5c575114-e2de-4387-a2de-1ca64d793b19/Cross-border-report-(final).pdf.aspx

[20] See European Parliamentary Research Service (2017). The Audiovisual Media Services Directive, 12. Retrieved from: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI%282016%29583859_EN.pdf Contrary to 'traditional' broadcasters, on-demand providers are still not bound by the 'European works quota' rules laid down in Articles 16(1) and 17 of the Audiovisual Media Services Directive, *supra* n. 15

protection remains largely a matter of national law.[21] This is because the EU Member States have had a general fundamental rights competence since the inception of the European integration project. Fundamental rights remain a matter of national competence even after the most recent amendments to the founding Treaties; the Charter of Fundamental Rights (CFREU), which has become legally binding post-Lisbon, explicitly provides that it does not afford new powers or tasks for the Union in this field.[22] This includes powers or tasks to protect the right to property, which is enshrined in Article 17 CFREU.[23] In view of the above, notwithstanding some similarities, there are currently 28 different copyright regimes in the EU.

The EU Member States are keen to maintain the status quo. Two recent examples vividly illustrate that Member States are less than willing to accept EU interference with national copyright laws. First, the Geo-blocking Regulation (currently in the process of adoption by the Council and the European Parliament[24]), which prohibits discriminatory practices preventing online customers from accessing and purchasing products or services from a website based in another Member State, explicitly excludes from its scope audiovisual services.[25] More recently, the Commission's proposal for a Copyright Regulation, which would extend the Country of Origin principle to rights clearance for the online platform, was largely rejected.[26]

Against this background, namely EU competence limitations in the field of copyright (and the inherent limitations of any legislative attempts to harmonize exploitation of copyrighted-protected content), the unwillingness of the Member States to permit significant

[21] European court decisions provide guidance on how to interpret uniform notions and basic principles enshrined in EU legislation, but ultimately what is permitted and what is unlawful is governed by the laws of each Member State. See European Broadcasting Union (2016). *Copyright Handbook*, 9.

[22] See Treaty on European Union (consolidated version) [2008] OJ C 115/19, Article 6 (1) and (2), and Charter of the Fundamental Rights of the European Union [2010] OJ C 83/389, Article 51(1). Article 51(1) explicitly lays down that its provisions bind the Member States only when they implement EU law and that the EU institutions must observe the principles enshrined therein 'respecting the limits of the powers of the Union as conferred on it in the Treaties'

[23] Article 17 reads as follows: '1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. ***Intellectual property shall be protected***' [emphasis added]

[24] For more information about the stage of the legislative process see: http://www.consilium.europa.eu/en/policies/geo-blocking/

[25] Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, Recital (6): 'Audio-visual services, including services the main feature of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses, are excluded from the scope of this Regulation'

[26] For more information see, for instance, Whittock, J. *Analysis - the next steps for the Digital Single Market reforms*. Television Business International Vision, 20 December 2017. Retrieved from: http://tbivision.com/2017/12/20/analysis-the-next-steps-for-the-digital-single-market-reforms/

EU interference with national copyright policies, and the strong position and/or increasing popularity of global firms in Europe, this paper will demonstrate that EU Competition Law has vainly been instrumentalized to complete a single market for copyright-protected broadcast content. Based on *developments*, such as the *Murphy* judgment,[27] the *pay-TV* investigation,[28] and the E-Commerce Sector Inquiry,[29] which may either challenge widespread licensing practices or extend the ill-founded reasoning underlying past decisional practice to online transmissions; *sector-specific economics*; and *the case law* that deals with whether and if so, under what conditions competition enforcement can introduce limits to copyright protection, this study will show that, in an attempt to create a single market for content, the EU has stretched the boundaries of competition law in an excessive manner *and* that unjustified interference with copyright is simply inadequate to promote competition or market integration. To that end, the piece will examine the implications for antitrust enforcement of three elements which commonly define the scope of a licence to exploit audiovisual content on an exclusive basis and which have been identified as areas where competition concerns may arise.[30] These elements are: territorial exclusivity, that is, the practice of licensing on a country-by-country basis (Part 3), technological exclusivity, one element of which consists in licensing rights for online transmission together with rights for other transmission technologies, (Part 4), and temporal exclusivity, which may be granted through windowing arrangements or the conclusion of long term agreements (Part 5). But, prior to delving into the intricacies of exclusive licencing, the topic of the present study is contextualized within the larger debate over the design of sound competition policies that adapt to the risks and opportunities of the digital economy (Part 2).

2. Relevance of the present study: Premium copyright-protected content is a valuable input in markets driven by quality, variety and innovation

The digital economy poses significant challenges to competition enforcement in content markets. One set of these challenges concerns practices in which popular platforms may engage and which determine the diversity and quality of information online users access. The demotion

[27] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083

[28] European Commission. *Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services*. Press Release of 13 January 2014. Retrieved from: http://europa.eu/rapid/press-release_IP-14-15_en.htm

[29] See *supra* n. 11

[30] European Commission (2017). *Final report on the E-commerce Sector Inquiry*, paragraph 21. Retrieved from: http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf

of competing services and 'self-favouring',[31] the dissemination of 'fake news' on social media,[32] and online agencies for the sale of e-books and news applications[33] test the limits of competition law in an unprecedented manner. The control platforms exercise over what may be regarded as distribution bottlenecks, the editorial-like judgments they perform in selecting the content they link to or carry, and their role in shaping future economic models for content provision[34] are only expected to add to the list of complex, understudied practices producing effects that are not easy to measure. With platforms being '*the* hot topic' in antitrust circles, interest in another set of challenges, which concerns competition in the markets for 'attractive' (or 'premium'[35]) audiovisual content has subsided. However, this set of challenges should also be included in the debate of how to ensure that competition enforcement is 'fit for purpose' in an ever-increasing digitized economy for at least two reasons.

First, while it is not doubted that assets such as (personal and non-personal) data and reputation now largely drive competition, attractive audiovisual content is still a crucially valuable input in digital content markets.[36] As the Commission put it in the Preliminary Report on the E-Commerce Sector Inquiry, '[w]hile online transmission offers the possibility to innovate the provision of access to products and services, *demand for digital content services is ultimately driven by demand for the content offered*. From this perspective, the main driver of competition remains the same: attractive content' [emphasis added].[37] This is illustrated by how this asset is valued by undertakings the core business of which is not the provision of

[31] The *Google Search* decision dealt with this issue. See Commission decision of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, Case AT.39740, *Google Search* C(2017) 4444 final. For a comprehensive analysis of the Commission's assessment see Zingales, N. *Google Shopping: beware of 'self-favouring' in a world of algorithmic nudging*. 13 February 2018. Competition Policy International. Retrieved from: https://www.competitionpolicyinternational.com/google-shopping-beware-of-self-favouring-in-a-world-of-algorithmic-nudging/

[32] On this issue see, for instance, Drexl, J. (2016). *Economic Efficiency versus Democracy: On the Potential Role of Competition Policy in Regulating Digital Markets in Times of Post-Truth Politics*. Max Planck Institute for Innovation & Competition Research Paper No. 16-16. Retrieved from: https://ssrn.com/abstract=2881191 Also published in Gerard, D. and Ioannis Lianos (eds.) (2017). *Competition Policy: Between Equity and Efficiency*. Cambridge: Cambridge University Press

[33] For an analysis of the implications for antitrust enforcement of online agency agreements see, for instance, Bania, K. (2015), *supra* n. 15, Chapter 5, Part 3

[34] An excellent study exploring these issues is Foster, R. (2012). *News Plurality in a Digital World – Report prepared for the Reuters Institute for the Study of Journalism*. Retrieved from: https://reutersinstitute.politics.ox.ac.uk/our-research/news-plurality-digital-world

[35] By 'attractive or 'premium' content I refer to content that has the capacity to attract large audiences. The most common examples are Hollywood blockbusters and popular sports competitions

[36] This is so despite the fact that new technologies have significantly lowered entry barriers. As Owen correctly notes, 'access' is different from 'success'. While establishing a media outlet is not as expensive as it once was, costs incurred in the creation of ***attractive*** content that manages to generate the advertising or subscription revenues that will ensure the longevity of the outlet remain high. See Owen, B. M. (2004, April). *Confusing Success with Access: "Correctly" Measuring Concentration of Ownership and Control in Mass Media and Online Services*. Paper prepared for the 'Media Concentration and the Internet - Empirical, Business and Policy Research', a Symposium at the Columbia Institute for Teleinformation (CITI), Columbia Business School

[37] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraph 924

audiovisual content. For example, in 2016, Twitter purchased the worldwide rights to broadcast ten games of the US National Football League.[38] Earlier this year, Facebook hired the Eurosport CEO to lead the social network's efforts to broker worldwide deals for live-streaming sports.[39] Electronic communications service providers are increasingly acquiring (or producing) premium content in order to attract subscribers to their fixed and/or mobile offers.[40] The above examples illustrate that 'Content is [still] King'.[41]

Second, amidst the changes brought about by digital technologies, the Commission needs to re-think of the approach underlying decisional practice in this sector. I have explained in detail in another study that, in antitrust and merger cases in the media industry, the Commission has focused on price.[42] The other dimensions of competition, namely quality, variety and innovation, have been cast aside. However, in (both mature and emerging) digital markets, price is not necessarily the only or the most relevant parameter that drives competition.[43] Placing an excessive focus on prices or, even worse, ignoring the non-price dimensions of competition has translated into a decisional practice that harmed rather than protected competition.[44] To address the drawbacks of the Commission's approach, I have made a number of proposals, including how to define the relevant product markets in cases where content is offered for free, how to measure the anti-competitive effects of content 'scraping', and how to assess the effects of a merger on content variety.[45] However, due to the focus of that other study on whether adapting the EU competition rules to the specific conditions of media markets would not only deliver better results for competition but also pluralism (i.e. a non-economic value), I have not examined in detail decisions introducing limitations on copyright.

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[38] European Audiovisual Observatory (2016). *Audiovisual sports rights between exclusivity and right to information*, 10. Retrieved from: https://rm.coe.int/1680788a5d

[39] See, for instance, Spangler, T. *Facebook Recruits Eurosport Chief Peter Hutton to Lead Global Sports-Rights Deals*. 21 January 2018. Variety. Retrieved from: http://variety.com/2018/digital/global/facebook-hires-eurosport-peter-hutton-global-sports-deals-1202671505/

[40] BEREC (2018). *Report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet*, 10-11. Retrieved from: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8013-berec-report-on-the-impact-of-premium-content-on-ecs-markets-and-the-effect-of-devices-on-the-open-use-of-the-internet

[41] For more information about this quote see Heath, E. *"Content is King"—Essay by Bill Gates 1996*. 29 January 2017. Medium. Retrieved from: https://medium.com/@HeathEvans/content-is-king-essay-by-bill-gates-1996-df74552f80d9

[42] Bania, K. (2015), *supra* n. 15

[43] For example, demand for certain products, such as newspapers, is highly inelastic in price because it is spurred by the readers' political preferences. See Joint Research Center (2012). *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry*, 24. Retrieved from: http://ipts.jrc.ec.europa.eu/publications/pub.cfm?id=5380 In other cases, such as free-to-air television, it is the variety of content offered by the broadcasters or the availability of programming on catch-up TV. See Csorgo, L. and Ian Munro (2011). *Market Definition Issues for Audio and Audio-Visual Distribution Products and Services in a Digital Environment, A Report Prepared for the Canadian Radio-television and Telecommunications Commission*. Retrieved from: http://www.crtc.gc.ca/eng/publications/reports/rp110215.htm#_ftn7

[44] Bania, K. (2015), *supra* n. 15

[45] Ibid.

A study of such decisions is also highly relevant to the broader discussion of how to apply competition law in a way that takes account of the characteristics of digital content markets (for the gap in the literature that each section of the study shall seek to fill see Part 3.e. and the Introduction to Part 4). This is arguably because past decisional practice and more recent developments in this area require reconsideration; driven by the assumption that limiting the exclusivity of copyright amounts to a *conditio sine qua non* for protecting competition in content markets, the Court and the Commission appear to have unjustifiably undermined copyright. But unjustified interference with copyright may reduce the incentive to invest in the production of innovative and high-quality digital content services.

Prior to delving into how the Court and the Commission have applied the EU competition rules to agreements and conduct involving copyright-protected broadcast content, it must be pointed out that this study is driven by the 'modern' understanding of the relationship between competition and intellectual property protection. This understanding 'is founded on the principle that competition and intellectual property protection are designed to promote a system that creates incentives for dynamic competition for better and diversified products by excluding competition by imitation and enhancing competition by substitution'.[46] Based on this principle, the key question that seeks for an answer is not 'whether' but 'how' competition law should apply to agreements or conduct involving copyright-protected broadcast content.[47] Answering this latter question requires antitrust agencies and courts to conduct assessments that do not disregard the potentially beneficial effects of copyright on competition.[48] The present study essentially revolves around this question.

3. How is EU competition law being instrumentalized to complete a single market for broadcast content? *Murphy* as an attempt to 'break' territoriality

In 2010, the Commission adopted a Communication on 'A Digital Agenda for Europe' where it noted that barriers to the flow of digital content across borders must be eliminated in order to enable Europeans to enjoy the benefits of a digital single market.[49] Since then, a number

[46] Max Planck Institute for Intellectual Property and Competition Law (2013). *Copyright, Competition and Development*, paragraph 9. Retrieved from: http://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf
[47] Ibid.
[48] Ibid. For a different (approach and) perspective see, for instance, Geradin, D. (2005). *Access to content by new media platforms: A review of the competition law problems*. European Law Review 30(1), 68-94. Geradin suggests that competition law could be used to ban exclusivity altogether
[49] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Digital Agenda for Europe', COM(2010) 245 final/2, p. 6

of developments in EU Competition Law have taken place that appear to challenge the widespread practice of 'territorial licensing'. Most notable among these developments are the *Murphy* judgment,[50] which the Court of Justice of the EU delivered in 2011, the *pay-TV investigation*, which the Commission opened in 2014,[51] and the *Paramount* commitments decision (an arguably unfortunate by-product of the *pay-TV investigation*), which the Commission adopted in 2016.[52] Prior to delving into the (ill-founded) reasoning underlying the above developments, two remarks should be made regarding the scope of the analysis that follows. First, both the decision to open the *pay-TV investigation* and *Paramount* were based on *Murphy*.[53] Since the investigation is still ongoing and *Paramount* is a commitments decision (i.e. it lacks a detailed assessment of the compatibility of the licensing agreements under scrutiny with the EU rules on competition[54]), the analysis will focus on *Murphy*. Second, while *Murphy* concerned satellite broadcasts, the issues discussed below are also relevant to other means of audiovisual content transmission, including online.

a. The case law on exclusive territorial restrictions

It was mentioned above that *Murphy* and subsequent developments may challenge the practice of licensing broadcast content on a country-by-country basis. A brief overview of the relevant case law will enable the reader to understand why this may be the case.

i. General rule on exclusive distribution arrangements: 'Absolute' territorial protection is, in principle, restrictive by object

The Court has long established that agreements granting territorial exclusivity are, in principle, contrary to the EU rules on competition. The dividing of markets along national lines (e.g. through export bans) is generally prohibited as being contrary to the overriding 'single

[50] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083
[51] European Commission. *Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services*. Press Release of 13 January 2014. Retrieved from: http://europa.eu/rapid/press-release_IP-14-15_en.htm
[52] Commission decision of 26 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, C(2016) 4740 final
[53] See 'Background on the pay-TV investigation' of European Commission. *Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services*. Press Release of 13 January 2014. The Paramount commitments decision also makes several references to *Murphy*. See Commission decision of 26.7.2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, fns. 5 and 9 et seq.
[54] Commitments decisions make the commitments legally binding on the undertaking concerned without concluding whether or not there has been or still is an infringement. See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Recital (13)

market' principle.[55] Restrictions on the territories into which the buyer of a good or service may sell are considered restrictions 'by object' under Article 101(1) TFEU, that is, hard-core restrictions of competition.[56] This does not mean that exclusive distribution agreements are altogether prohibited under EU competition law. In cases of distribution arrangements granting territorial exclusivity, a supplier may prevent 'active sales' by distributor A of goods or services into the territory awarded to distributor B, as long as distributor A is allowed to engage in 'passive sales' (i.e. distributor A must not be prevented from responding to unsolicited requests made by customers residing in the territory awarded to distributor B).[57]

The general prohibition on territorial exclusivity as described above applies to agreements irrespective of whether they concern products that incorporate an Intellectual Property Right (IPR).[58] However, based on the relevant case law, in such cases, the general prohibition applies only if the exclusive right to control distribution of the product concerned is 'exhausted' with the first sale within the EU[59] (this is the case for tangible articles incorporating a copyright,[60] such as books and CDs[61]). The rationale for this approach in the case law is that 'absolute' territorial protection is not indispensable to preserve the essential

[55] See, for instance, Case 19/77, *Miller International Schallplaten v Commission* [1978] EU:C:1978:19; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission ('Glaxo Spain')*, EU:C:2009:610; Case C-551/03 P *General Motors BV v Commission* [2006] ECR I-3173; Case T-175/95 *BASF v Commission* [1999] ECR II-1581; Case T-176/95 Accinauto SA v Commission [1999] ECR II-635; Cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* ('*Consten-Grundig'*), EU:C:1966:41

[56] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Article 4(b)

[57] Ibid., Article 4(b)(i). For a description of how the Commission perceives the distinction between 'active' and 'passive' sales see Commission Guidelines on Vertical Restraints [2010] OJ C 130/1, paragraphs 51-53

[58] Ibáñez Colomo, P. (2015). *Copyright Licensing and the EU Digital Single Market Strategy*. LSE Legal Studies Working Paper 19/2015, 5. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697178. Also in Roger D. Blair and D. Daniel Sokol, eds. (2016). *Handbook of Antitrust, Intellectual Property and High Technology*, 339-357. New York: Cambridge University Press

[59] Ibid. 4 and 5, referring to ECJ, Cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* ('*Consten-Grundig'*), EU:C:1966:41; Case 19/77, *Miller International Schallplaten v Commission* [1978] EU:C:1978:19; Case 258/78, *LC Nungesser KG and Kurt Eisele v Commission*, EU:C:1982:211; and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission ('Glaxo Spain')*, EU:C:2009:610

[60] See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society OJ (2001) L 167/10, Recital (28), which reads as follows: 'Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the right holder or with his consent exhausts the right to control resale of that object in the Community'. Recital (29) explains that ***'[t]he question of exhaustion does not arise in the case of services and on-line services in particular***. […] Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, ***every on-line service is in fact an act which should be subject to authorization where the copyright or related right so provides***' [emphasis added]. The same distinction is made by the Court in *Coditel II*, see *infra* n. 67

[61] For example, a record company that produced a CD can legally prevent others from producing and selling this CD, but cannot prevent customers who have bought the CD from the record company from reselling it to third parties in any given Member State

function of the IPR concerned.[62] On this basis, in such cases, restrictions on active sales are permitted, but bans on passive sales are forbidden.

ii. Where the right of distribution is not 'exhausted', 'absolute' territorial protection is not, in principle, restrictive by object

In the case of rights to which the exhaustion doctrine does not apply (consider, for example, the right to exhibit a film or the right to disseminate broadcast content), arrangements granting 'absolute' territorial protection are not, in principle, contrary to Article 101(1) TFEU, for the arrangements in question may be meant to preserve the essential function of the IPR involved.[63] The agreement will be caught by Article 101(1) TFEU only if the manner in which the right is exercised proves to generate restrictive effects in the economic and legal context in which it is implemented.[64]

This principle was established by *Coditel II*, which concerned content distributors that communicated the copyright-protected work to the public in the territory of a Member State *without having an authorization* from the right holders concerned and *without having paid remuneration* to them.[65] In this case, the Court ruled that an agreement whereby 'the owner of the copyright in a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibition contained in Article [101] of the Treaty'.[66] The Court essentially held that, in cases where the right of distribution is not 'exhausted' with the first sale in a given territory,[67] territorial exclusivity may fall outside the scope of Article 101 TFEU if it protects the subject-matter of copyright[68] (for our purposes, it must be noted that the Court held that the right of the copyright owner to receive remuneration

[62] Ibáñez Colomo, P. (2015), *supra* n. 58, 4
[63] Ibid., 5
[64] Ibid., referring to ECJ, Case 262/81 *Coditel SA and others v. Ciné-Vog Films SA and others* [1982] ECR 3381, paragraphs 14, 17-19
[65] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraph 119 referring to the factual differences between *Murphy* and *Coditel II*
[66] ECJ, Case 262/81 *Coditel SA and others v. Ciné-Vog Films SA and others* [1982] ECR 3381, paragraph 20
[67] See ibid., paragraph 11 where the Court draws a distinction between products incorporating IPRs and services to explain the different treatment with respect to 'exhaustion': 'The problems involved in the observance of a film producer's rights in relation to the requirements of the Treaty are not the same as those which arise in connection with literary and artistic works the placing of which at the disposal of the public is inseparable from the calculation of the material form of the works, as in the case of books or records, *whereas the film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated and the commercial exploitation of which comes under the movement of services, no matter whether the means whereby it is shown to the public be the cinema or television*' [emphasis added] [NB: The Court refers to Case 62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* (*Coditel I*), ECLI:EU:C:1980:84]
[68] Ibid., paragraphs 12 and 17

is 'part of the essential function of copyright'[69]). However, *Coditel II* does not give copyright owners a *carte blanche*; the Court further held that the exercise of the exclusive right to distribute must not '[create] barriers which are artificial and unjustifiable in terms of […] the possibility of charging fees which exceed a fair return on investment'.[70] As will be seen in greater detail below, while *Murphy* is supposedly based on *Coditel II*, it creates considerable confusion about whether EU competition law prohibits bans on passive sales where the right of distribution is *not* exhausted.

b. *Murphy*: Is 'absolute' territorial protection restrictive by object even if the right of distribution is *not* exhausted?

The *Murphy* judgment dealt with licensing agreements that granted broadcasters an exclusive live broadcasting right to Premier League matches on a territorial basis (generally corresponding to the territory of a Member State).[71] The agreements concerned included a clause that prevented broadcasters from selling their satellite decoder cards to customers outside the licensed territory.[72] In other words, the contracts inhibited licensees from responding to passive sales requests. The dispute was sparked when the Premier League realized that Karen Murphy, a UK pub landlady who was 'fed up' with paying a high subscription fee to Sky to screen matches in her pub, bought games from a Greek satellite broadcaster for a much lower price.[73] The Court ruled that the arrangements under consideration were restrictive 'by object' and, as such, caught by Article 101(1) TFEU.[74]

The key question that arises from *Murphy* is whether it overturns *Coditel II*.[75] The answer to this question is not as straightforward as one might initially think. This is because *Murphy* not only refers to the two pillars on which *Coditel II* was based, namely the right of the

[69] Ibid.
[70] Ibid., paragraph 19
[71] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083
[72] Ibid., paragraph 10
[73] For the prices that Sky and the Greek broadcaster were charging at the time see Poulter, S. *Pub landlady wins her match of the day: Legal victory ends Premier League TV stranglehold*. 5 October 2011, Daily Mail. Retrieved from: http://www.dailymail.co.uk/news/article-2045029/Pub-landlady-Karen-Murphy-wins-EU-fight-screen-Premier-League-football.html#ixzz55HcN251w Note that this was not an isolated incident; many restaurants and bars in the UK used foreign decoding devices to access Premier League matches. See CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraphs 36 et seq.
[74] Ibid., paragraph 134-146
[75] Put differently, the key question that arises from *Murphy* (a question which the cultural industry has considered 'settled' since the beginning of the 1980s when *Coditel II* was rendered) is whether content service providers that have 'cleared' the right to use a protected work in a specific Member State are obliged to respond to passive sales requests, i.e. unsolicited requests coming from consumers that reside in other Member States

copyright owner to authorize (or prohibit) the dissemination of the protected work and the right to receive appropriate remuneration,[76] but also reiterates that 'the mere fact that the right holder has granted to a sole licensee the exclusive right to broadcast protected subject-matter from a Member State, and consequently to prohibit its transmission by others […] is not sufficient to justify the finding that such an agreement has an anti-competitive object'.[77] A careful reading of *Murphy* reveals that, while the Court did not put the *Coditel II* principle into question, the way in which it applied it to the facts of the case shakes the principle to its foundations. As the analysis that follows will demonstrate, the ruling makes a number of far-fetched assumptions that fail to reflect the rationale for *Coditel II*.

More particularly, in *Murphy*, the Court mentioned that, unlike *Coditel II*, which concerned right holders that had not granted authorization for the dissemination of their work and were, as a result, deprived of the right to receive appropriate remuneration, *Murphy* concerned a right holder that granted authorization for the dissemination of its work but sought to receive remuneration that went beyond what was necessary to attain the objective of protecting the copyright at issue.[78] That the objective of the agreement was to ensure that the right holder received 'excessive' and not 'appropriate' remuneration was one of the key parameters that determined the Court's finding that the territorial licensing arrangements under consideration were restrictive by object;[79] the unduly high premiums the Premier League was charging resulted, according to the Court, in 'artificial price differences' which '[restored] the divisions between national markets'.[80]

The Court's considerations were arguably neither sufficient nor appropriate to reach the conclusion that the contested arrangements were caught by Article 101(1) TFEU for the reasons set out below.

First, as already mentioned, the Court ruled in *Murphy* that the premium charged by the Premier League went beyond what was necessary on the grounds that it resulted in 'artificial price differences between the partitioned national markets'.[81] This may be read as implying that

[76] ECJ, Case 262/81 *Coditel SA and others v. Ciné-Vog Films SA and others* [1982] ECR 3381 (*Coditel II*), paragraphs 11 and 12
[77] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraph 137
[78] Ibid., paragraphs 115 and 116
[79] Ibid., paragraphs 107-116 and 139
[80] Ibid., paragraphs 136 et seq. in combination with 115 et seq.
[81] Ibid., paragraphs 115-116

the UK and Greek customers should not be charged different prices and that, since they were, the remuneration received by the Premier League was 'excessive'. It bears noting that, while there is 'no single method, test or set of criteria which is generally accepted in economic writings or across jurisdictions […] to determine an excessive price',[82] a comparison of prices a copyright owner charges in different but relatively homogeneous countries is regarded as a valid method to conduct this assessment.[83] Based on the relevant case law, criteria for such a comparison may include, *inter alia*, economic factors, such as Gross Domestic Product (GDP) per capita, and consumption habits.[84] In 2011 (when *Murphy* was rendered), the GDP per capita in Greece was equivalent to 24,495 USD[85] whereas in the UK it was recorded at 41,412 USD.[86] With respect to consumption habits, contrary to the UK,[87] pay-TV is not particularly popular in Greece (NetMed, the Premier League's licensee for the Greek territory when *Murphy* was rendered, is a pay-TV service provider[88]).[89] It is also worth mentioning that, in 2011, Sky UK (the Premier League's licensee for the UK territory[90]), had approximately 10,187,000 subscribers.[91] This figure is almost equivalent to the entire Greek population.[92] While the number of NetMed subscribers in 2011 is not publicly available, at the time, the pay-TV penetration rate in Greece was 11%.[93] Subscriber numbers are particularly relevant for our purposes since, in arriving at the amount of payment to be made for the broadcast rights acquired, parties to a licensing agreement are expected to consider the amount of audience members that may access the copyright-protected content. Though not amounting to an exhaustive analysis of the factors that must be considered when comparing prices in different countries, the above remarks illustrate why, had the Court been more diligent in assessing

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[82] Opinion of Advocate General Wahl delivered on 6 April 2017 in Case C-177/16. *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība Konkurences padome***,** ECLI:EU:C:2017:286. Retrieved from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0177

[83] See, for instance, CJEU, Case C-177/16, *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība Konkurences padome***,** ECLI:EU:C:2017:689. See also judgments of 13 July 1989, *Tournier*, 395/87, paragraphs 37-38, EU:C:1989:319, and of 13 July 1989, *Lucazeau and Others*, 110/88, 241/88 and 242/88, paragraphs 24-25, EU:C:1989:326

[84] Ibid., paragraphs 42 and 46

[85] Information retrieved from: https://tradingeconomics.com/greece/gdp-per-capita

[86] Information retrieved from: https://fred.stlouisfed.org/series/PCAGDPGBA646NWDB

[87] Brennan, T. *Nearly 70% of Brits pay a subscription to watch TV or video-on-demand.* 17 March 2016, Nielsen Insights. Retrieved from: http://www.nielsen.com/uk/en/insights/news/2016/nearly-70-percent-of-brits-pay-a-subscription-to-watch-TV-or-video-on-demand.html

[88] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraph 40

[89] For a brief description of the Greek media landscape see OECD (2013), *supra* n. 2, 149-151

[90] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraph 41

[91] Statista (2018). *Number of subscribers to BSkyB in the United Kingdom (UK) from 2010 through September 2014, by service*. Retrieved from: https://www.statista.com/statistics/411098/bskyb-subscribers-by-service/

[92] As recorded in 2011. See Hellenic Statistical Authority (2014). *2011 Population and Housing Census*. Retrieved from: https://www.statistics.gr/documents/20181/1215267/A1602_SAM04_DT_DC_00_2011_01_F_EN.pdf/4b5473f2-86de-45e1-a8f2-c49de19c6947

[93] Georgakopoulos, G. *Crisis sends pay-TV penetration rates soaring*. 22 November 2013. Ekathimerini. Retrieved from: http://www.ekathimerini.com/155706/article/ekathimerini/business/crisis-sends-pay-tv-penetration-rates-soaring

'excessiveness', it might have reached a different outcome. It is submitted that, absent an analysis of the parameters that determine why a right holder charges different prices in different countries, holding that the licence fee is 'excessive' because it results in 'artificial price differences' is based on a rather simplistic assumption that fails to reflect how the markets under consideration work in practice (for more information about other factors that explain price discrimination, such as consumer preferences and income differences across the EU, please see below, Part 3.d.).

Second, in an attempt to establish that the fees charged by FAPL were excessive, the Court held the following:

> '[T]he specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration. [S]uch *remuneration must* in particular – as recital 17 in the preamble to the Satellite Broadcasting Directive confirms – *be reasonable* in relation to parameters of the broadcasts concerned […]. In this context, it is to be noted, first of all, that *the right holders at issue in the main proceedings are remunerated for the broadcasting of the protected subject-matter from the Member State of broadcast in which the act of broadcasting is deemed to take place, in accordance with* ***Article 1(2)(b) of the Satellite Broadcasting Directive****, and in which the appropriate remuneration is therefore payable* [emphasis added].[94]

In order to understand the Court's reasoning and the problems arising therefrom, the reason why the Court refers to the Satellite Broadcasting Directive[95] must be explained (it is reminded that *Murphy* concerned satellite broadcasts). This Directive harmonizes certain rules concerning copyright applicable to satellite broadcasting.[96] The goal of the Directive is to facilitate the cross-border transmission of satellite broadcasts.[97] To that end, the Directive establishes the Country of Origin (CoO) principle whereby the act of communication to the public by satellite occurs only in the Member State where the satellite transmission is carried out.[98] In other words, satellite broadcasters are only subject to the laws of the Member State from which the signal originates, not the Member States in which the signal is received. The practical implication of the application of the CoO principle is that a satellite broadcaster operating in Member State A

[94] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraphs 108-112

[95] 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 (Satellite and Cable Directive or Satellite Broadcasting Directive) [1993] OJ L 248/15

[96] It bears noting that, in addition to satellite broadcasting, the Directive further harmonizes certain rules concerning copyright applicable to cable retransmission. See ibid., Articles 8 et seq.

[97] Ibid., Recitals (3), (5), (8), (13), (14), and (33)

[98] Ibid., Article 1(2)(b), which reads as follows: 'The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the program-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth'

may reach viewers located in Member State B without encroaching on the rights of a broadcaster/licensee in Member State B. What is crucially important to understand is that the CoO principle applies in cases where the right holder and the licensee operating in Member State A *agree* that the licensee reach viewers in territory B. In such cases, the Directive lays down that the parties should take account of all aspects of the broadcast, including the actual and potential audience reached in order to ensure that right holder receives appropriate remuneration.[99] By no means does the CoO principle impose *an obligation* on the right holder to grant authorization for distribution of the work in another territory. From the perspective of satellite broadcasters/licensees, it does not establish an obligation to clear rights to a copyright-protected work in order to disseminate it in the territory of another Member State. The Directive explicitly provides that 'the principle of contractual freedom on which this [instrument] is based will make it possible to continue limiting the exploitation of [exclusive broadcasting] rights'.[100] Put differently, the Directive does not prevent right holders from granting exclusive territorial licences.

Going back to the judgment, the Court was right to say that, when FAPL negotiated price, 'there [was] '*nothing to prevent [it] from asking* at that time, for an amount which takes account of the actual audience and the potential audience both in the Member State of broadcast and in any other Member State in which the broadcasts including the protected subject-matter are also received' [emphasis added].[101] But, what the Court does not mention is that *there was nothing to oblige it* to do so either. In the case at hand, it was clear that the intention of the right holder was to grant its UK and Greek customers exclusive territorial licences. However, what the ruling seems to suggest is that the right holder was not entitled but required to license its content on the basis of the CoO principle. This reading of the judgment must arguably be considered against the market reality surrounding the provision of satellite broadcasts in the EU. As already mentioned, the Satellite Broadcasting Directive was adopted with a view to facilitating the cross-border transmission of satellite broadcasts. At the time of adoption, it was believed that addressing the legal problem, that is, the cumulative application of several national laws to one single act of broadcasting, would stimulate the cross-border provision of satellite

[99] Ibid., Recital (17)
[100] Ibid., Recital (16) in combination with (15)
[101] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraphs 112

broadcasting services.[102] However, this did not decrease the incentive of right holders to license content on a country-by-country basis. In fact, in a report on the application of the Directive that was published almost ten years after the instrument entered into force, the Commission lamented that 'producers sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure that they cannot be received beyond national borders'.[103] *Murphy* can be read as an attempt to force the completion of a single market for satellite broadcasts. This attempt would be founded on an opportunistic interpretation of the CoO principle. For the purposes of this study, it bears noting that, broadly speaking, online rights are also licensed on a country-by-country basis[104] and that, until recently, the option to extend the application of the CoO principle to online transmissions was on the table as part of the Commission's proposal for a Copyright Regulation.[105] While this proposal was largely rejected,[106] it must be mentioned that stakeholders of the cultural and creative industries (where territorial licensing is widespread) were concerned that, post-*Murphy*, extending the CoO principle to online transmissions could 'break' territoriality.[107]

Third, and related to the above, while *Murphy* did not contest that a copyright owner has the right to receive appropriate remuneration, it is doubted whether the logic it introduces indeed respects this right. As already mentioned, the Court held that, in negotiating 'appropriate

[102] 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 (Satellite and Cable Directive or Satellite Broadcasting Directive) [1993] OJ L 248/15, Recital (5), (14)

[103] Ibáñez Colomo, P. (2015), *supra* n. 58, 7, fn. 28 referring to European Commission (2002). Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. COM(2002) 430 final

[104] See European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraphs 699-700

[105] For more information see: https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-laying-down-rules-exercise-copyright-and-related-rights-applicable-certain

[106] The European Parliament has recently decided to restrict the extension of the CoO principle to news and current affairs program only. For a comprehensive overview of the developments in this area see European Parliamentary Research Service (2018). *Regulating online TV and radio broadcasting*. Retrieved from: http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620217/EPRS_BRI(2018)620217_EN.pdf

[107] This concern is arguably unfounded for (at least) the following reasons. As already mentioned, in *Murphy*, the Court mentioned that, unlike *Coditel*, which concerned right holders that had not granted authorization for the dissemination of their work and were, as a result, deprived of the right to receive appropriate remuneration, *Murphy* concerned a right holder that granted authorization for the dissemination of its work but sought to receive remuneration that went beyond what was necessary to attain the objective of protecting the copyright at issue (see paragraphs 115-116 of the judgment). There is nothing in the wording of the Court to suggest that the application of the CoO principle is more determinative than (appropriate) remuneration. On the contrary, the analysis of the Court regarding remuneration is far more detailed than that related to the issue of whether the broadcaster/licensee was granted an authorization to communicate the work to the public (see paragraphs 93 et seq. of the judgment). The question of appropriate remuneration is crucial to the question of whether or not the IPR is exhausted such that it can be made available cross border. And for all the reasons set out in the paragraphs that follow, appropriate remuneration is not necessarily guaranteed in this case. Moreover, the concern that the outcome of the *Coditel II* case was based on the fact that the 'country of destination' principle applied at the time is not proven. Such a position has never been expressly adopted by the Court, either in *Coditel* or in *Murphy*. Furthermore, it must be noted that when the *Coditel* judgment was rendered, terrestrial overspill of broadcast signals in neighbouring territories was already considered in practice as being subject to the legal regime of the signal-originating country. Finally (and perhaps more importantly), as already explained, the CoO principle does not impose an obligation on the right holder to grant authorization for distribution of the work in another territory

remuneration', the right holder was not prevented from asking '*for* ***an amount which takes account of the actual audience and the potential audience*** both in the Member State of broadcast ***and in any other Member State in which the broadcasts*** *including the protected subject-matter* ***are also received***' [emphasis added].[108] While the 'potential audience' to which the Court refers could include requests coming from consumers residing in other Member States, this means in practice that the licensee would need to acquire a licence covering multiple territories. In cases where a company makes a significant investment, it can reasonably be expected that it will recover the relevant costs by passing them on to its customers (the Court makes the same assumption in *Murphy*[109]). For example, Sky's average subscription price for domestic use increased by £2.50 per month just weeks after it won the rights to a record £4.2bn Premier League TV deal.[110] Sky further upped by 10% the prices that pubs are charged (pubs use the license for commercial purposes and are, as a result, charged higher prices than individual consumers).[111] These examples illustrate how a *pay* service provider could react to an increase in the price of the acquired rights. But, how can a free-to-use content provider/licensee finance the acquisition of licenses for multiple territories so that the right holder can receive 'appropriate remuneration'?

For publicly-funded media organizations (the EU Member States have opted for a 'dual system' whereby citizens are served by both privately and publicly-funded media), there are currently no mechanisms in place for non-residents to pay the licence fee (for the avoidance of confusion, in this context, 'licence fee' refers to the source of funding of public service media organizations). In cases where publicly-funded media organizations make their content available cross-border, they do not receive any remuneration from foreign customers accessing that content. Taking into account the national purpose, role and organization of public service media organizations, as well as the discretion afforded to the Member States under the Amsterdam Protocol to provide for their funding,[112] it would be against the principle of

[108] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraph 112
[109] Ibid., paragraph 130: 'Passing [the higher cost] on to its customers, the broadcaster may thus demand a different fee for access to its services according to whether the access is for commercial or for private purposes'
[110] See Hall, J. *Sky Sports subscription fees rise following record Premier League deal*. Published on 19/03/2015. Retrieved from: http://www.cityam.com/212007/sky-subscription-fees-rise-following-record-premier-league-deal
[111] See Devine, J., *Who is paying for the Premier League's bumper TV deal? Your local pub*. Published on 13/07/2017. Retrieved from: https://www.theguardian.com/football/the-set-pieces-blog/2017/jul/13/football-watch-pub-sky-bt-cost-rise-tv-premier-league
[112] The Amsterdam Protocol is an interpretative Protocol on the System of Public Broadcasting in the Member States that was introduced by the Treaty of Amsterdam. The Protocol explicitly provides that it is up to the Member States to define and organize the public service media system in a manner of their own choosing. It reads as follows: 'The High Contracting Parties, considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretive provisions,

subsidiarity to oblige Member States to set up a mechanism to levy and enforce a licence fee from people resident in another country.

Moreover, ad-based providers might not be able to generate revenues from their free-to-use content abroad, for advertising targets the national audience (e.g. due to language restrictions, different consumer preferences and different product availability). Ad-based providers cannot expect advertisers to pay more simply for the possibility that the content could be accessed by unintended non-residents with different consumer tastes and opportunities. While one could argue that it is possible (and perhaps easier now than ever before) to provide advertisements targeting audience members residing in other Member States, this would imply building up a network of local advertisers and/or incurring costs to comply with local laws, including advertising rules.[113] It must be noted that, based on the results of the E-Commerce Sector Inquiry, the costs of adapting their business models to obtain revenue from users in other territories and the costs of complying with local consumer protection laws are two of the most important reasons why digital content providers do not make their services accessible in territories other than the one in which they are established.[114] Combined with insufficient consumer demand for foreign content,[115] the above parameters illustrate why tailoring advertisements to audiences in other territories may not make business sense to many ad-based providers operating in the territory of the Member State where they are established.

Given that the EU has significant competence limitations to interfere with the organization of publicly-funded media organizations and advertising markets remain fragmented along national lines and that *Murphy* can be read as altogether prohibiting restrictions on passive sales, it is submitted that (at least) in the above cases the right of the copyright owner to receive 'appropriate' remuneration would be significantly undermined. The above remarks on the implications of *Murphy* for agreements that the right holder negotiates with licensees in order to receive appropriate remuneration must also be considered against the

which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union: ***The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting*** and in so far as such funding is granted to broadcasting organizations for the fulfillment ***of the public service remit as conferred, defined and organized by each Member State***, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account' [emphasis added]. See Protocol No. 29 on the System of Public Broadcasting in the Member States [2010] OJ C 83/312

[113] Note that, despite the fact that the Audiovisual Media Services Directive harmonizes advertising rules for specific issues, ad laws vary considerably across the EU

[114] European Commission. *Preliminary Report on the E-commerce Sector Inquiry*, Table C. 6, p. 227

[115] Ibid.

following finding of the E-Commerce Sector Inquiry: most respondents to the Commission's questionnaire stated that the cost involved in purchasing content for other territories is the most important reason why digital content providers decide not to make their services accessible in Member States other than those in which they currently operate.[116]

Fourth, as already mentioned, in *Murphy*, the Court held that the 'premium is paid to the right holders concerned in order to guarantee territorial exclusivity which is such as to result in artificial price differences between the partitioned national markets'.[117] According to the Court, 'such an artificial price difference to which [the premium] gives rise [is] irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market'.[118] Given that it did not engage in an assessment of whether the price differences concerned were indeed 'artificial', the Court seems to imply that price discrimination *always* runs counter to the completion of the internal market. This is arguably misleading; consider, for example, two territories in which consumers differ in their valuation of a given service.[119] With price discrimination, the right holder will charge consumers in the 'high valuation' territory a higher price than the price at which the service is made available in the 'low valuation' territory.[120] In other words, there will be cross-subsidization of low-valuation consumers through high-valuation consumers.[121] Conversely, if the right holder is not allowed to engage in price discrimination (and provided that the differences in consumers' willingness to pay are large[122]), it may not be risk-worthy to enter a low valuation territory. In view of the above, under certain conditions, the ability to charge different prices in different territories may *promote* rather than hinder market integration.[123]

[116] Ibid., In addition, the provider must incur all the other costs associated with doing business in other territories, including costs of preparing appropriate language versions for those territories, libel law issues, etc.
[117] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083, paragraphs 115-116
[118] Ibid., paragraph 115. See also paragraph 139
[119] See, for instance, Langus, G., Damien Neven and Sophie Poukens (2014). *Economic Analysis of the Territoriality of the Making Available Right in the EU*, paragraph 325
[120] Ibid.
[121] Ibid., paragraph 328
[122] Note that there exist significant income differences between the EU Member States. See, for instance, OECD. *Average Wages*. Retrieved from: https://data.oecd.org/earnwage/average-wages.htm For an overview see also Eurostat. *Comparative price levels of consumer goods and services* (data from December 2017). Retrieved from: http://ec.europa.eu/eurostat/statistics-explained/index.php/Comparative_price_levels_of_consumer_goods_and_services; and Eurostat. *Purchasing power parities in Europe and the world* (data from April 2014). Retrieved from: http://ec.europa.eu/eurostat/statistics-explained/index.php/Purchasing_power_parities_in_Europe_and_the_world
[123] Langus, G., Damien Neven and Sophie Poukens (2014), *supra* n. 119, paragraph 328

To sum up, while the Court made the attempt to explain that *Murphy* does not overturn the principle established by *Coditel II*, the way in which it applied it to the facts of the case suggests otherwise.

c. Is the approach in *Murphy* adequate to promote the cross-border flow of audiovisual content across the EU?

The implications of *Murphy* for the practice of territorial licensing are still far from clear. Some say that the outcome is narrowly based on the facts of the case.[124] However, the grounds on which the Commission opened the *pay-TV investigation*,[125] the *Murphy*-inspired commitments that were made legally binding on Paramount (see Part 3.e.),[126] and some remarks on passive sales restrictions made in the Preliminary Report on the E-Commerce Sector Inquiry[127] may indicate that the Commission has an appetite for extending the outcome of *Murphy* to other cases. If this is indeed the case, the Commission's approach to territorial licensing raises several problems. The analysis conducted in the previous section demonstrated that rendering licensing agreements that grant absolute territorial protection 'restrictive by object' when this is neither legally compelled nor economically sound undermines legal certainty, unjustifiably interferes with copyright, and could, under certain circumstances, discourage entry into the territories of other Member States. If it results in preventing the right holder from receiving appropriate remuneration, it may also harm the incentive to innovate (this is a plausible scenario in cases where the right holder has not managed to achieve a fair return on investment). But, there is another reason why extending the outcome of *Murphy* to other cases is problematic, the reason being that this approach is simply not adequate to promote the cross-border provision of audiovisual content.

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[124] See, for instance, Graf, T. *The Court of Justice Speaks On Licensing Of Satellite Broadcasting*. 10 October 2011. Kluwer Competition Law Blog. Retrieved from: http://competitionlawblog.kluwercompetitionlaw.com/2011/10/10/the-court-of-justice-speaks-on-licensing-of-satellite-broadcasting/; Ibáñez Colomo also puts forward some convincing reasons why this could be the case. See *supra* n. 58, 9

[125] See 'Background on the pay-TV investigation' of European Commission. *Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services*. Press Release of 13 January 2014

[126] See Commission decision of 26.7.2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, fns. 5 and 9 et seq.

[127] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraph 935. The Commission notes in the Report that 'in addition to the fact that rights are often licensed on a national basis, […] a large majority of digital content providers are required by rights holders to restrict access to their online digital content services for users from other Member States by means of geo-blocking. Moreover, many of these agreements contain clauses enabling the right holder to monitor the implementation of technical geo-blocking measures, suspend distribution, or as a final resort, terminate the licensing agreement or ask for compensation, where the measures are not implemented and used in accordance with the rights holders' requirements'.

In an attempt to avoid lengthy antitrust investigations, right holders may be tempted to remove from agreements clauses whereby licensees are required to restrict access to the content concerned for viewers from other Member States. Furthermore, content providers may distribute own productions. In such cases, content providers may still refuse to respond to unsolicited requests coming from consumers residing in other Member States. Licensees may, for instance, resort to geo-blocking because they have not 'cleared' the right to exploit the content concerned in other territories. Content providers that distribute own productions may, for instance, resort to geo-blocking because they do not have the full range of rights needed to engage in online retransmission of their programs.[128] In such cases, *Murphy* cannot be relied upon to impose on (non-dominant) content providers an obligation to engage in passive sales, for establishing such a duty would not be supported by the logic of EU competition law.

As a general rule, firms, whether dominant or not, have the right to choose their trading partners. Interference with this right requires careful justification and only in very narrow circumstances can the refusal to supply a product or service constitute a breach of Article 102 TFEU.[129] There are at least two reasons why Article 102 TFEU is unlikely to be relevant to the case at hand.

First, in order to establish that an abuse of dominance has taken place, the Commission must prove that the licensee is dominant in the relevant market.[130] Since the threshold for finding dominance is high,[131] the Commission would need to adopt an unrealistically narrow approach to market definition (e.g. that the relevant market is the market for a specific sports event, TV series or film that content providers distribute) in order to reach the conclusion that any given licensee that does not respond to passive sales requests is dominant.

[128] Ibid., paragraph 765

[129] In the late 1980s and early 1990s, the Commission adopted a broad interpretation of the term 'abusive refusal to supply', whereby companies which held a dominant position and which refused to grant their competitors access to a valuable input were deemed to act in violation of Article 102 TFEU (see, for instance, Commission decision *Sealink/B&I-Holyhead* [1992] 5 CMLR, 255). In recent times, however, stricter tests have been introduced that limited the scope of Article 102 TFEU in cases of refusal to deal. See, for instance, CFI, Case T-504/93, *Tiercé Ladbroke SA v. Comission*, [1997] ECR II-923; ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791; ECJ, Joined cases T- 374/1994, T-375/1994, T-384/1994 and T-388/1994, *European Night Services and others v. Commission of the European Communities* [1998] ECR II-3141. For more information on this paradigm shift and the conditions introduced by the more restrictive case law see, for instance, van den Bergh, R. and Peter Camesasca (2006). *European Competition Law and Economics – A Comparative Perspective,* 274-276. Antwerpen, Groningen, Oxford: Intersentia-Hart Publishing

[130] This is one of the material conditions for finding that Article 102 TFEU applies: 'Any abuse by one or more ***undertakings of a dominant position*** within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States' [emphasis added]

[131] On how the Commission assesses dominance see Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, paragraphs 9-18

Second, the vast majority of cases concerning refusals to supply in violation of Article 102 TFEU concern the relationship between undertakings that compete at some level of the supply chain.[132] In other words, related judgments and decisions are not concerned with regulating the relationship between a firm and the final consumer. To my knowledge, the only decision where the Commission found that a company abused its dominant position on the grounds that it refused to supply the final consumer is the one concerning the sale to the general public of entry tickets for the 1998 Football World Cup final tournament.[133] In this case, the Commission found that the organizing committee abused its dominant position for the reason that it discriminated in favour of French residents (i.e. it refused to supply tickets on the basis of nationality). But the facts we are considering differ because in the *World Cup* case the relevant undertaking failed to prove that there was an objective justification for its conduct (the Commission did not accept the public security defence).[134] A content provider/licensee, on the other hand, may objectively justify its refusal to supply on grounds of copyright territoriality. Compliance with copyright law represents an objective justification for limiting cross-border accessibility, for in the absence of a licensing arrangement with the right holder, the content provider/licensee would not be able to lawfully offer content to the customer making the unsolicited request.[135] That compliance with copyright law is an objective justification that could render Article 102 TFEU inapplicable is illustrated by the recent decision adopted by the German competition authority regarding a dispute between Google and newspaper publishers.[136] The antitrust investigation was prompted by a complaint filed by a newspaper association about Google's conduct in connection with the introduction of 'the ancillary copyright law' for press publishers.[137] Google decided to show search results relating to the websites of press publishers in a reduced form.[138] Google justified its decision by claiming that

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[132] See, for instance, CFI, Case T-504/93, *Tiercé Ladbroke SA v. Comission*, [1997] ECR II-923; ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791; ECJ, Joined cases T- 374/1994, T-375/1994, T-384/1994 and T-388/1994; and ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Comission* [1995] ECR I-743

[133] Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 - 1998 Football World Cup)

[134] Ibid., paragraphs 105 et seq.

[135] Legal constraints, such as those imposed by copyright law, rules on advertising, and rules that seek to protect minors, are deemed to be objectively justified for limiting cross-border accessibility. This may be inferred from the Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination, pp. 69 et seq. See also Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 20(2) [2006] OJ L 376/36

[136] See Bundeskartellamt Press Release of 9 September 2015, *Bundeskartellamt takes decision in ancillary copyright dispute*. Retrieved from: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html

[137] Ibid.

[138] Ibid.

otherwise it ran the risk of being sued for breaching the ancillary copyright law.[139] The German competition authority found that Google's conduct was objectively justified on the grounds that 'even a dominant firm cannot be compelled under competition law to take on a considerable risk of damages'.[140] The decision of the German competition authority not to initiate formal proceedings against Google was largely based on the margin of discretion that a firm, including a dominant company, enjoys in designing its business model.[141]

d. Is the approach in *Murphy* desirable for the purposes of EU competition law?

Even in cases where they are caught by Article 101(1) TFEU, content licensing agreements granting absolute territorial protection may qualify for an exemption under Article 101(3) TFEU. In *Murphy*, the Court held that 'while, in principle, Article 101(1) TFEU does not apply to agreements which fall within the categories specified in Article 101(3) TFEU, clauses of licence agreements such as the clauses at issue in the main proceedings do not meet the requirements laid down by the latter provision and therefore the possibility of Article 101(1) TFEU being inapplicable does not arise'.[142] This was repeated verbatim by the Commission in *Paramount*.[143] Given that every agreement, including an agreement that contains hard-core restrictions of competition (absolute territorial exclusivity being one of them[144]), must be assessed in the light of the 'market conditions and business realities facing the parties to the agreement',[145] making such a sweeping statement may prove counterproductive.

More particularly, as regards the market conditions and business realities surrounding licensing agreements that grant absolute territorial exclusivity, I refer to the fact that audiovisual content manifests 'cultural discount' (i.e. loses value) once it crosses the borders of the territory the residents of which it originally targets.[146] In other words, consumer preferences across the

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[139] Ibid.
[140] Ibid.
[141] See Bundeskartellamt Decision B6-126/14, paragraphs 212 et seq. Retrieved from: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2015/B6-126-14.pdf?__blob=publicationFile&v=2
[142] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited [2011] ECR I-09083*, paragraph 145
[143] Commission decision of 26.7.2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, paragraph 52
[144] See Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Article 4(b)
[145] See, for instance, European Commission Guidelines on the application of Article 101(3) of the Treaty [2004] OJ C 101/97, paragraph 75, and European Commission Guidelines on Vertical Restraints SEC(2010) 411, paragraph 125
[146] Langus, G., Damien Neven and Sophie Poukens (2014), *supra* n. 119, paragraph 313

EU vary considerably.[147] MTV's example illustrates this very clearly. MTV was initially launched as a pan-European English language channel.[148] However, the differences in musical tastes, the lack of demand for pan-European advertising and the significant proportion of the European population that was not fluent in English eventually led to the launch of country-specific MTV channels.[149] Consumer buying power also varies considerably across the EU, for there exist significant income differences between Member States.[150] Differences in preferences and differences in income translate into different valuations of the same content.[151] As a result, right holders have a strong incentive to engage in price discrimination, which is facilitated by territorial licensing.[152] The foregoing remarks must be the starting point of an assessment of whether a licensing agreement granting absolute territorial protection may be exempted under Article 101(3) TFEU.

In addition to the above, in its Guidelines on Vertical Restraints, the Commission notes that where 'the undertakings substantiate that likely efficiencies result from including the hard-core restriction in the agreement and demonstrate that in general all the conditions of Article 101(3) are fulfilled, this will require the Commission to assess the likely negative impact on competition before making an ultimate assessment of whether the conditions of Article 101(3) TFEU are fulfilled'.[153] Put differently, if the parties demonstrate that the agreement has pro-competitive effects, the Commission may not condemn the agreement from the outset and must prove that the arrangements concerned indeed harm competition. Many arguments have been put forward that, depending on the case, territorial licensing may generate efficiencies.

For example, price discrimination may increase the incentive to innovate. To understand why, a few remarks need to be made on the 'risky business' that the production of audiovisual content is. The production of audiovisual content requires significant investment in terms of funds, time, facilities and other resources.[154] Moreover, audiovisual content is a product with highly uncertain consumer demand; there is little doubt that the success of a film or a series depends on viewer preferences that are not easy to predict. This is not just common sense, but

[147] Ibid., fn. 39, referring to RBB Economics & Value Partners (2009). *The benefits of territorial exclusivity in the European audiovisual industry*, 13-17
[148] Ibid.
[149] Ibid.
[150] See *supra* n. 122
[151] Langus, G., Damien Neven and Sophie Poukens (2014), *supra* n. 119, paragraph 313
[152] Ibid.
[153] European Commission Guidelines on Vertical Restraints SEC(2010) 411, paragraph 47
[154] For an overview of entry barriers in media markets see Bania, K. (2015), *supra* n. 15, Chapter 3

an empirically verified hypothesis. For example, De Vany and Walls tested the assumption that the variance of the probability distribution of movie outcomes is infinite by developing a model that makes distribution conditional on a list of choice variables that may alter the location of the distribution's probability mass.[155] After applying their model to a sample of 2,015 movies, De Vany and Walls concluded that it is impossible to determine the parameters that make a movie successful. Factors such as release strategies, budget and aggressive marketing made no difference, since no pattern could be identified. If, in addition to the above, we throw into the mix short product lifecycles, it is easy to understand why the production of audiovisual content is a dicey undertaking. While for most products it is considered that the social optimum price equals marginal cost, it might be difficult to recoup production costs on this basis. In the event that rights holders are prevented from licensing the content they produce on an exclusive territorial basis, the cumulative value of the rights concerned could be significantly reduced because the flexibility to design optimal distribution in each territory would be lost.[156] Price discrimination, on the other hand, may enable the right holder to recover production costs by allowing it to balance financing demands with different audience expectations. In turn, this may stimulate production of new content.[157]

Similar remarks could be made on investment into quality. Szymanski and Valetti showed that parallel trade, which results in uniform prices, reduces the revenues from investments at the margin in comparison to a regime in which parallel trade is not possible.[158] This may lead to lower investments into quality and, by extension, to a loss of dynamic efficiency.[159]

Perhaps the following example convinces those who are sceptical about granting an exemption to an agreement which contains what could qualify as a 'hard-core' restriction of competition. In *VBBB/VBVB*, a case dealing with fixed book pricing arrangements whereby the publisher sets the retail prices of the titles it produces and the retailer is not permitted to offer

[155] De Vany, A. and W. David Walls (1999). *Uncertainty in the Movie Industry: Does Star Power Reduce the Terror of the Box Office?* Paper presented at the annual meeting of the American Economic Association, New York, January 1999. Retrieved 2017 from: http://pages.stern.nyu.edu/~wgreene/entertainmentandmedia/Devany&Walls.pdf
[156] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraph 742. As the Commission outlines, an absence of vertical restraints, including exclusive distribution arrangements, '*can lead to a sub-optimal level of investment and sales*'. In particular, the investment required in media content may meet the Commission's criteria for identifying a genuine hold-up problem, i.e. that the investor may not commit the necessary investments before particular supply arrangements are made. See Commission Notice, *Guidelines on Vertical Restraints* [2010] OJ C130/01, paragraph 107(d) and (h)
[157] Langus, G., Damien Neven and Sophie Poukens (2014), *supra* n. 119, paragraph 332
[158] Ibid., referring to Szymanski, S. and Tomaso Valletti, (2005). *Parallel trade, price discrimination, investment and price caps*. Economic Policy, 20(44), pp.705-749
[159] Ibid.

discounts or any other forms of promotion, the Commission gives the following reply to the argument that retail price maintenance (also a hard-core restriction of competition[160]) increases book variety:

> '*[E]ven if a wide range of titles* […] [*is*] *to be regarded as benefiting the consumer, the consumer generally cannot benefit from the advantages of any rationalization that takes place in the book trade. […]* ***Since the price of the product is, for many consumers, an important element in their decision to purchase – and this applies to books as much as to other products – […] the consumer is not receiving a fair share'*** [emphasis added].[161]

This finding is based on the assumption that fixed prices are higher than those that retailers would charge if they were allowed to offer discounts. Yet, in his *ex ante/ex post* study of the UK book market, Fishwick showed that after the collapse of the RPM system prices increased.[162] The point that I want to raise by referring to the above example is that generalized statements regarding the potential effects of a restraint on competition serve no purpose and the specific market conditions should always be duly considered.

Summing up the key points that were raised in this part of the study, which dealt with territorial exclusivity, the preceding analysis showed that *Murphy* stretched the boundaries of EU competition law in an excessive manner. In doing so, it has unjustifiably interfered with copyright, failing to consider the beneficial effects of copyright on competition. More particularly, the ruling that the licensing arrangements under scrutiny were contrary to Article 101(1) TFEU appears to have been based on the far-fetched assumption that the prices charged by the right holder went beyond what was necessary to protect the subject-matter of copyright. No mention was made of the criteria that the Court itself has occasionally referred to as parameters against which an assessment of whether a price charged by a copyright owner is excessive can be conducted. The finding that the licence fees were excessive was largely founded on the mere fact that the agreements under consideration granted absolute territorial protection. If *Murphy* were to be interpreted as imposing on free-to-use content providers an obligation to respond to unsolicited requests coming from consumers residing in other territories, right holders might not be able to receive appropriate remuneration. To the extent

[160] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Article 4(a). See also Commission Guidelines on Vertical Restraints [2010] OJ C 130/1, paragraph 48

[161] Commission decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-*VBBB/VBVB*) [1982] OJ L 52/36, paragraphs 54-55

[162] Fishwick, F. (2008). *Book Prices in the UK Since the End of Resale Price Maintenance*. International Journal of the Economics of Business, 15 (3), 359-377

that it could deprive copyright owners of the ability to recover costs, many productions could either be of lower quality or would not be made at all.

Moreover, the Court did not hesitate to make sweeping statements about whether exclusive territorial arrangements could benefit from an exemption under Article 101(3) TFEU. Even if one accepts that agreements such as those made between the Premier League and its licensees are caught by Article 101(1) TFEU, arrangements granting absolute territorial protection may generate significant (qualitative) efficiencies. A careful analysis of the specific market conditions and business realities facing the parties may lead to the conclusion that the agreement under consideration increases the incentive to innovate.

Finally, it is doubted whether the approach in *Murphy* serves the objective to promote market integration. Contrary to the Court's assumption that charging different prices in different territories restores the division between national markets, under certain circumstances, price discrimination may stimulate entry into other territories. It must also be noted that, if the intention of the Court (or the Commission which was based on the judgment to take action against other undertakings) was to create precedent that would facilitate the cross-border provision of content, the approach underlying *Murphy* is not well thought out. If the relevant clauses were removed from the agreements, content providers could still have the incentive to refuse to engage in passive sales. In such cases, refusing to supply a customer that resides in another Member State on grounds of copyright territoriality would not amount to an abuse of a dominant position that affects trade in the internal market.

e. The relevance of a study challenging *Murphy* seven years after the judgment was rendered

The contribution that the above analysis makes to policymaking and competition scholarship must be considered against the following considerations.

First, the impact of *Murphy* has *not* been limited to the facts of the specific case; in the aftermath of the judgment, the Commission opened formal antitrust proceedings to examine certain provisions in licensing agreements between several major US film studios and the largest European pay-TV broadcasters.[163] The Commission is investigating whether these provisions prevent broadcasters from providing their services across borders, for example by refusing to supply potential subscribers from other Member States or blocking cross-border access to their services.[164] One of the US majors under investigation, Paramount, has already undertaken to remove clauses restricting the ability of broadcasters to accept unsolicited requests for their pay-TV services from consumers located outside their licensed territory[165] (NB: while the Commission was satisfied with Paramount's commitments, Canal+ has reportedly appealed the decision[166]). It must be pointed out that, contrary to *Murphy*, which concerned satellite broadcasts only, Paramount's commitments cover both satellite broadcasters and online transmissions.[167] Given the above developments and the remarks that were made about the Court's reasoning in *Murphy*, concerns that elements of an ill-founded ruling are being integrated into decisional practice are growing.[168]

Second, as already explained above, *Murphy* has created considerable uncertainty about whether content licensing agreements that grant absolute territorial exclusivity are prohibited or not. This uncertainty has yet to be addressed; being a commitments decision, *Paramount* lacks a detailed analysis of why the agreements under scrutiny may have violated the EU competition rules. The industry was hoping that the Commission would explain how it intends to apply Article 101 to licensing agreements containing territorial restrictions after the conclusion of the E-Commerce Sector Inquiry. Unfortunately, however, the much anticipated Final Report, which was published a year ago, makes the rather vague remarks that 'online rights are to a large extent licensed on a national basis' and that '[a]ny assessment of [territorial] licensing practices under the EU competition rules has to consider the characteristics of the content industry, the legal and economic context of the licensing practice and/or the

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[163] European Commission. *Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services*. Press Release of 13 January 2014. Retrieved from: http://europa.eu/rapid/press-release_IP-14-15_en.htm
[164] Ibid.
[165] Commission decision of 26 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, C(2016) 4740 final
[166] See, for instance, Lawrance, S. and Noel Watson-Doig. *A decision of Paramount importance to independent film financing…?* The CLIP Board, 22 December 2016. Retrieved from: http://www.bristowsclipboard.com/post/a-decision-of-paramount-importance-to-independent-film-financing
[167] For a brief description of the decision see European Commission. *Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV services*. Press Release of 26 July 2016. Retrieved from: http://europa.eu/rapid/press-release_IP-16-2645_en.htm
[168] It bears noting that earlier this year the Commission raided the offices of a number of companies involved in the sale and/or acquisition of sports broadcasting rights on the grounds that the companies concerned may have violated the EU competition rules. There is no publicly available information about the scope of the investigation. See, for instance, Holton, K., Larry King, G Crosse and Jonathan Oatis. *European Commission raids offices in sports broadcasting investigation*. 10 April 2018. Reuters. Retrieved from: https://www.reuters.com/article/us-fox-britain-raid/european-commission-raids-offices-in-sports-broadcasting-investigation-idUSKBN1HH3C9

characteristics of the relevant product and geographic markets'.[169] It bears repeating that the practice of 'territorial licensing' is not widespread in the TV broadcasting sector only. Territorial licensing governs the activities of a number of content providers, including popular OTT service providers and digital music streaming services.

Finally, to my knowledge, there have been no systematic attempts to examine the issues I studied. The vast majority of commentators has discussed the *commercial* implications of the above developments for territorial licensing without, however, engaging in a critical analysis of the Court's reasoning.[170] Discussing options about how to face the challenges arising from the uncertainty the Court and the Commission have created has undoubtedly been useful to the cultural and creative industries. However, what is arguably more useful is to understand whether the case law and decisional practice under examination are subject to legal challenge. Compared to the aforementioned studies, certain commentators have examined the Court's argumentation in greater detail. However, they either do not develop the issues at stake to the extent the present study did[171] or focus on specific aspects of the judgment (e.g. the legal framework that applies to satellite broadcasters as a parameter that determined the outcome in *Murphy*[172]). While specific aspects of the judgment may undoubtedly deserve more attention than others, they should not be examined in isolation from other factors that seem to be equally

[169] European Commission (2017). *Final report on the E-commerce Sector Inquiry*, paragraphs 65 and 72

[170] For example, some say that, post-Murphy, copyright owners may be forced to tender rights on a pan-European basis. See Van Rompuy, B. and Karen Donders (2013). *The EBU's Eurovision System Governing the Joint Buying of Sports Broadcasting Rights: Unfinished Competition Business*. Competition Law Review, 9(1), 22. Retrieved from: http://new.clasf.org/CompLRev/Issues/Vol9Issue1Art1RompuyDonders.pdf. Others argue that the effects of the above developments on territorial licensing will largely depend on the type of content concerned (e.g. large leagues may attempt to circumvent 'Murphy's law' by self-broadcasting). See, for instance, Kaburakis, A., Johan Lindholm and Ryan M. Rodenberg (2012). *British Pubs, Decoder Cards, and the Future of Intellectual Property Licensing after Murphy*. Columbia Journal of European Law, 18(2), 320. See also Lindholm, J. and Anastasios Kaburakis (2013). *Cases C-403/08 and C-429/08 FA Premier League Ltd and Others v QC Leisure and Others; and Karen Murphy v Media Protection Services Ltd, 4 Oct 2011*. In Anderson, J. (ed.) Leading Cases in Sports Law, 271-286. Heidelberg, Germany: TMC Asser Press/Springer-Verlag

[171] For example, Alexiadis and Wood pose the questions this paper examines but do not develop them fully. They mention, for instance, that the Court should have been more diligent in its assessment of whether agreements granting territorial protection may be exempted under Article 101(3) TFEU. However, they do not delve into an analysis of the efficiencies these agreements may generate. See Alexiadis, P. and David Wood (2012). *Free Market 1: Copyright 0 - UK Premier League Loses Away from Home*. Utilities Law Review 18, 249.

[172] The argument goes as follows: since the legal framework that applies to satellite broadcasts differs from that governing copyright-protected work distributed through other platforms, the outcome would be different in case of territorial restrictions contained in agreements for exploitation of content through other distribution means. See Graf, T. (2011), *supra* n. 124: '[i]it is important to note that the Court's judgment is narrowly based on the facts of the case. While the Advocate General sought to formulate principles that apply to all dissemination of non-physical content, including online dissemination, the Court's conclusions are limited to the transmission and viewing of satellite broadcasts'. Retrieved from: http://competitionlawblog.kluwercompetitionlaw.com/2011/10/10/the-court-of-justice-speaks-on-licensing-of-satellite-broadcasting/; See also Ibáñez Colomo, P. (2015), *supra* n. 58, 10: 'There are indeed good reasons to believe that the ruling in *Murphy* cannot as such be extended without qualification beyond the specific facts of the case. […] *[I]n a different regulatory context (and, in particular, where the 'country of origin' principle would not apply) the Court would not have ruled in the same way*' [emphasis added]. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697178 For counter-arguments see *supra* n. 107

(or more) relevant to a competition assessment (e.g. prices charged by the licensee, the welfare effects of price differentiation, etc.) of territorial licensing agreements.

4. How is EU competition law being instrumentalized to complete a single market for broadcast content? The E-Commerce Sector Inquiry as an attempt to undermine technological and temporal exclusivity

Having discussed territorial licensing, I shall now turn to the implications for antitrust enforcement of the other two elements which commonly define the scope of the licence and which the Commission's Preliminary and Final Reports on the E-Commerce Sector Inquiry have identified as factors affecting access to digital content markets. These elements are: ***technological exclusivity*** and ***temporal exclusivity***.[173] With respect to technological exclusivity, the Commission expresses concerns about the practice of 'bundling' rights for online transmission with rights for other transmission technologies.[174] As regards temporal exclusivity, the Commission raises issues about 'windowing' (the process of managing the release sequence for content) and long duration.[175] In examining the above issues, I shall attempt to fill a gap in the literature; most studies dealing with the E-Commerce Sector Inquiry merely provide an overview of the main findings of the Commission's investigation[176] whilst the focus of the few studies that discuss the Inquiry results in greater detail is different from that of the present paper.[177] It bears noting at the outset that the Commission's approach to technological and temporal exclusivity in the Inquiry Reports appears to be largely influenced

[173] European Commission (2017). *Final report on the E-commerce Sector Inquiry*, paragraph 21

[174] See European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraphs 689 et seq. See in particular paragraph 694; and European Commission (2017). *Final report on the E-commerce Sector Inquiry*, paragraphs 63-64

[175] See European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraphs 804 and 839 et seq. See in particular paragraphs 933-944 and p. 268; and European Commission (2017). *Final report on the E-commerce Sector Inquiry*, paragraphs 68-69

[176] See, for instance, Sáenz Cardenal, M. B. (2017). *Vertical Restraints on E-Commerce in the Context of the Single Digital Market Initiative of the European Commission*. Stanford - Vienna Transatlantic Technology Law Forum. European Union Law Working Papers, No. 23, see in particular pp. 50 et seq. Retrieved from: https://www-cdn.law.stanford.edu/wp-content/uploads/2017/08/saenz_eulawwp23.pdf; Kucharczyk, J. (2017). *DG COMP's E-Commerce Sector Inquiry Leads to First Enforcement Action — Could Online Marketplace Bans Be Next in Line?* 9 February 2017. Project Disco. Retrieved from: http://www.project-disco.org/competition/020917-dg-comps-e-commerce-sector-inquiry-leads-first-enforcement-action-online-marketplace-bans-next-line/#.WmnrjjBry71; Liberatore, F. (2016). *The state of debate – what to expect from the EU e-commerce sector inquiry.* 6 November 2016, Competition Policy International. Retrieved from: https://www.competitionpolicyinternational.com/the-state-of-debate-what-to-expect-from-the-eu-e-commerce-sector-inquiry/

[177] See, for instance, Havu, K. (2016). *The Digital Single Market and E-commerce: Some Remarks concerning Online Sales and Distribution from the Private Enforcement Point of View*. Global Competition Litigation Review, 9(2), 50-56; Carloni, F., Scott S. Megregian and Mélanie Bruneau (2015). *The E-Commerce Sector Inquiry: Can It Stop National Competition Authorities from Adopting an Overly Restrictive Approach?* Journal of European Competition Law & Practice, 6(9) Issue 9, 639-651; De la Mano, M. and Alison Jones (2017). *Vertical Agreements Under EU Competition Law: Proposals for Pushing Article 101 Analysis, and the Modernization Process, to a Logical Conclusion*. King's College London Law School Research Paper No. 23. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930943

by previous decisions. As a result, the study takes the opportunity to bring the reader's attention to the drawbacks of past decisional practice.[178]

a. Technological Exclusivity: 'Bundling' Rights For Different Transmission Technologies

In the Preliminary Report on the E-Commerce Sector Inquiry, the Commission notes that rights for online content transmission are usually 'bundled' with rights for other transmission technologies, such as satellite, cable, mobile and terrestrial.[179] According to the Commission, bundling of rights '*may limit the availability of a varied offer of digital content services to users and* […] *hinder both existing operators and new entrants from competing and developing new innovative services, which in turn may reduce consumer choice*'.[180] This remark is repeated verbatim in the Final Report on the Inquiry.[181] The Commission's approach to 'bundling' in the Inquiry Reports raises several issues, which will be examined in detail below.

i. Licensing rights for online transmission together with rights for other transmission technologies: Is this really bundling?

As already mentioned, the Report uses the term 'bundling' to refer to licensing practices whereby rights for online transmission are licensed together with rights for other transmission technologies.[182] This definition of bundling is somewhat confusing in that including online rights in a package of rights for different transmission technologies does *not* consist in 'bundling' different services. This is because (at least) one of the conditions that the Court set for finding that a firm has engaged in anti-competitive bundling (or tying),[183] namely the condition that the

[178] While several authors provided an overview of the remedies which the Commission has occasionally imposed on right holders and licensees in order to ensure access to premium content, they refrained from testing the hypotheses on which the Commission has based its practice. Moreover, relevant studies have refrained from evaluating the effectiveness of the remedies that have been imposed thus far against how the markets evolved. See, for instance, Ungerer, H. (2014). *The Reasons For Intervention Trough Competition Policy*, 409-416. In Donders, K., Caroline Pauwels and Jan Loisen (ed.). *The Palgrave Handbook of European Media Policy*. New York: Palgrave Millan; Komorek, E. (2013). *Media Pluralism and European Union*, 130-135. Alphen aan den Rijn: Kluwer Law International; Psychogiopoulou, E. (2008). *The Integration of Cultural Considerations in EU Law and Policies*, 246-291. Leiden, Boston: Martinus Nijhoff Publishers; Capito, R. and Moira Kettner (2008). *Excursus: EC Merger Regulation*, 188-198. In Castendyk, O., Egbert J. Dommering and Alexander Scheurer. *European Media Law*. Alphen aan den Rijn: Kluwer Law International; Nikolinakos, N. (2006). *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT sectors*, 138-161. Alphen aan den Rijn: Kluwer Law International. An excellent study in this area is Ibáñez Colomo, P. (2006). *Saving the Monopsony: Exclusivity, Innovation and Market Power in the Media Sector*. Research Papers in Law, 07/2006, College of Europe, Global Competition Law Centre. My analysis complements this latter study by considering key assumptions regarding 'bundling' as anti-competitive conduct, duration, and windowing arrangements

[179] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraphs 689 and 693

[180] Ibid., paragraph 694

[181] European Commission (2017). *Final Report on the E-Commerce Sector Inquiry*, paragraph 64

[182] Ibid., paragraph 689

[183] The Commission Guidance on Article 102 TFEU, which codifies the relevant case law, notes that antitrust intervention would normally be justified if the following conditions are fulfilled: a. the firm engaging in tying (or bundling) is dominant;

bundled products must be 'distinct' products, is not fulfilled in the case at hand; aside from the obvious (the content is the same irrespective of the distribution mode that is used to reach viewers), *licensees* are usually keen (not forced) to acquire the rights for all transmission technologies and current market conditions indicate that *viewers* may regard the different means of delivery as substitutable.

Starting from the perspective of licensees, according to the relevant case law, two products are 'distinct' if, in the absence of tying (or bundling), a substantial number of customers would purchase the tying product without also buying the tied product from the same supplier.[184] This condition reflects Article 102(2)(d), which lays down that an abuse of a dominant position may consist in 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'.[185] The wording of this provision suggests that an element of the abuse of tying or bundling is that the customer is coerced into acquiring the tied or bundled product.[186] This is not the case here. As opposed to anti-competitive bundling, which would *discourage* customers from acquiring one of the two products from another supplier, licensees *aim* for entering into a contractual relationship with a right holder that would allow them to exploit the acquired content across various distribution platforms.[187] This is because, while attractive content usually has high acquisition (or first-copy) costs,[188] once the provider has purchased (or produced) the content, the incremental cost to an additional consumer is low.[189] The fact that attractive content is expensive to acquire but fairly cheap to deliver incentivizes providers to expand into every possible distribution platform[190] because expansion

b. the tying and tied products are distinct products; and c. the tying practice is likely to lead to anti-competitive foreclosure. See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/2, 48-50. Note that, contrary to what the definition in the Report suggests, the Guidance defines bundling as 'the offering of two *distinct* products sold jointly in fixed proportions' (see paragraph 48)

184 Ibid., paragraph 51

185 Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C 326/47

186 Whish, R. and David Bailey (2012). *Competition Law* (7th edition), 694. Oxford: OUP. Note that the Commission interpreted this provision rather broadly to prohibit conduct that was not based on a contractual relationship between the supplier and the customer. Most notably, in *Microsoft*, the customer was not coerced into purchasing the Media Player, which was included in the operating software. In other words, this was a case of 'technical bundling'. The General Court of the EU (then Court of First Instance) held that customers were forced to take the Media Player on the grounds that it was not possible to uninstall it from the system. See Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601, paragraph 963

187 See comments made by interested stakeholders during the Conference on the E-Commerce Sector Inquiry organized by the European Commission. 6 October 2016, Brussels. Retrieved from: https://webcast.ec.europa.eu/conference-on-e-commerce-sector-inquiry

188 OECD (2003). *Policy Roundtable on Media Mergers*, 21

189 Goodman, E. (2004). *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*. Berkeley Technology Law Journal, 19, 1432-1434

190 Doyle, G. (2002). *Media Ownership: The Economics and Politics of Convergence and Concentration in the UK and European Media*, 4. London: Sage Publications

enables them to reap economies of scale and scope. In recent years, this incentive has become even greater, for previously different communication infrastructures now use the same transport protocols. This means that television broadcasts can currently be delivered on more platforms[191] with significantly less cost.[192] The above parameters largely explain the practice of '360-degree commissioning', whereby, from their earliest stages, decisions on what type of content to invest in are determined by the ability of the content concerned to generate revenue through multiple platforms.[193] In view of the foregoing, it is clear why, contrary to conduct captured by Article 102(2)(d) TFEU, purchasing online rights together with rights for other transmission technologies does not customarily involve *acceptance of supplementary obligations which, according to commercial usage, have no connection with the subject of the agreements concerned*.

We are now turning to the viewers' perspective. Based on a long line of case law condemning abusive tying or bundling, products are 'distinct' if they belong to separate product markets.[194] By stating that the practice of 'bundling' rights for different transmission technologies may raise competition concerns, the Commission may imply that different types of transmission fulfil different needs. However, on numerous occasions, the Commission has *not* distinguished between terrestrial, satellite, cable and other means of content delivery.[195] For example, in *Newscorp/BSkyB*, it found that different distribution modes are part of the same product market for the retail distribution of content to consumers.[196] In other words, the Inquiry Reports appear to make an assumption that does not necessarily reflect market reality. To reflect

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[191] Ibid., 9-10. For more information on technology convergence and how it affects broadcasting see, for instance, EBU (2013). *Reply to the European Commission Green Paper – Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values*. The following example illustrates the point raised here: BBC news program Question Time is available on linear TV via BBC One, and on-demand via the BBC's iPlayer (through which it can be streamed, watched on catch-up TV and downloaded). Video highlights of the program are made available on the BBC iPlayer, the BBC News and the BBC One websites. Finally, a text summarizing the content broadcast accompanies the video highlights. See http://www.bbc.co.uk/programmes/b006t1q9; http://www.bbc.co.uk/iplayer/episode/b04v85qt/question-time-11122014; and http://www.bbc.co.uk/iplayer/categories/news/highlights, and http://www.bbc.co.uk/programmes/b006t1q9

[192] Pavlik, J. (2005). *Understanding Convergence and Digital Broadcasting Technologies for the Twenty-First Century*. NHK Broadcasting Studies. Retrieved from: https://www.nhk.or.jp/bunken/english/reports/pdf/05_no4_08.pdf

[193] See, for instance, Doyle, G. (2010). *From Television to Multi-platform: Less from more or more for less?* Convergence: The International Journal of Research into New Media Technologies, 16(4), 431-449

[194] See, for instance, CFI, Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601, paragraphs 912-944; Case T-30/89 *Hilti AG v Commission* [1990] ECR II-163, [1992] 4 CMLR 16, paragraph 68, upheld on appeal ECJ, Case C-53/92 *P Hilti AG v Commission* [1994] ECR I-667, [1994] 4 CMLR 614; and Commission decision *Tetra Pak II*, Case IV/31043 [1992] OJ L72/1, paragraph 119, upheld on appeal to the CFI, Case T-83/91 *Tetra Pak SA v Commission* [1994] ECR II-7, and on appeal to the ECJ, Case C-333/94 P Tetra Pak International SA v Commission [1996] ECR I-5951

[195] See Commission decisions *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraph 21; *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraphs 40 and 47; *SFR/Télé 2 France*, Case No COMP M.4504 [2007] OJ L 316/57, paragraph 40.

[196] Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraphs 103 *et seq*. One of the reasons underlying this approach seems to be that all content providers compete against each other to reach the largest possible number of viewers. See, for instance, Commission decision *Newscorp/Premiere*, Case COMP/M.5121, [2008] OJ C 219/4, paragraph 20

market reality, the Commission should arguably consider the magnitude of costs that viewers would incur in switching from one technology to another. Based on market data, it would appear that, in recent years, the investment costs associated with the choice of any given distribution channel have decreased. In other words, there appear to be no material disincentives for viewers to switch to another form of reception. For example, satellite dishes have long become an inexpensive tool for receiving television broadcasts.[197] Cable providers offer decoders on a rental basis. The majority of channels broadcast on digital terrestrial television are free-to-air (NB: to complete the digital switchover, that is, the transition from analogue to digital broadcasting, many Member States granted subsidies to viewers so that they could purchase the appropriate reception equipment[198]). In cases where IPTV providers require the viewer to acquire a dedicated set-top box, no extra fees are usually charged for that set-top box when an IPTV subscription is purchased. Finally, popular OTT service providers such as Netflix are already available on a wide range of devices, including smart TVs, laptops, smartphones, and game consoles;[199] in such cases, subscribers need only an Internet connection to access the desired content (based on data collected by Eurostat, by 2017, the share of EU-28 households with internet access had risen to 87 %).[200] The above may indicate that viewer preferences do not depend on the distribution means through which content can be accessed. In other words, if switching costs are low, rights for online transmission and rights for other transmission technologies would not seem to belong to different product markets.

To sum up, the Commission's definition of 'bundling' in the Inquiry Reports does not reflect the spirit of the relevant case law; based on certain conditions specific to the supply and consumption of audiovisual content, the 'distinct' product requirement set by the Court does not seem to be fulfilled in the case at hand. If the Commission's intention is to introduce a different standard against which to assess whether a content licensing practice qualifies as anti-competitive bundling, it should have clearly spelled it out in the Reports.

ii. If rights were split up, would 'unbundling' stimulate competition?

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[197] See, for instance, European Commission. *Commission sets out a right to use a satellite dish in the Internal Market*. IP 01/913, Press Release of 2 July 2001

[198] A list of these decisions is available at: http://ec.europa.eu/competition/sectors/telecommunications/digital_tv_decisions.pdf

[199] See https://help.netflix.com/en/node/33222

[200] Eurostat (2018). *Digital economy and society statistics - households and individuals*. Retrieved from: http://ec.europa.eu/eurostat/statistics-explained/index.php/Digital_economy_and_society_statistics_-_households_and_individuals

For the sake of the issues I raise below, let's assume that selling online rights with rights for other transmission technologies may indeed qualify as anti-competitive bundling under the EU competition rules.

The Preliminary Report on the E-Commerce Sector Inquiry notes that 'splitting up rights in order to allow a variety of digital content providers to offer their services by using different technologies may increase competition in digital content markets'.[201] This implies that 'unbundling' the rights would address the competition concerns that arise from licensing for several transmission technologies. In a number of cases involving arrangements that concerned licensing of attractive content, the Commission (and National Competition Authorities across the EU) exempted the relevant agreements upon the condition that rights would be broken down into several packages.[202] However, intervention to unbundle rights has been far from a success story.

The first case in this area that was examined by the Commission concerned the central marketing of broadcast rights to the UEFA Champions League.[203] Initially, the Commission refused to grant a negative clearance as well as an exemption under Article 101(3) TFEU because UEFA would sell all the free and pay-TV rights on an exclusive basis to a single broadcaster per territory for a period lasting several years.[204] This commercial policy was found to reduce output and eliminate price competition.[205] Following negotiations with the Commission, UEFA introduced changes to its collective selling scheme that were considered appropriate to address the concerns the Commission had identified throughout its investigation. One of these changes consisted in splitting the rights into fourteen smaller packages.[206] The same approach was adopted in the *German Football League* (Deutschen Fußball Liga, DFL)[207]

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[201] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraph 642

[202] See, for instance, Commission decisión, *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25; Commission decision, *Joint Selling of the Media Rights to the German Bundesliga* (Case COMP/C-2/37.214) [2005] OJ L 134/46; Commission decision, *Joint Selling of the Media Rights of the FA Premier League* (Case COMP/C.2/38.173) [2006] OJ L 176/104

[203] Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25

[204] European Commission (2001, July). *Commission opens proceedings against UEFA's selling of TV rights to UEFA Champions League*. Press Release IP/01/1043. Retrieved from: http://europa.eu/rapid/press-release_IP-01-1043_en.htm?locale=it

[205] European Commission (2002, June). *Commission welcomes UEFA's new policy for selling the media rights to the Champions League*, Press Release IP/02/806. Retrieved from: http://europa.eu/rapid/press-release_IP-02-806_en.htm?locale=it

[206] Ibid.

[207] Commission decision, *Joint Selling of the Media Rights to the German Bundesliga* (Case COMP/C-2/37.214) [2005] OJ L 134/46

and in the *English Football Association Premier League* (FAPL);[208] the Commission exempted the agreements upon the condition that rights would be broken down into different packages that could only be acquired on the basis of a transparent and non-discriminatory bidding procedure.[209]

This remedy proved to be ineffective. For example, FAPL segmented the rights for the 2004-2007 seasons into four packages, all packages, however, were ultimately acquired by Sky.[210] A similar scenario has recently emerged in Germany. In January 2012, the Bundeskartellamt accepted DFL's commitment to divide the rights into more than one package.[211] Yet, this did not prevent Sky Deutschland from purchasing the exclusive rights to the Bundesliga for pay-TV, IPTV *and* mobile for the 2013-2017 seasons.[212] Therefore, despite what the Commission expected, these arrangements did not 'enhance the possibility for more broadcasters, including small and medium-sized companies, to obtain [premium sports] content'.[213]

Stricter remedies have also failed to achieve this goal. For example, because Sky acquired all of the Premier League packages for the 2004-2007 seasons during the Commission's investigation, FAPL further undertook to specify in the invitations to future tenders that no single operator would be entitled to acquire all of the live audiovisual packages (no single buyer obligation).[214] The no single buyer obligation may have resulted in Setanta entering the market, but this was of little value. Sky won the rights to five of the six packages (the maximum available to a single bidder) whereas Setanta purchased the rights to the remaining package, 'generally

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[208] Commission decision, *Joint Selling of the Media Rights of the FA Premier League* (Case COMP/C.2/38.173), [2006] OJ L 176/104

[209] European Commission (2003, July). *New marketing system for Bundesliga broadcasting rights*. Press Release IP/03/1106. Retrieved from: http://europa.eu/rapid/press-release_IP-03-1106_en.htm?locale=it; Commission decision, *Joint Selling of the Media Rights to the German Bundesliga* (Case COMP/C-2/37.214) [2005] OJ L 134/46, Annex, paragraphs 2.1. *et seq*.; Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453, *Joint selling of the media rights of the FA Premier League on an exclusive basis* [2004] OJ C 115/02, paragraphs 16 *et seq*. On the practice the Commission developed in the area of joint selling rights and in particular on whether the relevant decision-making has benefited the consumer see Lefever, K. and Ben Van Rompuy (2009) *Ensuring Access to Sports Content: 10 Years of Intervention. Time to Celebrate?* Journal of Media Law, 1(2), 243-268

[210] Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453, *Joint selling of the media rights of the FA Premier League on an exclusive basis* [2004] OJ C 115/02, paragraphs 10 and 11

[211] European Competition Network. *Brief 02/2012*. Retrieved from: http://ec.europa.eu/competition/ecn/brief/02_2012/brief_02_2012.pdf p. 6

[212] See Briel, R. *Sky Deutschland wins all live Bundesliga rights*. 18 April 2012, Broadband TV News. Retrieved from: http://www.broadbandtvnews.com/2012/04/18/sky-deutschland-wins-live-bundesliga-rights/

[213] Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25, paragraph 171

[214] Commission decision, *Joint Selling of the Media Rights of the FA Premier League* (Case COMP/C.2/38.173), [2006] OJ L 176/104, paragraph 3.2.

recognized to be the least attractive'.[215] Moreover, Setanta did not manage to exert effective competitive constraints on Sky; in June 2009, it went into administration and its rights were awarded to ESPN, which concluded a wholesale deal with Sky for distribution of the package on Sky's DSat platform.[216] As a result, Setanta customers were ultimately forced to buy a Sky subscription.[217] Given the above experience, it is puzzling that the Commission (still) assumes that 'splitting up rights in order to allow a variety of digital content providers to offer their services […] may increase competition in digital content markets'.[218]

Finally, in addition to making contestable assumptions about the benefits that 'unbundling' could bring about, the Commission also makes contestable assumptions about the harm caused by bundling. As already mentioned, the Inquiry Reports raise the concern that bundling may limit the availability of a varied offer, reducing consumer choice.[219] But, even if it could increase the variety of providers offering digital content (the above analysis demonstrated that this is usually not the case), unbundling could harm consumers through higher prices. More particularly, viewers consume content in many different ways. For example, they may watch a film on their TV sets or their tablets. As a result, 'bundling' allows them to consume content using the hardware device and/or technology that best suits their needs. Without 'bundling', a consumer might be forced to pay for the same content more than once. The harm to consumer welfare that 'unbundling' remedies may cause is illustrated by *FAPL*; following the acquisition by Setanta of one of the Premier League packages (formerly sold in 'bundles'), consumers on Sky's satellite platform had to purchase an additional subscription.[220] Similarly, in 2016, the Bundeskartellamt imposed on the German football association (DFL) the 'no single buyer' obligation whereby 30 to 102 matches of the season (in which there are 306 matches in total) should be acquired by a second buyer.[221] The rights to the live events were acquired by pay-TV providers Sky and Discovery.[222] As a result, from the season 2017/2018 onwards, German viewers need to purchase two subscriptions to watch the entire competition.[223]

[215] Ofcom (2009). *Pay TV Phase Three Document: Proposed Remedies*, paragraph 2.53. Retrieved from: http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/summary/paytv_condoc.pdf
[216] Ibid., paragraph 1.17., fn. 42
[217] Ibid., paragraph 12.40
[218] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraph 642
[219] Ibid; and European Commission (2017). *Final Report on the E-Commerce Sector Inquiry*, paragraph 64
[220] Ofcom (2009), *supra* n. 216, paragraph 12.40. See also Jones, A. and Brenda Sufrin (2016). *EU Competition Law*. Texts, Cases and Materials. Sixth Edition, at p. 749. See also https://chillingcompetition.com/2016/02/11/football-tv-rights-and-the-single-buyer-rule-in-a-world-of-commitment-decisions-bad-policy-dies-hard/
[221] BEREC (2018), *supra* n. 40, 19. Note that Ofcom adopted the same solution for the rights to the Premier League. See Ofcom. Press Release of 8 August 2016. *Ofcom closes investigation into Premier League football rights*. Retrieved from: https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/premier-league-football-rights
[222] Ibid.
[223] Ibid.

iii. Does 'unbundling' go beyond what is permissible under EU competition law?

The Commission seems to believe that premium content is an 'essential facility', that is, an input which content providers cannot duplicate feasibly or economically and access to which is necessary in order to effectively compete. For example, in *Vivendi*, the Commission noted that the attractiveness of pay-TV depends on the availability of sports rights, thereby making access to this content '***essential***',[224] whereas in *Newscorp/Telepiu*, it referred to football content as 'a ***stand-alone driver*** for pay-TV operators' [emphasis added].[225] The remedies imposed upon copyright owners (which were occasionally required to split rights into different packages so as to ensure that rights to attractive content are shared between at least two providers) and licensees (which were occasionally required to sub-license the acquired rights so as to ensure that at least one competitor has access to the rights concerned[226]) also suggest a 'veiled application of the refusal to supply line of case-law'.[227] However, as the analysis below will demonstrate, establishing the above obligations in order to reduce the scope of the licence is not supported by the logic underlying the relevant case law.

Probably the first case concerning a refusal to supply is *Commercial Solvents* where the Court ruled that a firm in a dominant position in the market in raw materials and which, with the object of reserving such raw materials for manufacturing its own derivatives, refused to supply a customer that itself was a manufacturer of these derivatives, acted in violation of Article 102 TFEU.[228] The Court followed the same approach in *Télémarketing*.[229] Yet, these two judgments did not clarify whether, and if so under what conditions, the duty of a dominant

[224] Commission decision *Vivendi/Canal+/Seagram*, Case No COMP/M.2050 [2000] OJ C 311/3, paragraph 21
[225] Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 66. Similarly, in *BiB*, it stated that an entrant into the pay-TV market requires 'above all, premium film and sports channels. These are *the basics* around which other channels can be offered to subscribers' [emphasis added] See Commission decision *British Interactive Broadcasting/Open*, Case IV/36.539 [1999] OJ 312/1, paragraph 72
[226] For a comprehensive overview of the drawbacks of sub-licensing mechanisms see Ofcom (2009). *Wholesale must-offer remedies: International examples.* Retrieved from: https://www.ofcom.org.uk/__data/assets/pdf_file/0006/41001/annex11.pdf
[227] Ibáñez Colomo, P. (2006), *supra* n. 179, 20
[228] ECJ, Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission* [1974] ECR 223, paragraph 25. In this case, the manufacturer of a raw material for ethambutol, a pharmaceutical product used to treat tuberculosis, refused to supply a long-standing customer which depended on the material for commercial survival as a producer of the drug
[229] ECJ, Case 311/84, *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261. In this case, a television station subjected the sale of broadcasting time for any telemarketing operation to the use of the telephone number of an exclusive advertising agent belonging to the same group thereby excluding other telemarketing undertakings

firm to deal could be extended to a duty to license in cases where the firm in question held an IPR entitling it to exclusive exploitation.[230]

This issue was first tackled in *Volvo*[231] concerning the refusal by the proprietor of a design right covering car body panels to license third parties to sell products incorporating the protected design. In this case, the Court ruled that in the *primary* market for which a dominant undertaking has a monopoly owning to its own IP, the exclusive right to produce or sell should be fully respected.[232] However, the ways in which the IPR is exercised in *secondary* markets may, in certain exceptional circumstances, be an abuse.[233] The boundaries beyond which the exercise of exclusive IPRs may violate EU competition law were dealt with in more detail in *Magill*, a case concerning the refusal of three Irish broadcasters to license their program listings to a weekly TV guide.[234] In *Magill*, the Court held that, for the refusal to supply a competitor operating in an ancillary market to be regarded as an abuse under Article 102 TFEU, the following three requirements must be met cumulatively:[235] First, the refusal must prevent the appearance of a new product which the dominant firm does not offer and for which there is potential consumer demand.[236] According to the Court in *Magill*, this requirement is deemed fulfilled if there is no actual or potential substitute for the new product and the raw material which the dominant firm possesses is indispensable for its creation.[237] Second, there must be no objective justification for the refusal.[238] And third, the refusal must result in excluding potential competition in the secondary market.[239]

As regards right holders and, more particularly, football associations, the problem that arises from the application of the above case law to their decision to exploit the event on an exclusive basis does not have to do with the fact that broadcast sports rights do not derive from

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[230] Anderman, S. and Hedvig Schmidt (2011). *EU Competition Law and Intellectual Property Rights – The Regulation of Innovation* (2nd edition), 95. Oxford: Oxford University Press
[231] ECJ, Case 238/87 *Volvo v. Veng (UK)* [1988] ECR 6211
[232] Ibid., paragraph 8
[233] Ibid., paragraph 9. The Court gave three examples of conduct that may be viewed as abusive: a. the arbitrary refusal to supply spare parts to independent repairers; b. the fixing of prices for spare parts at an unfair level, and c. a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation
[234] ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Comission* [1995] ECR I-743
[235] Ibid., paragraph 2
[236] Ibid.
[237] Ibid., paragraphs 52-54
[238] Ibid., paragraph 2. See also paragraphs 39 *et seq*. Note that the mere possession of an IPR is not an objective justification for exclusionary behavior. Examples of acceptable justifications include poor creditworthiness, safety, etc. See Anderman, S. and Hedvig Schmidt (2011), *supra n.* 231, 104
[239] ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. v. Comission*, [1995] ECR I-743, paragraphs 54-56

intellectual but from physical property; it has long been accepted that *Coditel II*[240] applies to arrangements governing the granting of exclusive rights to sports events whereby a third party (the broadcaster) is allowed to access land or property (the stadium).[241] Moreover, *Oscar Bronner*, which concerned a refusal to access a nationwide newspaper home-delivery scheme, left the door open for an application of the *Magill* test to cases where no IPRs are involved.[242] However, from *Commercial Solvents* to *Magill* to *Oscar Bronner*, the (actual or potential) effect of the dominant firm's conduct was the elimination of competition in *secondary* markets. In the case at hand, these would be the downstream broadcasting markets for audiences and advertisers where football associations are not, as a rule, active.[243] In view of the above, the duty to divide the rights into several packages and the no single buyer obligation imposed on these undertakings seem to go beyond what is permitted by the relevant case law.

However, let's assume that the Court's intention in the above cases was not to capture refusals to deal that may only produce anti-competitive effects in secondary markets. The question then arises as to whether the new product condition set by *Magill* is met here. This is a requirement that the Court has interpreted in a rather flexible manner. For example, in *Microsoft*, the company claimed that it could not be compelled to share interface information on the grounds that, instead of providing a new product, competitors would be merely replicating MS Windows server operating systems. The Commission, however, argued that competitors could use the interface information to develop advanced versions of their own products. The Commission provided convincing evidence demonstrating that, absent the refusal, the competitors' work group server operating systems could be better than those of Microsoft with respect to, *inter alia*, the reliability/availability of the system and the security included in the server operating system, two characteristics to which consumers attached particular importance.[244] The Court upheld the Commission's finding and concluded that Microsoft's refusal was not a refusal to allow duplication but a 'refusal to allow follow-on innovation',[245]

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[240] ECJ, Case 262/81 *Coditel SA and others v. Ciné-Vog Films SA and others* [1982] ECR 3381

[241] Ibáñez Colomo, P. (2006), *supra n.* 179, 3 referring to Wachtmeister, A. M. (1998), *Broadcasting of sports events and Competition law*. Competition Policy Newsletter, 2, at 23

[242] Ibid., 17 referring to Case C-7/97, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others [1998] ECR I-7791, paragraph 41

[243] While this is gradually changing as a result of convergence and the lower costs that the distribution of sports content entails, football federations and clubs are not full-fledged competitors of companies operating in broadcasting markets. For example, federations or individual clubs have their own websites through which they provide information on the clubs' performance, highlights of the matches, etc. However, very few associations or clubs have launched their own channels and, even in these cases, they continue to sell the rights to the matches concerned to media companies. For more information on the expansion of federations and clubs into media markets see Lefever, K. (2012). *New Media and Sport: International Legal Aspects*, 12-20. The Hague: T.M.C. Asser Press

[244] CFI, Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601, paragraph 652

[245] Ibid., paragraphs 630 *et seq.*

which is caught by Article 102(b) TFEU.[246] In cases involving exclusive broadcast rights, and in particular in its assessments of whether the exercise of these rights may reduce product variety or adversely affect innovation, the Commission has not been as diligent as it was in *Microsoft*. The Commission has repeatedly taken the stance that ensuring access to premium content automatically results in more choice for the viewer.[247] It was mentioned above that the same assumption is made in the Inquiry Reports.[248] Yet, it is not axiomatic that only by reducing or eliminating exclusivity can 'new' content emerge.

Moreover, as already mentioned, in *Magill*, the Court established that preventing the creation of a new product is abusive on condition that there is no actual or potential substitute for the product and that the raw material the dominant firm possesses is indispensable.[249] There are strong doubts as to whether premium content fulfils these two criteria. For example, as regards non-substitutability, even if there is sports content with highly inelastic demand such as the Wimbledon finals, the Olympic Games and the World Cup finals,[250] this does not mean that *every* popular sports event has such unique attributes that excludes other competitions as attractive alternatives. This is particularly so when there is more than one event that may achieve high viewing figures, reach an identifiable audience targeted by the same advertisers, and develop a certain brand image.[251] As regards indispensability, in *Oscar Bronner* the Court explained that this condition is satisfied if there are no technical, legal and economic obstacles of making it impossible or even unreasonably difficult for another to replicate the product or service under consideration.[252] In our case, it would indeed be impossible to duplicate a certain

[246] Ibid., paragraph 647

[247] For example, in *Bertelsmann/Kirch/Premiere*, the Commission stated that '[a]n alternative program platform can […] be built up only by somebody who has access to premium content so that he can offer a promising bouquet'. See Commission decision *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraph 48. Similarly, in TPS it noted that that '[i]t is universally acknowledged that films and sporting events are the two most popular pay-TV products. It is necessary to have the corresponding rights in order to put together programs that are sufficiently attractive to persuade potential subscribers'. See Commission decision 1999/242/EC – TPS [1999] OJ L 90/6, paragraph 34

[248] Ibid; and European Commission (2017). *Final Report on the E-Commerce Sector Inquiry*, paragraph 64

[249] It is worth noting that in *Tiercé Ladbroke*, which concerned the request by a Belgian owner of betting shops to be granted access to televised transmissions of French horse races, the Court left the door open for this test to be applied independently of the first: 'The refusal to supply the applicant could not fall within the prohibition laid down by Article 86 [now Article 102] unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers'. CFI, Case T-504/93, *Tiercé Ladbroke SA v. Comission*, [1997] ECR II-923, paragraph 131. Note also that in *Oscar Bronner* the Court does not refer to the new product requirement, but only to the indispensability and the substitutability requirements. See ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791, paragraph 41. Thus, depending on how one reads the above judgments, these requirements may either complement or replace the new product condition

[250] See, for instance, Commission decision *Eurovision*, Case IV/32.150 [2000] OJ L151/18, paragraph 42 and Commission decision 2001/478/EC *UEFA Broadcasting Regulations* [2001] OJ L 171/12, paragraph 28

[251] Toft, T. (2003). *Football: joint selling of media rights*. *Competition Policy Newsletter*, 3, 49

[252] ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others* [1998] ECR I-7791, paragraph 44

match or a James Bond movie. However, it is questionable whether such a strict interpretation is desirable in competition assessments in audiovisual markets where almost every product, from a TV series to a film to an interview of a particular artist, would qualify as a product 'impossible to replicate', thereby constituting a separate product market.

Putting the pieces of the puzzle together, the above analysis illustrated that the Commission's approach to 'bundling' appears to stretch the limits of EU competition law in an excessive manner. Starting from the most recent developments, that is, the Inquiry Reports, the Commission refers to bundling as the practice whereby right holders license online rights together with rights for other transmission technologies. However, it was examined in detail that online rights and rights for other transmission technologies are not 'distinct' products; far from coerced into purchasing packages of rights for all transmission technologies, licensees aim for making such arrangements in order to be able to make the most out of the acquired content. Moreover, from the viewers' perspective, different means of delivery could be substitutable, for switching from one technology to another to access the desired content may not require them to incur significant costs. As a result of the above, the Commission's definition of 'bundling' does not seem to reflect the spirit of Article 102(2)(d) TFEU and the relevant case law. If the Commission has its reasons for stating that selling online rights together with rights for other transmission technologies may amount to anti-competitive bundling, the Inquiry Reports fail to explain what these reasons are. The definition of bundling given in the Inquiry Reports arguably serves the purpose of setting the ground for antitrust intervention that would result in splitting up rights based on transmission technology. However, imposing on a copyright owner the obligation to unbundle rights appears to go beyond what would be permissible by the case law setting the conditions under which the exercise of an IPR amounts to an abuse of a dominant position.

Furthermore, the Commission appears to have a flawed perception of the potential of unbundling remedies to boost competition in content markets and, by extension, to increase consumer choice. Experience shows that an obligation to unbundle is not adequate to increase choice of providers because it does not necessarily guarantee that other providers will successfully bid for the rights. Where a 'no single buyer' rule is imposed on the right holder, the consumer is forced to pay multiple subscriptions to access the same content. An oxymoron may arise whereby forcing the consumer to pay more for the same content (e.g. a sports competition) may result in less resources being made available for content offered by other providers.

Unbundling remedies are equally inadequate to promote market integration. The Commission appears to be driven by the logic that unbundling would enable online content providers across the Union to enter new markets. However, the outcome of past decisional practice shows that, contrary to what the Commission expected, forcing a copyright owner to divide the rights into smaller packages did not result in more competition in the domestic market (let alone in expansion into different geographic markets). In fact, in the *FAPL* case, the provider that managed to acquire rights as a result of the 'no single buyer' rule eventually ceased operations.

When discussing bundling of content rights, the issues that deserve attention do not seem to concern whether rights for online transmission are bundled with rights for other transmission technologies. One issue, which is mentioned (but not developed in detail) in the Preliminary Inquiry Report,[253] concerns cases where rights are left unused. This issue has been dealt with by the Commission in previous cases where either the right holder was forced to make available rights it was reluctant to exploit (e.g. Internet and UMTS rights)[254] or the licensee was required to sub-license rights it itself did not use.[255] It is hard to think of how leaving rights unused would increase economic efficiency and enhance consumer welfare. Yet another issue that the Commission should arguably consider in cases where access (or lack thereof) to attractive content is at stake is stricter merger control. Based on the results of research I conducted for the purposes of another study, it appears that prohibition decisions which dealt with whether the merged entity would have the ability and incentive to foreclose access to premium content were to the benefit of competition. To the contrary, in cases where the Commission approved mergers either unconditionally or subject to the duty to sub-license on fair, reasonable and non-discriminatory terms, competition (for price *and* content) was harmed.[256] Finally, a type of bundling of truly 'distinct' products which arguably deserves attention is bundling of Electronic Communications Services (ECS) with premium content. In such cases, consumers may be forced to subscribe to broadband with the ECS provider that acquired the specific content item, irrespective of their willingness to do so.[257] Based on the

[253] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*. See, for instance, p. 11

[254] See, for instance, European Commission (2002, June). *Commission welcomes UEFA's new policy for selling the media rights to the Champions League*, Press Release IP/02/806; and European Commission (2003, July). *New marketing system for Bundesliga broadcasting rights*. Press Release IP/03/1106

[255] See, for instance, Commission decision *Financing of public service broadcasters in Germany*, E 3/2005 [2007] OJ C 185/1, paragraphs 299, 321, 355 and 395

[256] Bania, K. (2015), *supra* n. 15, 142-146, 148, 166-167

[257] BEREC (2018), *supra* n. 40, 9

results of a recent survey conducted by the Body of European Regulators for Electronic Communications, bundling of ECS services (fixed and/or mobile), is a trend that is rising in the majority of the EU Member States.[258] While any anti-competitive effects arising from this (and any other) type of bundling must be assessed by reference to specific market conditions, this practice may lead to higher prices for consumers not interested in bundled offers, higher switching costs, and foreclosure of competing ECS providers.[259]

b. Temporal Exclusivity: Windowing arrangements and term of the licensing agreement

As already mentioned, this section will study the implications of temporal exclusivity for competition enforcement, focusing on windowing arrangements and (long) duration.

i. Providing a window on 'windowing'?

Windowing is the process of managing the release sequence for content[260] (currently, the main windows are: cinema → DVD → Video-On-Demand → Pay-Per-View → pay-TV → free-to-air TV[261]) and price tends to decrease as the product gets older.[262] Based on the results of the E-Commerce Sector Inquiry, windowing practices vary considerably across the EU, but broadly speaking, for most fiction products (i.e. films and television fiction), the Video-On-Demand (or Pay-Per-View) window tends to open between three and six months after the first commercial (i.e. theatrical) release of the product; the pay-TV window usually opens between six and twelve months after the first commercial release; and the free-to-air window opens between twelve and twenty-four months after the first commercial release (NB: the Report does not refer to common windowing arrangements regarding the DVD window).[263]

In its Preliminary Report, the Commission notes that windowing limits the availability of rights, thereby making it *'difficult for new entrants to secure licenses to provide digital content online, regardless of whether they […] are active in other geographic markets'*.[264] It is difficult

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[258] Ibid., 10
[259] Ibid., 13
[260] Doyle, G. (2016). *Digitization and Changing Windowing Strategies in the Television Industry. Negotiating New Windows on the World*. Television and New Media, 17(7), 629
[261] Castendyk, O. (2008). *Definition of European works*, 480. In Castendyk, O., Egbert J. Dommering and Alexander Scheurer. *European Media Law*. Alphen aan den Rijn: Kluwer Law International
[262] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraphs 804 and 806
[263] Ibid., paragraphs 808-809
[264] Ibid., paragraphs 933-934. See also paragraph 944

to infer from the above statement what the Commission's position on this licensing practice is.[265] The same can be said of the limited number of decisions in which the Commission examined windowing arrangements. For example, while in many cases different exhibition windows served as a parameter against which the Commission defined the relevant product markets (e.g. the Pay-Per-View and first pay-TV windows were considered two distinct markets),[266] windowing arrangements did not determine the outcome of the relevant decisions.[267] In other cases where competition concerns arose from windowing, these concerns either did not have to do with the practice of windowing itself or were dismissed on the grounds that they did not produce any anti-competitive effects. For example, in *NewsCorp/Telepiù*, the Commission did not take issue with windowing itself but with the 'holdback clauses' for second window rights that were included in the agreements between Telepiù and most Hollywood majors.[268] These clauses, which essentially prevented third parties from acquiring second window rights, were condemned on the grounds that they 'effectively [impeded] the product […] from ever reaching the market by creating a sort of "black-out period"'.[269] In *Newscorp/BskyB*, the Commission found that the merged entity would not have the incentive to engage in input foreclosure for the reason that licensing for the window under consideration was taking place on a non-exclusive basis and that this was a well-established practice developed by the right holders which the merged entity would not have the power to challenge.[270] Since the Commission's views on windowing are not clear and the relevant statement made in the Report could be read as implying that it considers intervention, the analysis that follows focuses on outlining certain parameters that should arguably guide the Commission in case it decides to take action in order to reduce the term of windowing arrangements. These parameters concern efficiencies that windowing may generate as well as certain conditions that are specific to the affected markets.

[265] Note that the section of the Report dealing with windowing merely offers a description of windowing arrangements across the EU. See paragraphs 804-814

[266] See, for instance, Commission decision *Vivendi/Canal+/Seagram*, Case No COMP/M.2050 [2000] OJ C 311/3, paragraphs 18 et seq.; *Sogecable/CanalSatélite Digital/Vía Digital*, Case COMP/M.2845 [2002] OJ C 166/6, paragraph 25; and *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraph 60

[267] See, for instance, Commission decision *Vivendi/Canal+/Seagram*, Case No COMP/M.2050 [2000] OJ C 311/3

[268] Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraphs 188 et seq. In another decision, which dealt with long duration, windowing arrangements were found to raise the concerns arising from long duration. See Commission decision ARD, Case IV/31.734 [1989] OJ L 284/36. However, similar to *NewsCorp/Telepiù*, the Commission did not pronounce on windowing itself

[269] Ibid., paragraph 189

[270] Commission decision *News Corp/BSkyB*, Case No COMP/M.5932 [2011] C 37/2, paragraphs 143 and 187

Prior to suggesting an approach to how windowing arrangements can be assessed under the EU competition rules,[271] one remark is worth making regarding windowing as an industry practice that may distort competition. In recent years, windows have been getting shorter. With respect to movies, for instance, since 2003, the DVD window has shifted from being 7-8 months after the theatrical release to being 3-5 months.[272] Another example is 'day and date' strategies, which involve simultaneous PPV and DVD releases.[273] The reasons that prompted rights holders to narrow windows vary. In addition to technological and market developments, including and especially the take-off of VOD offers (which resulted in the insertion of one or more windows in the chain),[274] willingness to maximize returns from the most profitable windows and the piracy that emerges in the 'dead space' between cinema and DVD releases have contributed to this new reality.[275]

Through restricting competition between content licensees, windowing may generate several efficiencies throughout the value chain. More particularly, the existence of different windows for the same content allows right holders to engage in price discrimination; each window is usually licensed on an exclusive basis and this system of sequential exclusivity enables copyright owners to maximize return on investment.[276] Related to the above, to the extent that the right holder has designed the length of the windows in an optimal manner, the release of a content item in one window may make the release in subsequent windows more successful, rendering the overall strategy more profitable.[277] This depends on various factors, including (low or high) demand-side substitutability between (differently priced) windows, and the 'success-breeds-success' effect.[278] Similar to what may hold for territorial restrictions, higher prices, which may be achieved through windowing, may stimulate investment in more varied and original content.[279] In addition to right holders, licensees may also benefit from content

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[271] In the area of free movement, it bears noting that the Court held that national laws imposing windowing restrictions may be regarded as a legitimate restriction on the freedom to provide services. See ECJ, Joined cases 60 and 61/84, *Cinéthèque SA and others v Fédération nationale des cinémas français* ECLI:EU:C:1985:329

[272] Ofcom (2010). *Competition issues in premium pay TV movies*, paragraph 3.88. Retrieved from: https://www.ofcom.org.uk/__data/assets/pdf_file/0027/57825/moviescondoc.pdf

[273] Ibid., paragraph 3.90. On the narrowing of windows by right holders (and the movie theaters' reaction) see also Petitn, N. *Windows*. 8 March 2010. Chillin'Competition. Retrieved from: https://chillingcompetition.com/category/case-law/page/15/

[274] Ranaivoson, H. Sophie De Vinck and Ben van Rompuy (2014). *Analysis of the legal rules for exploitation windows and commercial practices in EU Member States and of the importance of exploitation windows for new business practices*, p. 4. Retrieved from: https://ec.europa.eu/futurium/en/system/files/ged/analysisofthelegalrulesforexploitationwindows.pdf

[275] Ibid., paragraph 3.87

[276] Ibid., 2. For an overview of how the emergence of digital platforms is disrupting traditional windowing models see Doyle, G. (2016), *supra* n. 261

[277] Ibid.

[278] Ranaivoson, H. Sophie De Vinck and Ben van Rompuy (2014), *supra* n.119, p. 2

[279] The Commission exempted under Article 101(3) TFEU an industry agreement introducing windowing on the grounds that the agreement in question promoted film production by preserving the theatrical window, i.e. the revenue generated from

being licensed across different release periods, for windowing allows them to acquire the window that best suits their budget and the preferences of the audiences they target. Moreover, a period of time-limited exclusivity may incentivize the licensee to invest in marketing in order to enhance the value of the licensed content. In turn, this may lead to attracting new customers. As a study on the importance of exploitation windows for new business practices notes, 'the question of how to increase audience awareness, information and attraction should not be ignored. Simply making content available […] will not suffice in a digital context of abundance. Instead, the development of appropriate […] promotion tools to guide consumers to their platform of choice will be crucial in making [content] offers more attractive'.[280] Finally, consumers may also benefit from windowing. For example, if there is low substitutability between different windows and the content concerned is not highly perishable,[281] this practice allows viewers to opt for the window that best serves their needs. In the absence of windowing options, consumers might be *forced to consume in a one-format-fits-all scenario, at the timing and at the price established by one content provider*.[282]

Of course, whether the above benefits indeed arise from windowing arrangements is a question of fact that cannot be determined in the abstract.[283] However, the preceding analysis illustrated that we cannot condemn windowing from the outset simply because it limits the availability of rights.[284]

Finally, similar to what was said about technological and territorial exclusivity, windowing must be considered against the specific 'market conditions and business realities

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cinema tickets. See ibid., 17, referring to Commission decision *Nederlandse Federatie voor Cinematografie*, Case 34.927, closed by comfort letter of 30 August 1995

[280] Ibid., 7. Referring to windowing, the Commission's Green Paper on the Online Distribution of Audiovisual Works in the EU mentions that '*any approach that removed from* [European film] *producers and distributors the opportunity to recoup investments through contractual distribution and marketing arrangements, would be likely to lead to a significant loss of incentive to invest in film production*'. See COM/2011/0427 final. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0427

[281] News and sports content fall under this category. In the case of these content types, live or simulcast releases are the most common way to exploit the licensed right. European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraph 811 and Figure C.55

[282] See Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 192

[283] As noted in the Guidelines, the information submitted by the parties must be 'verifiable' because otherwise there is not 'sufficient certainty that the efficiencies have materialized or are likely to materialize'. See European Commission. *Guidelines on the Application of Article 101(3) TFEU* [2004] OJ C 101/08, paragraph 56. For a different perspective on windowing see, for instance, Schruers, M. *The Public Costs of Private Distribution Strategies: Content Release Windows as Negative Externalities*. 2 June 2015. Disruptive Competition Project. Retrieved from: http://www.project-disco.org/intellectual-property/060215-the-public-costs-of-private-distribution-strategies-content-release-windows-as-negative-externalities/#.WwcZa2f4f4Z

[284] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraph 933. See also paragraph 944

facing the parties to the agreement'.[285] Parameters to take into account include consumption habits (e.g. local audiences may prefer VOD over pay-TV), different technological infrastructures (which may explain the extent of certain windowing provisions),[286] and piracy.[287] With respect to piracy in particular, it bears noting that digitization has made it easier and less easy to stop.[288] Within reasonable limits prescribed by competition law, right holders and licensees should arguably be given sufficient room to experiment with and identify appropriate solutions to address this problem.[289] Increasing the number of legal options giving audiences what they want at low prices may reduce piracy levels.[290] Offering (online) content in different windows may be part of a legitimate strategy that secures the future of the cultural and creative industries.

ii. How many years are 'too many'?

In the Inquiry Reports, the Commission expresses the concern that licensing agreements are concluded 'for rather long durations'.[291] More particularly, the Commission notes that long durations may make it harder for new players to enter the market or for existing operators to expand their activities into other transmission means such as online, or to other geographical markets.[292] This implies that the Commission may be taking action to force parties to licensing agreements to reduce the duration of their (exclusivity) arrangements. Intervention to limit the term of a licensing agreement would not break ground. In past decisional practice, the Commission exempted agreements and approved mergers subject to the condition that right holders (or licensees) would not conclude contracts exceeding an *x* amount of years.[293] As the

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[285] See European Commission Guidelines on the application of Article 101(3) of the Treaty [2004] OJ C 101/97, paragraph 75, and European Commission Guidelines on Vertical Restraints SEC(2010) 411, paragraph 125

[286] Ranaivoson, H. Sophie De Vinck and Ben van Rompuy (2014), *supra* n. 119, 3

[287] The Commission was called upon to assess arguments that piracy exerts constraints on right holders in a number of decisions in the music industry. See, for instance, Commission decision *Universal Music Group/EMI Music*, Case No. COMP/M.6458, [2012] OJ C 220/8, paragraphs 197 et seq. and 674 et seq.; *Sony/Mubadala Development/EMI Music Publishing*, COMP/M.6459 [2012] C 196/1, paragraphs 215 and 238 et seq.; *Sony/MGM*, Case No. COMP/M.3595 [2005] OJ C 139/13,paragraph 40;

[288] Little, D. *The Analysis of Windowing in the US eBooks Case*. 8 August 2013. Kluwer Competition Law Blog. Retrieved from: http://competitionlawblog.kluwercompetitionlaw.com/2013/08/08/the-analysis-of-windowing-in-the-us-ebooks-case/

[289] Ibid.

[290] Moody, G. *Two New Reports Confirm: Best Way To Reduce Piracy Dramatically Is To Offer Good Legal Alternatives*. 25 July 2013. TechDirt. Retrieved from: https://www.techdirt.com/articles/20130723/12235723906/two-new-reports-confirm-best-way-to-reduce-piracy-dramatically-is-to-offer-good-legal-alternatives.shtml

[291] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, p. 268. See also European Commission (2017). *Final report on the E-commerce Sector Inquiry*, paragraphs 68-69

[292] Ibid.

[293] Past decisional practice is driven by the same logic, i.e. that limiting duration would ensure that other content providers are given a chance at regular intervals to bid for an event that is popular. See, for instance, European Commission (2003). *Commission ends monitoring of FIA/Formula One compliance with 2001 settlement*. Press Release IP/03/1491; and Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 233

analysis that follows illustrates, this condition suffers from many drawbacks, which the Commission should carefully consider prior to importing it into future cases.

First, in relevant decisions, the Commission refrained from explaining how limiting the term of the agreements under scrutiny to an *x* amount of years would protect competition in the affected market. For instance, in certain cases dealing with popular sports competitions, such as the Premier League and the German Bundesliga, the Commission required that the term of the contract be reduced to three years.[294] Given that the UK and German markets vary considerably, a 'rule of thumb' that introduces a one-size-fits-all approach to duration does not seem appropriate. The arguably sloppy reasoning on which the Commission's 'three-year rule' is based has filtered into the practice of National Competition Authorities (e.g. in Spain, Portugal, etc.[295]) or, worse, national legislation.[296]

Second, the Commission has created considerable uncertainty about what is permissible under the EU competition rules, for the practice it has developed lacks consistency. For example, the thread joining the decisions imposing the duty to conclude contracts that do not exceed three years seems to be that the event rights to which are acquired is conducted regularly throughout the year. However, contrary to the *FAPL*, *German Bundesliga*, and *UEFA Champions League* decisions, in *Formula 1* (also conducted regularly throughout the year), the Commission was satisfied with the commitment to limit the duration of certain agreements to five years.[297] One could say that the type of event may make a difference; as opposed to the aforementioned decisions, which deal with popular football competitions, *Formula 1* concerns an auto racing competition. However, this does not appear to be a parameter that would render the Commission's practice consistent. For example, in *NewsCorp/Telepiù*, the merged entity was required to limit the duration of licensing agreements for the acquisition of premium football rights to two years.[298] To add to the confusion, in the Final Inquiry Report, the Commission notes that '***[r]elatively long contract*** durations are common, with more than 50% of agreements lasting more than 3 years and 23% of them more than five years' [emphasis

[294] See, for instance, Commission decision *UEFA Champions League* (Case COMP/C.2-37.398) [2003] OJ L 291/25; Commission decision, *Joint Selling of the Media Rights to the German Bundesliga* (Case COMP/C-2/37.214) [2005] OJ L 134/46; Commission decision, *Joint Selling of the Media Rights of the FA Premier League* (Case COMP/C.2/38.173), [2006] OJ L 176/104
[295] See BEREC (2018), *supra* n. 40, 18 and 20
[296] The French legislator issued a Decree which established the three-year limit on exclusivity following the principles laid down in the UEFA Champions League case. See OECD (2013), *supra* n. 2
[297] See European Commission (2003). *Commission ends monitoring of FIA/Formula One compliance with 2001 settlement*. Press Release IP/03/1491. Retrieved from: http://europa.eu/rapid/press-release_IP-03-1491_en.htm?locale=fr
[298] Commission decision *NewsCorp/Telepiù*, Case COMP/M.2876 [2004] OJ L 110/73, paragraph 233

added].[299] This statement creates the impression that almost one fourth of the licensing agreements examined by the Commission for the purposes of the Inquiry (NB: the Commission scrutinized a representative sample of agreements, meaning that the figures in the Report reflect an industry-wide practice[300]) could raise competition concerns. It bears noting that the Commission refrains from explaining why a duration of between three and five years is 'relatively long'.

It is submitted that there is no arbitrary duration that determines whether or not a contract has a foreclosure effect and a wide range of options on duration should remain open to right holders and content providers. In other words, it is important to assess duration on a case-by-case basis. In addition to the specificities of each market, factors to be taken out in such an assessment include, for example, whether significant investment into an event or production is required on behalf of the licensee in order to raise brand awareness and build an audience over time,[301] the level of uncertainty surrounding that investment (e.g. is this a new sports event or TV series?), the extent of windowing provisions (if any), whether the long-term agreement concerns rights that were sold on a non-exclusive basis etc. Depending on the assessment of such factors, a long duration of an exclusivity agreement for the purchase of content rights may be deemed 'indispensable' to achieve the objectives pursued by the agreement concerned, in line with Article 101(3) TFEU.

Unless antitrust intervention concerns agreements with significantly long terms, we may raise serious doubts about whether the duty to reduce duration is suitable for achieving the objective the Commission pursues (i.e. the objective to ensure that attractive content can be acquired by new entrants or existing players[302]). Premium content is very expensive and antitrust intervention to limit the contract length does not necessarily mean that a smaller competitor will have the financial resources to successfully bid for the rights after the contract expires. For example, the decision dealing with the TV rights to the Premier League provides that related agreements shall be concluded for a period not exceeding three seasons.[303] This, however, did not prevent Sky from successfully bidding for the rights in every single auction

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[299] European Commission (2017). *Final report on the E-commerce Sector Inquiry*, paragraph 68

[300] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, paragraphs 51 et seq. See in particular paragraph 54

[301] It bears repeating that fear of antitrust intervention that seeks to limit duration may reduce the incentive of the licensee to effectively compete and/or innovate if the acquirer has not managed to receive a fair return on investment

[302] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry*, p. 268

[303] Commission decision *Joint Selling of the Media Rights of the FA Premier League* (*FAPL*), Case COMP/C.2/38.173 [2006] OJ L 176/104, paragraph 16

that was organized after the decision was adopted.[304] In fact, reduced duration may have led to the spiralling of content rights prices, thereby creating a larger gap between big and small players. For example, since the Commission's intervention in the *Premier League* case, the rights to the competition rose from one billion GBP (for the three-year season 2004-2007) to more than 5 billion GBP (for the 2016-2019 season).[305] Interestingly, a series of old decisions prohibiting mergers in the broadcasting sector were partly based on the concern that, even after termination of their output deals for pay-TV rights with film studios, the merging parties, given their financial strength, were most likely to acquire those rights for another term.[306]

5. Conclusions

This paper examined how the EU competition rules have been applied to copyright-protected broadcast content. The study was conducted against the background of ambitious policy initiatives the EU has undertaken in recent years in order to complete a digital single market where barriers to the cross-border provision of content would no longer exist. Certain developments that marked the past few years, including *Murphy* and *Paramount*, appear to challenge the *status quo* whereas the Reports on the E-Commerce Sector Inquiry indicate that the Commission may be extending the (ill-founded) reasoning underlying past decisions to licensing practices concerning rights for online transmission.

There has been considerable confusion about whether competition enforcement may be introducing new limitations on copyright. For example, *Murphy* reiterates the principle established by *Coditel II* that absolute territorial protection is not, as such, contrary to Article 101(1) TFEU. The Commission has occasionally stated that it does not intend to break down the 'exclusivity model'.[307] However, a closer look at how competition law has been interpreted and applied in cases dealing with content licensing may be telling us a different story. *Murphy*

[304] In fact, Sky Sports has been broadcasting the Premier League to UK TV viewing audiences since the launch of the league in 1992. See Harris, C. *BSkyB Retains Majority of TV Rights to Premier League On UK TV For 2013-16*. 13 June 2012, World Soccer Talk. Retrieved March 31st from: http://worldsoccertalk.com/2012/06/13/bskyb-retains-majority-of-tv-rights-to-premier-league-on-uk-tv-for-2013-16/ For recent developments see Williams, C. *Virgin Media urges Ofcom crackdown on Premier League TV prices*. 30 September 2014, The Telegraph. Retrieved March 31st from: http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/11131139/Virgin-Media-urges-Ofcom-crackdown-on-Premier-League-TV-prices.html

[305] See Statista (2018). *Premier League TV broadcasting rights revenue from 1992 to 2019 (in million GBP)*. Retrieved from: https://www.statista.com/statistics/385002/premier-league-tv-rights-revenue/

[306] See, for instance, Commission decisions *Bertelsmann/Kirch/Premiere*, Case IV/M.993 [1999] OJ L 053/1, paragraphs 49-50, and *Deutsche Telekom/Beta Research*, Case IV/M.1027 [1998] OJ C 37/4, paragraphs 31-32

[307] See, for instance, Hopewell, J. *Hollywood Anti-Trust Probe in Europe Might Be Softened, E.U. Official Hints*. Retrieved from: http://variety.com/2017/film/global/margrethe-vestager-signals-conciliation-hollywood-anti-trust-probe-1201969407/

seems to suggest in some passages that exclusive territoriality would no longer escape Article 101(1) TFEU. While attempts have been made to interpret *Murphy* as applying narrowly to the facts of the case,[308] the *Paramount* commitments decision whereby the Hollywood major undertook to remove restrictions on passive sales requests corroborates the claim that there is appetite to extend the outcome in *Murphy* to other cases involving rights to broadcast content. Both *Murphy* and *Paramount* arguably fail to respect the spirit of *Coditel II*, which sought to ensure that competition enforcement does not introduce unnecessary limitations on the right of the copyright owner to authorize dissemination of its work and the right to receive appropriate remuneration.

In a similar vein, the E-Commerce Inquiry Reports fail to explain why 'bundling' rights for online transmission with rights for other transmission technologies may amount to anti-competitive conduct under Article 102 TFEU. Contrary to the assumption underlying the Commission's definition of bundling, this licensing practice may not involve 'distinct' products, thereby failing to fulfil the requirement set by the Court for bundling to amount to an abuse of a dominant position.

The purpose of demonstrating that the logic underlying relevant recent initiatives may not embody long-established principles is *not* to question the ongoing reform on the grounds that it does not 'tick the boxes' of the relevant case law. The broadcasting sector is a fast-moving industry and digitization has undoubtedly brought about significant changes that challenge the current legal framework. However, a reform can be welcomed *if* it is adequate to achieve the objectives it pursues. This is not the case here. The study showed that the way in which competition law has been applied to content licensing agreements is inadequate to promote *competition* and *market integration* and that, in an arguably vain attempt to stimulate the cross-border provision of content, *copyright protection* has unjustifiably been undermined.

As regards the effects on *competition*, it was seen that sweeping statements were made regarding exclusivity arrangements for content licensing. For example, both *Murphy* and *Paramount* altogether dismiss the idea that exclusivity arrangements may generate efficiencies that would allow them to qualify for an exemption under Article 101(3) TFEU.[309] Albeit

[308] See, for instance, Graf, T. (2011), *supra* n. 124

[309] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited [2011] ECR I-09083*, paragraph 14; and Commission decision of 26.7.2016 relating to a

somewhat softer, generalized statements about the potential foreclosure effects they are likely to generate were also made for windowing[310] and duration.[311] The analysis conducted throughout this study showed that, instead of condemning exclusivity from the outset, relevant arrangements must be assessed by reference to the specific circumstances surrounding the affected markets; under certain conditions, exclusivity arrangements may stimulate investment in new content and increase the quality of services offered. Moreover, and perhaps more importantly, competition intervention to break exclusivity may do more harm than good. For example, experience shows that 'unbundling' not only fails to stimulate competition among different content providers, but also that it is likely to lead to higher prices for consumers. Similarly, reducing duration may have led to the spiralling of content rights prices, thereby creating a larger gap between big and small players.

The approach underlying the developments (and past decisional practice on which recent initiatives are based) that the present study examined is equally inadequate to promote *market integration*. For example, *Murphy* seems to imply that price discrimination, which is enabled by territorial licensing, always runs counter to the completion of the internal market.[312] However, it was seen that, under certain conditions, charging different prices in different territories may stimulate entry into other territories. With respect to the assumption that unbundling will enable online content providers across the Union to enter new markets, the outcome of past decisional practice shows that, contrary to what the Commission expected, forcing a copyright owner to divide the rights into smaller packages did not result in more competition in the domestic market (let alone in expansion into different geographic markets). There is one more reason lurking in the background that explains why instrumentalizing competition law to introduce limitations on exclusive licences is not adequate to promote market integration. This has to do with the fact that broadcasting markets largely remain national in nature. As Langus et al. put, '[t]he European audiovisual market is characterized by a strong heterogeneity in terms of cultures and languages. […] [T]he cultural differences in terms of humour, local stories or popular figures [largely explain] market fragmentation'.[313] This lies behind one of the findings of the E-Commerce Sector Inquiry: insufficient consumer

proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, paragraph 52

[310] European Commission (2016). *Preliminary Report on the E-Commerce Sector Inquiry,* paragraphs 933-934. See also paragraph 944

[311] Ibid., p. 268. See also European Commission (2017). *Final report on the E-commerce Sector Inquiry*, paragraphs 68-69

[312] CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v QC Leisure and Karen Murphy v. Media Protection Services Limited [2011] ECR I-09083*, paragraph 115. See also paragraph 139

[313] Langus, G., Damien Neven and Sophie Poukens (2014), *supra* n. 119, paragraph 81

demand for foreign content is one of the main reasons why digital content providers do not make their services accessible in territories other than the one in which they are established.[314] A far-fetched interpretation of the EU competition rules that may lead to undesirable results must also be considered against the above cultural reality.

With respect to interference with *copyright*, it was seen throughout the study that the way in which competition law was applied to content licensing agreements goes beyond the limits that would justify antitrust intervention. If *Murphy* indeed overturns *Coditel II*, the right of the copyright owner to receive appropriate remuneration could be significantly undermined. Moreover, imposing on a copyright owner unbundling obligations in order to ensure that more providers can acquire rights to the content concerned exceeds the limits within which a refusal to supply a copyright-protected work may amount to an abuse of a dominant position. And establishing a duty to reduce duration to an *x* amount of years without assessing how the term of the specific agreement may distort competition fails to reflect the principle that exclusivity arrangements would be anti-competitive only if duration were disproportionate[315] to the arrangements concerned.

This study does not intend to undermine the potential of the EU competition rules to address practices that may inhibit access to digital content markets. Quite the contrary, it is my belief that EU competition law is sufficiently flexible to adapt to the specificities of these markets. However, courts and competition authorities alike must bear in mind the fundamental distinction between the mere existence of a copyright and the manner in which the right is exercised. If one accepts the premise of this study, that is, that competition enforcement and copyright protection complement each other with a view to 'creating incentives for dynamic competition for better and diversified products by excluding competition by imitation and enhancing competition by substitution',[316] what should be of concern to a competition enforcer is the manner in which the copyright is exercised. Far from being based on generalizations about the harm caused by exclusivity restrictions, related assessments must take due account of the characteristics of the industry concerned and the specific conditions of the market under scrutiny.

[314] European Commission. *Preliminary Report on the E-commerce Sector Inquiry*, Table C. 6, p. 227
[315] ECJ, Case 262/81 *Coditel SA and others v. Ciné-Vog Films SA and others* [1982] ECR 3381, paragraph 19
[316] Max Planck Institute for Intellectual Property and Competition Law (2013), *supra* n. 46, paragraph 9