Kluwer Copyright Blog

Barking dogs occasionally do bite: The beginning of the end of territorial licensing of audiovisual content in Europe

Natali Helberger (Institute for Information Law (IViR)) · Thursday, August 11th, 2011

Territorial licensing of media content has for some time now been a painful stumbling block in the realization of the EU's ambitious vision for a common, European-wide audiovisual market. One, if not the most important reason why online audiovisual viewers are continuously reminded that the internet is not as borderless as they thought it was is the practice of licensing media content on a territorial basis. This way, providers that intend to offer a European-wide online video-on demand or streaming service would need to clear the rights (notably the reproduction and making available rights) in all 27 member states – an incredibly costly and complicate endeavor. Particularly smaller, independent media providers will find the acquisition of the necessary rights prohibitively expensive, if not impossible in practice. Users in smaller, financially less attractive national markets will also suffer from the resulting territorial discrimination.

In its recently released "Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market", the European Commission focuses on rights clearance mechanism for the online distribution of audiovisual media services. The goal of the Green Paper is, according to the EC, to "start a debate on the policy options to develop a framework within which European industry and European consumers can benefit from the economics of scale offered by the digital single market." One of the Commission's questions to stakeholders asks bluntly: "Is a copyright system based on territoriality in the EU appropriate in the online environment?" Reading between the lines, the Green Paper seems to suggest that the correct answer to the question is "probably not", as it proceeds to list a number of concrete policy options to overcome territorial licensing issues. The suggestions made are diverse and range from the improvement of collective management of copyright, as announced in the Commission's IPR Strategy, to extending the "country of origin" principle of the Satellite and Cable Directive to the delivery of programs online, the development of data management systems for the ownership of rights in audiovisual works and the sharing of ownership information across Europe, up to the creation of a unitary (optional) European Copyright Code. When considering the option of a European Copyright Code, the Commission, en passant, suggests that the creation of such a code would be an excellent opportunity to also examine the need to update the exceptions and limitation to copyright law under the Information Society Directive. True indeed, one may want to add, and long overdue. The Green Paper itself mentions the possible need for the mandatory exceptions for reproduction for preservation in libraries and the in situ consultation for researchers. It moreover discusses the potential need for an unwaivable right to remuneration for authors and performers for the making available of audiovisual works, as well as ways of improving the accessibility of online content.

The issue of territorial licensing has for a long time been an example of the “barking dogs don’t bite” philosophy, as the devastating but inconsequential report on the application of the Cable and Satellite Directive but also Art. 20 (2) of the Service Directive demonstrate (saying that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory does not constitute unlawful discrimination). But beware: these times might be over soon.

The public consultation is open until 18 November 2011.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Thursday, August 11th, 2011 at 9:51 am and is filed under European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.