

# Chapter 4

## Territoriality of Copyright Law



Radim Polčák

### 4.1 Territoriality and Sovereignty

Territoriality represents one of the key ontological features of the continental legal culture. It has developed throughout the centuries and its recent shape was laid down at the dawn of the law of nations in the late medieval period.

Territoriality of law is conceptually linked with sovereignty. Before Grotius (1901) and de Vattel (1797), sovereignty was mostly a factual concept, whereby a sovereign had jurisdiction only if she was able to constitute and maintain factual control over people residing in a certain territory. Consequently, the traditional concept of sovereignty consisted of territory, population and effective power over these two. The fact-based establishment of international order led to permanent violent conflict because armed action represented a regular tool in political competition between various nations.

Overall exhaustion of nations from permanent wars, expressed in the Peace of Westphalia, led to the establishment of recognition as an additional criterion of sovereignty (Beaulac 2004). Unlike the first three factual elements, i.e., people, territory and power, recognition was of a normative nature. It meant that sovereignty was no longer only a matter of factual effective control, but rather of normative (legal) recognition by the international community. Consequently, it was no longer possible to claim sovereignty based on military control, but rather on legal compliance under the established rules and principles of the newly founded complex international legal order. The shift of sovereignty from a factual to a normative concept also meant that all sovereigns were considered equal, regardless of their powers or the size of their sovereign domains.

---

R. Polčák (✉)

Faculty of Law, Institute of Law and Technology, Masaryk University, Veveří 70, 602 00 Brno, Czech Republic

e-mail: [radim.polcak@law.muni.cz](mailto:radim.polcak@law.muni.cz)

© The Author(s) 2020

P. Szczepanik et al. (eds.), *Digital Peripheries*, Springer Series in Media Industries, [https://doi.org/10.1007/978-3-030-44850-9\\_4](https://doi.org/10.1007/978-3-030-44850-9_4)

In Europe, sovereignty is deemed to be naturally linked with territoriality. This is primarily because Europe was and is relatively densely populated and thus the aforementioned permanent wars were fought mostly over territories. Even the term “Westphalian sovereignty” or “Westphalian order” is mostly interpreted as the principle that each nation (state) has exclusive sovereign rule over its territory.

Territoriality is not as relevant in all legal cultures around the world. For example, legal cultures based on religious belief, such as Islamic or Hindu laws, are typically based on personality (Glenn 2014). In these legal cultures, the physical location where respective persons reside is not of primary importance for the rule of law, but rather their confession. Even Roman law, which is believed to be the basis for the current continental European legal culture, used the personality principle rather than territoriality (Duff 1938)—the distinctive element was citizenship rather than confession (Rieder and Pappas 1998).

The traditional territoriality of the law came under strong pragmatic pressure in Europe and the USA with the introduction of the Internet, precisely because of the almost total deconstruction [or virtualization (Lévy 1998)] of the notion of matter or space as such. In his Declaration of Independence of Cyberspace, Barlow (1996) points to virtualized matter and territory in a strong anarchic statement as follows:

Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live.[...] Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.[...] Our identities have no bodies, so, unlike you, we cannot obtain order by physical coercion. We believe that from ethics, enlightened self-interest, and the common-weal, our governance will emerge. Our identities may be distributed across many of your jurisdictions.[...] These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self-determination who had to reject the authorities of distant, uninformed powers. We must declare our virtual selves immune to your sovereignty, even as we continue to consent to your rule over our bodies. We will spread ourselves across the Planet so that no one can arrest our thoughts.

The question of territoriality was also at the core of the famous debate between Goldsmith (1998) and Post (2002) about whether private international law should specifically acknowledge the cross-border nature of the Internet. Goldsmith (1998: 1250) argued against treating cross-border Internet transactions differently from their offline counterparts by saying that they:

are no different from “real-space” transnational transactions. They involve people in real space in one jurisdiction communicating with people in real space in other jurisdictions in a way that often does good but sometimes causes harm. There is no general normative argument that supports the immunization of cyberspace activities from territorial regulation. And there is every reason to believe that nations can exercise territorial authority to achieve significant regulatory control over cyberspace transactions.

Post (2002: 1383), labeled an “exceptionalist,” did not even look for any “normative” counterarguments, but argued pragmatically by pointing to the nature and scale of legally relevant cross-border acting on the Internet saying that

[a] world in which virtually all events and transactions have bordercrossing effects is surely not “functionally identical” to a world in which most do not, at least not with respect to the application of a principle that necessarily requires consideration of the distribution of those effects. A world in which the Effects Principle returns the result “No Substantial Effects Outside the Borders” when applied to the vast majority of events and transactions is not “functionally identical” to a world in which application of the same principle to the vast majority of events and transactions returns the opposite result. A world in which, on occasion, bullets are fired from one jurisdiction into another is not “functionally identical” to a world in which all jurisdictions are constantly subjected to shrapnel from a thousand different directions.

Nearly two decades later, it is now obvious that acknowledging the pragmatic aspects of jurisdiction over the Internet, as argued by Post, is inevitable. The scale and societal relevance of various Internet-based cross-border transactions, many of which are utterly impossible to physically localize, force us to develop new ways to deal with this jurisdictional (and even ontological) dilemma. Consequently, specific methods have arisen for resolving the “Internet jurisdictional puzzles” (Svantesson 2017) in various areas, from consumer contracting to personal data to intellectual property (Reindenberg 2005).

In addition to the aforementioned challenges to the traditional territorial understanding of sovereignty, there has arisen the phenomenon of extraterritorial application of the law on the Internet. The term “extraterritoriality” in this sense refers to regulatory actions that are, thanks to the cross-border nature of the information network, effective far beyond the territory of the respective sovereign (Svantesson 2015). Typical recent examples include cross-border forensic activities and global delisting orders.

Surely there is, as noted above by John Post, nothing entirely new about situations in which some sovereign action might affect the regulatory domains of other sovereigns. However, the scale, frequency and relevance of such extraterritorial exercises of jurisdiction make it necessary to tackle this specific issue in order to prevent positive conflicts between sovereign powers.

This does not mean that the Westphalian territorial concept of sovereignty is dead for the Internet. It is still valid in that every sovereign has the ultimate jurisdiction over her territory (meaning the physical area within its respective state borders). However, ultimately territorially based sovereign rule must be supplemented, with growing relevance, with various balancing mechanisms<sup>1</sup> in order for individuals and states to truly benefit from all the advantages of an internationally networked information society (Svantesson 2016) and for international law as such to prevail (Kohler 1917).

---

<sup>1</sup>One example is the Zippo Sliding Scale that was established for trademark disputes between US states (Aiken 1997).

## 4.2 Territoriality in Copyrights

The relationship between copyrights and territorial jurisdiction is quite complex (Trimble 2015). One reason is that the object of copyrights, i.e., the work, does not need to have a material form and thus can appear in objectively viewable form in multiple physical locations at once. Or, it might objectively exist, while not being physically present at any particular location. A second, and even more problematic, a factor of complexity in the relationship between territory and copyrights is that copyrights, although considered a kind of “property,” do not provide for true appropriation of respective works.

Lawrence Lessig quotes in his book *Free Culture* the following statement made by recording industry lobbyist Jack Valenti during his testimony to the US Congress in 1982 (2004: 117):

No matter the lengthy arguments made, no matter the charges and the countercharges, no matter the tumult and the shouting, reasonable men and women will keep returning to the fundamental issue, the central theme which animates this entire debate: Creative property owners must be accorded the same rights and protection resident in all other property owners in the nation. That is the issue. That is the question. And that is the rostrum on which this entire hearing and the debates to follow must rest.

Following this quotation, Lessig (2004: 118) elaborately argues why property and intellectual property do not represent the same concept. He notes that

[w]hile “creative property” is certainly “property” in a nerdy and precise sense that lawyers are trained to understand, it has never been the case, nor should it be, that “creative property owners” have been “accorded the same rights and protection resident in all other property owners.” Indeed, if creative property owners were given the same rights as all other property owners, that would effect a radical, and radically undesirable, change in our tradition.

As to the territoriality of copyrights, what is most important is what Lessig points out as property in the “precise sense that lawyers are trained to understand.” In such a “precise sense,” we first must distinguish what is the true object of intellectual property, or even more precisely, copyrights. In the case of the property of tangible assets, the object of exclusive property rights is exactly those tangible assets. However, with intellectual property, the object that is appropriated by the owner is not the copyrighted work as such, but only certain precisely specified rights (Dillenz 1987–1988). While the proprietor of a tangible thing owns the thing as such, the intellectual proprietor does not own the intellectual creation as such but only particular rights (copyrights). Thus, one cannot legally own a movie, but it is legally possible to own copyrights to a movie (Zemer 2006).

The idea of owning rights corresponds to the nature of inventions and intellectual creations. It was originally adopted by the Paris Convention and the Berne Convention, both of which laid down the basic structure of rights to inventions or creations that the signatories promised to protect.

Although there are conceptual differences between the Common Law concept of copyright and the continental concept of *droit d’auteur*, their common denominator is, besides the definition of the work as such, the notion of the use of protected work.

The particular proprietary rights to use the work cover practically all economically relevant forms of utilization of copyrighted works such as reproduction, distribution and broadcasting and form the core economic mechanism of copyrights (Zemer 2006).

The legal definition of use is not general, but it always covers only a specifically defined form of economically relevant utilization of copyrighted work. Consequently, there is relatively precise definition in statutory law as to the use by making copies or by making the work available to the public.

This means that forms of possible factual “use” of copyrighted works that are not listed in statutes are not covered by copyrights. A typical example is screening a movie or playing a music record at home—such forms of “use” of copyrighted works do not constitute a use in terms of copyright law and so the holder of copyrights has no claims against those who do so. This specification of particular rights that are owned by copyright holders differentiates copyrights from (standard) property rights. Ownership of tangible assets is universal and the law only defines particular exemptions, while, on the contrary, ownership of copyrights is always particular and any non-specific forms of “use” of copyrighted works are thus permitted.

The Berne Convention does not even explicitly mention the use of copyrighted works for the personal purposes of individuals. It implies that the signatories have no obligation to care about such form of “use” (or rather non-use) of copyrighted works.

In addition, the Berne Convention names certain cases of free use of copyrighted works. This means forms of use that would normally be covered by copyrights, but are for some reason exempted. These exemptions include using citations that would normally qualify as making a copy of a cited work or its part.

To sum up, the Berne Convention distinguishes between, firstly, particular forms of use of copyrighted works that are covered by specifically defined appropriate copyrights; secondly, “non-use” which is not covered by any rights; and thirdly, free use which is specifically permitted by the Convention or by the laws of its Member States. It is not compulsory for Member States to maintain these indications or structures of rights as long as the normative content of the Convention is preserved. The copyright laws of continental European members, then, mostly distinguish between (1) use in the sense of the Convention, (2) free use, which they mostly regard as making copies for personal purposes,<sup>2</sup> and (3) implied or statutory licenses that are regarded as specifically permitted forms of free use within the domain of copyrighted use.

Thus, only two forms of use of copyrighted works are relevant for the territorial scope of sovereign powers and subsequent applicability of copyright law—use and free use—according to the Berne Convention. Use is important because respective property rights are protected if the use takes place within a certain territory.

Free use is relevant depending on whether local laws provide for the exemption from copyright protection. For everything else, namely for the “use” of copyrighted

---

<sup>2</sup>Other forms of use of works for personal purposes, such as viewing, listening, reading, are not regarded as free use, because they do not constitute a “use” at all.

works for personal purposes, territorial jurisdiction is irrelevant, as no legal limitations for such “use” apply. Consequently, those who “use” copyrighted works for personal purposes (e.g., those who screen movies at home), do not have to be legally concerned about the place where they do so.

### 4.3 Geoblocking and Technical Measures

What this implies is that, contrary to general public belief, geoblocking or other forms of limiting access to copyrighted works based on geographic location have very little to do with copyrights. Geoblocking measures, if applied, are in many cases not deemed to serve the purpose of protecting copyrights, simply because there are no rights to decide with regard to the form or place of “use” of copyrighted works for personal purposes.

One intersection between copyright law and geoblocking measures can be argued by the possible classification of geoblocking measures as *de iure* “technological measures,” in the meaning e.g., of Art. 6(3) of Directive No. 2001/29/EC<sup>3</sup> or 17 USC § 1201(a)(3)(A) (Ginsburg 2000). These “technological measures” are regarded as a special object of legal protection and their circumvention is specifically sanctioned. If geoblocking tools were disabled or circumvented by individual users in order to view or in any other way consume copyrighted content, and if these geoblocking tools are legally regarded as “technological measures,” such circumvention would *per se* constitute violation of law even if the user does not violate any copyrights related to the content as such (Kra-Oz 2017).

The possibility of classifying geoblocking tools as “technological measures” mostly depends on their specific definition in applicable statutes. Art. 6(3) of Directive 2001/29/EC defines technological measures as “any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightsholder”.

This definition of technological measures, and especially its caveat “as provided for by law,” can be interpreted in two ways. The first is that a “technological measure” consists of any kind of technology that protects the copyrighted work as such. Another possible interpretation is that a “technological measure” can be regarded as only a tool that protects certain actual copyrights.

EU Member States differ as to how this interpretative dilemma is resolved in their statutory laws. Some Member States specifically legally protect all technological measures, while others regard as “technological measures” only those that technically back some actual rights.<sup>4</sup>

---

<sup>3</sup>See Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.

<sup>4</sup>For instance, the Czech Copyright Act speaks in Art. 43(1) only about “technological measures that protect rights implied by this statute.”

The latter approach, i.e., limiting the scope of protection using technological measures to only those measures whose purpose is to protect some actual (existing) copyrights, was adopted by the European Court of Justice in the Nintendo case.<sup>5</sup> The reference for the preliminary ruling involved a question as to whether the Directive is meant to protect against circumvention of a technological measure that prohibits the use of any software on a gaming console other than original products authorized by the manufacturer. The official reasoning for such a measure was the prevention of unauthorized copying of games. However, the same measure prevented the console from running software offered by independent developers. Consequently, a dispute arose as to whether a hack that would allow independently developed software to run on a Nintendo console is to be regarded as circumventing technological measures pursuant to Art. 6(1) and 6(2) of Directive 2001/29/EC. The Court concluded that “with a view to examining the purpose of those devices, products or components, the evidence of actual use which is made of them by third parties will, in the light of the circumstances at issue, be particularly relevant. The referring court may, in particular, examine how often PC Box’s devices are in fact used in order to allow unauthorized copies of Nintendo and Nintendo-licensed games to be used on Nintendo consoles and how often that equipment is used for purposes which do not infringe copyright in Nintendo and Nintendo-licensed games.”<sup>6</sup>

It is clear from the judgment that the scope of protection of technological measures is to be interpreted in light of their main teleology, i.e., to protect copyrights. Geoblocking measures that do not protect any copyrights but only prevent copyrighted works from being accessed by consumers from a certain location shall thus not be, following this interpretive approach, regarded as legally immune from circumvention.

While copyright law is relatively indifferent toward geoblocking, other areas of law might, depending on the circumstances, even outlaw these measures. Although there is no case law to date, doctrinal publications from different jurisdictions have already provided for solid arguments, particularly with respect to antitrust law, consumer protection law and antidiscrimination law (cf. Earle 2016; Zareh 2018).

It is, then, a bit paradoxical that the only sign of the explicit legality of geoblocking is found in a statute that was originally meant to ban it. Regulation (EU) 2018/302<sup>7</sup> should have helped establish the common digital single market by banning discriminatory geoblocking in cases where users from one Member State are willing to access content provided through an information society service from another Member State

---

<sup>5</sup>See Case C-355/12, *Nintendo Co. Ltd, Nintendo of America Inc., Nintendo of Europe GmbH v. PC Box Srl, 9Net Srl*. It is to be noted that the case involved software of a specific legal nature. Unlike other copyrighted works, software cannot be freely used by individuals for personal purposes (a license is required for any use of software).

<sup>6</sup>See Case C-355/12, para. 34–36.

<sup>7</sup>See Regulation (EU) 2018/302 on addressing unjustified geoblocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market, and amending Regulations (EC) No. 2006/2004 and (EU) 2017/2394, and Directive 2009/22/EC.

(Hoffman 2016). However, as explained in recital 8, “[a]udiovisual services, including services the principle purpose 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”.

Besides the paradox that the Regulation does not cover services of utmost practical importance for European consumers, it may even give the impression that all those geoblocking tools applied by audiovisual services, which are excluded from the scope of the Regulation, are actually legal.

## 4.4 Place of Availability of Works

Another intersection between geoblocking and copyrights may derive from an interpretive claim that is being heard mostly from lobbyists from the recording industries and that is based on the assumption that a work is used in a legal sense in all places where it can be accessed. In this interpretation, the work is used by the provider (or a distributor) in a country where a consumer can access it, which means that the work is considered, legally, to be distributed or broadcasted (depending on the technology) in that country. If the interpretation of the place of consumption as a place of use of copyrighted work prevails, geoblocking could be considered a tool to protect copyrights because it would limit not the users but the providers in using (distributing, broadcasting) copyrighted works in different jurisdictions.

The idea that a copyrighted work that is accessible online is being used simultaneously in all jurisdictions where it can be accessed by users is attractive for rightsholders, but it is problematic from both a normative and a pragmatic perspective. It would mean that making a copyrighted work available on the Internet automatically means the active use of it in all jurisdictions in the world (perhaps excluding North Korea). If such publication of a work is not lawful, there would be instant simultaneous establishment of separate causes of action in nearly 200 countries worldwide (or at least in the 176 Member States of the Berne Convention).

The general question of the place of something happening, legally speaking, on the Internet and consequent jurisdictional dilemmas will, in any case, keep lawyers occupied for decades. The essence of the problem goes back to the core of the Post-Goldsmith debate and the “puzzle” that is composed of the growing number of issues, from defamation to gambling to cybercrime, that is far from being truly resolved (Trimble 2016).

The basic ontological question with regard to the territorial application of copyright law relates to the choice of criterion according to which it is possible to determine the applicable law and the court that is entitled to decide about the use of copyrighted work. The options include the country of origin, meaning the country from which the provider operates, and the country of damage, i.e., the country where the damage occurred. The country of damage can, depending on circumstances and interpretation (see below), be the same as the country origin or it can also theoretically be regarded as another place including the country of consumption.

The country of origin was established as the lead principal for a number of Internet-related legal agendas such as liability of information society services and protection of personal data. However, the country of damage still exists as a subsequent subsidiary jurisdictional criterion that makes it possible to claim damages in the place where it occurred (Hellner 2004). In practice, the question is then reduced to the relation between the damage and respective territory.

Courts around the world have relatively broad experience dealing with that question, especially in cases of defamation (Svantesson 2003). In a landmark case, *Gutnick v. Dow Jones*, Australian courts asserted their jurisdiction over a defamatory article published in the USA by an American publisher based on the physical availability of that article in Australia (because it was available on the Internet), combined with the fact that the affected person resided in Australia and had nearly all his personal interests there. The ECJ (CJEU respectively) adopted a similar approach through the doctrine of “center of interests” when it ruled in Joined Cases C-509/09 and C-161/10<sup>8</sup> that “in the event of an alleged infringement of personality rights by means of content placed online on an Internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based.”

The Court, however, also noted that the plaintiff: “may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seized.”

In Case C-194/16, the Court limited the jurisdictional reach of all Member States on whose territory the defamatory content was accessible only to damages related to that respective territory, and established the “center of interests” as the sole jurisdiction that is entitled to decide on removal or rectification of defamatory data. The court argued that:

in the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal (...), an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage (...) and not before a court that does not have jurisdiction to do so. (...) [A] person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible.

In C-194/16, Advocate General (AG) Bobek went even further in his written opinion and suggested establishing a simple dichotomy between country of origin/country of center of interests for all possible claims. The AG asked “if it were established

---

<sup>8</sup>See Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH v. X and Olivier Martinez, Robert Martinez v. MGN Limited*.

that the Appellant may bring its claim before the Estonian courts with regard to the damage that has occurred in Estonia, the question would become: would and could the partial competence of these courts also be reflected at the level of partial competence to issue an injunction? Could the Respondent reasonably be asked to correct a proportional part of the allegedly harmful information and comments? If yes, how would that part be determined? Would the respondent be asked to delete only a proportionate segment of the information? Or just a portion of the comments?"

Consequently, the AG ambitiously recommended "to limit the international jurisdiction over Internet-related tortious claims to two heads of special jurisdiction [meaning country of origin and country of the center of interest]. The national courts competent under those two heads of jurisdiction would then have full jurisdiction for both determination and award of damages as well as any other remedies available to it under national law, including injunctions." The Court, despite consenting to the main idea of the priority of the center of interest, did not go further and maintained the possibility of courts in all Member States to individually decide about damages that physically occur in their respective jurisdictions.

That conclusion corresponds to the only relevant case of cross-border copyright infringement where the Internet played some role—case C-170/12.<sup>9</sup> The case involved copyrights to a music record that was unlawfully (without a valid license) pressed onto CDs in Austria, then marketed through an e-shop located in the UK and at least one copy was, upon an order made through that e-shop, delivered by post to France. The preliminary question was whether this cross-border situation allowed French courts to exercise their jurisdiction over the case.

The CJEU ruled that French courts do have jurisdiction based on the fact that the CDs were physically distributed in France and that French courts can decide only about damages that arose in France. In particular, the Court held,

in the event of alleged infringement of copyrights protected by the Member State of the court seized, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seized. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.

In its decision, the Court also noted that "[i]n circumstances such as those at issue in the main proceedings that likelihood arises, in particular, from the possibility of obtaining a reproduction of the work to which the rights relied on by the defendant pertain from an Internet site accessible within the jurisdiction of the court seized."

C-170/12, however, does not help much in resolving the question as to the place of damage in the case of publication of a copyrighted work on the Internet. What makes C-170/12 inapplicable here is that the "circumstances such as those at issue" involved a physical copy of a record that was only marketed through an e-shop, while the actual legally relevant distribution took place physically by post. The seller thus had to actively send a physical copy of a CD to a known address in France. If the

---

<sup>9</sup>See Case C-170/12 *Peter Pinckney v. KDG Mediatech AG*.

work was distributed only online, there would be no particular targeted activity of the “seller” required for a work to end up at a certain location (which could literally be anywhere). In addition, the music CDs in question were sold to end users, so it was possible to relatively easily calculate actual local damage caused in France to the rightsholder by simply summing up the sales in the respective territory.

Hypothetically, it would be possible to combine the conclusions of C-170/12 with those from C-128/11,<sup>10</sup> in which the Court ruled that “from an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of a program by downloading from the Internet are similar. The on-line transmission method is the functional equivalent of the supply of a material medium.” That would lead to the conclusion that in a case of illegal online distribution of digital copies of copyrighted works, damages could be sought separately in every jurisdiction from which copies could have been obtained. It would then be possible to argue that a geoblocking measure that prevents copies from being distributed to a certain territory is to be regarded as a technological measure in terms of Directive 2001/29.

## 4.5 Place of Communicating Works to the Public

One problem with the chain of arguments above is that, despite being normatively valid, they are pragmatically very problematic for a number of reasons that have been forcefully articulated not only by AG Bobek, but also in European and US copyright doctrine (Trimble 2019; Torremans 2016). It might, then, simply be a matter of time before the jurisdictional uncertainty, generated by the possibility of cause of action for damages in every EU Member State (not to mention the other approximately 150 Member States of the Berne Convention), is limited legislatively or judicially and the whole chain of arguments leading to the conclusion above regarding the link between copyrights and geoblocking is broken.

Even more problematic is the fact that many online distribution platforms for copyrighted content do not operate on the basis of distributing copies (files) but instead use various streaming technologies. In that case, there are no copies being *de iure* distributed<sup>11</sup> between various jurisdictions and thus no distribution rights can be protected here by the use of geoblocking tools according to the aforementioned interpretation of the existing case law of the CJEU.

Copyrighted works, in this instance, are without doubt made available to the public in terms of Art. 3 of Directive 2001/29/EC, but the question is whether “the act of communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them” physically takes place simultaneously in all Member States (and ultimately in all

---

<sup>10</sup>See Case C-128/11, *UsedSoft GmbH v. Oracle International Corp.*, para. 61.

<sup>11</sup>See Art. 4 of Directive 2001/29/EC.

states where the Internet is accessible), or only in the country of origin (i.e., in the Member State from which the work is being made available).

The answer to that question is relatively simple to find in the wording of Art. 3 of Directive 2001/29/EC. This question is also answered by the definition of the term “information society service” as provided in Directive (EU) 2015/1535.<sup>12</sup>

It is a definitional element of “communication to the public” that “the public” decides the place and time that copyrighted works are accessed and viewed or in any other way used for personal purposes (i.e., “non-used” in terms of the Berne treaty). The fact that place and time of access is by definition out of the control of the provider directly implies that the provider cannot be seen as using the work within a territory which is arbitrarily chosen by the consumer as a matter of legally irrelevant “non-using” of that work.

Recently, the CJEU considered multiple cases in which “communication to the public” was at stake, namely with regard to indirect forms of communication of copyrighted works such as linking (Savola 2017). Although these cases do not give an explicit answer as to possible fora where such a use of copyrighted work can be claimed, the actions were always determined to be in the country of origin of the provider (i.e., never in any other jurisdiction where such “communication to the public” was merely available).

The only remaining possibility for arguing that the copyrighted work, when it is available through the Internet, is legally used by the provider simultaneously in all jurisdictions is if the provider legally engages in broadcasting such work in all the jurisdictions at the same time. This would mean that by making the work available on the Internet, the provider legally broadcasts that work in every jurisdiction where the work is accessible.

Besides the problem in such circumstances of finding the particular places of broadcasting within every single jurisdiction (e.g., for the purpose of determining which particular court in that jurisdiction would be entitled to hear the case), it is not even possible to consider the communication to the public in this way as a form of broadcasting. The reason is that copyrighted works are made available on the Internet through services that are provided, in legal terms, upon the individual request of a user.

Broadcasting typically consists of coverage of a certain target group with a signal that can be refined by specific technologies (receivers) into particular casts. In contrast, transmitting content over the Internet always technically requires an individual request from a user. The ECJ (CJEU) acknowledged this in case C-607/11, which considered the webcast of TV programs, by noting that “[t]he software on the edge server creates a separate stream for each user who requests a channel through it. An

---

<sup>12</sup>See Directive (EU) 2015/1535, which lays down a procedure for the provision of information in the field of technical regulations and of rules on information society services.

individual packet of data leaving the edge server is thus addressed to an individual user, not to a class of users.”<sup>13</sup>

The key element of a webcast, i.e., the provision of the service in response to an individual request by a user, means that any distribution of content via the Internet is not a broadcast service but rather an information society service, according to the meaning of Art. 1(b) of Directive (EU) 2015/1535.

While the user of a broadcasting service only waits for the signal to arrive at her doorstep, the user of an information society service always individually requests service at the place from which it is provided. Upon such a request, an individual connection is always established. This individually established connection normally involves not only transmitting the requested content, but also mutual communication with the client device such as the processing of cookies. But in broadcasting, all communication goes only one way from the broadcaster to the (deemed) user.

The nature of the communication, unidirectional versus bidirectional, makes an important distinction between broadcasting and information society service. It is not only a technicality that information society service is based on direct communication between the provider and a user. Besides the provider knowing about each request and eventually even knowing in detail about the individual behavior of each user (which might have massive economic meaning), it is also significant that an information society service must be dimensioned in order to individually cater to its users. In broadcasting, there is no concern about too many viewers, for example, while too many requests for an information society service leads to a technical denial of that service.

Thus, in broadcasting, the signal is transmitted solely at the will of the provider, while in information society service, the user “travels” with her request to the place of origin. This, then, clearly implies that an information society service that consists of making content available for viewing is both technically and legally provided from the country of origin. This has been the conclusion of the ECJ (CJEU) in similar cases outside the copyright domain, such as *sui generis* rights<sup>14</sup> and personal data protection.<sup>15</sup>

---

<sup>13</sup>See Case C-607/11 *ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v. TVCatchup Ltd*.

<sup>14</sup>See Case C-173/11 *Football Dataco Ltd, Scottish Premier League Ltd, Scottish Football League, PA Sport UK Ltd v. Sportradar GmbH, Sportradar AG*, where the ECJ held that “the mere fact that the website containing the data in question is accessible in a particular national territory is not a sufficient basis for concluding that the operator of the website is performing an act of re-utilization caught by the national law applicable in that territory”.

<sup>15</sup>See Case C-101/01 *Bodil Lindqvist*, where the ECJ ruled that “[t]here is no ‘transfer [of data] to a third country’ (...) where an individual in a Member State loads personal data onto an internet page”.

## 4.6 Concluding Remarks

In this chapter, we focused on territoriality in the online distribution of copyrighted works. We concluded that geoblocking tools have de iure only very limited links to copyrights. We also noted that any criteria other than country of origin are quite problematic, both pragmatically and normatively, for determining the legally applicable and appropriate forum for protecting copyrights on the Internet.

We mostly focused on the EU in our discussion of particular legal issues. However, the problem of territorial aspects of copyright enforcement on the Internet is the same, or even worse, worldwide. When speaking about practices in the EU, where it is legally possible to independently litigate (only for damages, however) in all jurisdictions where an Internet-based publication is available, one should not forget that such a practice may be important for countries outside the EU, as well.

In cases when jurisdictional or other rules are open to interpretation, as in the question of place of damage on the Internet, copyright enforcement is often factually dependent on reciprocity. Courts often look at interpretive practices in other jurisdictions and apply analogous principles. If courts in the EU allow claims for damages against a provider in one Member State to be placed independently and simultaneously in all jurisdictions within the EU, it is quite likely that such a provider will be similarly treated offshore—which means being potentially targeted for litigation in 150+ more or less exotic jurisdictions.

In any case, both the issues of geoblocking and the jurisdictional criteria of copyright infringement are only symptoms of two diseases that are much more general and much more important for the future of the information society. The first relates to the issue of the territoriality of law on the Internet as such. While territory was crucial when the Westphalian concept of sovereignty was established, it is of less or even no importance when it now comes to various online societal relations and business transactions. Retaining normative links between the territory of states and the applicability of law when such links have no societal, economic or other actual *raison d'être*, is at least highly inefficient.

The second general disease, whose symptoms we briefly discussed, relates to the fundamental teleology of copyrights. Throughout the last half century, the function of copyrights (or rather of *droit d'auteur*) has transformed from that of an economic incentive for creative productivity into a tool for restricting access to creative and inventive content. While the original purpose of copyrights was to help generate material value from the quality and popularity of creative works, the theory behind more recent copyright laws tends in many respects only to mimic the logic of property rights by attempting to generate value by making creative works (the copyrighted work) scarce. As a result, some areas of creative production, such as music, videogames and software, already depend economically on legal mechanisms that use copyright tools only minimally or even not at all.<sup>16</sup>

---

<sup>16</sup>Typical examples include music streaming services like Spotify, Tidal and Apple Music that use economic models based on a purely contractual quasi-collective administration of profit generated through access subscriptions; gaming platforms such as Steam that instead of particularized statutory

All this means that even if we get the issue of geoblocking and territorial delimitation of jurisdictions in copyright matters in Europe right, the law as such may or may not work well to promote creativity. Fortunately, creative industries are still relatively capable of finding innovative ways to get the business cycle going even without much help from the law. The only question is, how long can this system continue to work and reproduce the existing creative potential in Europe and the US?<sup>17</sup>

## References

- Aiken, J. H. (1997). The jurisdiction of trademark and copyright infringement on the internet. *Mercer Law Review*, 48, 1331–1350.
- Barlow, J. P. (1996). *A declaration of the independence of cyberspace*. Electronic Frontier Foundation. <https://www.eff.org/cyberspace-independence>. Accessed April 4, 2019.
- Beaulac, S. (2004). The Westphalian model in defining international law: Challenging the myth. *Australian Journal of Legal History*, 8(2), 181–213.
- de Vattel, E. (1797). *The law of nations: Or, principles of the law of nature applied to the conduct and affairs of nations and sovereigns*. London: G. G. and J. Robinson.
- Dillenz, W. 1987–1988. What is and to which end do we engage in copyright. *Columbia-VLA Journal of Law & the Arts*, 12(1), 1–30.
- Duff, P. W. (1938). *Personality in Roman private law*. Cambridge: Cambridge University Press.
- Earle, S. (2016). The battle against geo-blocking: The consumer strikes back. *Richmond Journal of Global Law and Business*, 15(1), 1–20.
- Ginsburg, J. C. (2000). Copyright use and excuse on the internet. *Columbia-VLA Journal of Law & the Arts*, 24(1), 1–46.
- Glenn, P. (2014). *Legal traditions of the world*. Oxford: Oxford University Press.
- Goldsmith, J. L. (1998). Against cyberanarchy. *University of Chicago Law Review*, 65(4), 1199–1250.
- Grotius, H. (1901). *The rights of war and peace*. New York: M. Walter Dunne.
- Hellner, M. (2004). The country of origin principle in the E-commerce directive—A conflict with conflict of laws? *European Review of Private Law*, 12(2), 193–213.
- Hoffman, J. (2016). Crossing borders in the digital market: A proposal to end copyright territoriality and geo-blocking in the European Union. *George Washington International Law Review*, 49(1), 143–173.
- Kohler, J. (1917). The new law of nations. *Michigan Law Review*, 15(8), 634–638.
- Kra-Oz, T. (2017). Geoblocking and the legality of circumvention. *IDEA: The IP Law Review*, 57(3), 385–430.
- Lessig, L. (2004). *Free culture: How big media uses technology and the law to lock down culture and control creativity*. New York: Penguin Press.
- Lévy, P. (1998). *Becoming virtual: Reality in the digital age*. New York: Plenum Trade.

---

legal tools (that differ from one jurisdiction to another) rely on uniform proprietary soft law combined with technical measures; or the booming market of SaaS (software as a service) where the legal meaning of “use of software” has been rendered practically irrelevant due to the fact that software is no longer licensed but rather directly provided to users.

<sup>17</sup>This study was supported by the Technology Agency of the Czech Republic project “Research on the Impact of Current Legislation and the European Commission’s Strategy for Digital Single Market on Czech Audiovisual Industry: Evaluation of the Copyright System and Preparation of Cultural Politics within the DSM” (No. TL01000306).

- Post, D. G. (2002). Against “Against Cyberanarchy.” *Berkeley Technology Law Journal*, 17, 1365–1387.
- Reindenber, J. R. (2005). Technology and internet jurisdiction. *University of Pennsylvania Law Review*, 153, 1951–1974.
- Rieder, C. M., & Pappas, S. P. (1998). Personal jurisdiction for copyright infringement on the internet. *Santa Clara Law Review*, 38(2), 367–417.
- Savola, P. (2017). EU copyright liability for internet linking. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 8(2), 139–150.
- Svantesson, D. J. B. (2003). The place of action defence: A model for cross-border internet defamation. *Australian International Law Journal*, 2003, 172–198.
- Svantesson, D. J. B. (2015). A jurisprudential justification for extraterritoriality in (private) international law. *Santa Clara Journal of International Law*, 13(1), 517–571.
- Svantesson, D. J. B. (2016). Nostradamus light—Selected speculations as to the future of internet jurisdiction. *Masaryk University Journal of Law and Technology*, 10, 47–72.
- Svantesson, D. J. B. (2017). *Solving the jurisdictional puzzle*. Oxford: Oxford University Press.
- Torremans, P. (2016). Jurisdiction for cross-border intellectual property infringement cases in Europe. *Common Market Law Review*, 53(6), 1625–1645.
- Trimble, M. (2015). The multiplicity of copyright laws on the internet. *Fordham Intellectual Property, Media & Entertainment Law Journal*, 25, 339–405.
- Trimble, M. (2016). Undetected conflict-of-laws problems in cross-border online copyright infringement cases. *North Carolina Journal of Law & Technology*, 18(1), 119–159.
- Trimble, M. (2019). The territorial discrepancy between intellectual property rights infringement claims and remedies. *Lewis & Clark Law Review*, 23(2), 501–552.
- Zareh, B. M. (2018). Dr. Strange geo-blocking love. Or: How the E.U. learned to stop worrying about cultural integration and love the TV trade barrier. *Columbia Journal of Law & the Arts*, 41(2), 225–288.
- Zemer, L. (2006). What copyright is: Time to remember the basics. *Buffalo Intellectual Property Law Journal*, 4(2), 54–83.

**Radim Polčák** is the head of the Institute of Law and Technology, the Law Faculty of Masaryk University, Brno, Czech Republic. His research interests include cyberlaw and legal philosophy.

**Open Access** This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter’s Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter’s Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

