

UiO : **Faculty of Law**  
University of Oslo

# Cross-border portability of online content services in the internal market

Does the regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market terminate the exclusivity of national copyright royalties?

Author: Andrea Pohl

Supervisor: Prof. Dr. Christian Heinze, LL.M.

Submission deadline: 28.08.2017

Eulisp XXII

Number of words: 17.057

## List of abbreviations:

portabReg-P	PROPOSAL for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, Brussels, 9.12.2015 COM(2015) 627 final
portabReg-D	DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, Brussels, 21.6.2016 (COM(2015)0627 – C8-0392/2015 – 2015/0284(COD))
portability Regulation	REGULATION of the European Parliament and of the Council on cross-border portability of online content services in the internal market, Brussels, 24 May 2017, 2015/0284 (COD)
CJEU	Court of Justice of the European Union
TFEU	Treaty on the Functioning of the European Union
FAPL	Football Association Premier League
EEA	European Economic Area
VOD services	Video-on-Demand services
AV	Audio-Visual
CMO	Collective Management Organization
IPTV	Internet Protocol Television
DTT	Digital Terrestrial Television

## Table of contents

<b>1</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>2</b>	<b>BACKGROUND .....</b>	<b>2</b>
2.1	The Murphy case.....	3
2.2	Subsequent competition proceedings.....	5
<b>3</b>	<b>STATUS OF LICENCING IN EUROPE TODAY.....</b>	<b>6</b>
3.1	Violation of Article 56 TFEU? .....	7
3.2	Violation of Article 101 subsequence 1 TFEU? .....	8
3.3	Consequences for exclusive territorial licences .....	9
3.4	Adaptation of the Murphy decision to other distribution alternatives? .....	9
3.5	Adaptation of the principle of the country of origin to online transmission? .....	12
3.6	Consultation of the parties concerned .....	13
<b>4</b>	<b>COMPARISON WITH MUSIC STREAMING SERVICES.....</b>	<b>15</b>
<b>5</b>	<b>THE PORTABILITY REGULATION AND ITS REGULATORY CONTENT ..</b>	<b>16</b>
5.1	Who is affected by the portability Regulation .....	16
5.2	The obligation to offer trans-border portability – Article 3 .....	17
5.2.1	Member State of residence .....	18
5.2.2	Temporary presence .....	20
5.2.3	Quality of the service.....	21
5.3	The fiction of being “at home” – Article 4 .....	22
5.4	Cross-border portability without payment of money – Article 6.....	23
5.5	Unenforceability of contractual clauses – Article 7.....	23
5.5.1	Relationship between subscriber and service provider.....	24
5.5.2	Relationship between service provider and right holder .....	26
5.5.3	Relationship between the right holders and their contracting partners .....	26
5.6	Protection of personal data - Article 8 .....	27
<b>6</b>	<b>PORTABILITY – THE END OF TERRITORIAL LICENCES? .....</b>	<b>27</b>
<b>7</b>	<b>INTERNATIONAL CONTEXT.....</b>	<b>30</b>
7.1	The portability Regulation in the context of international copyright law .....	30
7.2	The portability Regulation in the context of international contract law .....	31
7.3	Enforceability in front of European courts .....	31
7.4	Enforceability in front of non-EU courts .....	32
7.5	Conclusion .....	33
<b>8</b>	<b>SUMMARY .....</b>	<b>33</b>
	<b>TABLE OF REFERENCE .....</b>	<b>36</b>

# 1 Introduction

The distribution of online content via the internet has become one of the key distribution channels in our nowadays world. More than 50 % of the European citizens use the internet and their tablets and smart phones to access music, video and games online. And this development is expected to grow further more in the future. As the usage of online content services and mobile devices is increasing rapidly also the expectations of the European user increases to that effect that everyone wants to be able to access and use their online content account from anywhere in the EU.

Today in the EU there are a lot of different online content services that offer creative content to users. But some of these online content service providers, especially these ones providing audio-visual content, only provide their services in the user's respective country of residence. Consequently, the user does not have access to his or her online content while staying somewhere else in the EU despite his country of residence.

On 09.12.2015 the European Commission issued a proposal for a Regulation ensuring the cross-border portability of online content (COM (2015) 627 final)<sup>1</sup>. The aim of the Regulation is to increase and ease trans-border portability of these online content services by imposing an obligation on service providers to allow trans-border portability under certain circumstances.

In the explanatory memorandum of the European Commission's proposal COM (2015) 627 final (in the following "portabReg-P") it furthermore said:

*"...The proposal does not extend beyond what is necessary to solve the identified problems. It does not substantially affect the licensing of rights and therefore has a limited effect on the business models of right holders and service providers. The proposal will not oblige right holders and service providers to renegotiate contracts as it will make unenforceable any provisions in contracts contrary to the obligation to provide for cross border portability. Moreover, the proposal does not impose on service providers any disproportionate cost. The proposal would not require that the provider of online content services takes any measures to ensure the quality of delivery of such services outside the Member State of residence of the subscriber. Also, the proposal would not oblige service providers that offer services free of charge to provide for cross-border portability where they do not verify the subscriber's Member State of residence as such requirement would involve a major change to the way they deliver their services and could involve disproportionate costs."*<sup>2</sup>

Already with the upcoming of the idea of a portability Regulation feelings ran high by the parties concerned. It had been argued, that the cross-border portability of online content services in the internal market, contrary to the above mentioned statements in the explanatory memorandum of the portabReg-P, will terminate the exclusivity of national copyright royalties.

---

<sup>1</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on ensuring the cross-border portability of online content services in the internal market, Brussels, 9.12.2015 COM(2015) 627 final.

<sup>2</sup> PortabReg-P, explanatory memorandum, 2. LEGAL BASIS, SUBSIDIARITY AND PROPORPTIONALITY, Proportionality, p. 4.

In the meanwhile, the portabReg-P has passed several stages of the legislation procedure and resulted in a final version (hereinafter called the “portability Regulation”<sup>3</sup>) which has been adopted by the Council of the European Parliament on 08.06.2017.

The initiative to implement cross-border portability of online content still is criticized variably, especially because of the apprehension of the termination of territorial licences and a loss in the protection possibilities of copyright protected works.

In the following it will therefore be looked at the initiative and the background of the portability Regulation, how the portability Regulation has evolved throughout the legislation procedure, which impact the portability Regulation will have on the existing licencing system and habits, if the above cited statement of the explanatory memorandum of the portabReg-P proves true and if the fear of the parties concerned of the end of territorial licences is justified.

## 2 Background

The portability Regulation is part of the European Commission’s digital single market strategy which has been published in March 2015. The digital single market strategy is built on three main points:

1. Access  
*Creation of a better access for consumers and businesses to digital goods and services across Europe;*
2. Environment  
*Creation of the right conditions and a level playing field for digital networks and innovative services to flourish;*
3. Economy & Society  
*Maximisation of the growth potential of the digital economy.*<sup>4</sup>

The digital single market strategy contains a catalogue of measures in order to implement the above mentioned three main points and to finally create and establish a digital single market in the European Union.<sup>5</sup>

In implementing the first pillar of the digital single market - the establishment of better access for consumers and businesses to digital goods and services across Europe - the European Commission has proposed the Regulation for cross-border portability of online content services, which is to be discussed in this paper. The establishment of cross-border portability and therewith an EU-wide harmonization is something new in the field of copyright with regard to audio-visual content.

---

<sup>3</sup> <http://data.consilium.europa.eu/doc/document/PE-9-2017-INIT/en/pdf>.

<sup>4</sup> <https://ec.europa.eu/digital-single-market/en/digital-single-market>.

<sup>5</sup> <https://ec.europa.eu/digital-single-market/en/digital-single-market>.

Until now copyright has only been harmonized to a limited extent, especially the content and the barriers of the rights of the copyright holders are still regulated mainly independently by each member state.

Moreover, most licence agreements contain exclusive territorial licences obliging the service providers to hinder its subscribers to access the online content services outside the licenced territory. These so called territorial restriction clauses already have been subject to case law of the European Court of Justice (in the following “CJEU”) in the so called “Murphy cases”<sup>6</sup>. In the “Murphy cases” the CJEU held, that certain restrictions to the provision of services cannot be justified in light of the objective of protecting intellectual property rights.<sup>7</sup>

## 2.1 The Murphy case

In the Murphy cases, the Football Association Premier League (in the following “FAPL”) managed the leading professional football league competition in England (the Premier League). In this connection it also marketed the television broadcasting rights for the matches of this competition. In doing so, the FAPL granted broadcasters an exclusive territorial broadcasting licence for live transmissions of the Premier League matches through an open tender process.

In the sector of live broadcasting of sport events, territorial licences usually follow the borders of the single Member States. This means that the viewers only can watch the football matches which are broadcasted in their Member State of residence by broadcasters established there. The territorial exclusivity had been the main factor of income for the FAPL, which is why every licence agreement with the broadcasters contained a clause obliging the broadcasters to encrypt their satellite signal and to then only transmit it to their customers in the awarded territory. In order to protect the territorial exclusivity and in order to prevent the viewers to watch the matches through broadcasts from outside their Member State of residence, the licence agreements also contained a prohibition for the broadcasters to provide viewers who wished to view their programmes also from another Member State then the Member State the licence was granted for, with decoder cards.

Despite these exclusivity clauses in the licence agreements, some operators of public houses in the United Kingdom bought decoder cards in Greece, issued by Greek broadcasters for the Greek market in order to access the Premier League matches. One of these pub operators was Karen Murphy, which is why the cases became famous under the title “Murphy decision” or “Murphy case”. The decoder cards and the decoder boxes in Greece were sold at much cheaper prices than those offered by the holder of the transmission rights in the United Kingdom. The Greek decoder cards therefore were not illegal in a general sense but principally were produced for the sole use of the viewers of the Member State in which they were sold and marketed. Some of the pub operators, and also Karen Murphy, used the Greek decoder cards and decoder boxes in order to show the Premier League matches in their public houses.

---

<sup>6</sup> CJEU, Case-403/08 and Case-429/08, Murphy, Judgment of 04.10.2011.

<sup>7</sup> Recital 11 of the portabReg-P.

As such a practice distorted the business activity of the FAPL, as it undermined the exclusivity of the broadcasting licences granted by the FAPL, the FAPL had raised a claim against Karen Murphy in order to terminate this practice of using foreign decoder cards.

The High Court of Justice of England and Wales in this process referred several considerable questions to the European Court of Justice with regard to the purchase of foreign decoder cards and the interpretation of EU law.

The European Court of Justice stated that it has to be differentiated between Premier League broadcastings and broadcastings following their reception. To begin with the Premier League broadcasting, the European Court of Justice explained that foreign decoding devices are not 'illicit devices' within the meaning of the Conditional Access Directive 98/84/EC, even though they were procured or enabled under the use of a false name and address and, in certain cases, used in breach of contractual terms permitting their use only for private purposes. Such behaviour implying the use of foreign decoding devices as well as national legislation possibly prohibiting this behaviour does not fall under the Directive 98/84/EC. Having specified this, the European Court of Justice especially stated that national legislation which prohibits the import, sale and use of foreign decoding cards is contrary to the freedom to provide services and cannot be justified either by the objective of protecting intellectual property rights or by the objective of encouraging the public to attend football stadiums.

With regard to the protection of intellectual property rights, the CJEU pointed out that the FAPL cannot claim copyright in the Premier League matches themselves, as these sporting events cannot be considered as an author's own intellectual creation and, therefore, are not to be classified as 'works' within the meaning of EU copyright law. Further on, even though according to national law sporting events could be protected by copyright law, the prohibition of the usage of foreign decoder cards goes beyond what is necessary to ensure appropriate remuneration for the rights holders concerned.

Here, the European Court of Justice additionally stated that the purpose of intellectual property law is to ensure a fair and appropriate remuneration for the right holders and to protect the copyright protected work from unauthorised use. But the aim to obtain the optimum remuneration does not fall within the purpose of intellectual property rights protection. In order to ascertain what an appropriate remuneration with regard to the sale of rights is, it is allowed to both include the actual and potential audience both in the Member State of broadcast and in any other Member State in which the broadcasts are received. Therefore, there is no need to restrict the free movement of services within the EU. Additionally, the CJEU said that an appropriate remuneration cannot include the payment of a premium by the television channels to reserve absolute territorial exclusivity, because the payment of such a premium would result in artificial price differences between the different markets. This again would lead to a drifting apart of the national markets which contradicts the aim of establishing a consistent single market as well as a single programme production and distribution market pursued by the Audio-visual Media Services Directive and the Satellite Broadcasting Directive.

With regard to broadcasts following their reception, the European Court of Justice stated that only the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, and various graphics are to be considered as 'works' in the meaning of the copyright Directive 2001/29/EC and therefore can be protected

by copyright. The matches themselves do not constitute a work in the meaning of the copyright Directive 2001/29/EC and therefore does not enjoy copyright protection.

Finally, the European Court of Justice defined the action of communicating to the public that broadly that it also covers any broadcasting of protected works, irrespective of the means or the technical procedure used. A communication to the public takes place, where the operator of a public house publicly and intentionally shows broadcasted works via a television screen and speakers to the customers present in that establishment. Furthermore, this retransmission constitutes a ‘communication to the public’ within the meaning of the Copyright Directive, for which the authorisation of the author of the works is necessary.

On a final note, the European Court of Justice also said, that the public showing of broadcasted works in the public house happened for the reason of profit-making, which also has to be taken into account.<sup>8</sup>

The response to the Murphy judgement was enormous. The judgement was called to be a revolution constituting the end for the marketing of rights in the fields of sporting events. But in the aftermath the echo of the judgement subsided when it had been realized that the impact of the judgement might not be that huge as expected.<sup>9</sup> With regard to that, the aspect of the actual impact of the judgement will be discussed further in the following of this paper.

## **2.2 Subsequent competition proceedings**

Subsequent to the aforementioned Murphy judgement of the CJEU, the competition authority of the European Commission filed competition proceedings against several huge film studios as amongst others Sky UK, Paramount pictures and so on.<sup>10</sup>

In these proceedings the European Commission wishes to examine, whether provisions in the licencing agreements between the parties preventing broadcasters from providing their services across borders, for example by refusing potential subscribers from other Member States or blocking cross-border access to their services, constitute a breach of the rules of EU competition law. In its press release the European Commission explicitly refers to the above mentioned Murphy decision and wants to expand the findings of the Murphy decision regarding passive sales of satellite decoders on the online streaming of exclusive audio-visual content.<sup>11</sup>

These proceedings are still in process, but Paramount Pictures already has made a commitment proposal to the European Commission regarding the proceedings which in the

---

<sup>8</sup> CJEU, Case-403/08 and Case-429/08, Murphy, Judgment of 04.10.2011;  
[http://ec.europa.eu/dgs/legal\\_service/arrets/08c403\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/08c403_en.pdf).

<sup>9</sup> *Christmann*, ZUM 2012, 187.

<sup>10</sup> See press releases on the European Commission’s website:  
[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40023](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40023).

<sup>11</sup> See press release on the European Commission’s website:  
[http://europa.eu/rapid/press-release\\_IP-14-15\\_en.htm](http://europa.eu/rapid/press-release_IP-14-15_en.htm).



meanwhile has been accepted by the European Commission and has been made legally binding on Paramount.<sup>12</sup> Paramount has declared to:

1. *When licensing its film output for pay-TV to a broadcaster in the EEA, Paramount will not (re)introduce contractual obligations, which prevent or limit a broadcaster from responding to unsolicited requests from consumers within the EEA but outside of the broadcaster's licensed territory (no "Broadcaster Obligation");*
2. *When licensing its film output for pay-TV to a broadcaster in the EEA, Paramount will not (re)introduce contractual obligations, which require it to prohibit or limit broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory (no "Paramount Obligation");*
3. *Paramount will not seek to bring an action before a court or tribunal for the violation of a Broadcaster Obligation in an existing licensing agreement;*
4. *Paramount will not act upon or enforce a Paramount Obligation in an existing licensing agreement.*<sup>13</sup>

This commitment by Paramount, the ongoing competition proceedings against other film studios as well as the Murphy decision may be already pointing the way ahead. Especially as the Murphy decision seems to differ from decisions made by the CJEU regarding similar legal questions before. In consideration of all these circumstances, in the following an evaluation of the status of licencing in the field of copyright law in Europe today will be made. Furthermore, an evaluation of the Murphy decision with regard to the applicability on other services like online-content services will be done. Moreover, it will be discussed if there are to be feared consequences for the future of exclusive licences in the light of the Murphy-decision, the competition proceedings and the portability Regulation itself.

### **3 Status of licencing in Europe today**

Copyright holders, the so called licensor, usually transfer their ordinary exploitation and usage rights through a licence to the so called licensees. In return the licensor and copyright holder normally receives remuneration. The restriction of licences to special territories or special transmission forms is a common handling in the fields of copyright law.

Although this is not necessary, local restrictions of exclusive licences or usage rights in the EU mainly lead to licence territories following the national borders of the member states and predominantly refer to the national markets. It is though also possible to issue licences independently of national borders, for territories consisting of several Member States or for example an EU wide licence covering all Member States. But until now such an EU wide

---

<sup>12</sup> See press release on the European Commission's website:  
[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40023/40023\\_4638\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_4638_3.pdf);  
[http://europa.eu/rapid/press-release\\_IP-16-2645\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2645_en.htm).

<sup>13</sup> See press release on the European Commission's website:  
[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40023/40023\\_4638\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_4638_3.pdf);  
[http://europa.eu/rapid/press-release\\_IP-16-2645\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2645_en.htm).

licence hasn't been of interest for licensees, probably owing to a lack of demand.<sup>14</sup> In accordance with the competition authority's competition proceedings and the Murphy decision it is now questionable if exclusive territorial licences violate the freedom to provide services according to Article 56 of the Treaty on the Functioning of the European Union ("TFEU") and Article 101 subsequence 1 TFEU, which prohibits anticompetitive agreements.

### 3.1 Violation of Article 56 TFEU?

The question, whether exclusive territorial licences violate the freedom to provide services according to Article 56 TFEU had already been examined by the CJEU in its "Coditel I" judgment.<sup>15</sup> In this case a French movie company had sued the Belgian cable TV companies (Coditel) for violation of copyright as the French movie company held an exclusive licence for a film in order to solely televise this film in Belgium. When the same film had been televised in German in Germany, Coditel intercepted the TV signal radiating over to Belgium and forwarded the signal to the Belgian cable network in order to televise this film without having an own licence on Belgian TV. In its judgment the CJEU examined that a restriction on the freedom to provide services may be justified by the aim to protect the rights in intellectual property. A copyright holder has a legitimate interest in gaining an adequate compensation for his consent to the performance or presentation of his work. The right to gain an adequate compensation is part of the essential substance of the copyright. A copyright applies free from discrimination and doesn't establish discretionary borders between the Member States. The fact that the licence territory accidentally follows the national borders of the Member States by itself does not constitute a violation of Article 56 TFEU. Especially with regard to that any other differentiation of the licence territory mostly won't be feasible and practical.<sup>16</sup>

The next time the CJEU had to examine a violation of the freedom to provide services was in the above mentioned "Murphy" decision. As we have seen above, in the "Murphy" decision the CJEU decided, that in general the protection of immaterial property rights could justify a restriction of the freedom to provide services and that territorial licences in general are legitimate, but that there is a violation of Article 56 TFEU where the licensee has to pay an extra charge in addition to the adequate remuneration in order to safeguard an absolute exclusivity.<sup>17</sup> The difference between the Coditel I judgement and the Murphy decision therewith is that the FAPL tried not to solely realize an adequate remuneration but to realize the best possible return on sales plus an additional charge for the exclusivity of the rights acquired. Because of the inadequate compensation structure, the CJEU decided in this case, that a restriction of the freedom to provide services wasn't legitimate.<sup>18</sup>

Therefore, where the licensor only requires an adequate and appropriate remuneration, a restriction of the freedom to provide services with regard to licences in the field of copyright, in general can be assumed to be legitimate.

---

<sup>14</sup> *Brost*, ZUM 2016,689, 691.

<sup>15</sup> CJEU, Case C-62/79, *Coditel I*, Judgment of 18.03.1980.

<sup>16</sup> CJEU, Case C-62/79, *Coditel I*, Judgment of 18.03.1980.

<sup>17</sup> CJEU, Case-403/08 and Case-429/08, *Murphy*, Judgment of 04.10.2011; *Spiegel*, DSRITB, 2016, 693, 699.

<sup>18</sup> *Heermann*, ZUM 2016, 835, 837.

### 3.2 Violation of Article 101 subsequence 1 TFEU?

In the Coditel I decision, the CJEU denied the applicability of Article 101 subsequence 1 TFEU. In the Coditel II decision the main question therefore was, if European competition law is applicable with regard to national copyright law and exclusive licences.<sup>19</sup>

According to Article 101 subsequence 1 TFEU all agreements and every coordinated behaviour between companies intending or inducing a falsification of competition is prohibited.

In the Coditel II judgment the CJEU said, that although copyright in a film and the right deriving from it, namely that of exhibiting the film, are not as such subject to the prohibitions contained in Article 101 subsequence 1 TFEU. The exercise of those rights may, none the less, come within the said prohibitions where there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market. With regard to a contract 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, it is up to the national courts to make the inquiries which are necessary to ascertain whether or not the exercise of the exclusive exhibition right creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry. Furthermore, the courts need to ascertain whether or not the possibility of charging fees which exceed a fair return on investment are able to prevent, restrict or distort competition within the common market. Or whether or not the duration of the exclusivity period is disproportionate with regard to the requirements, or from a general point of view, whether or not an exercise within a given geographic area is such as to prevent, restrict or distort competition within the common market.<sup>20</sup>

In principle the same had been examined by the CJEU in the above mentioned “Murphy decision”. Here the CJEU also said, that right holders principally are allowed to transfer an exclusive licence to a single licensee who intends to broadcast a copyright protected object from one single Member State or also from several Member States via satellite. But the CJEU said additionally, that an agreement aiming to restore a market foreclosure following the national borders might be violating the aim of the treaty of creating a single market. Therefore, agreements restricting competition in the internal market by sealing off national markets alongside national borders constitute a restraint of competition and therefore violate Article 101 subsequence 1 TFEU. Consequently, a licence agreement aiming to restraint or prohibit the trans-border delivery of broadcasting services already presumes the restraint of competition. Especially where the contract includes clauses imposing additional obligations on the licensee as for example denying him any trans-border delivery of services in connection with the broadcasting of for example football games. Such an approach enables the licensee to gain an absolute exclusive licence for the licenced territory which disables any other competitor to provide equal broadcasting services in this territory and consequently disables any competition. A clause included in a licence agreement prohibiting the licensee to sell for example decoder cards outside the licenced territory therefore violates Article 101

---

<sup>19</sup> CJEU, Case-262/81, Coditel II, Judgment of 06.10.1982.

<sup>20</sup> CJEU, Case-262/81, Coditel II, Judgment of 06.10.1982.

subsequence 1 TFEU.<sup>21</sup> But it has to be clarified in this regard, that the CJEU also explained that the assumption that territorial licences constitute a restriction of competition can be disproved by proving that the economical and legal context of the licencing agreement would lead to the findings that this licence agreement isn't qualified for restricting competition in the relevant market.<sup>22</sup>

So also with regard to Article 101 subsequence 1 TFEU it principally can be assumed that restrictions in licencing agreements are legitimate as long as they do not restrict competition in the European market and seal off single national markets in the EU.

It is now questionable if at all and if yes which consequences result from the above mentioned decisions for the practice of licencing and exclusive territorial licences in the European Union in future.

### **3.3 Consequences for exclusive territorial licences**

By analysing the Murphy decision, it becomes clear that there is a charged relationship between European competition law and national copyright law. Especially in the case where exclusive licences for immaterial property meet European antitrust law. With regard to the above mentioned judgements of the CJEU and the subsequent competition proceedings, it has to be determined that contractual agreements involving the sale of exclusive rights and licences has come more into the focus of the European competition supervisory. But even though, it still remains unclear or doubtful under which conditions exactly a licence agreement granting an absolute exclusive licence violates European competition law.<sup>23</sup>

The exclusivity granted by an exclusive licence to the licensee, in principle contradicts the aim of free competition and unrestricted trading of goods and services within the EU. Even though the CJEU in its Coditel judgements and in the Murphy decision didn't assume "exclusivity" to constitute a violation of either the freedom to provide services or of European competition rules as exclusivity is to be seen as the essence of copyright protection.<sup>24</sup> The monopolistic protection of immaterial goods aims to privilege financial investments and innovations and to safeguard an adequate remuneration of own creative and investment-related achievements for the right holders. Guaranteeing these privileges to the right holders otherwise wouldn't be possible because of the risks of unregulated and unauthorised plagiarism in a free and unregulated market.<sup>25</sup> Also the "Murphy judgement" doesn't seem to come to another result.

### **3.4 Adaptation of the Murphy decision to other distribution alternatives?**

---

<sup>21</sup> CJEU, Case-403/08 and Case-429/08, Murphy, Judgment of 04.10.2011.

<sup>22</sup> *Heerman*, ZUM 2016, 835, 838; *Christmann*, ZUM 2012, 187, 188.

<sup>23</sup> *Dauses*, EU-Wirtschaftsrecht, no. 234.

<sup>24</sup> *Brost*, ZUM 2016, 689, 691; *Heerman*, ZUM 2016, 835, 838; *Albrecht/Mutschler-Siebert/Bosch*, ZUM 2012, 93, 94.

<sup>25</sup> *Wandtke/Bullinger*, UrhG Kommentar, § 15 Rn. 1-5.

The prevailing opinion assumes that the Murphy decision by the CJEU is to be seen as an individual case assessment which can't be transferred or adapted to other cases relating exclusive territorial licences.<sup>26</sup> It is argued that the Murphy decision exclusively deals with the communication to the public of sport events via satellite. Moreover, licencing for broadcasting via satellite in the EU does have some specialities in comparison with other distribution alternatives. First and foremost, for satellite broadcasting the principle of the country of origin applies. This means, that with regard to copyright the relevant action of communication to the public takes place in the Member State where the up-link happens.<sup>27</sup> For the licensor this means, that he allocates only one licence for the country in which the broadcasting shall take place. This single licence then includes the whole outreach of the broadcasting. The extent of the outreach of the broadcasting then again is taken into account with regard to the level of remuneration. A territorial, temporal or linguistic exclusivity consequently only can be achieved on the basis of the law of obligations. A territorial restriction in rem of a satellite licence only can be achieved for the broadcasting area and by technical measures. A restriction in rem with regard to particular territories or countries is not possible any more.<sup>28</sup> The receiving of the broadcasted program in all other European Member States is legitimate when also the broadcasting in one of these countries has been legitimate and therefore doesn't constitute a new additional action of usage which involves a new obligation for remuneration. Therefore, in practice there is a need for restricting these extensive licences in rem through contractual agreements under the laws of obligations providing technical measures preventing the emission of the broadcasting into non-licensed territories.<sup>29</sup>

To put it more practical, this means that the licensee in one Member State, because of the special rules regarding communication to the public via satellite, is able to broadcast a sports event EU-wide without violating another broadcasting company's exclusive rights in another Member State. Since the Murphy decision, above mentioned contractual agreements under the laws of obligations restricting the outreach of the satellite transmission, violate competition law. The violation is to be seen in the prohibition for the licensee to import or purchase decoder cards released by another satellite broadcasting service in another Member State under the condition that these decoder cards won't be used in another Member State. Such contractual agreements according to the CJEU do not belong any more to the specific object of an exclusive right of communication to the public via satellite, as this constitutes an inadequate exercise of the protected right. By assuming that a restriction of the purchase of decoder cards in order to decrypt satellite transmission constitutes a violation of competition law, the CJEU adapts to a certain extent its evaluation standards of its law practice regarding antitrust supervision in the fields of free movement of goods onto the freedom to provide services. This kind of correspondence to a certain extent mirrors the principle of exhaustion, whereupon the right holder can't request an additional remuneration after having put the protected object on the market for the first time.<sup>30</sup>

---

<sup>26</sup> See amongst others, *Albrecht/Mutschler-Siebert/Bosch*, ZUM 2012, 93, 94; *Christmann*, ZUM 2012, 187, 189; *Brost*, ZUM 2016, 689, 691; *Heerman*, ZUM 2016, 835, 838.

<sup>27</sup> *Hillig*, BeckOK UrhR, § 20a no. 10; *Albrecht/Mutschler-Siebert/Bosch*, ZUM 2012, 93, 94.

<sup>28</sup> *Albrecht/Mutschler-Siebert/Bosch*, ZUM 2012, 93, 94.

<sup>29</sup> *Albrecht/Mutschler-Siebert/Bosch*, ZUM 2012, 93, 94.

<sup>30</sup> *Götting*, BeckOK, UrhR, § 17 no 37,38.

Against this approach some critics have pointed out that according to Article 3 subsequence 3 of the European Copyright Directive<sup>31</sup> the principle of exhaustion would not apply where copyrights are utilised in an immaterial manner by communicating to the public.<sup>32</sup> The exclusive right to communicate to the public would not expire by communicating the copyright protected object to the public for the first time (in contrary to the making available to the public for the first time). A specific part of the exclusive right to communicate to the public would be the capacity of the right holder to charge remuneration for each and every presentation and to restrict the related and licenced rights of use geographically.<sup>33</sup> In principle there therefore would be no need to additionally make a contractual agreement in order to restrict the rights of use geographically as the geographical restriction already would be inherent to the copyright protection of the exclusive right to communicate to the public. Another point adduced by some of the critics is that a communication to the public via satellite (which is deemed to be a service) is allowed to be encrypted according to Article 1 subsequence 2c) of the satellite and cable directive<sup>34</sup>. According to Article 1 subsequence 2c) of the satellite and cable directive a communication to the public through encrypted programme-carrying signals is legal as long as the communication to the public by satellite happens on the condition that the means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent. It therefore would have to be questioned, how the Murphy decision would be adaptable on immaterial decryption means with regard to encrypted satellite transmission and if on the basis of Art. 101 TFEU and in correspondence to the “passive sales” developed for the sales of goods, access to the actual service itself could be put across.<sup>35</sup>

Even though, the CJEU in the Murphy decision didn't explicitly mention the principle of exhaustion, the explanations made in the opinion of the court with regard to the restriction of the freedom to provide services, in the end constitute considerations in the light of the principle of exhaustion. A parallel to the principle of exhaustions could be especially seen in the statement of the CJEU that the right holder wouldn't be hindered to require a remuneration corresponding with the actual and potential audience ratings in the sending Member State as well as in all other Member States. It seems to be the right decision that the CJEU in the Murphy case draws a parallel to the principle of exhaustion because otherwise right holders could take advantage of the territorial borders in order to maximise their remuneration possibilities. This risk exists especially as according to the principle of territoriality copyrights principally constitute intellectual properties which are restricted to the territory of the country who issued the right.<sup>36</sup>

But in the end, because of the special rules regarding satellite transmission and the individual case assessment done by the CJEU in the Murphy case, the vast majority constitutes that an adaptation of the Murphy decision to other transmission alternatives, like for example the

---

<sup>31</sup> DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>32</sup> *Mestmäcker/Schweitzer*, EU WettbewerbsR, no.38 f.; *Brost*, ZUM 2016,689, 697.

<sup>33</sup> *Mestmäcker/Schweitzer*, EU WettbewerbsR, no.38 f.; *Brost*, ZUM 2016,689, 697.

<sup>34</sup> 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.

<sup>35</sup> See for example *Brost*, ZUM 2016,689, 697.

<sup>36</sup> *Bernhard/Nemeczek*, GRURInt 2012, 293, 296.

internet, is not possible.<sup>37</sup> Regarding all other transmission alternatives therefore the principle of territoriality applies. This means that the copyright related relevant action of the communication to the public or of making available to the public takes place in the Member State of destination and needs a special permission of the right holder.<sup>38</sup>

Even though principally the principle of territoriality applies to online transmission of online content, it has been questioned, if not the principle of the country of origin could be adapted to online transmission of online content.

### **3.5 Adaptation of the principle of the country of origin to online transmission?**

As we have just discussed, the broadcasting via satellite follows special rules which are not as such adaptable to other transmission alternatives and also the Murphy decision, based on these specialties, is such an individual decision that it actually can't be adapted to other transmission alternatives. Even though, the competition authority as well as the European Commission intends to refer to the Murphy decision while trying to improve the EU trans-border access to audio-visual content.<sup>39</sup>

With the Murphy decision trans-border passive sales of material decryption devices in the fields of satellite transmission have been made possible. Until now the legalised passive sales didn't have that much impact on the value of the broadcasting rights of live sport events, as the purchase of decoders or decoder cards in another Member State had been too inconvenient respectively elaborate for the normal consumer. But where the Murphy decision would be adapted to online transmissions of audio-visual content, the impact probably would be much more significant. The adaptation of the principle of the country of origin to online transmission of audio visual content could harm the value and the main benefit of exclusivity of the exclusive exploitation rights. Because in contrast to the sales of material goods like decoders and decoder cards in the respective Member State, the passive purchase of online services through the internet would be much more easy for the consumer and therefore very probably much more popular. Moreover, because of the worldwide availability, it won't be achievable to control the passivity of the sales through the internet. Where the cheapest and the least legally protected offers of audio-visual online content would for example be listed in the internet on social media platforms or similar, these offers and their awareness would spread around in a minimum of time and without efficient control of the right holders. Ultimately, where the consumer is able choose a licence territory inside the EU with low demand and low prices, it is feared that this could lead to a considerable loss of importance of exclusive territorial licences in the field of copyright within the EU, which then again would reduce the value of the underlying usage rights desperately.<sup>40</sup>

---

<sup>37</sup> *Christmann*, ZUM 2012, 187, 189; *Brost*, ZUM 2016, 689, 691; *Heerman*, ZUM 2016, 835, 838; *Albrecht/Mutschler-Siebert/Bosch*, ZUM 2012, 93, 94.

<sup>38</sup> *Christmann*, ZUM 2012, 187, 189; *Albrecht/Mutschler-Siebert/Bosch*, ZUM 2012, 93, 94.

<sup>39</sup> Recital 11 of the portability Regulation; Recital 11 of the PortabReg-P; Press Release of the European Commission of 13.01.2014 - [http://europa.eu/rapid/press-release\\_IP-14-15\\_en.htm](http://europa.eu/rapid/press-release_IP-14-15_en.htm); Press Release of the European Commission of 23.07.2015 - [http://europa.eu/rapid/press-release\\_IP-15-5432\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5432_en.htm).

<sup>40</sup> *Brost*, ZUM 2016, 689, 698.

Some critics already have raised concerns that a probable consequence then would be, that national licences, based on the principle of the country of origin, would be replaced by pan-European licences covering all Member States. As such a pan-European licence probably would be more expensive than a national licence, as it covers a much larger territory, presumably only the larger entities would be able to cover the costs for such a pan-European licence. This then again would probably lead to a restriction of the competition on the market.<sup>41</sup>

But until now it doesn't look like the European Commission is planning to adapt the Murphy decision directly to other transmission alternatives, but rather seeks to adopt some of the basic notions stated in the Murphy decision and also rather seeks to find more moderate ways to achieve a trans-border access to online content to the benefit of the consumer.

### **3.6 Consultation of the parties concerned**

The portability Regulation contains a restriction of the principle of territoriality through the principle of the country of origin, as we already know out of the Satellite and Cable Directive.<sup>42</sup>

With regard to the Satellite and Cable Directive, the European Commission held a public consultation in order to collect feedback on certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. The European Commission especially asked for evaluations regarding a possible extension of some of the principles of the Satellite and Cable Directive in light of market and technological developments, especially the cross-border distribution of television and radio programmes online, and the ensuring of wider access to content.<sup>43</sup>

The results have been published in a synopsis report by the European Commission.<sup>44</sup> Regarding the extension of the principle of the country of origin to online transmissions, the following results have been ascertained:

*“Views are divided as concerns the need of an extension of the country of origin principle to online transmissions.*

*Consumers representatives call for a broad extension of the country of origin principle to cover all online services. In addition, certain argue that introducing this principle with regard to online transmissions would not be sufficient on its own - such an intervention would need to be accompanied by a rule explicitly prohibiting technical or contractual restrictions on "passive sales" across EU borders (restrictions on responding to unsolicited requests from consumers residing in other Member States).*

---

<sup>41</sup> Brost, ZUM 2016,689, 698.

<sup>42</sup> Druschel/Lehmann, CR 4/2016, 244, 245.

<sup>43</sup> <https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive>.

<sup>44</sup> <https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive>.



*While a number of Member States/public authorities are open for discussions with the view of enabling more cross-border access to content, there is a strong call for caution. In their view, any reform should not undermine contractual freedom, a high level of protection of intellectual property and the exclusivity of rights and should ensure a level playing field. Certain Member States submit that they are against any extension of the application of the country of origin principle because of risks of unintended negative consequences, especially for the audio-visual sector.*

*Right holders are, in general, against any extension of the application of the country of origin principle. They consider that any such extension would de facto lead to pan-European licences and would restrict their ability to license rights on a territorial basis. They are in particular concerned about an extension which would cover broadcasters' VOD services and, even more so, any online services by any service providers. The main reasons given against it are:*

- *negative consequences for the value chain of the production (e.g. financing of AV works) and the distribution of creative content (notably for AV works, as producers would no longer be able to rely on pre-sales of distribution rights with territorial exclusivity);*
- *right holders would be no longer able to decide for which territories in the EU they license their rights;*
- *not needed, as voluntary multi-territorial licensing schemes already exist;*
- *the application of the principle to online services and the consequential focus of the licensing system on the country of origin could have a negative impact on creators' revenues;*
- *risk of forum shopping by service providers and more complicated enforcement by right holders;*
- *risk that rights in musical works may be withdrawn from CMOs if right holders come to the conclusion that CMOs cannot ensure the effective collective management of rights across the entire EU.*

*CMOs do not favour any extension of the principle. They raise the same arguments against it as right holders.*

*Broadcasters' views on the extension are split along the public service versus commercial broadcaster line. However, all broadcasters share the view that in all cases full contractual freedom should be maintained, enabling them to limit the exploitation of rights by territories.*

*The majority of commercial broadcasters argue that an extension of the principle would amount to pan-European licences. They raise the same arguments against the extension as right holders. By contrast, all public service broadcasters as well as commercial radios call for the application of the principle to EU broadcasters' transmissions by any technological means as well as to all broadcast-related online services. The main reasons given by those in favour of such an extension are:*

- *it would enable broadcasters to expand their services to other Member States;*
- *it would provide broadcasters with legal certainty;*
- *it would reduce significant administrative burden and costs associated with clearance of rights;*

- *it would provide for additional revenues for right holders by ensuring a wider dissemination of TV and radio programmes and, therefore, of their works and other protected subject matter.*

*Views of other service providers vary, though most of them call for a careful and measured approach. ISPs express most favourable views: they argue that it would enable digital content providers to offer services EU-wide. Telecommunications network operators, cable operators, IPTV operators, DTT providers and VOD operators are more cautious, even though some of them indicate that they favour technology-neutral approach. All of service providers other than broadcasters underline the importance of a level playing field. Also, many of them argue that contractual freedom should be maintained. They claim that if the extension of the application of the principle were to lead to pan-European licencing, it would put European and local market players at a competitive disadvantage in relation to multinational operators as they would not have the means to acquire pan-European licences.*<sup>45</sup>

As we can see, the opinions regarding the extension of the principle of the country of origin to online transmissions are much divided. Especially the risk of a loss of control and remuneration to the detriment of the right holders is criticized mainly. Even though it seems that the European Commission puts the interests of the consumer and the interest in creating a digital single market in the European Union in the first place. On the other hand, in the sector of music streaming, trans-border access and multi-territorial licences have already shown their applicability in practice. It therefore can be questioned why the same approach is seen that critical in the sector of audio-visual content.

## **4 Comparison with music streaming services**

Music streaming services like Spotify already offer trans-border access of their online-content to their subscribers for a considerable time. These service providers offer their subscribers a limited, non-exclusive, revocable licence to make personal, non-commercial use of the media content.<sup>46</sup> It can be questioned why the approach to offer trans-border access of the online content hasn't been adapted by the audio-visual industry yet. One difference might be the Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, which has eased the implementation of multi-territorial licences. The aim of this Directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework, and to lay down requirements applicable to collective management organisations, in order to ensure a high standard of governance, financial management, transparency and reporting.<sup>47</sup>

Moreover, music on the contrary to films is not that dependent on language as consumers often also listen to music in other languages than their mother tongue whereas most

---

<sup>45</sup> <https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive>, p. 3-4.

<sup>46</sup> <https://www.spotify.com/uk/legal/end-user-agreement/>.

<sup>47</sup> Recital 8 and 9 of the Directive 2014/26/EU.

consumers explicitly want to watch films in their mother tongue.<sup>48</sup> Because of that it is even more questionable why the audio-visual industry is that critical of a trans-border access to their online-content, as exclusivity in this area also can be achieved via language versions of the offered content.<sup>49</sup>

With regard to that and where the system of multi-territorial licences in the area of music is in good working order, it is even more incomprehensible why such a handling is seen that critical in the fields of audio-visual content and the marketing of sport events.<sup>50</sup> Maybe there also resonates the fear of in future only being able to require an adequate compensation instead of a beyond that reaching optimum compensation.

Therefore, it will now be looked at the portability Regulation itself and its impact on territorial licences and copyright. Especially it will also be looked at if the Regulation actually will lead to an erosion of the copyright and to pan-European licences or if not vice versa the Regulation strengthens the usage of territorial licences in the fields of audio-visual content.

## 5 The portability Regulation and its regulatory content

On 09.12.2015 the European Commission published its Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, the already in the introduction mentioned portabReg-P.<sup>51</sup>

During the further procedure, the Committee on Legal Affairs of the European Parliament has worked on the Regulation proposal and included several proposals for modifications, the so called Draft Report, which had been published on 21.06.2016, hereinafter called the portabReg-D.<sup>52</sup>

Recently on 24.05.2017 the European Parliament passed the final draft of the portability Regulation (hereinafter called “portability Regulation”), which had been accepted by the European Council of Ministers on 08.06.2017.<sup>53</sup> The new rules will start to apply in the first quarter of 2018 (nine months after its publication in the EU's Official Journal).<sup>54</sup>

### 5.1 Who is affected by the portability Regulation

---

<sup>48</sup> *Christmann*, ZUM 2012, 187, 189.

<sup>49</sup> *Christmann*, ZUM 2012, 187, 189.

<sup>50</sup> See here the very critical article of *Brost*, ZUM 2016, 689.

<sup>51</sup> Downloadable on:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0627&from=EN>.

<sup>52</sup> Downloadable on:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-585.465+01+DOC+PDF+V0//EN&language=EN>.

<sup>53</sup> Downloadable under: <http://data.consilium.europa.eu/doc/document/PE-9-2017-INIT/en/pdf>.

<sup>54</sup> <http://www.consilium.europa.eu/en/press/press-releases/2017/06/08-portability-of-digital-services/>.

The portability Regulation introduces a common approach in the Union to the cross-border portability of online content services, by ensuring that subscribers to portable online content services which are lawfully provided in their Member State of residence can access and use those services when temporarily present in a Member State other than their Member State of residence, Article 1 (1) of the portability Regulation.

According to Article 2 (5) of the portability Regulation “online content service” means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union that a service provider is lawfully providing online to a subscriber in his Member State of residence on a portable basis and which is an audio-visual media service within the meaning of Directive 2010/13/EU or a service the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner.

This definition is quite broadly and therewith does not only include films, tv-series, recordings and live-broadcasts of sport events, concerts or news, but also the online supply of music, games, apps, software and data bases.<sup>55</sup>

But, according to Articles 3 and 6 of the portability Regulation the Regulation does not apply, where the online content service is free of charge and where the online content service provider does not verify the subscriber’s Member State of residence. This means that online content services like YouTube or Flickr do not fall under the portability Regulation but vice versa need to keep with their licensing agreements.<sup>56</sup> Radio licence fees are not regarded as a fee in the meaning of the portability Regulation, so that public-service broadcasters likewise don’t fall under the portability Regulation.<sup>57</sup> Also stationary services like for example services bound to a specific cable connection do not fall under the portability Regulation as they already on their own terms are not portable and therefore can’t be transported to another country by the consumer.<sup>58</sup>

Ultimately, where the provider requires a fee for its services, it is irrelevant who the payee is. This is important to mention because, sometimes providers of telecommunications and providers of online content services cooperate with each other without invoicing separately. For example, where the provider of telecommunication services offers the possibility to additionally book a music streaming service of for example Spotify, the consumer then only will pay the fee to the provider of the telecommunication services, who will then again compensate the provider of the online content service in their internal relationship.<sup>59</sup>

## **5.2 The obligation to offer trans-border portability – Article 3**

Article 3 of the portability Regulation contains the actual obligation of the service provider to enable a subscriber who is temporarily present in a Member State to access and use the online content services in the same manner as in the Member State of residence.

---

<sup>55</sup> Recital 5; *Ranke/Glückler*, MMR 2017, 378; *Roos*, MMR 2017, 147, 149; *Ehle/Werner*, CR 6/2016, 377.

<sup>56</sup> *Ehle/Werner*, CR 6/2016, p. 377.

<sup>57</sup> *Roos*, MMR 2017, 147, 149.

<sup>58</sup> *Ehle/Werner*, CR 6/2016, p. 377.

<sup>59</sup> Recital 18 of the portability Regulation; *Ranke/Glückler*, MMR 2017, 378,379.

### 5.2.1 Member State of residence

The Member State of residence there again is defined in Article 2 (3) of the portability Regulation as the Member State, determined on the basis of Article 5, where the subscriber has his or her actual and stable residence.

This is a huge improvement with regard to the foregoing versions respectively proposals of the portability Regulation. The above mentioned foregoing version portabReg-P defined the Member State of residence as the Member State where the subscriber is habitually residing. This definition had been criticised a lot. This broad and indefinite definition led to huge legal uncertainties as an official and definite definition of what a habitual residence is, didn't and doesn't exist. Therewith the interpretation of the phrase "habitual residence" would have been let over to an individual case by case assessment by the European Court of Justice.<sup>60</sup>

Thankfully the European Parliament has heard these critics and changed the wording of the definition as mentioned above. The now approved definition of the Member State of residence is much better and especially much more easy to prove. The verification of the stable residence respectively the Member State of residence of the subscriber is very important to the right holders, as otherwise the principle of territoriality impends to be degraded because of abuse by the users.<sup>61</sup>

Even though, the verification of the subscribers' Member State of residence is most important for the right holders, the costs and the risks of determining and verifying the subscriber's Member State of residence rely according to the portability Regulation mainly on the service providers.<sup>62</sup>

According to Article 5 of the portability Regulation the service provider shall at the conclusion and upon the renewal of a contract for the provision of an online content service provided against payment of money, verify the Member State of residence of the subscriber by using not more than two of the means of verification listed in the following of the clause and shall ensure that the means used are reasonable, proportionate and effective.

Also this clause constitutes a huge improvement with regard to the foregoing versions. Article 5 of the portability Regulation now contains a list of verification measures which could be seen to be reasonable, proportionate and effective. Moreover, the clause explicitly says that not more than two of the listed measures should be used. Such a clarification and such a list hadn't been included in the portabReg-P which therefore had been criticised a lot as it again caused a lot of legal uncertainty in the relationship between the right holders and the service providers.<sup>63</sup> The inclusion of such a list therefore contributes to more legal certainty and clarification for the parties concerned.

---

<sup>60</sup> See here the meanings of *Ehle/Werner*, CR 6/2016, p. 377, 378 and *Roos*, MMR 2017, 147, 149 with regard to the usage of the phrase "habitual residence".

<sup>61</sup> *Roos*, MMR 2017, 147, 150.

<sup>62</sup> Art. 5 of the portability Regulation.

<sup>63</sup> See for example *Ehle/Werner*, CR 6/2016, 376, 378.

The short notification that not more than two of the listed measures should be used, is a contribution to the principle of minimization of data which lays down that the assessment of data always should be done in an adequate and necessary manner.<sup>64</sup>

The necessity of such a notification becomes clear when looking on the previous version, the portabReg-D, of the portability Regulation and the comments made hereto. In the portabReg-D, Article 3b subsequence 2h allowed the service providers and right holders to also agree on any other verification criterion which affords the same level of security as the listed previous criteria, provided that it does not call the current contract into question.<sup>65</sup> It consequently had been discussed that the parties concerned therewith also could agree on more than two verification criteria.<sup>66</sup>

In order to impede an escalating verification and the usage of measures inappropriate in the eyes of the European Commission, the European Parliament probably has included this short clarification. Moreover, Recital 26 of the portability Regulation now contains a further explanation with regard to a cautious use of the verification measures and straightens out that *“unless the subscriber’s Member State of residence can be verified with sufficient certainty on the basis of a single means of verification, providers should rely on two means of verification.”* This is to be attributed to the principle of adequacy. All verification measures should always be used in a reasonable, proportionate and effective manner.<sup>67</sup>

Where the service provider is in doubt about the subscriber’s Member State of residence, the provider is allowed to repeat the verification measures or request the subscriber to provide the information necessary to determine the subscriber’s Member State of residence.<sup>68</sup> Where the service provider fails to verify the subscriber’s Member State of residence, because the subscriber fails to provide the required information, the service provider shall not give the subscriber access from a Member State other than the Member State of residence.<sup>69</sup>

This is also a huge difference to the foregoing versions. The portabReg-P did not even regulate the case where the service provider on whatever reason is not able to verify the subscriber’s Member State of residence. The portabReg-P only allowed holders of copyright and related rights or those holding any other rights in the content of online content services in its Article 5 (2) to require that the service provider makes use of effective means in order to verify that the online content service is provided in conformity with Article 3 (1), provided that the required means are reasonable and do not go beyond what is necessary in order to achieve their purpose. The portabReg-D only opened the possibility to the service provider to deny access to the online content from a Member State other than the Member State of residence on a voluntary basis where the subscriber decides not to provide the information required.<sup>70</sup> This would have led to a huge detriment of the right holders who with the above mentioned regulations would have had difficulties to fight their rights.

---

<sup>64</sup> Wolff, BeckOK Datenschutzrecht, Prinzipien, no. 42.

<sup>65</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-585.465+01+DOC+PDF+V0//EN&language=EN>.

<sup>66</sup> Roos, MMR 2017, 147,150.

<sup>67</sup> Recital 26 of the portability Regulation.

<sup>68</sup> Article 5 no. 2 and 3 of the portability Regulation.

<sup>69</sup> Article 5 no. 3 of the portability Regulation.

<sup>70</sup> Article 3b of the protabReg-D.

The portabReg-D also included a clarification that a subscriber only can have one Member State of residence.<sup>71</sup> Therewith, users regularly temporary present in another Member State concluding a contract for online content services in that Member State, wouldn't have fallen under this Regulation. It consequently had been doubted whether this situation had been intended by the European Commission.<sup>72</sup> Probably this may be a reason why the final portability Regulation doesn't include such a clarification, in order to not exclude one special group of consumers.

### 5.2.2 Temporary presence

The wording "temporarily present" is defined in Article 2 (4) of the portability Regulation as a presence of a subscriber in a Member State other than the Member State of residence for a limited period of time.

Problematic is here, that it remains unclear how long such a limited period of time can be. This isn't defined or explained anywhere in the portability Regulation and therewith gets to a central question with regard to the implementation of the portability Regulation. According to the definition in Article 2 (4) the length of the temporary presence is irrelevant as long as the subscriber has registered a Member State of residence. Also the recitals do not give further indication on what exemplary is to be seen as a temporary stay or presence. Only recital 1 of the portabReg-D entailed a short indication on what a temporary presence could be. Here, stays in another Member State for leisure, business or study purposes were enumerated.<sup>73</sup> But in the portability Regulation only the frame "temporarily present" is used both in the recitals as well as in the Articles without further explanations or examples. This leaves the parties concerned by the portability Regulation with a quite huge legal uncertainty.

As the portability Regulation therewith does not give any explicit rule on the length of a temporary stay, it could be argued that the length of the temporary stay could be negotiated between the right holders and the service providers on a contractual basis. But this would lead to a variety of different time periods regarding the temporary stay in another Member State than the Member State of residence, which then would lead to a very inconsistent result for the different contents. This would absolutely contradict the aim of the portability Regulation to provide consumers with the same online-content which they have access to in their Member State of residence when they temporarily are residing in another Member State.<sup>74</sup>

Furthermore, now Article 7 no. 1 of the portability Regulation prohibits any contractual provision setting a maximum time limit for the trans-border access of the online content service. This means that the service providers even are not allowed to include a general time limit for the portability in their terms and conditions.

The missing of a clear rule with regard to a time-period for the trans-border access has been criticized throughout every version of the portability Regulation. Even though the European Parliament decided to not further clarify or define this component for the application of the

---

<sup>71</sup> Recital 23a of the portabReg-D.

<sup>72</sup> *Roos*, MMR 2017, 147, 150.

<sup>73</sup> Recital 1 of the portabReg-D.

<sup>74</sup> Recital 18 of the portabReg-D; *Ranke/Glückler*, MMR 2017, 378, 380.

portability Regulation.<sup>75</sup> Therefore, it has to be assumed that the legal uncertainty with regard to the temporary presence is approved by the legislator. One reason for that could be that it shall be avoided that by setting a general maximum time limit some consumers might be excluded to benefit from the portability Regulation. This may be consumers having their stable residence in one Member State but working in another Member State and therefore stay in the other Member State during the week or consumers staying in another Member State for longer time period like half a year or a year (exchange students, secondments abroad, etc.). In case of a fixed time limit of for example 3 months these consumers probably won't be able to make use of the portability Regulation.

The legislator therewith obviously considers and decides in the favour of the consumer and approves a kind of legal uncertainty to the detriment of the service providers and indirectly also for the right holders.

It therewith also in the final version of the portability Regulation remains unclear, how and if the time period for the access out of another Member State could be limited. Actually the service providers feel the need to set a maximum limit which needs to be identified in some way. In cases of doubt, a clarification with regard to a maximum time limit, probably will then be the part of the judiciary as the legislator denied to decide in this matter.

### 5.2.3 Quality of the service

Where the offered online content service falls under the portability Regulation, Article 3 no. 3 of the portability Regulation eases the burden of offering trans-border portability in that way, that the service providers do not need to offer the same quality of the online content during the stay in another Member State than the Member State of residence. The online content providers then only have to inform the user of the level of quality provided for in other Member States, Article 3 no. 4 of the portability Regulation.

These clauses existed similarly in the previous versions of the portability Regulation and had been interpreted in that way, that the service providers would be allowed to generally offer lower quality of their services in other Member States than the Member State of residence.<sup>76</sup> As this would have led to a counteraction of the objective of the portability Regulation, the European Parliament included an additional sentence at the end of Article 3 no. 3. There it now says: *“The provider shall not take any action to reduce the quality of delivery of the online content service when providing the online content service in accordance with paragraph 1.”*

Further on, recital 22 of the portability Regulation makes clear, what actually is meant and intended by Article 3 of the portability Regulation. The service provider shall not be liable for a loss of quality which is ascribed to the local online access, except where the service provider has promised a specific quality also in other Member States.<sup>77</sup> Recital 22 hereto explains exactly: *“Requiring that the delivery of online content services to subscribers temporarily present in a Member State other than their Member State of residence be of the same quality*

---

<sup>75</sup> Ehle/Werner, CR 6/2016, 376, 377; Roos, MMR 2017, 147, 149; Ranke/Glückler, MMR 2017, 378, 380.

<sup>76</sup> Stellungnahme Verbraucherzentrale NRW, p. 6; Roos, MMR 2017, 147, 149.

<sup>77</sup> Roos, MMR 2017, 147, 149.



*as in the Member State of residence could result in high costs for providers of online content services and thus ultimately for subscribers. Therefore, it is not appropriate for this Regulation to require that providers ensure a quality of delivery of such services that would be beyond the quality available via the local online access chosen by a subscriber while temporarily present in another Member State. In such cases the provider should not be liable if the quality of delivery of the service is lower. Nevertheless, if the provider expressly guarantees a certain quality of delivery to subscribers while temporarily present in another Member State, it should be bound by that guarantee. The provider, on the basis of the information in its possession, should provide its subscribers in advance with information concerning the quality of delivery of an online content service in Member States other than their Member State of residence, in particular the fact that the quality of delivery could differ from that applicable in their Member State of residence. The provider should not be under an obligation to actively seek information on the quality of delivery of a service in Member States other than the subscriber's Member State of residence. The relevant information could be provided on the provider's website.”*

Regarding the obligation to inform the subscriber of the quality offered in other Member States, with regard to the foregoing versions of the portability Regulation it had been criticized that for example the wording of Article 3 subsequence 3 of the portabReg-D was missing some clarifications. It had been argued that it also had to be added, that the information has to be provided in a clear and comprehensible manner. Moreover, it should have been added, that the information has to be provided before the conclusion of the contract or in case of existing contracts, shortly after coming into force of the final portability Regulation.<sup>78</sup>

Also these critics have been taken up by the European Parliament and have been included into the above cited recital 22 as well as into Article 3 no. 4 of the portability Regulation, which now reads: *“The provider shall, on the basis of the information in its possession, provide the subscriber with information concerning the quality of delivery of the online content service provided in accordance with paragraph 1. The information shall be provided to the subscriber prior to providing the online content service in accordance with paragraph 1 and by means which are adequate and proportionate.”*

### **5.3 The fiction of being “at home” – Article 4**

Article 4 of the portability Regulation contains the fiction that *the provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber’s Member State of residence.*

In the first instance it seems like there will be no big difference in the relationship between licensee and licensor. As Article 4 of the portability Regulation simulates that regardless of where the consumer accesses his online content services, the access will be simulated to be out of the Member State of residence, so that there will be no repeal of the principle of territoriality and the territorial licences. In future it therefore has to be distinguished between a trans-border access further on being in need of trans-border licences and the portability of

---

<sup>78</sup> Stellungnahme Verbraucherzentrale NRW, p. 6,7.

online content where solely a licence for the subscriber's Member State of residence is needed.<sup>79</sup>

That such a fiction may constitute a significant restriction of the freedom of contract will be discussed further under point 5.6.

#### **5.4 Cross-border portability without payment of money – Article 6**

According to Article 6 of the portability Regulation service providers who offer their online content services without payment of money are allowed to likewise offer trans-border portability of their offered online content under the premise that they then verify the subscriber's Member State of residence.

Where the service providers offering online content free of charge decides to offer cross-border portability, he has to inform both the subscribers and the right holders of his decision in advance.<sup>80</sup>

Providers who offer their online content without payment of money and decide to offer trans-border portability have to follow the rules of the portability Regulation, Article 6 no. 3 of the portability Regulation.

The ruling of article 6 of the portability Regulation has obviously been enclosed in order to compensate an imbalance emerging out of the advantages given with regard to the attractiveness of services also offering trans-border portability between service providers offering their services against payment of money and those offering their services free of charge.

On the other hand, the general inclusion of online content services without payment of money into the scope of the portability Regulation would involve a major change to the way how those services are delivered and could also involve disproportionate costs for service providers operating with lower budgets and offering their services free of charge.<sup>81</sup> Therefore, it has been chosen to solely include an option for these service providers to choose freely if they want to take these investments and offer trans-border portability or not.

#### **5.5 Unenforceability of contractual clauses – Article 7**

In order to guarantee the trans-border portability, Article 7 no. 1 of the portability Regulation regulates that *any contractual provisions, including those between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, as well as those between such providers and their subscribers, which are contrary to this Regulation, including those which prohibit cross-border portability of online content services or limit such portability to a specific time period, shall be unenforceable.*

---

<sup>79</sup> Recital 23 of the portability Regulation; *Roos*, MMR 2017, 147, 149; *Ranke/Glückler*, MMR 2017, 378, 381.

<sup>80</sup> Article 6 no. 2 of the portability Regulation.

<sup>81</sup> Recital 20 of the portability Regulation.

Moreover, Article 7 no. 2 of the portability Regulation says that the Regulation *shall apply irrespective of the law applicable to contracts concluded between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, or contracts concluded between such providers and their subscribers.*

This means that even right holders from outside the EU are obliged to follow the rules of the portability Regulation and can't waive this rule by choosing a different jurisdiction in the underlying licence agreement.<sup>82</sup>

Such a clarification had also been missing in the proposal of the European Commission (the portabReg-P) and therefore has led to diverse discussions with regard to contracts concluded with copyright holders outside the EU<sup>83</sup>. This issue will be discussed further later in this paper.

According to Article 9 of the portability Regulation the Regulation also applies to contracts concluded and rights acquired before the date of its application. This applies for existing contracts both between subscriber and service provider as well as between service provider and right holder. Such a rule is important and necessary in order to create the same starting position for all the service providers in the internal market and in order to enable the service providers to offer their services completely in all Member States.<sup>84</sup> The service providers are given a 2 months' period in order to implement the verification obligation according Article 9 no. 2 of the portability Regulation.

### 5.5.1 Relationship between subscriber and service provider

As clauses contrary to the obligations of the portability Regulation shall be unenforceable and as the Regulation also applies to existing contracts, subscribers do not need to cancel their existing contracts in order to enter into a new contract.

An explicit ruling with regard to that doesn't exist in the portability Regulation but can be indicated in the context.

Furthermore, with regard to that the committee on legal affairs of the European Parliament had added an amendment to recital 26 of the portabReg-D, which has been taken up in the final version of the portability Regulation with some further improvements. Recital 32 of the portability Regulation now says: *“Changes to the terms of use of online content services offered in packages combining an electronic communications service and an online content service that are made strictly in order to comply with the requirements of this Regulation should not trigger for subscribers any right under national laws transposing the regulatory framework for electronic communications networks and services to withdraw from contracts for the provision of such electronic communications services.”*

---

<sup>82</sup> Ranke/Glückler, MMR 2017, 378, 381.

<sup>83</sup> See here for example Ehle/Werner, CR 6/2016, 376, 379.

<sup>84</sup> Ranke/Glückler, MMR 2017, 378, 381.

This also indicates that an extraordinary termination right with regard to the online content service contract to the subscriber also in case of the change of the terms and conditions (presumed the terms and conditions already contain a valid opening clause with regard to the unilateral change of the terms and conditions) probably also must not be granted by the service providers. Especially, as the inclusion of rulings regarding the portability Regulation mostly will be to the benefit of the consumer as he receives an additional usage possibility of his online content service without having to pay more.

For the service providers it therefore would be advisable to already now start complementing their terms and conditions with regard to the changes under the implementation of the portability Regulation. For example, a clause informing the customer about the conditions of the trans-border access and under which conditions the service provider might stop the trans-border access to the service.<sup>85</sup> Also a clause explaining, that a trans-border portability of the online content first will be available when the Regulation comes into force would be a helpful and a preparatory measure.<sup>86</sup> Moreover, the service providers need to prepare for and maybe should already now start to collect additional data of their existing customers in order to be able to prove the two required verification methods with the start of the portability obligation.

Although the portability Regulation contains a strict obligation for the service providers to offer trans-border portability of the online content against payment of money, the portability Regulation doesn't contain any sanctions in case of noncompliance with the rules.

But competition law and civil law already seem to provide sufficient sanction opportunities so that additional sanctions in the portability Regulation probably are redundant.

Firstly, service providers could be held liable to pay compensation where the subscriber for example had to buy a new subscription in another Member State because he couldn't access the content normally provided under his existing subscription in his Member State of residence.<sup>87</sup>

Secondly, the rules of competition law obligate the service providers to comply with the obligation to offer trans-border portability to their subscribers according to Article 3 (1) of the portability Regulation. Where the service providers don't follow the obligation to offer trans-border access of the online-content services, they consequently risk to be admonished on the basis of competition law.<sup>88</sup>

Competition law and especially the rules of unfair competition law only have been harmonised to a certain extent and there still exist various differences between the Member States.<sup>89</sup> Even though, undistorted competition and consumer protection are highly important factors in the legal framework of the European Union. Legal protection of fair competition in the internal market therefore is not even justified but absolutely necessary. As long as there is no complete harmonisation of unfair competition law in the European Union, the single competition rules in the single Member States are very important in order to retain fair

---

<sup>85</sup> *Ranke/Glöckler*, MMR 2017, 378, 382.

<sup>86</sup> *Roos*, MMR 2017, 147, 151.

<sup>87</sup> *Roos*, MMR 2017, 147, 151.

<sup>88</sup> *Roos*, MMR 2017, 147, 151.

<sup>89</sup> *Ohly*, UWG-Kommentar, C. LauterkeitsR u EU-Recht, no. 1.

competition in the internal market.<sup>90</sup> The essence of competition law of prohibiting impairing commercial practices even though is the same in each Member State.

Therefore, as Article 3 of the portability Regulation aims to allow consumers a trans-border access to their online-content throughout the Member States of the European Union, it simultaneously aims to further on develop the digital single market in the European Union and to contribute to the interests of the participants in the market. Where a service provider decides not to comply with the obligation of Article 3 of the portability Regulation, he distorts the market to the detriment of both their subscribers and their competitors. Therefore, the noncompliance with the obligation to offer trans-border portability constitutes a tangible interference of the market participants' interests. Such a tangible interference exists nearly all the time, as the consumer potentially could wish to trans-border access his online-content at any time. Consequently, such interference could barely be disproved by the service provider and therefore leads to a high risk of written warnings and liability on the basis of competition law.

### 5.5.2 Relationship between service provider and right holder

As already said above contractual clauses, as well in new as in existing contracts, denying trans-border access of online-content won't be enforceable any more when the portability Regulation comes into force (Article 7 of the portability Regulation). Therewith, the fiction of Article 4 of the portability Regulation gets significant importance as this seems to be the only possible solution in order to keep up with the principle of territoriality. As because of the fiction the access shall be deemed to occur solely out of the Member State of residence, there is no need to regulate a trans-border access in the underlying licence agreement. The service provider only needs to hold a territorial licence for the subscriber's Member State of residence.

This is also underlined in recital 31 of the portability Regulation where it says at the end, that: *“The application of this Regulation should also allow right holders not to have to renegotiate their existing licensing contracts in order to enable providers to offer cross-border portability of their services.”*

That the fiction of Article 4 of the portability Regulation constitutes a significant restriction of the freedom of contract merely can be questioned. Even though, it seems to be the most convenient way in order to implement portability at short notice to the consumer's benefit.<sup>91</sup>

### 5.5.3 Relationship between the right holders and their contracting partners

The relationship between the right holders and their contracting partners, being for example the authors and so on, hadn't really been taken into account by the previous versions of the portability Regulation (the portabReg-P and portabReg-D). Therewith a clarification with regard to that portability restricting clauses won't be applicable in the whole licencing chain, meaning also in the relationship between the right holders and their contracting partners, was missing.<sup>92</sup>

---

<sup>90</sup> Ohly, UWG-Kommentar, C. LauterkeitsR u EU-Recht, no. 2.

<sup>91</sup> Roos, MMR 2017, 147, 151.

<sup>92</sup> Roos, MMR 2017, 147, 151.

Now in the final version of the portability Regulation in Article 7 no. 2 there is at least a clarification that the Regulation shall apply irrespective of the law applicable to the concluded contracts. To the contrary of all other clauses in the portability Regulation, this clause includes also “*those holding any other rights in the content of online content services*”, so that it should be clear, that a restriction of the portability of the content will be invalid throughout the whole licencing chain.

## **5.6 Protection of personal data - Article 8**

Article 8 of the portability Regulation clarifies that processing of personal data naturally also within this Regulation and especially with regard to the verification measures required by Article 5 of the portability Regulation, has to be carried out in compliance with the Directives 95/46/EC and 2002/58/EC.

Recital 28 of the portability Regulation for example contains a clarification with regard to IP address checks. Here it says: “*...for the purpose of verification of the subscriber’s Member State of residence what matters is not the precise location of the subscriber, but rather the Member State in which the subscriber is accessing the service. Accordingly, data on the subscriber’s precise location or any other personal data should neither be collected nor processed for that purpose. ...the data resulting from the checking of IP addresses should only be collected in binary format and in compliance with applicable data protection rules. The provider should not exceed that level of detail.*”

Compared to the foregoing versions the clause regarding the protection of personal data has been extended with regard to the proper handling of personal data. Especially important in this regard is Article 8 no. 3 of the portability Regulation, which says that data collected pursuant to Article 5 of the regulation, shall not be stored longer than necessary in order to complete verification and shall be deleted immediately after the verification is completed.

Service Providers therefore already should take into account that they will be handling additional personal data in order to fulfil their verification obligations and that they therefore need to make sure that they comply with the data protection rules and that their security systems are working.<sup>93</sup> They should be prepared for the start of the portability Regulation to that extent that they are ready to handle the collected personal data in compliance with data protection law right from the start on. Where the regulations of data protection law are not followed the service providers risk to receive high fines.<sup>94</sup> It further on should be taken into account that services providers handling and processing more personal data could even more attract the attention of hackers and therefore should be prepared for that and update their security systems.<sup>95</sup>

## **6 Portability – the end of territorial licences?**

---

<sup>93</sup> Recital 26 of the portability Regulation.

<sup>94</sup> Especially with regard to the new regulations and fines under the General Data Protection Regulation applicable from May 2018 on.

<sup>95</sup> *Roos*, MMR 2017, 147, 151.

Having looked at the regulatory content of the portability Regulation in detail, the main question is now, if the portability Regulation actually ends the application of territorial licences in the fields of copyright as feared by some of the parties concerned.

Where the portability Regulation obliges the service provider to guarantee access to the offered online content services also outside the licence territory of the Member State of residence, the service provider on the other side is obliged by the licencing agreement with the licensor not to exceed the licencing agreements in other cases than the portability obligation under the portability Regulation.<sup>96</sup>

Although, that there in general will be no change in and of the underlying license agreement, as the fiction allows retaining unchanged with the exclusive licenses in the respective license territory, there will be a change or a minus in the possibilities of control for the right holders.

The technical measure of geoblocking throughout the European countries won't be an appropriate tool any more as the obligation of portability prohibits the usage of geoblocking in order to prevent the consumer's access from other countries than the Member State of residence.<sup>97</sup>

In consequence of this deprivation of control, the right holders should try to additionally protect their rights on a contractual basis. The option to oblige the service provider to only use protection measures agreed on with the right holder on a contractual basis is not precluded by the portability Regulation. Recital 26 of the portability Regulation explains hereto: “ ... *Therefore, this Regulation should oblige providers of online content services to make use of reasonable, proportionate and effective means in order to verify the Member State of residence of their subscribers. To that end, providers should use the means of verification listed in this Regulation. This does not preclude agreement between providers and right holders on those means of verification within the limits of this Regulation. The objective of this list is to provide legal certainty as to the means of verification to be used by providers as well as to limit interference with subscribers' privacy. ...* ”

But even though, of course, the new rules of the portability Regulation do constitute a restriction of the freedom of the right holders to configure their licencing agreements at their own will. What already started in the area of broadcasting via satellite seems now to continue in the fields of online content services in order to contribute to a single European market.<sup>98</sup>

Critics argue that the portability Regulation could be seen to be a restriction in the right holder's freedom to contract and his commercial scope. But, because of the fact, that such a restriction only happens in relation to the temporary presence of a subscriber in a Member States other than his Member State of residence, it could also be argued that the portability Regulation vice versa strengthens the position of the right holder and confirms the application of exclusive territorial licences.<sup>99</sup> Moreover, recital 12 of the portability Regulation asserts that “...*this Regulation should ensure cross-border portability of online content services in all sectors concerned and hence provide consumers with an additional means of accessing online*

---

<sup>96</sup> Ehle/Werner, CR 6/2016, 378.

<sup>97</sup> Ehle/Werner, CR 6/2016, 379; Spindler, CR 2016, 76.

<sup>98</sup> Ranke/Glückler, MMR 2017, 378, 382.

<sup>99</sup> Ranke/Glückler, MMR 2017, 378, 382.

*content lawfully, without affecting the high level of protection guaranteed by copyright and related rights in the Union, without changing the existing licensing models, such as territorial licensing, and without affecting the existing financing mechanisms. The concept of cross-border portability of online content services should be distinguished from that of cross-border access by consumers to online content services provided in a Member State other than their Member State of residence, which is not covered by this Regulation.*“ This shows the interest of the legislator to preserve also the interests of the parties concerned and to retain with the system of territorial licences which are highly important for the financing and the production of online content.<sup>100</sup>

On the other hand, where the right holders and the service providers haven't explicitly agreed on it on a contractual basis, the right holders do not have that much impact on measures taken by the service provider in order to verify the subscriber's Member State of residence. Not all of the listed verification measures in Article 5 (1) of the portability Regulation are suitable to undoubtedly verify the subscriber's Member State of residence. For example, Article 5 (1) h) and i) of the portability Regulation, which aim to verify the subscriber's Member State of residence through a utility bill, a billing address or a postal address, are not to be seen as effective verification measures as these are not tied to a registered stable residence.<sup>101</sup>

Consequently, it could be beneficiary for the right holders to, even though an amendment of the existing licensing agreements basically wouldn't be necessary, include some clarifications into the licensing agreements with regard to for example which verification measures should be taken, when for example a repetition of the verification of the subscriber's Member State of residence because of doubts should be done or when a service provider should deny trans-border access to the online content in case of doubts of for example the subscribers' Member State of residence.<sup>102</sup> Such measures could help to better protect the right holder's position and interests.

So in the end, even though the parties concerned have to tolerate some restrictions in their freedom to contract, the portability Regulation does not constitute the feared end of territorial licences. Some points like a time period for the trans-border access are not regulated conclusively, which leads to a legal uncertainty for the parties concerned. Even though, the final version of the portability Regulation constitutes a huge improvement in comparison to the first proposed portabReg-P or the intermediate version, the portabReg-D, and has eliminated most of the criticised points. Where points like a maximum time limit haven't been regulated conclusively, this probably happened intentionally in order to not exclude any group of consumers from the benefit of the trans-border access in the European Union.

Where there still are legal or practical uncertainties both the right holders and the service providers do good at regulating these aspects on a contractual basis or in their licence agreements in order to gain certainty with regard to the implementation of the portability Regulation.

---

<sup>100</sup> With regard to the importance of territorial licences and with regard to the production and financing of online content, see also the proposed amendment to recital 10 of the committee on legal affairs in the portabReg-D.

<sup>101</sup> *Ranke/Glückler*, MMR 2017, 378, 382.

<sup>102</sup> *Ehle/Werner*, CR 6/2016, 379.



## 7 International context

As already shortly mentioned above, notwithstanding the implementation of the portability Regulation in the European Union, it is questionable to what extent the portability Regulation will be enforceable and realizable in an international context.

Regarding the relationship between service provider and consumer there will be no difference, as the consumer habitually residing in a European country always will be able to appeal to the portability Regulation as compulsory EU-consumer-right-law.<sup>103</sup>

But regarding the relationship between licensor and licensee another non-EU law can be chosen to be applicable. In general, agreements under the law of obligations principally follow the rules and the jurisdiction chosen by the contracting parties. Because of the freedom of contract and the private autonomy the contracting parties are free to agree on the legal system under which their contract shall be performed.<sup>104</sup>

Therefore, although the existence of Article 4 of the portability Regulation, which simulates the usage of the online content service in the licence territory, Article 7 (1) which prohibits circumventing the rules of the portability Regulation by contractual agreements and Article 7 (2) of the portability Regulation, which declares the applicability of the Regulation irrespective of the law applicable to contracts between the other parties in the licencing chain, licensor and licensee are able and free to agree on the applicability of another (non EU) legal framework in their contract.<sup>105</sup>

### 7.1 The portability Regulation in the context of international copyright law

It could be supposed that the discussed rules of the portability Regulation are to be classified to follow the rules of copyright law as all questions regarding the formation and the extent of copyright always are to be examined on the basis of copyright law and therewith independently from contract law.<sup>106</sup> Consequently licensor and licensee are only free to choose the applicable law regarding their contractual relationship, but regarding the underlying copyright they have to follow the rules of the national copyright law where the copyright emerged. This is a consequence of the principle of territoriality of copyright which implies that copyright always follows the rules of the country of protection.<sup>107</sup>

Regarding Article 4 of the portability Regulation and the simulation of the usage of the online content service in the licence territory, one could without problems argue that this is

---

<sup>103</sup> As the portability Regulation ties in with the habitual residence of the consumer and also Art.6 subsequence 1 of the Rome I Convention links the applicable law regarding B2C contracts to the habitual residence of the consumer. Consequently, an EU-consumer will always be able to appeal to Art. 6 subsequence 2 of the Rome I Convention.

<sup>104</sup> *Martiny*, MüKo BGB, Rom I-VO Art. 3, no. 8.

<sup>105</sup> Art. 3 of the Rome I Convention; *Ehle/Werner*, CR 6/2016, 380.

<sup>106</sup> v. *Welser*, Praxiskommentar UrheberR, Vorbem. Vor §§120ff., no. 14; *Dietz*, Wandtke UrheberR, p. 532, no. 45.

<sup>107</sup> v. *Welser*, Praxiskommentar UrheberR. § 32b , no. 5; v. *Welser*, Praxiskommentar UrheberR, Vorbem. Vor §§120 ff., no. 14; *Goldstein und Hugenholtz*, International Copyright, 2012, p. 97; *Dietz*, Wandtke UrheberR, p. 532, no. 45.

something coming out of the sphere of copyright law and therefore has to be ruled in accordance with the rules of copyright law. This in consequence means that the principle of territoriality applies.

Regarding Article 7 (1) of the portability Regulation and the ruling that any agreement between licensor and licensee circumventing the portability obligation and the simulation won't be enforceable, a direct connection to copyright law can't be drawn that easily. Article 7 (1) of the portability Regulation explicitly mentions "contractual provisions". Consequently, one could also assign the clause of Article 7 (1) of the portability Regulation to contract law.

## 7.2 The portability Regulation in the context of international contract law

In the case, Article 7 (1) of the portability Regulation will be interpreted under the precondition to be out of the sphere of contract law, the question, if despite another choice of law in the licence agreement, Article 7 of the portability Regulation will be applicable and enforceable, will depend on a courts' decision.<sup>108</sup>

This question is of high importance and especially of high impact for the implementation of the portability Regulation. Licence Agreements often are based on non EU law (especially US law) and therefore the possibility to circumvent the implementation of Article 7 (1) of the portability Regulation by choosing a non EU legal framework would be a risk for the enforceability of the portability Regulation as a whole.<sup>109</sup>

## 7.3 Enforceability in front of European courts

Although licensee and licensor are free to agree on a non EU legal framework, the chosen law and jurisdiction could be displaced by internationally binding legal rules. Especially Article 9 of the Rome I Regulation, which constitutes that *overriding mandatory provisions shall be applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation*, is of importance in this context. In case that Article 9 of the Rome I Regulation should be applicable, this would result in that EU courts would judge rulings in the licence agreements circumventing Article 7 (1) of the portability Regulation to be invalid although they might be valid in another jurisdiction outside the EU.

It is therefore questionable if Article 7 (1) of the portability Regulation could be classified to be an overriding mandatory provision in the meaning of Article 9 of the Rome I Regulation.

According to Article 9 (1) of the Rome I Regulation *overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation*.

Article 7 (2) of the portability Regulation now contains a clarification that the Regulation shall apply irrespective of the law applicable to contracts concluded between the parties of the licencing chain. Such a clarification had been missing in the foregoing versions (the

---

<sup>108</sup> Ehle/Werner, CR 6/2016, 380.

<sup>109</sup> Ehle/Werner, CR 6/2016, 380.

portabReg-P and the portabReg-D) for what reason it had been discussed if the portability Regulation claims an overriding applicability in an international context.<sup>110</sup> Such a discussion has now become redundant as Article 7 (2) of the portability Regulation explicitly explains that Article 7 (1) of the portability Regulation shall be seen to be a mandatory provision. Therefore, Article 7 (1) of the portability Regulation is to be classified as a mandatory provision in the meaning of Article 9 (1) of the Rome I Regulation and therefore has to be observed by the courts.

Furthermore, the CJEU said in amongst others the Ingmar Case<sup>111</sup> that European law at least needs to be overriding and applicable in an international context, where the parties of a contract mainly operate in the EU Member States. Because only then, a circumvention of European law by choosing another legal framework can be inhibited.<sup>112</sup>

Consequently, it becomes clear that the realisability and the practical implementation of the portability Regulation and the right to portability as well as its harmonisation effect are reliant on the mandatory applicability of the portability Regulation. Otherwise right holders from outside the EU could then deprive from the obligation to portability by choosing a suitable legal framework, while EU-licensees even though would be obliged to offer portability to their customers. Consequently, EU-licensees would either fail to fulfil their contractual obligations regarding the territorial exclusivity of the licence in connection to the licensor or would violate their legal obligation to offer portability. As there is always the chance that a licensee prefers to follow his contractual obligations (for example because he otherwise risks to pay a contractual penalty or to miss the licence at all, whereas the portability Regulation until now doesn't contain any penalty or consequence in case of non-implementation) this would harm the harmonisation of the digital single market.<sup>113</sup> As this is a development or an outcome which can't be intended by the European Commission, Article 7 (2) of the portability Regulation obviously had been included in order to gain more legal certainty and to clarify the status and the scope of applicability of the portability Regulation.

#### **7.4 Enforceability in front of non-EU courts**

Even though European Courts would judge Article 7 (1) of the portability Regulation to be classified as an overriding mandatory provision in the meaning of Article 9 of the Rome I Regulation, non-European courts won't be obliged to do similarly. Article 9 I of the Rome I Regulation only gives priority to overriding mandatory provisions of the EU. Non-European courts, for example US-courts, might rather give priority to overriding mandatory provisions of their laws. There is no obligation for non-European courts to give priority to foreign European overriding mandatory provisions. Therefore, the discussion of the applicability of the Rome I Regulation in order to protect the enforceability of Article 7 of the portability Regulation, will probably be irrelevant in a non-European context.<sup>114</sup>

---

<sup>110</sup> See especially *Ehle/Werner*, CR 6/2016, 381.

<sup>111</sup> CJEU Case, C-381/98 *Ingmar GB Ltd. V. Eaton Leonard Technologies Inc.*

<sup>112</sup> *Dittl*, Handbuch UrheberR, p. 776, no. 135, 136; *Martiny*, MüKo BGB, Art. 3 Rom I-VO, no. 98-103; *Ehle/Werner*, CR 6/2016, 380.

<sup>113</sup> *Ehle/Werner*, CR 6/2016, 381.

<sup>114</sup> *Ehle/Werner*, CR 6/2016, 381.

Following the obligation to offer portability to the subscribers, the licensee in an international context always risks to be sued in front of non-European courts for breach of contract with the licensor assumed that territorial exclusivity and non-portability had been agreed.

This there again, may have interdependency on the virtue of jurisdiction clauses in trans-border licence agreements. The Federal Court of Justice of Germany decided that it can be assumed that US courts principally won't apply overriding mandatory provisions in the meaning of Article 9 of the Rome I Regulation where the underlying contract is based on US law.<sup>115</sup> Where there are strong doubts that a foreign court will apply international overriding mandatory provisions, the higher regional court of Munich decided that national jurisdiction will apply, although the parties agreed on a foreign jurisdiction. Consequently, it is doubtful whether choice of law and jurisdiction clauses, having as a consequence that overriding mandatory provisions won't be applied, will be effective and enforceable in a European country.<sup>116</sup>

## 7.5 Conclusion

To sum up, this would mean, that although, a licensor could rely on the virtue of a jurisdiction clause and file a suit in front of a foreign non-European court he could not rely on the virtue of such a clause in front of a European court. To put it in another way, although the parties agreed on a jurisdiction outside the EU, the licensee could file a suit against the licensor in front of a European court in order to get assessed that the contractual clauses restricting the right to portability are invalid and that the offering of portability won't constitute a breach of contract.

Therefore, foreign judgments confirming the contractual restriction of the right or obligation to portability won't be enforceable in the EU. This is because in general the acknowledgement and the enforceability of a foreign judgment in the EU depends on its compatibility with the national law and the *ordre public* according to Article 9 of the Rome I Regulation.<sup>117</sup>

As the European market is a quite huge market, non-European firms probably can't renounce the profit drawn from the European market. Therefore, it probably can be assumed that also non-European firms and especially also US-firms, as we have seen in the case of paramount, will comply with the rules of the portability Regulation without bothering European service providers with contractual clauses denying them to offer trans-border access to their subscribers.

## 8 Summary

With the portability Regulation one of the first steps on the way to a digital single market in the European Union has been implemented. The portability Regulation thereby gives an indication on what the European Commission is planning to do. Unrestricted access and exchange of digital content including the break-through of copyright related territorial

---

<sup>115</sup> *Ehle/Werner*, CR 6/2016, 381; Federal Court of Justice of Germany (BGH), 05.09.2012 – VII ZR 25/12.

<sup>116</sup> *Ehle/Werner*, CR 6/2016, 381.

<sup>117</sup> *Martiny*, MüKo BGB, Art. 9 Rom I-VO, no. 39; *Ehle/Werner*, CR 6/2016, 381.

restrictions seems to be on the agenda of the European Commission. On the other hand, the European Commission as well has taken up the cause of the strengthening of cultural diversity and the possibilities for the creative industries. Especially the creative industries underline the importance of territorial licences.<sup>118</sup>

One of the most important factors for the right holders is the principle of territoriality and this isn't restricted or suspended by the portability Regulation. Neither the service providers nor the right holders or the authors or holders of related rights therefore should have to fear losses in sales or additional market potential.<sup>119</sup>

The portability Regulation though constitutes a very consumer-friendly Regulation, which aims to open a borderless digital, European economic area in the fields of digital subscription services in the EU. The worry of higher prices for the offered online-content services to the detriment of the consumers on the other hand may be doubted as the market for online content services is a high competitive market.<sup>120</sup>

Furthermore, the portability Regulation may finally terminate the discussions about a legally effective restriction of the usage of geoblocking in the fields of online content services. With regard to that, subsequently to the "Murphy decision" it even had been discussed to generally allow cross-border access to online content services. The portability Regulation therefore constitutes a moderate restriction of the principle of territoriality with regard to copyright. The portability Regulation seems to be a balanced ruling taking into account the interests of the parties concerned in an as broad as possible manner. The fear expressed by the parties concerned and especially the right holders that the portability Regulation will terminate the exclusivity of national copyright royalties, can't be acknowledged after having examined this question in this paper.

Even more important however, is that the service providers conscientiously perform their verification obligations with regard to the Member State of residence of the subscribers.

As we have seen above, only the temporary presence seems to be regulated in an insufficient or imprecise manner in the portability Regulation. This is a point deserving a concretisation, either on a contractual basis or through the judiciary.<sup>121</sup> It therefore can be expected that the right holders especially will exert influence on the verification mechanisms taken by the service providers as this is one of the main factors where they are able to exercise control.<sup>122</sup>

As the period for the coming into force of the portability Regulation has been set to 9 months from the publishing date, the parties concerned do well to start technical and contractual preparations.<sup>123</sup>

---

<sup>118</sup> *Spindler*, CR 2/2016, 73, 76.

<sup>119</sup> *Roos*, MMR 2017, 147, 151; Statement DAV, p. 8.

<sup>120</sup> *Roos*, MMR 2017, 147, 151; *Heermann*, ZUM 2016, 835, 838.

<sup>121</sup> *Druschel/Lehmann*, CR 4/2016, 244, 245.

<sup>122</sup> *Roos*, MMR 2017, 147, 152.

<sup>123</sup> Art. 8 subsequence 2 of the draft report of the European Parliament the portabReg-P; *Roos*, MMR 2017, 147, 152.

Apart from that, the portability of online content is one of the first steps into the right direction with regard to the creation of a functioning European digital single market and draws a parallel to the Roaming Regulation.

The portability Regulation therewith constitutes a considerable benefit for the consumers without restricting the right holders' rights too extensively.

## Table of reference

### Legal texts

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on ensuring the cross-border portability of online content services in the internal market, Brussels, 9.12.2015 COM(2015) 627 final

DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market (COM(2015)0627 – C8-0392/2015 – 2015/0284(COD))

REGULATION (EU) 2017/... OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of on cross-border portability of online content services in the internal market 2015/0284 (COD), Brussels, 24 May 2017

Treaty on the Functioning of the European Union

DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

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

DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

### Webpages

<http://data.consilium.europa.eu/doc/document/PE-9-2017-INIT/en/pdf>

<https://ec.europa.eu/digital-single-market/en/digital-single-market>

[http://ec.europa.eu/dgs/legal\\_service/arrets/08c403\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/08c403_en.pdf)

[http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40023](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40023)

[http://europa.eu/rapid/press-release\\_IP-14-15\\_en.htm](http://europa.eu/rapid/press-release_IP-14-15_en.htm)

[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40023/40023\\_4638\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_4638_3.pdf)

[http://europa.eu/rapid/press-release\\_IP-16-2645\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2645_en.htm)

[http://europa.eu/rapid/press-release\\_IP-15-5432\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5432_en.htm)

<https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive>

<https://www.spotify.com/uk/legal/end-user-agreement/>

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0627&from=EN>

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+COMPARL+PE-585.465+01+DOC+PDF+V0//EN&language=EN>

<http://www.consilium.europa.eu/en/press/press-releases/2017/06/08-portability-of-digital-services/>

#### Books/ Commentaries

*Manfred A. Dausen*, Handbuch des EU-Wirtschaftsrechts, Band 1, Stand Juni 2016 (40. EL), C.H. Beck Verlag

*Hartwig Ahlberg, Horst-Peter Götting*, Beck'scher Online-Kommentar Urheberrecht, 16. Edition, Stand: 01.04.2017, C.H. Beck Verlag

*Heinrich Amadeus Wolff, Stefan Brink*, Beck'scher Online Kommentar Datenschutzrecht, 20. Edition, Stand: 01.05.2017, C.H. Beck Verlag

*Artur-Axel Wandtke, Winfried Bullinger*, Praxiskommentar zum Urheberrecht, 4. Auflage 2014, C.H. Beck Verlag

*Ernst-Joachim Mestmäcker, Heike Schweitzer*, Europäisches Wettbewerbsrecht, 3. Auflage 2014, C.H. Beck Verlag

*Jürgen Säcker, Roland Rixecker, Hartmut Oetker, Bettina Limpberg*, Münchener Kommentar zum BGB, 6. Auflage 2015, C.H. Beck Verlag

*Paul Goldstein, Bernt P. Hugenholtz*, International Copyright, Principles, Law, and Practice, 3rd Edition 2012, Oxford University Press

*Artur-Axel Wandtke*, Urheberrecht, 5. Auflage 2016, De Gruyter

*Marcel Bisges*, Handbuch Urheberrecht, 1. Auflage 2016, Erich Schmidt Verlag

*Ansgar Ohly, Olaf Sosnitza*, Kommentar zum Gesetz gegen den unlauteren Wettbewerb, 7. Auflage 2016, C. H. Beck Verlag



## Articles

*Kristina Ehle, Jannis Werner*, Online-Inhalte auf Europareise – Zum Entwurf einer Portabilitätsverordnung für Online-Inhalte in der EU, CR 6/2016, 376 ff.

*Stefan Brost*, Der lange Schatten von “Murphy” – droht das Ende der Exklusivität nationaler Urheberrechtslizenzen?, ZUM 2016, 689 ff.

*Sabine Christmann*, “Murphy”: Zwischen Revolution und Einzelfallentscheidung, ZUM 2012, 187

*Gerald Spindler*, die Modernisierung des europäischen Urheberrechts, Der Vorschlag zur Portabilitäts-VO und die Planung der EU-Kommission, CR 2/2016, 73 ff.

*Johannes Druschel, Michael Lehmann*, Ein digitaler Binnenmarkt für digitale Güter, CR 4/2016, 244ff.

*Philipp Roos*, Grenzenloses Streaming? Die Portabilitätsverordnung als Teil der europäischen Urheberrechtsreform, MMR 2017, 147

*Verbraucherzentrale Nordrhein-Westfalen*, Stellungnahme der Verbraucherzentrale Nordrhein-Westfalen zum Vorschlag der EU Kommission für eine Verordnung zur Gewährleistung der grenzüberschreitenden Portabilität von Online-Inhaltendiensten vom 05.01.2016

*Deutscher Anwalt Verein*, Stellungnahme des deutschen Anwaltsvereins durch den Ausschuss Geistiges Eigentum zum Vorschlag der Europäischen Kommission für eine Verordnung des Europäischen Parlaments und des Rates zur Gewährleistung der grenzüberschreitenden Portabilität von Online-Inhaltendiensten im Binnenmarkt (COM(2015) 627 final v. 9.12.2015), Stellungnahme Nr.: 5/2016

*Johannes Ranke, Moritz Glöckler*, Grenzüberschreitende Portabilität von online-Inhaltendiensten im Binnenmarkt – Auswirkungen auf Vereinbarungen von territorialen Lizenzen, MMR 2017, 378.

*Johanna Spiegel*, Ich packe meine Koffer und nehme mit... meine Online-Inhalte, DSRITB 2016, 693.

*Peter W. Heermann*, Kein Ende nationaler Urheberrechtslizenzen nach der “FAPL/Karen Murphy” – Entscheidung des EUGH, Erwiderung und Ergänzung zu Brost, ZUM 2016, 689, ZUM 2016, 835.

*Martin von Albrecht, Anette Mutschler-Siebert, Tobias Bosch*, Die Murphy-Entscheidung und ihre Auswirkungen auf Sport- und Filmlicenzen im Online-Bereich, Die exclusive territorial Rechtevergabe ist kein Modell der Vergangenheit!, ZUM 2012, 93

*Jochen Bernhard, Heinrich Nemeček*, Grenzüberschreitende Fußballübertragungen im Lichte von Grundfreiheiten, geistigem Eigentum und EU- Wettbewerbsrecht, GRURInt 2012, 293