

Transmissions over the Internet and the European satellite model

*Heijo Ruijsenaars**

Ten years ago, Feer Verkade raised substantive concerns with respect to the idea of adopting a country-of-reception approach to determining (under the international private law rules of the Netherlands) the applicable law with regard to tort and intellectual property law infringements in on-line situations.¹ Today, with the European Commission (DG Information Society) urging a "stronger, more consumer-friendly Single Market for online music, films and games in Europe",² that issue still represents a key challenge in need of a practical solution so that content can be made available on-line Europe-wide. This article suggests that under European copyright law such a solution is possible.

1. Introduction

Through the recent adoption of the Audiovisual Media Services (AMS) Directive, revising the former Television without Frontiers Directive, the European media law framework for the content of cross-border television broadcast services is extended to the (audiovisual) content of Internet transmissions, both so-called "linear" services.³ The reason for the extension may seem obvious: given the ever-increasing convergence of audiovisual media, the delivery of audiovisual content services to the end-user should be subject to the same rules, if the sole differences between such services are related to the functioning of the consumer's device for receiving and displaying the audiovisual signal.⁴ Through this important step by the Community legislator, the principle of technological neutrality of audiovisual signal delivery was recognized,⁵ if not confirmed.⁶

* Mr H.E. Ruijsenaars is Legal Adviser of the European Broadcasting Union, Geneva, Switzerland.

¹ *Verkade*, Handelingen NJV 1998-II, p. 52 *et seq.* (intervention on report of Prof. *M.V. Polak*).

² EC Communication on Creative Content Online in Europe's Single Market, COM(2007) 836 final, of 3 January 2007, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_en.pdf.

³ Henceforth, the "AMS Directive" is the consolidated version of the revised Television without Frontiers Directive (Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities). The Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, which includes the amendments, was published in the *Official Journal* of 18 December 2007, L 332, p. 27, and has to be implemented into national law by the end of 2009.

⁴ Of course, when (standard) PC technology becomes an integrated part of (standard) TV sets, even this technical distinction will be obsolete.

⁵ The new definition of broadcasting as any kind of "linear" service implies that the former, technically orientated debate on "point-to-point/multipoint" connections lost its relevance. Today, this can also be illustrated by Internet real-time streaming via peer-to-peer technology.

⁶ It should be mentioned that the AMS Directive does make a certain distinction between "linear" and "non-linear" (*i.e.* on-demand) services, as the latter are subject to a less stricter (*e.g.* advertising) regime. However, this distinction is not directly based on the technology involved, but on the greater choice and control that the consumer of an on-demand service can exercise, and with regard to the lower degree of impact of such services on society; see Recital 42 of the AMS Directive.

At the same time, this extension raises the question of whether the 1993 Satellite and Cable (Sat/Cab) Directive, which was specifically designed to complement the Television without Frontiers Directive from a copyright angle,⁷ should be modernized in that sense too. In literature, it has been suggested that the Sat/Cab Directive is outdated and unlikely to be revised. It would "slowly fade away, as contractual practice, technological measures, media convergence and the 'horizontal' rules of European copyright law gradually supersede it."⁸ It remains to be seen whether this expectation can be maintained and whether such a revision may still be worthwhile.

2. The "injection rule" of satellite broadcasting as a model for European on-line transmissions

In the IViR study "The Recasting of Copyright & Related Rights for the Knowledge Economy", published in November 2006, one of the main conclusions is that the *territorial nature of the economic rights remains one of the main obstacles* to the creation of a true Internal Market in products of creativity.⁹ It can, of course, be assumed that a fully harmonized framework on copyright law, like the existing framework for Community Trademarks and Community Designs, could make that territorial nature, at least within the EU borders, obsolete. The more interesting question, however, is whether this particular obstacle could not also be overcome, and perhaps more appropriately so, by recognition of a simplified structure for *determining the place where the act of the communication to the public by online transmissions occurs* within the European Community, as was done for satellite broadcasting in the Sat/Cab Directive. According to Art. 1(2) of that Directive, the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the Earth (sometimes called the "injection rule").

This question is obviously closely linked (but not identical) to the issue of *applicable law* in Internet infringement situations under copyright law which, although far from new,¹⁰ is still not satisfactorily resolved on European level. Evidently, applying a "country-of-reception" theory to transmissions via the Internet would lead to a

⁷ For an introductory overview of the history and structure of the 1993 Sat/Cab Directive, see, for instance, *Rumphorst*, The EC Directive on satellite and cable, *Diffusion* (EBU), Autumn 1993, p. 30 *et seq.*; *Dreier*, Europäisches Gemeinschaftsrecht, II. Abschnitt. Richtlinien des Europäischen Parlaments und des Rates, Nr. 3, in *Möhring/Schulze/Ulmer/Zweigert*, Quellen des Urheberrechts, Band 6.

⁸ So wrote Prof. B. Hugenholtz, "Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?", in *Die Zukunft der Fernsehrichtlinie/The Future of the "Television without Frontiers" Directive*, Proceedings of the Conference organized by the Institute of European Media Law (EMR) in cooperation with the European Academy of Law Trier (ERA), Schriftenreihe des Instituts für Europäisches Medienrecht (EMR), Band 29, 2005, also available (in English and Dutch) at <http://www.ivir.nl/publications/hugenholtz/copyrightwithoutfrontiers.html>.

⁹ See http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

¹⁰ See (e.g.) *Ricketson/Ginsburg*, International Copyright and Neighbouring Rights, 2nd Ed. (2006), Vol. II, N. 20.08 *et seq.* *Lucas*, Report on Country of Origin vs. Territoriality (Conference on "European Copyright Revisited", Santiago de Compostela, Spain, June 2002), available at http://ec.europa.eu/internal_market/copyright/conferences/2002-06-santiago-rapport-lucas_fr.htm;

Schönning, Applicable law in transfrontier online transmissions, 170 RIDA (1996), p. 21 *et seq.* For Dutch law, see *van Eechoud*, Overleefde territorialiteit: Grensoverschrijdende auteursrechtinbreuken onder de 'Rome II'-ontwerpverordening, AMI 2005-2, p. 45 *et seq.* (also available at http://www.ivir.nl/publicaties/eechoud/AMI2005_2.pdf).

situation *ad absurdum*: since such transmissions can be received worldwide, this theory would require that an Internet transmission of any kind of protected material complies with all national laws worldwide. Consequently, if such on-line transmission were a copyright infringement only in one or a few countries of reception, this would render it virtually impossible for such a transmission to take place from anywhere in the world. The administrative burden for the transmitting entities would be likely to prevent Internet transmissions from being contemplated at all.¹¹

Although a comprehensive analysis of this issue, even limited to European copyright law, cannot be offered by this short article alone, the debate should be enriched with some further thoughts.

❖ **Actual audience of transmission relevant for negotiations and remuneration**

The first important point to realize is that reception or, to be more precise, receivability of a transmission is only the *consequence* of the act of communication to the public, but it is not a copyright-relevant act in itself. That is the main reason why the injection rule in the Sat/Cab Directive cannot be considered "exceptional" (e.g. compared to the *lex loci delicti*); it is actually an explicit confirmation of the initial understanding of the act of communication to the public as defined by Art. 11*bis*(1)(i) of the Berne Convention.¹² It is therefore not surprising that the infamous "Bogsch theory", which favoured the country-of-reception approach for communications to the public, has never been implemented,¹³ at least in Europe. However, this does not mean that such consequences of the transmission are entirely irrelevant. The fact that reception itself is not a copyright-relevant act, and that the transmitting entity therefore has to clear the necessary rights in accordance with the law of the country where the act of transmission takes place, does not exclude this rights clearance *taking account of the actual circumstances*, such as the *actual audiences*, of the envisaged transmission (whether they are situated in the transmitting country or abroad) for the negotiations on the conditions of the licence, and in particular on the calculation of the total amount of remuneration payable to the right-holders. That is why the Sat/Cab Directive too merely provides that the necessary authorisations for the satellite broadcast must be acquired by contract, but does not define the conditions, thereby

¹¹ It might be argued that this would be much less problematic if it were technically easy to block the public's access to the transmission in those countries where it would be unlawful (see *footnote 32* below). However, aside from the cost of such measures, in that case the transmitting entity would first need to investigate to which countries the unlawfulness would apply, which does not reduce the administrative burden significantly.

¹² In the 1928 Rome Conference Records (*Actes de la Conférence réunie à Rome du 7 mai au 2 juin 1928*), p. 259-260, the Committee on Article 11*bis* BC was of the view that, if a broadcast was lawful in the country where it originated, the author could not demand damages from that broadcaster on the grounds that the broadcast was likely to be picked up in a country where the same broadcast (had it originated there) would have been unlawful. Moreover, in the 1948 Brussels Conference Records (*Documents de la Conférence réunie à Bruxelles du 5 au 26 juin 1948*), p. 114, it is stated that "only the act of transmission ("*émission*") is relevant, not the reception or listening", and elsewhere (p. 265-266) that "the original broadcast is subject to the law of the country where it takes place, even if the radio waves go beyond the national frontiers and are received abroad (this reception outside the country of origin is irrelevant)."

¹³ See *Schønning, op.cit.* (footnote 10), p. 35.

leaving the details thereof (including the remuneration) to negotiations by the parties concerned, taking account of the actual circumstances.¹⁴

Some may be inclined to argue that until the Internet came into existence the former discussions on the right of communication to the public referred to broadcasting only, whereas the (publicly accessible part of the) Internet network would give this right a much larger dimension.¹⁵ On the other hand, the 1996 WIPO treaties were clearly intended to deal with this new dimension, and it was ultimately decided to uphold Art. 11bis BC in its entirety.¹⁶ It can therefore be assumed that for generally determining the place where any communication to the public via the Internet occurs, the country-of-origin-of-transmission principle is part of current international law.

Another relevant aspect is that, under current copyright law, the act of "making available" is a sub-category of the act of communication to the public, which indicates that in general the same approach should apply to both types of on-line transmissions. However, as the "making available" right is construed as a *separate* exclusive right (also for holders of neighbouring rights), a question that can be raised is whether for on-demand services *more safeguards* to protect the right-holders' legitimate interests may be necessary, and particularly as such type of transmissions are expected to create "download-to-own" services and thus replacing the traditional distribution of physical copies of protected material.

❖ No solution in the "Rome II" Directive

It should be noted that within the EU an opportunity to resolve the question of the applicable law in Internet situations generally existed during the debates on the new EU Directive on the Law Applicable to Non-Contractual Obligations ("Rome II").¹⁷ It is explained elsewhere why final adoption of that Directive largely failed to achieve such a solution.¹⁸ It could even be concluded that, for IPR infringements, the final

¹⁴ See Recital 17 of the Sat/Cab Directive. The European Court of Justice, in its decision of 14 July 2005, *Lagardère (Europe 1) v. SPRE and GVL* (available at <http://www.curia.eu.int>) concluded that a French broadcaster was required to pay equitable remuneration to both the French and the German neighbouring rights' collecting societies, as its long-wave signal, intended for the territory of France, was sent out from a retransmitting station in Germany. However, in this case the long-wave signal was an *additional* signal to the one operated directly from France, which means that there were two *separate* terrestrial broadcasting operations being carried out in the respective territories of the two Member States. The ECJ could therefore rule that the Sat/Cab Directive was not applicable and that the economic value of those two acts of broadcasting had to be evaluated separately (but also that the broadcaster was not entitled unilaterally to deduct royalties paid in Germany from the royalties paid in France). However, the most significant aspect of this case is the ECJ's ruling that the criteria indicated in Recital 17 of the Sat/Cab Directive (which include actual audience and the language version) to determine what constitutes equitable remuneration for a communication to the public are not confined to the case of satellite broadcasting, but also apply to terrestrial broadcasting.

¹⁵ Excluded here are transmissions over TCP/IP ("Internet Protocol") interfaces, as these do not use the publicly accessible network of the World Wide Web and are not necessarily of a cross-border nature.

¹⁶ Article 8 WIPO Copyright Treaty (on the Right of Communication to the Public) starts: "*Without prejudice to the provisions of (...) 11bis(1)(i) and (ii) (...) of the Berne Convention.*"

¹⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L199, 31 July 2007, p. 40 *et seq.*

¹⁸ See *van Eechoud*, The Position of Broadcasters and Other Media under "Rome II", Proposed Regulation on the Law Applicable to Non-Contractual Obligations, IRIS-Plus (Supplement to IRIS - Legal observations of the European Audiovisual Observatory), 2006-10, also available at http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus10_2006.pdf.en.

wording of the Directive seems to create more confusion than before. According to Art. 8(1) of this new Directive, the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country *for which protection is claimed*. On the other hand, the Directive does not deal with the vital question of where the *infringing act* is deemed to occur. Moreover, for infringements of a unitary Community intellectual property right (such as the Community Trademark or Design), the law applicable shall be, for any question not governed by the relevant Community instrument itself, the law of the country *in which the act of infringement was committed*. The different wording would seem to suggest a different method of determining the applicable law. However, it is highly unlikely that such a difference is, or could have been, intended.¹⁹ In its Explanatory Memorandum for the Directive's proposal of 22 July 2003, the European Commission explicitly referred to the fact that "in copyright cases the courts apply the law of the country *where the violation was committed*" [emphasis added]. This indicates that the initial purpose of Art.8(1) was to arrive at exactly the same means of determining the applicable law as with respect to infringements of a Community intellectual property right in Art. 8(2). Obviously, it would then have been more appropriate to use the same wording also in Article 8(1).

❖ **Pro and contra the injection rule**

In the light of this *impasse*, it is worth looking more closely at the application of the country-of-origin principle to transmissions via the Internet. From the European Parliament there appears to be a certain political willingness to maintain this principle.²⁰ However, as the above-mentioned IViR study suggested that several arguments could be raised against that,²¹ a more detailed analysis is required.

• **"Race to the bottom"?**

As a possible argument against applying the injection rule to on-line transmissions the IViR study mentions that "right holders feared they would lose control of copyrighted content once it would be offered online, under a license, somewhere within the European Union. (...) In a worst case scenario applying the country of origin rule to the Internet would result in a 'race to the bottom' between Member States seeking to attract service providers by offering the most lenient level of copyright protection." This cannot be a sufficient reason, as it needs to be realized that these fears were also voiced before adoption of the injection rule in the Sat/Cable Directive, and that they have proven solvable in practice.

¹⁹ For example, Recital 26 of the "Rome II" Directive states that "regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved", without making any distinction between paragraphs (1) and (2) of Art. 8. Cf. also *Rivers*, The applicable law, EBU Conference "Quo Vadis", Copyright?, Barcelona, March 2006, available at http://www.ebu.ch/CMSImages/en/rivers_en_tcm6-43890.pdf.

²⁰ In its Resolution of 14 March 2007 on the 2005 Recommendation on Music Online, the European Parliament stressed the need for " (...) guaranteeing the efficiency and coherence of licensing systems (e.g. by enabling broadcasters to acquire rights in accordance with the copyright legislation of the Member State in which the programme in question originates) (...)." From a political perspective, *Schønning, op. cit.* (footnote 10), prefers the country of reception approach, referring, however, to *on-demand* transmissions only.

²¹ See particularly p. 28-29 of the above-mentioned study, *op. cit.* (footnote 9).

First of all, since all EU Member States have to apply the *acquis communautaire* in copyright law, including the 2001 (InfoSoc) Copyright Directive, which harmonizes the right of communication to the public right throughout the EU, such a "lenient" level of protection should not be available at all within the European Community.²² In particular, since the on-line communication to the public would therefore require the user to obtain the prior permission of the author(s) concerned, the latter (or his/their representative management society) is in *full control of all contractual conditions* he may wish to agree upon, including the level of the royalty. In practical terms, through the level of the royalty sufficient control is available also for holders of mere remuneration rights for such communications. That situation would thus be exactly the same as for satellite broadcasting.

It may also be worth considering whether the injection rule would have to cover all types of Internet transmission services. If the main goal is to complement the AMS Directive, it would suffice to limit the applicability of the injection rule to those media services which fall within that Directive.²³ This would exclude, for example, electronic versions of newspapers and magazines, as well as all other services whose principal purpose is not the provision of audiovisual programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose.²⁴

Moreover, these deliberations concern European copyright law only. Given that the purpose of such an injection rule would be to make it easier for European media providers to deliver their services to all EU Member States on the basis of one applicable copyright law, it could (and probably should) be stipulated that operators of on-line transmission services with headquarters outside the EU would not be entitled to benefit from such a rule.

- ***Complicated attachment rules?***

It is assumed by the IViR study that determining the "place of injection" by a network-based service would probably require a set of complex rules of attachment. For which services would this assumption apply? Under the Sat/Cab Directive, the point of attachment of a satellite broadcast is the place where the broadcast actually starts; in practice, this is nearly always the satellite broadcaster's headquarters or its principal establishment, which is also the usual place where a broadcaster operates its Internet servers. When applying the injection rule to such a broadcaster's on-line services, this point is thus likely to be the same. Consequently, with respect to on-line broadcast services, the injection rule is already a safeguard against circumvention of the *acquis communautaire*, as the practical point of attachment remains that broadcaster's headquarters, independently of where the on-line copyright licence may have been obtained.

²² Art. 3 of the 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. The *enforcement* of IPR rules is harmonized through the EC Directive 2004/48/EC of 29 April 2004 of the European Parliament and of the Council on the enforcement of intellectual property rights.

²³ An important exception hereto must be made for *radio* transmission services, which (if transmitted via satellite) already benefit from the injection rule under the Sat/Cab Directive, but are not covered by the AMS Directive (just as they were not covered by the Television without Frontiers Directive).

²⁴ See Recitals 18 and 21 of the AMS Directive.

A potentially harder question may be whether more safeguards would be needed for on-line transmission services by other Internet operators, such as *webcasters* (i.e. other than broadcasters which use the Internet in addition to their broadcasting network). Those network operators would not need such a complex technical infrastructure as broadcasters and may thus be inclined to shift their principal place of operations more easily (e.g. for tax reasons). Experience with localizing "domain name squatters" may also suggest a certain need for more safeguards as regards mere on-line service operators. Consequently, there could be a certain desire for regulatory guarantees in order to prevent deliberate delocalization of the injection point to circumvent EU copyright rules. On the other hand, it must first be asked whether European webcasters would really wish to delocalize to an address outside the EU, given that they would thereby lose the (media law) benefits of the country-of-origin principle under the AMS Directive. Secondly, must such safeguard provisions necessarily be complicated? The mere fact that an Internet transmission passes through several "cache servers" on its way to the end-user is explained by technical reasons alone and does not change the initial point of injection. To compel media service providers to apply European standards, would it not suffice to apply rules similar to Art. 1(2)(d) of the Sat/Cab Directive, so that EU copyright law would be applicable if either the webcaster's headquarters or its (main) server is located in an EU country?²⁵

- ***Effects of non-harmonized exceptions and limitations?***

In the IViR study, it is considered a further problem that "exceptions and limitations that apply locally to works made available online may differ significantly from Member State to Member State, making the prospect of a 'level playing-field' for content-related services unlikely". Can this be a decisive argument? The assumed problem of non-harmonized exceptions and limitations within the EU is a horizontal issue and thus not specific to on-line transmission activities. Moreover, given the principle of *exhaustion* following on from the authorized distribution of *physical carriers* of protected material (e.g. selling films on DVDs via the Internet) within the EU, it is unclear whether such a problem would be significantly aggravated by on-line transmissions.

For the field of broadcasting this partial lack of EU harmonization has not yet created any difficulties, since the mere reception of a broadcast in another country, e.g. via terrestrial overspill (which occurs in all transmissions by national broadcasters), is not a relevant act under copyright law. In fact, for satellite broadcasts it is the very purpose of the injection rule in the Sat/Cab Directive to confirm that this problem is practically obsolete. If the satellite broadcast of a programme is lawful under an exception in accordance with the law of the country of injection, reception of that broadcast in the rest of the satellite footprint cannot be prohibited - at least not for copyright reasons. If it were then argued that for the Internet this would not provide a sufficient safeguard because Internet transmissions are also received outside Europe, that would already be the case today for many satellite broadcasts whose footprints do

²⁵ Rules to ensure transparency and information on any "information society" service provider's identity and place of establishment within the EU are already in place: Art. 5 of the e-Commerce Directive requires, *inter alia*, that the name of the service provider, his geographic address, details permitting his contact, and relevant entries in trade or similar registers, are provided. Under Art. 3a of the AMS Directive, similar information is to be provided by any audiovisual media service provider.

not stop at the EU's (or Council of Europe's)²⁶ borders; even the imaginary case of a fully EU-harmonized exception or limitation would not then help as it might still differ from the law outside Europe. Is it not rather illusionary to expect that the beneficiary of an exception or limitation under his own copyright law could verify whether that exception or limitation would also exist, and would then also have exactly the same meaning and interpretation, in every other part of the world?

It may be conceivable that a delocalization issue *within* the EU could arise, i.e. when the type of media service is *predominantly* based on exercising an exception and the media service provider would prefer the country with the most favourable law for its place of establishment. However, in view of the current exceptions under copyright, this (theoretical) risk might possibly exist in only a few cases and would be more likely to be taken into consideration by on-demand service providers than with regard to linear services. Moreover, since for the physical distribution of (copies of) works and other protected matter derived from exercising such an exception the freedom of establishment under Community law prevails, it is doubtful whether for on-line transmissions this freedom could be severely restricted. If the risk is really considered significant, it would seem more appropriate to provide safeguards only against abusive practices.

- ***No guarantee of creating a single market in the EU?***

The IViR study suggests that if a combination of encryption technology and territorial licensing is capable of emulating national borderlines and partitioning markets in the realm of satellite broadcasting, the same would be true for content delivered over the Internet; introducing a digital "injection right" by itself would therefore not be sufficient to create a single on-line market. This may be a very valid argument, but it seems tantamount to claiming that the Single Market can never be realized as long as it depends on contractual arrangements. Is that not a little too pessimistic?

This argument fails to recognize the fact that the injection rule in the Sat/Cab Directive has proven helpful in allowing satellite (and satellite-to-cable) broadcasting services in the EU to develop at all, also to the benefit of EU citizens and the Internal Market, as otherwise it would be highly unlikely that these services would be flourishing as they are today. Furthermore, insofar as encryption is concerned, it should be realized that such requests can be relevant only in cases where there is a *real economic conflict*. Such potential for conflict would require it to concern the exercise of exclusive rights on a territory-by-territory basis for exactly the same protected material and for exactly the same time period of exploitation. However, that situation is not the rule, but rather the exception. In today's contractual practice, the actual audience as determined by the *language barriers* is by far the most relevant factor for explaining why, in a few cases, certain exploitation borders still exist within the EU. "Potential audience" must not be confused with "hypothetical public", which is irrelevant.²⁷ Most encryption of broadcast programmes simply takes place to *control access* (to the broadcast channel concerned) via subscription agreements, and

²⁶ The Council of Europe's Convention relating to questions on copyright law and neighbouring rights in the framework of transfrontier broadcasting by satellite, of July 1994, provides for the same injection rule as the Sat/Cab Directive, and thus practically extends the application of that rule to the (adhering) countries which are Members of the Council of Europe, but not of the European Community.

²⁷ Cf. recently *Spoor*, Hooggeschat Publiek, AMI 2007-5, p. 141, 144.

only in some cases for purely copyright reasons. There are only a few free-to-air broadcasters in Europe (notably those situated in a small country which shares the language of a much larger country) which feel obliged to encrypt their satellite services in order to avoid a higher financial risk as a result of (certain) right-holders' demands. Moreover, for linear transmission services not only the language differences but also the *viewing and listening habits* of the general public form practical barriers to seriously creating profitable markets in foreign territories, and particularly compared to the size of the national audience. Consequently, when assessing the level of comprehension of, and the willingness to comprehend, linear programmes from other countries, the general public's knowledge of foreign languages should not be overestimated.²⁸

3. Towards a pragmatic approach

In European media law, the country-of-origin principle is essential for the free flow of information and audiovisual programmes in the Internal Market.²⁹ It is therefore noteworthy that no objection to this principle was raised when the new AMS Directive extended that principle to (audiovisual) on-line services, for both linear and non-linear services, indicating that the option of applying the injection rule to Internet transmissions in the EU is not only realistic but also opportune.³⁰

The practical reality of Internet transmission activities is that many linear services, if not the vast majority thereof, will not be targeted at the general public of all countries worldwide. As in the analogue world, the language barriers will continue to divide markets in a natural way. Nearly all European satellite television channels demonstrate that their target audiences are the national or regional public sharing the same or a closely similar language. In the same way, so-called "pan-European" broadcast services cannot be considered to exist unless they take due account of the wide variety of languages. Why otherwise would those broadcast channels aiming to cover the whole or most of Europe (such as Eurosport) decide to offer eight or more different language versions, if not in an attempt to enhance their potential audience? The AMS Directive also takes account of special cases of audiovisual media services specifically targeted at foreign audiences and provides for a solution without rejecting the country-of-origin principle.³¹ At the same time, if a commercial on-demand,

²⁸ Admittedly, the Internet network also moved the language factor into a larger dimension, at least in theory. However, on a global scale most languages are unlikely to create any serious difficulties, and insofar as linear "real-time streaming" (as opposed to on-demand) services are concerned, the time-zone differences added by such scale are another factor to be taken into account.

²⁹ See also Recital 27 of the AMS Directive.

³⁰ In a speech by the DG Media and Information Society Commissioner Ms Viviane Reding: *A "Triple Play" for Europe*, in Munich on 23 January 2006 regarding the revised Television without Frontiers Directive, she said that: "(...) the modernised Directive aims to create an internal market framework for new audiovisual on-demand services, thus allowing, for example, a video-on-demand provider in Britain to deliver his services to all 25 EU Member States on the basis of UK law only, and without the need to respect at the same time 24 other legal regimes. (...) If Europe's content industry really wants to be able to compete with other continents, and if it really wants to become a driver of growth in jobs for the digital economy, we have in particular to start calling into question the territoriality of copyright protection in Europe. And move to a true level-playing-field for content, encompassing the territory of all 25 EU-Member States as a single content space."

³¹ See Article 3 and the criteria in Recital 33 of the AMS Directive. Under Dutch law, also *van Eechoud, op. cit.* (footnote 12), prefers an approach to determine the applicable law focussing on

download-to-own service unambiguously targets the entire general public in each and every EU country (such as music online shops like iTunes), then the rightholders continue to be entitled, also under the injection rule, to use the contractual negotiations for agreeing on the conditions of such licence,³² including the total amount of remuneration.

In the light of the foregoing, it is arguable not only that the injection rule, provided with some additional safeguards for on-demand services, can function very well for European copyright law but also that there should be *reasonable limits* on the exercise of territorial rights within the EU, as dividing Europe into different regions should be allowed only if there are serious economic conflicts involved. After all, if the majority of contractual arrangements would require encryption or other technical means to achieve a territorial split between the EU countries, the new AMS Directive would not be likely to achieve its main goal of guaranteeing the freedom of providing and receiving audiovisual media services from other Member States.

To put the crux of the issue more bluntly: if the mere receivability of Internet transmissions across borders could be regarded as a compelling reason for replacing the injection rule by a country-of-reception approach, the Internet would ultimately, also in Europe, be deprived of its lifeblood, i.e. its wide accessibility. Similarly, the situation for the Single Market in audiovisual services would become worse than it is today: instead of facing a few occasional programme "black-outs", we would be falling into a black hole. No doubt certain right-holders would prefer to continue licensing on a territorial basis only, and the injection rule itself is not intended to prohibit that *per se*. However, it should be much more important to ensure that those on-line services which have reason to believe that they can afford to offer a cross-border service are not unduly restricted in obtaining such a licence lawfully and efficiently. Instead of allowing the (re-)establishment of artificial borders, should we not find appropriate ways to *promote* the availability of European Internet services?

actually targeted audiences, and suggests similar criteria. Those criteria were also used by the ECoJ in the above-mentioned *Lagardère* case (see footnote 17).

³² Commercial on-demand services are likely to be connected also with (certain) right-holders' wishes to limit the territories and restrict the general public's access to such transmissions from other territories. This is possible via so-called "geoblocking" measures (which result in denying the request for access when the incoming request stems from a URL address indicating a non-authorized territory). However, in cases where such measures are intended to work also within the EU borders it should be assessed also whether this would be compatible with the principles of the Single Market and EU competition law.