Evaluation of Legal Limitations regarding the Mobility of Digital Media in the European Union

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ABSTRACT

Digital Media is mobile by nature either being carried on physical devices, moved as files over the Internet or streamed online. Technical, regulatory, contractual or geographical limitations to such a digital mobility are therefore obstacles introduced by companies to serve and protect their commercial interests and intellectual property (IP).
In 2012, the European Commission called for an industrial round table 'Licenses for Europe - Structured Stakeholder Dialogue 2013' under the auspices of Commissioner Michel Barnier to discuss the obstacles to digital mobility and its evolution on a voluntary basis [1].
The objective of this paper is to evaluate if under present European and national legislation and rulings of the European Court of Justice (ECJ) such obstacles and limitations to the purchase and distribution of files and via streaming are contradictory to European laws and regulations and if they could be erased by a dedicated ruling of the ECJ instantly.
The paper should also increase the sensibility of non-legal actors to understand that there are limits to the restriction of user experience and that consumer rights need to be considered as well when implementing technical or legal IP protection mechanisms.

KEYWORDS

digital mobility, obstacles, mobility of digital media, European Union

1 INTRODUCTION

Since the introduction of the possibility to purchase digital content online, border-crossing purchases have become an easy option to obtain digital media from foreign countries. What used to be national markets for media companies using different pricing and sales approaches beforehand, become now generally accessible markets for the international public.
One way to restrict such international access by the seller is to assign national license conditions to digital content for one country only. It can take place by using billing addresses, national payment methods and/or Internet Protocol-addresses (IP-address) of the customers as filtering methods to block access of the customer from the purchase or the digital content itself. Therefore, this then excludes all users from the possibility to order from abroad or use services provided – which were paid for already - while traveling.
In the case of the European Union, it can be doubted if such a geographical discrimination of European customers, while being inside the borders of the EU, is covered legally. The question therefore is, if such limiting factors can constitute an infringement of European law according to the Service Directive [2] and the Free Movement of Goods Treaty [3].
Generally speaking, digital media can be purchased legally in different ways. One option is to acquire it on physical devices like CDs, DVDs, Blue-Ray discs, or non-permanent

devices like USB-sticks or memory cards. Border crossing can then take place in two ways. Either before the purchase when the customer buys them from abroad and the seller ships them cross-border. Alternatively, the customer purchases them locally and moves them abroad afterwards personally.

A second option is to purchase digital media in a downloadable form. Again, border crossing can take place in two ways. Either the media is downloaded within the country of the seller by the customer and transferred later outside the country on physical devices or digitally. Or the customer resides outside the country of the seller and the download itself is already a cross-border action in itself.

A third option is online video streaming. The access to online video streams can either be rented as a regular abonnement (service) or purchased for e.g. specific movies whereas the movies stay on the servers of the streaming company. Border crossing in this context is related to the date of the purchase of the abonnement or the license. In the first case, when the abonnement or license is purchased within the country, can the customer enjoy the services of video streaming afterwards when he is temporarily abroad? In the second case, can a customer sign up for the purchase of abonnement or a license in the beginning while being physically in another country?

Lastly, the question remains what criteria can be employed to determine the physical location of a customer. This can be established during the registration of the customer online, which is usually done with the billing address. In the case of Amazon™, customers being registered with one of the national Amazon™ branches can purchase from all other branches without registering again. In addition, sellers can use the IP-address of the customer to determine the location of the customer and use this location information for the sales or usage process. Likewise, payment methods can be used to exclude customers by either only offering nationally available ones or using the billing address of credit card customers for possible exclusion from the purchase process.

In the following theory chapter, the general concept of freedom of services and goods is investigated and verified, if it applies to digital content as well. In addition, a counter position needs to be investigated to put arguments in perspective.

2 THEORY

As investigated in the report ‘Protection of Customer Rights regarding Digital Media IP: Propositions’ [4] of the national association of consumer protection in Germany, laws about digital media IP protect the interests of owners of IP to a very large extend and not the consumers. Furthermore, buyers are also confronted with lengthy non-negotiable Terms & Conditions (T&Cs) and/or end-user license agreements (EULAs) when buying or using digital media without a real choice of sellers in the market since license conditions are dictated by the license holder and not by the sellers themselves.

In the case of Germany, it is interesting to understand that EULAs are only valid if they have been made available to the buyer before the purchase process. Hence, EULAs that only show up during the installation process or during the opening credits of a video have no legal value (culpa in contrahendo). EULAs made available correctly in a pre-purchase process are, similar as T&Cs, automatically governed by the German Civil Code and cannot contradict its legal base [5].

Although company T&Cs might be clear-cut, it is much less clear if on closer examination they can be upheld against national or European legislation. As a first example, is it legal that Netflix™ checks the geographic position of its customer each time the service is used [6] whereas obviously in the case of DVDs this is neither required nor presently done? The region code for DVD players, which limited DVDs and players to certain regions seem to become out-dated again with the introduction of blue-

ray discs. Nevertheless, in both cases, a region code never presented a geographical limitation within the European Union [7] but covered regions even larger than the European Union.

In order to investigate different types of digital goods and possible applicable legal contexts, the difference between a digital good and a digital service needs to be established because digital contents are not tangible themselves (the physical device like a DVD is a carrier, not the digital content itself). For the discussion at stake, it is assumed that the buyer is always a private citizen without intentions to resell or let on a commercial basis.

Generally speaking, a digital good is a file which can be downloaded locally or purchased on a physical device and can be usually reused by the buyer without limitation.

Articles 34 – 36 of the aforementioned Free Movement of Goods Treaty, which regulate the free movement of goods in the European, do not recognize a specific exclusion right for digital content. Furthermore, even if there were restrictions as explained in the Treaty, they should not constitute a means of arbitrary discrimination or a disguised restriction on trade between member states [8].

The definition can be blurred by the fact that Digital Rights Management (DRM) might require an internet connection to verify the legality of the license and file or as has happened in 2009 with Amazon™, legally correctly bought but incorrectly published eBooks were deleted on Kindles without the permission of the users when Amazon™ found out that the eBooks were sold without a proper license in the shop themselves [9]. As a justification in its T&Cs, Amazon™ retains the right to remove access or files of customers who had previously purchased digital content.

A service can be easily perceived in the case of streaming when, usually by abonnement payment, access to digital content is offered. The service can be blurred again, when e.g. films are purchased but continue to be stored online on the seller's servers and the user can watch them with an internet connection without further restriction.

In the case *Jägerskiöld* [10] the ECJ defined that when rights or licenses are involved it can usually be assumed to be a service. Hence, it can be concluded that in the case of streaming it can generally be assumed to be a service. In the case of downloadable files, the T&Cs often define it as a license purchase without ownership of the digital media rather than a goods purchase; the question nevertheless remains if this is legally correct.

In the aforementioned European Service Directive, it is explicitly mentioned in the summary that the Directive prohibits any discrimination based on nationality or the residence of the service beneficiary. Also digital content, rights and license management are not included in the list of non-regulated services.

Therefore, considering the two major legislative pieces of the European Union involved for the Free Movement of Goods and Services, it could be derived that a limitation to mobility is contradictory to the legal framework.

Since a commercial transaction for digital content is a legal contract between a company and a private person, the question can also be raised if the European Commission is actually empowered to oblige digital media companies to adhere to free movement standards.

In the case of *Pierre Fabre Dermo-Cosmétique SAS* [11] the EJC made clear that a supplier cannot prohibit the sale of its products over the Internet inside the EU with very few exceptions like products where an expert (e.g. pharmacist) needs to explain the product before usage.

Such an interference by the European Commission could also be justified based on anti-trust law. Since by logical consequence, owners of IP for digital media form a monopoly, they can demand from their resellers to comply exclusively with their own perception of user rights. Anti-trust law knows horizontal as well as vertical influences and its impacts. Horizontal means that, either between resellers or IP-holders, they come to an

agreement to treat markets and consumers in a similar, restrictive way. Vertical means that e.g. the IP-holder dictates how and where a reseller has to sell and apply limiting conditions to the digital media.

Actually, a variety of examples will be listed further down which show that the European Commission indeed has the executive power to regulate such issues.

The next chapter will investigate judgements of the European Court of Justice to determine, if certain Terms & Conditions or limitations of services are out of bounds for digital media.

3 METHODOLOGY EUROPEAN COURT OF JUSTICE AND NATIONAL LAW SUITS

Both of the following examples show that in theory licensing can be designed in any way; if it is discriminating against the customers is then to be determined.

In the case of *Karen Murphy vs. Media Protection Services Ltd* [12] the ECJ had to decide if legally acquired decoder cards for Pay TV, which were more cheaply bought or rented in other member states of the European Union, could be legally used, even when license conditions do not allow for cross-border use. In that concrete case, a British pub owner purchased a SKY TV decoder card for public use from Greece, which was retailed much cheaper than in Britain. The visual track for the transmission of football games was universal, the audio track for the transmission continued to be in Greek language due to the Greek decoder card. Since the intended usage was for public viewing in a pub, the transmission was shown without sound and the audio track was of no importance to the pub owner and her customers.

The plaintiff at the same time claimed that a regionalized approach for licensing is common practice to maximize the value of its media rights for the member clubs which she represents [13].

Several legal points of view have to be considered here. On the one hand, there exists the economic interest of each and any company to maximize their turnover and profits. On the other hand, it needs to be determined if this causes monopolistic, oligopolistic, discriminatory or unfavorable customer limitations which then cause conflicts with other pieces of legislation not directly related to IP-issues.

As became clear in the case above, the plaintiffs introduced conditions in their sales system and license contracts in order to effectively maintain a monopoly for each country. Only the highest bidder received licenses in each country and it was contractually and technically forbidden to offer services outside the licensed territory. Two separate aspects of the license holders need to be discussed in this context. First, can they prohibit their resellers of decoder cards to resell outside their territory as specified in the contracts? Second, can they claim financial compensation from end customers because the end customer was enjoying licensed media outside the specified territory and did not pay the full price tag of the specific country?

The ECJ decided that selling outside its own territory is not illegal in the EU; but enjoying IP-protected media, which is not licensed for the specific territory, could be. This creates a catch 22, because the end customer pays for the digital good or service since it is legally sold inside the EU, but does not pay the price assigned to the national territory. The ECJ left this second issue open and did not come to a conclusion at European level referring it back instead to national courts of each member state.

An analogy could be drawn to the reimport of new cars from one member state to the other due to different shop prices applied to territories [14]. There the European Commission became strongly active about 15 years ago, establishing clearly that inter-community purchases are legal and manufacturers are obliged to provide warranty conditions EU-wide.

As another significant example, in the case of *UsedSoft GmbH vs. Oracle International Corp.* [15] it was to be determined by the ECJ if a company reselling used SW-licenses can do this even when the IT-company is prohibiting it explicitly in the license contract. In the specific case, UsedSoft was purchasing licenses not needed anymore by other companies and resold them to companies who wanted to purchase them at a cheaper price than a new license. The SW itself can always be downloaded in its newest version from Oracle's website. Oracle's argument was that a buyer actually never became owner of the software but just purchased the right to use it. Also, the concept of seeing the license separately from the SW makes this clear, because the buyer of the used SW-license actually obtains the newest version from the Oracle website and does not use the older version valid at the time of purchase from the original customer [16].

The ECJ upheld that after having purchased the software, the customer is free to sell the SW again and license conditions of the original contract do not apply to the new customer similar to the first-sale doctrine widely used in the US. The only condition remains that quite obviously the customer who sells the license of the software is not allowed to retain an own copy since this would then be an illegal act of software duplication. Also for obvious reasons a customer is not allowed to sell the same used license repeatedly.

Taking also into consideration as an example German antitrust law (Gesetz gegen Wettbewerbsbeschränkungen - GWB) and the definition of vertical and horizontal influences, the following paragraphs could be used to argue for a further liberation of the digital market of the EU. §1 GWB explicitly prohibits that sellers split their markets into territories because this would eliminate competition in the market. The same paragraph also prohibits price setting by the owner/manufacturer of the product (in this case the license holder).

§18 – 21 describes the limitations of a dominating position in the market and the obligation of the owner to limit the negative effects of its monopoly to the consumers. Especially §19.1 focuses on the topic, that a dominating position in the market can be assumed, when companies invent terms and conditions (T&Cs), which would not exist, if there were more competitors with equal offers in the market.

The variety of relevant precedence cases and references to legal frameworks both at national as well as the European level seem to indicate, that a limitation of digital mobility appears difficult to be justified within the borders of the EU. The next chapter will therefore focus on the argumentation line to abolish unacceptable T&Cs.

4 METHODOLOGY LEGAL AND TECHNICAL BARRIERS

From a definition point, licensing of digital media in itself is a commercial aspect; there does not exist a legislative rule, which obliges companies to consider regions of the world for licensing issues. It is therefore artificially company-made to maximize profit as it was said by the plaintiff in the case of *Murphy* beforehand.

The obvious question then is to what extreme license conditions can be defined and where national or European law steps in to uphold reasonable customer rights. To consider this more in depth the hypothetical example can be used that licenses for movies are available and the license price for the Spanish market are sold at a different price than for the French market. A concept, which is widely used at the moment.

The first step to verify the validity of geographically limiting factors is to determine if even more extreme measures still seem to be plausible. Since most countries are divided also into provinces, would it seem legitimate, that even a finer clustering within a country would be admissible? German anti-trust law would not permit this and also the notion that not everything, which is not explicitly prohibited, is

not automatically allowed would apply in the context of territories.

Or as an alternative, that instead of regions, nationality is used to determine the license contract. It would then mean that being of a certain nationality it would connect one automatically to a certain licensing (and pricing) model independent from where the person is located physically.

Or instead of using these criteria, a focus on age, gender, income or occupation is applied. Age criteria for any kind of industry is becoming less used since it is as yet unclear if this could lead to discrimination based on age prohibited under the non-discrimination regulation of the EU. An income approach is used indirectly when either it can be assumed that a high-price country is generally also a high-income country or when special conditions are applied especially for pupils or students. A professional approach is very often used in the educational sector or for people in the decision-making environment.

The question remains if the European Commission is entitled to take action, which then would result in a direct drop of turnover and profit for commercial companies.

In the case of roaming cost – a service provided by mobile telecoms operators – the European Commission interfered heavily on the maximum price level of the service. Over several years in a step-by-step approach, the European Commission established maximum prices for calls and digital roaming and is planning to abolish roaming completely by 2016 [17].

This serves probably as the best example to show that indeed the European Commission is capable to not only administer a market with certain legal guidelines but also actually to directly influence or better said abolish the price setting of market players.

5 RESULTS AND DISCUSSION

The question to clarify is if such multi-page long T&Cs or effective obstacles to mobility within the European Union constitute an infringement of European legislation.

Does the continuous move from good to service with elaborate license agreements for the private user market have something to do with the legitimate interest of companies to protect their intellectual property? Or are these agreements rather directed to maximizing company profits by segmenting markets and actually removing the second-hand market for resale of digital content?

Regarding the geographic location of a customer by the company, it can be safely assumed that this is legally irrelevant and possibly even illegal under already implemented regulations for the free movement of goods and services.

The first reason is that usually this is done by using the IP-address of the customer to identify his possible location. The challenge is that this approach is not a safe method for several reasons to identify the location. For one, if a user is using a VPN-channel, then the location of the VPN-server is actually identified as the location. Or a user uses - legally completely admissible - a service which anonymises his whereabouts and identification (except the log-in details). There is no reason to assume that a user is obliged to provide correct data about himself as long as he does not defraud the seller by making copies and reselling or allowing multiple streams giving access to persons who have not paid for the service.

In the end, there is no reason to believe that when a purchase is done online, there exists an obligation to give personal records and a tracking by the seller is legitimate. When DVDs and BlueRays can be bought in any physical shop anonymously then the introduction of tracking obligations can only be considered inappropriate.

A German Court actually went even further by determining that using incorrect log-in account details do not constitute an illegal act in itself as long as no malicious intention regarding non-payment besides not making illegal copies - being realistically the only obligation of a

consumer - is intended [18]. Moreover, since manipulating IP-addresses is not illegal and providing non-exact billing addresses is acceptable as long as it does not interfere with the payment, territories within the European Union cannot be the limiting factor for consuming digital media. The media industry is overstepping a legal mark.
Also to prohibit border-crossing sales of downloadable or physical digital media falls into the same non-permissible category.

6 LIMITATIONS

The legal foundation for the design of commercial T&Cs are unclear in the European Union. Companies tend to maximise their limitations in the T&Cs without any traceable line towards European or national legislation regarding the mobility issue.
Unclear would be in a civil law environment between companies and consumers, how far companies can go in protecting their interests. Drawing comparisons with similar sectors, it seems that national and European law gives significant leeway for the protection of IP-rights (e.g. limitations to the copyability of digital media). However, abusing these rights to exploit consumers financially is a completely different matter.
No court cases can be found where license holders take private customers to court over the infringement of mobility limitations. Laws and regulations also seem not to exist.
In BBC's worldwide demand for the judicial banning of anonymised IP-addresses [19] it seems to become clear that hiding one's physical location in order to purchase legally correctly digital content is not wrongful in itself. The avoidance of such a geo-location via IP-addresses as an illegal act becomes even less plausible when the customer is actually paying for the service or good but is just not (temporarily) inside the country of the seller.
Perhaps a reversal of evidence could also be used to determine why IP-owners should actually be allowed to license according to territory inside the European Union. The legal burden of proof to be allowed to do so should be in the hands of the sellers.

7 CONCLUSION

Generally, it seems that for digital markets the contractual relationship between companies and consumers is shifting from a goods purchase to license models. Whereas the purchase of goods is usually a straightforward model well covered by national and European legislation, license models are regularly very one-sided since the power to design the contract and specify limitations are typically with the seller [20].
The argument that nobody is obliged to buy does not give justification to a balance of power between buyers and sellers. In a legal environment, where even for governments commonly judicial search warrants have to be applied for in order to determine physical locations of persons, it should not be the case that the industry can do so just by including it in T&Cs or EULAs [21].
Although in completely a different sector, a similar discussion is ongoing in the car industry presently. New cars are often equipped with communication hardware so that a manufacturer can have direct access for diagnosis or other actions to the car without the owner knowing about it or at least not having the opportunity to block it. In case of electrical cars, for example the manufacturer can block the charging of the car without a court order if the owner – for justified or unjustified reason – is delaying the payment for the rental of the batteries.
Legally the question is similar since when purchasing such a car, the buyer automatically has to consent to such blocking functionalities. This would reach a self-administered justice, which is forbidden in the EU and commonly the exclusive task of bailiffs and court procedures.
This example and others show that legislative bodies, consumer protection agencies and class-action suits at court are required to determine,

how far companies can go to protect their (legitimate) IP- and commercial interests.

It is the firm opinion of the authors that in the case of digital mobility, a limitation of usage to one member state of the European Union only is outside the legally permissible. It needs to be challenged at the level of the ECJ or addressed by the European Commission.

In the end, as stated in the report about 'Protection of Customer Rights regarding Digital Media IP: Position Paper' [22] there needs to be a change of perspective. The tasks of Intellectual Property Laws – as the name tells so already – protects one-sidedly the originators of the IP. A consumer law regarding IP access also needs to be established to maintain defined rights and not only obligations of users. Otherwise it is always left to national or the ECJ to decide what most recent legal innovation in license contracts is permissible or already overstepping the mark. Consequently, this would leave consumers always one-step behind the industry.

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