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European Parliament Resolution of 9 July 2015 and Its Progeny: Why the Digital Age Demands a Single European Copyright Title

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EUROPEAN PARLIAMENT RESOLUTION OF 9 JULY 2015 AND
ITS PROGENY: WHY THE DIGITAL AGE DEMANDS A SINGLE
EUROPEAN COPYRIGHT TITLE

KEVIN J. CAMMISO*

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I. INTRODUCTION

The current European Union (“EU”) copyright framework, a set of approximately ten directives,¹ is governed principally by 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 (“InfoSoc Directive”). With this governing piece of legislation “adopted before Facebook and YouTube even existed,” Europeans have found the rules “too inflexible to be adaptable to new forms of using cultural works.”² For instance, companies providing digital copyright content—such as Netflix or Google Play—must license their services on a country-by-country basis.³ Frequently, companies that hold a license in one country do not hold a license to provide the same content in another EU country.⁴ As a result, Europeans are often blocked from accessing online content depending on their geographic location.⁵ Recognizing the need to modernize the copyright framework “in light of the digital revolution and changed consumer behavior,”⁶ the European Parliament tasked Member of the European Parliament (“MEP”) rapporteur Julia Reda with drafting legislation to guide the European Commission in conforming EU copyright law to the digital age. Toward that end, Parliament adopted *European Parliament Resolution of 9 July 2015 on the Implementation of Directive 2001/29/EC of the European Parliament and of*

1. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Modern, More European Copyright Framework*, at 3 n.4, COM (2015) 0626 (Dec. 9, 2015) [hereinafter *Communication*].

2. Zachary Davies Boren, *Pirate Party: “We are Literally Rewriting EU Copyright Law*, THE INDEPENDENT (Jan. 6, 2015), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/pirate-party-we-are-literally-rewriting-eu-copyright-law-9958982.html>.

3. Nicholas Hirst, *Cross-Border Content Complications*, POLITICO (May 2, 2014), <http://www.politico.eu/article/cross-border-content-complications/>.

4. *Id.*

5. *Id.*

6. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe*, at 2, COM (2015) 192 final (May 6, 2015) [hereinafter *Digital Single Market Strategy*].

the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (“Resolution”).⁷

Although non-binding, the Resolution effectively sets forth Parliament’s position on pivotal issues facing EU copyright law and calls upon the European Commission to consider or adopt a score of its recommendations thereon. Responding in part, the Commission has already submitted a proposed regulation regarding cross-portability of online content services⁸ and a communication further outlining how it plans on achieving “a more modern, more European copyright framework.”⁹

With the Commission set to propose further legislation modernizing the copyright regime that Parliament and the Council of the European Union may then adopt as binding EU-wide law, the Resolution’s significance is clear and warrants analysis.¹⁰ While not without its merits, the Resolution is certainly not without its shortcomings. By taking inconsistent positions on territoriality, geo-blocking and contractual relations between right holders, urging a reduction in the duration of copyright protection, and failing to request legislation establishing a single European copyright title, the Resolution and subsequent legislation complicate the copyright regime which Parliament and the Council have a duty to resolve via a single European copyright title.

Toward that end, Section II of this article will summarize and identify the ramifications of the InfoSoc Directive, which prompted the Resolution and anticipated copyright reform in Europe. Sections III and IV will identify and analyze the Resolution’s merits and shortcomings, respectively. These sections will also identify any issues the Commission has subsequently addressed via 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 (“Proposal”) or communication titled *Towards a Modern, More European Copyright Framework* (“Communication”) and provide analysis thereof. Section V will argue that Parliament and the Council have a duty to resolve the issues raised by the

7. See generally *European Parliament Resolution of 9 July 2015 on the Implementation of 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*, 2015 O.J. (C 265) [hereinafter Resolution].

8. See generally *Proposal for a Regulation of the European Parliament and of the Council to Ensure the Cross-Border Portability of Online Content Services in the Internal Market*, EUR. PARL. DOC. (COM 627) (2015) [hereinafter Proposal].

9. Communication, *supra* note 1, at 2.

10. *Copyright Reform: Promote Cultural Diversity and Ensure Access to it, Say MEPs*, EUROPEAN PARLIAMENT NEWS (July 9, 2015), <http://www.europarl.europa.eu/news/en/news-room/content/20150703IPR73903/html/Copyright-reform-promote-cultural-diversity-and-ensure-access-to-it-say-MEPs>.

Resolution, Proposal and Communication via a single European copyright title. Finally, Section VI will conclude by summarizing the arguments made in previous sections then identifying the pros of establishing a single European copyright title.

II. BACKGROUND

In late June of 1994, on the Greek island of Corfu, the European Council resolved to “create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe.”¹¹ Copyright law, therefore, needed to be “adapted and supplemented to respond adequately to economic realities such as new forms of exploitation” brought about by the digital revolution.¹² Toward that end, and to implement the World Intellectual Property Organization Copyright Treaty, Parliament and the Council adopted the InfoSoc Directive in 2001 with the dual purpose of harmonizing the legal framework on copyright to thereby increase legal certainty.¹³ Despite these lofty intentions, the InfoSoc Directive actuated legal calamity, the chief culprits of which are Articles 5 and 6.

A. Article 5 of the InfoSoc Directive

Article 5 enunciates a host of exceptions and limitations that Member States¹⁴ may, but are not obligated to, adopt.¹⁵ The permissive nature of these exceptions and limitations allows Member States to cherry-pick exceptions and limitations as they see fit. Not surprisingly, different Member States have adopted different exceptions and limitations, so what may be legal in one country may be illegal in another.¹⁶ For example, Article 5, Section 3(h) allows Member States to provide an exception or limitation for “use of

11. 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, 2001 O.J. (L 167) 10 [hereinafter Directive 2001/29/EC].

12. *Id.*

13. *Id.*

14. Member States are those nations that are members of the European Union: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Countries, EUROPA (Jan. 25, 2016), http://europa.eu/about-eu/countries/index_en.htm.

15. Directive 2001/29/EC, *supra* note 10, at art. 5 §§ 2–4.

16. Eleonora Rosati, *EU Parliament Rejects Restrictions on Freedom of Panorama and Ancillary Right Over News Content*, THE IPKAT (July 9, 2015), <http://ipkitten.blogspot.com/2015/07/eu-parliament-rejects-restrictions-on.html>.

works, such as works of architecture or sculpture, made to be located permanently in public places,” otherwise known as the freedom of panorama exception.¹⁷ While most Member States provide for freedom of panorama in some form, many do not and the map below depicts this incongruity.¹⁸ Countries with complete freedom of panorama are green; countries that limit freedom of panorama to buildings are light green; countries where freedom of panorama exists only for non-commercial use of photos of public artworks are yellow; and, finally, countries devoid of freedom of panorama altogether are red:



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17. Directive 2001/29/EC, *supra* note 10, at art. 5 § 3(h).

18. Julia Reda, *Freedom of Panorama Under Threat*, JULIA REDA (June 22, 2015), <https://juliareda.eu/2015/06/fop-under-threat/>.

19. *Id.*

At first blush, these laws may appear problematic only to professional photographers or videographers, but to hold so would be remiss. To understand how these laws have the potential to affect the average European and tourist alike, consider the following example. In France, as in the United States, architectural works are copyrightable subject matter and therefore protected for the life of the author, plus seventy years.²⁰ If the term of protection has not expired and thereby placed the work within the public domain, reproductions of such works require consent of the current right holder.²¹ Tourists rejoice, for the 125-year-old Eiffel Tower is well within the public domain and so may be freely photographed or sketched—but only before its lights go on.²² As it were, a special lighting design was installed in 1989 to commemorate the tower's 100th anniversary which the *Cour de Cassation* held in 1992 was an “original ‘visual creation’” protected by copyright.²³ Commercial use of a photograph of the Eiffel Tower at night therefore requires prior authorization by the *Société d'Exploitation de la Tour Eiffel* (“SETE”), the organization that operates the tower.²⁴

Considering, however, the vast majority of people visiting the Eiffel Tower are unlikely to offer their photographs of the tower commercially, one may wonder how laws restricting the freedom of panorama actually affect the average European or tourist. To put it simply, the trouble occurs when those photographs are posted on social media platforms such as Facebook. By agreeing to Facebook's Terms of Service, users permit Facebook to use their “name, profile picture, content, and information in connection with commercial . . . content.”²⁵ Assent to Facebook's terms also means users agree to “not post content . . . that infringes or violates someone else's rights.”²⁶ Posting on Facebook a photograph of the Eiffel Tower illuminated at night without SETE's prior authorization thus turns what would otherwise be a noncommercial use into a commercial use and thereby violates SETE's copyright, as well as Facebook's Terms of Service.

20. Compare Code de la Propriété Intellectuelle [Intellectual Property Code] arts. L112-2 and L123-1 [hereinafter French Intellectual Property Code], with U.S. Copyright Code, 17 U.S.C. § 102 (1990).

21. French Intellectual Property Code, *supra* note 19, at art. L122-4.

22. Steve Schlackman, *Do Night Photos of the Eiffel Tower Violate Copyright?*, ART LAW JOURNAL (Nov. 16, 2014), <http://artlawjournal.com/night-photos-eiffel-tower-violate-copyright/>.

23. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 3, 1992, Bull. civ. I, No. 90-18081 (Fr.) (“les formes du monument constituait une ‘création visuelle’ originale”) [“the forms of the monument constituted an original ‘visual creation’”].

24. *Filming and Image Shots—Professionals*, TOUREIFFEL.PARIS, <http://www.tou Eiffel.paris/en/the-eiffel-tower-image-and-brand/filming-at-the-eiffel-tower.html>.

25. *Terms of Service*, § 9.1, FACEBOOK, <https://www.facebook.com/terms.php>.

26. *Id.* § 5.1.

Aside from allowing Member States to enact such odd laws with respect to freedom of panorama, the optional nature of Article 5 of the InfoSoc has, above all, needlessly created legal uncertainty. Because most Member States are only a few hours away by train from each other, it is entirely possible for Europeans and tourists alike to find themselves in two, perhaps three, separate Member States in a single day—some of which may provide for freedom of panorama, some of which may not. To continue with the Eiffel Tower example above, someone who takes a photograph of the Eiffel Tower at night could travel through France and Belgium, into the Netherlands and end up in Amsterdam photographing the “I amsterdam” letters just three hours and twenty minutes later.²⁷ During this relatively short time, the photographer would be confronted with antithetical legal systems: the Netherlands affords complete freedom of panorama, whereas France and Belgium do not.²⁸ Likely unbeknownst to him, the photographer’s pictures of the Eiffel Tower may thus expose him to liability for copyright infringement while his pictures of the “I amsterdam” letters are protected by the freedom of panorama. With such laws that only those familiar with the nuances of copyright law are likely to be aware of, but all are affected by, the InfoSoc Directive missed the mark with regard to providing legal certainty.

B. Article 6 of the InfoSoc Directive

Unlike Article 5, however, Article 6 requires Member States to provide protections against circumvention of technological protection measures for copyrighted works.²⁹ Article 6(1) states that “Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.”³⁰

Because “circumvention usually takes place by means of a device,”³¹ Article 6(2) requires Member States to:

provide adequate legal protection against the manufacture,
import, distribution, sale, rental, advertisement for sale or

27. *Eurail Map of Train Routes in Europe*, EURAIL.COM, <http://www.eurail.com/plan-your-trip/railway-map#traveltime>.

28. Reda, *supra* note 17.

29. See generally Directive 2001/29/EC, *supra* note 10, at art. 6.

30. *Id.* at art. 6(1).

31. Alvisé M. Casellati, The Evolution of Article 6.4 of the European Information Society Copyright Directive, 24 COLUM.-VLA J.L. & ARTS 369, 377 (2001).

rental, or possession for commercial purposes of devices, products or components or the provision of services which:

- (a) are promoted, advertised or marketed for the purpose of circumvention of, or
- (b) have only a limited commercially significant purpose or use other than to circumvent, or
- (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.³²

Recognizing that such requirements may infringe upon the so-called “public policy exceptions” of Article 5,³³ e.g., those regarding photocopying, copy and archive purposes of educational facilities, broadcaster’s own ephemeral recordings, non-commercial broadcasts, teaching and research, use by disabled individuals, and public safety,³⁴ Article 6(4) subparagraph 1 requires Member States to also take measures to ensure that the public is not denied the benefit of those exceptions by the protective measures mandated by Article 6(1) and (2).³⁵ It is interesting to note that despite the permissive nature of Article 5, Article 6(4) subparagraph 1 requires Member States to take such measures and therefore turns these permissive exceptions into mandatory exceptions in all Member States. Similarly, although not required, Article 6(4) subparagraph 2 allows Member States to take measures to ensure that beneficiaries of the private copying exception delineated in Article 5(b)(2) are not denied the benefit of that exception by Article 6(1) and (2).³⁶

Apparently anticipating, but perhaps underestimating, the rise of video-on-demand services and the need to protect such markets, the Commission added Article 6(4) subparagraph 4, which states: “[t]he provisions of the first and second subparagraphs shall not apply to the works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.”³⁷ Simply put, EU copyright law does not

32. Directive 2001/29/EC, *supra* note 10, at art. 6(2).

33. *Id.* at arts. 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) and (3)(e).

34. *See id.* at art. 5

35. Directive 2001/29/EC, *supra* note 10, at art. 6(4), ¶ 1.

36. *Id.* at art. 6(4), ¶ 2.

37. *Id.* at art. 6(4), ¶ 4.

require Member States to do anything to ensure that parties to contracts providing on-demand access to copyright works like Netflix are actually able to access those works. This subparagraph, therefore, establishes that copyright exceptions are not applicable to on-demand services and that contract law controls such services. What is troublesome about this, though, is that companies providing on-demand services typically license their services on a country-by-country basis.³⁸ Frequently, these companies do not hold licenses in every Member State which means many Europeans are often blocked from accessing content they pay for when visiting other countries. Because geo-restrictions are generally written into service agreements,³⁹ Europeans have no legal basis to challenge these restrictions. As a result, many Europeans resolve to circumvent such restrictions through virtual private networks (“VPN’s”).⁴⁰ VPN’s allow users to disguise their IP address so that it appears as if they are in a country that is licensed to access the content⁴¹ and, as it stands, approximately twenty percent of European users use them to access digital content.⁴² Ironically, by adopting Article 6(4) subparagraph 4 the Commission instigated the type of circumvention that the same article aimed at preventing. As Vice-President of the European Commission Andrus Ansip noted, “[European] legislation is pushing people to steal.”⁴³

As the examples above demonstrate, the InfoSoc Directive has created legal discord among Member States and is ill equipped for a post-digital revolution society. Fortunately, legislation to harmonize and conform European copyright law to the digital age is already underway with the Commission’s Digital Single Market Strategy and Parliament’s Resolution, the latter of which will be analyzed and evaluated below.

III. MERITS OF RESOLUTION

Although the Resolution is not binding, it does present Parliament’s position on several pivotal issues facing the EU copyright regime. As such, it will undoubtedly inform the Commission in drafting legislation to update copyright law to the digital age and, at the very least, indicates what will be

38. Hirst, *supra* note 3.

39. *Terms of Use*, § 6(c), NETFLIX, <https://www.netflix.com/TermsOfUse>.

40. Andrew Tarantola, *VPNs: What They Do, How They Work, and Why You’re Dumb for Not Using One*, GIZMODO (Mar. 26, 2013), <http://gizmodo.com/5990192/vpns-what-they-do-how-they-work-and-why-youre-dumb-for-not-using-one> (defining VPN’s); *see also* Andy, *EU: Copyright Legislation is Pushing People to Piracy*, TORRENTFREAK (June 9, 2015), <https://torrentfreak.com/eu-copyright-legislation-is-pushing-people-to-piracy-150609/>.

41. Tarantola, *supra* note 40.

42. Andy, *supra* note 40.

43. *Id.*

important to Parliament when voting on that legislation. It is therefore appropriate to analyze and evaluate the Resolution, as well as to consider its ramifications.

Notwithstanding the shortcomings discussed *infra*, the Resolution laudably advocates for several significant changes in the EU copyright regime. Among the Resolution's noteworthy merits are its preservation of freedom of panorama, cognizance of consumers' rights, and requests for new exceptions and limitations.

A. Freedom of Panorama

"Freedom of panorama is the unrestricted right to use photographs of public spaces, without infringing [upon] the rights of the architect or the visual artist."⁴⁴

This right is permitted under Article 5(3)(h) of the InfoSoc Directive which states Member States may provide an exception for the "use of works, such as works of architecture or sculpture, made to be located permanently in public places."⁴⁵ Most Member States have adopted such an exception thereby providing for freedom of panorama, but Belgium, France, Greece, Italy and Luxembourg have not.⁴⁶ To harmonize the EU in this regard, Paragraph 16 of Julia Reda's Draft Report "calls on the EU legislator to ensure that the use of photographs, video footage or other images of works which are permanently located in public places is permitted."⁴⁷ Members of the European People's Party, Socialists and Liberals on the legal affairs committee rejected this proposal and amended the report to read: "Considers that the commercial use of photographs, video footage or other images of works which are permanently located in physical public places should always be subject to prior authorisation from the authors or any proxy acting for them."⁴⁸ Recalling the map above, this amendment would turn all green

44. Jimmy Wales, *If You Want to Keep Sharing Photos for Free, Read This*, THE GUARDIAN (July 3, 2015), <http://www.theguardian.com/commentisfree/2015/jul/03/sharing-photos-freedom-of-panorama>.

45. Directive 2001/29/EC, *supra* note 10, at art. 5(3)(h).

46. *Freedom of Panorama in Europe in 2015*, WIKIMEDIA (July 4, 2015), https://meta.wikimedia.org/wiki/Freedom_of_Panorama_in_Europe_in_2015/Learn_more; *see also* Reda, *supra* note 18.

47. *Draft Report on the Implementation of Directive 2001/21/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* (2014/2256(INI)), at 6 (Jan. 15, 2015), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-546.580+02+DOC+PDF+V0//EN>.

48. *Amendments 281–556 Draft Report on the Implementation of Directive 2001/21/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of*

and light green countries either yellow or red.⁴⁹ This would mean freedom of panorama would extend only to publication of photos of public artworks for noncommercial purposes or the freedom would not exist at all.⁵⁰

Fortunately, European citizens rallied in opposition to the amendment and it was subsequently dropped from the final draft of the Resolution.⁵¹ The freedom of panorama, then, will remain where it is presently envisaged—at least for now. As the Communication reports, the Commission “will consider legislative proposals on [] EU exceptions by spring 2016” in order to clarify certain exceptions.⁵² Specifically, the Communication expresses the need to “clarify the current EU exception” regarding freedom of panorama.⁵³ While some have criticized the Commission for not demonstrating a firm “commitment to a strong exception for Freedom of Panorama,” it is unlikely the Commission will fail to do so in the coming proposals given the outpour of public opposition during the drafting stage of the Resolution in the summer of 2015.⁵⁴ Indeed, the Communication’s acknowledgement of the importance of freedom of panorama to Europeans constitutes “a step in the right direction.”⁵⁵ As this section of the Communication is the “likely consequence” of the Resolution, the Resolution is commendable in that it has had a positive influence on the Commission.⁵⁶

B. Consumers’ Rights and Geo-blocking

European copyright theory is underpinned by the *droit d’auteur* (author’s right) tradition, which focuses on the moral rights of the author rather than on the rights of consumers or other right holders.⁵⁷ Interestingly,

Copyright and Related Rights in the Information Society (2014/2256(INI)), at 70 (Mar. 5, 2015), <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-549.469&format=PDF&language=EN&secondRef=01>.

49. Reda, *supra* note 18.

50. *Id.*

51. Nevena Kostova, *The EU Copyright Reform Debate is Marked by Diverging Views*, EUROPEAN FUTURES (July 28, 2015), <http://www.europeanfutures.ed.ac.uk/article-1359>.

52. Communication, *supra* note 1, at 8.

53. *Id.*

54. Paul Keller, *Leaked Copyright Communication: A More Modern Copyright Framework for Europe?*, COMMUNIA (Nov. 6, 2015), <http://www.communia-association.org/2015/11/06/leaked-copyright-communication-a-more-modern-copyright-framework-for-europe/>.

55. Jorge Castro, *European Commission Copyright Action Plan: A Busy 2016*, CTR. DEMOCRACY & TECH. (Dec. 10, 2015), <https://cdt.org/blog/european-commission-copyright-action-plan-a-busy-2016/>.

56. *Id.*

57. Rainer Kuhlen, *Copyright Issues in the European Union—Towards a Science—and Education—Friendly Copyright*, INSTITUTIONAL REPOSITORY UNIV. KONSTANZ 1, 2 (Mar. 5, 2013), http://kops.uni-konstanz.de/bitstream/handle/123456789/27083/Kuhlen_270834.pdf?sequence=1&isAllowed=y.

however, paragraphs 59 and 67 specifically stress the importance of “consumers’ rights.”⁵⁸ This shift away from the strictly author’s rights centered copyright regime is also reflected in the Resolution’s treatment of geo-blocking, which often prevents Europeans from accessing digital content depending on their geographic location. With the Resolution’s drafter, Julia Reda, opining that “this video is not available in your country’ message must be a thing of the past,” it is no surprise the issue is repeatedly touched on in the final version of the Resolution.⁵⁹ Indeed, paragraph 9 points out “that consumers are too often denied access to certain content services on geographical grounds, which runs counter to the objective of [the InfoSoc Directive] of implementing the four freedoms of the internal market.”⁶⁰ The Resolution in paragraph 11 also “[s]tresses” that the creative output of the EU is one of its richest resources, and those who want to enjoy it should be able to pay to do so, even when it is only sold in another Member State.”⁶¹ The Resolution, therefore, urges the Commission “to propose adequate solutions for better cross-border accessibility of services and copyright content for consumers.”⁶² Toward that end, the Resolution also expresses support for the Commission’s Digital Single Market Strategy adopted May 6, 2015.⁶³ By advocating for consumers’ rights to access content, the Resolution marks a much needed shift from the largely author-centered copyright framework towards a system that recognizes that, in the information society, consumers also have rights with regard to copyright materials.

Because approximately twenty percent of European internet users employ VPN’s to circumvent geo-blocking measures, creators are losing “a huge amount of money.”⁶⁴ Preventing geo-blocking, therefore, would put that money back into the pockets of creators, providers, and other rights holders. As alluded to in paragraph 11 of the Resolution, by preventing geo-blocking, digital content providers would also have access to larger markets and may therefore increase capital. It is clear, therefore, that preventing geo-blocking is not only in the best interest of European consumers, but also in the best interest of creators, providers, or other right holders. The Resolution

58. Resolution, *supra* note 7, ¶¶ 59, 67.

59. Boren, *supra* note 2 (internal quotation marks omitted).

60. Resolution, *supra* note 7, ¶ 9.

61. *Id.* ¶ 11.

62. *Id.* ¶ 9.

63. *See id.* ¶¶ 3, 20, 23, 24.

64. Andy, *supra* note 39.

thus calls for a win-win situation for all those interested and for that it is commendable.

However, the Resolution deserves praise for another reason. Just five months after the Resolution was published, the Commission acted on Parliament's call for legislation to address the issue of geo-blocking and submitted its Proposal for a regulation ensuring the cross-border portability of online content services.⁶⁵ While a close analysis of the Proposal will be presented below, it is enough for now to note that it requires service providers to allow subscribers "temporarily present in a Member State to access and use the online content service."⁶⁶ The Proposal therefore marks the Commission's first move to combat the deleterious practice of geo-blocking as requested in the Resolution. This move is undoubtedly a step in the right direction, and its effect was immediate with Netflix representatives commenting, "[w]e" are committed to providing Netflix members with great programming wherever they are and are studying the EU's proposal."⁶⁷

C. *Exceptions and Limitations*

Recognizing that the optional nature of the twenty-one exceptions and limitations laid out in Article 5 of the InfoSoc Directive has created vast discrepancies between Member States' copyright regimes, the Resolution points out "some exceptions and limitations may therefore benefit from more common rules."⁶⁸ The Resolution therefore appropriately calls upon the Commission "to examine the application of minimum standards across the exceptions and limitations."⁶⁹ The Resolution also asks the Commission to review existing exceptions and limitations "in order to better adapt them to the digital environment."⁷⁰ As harmonization and modernization of the copyright regime works towards the goals of the internal market, these propositions are certainly praiseworthy.

The Resolution is also meritorious in that it calls for the creation of numerous exceptions to address obstacles brought about by the digital revolution as follows:

65. *See generally* Proposal, *supra* note 8.

66. *Id.* art. 3(1).

67. Kevin Rawlinson, *Netflix and Other Services to Be Available on Holiday*, BBC NEWS (Dec. 9, 2015), <http://www.bbc.com/news/technology-35051054>.

68. Resolution, *supra* note 7, ¶ 37.

69. *Id.* ¶ 38.

70. *Id.* ¶ 35.

Paragraph 51 calls for an exception for online and cross-border activities for research and education purposes;

Paragraph 53 calls upon the Commission to consider adopting an e-lending exception “allowing public and research libraries to legally lend works to the public in digital formats for personal use;” and

Paragraph 54 asks the Commission to consider adopting an exception digitalize their collections for consulting, cataloging and archiving purposes.⁷¹

Providing for such exceptions will allow institutions to effectively fulfill their “public interest duty of disseminating knowledge . . . in an up-to-date manner.”⁷² Keeping with the *droit d’auteur* tradition, the Resolution asks for fair remuneration for right holders with regard to digital distribution of their works which seems to strike an appropriate balance between the public interest in accessing works conveniently and right holders’ interests in compensation for those works.⁷³

The Resolution deserves praise not only for calling on the Commission to provide for such exceptions, but also for instigating the Commission to actually make such changes. The Communication notes that the Commission will “consider legislative proposals” that will clarify the scope of the exception for digital modes of teaching illustrations, “support remote consultation” of library works for academic purposes, and balance the needs of cultural heritage institutions and the needs of “born-digital and digitised works.”⁷⁴ As is clear, the Resolution is directly responsible for bringing these important issues to the Commission’s attention and prompting it to determine legislative solutions.

IV. SHORTCOMINGS OF RESOLUTION

Although the Resolution makes great strides with regard to modernizing European copyright law for the contemporary digital, information society, it is not without its shortcomings. The Resolution warrants criticism for breaching its duty to promote a clear legal framework for copyright law, advocating for a reduction in the duration of copyright protection, and failing

71. *Id.* ¶¶ 51, 53, 54.

72. *Id.* ¶ 53.

73. See generally *Copyright Reform*, *supra* note 10.

74. Communication, *supra* note 1, at 8.

to make a stronger statement on establishing a single European copyright title.

A. *Duty to Promote a Clear Legal Framework*

Paragraph Q of the Resolution relates that “EU legislative authorities have a duty to promote a clear legal framework for copyright and related rights that can be understood by all stakeholders, in particular the general public, and that ensures legal certainty.”⁷⁵ The Resolution, however, fails to satisfy this duty, and in fact creates legal uncertainty, by reaffirming the principle of territoriality with regard to copyright law as well as taking inconsistent stances on geo-blocking and freedom of contract.

1. The Principle of Territoriality

Most troublesome about providing legal certainty is the Resolution’s affirmation of the principle of territoriality.⁷⁶ The principle of territoriality holds that copyright laws should be determined on a country-by-country basis because rights are “acquired and enforced on a country-by-country basis.”⁷⁷ The extent to which this principle should be applied to the EU copyright framework in light of the internal market will be discussed below in Section V. For now, though, it is enough to note that although there has been some EU wide harmonization, copyright and related rights remain territorial. The supposed territorial nature of copyright law has thus led legislators to leave it up to Member States to decide which exceptions and limitations they see fit given their individual cultural values and legal traditions. So, on one hand, the legislature has a duty to provide clarity and harmonization, and, on the other, the legislature must respect Member States’ cultural diversity.⁷⁸ The optional nature of the exceptions and limitations enunciated in Article 5 of the InfoSoc Directive, then, evidences a clear attempt by the Commission, Parliament and Council to balance these two duties. However, these two duties are not always compatible with each other. For example, the optional nature of the twenty-one exceptions or limitations allowed for under Article 5 of the InfoSoc Directive means there

75. Resolution, *supra* note 7, ¶ Q.

76. *Id.* ¶ 6 (the “existence of copyright and related rights inherently implies territoriality”).

77. Tambiana A. Madiaga, *EU Copyright Reform: Revisiting the Principle of Territoriality*, EUROPEAN PARLIAMENTARY RESEARCH SERVICES (Sept. 28, 2015), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568348/EPRS_BRI\(2015\)568348_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568348/EPRS_BRI(2015)568348_EN.pdf).

78. See Consolidated Version of the Treaty on the Functioning of the European Union, art. 151, 2012 O.J. (C 326) 47 [hereinafter TFEU].

are 2,097,152 different ways Article 5 may be implemented.⁷⁹ Clearly, harmony took a backseat to cultural diversity in the InfoSoc Directive; but, the shortcomings of the InfoSoc Directive do not excuse the shortcomings of the Resolution. Rather, the InfoSoc Directive's shortcomings elevate the legislature's duty to provide uniformity because there is such disconformity among Member States' copyright regimes. It is inapposite, then, to affirm a principle which fosters such disharmony.

2. Geo-Blocking & Content Portability

Another consequence of applying the principle of territoriality to copyright law is that there is not one single European copyright title, but rather twenty-eight "separate national ones."⁸⁰ Copyright owners therefore must obtain licenses in each Member State before their rights can be protected in that State. Because it can be "difficult or impossible to obtain"⁸¹ licenses in all twenty-eight Member States, many right holders do not hold licenses in all Member States and are unable to distribute content across the entire EU.⁸² Conversely, right holders may restrict the "territorial scope of licenses granted to service providers" thereby limiting the availability of those services to particular Member States.⁸³ Service providers themselves may further confine their services to particular Member States, even if their licenses permit them to offer those services to a multitude of Member States.⁸⁴ Because content is "blocked" from users depending on their geographic location, these deleterious practices have been dubbed geo-blocking.

As noted above, one central goal of the Resolution is to prohibit geo-blocking because it interferes with consumers' rights to content. Nevertheless, the Resolution sends mixed signals to the Commission on the issue of geo-blocking, at times denouncing it and at others maintaining its importance to the audio-visual industry. Consider the following:

Paragraph 9. [C]onsumers are too often denied access to certain content services on geographical grounds, which runs counter to the objective of [the InfoSoc Directive] of implementing the four freedoms of the internal market; urges the Commission, therefore, to propose adequate

79. FIX COPYRIGHT!, <http://www.fixcopyright.eu/>.

80. Communication, *supra* note 1, at 4 n.14.

81. *Id.*

82. *See generally* Hirst, *supra* note 3.

83. Communication, *supra* note 1, at 4.

84. *Id.*

solutions for better cross-border accessibility of services and copyright content for consumers;

Paragraph 11. Stresses that the creative output of the EU is one of its richest resources, and those who want to enjoy it should be able to pay to do so, even when it is only sold in another Member State; and

Paragraph 14. Emphasises that industry geoblocking practices should not prevent cultural minorities living in EU Member States from accessing existing content or services in their language that are either free or paid for.⁸⁵

In these paragraphs Parliament seems to have recognized and appreciated the effect of geo-blocking on consumers and pushed for legislation preventing such practices. The following paragraphs, however, disclose a contrary attitude towards the practice of geo-blocking:

Paragraph 13. Points out that the financing, production and co-production of films and television content depend to a great extent on exclusive territorial licenses . . . that being so, emphasises that the ability, under the principle of freedom of contract, to select the extent of territorial coverage and the type of distribution platform encourages investment

Paragraph 17. Takes note of the importance of territorial licenses in the EU, particularly with regard to audiovisual and film production which is primarily based on broadcasters' pre-purchase or pre-financing systems.⁸⁶

The Resolution thus rallies against geo-blocking practices while emphasizing right holders' ability to contract in such a way as to deny Europeans audio-visual content on the basis of their geographic location. Even if the above is nothing more than an innocent inconsistency, it is nevertheless an inconsistency that is difficult, if not impossible, to reconcile. Such contrary treatment of geo-blocking can hardly be seen as providing legal clarity; in fact, the Commission's December 2015 proposal regarding

85. Resolution, *supra* note 7, ¶¶ 9, 11, 14.

86. *Id.* ¶¶ 13, 17.

cross-border portability of online content makes it apparent that the Resolution far from clarified the EU legislature's position on the subject.⁸⁷

The Commission's 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 Proposal") marks the first step of the Commission's Digital Single Market Strategy.⁸⁸ As its title suggests, the Proposal sets forth regulations prohibiting geo-blocking practices by requiring that online content services be "portable," meaning accessible, between Member States. Specifically, Article 3(1) of the Proposal states that "[t]he provider of an online content service shall enable a subscriber who is *temporarily present* in a Member State to access and use the online content service."⁸⁹ Article 2 defines "temporarily present" as the "presence of a subscriber in a Member State other than the Member State of residence."⁹⁰ The Proposal defines "Member State of residence" as "the Member State where the subscriber is habitually residing."⁹¹ While the Proposal is certainly a welcomed improvement towards ridding the EU of geo-blocking practices, such practices will not thereby be eliminated. As one commentator notes, "the notion of temporality is defined nowhere."⁹² Issues as to how long or short a stay may be to fall under Article 2(d) will undoubtedly arise if the Proposal is adopted without the inclusion of clear temporal restrictions.

Perhaps another consequence of the Resolution's inconsistent treatment of geo-blocking is the Proposal's own inconsistent treatment of geo-blocking. The stated goals of the Proposal are "to remove barriers to cross-border portability so that the needs of users can be met more effectively" and to promote innovation "for the benefit of consumers."⁹³ Such strong statements indicate that the Proposal aims to outright prohibit geo-blocking for the benefit of all consumers, not just those temporarily present in another Member State. Indeed, the very first paragraph of the Proposal argues "barriers that hamper access and use of [] online content services cross

87. See generally *supra* note 8.

88. The Digital Single Market is "one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence." *Digital Single Market Strategy*, *supra* note 6, at 3.

89. Proposal, *supra* note 8, art. 3(1) (emphasis added).

90. *Id.* art. 2(d).

91. *Id.* art. 2(c).

92. Eleonora Rosati, *BREAKING: EU Commission Unveils Next Steps for Copyright Reform, Including Draft Content Portability Regulation*, THE IPKAT (Dec. 9, 2015, 11:46 AM), <http://ipkitten.blogspot.it/2015/12/breaking-eu-commission-unveils-next.html>.

93. Proposal, *supra* note 8, at 2.

border should be eliminated.”⁹⁴ What is more, the Commission actually considered a total prohibition on geo-blocking while drafting the Proposal.⁹⁵ In limiting Article 3(1) to those “temporarily present” in another Member State, however, the Proposal allows for geo-blocking to continue in Europe. Specifically, the Proposal fails to provide access to content for those Europeans that may be in their “Member State of residence” but who wish to enjoy services that are not accessible in that Member State.

To illustrate the issue, suppose a French citizen, living in France, wants to subscribe to a British content provider. The content provider, however, does not have a license to distribute its content in France. Under the narrow terms of the Proposal, and as a result of the antiquated principle of territoriality, the French citizen would still be unable to access that content. Because Europeans in their “Member State of residence” may still be denied access to content not available in that Member State, geo-blocking will continue to exist in Europe and will continue to deprive Europeans of a truly free internal market.

As MEP Julia Reda opined, “geoblocking is a problem that most adversely affects those who need access to services that aren’t offered in their home countries”⁹⁶ Legislation beyond “roaming for Netflix” is therefore necessary in order for the four freedoms of the internal market to be fully realized.⁹⁷ By failing to take a clear and consistent stance on geo-blocking, the Resolution sent mixed signals to the Commission. As a result, the Commission’s Proposal is just as inconsistent as the Resolution, which not only creates legal uncertainty, but also fails to provide measures that would effectively eliminate geo-blocking in Europe.

3. Freedom of Contract

Another inconsistency that fails to allow for legal clarity within the copyright framework is the Resolution’s contradictory stance on the freedom of contract. Specifically, the Resolution calls for legislation that would dictate contractual relationships between authors and other right holders but simultaneously stresses the importance of contractual freedom. For instance,

94. *Id.* at 10, ¶ 1.

95. Tom Scourfield, Christ Watson & Poonam Majithia, *The EU’s Portability proposal—an attainable step towards a Digital Single Market*, LAW-NOW (Dec. 14, 2015), http://www.cms-lawnow.com/ealerts/2015/12/the-eus-portability-proposal--an-attainable-step-towards-a-digital-single-market?cc_lang=en.

96. Julia Reda, *End Geoblocking: We Need More than Just Roaming for Netflix!*, JULIA REDA (Dec. 9, 2015), <https://juliareda.eu/2015/12/more-than-just-roaming-for-netflix/>.

97. *Id.*

the following paragraphs indicate that a chief concern of the Resolution is to preserve contractual freedom in the digital age:

Paragraph 13. [E]mphasises that the ability, *under the principle of freedom of contract*, to select the extent of territorial coverage, to select the extent of territorial coverage and the type of distribution platform encourages investment in films and television content and promotes cultural diversity.

Paragraph 25. [C]alls for improvements to the contractual position of authors and performers in relation to other rightholders and intermediaries . . . as contractual exchanges may be marked by an imbalance of power; *stresses in this connection the importance of contractual freedom.*⁹⁸

On the other hand, the Resolution seems to advocate for statutorily imposed bargaining positions or powers:

Paragraph 24. Deems it indispensable to *strengthen the position of authors and creators* and improve their remuneration with regard to the digital distribution and exploitation of their works.

Paragraph 25. [C]alls for *improvements to the contractual position of authors and performers* in relation to other rightholders and intermediaries . . . as contractual exchanges may be marked by an imbalance of power; stresses in this connection the importance of contractual freedom.

Paragraph 29. Points out that, in the fragile ecosystem which produces and finances creative work, exclusive rights and *freedom of contract are key components*

Paragraph 61. [T]he effective exercise of exceptions or limitations, and access to content that is not subject to copyright or related rights protection, *should not be waived by contract or contractual terms.*⁹⁹

98. Resolution, *supra* note 7, at ¶¶ 13 and 25 (emphasis added).

99. *Id.* at ¶¶ 24, 25, 29, and 61 (emphasis added).

Stressing the need for authors, creators, and performers to not be “cut-out” of the profits of their work certainly shows that Parliament is sympathetic to groups that are often underrated or undercompensated in the creative sector and that sentiment is certainly well placed. The problem does not lie with the Resolution’s intentions, but rather with the language of the Resolution as a whole. As some commentators have noted, it “seems contradictory” to statutorily improve the contractual position of creators while stressing that freedom of contract is a key component of the creative sector.¹⁰⁰ At least facially this argument makes sense: if certain parties are given greater strength by statute and similar statutes limit the length of assignments of rights, then the parties are not exactly free to contract however they want. It hardly needs to be noted, however, that certain freedoms are not absolute. For instance, freedom of speech may be restricted in order to respect the rights of others or to protect public order or morals.¹⁰¹ Accordingly, it may simply be that Parliament believes that protecting authors, creators, and performers by statutorily affording them increased bargaining power is one such restriction on the freedom of contract. Whatever the case may be, it remains unclear how Paragraphs 13 and 25 are supposed to fit in with Paragraphs 24, 25, 29 and 61 and this ambiguity—or, arguably, this contradiction—further demonstrates that the Resolution failed to meet its duty of promoting a clear legal framework for European copyright.

B. *Reduction in Duration of Copyright Protection*

Another aspect of the Resolution worthy of criticism is its treatment of the duration of copyright protection. As it stands, the duration of protection in the EU depends on the type of work for which protection is sought.¹⁰² Under Council Directive 93/98/EEC, authors of literary or artistic works enjoy protection for the life of the author plus seventy years after his or her death.¹⁰³ Cinematographic or audiovisual works are similarly protected for

100. Christophe Geiger et al., *Reaction of CEIPI to the Resolution on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright in the Information Society Adopted by the European Parliament on the 9th July 2015*, CTR. FOR INT’L INTELL. PROP. L., at 5 (July 24, 2015), http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Etudes/CEIPI_statement_on_EU_copyright_reform_final-1.pdf.

101. Treaty of International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, S. TREATY DOC. No. 95-20 (1977), 999 U.N.T.S. 171.

102. See generally Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9 (EC) [hereinafter Directive 93/98/EEC].

103. *Id.* at art. 1.

the life of the “principal director” plus seventy years after his or her death.¹⁰⁴ The related rights of performers, phonogram producers, and broadcasting organizations, however, are only protected for fifty years following the date of the performance or fixation.¹⁰⁵

It is interesting to note that when Council Directive 93/98/EEC was passed in 1993, the duration of copyright protection in the United States was the life of the author plus fifty years.¹⁰⁶ It was argued that American creators were therefore disadvantaged “vis a vis their European counterparts.”¹⁰⁷ As a result, some authors created artificial “legal domiciles for Europe in order to gain the benefit of the longer license term.”¹⁰⁸ After pressure from corporate copyright holders, such as Disney to shore up the discrepancy between the EU and the US, Congress adopted the Sonny Bono Copyright Term Extension Act of 1998 (“CTEA”). The CTEA amended the Copyright Act of 1976 to increase the duration of copyright protection from the life of the author plus fifty years to the life of the author plus seventy years.¹⁰⁹

Before examining the Resolution, it is important to identify the reasons Council Directive 93/98/EEC extended the term of copyright protection by twenty years in the first place. As Paragraph 5 of Council Directive 93/98/EEC notes, the Berne Convention, which laid out minimum standards of copyright protection in signatory states, set the minimum term of protection as the life of the author plus fifty years.¹¹⁰ This was “intended to provide protection for the author and the first two generations of his descendants.”¹¹¹ Considering the Berne Convention was originally drafted in 1886, around which time the average person lived to be almost forty-three years old, affording copyright protection for the life of the author plus fifty years was sufficient.¹¹² By 1993, however, the average lifespan of Europeans in 1993 had grown so much that the term set forth in the Berne Convention was “no longer sufficient to cover two generations.”¹¹³ Most significantly,

104. *Id.* at art. 2.

105. *Id.* at art. 3.

106. Timothy B. Lee, *15 Years Ago, Congress Kept Mickey Mouse Out of the Public Domain. Will They Do It Again?*, THE WASHINGTON POST (Oct. 25, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/>.

107. *Id.*

108. *Id.*

109. See The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 § 102(b)(1) (1998) (codified at 17 U.S.C. § 302(a)).

110. Directive 93/98/EEC, *supra* note 101, at ¶ 5.

111. *Id.*

112. See Max Roser, *Life Expectancy*, OUR WORLD IN DATA (2017), <https://ourworldindata.org/life-expectancy/#rising-life-expectancy-around-the-world>.

113. Directive 93/98/EEC, *supra* note 101, at ¶ 5.

the drafters believed that robust copyright protection was necessary to foster innovation. Paragraph 11 reads:

Whereas *in order to establish a high level of protection* which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, *the term of protection for copyright should be harmonized at 70 years after the death of the author . . .*¹¹⁴

It is clear, then, that the drafter believed that extending the duration of copyright protection to seventy years after the death of the author was vital to giving EU copyright holders a high level of protection. Parliament, in drafting the Resolution, seems to have shared this sentiment, noting at paragraph 19 that “any reform of the copyright framework *should be based on a high level of protection*, since rights are crucial to intellectual creation and provide a stable, clear and flexible legal base that fosters investment and growth in the creative and cultural sector.”¹¹⁵

Nonetheless, the Resolution simultaneously “calls on the Commission to further harmonise the protection of copyright . . . according to the international standards set out in the Berne Convention.”¹¹⁶ Not only does such language reveal yet another an internal inconsistency of the Resolution, but it most importantly runs contrary to a notable goal of the EU copyright regime. As noted above, the goal of the Berne Convention was to compensate the author and at least two generations of his decedents.¹¹⁷ To lower the duration of copyright in an age where the average European lives to be approximately seventy-eight years old would completely undermine that goal.¹¹⁸ Furthermore, if the copyright regime “should be based on a high level of protection,”¹¹⁹ and Council Directive 93/98/EEC specifically noted that a term of protection extending seventy years after the death of the author is necessary “in order to establish a high level of protection,”¹²⁰ it is entirely contrary to the goals of the EU copyright reform to advocate a reduction in

114. *Id.* at ¶ 11 (emphasis added).

115. Resolution, *supra* note 7, at ¶ 19 (emphasis added).

116. *Id.* at ¶ 32.

117. Directive 93/98/EEC, *supra* note 101, at ¶ 5.

118. See *Average Life Expectancy* in Europe for Those Born in 2017, By Gender and Region (In Years)*, STATISTA.COM, <http://www.statista.com/statistics/274514/life-expectancy-in-europe/>.

119. Resolution, *supra* note 7, at ¶ 19.

120. Directive 93/98/EEC, *supra* note 101, at ¶ 5.

the term of protection. Not only does the Resolution fail to promote a clear copyright framework in this regard, but also seeks to diminish the rights of copyright holders and for that the Resolution deserves significant criticism.

C. *Single European Copyright Title*

A final shortcoming worth pointing out is the Resolution's lackluster request for the Commission "to study the impact of a single European Copyright Title."¹²¹ As will be discussed extensively in Sections V and VI, such a system is "crucial for the development of a truly European information society."¹²² Accordingly, some commentators have referred to the Resolution's rather weak statement on the subject as a "missed opportunity to make a stronger statement on some essential issues of copyright law in the EU."¹²³ Rather than calling on the Commission to consider the option, it would have been stronger to call on the Commission to actually establish such a system.

Parliament's failure to take a more progressive stance with regard to establishing a single European copyright title is, in turn, reflected in the Commission's recent Communication. Because a single European copyright title "would require substantial changes in the way our rules work today," the Commission believes an incremental approach is necessary.¹²⁴ Thus, such an incremental approach renders the establishment of a single European copyright title nothing more than a "long-term vision for copyright in the EU."¹²⁵

It should also be recalled that the whole purpose of the Communication was to set out "how the Commission intends to achieve the goal of a 'more modern, more European copyright framework.'"¹²⁶ Yet, similar to how the Resolution merely calls on the Commission to "study the impact"¹²⁷ of a single European copyright title, the Communication simply asserts that the EU "should pursue"¹²⁸ establishing such a system. Failing to state that it will pursue a single European copyright title implies that establishing such a system is not part of the Commission's plan to achieve a "more modern,

121. Resolution, *supra* note 7, at ¶ 28.

122. Geiger et al., *supra* note 99, at 2.

123. *Id.*

124. Communication, *supra* note 1, at 12.

125. *Id.*

126. *Id.* at 2.

127. Resolution, *supra* note 7, at ¶ 28.

128. Communication, *supra* note 1, at 12.

more European copyright framework.”¹²⁹ As a result, some commentators have dismissed this language as nothing more than the Commission’s attempt to reserve the “right to dream about full copyright harmonisation.”¹³⁰ Others have also warned that “the Commission’s ‘gradual approach’ to copyright reform must not retract into a ‘wait-and-see’ one,” fearing that the Communication “signals diminished momentum from the Commission” to provide meaningful copyright reform.¹³¹ By “tak[ing] into account”¹³² the uninspiring language of the Resolution with regard to establishing a single European copyright title, the Communication relates a similarly uninspiring position on the subject. The Resolution, therefore, warrants criticism for failing to make a stronger statement on the subject.

V. DUTY TO ESTABLISH A SINGLE EUROPEAN COPYRIGHT TITLE

The principle of conferral, as set forth in Article 5(2) of the Treaty on European Union (“TEU”), states that the EU legislature may only enact EU-wide laws in areas the Treaty on the Functioning of the European Union (“TFEU”) or TEU (collectively, “the Treaties”) grants it the exclusive competence to do so and where the law furthers the objectives of the Treaties.¹³³ Areas where the EU legislature has exclusive competence include customs union, “common commercial policy,” monetary policy for Eurozone members,¹³⁴ common fisheries policy, and “competition rules for the functioning of the internal market.”¹³⁵ If the proposed law falls outside an area in which the EU legislature has exclusive competence, the legislature may nevertheless share competence with the Member States.¹³⁶ Shared competence exists in a number of different areas, the most important to this

129. *Id.* at 2.

130. Rosati, *BREAKING: EU Commission unveils next steps for copyright reform, including draft content portability regulation*, *supra* note 91.

131. *Content Portability proposal encouraging, but greater ambition required to modernize copyright*, EUROISPA (Dec. 9, 2015), <http://www.euroispa.org/content-portability-proposal-encouraging-greater-ambition-required-modernise-copyright/>.

132. Communication, *supra* note 1, at 3.

133. Ana Ramalho, *Conceptualizing the European Union’s Competence in Copyright – What Can the EU Do?*, 45 INT’L REV. INTEL. PROP. L. 178, 178–179 (2014); *see* Consolidated Version of the Treaty on European Union art. 5, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

134. Eurozone members are those Member States whose currency is the euro: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. *See The Euro*, EUROPEAN UNION (Jan. 6, 2016), https://europa.eu/european-union/about-eu/money/euro_en#euro.

135. TFEU, *supra* note 78, at art. 3.

136. *Id.* at art. 4.

analysis being the functioning of the internal market.¹³⁷ In such a case, the EU legislature must satisfy two other principles before the law can be enacted.¹³⁸ First, the law must not offend the principle of subsidiarity, meaning the law's objectives "cannot be sufficiently achieved by the Member States" or are "better achieved at Union level."¹³⁹ Next, the law must "not exceed what is necessary to achieve the objectives of the Treaties."¹⁴⁰ This rule is known as the principle of proportionality.¹⁴¹

Thus, in order to establish that the EU legislature has a duty to enact a single European copyright title, it must be shown that the EU legislature has the necessary competence to do so and that Union level action will further the objectives of the Treaties.

A. Competence Under Article 118 of the Treaty on the Functioning of the European Union

The principal goal of the Treaty of Rome was to establish political unity via economic equality.¹⁴² For economic equality to exist, there must be an internal market, meaning "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."¹⁴³ Because intellectual property encompasses both goods and services, Article 118 of the Treaty on the Functioning of the European Union ("TFEU") states that:

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with ordinary legislative procedure, *shall* establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.¹⁴⁴

137. *Id.*

138. TEU, *supra* note 132, at art. 5.

139. *Id.*

140. *Id.*

141. *Id.*

142. *The EU Common Market*, EUROPEDIA, http://www.europedia.moussis.eu/books/Book_2/3/6/index.tkl?all (last visited Oct. 23, 2017).

143. TFEU, *supra* note 78, at art. 26.

144. *Id.* at art. 118 (emphasis added).

Although the Treaties do not expressly grant the EU legislature with exclusive competence over copyright,¹⁴⁵ Article 118 clearly grants to it competence over intellectual property rights.¹⁴⁶ Because copyright is a form of intellectual property,¹⁴⁷ it follows that Article 118 provides the EU legislature competence over copyright. It remains unclear from the language of the statute, however, whether the EU legislature possesses exclusive competence with respect to intellectual property or merely shares competence with the Member States. Although the case law resolving this issue concerns uniform patent protection,¹⁴⁸ the decision should extend to uniform copyright protection as both are simply species of intellectual property.¹⁴⁹

In Joined Cases C-274/11 and C-295/11, Italy and Spain challenged the Council's decision to permit twenty-five Member States¹⁵⁰ to create a unitary patent via enhanced cooperation.¹⁵¹ Enhanced cooperation is a power set forth in Articles 326–334 of the TFEU which allows a minimum of nine Member States to “establish advanced integration or cooperation . . . without the other EU countries.”¹⁵² The unitary patent system at issue in the joined cases provides uniform patent protection in all participating Member States upon registration with the European Patent Office.¹⁵³ Italy and Spain's main contention, however, lied with the language provisions of the unitary patent system.¹⁵⁴ The countries argued that because the system's official languages are English, German, and French,¹⁵⁵ parties who are not native speakers of

145. Ramalho, *supra* note 132, at 179.

146. TFEU, *supra* note 78, at art. 118.

147. See Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG*, 1971 E.C.R. 487, 492.

148. See Joined Cases C-274/11 & C-295/11, *Italian Republic and Kingdom of Spain v. Council of the European Union*, 2013 E.C.R. I-240.

149. *Intellectual Property Rights*, EUROPA, http://europa.eu/youreurope/business/start-grow/intellectual-property-rights/index_en.htm (last visited Oct. 23, 2017).

150. The twenty-five Member States included: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden and the United Kingdom. Joined Cases C-274/11 & C-295/11, 2013 E.C.R. I-240, ¶ 2.

151. *Id.* ¶ 7.

152. *Glossary of Summaries: Enhanced Cooperation*, EUR-LEX, http://eur-lex.europa.eu/summary/glossary/enhanced_cooperation.html (last visited Oct. 23, 2017); see also TFEU, *supra* note 78, at arts. 326–334.

153. Regulation (EU) 1257/2012 of the European Parliament and of the Council of 17 December 2012 Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2012 O.J. (L 361) 1, 4–6.

154. Joined Cases C-274/11 & C-295/11, 2013 E.C.R. I-240, ¶¶ 27–28.

155. Convention on the Grant of European Patents (European Patent Convention), Oct. 7, 1977, 1065 U.N.T.S. 199, 262.

those languages would be disadvantaged in the prosecution process.¹⁵⁶ In attacking the validity of the unitary patent system, the countries argued that creation of such a system was within the exclusive competence of the EU legislature under Article 118 TFEU.¹⁵⁷ According to this argument, the Member States therefore lacked the requisite competence to provide uniform patent protection and doing so via enhanced cooperation usurped the role of the legislature.¹⁵⁸

The Court of Justice of the European Union began its analysis by noting that the power, or competence, to provide uniform protection of intellectual property rights is conferred within “the context of the establishment and functioning of the internal market” under Article 118 TFEU.¹⁵⁹ Because the functioning of the internal market is an area of shared competence under Article 4 of the TFEU, the court reasoned that Member States and EU legislature therefore share competence to provide uniform protection of intellectual property rights.¹⁶⁰ Accordingly, the court held that enhanced cooperation validly established the unitary patent system.¹⁶¹

Because copyright is a form of intellectual property, Joined Cases C-274/11 and C-295/11 established that the EU legislature has shared competence over copyright. Keeping this in mind, the unambiguous, prescriptive language of Article 118 becomes extremely significant. It states that Parliament and the Council “shall” take measures to provide uniform protection of intellectual property rights, not merely that they “may.”¹⁶² Thus, not only does the EU legislature have the power to establish measures providing uniform protection of intellectual property rights, as a number of scholars have noted,¹⁶³ but also an obligation to do so.¹⁶⁴ It follows that if there is not uniform protection of intellectual property rights throughout the

156. Kluwer UPC News Blogger, *Despite the Defeat at the CJEU, Spain Will Not Join the Unitary Patent System*, KLUWER PATENT BLOG (June 17, 2015), <http://kluwerpatentblog.com/2015/06/17/despite-the-defeat-at-the-cjeu-spain-will-not-join-the-unitary-patent-system/>.

157. Joined Cases C-274/11 & C-295/11, 2013 E.C.R. I-240, ¶ 10.

158. *Id.* ¶¶ 10–11.

159. *Id.* ¶ 17.

160. *Id.* ¶¶ 17–19, 25.

161. *Id.* ¶¶ 24–26.

162. TFEU, *supra* note 78, at art. 118.

163. See Letter from the European Copyright Society to Gunther Oettinger, Commissioner for Digital Econ. and Soc’y (Dec. 19, 2014) (on file at https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs_letter_to_oettinger_fin-1.pdf) [hereinafter E.C.S. Letter]; see also Bernt Hugenholtz, *Copyright in Europe: Twenty Years Ago, Today and What the Future Holds*, 23 *FORDHAM INTELL. PROP. MEDIA AND ENT. L. J.* 503, 523 (2013); Geiger et al., *supra* note 99, at 7 n.21.

164. See Geiger et al., *supra* note 99, at 7 n.21.

EU, then Parliament and the Council must take measures to provide for such uniformity.

With this in mind, it is important to note that Article 118 TFEU explicitly states that Parliament and the Council must act “in accordance with ordinary legislative procedure.”¹⁶⁵ Under the “ordinary legislative procedure,” the Commission submits a proposal that Parliament and the Council will either approve or amend.¹⁶⁶ If necessary, the proposal will go through a series of amendment procedures, after which Parliament and the Council will make a final vote either for or against the proposal becoming EU-wide law.¹⁶⁷

Although neither Parliament nor the Council have the ability to draft legislation on their own initiative,¹⁶⁸ Article 225 of the TFEU allows Parliament to ask the Commission to submit a proposal on any matter Parliament believes is “required for the purpose of implementing the Treaties.”¹⁶⁹ Accordingly, if there is no uniform protection of intellectual property rights, Parliament and the Council have a duty to do one of three things: (1) request the Commission to submit then amend and/or approve any proposal that provides uniform protection of intellectual property rights; (2) amend any proposal regarding intellectual property rights so that it provides uniform protection of said rights and ultimately approve it; or (3) approve any proposal that provides uniform protection of intellectual rights from the outset.

As noted above, there are 2,097,152 different ways Article 5 of the InfoSoc Directive may be implemented.¹⁷⁰ Moreover, different Member States have, in fact, adopted different exceptions and limitations such that considerable disconformity exists between the copyright regimes of the twenty-eight Member States.¹⁷¹ To make matters worse, the Resolution—whose explicit goal was to promote clarity within the copyright regime¹⁷²—

165. TFEU, *supra* note 78, at art. 118.

166. *Ordinary Legislative Procedure (COD)*, EU MONITOR, <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vga3bya9max9> (last visited Oct. 23, 2017).

167. *Id.*

168. *Legislative Powers*, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers>. (last visited Oct. 23, 2017).

169. TFEU, *supra* note 78, at art. 225.

170. *FIX COPYRIGHT!*, *supra* note 79.

171. For a complete overview of the differences between Member States’ copyright laws, see Guido Westkamp, *Part II: The Implementation of Directive 2001/29/EC in the Member States*, QUEEN MARY INTELL. PROP. RES. INST., 84–95 (2007), http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf.

172. Resolution, *supra* note 7, ¶ Q.

is ripe with discrepancies and ambiguities that have already complicated the EU copyright reform effort by creating similar inconsistencies and ambiguities in both the Proposal and Communication.

As is clear, uniform copyright protection across the EU does not currently exist. Therefore, Parliament and the Council have a duty to take any of the three steps identified above in order to provide uniform copyright protection. Because the EU legislature's competence over copyright is shared with the Member States,¹⁷³ any measure providing uniform copyright protection must not offend the principles of subsidiarity and proportionality.¹⁷⁴

B. Necessity and Propriety of a Single European Copyright Title

Because Article 118 TFEU does not specify how uniform protection of intellectual property rights must be obtained, uniform copyright protection may be provided by creating a single European copyright title as long as doing so will not offend the principles of subsidiarity and proportionality.¹⁷⁵ In other words, it must be shown that EU-wide, rather than national, legislation is necessary to provide uniform copyright protection and that a single European copyright title does not "exceed what is necessary" to the functioning of the internal market.¹⁷⁶

1. Principle of Subsidiarity

Under the principle of subsidiarity, EU level action may only be taken if "the objectives of the proposed action cannot be sufficiently achieved by the Member States" or are "better achieved at Union level."¹⁷⁷ The first step, then, is to identify the objectives a single European copyright title would serve. As Article 118 TFEU itself reports, the objective of any measure establishing a European intellectual property right is "to provide uniform protection of intellectual property rights throughout the Union."¹⁷⁸

173. Joined Cases C-274/11 & C-295/11, 2013 E.C.R. I-240, ¶ 25.

174. TEU, *supra* note 132, at art. 5.

175. *Id.*

176. *Id.*; see TFEU, *supra* note 78, at art. 4.

177. Article 5(3) states: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. TEU, *supra* note 132, at art. 5.

178. TFEU, *supra* note 78, at art. 118.

Embedded in Article 118 TFEU, however, is also the underlying objective to foster the internal market.¹⁷⁹ A single European copyright title’s objective, therefore, must be to provide uniform copyright protection and to further the internal market.

Next, it must be established that these objectives cannot be sufficiently achieved by the Member States or are “better achieved at Union level.”¹⁸⁰ To begin, over the past twenty-five years, the EU legislature has adopted approximately ten directives aimed at incrementally harmonizing the copyright framework.¹⁸¹ While this piecemeal approach has been moderately successful in providing some minimum standards of copyright protection at the EU level, it has done so at “considerable expense” as it can often take up to ten years and vast sums of taxpayers’ money for a directive to be passed, translated, and transposed by Member States.¹⁸² As such, the harmonization approach is inherently ill equipped to promptly respond to the digital revolution where a “dynamic information market” is constantly evolving.¹⁸³ As one commentator has put it, “the harmonisation agenda of the EC has resulted in an almost non-stop process of amending the national laws on copyright and related rights.”¹⁸⁴

To make matters worse, Member States may not even be amending national copyright laws in the same way given that Article 5 of the InfoSoc Directive allows Member States to adopt exceptions and limitations—which thereby dictate the scope of copyright protection—as they see fit.¹⁸⁵ In truth, the optional nature of Article 5 of the InfoSoc Directive has made uniform copyright protection virtually impossible because Member States have in fact adopted different exceptions.¹⁸⁶ Perhaps the strongest indication that uniform copyright protection cannot be sufficiently achieved by the Member States is the fact that Member States could have adopted the same exceptions listed in Article 5 of the InfoSoc Directive but did not.

Furthermore, the Resolution and its progeny make the prospect of uniform copyright protection occurring on the Member States’ own volition

179. Joined Cases C-274/11 & C-295/11, Italian Republic and Kingdom of Spain v. Council of the European Union, 2013 E.C.R. I-240, ¶ 17; TFEU, *supra* note 78, at art. 118.

180. TEU, *supra* note 132, at art. 5.

181. Communication, *supra* note 1, at 3 n.6.

182. Bernt Hugenholtz et al., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, INST. FOR INFO. LAW, 211 (2006), http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

183. *Id.* at 212.

184. *Id.*

185. Directive 2001/29/EC, *supra* note 11, at art. 5.

186. Westkamp, *supra* note 170, at 84–94.

all the more dismal because the ambiguities and discrepancies therein further muddle the copyright regime and allow for differences in protection amongst Member States.¹⁸⁷ It is true that Member States could propose enhanced cooperation measures similar to those which established the unitary patent system, but because participation is voluntary truly uniform protection may not exist should Member States refuse to participate.¹⁸⁸ Given the above, uniform copyright protection cannot be sufficiently achieved by the Member States. At the very least, the overwhelming success of the Community Trademark,¹⁸⁹ an EU-wide trademark system that allows mark owners to file a single application and gain uniform protection in all Member States,¹⁹⁰ demonstrates that uniform copyright protection would be better achieved at the Union level.

The EU legislature is similarly better equipped than Member States to sufficiently achieve the single European copyright title's second objective of advancing the internal market. The internal market is "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."¹⁹¹ Ideally, the internal market would ensure that companies are free to "provide or receive services in a Member State other than the one where the company or consumer is established."¹⁹² However, "fragmentation and barriers that do not exist" in the physical context have prevented a digital single market, meaning one where "individuals and businesses can seamlessly access and exercise online activities . . . irrespective of their nationality or place of residence," from thriving.¹⁹³ For example, "territoriality has led to fragmentation of markets along national borderlines" and allowed geo-blocking to become commonplace, particularly with respect to copyright content.¹⁹⁴ Such practices thereby inhibit the free movement of services and do not advance the internal market.¹⁹⁵ Because removing such artificial restrictions on the free

187. TFEU, *supra* note 78, at arts. 326–334.

188. *Id.*

189. Jose Romero & Marcela Dada, *A European Success Story*, WORLD TRADEMARK REVIEW, July/Aug. 2006, at 35.

190. See *What Is A Community Trademark (CTM)?*, ALBRIGHT IP, <https://www.albright-ip.co.uk/2013/05/what-is-a-community-trademark-ctm/>.

191. TFEU, *supra* note 78, at art. 26.

192. *Single Market for Services*, EUROPEAN COMMISSION (Feb. 11, 2016), http://ec.europa.eu/growth/single-market/services/index_en.htm.

193. Digital Single Market Strategy, *supra* note 6, at 3.

194. E.C.S. Letter, *supra* note 162; Mark Walton, *EU Hits Sky and Hollywood With Antitrust Complaint Over Pay-TV Geoblocking*, ARS TECHNICA UK (July 23, 2015, 9:23AM), <http://arstechnica.co.uk/tech-policy/2015/07/eu-hits-sky-and-hollywood-with-antitrust-complaint-over-pay-tv-geoblocking/>.

195. Walton, *supra* note 193.

movement of copyright content and services would require cooperation by each Member State, the EU legislature would best be able to achieve the single European copyright title's objective of promoting the functioning of the internal market.

In light of the foregoing, it is clear that the single European copyright title's dual objectives of providing uniform copyright protection and furthering the internal market cannot be sufficiently achieved by the Member States and are "better achieved at Union level."¹⁹⁶ Accordingly, the principle of subsidiarity is not offended and the EU legislature may lawfully unify EU copyright law provided the principle of proportionality is similarly unoffended.

2. Principle of Proportionality

The principle of proportionality limits the EU legislature's power to "what is necessary to achieve the objectives of the Treaties."¹⁹⁷ Measures are deemed disproportionate "only where no objectively defensible consideration can justify recourse to a specific method intended to attain a given objective."¹⁹⁸ Other cases have considered measures disproportionate where they are "manifestly inappropriate . . . to the objective . . . the competent institution is seeking to pursue."¹⁹⁹ It appears, therefore, that great deference is given to legislative bodies and only when the means far outweigh the end objective will a measure violate the principle of proportionality. Among the objectives of the Treaties are to ensure the "functioning of the internal market" and to "provide uniform protection of intellectual property rights throughout the Union."²⁰⁰ In the context of creating a single European copyright title, then, as long as the measure is not manifestly inappropriate to these objectives, the principle of proportionality will not be violated.

Although a single European copyright title "would require substantial changes in the way [EU copyright] rules work,"²⁰¹ nothing short of unification would sufficiently serve the objectives of providing "uniform protection of intellectual property rights throughout the Union" and ensuring

196. TEU, *supra* note 132, at art. 5.

197. *Id.*

198. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1130.

199. Case C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health*, 1990 E.C.R. I-4023, 4063.

200. TFEU, *supra* note 78, at arts. 26 and 118.

201. Communication, *supra* note 1, at 12.

the “functioning of the internal market.”²⁰² As noted above, the optional nature of Article 5 of the InfoSoc Directive allowed Member States to provide uniform copyright protection by adopting the same exceptions and limitations, but they did not.²⁰³ Member States may also, at any time, engage in enhanced cooperation to provide uniform copyright protection, but they have not.²⁰⁴ In any event, participation in enhanced cooperation is voluntary, so such measures may not provide uniform copyright protection if even one Member State refuses to participate.²⁰⁵ Measures at the national level, therefore, are an incredibly unlikely source of uniform copyright protection.

By contrast, the overwhelming success of the Community Trademark (“CTM”), demonstrates that uniform copyright protection is best achieved by a single European copyright title.²⁰⁶ Under this system, mark owners may file a single trademark registration that entitles the mark to uniform protection in all Member States.²⁰⁷ Although Regulation 40/49 left national trademark systems intact, these systems have been substantially harmonized by Directives 2008/95/EC and 2015/2436.²⁰⁸ With over ten directives and numerous other legislative documents already comprising the EU copyright framework,²⁰⁹ many claim, “the next logical step in this process towards uniformity of European copyright law would be the introduction of a truly unified European Copyright Law.”²¹⁰

As established above, providing uniform copyright protection and ensuring the functioning of the internal market are objectives best achieved at EU, rather than national, level. Of course, the precise mechanics must be devised by the legislature, but a single European copyright title “would establish a truly unified legal framework, replacing the multitude of—often opaque and sometimes conflicting—national rules that presently exists.”²¹¹ This would ensure that what is legal in one Member State is not illegal in

202. TFEU, *supra* note 78, at arts. 26, 118.

203. Guibault et al., *supra* note 170, at 84-94.

204. *See* TFEU, *supra* note 78, at arts. 326-334.

205. *See id.*

206. Jose Romero & Marcela Dada, *supra* note 188, at 35.

207. *See* Council Regulation 207/2009, 2009 O.J. (L 78) 1.

208. *See generally* Directive 2008/95/EC, 2008 O.J. (L 299) 25; Directive 2015/2436, 2015 O.J. (L 336) 1 (EU).

209. *The EU Legal Framework (“Acquis”)*, EUROPEAN COMMISSION (Oct. 3, 2014), http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm.

210. Hugenholtz, Copyright in Europe: Twenty Years Ago, Today and What the Future Holds, *supra* note 181, at 521; *see also* E.C.S. Letter, *supra* note 162 (copyright unification “is in fact the logical next step for the EU legislature to take in this field”).

211. E.C.S. Letter, *supra* note 162.

another and thereby achieve the objective of uniform protection of intellectual property rights.

A single European copyright title would also ensure the functioning of the internal market by ending the anachronistic application of territoriality to copyright. Although the European audiovisual industry has maintained that territoriality is needed to “preserve sustainable financing,” which is generally “based on territorial licensing combined with the territorial exclusivity granted to individual distributors or service providers,”²¹² culture in the digital age “is not confined to national borders.”²¹³ As such, territoriality has actually prevented “service providers and distributors from providing cross-border ‘portability’ of services.”²¹⁴ As the European Copyright Society has argued, a single European copyright title, then, is “the only way a fully functioning Digital Single Market,” and therefore a fully functioning internal market, “can ultimately be achieved.”²¹⁵ It follows that such a system is not only proportionate, but also necessary to providing uniform protection and promoting the internal market. The principle of proportionality, therefore, would not be offended by a single European copyright title.

In sum, Union, rather than national, level legislation is necessary to ensure uniform copyright protection and the functioning of the internal market. Because a single European copyright title would not “exceed what is necessary” to achieve these objectives, the principles of subsidiarity and proportionality would not be violated.²¹⁶ Accordingly, the EU legislature must satisfy its duty to provide uniform copyright protection under Article 118 TFEU by establishing a single European copyright title.

VI. CONCLUSION

For calling to preserve the freedom of panorama, recognizing consumers’ rights, and urging of new exceptions and limitations to better fit the digital age, the Resolution is undoubtedly commendable. Perhaps equally as laudable is the fact that it served as a catalyst for change, prompting a proposed regulation on the cross-border portability of online content by the Commission and a communication outlining its plans to achieve “a more

212. Communication, *supra* note 1, at 4.

213. Julia Reda, *European Culture is Not Confined to National Borders—Let’s Not Use Copyright to Force it To Be*, JULIA REDA (Apr. 3, 2015), <https://juliareda.eu/2015/04/european-culture-not-confined-to-national-borders/>.

214. Communication, *supra* note 1, at 4.

215. E.C.S. Letter, *supra* note 162.

216. TEU, *supra* note 132, at art. 5; *see* TFEU, *supra* note 78, at art. 4.

modern, more European copyright framework” just six months after it was released.²¹⁷

The Resolution and its progeny, however, are not without their shortcomings. For instance, the Resolution laments geo-blocking as a threat to the free movement of goods and services, yet affirms the principle of territoriality, which allows for and encourages geo-blocking.²¹⁸ What is worse, this inconsistency was apparently transposed in the Proposal in that the Proposal similarly denounces geo-blocking yet does not outright ban the practice.²¹⁹ Moreover, the Resolution purports to be based on a “high level of protection” yet calls on the Commission to lower the term of copyright protection by twenty years.²²⁰ Perhaps the most frustrating shortcoming of the Resolution is Parliament’s vapid request for the Commission to simply “study the impact of a single European Copyright Title” rather than rallying the Commission to create one.²²¹ This uninspiring request had a similarly uninspiring effect, with the Commission merely noting that the EU “should pursue” a single European copyright title.²²²

These shortcomings not only confuse the copyright framework, but also perpetuate the struggles EU copyright law already faces. For example, by affirming the principle of territoriality, the Resolution and its progeny continue to fracture the internal market, particularly the digital single market the Commission is striving to create.²²³ Furthermore, the Resolution’s note that “some exceptions and limitations may [] benefit from more common rules” does not adequately resolve the issues raised by the optional nature of Article 5 of the InfoSoc Directive because differences in copyright protection could still exist between Member States.²²⁴ The existing and inevitable differences resulting from the Resolution and its progeny with respect to national copyright regimes contravene the EU legislature’s duty to provide uniform protection of intellectual property rights under Article 118 TFEU.²²⁵ Because a single European copyright is necessary to provide uniform copyright protection and ensure the functioning of the internal market, the EU legislature has a duty to establish a single European copyright title.

217. See Communication, *supra* note 1, at 3; see also Proposal, *supra* note 8, at 1; Resolution, *supra* note 7, at 1.

218. Compare Resolution, *supra* note 7, at ¶¶ 13 and 17 with ¶¶ 6, 9, 11 and 14.

219. Compare Proposal, *supra* note 8, at 2 and ¶ 1 with art. 2(c).

220. Compare Resolution, *supra* note 7, at ¶ 19 with ¶ 32.

221. *Id.* at ¶ 28.

222. Communication, *supra* note 1, at 12.

223. See Digital Single Market Strategy, *supra* note 6, at 3.

224. Resolution, *supra* note 7, at ¶ 37.

225. TFEU, *supra* note 78, at art. 118.

Although a single European copyright title “may be considered undesirable, or perhaps too drastic, by certain stakeholders and national legislatures . . . it is in fact the logical next step for the EU legislature to take in this field.”²²⁶ Such a title would afford uniform copyright protection because there would be just one, EU-wide copyright regime that all Member States must adhere to, rather than twenty-eight separate ones.²²⁷ This, in turn, would “enhance legal security and transparency” as Europeans would no longer need to consider a multitude of copyright systems just to make sure their activities are permissible.²²⁸ A single European copyright title would necessarily entail a central copyright office similar to the Office for Harmonization in the Internal Market, which manages CTM registrations.²²⁹ If a consolidated recording system for transfers of copyright ownership were included at this copyright office, legal security and transparency would be even further increased because parties could look at one set of records to verify the validity of their transfers. In turn, this would “greatly reduce transaction and enforcement costs.”²³⁰ Given the “considerable ‘time, finance, and other social costs’” associated with incremental harmonization, a unified system may ultimately cost the EU less than incremental harmonization by an endless string of directives over the long run.²³¹ A single European copyright title would also eliminate territoriality with respect to copyright. This would prohibit the now commonplace yet deleterious practice of geo-blocking and allow for true cross-border portability of online content services in the internal market. According to the European Copyright Society, this is “the only way a fully functioning Digital Single Market” can be achieved, without which there cannot be truly free movement of goods and services as required by the internal market.²³²

226. E.C.S. Letter, *supra* note 162.

227. Hugenholtz, *Copyright in Europe: Twenty Years Ago, Today and What the Future Holds*, *supra* note 162, at 523.

228. E.C.S. Letter, *supra* note 162.

229. See Trade Marks in the European Union, Office for Harmonization in the Internal Market, EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (Feb. 2, 2016), <https://oami.europa.eu/ohimportal/en/trade-marks-in-the-european-union>.

230. E.C.S. Letter, *supra* note 162.

231. Hugenholtz, *Copyright in Europe: Twenty Years Ago, Today and What the Future Holds*, *supra* note 162, at 523.

232. TFEU, *supra* note 78, at art. 26.