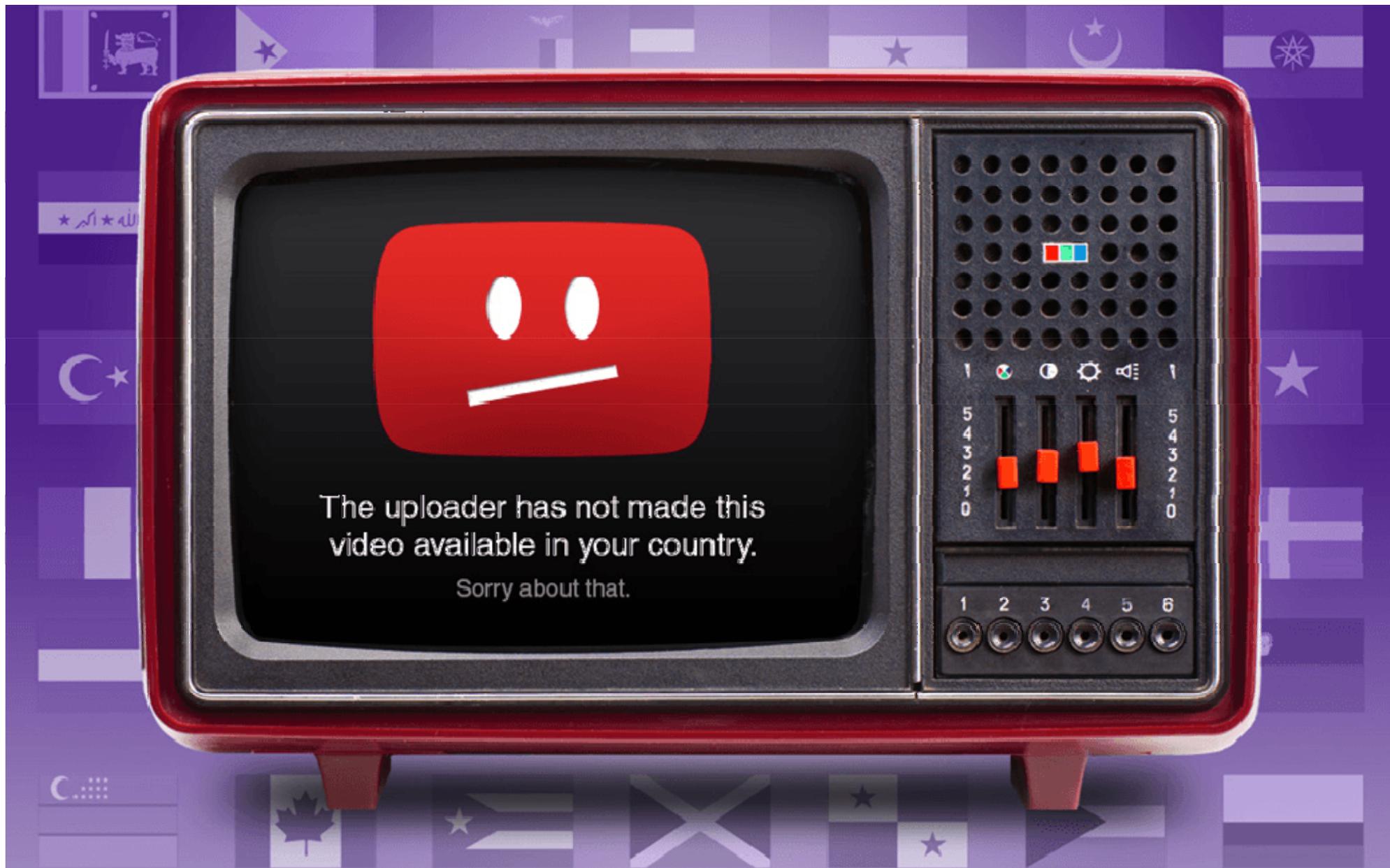


# Copyright, Competition, and the Digital Single Market

Pablo Ibanez Colomo  
London School of Economics

## Hollywood major studios





The uploader has not made this  
video available in your country.

Sorry about that.

## The *Cross-Border Pay TV* case

‘US film studios typically license audio-visual content, such as films, to a single pay-TV broadcaster in each Member State (or combined for a few Member States with a common language). The Commission's investigation, which was opened in January 2014, identified clauses in licensing agreements between the six film studios and Sky UK **which require Sky UK to block access to films through its online pay-TV services (so-called “geo-blocking”)** or through its satellite pay-TV services to consumers outside its licensed territory (UK and Ireland)’.

Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland (23 July 2015)

# The broader context

- The *Cross-Border Pay TV* case is part of a broader and more ambitious Digital Single Market Strategy:
  - The Commission has proposed a series of legislative and non-legislative initiative to ensure that the Internet fulfils its potential
    - Better access to online services
    - Reform of copyright
    - Reform of telecoms rules
    - Data protection
  - At the same time, the Commission launched a sector inquiry into e-commerce
  - Access to digital content and the removal of 'unjustified geo-blocking' have become a policy priority

## The broader context

‘Deep in my heart, I hate geoblocking. It is old-fashioned and it is not fair. We do not have to use these instruments in the 21st century’.

Commissioner Andrus Ansip

# The broader context

- Limited access to online content across borders is, first and foremost, the consequence of the limited territorial scope of copyright
  - Copyright is national in scope and is licensed on a territorial basis
  - Right holders are entitled to authorise or prohibit any communication to the public
  - The right of communication to the public is not exhausted and thus the right holder may control the cross-border provision of content
- As a result, removing geo-blocking requires copyright reform
  - Review of the Cable and Satellite Directive (consultation in August 2015)
  - Proposal for a Portability Regulation (December 2015)

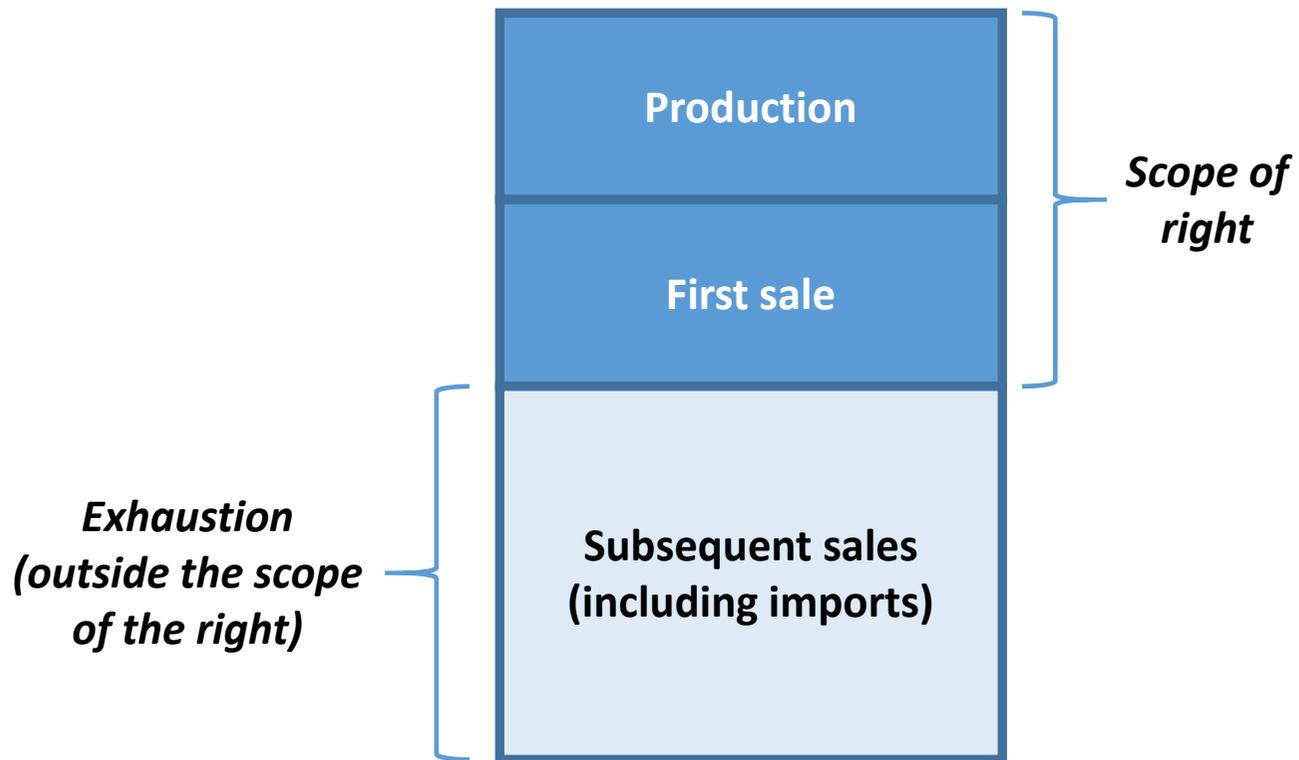
# The *Cross-Border Pay TV* case

- The *Cross-Border Pay TV* case hints at a new balance between competition law and intellectual property
- EU competition law was never applied to second-guess the nature and operation of intellectual property regimes
  - The existence of the intellectual property right has never been called into question (*Consten-Grundig*)
  - Restrictions to cross-border trade that are the necessary consequence of the essential function of the intellectual property right are not unlawful
- In this sense, the case appears to be the expression of a wider trend (pay-for-delay, SEPs injunctions)

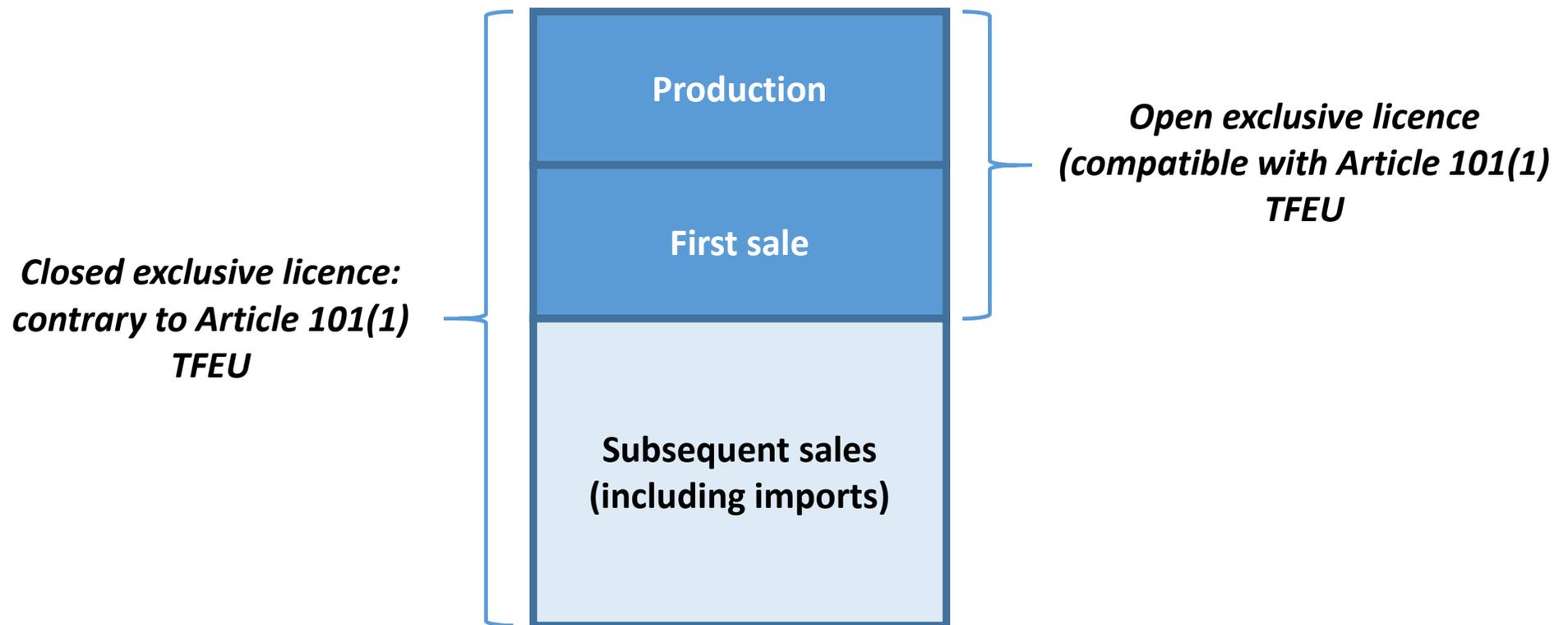
# The *Cross-Border Pay TV* case

- What we thought we knew before the case:
  - An agreement that remains within the substantive scope of an intellectual property right is not contrary to Article 101(1) TFEU
  - Thus, an agreement that allows a licensee to control the same range of acts that the right holder would have been entitled to control is not unlawful
  - Conversely, where the agreement covers acts that are not part of the range of acts that the right holder can authorise or prohibit, it would be unlawful
- This idea is particularly well illustrated by reference to *Nungesser*
  - An open exclusive licence remains within the substantive scope of the plant breeders' rights
  - A closed exclusive licence would allow the licensee to control parallel trade, which the right holder itself would not be able to control

# Precedent 1: *Nungesser*



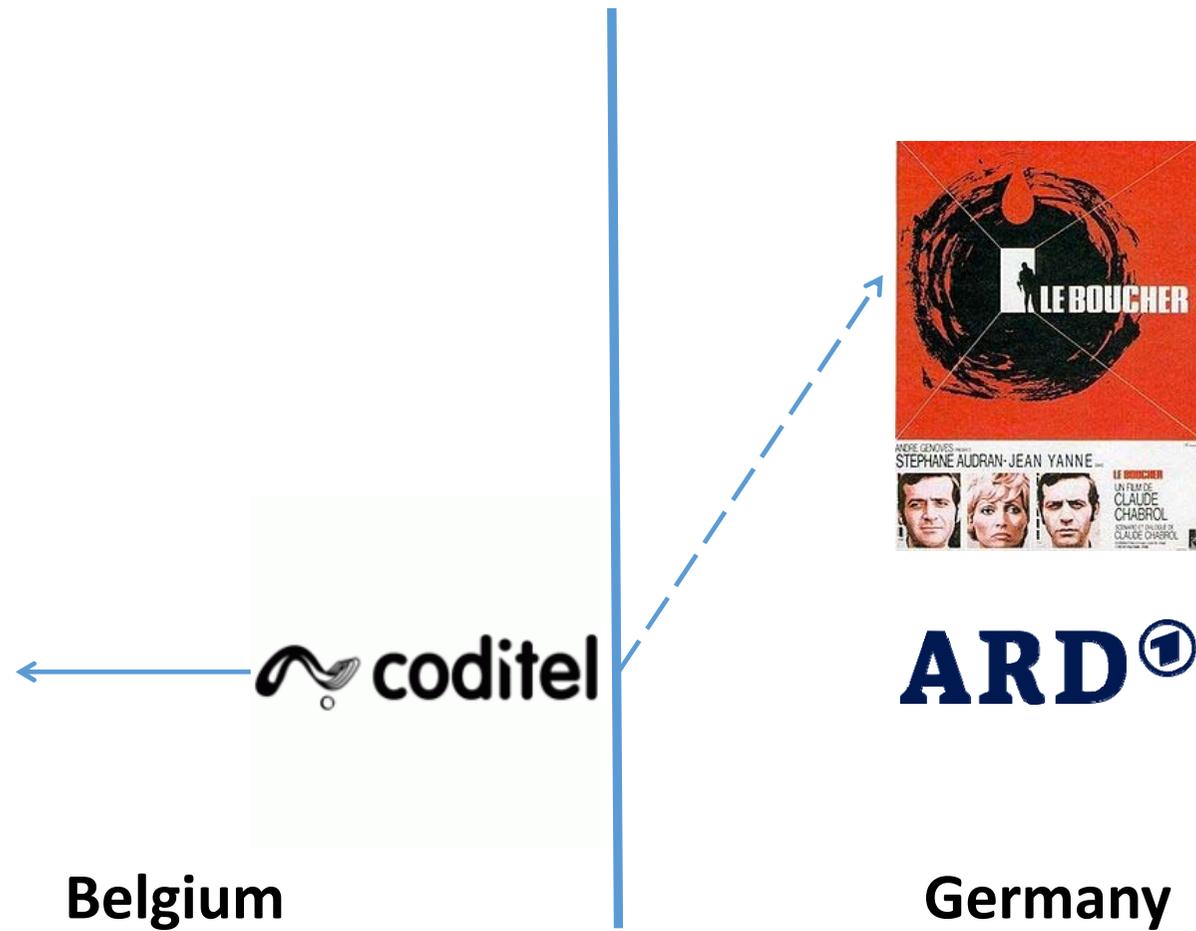
# Precedent 1: *Nungesser*



# The *Cross-Border Pay TV* case

- The Cross-Border Pay TV case concerns the right of communication to the public
  - An authorisation to communicate the work in one Member State **does not exhaust** the right to authorise the showing of the work elsewhere (*Coditel I*)
  - As a result, the right holder is entitled to prohibit **any** communication to the public, including the ‘import’ of online broadcasts from other Member States
  - An agreement that gives an exclusive right to communicate the work to the public in a given territory does not infringe Article 101(1) TFEU (*Coditel II*)
  - The same could be said of an agreement that prevents others from communicating the work to the public in that territory (*Coditel II*)

# Precedent 2: the *Coditel* saga



## Precedent 2: the *Coditel* saga

‘12. A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connexion with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records’.

Case 62/79, *Coditel I*

## Precedent 2: the *Coditel* saga

‘14. These facts are important in two regards. On the one hand, they highlight the fact that the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work. On the other hand, they demonstrate that the exploitation of copyright in films and the fees attaching thereto cannot be regulated without regard being had to the possibility of television broadcasts of those films’.

Case 62/79, *Coditel I*

## Precedent 2: the *Coditel* saga

‘15. However, the mere fact that the owner of the copyright in a film has granted to a sole licensee the exclusive right to exhibit that film in the territory of a Member State ***and, consequently to prohibit, during a specified period, its showing by others***, is not sufficient to justify the finding that such contract must be regarded as the purpose, the means or the result of an agreement, decision or concerted practice prohibited by the Treaty’.

Case 262/81, *Coditel II*

[confirmed in Joined cases C-403/08 and C-429/08, *Murphy*, para 137]

# The *Cross-Border Pay TV* case

- In the *Cross-Border Pay TV* case the Commission does not seem to argue that the right of communication to the public is exhausted
  - The Commission seems to accept that Sky UK cannot offer copyright-protected content outside the UK and Ireland
  - Thus, it is not the agreement, but the copyright system, which prevents Sky UK from responding to 'unsolicited requests' from end-users
  - From this perspective, the agreement does not appear to restrict competition that would have existed in its absence (***counterfactual analysis***)
- Is geo-blocking a competition law problem then? If anything, it might be an issue to be addressed through copyright reform

## The *Cross-Border Pay TV* case

‘If such clauses did not exist, broadcasters would no longer be contractually prevented from responding to unsolicited requests coming from consumers from other countries. At the same time, broadcasters also have to take account of the applicable regulatory framework, such as, for online services, relevant national copyright laws. ***These aspects may need to be tackled by changes to copyright rules, for example as part of the copyright initiatives included in the Commission’s Digital Single Market Strategy***’.

Commissioner Vestager, 19<sup>th</sup> IBA Competition Conference

# The *Cross-Border Pay TV* case

- The Commission appears to argue that the clauses restrict competition insofar as they limit Sky's commercial freedom
  - A restriction in the commercial freedom of the parties to the agreement has never been sufficient to establish a restriction of competition
  - The argument was in fact attempted in *Nungesser* and *Coditel II*, but was rejected by the Court
- The Commission argues that geo-blocking provisions must be justified by the parties under Article 101(3) TFEU
  - Does this mean that the parties need to show that copyright protection fulfils the conditions of Article 101(3) TFEU?
  - Is this not tantamount to questioning the existence of intellectual property rights?