

# Chapter 3

## On the Boundaries of Digital Markets



Ramon Lobato

### 3.1 Introduction

The purpose of this chapter is to investigate a fundamental, but highly opaque, concept that is integral to current policy debates about European audiovisual industries. The concept in question is the “digital market.” This chapter asks: What exactly is a digital market? Just as importantly, *where* is a digital market? How are digital markets defined and bounded? What does it mean to describe a market as digital, as European, or as both? Can a digital market have a defined geography?

I have written this chapter with a specific policy context in mind—namely, the European Union’s Digital Single Market (DSM) strategy. The DSM is a major policy intervention that raises fascinating questions for consumers, audiences, cultural producers, technology companies and regulators inside and outside Europe. The issues in play within the DSM are enormously varied, ranging from telecommunications standards to geoblocking. However, it is worth stressing that virtually all the issues being debated relate in some way to a central problematic: the boundaries of digital markets. Hence, it is an appropriate time to critically reflect on these three concepts (boundaries, the digital and markets) and the relations between them.

Most of the literature on market boundaries is produced by economists and lawyers for the purposes of regulatory analysis. In the context of antitrust and competition law, market definition is a technical exercise to delineate what regulators call the “relevant market” and then to assess market shares, power and competition within that market (Evans 2012). A vast law and economics literature attends to the nuances of this topic, with the effect that market definition techniques have acquired a quasi-scientific character through the use of formalist quantitative methods. However, the

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act of defining markets is always partly discursive. Market boundaries are inevitably malleable and open to contestation, because “the rigid and linear market boundaries envisioned by the law simply do not have parallels in the real world: border zones are invariably wide, and blurry” (Christophers 2013: 129).

Fortunately, there are other ways to approach this problem. Scholars in the social sciences have been thinking about, and around, the general problem of market boundaries for some time. Recent work in sociology, geography and political theory provides useful concepts for understanding how market boundaries are drawn—politically, discursively and institutionally (Aspers 2011; Christophers 2013; Keat 1999). There is also a tradition of critical inquiry into the geography of markets within various strands of communication research (de Sola Pool 1990; Morley and Robins 1995; Berland 2009). Drawing on the analytical frameworks established in these fields can deepen our understanding of media policy debates, providing new ways to think about old problems.

This chapter offers a selective summary of relevant ideas from these fields. By putting these ideas into dialogue with more familiar ways of thinking about markets, such as those inherited from economic and legal analysis, I hope to provide a conceptual frame through which we can see the DSM differently. My intended audience here is media and culture scholars and other readers who are interested not only in the DSM itself but also in what it might mean for debates about the geography of cultural markets. It should be emphasized that my aim is not to get into the weeds of policy detail but rather to interrogate some of the metaphors and concepts used *within* policy.

### 3.2 What Is a Market?

The market is a spatial metaphor, in the sense that it evokes a space of exchange whose boundaries are defined in such a way as to produce an inside and an outside. Hence, the question of market boundaries becomes essential. “To distinguish between markets, we must look at the boundaries of markets”, writes the economic sociologist Patrik Aspers. “When does a market begin, and when does it end?” (Aspers 2011: 100).

Defining markets is always a discursive exercise, because it involves asking questions about demand, value, comparability and commensurability. In other words, it involves asking questions about culture. Legal and statistical techniques for defining markets are still, by and large, based on an assumption of substitution (i.e., that a consumer will switch from one brand of sugar to another brand if the price rises beyond a certain amount). If substitution occurs, then it is assumed that a market of some kind exists, and the boundary is drawn accordingly. While this principle may work well enough for raw commodities, cultural goods—including audiovisual content—are not straightforwardly substitutable because they are subject to the vagaries of individual and collective taste, language, identity and comprehensibility. Their

value is always uncertain. From the perspective of economics, this is “imperfect substitution”; for those in the arts and humanities, it is more likely to be understood as the fundamental irreducibility of human creativity.

Audiovisual markets are paradigmatic cultural markets in the sense that they involve trade in images, affects and ideas, as well as physical products. It is often unclear where the audiovisual market begins; what dynamics of competition and substitution are at play within its boundaries; and how it interfaces with other kinds of markets, including leisure, entertainment and information markets. Is the consumer lining up at the cinema box office “in the market for” a movie only, or would they be just as happy watching something on television, going to a restaurant or reading a book? How substitutable are these experiences?

Economic sociology provides some useful tools for thinking through these problems (Aspers 2011; Callon 1998). To summarize one strand of a complex literature, we can simply say that markets are a way of seeing and structuring economic activity. Markets exist to the extent that they are rendered visible through discourse and measurement, or formalized through regulation. However, transactions that occur within and define a given market are not always understood through the market frame. Many filmmakers simply do not accept the argument that they are operating within a market, preferring instead to see themselves as driven by creative, social and critical motivations. Even though markets become a necessary consideration at the point of distribution, the language of “the market” is not part of their professional identity, or exists as something that they define their work *against*. This is similar to what the political theorist Keat (2000) writes about in his work on market boundaries, which is concerned with delineating what he describes as the “limits of the market.” For Keat, the critical study of market boundaries is a philosophical project addressing the following question: “where, and on what grounds, are the lines to be drawn between those social practices that properly belong to the market domain, and those that do not?” (Keat 2000: 70).

This point about the limited acceptance of market discourse within audiovisual industry practice applies even to professions that are explicitly commercial. For example, many YouTube influencers would struggle to respond if asked about the boundaries of their market. However, they would certainly have a clear idea of who their audience is, what those individuals are looking for, how much they will pay, what forms such payment might take (attention, subscription, advertising, direct purchase) and where else they may go for similar content. In other words, “market” is a way of narrating a network of socioeconomic relations, rather than a thing that exists in its own right. Once defined or enumerated, markets also create their own social realities, hence the emphasis on the performativity of markets in recent economic sociology (Callon 1998).

### 3.3 Market Space and Social Space

A vital insight from the social science of markets is to always consider the messiness and friction built into markets. In other words, we must think of markets as social spaces constituted by history, politics and culture rather than abstract spaces constituted by exchange (Lefebvre 2000; Shields 2013: 74). This involves, among other things, paying attention to how official market boundaries come into contact with—and inevitably conflict with—consumer preferences, practices, activities and institutions that may or may not respect those boundaries. The effect of this thought experiment is to pluralize the idea of “the market” by acknowledging that there are, in fact, many different kinds of markets. More to the point, each market comprises a palimpsest of layers that interact in complex ways.

In the case of audiovisual markets, these layers include:

- The boundaries of territorial markets in copyright licensing, which usually but do not always align with the borders of nation states<sup>1</sup>;
- The preferred market boundaries of local distributors as expressed through their established sales practices (i.e., territorially anchored industry practice);
- The geography of taste and demand (what people want to watch and where), which never aligns neatly with national borders or territorial market boundaries;
- The linguistic geography of language competency and preference, and the availability of subtitles and dubbing;
- The socioeconomic geography of consumers’ ability and willingness to pay for such content;
- The differential pricing and availability of that content in both formal and informal markets, and so on.

In other words, the market as a regulatory construct is only one layer in the larger assemblage of preferences, transactions and dispositions that comprise this market. The official market, then, is one layer in a stack.

The next logical step in this line of analysis is to consider the relations *between* layers. The most appropriate way to understand these relations, in my view, would be to describe them as disjunctive, following Arjun Appadurai’s use of the term. Appadurai, in his canonical essay “Disjuncture and Difference in the Global Cultural Economy” (Appadurai 1996), famously envisaged the cultural economy as a series of “scapes” encompassing flows of finance, technology, media, migration and ideology.<sup>2</sup> Appadurai’s basic point—often overlooked in subsequent commentary—is that the relations between these scapes are disjunctive: Flows in each “scape” are connected but not determinant. Each domain “is subject to its own constraints and incentives [...] at the same time as each acts as a constraint and a parameter for movements

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<sup>1</sup>For example, distribution contracts used in audiovisual licensing may refer to Benelux (Belgium, The Netherlands, Luxembourg), North America (USA plus Canada) or the Caribbean region.

<sup>2</sup>Appadurai’s essay was first published in *Theory, Culture & Society* (Appadurai 1990). The extended and better-known version of this essay appeared several years later as a chapter in his book *Globalization at Large* (Appadurai 1996).

in the others” (Appadurai 1996: 35). Hence, there is a degree of autonomy between ideas and technology, for example, or between human migration and technological development. Of course, there are also structural connections.

This notion of disjuncture is a useful starting point for understanding the relations between audiovisual market layers. Extending this idea, we could say two things. First, relations between market layers are neither aligned nor coordinated, and often function out of kilter with one another. The geography of European languages, for example, often bears little resemblance to the territorial market boundaries established in copyright law, because linguistic communities are often spread across multiple national borders, and because many European nations contain multiple linguistic communities within their borders. Hence, the “language” layer and the “copyright territory” layer are not always aligned. Language is shaped by the contingency of history rather than the formal geometry of market boundaries.

A second observation about market layers is that conflict tends to arise where there is an obvious disparity between two or more layers. This is the case, for example, when there is pent-up demand for a particular work but no formal availability to satisfy that demand (i.e., when the consumer demand layer is out of sync with the copyright licensing and/or availability layers and/or the socioeconomic layer). The result in this case would be market failure or piracy. Too much demand and too little formal availability means that activity tends to spill over into informal markets (Lobato and Thomas 2015).

The analytical approach I have suggested allows us to see official market boundaries as one layer in a larger structure. This, I would argue, is an appropriate starting point for thinking about audiovisual markets. It is especially helpful for understanding controversies surrounding the DSM—a grand policy exercise that brings into focus the tension between market layers.

### 3.4 The Digital Single Market and Its Discontents

Let us now consider what this multi-layered approach to markets can reveal about the DSM. For those unfamiliar with the DSM, I begin with a summary of its key components and some well-known areas of controversy relating specifically to the audiovisual sector. By necessity, this is a brief overview of a complex topic. More detailed analysis can be found in subsequent chapters in this book and in other expert studies (Bondebjerg et al. 2015; Gomez Herrera and Martens 2018; Ibrus 2016; Trimble 2019).

The DSM is a set of interlocked EU reforms designed to reduce barriers to trade in digital services and goods within the EU. It involves a raft of changes to EU law, standards and regulations across several policy areas, including copyright, consumer protection, telecommunications, e-commerce, media regulation and data policy. Many of the measures have already been passed by the European Parliament, though others, at the time of writing, are yet to be legislated. A key objective of the overall DSM package is to create seamless access to European digital services

across the continent by reducing “unjustified” geoblocking and eliminating other technological barriers. A discussion of EU-wide copyright licensing was also part of the initial DSM agenda, but this was scaled back in the face of strong objections from filmmakers, producers and audiovisual distributors.

The elements of the DSM that are most relevant for our analysis include new rules mandating the portability of digital media content for users moving between EU countries (so that Europeans can take their online subscription services with them when they travel within Europe) and measures designed to reduce geoblocking in e-commerce. Another important change is the 2018 revision of the Audiovisual Media Services Directive (AVMSD), which introduces a 30% European content quota and rules about the promotion and recommendation of this content within video streaming services.

The DSM has been highly controversial, and it is helpful to reflect on why this is so. One reason is that the DSM embodies a number of connected, but philosophically incompatible, principles. These principles can be summarized as follows:

- A rights-based principle of free movement and access to European culture, transposed into the realm of digital goods and services;
- A vision of economic liberalization, competition and innovation;
- A contemporary discourse of Internet freedom and a “borderless Internet” (especially evident in the comments of Andrus Ansip, EU Commissioner for the DSM);
- An efficiency argument about solving market failures and blockages and improving consumer welfare;
- A protectionist policy agenda (visible especially within the revised AVMSD) focused on supporting European producers through legislated protections and quotas;
- A commitment to cultural diversity in line with EU principles.

Clearly, these goals exist in a somewhat tense relationship. For example, the protectionism of content quotas pulls, ideologically, in a different direction from the DSM initiatives that prioritize liberalization.

A second reason why the DSM has been divisive, especially among European filmmakers, is because the DSM is not strictly audiovisual policy. Instead, it is economic policy that encompasses audiovisual markets alongside other kinds of markets—including telecommunications and e-commerce. In this sense, the DSM’s controversial nature can be partly attributed to the fact that it appears, at least discursively, as an attempt to redraw market boundaries around film and television and to reframe these media as part of a larger, non-medium-specific “digital” market. This was more a rhetorical move than a substantive policy shift. Despite the rhetoric of a single digital market, the DSM is really a collection of distinct initiatives designed to boost pan-EU trade *within* existing markets. Nonetheless, the rhetorical force of DSM—as a catchphrase—has been powerful, and somewhat counterproductive in terms of managing expectations for industry-specific solutions.

Part of the problem here is the term “digital,” itself a highly contentious category. Trade in digital goods frequently expands the geographic boundaries of the market, because it lowers transaction costs (Elzinga 1981). To add further complexity, digital markets also blur boundaries between formally distinct media such as cinema and television (media convergence), which means that product categories *within* a market may shift. In other words, the digital both pushes the geographic boundaries of the market outward while redrawing boundaries on the inside of the market. However, the digital is always bounded and territorialized through social practice, language and taste. It can only exist on the rough terrain of culture. Hence, we return, once more, to the disjuncture between market boundaries and social space.

### 3.5 The Geoblocking Problem

Let us turn to a specific issue within the DSM—geoblocking—that neatly illustrates this problem of disjuncture. Notwithstanding the many inherent tensions within the DSM project, it was the European Commission’s proposals on geoblocking that generated the strongest opposition on the part of AV industry stakeholders and their representatives. Geoblocking is a technique of digital rights management in which IP geolocation is used as the basis for granting or restricting access to digital content, in order to conform to licensing agreements organized on a territorial/national basis. In this sense, geoblocking is the technical solution for extending the principle of territoriality online.

Many consumers, of course, see geoblocking as a cause of great frustration. The European Commission’s stated objective with the DSM was to reduce unjustified geoblocking, and by extension, to reduce digital market segmentation, geographic price differentiation and uneven availability of services within the EU. However, the implications of an end to geoblocking for long-established business models within the EU audiovisual sector were underestimated by EU policymakers. Anna Herold of the European Commission, writing in a personal capacity, has described this tension over geoblocking as “a fundamental controversy” that the DSM “stumbled upon” (Herold 2018: 255).

Zahrádka (2018) has studied in detail how geoblocking became such a controversy within the DSM discussions, dividing stakeholders along different lines. On the one hand, consumer groups and Internet advocates strongly supported the aspects of the DSM that promoted cross-border access. On the other hand, European filmmakers, producers and distributors saw in the DSM’s anti-geoblocking agenda a weakening of territorial copyright and pointed to unforeseen consequences. A key concern of these objectors was the destabilization of the presale financing model, which is premised on territorial exclusivity and market segmentation. For example, John McVay of the Producers Alliance for Cinema and Television (UK) warned that “Any intervention that undermines the ability to license on an exclusive territorial basis will lead to less investment in new productions and reduce the quality and range of content available to consumers” (Roxborough 2015).

Other objectors were concerned that the DSM might reorganize the market around the needs of Netflix, Amazon, Google and Apple, who were arguably in the best position to benefit from the increased efficiencies of a single market. Indeed, several Silicon Valley companies expressed strong approval of the DSM. Google's Chairman Eric Schmidt stated that "To succeed globally, Europe needs a single digital market" (Mizroch and Jervell 2015), while Netflix CEO Reed Hastings went further, noting that "We really want the world to be a single market" (Stupp 2015). Comments such as these did not allay suspicions among smaller European players that they may have little to gain from redrawing market boundaries.

Critics of the DSM also warned of harmful knock-on effects that would result from any weakening of territoriality. These included everything from the crippling of the theatrical exhibition sector and the financial ruin of smaller distributors who could not afford to license films on an EU-wide basis to the equalization of pricing across the EU (so that Romanians would have to pay the same as Germans for their digital movie rentals) and even the rise of dubbing in subtitle nations (because dubbing could be used as a de facto market separation measure) (Trimble 2019).

As an example, consider the following remarks from Jelmer Hofkamp, secretary of the International Federation of Film Distributors' Associations (FIAD), offered in 2015 when the DSM territoriality debate was at its peak:

If we look at the kind of tools they [the European Commission] want to use to create this DSM with a strong focus on availability, that is where they [the EC] go wrong because availability is not the same thing as building bigger audiences or having better circulation of European works. [...] Is it the principle of availability of the single market they want, or is it actually a flourishing European production market and more circulation within the EU of European product? (Macnab 2015)

Hofkamp's point here is that the stated aims of the DSM—including pan-European availability and circulation of EU works, and a flourishing European screen production culture—may be incompatible. In other words, the dream of unfettered digital availability cannot always be reconciled with the political economy of film and television production. This was not a consensus position, as those on the other side hotly disputed the claim. Pirate Party MEP Julia Reda argued that "Europe's 'natural' cultural and linguistic barriers are much more effective and unintrusive in achieving some market segmentation than discriminating viewers based on the country they are currently in." Reda added that "Nobody's going to stop going to the cinema in Portugal because a film is already viewable online on an Estonian website" (Reda 2016).

As we can see from these various interventions, the key issue here for both sides was the relationship between the ideal boundaries of the market and the actual functioning of those markets in practice. Rightsholders, producers, audiovisual industry associations and some filmmakers argued that the dream of a pan-European audiovisual space was blind to the *realpolitik* of production, including the complex relationship between distribution guarantees and production financing. Meanwhile, consumer and Internet advocates argued that the existing system of territoriality simply could not be reconciled with the everyday practices of consumers, nor with the circulatory logics of data in the Internet age.



### 3.6 Boundary Trouble

How do we make sense of all this complex position-taking? One analytical possibility is to see the whole DSM/geoblocking affair as symptomatic of a wider conflict between the regulatory, industrial, social and cultural layers of the market, as defined earlier.

For European filmmakers, producers and distributors, the vision of borderless consumption within the EU was problematic because it clashed with the existing institutional arrangements in the audiovisual sector. In other words, it was a conflict between the existing social space of the market and its new (proposed) abstract form. Internet and consumer advocates saw the situation through a different lens, but using similar categories. They argued that the artificial constraints of an outdated copyright system were being imposed on the “natural” geography of consumer demand. In both cases, the core conflict involved a perceived clash between real-world markets and official market boundaries.

A second vector of conflict was whether market boundaries in the DSM would reflect consumers’ needs or rightsholders’ needs. Markets designed for rightsholders will logically have different boundaries from markets designed for consumers. Copyright is a system designed for rightsholders, in the sense that its incentives rely on protections and rights granted on a territorial basis, following the publishing industries’ historical business model. In the DSM debate, the most vocal industry stakeholders—many of whom felt they had little to gain from an EU-wide market, because demand for their work was concentrated in a handful of key territories—wanted to retain the licensing cost structures that come with territory-by-territory licensing. In other words, they wanted *small markets* with tightly defined, enforceable boundaries.<sup>3</sup>

On the other hand, consumers—to the extent that they care about market boundaries at all—are likely to prefer larger markets (for increased choice and to avoid the hassle of geoblocking) with permeable boundaries and no enforcement, except in those instances when drawing the boundary in such a way results in price differences.

In other words, there is a clash not only between the material interests of producers and consumers, but also in how these interests map onto the abstract form of the market. The idea of a single audiovisual market, as articulated in the DSM discussions, proved to be divisive rather than unifying, because it brought into focus the many conflicts that arise when a boundary is moved.

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<sup>3</sup>The interests of rightsholders and creators are not necessarily aligned, as many creators seek the widest possible circulation of their work. The different interests of rightsholders and creators are often grouped together under the category of “producer,” but these need to be carefully disentangled.

### 3.7 Conclusion

In this chapter, I have argued that the Digital Single Market controversy is emblematic of a wider set of tensions about market boundaries, which are reconfigured but also reinforced by digitization. In this sense, the DSM draws our attention to the contradictions between the spatial free flow and spatial restriction that characterize digital media. Far from creating a flat space of friction-free commerce, the DSM reminds us that digital distribution has the potential to create new kinds of borders, new enclosures and new territorialities, as well as new mobilities.

Scholarship and policy in this area need to retain a spatialized understanding of markets that sees them not as flat spaces of flow and exchange but as social spaces of friction. The coming years are likely to be marked by further disjuncture between the market layers I described earlier. While these problems are not unique to Europe, they will play out in an intensified form in Europe—because of its dense patchwork of media markets, institutions, languages and histories.

The DSM is the most developed policy response to the problem of geoblocking that has been tried anywhere in the world. As such, it represents a major intervention into a hitherto unregulated aspect of everyday media usage affecting millions of users. Any scholar interested in questions of distribution, copyright, piracy and so on should be paying attention to the DSM, and especially to its evolution over time as the early proposals hit the hard ground of stakeholder self-interest.

However, a key lesson from the DSM case is that territoriality in copyright cannot be reduced to a Manichean conflict between two sides, such as corporations versus the consumer, capital versus creativity or the powerful versus the powerless. The DSM has shown us, among other things, that moving a market boundary can have many unforeseen effects. As I have argued throughout this chapter, each stakeholder's position in the DSM debate has relied on a particular set of claims about the proper boundaries of the market. None of these claims are pure in their own right, but all of them reveal something about the disjuncture that characterizes cultural markets.

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