

Chapter 5

Geoblocking: At Odds with the EU Single Market and Consumer Expectations



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5.1 Introduction

“This video is not available in your country” is a message that has for many years been a common grievance for Internet users trying to legally access audiovisual content online. This chapter takes a consumer perspective on geoblocking, explaining how this practice is detrimental to the consumer experience, disproportionately affects those consumers who are prepared to pay for copyrighted online content and ultimately constitutes a form of discrimination based on national and language barriers. The article draws from the author’s experience as a Member of the European Parliament who has served as her political group’s shadow rapporteur on the European Commission’s major legislative initiatives to address geoblocking during the legislative period of 2014–2019. The European Parliament’s politicians and staff form one of the groups highly affected by geoblocking, since they spend extended time in a European country other than their home country and typically consume media in a number of different languages to follow public debate in different European countries. I draw on my experience as a lawmaker tasked with addressing the issue of geoblocking, as well as my firsthand experience as a particularly privileged consumer of international media as part of the Brussels expatriate community, to describe and analyze the EU response to geoblocking as well as the political controversy around these measures. This unique perspective necessitates a more personal approach than a typical academic article based mainly on the academic literature; this chapter relies mainly on official European Union documents in the context of the policymaking process to address the geoblocking phenomenon.

We begin in Sect. 5.2 with an overview of the general effects of geoblocking on consumers, while the third section explores geoblocking as a form of discrimination, particularly affecting consumers at the periphery, such as linguistic minorities,

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residents of small Member States and long-term migrants. Section 5.4 briefly examines possible negative effects of geoblocking on artists, who are often presumed to benefit from the practice. Section 5.5 examines possible economic consequences of unmet consumer demand for non-geoblocked audiovisual offers. Furthermore, Sect. 5.6 puts particular focus on the friction between the practice of geoblocking and the concept of a European Single Market, as well as the nascent European public sphere. Section 5.7 briefly presents three recent legislative attempts at the European Union level to abolish or reduce geoblocking as part of the EU's Digital Single Market strategy. Last but not least, Sect. 5.8 attempts to present a prognosis of future developments in the audiovisual market online in the absence of adequate legislative interventions to abolish geoblocking.

5.2 Geoblocking Locks Out Audiences

From the perspective of a consumer trying to legally access cultural material online, the practice of geoblocking appears as a form of “discrimination of content” based on criteria of location. This means that content is blocked based on the user's actual or presumed geographic location. Geoblocking can be the consequence of explicitly blocking audiences from a particular location, or it can be due to the unavailability of global licenses, where content is only made available to specific audiences in countries or regions where a license has been obtained, while all other regions are blocked by default. However, geoblocking does not refer solely to the “blocking” of copyrighted content, such as audiovisual works, although this form of geoblocking is the primary focus of this article. Geoblocking also refers to acts of refusing to sell a specific product when a consumer makes an order online from a different country, rerouting the users to a Web site different from the one they chose or even offering different products or the same products but with a differentiated price depending on the place of order. To do so, content providers verify the IP address of the users and identify the geographic location of their devices. These acts are particularly harmful to certain marginalized groups of consumers and negatively impact their fundamental rights by failing to respond to the fundamental principles of the European Single Market. In other words, the EU promises freedom of movement within its physical borders, but blocks the free movement of services online by allowing digital borders to persist.

The EU promises freedom of expression and access to information for its citizens and residents. However, geoblocking undermines these rights by enforcing geographic boundaries on the free flow of information, especially in the form of cultural and educational material. Geoblocking practices will continue to exist as long as laws, but also business models that incentivize geoblocking fail to modernize. Instances of such sectors and services are online providers of goods and services most notably in the retail, tourism and leisure services sectors (European Commission 2016b), but also broadcasting and streaming services, such as TV and radio programs, broadcasting of sports events, and the video games (European Commission 2019), music

and film sectors. This article focuses on geoblocking in the audiovisual sector, but will also briefly describe policy initiatives to address geoblocking in other sectors.

As a result of geoblocking, citizens traveling, working or studying within Europe cannot access content that they could access from their home countries, or they find themselves permanently on the wrong side of a national border and are thereby deprived of access to cultural, educational or other content that is available in other parts of the EU. While recent EU initiatives to address geoblocking have promised to solve this issue at least with regard to temporary travelers trying to access content from their country of residence, as described in Sect. 5.7 below, enforcement of these rules is still far from complete. As a result, consumers are less likely to get to know new content originating from a different Member State, as it may not be financially attractive to the service providers to purchase geographic licenses for content that is not (yet) popular in a given region. This illustrates that there is not always an economic interest in restricting access to content in order to provide exclusivity: Geoblocking can also apply to older, economically less relevant content such as historical TV shows or outdated news programs. This surprising phenomenon could often be observed by Brussels-based expatriates trying to catch up on online free-to-air TV news programs from their home country, which they may find subjected to geoblocking or removed from the Internet entirely after a certain period of time, despite the questionable economical need to protect the investment in past news programs. Cultural programs with limited geographic significance would also be subjected to geoblocking. Occasionally, outraged consumers would air their frustration on social media, sharing screenshots of blocked news programs (e.g., see Twitter 2019a, b). European film productions are also particularly affected: 63% of European films are only released on video on demand (VOD) in a single national market, neglecting the cross-border demand for cultural works and limiting the potential commercial success of European films (Grece 2016). In the absence of global licenses, geoblocking of audiovisual content in particular is the norm rather than the exception and it requires conscious effort and financial resources by service providers to make audiovisual material available globally, which is rarely in the business interest of such providers.

Some consumers react to the geoblocking of content that they feel they have the right to access by using alternative methods to gain access to content, such as the purchase of a VPN service that changes their IP address to one that is associated with a different geographic location or illegal methods. The strategies of EU policymakers and administrators for circumventing geoblocking, most of whom had moved to Brussels from another EU country, were often a topic of discussion at the fringes of shadow meetings or trilogue negotiations on the very legislative proposals intended to address geoblocking in the EU. The use of VPN services as a means of circumventing geoblocking, particularly popular among Brussels expats, has even led some media companies to voice demands during closed-door lobby meetings that policymakers outlaw or technologically restrict the use of VPNs, which is worrying from a cybersecurity perspective, as VPN services are an essential element of IT security strategies, facilitating for example the secure connection to company or government intranets for traveling employees. In policy discussions, the use of

VPNs is often conflated with illegal means of accessing content online, although VPNs are perfectly legal and consumers who use VPNs still have to pay for access to the subscription services they access via VPN, in addition to eventual charges for the VPN service as well.

Last but not least, consumers confronted with geoblocking may avoid conducting cross-border purchases or other transactions altogether and may show lack of trust in small and medium-sized enterprises based in other European countries as a consequence of the large number of unsuccessful purchase attempts due to geoblocking. A mystery shopping survey conducted by the European Commission in 2015 aimed at quantifying the problem found that “only 37% of Web sites actually allowed cross-border EU visitors to reach the stage of successfully entering payment card details, i.e., the final step before completing the purchase” (European Commission 2016b). When considering what consequences this frequent frustration may have on consumer behavior, it is likely that consumers would prefer larger platforms with a uniform presence in most European countries that have managed to concentrate the necessary human and economic resources to offer a solution closer to their demands. Geoblocking thus not only contributes to locking in audiences to geographically segmented programs, but may drive consumers toward a smaller number of multinational service providers.

5.3 Geoblocking Is Discrimination

It is self-evident that geoblocking constitutes a form of discrimination of content, differentiating the offer based on geographic boundaries. Proponents of geoblocking may argue that the practice is not discriminatory, as it is not strictly based on nationality, but on temporary geographic location, which the consumer can influence. This view does not take into account the very real financial, educational and cultural restrictions on freedom of movement within the EU. New policy interventions like the Portability Regulation particularly help affluent consumers who can afford to travel frequently between EU countries, all the while ignoring that geoblocking frequently results in discrimination against marginalized groups of consumers, whose cultural consumption needs are different from those of the general population. It is hardly a solution for members of a linguistic minority to give up their cultural traditions and move to another country where their language is the majority language, simply to be able to access cultural content in their mother tongue online. Nor is it helpful to tell low-income migrants that limiting their access to news programs from their home country is not discrimination, because they can always travel back. Discrimination based on geographic location, while not identical with discrimination based on nationality in the sense that geographic location can more easily change over time, disproportionately affects those parts of the population that are less mobile, less affluent and culturally marginalized because they speak a language that is not the majority language in their country of residence. Consumer groups particularly negatively affected by geographic discrimination in the form of geoblocking include

travelers, exchange students and commuters, who may temporarily lose access to the content they are used to, as well as linguistic minorities, language learners or long-term migrants, who find themselves permanently on the wrong side of a national border separating them from the majority of consumers wishing to access content in a particular language. Furthermore, professionals who regularly rely on accessing a broad range of cultural, educational and news material from different countries, such as academics or journalists, are also disproportionately affected by geoblocking. Generally speaking, geoblocking most strongly affects consumers who have a particular interest in cultural, social, political or other content most frequently consumed in another country, an interest that the EU has long been trying to cultivate through exchange programs and attempts to foster the development of a European public sphere. News and other relevant information about another European country may also to a large degree be hidden from interested parties. Reducing geographic discrimination in the form of geoblocking should therefore be high on the EU policy agenda.

Despite the fact that geographic discrimination is strictly prohibited in the EU, reports by consumer associations (Reyna and Silva 2017), occasional court cases¹ as well as the European Commission's own investigations into the subject (European Commission 2016a) show that geographic discrimination in the form of geoblocking continues to be a significant problem in the EU. More specifically, consumers have long been "geoblocked" due to their nationality, place of residence, place of establishment or, more generally, the location from which they access content online.

Finally, geoblocking reproduces existing inequalities between large EU economies and smaller countries at the periphery. Due to economic inefficiencies caused by geoblocking, the online streaming market favors large multinational streaming companies, as is explained in Sect. 5.5 below. Those multinationals have less incentive to invest in licenses for globally successful audiovisual content that cover small European countries, as the smaller number of potential customers makes it more difficult to recoup the investment. For instance, bias in favor of consumers in large, economically significant countries can be demonstrated on Netflix, where the country-by-country repertoire of films varies substantially (Kidman 2016). While the German Netflix library is 28% the size of the US library, this number is 18% for Slovakia and 15% for Estonia, respectively. As cultural proximity and shared language seem to be the main drivers of cross-border availability on Netflix (Batikas et al. 2015), this also means that countries with less common languages are at a disadvantage. To illustrate this phenomenon, Slovak Netflix users were recently successful in gaining access to a much wider range of regionally suitable content by petitioning Netflix to make the much larger catalogue of Czech language dubbing and subtitles available to Slovak users, as the two languages are very similar and mutually understandable (Kafkadesk 2019). The fact that consumers had to organize and petition Netflix to enact this change also illustrates the limits of multinationals' ability and willingness to study the needs of smaller, peripheral language communities.

¹See Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others*.

Language minorities find themselves in a particularly difficult situation when they try to access online content in their native language: National language minorities may speak a language the majority of whose speakers live in another country. One example is the island of Åland, a Swedish-speaking language community in the Baltic Sea that belongs to Finland. Such linguistic minorities often find themselves geoblocked from TV or radio content online that they have no trouble accessing via traditional broadcasting. Many language minorities speak a language that is not the majority language in any country, a situation which makes language discrimination through geoblocking particularly rampant when members of that language community travel abroad or permanently move to another country. One example is the availability of Scottish Gaelic television (Hicks 2016). Under the BBC rights system, it is problematic to rebroadcast programs outside of the UK. This results in a situation where Gaelic speakers, members of the language community and language learners are not able to access such programs if they are outside the UK. It is obvious that this form of geoblocking does not protect an investment by the BBC, as the economic value of streaming rights for minority language programs outside the country in which that linguistic minority is primarily located can be expected to be very low. Yet native speakers and learners of minority languages face discrimination as a form of collateral damage caused by rights management systems that are designed to protect the economic investments in globally successful, often English language programs. As many minority or small national languages are threatened by extinction, the unavailability of cultural content in those languages in most of the world is an additional contributing factor to the shrinking of those language communities that goes against the EU's goal of cultural diversity.

Some progress has recently been made in the passing of legislation aimed at addressing the demand for cross-border accessibility of content by the—overall more privileged—consumer groups of professional travelers, tourists, commuters and exchange students. The Portability Regulation, which will be presented in Sect. 5.7 below, is designed to extend the accessibility of content for consumers who have their principal place of establishment in the “right” country, while traveling temporarily abroad within the EU. Remarkably, this legislative intervention does nothing to address the concerns of those often less privileged groups of European consumers who find themselves permanently on the wrong side of the border, such as long-term migrants or language learners who lack the financial resources to travel in order to further their education. Geoblocking thus contributes to social inequality in the EU, and the policy initiatives to counter it are criticized that they may do more to make the problem invisible to the political elites such as Members of the European Parliament and other Brussels officials, who can often afford to maintain a place of residence in their home country, than to actually end the practice of geoblocking to the benefit of all Europeans, including those who cannot afford to travel.

All in all, geoblocking is causing and strengthening discrimination in the EU. The differentiated treatment of consumers based on their nationality or place of residence, place of establishment, native language or other factors is increasingly acknowledged by the European institutions, and an effort was made to tackle the issue during the European legislative period of 2009–2014. As Sect. 5.7 will explore in

greater detail, these efforts have largely excluded the most relevant area of audiovisual cultural content and have been more focused on cross-border e-commerce. However, discrimination is not only a question of the cross-border availability of goods and the feasibility of cross-border payments, but also a question of equal and fair access to cultural and educational content from anywhere in the EU.

5.4 Geoblocking Locks in Creators

Advocates of geoblocking may claim that practices that lead to geoblocking serve the interests of rightsholders. Rightsholders' organizations in the audiovisual sector (with the notable exception of some public service broadcasters) have consistently responded negatively to European Commission initiatives to abolish or reduce geoblocking, including legislation to improve portability, arguing that market-led solutions are sufficient to meet consumer demand, and where cross-border audiovisual services are not available, this is due to lack of consumer demand. Film producers in particular held that territorial restrictions were beneficial to their business model, improving the possibility to secure financing for future productions through exclusive contracts with different regional distributors, as evidenced by the stakeholder consultation conducted by the European Commission in preparation for the portability proposal (European Commission 2015a).

However, a more thorough look into the dynamics of cultural production calls that claim into question. Geoblocking has two directions. The first is, as previously explored, the blocking, or in any other way hindering, of access to content. The second is the blocking, or in any other way hindering, of dissemination of such content. The former affects the potential consumers of cultural content, while the latter affects artists, creators, rightsholders and service providers. In fact, geoblocking is rarely in the interest of all parties on the supply side of content. For example, in response to a public questionnaire conducted by the European Commission, of the 68% of providers who geoblocked users located in other EU Member States, 59% reported that they were doing so based on a contractual obligation, for example based on licensing restrictions imposed by the rightsholder (European Commission 2016c).

One of the differences between the analog and digital environments is that the latter offers faster, easier and wider access to content. This is also one of the most significant advantages of the Internet for creators, not just for consumers. Nowadays, people have a tool which allows them to access information from anywhere at an instant. At the same time, they have the ability to express themselves and disseminate their own content, whether this is a product, service or free content, more widely than ever before and without having to rely on intermediaries. That being said, it is evident that geoblocking is largely affecting the visibility of content, which ultimately affects original creators and the business of online enterprises.

When content is blocked, the providers of content, products or services are deprived of a wider audience and lose on visibility, "visitability" and ultimately revenue. Fewer consumers become aware of their work or products and services, while

those who are aware and who would like to make a purchase are blocked. Geoblocking may lead consumers to look for illegal sources of online content (Australian Government Productivity Commission 2016), which do not generate revenue streams for the rightsholders or original creators at all, or divert parts of the consumers' budgets for cultural content to third parties, such as the providers of VPN services, also leading to less money available for paying creators. Based on the assumption that consumers have a limited budget for cultural content, the incurring of additional costs such as paying for VPN services, in order to be able to access legal cultural content of their choice, is likely to reduce the budget available to spend on streaming subscriptions or downloads of cultural content as such, which is supposed to financially benefit the creators of the cultural content in question. Especially considering the advertising market online, where platforms earn more with every "click," it is evident that the blocking of access directly affects their economic well-being.

However, the above logic is not the same for large platforms that tend to monopolize the digital market. These platforms have the necessary economic and human resources to respond to contemporary practices and obsolete laws. As they earn more and more market share, not being represented on these platforms becomes more and more costly for artists, creators and other rightsholders, since this is where consumers will likely discover new content. By becoming dependent on large online platforms, creators cede some of the independence that the Internet has promised them to the gatekeepers. Therefore, similar to the position of large retailers of physical goods that have dominated the analog world of commerce, dominant digital platforms such as Amazon and Netflix concentrate market resources and end up being the sole sources for access to digital goods and services.

In contrast to the film sector, where the platform either produces the content itself or has purchased a geographically limited license that is often exclusive in nature, the music sector relies more heavily on the global licensing of repertoire, which seems to be more closely aligned to user expectations (European Commission 2015a). Since exclusive licenses are less common in the music sector, it follows that there is a better possibility for more streaming services to offer the same music catalogues. Nevertheless, fringe artists that are not associated with a traditional music label may have difficulty being included in the repertoire of those streaming platforms and therefore find it difficult to gain visibility with their potential audiences (Farrand 2014). This problem may be exacerbated by a crackdown on user-generated music platforms such as SoundCloud or Bandcamp, which are increasingly forced into a licensing-based business model and negotiations with traditional collecting societies through recent changes in liability rules for copyrighted content uploaded by users (Reda 2019). While geoblocking may continue to be a lesser concern for independent music creators, they may still face greater restrictions on dissemination of their material online through consolidation of the online platform economy.

5.5 Geoblocking Harms the Economy

Contrary to claims made by representatives of certain media companies in the European policy debate (European Commission 2015a), abolishing geoblocking does not mean harming rightsholders. In many respects, geoblocking is harmful to the economy at large and constitutes a market consolidation practice employed by already large players in the market to the detriment of smaller players. Additionally, the issue of geoblocking is largely unrelated to controversies around the fair remuneration of original creators, who, as discussed above, do not necessarily benefit from geoblocking.

The potential economic impact of geoblocking can be estimated by examining a number of different indicators, such as the figures regarding the total European consumer spending on paid subscriptions to online content services. Technological development and the spread of portable devices have improved access to online content services. The purchase or rental of films and TV series delivered over the open Internet or on a subscription basis keeps growing every year (International Video Federation 2017). The total spending on digital video in 2017 was €5.7083 billion, a 32% increase compared to the previous year (*ibid.*).

Another important indicator is the potential demand for cross-border services. Free movement of people in the internal market, availability of portable devices, increasing broadband speed and decreasing roaming charges have contributed to the increased demand for the cross-border availability of online content services. As a result, according to recent estimates, up to €1.6 billion worth of cross-border demand is kept from EU VOD platforms, EU start-ups and artists (Plum Consulting 2012). Willingness to pay for content by frequent travelers was estimated to be around €90 million annually (*ibid.*).

The European Parliament's own research service also concluded that many millions of Euros in sales are lost annually due to this unmet demand. The amount that consumers are willing to spend is estimated at a lower bound of €189 million and an upper bound of €945 million per annum (European Parliament 2017a).

Increasingly, some of the biggest traditional media companies are acknowledging the growing demand for subscription-based services and launching their own streaming services (Anderton 2019). Due to their economic resources and the size of their license portfolios, they can provide European consumers with interesting offers; however, their repertoire remains limited compared to US catalogues. The most attractive audiovisual streaming services in the European market combine internationally successful US content with European productions. The multinational streaming platforms of US technology companies, although they do not allow access to the entirety of content available, are often in the best position to offer a diversity of content by combining the purchase of licenses for third-party content with an increasing number of their own productions, TV shows and even feature-length films that are entirely financed, produced and distributed by the streaming service provider itself. Increasingly, these in-house productions include big-budget European TV series, partially to increase the attractiveness of their services in the most important EU markets such

as Germany, Spain and France, but also to address regulatory demands for European content in the repertoires of streaming services.²

In the case of their own productions, the streaming service provider holds the worldwide rights to the online exploitation of the content, enabling it to offer the same content on its service worldwide without any geoblocking imposed by third-party rightsholders. The most well-known examples of such streaming service providers in the audiovisual sector are Netflix and Amazon Prime. Both companies were able to grow their business in the USA with a large single market available to them and later branched out into global audiovisual streaming only after they had already built considerable revenue streams in the USA. Their substantial financial means put them in a position to gradually buy up geographic licenses for popular audiovisual content in different EU countries, rolling out their services country by country over a number of years. Eventually, their profit margins allowed them to build up their own production capacities, with in-house productions making up an ever-increasing share of their streaming catalogues and functioning as a means of differentiating their offer by providing their own productions exclusively.

In-house productions have become an attractive business model for established streaming companies not least as a reaction to a regulatory environment that may have been intended to prop up traditional European media companies. The proposed ban on geoblocking, initially championed by European Commission Vice-President for the Digital Single Market Andrus Ansip (Reda 2015), has largely failed to materialize due to opposition from the European cultural sector, as shall be explored in the next section. Similarly, a policy to increase obligations for investment in European productions was also championed by European TV, film and cinema companies (European Commission 2015b) during the review of the Audiovisual Media Services Directive. For technology companies with successful streaming services, both legislative developments have increased the attractiveness of investing in their own productions, thereby becoming competitors against the very media companies lobbying to maintain geoblocking. Consequently, a small number of large enterprises with origins in the technology sector rather than the cultural sector have started a trend toward “oligopolizing” the audiovisual streaming market, which could end up having detrimental effects on the established European media production companies as well as on consumers, who may once again see themselves confronted with a lack of choice between streaming services offering a wide repertoire.

It would be difficult to imagine a European streaming start-up growing to the scale of Netflix or Amazon Prime, considering that such a company would not have a single market of hundreds of millions of potential customers to rely on, despite the EU’s ambitions to build a Digital Single Market. Rather, such a company would have to start out in a relatively small national market and could not grow without making an early investment by the purchase of additional national streaming licenses, which would enable it to offer services across national borders within the EU. Without a

²The recent legislative overhaul of the Audiovisual Media Services Directive requires on-demand audiovisual services to devote 30% of their repertoires to European productions, as well as contributing to the financing and visibility of European works (European Union 2018b).

change in legislation and licensing practices, EU-based market entrants are unlikely to be able to compete with the likes of Netflix or Amazon, and further consolidation of the streaming market seems likely.

This threat of further consolidation of the streaming market must be viewed against the backdrop of mounting concerns about competition related to geoblocking. There is ample evidence that geographic discrimination may violate competition law. One of the earliest cases pointing in this direction is European Court of Justice case C-403/08—*Football Association Premier League and Others*, which found that: “The clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices enabling access to that rightsholder’s protected subject-matter with a view to their use outside the territory covered by that licence agreement.”³ The European Commission subsequently launched a sector inquiry into geoblocking in the e-commerce sector between 2015 and 2017 (European Commission 2017a), and opened several investigations into specific geoblocking practices, including the question of online content in the video games sector (European Commission 2017b). It is notable that despite these concerns about a fundamental lack of compatibility of geoblocking with EU market principles, legislative action to ban geoblocking has remained rather timid. The interaction of geoblocking with EU principles and the most recent legislative reactions will be the subject of the two following sections.

5.6 Geoblocking Betrays EU Principles

On a global level, the Universal Declaration of Human Rights (United Nations 1948) states in Article 19 that “everyone has the right to freedom of opinion and expression.” Similarly, Article 11 of the Charter of Fundamental Rights of the European Union (European Union 2000), hereafter Charter, states that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” It is therefore enshrined in the core principles of the European Union that its citizens enjoy freedom of speech, but also freedom to access information, without any hindrance by any physical or digital borders.

Furthermore, Article 21 of the Charter prohibits any acts of discrimination, whether based on race, language, religion or other beliefs and opinions, while Article 22 more specifically states that “the Union shall respect cultural, religious and linguistic diversity.” Last but not least, Article 38 of the Charter requires the European Union to “ensure a high level of consumer protection.”

In accordance with the above, the European Commission has identified as its core principles for the single market in the EU the four freedoms—namely the freedom

³See Joined Cases C-403/08 and C-429/08. *Football Association Premier League Ltd and Others v QC Leisure and Others*, paragraph 5.

of movement of goods, capital, services and labor. The same applies—or should apply—for the Digital Single Market of the EU. In other words, access to digital goods and services should be enhanced under the principles of proportionality and equality, taking into account the fundamental freedoms of EU citizens. Remarkably, the European institutions have recently started promoting the free flow of data as a “fifth freedom” (European Parliament 2018), calling into question why cultural content online should be an exception to this principle.

Also, the Council has adopted the EU Human Rights Guidelines on Freedom of Expression Online and Offline (Council of the European Union 2014), which advocates among other things to promote and respect human rights, including freedom of expression, in cyberspace and in the use of other information and communication technologies.

The European institutions have long been aware of barriers to the free flow of information caused by copyright law, an area of law that remains fragmented and outdated, failing to respond to the demands of the digital era. For this reason, the European Commission pursued the modernization of the law in line with the Digital Single Market via a series of legislative proposals, which lightly touched upon the issues of copyright reform in particular and geoblocking more generally, but eventually brought no sustainable solutions for consumers. These initiatives shall be examined in the next section.

5.7 European Commission Initiatives to Abolish Geoblocking, 2014–2019

During the period of 2014–2019, the European Commission launched several initiatives that had the goal of addressing the issue of geoblocking. However, these proposals, already lacking ambition from the start, were substantially watered down during the legislative process due to lobbying, particularly from the entertainment industry (Society of Audiovisual Authors 2018; Association of Commercial Television in Europe et al. 2017).

In 2015, the European Commission presented the proposal for a regulation on ensuring the cross-border portability of online content services in the internal market (European Commission 2015c). The proposal aimed at ensuring that consumers subscribed to portable online services in their Member State of residence would also be able to use these services when temporarily present in another EU Member State. The proposal, however, was an unambitious attempt to address geographic limitations. It was limited to a restricted amount of time (temporarily), to those services that were already available in the consumers’ Member State of residence, and subjected to verification of residence by the service provider. However, those citizens who never had legal access to certain content in their own Member State in the first place were largely ignored. The European Parliament and Council approved the Portability Regulation without substantial amendments, although they did clarify

that the new legal mechanism does not prevent a service provider from enabling the subscriber to additionally access and use the content lawfully offered by the provider in the Member State where the subscriber is temporarily present. The co-legislators maintained a relatively onerous system of verification of a user's country of residence, which appears disproportionate considering that the most negative outcome of a consumer "cheating" by falsifying his or her country of residence is that he or she would be able to pay to subscribe to a legal online content offer that was not intended for their geographic location.

Certain statements by commission representatives⁴ substantiate the suspicion that the Portability Regulation may have done more to assuage the concerns of European Union officials working temporarily abroad in Brussels about still being able to access the content they were used to from back home, than to take steps toward abolishing geoblocking more generally. While constituting a significant step forward for the relatively privileged minority of Europeans who spend a substantial amount of time in a European country other than their country of residence, the regulation's benefits are limited to that group and do not extend to the European population at large. Furthermore, as a survey by the German consumer organization in the state of Rhineland-Palatinate illustrated, by the end of 2018, several months after the entry into force of the Portability Regulation, half of the surveyed consumers who had used paid streaming services abroad still faced problems in practice when trying to access content under the Portability Regulation.⁵ By addressing the most pressing concerns of Brussels-based expats in charge of shaping European legislation, the Portability Regulation may have lessened EU lawmakers' appetite for more far-reaching reforms to abolish geoblocking altogether rather than bringing tangible improvement.

The Portability Regulation was followed in 2016 by the proposal for a regulation on addressing geoblocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market (European Commission 2016d). This was meant to address situations when service providers put in place a technological restriction or otherwise make it impossible for consumers in one Member State to access their Web site or application, or apply different conditions for the purchasing of goods or services. According to the original plans of the commission, this would have covered digital content services, such as streaming services, music, computer games, software and e-books, at least where the geoblocking was not the consequence of licensing restrictions under copyright law (Plucinska 2016; TorrentFreak 2016). However, due to a political compromise made internally in the commission cabinet (undoubtedly following interventions by the entertainment industry), this part disappeared from the version of the proposal that was officially released. Following its own assessment of the problem (European

⁴"The reform is a hobbyhorse of Commission Vice-President for the Digital Single Market Andrus Ansip, an Estonian unhappy that he is unable to stream Estonian football matches when away from his home country" (Sayer 2015).

⁵Survey conducted by the consumer protection authority of the German state of Rhineland-Palatinate of 2590 consumers of paid streaming services based on an online representative sample, 500 of which reported having used those streaming services in EU countries other than their country of residency since entry into force of the portability regulation in April 2018 (Marktwächter 2018).

Parliament 2016), the European Parliament attempted to reintroduce such services into the scope of the regulation (European Parliament 2017b), but eventually gave up its ambition to tackle the geoblocking of copyrighted content during trilogue negotiations among the three European Institutions (European Union 2018a). The final regulation merely contains a review clause which states that the first evaluation carried out by the European Commission shall examine the scope of the regulation and in particular whether the prohibition clause introduced in the regulation should be extended to cover copyrighted content (*ibid.*). Finally, the commission also issued a statement to affirm its commitment to the review.

In an effort to modernize and harmonize EU copyright law and increase the availability of EU broadcasting content online, the European Commission announced a plan to review the Satellite and Cable Directive, which resulted in the proposal for a new regulation to apply the country of origin principle to the online offers of broadcasters, just as it is to satellite broadcasts (European Commission 2016e). Despite the evaluation (European Commission 2016f), study (European Commission 2016g) and public consultation⁶ that were conducted for that purpose, the European Parliament met the proposal with hostility. In November 2018, the European Parliament adopted its report, which significantly watered down the original proposal by limiting it to news and current affairs programs. A compromise was eventually found in trilogue negotiations, which applies the country of origin principle to broadcasters' ancillary online services, which are radio or TV programs that are news and current affairs programs or their own fully financed productions. At the same time, the report clearly excludes other types of content, such as audiovisual sports content (European Union 2019).

In summary, the legislative proposals adopted by the European institutions in the legislative period of 2009–2014 lacked the ambition to abolish geoblocking in the EU and complete the Digital Single Market. In one instance, the European Commission and the Council of Ministers opposed a more ambitious approach by blocking the inclusion of licensed copyrighted content in the geoblocking regulation; in another, the European Parliament echoed the entertainment industry's opposition to extending the country of origin principle to all broadcasters' online services, in analogy to the EU satellite broadcasting rules. As a consequence, consumers affected by geoblocking may find a wider variety of legal content on legacy technologies such as satellite broadcasting than they can find online.

5.8 Conclusions—Solutions

As this chapter has demonstrated, geoblocking remains a problem of the digital era, perpetuated by a persistent failure of laws and commercial practices to modernize and respond to the demands of the digital environment. The European Union's attempts

⁶For a summary of the responses, see European Commission (2016f) Annex 2C—Synopsis report on the responses to the public consultation on the review of the satellite and cable directive.

to ban geoblocking have failed to meet consumer expectations thus far, though review clauses and continuing attention paid to the issue by the EU's competition authorities may still bear fruit in the coming years. The realization that geoblocking undermines the European Union's principles of the single market, freedom of information and cultural diversity is a first step toward addressing the problem more effectively. Both lawmakers and the commercial actors should boost cross-border access to content and consider and accommodate the needs of contemporary and future consumers in a true Digital Single Market.

As regards future legislative solutions, the EU institutions should support laws that respond to consumer demand for cross-border access to content and stand firm against the lobbying efforts of the legacy entertainment industry. In other words, laws should promote competition among a wide variety of market players, in line with the principle of non-discrimination and the fundamental rights of Europeans, both at the center and at the periphery. Access to European cultural diversity must no longer be dependent on belonging to a majority linguistic group and having the means to travel frequently. Online goods and service providers should be obliged to offer the same goods and services across the EU and should refrain from any "geodiscrimination."

However, their work should not finish there. The abolishment of geoblocking should follow not only the legal route via the adoption of new laws or the amendment of old ones. The EU institutions should require ongoing informed and regular impact assessments, in order to recognize contemporary issues and find ways to solve them, without harming the consumer or the economy. Also, consumers should have the necessary tools to identify and report unfair practices easily and swiftly.

Only the abolishment of geoblocking practices promises an attractive alternative to illegal access to cultural content by giving consumers the possibility to pay for the works they want to see. If the legislature fails to respond, consumer preferences will further gravitate toward the increasing number of in-house productions presented by a very small number of multinational technology companies, thereby undermining the sustainability of the very European entertainment companies that have been lobbying against the abolishment of geoblocking. By the time these companies realize that lobbying-induced legislative apathy does not protect a legacy business model from going with the times and satisfying consumer demand for real-time access to content, it may be too late for them to change their business model and break the emerging duopoly of online streaming services that threatens European cultural diversity and the fundamental rights of European consumers.

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