

Chapter 6

The Czech and Slovak Audiovisual Market as a Laboratory Experiment for the Digital Single Market in Europe



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6.1 What's Wrong with the Audiovisual Industries in Europe?

In mid-2015, the European Commission introduced the Digital Single Market (DSM) strategy, the principal goal of which was to remove obstacles to the free movement of digital products and services within the EU. One of the areas targeted by the strategy was to improve the cross-border availability of cultural content, which is often inhibited by geoblocking (the restriction of access to Internet content based upon the user's geographic location). Customers from Member States other than the Member State of the content provider are, for example, unable to purchase access to audiovisual digital libraries. Until recently, consumers were also denied access to prepaid online video libraries if they crossed the borders of the country where the purchase was made. While for the most part the internal market for the free movement of goods in the EU is working, the development of a Digital Single Market—which would provide a wider and barrier-free supply of digital goods and services to EU citizens, regardless of their nationality or place of residence—remains an unrealized economic and political goal of the European Union.

The Commission hopes that a Digital Single Market will, among other things, improve access to European audiovisual works offered by online audiovisual services in the EU Member States. European audiovisual works do not travel easily beyond the country of origin, not only in the context of classical film distribution and television broadcasting, but also in the context of on-demand audiovisual media services. The European Audiovisual Observatory found that in 2015, European films were available on TVOD platforms in 2.8 EU countries on average (and coproduced films in 3.6 Member States on average), while US films were available on TVOD platforms

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in 6.8 EU countries on average (Grece 2016: 12). The limited export of European audiovisual works concerns mainly smaller countries (Grece 2017: 15).¹

The Commission considers geoblocking one of the main causes of the fragmentation of the European digital market for cultural content, as it divides national markets with virtual barriers (European Commission 2015a). Cultural content includes copyrighted works of authorship. Copyright is, nonetheless, territorial in the EU, and every Member State has its own copyright law applicable to its territory. Works of authorship are consequently protected in the EU by 28 national copyright laws. The territorial fragmentation of copyright is reflected in the territorial fragmentation of the licensing and business practices of the audiovisual industry. Producers sell the rights to audiovisual works, in most cases, in the form of monoterritorial licenses to local distributors operating in each State. Geoblocking is a technical means employed to ensure the owner of a territorial license makes the work available only to consumers within the licensed territory.

Another reason why there is no pan-European digital audiovisual market is, the Commission holds, the complicated rights clearance process. Films are distributed within a territory mostly on a sequential basis. This means that a film reaches the audience through gradually opening release windows (theaters, Pay TV, DVD, VOD and FTA TV). The order of the channels of distribution is determined by the highest marginal income generated in the shortest possible time.² Providers of on-demand video services (VOD) wishing to deliver a film to a larger number of EU countries, therefore, mostly have to clear digital distribution rights for each country separately, i.e., they need to purchase territorial licenses from local distributors. The Commission warns that this increases both the information costs of identifying the relevant transactional actor and the transaction costs related to the high number of transactions and transactional actors (European Commission 2016: 52–55).

The territorial fragmentation of the audiovisual market is also criticized by consumer protection advocates. While the European Commission is concerned about violations of free market principles, consumer rights organizations are concerned about discrimination against consumers in their access to European cultural wealth.³ Monoterritorial licensing of audiovisual works is the cause of cross-border unavailability and (until recently) the limited cross-border portability of online audiovisual services in the EU. In other words, the blocking of access to content or an audiovisual service based on the location where the consumer connects to the Internet occurs when the service provider lacks the license needed for the territory from which the consumer wants to use the service. Enclosing content within the borders of nation states is discriminatory against language minorities, foreign students, short-term and

¹See also Petr Szczepanik's chapter "Channels and Barriers of Cross-Border Online Circulation" in this book.

²In some European countries, such as France, the chronology of media distribution is even determined by law.

³According to the founding documents, the European Single Market is an area with no internal borders, an area of free movement of goods, people, services and capital. Cf. Article 26 of the Treaty on the Functioning of the European Union.

long-term migrants, and those interested in foreign language and culture. The borders of national states in many cases do not respect cultural and linguistic borders.

The argument gains momentum if the share that European financial grants (Eurimages, MEDIA) play in the funding and distribution of audiovisual production is considered. The fact is that the citizens of countries contributing to the production of audiovisual works are then denied access. In addition, blocking access to culture not only confines audiovisual work within the borders of nation states, but it also deprives authors of a potential source of income or a new audience that is willing to pay for the content but that lacks legal access to it, which can lead to the use of illegal content sources (Macek and Zahrádka 2016; Dootson and Suzor 2015).⁴

6.2 Don't Panic? The Digital Single Market and the Concerns of the Audiovisual Industry in the EU

The Commission, therefore, proposed a series of legislative measures in 2015 and 2016 aimed at eliminating the unjustified geoblocking of consumers within the European market and facilitating the clearance of rights to online services of broadcasters which are ancillary to linear broadcasting (simulcasting and catch-up TV). The legislative reforms were strongly opposed by representatives of the audiovisual industry, despite the fact that the proposed measures did not promote any pan-European audiovisual digital market. Audiovisual services were explicitly excluded from the scope of the Geoblocking Regulation.⁵ The proposal for a regulation on online transmissions—aimed at simplifying the clearance of rights for broadcasters' ancillary online services with the help of the country of origin principle⁶—was limited by amendments either to content fully funded by the broadcasting organization or to news and current affairs content. Moreover, the application of the country of origin principle to the clearance of rights for online services ancillary to broadcast was accompanied in the Regulation by contractual freedom, namely the option of a contractual (e.g., territorial) limitation on the exercise of the right.⁷

⁴See Kim Tae-Sik's chapter "Finding Larger Transnational Media Markets: Media Practices of the Vietnamese Diasporic Community" in this book.

⁵See Recital 8 of the European Union Regulation 2018/302 of February 28, 2018 on addressing unjustified geoblocking and other forms of discrimination based on customer nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

⁶Based on the country of origin principle, a broadcaster providing content via its ancillary online services throughout the EU is not obligated to clear the broadcasting rights for each Member State separately; the broadcaster only needs to clear rights for the Member State in which it has its principal establishment.

⁷However, this contractual freedom is limited by the fact that the restriction on the exercise of the rights agreed upon by the contractual partners must be in accordance with EU law. See Recital 11 of the Proposal for a Regulation laying down rules on the exercise of copyright and related

What is interesting about the political debate over the DSM is the clash between the idea of a free digital market and the reasons why this concept raises strong opposition from audiovisual industry stakeholders.⁸ The discussion reveals the basic principles of the audiovisual business models and their limits. This provokes the question of the sustainability of the fundamental mechanisms of the audiovisual market in connection with globalization and digitalization, which result in the increasingly frequent crossing of physical territorial borders and hinder the control of nation states' virtual borders.

In this chapter, I first describe and analyze the attitudes of distributors and providers of online audiovisual services in the Czech Republic (a particular category of stakeholders in a small audiovisual market) toward the DSM concept. Are their attitudes any different from those held by the European audiovisual industry? Are small-market players threatened by the DSM more or less than those operating in the big market? Does the DSM offer any opportunities and advantages? For whom? In the second part, I reflect on the sustainability of online audiovisual business models in the EU with respect to the industry's operating principles, consumers' expectations and European law.

The Czech audiovisual market is a small national market in the EU, limited by the national language. The main language, Czech, is not much used or understood outside the Czech Republic, except for Slovakia where, to a large extent, Czech audiovisual works can be distributed without localization, i.e., without subtitles or dubbing in Slovak. The Czech Republic and Slovakia form a culturally intertwined region. This is strongly felt in cross-border distribution in particular. Distributors often buy licenses for both the Czech and Slovak markets, and the highest share of exported audiovisual works produced in the Czech Republic goes to Slovakia and vice versa. The degree of mutual export dependence is the highest of all the culturally connected regions in the EU. My analysis of the attitudes of audiovisual players in the Czech market, therefore, serves as a model for the functioning of the single digital (audiovisual) market in two linguistically (and culturally) affiliated and separate territories, namely the Czech–Slovak market versus the other EU Member States.

6.3 Who Was Interviewed and What About?

The attitudes were reconstructed based on an analysis of qualitative data collected between 2016 and 2018 through a series of semi-structured interviews with selected audiovisual distributors and providers of audiovisual online services in the Czech

rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM (2016) 594 final.

⁸Audiovisual industry representatives were some of the loudest critics of the DSM, among other cultural industries.

Republic.⁹ The sample includes the most influential representatives of the various types of distribution practices on the opposite poles of the audiovisual field, namely representatives of commercial and art house audiovisual distribution.

The research sample included four types of respondents participating in the digital distribution of audiovisual works: (1) video on demand providers¹⁰; (2) distributors who, in addition to other channels (theater, TV, DVD), distribute content as video on demand (VOD) using a business model based on one-time payment for content (TVOD), subscription (SVOD) or advertising (AVOD)¹¹; (3) television broadcasters¹²; and (4) providers of satellite and cable retransmissions who also offer VOD as part of their services.¹³

The respondents were questioned about their views on the cross-border portability of online audiovisual services and the cross-border availability of audiovisual works, the importance of territorial licenses and geoblocking for audiovisual industry business models, obstacles to the international circulation of European (Czech) audiovisual works and their attitudes toward proposed legislation. An audiovisual work, in the scope of this project, includes feature films and television and Web series which meet the definition of authored work and have the status of premium content in official distribution channels.

The following three scenarios for the development of a Digital Single Market were discussed with the respondents in relation to the cross-border accessibility of audiovisual content: (1) permission of passive sales for online audiovisual service providers; (2) extension of the country of origin principle to the ancillary online services of television providers; and (3) extension of the country of origin principle to all online audiovisual services. According to the passive sales model, providers of online audiovisual services would be obligated to clear rights only for the territories in which they actively promote and offer the content. However, they could not deny access to their service to a consumer from an unlicensed territory where they do not actively offer their services. In other words, the current practice of selling audiovisual works on the basis of territorial licenses would be accompanied by a ban on blocking access to content from a territory where the service provider does not have the rights cleared. The model-based scenario of applying the country of origin principle to clear the rights to distribute works through on-demand audiovisual media services would allow service providers wishing to offer their content to consumers in other Member States or throughout the EU to do so by purchasing a single license for the Member State where the provider has its principal establishment. If combined with a ban on contractual territorial limitation of rights, this scenario would create

⁹The descriptive part of the chapter is based on the findings of a study published by Zahrádka and Szczepanik (2019).

¹⁰Banaxi, O2 Czech Republic, Seznam, Google.

¹¹Bontonfilm, CinemArt, Aerofilms, Doc Alliance Films, Film Europe, Bioscop, Association of Czech Film Clubs (AČFK), Artcam Films.

¹²Prima, Czech Television.

¹³Skylink, UPC, DIGI CZ.

a pan-European space for the provision of online audiovisual services and eliminate the fragmentation of the audiovisual market based on national borders.

6.4 Digital Single Market as a Threat or Opportunity for Small-Market Players?

6.4.1 *Cross-Border Portability of Online Audiovisual Services*

The Online Portability Regulation has been effective since March 20, 2018, improving the user-friendliness of paid audiovisual online services in the sense that subscribers are able to use the services even if temporarily abroad, away from the territory in which the provider is licensed to provide the content.¹⁴ The regulation, based on a legal fiction, rules that the access to and use of such an online content service is deemed to occur only in the subscriber's Member State of residence. This means that the temporary use of the online service in another Member State is, in accordance with the Regulation, considered as use in a Member State for which the content distributor has purchased the license. Freed from the fear of infringing copyright or license agreements, the content distributor no longer needs to block service access to subscribers who travel outside the licensed territory.

Our respondents considered the Regulation to be an acceptable concession to the Commission's demand for the DSM. The Regulation respects established business practices and the territorial fragmentation of the market; it does not violate the territorial monopoly of the exclusive territorial license holder (content distributor). The only point of dispute was the verification mechanisms for the place of residence of the service user.

Service providers operating in only one Member State, without the possibility of price discrimination across EU Member States, were more benevolent when discussing various possible verification mechanisms (e.g., ownership of a bank account or real estate, or payment of a license fee for another type of service such as rent or a monthly phone plan) to ensure the portability of the service for customers such as long-term migrants or subscribers who own an account or property in the given Member State. Their attitude was driven by a desire to minimize the costs of verification of the place of residence of the service user, as they did not expect the cross-border portability of the service to generate an increase in new subscribers. Nor did they expect consumers from other countries to circumvent the verification mechanisms to use the service abroad on a permanent basis, given the fact that their catalogues target local audiences (Czech or dubbed content).

Providers of online audiovisual services in multiple territories, in contrast, preferred more stringent verification mechanisms (e.g., limitation of the duration of

¹⁴Regulation (EU) 2017/1128 of 14 June 2017 on cross-border portability of online content services in the internal market.

“temporary residence in a Member State other than the Member State of permanent residence,” registration in local electoral registers, etc.). The Regulation would, according to this scenario, only allow the cross-border portability of audiovisual online services for tourists and short-term migrants. The rationale behind the promotion of stricter verification tools was the fear that consumers from countries with a more expensive service could—if they circumvented weak verification mechanisms—start using a cheaper service offered in another Member State. Opening an account with a streaming service provided in another Member State and using it in one’s home territory in accordance with the Cross-Border Portability Regulation would violate the principle of territoriality, namely territorial barriers between national markets, which are crucial to the functioning of the audiovisual industry.

6.4.2 *Cross-Border Availability of Audiovisual Content and the Importance of Geoblocking*

The discussion on improving cross-border content availability proved a controversial topic in the interviews with distributors. Although distributors recognize that each new service customer from the territory of another Member State generates economic benefit, breaking the exclusive territorial monopoly over content distribution would, in their view, entail a series of negative consequences for the audiovisual industry, which would eliminate this hypothetical benefit: (1) the loss of territorial monopoly would lead to the cross-border cannibalization of revenues generated by the differently timed release windows and make premium content unaffordable for local providers of online audiovisual services; (2) the disruption of territoriality threatens the funding of audiovisual works through presales, particularly for international coproductions; (3) facilitated rights clearance would not improve the international circulation of European works, and the DSM threatens local distributors, who play an important role in the promotion and localization of an audiovisual work in the national market; and (4) reduction of transaction costs related to contracts between licensing stakeholders in connection with the introduction of the DSM is unnecessary; it would reinforce the market dominance of multinational VOD providers over small markets and weaken the position of small local VOD providers. Despite widespread reservations about the DSM, my data analysis also revealed that some of the stakeholders welcomed the DSM or questioned the worst-case scenarios predicting devastating impacts from the DSM on the Czech audiovisual market.

6.4.2.1 *Loss of Territorial Monopoly and Unaffordable Premium Content*

Territorial limitation of licenses is important for European distributors who purchase foreign audiovisual content and make it accessible to local audiences. They view

geoblocking as a tool that protects their business model as it secures, with an exclusive territorial license, a distribution monopoly in the licensed territory. License providers (producers or sales agents) are, in return, guaranteed that their audiovisual work will be used in the licensed territory only and retain the option to sell an exclusive license for another territory to another local distributor at an advantageous price.

Unlike the European associations of film industry stakeholders, local distributors do not fear losing territorial monopoly due to cross-border content availability, since the Czech market has a high demand for localized, preferably dubbed content. They are of the opinion that the majority of Czech consumers would be discouraged from accessing streaming services offered in other Member States due to the lack of Czech content localization, payment in foreign currency and communication in a foreign language. The respondents were therefore not concerned about losing Czech audiences to foreign services with a wider or cheaper range of content. Cross-border services, in their view, would be used primarily by consumers who already use illegal sources to gain access to content. In the majority of cases, these are movie geeks and active viewers dissatisfied with the range provided by local film distribution. The respondents maintained that such a change in consumer behavior would not have a significant impact on the existing domestic market.

Local distributors were concerned about the loss of territorial monopoly, specifically in connection with the availability of services on the Czech and Slovak audiovisual markets due to the linguistic and cultural affiliation of the two countries. This concern, however, was mitigated by the fact that most of our respondents treated the Czech and Slovak markets as a single market, purchasing licenses for both countries. This meant that the local distributors controlled the distribution of content in both territories. The Digital Single Market would not threaten content distributors in the Czech Republic who buy licenses for both markets and are able to synchronize the distribution of content so as to avoid the overlapping of different types of release windows within the DSM, for example, to prevent having content available in Slovakia as VOD when it is just entering theaters in the Czech Republic.

The separation of both markets was, on the other hand, vital for respondents who did not have licenses to distribute content in both territories and yet offered their services there, or who distributed content within only one national market and yet were damaged by the cross-border availability of the same content from a linguistically affiliated territory. Such respondents included commercial free-to-air TV providers (TV Prima and TV Nova), who did not have licenses to distribute content in both the Czech Republic and Slovakia and yet offered their services through sister TV stations in both territories. Recent disputes between commercial broadcasters and cable/satellite TV providers (Skylink, DIGI CZ and UPC) demonstrate that blocking the satellite reception of Czech TV stations in Slovakia and vice versa is important for the protection of broadcasters' business models. Satellite transmission brought Czech TV stations, which are popular in Slovakia, into competition with Slovak stations, depriving them of ratings and advertizing revenue. Another reason is the fact that commercial broadcasters were concerned about cross-border revenue cannibalization in the case of broadcasting an acquisition program (e.g., a foreign film) which was already available to viewers in Slovakia via cable or satellite service,

since it had been broadcast by a Czech broadcaster. In addition, broadcasters did not have the rights to distribute foreign films in Slovakia, and the satellite transmission of full-format television stations (i.e., without switching off selected TV shows) to Slovakia infringed the copyright of producers.

Distributors also agreed that cross-border cannibalization of revenues mainly threatened the distribution of content in widely spoken languages and of sports broadcasts, where the language component is not particularly important. The possibility of cross-border access to content, therefore, primarily threatens the economic interests of sports broadcast rightsholders, US film studios, European producers of audiovisual works in English, and content distributors on linguistically affiliated, but territorially separate, markets where two mutually independent local distributors operate.

Local distributors with a business strategy based on purchasing distribution rights for foreign films said they were threatened by an increase in the price of premium content licenses more than by the loss of territorial monopoly. They were concerned that many of them would not be able to afford premium audiovisual content within the Digital Single Market. In addition, pan-European licenses were irrelevant to them because their business activities were solely targeted at the domestic market. They were not interested in distributing content to markets in other Member States apart from Slovakia. Nor did they expect there to be economically relevant demand for their online services among short-term or long-term migrants in other Member States or parties interested in Czech culture and language. They maintained that the unified market would generate a poorer or extremely delayed supply (compared with the film premiere abroad), or that foreign content would need to be dubbed due to pressure from producers, which is much more costly than subtitling. This would reduce the appeal and competitiveness of local online audiovisual services in relation to global or foreign competition. Worse, foreign producers could demand that online distribution rights be excluded from licensing rights packages. In other words, release windows compromising the value of the license to distribute content in other Member States could be excluded.

Respondents with a positive or neutral attitude toward a Digital Single Market in Europe included (a) a multinational provider of an online audiovisual service whose ambition was to serve a higher number of territories than the Czech–Slovak market only (Google Play); (b) local AVOD services with original online content, such as the Czech Internet company Seznam, which runs the online Stream portal providing professional short video content based on the AVOD business model and product placement; (c) niche distributors with a specific business model sustainable within the DSM; and (d) retransmission service providers such as satellite TV providers.

- (a) Google, as a multinational online audiovisual service provider (Google Play), had a positive view of the DSM free of geoblocking barriers. The goal of the company was to make use of current technology which allows the transfer of digital content at extremely low logistical costs across many territories and to provide it to the widest possible range of consumers around the world. Simplification of legal operations was therefore in line with the company's business objectives.

Although Google faced high transaction costs associated with the purchase of licenses for content distribution in Member States, its business model had managed to adapt to the rules of the audiovisual market and, moreover, turned them into a competitive edge over local content distributors. Although a facilitated rights' clearance for the online distribution of audiovisual works would, in the opinion of local distributors, mainly assist the providers of US-based transnational online audiovisual services (e.g., Google Play, iTunes, Netflix and Amazon), the high transaction costs associated with clearing online rights for each territory separately also helped to strengthen the global providers' dominant position in the European market. Global online portals have access to extensive legal services, which helps them deal with the fragmented market and the territorial fragmentation of copyright law in the EU. The European providers of online audiovisual services, on the other hand, may be discouraged by this fact from their plans to become pan-European distributors. The dominance of global US platforms in the European market is therefore not dependent on the size of transaction costs of copyright clearance but rather on the uniqueness of their business model, broad consumer base, the high economic capital invested by some content providers in global licenses and in the development of their own premium content (such as Netflix and HBO GO). Additionally, the transaction costs associated with the purchase of licenses are reduced by rights aggregators who specialize in buying online rights to large libraries of digital content, which they then offer to transnational VOD portals.

- (b) Most producers and distributors of original content developed for local audiences were indifferent to the reform proposals since they were already able to distribute their content globally or multi-territorially, without facing any transaction costs incurred when concluding license agreements.
- (c) Although the majority of local distributors were concerned about the introduction of the DSM, those whose business model was largely independent of online distribution took a neutral stance toward DSM. An example is Film Europe, a rights aggregator and film festival distributor, who has been expanding its festival films into European markets (Belgium, the Netherlands and Luxembourg) through partnerships with local VOD providers and satellite operators. Film Europe's business model involves the monetization of curator-selected collections of films through themed festivals held in Czech and Slovak theaters, television broadcasting and VOD portals.¹⁵ Even if the introduction of a single digital market were to enhance the dominant position of global online audiovisual service providers, Film Europe would not lose its position in the market, according to its director. He was convinced that FE would play an important curatorial role for global streaming portals in terms of selecting and promoting collections of art house films and actively generating a digital audience for them. The indispensable curatorial role of Film Europe derived from its strong

¹⁵B2Can, the best-known label of Film Europe, offers a selection of competition titles (often winners) from the Berlin, Cannes and Venice festivals.

- position at content purchase, thanks to its ability to recognize and purchase the rights to winners before the films were awarded by festival juries.
- (d) Satellite operators providing retransmission services were against geoblocking consumers. Their reasoning, as providers of technology infrastructure for transmissions of audiovisual works, was similar to the reasoning of Google, which offers audiovisual works through Internet technology. As the satellite signal covers the whole of Europe, it is in the commercial interest of operators to have the service available for subscription by the maximum number of customers. The only requirement for consumers to receive satellite TV services is to purchase a decoder card. According to Skylink, customers interested in purchasing the decoder could not be discriminated against based on their nationality or place of residence: “The free movement of goods and services has a higher priority than copyright restrictions.”¹⁶ Consumers should be able to use a prepaid service regardless of their physical location (provided the territory is covered by a satellite or Internet network), which is technically impossible to check in the case of satellite reception—unlike Internet transmission. Furthermore, the providers of cable and satellite retransmission services operate in a different legal framework compared with the other licensing chain stakeholders.¹⁷ The retransmission operators need to clear the necessary rights with the broadcasters whose channels they retransmit and with collective management organizations (i.e., with organizations that represent a multitude of rightsholders and not with individual rightsholders) in the territory where they retransmit the content under the regime of mandatory collective administration of rights. The operator seeking to use audiovisual work therefore does not need to ask for the rightsholder’s consent, but must pay for the license fee to the respective collective management organization. In short, their business strategy is not based on the territorial exclusivity of content, but on the widest and most attractive possible range of content.¹⁸

6.4.2.2 The Importance of Territorial Exclusivity for Film Coproduction

The cross-border accessibility of content would, in the opinion of distributors involved in the production of audiovisual works, jeopardize their production, which largely relies on the presales of exclusive territorial rights. The inability to provide

¹⁶Interview with Jaromír Glisnik, Ostrava, Czech Republic, November 27, 2018.

¹⁷See the amendment to the Czech Copyright Act (Act No. 102/2017 Coll.) or the Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM(2016) 594 final.

¹⁸An exception to this is the rights exercised by a broadcasting organization with respect to their own transmission (“signal”), which satellite and cable operators are obligated to contractually secure from broadcasters.

investors or future distributors with exclusive rights to distribute content in a specific territory would reduce their willingness to invest and thus reduce the number of audiovisual works produced, international coproductions in particular. Given the similarity of the national languages, this problem is most striking in joint Czech–Slovak productions, which are the most common type of coproduction in the Czech audiovisual landscape. The threat to international coproduction—the risk of cannibalization of revenues generated by the release window, which the cross-border availability of content could hypothetically cause—is mitigated in the Czech–Slovak context by the possibility of amending coproduction contracts. The coproducers could commit themselves to holdbacks or synchronization of release windows in the respective Member States. This option—possible in the Czech–Slovak market thanks to the fact that many distributors operate in both markets and buy distribution rights for both territories at the same time, which means they are able to synchronize parallel distribution of content in both markets—is not possible to the same extent in all the EU market clusters of linguistically and culturally affiliated countries (such as France and Belgium or Germany and Austria).

6.4.2.3 The Cross-Border Circulation of (Czech) Audiovisual Works

The respondents maintained that copyright territoriality did not prevent the international distribution of European films, nor did it cause territorial fragmentation of supply. Facilitating the clearance of rights would therefore not increase the international circulation of European films. Provided it is in their economic interests, producers can sell a multi-territory license to a distributor for the whole of Europe (some independent producers do so in a minority of cases). Entry into foreign markets is not hindered by territorial differences in copyright, given the high degree of harmonization of property rights: it is the costs incurred in localizing content in the relevant national language and marketing the content with regard to local audience preferences. Business practices in most cases diverge, however, from selling a multi-territorial license. The reasons are economic: (1) Low demand for content within a territory, caused by cultural and linguistic differences and different consumer preferences, does not exceed the transaction costs the online audiovisual service provider would have to expend on the license and content localization. (2) Selling a monoteritorial license to local distributors who are familiar with the local market and are best able to prepare a promotional campaign and distribute the content is advantageous in terms of maximizing profits and reduces the business uncertainty of producers associated with poor knowledge of the market. (3) The business strategy of premium content producers involves retaining the commercial value of a license for additional territories, namely the option to sell it to a local distributor in another territory. To avoid damaging the commercial potential of the license for use of the work in additional territories, distributors signing the license agreements commit themselves not to offer the licensed work to consumers in other Member States for which they do not have the relevant licenses. (4) According to some of the local distributors, the public support for film production fails to motivate producers, whose business

model is based on obtaining subsidies for film making, to invest greater efforts in the international distribution of the title. Instead, they tend to seek support for another project.

6.4.2.4 The Dangers of Multinational VOD Providers Dominating a Small Market

The majority of our respondents—local distributors—dealt with audiovisual content mainly in the Czech and Slovak territories, purchasing the relevant territorial licenses directly from producers or rights aggregators. They thereby avoided the high number of transactions necessary to clear copyright for each territory and the information costs associated with the identification of the contracting party. Reduction of transaction costs associated with rights clearance—through the application of the country of origin principle to online audiovisual services—therefore has no benefit for local distributors. On the contrary, most of the respondents were of the opinion that it could strengthen the major global players (Netflix, Amazon, Apple and Google) as they are the only ones who want to deliver content to all territories and have sufficient funds for expensive titles. The purchase of a single EU-wide license would reduce their transaction costs of rights clearance. This argument is reinforced by the fact that the only VOD services operating on the Slovak VOD market are Czech, as there is almost no original Slovak VOD service.¹⁹

In addition, global online portals serving the pan-European digital market would become the most attractive contracting partners for producers and sales agents, since they can afford to invest in a pan-European license as they have the necessary capital and are able to valorize the license to use a work across EU Member States. The Czech distributors were of the opinion that territorial fragmentation of the audiovisual market thereby protects local audiovisual services from the competitive pressure of Netflix, which—if the company wants to offer the same content in all EU Member States, and unless it has purchased a Europe-wide license directly from the producer—has to buy online rights from local distributors in individual territories. This protects the traditional model of sequential distribution respected by local distributors.

Local distributors pointed out that competition with global players over content purchase was already in progress—regardless of the DSM implementation. However, significant differences between transnational online audiovisual services were noted in the ways the purchased licenses are used. For example, Amazon respects the traditional model of audiovisual content distribution through gradually opening windows when it distributes its own and acquired films. The first release window is theatrical, which helps, in combination with a marketing campaign, create awareness of the title and thereby a digital audience for the subsequent monetization of the title listed in the catalogue of an online audiovisual service. This distribution practice respects the

¹⁹In mid-2018, the telecommunication company Slovak Telekom launched its VOD service, Magio Kino.

importance of local distributors and the traditional sequential distribution model in terms of the title promotion on the local market. Collaboration between global and local players suggests that large global video libraries need to win local audiences for their titles. Local distributors are those who know the specifics of local markets and have a curatorial role and therefore are able—before the film is released on the VOD platform—to create a (digital) audience through a targeted and dramaturgically sophisticated distribution of the film in theaters and festivals. Netflix, on the other hand, deliberately disrupts the traditional distribution chain, offering purchased titles globally through its online service, regardless of their theatrical distribution.

Some of the local distributors were therefore not concerned about the danger posed by American giants like Netflix, Amazon and Google securing a distribution monopoly or oligopoly. They believed that the specificities of local markets are so different that content distribution will always require knowledge of the market (e.g., the network of cinema operators, consumer habits, culture and calendar year) possessed by local distributors or local representatives of film studios. Furthermore, services offering a large amount of content are grappling with insufficient content localization, curation and promotion. Film producers, therefore, according to the local distributors, face a dilemma whether to sell content to a global distribution portal (Netflix) and risk that their film becomes lost among the great number of other titles, or whether to offer the content to distributors in several selected territories who follow the traditional sequential model of distribution and will duly localize and promote the film. Producers who sell a license to a global VOD portal which will make their film globally available, risk not being able to sell the film to any local distributor due to the missing guarantee of investment appreciation.

The entry of global portals purchasing territorially exclusive rights (Netflix, Amazon and HBO GO) into the Czech market is threatening mainstream local VOD portals. Respondents said they did not feel threatened in the case of services (a) with distinctive repertory and strong branding (such as Aerofilms or Doc Alliance) focused on specific minority content; (b) with a fixed base of subscribers, such as the video libraries of FTA broadcasters (Voyo, Czech Television online) or Pay TV channels (HBO GO) providing its own exclusive content. Nor is any service under threat that is (c) an add-on bonus in relation to other commercial services (e.g., MALL.TV Internet television, which experiments with the acquisition of feature films) or (d) an Internet television organization producing its own short format content exclusively for online consumption (Stream, Obbod and Playtvak). The best defenses against global competitors, respondents said, are highly specific dramaturgy, close contact with a clearly defined user base or links to other commercial services, and original short content developed for online consumption.

6.5 Sustainable Business Models?

The respondents' attitudes revealed the basic mechanisms of audiovisual business models in a small market. The production and distribution of audiovisual works in

the Czech Republic (and throughout Europe) is dependent, in addition to public support, on the sale and purchase of exclusive territorial licenses. An exclusive territorial license is a tool used by the value chain stakeholders to eliminate market risks associated with the monetization of audiovisual works whose production requires large financial investments.

The territorial exclusivity of a license encourages a prospective distributor to duly promote and localize films (subtitles, dubbing, etc.) within the licensed territory and in the relevant national language. In addition, it is a tool which helps a producer generate funds needed to produce a costly audiovisual work in exchange for the territorially exclusive license the producer grants to the investor or future distributor of the work (presale of rights). In return, the investor is assured the same work will not be offered by another audiovisual service provider within the given territory. If the distributor could not be certain about this, other market entities could take advantage of the distributor's investments in the production of the work.

Geoblocking is a technical measure serving to protect the value of an exclusive territorial license online. The reason for territorial exclusivity, which is absolute in the case of geoblocking, is the protection of an investment in the production, distribution and promotion of audiovisual works.²⁰ Without geoblocking, Czech consumers could, for example, buy access to a work from a foreign online audiovisual service provider who does not have a license to distribute the work in the Czech Republic. Therefore, the territorial license for the Czech Republic would lose its exclusivity.

In addition to the business considerations, there are also legal reasons for geoblocking. For example, if a Czech viewer could subscribe to a VOD service provided in Poland, the service provider would violate copyright law since the work would be used (communicated to the public) in unlicensed territory. The fact is that the rightsholder controls territorial use of the work concerning its communication to the public.²¹ This means that the rightsholder may prevent unauthorized entities from using the work within a particular territory and the licensee from offering the

²⁰ Absolute territorial exclusivity refers to an agreement in which the parties eliminate third-party competition; for example, the parallel import of a product from another territory. This type of agreement is problematic in terms of European Union competition law as it may breach free competition. The European Commission, for example, opened an investigation into contractual arrangements between Sky UK, a Pay TV provider and six Hollywood film studios in 2014. In the agreement, Sky UK committed not to provide its Pay TV services available in the UK and Ireland to consumers outside the licensed territories, while the Hollywood studios agreed to put in place contractual restrictions that prevent audiovisual service providers in other Member States from making their Pay TV services available in the UK and Ireland. For more details, see European Commission (2015b).

²¹ On the contrary, under the exhaustion principle, the copyright holder has no control over the territorial circulation of copyrighted works on physical carriers from the moment the holder, or an entity authorized by the holder, offers the carriers for sale on any national market in the European Economic Area. The holder of the rights to use the work, specifically to distribute the copies of the work, is therefore unable, following its first sale (on a physical carrier) to prevent, for example, the parallel import of the work from another EEA territory, where it may be sold at a lower price. See Article 4 of Directive 2001/29/EC of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

work outside the licensed territory. According to the prevalent statutory interpretation, the right to communicate a work to the public, which includes streaming films and television shows as part of an on-demand video service, is subject to the country of destination principle. The service provider is obligated to clear the rights to use the work with the rightsholder for each territory where the work is used (communicated to the public).²² For example, Czech Television is the holder of the rights to the *Svět pod hlavou* [*World under your Head*] mystery television series. Anyone who wants to make *Svět pod hlavou* available in Poland needs to purchase a license from Czech Television for this territory. Holding a license for Slovakia, for example, is not enough. Therefore, there is no competition between the Slovak and the Polish providers of the content.

From the nature of copyright territoriality and the possibility of exclusive territorial restrictions with regard to the exercise of the rights, it follows that competition among audiovisual distributors takes place mostly for national markets and not within a national market. Distributors do not compete over who will offer the same content but cheaper within a given territory, but who will offer more attractive content at a better price within the given territory. Geoblocking therefore restricts competition among distributors selling the same content from the same producer (intra-brand competition) and not competition among distributors selling the same type of content from different producers (interbrand competition).²³ Rather than being a cause, geoblocking is a consequence of this business practice since the possibility of selling exclusive territorial licenses restricts free competition. Even if geoblocking barriers were removed, content providers would not be allowed to offer their services to customers in a territory where they do not have a license.

Nevertheless, the territory-based structure of audiovisual business models is limited in relation to the cross-border mobility of consumers, the demand for content offered in other Member States and the global availability of digital technologies. A secondary negative consequence of the audiovisual business models is content piracy or VPN piracy, a practice of some consumers who are willing to pay for desired content that is available only from a foreign on-demand video service provider, but who lack access due to limited territorial supply and geoblocking barriers.

The size of this consumer group can only be indirectly inferred from the statistics. A poll conducted by the European Commission in 2015 revealed that very few Europeans (5%, compared to 7% in the Czech Republic) have tried to access audiovisual content (films, series, video clips and all TV content excluding sports) through online services intended for users in other Member States. The reasons why most

²² Although the Information Society Directive (2001/29/EC) regarding copyright clearance does not address whether the right of communication to the public is governed by the country of origin principle or the country of destination principle, the introduction of the country of origin principle for the clearance of rights to satellite broadcasting in the Satellite and Cable Directive (93/83/EEC) is understood to be an exception to the rule, and therefore the prevailing opinion is that copyright territoriality means that the rights need to be cleared for each country where the work is exploited [c.f. Doukas (2012); Batchelor and Montani (2015); Ibáñez Colomo (2017)]. Radim Polčák voices a different view in chapter “Territoriality of Copyright Law” in this book.

²³ For more on the distinction between intra-brand and interbrand competition, see Gundem (2016).

consumers have not attempted cross-border access to digital content on the Internet include lack of interest in this type of content (56% in the CR); sufficient supply of content in the domestic territory (64% in the CR); not knowing how to access the content technically (18% in the CR); content incomprehensibility due to foreign language (26% in the CR); distrust of services offered abroad (13% in the CR); and conviction that cross-border access to content is impossible (6% in the CR). The findings need to be interpreted in a wider context, however. Firstly, the multiple choice survey method does not take into account Internet piracy, particularly the fact that the lack of interest in content from foreign services may be due to the availability of such content, distributed illegally. Responses to other questions likewise indicate that 30% of Czech respondents (29% of Europeans on average) who have not attempted to access online services offered in another Member State would be interested to do so in order to access films, series, video clips and TV content excluding sports. In the case of sports broadcasts, 18% of respondents express interest in cross-border access (TNS Political and Social 2015). A survey requested by the Federation of German Consumer Organizations (VZBV) in February 2016, carried out by TNS with German consumers (N = 1032), indicated that 73% of respondents would welcome legal access to paid audiovisual services (sports broadcasts, films and series) from other Member States (VZBV 2017). The current business model of the audiovisual industry is unable to satisfy this demand.

A change in the business model may, in principle, arise from either a change in the business strategy (in response to consumer demand and technological developments) or a change in law (reflecting political, legal and ethical debates). Three options are available in relation to a change in the business strategy.²⁴ The first is represented by Netflix, which overcomes territorial barriers to pan-European distribution of content by producing its own content (Netflix originals) and by purchasing rights for the particular territories, or a multi-territory license, and by offering 28 national versions of its VOD service in the 28 Member States. The second option involves a change in the licensing strategy and segmentation of the market based on national languages. Licenses for the distribution of content would no longer be limited by territory but only by language version, and the cost would depend on the size of potential audiences speaking the language. The problem with this scenario is the territorial limitations of a number of local distributors or providers of national VOD services. Another drawback is the risk of cross-border cannibalization of revenues generated during a particular release window in the case of content produced in widely spoken languages (predominantly English) or sports broadcasts. The third option is to base the licensing agreement not on the territory where the content is to be viewed but on the quantity of content that is viewed, i.e., on the number of subscribers with the SVOD model, the number of transactions with the TVOD model and the number of views with the AVOD service.²⁵ The disadvantage of this solution is the lack of motivation for the

²⁴This is not an exhaustive list of all possible scenarios of the transformation of the audiovisual industry business model.

²⁵This solution is advocated by Erle (2016), for example.

distributor to invest in production and promotion, as the competitive advantage over other distributors, provided by absolute territorial exclusivity, will be lost.

The application of the country of origin principle to the online communication of audiovisual works to the public and the passive sales scenario are changes currently being discussed in the context of the transformation of the legal framework under which on-demand video service providers operate. In the first option, instead of the country of destination principle, the right to communicate the work to the public would be subject to the country of origin principle. Property rights would no longer need to be cleared for each country separately; content distributors (users of the work) would only need to clear the rights for the country of their principal establishment. Geoblocking would no longer be backed by copyright and it is uncertain whether it could be applied without violating free market principles, namely that of competition law.²⁶

Article 101(3) of the Treaty on the Functioning of the European Union contains exceptions to the prohibition on agreements restricting competition within the internal market. The exceptions concern any agreement between undertakings, “which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.” However, the agreements must not impose restrictions which are not indispensable, nor may they eliminate competition with respect to a substantial part of the products in question. Application of these requirements to the geoblocking of audiovisual content reveals that while geoblocking eliminates intra-brand competition, it does not remove interbrand competition. The interbrand competition would therefore not be eliminated, even if absolute territorial exclusivity was granted. In addition, representatives of the audiovisual industry argue that geoblocking is necessary for the production and localization of audiovisual content, which is advantageous for consumers.

If geoblocking continues to be allowed, in all probability, the current functioning of the audiovisual market will not change much. At most, geoblocking barriers would be canceled for audiovisual content for which there is no business reason to geoblock, i.e., content which cannot find a foreign distributor. However, if geoblocking is prohibited, the impossibility of territorial protection could disturb the audiovisual

²⁶The rulings of the European Court of Justice on the dispute between pub landlady Karen Murphy and FA Premier League, C-403/08 and C-429/08, are relevant in this context. The owner of a UK pub was brought to court for using cheaper decoding cards purchased in Greece for satellite broadcasting of soccer matches. The Court concluded that the prohibition on the import, sale or use of foreign decoder cards restricts the free movement of services. The judgment is relevant because the clearance of rights to satellite broadcasting is subject to the country of origin principle and because geoblocking (restricting the online availability of content) is a technical means similar to the prohibition on the use of cards decoding satellite signals outside the licensed territory. According to the Satellite and Cable Directive (93/83/EEC), content may only be communicated by satellite broadcasting where the satellite transmission is initiated. The satellite broadcaster is obligated to clear the rights only for the country in which the broadcaster resides. If a card subscriber receives a satellite television signal in a Member State other than the one in which the subscriber purchased the decoder card, the satellite broadcaster is not infringing the copyright and cannot justify refusing to sell the card to a customer from another Member State by referring to copyright protection.

industry ecosystem. The Czech audiovisual market would be hit by some of the negative impacts of this radical scenario (notably, unaffordable premium content in the main languages for providers of local audiovisual online services) despite the fact that it is protected by language barriers, consumer preference for content localized in the Czech language, and the fairly synchronized distribution of content within the combined Czech-Slovak market, where natural language barriers do not apply.

An alternative scenario of legislative reform therefore comprises explicit recognition of consumer rights (e.g., the right not to be discriminated against in the access to the cultural life of the community based on place of residence or nationality) in copyright legislation and the application of the country of origin principle only in cases where a consumer from an unlicensed territory is interested in subscribing to a service or purchasing content (“unsolicited request”) and the service provider does not target consumers in the unlicensed territory.²⁷ This scenario combines the licensing practice of territorially exclusive licenses and the prohibition of geoblocking and thereby eliminates absolute territorial exclusivity. This may produce unintended negative consequences for the industry due to intra-brand competition wherever there are no natural language barriers. Fearing cross-border competition, investors—potential distributors—will not be willing to invest in the purchase of an exclusive territorial license and in content localization and promotion. This may lead to a drop in the number of films made or lower rates of promotion and localization of audiovisual works in Europe, which would, however, be offset by their cross-border availability to all EU citizens on non-discriminatory terms. The question, therefore, is whether a compromise solution for a sustainable audiovisual business model could be a combination of the passive sales scenario and a list of permitted territorial restrictions (e.g., of limited duration) grounded in the protection of investment in the development, promotion and localization of audiovisual works.²⁸

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²⁷ Copyright law has, to date, reflected consumer rights only in the form of exemptions from and limitations on copyright protection, and not through an explicit definition of a consumer right to access cultural wealth.

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