

Geo-Blocking: What is it Good For... A Surprising Amount, Actually

December 11, 2020

[Dirk Auer](#) and [Kristian Stout](#)

The European Court of Justice issued its long-awaited ruling Dec. 9 in the [Groupe Canal+](#) case. The case centered on licensing agreements in which Paramount Pictures granted absolute territorial exclusivity to several European broadcasters, including Canal+.

Back in 2015, the European Commission [charged](#) six U.S. film studios, including Paramount, as well as British broadcaster Sky UK Ltd., with illegally limiting access to content. The crux of the EC's complaint was that the contractual agreements to limit cross-border competition for content distribution ran afoul of European Union competition law. Paramount ultimately settled its case with the commission and agreed to remove the problematic clauses from its contracts. This affected third parties like Canal+, who lost valuable contractual protections.

While the ECJ ultimately upheld the agreements on what amounts to procedural grounds (Canal+ was unduly affected by a decision to which it was not a party), the case provides yet another example of the European Commission's misguided stance on absolute territorial licensing, sometimes referred to as "geo-blocking."

The EC's long-running efforts to restrict geo-blocking emerge from its attempts to harmonize trade across the EU. Notably, in its Digital Single Market initiative, the Commission [envisioned](#):

[A] Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.

This policy stance has been endorsed consistently by the European Court of Justice. In the 2011 *Murphy* decision, for example, the court [held](#) that agreements between rights holders and broadcasters infringe European competition when they categorically prevent the latter from supplying "decoding devices" to consumers located in other member states. More precisely, while rights holders can license their content on a territorial basis, they cannot restrict so-called "passive sales"; broadcasters can be prevented from actively chasing consumers in other member states, but not from serving them altogether. If this sounds Kafkaesque, it's because it is.

The problem with the ECJ's vision is that it elides the complex factors that underlie a healthy free-trade zone. Geo-blocking frequently is [misunderstood or derided](#) by consumers as an unwarranted restriction on their consumption preferences. It doesn't feel "fair" or "seamless" when a rights holder can decide who can access their content and on what terms. But that doesn't mean geo-blocking is a nefarious or socially harmful practice. Quite the contrary: allowing creators to create different sets of distribution options offers both a return to the creators as well as more choice in general to consumers.

In economic terms, geo-blocking allows rights holders to engage in third-degree price discrimination; that is, they have the ability to charge different prices for different sets of consumers. This type of pricing will increase total welfare so long as it increases output. As Hal Varian [puts it](#):

If a new market is opened up because of price discrimination—a market that was not previously being served under the ordinary monopoly—then we will typically have a Pareto improving welfare enhancement.

Another benefit of third-degree price discrimination is that, by shifting some economic surplus from consumers to firms, it can stimulate investment in much the same way copyright and patents do. Put simply, the prospect of greater economic rents increases the maximum investment firms will be willing to make in content creation and distribution.

For these reasons, respecting parties' freedom to license content as they see fit is likely to produce much more efficient outcomes than annulling those agreements through government-imposed "seamless access" and "fair competition" rules. Part of the value of copyright law is in [creating space to contract](#) by protecting creators' property rights. Without geo-blocking, the enforcement of licensing agreements would become much more difficult. Laws restricting copyright owners' ability to contract freely reduce allocational efficiency, as well as the incentives to create in the first place. Further, when individual creators have commercial and creative autonomy, they gain a degree of predictability that can ensure they will continue to produce content in the future.

The European Union would do well to adopt a more nuanced understanding of the contractual relationships between producers and distributors.

[View Article](#)