Geo-blocking, Live Sporting Events and the Digital Single Market in Europe.

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# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>4</td>
</tr>
<tr>
<td>A. What is geo-blocking?</td>
<td>8</td>
</tr>
<tr>
<td>B. How are live sports events sold to distributors throughout the European Union</td>
<td>9</td>
</tr>
<tr>
<td>C. The problems with erecting hard borders for distributing live sporting events.</td>
<td>10</td>
</tr>
<tr>
<td>1. The disruption of the free movement of people and products.</td>
<td>11</td>
</tr>
<tr>
<td>2. The humanitarian argument against geo-blocking live sports</td>
<td>12</td>
</tr>
<tr>
<td>3. Geo-blocking creates monopolies within each Member State.</td>
<td>13</td>
</tr>
<tr>
<td>II. Thesis Statement</td>
<td>14</td>
</tr>
<tr>
<td>III. The European Union’s historic action on geo-blocking.</td>
<td>14</td>
</tr>
<tr>
<td>A. The May 2015 Inquiry begins a review of general geo-blocking across the Union.</td>
<td>14</td>
</tr>
<tr>
<td>B. The results of the Inquiry show significant problems with cross-border sales.</td>
<td>15</td>
</tr>
<tr>
<td>1. Retailers charge different prices based on the location of the consumer.</td>
<td>16</td>
</tr>
<tr>
<td>2. Agreements between suppliers and retailers restricting cross-border online sales.</td>
<td>17</td>
</tr>
<tr>
<td>3. Unilateral reasons for not selling cross-border.</td>
<td>18</td>
</tr>
<tr>
<td>4. Geo-blocking and digital content.</td>
<td>18</td>
</tr>
<tr>
<td>C. The EU moves forward after the Inquiry.</td>
<td>19</td>
</tr>
<tr>
<td>1. The Commission’s proposal.</td>
<td>20</td>
</tr>
</tbody>
</table>
2. Negotiations continue on the proposed Regulation while it is unclear whether live sports will be excluded.

3. Reactions to the “live sporting event” exclusion.

IV. Why exclude live sporting events from the proposed regulation?
   A. How the Premier League is distributed throughout the EU.
   B. The Premier League’s rationale for the status quo.
   C. Pricing disparity across the EU.
   D. Steps taken by consumers to combat high prices.
      1. Piracy.
      2. Portability Regulation.
      3. Could the Portability Regulation blur the lines on what is acceptable cross-border streaming?

V. Arguments for the status quo.
   A. It is easy to order a subscription and if there are issues, to seek support.
   B. Consumption is seamless.
   C. The predictability of the current system.

VI. A way forward.
   A. Copyright reform in the European Union.
   B. Adding live sporting events to the proposed Geo-blocking Regulation.
   C. Broadcasters and languages throughout the European Union.
   D. A proposal to award exclusive rights to broadcast in a specific language instead of by territory.
   E. Could Brexit change the distribution of the Premier League?
   F. Could OTT change everything?

V. Conclusion

Table of Reference
I. Introduction

A core tenet of the European Union is that goods (along with people) should have free movement throughout the Union. The past two decades have seen Brussels attempt to remove all territorial protections so that the dream of one single market can be realized. Tearing down hard borders has had immediate positive impact for consumers across Europe. One only has to look at the EU’s moratorium on roaming mobile charges to see how Union wide action can improve circumstances for its citizens.\(^1\) In essence, consumers across the Union complained loudly about having to pay additional fees for calls, SMS and text messages while travelling from Member State to Member State. The governmental powers of the EU listened to these complaints and acted to eradicate any additional charges to consumers. In a testament to the idea that nothing good happens fast, it did take 11 years for the roaming charges to be sunset.

Another major victory for the Union is the saturation of the continent with high-level access to bandwidth.\(^2\) Access to high speed and consistent connections are pillars of the Digital Single Market, which is the EU strategy to open up digital opportunities for people and businesses while enhancing Europe’s position as a world leader in the digital economy.\(^3\) The Digital Single Market is enhanced by the Single Market Strategy, which was announced on October 28, 2015. The Single Market, as defined by the press release, which accompanied its announcement, is


designed to allow goods, services, capital and people to move freely. The Commission pointed out that a major barrier to the full implementation of the Single Market was “unjustified barriers”.

The EU, through the Single Market Strategy and the Digital Single Market (as the name suggests), seeks to have one digital market across the continent. The European Commission aims for an inclusive digital society where its’ citizens can benefit from this access. The benefits extend to media and entertainment and for the most part, Europeans have the freedom to enjoy whatever kind of digital media they choose anywhere on the continent, with one notable exception.

The focus of this paper is the failure of the Union to tear down the borders for consumers within the Union of broadcasted live events, particularly sports. Currently, Europeans who seek to watch live sports can only purchase that coverage (whether via broadcasting or streaming) from the authorized distributor for the country where they are located. There is no Digital Single Market for these live broadcasts; there are at least 28, with different pricing, quality and (for the most part) no real competition. The example that will be used the most is that of club football. When it comes to club football, nothing matches the English Premier League for wealth, market penetration, access (with pay) and viewership. Based on numbers from 2013, the top league in England is distributed in 212 countries/territories, broadcast to 643 million households, with a potential worldwide audience of 4.7 billion.

5 Id.
6 Known to some as soccer.
7 Please do not call it soccer.
8 Sarah Ebner, “History and time are key to power of football, says Premier League chief”, July 2, 2013, The Times. https://www.thetimes.co.uk/article/history-and-time-are-key-to-power-of-football-says-premier-league-chief-3d3zf5kb35m
Due to the popularity of the Premier League, England’s top division (and its distribution throughout Europe) will be the main focus of this paper. The simple fact is that the world is blanketed by the Prem, but that does not mean that the consumer has multiple choices for viewing the league. In fact, just the opposite, for the Premier League, like most professional sports organizations sells its distribution rights to only one entity per country. While that means that individuals across the world have the ability to access the games, there is no competition between broadcasters within their country.

Cable and satellite broadcasts are covered in the European Union by a 1993 directive. The Satellite and Cable Directive (“SatCab Directive”) serves as the benchmark for any and all cross border broadcasts within the Union. The dual goal of the Directive, as stated in a 2002 EU review of its rollout, is to provide “appropriate protection for the relevant copyright without jeopardizing the benefits which are inherent in a genuine internal audiovisual market, both for the economic operators active in the sector and for a general public geared more and more towards a transnational market.” That definition is a fantastic example of the tortuous prose that plagues the EU in most of their written items. A better description of the goal is to protect copyright-protected items without thwarting the best parts of the television market for the viewing public and the corporations as it expands past traditional borders.

While the Directive is still applicable to more traditional forms of content consumption, like cable TV and satellite broadcasts, the concept of streaming

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content was only a dream when it was written. The reality is that while those traditional forms of reception have been dominant in the past, the growth in the industry is found in streaming. According to a study from the European Parliament in 2017, demand for copyrighted digital content services is growing at a fast pace. The number of individuals who ordered digital content grew by 45.5% between 2011 and 2014 within the EU. This is faster than the growth of individuals that ordered physical goods online (23.5% increase) or services online, like travel, which rose at a 25% clip during that same period.\textsuperscript{12} For that reason, the main thrust of this paper will concentrate on digital streaming and the measures taken by companies and governments to curtail cross-border interactions.

The move to streaming digital content has not been lost on players in the industry and has led to calls for an update. One such call came in the form of a joint statement from three broadband focused trade associations in April 2016. ANGA, Bitkom and Cable Europe stated that while the collective management enshrined in the Directive is still very important for cable retransmission of TV and radio programs, digitization has fundamentally changed the way that TV is consumed and the market it inhabits.\textsuperscript{13} With new business players, technologies, business models and types of consumption coming online every day, the decades old Directive struggles under its 20\textsuperscript{th} century thinking. The trade associations advocate a modernization of the SatCab Directive, especially the licensing aspects to streamline rules for e-transmissions of broadcast programs and the various ancillary services that have evolved through technological gains like on-demand functions that allow


\textsuperscript{13} “Joint Statement of ANGA, Bitkom and Cable Europe”, 26 April, 2016. \url{http://www.cable-europe.eu/wp-content/uploads/2010/09/160426_NewTV_OldLaw_final.pdf} (ANGA represents more than 200 German broadband companies in the cable industry. Bitkom represents more than 2,300 companies in the digital sector from across the European Union. Cable Europe is the trade association that connects leading broadband cable TV operators and their national trade associations throughout the European Union.)
the consumers to pause and catch up on a live program, restart a program from the beginning and “record” and store a program on their providers servers instead of on a machine at their residence.\textsuperscript{14}

So far, no proposals have been made by either the European Commission or the European Parliament to update the SatCab Directive.

**A. What is geo-blocking?**

Geo-blocking is defined as the commercial practice that prevents online consumers from purchasing or accessing content based solely on their location.\textsuperscript{15} The consumer’s locale is determined by using their Internet Protocol address (hereafter “IP”). The IP is a unique string of numbers separated by periods that identifies each computer on the network. Put another way, when an individual seeks to access content, in most instances the distributor website will ping their location to see if access should be granted. While the geo-location accuracy of IP addresses is far from one hundred percent, it almost always does the job of placing you within the correct country.

In the past within the European Union, geo-blocking had been used to deny online shopping between consumers and retailers from different countries. Also, consumers shopping for goods that have designated distributors within their home country were blocked from completing a purchase; instead they were directed to the authorized distributor within their geographic market. The EU’s reaction to consumer complaints with regards to these restrictions is explored below in section III.

\textsuperscript{14} Id.
B. How are live sports events sold to distributors throughout the European Union?

As stated above, the Premier League is the most widely distributed sports association in the world. The Prem is found in every corner of the EU, but how is that accomplished? For an interesting view of distribution strategies on the world stage, Raj Korla’s article on the Premier League is quite informative.\(^{16}\) Mr. Korla explains that even though leagues like England’s top division may desire market saturation, in countries with less sophisticated infrastructure, the league may need to use multiple broadcasters to grant access to all customers. Infrastructure, like high speed Internet and broadcast saturation also play into the equation.\(^{17}\)

Within the EU, television (and more specifically, the TV set) is the preferred medium for consuming media. A study from autumn of 2014 found that 86% of the people within the Union watched television on a nearly daily basis.\(^{18}\) 94% of the viewers accessed the content on a standard TV set, while 20% accessed it online.\(^{19}\) While standard terrestrial television consumption is the norm, as seen above, growth is exponential within the streaming content market.

Jean-Claude Juncker, the European Commission President has made the Union’s top priority a robust digital economy. The Luxembourger replaced Jose Manuel Barroso in November of 2014 after campaigning on five separate priorities, the first being the creation of a digital single market for consumers and businesses. Candidate Juncker stated that “courage” was needed to break down “the national silos in telecoms regulation, in copyright and data protection legislation, in the management


\(^{17}\) Jean-Claude Juncker, “My Priorities”. \url{http://juncker.epp.eu/my-priorities}


\(^{19}\) Id.
of radio waves and in competition law.” Access to sports events on electronic devices wherever they are in Europe and regardless of borders was listed as a main goal.

Within his presidency, Juncker has made gains towards achieving the Digital Single Market, but “borders” still exist. The Juncker Commission’s focus on high speed broadband access has paid dividends when it comes to online coverage as in 2016, 85% of EU households had access to the Internet from their home. Countries like Luxembourg and the Netherlands boast rates of 97% coverage while Bulgaria and Greece are the only countries lower than 70%. Thus, sports associations, like the Premier League, are relatively assured that if they seek to distribute their product through traditional television stations or the emerging online means within the Union, they can reach most residents. The problem within the Union is not access to the product; the problem is that there is no competition in the distribution of the product within borders.

C. The problems with erecting hard borders for distributing live sporting events.

Plainly stated, consumers across the European Union suffer from the present distribution model used for live sporting events. Competition in the marketplace is a hallmark goal for the Union, yet the sale of distribution rights by country coupled by the geo-blocking scheme leave consumers with only one choice per country at a rate that is not vetted by competition. This is the truest definition of a monopoly.

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20 Juncker, “My Priorities”.
21 Id.
22 European Commission, “Internet access and use statistics-households and individuals”.
23 Id.
1. The disruption of the free movement of people and products.

A principle at the foundation of the Union is the free movement of people and products.\(^{24}\) The free movement of goods is so important that it is listed as the first of the four fundamental freedoms of the internal market.\(^{25}\)

While the focus of this paper is the restriction of the product (the live broadcast), another issue is for those that travel frequently from country to country within the Union. As stated above, over 20\% of EU TV viewers consume their television online and with a combine population over 500 million, that equates to roughly 90 million Europeans streaming content.\(^{26}\) These streaming people travel, either for work or pleasure, and cross borders on a daily basis.

Under the Schengen Treaty, individuals no longer need to show passports while crossing borders within the treaty umbrella, yet when they emerge in another country they will not be able to stream content.\(^{27}\) In response to complaints, the EU has taken steps to work with distributors of on-demand content (i.e. Netflix, Amazon Prime) so that a subscriber from one country may still be able to access content when traveling within another country. The Portability Regulation (explored below) will roll out in 2018 and could solve many of these issues but that will not be clear until it goes into effect next March.


\(^{27}\) Schengen Visa Info, “Schengen Agreement” 2017. [https://www.schengenvisainfo.com/schengen-agreement/](https://www.schengenvisainfo.com/schengen-agreement/)
2. The humanitarian argument against geo-blocking live sports.

A major issue across the Union over the past five years has been the influx of refugees.\textsuperscript{28} Migration onto the continent creates large population clusters of individuals who may not speak the language of their new country. Migrants face multiple challenges when relocating, from occupational to food security. One issue highlighted by the Commission is the absence of some cultural aspects from their home country; sport definitely fits into these absent cultural aspects. The geoblocking of live events, in many cases, means that a new immigrant can only access international sporting events, like the Olympics or World Cup, in the language of their new home country. While these cultural connections do not rise to the importance of food security, health care, education or employment, they represent an important enough issue for the EU to seek comment on them.

Parliamentary questions were raised on when the single market will be realized for live sporting events so that those in linguistic minorities should be able to access content in their mother tongue.\textsuperscript{29} Gunther Oettinger, a German member of the Juncker Commission “responded” four months later by stating that the Commission finds the broadcast of sporting events to be an important means of promoting cultural and linguistic diversity.\textsuperscript{30} Oettinger mentions the portability changes that are coming along with restating the primary goal of full cross-border access for all types of content but ends the statement by saying that even though the Commission sees great import in breaking down these border, they are not covered by the geo-blocking proposal.\textsuperscript{31}

\textsuperscript{28} “Migrant Crisis:Migration to Europe explained in seven charts,” 4 March, 2016, \textit{BBC}. \url{http://www.bbc.com/news/world-europe-34131911}
\textsuperscript{31} Id.
In sum, the European Union pushes cultural identity and diversity in a general manner. When it comes to the application of law, the priority seems to get lost within the buzz of economic activity. Within the Court of Justice, no cases can be found that focus on the humanitarian issues that crop up from hard borders. The same goes for the European Court of Human Rights. It is possible that cases are winding their way up the procedural chain and will be presented in one or both of the courts. That is to be seen. If the cases do not materialize, this could represent a situation where the ideals behind the EU are overshadowed by everyday business concerns.

3. **Geo-blocking creates monopolies within each Member State.**

Putting travel and humanitarian considerations aside, the major issue with the present market is that consumers simply do not have a choice. If you are in Sweden and want to watch the Premier League, you need to purchase it from Viasat Sport. If you are in Greece, you can only watch it through Cosmote Sport. In the Czech Republic it is Digi Sport. That doesn’t mean that some countries do not have multiple distributors as places like the United Kingdom and Denmark parcel out matches between multiple distributors like Sky Sports and BT Sports (in the UK) and TV3 Sport and 6’eren in the Danish market.

This hardly creates competition as each distributor is assigned specific matches and except for in Belgium (explained below) a match will not appear on both platforms. In essence, the existence of multiple distributors means that the consumer will have to shell out additional fees to ensure they see their club. For instance, Chelsea F.C. has fans worldwide, yet if you live in Denmark, a Blues fan would need to buy

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33 Id. “Filter by Location: Greece”.
34 Id. “Filter by Location: Czech Republic”.
35 Id. “Filter by Location: United Kingdom and Denmark”.
36 Including the author.
subscriptions to both distributors since Chelsea games can appear on either platform.

II. Thesis Statement.
The European Union should strengthen its stance against geo-blocking and forbid distributors from setting hard borders for viewing live event content. The focus of this paper is a review of the EU’s move toward the Digital Single Market while ridding the economic landscape of most cross-border geo-blocking of economic activity. A notable, significant exception is the broadcast of live sports events. What follows is a summary of the background analysis that serves as the basis for the forthcoming Regulation on geo-blocking along with a proposal for a way forward.

III. The European Union’s historic action on geo-blocking.
The EU turned its collective eye to the issue of geo-blocking in the mid 2010s as consumers across the Union complained about restrictions put in place that made it impossible for consumers to purchase goods from a distributor in another Union country.

A. The May 2015 Inquiry begins a review of general geo-blocking across the Union.
The European Commission launched a competition inquiry for the e-commerce sector within the Union on May 6, 2015. Margethe Vestaker, the Commissioner in charge of competition policy stated, “European Citizens face too many barriers to accessing goods and services online across borders. Some of these barriers are put in place by companies themselves.” Vestaker said the aim of the study was to determine how widespread the barriers are and what effects they have on competition and consumers. The antitrust inquiry was part of the ever-expanding work done associated with the Digital Single Market Strategy.

The inquiry took place over several months and consisted of the collection of information from multiple entities involved in e-commerce throughout the Union. The focus was online sales of consumer goods like electronics, shoes, clothing and sports equipment, along with online distribution of digital content. The Commission gathered evidence from nearly 1900 companies (including the Premier League) from the e-commerce world and analyzed roughly 8000 distribution contracts.38

**B. The results of the inquiry show significant problems with cross-border sales.**

The Commission delivered the initial findings in March of 2016.39 While there is a lot to unpack from the 79-page report, some major trends are evident. The inquiry relied heavily on an August 2015 report entitled, “Cross-border Access to Online Content” which is a part of the survey wing of the European Union called the Eurobarometer.40

In general, the Commission found that while e-commerce has steadily grown within the Union, cross-border e-commerce remains limited. In 2015, more than 50% of the EU population shopped online, but only 16% shopped from a seller based in another EU Member State. 41 Digital content is a major component of this economic activity, with TV series, movies and sports broadcast accounting for 33% of online trade by individuals. Cross-border attempts to access online content only account for eight percent of searches.

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40 European Commission, Flash Eurobarometer 411, “Cross Border Access to Online Content”, August 2015.

The Commission defined “geo-blocking” as (i) preventing the user from accessing the website, (ii) automatically rerouting the user to a website targeted at another Member State, (iii) refusing payment or (iv) refusing delivery. The inquiry found that 38% of online retailers collect data for geo-blocking.\textsuperscript{42} Retailers used many tools to determine the location of the online consumer including, postal address, choice of language, IP address, Credit/debit card details, phone number and country of residence. Since the majority of transactions online are for tangible goods that are physically shipped to the buyer, the postal address of the consumer is the most heavily relied upon tool to geo-block. For example, if an online company has a policy not to ship to Romania and your postal address is in Romania, the blocking can be done in several ways. Sometimes the vendor looks to the consumers IP address and if the vendor sees Romania it will simply not load the website. Other times the consumer can go through the entire purchasing process but once the shipping address is input the transaction will not complete. This can create confusion and anxiety as the consumer will not know whether the transaction has gone through.

1. Retailers charge different prices based on the location of the consumer.

31% of retailers that sell cross-border goods reported that they charge different prices for at least one item.\textsuperscript{43} 22% of retailers charge different prices for the large majority of products offered.\textsuperscript{44} These retailers were asked why they charge different prices and the responses pointed to different tax regimes, costs and product demand as being the most prominent; requests by their suppliers to charge differing amounts was considered less relevant.\textsuperscript{45} All of these findings fly in the face of the Commission’s hopes for a Digital Single Market.

\textsuperscript{42} Id. Pg. 29.
\textsuperscript{43} Id. Pg. 36.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
2. Agreements between suppliers and retailers restricting cross-border online sales.

Even though the survey results downplayed the effect of suppliers’ wishes on retailers’ decisions to geo-block or charge additionally for cross-border sales, the Commission drilled down on the issue of agreements between suppliers and retailers. 12% of online retailers said they had agreements with manufactures and/or suppliers that restricted cross-border sales.\(^\text{46}\) Agreements can take various forms from an outright ban to sell outside of the seller’s home State to less straightforward terms, like seeking the manufacturers’ approval before the sale is completed. The Inquiry found that such approval was tantamount to an outright prohibition.\(^\text{47}\)

Additionally, the Inquiry collected anecdotal evidence from retailers regarding demands of suppliers and manufacturers. Some retailers stated that they have experienced retaliatory measure by suppliers that have stopped delivery to them because they sold cross-border. The Inquiry concluded that suppliers’ requests not to sell cross-border appear to be driven by a desire to keep prices in different Member States at different levels. Some retailers stated that suppliers intervened to “stabilize” retail prices in certain countries by asking the retailer not to sell products in certain Member States (or to raise the price to certain levels) so as not to negatively affect the price level in that Member State.\(^\text{48}\) This price manipulation flies in the face of Article 101 of the Treaty on the Functioning of the European Union that forbids cartels and other agreements that could disrupt free competition in the internal market.\(^\text{49}\) The Commission has promised further analysis on this issue.

\(^{46}\) Id. Pg. 39-40.  
\(^{47}\) Id.  
\(^{48}\) Id. Pg. 41.  
\(^{49}\) Id.
3. Unilateral reasons for not selling cross-border.

Cross-border sales are not easy for some retailers. While a seller could see a significant increase in sales by pushing into other Member States, retailers listed several practical reasons for abstaining. First, the European Union has 24 official languages. 50 While English may seem pervasive, retailers’ number one reason not to sell cross-border was the cost of translating their websites. Sellers were also concerned with how to advertise outside of their native country along with the logistics of arranging payment and delivery. 51

4. Geo-blocking and digital content.

Within the report, the Commission next turned its focus away from traditional online sales and focused on the distribution of digital content. Across the Union, 68% of digital content vendors use some form of geo-blocking. Interestingly, there is a large variance between Member States with Italian vendors only geo-blocking at a clip of 46%, while Member States Denmark, the Czech Republic, Greece and UK have rates of over 80%. 52

Variance exists based on the business model of the vendor as well but those that offer pay services (whether by subscription or transaction) geo-block at a much higher rate than those that earn money by advertising. For example, HBO Go (subscription based) cares greatly where you are situated, while YouTube, Facebook and Google Play care very little. 53 Regardless of income model, the most favored manner of geo-blocking for digital content is by checking the IP address of the consumer. 78% of geo-blocking uses IP addresses in some form or fashion.54

51 European Commission, ”Commission Staff Working Document: Geo-blocking practices in e-commerce”, Pg. 43-44.
52 Id. Pg. 48-50.
53 Id. Pg. 51-52.
54 Id. Pg. 54.
Variance is the name of the game when it comes to the different forms of content for which providers are required to geo-block in the Union. Fictional TV and Films hold the highest percentage while Sports checks in with 63% of the agreements requiring geo-blocking.\(^{55}\)

The flip side of the geo-blocking scheme is the cross-border availability of digital content. Respondent providers answered that the cost of purchasing content for additional territories or the lack of availability of that content as the top two reasons they weren’t marketing their product in other countries.\(^{56}\) Put another way, the main reason for foregoing cross-border sales was access to the content under their current contractual arrangement.

The Inquiry finished its’ analysis by reviewing practices by digital content suppliers relating to customers who attempt to access content from outside of their home country. According to the respondents’ answers, 72% of content providers employ some form of geo-blocking. This can result in limited access to the product along with the inability of consumers to play downloaded items, even if the consumer has already paid for the items.\(^{57}\)

C. The EU moves forward after the Inquiry.

The Inquiry established that geo-blocking by online retailers and digital content vendors persists across the continent. Based on the findings a three-stage process began from which legislation is expected to restrict geo-blocking. The first step in the process was the presentation of a proposed draft Regulation by the Commission to the European Parliament and the Council on May 25, 2016.\(^{58}\)

\(^{55}\) Id.
\(^{56}\) Id. Pg. 62.
\(^{57}\) Id. at 66-67.
\(^{58}\) European Commission, “Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive
1. The Commission’s proposal.
The Commission listed the general objective of the proposal as giving customers “better access to goods and services in the Single Market by preventing direct and indirect discrimination by traders artificially segmenting the market based on customers’ residence. Customers experience such differences in treatment when purchasing online, but also when travelling to other Member States to buy goods and services.”

The Commission’s 23-page proposed regulation contains the following:

- Article 3 of the proposal states that traders cannot prevent access to their online interfaces based on the customers’ residence unless the access restrictions or rerouting are required by law, in which case the trader must provide a clear justification.
- Article 4 states that geo-blocking is forbidden for the sale of physical goods when the trader is not involved in the delivery of the product. For electronic supplied services, only services where the main feature is the access to and use of copyright protected works or other protected subject matter can be geo-blocked. In addition, a trader cannot geo-block services if it provides them in another Member State.
- Proposed Article 5 forbids traders from rejecting orders based on the payment instruments of the consumer.
- Proposed Article 6 provides that agreements with traders containing passive sales restrictions, which would lead to violations of the Regulations, are automatically void.
- Article 8 requires Member States to designate one or more bodies to provide assistance to consumers in relation to disputes relating to geo-blocking.
- Article 9 requires periodic review of the Regulation and specifically names the carve-out for electronically supplied services, the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, provided that the trader has the requisite rights for the relevant territories.
- Proposed Recital 6 deals specifically with geo-blocking of live sporting events. The Recital proposes to exclude from the Regulation all audio-


59 Id. Pg. 2.
visual services, including services the main feature of which is the provision of access to broadcasts of sports events, which are provided on the basis of exclusive territorial license.

On November 28, 2016, the Council published an agreement with the general approach that will serve to form the basis for further negotiations. The Council adopted most of the Commission’s draft but clarified that the Regulation would only apply to “unjustified” geo-blocking. The council, in Article 1, carved out any transactions where all of the relevant elements of the transaction occur within one Single Member State. The Council’s proposal keeps the live sports exclusion in place. There is no justification for carving out live sports from this regulation, just silence.

Next, the IMCO weighed in. According to their own website, “the IMCO Committee is responsible for legislative oversight and scrutiny for EU rules on the free movement of goods, free movement of professionals, customs policy, standardization and the economic interests of consumers.” The website continues that “the committee members work to reduce barriers to economic trade and simplify legislation to enhance competitiveness across the Single Market (SM), while taking care for consumer interests in a wide range of sectors.”

The Committee announced on April 25, 2017 its interest in the negotiation process regarding a geo-blocking regulation. On April 27th, the IMCO published their lengthy opinions in response to the original proposal. With regards to broadcasts of sports

61 Which, somehow stands for the Committee on the Internal Market and Consumer Protection.
63 Id.
events, the IMCO adopted the language from proposed Recital 6 but added that the exclusion should remain only after a comprehensive review of the legislation is completed. The IMCO urged that the Commission should also consider the possibility of keeping them in the scope of the Regulation. There were no proposals as to what the “comprehensive review” would look like or the likelihood of ridding the Regulation of the exclusion.

2. Negotiations continue on the proposed Regulation while it is unclear whether live sports will be excluded.

The contents of the proposed regulations are currently being negotiated within the EU. While it is unclear what the final product will be, it appears that the chance of the regulation opening up cross-border viewing of live sports events is remote. As seen above, throughout the first stages of the process, Recital 6 of the Proposed Geo-blocking Regulation specifically carved out live sporting events from the regulated activity. Only the IMCO proposed that the issue be examined before the exclusion is put into effect. What this examination will look like is unknown.

3. Reactions to the “live sporting event” exclusion.

Consumer groups across Europe were dismayed at the proposed exclusion of live sporting events from the geo-blocking regulation. The European Consumer Organisation (“BEUC”) stated that the restrictions “do not make sense in a Single

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Markets”. BEUC had harsh words for the IMCO as well stating, that the Committee were “motivated by fears that the financing of European productions could suffer”, if all of the borders were torn down.

This continued a trend in which BEUC set out to tear down all forms of geo-blocking. Monique Goyens, Director-General of BEUC stated that” the digital single market cannot be a one-way street. Business practices which restrict consumers from choosing the product or service they want to purchase from providers across the EU are incompatible with a single market. Lifting such barriers will be good for consumers and the economy alike” Goyens next took aim at the very licensing agreements the Premier League and broadcasters hold as sacred by highlighting a finding of the European Commission on e-commerce that found that the longer a sport organizer licenses its contents exclusively to a specific broadcaster, the harder it gets for competitors to enter the market.

IV. Why exclude live sporting events from the proposed regulation?

The focus of the proposed geo-blocking regulation is to rid the European Union of hard borders when it comes to e-commerce as part of the Digital Single Market strategy. Based on the proposal, competition, along with an eye to dispense of any form of geographic discrimination, are the major rationales behind tearing down the online borders. This begs the question as to why those goals wouldn’t be important to live sporting events. One answer could be the way the products are distributed throughout the world. A more cynical view would be that the current system has


66 Id.


68 Id.
been in place for so long that no entity with any power has a reason to upset the apple cart.

A. How the Premier League is distributed throughout the EU.

As established above, the Premier League blankets Europe. While each country has its own league, the English first division is generally available in every corner of the Union. In response to the E-Commerce Sector Inquiry regarding geo-blocking mentioned earlier, the Premier League submitted a nine-page comment.\(^{69}\) The comment gives insight into how the Premier League distributes its broadcasting rights throughout the EU. The Premier League touts the exclusive territorial basis (the ET Model) as being equally beneficial for the consumer, broadcaster, right's holder and content producer.

According to the comment, the rights to broadcast the Premier League are bid on by companies for each country. The bid is for a three-year contract. When an entity wins the exclusive rights to distribution, they are given both the traditional broadcast rights along with the rights to distribute games via the Internet.\(^{70}\) It is the second part, the bundling, that the Premier League seems to be most focused on retaining.

The bidding process for the contract period of 2019 to 2022 is about to begin with the League sending invitations out to broadcasters to make bids.\(^{71}\) In the UK, the League has promised the Office of Communications (“OFCOM”), the national broadcast regulator, that they will make additional games available to broadcast for


\(^{70}\) Id.

\(^{71}\) Martha Kelner, “Premier League clubs agree to screen up to 210 live matches a season”, *The Guardian*, 16 November, 2017. [https://www.theguardian.com/football/2017/nov/16/premier-league-club-live-matches-increase](https://www.theguardian.com/football/2017/nov/16/premier-league-club-live-matches-increase)
that time period, specifically Saturday nights. OFCOM defines itself as the communications regulator in the UK with its’ principal duty being to further the interests of citizens and consumers of TV, radio and video-on-demand sectors, fixed-line telecoms like phones, mobiles and postal service.72

The possible extension of games in England to Saturday nights highlights a peculiarity in the British football market. In the United Kingdom, games cannot be broadcast between the hours of 2:45 pm and 5:15 pm on Saturdays. This coincides with the time when a significant amount of the league matches are played within the British Isles.

The history of the Saturday blackout starts over 50 years ago when Bob Lord, the chairman at Burnley FC stated that televised matches would result in significantly lower attendance at games, which would reduce the clubs’ financial income. Lord was able to convince the other clubs to quarantine those prime matches from television.73

Little to no evidence exists proving that blacking out games drives spectators to stadiums to watch live matches. For example, in Germany, nearly 100% of Bundesliga and Bundesliga 2 matches are available on television, yet they have the highest attendance figures in the world.74 The average attendance in Germany’s top division for the 2016/17 season was 40,693 fans per match with over 91% of all

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seats being sold.\textsuperscript{75} The average attendance in the Premier League for the same time was 35,822.\textsuperscript{76}

The blackout, along with other portions of the Premier League football rights bidding process were part of an investigation by OFCOM that ended in August of 2016. The investigation arose out of complaints made by a broadcaster, Virgin Media, that the market within the UK was being artificially constricted, which was driving up prices and hurting consumers.\textsuperscript{77} Virgin’s complaint was viewed by many as an attempt by one broadcaster to upset the apple cart of those who owned the rights. This may not be false, but Virgin’s complaint brought interesting facts into the open, such as, only 41\% of league matches were shown in the UK, which the complainant stated was the lowest in all of Europe.\textsuperscript{78}

Regardless of the motive of Virgin, nothing came from the investigation. OFCOM closed it with a press release dated August 8, 2016 and stated, among other things, that “due to the range of views expressed in the consumer research, significant further work-including additional research among football fans-would be required to conclude this investigation.”\textsuperscript{79} OFCOM also mentioned in closing the investigation that the Premier League had recently decided to increase the number of matches available and will also include a “no single buyer” clause which means that more than one broadcaster must be awarded rights. OFCOM ended the press release by basically stating that with the grand scope of the potential investigation, their

\textsuperscript{75} Id.
\textsuperscript{76} Worldfootball.net, “Premier League 2016/17>>Attendance>>Home matches”, 2017. \url{http://www.worldfootball.net/attendance/eng-premier-league-2016-2017/1/}
\textsuperscript{77} Owen Gibson, ”Ofcom inquiry may pave way for 3pm football matches screened live,” \textit{The Guardian}, 18 November, 2014. \url{https://www.theguardian.com/football/2014/nov/18/ofcom-premier-league-tv-rights-virgin-media}
\textsuperscript{78} Id.
resources could be used more effectively on other priorities to benefit consumers and competition. In other words, the problem may be too big for the regulator to take on. The end result was a small uptick of games available to Britons but very little else. The fix that OFCOM mentioned in its release that stated that the Premier League would not have one single buyer in the UK may look like a win for consumers initially but the reality is that for followers of one club this could mean that additional fees need to be shelled out so that every team game can be seen.

This does not create a market for games where broadcasters compete for viewers by offering lower prices or greater access. It simply means that games are divided up with teams hopping back and forth from broadcasters game to game. For example, a simple breakdown of Chelsea’s Premier League matches over a seven game stretch during the 2017/18 campaign found four broadcast by Sky Sports and three by BT Sports. Sky Sports subscriptions in the UK that cover the Premier League can be purchased by the month at £33.99 or viewers can purchase a day pass for £6.99 or week pass for £10.99. BT Sports fee schedule is strictly based on months with rates changing depending on your form of access (broadband, TV or both) along with bundling with other products to that the fee range runs from £25.99 a month to as low as £3.50 a month. Regardless of the high wire act performed by consumers, a fan of the club will shell out as much as £59.98 a month just to see every match. The consumer, in this instance, would be better off with only one broadcaster.

**B. The Premier League’s rationale for the status quo.**

As expected, the Premier League’s comment to the E-Commerce Inquiry is heavily slanted against any cross-border distribution. The Premier League’s current flight

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of contracts guarantees over ten billion British Pounds for the three-year period.\textsuperscript{83} That is ten billion reasons for the Premier League to fight any changes to distribution. The Premier League lauds the idea of rejecting change by pointing to a Charles River Associates study commissioned by the European Commission which found that “policy changes which reduce the effectiveness of territorial licensing entail a risk of undermining the associated efficiencies which do not appear to be justified by the possibility to reduce the risk of harm.”\textsuperscript{84} The Premier League fails to mention footnote 17 from the report, which specifically states “Sport events, talk-shows, documentaries and news programmes are therefore outside of the scope of this report.” In other words, the report the Premier League holds up as supporting their view has no relevance whatsoever.

The Premier League argues that consumers simply do not want to access cross-border content. The League cherry-picks a 2015 study by the Eurobarometer that found only 2% of respondents attempted to access cross-border sports. There is very little actual connection between the desires of the consumer and attempts by a segment of the population to access content they probably know is not available to them.

The Premier League hangs its hat on the “Virtuous Circle” as the best proof of the supremacy of the Exclusive Territorial Model. The virtuous circle, as defined by the Premier League is the phenomenon that results from the ET model. Basically, the investment in quality, primarily in playing talent, coaching, youth development and academies, stadia and facilities leads to a consequential increase in the quality, attractiveness and competitiveness of the Premier League football competition.


\textsuperscript{84} Charles River Associates, “Economic Analysis of the Territoriality of the Making Available Right in the EU”, March 2014. \url{http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf}
which in turn makes the product more desirable to consumer and helps to maintain or increase rights values, which in turn leads to a great investment in quality. Put another way, the guaranteed money the Premier League receives by creating monopolies in individual markets makes the product better for the consumers who have no say in how they consume that product. There is no mention in this section (or throughout the nine-page comment) about the damage done to the market by the distributors of the Premier League being able to set their own prices.

The thrust of the comments is the Premier League’s opposition to any unbundling of the online rights with the traditional broadcast rights. This unbundling, coupled with a move to outlaw geo-blocking and geo-filtering would create a potential “Pan-European market” where consumers in EU countries (or anywhere else in the world) could buy online subscriptions from any country. Another name for this could be a Digital Single Market for the Premier League.

According to the Premier League, if the online borders were torn down, broadcasters would be dis-incentivised from investing in innovative digital delivery products. It would seem that the exact opposite is the probability. If the market were open to multiple distributors, consumers could put pressure on broadcasters on various items from quality of broadcast to price of a subscription, increasing competition. In addition, new, dynamic entrants to the market would appear and push the envelope on quality and price. Geo-blocking and the ET Model currently serve as a governor to new entrants.  

The League finishes its comments with a defense of the entire fixed fee structure that starts with bids made by broadcasters. The League argues that if rights prices were determined by another measure, like subscription amounts, all of the players in the process would suffer, as there would be no guarantees that the amount of

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profit expected, would be received. But where else in the business world are profits guaranteed?

Notably, the Premier League’s comment only talks about consumers from an access standpoint. There is no mention of price or choice, only access. Basically, their analysis is limited to what is best for the businesses within the supply chain while ignoring consumers.

C. Pricing disparity across the EU.

The goal of the European Union and the Digital Single Market is for the EU to become one economic market. There are many areas in which the Union’s formation has created a more level playing field for the consumer, but there are other factors that create major price differences from country to country. Since the goal of one Single Market is a main tenet of the EU, a lot of macro analysis is done.

Market surveys are performed twice a year by the European Commission. The latest findings were published in June 2017 and looked at prices from 38 countries in the European sphere, including all 28 EU states. On general terms, Denmark prices are 39% higher than the EU average while Bulgaria is 52% below the EU average.

While the report does not drill down deep enough to analyze prices paid for subscriptions to the Premier League, it does include information regarding communication services, which include Pay TV prices. Strangely, Greece tops the list as having the highest prices within the Union on Communication services, with Lithuania being the cheapest. A quick review of the other research areas makes the Greek number an outlier as the Aegean country is below average, for price, on every other test point, besides footwear, where it is basically at the average.

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87 Id.
The chart (see below) accompanying the report shows great disparity in communication prices with countries like Romania, Poland and Estonia enjoying prices that are less than half of the prices found in Ireland, the United Kingdom, Belgium and Italy.\textsuperscript{88}

\begin{table}
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
 & HFCE & Personal transport equipment & Transport services & Communication & Restaurants and hotels \\
\hline
Switzerland & 161 & 103 & 127 & 135 & 167 \\
Iceland & 147 & 129 & 168 & 107 & 162 \\
Norway & 140 & 137 & 134 & 104 & 161 \\
Denmark & 139 & 146 & 124 & 80 & 150 \\
Ireland & 125 & 111 & 109 & 134 & 120 \\
Sweden & 124 & 99 & 113 & 87 & 144 \\
Luxembourg & 124 & 99 & 78 & 103 & 111 \\
Finland & 121 & 111 & 123 & 77 & 127 \\
United Kingdom & 121 & 102 & 138 & 129 & 111 \\
Netherlands & 111 & 119 & 113 & 109 & 109 \\
Belgium & 109 & 104 & 106 & 117 & 117 \\
France & 108 & 104 & 106 & 117 & 117 \\
Austria & 107 & 101 & 103 & 90 & 103 \\
Germany & 104 & 99 & 119 & 88 & 109 \\
Italy & 102 & 101 & 69 & 120 & 104 \\
EA-19 & 102 & 100 & 97 & 104 & 100 \\
Spain & 92 & 88 & 80 & 109 & 86 \\
Cyprus & 88 & 89 & 76 & 82 & 91 \\
Greece & 86 & 95 & 82 & 139 & 81 \\
Portugal & 84 & 108 & 85 & 99 & 75 \\
Malta & 82 & 102 & 86 & 90 & 81 \\
Slovenia & 82 & 90 & 93 & 97 & 82 \\
Estonia & 76 & 86 & 67 & 58 & 80 \\
Latvia & 71 & 85 & 57 & 59 & 82 \\
Slovakia & 68 & 80 & 48 & 81 & 74 \\
Croatia & 66 & 91 & 74 & 73 & 71 \\
Czech Republic & 65 & 78 & 52 & 93 & 56 \\
Lithuania & 63 & 83 & 59 & 50 & 65 \\
Turkey & 60 & 107 & 52 & 79 & 68 \\
Hungary & 60 & 87 & 65 & 85 & 60 \\
Montenegro & 54 & 84 & 54 & 74 & 55 \\
Poland & 53 & 83 & 53 & 52 & 71 \\
Romania & 52 & 84 & 47 & 56 & 53 \\
Bosnia and Herzegovina & 51 & 83 & 69 & 79 & 55 \\
Serbia & 49 & 85 & 54 & 55 & 49 \\
Albania & 49 & 81 & 34 & 54 & 40 \\
Bulgaria & 48 & 86 & 46 & 66 & 44 \\
FYR of Macedonia & 46 & 88 & 40 & 60 & 41 \\
\hline
\end{tabular}
\caption{Table 3.}
\end{table}

\textsuperscript{88} Id. Table 3.
Other analysis gives a more precise view of the cost of Pay TV (like the Premier League) within certain countries of the EU. Strategy Analytics did a survey of the cost of Pay TV across the world in May of 2017. The review focused on 31 of 35 countries that are members of the Organization for Economic Cooperation and Development (“OECD”). 21 of these countries are also members of the European Union.

While the goal of the report was to collect information on the cost of basic pay TV services, the authors were able to collect some information on the cost of that basic pay TV coupled with subscriptions to sports packages for a couple of European countries. While the report did not drill down far enough to get a clear view of what channels were being offered, the authors found great disparity between countries when it comes to the average basic pay TV cost per month. Sweden was the cheapest, while countries like France and the Netherlands were double the price of Sweden. Spain was almost six times the price of the Swedes.

When sports subscriptions were added to the equation, disparity still rained. The report did not specify what sports were offered with the cable packages, but the huge difference is helpful in showing the uneven markets across the EU. Strategy Analytics based their analysis on United States dollars and found the following range from a select number of EU countries:

<table>
<thead>
<tr>
<th>Country</th>
<th>Rate per month in USD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>$72.76</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>$37.21</td>
</tr>
<tr>
<td>Denmark</td>
<td>$36.74</td>
</tr>
<tr>
<td>Hungary</td>
<td>$18.70-$47.37</td>
</tr>
<tr>
<td>Poland</td>
<td>$4.94</td>
</tr>
<tr>
<td>Spain</td>
<td>$105.30</td>
</tr>
</tbody>
</table>

It is not hard to imagine the steps a Spanish sports fan would take to try to find relief from the high prices found within their country.\(^9\)

**D. Steps taken by consumers to combat high prices.**

The high prices for sports have lead some consumers to take steps (some, illegal) to view their favorite teams through unconventional means. Piracy is not a new phenomenon, but within the digital world, new opportunities crop up each day for cash-strapped consumers to find a cheaper way to view content. Basically, these consumer moves fall into two camps: outright piracy, in other words, viewing content without paying anything; or masking one’s location to receive a signal for a feed that is cheaper.

**1. Piracy.**

Starting over five years ago, sports associations, like the Premier League, started to get serious about putting pressure on Internet service providers to block specific sites that were streaming games for free. The Premier League won a court order in 2013 forcing UK Internet service providers to block FirstRow1.eu from the country.\(^1\) First Row, a Swedish company, had been streaming Premier League games for free. The Order shifted the onus to the service providers to make sure the pirate website could not be accessed from the UK. The Premier League and the Football Association continually add new sites to the banned list.\(^2\)

The crackdown on piracy is paralleled by increased interest, by consumers, in finding illegal streams of matches. The BBC surveyed Premier League fans earlier

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\(^9\) Perhaps this is one of the lesser-known reasons for Catalonia seeking independence?


this year and found that more than a third regularly watch matches live online via unofficial streams. The poll of 1,000 people found that:

- Nearly half of fans say they have streamed a match online through an unofficial provider.
- The main reasons for streaming include a friend/family member doing it and they just watch; the quality of the stream; and because sports TV packages are considered not good value for money.
- Just under a third of fans do not know whether it is illegal to stream Premier League matches online from unofficial providers, but another third believe it is always illegal.

This was not news to the Premier League and its broadcasters. In fact, the powers that be behind the distribution have enhanced their focus on piracy. Piracy has evolved over the years. One such advancement, (if it can be considered that) was the rollout of Kodi in August 2014. Kodi is free software, built by volunteers, that is designed to bring video, music, games and photographs together in one easy-to-use application. It is also the biggest target of the Premier League.

Kodi can reside on setboxes or streaming sticks and is the kind of open sourced platform that harkens back to the ideals of the Internet back in its infancy. Regardless of the purity of the software’s development, it has been modified with third-party add-ons that provide access to pirated copies of films and TV series as well as free access to subscription television channels, including the Premier League.

The Premier League, and other organizations have been aggressively pushing back on the Kodi-led trend on illegal streaming. In the UK, arrest have been made relating to the sale of “loaded” Kodi streaming boxes, that have been pre-loaded

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with software to access subscription material, including the Premier League, for free.\textsuperscript{95}

On March 8, 2017 the Premier League secured a High Court Order requiring the major UK Internet Service Providers to block access by their customers to streaming servers delivering live streams of Premier League matches to customers in the United Kingdom.\textsuperscript{96} The Order by Justice Arnold speaks of Kodi specifically but also expands the responsibility of the ISPs to block all illegal streaming into the country by implementing a weekly scan of servers. The Court’s order acknowledges the enhanced sophistication of current privacy and the import of isolating offending servers. The days of blocking a specific offending website are gone and replaced by system-wide quarantines of specific servers hosting the illegal stream. The Order was in place only until May 22, 2017 (the end of the Premier League season). However, the Premier League was able to secure a similar order for the entire 2017/18 campaign.\textsuperscript{97}

Action has been taken on the European continent as well. The Court of Justice for the European Union has weighed in on the legality of a similar multimedia device in Stichting Brein v. Jack Frederick Wullems.\textsuperscript{98} The April 2017 CJEU ruling stated that the sale of devices, like the defendants, Filmspeler, that contained links to websites streaming unauthorized film, TV and sports infringed on copyrights and are illegal. Since the ruling is only a few months old, it is too early to see how it will change the landscape for pirating in the EU.

\textsuperscript{95} “Five arrests in ‘fully loaded’ Kodi streaming box raids”, \textit{BBC}, 8 February, 2017. \url{http://www.bbc.com/news/technology-38906561}
\textsuperscript{96} The Football Association Premier League Ltd v. British Telecommunications plc & Others [2017 EWHC 480 (Ch)].
\textsuperscript{98} Judgment of the Court in C-527/15, April 26, 2017.
An offshoot of the piracy trend is the use of Virtual private networks or VPNs. A VPN disguises a user's location, so if they are attempting to access a sight that uses IP addresses to geo-block, the provider will be unable to determine the location. In most cases if a provider cannot determine the location of the user it defaults to the local location. In other words, the server receiving the request asks the question, “where are you”? If the answer comes back “no comment”, the server moves on and allows the user to have access. There are varying statistics on VPNs but it is believed that as many as one and four browsers use them.\(^ {99}\)

There are legitimate uses for a VPN. If your location is masked, your privacy is greatly enhanced. The GlobalWebIndex survey, quoted in the story, stated that “privacy” was the main concern of VPN users in Western Europe. An added perk to privacy is the ability to access content from other locations. The VPN will allow you access but you will still need an account with the broadcaster. This has created an interesting trend where you have residents of one country acquiring an account from a broadcaster from another country to access material that would usually be geo-blocked. The legality of this is in question as the user is paying the subscription cost, albeit from a country different than their home.

2. Portability Regulation

Online content viewers received some good news in February 2017 when the European Commission announced that EU negotiators had agreed on new rules that will allow Europeans to travel and enjoy their digital content services across borders.\(^ {100}\) The Regulation, which is set to go into effect March 20, 2018, will allow Europeans to fully use their online subscriptions to various items, including sports broadcasts, when traveling within the EU. The Regulation was accompanied by a


fact sheet that stated that more than 50% of Europeans who have tried to access live sports events online while outside of their home Member State could not. 101

The Portability Regulation is being touted as a win for consumers along with online broadcasters. The traveling public will have the freedom to access content covered by subscriptions throughout the Union. The broadcasters will be able to market Union-wide coverage that is anchored in a home country. Since the regulation is still in its infancy it is too early to see how it will affect the marketplace.

As with most pieces of legislation, the Cross-Border Portability Regulation leaves many things up to interpretation. For one, the Regulation covers consumers who are temporarily present in a Member State, but does not define what is meant by a “limited period of time.”

According to the regulations, eligibility to stream outside of their home country will be determined by the underlying contract. All new or renewed contracts after May 21, 2018 must include two separate means of verification determining the consumer’s home country. The Commission states that the country of residence can be verified by basic information such as payment details, payment of a license fee for broadcasting, the existence of a contract for internet or telephone connection, IP checks or the subscriber’s declaration about his or her address.102 It is unclear if it will fall to the Internet Service Provider, the broadcaster, or some other entity to police this cross-border streaming.

101 Id.
3. Could the Portability Regulation blur the lines on what is acceptable cross-border streaming?

The Cross-Border Portability Regulation could afford consumers the opportunity to enjoy the fruits of competition. With signals freely crossing borders, the potential for consumers to find ways to consistently stream broadcasts from other countries is greatly increased. This could take many forms including sharing account login and password information across borders to actually setting up accounts in another country. As shown above, the price differences from countries on the expensive end, like Belgium and Spain and others on the cheaper end, like Poland, are significant. Someone in Spain could buy two full year subscriptions from Poland for the cost of one month in Spain.

Will this, in essence, create the single market? In short, probably not. While there can be vast price differences between markets, at the end of the day, the amount of effort needed to acquire an account from a cheaper territory may dwarf the potential savings. Throw in language differences along with cultural preferences and it could be that no one decides to subscribe across borders.

V. Arguments for the status quo.

This last point (effort v ease in the face of small savings), is an excellent segue to a section that flips the argument and looks at the positives of the current system. While the current system has giant negatives, no actual competition within countries along with significant price variations by country, there are several positive aspects of the current system.

A. It is easy to order a subscription and if there are issues, to seek support.

The broadcasters that win the bids for the Member States in the European Union operate within that country (for the most part) and in their native tongue. These broadcasters are well established within the Member State and represent the major players within in the industry in Europe. Whether it is Canal in Poland, Viasat in
Sweden, or Sky/BT in the United Kingdom the high price of carrying the Premier League leaves the broadcasting to only the strongest, most established companies.

The dangers of this monopoly are listed above, but there are some positive qualities that go along with the model that are hard to argue against. In the Member States, the market is saturated with advertising so there is little question about how to order the product. Even passive fans will be able to find broadcasting information with little or no effort. Prices for the subscription are always plainly listed and in the local currency, if that country has not switched to the Euro. Consumers can be assured that the product will be obtained easily and for the posted price, creating high consumer confidence.

If a problem arises and support is needed, the assistance will likely come from within the country in question and in the consumer’s native language. If the borders were erased and it was a free for all, there are legitimate questions as to whether the discounted providers could handle customers in accordance with the EU expectations. One only has to recall the Mayweather-McGregor fight from earlier in the year to see the potential issues that can crop up in subscription-based models.103 That August 26, 2017 matchup saw a long delay before the fight as cable operators in the United States scrambled to solve reception issues experienced by many paying viewers. In the end, the cable operators were able to receive the complaints from their customers, push that onto the fight organizers and push the starting time back long enough to fix the problems. If there had been language problems or if the cable operators did not feel they needed to react to the complaints, it could have been a very different story.

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B. Consumption is seamless.

For those that have cable based subscriptions, the acquisition is effortless. You simply have new channels with the games on them. For those streaming the subscribed product, it is comparable, with the broadcaster either supplying log-in information for a website or an app.

For the most part, quality of signal across the Union is exceptional. Starting in 2005, the EU pushed for a complete transition from analog to digital broadcasting. This was coupled with the prioritization of fiber-optic access throughout the Union, which is a main tenet of the Digital Agenda pillar of the Europe 2020 strategy.104 Specifically, on September 14, 2016 the Commission published goals for all major public service provides to have download/upload speeds of 1 Gigabit of data per second by 2025. The Commission’s goal is to push 100 Mbps coverage into every rural corner of the Union while also creating a framework of 5th generation (5G) wireless technology. The Juncker Commission wants Europeans to enjoy the fastest possible speeds whether at home or on the move.105 With speeds that high, streaming live events with crystal clear reception will become the norm.

C. The predictability of the current system.

A major argument for the status quo put forth by the Premier League is that the territorial distribution coupled with the three year contracts signed by broadcasters gives a substantial amount of security to the League and its teams. The budgetary consistency allows teams to plan for the future, whether that means building or renovating stadiums, signing players to extended contracts or seeking the highest quality managerial talent in the world. The cache of the Premier League is difficult to combat.

The results are hard to argue with, as English teams sport gleaming stadiums with the highest quality pitches in the world. The Prem operates as a well-oiled machine. Players flock to the UK from all corners of the world to fill English rosters. In fact, the Premier League has the highest percentage of foreign players in the world. This creates better teams within the league but also extends the talent further down the table so that more teams are competitive for spots in European competitions along with the league championship.

Spain owns the two best teams in the world (Barcelona and Real Madrid) but for the most part, the La Liga championship will come down to one of those two teams, with Atletico Madrid creeping into the mix ever so often. In Germany, while the standard of play in the Bundesliga is high, it usually comes down to Borussia Dortmund or Bayern Munich for the championship. PSG or Monaco will consistently hoist the French title in Ligue 1 while Juventus dominates Serie A in Italy. The Premier League certainly has a hierarchy, but it also has had four different clubs win the title over the past five years.

This financial security is most evident when one looks at the stable of managers that lead the English teams. Whether the coaches are Spanish (Pep Guardiola from Manchester City), Portuguese (Jose Mourinho at Manchester United), Italian (Antonio Conte at Chelsea), German (Jurgen Klopp at Liverpool) or French (Arsene Wenger at Arsenal), the world’s best are in England and paid well for their services.

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As one looks at the landscape it is difficult to argue that the current system does not create great results for some, but there is nothing that the Premier League has put forth that calls into question whether a more competitive distribution model would result in less money (or predictability) for the league or its clubs. In fact, if the League were able to push access into new languages with more competition for consumers, it is entirely possible that the broadcasting fees could go up.

VI. A way forward.
What is the next step? Over the next few months, the negotiations surrounding the proposed Geo-blocking Regulation between the Commission and other entities, including the IMCO will conclude. It is clear from the initial drafts that live sporting events will not be covered in the initial regulation. That being said the push by the IMCO to complete a full review of the “live sports” exclusion once the underlying regulation has been adopted gives some hope that the digital borders might fall, but there is nothing in the proposals that makes that a short-term possibility.

The Cross-Border Portability Regulation will give the EU a view of what a Digital Single Market for Pay TV could look like as Europeans will be travelling and streaming content from their home countries without interference after March 2018. It could also serve as a framework for a new regulation that would end the reign of territorial distribution.

A new regulation could take at least two forms: 1) a complete eradication of geo-blocking of online content, which would allow consumers from any Member State to purchase content from any other Member State; or 2) a revamping of the licensing sales model to create markets based on language instead of countries. Both of these steps would require a change to the current copyright philosophy within the EU.

Live sporting events are, by themselves, outside of the realm of copyright protection, as ordered by the Court of Justice in FAPL v QC/Murphy v. MPS in
2011. The CJEU held that since there is no artistic work present within the playing of the sport, no copyright attaches to the actual broadcast of play. However, copyright can attach to other aspects of the broadcast, like the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches or various graphics. Since those smaller items are deeply imbedded into each and every Premier League broadcast, it, arguably, blankets the entire game broadcast under a cloak of copyright protection. So, even though the game itself is not protected, some argue that for there to be meaningful changes in the cross-border broadcasting landscape there must be reform to copyright law within the EU.

A. Copyright reform in the European Union.
Reform of copyright laws within Europe has been a topic of conversation since the Treaty was signed that formally brought the Member States together in 1992. The goal of a Digital Single Market has brought those discussions to a head. Currently, the European Parliament is debating major changes to the EU copyright rules. The European Commission published their proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organization and retransmissions of television and radio programs on September 14, 2016. The Commission also proposed a Directive on copyright in the Digital Single Market. The Proposals were accompanied by an Impact Assessment that highlighted potential changes in three specific areas: 1) access to content online; 2) the functioning of key exceptions in the digital and cross-border environment; and 3) the functioning of the copyright marketplace.109

108 C-403/08 and C-429/08.
The Commission stresses throughout the Assessment that reform on national levels will only lead to further fragmentation of the online marketplace. Thus, changes should be done Union-wide with an eye toward commonality of approach and action. The hope is that unification of copyright rules regarding online distribution will guarantee legal certainty in cross border situations. This legal certainty is important for creators and those investing in content along with distributors and end users. The Commission touts this as a major step towards guaranteeing a level playing field within the Digital Single Market.

The three general objectives identified within the Assessment are:

1) allow for wider online access to protected content across the EU, focusing on TV and radio programmes, European audiovisual works and cultural heritage:

2) facilitate digital uses of protected content for education, research and preservation in the single market; and

3) ensure that the online copyright marketplace works efficiently for all players and gives the right incentives for investment in and dissemination of creative content.

The first objective is the most important for the purposes of this discussion. To achieve the objective, the Commission’s preferred option in relation to online transmissions of broadcasting organizations is the application of the country of origin principle to the clearing of rights for their online services, which are ancillary to their initial broadcast. The Commission believes that this augmentation would reduce transaction costs linked to the clearance of rights faced by broadcasters for their cross-border online transmissions and by retransmission services provided over “closed” electronic communications networks (e.g.IPTV). The Commission

110 Id.
111 Id.
112 Id.
113 Id.
also states that they are also expected to enhance the cross-border distribution of and access to broadcasters’ TV and radio programs.\textsuperscript{114}

Whether the proposed changes will actually occur is still up in the air. Even though debate has been ongoing for over 14 months, votes on the proposed Regulation and Directive won’t occur until at least January of 2018.\textsuperscript{115} Close to 1000 amendments have been submitted.\textsuperscript{116} Passions are running high on many sides with opponents of the proposed changes claiming they will create new rights for distributors of media, especially news sites, which could serve as a restriction on individual rights. Other complaints focus on the proposal that would hoist additional requirements on Internet platforms to detect infringing content uploaded by their users.\textsuperscript{117} There are mountains of comments from many sides and little clarity as to how it will shake out.

Regardless of how (or if) the copyright controversy is resolved, it appears that there are two viable ways to flatten the market for Premier League football across the EU; amend the recently enacted Geo-blocking Regulation to include live sporting events or change the licensing structure across the Union so that the broadcasting rights are not awarded by country but, instead, are divided by language of the broadcast.

\textsuperscript{114} Id.
\textsuperscript{115} Julia Reda, “EU copyright reform/expansion” 20 November, 2017. \url{https://juliareda.eu/eu-copyright-reform/} (Ms. Reda is a German Member of the European Parliament and an avid supporter of the Digital Single Market in Europe. She is also the current President of the Young Pirates of Europe, an organization whose prime goal is to improve the lives of everyone on the planet through technology. See \url{https://young-pirates.eu/})
\textsuperscript{117} Julia Reda, “Experts unanimously slam EU copyright expansion plans—but are politicians listening?” 28 April, 2017. \url{https://juliareda.eu/2017/04/experts-slam-eu-copyright-plans/}
B. Adding live sporting events to the proposed Geo-blocking Regulation.

This seems simple enough. In its present form the proposed regulation forbidding unjustified geo-blocking within the EU contains an exclusion of live sporting events within Recital 6. From a legislating standpoint, deleting the recital would be a big first step. However, due to the territorial distribution of the Premier League, which are commonly backed up by three-year contracts, a change like that could bring a significant amount of discord to the industry. This is especially true since any work done on the Geo-blocking Regulation (with or without changes to the “live sporting event” exclusion) will be done in 2018 while the Premier League is busy going through the bidding process for the 2019-2022 seasons. If this conversation took place a year earlier, there would be ample time for the market participants to react to a borderless market within Europe. The timing problem could be fixed by pushing a rollout time to some point in the near future. That way, the Premier League and its broadcasters would have ample time to prepare for the new world.

If the exclusion from Recital 6 was erased a revolution could take place for consumers of live sporting events in the European Union. While this could potentially overwhelm less sophisticated consumers by creating a deluge of choices across multiple platforms, savvy viewers could legally save money by choosing a vendor from somewhere else in the Union. This could also allow consumers to buy access to the live sporting events without the added cost of purchasing subscriptions to the underlying cable or satellite providers, which would be a major savings.

The stark reality though is that a “ripping the band-aid off” approach is the least likely possibility with regards to a solution to geo-blocking of live sporting events. If the exclusion from Recital 6 were to be set aside it could only occur after extended negotiations between the Commission, the broadcasters and various sporting associations, including the Premier League. These discussions could rival (or
surpass) the length of the talks that brought about the Roaming Regulation that sunset mobile roaming charges across the EU; those talks lasted 11 years.

C. Broadcasters and Languages throughout the European Union.

Language is a major component of the European Union. The EU has 24 official languages. A designation as an official language means that all official documents are translated into each of the languages while EU citizens may use any of the languages to correspond with the EU.

The language policy does not cover all residents of the EU though as over 60 regional or minority languages are spoken by roughly 40 million people across the continent. The most common of the minority languages are Basque, Catalan, Frisian, Saami, Welsh and Yiddish. While the languages are usually centered within their home country, the EU has successfully blurred borders enough that languages are leeching into neighboring Member States.

Broadcast TV has embraced multilingualism. While traveling throughout Europe, you will find channels featuring programming in many of the EU languages and also Arabic, Mandarin, Russian, Hindi and Japanese. These channels broadcast TV series from their home countries along with programming from around the world dubbed into the language of their choice. The noted exception to this is live sporting events.

When the Premier League awards a distribution contract to a broadcaster, that broadcaster tends to push its signal only in the language of the territory for which it hold the rights. For example, Viasat owns the rights to broadcast in Sweden, Finland

119 Id.
and the Baltic countries of Estonia, Latvia and Lithuania. Even though the visual feed may be the exact same throughout those countries, the commentary will only be in the language of the home country. In addition, the prices vary from country to country even though it is the same broadcaster. According to their websites, the monthly price of a subscription covering the Premier League in Euro terms is about €40 a month in Sweden, €29. 99 a month in Finland, €4.99 a month in Estonia, €9.99 a month in Latvia and €4.99 a month in Lithuania.\textsuperscript{120} That is one company, broadcasting basically the same content to five different countries at four different (and divergent) price points.

Belgium is an exception. The lowland country has three official languages: Dutch, German and French. Because of its multilingual background, it is the only country in the European Union that broadcasts Premier League matches in different languages.\textsuperscript{121} Play Sports, run by the countries largest cable provider, Telnet, broadcasts the Prem in Dutch and sells subscriptions for €18.40 a month.\textsuperscript{122} VOO Sport owns the rights to broadcast in French in Belgium and sells subscriptions for €16.99 a month.\textsuperscript{123} Play Sports carries more matches than VOO on a weekly basis. However, high profile matches that showcase Belgian stars like Eden Hazard from Chelsea, Romelu Lukaku from Manchester United and Kevin de Bruyne from Manchester City are broadcast live by both. So, if you were a Dutch speaking Belgian, you could save a few Euro each month by switching to the French language feed. The Belgian distribution plan for the Premier League appears to be the exception to the rule in Europe and, possibly, a potential answer to current problem.


\textsuperscript{121} It should be noted that Switzerland, while not part of the EU, also has multiple language options for viewing the Premier League. The Swiss can select between German, French or Italian commenting.

\textsuperscript{122} Telnet, 2017. \url{https://www2.telenet.be/nl/entertainment/play-sports/}

\textsuperscript{123} Voo Sports, 2017. \url{http://www.voo.be/fr/tv/voosport-world/}
D. A proposal to award exclusive rights to broadcast in a specific language instead of by territory.

One proposal that could solve issues broadcasting across borders, satisfy the Premier League with some predictability and could even raise more money for the league while giving customers choices would be to award broadcasting rights across the entire Union based on the language of the broadcast. As stated above the Premier League has significant reasons to push for the status quo as the last set of TV contracts netted the league and its clubs over eight billion British pounds. Yet there are populations within the EU that may not be purchasing subscriptions to the Premier League due to language barriers. This just does not apply to the migration of people from Member State to Member State but also to immigrants newly established within the Union. There are no broadcasters currently broadcasting Premier League games in Europe in Mandarin, Arabic or Hindi. Licensing based on language could open those markets and even encourage new businesses to get into the broadcasting game. The proposal is based on the expectation that at least one broadcaster would be interesting in purchasing the distribution rights for each language with the highest prices reserved for the EU's primary languages of English, French, German, Spanish and Italian.

In some Member States this would not make much of a difference for a bulk of the population. Bulgaria, for example, has an official EU language that is the mother tongue of 95% of their population. In addition, the Premier League is available for a paltry Euro equivalent of €2.55 a month through various Bulgarian operators that have a relationship with the licensed distributor, Diema Sport. That would give Bulgarians very little incentive to look at subscription packages outside of their

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124 Ben Rumbsy, “Premier League clubs to share £8.3 billion TV windfall”, The Telegraph, 4 February, 2016.  
http://www.telegraph.co.uk/sport/football/12141415/Premier-League-clubs-to-share-8.3-billion-TV-windfall.html


126 Diemaxtra, 2017.  https://diemaxtra.nova.bg/operators
country. If, however, a viewer in Sweden was able to buy from Estonia (where it is 1/10 the price), the Swedish viewer may be willing to give up the ability to understand the commentators in exchange for a huge discount. This is an unknown factor as there are few parallels to use as a benchmark.

A potentially bad outcome could be that broadcasters across the Union could decline to broadcast in established languages due to cost. For example, Slovenia is a country of just over two million citizens where 93% of the people speak in the mother tongue. Sports Klub is the company that owns the distribution rights for the Premier League in Slovenia. They also own the rights in Serbia, Croatia and Macedonia. Could Sports Klub buy up the rights to Slovenian language distribution and simply shelve that broadcasting and expect Slovenians to simply buy up the rights from another, similar language like Croatian or Serbian? This would have the opposite of the desired effect and shrink the market across the EU instead of expand it.

The logistics of changing the licensing model from territorial to linguistic are as daunting as adding the cross-border live broadcasts to the Geo-Blocking Regulation. The difference may be in the perceived financial gains seen by broadcaster and the sports associations. While it is hard to estimate on existing data what changes would occur to the licensing totals, the players in the industry could be intrigued by marketing Union-wide in languages currently not offered in the EU like Arabic, Russian and Mandarin.

E. Could Brexit change the distribution of the Premier League?
The June 23, 2016 referendum vote in the United Kingdom on the issue of leaving the European Union could affect the Premier League in many ways. The actual exit date is currently set for March 30, 2019 and negotiations are ongoing. There are thousands of issues to resolve from border control between Northern Ireland and
Ireland to the status of the over one million Britons living on the continent. It is unknown how those negotiations will shake out or if the UK could collectively change their mind and decided to stay.

The Premier League could be greatly changed by an exit with discussions occurring around the world as to what form the league could emerge in after an exit. Players come from around the EU (and the world) and the divorce could make it more difficult to relocate to Britain. That could damage the reputation of the league and lead to less interest. Less interest equals less money from broadcasters and the virtuous circle touted by the Prem becomes a vicious one.

The reality may be that timing is on the Premier League’s side. With the negotiating period ramping up for the 2019-2022 seasons, new, lucrative contracts will be in place if and when the separation becomes final. That will give the market a few years to adjust and settle down before broadcasts start to bid on the television rights once again.

F. Could OTT change everything?

A technological innovation that could be a game changer not only in Europe but also across the world is Over The Top ("OTT") broadcasting. OTT has been around in some form or fashion for several years. In fact, OTT was the focus of a 2015 study for the IMCO Committee meant to investigate and summarize current and emerging business models while identifying barriers to use within the EU. The Study also set forth a summary of the regulatory environment in the EU along with

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recommendations to achieve a Digital Single Market. One of the most helpful portions of the report is the definition of OTT included in the introduction when it is succinctly identified as, "an online service that can be regarded as potentially substituting for traditional telecommunications and audiovisual services such as voice telephony, SMS and television." Voice over IP (VoIP) is the most established portion of this grouping with Skype and WhatsApp serving as the standard bearers.

Audio-visual OTT services are dominated by Netflix and Amazon and tend to be on-demand movies and TV series. The study highlighted a weakness inherent in the EU model in that while the Union can sometimes operate as one economic market in many circumstances (especially when copyright is involved) it is a collection of several individual markets. Thus, none of the individual markets can touch the size of the markets from China, Brazil or the United States. The survey found this as a significant hindrance to innovation in the market.

Even with hurdles on the way to market, Europe has seen some initial forays into the OTT market, including live sporting events. DAZN, a subscription service owned by UK-based media company Perform Group was launched in the summer of 2016. DAZN touts itself as Netflix for sports fans and owns web rights to lives matches for various leagues, including the Premier League. Currently, it rolled out broadcasts in German and became available in Germany, Austria, Switzerland and Luxembourg in time for the fall football season of 2016. DAZN is the only service within Europe not to be connected to either a cable or satellite provider. All a consumer needs is an Internet connection. Games can be viewed on SMART TVs, gaming platforms like Xbox or Playstation, Apple TV, the DAZN app or via a browser. The company advertises access to 8,000 events a year for the price of €9.99 a month without a

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130 Id. at 21.

131 Id.
contract. It is unclear how many subscriptions DAZN has sold but they have expanded into Japan and Canada since their initial rollout. It also should be noted that DAZN and the Perform Group are far from a hand to mouth organizations as they have the backing of Leonard Blavatnik, the richest man in the United Kingdom.

What the existence and purported success of DAZN shows is that a broadcaster operating in a cross-border situation with at a consistent monthly rate is possible. Whether DAZN is able to sustain their progress and expand into other corners of the EU is yet to be seen.

An interesting extension of the OTT model could be the combination of Over-the-Top with linguistic licensing rights. This is, in essence, what has occurred within the German and Austrian markets where DAZN now transmits in German across both countries without the presence of a traditional broadcaster. Those traditional broadcasts may blanch at losing the broadband and bundling fees that are currently linked to the terrestrial TV operators, but the Premier League and other sports associations could push the issue Union-wide.

V. Conclusion

The various machinations within the European Union hint at the potential of a major change on how live sporting events, including the Premier League, are distributed. Within the Union, geo-blocking, the weapon used by distributors to discriminate based on location, will soon be sunset for most transactions. While the current proposals of the Geo-Blocking Regulation contain a specific exclusion for live

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sporting events, the rollout of the Portability Regulation in the spring of 2018 will allow citizens of the EU to access and watch live sporting events while traveling.

This portability will mark the first time that major broadcasters will have programming legally streamed into other Member States. Whether this portability coupled with the recent emergence of OTT distribution will result in a true Digital Single Market is up in the air. It is possible that all borders (for streaming) could be torn down and consumers would be able to purchase subscriptions from any broadcaster in the Union. It also is possible that a new system will need to be created to deal with the bidding and awarding of licenses. Union-wide licensing based on language could be the answer, but that would take coordination between the leagues, broadcasters and governments, which might be a mountain too high to climb. There is also the possibility that the leagues, along with their broadcasting partners will be buoyed by recent successes against digital piracy and ramp up litigation against any parties who dare expose holes in the territorial licensing scheme, thus doubling down on distribution by Member State.

What cannot be argued is that the present climate represents the best opportunity for a revolution in the way live sporting events are transmitted and consumed in the European Union. The Juncker Commission’s top priority is the Digital Single Market, which promises to flatten barriers across the EU while making innovation and expansion in the digital markets a top priority. Consumer interest in streaming content has never been greater throughout Europe. At the same time, technological advances are continually pushing new ways for the individual viewer to enjoy broadcasts in forms of their choosing. The real questions are whether the public can speak in one clear voice and whether the politicians in Brussels can find the political courage to push the powers that be (broadcasters and the leagues) to make a change. So far all efforts have appeared disjointed and have been unsuccessful but hope can be found in the Union’s acceptance of changes that have resulted in forbidding mobile roaming charges from state to state and the forthcoming Portability Regulation. These advances show that even if the message starts as a
murmur, if it reaches a cacophony Brussels can move. Football fans throughout Europe must either add their voice to the gathering chorus or wait for the system to self-correct, which is unlikely.
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