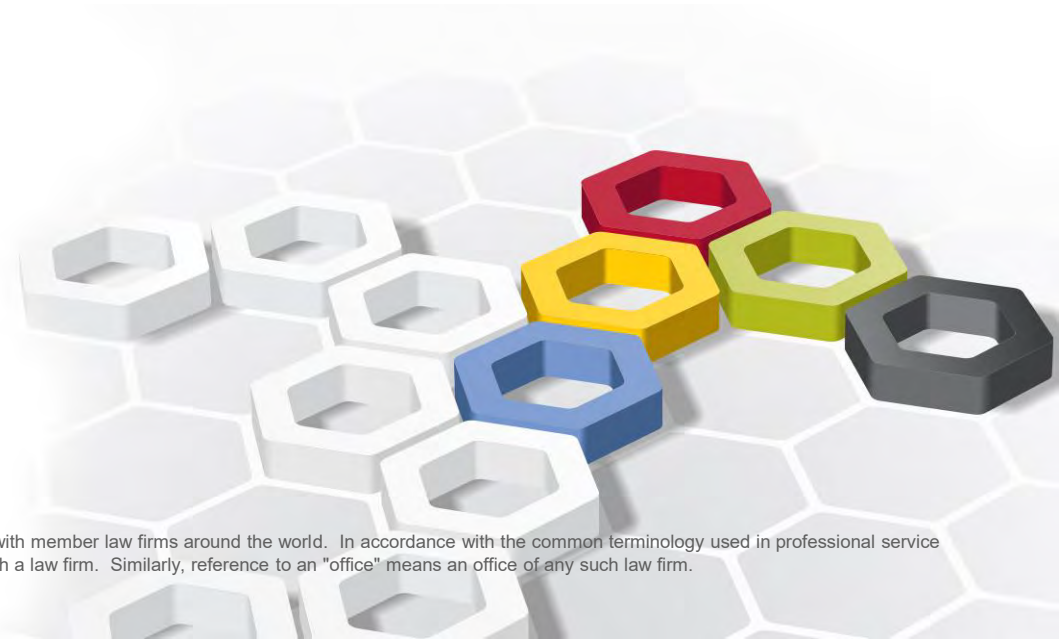


# The Digital Single Market and Geo-blocking

Institute of European and Comparative Law, University of Oxford

Bill Batchelor, Partner, Brussels

10 June 2016



# agenda

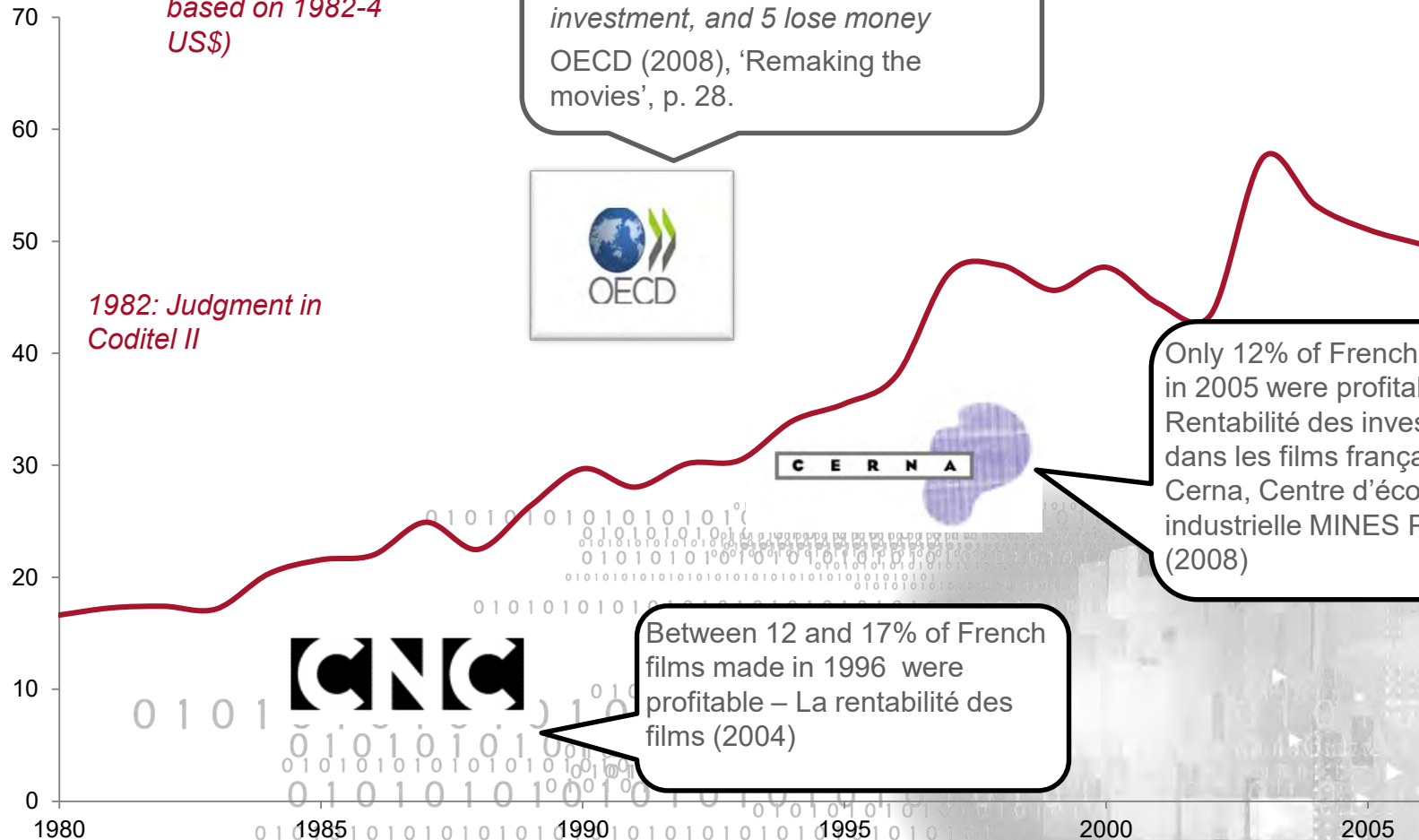
- Industry Background
- The Geo-blocking Debate
- Legal Background
- Proposed Regulation and Product-specific Rules
- The Pay-TV Investigation

# Industry Background



# Production and Marketing Costs

*\$ million (inflation adjusted figures based on 1982-4 US\$)*



*1982: Judgment in Coditel II*

For every 10 films, 2 are successes, 3 pay back the investment, and 5 lose money  
 OECD (2008), 'Remaking the movies', p. 28.



Only 12% of French films made in 2005 were profitable - Rentabilité des investissements dans les films français - Cerna, Centre d'économie industrielle MINES ParisTech (2008)



Between 12 and 17% of French films made in 1996 were profitable - La rentabilité des films (2004)

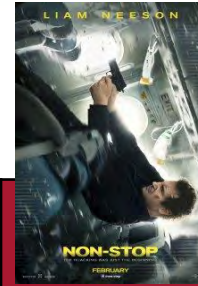
# 2014 Box Office Ranking in Selected Territories



	Box office ranking
France	36
Germany	25
Italy	55
Spain	27
UK	3



	Box office ranking
France	11
Germany	43
Italy	70
Spain	23
UK	34



	Box office ranking
France	45
Germany	27
Italy	412
Spain	87
UK	31



	Box office ranking
France	3
Germany	104
Italy	144



	Box office ranking
France	84
Germany	20
Italy	177
Spain	59
UK	18



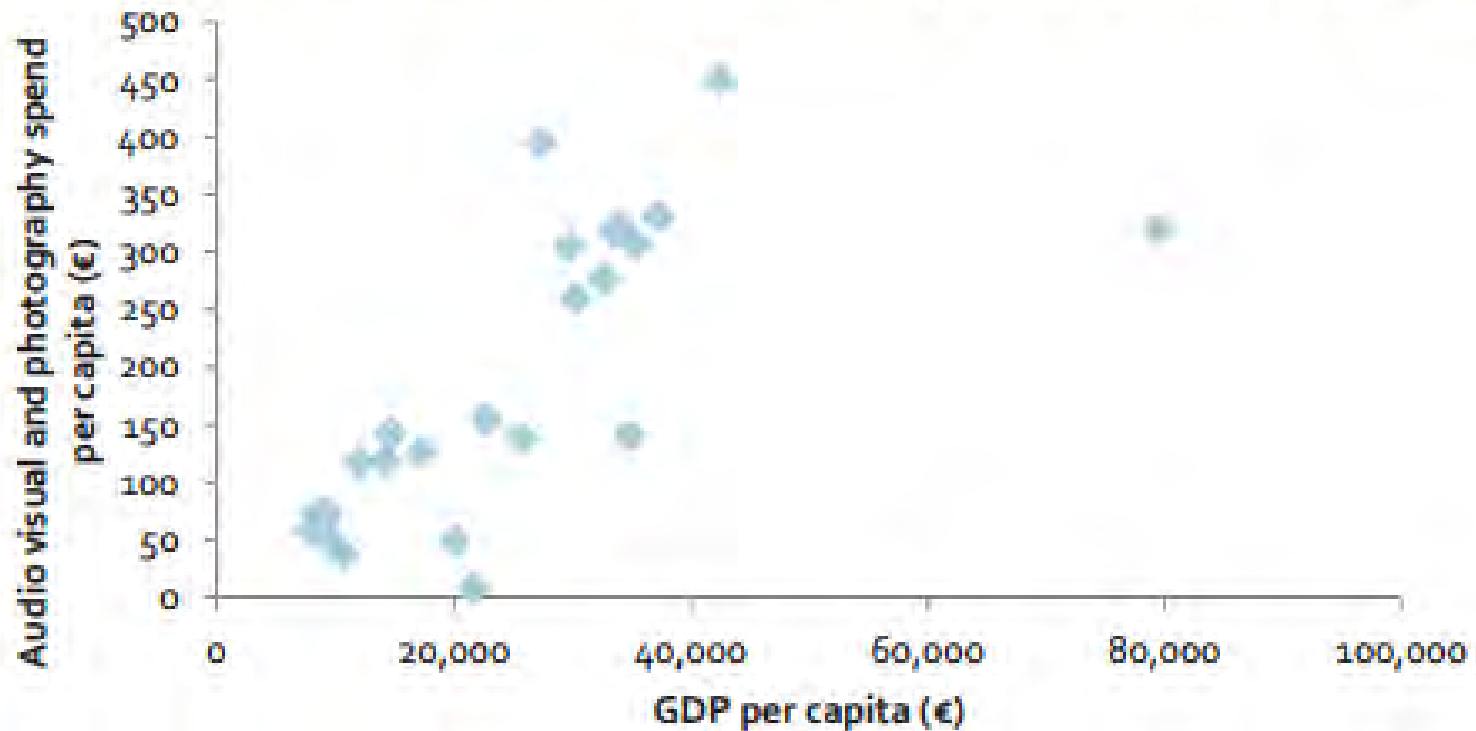
	Box office ranking
France	220
Germany	115
Italy	50
Spain	28
UK	64

Source: Rentrak

# Territorial Licensing Creates Benefits

Lower prices

Per capita GDP and spend on audiovisual and photography (€), 2010



[Source: Eurostat]



# Impact of the Proposals on Content Production

## Short term impact

Up to €9.3bn annual  
consumer welfare loss

Up to 48% less content  
made (with more at risk in  
some scenarios)

Up to €8.2bn annual  
producer revenue loss

## Medium to long term impact

- Unclear whether the industry could adapt or how many years this would take
- Significant consumer losses in the long term, of up to €4.5bn per annum
- Less content would be produced – and content that is less mainstream would be dropped
- Locally targeted content would be particularly affected, threatening diversity
- Some consumers would pay a higher price and/or be left with a lower quality offering
- Consumers in lower-income Member States would be disproportionately affected

[http://www.oxera.com/getmedia/5c575114-e2de-4387-a2de-1ca64d793b19/Cross-border-report-\(final\).pdf.aspx?ext=.pdf](http://www.oxera.com/getmedia/5c575114-e2de-4387-a2de-1ca64d793b19/Cross-border-report-(final).pdf.aspx?ext=.pdf)

# The Geo-blocking Debate





# The EU on geo-blocking

“Europe cannot be at the forefront of the digital revolution with a **patchwork of 28 different rules** for telecommunications services, copyright, IT security and data protection”  
(Brussels, 25 March 2015)



Commissioner (2014 – 2019)  
**Günther H. Oettinger**  
Digital Economy & Society

“Deep in my heart, I would like to say, **I hate geo-blocking.** I think this is old fashioned, this is not fair. We don’t have to use that kind of instruments in the 21st century”  
(Brussels, 25 March 2015)



Vice-President (2014 – 2019)  
**Andrus Anšip**  
Digital Single Market

“**I, for one, cannot understand why I can watch my favourite Danish channels on my tablet in Copenhagen – a service I paid for – but I can’t when I am in Brussels.** Or why I can buy a film on DVD back home and watch it abroad, but I cannot do the same online”  
(Berlin, 26 March 2015)



Commissioner (2014 – 2019)  
**Margrethe Vestager**  
Competition

# The EU understanding the importance of territoriality for the audiovisual media sector

“And there are areas, for example for **copyright-protected digital content**, where [geo-blocking] may remain justified [...] in order to **preserve the value of rights** in the audio-visual sector”  
(Warsaw, 15 June 2015)

“**The principle of territoriality has to stay**. It is important, especially for smaller producers”  
(Cannes, 15 May 2016)

“**We are fully aware of the different financing models and their necessity**. There are different ways of selling rights and it will still be possible to impose different forms of restrictions, that's how I see it”  
(Berlingske Business, 4 February 2016)



Commissioner (2014 – 2019)  
**Günther H. Oettinger**  
Digital Economy & Society



Vice-President (2014 – 2019)  
**Andrus Ansip**  
Digital Single Market



Commissioner (2014 – 2019)  
**Margrethe Vestager**  
Competition

## Industry asking for clarification

*“I, for one, am getting sick and tired of being lied to by people who are sitting and facing me at the table when we’re negotiating, who will all say to us, looking us in the eyes, ‘You don’t have to worry about territoriality. That is sacred.’ ... Make no mistake, there will be hardly any facility for funding independent films [if territoriality is eliminated]. We won’t be able to do our jobs.”*

Michael Ryan, Partner at London-based production company and distributor GFM Films, speaking at the Cannes Film Festival, May 2016



# Legal Background



# Competition Law

**General Rule:** Article 101(1) TFEU prohibits restrictions on parallel trade imposed by suppliers on distributors



- “By object” restriction – absence of anti-competitive effects not a defence
- Applies to copyright tangible works  
e.g. territory restrictions on Ernest Hemmingway’s “Old Man and the Sea” in the UK and Ireland
- Restrictions on “active” marketing permitted in some circumstances



# Online Resale Restrictions

- **Vertical Restraints Guidelines §52**

“[C]ertain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products.”

- Case C-439/09 *Pierre Fabre*:

- Obligation to purchase cosmetics and personal care products in presence of qualified pharmacist was an online sales restriction
- No defence of higher quality service or reputation
- Fined (€17,000) and ordered to remove restraint

- **Permitted §53-54:**

- Physical store requirement
- In store sales targets
- Quality criteria for etail sites BUT litigation as to whether quality criteria are justified by reference to brand reputation or consumer experience. *Coty v Parfumerie Akzente* (on reference to ECJ)

# Exception for Performance Copyright Licences

Case 262/81 *Coditel v Ciné-Vog Films*  
[1982] ECR 03381 ("*Coditel II*") §15-16

COPYRIGHT



- “The mere fact that the owner of the copyright in a film has granted to a sole licensee the exclusive right to exhibit that film in the territory of a member state and ... to prohibit ... its showing by others, is not sufficient to justify the finding [of an anticompetitive agreement].”
- “The characteristics of the cinematographic industry and of its markets in the community, especially those relating to dubbing and subtitling for the benefit of different language groups, to the possibilities of television broadcasts, and to the system of financing cinematographic production in Europe serve to show that an exclusive exhibition licence is not, in itself, such as to prevent, restrict or distort competition.”



## ...Distinguished by *Murphy*

### Cases C- 403/08 and 429/08, *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083

- §111-116 UK anti-piracy law (s297 CDA) restricting cross border broadcasts not justified under Art 56 TFEU based on IP protection:
  - satellite decoder cards allows viewers to be tracked and monetised so rightsholder paid a “reasonable” remuneration in origin state (Greece uplink territory under A1.2.b CabSat Directive)
  - protecting higher territory prices “an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market.”
- §137-140 agreements with territorial restrictions anticompetitive
  - “[W]here a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, **unless**
  - other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.”

## ... Distinguished by OSA

### Case C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním o.s. ("OSA") v Léčebné lázně*. EU:C:2014:110 §69-72

- Czech spa owner argues that legal restriction on using cheaper collecting societies in other EU countries contrary to *Murphy*.
- Applying *Murphy* the Court concludes:
  - “[L]egislation such as that at issue in the main proceedings, prohibiting, in practice, the provision of such a service, constitutes a restriction on the freedom to provide services.”
  - “As OSA ... and the Commission rightly point out, the protection of intellectual property rights constitutes such an overriding reason in the public interest”
  - “[L]egislation such as that at issue ... must be considered as suitable for protecting intellectual property rights, since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory.
  - “[L]egislation ... forms part of a context of territory-based copyright protection...”

# Does *Murphy* apply outside Sports/CabSat Directive?

## Premier League inapplicable in cases involving national copyright protection

- OSA, C-351/12: a Czech spa owner was not entitled to license television and radio rights from a foreign, less expensive, collecting society since "the legislation [...] at issue [...] forms part of a context of territory-based copyright protection."

## Content accessible via internet infringes in origin and destination state

- *Pez Hejduk v Energie Agentur NRW GmbH*, C-441/13: German based website content accessible in Austria involves infringements in Germany and Austria

## Relative valuation of a licensed exhibition inappropriate

- *Lagardère*, C-192/04: a German rights holder was not precluded in claiming remuneration in respect of a cross-border broadcast from France, where the rightsholder had already been remunerated
- OSA, C-351/12: irrelevant that local collecting society charged higher royalties for the same content

## For creative audio-visual works the test is whether fees represent a fair return on investment

- *Coditel II* Case 262/81: Territorially restricted licence lawful unless "fees ... exceed a fair return on investment"

# E-Commerce Sector Inquiry

6 May 2015	Commission Decision initiating sector inquiry into e-commerce of goods and digital content
June 2015	First round of questions relating to digital content
July 2015	First round of questions (2,000+ companies): <ul style="list-style-type: none"><li>• Mainly to resellers and wholesalers</li><li>• Focus on “tangible goods”; electronics, clothes, shoes, toys, cosmetics, DVDs...</li></ul>
October 2015	Second round of questions: <ul style="list-style-type: none"><li>• Content owners (studios...)</li><li>• Manufacturers/suppliers of electronics, clothes</li><li>• Scope broadened: online music, sports...</li></ul>
March 2016	Issues paper on prevalence of geo-blocking
July 2016	Interim report for public consultation
Q1 2017	Final report



# E-Commerce Sector Inquiry: Issues paper presenting initial findings

- Geo-blocking is widely used in e-commerce across the EU
- **Consumer goods:** More than a third of online retailers collect information on the location of users for geo-blocking purposes. Geo-blocking can take the form of:
  - Refusal to deliver abroad
  - Refusal to accept payment
  - Rerouting and website access blocks
- **Online digital content:** Vast majority of respondents blocked access to services to users in other Member States:
  - 68% of respondents implement at least one type of geo-blocking measure
  - Mostly through denial of access based on IP address
  - 59% are contractually required by rightsholders to geo-block

# Proposed Regulation and Product-specific Rules



# Draft EU Geo-blocking Regulation – Published 25 May 2016

Scope	<ul style="list-style-type: none"><li>• <b>Territorial:</b> Covers traders in the EU and traders outside EU but selling goods/services to customers inside EU</li><li>• <b>Sectors:</b> Certain sectors are not covered by the Regulation:<ul style="list-style-type: none"><li>• <b>Transport services:</b> Legislation exists for discrimination based on nationality for air flight tickets, bus, coach, and waterborne transport. Similar prohibition for rail transport proposed</li><li>• <b>Retail financial services:</b> Discrimination when accessing services such as taking out a mortgage, opening a bank account, or buying cross-border insurance to be addressed by the upcoming follow-up document to the Green Paper on retail financial services</li><li>• <b>Audiovisual services:</b> Addressed by the Digital Single Market strategy and proposed modernisations to the EU copyright framework<ul style="list-style-type: none"><li>• <b>Satellite and online services</b> are excluded from the Regulation – but consider <i>Murphy</i></li></ul></li></ul></li></ul>
Online interfaces	<ul style="list-style-type: none"><li>• Traders must not prevent access to their “online interfaces” on the basis of customers’ residence, and must obtain customer’s consent for rerouting</li><li>• If customer consents to rerouting, the original interface must remain “easily accessible”</li></ul>
Access to goods or services	<ul style="list-style-type: none"><li>• Situations where discrimination based on residence is prohibited:<ul style="list-style-type: none"><li>• Selling of <b>physical goods</b> where trader is not involved in delivery of products to MS of customer<ul style="list-style-type: none"><li>• <b>Books:</b> Traders may apply different prices to customers in certain territories if required to do so by MS law</li></ul></li><li>• Provision of <b>electronically supplied services</b>, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter</li><li>• <b>Services which are provided by the trader in a MS different to the customer’s</b> MS of residence</li></ul></li></ul>
Payment	<ul style="list-style-type: none"><li>• Traders must not discriminate based on payment instruments (credit or debit cards)</li></ul>
Passive sales	<ul style="list-style-type: none"><li>• Agreements with traders containing passive sales restrictions which would infringe the Regulation are automatically void (designed to avoid circumvention)<ul style="list-style-type: none"><li>• Conflicts with two-year grace period under paragraph 61 of the Guidelines on Vertical Restraints</li></ul></li></ul>



# The Pay-TV Investigation



# European Commission pay-TV investigation

- Investigation opened in January 2014
- Examination of restrictions in licensing agreements between Hollywood studios and major European pay-TV broadcasters
- Statement of Objections issued in July 2015 to Sky UK and Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros
  - Alleged contractual restrictions that prevent Sky UK from allowing EU consumers located elsewhere to access, via satellite or online, pay-TV services available in the UK and Ireland
  - Procedure:
    - Post oral hearing
    - Paramount only offered commitments
- Proposed concurrent modernisation of EU copyright rules and review of the EU Satellite and Cable Directive- as part of Digital Single Market Strategy adopted in May 2015

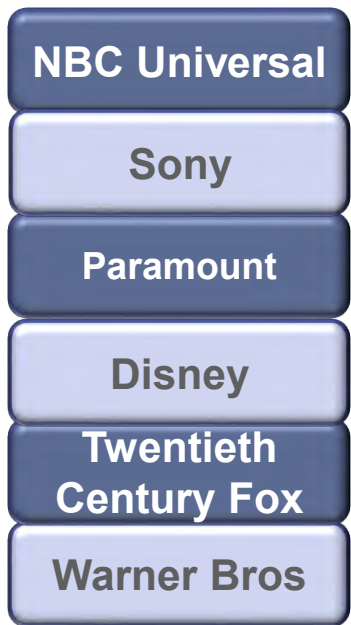


# Paramount commitments offered: 22 April 2016



# Paramount commitments

## Rightsholders



## Television



## Content



# Paramount commitments

## Rightsholders



## Television



## Content



## Copyright?

*“Nothing in the Commitments shall be interpreted as limiting or waiving Paramount’s right to engage in licensing or enforcement practices in the EEA that are legally permissible under EU law”*



# Questions?





# The Digital Single Market and Geo-blocking

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10 June 2016

