Geolocation, Geoblocking, and Private International Law

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Relevance of Physical Location in Private International Law

- Regulatory jurisdiction
  - Choice-of-law rules
  - The territoriality principle

- Adjudicatory jurisdiction
  - Personal jurisdiction
  - In rem jurisdiction

- Enforcement jurisdiction
  - Jurisdiction to enforce v. physical ability to enforce
Cyberspace and Private International Law

- Accessibility of websites (and other content) potentially from anywhere where an Internet connection is available

- Ability to act remotely

- Possibility to strategically locate activities and assets to avoid enforcement

- Global jurisdiction over present actors
  - v. no enforcement power over absent actors with no assets in the jurisdiction
  - v. power over intermediaries (e.g., internet service providers, payment processors, servers)
Cyberspace and Private International Law

- Need for a delineation of jurisdictional reach
- Ensure that actors not exposed to jurisdictions of all countries with an Internet connection
- Ensure the possibility of enforcement against absent actors
- Re-assessment of enforcement against intermediaries
Geolocation

- A mechanism to determine the physical location of an actor
- Used early on in advertising, security
- Possibility to tailor content based on the user’s physical location
- Based on IP addresses v. on a combination of information (including, e.g., wifi signals and GPS)
Geolocation

- Geolocation (determination of a user’s physical location)
  - Identification of a user’s internet connection
  - Identification of a user’s device
  - Attribution (linking particular acts on the Internet to a particular user)
Geolocation

- Geolocation (determination of a user’s physical location)
  - Identification of a user’s internet connection
    - IPv4 v. IPv6 protocol
  - Identification of a user’s device
  - Attribution (linking particular acts on the Internet to a particular user)
Geolocation

- Geolocation (determination of a user’s physical location)
  - Identification of a user’s internet connection
  - Identification of a user’s device
    - MAC address
    - Computer fingerprinting (e.g., EFF tool)
  - Attribution (linking particular acts on the Internet to a particular user)
Geolocation

• Geolocation (determination of a user’s physical location)
  v. Identification of a user’s internet connection
  v. Identification of a user’s device
  v. Attribution (linking particular acts on the Internet to a particular user)
Geoblocking

- Restriction of access to content on the internet based on user’s location
  1. Geolocation
  2. Geoblocking

- Adoption of geoblocking by the private sector
  - Market partitioning
  - Security
  - Compliance with territorially-defined contractual obligations

- The use of geoblocking for regulation and for the enforcement of laws
Legality of Geoblocking

- **Int’l: WTO/GATT rules**
- **US: Dormant Commerce Clause**
  - Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 821 F.3d 265 (2d Cir. 2016) (pre-1972 sound recordings and satellite radio)
  - Direct Marketing Ass’n v. Brohl, 814 F.3d 1129 (10th Cir. 2016), *cert. filed Sept. 1, 2016* (state online sales tax)
- **EU: EU single market**
  - Proposal for a Regulation on ensuring cross-border portability of online content services in the internal market
  - Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence, or place of establishment within the internal market
Legality of Geoblocking

- Privacy issues
  - Information about user’s current location
  - Tracking user’s location over time
- Free speech issues
Is geoblocking mandatory? Required by law?

- Regulation of online gambling
- Limitation of personal jurisdiction
- EU: Right to be forgotten
- Canada: Injunction on the internet
- Territorially-limited licenses
Circumvention of geoblocking

- Used to evade geoblocking and access information that is inaccessible because of a user’s location
- To protect privacy
- To secure free speech
- To test the networks
Legality of the circumvention of geoblocking

- Anti-hacking provisions
- Violation of laws against access to certain content
  - Online gambling
  - Child pornography
  - Other content prohibited by national laws
- Protection for digital rights management (DMCA)
- Contract/license/terms of service conditions
Opposition to geoblocking

- Objections to geoblocking *per se*:
  - Geoblocking
    - is contrary to the original architecture of the internet
    - is imperfect, and spillover is more than negligible
    - has uncertain legality
      - e.g., *GlobalMode* in New Zealand
    - is associated with not insignificant implementation costs
    - may have an impact on free speech

- Objections concerning the underlying reasons for geoblocking
Geoblocking serving positive ends

• Diversity of content on the internet
  ○ From a global perspective, the diversity of content accessible to users around the world will be enhanced by geoblocking
  ○ Geoblocking allows for content to be made available where it is legal
  ○ Geoblocking allows for territorially-limited (i.e. lower-priced) licensing

• Other reasons for geoblocking
  ○ A territorial partitioning of the internet is inevitable as long as countries have strong national public policies that shape at least some of their laws
  ○ Online gambling and other sensitive areas of regulation will provoke countries’ strong policy stances, for which geoblocking on the internet offers a workable *modus operandi*
The EU anti-geoblocking campaign

- Proposal for a Regulation on ensuring cross-border portability of online content services in the internal market
- The effects of the cross-border portability proposal
  - The Proposal legislates an acceptable level of cross-border spillover
  - The Proposal requires tracking and authentication (i.e. impact on privacy)
  - Localization fiction in Article 4:
    “The provision of an online content service to, as well as the access to and the use of this service by, a subscriber, … shall be deemed to occur solely in the Member State of residence…”
- Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence, or place of establishment within the internal market
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