

Geolocation, Geoblocking, and Private International Law

Marketa Trimble

Samuel S. Lionel Professor of Intellectual Property Law
William S. Boyd School of Law

Professor Tereza Kyselovska's Class
Law School of Masaryk University, Brno, Czech Republic
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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)**
 - 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)**

Geolocation

- **Geolocation (determination of a user's physical location)**
 - v. **Identification of a user's internet connection**
 - **IPv4 v. IPv6 protocol**
 - v. **Identification of a user's device**
 - v. **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**
 - **MAC address**
 - **Computer fingerprinting (e.g., EFF tool)**
 - v. **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
 - Equustek Solutions Inc. v. Google Inc., [2015] BCCA 265, June 11, 2015, appeal pending to the Supreme Court of Canada
- Territorially-limited licenses
 - Spanski Enterprises, Inc. v. Telewizja Polska, S.A., D.D.C., 1:12-cv-00957-TSC

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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