The European Union Anti-Geoblocking Regulation Isn’t the End of the Anti-Geoblocking Battle (Guest Blog Post)

March 5, 2018 · by Eric Goldman · in Content Regulation, Copyright, Licensing/Contracts

by guest blogger Marketa Trimble

The EU Anti-Geoblocking Regulation has finally been published. After the Council of the European Union adopted the EU Anti-Geoblocking Regulation on February 27, 2018 (the European Parliament had adopted it earlier in the month), the Regulation was published in the Official Journal of the European Union on March 2, 2018, as “Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on consumers’ nationality, place of residence or place of establishment within the internal market” (and amending some existing EU legislation) (the “Regulation”). The adoption of the Regulation is not the end of the EU geoblocking battle, which endures, with the focal point shifting to another piece of EU legislation that is discussed below.

The adoption of the Regulation might appear to be the culmination of the anti-geoblocking campaign, as led by the European Commission within its Digital Single Market Strategy – a strategy to create and foster a single EU digital market. Initially, the future of geoblocking seemed doomed, but discussions revealed that not all geoblocking could or should be prohibited. Little by little, scenarios were presented in which geoblocking could not be eliminated; the scenarios were addressed in changes to the Regulation proposal, including a change that saw the word “unjustified” inserted in the title of the Regulation, acknowledging the fact that some leeway must remain for geoblocking that is “justified.”

Those accustomed to operating in a world with a legal/illegal dichotomy might find the use of the terms “justified” and “unjustified” unsettling in legislative text. With respect to the Regulation, the terms originated in the EU Services Directive, which prohibits discrimination among service recipients based on their nationality or place of residence, but allows for “differences in the conditions of access where those differences are directly justified by objective criteria.” According to the Explanatory Memorandum accompanying the Regulation proposal, the Regulation was designed to clarify what these “objective criteria” are, and therefore when the differences are or are not justified.

Allowing latitude for “justified differences,” the Regulation leaves certain situations open for disparate treatment of customers from different countries, and most importantly – and not surprisingly – the Regulation acknowledges that geoblocking must be permitted when its use is necessary in order to comply with law. Prohibition of geoblocking thus appears to be relegated primarily to cases of pure market partitioning, where EU competition law could have functioned as a sufficient corrective measure.
However, whether the use of geoblocking violates EU competition law is not yet settled. Legality of the use of geoblocking under EU competition law is the subject of ongoing EU Commission antitrust proceedings against several major film studios. In the proceedings, the Commission is investigating the studios’ practice of imposing obligations on their licensees to geoblock customers connecting from places outside the territory for which the studios have granted exclusive licenses to the licensees. The Commission has already expressed the opinion that the use of geoblocking does violate competition law because it prevents “passive sales” — unsolicited sales to (access by) customers located outside the exclusively licensed territory. The final word on the matter has not yet been pronounced by the EU courts; to date, the Commission has accepted commitments by two of the studios involved in the proceedings, while the proceedings continue against the other studios.

The Commission’s approach to geoblocking within the competition law framework is consistent with the digital single market vision, but the implementation of the approach faces a significant hurdle in practice: Any internet actor who does not hold copyright in a work for all EU countries could face copyright infringement actions under the copyright laws of the countries where the actor does not hold copyright, if the actor ceases to geoblock users connecting from those countries from accessing the work. Copyright in the EU continues to be governed by the national laws of the individual EU member countries, and although the Commission has attempted to create a single EU-wide copyright, it has not yet been successful in doing so.

In other contexts the Commission has looked for a route around EU member countries’ refusals to accept a single EU copyright: The Commission has taken measures to promote EU-wide licensing through legislation such as the Collective Rights Management Directive and the Cross-Border Portability Regulation. The Directive aims to facilitate “multi-territorial licensing of rights in musical works for online use”; the Regulation pushes EU-wide licensing by forcing content providers to offer content to EU residents even when the residents are temporarily present in another EU member state.

For geoblocking, the Commission once again needs to find some means of bypassing the absence of a single EU copyright. One possible means was the introduction in the Regulation proposal of a provision that would have prohibited actors who hold copyright in multiple EU countries from using geoblocking to partition the markets of the countries. However, the proposed provision met with heavy criticism and was eventually deleted from the proposal; an ominous remnant is the provision in the adopted Regulation that calls for the Commission to assess in the future whether a geoblocking prohibition should extend to such cases.

Another possibility for bypassing the absence of a single EU copyright and making the elimination of geoblocking possible, at least in the scenario that seems to be the most pressing for the Commission, lies in the discussions of the “Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes,” also known as the SatCab Regulation proposal. The SatCab Regulation proposal is now the focal point for the continuing battle over geoblocking in the European Union.

In the proposal for the SatCab Regulation, the Commission is pushing for the emission principle (the “country of origin” principle), which is currently legislated in the EU for satellite broadcasting, to apply additionally to “ancillary online services by broadcasting organisations.” This additional application of the principle would ensure that the copyright law of a single country (for simplification let us say the country of the broadcast) would govern such online services, thus eliminating the danger that a broadcaster would face a copyright infringement suit for violation of copyright laws in other EU countries through its online services if the broadcaster discontinued its
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geoblocking of the broadcast in the other countries. Consequently, the legislation would permit the elimination of geoblocking in at least the circumstances covered by the regulation. Not surprisingly, the proposed SatCab Regulation provision has received support from broadcasters but lacks support from copyright holders.

While the adoption of the Anti-Geoblocking Regulation might seem to signal the end of the battle over geoblocking, in reality the battle continues with a focus on the SatCab Regulation – highlighting once again that conflict-of-laws tools can be utilized to advance substantive intellectual property law policies.
This is why the EU is destroying itself. Pure stupidity on their part. Large bodies of people who call themselves "Council of the European Union" and the European Parliament, adopting the EU Anti-Geoblocking Regulation on February 27, 2018, shows how archaic and pointless these groups are to the world today. They are literally cannibalizing themselves based on their own stupidity or allowing themselves to be infiltrated with garbage ideas.

As a IT Security Professional, removing Geo-IP is not only preposterous as a claim by the European Parliament, but it requires knowledge of IT, that neither European group seems to comprehend.

Geo-IP filtering allows USA businesses to deflect ANY Internet attack or solicitation from China, for instance, if the business has no interaction with China whatsoever. It is a defensive measure that is REQUIRED today in any business.

If an America business chooses to BLACK LIST all countries that are NOT part of their business dealings, it SIGNIFICANTLY reduces the attack success of cyber criminals.