

Scholarly Commons @ UNLV Boyd Law

Media & Informal Publications

Faculty Scholarship

11-4-2021

Conflict of Laws, Geoblocking, and Intellectual Property

Marketa Trimble

Follow this and additional works at: <https://scholars.law.unlv.edu/facmedia>



Part of the [Conflict of Laws Commons](#), and the [Intellectual Property Law Commons](#)

This Conference Proceeding is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Conflict of Laws, Geoblocking, and Intellectual Property

Marketa Trimble

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

IP Colloquium

Indiana University Maurer School of Law

November 4, 2021

- My research on geoblocking since about 2009

ARTICLE

**COPYRIGHT AND GEOBLOCKING:
THE CONSEQUENCES OF ELIMINATING GEOBLOCKING**

MARKETA TRIMBLE*

CONTENTS

INTRODUCTION	477
I. COPYRIGHT AND GEOBLOCKING IN THE UNITED STATES.....	481
II. COPYRIGHT AND GEOBLOCKING IN THE EUROPEAN UNION	487
III. POTENTIAL CONSEQUENCES OF THE ELIMINATION OF GEOBLOCKING FOR COPYRIGHT LAW AND PRACTICE	494
CONCLUSIONS	501

* Samuel S. Lionel Professor of Intellectual Property Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks Lex Machina for access to its database. The author is indebted to Gary A. Trimble for his invaluable editing suggestions.

476

- E.g., Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 Fordham Intell. Prop. Media & Ent. L.J. 567 (2012) (<https://ssrn.com/abstract=1937960>)
- Additional works on geoblocking (<http://trimbleongeoblocking.com>)
- Marketa Trimble, *Copyright and Geoblocking: The Consequences of Eliminating Geoblocking*, 25(2) B. U. J. SCI. & TECH. L. 476 (2019) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330876)
- A 2018 EU regulation on the elimination of “unjustified geoblocking”

- 1. Conflict of Laws and IP**
- 2. Geoblocking, Its Uses, and Its Legality**
- 3. Circumvention of Geoblocking, Its Uses, and Its Legality**
- 4. Opposition to Geoblocking**
- 5. Geoblocking Serving Positive Ends**
- 6. Potential Consequences of Elimination of Geoblocking**

CONFLICT OF LAWS

- ◉ Jurisdiction
- ◉ Choice of law
- ◉ Recognition and enforcement of foreign judgments

- ◉ Localization

CONFLICT OF LAWS AND IP

- ◉ Conflict-of-laws issues in IP
- ◉ The principle of territoriality and IP

⦿ Geoblocking

- Content provider-implemented geoblocking
 - v. blocking implemented by others
 - ISP-implemented blocking and blocking orders
 - Politically-motivated government-imposed blocking
 - The “Great Wall” in China
 - The Egyptian and Belarus governments blocking the Internet

451: Unavailable

The page you are attempting to access is not available in your country.

Unfortunately, our e-commerce site is unavailable

and we are not accepting orders for customers in the European Economic Area (EEA). We apologize for any inconvenience this may cause and we are looking into solutions that will allow us to serve our European customers in the future

⦿ Geoblocking Uses

- Restriction of access to content on the internet based on user's location
 - (1) Geolocation
 - (2) Geoblocking
- Adoption of geoblocking by the private sector
 - Targeted advertising
 - Delivery of other geographically-tailored content
 - Market partitioning
 - Security
 - Copyright restrictions
- The use of geoblocking for regulation and for the enforcement of laws

⊙ Legality of Geoblocking

- Int'l: WTO/GATT rules
- Privacy issues
 - Information about user's current location
 - Tracking user's location over time
- Free speech issues
- US: Dormant Commerce Clause
 - E.g., *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (an internet seller's duty to collect and remit sales tax)
- EU: EU single market
- Antitrust issues

⦿ **Is Geoblocking Mandatory? (I)**

- Regulation of online gambling
- EU: GDPR, the 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

◎ Is Geoblocking Mandatory? (II)

- Limitation of personal jurisdiction
 - Triple Up Ltd. v. Youku Tudou Inc., 235 F. Supp. 3d 15 (D.D.C. 2017)
 - Plixer Intl. v. Scrutinizer GmbH, 905 F.3d 1 (1st Cir. 2018)
 - Carsey-Werner Co., LLC v. BBC, 2018 U.S. Dist. LEXIS 33862 (C.D. Cal. Feb. 23, 2018)
- Territorially-limited licenses
 - Spanski Enters. v. Telewizja Polska S.A., 883 F.3d 904, 907 (D.C. Cir. 2018)

⦿ **Uses of Circumvention of Geoblocking**

- To 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

⦿ **EU Anti-Geoblocking Campaign (I)**

- **Green Paper** on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market (2011)
- **Digital Single Market Strategy** (2015)
- **Cross-Border Portability Regulation** (2017)
 - Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market
- **Anti-Geoblocking Regulation** (2018)
 - 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 customers' nationality, place of residence or place of establishment within the internal market

⦿ EU Anti-Geoblocking Campaign (II)

- Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geoblocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market
 - Exceptions that permit geoblocking to be used for compliance with the laws of the EU and the laws of the EU member states, including for copyright law compliance
 - Exceptions for any “services the main feature of which is the provision of access to and use of copyright protected works.”
 - A future review regarding the feasibility of the elimination of geoblocking for copyright-protected content

⊙ 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*

© Potential Consequences of Eliminating Geoblocking

- **Licensing practices**

- Only global licenses de facto
- Pricing of licenses / unaffordability to small providers
- Copyright owner's willingness to license globally
- Copyright holding entities
- Expansion of copyright or copyright-like protections to unprotected content

- **Content**

- Accessibility of content
- Globally unobjectionable content
- Impact on languages, localization

- **Copyright law**

- Impetus for further harmonization / unitary copyright
- Emission principle

Conflict of Laws, Geoblocking, and Intellectual Property

Marketa Trimble

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

IP Colloquium

Indiana University Maurer School of Law

November 4, 2021