The Geoblocking of Legitimate Content

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The 17th IEEM Intellectual Property Seminar: IP Rights: Obstacles or Opportunities to Legitimate Trade?
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1. Terminology
2. The Territorialization of the Internet
3. Mandated Versus Voluntary Geoblocking
4. Legality of Geoblocking
1. TERMINOLOGY
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, or 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
   • Dynamically v. statically assigned IP addresses
   • IPv4 v. IPv6 protocol

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)
Geoblocking

– Restriction of access to content on the internet based on user’s location
  (1) Geolocation
  (2) Geoblocking
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
Circumvention of Geolocation/Geoblocking

- Technological tools allow to change the IP address to appear as if the user were physically located elsewhere.
- Newer technological tools may change not only the IP address of the user but also other information that can be used to identify the physical location of the user.
Circumvention of Geolocation/Geoblocking

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- Uses:
  - 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
“Legitimate Content”

= Content on the internet that should be available to a particular user because there is no competing right and/or legal obligation that should prevent the user’s access to the content
2. THE TERRITORIALIZATION OF THE INTERNET
The Territorialization of the Internet

“Territorialization”

= the action of territorializing, i.e. “mak[ing] (something) territorial; to organize on a territorial basis; to associate with or restrict to a particular territory or district”

The Original, “De-Territorialized” Internet

– The internet was conceived as a distributed network, **indifferent** to geographical boundaries.

– Users expect no boundaries and a free flow of content on the internet.
The Territorialization of the Internet

- The internet has been and is undergoing a process of territorialization, in which the internet is increasingly being linked to physical geography.
The Territorialization of the Internet

A number of developments suggest a territorialization trend on the internet:

- The increasing use of geolocation to deliver location-based content that is tailored to a user’s physical location
- The popularity among users of location-based services
- The increasing use of geoblocking to limit the access of users to content, based on a user’s physical location
- Attempts by some governments to partition off their national space on the internet
The Territorialization of the Internet

– The process has been propelled partly by the territorial perception of sovereignty, the entrenched legislative and judicial approaches to solving territorially distributed problems, and by actual ability of countries to enforce their national laws and decisions of their courts and institutions.

– But other factors have also contributed to the territorialization.
3. MANDATED VERSUS VOLUNTARY GEOBLOCKING
Geoblocking Mandated by Law

– Legislation mandating the use of geoblocking
  • E.g., regulation of online gambling

– Judicial recognition of effects of geoblocking
  • E.g., limitation of personal jurisdiction

– Administrative agency reliance on geoblocking
  • E.g., the right to be forgotten decisions in the European Union
Geoblocking and Clashes of Sovereignty

– Instances where content legally accessible in one country but not in the other

– Examples:

– Injunctions on the internet
  • Equustek Solutions Inc. v. Google Inc., 2017 SCC 34 (Supreme Court of Canada, 2017)
  • Google v. Equustek, NDCA, 5:17-cv-04207-NC

– Territorially-limited copyright licenses
Voluntary Geoblocking (Not Mandated by Law)

- Instances in which geoblocking is used notwithstanding the fact that there is no legal obligation that necessitates the limitation of access to the work based on user’s physical location
  - E.g., a copyright licensee geoblocks notwithstanding the fact that it holds a global license to the content.

- Geoblocking used to
  - Limit access to information, and/or
  - Territorially partition the markets.
4. LEGALITY OF GEOBLOCKING
Legality of Voluntary Geoblocking Based on Jurisdictional Boundaries

- **Int’l: WTO/GATT rules**
- **US: Dormant Commerce Clause**
  - Litigation concerning state-law copyright in pre-1972 sound recordings in Flo & Eddie, Inc. v. Sirius XM Radio, Inc. (New York, California, and Florida)
  - Direct Marketing Ass’n v. Brohl, 814 F.3d 1129 (10th Cir. 2016), *cert. denied* (state online sales tax)
- **EU: EU digital single market**
  - Cross-Border Portability Regulation (EU) 2017/1128
  - 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 Other Voluntary Geoblocking

– Once content is made to the public online, may access to it be limited based on users’ physical location, absent a legal obligation to limit access in such way?

– Legitimacy of limitations of access to information

– Legitimacy of market partitioning
Evolving Views of the Legitimacy of Market Partitioning

The U.S. Supreme Court in its recent decisions concerning exhaustion of rights:

– “[T]he Constitution's language nowhere suggests that its limited exclusive right [of copyright] should include a right to divide markets ...”
  

– “Allowing patent rights to stick remora-like to [an] item as it flows through the market would violate the principle against restraints on alienation. Exhaustion does not depend on whether the patentee receives a premium for selling in the United States, or the type of rights that buyers expect to receive. ... [W]hat matters is the patentee's decision to make a sale.”

  Impression Products v. Lexmark, 137 S.Ct. 1523 (2017)
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
Marketa Trimble’s Works on Geoblocking

• *The Role of Geoblocking in the Internet Legal Landscape*, IDP, Revista de Internet, Derecho y Política (23) (2017), [http://idp.uoc.edu/articles/abstract/3076/](http://idp.uoc.edu/articles/abstract/3076/)
  


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