



Geoblocking

University of Haifa

10 May 2018

Marketa Trimble

Samuel S. Lionel Professor of Intellectual Property Law

William S. Boyd School of Law, University of Nevada, Las Vegas

BBC iPlayer only works in the UK

Sorry, it's due to rights issues.

In the UK? Here's some advice.

- 1. Geolocation, Geoblocking,
and the Territorialization of the Internet**
- 2. Mandated Versus Voluntary Geoblocking**
- 3. Legality of Geoblocking**

**1.
Geolocation,
Geoblocking,
and the Territorialization
of the Internet**

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)**

Google Settings

https://www.google.com

Apps Google Google News What is my IP address Your IP address, IP g BBC BBC One - EastEnde Doktor Martin - Če LH

Gmail Images  [Sign In](#)

Google

[Google Search](#) [I'm Feeling Lucky](#)

Big ideas, young minds: meet this year's [Google Science Fair winners](#)

Advertising Business About Privacy Terms Settings

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
- **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
- 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

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 domain name system

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.**

2.

**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**
 - Spanski Enterprises, Inc. v. Telewizja Polska, S.A., D.D.C., 1:12-cv-00957-TSC

Voluntary Geoblocking (Not Mandated by Law)

- **Instances in which geoblocking is used although 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.**

3. Legality of Geoblocking

Legality of Mandatory Geoblocking

- **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**

Legality of Voluntary Geoblocking I

- **EU: EU digital single market**
 - **Cross-Border Portability Regulation (EU) 2017/1128**
 - **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**
- **Competition law**
 - **EU: passive sales exception**
 - **Commission Decision of 26 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40023 – Cross-border access to pay-TV), C(2016) 4740 final**

Legality of Voluntary Geoblocking II

- **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**

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 I

- *Geoblocking and “Legitimate Trade”* in INTELLECTUAL PROPERTY AND OBSTACLES TO LEGITIMATE TRADE (Christopher Heath, Anselm Kamperman Sanders & Anke Moerland eds., Wolters Kluwer, forthcoming 2018), <https://ssrn.com/abstract=3135036>
- *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/>

(an earlier version published as *The Role of Geoblocking in the Internet Legal Landscape*, in Building a European Digital Space, Proceedings of the 12th International Conference on Internet, Law & Politics (2016), http://www.huygens.es/ebooks/IDP_2016.pdf)
- *Geoblocking and Evasion of Geoblocking – Technical Standards and the Law*, in GEOBLOCKING AND GLOBAL VIDEO CULTURE (Ramon Lobato & James Meese eds., Institute of Network Cultures, Amsterdam, 2016), <http://networkcultures.org/wp-content/uploads/2016/01/TOD18-Geoblocking-Final1.pdf>

Marketa Trimble's Works on Geoblocking II

- *The Territoriality Referendum*, 6 WIPO J. 89 (2015), http://www.wipo.int/edocs/pubdocs/en/wipo_journal_wpj6n1.pdf
- *Proposal for an International Convention on Online Gambling*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES (Ngai Pindell & Anthony Cabot eds., UNLV Gaming Press, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089935
- *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 Fordham Intell. Prop. Media & Ent. L.J. 567 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937960

Marketa Trimble's Works on Geoblocking III

- **Blog posts:**

- <https://blog.ericgoldman.org/archives/2018/03/the-european-union-anti-geoblocking-regulation-isnt-the-end-of-the-anti-geoblocking-battle-guest-blog-post.htm>
- <http://blog.ericgoldman.org/archives/2018/01/a-patent-for-geotagging-ip-packets-raises-important-internet-law-questions-guest-blog-post.htm>
- <http://blog.ericgoldman.org/archives/2017/05/your-movements-shall-be-traced-the-new-eu-regulation-on-cross-border-portability-guest-blog-post.htm>
- <http://blog.ericgoldman.org/archives/2017/05/to-geoblock-or-not-to-geoblock-is-that-still-a-question-guest-blog-post.htm>
- <http://blog.ericgoldman.org/archives/2016/05/proposed-eu-regulation-on-cross-border-access-to-copyrighted-content-guest-blog-post.htm>
- <http://blog.ericgoldman.org/archives/2015/04/what-bothers-brussels-geoblocking-on-the-front-burner-of-the-eu-commission-guest-blog-post.htm>
- <http://blog.ericgoldman.org/archives/2014/01/the-sochi-olympics-and-european-answers-to-cross-border-copyright-questions-guest-blog-post.htm>
- http://blog.ericgoldman.org/archives/2012/08/the_newest_olym.htm

The background features a light gray circuit board pattern with black lines and circular nodes. A dark gray horizontal band runs across the middle of the image, containing the text.

Geoblocking

University of Haifa

10 May 2018

Marketa Trimble

Samuel S. Lionel Professor of Intellectual Property Law

William S. Boyd School of Law, University of Nevada, Las Vegas