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The Territoriality Referendum

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☞ Blocking injunctions; Copyright; Geographic areas; Intellectual property; Online services; Territorial application; Websites

Introduction

Internet users are participating unconsciously in an informal—but very important—referendum on the future of the territoriality of intellectual property rights (IPRs),¹ particularly copyright. Users cast their votes in this referendum through their use of tools that enable them to evade geoblocking. Geoblocking is used by content providers on the internet² for the purpose of geographically limiting user access to content, often because of territorial limitations that relate to IPR protection.

The degree to which users evade geolocation will influence how governments and the private sector regard the future of the territoriality of IPRs. Although the results of the informal referendum might not result in a dramatic departure from the notion of IPRs as territorially constrained rights, the results might prompt governments to consider novel legal approaches to IPRs and inspire the private sector to develop new business models to bridge countries' borders and provide greater cross-border access to IPR-protected works.

Territorial rights on the internet

Since the beginnings of the commercial internet in the mid-1990s, many commentators have viewed the internet as a significant challenge to the territoriality of IPRs. The architecture of the network did not seem to enable an emulation of the territorial constraints that exist in the physical world, and therefore the architecture did not allow the limiting of access to the objects of IPR protection within a country's borders.³ Although the infrastructure of the internet—cables, servers, routers, switches etc.—is as physical as the infrastructure of other older media and means of communication,⁴ such as the telegraph and telephone, the internet opened a new and unprecedented space that appeared to be completely devoid of physical substance and territorial boundaries.⁵

Notwithstanding the excitement about the internet's ability to defy territorial limits and challenge territorial regulation, some commentators doubted that the internet would bring an end to the territoriality

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¹ The territoriality of IPRs means that IPRs exist only within the limits of the prescriptive jurisdiction of each country whose national laws create the IPRs.

² This article uses the term “internet” to refer to the worldwide network of interconnected devices, regardless of the protocol used for a connection.

³ On the origins of Internet architecture, see, for example, Baran Paul, “On Distributed Communications: I. Introduction to Distributed Communications Networks”, August 1964, RAND Corporation, Memorandum RM-3420-PR; Janet Abbate, *Inventing the Internet* (Cambridge, MA: MIT Press, 2000); Jack L. Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of a Borderless World* (New York: Oxford University Press, 2006), pp.22–23.

⁴ For an illuminating and accessible description of the physical infrastructure of the internet, see Andrew Blum, *Tubes: A Journey to the Center of the Internet* (New York: Harper Collins, 2012).

⁵ For an overview of the early discussions about the internet, see Dan Jerker B. Svantesson, *Private International Law and the Internet*, 2nd edn (Alphen aan den Rijn: Kluwer Law International, 2012), pp.1–3.

principle of IPRs.⁶ These commentators correctly predicted that, with sufficiently strong interests at stake, the architecture of the network would yield to the territoriality principle, and means would eventually emerge to allow a replication on the internet of the territorial limitations of the physical world.⁷

The interests were indeed very strong, and countries would not relinquish their power to regulate and enforce their laws simply because the internet space overlapped with their sovereign territory and also happened to be borderless.⁸ Instead of hesitating to regulate activities on the internet, countries asserted jurisdiction over internet activities without any territorial limits. In what was termed the rule of “cyberlaw 2.0”,⁹ countries prescribed their laws with de facto global effect on the internet. To the extent that they could, they also enforced their laws on the internet globally.

It was in the shadow of cyberlaw 2.0 that important technologies—geolocation technologies—proliferated to enable internet actors such as content providers and intermediaries to identify the physical locations from which users connect to the internet.¹⁰ Propelled by various motivations, including a benign desire to offer localised advertising and detect potential credit card fraud, the technologies initially used internet protocol (IP) addresses, and later additional data points, to localise users in the physical world.¹¹ The technologies make it possible to supply local content—for example, to display advertisements that are geographically tailored to an internet user’s physical location and assist in fraud prevention.

Geolocation also facilitated geoblocking—the blocking of access to internet content to users connecting to the internet from, or outside of, a certain territory. Geoblocking establishes true borders on the internet; it enables internet actors to partition markets for the purposes of maintaining price differentiation, meeting contractual obligations and/or complying with countries’ territorial laws and regulations. For example, sellers of electrical equipment can limit their sales to countries in which their equipment meets required safety and/or other standards, and online gambling providers who are licensed in a jurisdiction can limit online betting to users connecting from that jurisdiction.¹² Geoblocking also assists in the effective policing of territorial IPR licensing conditions. With geoblocking, licensing for a certain territory becomes enforceable on the internet, because a licensee can limit access to licensed content to users connecting from the territory for which the licensor has granted a licence.

Notwithstanding its many beneficial uses, geoblocking has been perceived as a major barrier to access to content on the internet; yet, counter-intuitively, geoblocking can facilitate greater access to content in some circumstances. For instance, geoblocking enables the territorial functioning of IPR laws—not only laws that remain territorial (that is, national laws that individual countries adopt and implement within the territorial scope of their prescriptive jurisdiction), but also laws that vary from country to country notwithstanding a significant degree of international harmonisation. Because exceptions and limitations to copyright differ in the national laws of different countries,¹³ the act of posting a copyright-protected work on the internet that is considered fair use in the United States might infringe on copyright in other

⁶ e.g. Silke von Lewinski, *International Copyright Law and Policy* (Oxford: Oxford University Press, 2008), para.25.33.

⁷ While the architecture of the internet influences how the law will be shaped, the process is circular and interests of a sufficient strength to shape the law will result in new or adjusted architecture. Lawrence Lessig, *Code: Version 2.0* (New York: Basic Books, 2006), p.3. See also Winston Churchill, Speech at House of Commons (Meeting in the House of Lords), October 28, 1943, available at <http://www.winstonchurchill.org/learn/speeches/quotations/famous-quotations-and-stories> [Accessed October 22, 2014] (“We shape our buildings, and afterwards our buildings shape us.”).

⁸ e.g. Jack L. Goldsmith and Alan O. Sykes, “The Internet and the Dormant Commerce Clause” (2001) 110 Yale L.J. 785, 785.

⁹ Michael Geist, “Cyberlaw 2.0” (2003) 44 B.C. L. Rev. 323, 357. For an early prediction of “cyberlaw 2.0”, see Jack Goldsmith, “The Internet and the Abiding Significance of Territorial Sovereignty” (1998) 5 Ind. J. Global Legal Stud. 475, 483.

¹⁰ Benjamin Edelman, “Shortcomings and Challenges in the Restriction of Internet Retransmissions of Over-the-Air Television Content to Canadian Internet Users”, p.2, available at http://cyber.law.harvard.edu/archived_content/people/edelman/pubs/jump-091701.pdf [Accessed August 11, 2014] (“To the best of my knowledge, commercial Internet-based geographic analysis tools have been available since no later than 1999 ...”).

¹¹ On the use and operation of geolocation tools see, for example, Svantesson, *Private International Law and the Internet* (2012), pp.400–426; Marketa Trimble, “The Future of Cybertravel: Legal Implications of the Evasion of Geolocation” (2012) 22 Fordham Intell. Prop. Media & Ent. L.J. 567, 586–599.

¹² e.g. *Telemedicus*, Oberverwaltungsgericht Münster, 13 B 646/10, July 2, 2010; Julia Hörnle and Brigitte Zammit, *Cross-Border Online Gambling Law and Policy* (Cheltenham: Edward Elgar Publishing, 2010), pp.137–138.

¹³ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) includes loosely formulated provisions on exceptions and limitations. By contrast, the Marrakesh Treaty aims to harmonise more deeply some exceptions and limitations for the benefit of visually impaired persons. Marketa Trimble, “The Marrakesh Puzzle” (2014) 45 Int’l Rev. Intell. Prop. & Competition L. 768.

countries. Without the ability to block access to the work from any place outside the United States, the work may not be posted on the internet at all. Because the use of geoblocking enables internet actors to post the content and limit access to the content to users connecting from the United States, the same geoblocking, which is a major enemy of access to content on the internet, can, at least in some circumstances, be a useful ally in achieving greater access to certain content on the internet.

Territorial limitations and spillover

Territorial limitations on IPRs in the physical world are not perfect; physical borders are permeable, and even when right owners impose territorial limits in their licences, the objects of IPR protection can leak onto the markets of countries beyond those limits. Consider a completely offline scenario in which an author grants a licence to a book publisher to publish the author's book (the right to reproduce and distribute the work), but the author limits the licence to the United States because the author intends to license the work to other publishers for publication and distribution in other countries. It would be naïve to expect that no copies of the book published by the publisher and intended for the US market will ever cross US borders. Even if the publisher distributes the book only within the United States, the reality is that some spillover will occur because some copies of the book will "leak" outside the United States.

To the extent that leakage into an unlicensed market is *de minimis*, countries tolerate spillover when the leakage is only a trivial violation of the law.¹⁴ Legal spillover occurs through international travel and personal mail; travellers may bring a limited number of copies of a book with them to other countries for non-commercial purposes, and some copies may be mailed to other countries in small numbers, also for non-commercial purposes.¹⁵ Another type of spillover that is tolerated is the extraterritorial reach of over-the-air broadcasting. Recognising that an over-the-air signal cannot be perfectly confined to the territory of one country, IPR owners must accept the fact that a signal might be carried across a border, and consequently that their works will be accessible to a small number of unintended recipients in border regions.¹⁶

The internet, fortified with geoblocking, seemed to provide an ideal border-enabled space that would cure the permeability of the physical borders and eliminate any spillover.¹⁷ Geoblocking promised to limit access to content on a territorial basis with no leakage whatsoever. It also promised to offer access limitations with unprecedented granularity, allowing access denial or permission based on a location not only within a certain jurisdiction but even within a much smaller territory. Of course in the physical world, IPR owners can rely on contracts to enforce license limitations that are territorially smaller than a country.

¹⁴ *Ringgold v Black Entertainment Television Inc* 126 F.3d 70, 74 (2nd Cir. 1997).

¹⁵ TRIPS Agreement art.60. The *de minimis* importation exception applies not only to copyright but also to other types of IPRs. See also 17 U.S.C. § 107 (2012) (US) (particularly § 107(1) and (4)); Urheberrechtsgesetz (Germany) § 57. Transportation exceptions to patent rights are limited by time; the uses under the exceptions must be temporary. See Paris Convention for the Protection of Industrial Property 1883 (Stockholm Act 1967) art.5ter.

Leakage through commercial postal mail, which is typical in cases of products purchased online and shipped from foreign countries, is not the kind of spillover that is viewed as legal. However, the enforcement of IPRs for small shipments is challenging because customs offices deal with large numbers of small consignments and have limited resources. For an example of acceptable spillover, see "BBC iPlayer Help", available at https://iplayerhelp.external.bbc.co.uk/tv/watch_outside_uk [Accessed October 22, 2014]. According to the webpage, you may *not* download programs from the website onto your BBC iPlayer while you are outside the UK, but "[i]f you download a programme to your laptop or hard drive, or to your phone or tablet via the BBC iPlayer App [while in the United Kingdom], you can watch it anywhere in the world". BBC treats the latter conduct as permissible spillover.

¹⁶ Cf. *Sender Felsberg*, Bundesgerichtshof, I ZR 175/00, November 7, 2002; *Lagardère Active Broadcast SA v SPRE* (C-192/04) [2005] E.C.R. I-7199 (recognising that an extraterritorial broadcast may "require payment of equitable remuneration for the broadcast of phonograms within [the extraterritorial broadcast] territory" and the remuneration must reflect the "economic value of such use", which in this case was influenced by the fact that "almost the entire audience is in [the other, intended territory] ... , the broadcast ... can only be received by the public in a small [extraterritorial] area ... , and ... the broadcast is in the [intended territory's] language"). A territorial limitation can be imposed on satellite broadcasting by implementing a system of decoding devices that decrypt satellite transmissions and by selling the devices only within a certain territory. In the EU context, see *Football Association Premier League Ltd v QC Leisure* (C-403/08 and C-429/08) [2011] E.C.R. I-9083.

¹⁷ The internet also differs from the physical world in the volume and speed with which it can move data from one place to another, including across national borders.

However, in the physical world, only countries' borders provide physical points for effective enforcement of territorial limitations.

Geoblocking was not ignored by the technically savvy members of the internet community, who are extremely sensitive to attempts to constrain what they consider to be inherent internet freedoms, such as the freedom to access all content on the internet, regardless of where the content originates, as well as the freedom to enjoy the internet without surveillance. In order to support users' desire for privacy and their wish for access to content worldwide, the community created new tools that enabled internet users to hide their identities and physical locations while accessing the internet. These tools therefore allow users to evade geoblocking.¹⁸

If users evade geoblocking, they can access content on the internet as if they are located inside any territory that the evasion tool offers as a territory of location.¹⁹ For example, My Expat Network offers four countries to which users can "cybertravel"²⁰—meaning four countries whose IP addresses users can utilise as their point of connection to the internet. Once a user signs into My Expat Network, his internet connection is rerouted through an IP address inside the country he selects, and he appears to the internet world as though he is located in that country notwithstanding the fact that he remains physically in his original location. For example, a user located in the United States may sign in, ask to be rerouted through an IP address in the United Kingdom, and thereafter appear to be located in the United Kingdom. In doing so, he gains access to content that is normally available only to users who connect to the internet from inside the United Kingdom.

The tools that help users evade geolocation range from difficult-to-use tools (which require a degree of technical knowledge) to simple-to-use tools (which can be employed by any user with a basic understanding of the operation of the internet). For example, TOR (The Onion Router) requires the installation of the TOR program on a user's computer. For an effective masking of the user's location, the tool might also necessitate the installation of additional programs. My Expat Network requires only that a user sign into the My Expat Network website. Some tools have been created for general purposes, while others pursue a specific goal. For example, TOR's purpose is to assist anyone who wishes to operate on the internet free of surveillance, while My Expat Network declares on its website that it provides "access [to] TV and IP restricted content from any of [the supported] countries". Virtual private networks (VPN) were originally created for a variety of other purposes, but today they can be used to evade geoblocking as well.²¹

The emergence of geoblocking evasion tools has prompted the development of programs to detect the use of evasion tools and block access that is attempted through the use of these tools. Internet content providers have blocked IP addresses known to be used by evasion tools and have employed deep packet inspection²² to identify traffic routed through some of the tools. Of course the identification and blocking efforts do not remain unanswered by the creators of the evasion tools, who continue to develop additional tools to subvert geoblocking. For example, so-called "pluggable transports" are assisting users in obfuscating internet traffic that runs through evasion tools. They thereby help users to hide their use of the tools.

¹⁸ These tools are different from remote access tools, such as the Telnet and Secure Shell (SSH) protocols, which pre-dated geoblocking evasion tools and which users typically utilise to access their *own* computers from remote locations. Trimble, "The Future of Cybertravel" (2012) 22 Fordham Intell. Prop. Media & Ent. L.J. 567, 599–605.

¹⁹ On evasion of geolocation tools, see James A. Muir and Paul C. Van Oorschot, "Internet Geolocation: Evasion and Counterevasion", (2009) 42 *ACM Computing Surveys*.

²⁰ For the use of the term in this context, see Trimble, "The Future of Cybertravel" (2012) 22 Fordham Intell. Prop. Media & Ent. L.J. 567, 569.

²¹ For example, ExpressVPN offers connections through IP addresses in 46 countries.

²² Deep packet inspection is a technology that examines every packet—every protocol data unit on the internet—to detect the information that the packet is carrying. Milton Mueller, "DPI Technology from the Standpoint of Internet Governance Studies: An Introduction", p.2, available at http://dpi.ischool.syr.edu/Technology_files/WhatisDPI-2.pdf [Accessed October 22, 2014].

The referendum

Whether access to IPR-protected content through evasion of geoblocking will be viewed as an IPR infringing act, or as a permissible de minimis spillover comparable to de minimis importation, will depend largely on users' actions. The more commonplace that geoblocking evasion becomes, the more likely are the acts to be deemed as impermissibly encroaching upon IPR owners' rights and thus in violation of IPRs.²³ Of course, internet users' evasion of geoblocking may signal a number of various trends. Without knowing individual users' motivations, it is impossible to isolate the presence of any one trend in user behaviour. Users might turn to geoblocking evasion tools solely because of an increased desire for privacy on the internet; recent revelations about large-scale surveillance on the internet may fuel this desire. In a less appealing scenario, user interest in evasion tools might indicate a greater awareness among *mala fide* users of the features of the internet that make it difficult for law enforcement to identify criminal elements on the internet. But an increased use of evasion tools will very likely evidence user desire to access content to which user access has been limited, often because of IPR-related restrictions.

There are several signals indicating that users wish to and will attempt to access content that is available solely in some territories. First, providers that advertise geoblocking evasion tools often prominently state that their tools enable access to IPR-protected material (notwithstanding the questionable legality of such use of the tools, at least in some scenarios).²⁴ The marketing strategy therefore suggests that the advertisers are aware that their frequent customers include users who wish to evade geoblocking to gain access to such material. Secondly, news coverage on the internet has provided anecdotal evidence of the use of the tools in accessing IPR-protected content, including time-sensitive content, such as the broadcasts of the Olympic Games²⁵ and the World Cup.²⁶

The proliferation of services that secure access to television content that is available only in certain markets evidences users' desire for such access.²⁷ These "space-shifting" services²⁸ are of three types. The first type captures over-the-air signals and retransmits the signals over the internet for the benefit of viewers, regardless of the location from which the viewers have connected to the internet (whether that location was intended by an over-the-air broadcaster to receive the signal or not). TVCatchup in the United Kingdom and Shift.TV in Germany were examples of this type of service. Both services were found to have infringed copyright.²⁹

The second and third types of services try to avoid liability for any acts that might be found infringing. They rely on making their users responsible for any volitional conduct associated with potential IPR infringement. The second type of service makes devices available for purchase or rental by users. The devices are then located in the service provider's facility, where the devices capture over-the-air television signals for the users based on their instructions. Rokuga Net, Rokuraku and ManekiTV were such services

²³ TRIPS Agreement arts 13, 17 and 30.

²⁴ Trimble, "The Future of Cybertravel" (2012) 22 *Fordham Intell. Prop. Media & Ent. L.J.* 567, 606–636.

²⁵ e.g. Liana B. Baker and Yinka Adegoke, "Olympics Fans Find Ways to Circumvent NBC's Online Control", Reuters, July 31, 2012; Aaron Gell, "Reinventing the Web: A New App Lets You Watch Whatever TV Program You Want, Including the Olympics, Anywhere in the World", *Business Insider*, January 25, 2014.

²⁶ Cecilia Kang, "Here's How People Are Watching the World Cup—Without Cable", *Washington Post*, June 13, 2014.

²⁷ According to recent surveys, "22% of EU citizens watch or listen to home services when abroad and 34% of the migrant population surveyed ... claimed that they would be very likely willing to pay a monthly subscription of €10 or more for a cross-border audiovisual service". Gregor Langus, Damien Neven and Sophie Poukens, *Economic Analysis of the Territoriality of the Making Available Right in the EU* (Brussels: European Commission, 2014), p. 106.

²⁸ "Space-shifting" typically refers to an activity that makes content "portable" in the sense that it can be used on different media, e.g. *Recording Industry Association of America v Diamond Multimedia Systems Inc* 180 F.3d 1072, 1079 (9th Cir. 1999). The term does not necessarily imply uses in different jurisdictions.

²⁹ *Internet-Videorecorder II ("Shift.TV")*, Bundesgerichtshof, I ZR 152/11, April 11, 2013; *ITV Broadcasting Ltd v TVCatchup Ltd*, Order, October 7, 2013, available at <http://static.tvcatchup.com/DOCS/ITV,%20Ch%204,%20Ch%205%20v%20TV%20Catchup%20Sealed%20Order%20%207th%20October%202013%20LJ%20Floyd.pdf> [Accessed October 22, 2014]. The findings of copyright infringement were not based on the fact that the services enabled access to content from territories outside the protecting countries. Issues related to extraterritorial access were not litigated in these cases.

in Japan, and Japanese courts found that each of these three services had infringed copyright.³⁰ Recently the US Supreme Court held that the activities of Aereo, a similar service offered in the United States, infringed copyright as well.³¹

The third type of service has not yet been subject to litigation—perhaps because this type of service appears the least likely to infringe copyright among all three types of services. This type of service provides devices that customers install in and run from their homes; the devices allow customers to view content on the internet that the devices capture.³² One company, Sling Media, enables users to “watch ... content ... anywhere in the world” with the help of its “Slingbox”, which links the television signal that a user receives at home with the internet.³³ Simple.TV devices from Really Simple Software³⁴ offer a similar functionality, thus providing access to content “wherever [users] are”.³⁵

Some providers of the three types of services have advertised that they enable access to domestic programming from abroad, while others have restricted their services, at least in their terms of service, to a certain territory or territories. Still others have remained vague (perhaps purposefully) about the territorial availability of their services. For example, Rokuga Net, Rokuraku and Maneki TV all apparently advertised their services to customers who lived outside Japan and who could—by using their services—enjoy Japanese television anywhere in the world.³⁶ TVCatchup and Aereo built portions of their legal defences on the fact that they limited their services to users who had access to the same content even without their services. TVCatchup’s terms of service restricted the use of its service to the United Kingdom,³⁷ and Aereo’s terms of service restricted the use of its service to users’ “home markets”.³⁸ Sling Media continues to promote the use of its products worldwide, including use by “frequent travelers or expats”, “college students or snowbirds”, and “military personnel”.³⁹ Really Simple Software recently changed its advertising: in May 2014, close to the time the US Supreme Court issued its decision in *American Broadcasting Companies v Aereo Inc.*,⁴⁰ Really Simple Software discontinued emphasising the availability of its content to users “on the road”—which it had prominently advertised earlier.⁴¹

Providers’ reliance on the effectiveness of boilerplate language in their terms of service in shifting responsibility for any potentially infringing conduct onto their users is an approach not unique to space-shifting services.⁴² Content providers also include boilerplate provisions in their terms of service concerning any attempted evasion of the geoblocking that they install to limit access to the content they provide. For example, German television station SAT.1’s terms of service prohibit “in particular chang[ing],

³⁰ Naoya Isoda, “Copyright Infringement Liability of Placeshifting Services in the United States and Japan” (2011) 7 Wash. J.L. Tech. & Arts 149, 180–191; *Rokuraku II*, Supreme Court, H21 (Ju) No.788, January 21, 2011, translation available at <http://www.softic.or.jp/en/cases/rokuraku.pdf> [Accessed October 22, 2014]; *Maneki TV*, Supreme Court, H21 (Ju) No.653, January 18, 2011, translation available at http://www.jpaa.or.jp/english/court_decisions/63-MANEKI%20TV%20Case%EF%BC%BBSupreme%20Court%EF%BC%BD.pdf [Accessed October 22, 2014]. Just as they were not litigated in the previous examples, issues of extraterritorial access were also not litigated in these cases.

³¹ *American Broadcasting Companies v Aereo Inc* 134 S. Ct. 2498 (2014). Issues of extraterritorial access were also not litigated in this case.

³² Because they are located in the user’s own home, the services are akin to the remote access tools.

³³ Sling, available at <http://www.sling.com/> [Accessed October 22, 2014].

³⁴ Really Simple Software Inc Privacy Policy, available at <https://us.simple.tv/Legal> [Accessed October 22, 2014].

³⁵ Simple.TV, available at <https://us.simple.tv/> [Accessed October 22, 2014].

³⁶ Isoda, “Copyright Infringement Liability” (2011) 7 Wash. J.L. Tech. & Arts 149, 180; “APAA Copyright Committee 2010, Special Topic Report, Japan Group”, available at http://www.apaaonline.org/pdf/APAA_58th_council_meeting_Korea/3-CopyrightCommitteeReports/SpecialTopicReportCopyright2010-Japan.pdf [Accessed October 22, 2014].

³⁷ *ITV Broadcasting Ltd v TVCatchup Ltd* (C-607/11) [2013] E.C.D.R. 9 at [10].

³⁸ *American Broadcasting Companies v Aereo Inc*, Defendant Aereo Inc’s Reply to the ABC Plaintiffs’ Response to Aereo’s Statement of Undisputed Material Facts in Support of Aereo’s Motion for Summary Judgment, SDNY, July 17, 2013, p.31 (“The Aereo Terms of Use ... limits playback only to those physically present in the home market.”).

³⁹ Discover Sling, available at <http://www.sling.com/en-US/DiscoverSling.aspx> [Accessed October 22, 2014]. A “snowbird” is a person who moves for the winter to a geographical location with mild winters (or into the opposite hemisphere) in order to avoid the harsh winters that exist in the geographical location where he spends his summers.

⁴⁰ 134 S. Ct. 2498 (2014).

⁴¹ On May 26, 2014, Simple.TV’s main page included “on the road” language; this date was about a month after the oral argument in *Aereo* and about a month before the US Supreme Court issued its judgment in that case. The language was not included on the main page as of August 12, 2014.

⁴² For example, Simple.TV, Service Agreement, available at <https://us.simple.tv/serviceagreement> [Accessed October 22, 2014] (“You agree to use the Service, including all features and functionalities associated therewith, in accordance with all applicable laws, rules and regulations, including public performance limitations or other restrictions on use of the service or content therein.”).

circumvent[ing], or otherwise violat[ing] the technical measures used by ProSiebenSat.1 Digital to territorially limit use”.⁴³

Regardless of the official approach that content, space-shifting or geoblocking evasion tool providers adopt to influence their users’ conduct, users continue to use geoblocking evasion tools to access restricted content. Users tend to take terms of service lightly; they typically accept the terms without reading them or ignore them completely. For example, Aereo has been discussed by internet users as a service that they could utilise to connect to the programming offered outside their “home markets” through the use of geoblocking evasion tools. The accessibility of such content (albeit through the use of evasion tools) from outside the users’ “home markets” could have been one appeal for users of the Aereo service.⁴⁴ Additionally, content providers (other than IPR owners) might use geoblocking imperfectly—either intentionally or unintentionally. Content providers (other than IPR holders) and space-shifting providers alike might also have little or no incentive, at least at present, to enforce their terms of service against their own users.

Users’ desire for inaccessible content will not evaporate simply because courts have found that some retransmission services infringe copyright; users will continue to seek methods to access territorially limited content.⁴⁵ Some of the services that have been found infringing have pursued or will pursue avenues to continue their operations legally by seeking necessary licenses. If content remains territorially restricted, users will probably use geoblocking evasion tools to accomplish their objectives. If users’ evasion activities become widespread, it is possible that geoblocking evasion will be the focus of another major internet copyright battle.⁴⁶ As geoblocking evasion increases, it is much less likely to be tolerated as an activity akin to de minimis importation of physical copies across international borders. A confrontation among copyright owners, their licensees and geoblocking evasion tool providers will then become very likely.

Mass use of evasion tools by users would prove that users wish to access content available outside the territory from which they connect to the internet. It would further prove that the territoriality of IPRs deserves a thorough review. Internet users enjoyed the internet in its early days when it was borderless, and they could access content that was available everywhere on the network without territorial restrictions. However, in the borderless days of the internet, users were merely passive beneficiaries of the status quo. Today, users must assert their desire for a borderless internet affirmatively by using geoblocking evasion tools, and this user conduct should be understood as users casting their votes in favour of a revision of IPR territoriality—or at least a revision of some of the implications of IPR territoriality.

The implications of referendum results for IPR territoriality

Internet users have various reasons for which they want to access content that is not available from the territory from which they connect to the internet. Immigrants may miss programming from their country of origin or want their children to have access to the programming; the wish to access the programming may be motivated by a desire or need to access programming in a native language and/or with local content.⁴⁷ A desire to enjoy content in a different language or a different version of the content is certainly not limited to immigrants; persons travelling or temporarily stationed abroad will share the desire, and other users may also prefer such content. Some users will not want to wait for the official release of content in their own territory once that content has been released in another territory, and some users will want to access content in other countries even if the content is available in their own country if access to the content requires a payment in their own country but is available for free elsewhere.

⁴³ SAT.1, *Nutzungsbedingungen für die Nutzung des Videoportals von Sat.1*, §4.1(g), available at <http://www.sat1.de/service/nutzungsbedingungen/nutzungsbedingungen-fuer-die-nutzung-des-videoportals-von-sat-1> [Accessed October 22, 2014].

⁴⁴ For a critical view of the otherwise limited utility of the service, see Sascha Segan, “5 Reasons Aereo Isn’t a Cord Cutter’s Dream”, *PC Magazine*, March 14, 2012.

⁴⁵ Emily Steel, “After Supreme Court Ruling, Aereo’s Rivals in TV Streaming Seize Opening”, *New York Times*, June 29, 2014.

⁴⁶ e.g. “Submission in Response to the Australian Government’s Online Copyright Infringement Discussion Paper”, *BBC*, September 2014, p.3.

⁴⁷ e.g. *Football Association Premier League* [2011] E.C.R. I-9083 at [42] and [60].

Various considerations prompt internet actors to place territorial restrictions on access to content on the internet: governmental censorship,⁴⁸ safety standards, labelling requirements and security requirements are among these considerations. IPR owners and licensees partition markets to maximise their returns on their IPR-protected works. They may, for example, make content accessible only to particular market(s) for which the content is tailored. Such fine-tuned content not only uses the local language but also reflects the cultural, social and legal expectations of the target market.⁴⁹ IPR owners also partition markets to enjoy the maximum benefits of varying release schedules in different markets⁵⁰ and to negotiate the best possible licensing conditions for maximising their revenues.⁵¹

The territoriality principle that governs IPRs does not mandate the partitioning of markets for IPR-protected works. The fact that IPRs are creatures of national laws and extend only to the limits of an individual country's prescriptive jurisdiction does not automatically mean that markets with IPR-protected goods must be partitioned. Theoretically, a copyright owner can grant a single licence to his work for all countries whose respective national copyright laws protect his work and consider him to be the copyright owner and/or a person or entity who may grant a licence.⁵² However, there will certainly be situations in which the adherence to the territoriality principle, and the fact that national IPR laws differ, will cause assignments and licensing to occur in a territorially limited fashion. For example, the same person or entity might not be deemed the copyright owner of a work in all countries—or even in all countries that are parties to the major IPR treaties that have harmonised many aspects of national IPR laws. The same person might therefore not be able to assign and license the work for all countries.

What should the next step be if the “territoriality referendum” shows that users want to access IPR-protected works available in other territories to a degree that exceeds the equivalent of acceptable de minimis importation or other tolerable spillover? To the extent that access limitations are imposed solely for profit maximisation, evidence of user interest in cross-border access to works might cause the private sector to reassess its approach to the territorial partitioning of markets. For example, content providers might seek broader territorial licences to make programming in a particular language accessible to all persons who speak the language—both local residents and expatriates. In the alternative content providers might begin providing their content globally on a pay-per-view basis.⁵³

To the extent that territorial access limitations are the result of legal barriers, such as the diverse rules for initial and subsequent IPR ownership, countries may consider ways of removing the barriers or mitigating their impact. International legal harmonisation has helped remove some barriers to cross-border access. However, in an environment in which harmonisation has not led to uniform laws (either globally or for all IPRs) and in an environment in which further deeper harmonisation of national IPR laws has been progressing slowly, lowering the transaction costs associated with the provision of access to content in multiple territories is a logical step that countries can take towards improving cross-border access to content.

⁴⁸ Peter K. Yu, “Towards the Seamless Global Distribution of Cloud Content” in Anne S.Y. Cheung and Rolf H. Weber (eds), *Privacy and Legal Issues in Cloud Computing* (Cheltenham: Edward Elgar Publishing, 2015).

⁴⁹ On localised versions of music and video on-demand services, see Langus, Neven and Poukens, *Economic Analysis of the Territoriality of the Making Available Right in the EU* (2014), p.104; Peter K. Yu, “Region Codes and the Territorial Mess” (2012) 30 *Cardozo Arts & Ent. L.J.* 187, 209–216 (discussing “distribution and licensing agreements”).

⁵⁰ For example, on the “[h]eterogeneity in film release trends across EU Member States”, see Langus, Neven and Poukens, *Economic Analysis of the Territoriality of the Making Available Right in the EU* (2014), pp.56–57; Yu, “Region Codes and the Territorial Mess” (2012) 30 *Cardozo Arts & Ent. L.J.* 187, 200–206 (discussing “sequential release”); Yu, “Towards the Seamless Global Distribution” in Cheung and Weber (eds), *Privacy and Legal Issues in Cloud Computing* (2015).

⁵¹ Yu, “Region Codes and the Territorial Mess” (2012) 30 *Cardozo Arts & Ent. L.J.* 187, 206–209 (discussing “price discrimination”); Yu, “Towards the Seamless Global Distribution” in Cheung and Weber (eds), *Privacy and Legal Issues in Cloud Computing* (2015).

⁵² For example, in some countries an employer is not the owner or an owner of copyright to an employee's work, but in some of these countries (and in some instances) the employer might be the exclusive licensee, at least of the economic rights associated with the copyright. For example, Copyright Law of the People's Republic of China art.16; French Intellectual Property Code art.L. 113-9.

⁵³ For the general “celestial jukebox” idea, see Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1994), pp.28–29.

Some countries have already joined forces to lower transaction costs and facilitate cross-border access to copyright-protected works, at least in some circumstances. The 2012 European Union (EU) Orphan Works Directive requires Member States to provide for the mutual recognition of the orphan work status of a copyright-protected work. This status recognition permits access to the work in all EU countries (albeit in limited circumstances).⁵⁴ The 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, once implemented by its contracting parties, will enable cross-border access to works in formats that are accessible to persons who are visually impaired.⁵⁵ Finally, the 2014 EU Collective Rights Management Directive outlines and harmonises across the European Union the conditions for “multi-territorial licences for online rights in musical works”.⁵⁶ The conditions should “facilitat[e] the voluntary aggregation of music repertoire and rights”⁵⁷ and thus simplify multi-territorial licensing of musical works.⁵⁸

Conclusions

When internet users evade geoblocking, they are not actually voting in a referendum. No one has informed users that they have an opportunity to cast their votes. No one has explained what the referendum questions are, or what the answers to the questions might be. And no one knows what the force of the referendum result will be—whether someone (and, if so, who) will respect the results or reflect on them in any sensible manner. Most importantly, it is unclear who might report the results of the vote. Those who are in the best position to count the votes—geoblocking evasion tool providers—are likely to have little or no incentive to report the magnitude of the evasion of geoblocking.

If the geoblocking evasion data do become available and show that geoblocking evasion has become widespread among internet users, countries might want to react to the phenomenon if it implies that access to IPR-protected works is exceeding the level of acceptable de minimis importation. Countries cannot adopt laws to permit such increased spillover without making the legislation comply with the set international framework for exceptions and limitations to IPRs, such as the three-step-test for copyright.⁵⁹ Countries could attempt to increase IPR enforcement and act against geoblocking evasion providers. They could also decide to tolerate the spillover and legislate statutory licences or other remuneration schemes to allow the spillover to function within the three-step-test framework. In addition, countries could decide to facilitate greater cross-border access to IPR-protected works by further harmonising their laws internationally, thereby removing barriers to cross-border transactions involving IPRs and lowering transaction costs where barriers persist. The private sector has already responded to users’ desire for greater cross-border access by offering services that enable cross-border access to content. It is likely to continue to develop business models that monetise that desire.

The territoriality principle that governs IPRs is not responsible for all of the territorial limitations that are placed on access to IPR-protected works. Although the reasons for limiting territorial access to works sometimes arise because of differences among national laws that create the IPRs, at other times the reasons

⁵⁴ Directive 2012/28 of October 15, 2012 on certain permitted uses of orphan works [2012] OJ L299/5, art.4.

⁵⁵ Marrakesh Treaty arts 2(b), 5 and 6.

⁵⁶ Directive 2014/26 of February 26, 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72, art.23. Recital 40 states that the provisions do not concern “online services solely providing access to musical works in sheet music form”.

⁵⁷ Directive 2014/26 recital 40.

⁵⁸ To the extent that current law provides sufficient leeway for flexible interpretations, courts may contribute to the removal or mitigation of barriers by interpreting the law in a manner that facilitates the removal or mitigation of the barriers. In *Football Association Premier League*, the European Court of Justice decided in favour of extraterritorial access. However, that case concerned satellite transmission decoding devices, and it would not be a good example in the context of geoblocking evasion tools, which in this context would likely be held unlawful under the EU Conditional Access Directive. *Football Association Premier* [2011] E.C.R. I-9083 at [64]; Directive 98/84 of November 20, 1998 on the legal protection of services based on, or consisting of, conditional access [1998] OJ L320/54. See also Trimble, “The Future of Cybertravel” (2012) 22 *Fordham Intell. Prop. Media & Ent. L.J.* 567, 629–630.

⁵⁹ TRIPS Agreement art.13; “United States—Section 110(5) of the U.S. Copyright Act”, Report of the Panel, 2000, WT/DS160/R, para.6.80.

are not linked to these differences and reflect instead the economic interests and other concerns of IPR owners, including concerns that stem from non-IPR-related legal obligations. Market partitioning that leads to territorial access limitations is therefore likely to continue, at least to a certain extent.