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GEOBLOCKING, TECHNICAL STANDARDS AND THE LAW

MARKETA TRIMBLE

Introduction

In a world where countries cannot agree on a single set of laws that would apply uniformly around the globe, most national laws need to be territorially confined. Without territorial limits, laws have extraterritorial effects that often, although not always, impinge upon other countries' sovereignty and freedom to set their own laws and policies. For example, what might work as law in the United States might not work in France, and therefore French law might be different from U.S. law. Some legal rights and responsibilities exist only within countries' jurisdictional limits, and therefore persons and entities may enjoy the rights and must fulfill the responsibilities within the defined territory. For example, copyright is territorially limited; someone who owns copyright to a work in the United States under U.S. law might not be the owner of copyright to that same work in France under French law.¹ As long as the world operates on the basis of national laws, there will be a need to replicate national borders on the internet to comply with these corresponding physical limitations.² Geoblocking is being used with increasing frequency to achieve this compliance.³

The relationship between geoblocking and legal compliance has undergone significant development in recent years. Legislators, courts, and agencies previously did not view geoblocking as a reliable method of achieving legal compliance. They assumed that the internet was inherently borderless and geoblocking was invariably unreliable, and they adopted laws, rendered judgments, and issued decisions with the conviction that these would inevitably have global effects.⁴ Recently, however, legislators, courts, and agencies have begun to consider geoblocking as a viable tool for delineating the effects of their laws, judgments, and decisions, and for territorially limiting actions on the internet in general.

The idea that geoblocking could be used as a compliance tool is one part of the development of the relationship between geoblocking and legal compliance. This chapter outlines the three stages through which this development will proceed. In the first stage, geoblocking will be accepted as a tool of regulation and enforcement. While acceptance has already occurred in some countries in some contexts, this acceptance is certainly not yet general

1 Marketa Trimble, 'The Multiplicity of Copyright Laws on the Internet', *Fordham Intellectual Property, Media & Entertainment Law Journal* 25.2 (Winter, 2015): 345-346.

2 Jack L. Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of A Borderless World*, New York: Oxford University Press, 2006, at p. viii and 152.

3 On other methods of imposing borders on the internet see Marketa Trimble, 'The Future of Cybertravel: Legal Implications of the Evasion of Geolocation', *Fordham Intellectual Property, Media & Entertainment Law Journal* 22.3 (2012): 583-585.

4 Michael Geist, 'Cyberlaw 2.0', *Boston College Law Review* 44 (2003): 335-347.

or widespread. In the second stage, minimum standards for geoblocking will be promulgated because the use of geoblocking for purposes of legal compliance necessarily calls for minimum technological standards that geoblocking tools must meet in order to create virtual borders sufficiently precise and impermeable to satisfy the law. In the third stage, circumvention of geoblocking and the tools that facilitate circumvention will be targeted by countries' regulation. The three stages will likely begin at different times in different countries, industries, and contexts, but will eventually overlap and thereafter develop concurrently.



Figure 1. Geoblocking has a complicated relationship with national legal systems but it is starting to be increasingly recognized as a useful tool for legal compliance. Credit: Karen Roe (CC BY 2.0)

Geoblocking as a Tool of Regulation and Enforcement

The first stage of the development of the relationship between geoblocking and legal compliance – the process of accepting geoblocking as a tool of regulation and enforcement – is already under way. Here, three specific developments are notable: First, private party contracts are including geoblocking to secure territorial limitations on contractual obligations; second, regulators have turned to geoblocking as their preferred means of achieving compliance with territorially-limited regulatory requirements; and, third (the most remarkable development so far), the legal profession is exploring the potential for geoblocking as the *only* valid means to comply with laws that create territorially-limited rights and responsibilities. We now look at these developments in detail.

Parties enter contracts that include obligations to geoblock for various reasons, not all of which are based in legal requirements.⁵ Geoblocking may be used to customize localized services through supply of content in a particular language, culturally-sensitive content, and localized advertising. Geoblocking may be also used to enforce price differentiation in various markets. Contractually-prescribed geoblocking need not follow national borders; parties may define other, completely different territorial limits if they wish – such as only the West Coast of the United States, or the Flemish-speaking region of Belgium. Additionally, parties include geoblocking in their contracts in order to comply with obligations related to territorial limitations arising by law. For example, when a content provider owns copyright to content in only some countries and licenses that content only for some of the countries

5 On the various reasons for which parties turn to geolocation and geoblocking see Trimble, *supra* note 3, pp. 586-589.

in which it owns copyright, its license may require that the licensee geoblock users who connect from outside the particular countries for which the license is issued. For instance, when Czech Television obtains a license from BBC to the *Doc Martin* TV show, BBC might limit the license to the territory of the Czech Republic with the result that the Czech Television must use geoblocking to prevent users who connect from outside the Czech Republic from viewing the show on their platform.

The acceptance of geoblocking as a tool of regulation is another important development. For example, online gambling regulators in some jurisdictions require their licensees to use geoblocking tools and to allow users to access content only within the jurisdictions where online gambling is legal. In Germany, when doubts arose as to whether geoblocking was and is a sufficiently reliable tool to meet the territorial limitations set by law for online gambling, courts have confirmed that geoblocking is sufficiently reliable for that purpose.⁶ In the United States, a Kentucky court issued an order directing an online gambling website to geoblock users connecting from Kentucky in order for the website to comply with Kentucky law.⁷

As these court decisions suggest, geoblocking may eventually be recognized by courts as *the* indispensable compliance tool. This development is important because it could result in geoblocking being accepted as standard practice on the internet – the standard measure that every actor on the internet would be expected to employ in order to satisfy an obligation to territorially restrict access to content on the internet.

Typically, the law expects persons and entities to employ measures that are reasonable according to the law to comply with the law, including its territorial limitations. An example of an offline distribution of a book is illustrative: When a distributor obtains a license to sell copies of a book in one particular country, the law requires the distributor to take reasonable measures to comply with the territorial limitation of the license. The distributor takes a reasonable measure, for example, when it checks the address of a purchaser before it ships a copy of the book to the purchaser. The law does not require the distributor to attach a weight to every copy to make transportation of the copies more difficult, nor does the law expect the distributor to attach a radio frequency identification tag to every copy and install a surveillance system to monitor the movement of each copy and prevent copies from leaving the country. The latter two measures are technically feasible but are clearly not reasonable; a contract could in theory bind the publisher to employ such measures, provided that the publisher would agree to such unusual contractual terms. However, absent such contractual terms or absent an explicit requirement in the law, no one would read in the law – for example in copyright law in the present example – an obligation to employ such extreme measures.

6 Oberlandesgericht Münster, 13 B 775/09, 3 December 2009; Oberverwaltungsgericht Nordrhein-Westfalen, 13 B 646/10, 2 July 2010; Oberverwaltungsgericht Nordrhein-Westfalen, 13 B 676/10, 13 July 2010.

7 *Jazette Enterprises Ltd. v. Commonwealth of Kentucky*, Court of Appeals of Kentucky, 2014 WL 689044, 21 February 2014, p. 2.

Is geoblocking today more consistent with checking purchasers' addresses or is it more like attaching weights and radio frequency identification tags to books? If geoblocking is more like checking purchasers' addresses and is a reasonable measure, then any territorial limitations mandated by law should implicate the required use of geoblocking. If geoblocking is more like a weight or radio tag, it is not a reasonable measure and will not usually be required by law. The following dispute involving video content made available on the internet highlights the issue that needs to be clarified.

A dispute arose between *Spanski Enterprises, Inc.*, a Canadian television distributor, and *Telewizja Polska, S.A.*, a Polish government-owned corporation that operates several television channels in Poland. *Spanski Enterprises* obtained an exclusive license from *Telewizja Polska* to broadcast Polish television programming in North and South America; later the parties updated the license to include broadcasting on the internet. However, approximately seven years into the license, *Spanski Enterprises* objected to the fact that internet users in North and South America could access the *Telewizja Polska* website and watch content on the website for which *Spanski Enterprises* held an exclusive license.

The first lawsuit that *Spanski Enterprises* filed (in 2007) resulted in a 2009 settlement agreement in which the parties agreed to 'maintain and continue all internet geo-blocking which is currently in effect, and [...] use their best efforts to conform their respective future geo-blocking efforts to the latest widely disseminated and financially practicable geo-blocking technologies.'⁸ Then, in 2012, *Spanski Enterprises* returned to court with allegations that *Telewizja Polska* had 'turned off the geoblocking feature and thereby intentionally made available to viewers in the United States via the internet thousands of episodes of shows to which [*Spanski Enterprises*] had the exclusive distribution rights in the United States.'⁹ As of September 2015 the case was still pending before the U.S. District Court for the District of Columbia with the trial date set for December 7, 2015.¹⁰

If *Telewizja Polska* did indeed disable geoblocking (an allegation it denied), it would likely violate the settlement agreement. The more difficult question is whether *Telewizja Polska*'s alleged actions would violate U.S. copyright law – whether the use of geoblocking is a reasonable measure that the law today should expect to be employed by content providers to avoid infringing the copyrights of others. *Spanski Enterprises* claims that *Telewizja Polska* infringed copyright under U.S. law; *Telewizja Polska* contends that its 'obligation to geo-block is a contractual covenant to protect the rights actually licensed to [*Spanski Enterprises*] – it is not part of the licensed rights themselves.'¹¹

8 *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, D.D.C., 1:12-cv-00957-TSC, document 1, Complaint, 11 June 2012, p. 4.

9 *Id.*, pp. 4-5.

10 *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, D.D.C., 1:12-cv-00957-TSC, document 37, Amended Pretrial Order, 20 August 2015, p. 1.

11 *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, D.D.C., 1:12-cv-00957-TSC, document 29, Defendant's Consolidated Memorandum of Points and Authorities, 27 February 2015, p. 4. For the purposes of the present discussion we leave aside the question whether the agreement's provision on geoblocking was a covenant or a condition.

Telewizja Polska argues that an obligation to geoblock is a contractual covenant. If *Spanski Enterprises* can prove its allegations, a breach of a contractual covenant would result only in monetary remedies for a violation of the agreement; a finding of copyright infringement would presumably be more costly for *Telewizja Polska*. The outcome of the case could be of general importance for the future of geoblocking because it should clarify whether geoblocking is *the* reasonable measure – *the* standard means that internet actors must employ to meet territorial limitations on rights and responsibilities imposed by law.

Minimum Standards for Geoblocking

Minimum standards for geoblocking – the hallmark of the second stage of the development in the relationship between geoblocking and legal compliance – have been the subject of debate. A range of geoblocking tools exists, and more advanced tools are constantly being developed.¹² The difficulty, of course, is setting minimal legal standards with sufficient precision, while still allowing improvements in current tools and the development of new tools. To facilitate and propel improvements, minimum standards must not include specific technical details that would entrench old technology; to safeguard the potential to develop new technology, minimum standards should follow the principle of technological neutrality.

As mentioned earlier, minimum standards for geoblocking exist in contracts between parties that have agreed to the use of geoblocking. For example, the language of the 2009 settlement agreement between *Spanski Enterprises* and *Telewizja Polska* sets a minimum standard for geoblocking; the parties agreed to 'the latest widely disseminated and financially practicable geo-blocking technologies.'¹³ In a licensing agreement concluded between Sony and Netflix, the parties agreed on very general language according to which Netflix would 'utilize an industry standard geolocation service'¹⁴ and language that specified that the geolocation service employed must, for example, 'provide geographic location information based on DNS registrations, WHOIS databases and Internet subnet mapping' and 'provide geolocation bypass detection technology designed to detect IP addresses located in the Territory, but being used by Registered Users outside the Territory.'¹⁵ For the purposes of legal compliance, courts and regulators will play an important role in defining the minimum standards of geoblocking.

The general understanding is that geoblocking cannot be perfect; geoblocking tools are not 100 percent reliable, particularly given that users have access to readily available tools to

12 James A. Muir and Paul C. Van Oorschot, 'Internet Geolocation: Evasion and Counterevasion', *ACM Computing Surveys* 4 (December 2009).

13 *Supra* note 8.

14 Michael Geist, 'Nobody's Perfect: Leaked Contract Reveals Sony Requires Netflix to Geo-Block But Acknowledges Technology is Imperfect', Michael Geist's blog, 17 April 2015, <http://www.michaelgeist.ca/2015/04/nobodys-perfect-leaked-contract-reveals-sony-requires-netflix-to-geo-block-but-acknowledges-technology-is-imperfect/>.

15 *Id.*

circumvent geoblocking.¹⁶ For example, users can use VPNs, such as Chameleon, simpler tools, such as MyExpatNetwork, or more complicated tools, such as Tor, to bypass geoblocking and access content on the internet that is otherwise inaccessible to them because of their location. Not only might it be unrealistic to expect perfect geoblocking, it might also be illogical to require perfect geoblocking for purposes of legal compliance. The offline physical borders on which legal compliance relies are not impermeable, and the law accepts some cross-border spillover. For example, countries recognize an intellectual property law exception for small quantities of materials protected by intellectual property rights that travelers carry in their luggage for personal use.¹⁷ Similarly, some leakage through national borders on the internet should be acceptable. The question is what an acceptable volume of leakage is; the acceptable volume may vary depending on the area of law and regulation. In other words, when does VPN or proxy use become too much?

The fact that geoblocking circumvention tools exist does not mean that geoblocking is incapable of meeting some minimum standards of territorial restrictions sufficient for legal compliance. The approaches that courts have taken to evaluate the effectiveness of technological protection measures designed to protect access to copyrighted works is instructive, given that, in the case of technological protection measures, tools also exist that enable circumvention of these measures. For example, the Regional Court of Munich, in a discussion of the secondary liability of an online journal provider for providing a link to a circumvention tool, noted that the ineffectiveness of a technological measure cannot be concluded from the existence of a circumvention tool; it might be sufficient for the measure to prevent *average* users from accessing protected content.¹⁸ The U.S. District Court for the Northern District of California rejected an argument proposing that a measure not be considered effective if tools to circumvent the measure are 'widely available on the Internet.'¹⁹ The court said that the argument is 'equivalent to a claim that, since it is easy to find skeleton keys on the black market, a deadbolt is not an effective lock to a door.'²⁰

Regulating the Circumvention of Geoblocking

In the third stage of the process, the law will start to respond to the easy availability of VPNs, proxies and other circumvention tools. Their widespread use, as shown throughout this book, suggests that ongoing evasions can no longer be considered negligible spillover.²¹

16 Dan Jerker B. Svantesson, 'Geo-Location Technologies and Other Means of Placing Borders on the Borderless Internet', *The John Marshall Journal of Information Technology & Privacy Law* 23 (2004): 111 ff.

17 Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO, 1994, Article 60.

18 Oberlandesgericht München I, 21 O 6742/07, 14 November 2007.

19 *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F.Supp.2d 1085, 1095 (N.D.Ca. 2004).

20 *Id.*

21 For example, Liana B. Baker and Yinka Adegoke, 'Olympics Fans Find Ways to Circumvent NBC's Online Control', *Reuters*, 31 July 2012, <http://www.reuters.com/article/2012/07/31/us-olympics-tech-workaround-idUSBRE86U02R20120731>; 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*, 25 January 2014, <http://www.businessinsider.com/hola-tv-watch-olympics-vpn-blocker-netflix-world-2014-1>.

Some content providers now include provisions in their terms of service that prohibit internet users from evading geoblocking. For example, German television station *Sat. 1* in its terms of service for the use of its online video portal makes it a violation of the terms of service for users to 'alter, evade or otherwise disregard' the technical measures that the station uses to territorially limit the access to content on the portal.²² If a user does use a VPN or other tool to circumvent geoblocking, the user violates this provision of the terms of service and is in breach of his contract with *Sat. 1*, thus exposing himself to a response by *Sat. 1*, who may terminate the contract with the user, or, although unlikely, file suit against the user for violation of the contract.

Absent a contractual provision prohibiting circumvention, the status of geoblocking evasion under the law of various countries is currently unclear.²³ Specific legislation on the evasion of geoblocking does not exist; whether the evasion of geoblocking is covered by copyright law provisions on technological protection measures or retransmission has been disputed,²⁴ and anti-computer-hacking laws may be applicable in some countries, to a limited degree.²⁵ In some countries the providers of geoblocking circumvention tools could be held liable for facilitating access to restricted content.²⁶ A dispute that arose in New Zealand between the media companies SKY, TVNZ, Lightbox, and MediaWorks on one side and ByPass Network Services on the other side seemed to have provided impetus for a clarification – or at least a fruitful discussion – of the status of circumvention of geoblocking in New Zealand.²⁷ The dispute over the Bypass *GlobalMode* product – a 'geo-unblocking solution' for ISPs – was settled in June 2015 and therefore provided no guidance on the status of the evasion of geoblocking in New Zealand; nevertheless, it is notable that the practical result was the promise to withdraw the geoblocking circumvention tool from the New Zealand market as of 1 September 2015.²⁸

The development of approaches to geoblocking circumvention tools by legislators, courts, and agencies has been complicated by the fact that many existing circumvention tools were developed for and still serve another purpose – anonymization. Safeguarding privacy, protecting personal data, and securing the freedom of speech and the right to access information are among the concerns that suggest that a simple proscription against geoblocking circumvention tools might be undesirable.

22 Nutzungsbedingungen für die Nutzung des Videoportals von Sat.1, § 4.1(g), <http://www.sat1.de/service/nutzungsbedingungen/nutzungsbedingungen-fuer-die-nutzung-des-videoportals-von-sat-1>.

23 Trimble, *supra* note 3.

24 *Id.*, pp. 612-620 and 630-634; Christopher Hilliard, 'Evaluating the Legitimacy of Geo-Location Circumvention in the Context of Technical Protection Measures', *Queen Mary Journal of Intellectual Property* 5(2) (2015): 157-182.

25 Trimble, *supra* note 3, pp. 625-627 and 630.

26 *Id.*, pp. 628-630.

27 Jeremy Kirk, 'Geoblocking Question Unresolved After New Zealand Lawsuit Ends', PCWorld, 23 June 2015, <http://www.pcworld.com/article/2939972/geoblocking-question-unresolved-after-new-zealand-lawsuit-ends.html>.

28 *Supra* note 27.

Conclusion

In discussing the three stages in the development of the relationship between geoblocking and legal compliance this chapter presumes that geoblocking will be more pervasive and eventually become the only means to achieve compliance with territorial limitations of the law. The presumption is rooted in the conviction that legal compliance on the internet cannot be achieved without replicating national borders online. A single global law that would eliminate the need for national borders is unlikely to develop anytime soon, and the alternative – the harmonization of national laws – is unlikely to result in the uniformity necessary to make national borders obsolete for legal purposes. Because differences among national laws persist, a need for borders on the internet, and therefore for geoblocking, seems unavoidable.

There is, of course, much opposition to geoblocking. Users complain about the inaccessibility of geoblocked content, and their increasing use of geoblocking circumvention tools evidences their displeasure with territorial limitations. In May 2015 the European Commission criticized the use of geoblocking in the European Union in 'A Digital Single Market Strategy for Europe – Analysis and Evidence'²⁹ and launched a related inquiry into the e-commerce sector.³⁰ In the document the Commission referred to geoblocking as one of the 'barriers that hold back cross-border e-commerce.'³¹ A preference for unencumbered cross-border access to content on the internet is also apparent from the draft 'Trade in Services Agreement'³² that is being negotiated by a group of countries – members of the World Trade Organization. However, all official initiatives throughout the world concerning cross-border access on the internet recognize that there are areas of law – such as intellectual property law and gambling law – in which countries will continue to have legitimate grounds for imposing restrictions on the cross-border flows of goods and services.³³ Although some stakeholders desire a liberalization of cross-border access to internet content, the fact cannot be ignored that countries have major differences in some areas of law, and therefore good reasons to maintain control of content flows.

Business models that respond to consumer demand for cross-border access will continue to emerge, and countries can facilitate the development of new business models by providing favorable legislative and regulatory environments. The 2014 European Union's Collective Rights Management Directive³⁴ is one effort to improve the environment for businesses

29 A Digital Single Market Strategy for Europe – Analysis and Evidence, European Commission, SWD(2015) 100 final, 6 May 2015, pp. 21-25.

30 Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003.

31 *Supra* note 30, p. 3.

32 Draft Trade in Services Agreement (TiSA), Annex on Electronic Commerce, 16 September 2013. See also Marketa Trimble, Local Hosting and the Draft "Trade in Services Agreement", Technology & Marketing Law Blog, 22 September 2015, <http://blog.ericgoldman.org/archives/2015/09/local-hosting-and-the-draft-trade-in-services-agreement-guest-blog-post.html>.

33 For example General Agreement on Trade in Services, Article XIV(a); North American Free Trade Agreement, Chapter 21; Treaty on the Functioning of the European Union, Article 36.

34 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical

that seek to provide cross-border online access to music, at least within the borders of the European Union. Because some geoblocking is required by law, contracts will not be able to eliminate geoblocking entirely; however, contracting parties can eliminate some geoblocking, and limited geoblocking evasion could mitigate some of the effects of geoblocking where the use of geoblocking exceeds what is required by law. For example, a system of 'digital passports' could facilitate access to users who travel abroad.³⁵

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35 Trimble, *supra* note 3, p. 639.

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