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# Copyright and Geoblocking: The Consequences of Eliminating Geoblocking

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# ARTICLE

## COPYRIGHT AND GEOBLOCKING: THE CONSEQUENCES OF ELIMINATING GEOBLOCKING

MARKETA TRIMBLE\*

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## INTRODUCTION

Geoblocking<sup>1</sup> has become a common companion of copyrighted content on the internet.<sup>2</sup> The practice of geoblocking involves internet actors who provide content such as motion pictures, e-books, and photographs and then block or enable users' access to such content according to a user's physical location.<sup>3</sup> A variety of internet actors use geoblocking, including streaming services that can make streamed content available or unavailable according to the location of their users.<sup>4</sup> There are various reasons for geographical restrictions on access to content; copyright issues are not the only reasons, but territorial limitations associated with copyright are significant – and sometimes the primary – reasons for implementing geoblocking.<sup>5</sup> This article reviews the current relationship between copyright and geoblocking, considers whether geoblocking is an inevitable part of the future of copyrighted content on the internet, and suggests some possible consequences that might result from eliminating geoblocking.

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<sup>1</sup> For a detailed definition of “geoblocking” and a definition of the related term “geolocation” see, e.g., Marketa Trimble, *Geoblocking and “Legitimate Trade”* in *INTELLECTUAL PROPERTY AND OBSTACLES TO LEGITIMATE TRADE* 53 (Christopher Heath, Anselm Kamperman Sanders & Anke Moerland eds., Wolters Kluwer, 2018).

This article does not discuss measures implemented by internet service providers, which are often implemented pursuant to an order from a court or agency, to block access to webpages or websites that infringe intellectual property rights. See, e.g., Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, 2014 EUR-Lex CELEX LEXIS 192 (Mar. 27, 2014); *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 S.C.R. 824 (Can.).

<sup>2</sup> See, e.g., Commonwealth, *Intellectual Property Arrangements*, Productivity Commission Inquiry Report No 78, (Sept. 23, 2016) 11, available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf> [<https://perma.cc/6N9A-6U3X>] (“The use of geoblocking technology is pervasive, and frequently results in Australian consumers being offered a lower level of digital service (such as a more limited music or TV streaming catalogue) at a higher price than in overseas markets.”).

<sup>3</sup> Other terms that are used are “geofencing” and “access-blocking technologies.” See, e.g., *Plixer Intl. v. Scrutinizer GmbH*, 905 F.3d 1, 9-10 (1st Cir. 2018).

<sup>4</sup> Max Haot, *Livestream’s Geo-Blocking for Enterprise Accounts*, VIMEO (last visited Nov. 19, 2018), <https://livestream.com/blog/livestream-geo-blocking> [<https://perma.cc/JHW2-5YYE>].

<sup>5</sup> *Combating Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and Other Forms of Geo-Discrimination*, at 17-18, 30, European Parliament IP/A/IMCO/2016-06 (Sept. 2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587315/IPOL\\_STU\(2016\)5873\\_15\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587315/IPOL_STU(2016)5873_15_EN.pdf) [<https://perma.cc/QM9S-JN9K>] (“[T]he online provision of digital copyrighted works is one of the largest and most promising ecommerce segment in the EU, as well as the most geo-blocked and fragmented one...”).

Internet actors utilize geoblocking for various purposes.<sup>6</sup> Geoblocking is a tool for market partitioning;<sup>7</sup> it enables internet actors to differentiate among markets and price discriminate based on a user's location.<sup>8</sup> Actors may divide markets because of differences in legal, technical, or safety requirements that apply in different jurisdictions, or actors may partition markets to maximize the benefits of content localization, such as building a localized brand.<sup>9</sup> Price discrimination in different markets makes it possible to adjust prices to the supply and demand, and purchasing power of different locations and thereby maximize actors' profits. Additionally, geoblocking may be employed for other purposes such as security.<sup>10</sup>

Geoblocking is unpopular with internet users; users are generally not content on seeing a screen message stating that certain "content is not available in [the user's] location." Copyright is frequently blamed for geoblocking because geoblocking for copyright compliance purposes is the kind of geoblocking that is typically visible to users.<sup>11</sup> For example, clicking on a link to an episode of a television show will frequently display a page that announces to users that the episode is not available in their location because of copyright limitations.

In many instances undisclosed geoblocking is arguably more harmful to the interests of users than visible geoblocking. Undisclosed geoblocking that occurs without any notification to users perpetuates users' ignorance of the geoblocking itself and its potentially undesirable consequences, such as users being charged higher prices because of their particular physical location.<sup>12</sup> Yet, visible

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<sup>6</sup> "Our results show that geoblocking is a widespread phenomenon, present in most countries globally." Allison McDonald et al., *403 Forbidden: A Global View of CDN Geoblocking*, ACM IMC, 219 (Nov. 2018), [https://ensa.fi/papers/403forbidden\\_imc18.pdf](https://ensa.fi/papers/403forbidden_imc18.pdf) [<https://perma.cc/VYC4-E8K4>].

<sup>7</sup> See RAMON LOBATO, NETFLIX NATIONS: THE GEOGRAPHY OF DIGITAL DISTRIBUTION 68 (2018) (on the "unique spatial patterns" of internet-distributed services).

<sup>8</sup> See *infra* Part I (discussing the prohibition of geoblocking in the EU).

<sup>9</sup> See, e.g., *Lever Brothers Co. v. U.S.*, 981 F.2d 1330 (D.C. Cir. 1993).

<sup>10</sup> An internet actor may block a request from a user to access content from certain locations (or from outside of certain locations) if the locations are deemed to present a security risk to the network or the internet actor's operations, such as its online banking services. See Nicolas Seidler & Andrei Rabachevsky, *Internet Society Perspectives on Internet Content Blocking: An Overview*, INTERNET SOCIETY (Mar. 2017), <https://www.internetsociety.org/wp-content/uploads/2017/03/ContentBlockingOverview.pdf> [<https://perma.cc/4MTL-768C>].

<sup>11</sup> Since the EU General Data Protection Regulation entered into force, geoblocking that is visible to users connecting from the EU is also being justified by EU data protection rules. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, O.J. (L 119) 1 [hereinafter General Data Protection Regulation].

<sup>12</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 6, COM (2015) 192 final (May 6, 2015).

geoblocking receives the most attention from users, and because visible geoblocking is often justified by copyright limitations, copyright takes the blame for much of geoblocking.

It might seem that geoblocking used to protect copyright inevitably results from the principle of territoriality that governs copyright law. Copyright stems from national law and rights associated with copyright extend only to the limits of the territorial scope of each country's prescriptive jurisdiction.<sup>13</sup> Even though copyright in a given work arises automatically in most countries of the world,<sup>14</sup> differences in national laws may result in copyright being owned, at least initially, by different owners in different countries. Some works might not enjoy copyright protection in some countries or under identical conditions; different rules for originality, fixation, rights, exceptions and limitations to rights, and collective management of copyright may result in a global patchwork of varying legal conditions for the same work. Therefore, it may be necessary for internet actors to utilize geoblocking so that the actors comply with different legal rules in different jurisdictions.

Nevertheless, the use of geoblocking is not inevitable for copyright-protected works; the global legal patchwork does not automatically exist for all copyright-protected works. For example, many works benefit from legal circumstances that are identical or substantially similar in most countries either from the moment copyright to the works vests or copyright to the works is assigned or licensed. In cases of such works, compliance with most of the national copyright laws does not require the use of geoblocking.<sup>15</sup> But even if compliance with different national copyright laws does not require geoblocking, internet actors may still choose to partition markets to protect their different interests, such as localized versions of content, maximization of revenues through staggered content release, and exclusive licensing to local content providers.<sup>16</sup>

Since geoblocking is unpopular and copyright is often blamed for geoblocking, the question arises whether geoblocking, as applied to copyright-protected content, could be eliminated. This question was recently debated extensively in the European Union when the European Commission proposed a regulation to eliminate geoblocking within the EU internal market.<sup>17</sup> The

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<sup>13</sup> PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 99 (2013).

<sup>14</sup> See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 102 Stat. 2853, 1161 U.N.T.S. 3 (as revised at Paris July 4, 1971 and amended Sept. 28, 1979).

<sup>15</sup> Additionally, not all jurisdictions require that geoblocking be used to territorially limit activities on the internet; other means of territorial partitioning might be acceptable. See discussion *infra* Part II.

<sup>16</sup> See Peter Yu, *Region Codes and the Territorial Mess*, 30 CARDOZO ARTS & ENT. L. J. 187, 200-213 (2012) (discussing staggered or sequential release, price discrimination, and distribution and licensing arrangements in the motion picture industry).

<sup>17</sup> *Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC)*

regulation was eventually enacted, but with important exceptions that permit geoblocking to be used for compliance with the laws of the EU and the laws of the EU member states, including for copyright law compliance,<sup>18</sup> and for any “services the main feature of which is the provision of access to and use of copyright protected works.”<sup>19</sup> The regulation provides for review in the near future regarding the feasibility of the elimination of geoblocking for copyright-protected content.<sup>20</sup> The requirement of this review, together with other developments in the EU, suggests that discussions will continue regarding the elimination of geoblocking for copyright-protected content.<sup>21</sup>

To date no proposals have been made to eliminate geoblocking globally; however, this article considers what the consequences of a global or large-scale territorial elimination would be. Some consequences might arise even within the limited area of the EU, while other consequences might be more likely to arise upon an elimination of geoblocking in countries that have less in common with one another than the EU member states have among themselves. This article aims to show that while the idea of eliminating geoblocking is popular and might appear to be pro-competitive, the elimination of geoblocking could also generate negative, and even anti-competitive, effects.

The first part of the article reviews the role attributed to geoblocking in U.S. copyright law and law of personal jurisdiction. The second part addresses the situation in the EU, and discusses recent EU legislative developments concerning geoblocking. The third part analyzes the implications for copyright if geoblocking were eliminated either globally or in a group of countries. Finally, this article contemplates the adjustments to law and business practices that would likely result from such an elimination.<sup>22</sup>

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*No 2006/2004 and Directive 2009/22/EC*, COM (2016) 289 final (May 25, 2016) [hereinafter *Proposal for the EU Anti-Geoblocking Regulation*].

<sup>18</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, arts. 3(3), 4(5), 2018 O.J. (L 60) 1 [hereinafter *EU Anti-Geoblocking Regulation*].

<sup>19</sup> *Id.* art. 4(1)(b) (excluding “services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form.”).

<sup>20</sup> *Id.* art. 9, Statement by the Commission at 15.

<sup>21</sup> See *infra* Part I.

<sup>22</sup> This article does not discuss the degree of reliability and effectiveness of geoblocking and the circumvention of geoblocking. For a discussion of these topics see, e.g., Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567 (2012).

## I. COPYRIGHT AND GEOBLOCKING IN THE UNITED STATES

Internet actors sometimes use geoblocking purely for voluntary market partitioning;<sup>23</sup> other times, they use geoblocking in response to legal requirements or implications. The places where internet actors are deemed to act or the places where their acts are deemed to have effects may have important legal consequences.<sup>24</sup> First, where an internet actor acts or where the actor's acts have effects may determine or affect personal jurisdiction over the actor;<sup>25</sup> certain rules of personal jurisdiction, which define the scope of a country's adjudicatory power, refer to the internet actor's activity within the country.<sup>26</sup> Second, the localization of an internet actor's acts and the effects of those acts may determine whether a country's substantive law applies to the acts; the territorial scope of national laws,<sup>27</sup> combined with national choice-of-law rules,<sup>28</sup> territorially delineate a country's regulatory power. The fact that an act occurs within the territorial scope or has effects within the territorial scope will usually determine whether the country's law applies. Finally, the location of the internet actor's acts and of the effects of those acts can have consequences pursuant to contract if the location triggers rights, obligations, and/or conditions under a contract.<sup>29</sup>

The internet has facilitated global activity and has therefore created the possibility that an internet actor's acts and/or their effects could be considered territorially unlimited – occurring everywhere a user might access the internet. In the offline world, the location where an infringer distributed a copyright-infringing recording embedded in a phonogram would be detectable, but on the

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<sup>23</sup> See Trimble, *supra* note 1, at 10 (discussing voluntary online territorial restrictions).

<sup>24</sup> The location of an internet actor's acts may be localized in different places, depending on the rules of localization and the approaches to localization taken.

<sup>25</sup> See, e.g., *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 712-714 (4th Cir. 2002); *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 726-30 (2d Cir. 2012).

<sup>26</sup> Typically, the place of a tortious activity determines or affects specific jurisdiction over a tortfeasor. See, e.g., N.Y. C.P.L.R. §302(a) (McKinney 2008); Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Brussels I Regulation (recast)"), art. 7(2), 2012 O.J. (L 351) 1.

<sup>27</sup> See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016) (discussing the two-step framework of analysis that is used for territorial scope in the application of U.S. statutes).

<sup>28</sup> See, e.g., *Itar-Tass Russian News Agency v. Russian Kurier Inc.*, 153 F.3d 82, 84, 88-91 (2d Cir. 1998) (explaining choice-of-law rules in intellectual property cases).

<sup>29</sup> See, e.g., Paul Edward Geller, *International Intellectual Property, Conflict of Laws, and Internet Remedies*, 10 J. INTELL. PROP. RIGHTS 133 (2005) (reviewing ambiguities in the process of localizing acts of IP rights infringement); Marketa Trimble, *The Territorial Discrepancy between Intellectual Property Rights Infringement Claims and Remedies*, 23 LEWIS & CLARK L. REV. 501, 507-511 (2019); see also Michael Pryles, *The Time Factor in Private International Law*, 6 MONASH U. L. REV. 225, 239-40 (1980) (discussing the temporal aspect of the ambiguity of localization).

internet, in the absence of physical borders, an infringer's act of making a recording available as a downloadable file could be considered a global act.

Courts have taken the view that exposing internet actors to global liability is unreasonable and unjust, as most actors do not have the resources necessary to ensure the legality of their actions in all countries with internet connections.<sup>30</sup> Instead of creating an unworkable environment in which potential liability would hinder or completely inhibit internet activities, courts have interpreted the territorial scope of internet actors' acts in a territorially limited manner.<sup>31</sup> Absent technological means that could ensure that acts on the internet occur in only some jurisdictions, courts have assessed the territorial reach of acts by considering factors such as the degree of interactivity of a website,<sup>32</sup> the language used on a website, the top-level domain of a website, the currency accepted, and the advertised delivery locations for products and services.

Geoblocking, which is a technological means of placing territorial limits on acts on the internet, has not been uniformly embraced by courts. Courts have questioned the accuracy of geoblocking, not least because geoblocking can be circumvented. In the past, some courts might have viewed geoblocking as a costly technology that would be unfair to impose on internet actors because it would be an unreasonable hurdle to internet activities. But, this view might be less true today, and at least some courts have taken note of the advances in geoblocking technologies, which have improved and become less costly. Although some courts continue to believe that the internet is borderless and

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<sup>30</sup> By itself, accessibility is typically not sufficient as a ground of personal jurisdiction. *See, e.g.,* Pablo Star Ltd. v. Welsh Government, 170 F. Supp. 3d 597, 607 (S.D.N.Y. 2016); A Corp. v. All American Plumbing, Inc., 812 F.3d 54, 61 (1st Cir. 2016); GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1349-50 (D.C. Cir. 2000); *see* discussion of EU case law *infra* Part II.

<sup>31</sup> *See, e.g.,* Spanski Enterprises, Inc. v. Telewizja Polska, S.A., 883 F.3d 904, 915-16 (D.C. Cir. 2018).

<sup>32</sup> *See, e.g.,* Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999); Mink v. AAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997). As of the publishing of this article, the once famous *Zippo* test, which relied on degree of interactivity, is mostly outdated. *See* *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997).



activities on the internet cannot be effectively delimited territorially,<sup>33</sup> other courts have shown greater confidence in geoblocking technologies.<sup>34</sup>

Geoblocking technologies are becoming more effective, less costly, and are standard features of internet operations.<sup>35</sup> Geolocation – the determination of a user's location, which is the first step in geoblocking – is becoming a common practice as internet actors seek to collect data about users and benefit from localized advertising. Also, legislatures' increased emphasis on regulation based on the point of consumption<sup>36</sup> has contributed to a greater use of geolocation. Under regulatory schemes based on the point of consumption, internet actors detect the location of users in order to determine what jurisdiction's laws and regulations apply to the actors' activities.<sup>37</sup> Courts in the U.S. commonly rely on geolocation data when cases are filed against John Does and plaintiffs base their requests for jurisdictional discovery on geolocation information.<sup>38</sup>

In personal jurisdiction inquiries, plaintiffs have urged courts to adopt the view that defendants have acted or their acts have had effects within a jurisdiction if the defendants failed to implement geoblocking and prevent users who connect from that jurisdiction from accessing defendants' content. However, courts have so far refused to accept a lack of geoblocking alone as

<sup>33</sup> *E.g.*, *Fox Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1011 (9th Cir. 2017) (“[A]n Internet-based service has no geographic boundary . . .”); *see also*, *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 SCR 824, 827 (Can.) (a Canadian case stating “The Internet has no borders – its natural habitat is global.”); *Case C-194/16, Bolagsupplysningen OÜ v. Svensk Handel AB*, 2017 EUR-Lex CELEX LEXIS 766 ¶ 48 (Oct. 17, 2017) (“[I]n the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal.”); *but see* Dan Jerker B. Svantesson, *European Union Claims of Jurisdiction over the Internet*, 9 J. INTEL. PROP. INFO. TECH. & ELEC. COM. L. 113, 122 (2018) (criticizing the CJEU's view in *Bolagsupplysningen*); DAN JERKER B. SVANTESSON, *PRIVATE INTERNATIONAL LAW AND THE INTERNET* 546-48 (3d ed. 2016).

<sup>34</sup> *Spanski Enters. v. Telewizja Polska S.A.*, 222 F. Supp. 3d 95, 102 (D.D.C. 2016); *Plixer Int'l v. Scrutinizer GmbH*, 905 F.3d 1, 8-9 (1st Cir. 2018).

<sup>35</sup> Marketa Trimble, *The Role of Geoblocking in the Internet Legal Landscape*, 23 IDP: REVISTA D'INTERNET, DRET I POLÍTICA 45, 49 (2016) (Spain).

<sup>36</sup> *See* Marketa Trimble, *Extraterritorial Enforcement of National Laws in Connection with Online Commercial Activity*, RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 261, 266-70 (John A. Rothchild ed., Edward Elgar Publ'g, 2016) (discussing regulation that is based on point of consumption as opposed to regulation that is based on point of source).

<sup>37</sup> *E.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2095, 2097-98 (2018) (concerning an internet seller's duty to collect and remit sales tax); General Data Protection Regulation, *supra* note 11, art. 3, at 32-33 (imposing obligations on controllers and processors of personal data even if they are located outside the EU if the data are of EU data subjects); *see also*, *e.g.*, *Plixer*, 905 F.3d at 8-9.

<sup>38</sup> Matthew Sag & Jake Haskell, *Defense against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 589-90, 589 nn.75-78 (2018).

evidence that a defendant targeted a jurisdiction.<sup>39</sup> In *Triple Up Ltd. v. Youku Tudou, Inc.*,<sup>40</sup> the plaintiff argued that the defendant's lack of geoblocking should have been interpreted as a purposeful act directed at the forum. The judge in the case rejected this "most novel argument,"<sup>41</sup> but found "unobjectionable" the proposition that "a website's affirmative geoblocking efforts should weigh *against* the exercise of personal jurisdiction,"<sup>42</sup> while still concluding that a defendant's failure to geoblock should not equate to purposeful availment.<sup>43</sup>

The fact that a defendant is geoblocking users who are attempting to access content from a jurisdiction may shield the defendant from personal jurisdiction in that jurisdiction. This was the result in *Carsey-Werner Company, LLC v. BBC*,<sup>44</sup> where the court was not persuaded by plaintiff's allegations that the defendant knew that BBC users were circumventing the defendant's geoblocking. In *Carsey-Werner*, the BBC users accessed content on the BBC's website by circumventing the BBC's geoblocking allegedly with the BBC's knowledge that users had frequently done so. The judge in the case agreed with the rule formulated in *Triple Up* and refused to find specific jurisdiction over the BBC; the fact that the BBC did implement geoblocking shielded the BBC from personal jurisdiction.

The reliability of geoblocking was attacked by the defendant in *Plixer Intl. v. Scrutinizer GmbH*.<sup>45</sup> The German defendant did not specifically target U.S. customers nor did the defendant geoblock users connecting from the U.S.; rather, its website was accessible worldwide and served customers in the U.S.<sup>46</sup> The defendant urged the court to treat the lack of geoblocking as irrelevant for the jurisdictional inquiry, pointing out that the technology was "imperfect" and "developing."<sup>47</sup>

The U.S. Court of Appeals for the First Circuit found *Scrutinizer*'s arguments concerning geoblocking "misplaced based on the record before [the court]."<sup>48</sup> The court concluded that while the use of geoblocking was not necessary to limit

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<sup>39</sup> *Plixer*, 905 F.3d at 7 ("The Supreme Court has not definitively answered how a defendant's online activities translate into contacts for purposes of the minimum contacts analysis.").

<sup>40</sup> *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 24-25 (D.D.C. 2017).

<sup>41</sup> *Id.* at 24.

<sup>42</sup> *Id.* at 25.

<sup>43</sup> *Id.*

<sup>44</sup> *Carsey-Werner Co., LLC v. BBC*, No. CV 17-8041 PA (ASx), 2018 U.S. Dist. LEXIS 33862, at \*11-21 (C.D. Cal. Feb. 23, 2018).

<sup>45</sup> *Plixer*, 905 F.3d at 9. The defendant used on the internet, in connection with the defendant's own services, a mark that was identical to the plaintiff's federally-registered trademark. *Id.* at 5.

<sup>46</sup> *Id.* The defendant drew income from the U.S. that the court described as "not insubstantial." *Id.* at 10.

<sup>47</sup> *Id.* at 9.

<sup>48</sup> *Id.*

the territorial scope of activities on the internet for jurisdictional purposes, the use of geoblocking “is surely relevant to [a defendant’s] intent not to serve the United States.”<sup>49</sup> The court considered the defendant’s failure to geoblock as a factor that, together with the defendant’s substantial U.S. business, evidenced the defendant’s intent to avail itself of the U.S. market.<sup>50</sup> However, the failure to geoblock alone would not have sufficed to find personal jurisdiction over the defendant.

Although the First Circuit’s conclusion does not elevate geoblocking to a status at which a lack of geoblocking alone would trigger personal jurisdiction, internet actors must avoid other factors that could cause a court to find personal jurisdiction when geoblocking is absent. Actors may be able to protect themselves from having other factors lead to a finding of personal jurisdiction if the actors employ geoblocking.

The U.S. Copyright Act imposes no obligation to use geoblocking as *the* means of territorial delineation. The territorial limits of the Act<sup>51</sup> imply that some means must be employed to comply with its territorial limits but the Act does not mandate that the means specifically be geoblocking. *Spanski Enterprises v. Telewizja Polska* seemed to offer an opportunity to clarify the role of geoblocking in copyright, but because a prior settlement agreement included the obligation to geoblock, the court did not need to decide whether copyright law alone, absent a contractual obligation, implies a requirement to geoblock.

The defendant that was accused of infringement in *Spanski* was the copyright owner Telewizja Polska – “TV Polska,” an entity who had no right to publicly perform its content in the U.S. because it had granted an exclusive license to Spanski to broadcast TV Polska’s content in North and South America.<sup>52</sup> At one point, the parties concluded a settlement agreement in which TV Polska agreed to geoblock users connecting from the jurisdictions covered by the exclusive license.<sup>53</sup> However, the agreement was not the end of the dispute; after Spanski’s attorneys were able to access TV Polska’s content from the U.S. (which should not have been possible under the settlement agreement), Spanski filed a lawsuit against TV Polska, alleging that TV Polska did not fulfill its obligation to geoblock and had thereby infringed Spanski’s public performance rights.<sup>54</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* Note that the defendant in Plixer knew the locations of its users; its privacy policy specifically referred to user location as one of the kinds of data that the defendant stored. Exhibit 4 to the *Declaration of James G. Goggin in Support of Opposition to Motion to Dismiss* at 3, Plixer Int’l. v. Scrutinizer GmbH, 293 F. Supp. 3d 232 (D. Me. 2017) (2:16-cv-00578), ECF No. 15-4.

<sup>51</sup> See *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 248 (2010) (elaborating on the presumption against extraterritoriality); see *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

<sup>52</sup> *Spanski Enters. v. Telewizja Polska S.A.*, 883 F.3d 904, 907 (D.C. Cir. 2018).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

The U.S. District Court for the District of Columbia decided in *Spanski's* favor. Judge Chutkan found that TV Polska infringed the copyright to which *Spanski* had an exclusive license because the content was made accessible on TV Polska's website to users connecting from the U.S., thus infringing the public performance right exclusively licensed to *Spanski*.<sup>55</sup> Because the court determined that TV Polska acted intentionally, TV Polska was ordered to pay to *Spanski* enhanced statutory damages in the amount of \$3,060,000.<sup>56</sup>

In the *Spanski* case, geoblocking played a role in the determination of intent; it was because of the failure to geoblock properly that the judge found intent on the part of TV Polska to make the content available in the U.S.<sup>57</sup> Judge Chutkan noted that the infringement was "volitional and intentional" because of actions by TV Polska's employees<sup>58</sup> and "not due to a failure of its geoblocking system or an effort at circumventing geoblocking by [*Spanski*]."<sup>59</sup> The D.C. Circuit Court affirmed the District Court's judgment and confirmed the District Court's finding that TV Polska acted willfully by "deliberately remov[ing] geoblocking,"<sup>60</sup> while being aware of *Spanski's* rights, and by taking "purposeful after-the-fact steps to hide its conduct."<sup>61</sup>

The courts in *Spanski v. TV Polska* offered no opinion on whether geoblocking is necessary for an internet actor to comply with a territorially-limited copyright since the license (which was a part of the settlement agreement) included an obligation to geoblock.<sup>62</sup> Nor did the courts address whether an obligation to geoblock should be read into the copyright law in the absence of a contractual obligation to geoblock.<sup>63</sup> Therefore, the question remains: if the exclusive license granted by TV Polska included no obligation to geoblock, should TV Polska have been obligated to geoblock in any case, because geoblocking would have been implicitly required by U.S. copyright law for compliance with the territorial limits of the copyright at issue?

The answer to this question depends on how geoblocking is viewed. When a copyright owner grants an exclusive license to distribute a book, the copyright

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<sup>55</sup> *Spanski Enters. v. Telewizja Polska S.A.*, 222 F. Supp. 3d 95, 112 (D.D.C. 2016).

<sup>56</sup> *Spanski Enters. v. Telewizja Polska S.A.*, No. 12-CV-957 (TSC), 2017 WL 598465, at \*1 (D.D.C. Feb. 14, 2017), *aff'd*, 883 F.3d 904 (D.C. Cir. 2018).

<sup>57</sup> *Spanski*, 222 F. Supp. 3d at 101.

<sup>58</sup> *Id.* at 109 ("[S]ince the default settings for programs were to geoblock TVP Polonia content from being accessible in the U.S., TVP employees had to take willful and volitional steps to remove the geo-block for the 36 episodes that were viewed and recorded in the U.S. . . .").

<sup>59</sup> *Id.* at 98.

<sup>60</sup> *Spanski Enters. v. Telewizja Polska S.A.*, 883 F.3d 904, 917 (D.C. Cir. 2018).

<sup>61</sup> *Id.* The D.C. Circuit Court also noted that it had "no occasion to prejudge" a situation in which users connecting from the U.S. could access content by "circumventing geoblocking." *Id.* at 916.

<sup>62</sup> *Spanski Enterprises, Inc. v. Telewizja Polska S.A.*, 222 F. Supp. 3d 95, 102 (D.D.C. 2016).

<sup>63</sup> *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 916 (D.C. Cir. 2018).

owner is expected to take steps to abide by the license. For example, the copyright owner would be expected to check the addresses of customers before shipping copies of the book to the customers in order to prevent distributing the book to customers in a jurisdiction covered by the exclusive license.<sup>64</sup> No one would expect for the copyright owner to install a radio frequency (“RF”) identification tag in every book copy and implement a RF surveillance system to monitor the movement of each book copy to prevent copies from entering the licensed territory.<sup>65</sup> The question is whether geoblocking is analogous to the reasonable measure of checking customers’ addresses, or whether it is an unreasonably extreme measure similar to the installation of RF identification tags in every book copy.<sup>66</sup>

An important lesson from *Spanski* is that the controlling factor in the decision was the accessibility of the content in the U.S., which would not have existed but for TV Polska’s failure to geoblock all licensed content. Therefore, if TV Polska had wanted to avoid liability for copyright infringement, it would have had to geoblock to prevent content from being accessible in the U.S.<sup>67</sup> Only with the use of geoblocking might TV Polska have been shielded from personal jurisdiction in the U.S. courts.<sup>68</sup>

## II. COPYRIGHT AND GEOBLOCKING IN THE EUROPEAN UNION

The use of geoblocking has received significantly more legislative attention in the EU than in the U.S. Geoblocking is antithetical to the EU’s goal of the EU Single Market,<sup>69</sup> which the European Commission seeks to expand into the online environment. In its 2015 “Digital Single Market Strategy,”<sup>70</sup> the European Commission called geoblocking “a significant cause of consumer

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<sup>64</sup> See Marketa Trimble, *Geoblocking and Evasion of Geoblocking – Technical Standards and the Law*, GEOBLOCKING AND GLOBAL VIDEO CULTURE 56 (Ramon Lobato & James Meese eds., Institute of Network Cultures, 2016).

<sup>65</sup> See *id.*

<sup>66</sup> *Id.*

<sup>67</sup> “[I]n general, regardless of how ‘non-directed’ a website might be toward a particular jurisdiction, geoblocking seems to be necessary to prevent the viewing of a website in a jurisdiction – which viewing might result in a finding of copyright infringement in the jurisdiction.” Marketa Trimble, *To Geoblock, or Not To Geoblock – Is That Still a Question?*, TECHNOLOGY & MARKETING LAW BLOG (May 9, 2017), <https://blog.ericgoldman.org/archives/2017/05/to-geoblock-or-not-to-geoblock-is-that-still-a-question-guest-blog-post.htm> [<https://perma.cc/95AC-W4WU>].

<sup>68</sup> *Id.*

<sup>69</sup> See *The European Single Market*, EUROPEAN COMMISSION (last visited Mar. 3, 2019), available at [https://ec.europa.eu/growth/single-market\\_en](https://ec.europa.eu/growth/single-market_en) [<https://perma.cc/ZEK5-DDAE>] (“The Single Market refers to the [EU] as one territory without any internal borders or other regulatory obstacles to the free movement of goods and services.”).

<sup>70</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2015) 192 final (May 6, 2015).

dissatisfaction and of fragmentation of the Internal Market”<sup>71</sup> and declared its determination to take measures to prevent “unjustified geo-blocking.”<sup>72</sup>

The European Commission identified copyright as one of the primary causes of the use of geoblocking and barriers to online access.<sup>73</sup> Because the Commission’s idea for a single unitary EU copyright had been negatively received by EU member states,<sup>74</sup> the Commission aimed at greater harmonization of EU member states’ laws, a decision that has proved to be quite controversial.<sup>75</sup> The more easily achievable measures of the Strategy turned out to be the proposal for cross-border portability of online content<sup>76</sup> and the proposal for the elimination of unjustified geoblocking,<sup>77</sup> which were enacted in 2017 and 2018, respectively.

The Cross-Border Portability Regulation<sup>78</sup> addresses a very narrow set of geoblocking uses – geoblocking by service providers that block access to content by users who have subscribed to their services in one EU member state but want to access the content from another EU member state. For example, a user who subscribed to Netflix in Estonia viewed the Estonian Netflix offerings from Estonia but if the user later connected to Netflix from Belgium, Netflix made only the Belgian Netflix offerings available to the user, which were potentially different from those offered to the same user in Estonia. To address this issue, the Cross-Border Portability Regulation requires that service providers, such as Netflix,<sup>79</sup> provide a user with the user’s home content even when the user is temporarily present in another EU member state.<sup>80</sup>

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<sup>71</sup> *Id.* at 6.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 4, 7.

<sup>74</sup> *Green paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a Digital Single Market*, at 13, COM (2011) 427 final (July 13, 2011); see also Trevor Cook & Estelle Derclaye, *An EU Copyright Code: What and How, If Ever?* INTELL. PROP. QUARTERLY, 259, 260-64 (2011).

<sup>75</sup> *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, at 2-3, COM (2016) 593 final (Sept. 14, 2016). The Directive was adopted in April 2019. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

<sup>76</sup> *Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market*, at 2-3, COM (2015) 627 final (Dec. 9, 2015).

<sup>77</sup> *Proposal for the EU Anti-Geoblocking Regulation*, *supra* note 17, at 2-3.

<sup>78</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, 2017 O.J. (L 168) [hereinafter EU Cross-Border Portability Regulation].

<sup>79</sup> *Id.* art. 2(5).

<sup>80</sup> *Id.* art. 1. The rule is optional for online content service providers who provide their services without payment. *Id.* art. 6.

The Anti-Geoblocking Regulation<sup>81</sup> covers a much broader spectrum of geoblocking use. The Regulation focuses on the elimination of geoblocking when geoblocking results in “discrimination based on customers’ nationality, place of residence or place of establishment.”<sup>82</sup> Businesses are prohibited from discriminating among customers based on these criteria as to a customer’s access to online interfaces, access to goods and services, and conditions for payment transactions.<sup>83</sup> While businesses are permitted to maintain localized versions of their websites, they must obtain consent from their customers if they want to redirect the customers to the localized versions.<sup>84</sup> If the business does opt to redirect its customers to localized versions, it must also make the version originally sought by the customers easily accessible to them.<sup>85</sup>

Importantly, the Anti-Geoblocking Regulation permits the continued use of geoblocking to comply with EU law and/or EU member states’ laws,<sup>86</sup> including copyright laws, and also for any “services the main feature of which is the provision of access to and use of copyright protected works.”<sup>87</sup> There was an attempt to extend the prohibition of geoblocking to instances in which a copyright holder holds copyright for the entire EU (meaning to instances in which geoblocking is used purely for market partitioning), but the attempt encountered strong opposition.<sup>88</sup> Nevertheless, the Regulation as enacted provides that upon its first review the European Commission should evaluate whether an extension to such instances should be made.<sup>89</sup>

The European Commission has also targeted geoblocking through other means. In 2014, the European Commission commenced antitrust proceedings against several major U.S. motion picture studios and European pay-TV broadcasters to investigate whether their agreements had prevented the broadcasters from providing services across borders.<sup>90</sup> In its 2015 Statement of Objections, the European Commission suggested that the use of geoblocking

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<sup>81</sup> EU Anti-Geoblocking Regulation, *supra* note 18.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* arts. 3, 4, 5.

<sup>84</sup> *Id.* art. 3(2).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* arts. 3(3), 4(5).

<sup>87</sup> *Id.* art. 4(1)(b).

<sup>88</sup> Marketa Trimble, *The European Union Anti-Geoblocking Regulation Isn't the End of the Anti-Geoblocking Battle*, TECHNOLOGY & MARKETING LAW BLOG (Mar. 5, 2018), <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>.

<sup>89</sup> EU Anti-Geoblocking Regulation, *supra* note 18, art. 9, and the Statement by the Commission (attached to the Regulation). *Id.* at 15.

<sup>90</sup> European Commission Press Release IP/14/15, Antitrust: Commission Investigates Restrictions Affecting Cross Border Provision of Pay TV Services (Jan. 13, 2014); *see also* Juha Vesela, *Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law*, 25 MICHIGAN STATE INT'L L. REV. 595, 599 (2017).

might be a violation of EU competition law because the geoblocking implemented by the broadcasters had prevented passive sales<sup>91</sup> to the geoblocked parts of the EU.<sup>92</sup> In response to the Statement, two of the parties who were being investigated committed not to enter into, renew, or extend contractual obligations that would prevent or limit the broadcaster “from responding to unsolicited requests from consumers residing and located in the [European Economic Area] but outside [of such broadcaster’s] licensed territory.”<sup>93</sup> The European Commission made the commitments legally binding upon the two parties through its 2016 decision,<sup>94</sup> and, after a favorable CJEU General Court’s decision,<sup>95</sup> accepted similar commitments from the other parties to the proceedings.<sup>96</sup>

The European Commission has also pursued its mission to achieve an EU digital single market and eliminate geoblocking through the implementation of a choice-of-law rule under which the copyright law of only one EU member state would govern in any given case. Were a single member state’s law to apply in any particular case, differences among national copyright laws of the EU member states would no longer justify the use of geoblocking and licensing agreements would be simplified by being subject to a single national copyright regime.

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<sup>91</sup> The term “passive sales” refers to “responding to unsolicited requests from individual customers including delivery of goods and services to such customers.” *Guidelines on Vertical Restraints*, at 19, SEC (2010) 411 (May 10, 2010). In the *Guidelines*, the European Commission explained that it considers a website to be “a form of passive selling.” *Id.* The caveat is that “[t]he Commission considers online advertisement specifically addressed to certain customers a form of active selling to these customers.” *Id.* at 20. “While territorial restrictions of active sales are allowed [in the EU within the context of vertical restraints], the agreements that create and maintain such restrictions must permit passive sales into the territory under the agreements.” Trimble, *supra* note 1, at 17.

<sup>92</sup> European Commission Press Release IP/15/5432, Antitrust: Commission Sends Statement of Objections on Cross-Border Provision of Pay-TV Services Available in UK and Ireland (July 23, 2015); see the EU Anti-Geoblocking Regulation, *supra* note 18, art. 6(2) (on the prohibition of passive sales through geoblocking, but outside the copyrighted content context).

<sup>93</sup> Commission Decision on Cross-Border Access to Pay-TV Paramount Commitments, 2016 Case AT.40023 1.

<sup>94</sup> *Id.*; see Peter Yu, *Region Codes and the Territorial Mess*, 30 CARDOZO ARTS & ENT. L. J. 187, 220-26 (2012) (investigating uses of market partitioning tools, such as DVD region codes).

<sup>95</sup> Case T-873/16, *Groupe Canal+ SA v. European Commission*, 2018 EUR-Lex CELEX LEXIS 904 (Dec. 12, 2018).

<sup>96</sup> European Commission Press Release IP/19/1590, Antitrust: Commission Accepts Commitments by Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky on Cross-Border Pay-TV Services (Mar. 7, 2019).



The EU Satellite and Cable Directive<sup>97</sup> provides for the so-called “emission principle,” under which the governing law throughout the EU in any given case is the law of the place of the EU member state from which the broadcast originates (this is also referred to as the country of origin principle).<sup>98</sup>

In 2016, the European Commission proposed a regulation that would extend the country of origin principle to “ancillary online services by broadcasting organisations.”<sup>99</sup> The proposal was met with fierce opposition, and in the legislative process several limitations were introduced, including the freedom to contract around the country of origin principle.<sup>100</sup> The regulation was eventually converted into a directive<sup>101</sup> and agreed upon by the EU institutions in December 2018 and adopted in April 2019<sup>102</sup> with important limitations, namely that the principle of the country of origin applies only to (1) radio programs and (2) television programs that are either “news and current affairs” programs or a content provider’s own productions (not licensed content).<sup>103</sup> Dictating that content be governed by a single member state’s copyright law may be a precursor to further elimination of geoblocking,<sup>104</sup> albeit within a more limited scope than originally intended in the proposed regulation.

<sup>97</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L 248) [hereinafter the Satellite and Cable Directive].

<sup>98</sup> Under the Directive, the country of origin is “the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.” *Id.* art. 1(2)(b).

<sup>99</sup> *Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*, at 4; COM (2016) 594 final (Sept. 14, 2016).

<sup>100</sup> *Id.* art. 2(3).

<sup>101</sup> An EU directive provides greater freedom for member states to adjust their implementation of the directive to their own conditions. While “[a] regulation ... shall be binding in its entirety and directly applicable in all Member States, ... [a] directive shall be binding, as to the result to be achieved ... but leave to the national authorities the choice of forms and methods.” See Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 171-72.

<sup>102</sup> European Commission Press Release IP/18/6541, Digital Single Market: EU Negotiators Agree to Facilitate Access to Online TV and Radio Content Across Borders (Dec. 13, 2018), [http://europa.eu/rapid/press-release\\_IP-18-6541\\_en.htm](http://europa.eu/rapid/press-release_IP-18-6541_en.htm) [<https://perma.cc/A9LP-82GT>]; Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.

<sup>103</sup> Directive (EU) 2019/789, *supra* note 102, Recital 10, art. 3(1).

<sup>104</sup> See EU Anti-Geoblocking Regulation, *supra* note 20 and the accompanying text on the review that the EU Anti-Geoblocking Regulation provides with respect to the future course of anti-geoblocking legislation in the EU.

For adjudicatory jurisdiction the Court of Justice of the European Union (“CJEU”) decided that website activities will not be deemed to have been directed at an EU member state merely because a website is accessible in the member state.<sup>105</sup> Instead, the CJEU instructed national courts in EU member states to use a targeting approach by considering various factors such as “the international nature of the activity at issue,” “telephone numbers with the international code,” the top-level domain name, “the description of itineraries from one or more other Member States to the place where the service is provided,” and “mention of an international clientele.”<sup>106</sup> If the language and the currency used on the website do not “correspond to the languages [and currency] generally used in the Member State from which the trader pursues its activity,” the language and currency “can be taken into consideration and constitute evidence from which it may be concluded that the trader’s activity is directed to other Member States.”<sup>107</sup> According to the CJEU, the interactivity of a website is “not decisive” in the targeting analysis.<sup>108</sup>

In determining the scope of prescriptive jurisdiction of a member state’s law, the CJEU used the same targeting approach,<sup>109</sup> stating that the accessibility of a website, taken alone, may not serve as the basis for applying the law of a particular member state.<sup>110</sup> Member states’ courts have turned, in their prescriptive jurisdiction analysis, to the targeting approach outlined by the CJEU.<sup>111</sup> The 2016 EU General Data Protection Regulation<sup>112</sup> also refers to the

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<sup>105</sup> Joined Cases C-585/08 & C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG*, 2010 E.C.R. I-12527 ¶ 69.

<sup>106</sup> *Id.* ¶ 83.

<sup>107</sup> *Id.* ¶ 84.

<sup>108</sup> *Id.* ¶ 79.

<sup>109</sup> Case C-173/11, *Football Dataco Ltd. v. Sportradar GmbH*, 2012 Eur-Lex CELEX LEXIS 642, ¶ 40-42 (Oct. 18, 2012); Case C-324/09, *L’Oréal SA v. eBay International AG*, 2011 E.C.R. I-06011, ¶ 64-65.

<sup>110</sup> Case C-173/11 *Football Dataco*, ¶ 36. The CJEU also rejected the proposition that the place of the server should determine the applicable law. *Id.* ¶ 44-46; *see also* Case C-324/09 *L’Oréal*, 2010 EUR-Lex CELEX LEXIS 757, ¶ 64.; *Argos Ltd. v. Argos Sys. Inc.*, [2018] EWCA (Civ) 2211 [48] (Eng.) (“[T]he fact that a website is accessible from anywhere in the world, and therefore may attract occasional interest from consumers there when this is not intended, should not give rise to any form of liability.”).

<sup>111</sup> *See, e.g.*, *Merck KGaA v. Merck Sharp & Dohme Corp.* [2017] EWCA (Civ) 1834 [153]-[170] (Eng.); *Omnibill (Pty) Ltd. v. Egpsxxx Ltd. & Anor* [2014] EWHC 3762 (IPEC) [40]; *see also Argos*, EWCA 2211 [48]; *Easygroup Ltd. v. Easy Fly Express Ltd. & Anor*, [2018] EWHC 3155 (Ch) [7] (using the targeting analysis to determine whether substantive law covers the act when the question of prescriptive jurisdiction was raised in the context of personal jurisdiction).

<sup>112</sup> General Data Protection Regulation, *supra* note 11.

targeting test as *the* means to determine the applicability of the Regulation to non-EU parties on the internet.<sup>113</sup>

Because of the CJEU's acceptance of the targeting approach, some commentators might have been surprised when the CJEU declined to use the targeting approach to determine adjudicatory jurisdiction in cases concerning torts. The CJEU explained that it had formulated the targeting approach in the context of jurisdiction in matters concerning consumer contracts because in this context the language of the EU regulation refers to a defendant's directing its activities to a member state.<sup>114</sup> However, no mention of "directing" or "targeting" appears in the provision of the regulation concerning torts such as copyright infringement; rather, the provision refers only to "the place where the harmful event occurred or may occur."<sup>115</sup> The CJEU therefore ruled that, unlike jurisdiction over consumer contract disputes, jurisdiction over torts may be based solely on the accessibility of the content on the internet.<sup>116</sup> According to the CJEU, this approach applies only "for the purposes of determining the place where the damage occurred with a view to attributing [adjudicatory] jurisdiction" under the provision of the regulation concerning torts; therefore, it appears that the targeting approach may continue to be applied to determine prescriptive jurisdiction (the territorial scope of substantive law).

EU member states' courts may continue to use the targeting approach in tort cases when they determine jurisdiction over non-EU defendants. The CJEU's

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<sup>113</sup> *Id.* at Recital 23; *see also Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters*, at Recital 28, COM (2018) 225 final (Apr. 17, 2018); *Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings*, at Recital 13, COM (2018) 226 final (Apr. 17, 2018); *see Svantesson, supra* note 33, ¶¶ 20-26, 40-47.

<sup>114</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 15(1)(c), 2000 O.J. (L 012) ("Brussels I Regulation"). Currently, the regulation and provision in force is Brussels I Regulation (recast), *supra* note 26, art. 17(1)(c).

<sup>115</sup> Brussels I Regulation, *supra* note 114, art. 5(3); Brussels I Regulation (recast), *supra* note 26, art. 7(2); *see also* Case C-441/13, *Pez Hejduk v. EnergieAgentur. NRW GmbH*, 2015 EUR-Lex CELEX LEXIS 28, ¶¶ 32-33 (Jan. 22, 2015).

<sup>116</sup> Joined Cases C-509/09 & C-161/10, *eDate Advertising GmbH v. X*, 2011 E.C.R. I-10269 (in the context of personality rights); Case C-523/10, *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH*, 2012 EUR-Lex CELEX LEXIS 220 (Apr. 19, 2012) (in the context of trademark rights, specific jurisdiction is limited to the damage that occurred within the jurisdiction of the court); *see* C-441/13, *Pez Hejduk*, ¶ 38 (in the context of copyright); *But cf.* Case C-194/16, *Bolagsupplysningen OÜ v. Svensk Handel AB*, 2017 EUR-Lex CELEX LEXIS 766, ¶ 49 (Oct. 17, 2017) ("[A] person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible.").

decisions on jurisdiction do not apply to the national rules on jurisdiction that member states adopt and apply in cases that are not subject to EU regulations, which are cases where defendants are not domiciled in EU member states.<sup>117</sup> In these cases, member states maintain their own national laws on jurisdiction and member states' courts may therefore continue to apply the targeting approach in those cases in the context of both prescriptive and adjudicatory jurisdiction.

In cases where courts in the EU consider targeting, it does not appear at this time that an absence of geoblocking alone would lead to the conclusion that a defendant had directed his activities to a member state.<sup>118</sup> The proposed EU regulation and EU directive concerning electronic evidence in criminal matters explicitly state that targeting cannot be found solely because a defendant had not geoblocked if the lack of geoblocking stemmed merely from compliance with the Anti-Geoblocking Regulation.<sup>119</sup>

For now, it is likely that the use of geoblocking could be considered one of several factors against a finding of targeting. Courts have also taken into account data on actual access from a jurisdiction,<sup>120</sup> which would be affected by the use of geoblocking. In the future, as the collecting of geolocation data becomes indispensable for other reasons and/or when geoblocking becomes a standard practice in the industry, it is possible that courts might give greater weight to a defendant's use or non-use of geoblocking.<sup>121</sup>

### III. POTENTIAL CONSEQUENCES OF THE ELIMINATION OF GEOBLOCKING FOR COPYRIGHT LAW AND PRACTICE

The elimination of geoblocking would have consequences for copyright law and practice; however, at this point, the consideration of consequences is mostly academic given that geoblocking has not been completely prohibited in any jurisdiction. Even in the EU, where geoblocking has been subject to critical scrutiny, it has not been completely eliminated despite the European Commission's attempts to limit geoblocking as much as politically possible. In Australia it has been proposed that legislation be adopted to explicitly legalize

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<sup>117</sup> Brussels I Regulation (recast), *supra* note 26, art. 6.

<sup>118</sup> E.g., *Easygroup Ltd. v. Easy Fly Express Ltd. & Anor* [2018] EWHC 3155 (Ch) (Eng.).

<sup>119</sup> *Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters*, *supra* note 113, at Recital 28; *Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings*, *supra* note 113, at Recital 13.

<sup>120</sup> E.g., *Argos Ltd. v Argos Sys. Inc.* [2018] EWCA (Civ) 2211 [9] (Eng.).

<sup>121</sup> "[E]vidence of subjective intention is a relevant, and possibly (where the objective position is unclear or finely balanced) a determinative consideration in deciding whether the trader's activities, viewed objectively from the perspective of the average consumer, are targeted at the UK." See Case C-507/17, Opinion of Advocate General Maciej Szpunar in *Google v. CNIL*, 2019 EUR-Lex CELEX LEXIS 15, ¶¶ 70-74, 78 (Jan. 10, 2019).

user circumvention of geoblocking,<sup>122</sup> which would have the effect of making geoblocking ineffective and lead to the elimination of geoblocking in fact.<sup>123</sup> However, Australia has not adopted legislation to this effect.<sup>124</sup>

Opponents of geoblocking emphasize that an elimination of geoblocking would remove or mitigate negative effects of geoblocking: For example, the European Commission has pointed out user displeasure with geoblocking and the negative effects of geoblocking on the EU digital single market.<sup>125</sup> The Australian Productivity Commission has noted price discrimination of Australian users, which is facilitated by geoblocking.<sup>126</sup> Indeed, the elimination of geoblocking would likely be popular among internet users, bring about pro-EU single market results, and end Australian user online price discrimination (although Australian users might still not have access to prices that are currently charged outside of Australia).<sup>127</sup>

Despite these positive impacts of the potential elimination of geoblocking, it is important to recognize that the elimination would also likely have problematic and perhaps surprising consequences for copyright law and practice. The importance of a careful examination of the potential effects of eliminating geoblocking extends beyond the EU if European Commission-style initiatives for eliminating geoblocking were to take hold outside the EU. This would be the case particularly if the initiatives were embraced by countries that are not as legally, socially, and economically close as are the EU member states and in which the consequences of eliminating geoblocking would be amplified.

The elimination of geoblocking would affect IP licensing practices.<sup>128</sup> The effect of the EU Cross-Border Portability Regulation on licensing was immediate;<sup>129</sup> the Regulation made unenforceable all contractual provisions that were “contrary to [the] Regulation, including those which prohibit[ed] cross-border portability of online content services or limit[ed] such portability.”<sup>130</sup> The Regulation made unenforceable such noncompliant provisions in all past, present, or future contracts,<sup>131</sup> regardless of whether the provisions were between content providers and copyright holders or between content providers and users.<sup>132</sup>

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<sup>122</sup> Productivity Commission Inquiry Report, *supra* note 2, at 11, 32.

<sup>123</sup> *Id.*

<sup>124</sup> Jessica McNamara, *Geoblocking in Australia: Intellectual Property Rights versus Consumer Freedom – Where Does the Balance Lie?*, 112 INTEL. PROP. FORUM 38, 44 (2018).

<sup>125</sup> See, e.g., *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 6, COM (2015) 192 final (May 6, 2015).

<sup>126</sup> Productivity Commission Inquiry Report, *supra* note 2, at 11.

<sup>127</sup> McNamara, *supra* note 124, at 41.

<sup>128</sup> See, e.g., EU Cross-Border Portability Regulation, *supra* note 76.

<sup>129</sup> EU Cross-Border Portability Regulation, *supra* note 76.

<sup>130</sup> *Id.* art. 7(1).

<sup>131</sup> *Id.* art. 9.

<sup>132</sup> *Id.* art. 7(2).

However, the overall impact of the Regulation was constrained because of its limited scope.<sup>133</sup>

The elimination of geoblocking would mean that licensors (content providers, distributors) would effectively be precluded from granting territorially-limited licenses, because even if licensors did include a territorial delineation in a license, the territorial delineation would be highly permeable or completely ineffective absent the assistance of geoblocking. Although internet users can currently circumvent geoblocking, circumvention is arguably limited<sup>134</sup> and results in what might be considered negligible spillover – spillover akin to that caused by international travel in the physical world.<sup>135</sup> Eliminating geoblocking would completely erase the digital equivalent of physical borders and enable the free flow of content across borders.

The elimination of borders would pressure licensors to grant worldwide licenses (or licenses for an entire area in which geoblocking had been prohibited).<sup>136</sup> Without effective enforcement of the territorial limitations of licenses, only global licenses would be practicable, and authors and other copyright holders who may at present choose the territories in which they wish to license their works would no longer be able to do so. Copyright holders might have reasons for not granting licenses in certain countries and territories; perhaps it is valuable for them to delay or withhold licenses for certain countries and territories, or to coordinate licenses with other parties, such as co-producers,<sup>137</sup>

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<sup>133</sup> See *supra* Part II.

<sup>134</sup> See Trimble, *supra* note 22 (discussing the legality of the circumvention of geoblocking).

<sup>135</sup> See Marketa Trimble, *The Territoriality Referendum*, 6 W.I.P.O. J. 73, 75-76 (2014) (explaining the spillover issue and geoblocking); see LOBATO, *supra* note 7, at 56-59 (explaining spillover in transnational broadcasting).

<sup>136</sup> For simplification the rest of Part III uses global or world-wide effects; however, the effects might be limited to an area or region in which geoblocking had been eliminated. See *generally infra* Part III.

<sup>137</sup> See *Consultation on the EU Cable and Satellite Directive (SatCab Directive)*, FILM PRODUCERS NETHS. 1, 2 (Nov. 15, 2015), [http://ec.europa.eu/information\\_society/newsroom/image/document/2015-51/film\\_producers\\_netherlands\\_12782.pdf](http://ec.europa.eu/information_society/newsroom/image/document/2015-51/film_producers_netherlands_12782.pdf) [<https://perma.cc/7CHM-EGUR>] (on the importance of “the territory-based way of financing European film works” and the need for co-producers to be able to exercise their rights separately and independently); see also Recommendations for the Trilogues, European Film Agency Directors, April 12, 2018, <http://www.efads.eu/common-positions/european-film-agency-directors-efads-letter-on-the-satcab-proposal.html> [<https://perma.cc/V38Y-XDHS>] (“[T]he Country of origin Principle (CoO) principle [*sic*] for licensing would make it more difficult to finance films, series, documentaries and in particular European co-productions.”); John Hopewell, *Europe, Hollywood Hail Landmark E.U. Territorial Licensing Agreement*, VARIETY (Dec. 18, 2018), <https://variety.com/2018/digital/news/europe-hollywood-landmark-e-u-territorial-licensing-agreement-1203092594/> [<https://perma.cc/U8GM-5MUC>] (quoting Börje Hansson, a Vice-President of the International Federation of Film Producers Associations (FIAPF): “[o]ur ability to license rights on a territorial basis is our currency, and the future of our production

or perhaps a decision to limit licenses territorially might not be motivated by economic factors. Without geoblocking the message to copyright owners is “a global license for internet distribution, or no license at all.”

The pressure to license globally fits into the current trend of focusing on strengthening the exceptions and limitations to copyright and emphasizing users’ rights and access.<sup>138</sup> When society exerts pressure on copyright holders to make their works more available to the public, pressure for global internet licensing is merely a further step in the same direction. The discussion of the consequences of the elimination of geoblocking therefore fits within the broader and more fundamental debate about copyright owners’ rights, the freedom copyright owners have to manage their rights, and the balancing of, on the one hand, the rights and the freedom to exercise the rights against, on the other hand, the goals of society in general.

Faced with the inevitability of global licensing and with no backing from large corporations, some copyright owners might decline to make their works available to the public on the internet (or at all) because of concerns about economic, legal, and other costs that are associated with the logistics of global licensing and enforcing licenses globally, in multiple countries, or in even just one foreign country. Alternatively, copyright owners might be resigned to assigning or exclusively licensing their rights to large corporations – copyright holding entities – that have the resources necessary to manage global licensing. This result might or might not be viewed as a victory for society.

Copyright holders might also be discouraged by the risk of being exposed to personal jurisdiction in multiple countries and being subject to the laws of multiple countries. Global availability of content could trigger the application of national laws (including laws other than copyright laws) to which copyright holders might not want to be subject.<sup>139</sup> These include laws that might expose them to litigation in distant venues and force them to incur risks such as declaratory judgment suits.<sup>140</sup>

Another consequence of eliminating geoblocking could be an expansion of copyright and copyright-similar protection even in jurisdictions where a work is not protected by copyright or where a work’s availability or other uses should

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companies depends on our capacity to build IP capital thought rights and catalogue.”); Charlotte Appelgren, *The Impact of Regional Film Funds on the European Co-Production Model*, in *EUROPEAN FILM AND TELEVISION CO-PRODUCTION* 265, 276 (2018) (observing that “proposals to ban geo-blocking ... would undermine territoriality and affect co-productions that are funded by private and public partners from different countries.”).

<sup>138</sup> McDonald, *supra* note 6.

<sup>139</sup> While the danger of simultaneous exposure to the laws of multiple countries might be overstated, the danger of being exposed to even one foreign country’s laws might discourage a small copyright holder. See Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 *FORDHAM INTELL. PROP., MEDIA & ENT. L. REV.* 339, 341-43 (2015) (discussing limitations on the multiplicity problem).

<sup>140</sup> See, e.g., *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008).

be covered by a jurisdiction's exceptions and limitations to copyright. In their quest to obtain global licenses (given that more restrictive licenses would no longer make sense without geoblocking), content providers and distributors might enter into licenses covering jurisdictions for which licenses should not be needed. This kind of expansion might be harmless and have minimal practical consequences, but it might also reduce the size of the public domain as licenses would directly or indirectly create obstacles to the access to and use of a work.<sup>141</sup>

Global licenses will likely result in *de facto* global pricing for all users,<sup>142</sup> the global price would reflect not only an inability to charge for a limited territory but also an inability to maximize profits through staggered release of content. With geoblocking, a small internet actor can obtain a territorially-limited license for a price that reflects the territorial limitation. Without geoblocking, the small actor will have to pay the same price that is charged to a large multinational corporation for a territorially-unlimited license. It is possible that small actors will be priced out of the global market, leaving large corporations that can afford to pay for global licenses to take over the market to the detriment of smaller local actors.<sup>143</sup>

An important positive effect of eliminating geoblocking should be that content would become accessible globally, but this would not necessarily be the case. Small copyright holders might be unwilling to permit dissemination of their works for the reasons discussed above;<sup>144</sup> global licenses might be more costly than local and regional licenses, pricing small content distributors out of the market; and subscription services may charge prices that exclude large numbers of viewers, resulting in economic, rather than territorial discrimination against users.<sup>145</sup> Content financing through a licensing fee that spreads some of the costs of producing content among one country's population will not be feasible because it will be impossible to limit access to the content to the population of that country.<sup>146</sup> It is conceivable that limits on access to content

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<sup>141</sup> Direct obstacles would mean that it would be more difficult to access a work, for example, because technological protection measures had been implemented to prevent access to a work. Indirect obstacles would mean, for example, that practices would be established that would cause users to believe that they are not permitted to access or use certain content.

<sup>142</sup> Global pricing might not result for some content when other means of market partitioning are available, such as country-specific languages, national technical standards, or territorially-limited warranties. See LOBATO, *supra* note 7, at 110-11 (on market partitioning of television content).

<sup>143</sup> See, e.g., JOSEF DREXL, *EU Competition Law and Parallel Trade in Pharmaceuticals: Lessons to be Learned for WTO/TRIPS?*, in INTELL. PROP. AT THE CROSSROADS OF TRADE 6-7 (Rosén ed., 2012) (on the evolving opinions of the effects of territorial restrictions on competition in general).

<sup>144</sup> Other means of market partitioning may be used. See LOBATO, *supra* note 7, at 110-11.

<sup>145</sup> See, e.g., McNamara, *supra* note 124, at 41.

<sup>146</sup> See TV Licensing, <https://www.tvlicensing.co.uk/check-if-you-need-one/topics/tv-licence-types-and-costs-top2/> [<https://perma.cc/LGZ8-KQCB>] (last visited Jan. 17, 2019) (explaining the licensing fee in the United Kingdom). BBC licensing fees constituted more



based on economic criteria might cause greater socio-political problems than limits imposed in different territories based on territorial criteria.<sup>147</sup>

An elimination of geoblocking would also have effects on content itself. With no effective means to limit where content is accessible, content might have to become globally unobjectionable (content that some would label as “sterile”)<sup>148</sup> because the content would have to fit the various requirements that individual countries’ laws impose on content. Although local or national versions of content (that would be viewable worldwide) could still exist, competition might force authors, copyright holders, and content providers to create only globally acceptable versions.<sup>149</sup> Even if universal or global taste is considered a goal worth pursuing, it might be unfortunate if small market experimentation is lost because of concerns over global reputation and competition.<sup>150</sup> Localizing content on a global platform requires resources that only a large corporation may be able to afford.<sup>151</sup>

Some commentators have suggested that the use of languages could be impacted by the elimination of geoblocking. One theory is that the elimination of geoblocking would promote the use of local languages because content providers would create content in local languages as a means of market partitioning. For example, a Hungarian version of a film, even if made available globally, would likely limit the film audience to Hungarian-speaking users. Under the same theory, content providers would prefer to dub films rather than

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than 75% of the income of the BBC in the financial year ending March 31, 2018. *Annual Report and Accounts 2017/18*, BBC 1, 69 (2018), [http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc\\_annualreport\\_201718.pdf](http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc_annualreport_201718.pdf) [<https://perma.cc/CLJ8-T7P9>].

<sup>147</sup> See LOBATO, *supra* note 7, at 157-58 (discussing different market niches that Netflix occupies in different countries).

<sup>148</sup> *Open Letter to Members of the European Parliament on Behalf of Europe’s Creative Sectors in Support of the JURI Mandate on the Broadcasting (SatCab) Regulation* (Dec. 7, 2017), <http://www.iftaonline.org/sites/default/files/open-letter-from-the-audiovisual-sector-on-satcab—support-the-juri-com.pdf> [<https://perma.cc/D5KB-U86L>] (“We also support the territoriality of copyright and the commercial freedom to agree territorial exclusivity. Undermining this risks lowering quality and diversity of content.”).

<sup>149</sup> See Appelgren, *supra* note 137, at 277 (pointing out that “there is neither evidence nor explanation [from the European Commission] on how the end of geo-blocking would lead to more diversity”); *But cf.* LOBATO, *supra* note 7, at 108 (remarking on MTV’s realization that “[the] one-channel-for-all approach was a failure”).

<sup>150</sup> LOBATO, *supra* note 7, at 111 (emphasizing the need for localization of television content and therefore for local expertise in “distinctive tastes, preferences, and expectations”); *see also* Herold, *supra* note 150 at 262 (discussing the European Commission’s “explor[ation of] alternative models of financing, production and distribution that have the single market and global markets as their horizon from the outset,” and the Commission’s focus, in this regard, on “the European animation sector” where “projects travel across borders more easily”).

<sup>151</sup> See LOBATO, *supra* note 7, at 116-20; JOSEPH D. STRAUBHAAR, *WORLD TELEVISION: FROM GLOBAL TO LOCAL* 182-86 (2007).

subtitle them because dubbing would ensure the limited accessibility of the local language version. An elimination of geoblocking might also promote the use of minority languages in population pockets scattered in multiple countries.<sup>152</sup>

Another theory is that the elimination of geoblocking would drive content providers to resign themselves completely from producing content in local languages; rather, global licensing would incentivize them to produce content only in English and the few other major world languages.<sup>153</sup> This path would certainly affect, and perhaps even eventually eradicate, language diversity.

Eliminating geoblocking would also affect copyright law. The European Commission appears to be using the elimination of geoblocking as a back door to unitary EU copyright, which it has so far failed to push past the opposition of EU member states. A single copyright law would certainly make sense for an entire territory in which no geoblocking is available because it would simplify licensing and other dealings in copyrights. Globally, it is difficult to picture a scenario in which all countries would adhere to a unitary copyright and a single copyright law; however, without geoblocking, countries might become more open to deeper harmonization of their national copyright laws in order to facilitate global licensing. This could be a needed boost for international copyright law, particularly for stakeholders who are disappointed with the arguably slow progress in recent international intellectual property law negotiations.

If geoblocking were eliminated and countries could not agree on a single copyright law, another possible reaction might be for countries to adopt the emission principle for determining applicable copyright law – the avenue explored by the European Commission in the EU.<sup>154</sup> However, the increasing reliance on regulation based on point of consumption<sup>155</sup> suggests that countries might not be amenable to any far-reaching agreement that would pursue the emission principle. Even the EU, which has embraced the emission principle in the Satellite and Cable Directive<sup>156</sup> has not been successful in using the principle for across-the-board legislation relating to copyright law.<sup>157</sup> Additionally, the emission principle might only be appealing when national copyright laws are sufficiently harmonized.

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<sup>152</sup> See LOBATO, *supra* note 7, at 64 (“[I]nternet television services have more explicitly transnational and transcultural effects ... [They] tend to operate transnationally by aggregating small audiences in many nations, license terms permitting.”).

<sup>153</sup> *Id.* at 109 (comparing MTV and Netflix: “In both cases, we see the launch of a disruptive American television service, the attempted export of this service to global markets, [territorially] uneven uptake, cultural blowback, and then a commitment to localization and local content production.”). A valid question might be whether Netflix’s own productions are truly local productions.

<sup>154</sup> See *supra* notes 99 - 104 and accompanying text.

<sup>155</sup> See *supra* notes 36 - 37 and accompanying text.

<sup>156</sup> See *supra* notes 97 - 98 and accompanying text.

<sup>157</sup> See *supra* notes 99 - 104 and accompanying text.

Without a greater harmonization of copyright law, an elimination of geoblocking would increase the reliance of parties on contract law. Reliance on contracts would in turn highlight the differences in national copyright laws that could not be solved by contract; countries' internationally mandatory provisions, such as some countries' provisions concerning moral rights and author remuneration, would stand out as prominent problems for global licensing.<sup>158</sup>

### CONCLUSIONS

Eliminating geoblocking would likely be popular with internet users given that users continually desire more content and instantaneous access to content, and geoblocking presents an obstacle to access. However, popular changes are not necessarily positive changes and an elimination of geoblocking would invariably have negative effects. Copyright law and business practices would adjust to an absence of geoblocking and the resulting lack of an effective territorial delineation of internet activities<sup>159</sup> – but possibly at a significant price that is not yet fully appreciated.

This article suggests some of the consequences and effects of an elimination of geoblocking; the list is not exhaustive but the article paints a broad picture of some of the possible consequences of the elimination. Geoblocking and its possible demise should not be considered in isolation in the context of copyright law; rather, they should be evaluated with other legal consequences that would result, such as consequences for the evolving law of adjudicatory jurisdiction and regulatory jurisdiction.

Complete elimination of geoblocking could be the ultimate result in the EU in the future, notwithstanding the current opposition from the EU's creative industries. The current partial elimination of geoblocking in the EU, and certainly any further limitation of geoblocking in the EU, will promote the European Commission's digital single market agenda and contribute to a greater cohesiveness within the EU – goals that might be worth pursuing despite any negative effects associated with a complete elimination of geoblocking. However, outside the EU and among countries that are less socially, economically, and legally proximate, and among countries that do not share a desire for a common market and social and political cohesiveness, eliminating geoblocking might not be an acceptable tradeoff, given the negative effects it would cause.

To the extent that geoblocking continues to be used, either generally or with limitations such as those implemented under recent legislation in the EU, it is important that the legal status of geoblocking be clarified, including the status of the legality or illegality of circumventing geoblocking. Although the current

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<sup>158</sup> On internationally mandatory rules in countries' intellectual property laws see Marketa Trimble, *Advancing National Intellectual Property Policies in A Transnational Context*, 74 MD. L. REV. 203, 249-51 (2015).

<sup>159</sup> See Herold, *supra* note 150, at 262 (discussing the European Commission's interest in "cross-border content exploitation strategies.").

uncertainty regarding the legal implications of geoblocking and the legal implications of the circumvention of geoblocking might help perpetuate the illusion of a borderless internet, this uncertainty might present hurdles to further internet development and improvement.