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The role of geoblocking in the Internet legal landscape^{*}

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Abstract

Geoblocking has been presented both as an evil perpetrated against the Internet and as the savior of content on the Internet. The European Commission regards geoblocking as undesirable and aims to eliminate geoblocking within the European Union to the extent possible. Although the Commission's 2015 proposed cross-border portability regulation and its 2016 proposed anti-geoblocking regulation would not eliminate geoblocking entirely, the two regulations would significantly limit the instances in which geoblocking would be legal. Content creators, such as motion picture studios, take a different position on geoblocking: they see geoblocking as a helpful means to partition markets, maintain distribution schedules, and secure financing based on territorially-defined distribution. For content providers such as small online radio stations, geoblocking may be the only way to conduct business if these stations rely on affordable, but territorially-limited, licenses. This article reviews the recent legal developments concerning geoblocking and considers whether the future of the Internet can and should include geoblocking. Recent developments suggest that geoblocking is receiving a greater role in the legal context: legislators, courts, and regulators are considering geoblocking as an effective and necessary means of territorially limiting on the Internet the effects of their laws, judgments, and decisions. Because there are no uniform global laws that would govern activities on the Internet without respect to where those activities occur in the world, some form of geoblocking might be needed to address specific circumstances.

Keywords

geolocation, geoblocking, Internet, territoriality, cross-border portability

Topic

geoblocking

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El papel del geobloqueo en el contexto jurídico de Internet

Resumen

El geobloqueo, o bloqueo geográfico en internet, ha sido presentado al mismo tiempo como un mal perpetrado contra la red y como la salvación para los contenidos de internet. La Comisión Europea considera el geobloqueo una herramienta indeseable y pretende eliminarlo, en la medida de lo posible, dentro de la Unión Europea. Si bien la normativa sobre portabilidad transfronteriza propuesta por la Comisión en 2015 y su propuesta de normativa de 2016 contra el geobloqueo no supondrían su eliminación completa, lo cierto es que ambas limitarían notablemente los casos en los que el geobloqueo se consideraría legal. Algunos creadores de contenidos, como los estudios cinematográficos, adoptan una posición distinta respecto a este fenómeno: consideran que el geobloqueo es un método útil para dividir los mercados, mantener sus calendarios de distribución y garantizar la financiación basándose en una distribución definida territorialmente. Para proveedores de contenidos, como las pequeñas emisoras de radio en línea, el geobloqueo podría ser la única forma de hacer negocio si esas emisoras dependen de obtener licencias asequibles, pero también limitadas territorialmente. Este artículo revisa las novedades jurídicas más recientes en relación con el geobloqueo y se plantea si el futuro de internet puede, o debe, incluir este tipo de bloqueo. Según los últimos acontecimientos, parece que el geobloqueo está adquiriendo un papel cada vez más relevante en el contexto legal: legisladores, tribunales y reguladores lo consideran un medio efectivo y necesario para limitar territorialmente en internet los efectos de sus leyes, sentencias y decisiones. Puesto que no existe una legislación global y uniforme que regule las actividades en internet que no tenga en cuenta en qué lugar del mundo se produzcan esas actividades, podría ser necesario cierto tipo de bloqueo territorial para abordar determinadas circunstancias.

Palabras clave

geolocalización, geobloqueo, internet, territorialidad, portabilidad transfronteriza

Tema

geobloqueo

1. Introduction

“Geoblocking” has become a common term in the everyday vocabulary of the Internet; it is no longer a term known only to technical experts.¹ In early 2011, few members of non-technical audiences knew the term “geoblocking,” and of those who knew the term, fewer still were familiar with the tools that were available to circumvent geoblocking.² Just five years later it is now rare to meet anyone – certainly

anyone in the younger age groups – who has not encountered geoblocking, and many more users are aware of the ways in which it can be circumvented.

With the greater awareness of geoblocking, public opinion is developing about geoblocking, its functions, and its desirability. The fact that users seem to use virtual private networks (“VPNs”) and other means to circumvent geoblocking with increasing frequency suggests that

1. In this article I use “geoblocking” to refer to any means of preventing access to a user to content on the Internet based on the user’s location. The means might not prevent access absolutely; tools exist through which users may circumvent geoblocking, and such circumvention decreases the effectiveness of geoblocking.
The term “geoblocking” may be distinguished from the term “geolocation,” which refers to a means of determining the location of a user. While geoblocking requires geolocation as a step in the process of blocking access by a user who is connecting from a certain location, not all geolocation is necessarily followed by blocking access to the user based on the user’s location.
I use “Internet” in a general sense, without referring to a particular network protocol.
2. M. Trimble (2012, pp. 567-657).

the opinion is negative.³ Public opinion is reflected in the actions of at least one policy maker: the European Commission's recent anti-geoblocking initiatives,⁴ discussed in this article, evidence the Commission's opposition to geoblocking. However, any vilification of geoblocking would be misguided because such a position lessens the opportunity for a comprehensive and objective assessment of the role of geoblocking; an assessment of geoblocking must include a consideration of important roles that geoblocking can and should play in the Internet legal landscape. This article argues that geoblocking has served such important roles and should be maintained in some circumstances.

2. Uses of geoblocking and the Internet legal landscape

Internet users may have different expectations of the Internet, depending on their experiences with the medium, but one expectation seems to be constant across time and across generations: users seem to expect the Internet to provide unrestricted access to information.⁵ Different users may have different expectations of what "unrestricted" access should mean; to some users "unrestricted access" might mean "free" in the sense of unpaid, to other users "unrestricted access" might mean available to everyone and available everywhere, even if available occasionally only for a fee. Because the Internet was territorially unrestricted in its beginnings, it is not surprising that users would expect geographically unrestricted access to all information. This sentiment does not seem to have changed, even though users are aware of website geolocation practices; website geolocation capabilities allow websites to adjust content, including advertising and search engine results, to viewer location with increasing accuracy. The tracking of a user's location that such localization practices involve causes privacy concerns for

some users,⁶ but user concerns over geolocation alone do not seem to generate the public outrage that geoblocking seems to create.

Notwithstanding any opposition to geoblocking that may exist among Internet users, geoblocking plays important roles in the Internet legal landscape. This section discusses how geoblocking affects the landscape: the first subsection looks at the landscape without the use of geoblocking and discusses the rationales and means for the territorial delimitation of the Internet in the absence of geoblocking. The second and third subsections review the uses of geoblocking from their beginnings in the private sector to their current position in the regulation and enforcement of law.

2.1. Regulation and jurisdiction in the absence of geoblocking

Whether and how borders would be drawn on the Internet was not clear at the beginnings of the medium. Without a clear notion of how far their jurisdiction might actually extend, some jurisdictions have approached the regulation of online activities, such as the licensing of online gambling, by employing an approach analogous to dealing with vessels on the high seas. This approach is based on the assumption that if ships may register in only one country to sail anywhere in the world, companies should be able to register in a single jurisdiction to offer online gambling on the Internet to users anywhere in the world. The jurisdictions using this model seem to assume that, as on the high seas where "every state [...] has the right to sail ships under its flag,"⁷ on the Internet every jurisdiction has the right to have companies that are registered or licensed in that jurisdiction operate anywhere and everywhere on the Internet. The high seas analogy is helpful to content and service providers because it means that they may subject themselves to a single jurisdiction, of their choosing, and conduct business anywhere in the world

3. See, for example, L. B. Baker and Y. Adegoke (2012); A. Gell (2014).

4. *A Digital Single Market Strategy for Europe – Analysis and Evidence* (2015); *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* (2015); *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* (2016).

5. "International Public Opinion Says Government Should Not Limit Internet Access" (2009); *Summary of Responses to the European Commission's 2015 Public Consultation on "Geo-blocking and Other Geographically-Based Restrictions When Shopping and Accessing Information in the EU"* (2015, p. 10).

6. On the risk of re-identification and the potential discriminative power of location data see, for example, C. Riederer et al. (2015).

7. *Convention on the High Seas* (1958).

under the laws of that jurisdiction (using the “country of the flag” analogy), and only that jurisdiction.⁸

The high seas analogy would be even more apt and useful for understanding the relationships between countries’ sovereignty and their jurisdiction on the Internet if the analogy were extended to its logical limits.⁹ Two other principles of the law of the high seas are that “no state may validly purport to subject any part of [the high seas] to its sovereignty,”¹⁰ and that within the so-called “territorial sea,” the jurisdiction of the state of the flag is concurrent with the jurisdiction of the state of the territorial sea as soon as a ship sails into, and while it remains in, the territorial sea.¹¹ These principles accommodate countries’ jurisdictions – a principle that is fully acceptable on the sea but unacceptable on the Internet to those who advocate unlimited country jurisdiction on the Internet.¹²

From the Internet industry’s perspective, the preference to be subject to a single jurisdiction and its laws is understandable; the industry would prefer that 1) an entity be subject to a single jurisdiction, and 2) an entity have the option to select the jurisdiction that will regulate its activities, without regard to the entity’s place of incorporation, principal place of business, or the geographical scope of its activities. However, countries are unlikely to relinquish their regulation of conduct in their territory in favor of a foreign jurisdiction selected by a company. Countries may be willing to recognize the rules and decisions of other countries in some areas of law and for some issues, but in other areas and for other issues they demand full sovereignty and will regulate the areas on their own terms (although they sometimes agree to be constrained to a certain degree by international or regional harmonization).

A country’s desire to maintain full sovereignty in certain areas of law should have a mirror image: the country’s

respect for the sovereignty of other countries. This respect requires that the country regulate areas of law under its own sovereignty and enforce decisions in these areas in a territorially-limited manner. Geoblocking enables a country to limit the effects of the exercise of its jurisdiction.

What happens if there is no territorial limit on the effects of a country’s jurisdiction? A country typically does not relinquish its power merely because it faces circumstances under which it cannot limit the territorial effects of its power; rather, it regulates and enforces its decisions to the extent that it can while ignoring territorial limits.¹³ As Geist pointed out, ignoring the territorial limits that constrain the effects of jurisdiction causes “a shift from a borderless network to borderless law.”¹⁴ Such disregard, at a minimum, sparks uncertainty about the effects of territorially-unlimited decisions when agencies or parties to a dispute seek to have such decisions enforced outside the country whose court or agency issued the decision.¹⁵ When foreign countries deny assistance in enforcing such territorially-unlimited decisions, the countries that issued the decisions search for other solutions, directing enforcement measures at intermediaries such as Internet service providers and payment processors; however, these solutions provide no direct remedy and generate various problems of their own.¹⁶

The ability to use geoblocking to delimit jurisdiction and enforce decisions within territorial boundaries makes geoblocking appealing to those agencies, courts, and legislators who are conscious of the need for restraint as regards the exercise of jurisdiction on the Internet. Of course, before geoblocking existed, and even today whenever geoblocking is not utilized, other techniques have been and

8. *Id.*, Article 6(1). The localization of acts on the Internet based on the place of a server would also allow content and service providers to select a governing jurisdiction. For a discussion of localization in the place of a server, see note 24 on p. 267 in M. Trimble (2016a). See also M. Trimble (2016b).
9. For an analysis of Internet jurisdiction issues from the perspective of the law of the high seas, see W. G. Jiménez and A. R. Lodder (2015).
10. *Convention on the High Seas*, *supra* note 7, Article 2.
11. *Id.*, Article 1. *Convention on the Territorial Sea and the Contiguous Zone* (1958, Article 1).
12. “[Vint] Cerf’s central mistake, a mistake typically made about the Internet, is to believe that there was something necessary or unchangeable about the Net’s original architecture,” which “did not contemplate national boundaries.” J. Goldsmith and T. Wu (2006).
13. The capability of a country to regulate activity and enforce decisions globally (i.e. including outside its national borders) depends on the ability of the country to enforce the decisions of its courts and agencies on its own (when the subject of the regulation and/or enforcement is located in the country or has assets there), or on its ability to rely on other countries’ assistance in enforcing its decisions.
14. M. Geist (2003).
15. See, for example, *Yahoo! Inc. v. LICRA and UEJF*, 433 F.3d 1199 (9th Cir. 2006), cert. denied.
16. M. Trimble (2016a).

still are used to limit the territorial scope of jurisdiction; for some purposes, the degree of interactivity of a website¹⁷ or signs of targeting, such as the particular top level domain and the language of the website, are used to determine whether a website will be subject to the jurisdiction of a particular country. However, since geoblocking is now adequately developed to serve various purposes, agencies, courts, and legislators have begun to consider geoblocking as a potentially effective means to delimit their actions on the Internet territorially.

2.2. Adoption of geoblocking by the private sector

Governmental interest in geoblocking was preceded by the utilization of geoblocking in the private sector. The private sector began to use geoblocking because it serves the purposes of enhancing security and partitioning markets. Geoblocking improves security on the Internet by preventing unauthorized access by blocking login and/or transaction attempts from outside a location in which an authorized user is expected to be located. Geoblocking enhances market partitioning on the Internet by enabling content and service providers to limit access by users to information about certain goods, services, and/or prices, thereby enabling the providers to discriminate among different markets and offer different goods and services in various markets, for different prices, with different technical standards and warranties, and at different times.

Geoblocking has also been incorporated into contractual obligations: when content and service providers enter into contracts that require them to limit access to content to users connecting from a particular territory, the providers are sometimes required by the contracts to utilize geoblocking tools to fulfill the access limitations. In some instances the reasons for such contractually-mandated territorial limitations are economic (market partitioning), but in other instances the requirements stem from territorial limitations on the licensor's rights and/or obligations to which the licensor is subject. A typical example would be a scenario in which a licensor holds copyright to a work in only some countries; if the licensor licenses the copyrighted content, the license must be territorially-limited, mirroring

- or at least not extending - the territorial limits of the licensor's rights.

When they are fulfilling their contractual obligations, content and service providers do not stop at using geoblocking tools; they also commonly insert provisions in their users' terms of service to contractually support the employment of geoblocking. These provisions may include an obligation for users to access content only from a certain geographical area and/or a prohibition against users' circumventing geoblocking. For example, Sat.1, a German television station, in its terms of service says that its users may not "alter, evade or otherwise disregard" its geoblocking tools.¹⁸ If a user does not comply with the provider's terms of service, the user is in violation of the agreement and could potentially face consequences associated with such a breach of contract. However, geoblocking is a more effective means of delineating the territorial imprint for user access to content; it functions instantly and creates no further enforcement costs for a provider, namely the legal and reputational costs that a provider would incur if it enforced its rights against users.

2.3. The use of geoblocking for regulation and in the enforcement of laws

At the same time that geoblocking has become a part of private ordering, regulators and courts have also begun to explore geoblocking, not only as one of the options available to territorially delineate the scope of their decisions, but potentially as the *only* viable, sufficiently reliable option to define their decisions territorially. The area of gambling law provides instructive examples in which regulators and courts require the use of geoblocking to prevent users in their jurisdiction from accessing content that is prohibited in the jurisdiction; these regulators and courts also turn to geoblocking to allow users in their jurisdiction to access content that is legal in the jurisdiction, and to prevent users from outside their jurisdiction from accessing the same content that is not legal in those other jurisdictions.

For example, the Italian gambling regulator has required that online gambling websites geoblock users connecting

17. Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997).

18. Nutzungsbedingungen für die Nutzung des Videoportals von Sat.1, § 4.1(g). [Accessed: 30/10/2016] <<http://www.sat1.de/service/nutzungsbedingungen/nutzungsbedingungen-fuer-die-nutzung-des-videoportals-von-sat-1>>.

from Italy to prevent the users from accessing certain content.¹⁹ In the United States, a Kentucky state court ordered an online gambling website to employ geoblocking to prevent access to the website by users connecting to the Internet from the State of Kentucky.²⁰ Conversely, gambling regulators in some jurisdictions require online gambling operators licensed in their jurisdictions to employ geoblocking to allow access to the operators' websites only to users connecting from their jurisdictions and from such other jurisdictions where the operators are also licensed. This requirement stems from a general obligation imposed on gambling operators in these jurisdictions to abide not only by the laws of the licensing jurisdiction but also by the laws of any other jurisdiction where the operators hold licenses.²¹

Geoblocking enables compliance with territorially-defined laws and decisions in other contexts as well. In a case in the United States, a question arose whether sufficiently effective geoblocking is to be deemed a standard practice, meaning whether one must employ geoblocking in order not to infringe the rights of another arising under U.S. copyright law.²² The determination was important to the plaintiff because if geoblocking is considered a standard practice, the plaintiff could potentially be awarded higher damages for a violation of copyright (as opposed to contractual damages for violation of contract). But the determination would also be important generally: if geoblocking is held to be a standard practice, compliance with U.S. copyright laws on the Internet would always require the use of geoblocking. The court eventually decided the case as a copyright infringement case, finding that the defendant willfully infringed copyright; however, the court did not answer whether geoblocking would have been required absent the contractual obligation to geoblock that existed in this case.²³

The need to comply with territorially-limited rules of privacy and personal data protection also generates interest in geoblocking. For example, in response to pressure from European privacy regulators, Google announced in early March 2016 that it would begin to utilize geoblocking in an effort to comply with requests from users who wish to exercise their "right to be forgotten."²⁴ The right enables an Internet user to request that a search engine remove from its search any results it generates if those results contain information about the user that the user does not wish to appear in the results in some circumstances, particularly if the information is inaccurate, or "inadequate, irrelevant or excessive in relation to the purposes of the processing."²⁵ Commenting on the utilization of geoblocking to comply with user requests under the "right to be forgotten," Peter Fleischer, Google's Global Privacy Counsel, explained that Google will "use geolocation signals (like IP addresses) to restrict access to the delisted URL on all Google Search domains, including google.com, when accessed from the country of the person requesting the removal."²⁶

Although Google users who are opposed to territorial restrictions on access to information might consider it unfortunate that Google has agreed to geoblock users connecting from the jurisdiction for which the "right to be forgotten" request is filed, this solution is in fact more advantageous to Google users than the alternative. The alternative would be that Google take down the search results worldwide and disable access to the links through the Google search even for users accessing Google from outside the jurisdiction for which the request was made. Limiting compliance by taking the links down only from the Google website with the top level domain of the particular jurisdiction (Google.es for Spain, for example) would clearly be insufficient to achieve compliance with the request if users in the jurisdiction could still easily access the content

19. "IP Geolocation Can Ensure Compliance with UIGEA Regulations". *Neustar*. [Accessed: 30/10/16]. <<https://www.neustar.biz/resources/whitepapers/ip-geolocation-ensuring-compliance-with-online-gambling-regulations>>.

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

21. See, for example, N.R.S. 463.720 (Nevada). *Alderney eGambling Regulations* 2009, as amended in 2010 and 2011, Sections 21(1)(a) and (h), 22(b)(i), 41(1)(a), 42(1)(b)(i), 65(1)(a), 66(1)(a) and (h), 67(b)(i), 85(1)(a), 102(1)(a), 122(a).

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

23. *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, D.D.C., 1:12-cv-00957-TSC, Memorandum Opinion Setting Forth Findings of Fact and Conclusions of Law, December 2nd, 2016.

24. *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, ECJ, C-131/12, May 13th, 2014.

25. *Id.*, par. 92 and the ruling of the Court.

26. P. Fleischer (2014). Emphasis omitted.

(which they could) by simply switching to a website with a different top level domain (Google.com, for example)²⁷ Geoblocking only the users that connect to the Internet from Spain (in this example) means that Internet users from other jurisdictions may continue to access full Internet search results.

3. Opposition to geoblocking

Geoblocking has its opponents, whose objections to geoblocking fall into two categories: objections concerning geoblocking *per se*, and objections concerning the underlying reasons for geoblocking. Critics who oppose the underlying reasons for geoblocking often frame their objections as objections to geoblocking *per se* and question geoblocking's effectiveness in delimiting borders on the Internet, instead of addressing their true objections, which are directed at the underlying reasons for geoblocking. Because the two categories of objections are often presented together, it is useful to separate them and consider them *seriatim*.

3.1. Objections to geoblocking *per se*

Geoblocking itself is criticized by those who believe that the original architecture of the network should remain intact as to its indifference to national borders. As Goldsmith and Wu noted, such critics have viewed "[t]he bordered Internet [as] a dreadful development that is antithetical to the Internet's 'true' purposes and undermines the Internet's promise."²⁸ For these critics, replicating national borders or creating new borders on the Internet, including through geoblocking, is unacceptable.

Geoblocking is also criticized for allowing spillover that might or might not be negligible. In addition to the fact that it suffers from potential technical flaws that may allow for such

spillover, geoblocking is targeted by acts of circumvention from users.²⁹ Although geoblocking is constantly improving, so too are the various tools being developed to circumvent geoblocking. As with other technological measures, it is unreasonable to expect flawless reliability from geoblocking; laws are frequently employed to support the use of technological measures that are imperfect. If the measures operated perfectly, there would be no need for legal rules to support the functioning of the measures.³⁰

It is uncertain if, and if so how, the law currently supports the operation of geoblocking.³¹ The uncertainty regarding the legality of geolocation circumvention is best exemplified by the changes in the ways that circumvention tool providers advertise their tools. Tool providers previously touted the function of their tools in evading geolocation and circumventing geoblocking for users who wanted to access copyright-protected content that was restricted to certain users based on their location; now, however, they refrain in their advertising from referring specifically to copyright-protected content. For example, in 2011 *My Expat Network* encouraged users to use its services to "watch American TV online whilst overseas," noting that by "using [My Expat Network's] US based servers, [users] will ... be able to access US based content such as American TV catchup services, sites blocked where you are and other US only websites."³² Today, however (as of May 7th, 2016), *My Expat Network* encourages users in nebulous terms to use its tool to "watch the online content [the users] love from wherever [they] are" and "[g]et [their] home country Internet throughout [their] home."³³ Providers of geoblocking evasion tools also tend to emphasize the use of their tools for purposes other than avoiding geoblocking, which are primarily the purposes of anonymization and the protection of privacy.

Other examples illustrate the uncertainty about the legal status of the circumvention of geoblocking. The fact that a

27. For a Canadian case in which Google was unsuccessful in attempting to justify its compliance with an injunction solely through a website version for a particular jurisdiction, see *Equustek Solutions Inc. v. Google Inc.*, Court of Appeal for British Columbia, [2014] BCCA 295, July 23, 2014; *Equustek Solutions Inc. v. Google Inc.*, [2015] BCCA 265, June 11, 2015. An appeal of the 2015 decision was pending before the Supreme Court of Canada as of October 30th, 2016.

28. Goldsmith and Wu, *supra* note 12, p. 150.

29. Trimble, *supra* note 2.

30. Neil Stanley Higgs v. The Queen, [2008] EWCA (Crim) 1324.

31. P. Leung (2016).. See also Trimble (2012).

32. *My Expat Network*. November 1st, 2011. [Accessed: 30-October-2016] <<http://www.my-expat-network.com/>>.

33. *My Expat Network*. March 13th, 2016. [Accessed: 30-October-2016] <<https://www.my-expat-network.com/>>.

dispute between content providers and the provider of the circumvention tool *Global Mode* in New Zealand resulted in a settlement³⁴ could signal uncertainty about the legal status of the circumvention of geoblocking. In a recent draft report, the Australian Productivity Commission urges the Government of Australia to amend the copyright statute to clarify that circumvention of geoblocking is not in violation of Australian copyright law and thus “prevent the future possibility that rights holders seek to use ambiguity in the Australian copyright system to prevent consumers’ circumvention of geoblocks.”³⁵

While geoblocking suffers criticism for its less-than-perfect reliability and the uncertainty regarding the legal protection it might enjoy, it suffers further criticism on a third front: implementing geoblocking is not without costs. When service and content providers are required to employ geoblocking, they expend capital that they could otherwise use in areas arguably more beneficial to their businesses and their customers. The strength of this argument will weaken, of course, if and when the costs of geoblocking tools drop in price. Additionally, if geoblocking becomes standard practice in the industry or legally mandated (as it has in online gambling regulation, mentioned earlier), its costs become regular costs of doing business that are incurred by all businesses, similar to the costs of domain name registration or website hosting.

Geoblocking also frequently attracts criticism as a barrier to free speech and the right to “receive and impart information and ideas... regardless of frontiers” – the right that is included, for example, in Article 11(1) of the Charter of Fundamental Rights of the European Union. To the extent that geoblocking is used in a circumscribed manner and is not in violation of constitutional and human rights laws, such criticism is unwarranted; constitutional and human rights laws typically do permit some limitations on speech.³⁶ The problem arises when, as is the case when any technological measures are employed, the employment of geoblocking leads or might lead to inadvertent limitations on speech, and when such limitations, if they occur, are in violation of the law. Limitations placed on speech are problematic, particularly when the limitations are implemented by an intermediary, without the authorization of – or even against

the will of – the speaker, and the limitations are contrary to the legal obligations of the intermediary. Limitations on speech imposed by the speaker him or herself should pose no legal issues as long as no affirmative legal duty exists for the speaker to impart the speech him or herself, and impart the speech without territorial limitation.

3.2. Objections concerning the underlying reasons for geoblocking

Other objections to geoblocking, even if framed as objections to the tools themselves and the effects of the tools, in fact relate to the purposes for which geoblocking is utilized. For example, users complain about being geoblocked when they try to access copyrighted content; in such instances, geoblocking is typically used to comply with territorially-limited rights and/or licenses. Therefore, rather than targeting geoblocking in their complaints, users should direct their complaints at the differences among national copyright laws and the differences in rules of copyright ownership, subject matter protectability, and/or exceptions and limitations to copyright protection. Or, if a territorial limitation arises from licensing practices associated with market partitioning, users should criticize the practice of market partitioning. In either set of circumstances the debate should concentrate on the reasons for which geoblocking is employed rather than on the employment of geoblocking itself.

If objections to geoblocking stem from the underlying reasons for geoblocking but the debate still focuses on geoblocking itself, the course of the debate may reveal the critics’ desire to find less effective (and therefore less restrictive) means of delineating borders on the Internet and bypass any debate about the underlying reasons. At present, although it is not a perfect means, geoblocking is the most effective means of limiting access to content on the Internet on a territorial basis. All of the alternatives to geoblocking are less effective; the alternatives, such as relying on providers’ targeting (using indicators such as a particular language or top-level domain) and/or users’ self-reporting (relying on users to indicate their location), usually result in substantial territorial spillover and arguably substantially lower compliance and enforcement.

34. J. Kirk (2015).

35. *Intellectual Property Arrangements, Draft Report* (2016).

36. S. Tully (2014, p. 193).

Choosing a less effective means to achieve compliance and enforcement with territorial restrictions is equivalent to a policy choice to under-enforce the territorial restrictions. Such a policy choice might be substantiated by the interests of some stakeholders; however, to substantiate this choice the stakeholder interests should be legitimate and significant enough to shape national policies. Further, it might be possible to pursue other avenues to promote the interests rather than deliberately building highly permeable borders; while some cross-border spillover has always been accepted, a large spillover resulting from highly permeable borders defeats the existence of the borders.³⁷

4. The EU anti-geoblocking campaign

A regulation of cross-border spillover that could affect the effectiveness of geoblocking is the first action in the European Commission's campaign against "unjustified geoblocking."³⁸ When the Commission launched the campaign in 2015, the first reports indicated that the future of geoblocking was unclear; however, the resulting proposals for two regulations were much milder than the initial Commission document had suggested.

After the Commission had examined the various reasons for which service and content providers employ geoblocking, it introduced in December 2015 a relatively modest proposal to address one effect of geoblocking – the limitation on access that users experience when they are temporarily present in another country. In May 2016, the Commission introduced its second proposal, which was a substantially more ambitious regulation that would eliminate geoblocking in most instances. However, even this second proposal includes a significant limitation: it prohibits geoblocking generally, unless "the blocking [...] is necessary in order to ensure compliance with a legal requirement in Union law

or in the laws of Member States in accordance with Union law."³⁹ While the second proposal would combat geoblocking that is employed for purely economic reasons, such as price differentiation, the proposal would not eliminate geoblocking that is employed to comply with national laws.

This section reviews the Commission's first proposal – the proposal for the regulation on cross-border portability – and discusses the potential effects of the proposed regulation. The proposal exemplifies the problem of mixing the two types of objections to geoblocking that were discussed in section 3 – objections to geoblocking *per se* and objections to the underlying reasons for geoblocking. In this proposal, the Commission seeks to set limits on the legal evasion of geoblocking, rather than addressing the underlying objection to geoblocking – the territorial nature of copyright law.

4.1. The Proposal for the EU Regulation on Cross-Border Portability

The proposed Regulation on ensuring cross-border portability of online content services in the internal market⁴⁰ responds to the substantial "[c]onsumer demand for the cross-border portability of online content services."⁴¹ By "cross-border portability" the Commission means the ability of a user to access content that is accessible to the user in his or her EU member state of residence when the user is temporarily present in another EU member state.⁴²

Annex 7 of the Impact Assessment that accompanies the Proposal provides a glimpse of the kinds of services that the Commission wants the cross-border portability to apply to: they are, for example, subscription services such as iTunes, Sky Now, and CanalPlay that place territorial restrictions on access to the content that they provide.⁴³ The fact that there might be contractual obligations that stand in the way of cross-border portability is not a roadblock for the Proposal, which in its Article 5 would make any contractual provisions unenforceable if they contravene the cross-border

37. For a discussion of acceptable cross-border spillover, see, for example, M. Trimble (2014).

38. *A Digital Single Market Strategy for Europe*, *supra* note 4, pp. 4, 6, and 21-25.

39. Article 3(3). European Commission, COM (2016) 289 final, May 25th, 2016.

40. European Commission, COM (2015) 627 final, December 9, 2015.

41. Proposal for a Regulation, *supra* note 4, p. 2.

42. *Id.*, Article 3, pp. 16-17. "Portability" is defined as a characteristic that "means that subscribers can effectively access and use the online content service in the Member State of residence without being limited to a specific location." *Id.*, Article 2(f), p. 16.

43. Impact Assessment (2015). See also Proposal for a Regulation, *supra* note 4, p. 8.

portability requirement. The Proposal would not distinguish among such contractual provisions based on the reasons for the existence of the provisions. For example, it would be irrelevant that a contractual provision was based on a licensor's territorially-limited scope of rights; if the provision contravened the cross-border portability requirement, it would be unenforceable.

The Proposal legislates an acceptable level of cross-border spillover.⁴⁴ At present, when a user is temporarily in another country the user must use a geoblocking circumvention tool if the user wants to access content that is otherwise available to the user in his or her country of residence (and which he or she might be paying for). This is problematic because of the uncertainty regarding the legal status of the use of circumvention tools to access any blocked content. Content and service providers realize that such spillover exists and some try to minimize it by blocking the circumvention tools to the extent that the providers are able. Some providers might decide not to contest the circumvention; for some providers spillover might be negligible, and for other providers spillover might even be welcome if they benefit from the increased website traffic. The proposed Regulation would define an acceptable spillover⁴⁵ and mandate that content and service providers allow that level of spillover - access to content by a user who is a resident of one EU member state when that user is temporarily present in another EU member state and is accessing content that is available in the user's EU member state of residence.⁴⁶

4.2. The effects of the cross-border portability proposal

One problem of the Proposal is that, in order to ensure that only users who are residents of EU member states are granted access, and granted access only from EU member states where the users are temporarily present, the users' movement must be tracked and their identity authenticated when the users access content. Unless providers are expected to rely on users' own declarations of their status, providers will have to implement geolocation, location tracking, and authentication mechanisms to verify that particular users are eligible to enjoy portability at a given moment. Whether such greater surveillance of users by content and service providers inures to the benefit of society as a whole is open to debate.⁴⁷ Without such mechanisms, however, spillover could easily increase to a level that would defeat any geoblocking that providers might employ.

By addressing geoblocking itself rather than the reasons for which geoblocking is employed, the Proposal seems to be treating the pain rather than the underlying disease. Although the Commission Communication that was issued on the same day as the Regulation Proposal suggests that further legislative proposals should be directed at the causes of the "pain", i.e. the reasons that underlie the use of geoblocking,⁴⁸ the order in which the Commission produces its proposals seems to be logically reversed, with the Regulation Proposal preceding other legislative initiatives that should target the reasons for which geoblocking is

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44. One indication that the Proposal is in fact about acceptable spillover is this statement from the Proposal: "For the licensing of copyright and related rights, this means that the relevant copyright acts, which occur when the service is provided to consumers on a basis of cross-border portability, are deemed to occur solely in the Member State of residence." Proposal for a Regulation, *supra* note 4, p. 8. The Proposal thus uses a conflict-of-laws concept - localization of the acts - to prevent liability in the EU member state where the user is temporarily present for copyright infringements and violations of licenses.
45. The magnitude of the resulting spillover would depend on the definition of the term "temporarily present" for the purposes of the Regulation, and also on the reliability of tools employed to ensure geolocation, location tracking, and authentication of users who are intended to benefit from cross-border portability under the Regulation.
46. The supposition that the Commission understands the effects of cross-border portability as an acceptable spillover is supported by the fact that the Commission does not expect that content and service providers will have to re-negotiate their contracts in order to comply with the Regulation on cross-border portability. Proposal for a Regulation, *supra* note 4, p. 6.
47. In the Explanatory Memorandum to the proposal for the Regulation, the Commission acknowledges that "[s]ervice providers would benefit from the mechanism establishing the localisation of the service for purposes of portability and be able to better respond to their customers' needs." Proposal for a Regulation, *supra* note 4, p. 6.
48. *Towards A Modern, More European Copyright Framework* (2015). See also *A Digital Single Market Strategy for Europe*, *supra* note 4, p. 4.
49. "Removing the obstacles to cross-border portability is a first significant step that addresses a specific obstacle to cross-border access to content which is important for consumers." Proposal for a Regulation, *supra* note 4, p. 2.

being employed.⁴⁹ Of course, removing geoblocking first may be an avenue for the European Commission to push forward certain policy agendas that EU member countries have resisted so far – for example, a unification of copyright law in the European Union.⁵⁰

5. Geoblocking serving positive ends

Geoblocking should not be summarily rejected as an evil on the Internet; not all purposes for which geoblocking is used are contrary to law or otherwise worth eliminating. Although geoblocking prevents unrestricted access to information on the Internet, it also serves important ends that should not be overlooked when considering the future of geoblocking on the Internet. Geoblocking promotes diversity of content on the Internet and serves other positive ends.

5.1. Diversity of content on the Internet

That geoblocking contributes to the diversity of content on the Internet seems counterintuitive. Although geoblocking will limit the variety of content accessible to a user in a certain location to the content accessible from that location, from a global perspective the diversity of content accessible to users around the world will be enhanced. For example, when a search engine provider makes certain search results inaccessible in Spain to comply with a request under “the right to be forgotten” (mentioned in subsection 2.3. above), a user located in Spain will not be able to find or access the search results. However, worldwide diversity will be increased because geoblocking allows the search engine to comply with “the right to be forgotten” in Spain while the full search results are maintained for users connecting to the Internet from outside Spain. Absent geoblocking, the search engine provider might choose to, or be forced to, remove the full search results globally.

Geoblocking arguably contributes to the diversity of content on the Internet in yet another way: content licensing can be priced differently, depending on

the market, the size of the market, and the other characteristics of the market. Geoblocking allows licensors to grant, and licensees to comply with, territorially-limited licenses that are less costly than global licenses. Without geoblocking, content creators would be pressed to license on a worldwide basis at prices that would most certainly exclude smaller service providers from the market. The absence of geoblocking could therefore unwittingly lead to a large consolidation in the market and diminished competition among service providers, both locally and globally. Whether large industry consolidations would be harmful for society should be a topic of discussion before geoblocking is eliminated.

5.2. Other reasons for geoblocking

Supporters and critics of geoblocking debate the advantages and disadvantages of geoblocking according to their own motivations; some critics will even argue against diversity of content on the Internet in favor of what they perceive as advantages of uniform content, including, for example, the promotion of global unity among societies and enhancement of cross-border trade. Promoters and detractors of market partitioning will also promote the positions that serve their own interests; numerous authors have discussed why market partitioning might be beneficial to consumers, and therefore the use of geoblocking, even for market partitioning, should not be summarily rejected without considering the economic implications of this use in some circumstances.

Territorial partitioning of the Internet is inevitable as long as countries have strong national public policies that shape at least some areas of their laws. Even within the European Union, where great strides have been made to unify or harmonize national laws among the individual EU member states, or achieve a single EU market through mutual recognition, many differences in laws persist that not even the single EU market can eliminate. The difference in the rules for online sales of over-the-counter medicines (as opposed to prescription medicines) is a lesson about when and why it matters to countries whether borders on the Internet are permeable or not.⁵¹ Online gambling and other sensitive areas of regulation evidence countries’

50. For now, the European Commission has declared that “[t]he general objective is to increase the level of harmonisation.” *Towards A Modern More European Copyright Framework*, *supra* note 48, p. 8. See also *id.*, p. 12. For an earlier mention of a possible future EU action on uniform copyright law, see *Online Services, Including E-commerce, in the Single Market* (2012).

51. *Deutscher Apothekerverband v. 0800 Doc Morris*, ECJ, C-322/01, December 11th, 2003.

strong policy stances for which geoblocking on the Internet offers a workable *modus operandi*.

6. Conclusions

Two conclusions may be drawn from this article. First, geoblocking should not be summarily rejected without considering the beneficial roles that it plays or may play in the Internet legal landscape. Geoblocking is a tool that serves multiple purposes, not all of which are undesirable and should be discarded. Only after we assess the purposes of geoblocking and how geoblocking supports the purposes should we discuss any elimination of geoblocking. In a 2012 proposal for a “digital passport” that would allow users to access content available outside of the jurisdiction in which they are located (to “cybertravel”)⁵² the suggestion was not that all content should necessarily be available everywhere; in fact, the digital passport idea was guided by the notion that some cybertravel might *not* be permissible and that a digital passport would allow cybertravel only to the extent permitted by law.

The second conclusion to be drawn from this article is that a weakening of geoblocking will open a back door to legal harmonization or unification that countries and other stakeholders might or might not find desirable. Of course, geoblocking is not the only tool that can achieve a territorial partitioning of the Internet; arguably, however, it is the most effective tool that exists today. Replacing geoblocking with a less effective means, or opening holes in geoblocks with potentially ineffective cross-border portability rules, would concede a greater content spillover that could *de facto* mean the end of the territorial partitioning of the Internet. Some critics may argue that eliminating or replacing geoblocking is the proper course of action – it is a course that, if taken, would force the industry and countries to find common business and/or legal solutions in those areas of law where countries disagree on a uniform approach. Apart from whether the unification of laws and business practices is currently realistic or not, we should ask ourselves whether we actually want a territorially unpartitioned Internet, given the effects that the removal of borders on the Internet would have on the legal landscape.

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52. See *supra* note 2.

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