

Remedies, Enforcement and Territoriality

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I would like to start by thanking the Kernochan Center and all its members, in particular Jane Ginsburg, and also Rebecca Giblin, together with all the colleagues who have been involved in the conception of this Symposium. I am happy to be back after a few years: I was a Visiting Scholar at Columbia Law School in the academic year 2011 and I was very lucky to be invited to speak at the 2011 annual copyright symposium on collective rights management. I am happy to talk briefly about the implications of territoriality for online copyright enforcement measures. As it has been remarked earlier today, territoriality is a principle established indirectly in many ways by the Berne Convention.¹ Territoriality also plays a central role for a number of copyright enforcement measures that have become extremely important for the creative sector in the digital environment.

I. GEO-BLOCKING AND SITE-BLOCKING MEASURES

I am going to talk briefly about how the creative sector is using in particular two types of measures for the enforcement of copyright on the Internet: geo-blocking, on one hand, and site-blocking measures, both of which having to deal with territoriality, somehow. So far, enforcement measures have been based on the idea of a country-by-country enforcement and are inevitably constrained by the territorial dimension of copyright and of the judicial measures that can be obtained by the rights-holders. As I will point out, the original borderless character of the Internet would have made it an optimal transnational, cross-border approach to copyright enforcement, which would help the creative sector save money by

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1. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 24, 1971, and *as amended* in 1979, S. Treaty Doc. No. 99-27 (1986) (entered into force in the United States Mar. 1, 1989).

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making enforcement measures more bearable from the point of view of costs and time. So, whenever I mention enforcement under the international treaties that we have taken into consideration today, I mean and I intend to address not only judicial remedies but also remedies that have been created and relied upon around the world. Such remedies also include administrative remedies, but even more so, self-help remedies.

Geo-blocking can be considered a kind of enforcement-related technology that is actually pre-supposed by the digital businesses that we have today. All of these businesses—and correct me if I am wrong, especially in the Q&A session—are based on the idea of geo-localization. The dream that we had at the very beginning, when the Internet was new and was regarded as a place where borders should not have mattered any longer, has progressively disappeared. In the last decade the idea of partitioning the Internet into an environment where each country has its own rules and its own market has become mainstream, whereas in the Internet infancy it would have been regarded as a conservative concept.

We live in an environment in which all the devices we use are somehow geo-localized. On the one hand, all the apps that we run on our mobile devices, in particular on our smart phones, are restricted in a way that we cannot access whatever we like and want—unless we are smart enough to install a VPN (a virtual private network), or we manage to be hacking technical restrictions.² This means that, when it comes to lawfully accessible content, we have to deal with geo-localization, which is something that is territoriality-friendly, let's say. We have spoken a lot about the Internet during the day. However, someone objected that the vast majority of speakers seemed to embrace a sort of denial rhetoric, as if the Internet had not revolutionized the way we access creative works. The main reason for the predominance of that rhetoric, in my view, is the fact that multi-territorial, cross-border businesses are still relatively poor in comparison to the potential of the Internet. This happens since content offerings are not being conceived and taken into consideration as profitable or sustainable businesses. The copyright system and, in particular, its territoriality has often been regarded as the main obstacle to the formation of cross-border markets and the supply of content services that might significantly reduce the appeal of (borderless) online piracy channels. I do not think copyright can be regarded as the main factor triggering the aforementioned scenario. I wrote an article on geo-blocking a couple of years ago in which I tried to emphasize, at least when it comes to the European Union, that commercial decisions as well as cultural and linguistic diversity mattered more than the territoriality of copyright in the establishment of artificial barriers in a potentially borderless environment.³

2. A VPN, or virtual private network, is “a secure and private solution within the wider Internet itself that allows users – whether they are individuals, or part of an organization, or business – to send and receive data while maintaining the secrecy of a private network.” Desire Athrow, *What is a VPN?*, TECHRADAR.PRO (Oct. 9, 2017), <https://perma.cc/D4FU-EHXP>.

3. Giuseppe Mazziotti, *Is Geo-Blocking a Real Cause for Concern in Europe?*, 38 EUR. INTELL. PROP. REV. 365 (2016).

Geo-blocking differs from site-blocking measures in so far as it is a self-help remedy, which aims not only at fighting piracy but also at enforcing territorially restricted licensing agreements. Geo-blocking presupposes geo-localization and is very much a precondition for the online business models that we have embraced in the last decade. I believe that the circumvention of all technologies that make geo-blocking effective might be regarded, from a copyright perspective, as being legally restricted under anti-circumvention laws that the 1996 WIPO Copyright Treaty made mandatory for all its Contracting Parties.⁴ At least in the U.S. and in the European Union, these prohibitions include also “anti-trafficking” provisions, which outlaw the manufacturing and marketing of technologies whose main intent is to enable the circumvention of technological protection measures used in connection with the exercise of copyright.⁵ This means that VPN services, which are widely used by Internet users to bypass geo-blocking measures, might be regarded in the near future as circumvention technologies that could fall within the scope of the anti-trafficking provisions and be outlawed under national laws.

When I mentioned ‘site-blocking’, instead, I intended to refer to national judicial measures having—by necessity—territorially restricted effects. Some of you might remember the story of the Pirate Bay,⁶ a structurally infringing site against which, at least in Europe, site-blocking injunctions were sought and implemented in a multiplicity of jurisdictions. I find it paradoxical that in the European Union we are openly talking about the development of a “Digital Single Market” and the possible unification of copyright titles in the long run, but at the same time we are *not* thinking about unifying the related judicial measures. In fully unified digital markets also site-blocking injunctions would become necessary in order to have an appropriate and convincing enforcement of rights on a EU-wide basis. As things stand, the different traditions and the still diverging applicable laws in Europe when it comes to copyright enforcement make site-blocking injunctions different from one country to another and legally questionable, in several countries, where such measures are regarded as potentially unacceptable because of the risk of over-blocking and their conflict with the principle of online freedom of communication.

4. See generally, WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO Internet Treaties, <https://perma.cc/6Z2S-U8QZ>.

5. For instance, under Article 6 of Directive 2001/29/EC (*Obligations as to technological measures*), par. 2, it is provided that the Member States of the European Union should provide adequate legal protection against the manufacturing, marketing and possession of products or components or the supply of services which are (a) promoted, advertised or marketed for the purpose of circumvention or (b) have only a limited significant commercial purpose or use other than circumvent or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.

6. Case C-610/15, *Stichting Brein v. Ziggo BV and XS4All Internet BV* (June 14, 2017), <https://perma.cc/LC4A-BU5J>.

II. SITE-BLOCKING MEASURES AND PRIVATE INTERNATIONAL LAW

In the previous panels the speakers have shed light on the gaps and the flexibilities inside the international copyright treaties. In the specific domain of enforcement measures, a relevant source of flexibility is given by private international law, which has the potential to make enforcement measures multi-territorial even without a textual modification of the Berne Convention. In this respect, European Union law provides useful examples of how cross-border uses of copyright works have been made subject to a single national law for the whole E.U. It is worth recalling that, in the field of copyright, E.U. law is a sort of an intermediate step between national and international law since we still have, in spite of the adoption of a plethora of harmonization measures, a multiplicity of national copyright systems, each of which is based on the principle of territoriality. The European Union has already relied upon private international law provisions to oblige the E.U. member states to avoid the simultaneous application of multiple national laws by mandating the adoption of one single law. These measures are embodied in directives that aimed at simplifying the clearance of copyright and to strengthen the freedom to provide certain services on a multi-territorial basis.⁷ These provisions impose on the E.U. Member States adoption of a “country of origin” principle that makes cross-border content exploitation such as satellite broadcasts and digital TV services subject to one single national law, as if those activities occurred just in the country where the service provider is established. An identical objective is being pursued at the EU level through a EU regulation the European Commission proposed in September 2016 in order to facilitate clearance of copyright for online ancillary services and content retransmissions by broadcasters and operators of services such as IP TV providers wishing to offer access to their television and radio programmes on a cross-border basis.⁸ To this end, by complementing the existing 1993 Satellite and Cable Directive, the upcoming Broadcasting Regulation aims to make certain online transmissions of radio and TV broadcasts, as well as their cross-border re-transmissions, subject to the single law of the country of origin of the broadcaster.⁹

7. See Directive 2010/13/EU, of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, O.J. (L 95/1), 2; and 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, O.J. (L 248), (hereinafter *Satellite and Cable Directive*), 1.

8. Proposal for a Regulation 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, COM (2016) 594 final (Sept. 14, 2016) (hereinafter, “*Broadcasting Regulation*”). Recital 8 of the *Broadcasting Regulation* refers to ‘ancillary services’ as those services offered by broadcasting organizations which have a clear and subordinate relationship to the broadcast.

9. The services falling within the scope of application of the *Broadcasting Regulation* include transmissions of radio and TV programmes simultaneously to the broadcast; services giving access, within a defined time period after the broadcast, to radio and TV programmes which have been

Considering that E.U. law already allows for the choice of jurisdiction and of the law applicable to contractual obligation, on the grounds of E.U. regulations that are the equivalent of federal laws in the U.S., it would not be unrealistic to think of the establishment of single points of attachment also for enforcement measures such as site-blocking injunctions. As pointed out by Professor Ginsburg, if the traditional criterion of the law of the country where protection is sought (*lex loci protectionis*), which is entailed by the principle of territoriality, were interpreted differently, it would be possible to enable the enforcement of copyright in a given jurisdiction with effects extended to *all* infringements occurring in other E.U. jurisdictions.¹⁰ Unfortunately, at least in the E.U., the creation of such single points of attachment seems to be hindered by a still diverging interpretation and implementation of Article 7 of the Brussels Regulation.¹¹ In designating “the place where the harmful event occurred or may occur”, this provision aims to establish where, in case of tort, a person can be sued. So far the Court of Justice has identified such jurisdiction in a diverging way, mentioning the country where the claimant has her center of interests,¹² or, in another case, the country where the persons targeted by a given exploitation of copyright works are located.¹³ More recently, to determine the law applicable to a copyright infringement case occurring also online, the CJEU applied the so-called ‘accessibility’ criterion, according to which an infringement action can be validly brought before the courts of the place where the damage occurs or where the act causing such damage takes place.¹⁴ It is evident that the criterion of accessibility paves the way for a multiplication of courts, on the assumption that a copyright enforcement action can be brought in each Member State where the infringed work can be accessed, in accordance with the applicable national rules and in relation to the damages occurred in each single jurisdiction.¹⁵ Such a potential multiplication of courts is exactly the opposite of the multi-territorial—possibly pan-EU—online enforcement measures that this piece has advocated. In this respect, considering the aforementioned uncertainties, it would seem suitable to enable a right holder to enforce copyright in a single jurisdiction

previously transmitted by the same organization (the so-called “catch-up” services); services providing access to material that enriches or otherwise expands radio and TV broadcasts (e.g. previewing, reviewing, etc).

10. See Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights, The Berne Convention and Beyond* 1301-03 (Oxford Univ. Press, 2d ed. 2005).

11. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012 O.J. (L 351), art. 7(2).

12. Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH v. X and Oliver Martinez*, 2011 E.C.R. I-10269, ¶¶ 48-52.

13. C-173/11, *Football Dataco Ltd v. Sportradar GmbH*, 2012 EUR-Lex CELEX LEXIS 642 (Oct. 18, 2012), ¶¶ 38-39.

14. See C-170/12, *Peter Pinckney v. KDG Mediatech AG*, 2013 EUR-Lex CELEX LEXIS 635 (Oct. 3, 2013), ¶¶ 42-43.

15. See C-387/12, *Hi Hotel v. Uwe Spoering*, 2014 EUR-Lex CELEX LEXIS 215 (Apr. 3, 2014), ¶¶ 35, 38-39, where the CJEU held that the courts of the Member States where the damage occurs are ‘best placed, first, to ascertain whether the rights of copyright guaranteed by the Member State concerned have in fact been infringed and, secondly, to determine the nature of the damage caused’.

through the enactment of a private international law measure aimed at determining the specific country (for instance, the country from which the infringement originates) where online copyright enforcement actions might have multi-territorial or pan-EU effects.¹⁶ I'll be happy to discuss with you the implication of this proposal during the Q&A session. Thanks a lot.

16. See Ricketson & Ginsburg, *supra* note 10, at 1303 (discussing the possibility of introducing the criterion of the country of the 'initiating act' with regard to online infringements in order to make multi-territorial enforcement of copyright compatible with the principle of territoriality).