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Sabrina Earle
University of Richmond

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THE BATTLE AGAINST GEO-BLOCKING: THE CONSUMER STRIKES BACK

Sabrina Earle

I. INTRODUCTION

A person can access any number of websites from varying countries within a matter of seconds while sitting comfortably from any place in the world that has Internet access. The advancement and growth of the Internet has helped create and enhance a globalized economy in which ideas are shared and items are sold almost instantaneously. On one hand, the Internet has created a place where collaboration and exchange can be done easily on international scale. On the other hand, however, industries attempt to hinder the viewing of copyrighted materials based solely on the geographical location of the potential viewer.

The quick and relatively easy access to information has led users to generally expect instant gratification of obtaining the information that they seek. The market of exchange provided by the World Wide Web allows users to access millions of blogs, newspaper articles, songs, and other various copyrightable materials almost literally at their fingertips. This access occurs not only at the user's place of choice, but also in a near-instantaneous fashion. Because of the convenience and speed of obtaining information and sources that the internet has provided, users are now accustomed to a market place that provides "no holds barred" access to everything from a 1980's newspaper article to last night's Law and Order episode.

However, the entertainment industry (hereinafter "Industry") has somewhat ironically both embraced and attempted to hinder the quick access to copyrighted information. The Industry has embraced this quick access by recognizing a growing preference for streaming television shows. This recognition has led to an increase in the availability of network programs with episodes that can be viewed or streamed the day after they air on traditional cable television. Conversely, region locks still occur on DVD versions of media and similarly on streamed television programs available in the UK, but not in the United States (and vice-versa). These "precautions" that the Industry has taken have become an antiquated and superfluous hindrance to the use of media files. Rather than allowing a person who presumably legally obtained access to the copyrighted material, these "locks" frustrate the viewer and inspire them to find another route. The conflicting goals of the Industry have led users to find alternative means of

accessing information that they have become accustomed to quickly acquiring.

The first part of this article will focus on the background of copyright law and its expansion in the digital age. The development of copyright law in the United States will be discussed along with a focus on current case law that has applied copyright law to the Internet and advancing technologies. Part I will also look into the expansion of copyright protection to an international level, including the creation of WIPO and the WIPO Copyright Treaty. Finally, Part I will discuss the popular trend of how consumers use the Internet to access digital copyrightable material.

The second part of this article will focus on one hand how television networks (Networks), as copyright holders, use the rising popularity of Internet streaming to their benefit. Alternatively, it will also focus on how these Networks also hinder themselves in the precautions that they set forth, such as region locking (also called “geo-blocking”) and delayed viewing for certain areas of the world. Due to the “precautions” used, this part will also highlight how these methods hurt, rather than help, these copyright holders. This section will discuss arguments for and against geo-blocking. Additionally, the section will consider the legality and rationality of geo-blocking and the use of circumvention measures.

Finally, the third part of this article will discuss how the Industry should change to keep up with social change. Industry change would achieve two main goals. The first goal is to keep up to date with changing technology and the way that people use the Internet. The second goal is to reduce the amount of piracy that occurs. This will in turn help copyright holders reclaim lost profits in both advertisement revenue and the purchasing of television programs. This section will also discuss how some of this change is already occurring with international organizations.

II. COPYRIGHT LAW AND CONSUMER ACTIVITY

A. *Law in the United States*

Since the foundation of the United States, the government has been concerned with protecting the rights of creators. Modern day copyright law, based on the rights defined by Article I, Section 8 of the United States Constitution, can be found in Title 17 of the United States Code (the Copyright Act). The statute provides that copyright protection is applied to original works created in “any tangible medium of expression.”¹ The protection extends to works of literature, musical work, dramatic works, choreography, graphics, sound record-

¹ 17 U.S.C. § 101 (2012).

ing, architecture, motion pictures, “and other audiovisual works.”² The last of that list provides part of the foundation for this paper.

An owner of a copyright holds the exclusive right to do or authorize a number of things with their creative works. Specifically, the copyright holder has the right to reproduce copies, distribute copies by sale or “other transfer,”³ and the right to transmit through digital audio.⁴ The right of a copyright holder to determine when to first distribute or make available audiovisual works provides the basis for the opposing argument in this paper. This right, although widely agreed upon, does have some limitations.

Basic copyright protection for digital media was expanded in 1998 with the Digital Millennium Copyright Act (DMCA).⁵ This act is composed of two main sections. The first section pertains to prohibiting the circumvention of access controls placed on digital media.⁶ The second section provides safe harbor provisions meant to protect service providers from being held liable for any infringement committed by their users.⁷ The purpose of the anti-circumvention provisions is to help put a stop to copyright pirates. Essentially, the act prohibits individuals from getting around content access restrictions of copyrighted works. Such digital rights management (DRM) techniques are meant to restrict access to copyrighted materials either by requiring a password or restricting use after the material has been purchased. Other access restrictions include “zone locking” or “geo-blocking” copyrighted material. If a viewer’s physical location is not within the designated geographical zone of the digital media, then they will be unable to view the copyrighted material. This became common with DVDs and is now occurring with online-streamed media, such as television shows posted on Hulu, Netflix, and iTV. As the law stands now, copyright holders have the unlimited right to control when and where a person may stream online content.

The main limitations to copyright protection include the “fair use” doctrine and the “first-sale” doctrine.⁸ The “fair use” doctrine is generally applied when part or all of the material is used either in a

² 17 U.S.C. § 102 (2012).

³ “Other transfer” includes renting, leasing, or lending the copyrighted material. 17 U.S.C. § 106(3) (2012)

⁴ 17 U.S.C. § 106 (2012).

⁵ The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

⁶ U.S. COPYRIGHT OFFICE SUMMARY: THE DIGITAL MILLENNIUM COPY RIGHT ACT OF 1998, at 2 (1998) available at <http://www.copyright.gov/legislation/dmca.pdf> (last visited Nov. 10, 2015).

⁷ *Id.* at 8.

⁸ 17 USC §§ 106 – 07 (2012).

review of the work or for educational purposes.⁹ However, application of this doctrine is always fact dependent.¹⁰

The other implicated limitation is that the copyright owner may only control the first distribution, or “first sale” of the copyrighted material. This limitation is often referred to as the “first sale” doctrine. In the 2013 case *Kirtsaeng v. John Wiley & Sons*, the Supreme Court held that the “first sale” doctrine extended to copies of copyrighted works “lawfully made abroad” and protected the reselling of textbooks purchased overseas.¹¹ The suit originated when, Kirtsaeng, a citizen of Thailand, moved to the United States to obtain an undergraduate degree and doctorate in mathematics.¹² While in the United States, his family shipped him foreign edition textbooks (printed in English) that were sold in Thailand for lower prices than in the United States.¹³ Kirtsaeng then resold the textbooks the profit.¹⁴ Wiley brought suit against Kirtsaeng for copyright infringement, citing § 602(a) of the Copyright Act, which has an import prohibition.¹⁵

The Court sided with Kirtsaeng, finding that geography had no effect on the protections and exceptions created by the Copyright Act.¹⁶ This means that the protection offered by the Copyright Act applies to any copies legally made worldwide (“lawfully under this title”), whether inside the United States or in a foreign country.¹⁷ The Court felt that Congress would not intend to harm commercial and consumer activities by creating a geographical limitation. Additionally, the Court noted that another section of the Copyright Act supports this non-geographical interpretation.¹⁸ Section 104 states that works protected under the Copyright Act include unpublished works “without regard to nationality or domicile of the author.”¹⁹ Furthermore, there is no evidence to show that Congress ever had geography in mind when creating the Copyright Act.²⁰

The holding in *Kirtsaeng* is in direct opposition to § 602 of the Copyright Act. That section explicitly prohibits the importation of copyrighted materials without the author’s permission for the purpose

⁹ 17 U.S.C. § 107 (2012).

¹⁰ *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, last updated Nov. 15, 2015, available at <http://www.copyright.gov/fls/fl102.html>.

¹¹ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1355-56 (2013).

¹² *Id.* at 1356.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1357.

¹⁶ *See id.* at 1358.

¹⁷ *Id.*

¹⁸ *See id.* at 1359.

¹⁹ 17 U.S.C. § 104(a), (2012).

²⁰ *See Kirtsaeng* 133 S. Ct. at 1360.

of distribution.²¹ Now, under *Kirtsaeng*, an individual has the right to import lawfully obtained copies of copyrighted materials, even if those materials are imported for resale.²² The Court's expansion of the "first sale" doctrine could possibly be a preview of the next direction that copyright law will take. Most importantly, *Kirtsaeng* showed a legal recognition of (1) an increase in consumer rights over legally obtained copyrighted material; and (2) how copyright material is accessible and used on a global basis.²³

B. International Law

In order to help adapt Intellectual Property laws on a global basis, over 180 countries have become members of the Worldwide Intellectual Property Organization (WIPO).²⁴ The WIPO is an agency of the United Nations (UN) that is dedicated to providing IP laws that continue to protect the rights of the authors and also adapt to the interconnected global society of today.²⁵ The WIPO has numerous treaties concerning Intellectual Property laws on a global scale. This includes the WIPO Copyright Act (WCT)²⁶ and the WIPO Performances and Phonograms Treaty (WPPT).²⁷ Both were implemented into US law through the DMCA in 1998. Notably, both the WPPT and the WCT recognize the "first sale" doctrine. However, the WIPO left open how the "first sale" doctrine was to apply.²⁸

The subject of this article relates strongly to Article 11 of the WCT. Article 11 prohibits the circumvention of technological measures that are used by authors to "control their rights."²⁹ These rights include an author's inherent right to control the distribution of his or

²¹ 17 U.S.C. § 602(a)(1) (2012).

²² See *Kirtsaeng*, 113 S. Ct. at 1355-56 (holding that the "first sale" doctrine applies to copyrighted works lawfully obtained abroad).

²³ See *id.* at 1365-67.

²⁴ *What is WIPO?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Nov 12, 2015, 8:15 PM), <http://www.wipo.int/about-wipo/en/#what>.

²⁵ See Convention Establishing the World Intellectual Property Organization, art. 3, July 14, 1967, 21 U.T.S. 1749, 828 U.N.T.S. 11846.

²⁶ WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121, 36 I.L.M. 65 (addressing the rights of authors of digital works, more specifically computer programs and databases as recognized by the Berne Convention).

²⁷ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203, 36 I.L.M. 76 (addressing the rights of performers and producers of phonograms, focusing on those in the digital environment).

²⁸ WIPO Performance and Phonograms Treaty art. 5 ¶ 2, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997) [hereinafter WPPT]; WIPO Copyright Treaty art. 6 ¶ 2, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 65 (1997) [hereinafter WCT].

²⁹ WCT, *supra* note 28, at art. 11.

her work. The argument here is whether an author should maintain the right to keep a person from viewing a copyrighted work when it is viewed from a computer in Germany, when that same person would not be prohibited from viewing that same material if he or she was in England.

The basis of the United Kingdom's (UK) copyright law closely mirrors the categories and rights granted in the United States. Recent revisions of the UK's Copyright, Designs, and Patents Act (UK Copyright Act) have included new technological language such as "downloading" and "streaming."³⁰ Additionally, the UK has also recognized the right for an individual to make a personal copy of legally-obtained copyrighted material. In 2014, the UK amended its copyright act to expand an individual's rights when privately using copyrighted material.³¹ These rights include allowing individuals to make back up copies and change the format of a legally obtained copy of copyrighted material.³² This expansion of consumers' right to use is an excellent example of the law reflecting the way society is behaving and societal expectations.

The last part the UK Copyright Act incorporates the electronic rights management provisions created by the WIPO. Sections 296ZA and 296ZB prohibit the distribution or possession of a "device, product, or component" that is primarily used to circumvent technological measures.³³ Interestingly, part of the UK Copyright Act excludes the British Broadcasting Corporation (BBC) from infringement when the actions of the BBC are for the "purpose of maintaining supervision and control," including the use of adding the material to any on-demand program service.³⁴ So, although the act gives consumers some leeway in their actions, it also provides for additional leeway for the BBC.

C. Consumer Activity and Market Division

There are six models in which television shows can be viewed. Traditionally, shows are viewed in what is sometimes referred to as the "linear TV" model.³⁵ In this instance, shows are aired at a certain time that is specified by the network that hosts them. The second model is the "time displacement" model. This occurs when a show is

³⁰ Copyright, Designs and Patents Act, 1988, c. 1, § 28B (Eng.).

³¹ The Copyright (Public Administration) Regulations, 2014, c. 2, § 2 (Eng.).

³² Copyright, Designs and Patents Act, 1988, c. 1, § 28B(5) (Eng.).

³³ *Id.* at § 296ZF(1) (defining "technological measures" as "any technology" designed to protect a copyright work through controlling access to the copyrighted material.).

³⁴ Copyright, Designs and Patents Act, 1988, c. 1 § 96 (Eng.).

³⁵ *Netflix View: Internet TV is replacing linear TV*, IR OVERVIEW (July 15, 2015), <http://ir.netflix.com/long-term-view.cfm>.

recorded during its linear TV spot and then watched later at the convenience of the viewer. A recent addition to time displacement is viewing shows via an eight-day displacement, in which an episode is available for streaming eight days after it is originally aired on linear TV. Finally, the last models of viewing are through different methods of Internet streaming. There are three ways in which episodes are viewed via the Internet. A show can be viewed with commercials (Hulu), on a pay-per-view basis (iTunes and Amazon), or on a streaming service with a monthly/yearly flat rate (Amazon Prime and Netflix).

The model that a viewer uses determines the limitations on viewing. For instance, linear TV requires the viewer to be at the television set at a pre-determined time outside the control of the viewer. Time displacement requires the viewer to have a device to record the linear TV spot, and also requires the viewer to have access to linear TV. Viewing streamed media online can require a viewer to have an ISP log on, a subscription to a media service, and most likely will keep the view zone locked, limiting how and where the material can be viewed.

The reason that the final limitation of zone locking Internet accessed media still exists is because it is still allowed by contract and copyright law. When an owner of copyrighted material, such as a movie, contracts with a provider for Internet streamed media, like Netflix, the contract often includes the limitation that the movie can only be streamed in certain geographical locations. In Sony's contract with Netflix, Netflix is obligated to use "standard geolocation service[s]" to verify the location of the Netflix customer and Netflix must also use software to detect circumvention techniques.³⁶ If Netflix were to actively allow their subscribers to circumvent geo-blocking and access Netflix with circumvention techniques, then Netflix would not only be liable for contributing to infringement, but also for breach of contract. In a possible attempt to change the marketplace, Netflix has begun creating its own shows, such as "House of Cards," and releasing them on the same day around the world.³⁷ HBO as since followed suit with the same release date for the fifth season of "Game of Thrones."³⁸

³⁶ Ernesto, *Netflix Cracks Down on VPN and Proxy "Pirates,"* TORRENTFREAK (Jan. 3, 2015), <https://torrentfreak.com/netflix-cracks-down-on-vpn-and-proxy-pirates-150103/>.

³⁷ NETFLIX ORIGINALS PREMIERE DATES, <https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10571&contentGroup=premiere%20Dates> (last visited Nov. 10, 2015).

³⁸ Aaron Couch, *'Game of Thrones' Season 5 Set for Global Day-Date Release,* HOLLYWOOD REPORTER (Mar. 10, 2015, 11:01 AM), <http://www.hollywoodreporter.com/live-feed/game-thrones-season-5-set-780377>.

III. COMPANY ENFORCED GEO-BLOCKING AND THE BATTLE AGAINST CONSUMERS

A. *Television in the Internet Age*

Television networks (Networks), although in direct competition with online services such as Netflix, still make use of the Internet to increase coverage and publicity of their shows. Episode previews are hosted on YouTube,³⁹ Twitter is used to determine the current week's most popular show,⁴⁰ and social media is used to gain feedback on episodes after they have aired.⁴¹ Despite Internet websites competing for viewers with traditional television, networks hosted on television still find a way to use the Internet to their benefit.

In addition to gaining marketing information, Networks are also tapping into the steady rise of streaming television shows via the Internet.⁴² Most networks have made recently aired episodes available to stream on their website. These episodes are generally subject to two main restrictions. Commonly, episodes are streamed with commercials spliced in similar areas as when commercials appeared during the linear TV spot. In a growing trend, Networks are now also starting to require viewers to sign-on through their ISP in order to access available episodes.

The use of advertisements provides a large source of additional income for Networks. To begin with, websites often display advertisements on the webpage in the form of banners that are displayed across the top, bottom, or sides of an individual webpage. According to eMarketer, spending on ads for digital webpages will surpass ad spending for traditional TV by 2018.⁴³ Currently, eMarketer expects ad spending for digital media for 2015 to increase by eight billion dollars from 2014. This will be fifteen billion dollars more than what was

³⁹ The CW Television Network Channel, YOUTUBE, <https://www.youtube.com/channel/UCPWQWav6BpPvtanCtloXkiw>; Fox Channel, YOUTUBE, <https://www.youtube.com/channel/UCDiPds0v60wueil5B8w3fPQ>.

⁴⁰ Nielsen, *Weekly Top Ten Series Specials* NIELSEN SOCIAL (updated weekly), <http://www.nielsensocial.com/nielsentwittertvratings/weekly/#SeriesSpecials> (last visited Nov. 9, 2015).

⁴¹ John Jannarone, *When Twitter Fans Steer TV: Viewer Feedback is Louder, Faster than Ever, Influencing Scripts of Some Shows*, WASHINGTON STREET J. (Sept. 17, 2012), <http://www.wsj.com/articles/SB10000872396390444772804577623444273016770>.

⁴² Felix Richter, *How TV Watching Has Evolved Over the Past 8 Years*, STATISTA (July 23, 2014), <http://www.statista.com/chart/2484/tv-watching-habits/>.

⁴³ *US Total Media Ad Spending, 2012-2018*, EMARKETER, (Mar. 2015), http://www.emarketer.com/public_media/docs/eMarketer_iMedia_Agency_US_Ad_Spend.pdf

spent in 2013.⁴⁴ Comparatively, spending for TV ads is only expected to increase by four billion dollars over the same period.⁴⁵

In addition to advertisements placed directly on webpages, advertisements are also placed within the streamed content. As with linear TV, these commercial spots generate revenue for the Network that is streaming the episode online. Studies by eMarket project that spending for digital video as will go above seven billions dollars.⁴⁶ In 2013, only 3.8 billion dollars was spent on digital video ads.⁴⁷ It is projected that almost thirteen billion dollars will be spent on these types of ads by 2018.⁴⁸ CBS reportedly makes more money per streaming viewer than per linear viewer. According to David Poltrack, Chief Research Officer of CBS Entertainment, CBS makes up to 20% more ad revenue from online viewers.⁴⁹

Despite the increased revenue source of streaming videos, Networks often require a second aspect in the video streaming. Many Networks require viewers to sign-in with their “TV Provider” (ISP) in order to view recent episodes that have already been aired via linear TV.⁵⁰ This sign-on requirement serves two purposes. First, it allows Networks to control who has access to the television shows. Second, it prevents fans of shows from “cord cutting.” Cord cutting refers to the cancellation of traditional television services, generally meaning cable subscriptions, and these cord cutters instead depend on video streaming via the Internet.⁵¹ This allows members of the public to stop paying high costs for cable television and still watch shows via streaming. However, networks combat this by requiring TV provider sign-on accounts, which requires viewers to keep their cable subscription.

Alternatively, there has been a rise in subscription services in lieu of linear TV. Services such as Hulu Plus and Amazon Prime allow viewers to watch currently aired television shows. Hulu Plus has customers pay a flat monthly rate and Amazon Prime allows viewers to

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Todd Spangler, *CBS Makes Up to 20% More Revenue Online than TV Per Viewer: Research Chief*, VARIETY (July 1, 2014), <http://variety.com/2014/digital/news/cbs-makes-up-to-20-more-ad-revenue-online-than-tv-per-viewer-research-chief-1201256077/>.

⁵⁰ See, e.g., *Watch ABC Overview*, ABC, <http://abc.go.com/watchabc-overview> (last visited Nov. 21, 2015); *FAQ*, ABC FAMILY, <http://abcfamily.go.com/faq> (last visited Nov. 21, 2015); *Help Center*, FOX, <https://ask.fox.com/hc/en-us/articles/205613424-What-can-I-watch-if-I-don-t-have-a-TV-provider-> (last visited Nov. 21, 2015).

⁵¹ *What is Cord Cutting?*, TECHOPEDIA, <http://www.techopedia.com/definition/28547/cord-cutting> (last visited Nov. 19, 2015).

either pay-per-episode or buy a season pass and Netflix is now available in 190 countries.⁵² Noticing the steadily increasing shift of viewers to use Internet streaming, CBS became the first major Network to offer an Internet TV service in 2014.⁵³ This coincided with HBO announcing that in 2015 they will be offering a subscription service of their own that will allow viewers to “cut the cord” on television subscriptions.⁵⁴

B. *The Battle For and Against Geo-blocking*

In a final stance to control who views streamed content, Networks and subscription services also make use of zone locking content. Hulu can only be accessed in the United States, regardless of if you pay for a subscription account in the United States and try to access it while traveling abroad.⁵⁵ Netflix is only available in about 80 countries, with varying content depending on which country, or “market”, in which you subscribe.⁵⁶ BBC’s ITV Network does not allow streaming outside of the United Kingdom.⁵⁷

With online advertisements providing additional revenue and sign-on requirements preventing “cord cutting,” it is difficult to understand the reasoning behind geo-blocking. The terms and conditions for iTV, a popular television network in the United Kingdom, explain that geo-blocking is used to comply with the licensing agreements that were signed in order to provide content to their viewers in the first place. The issue, however, is that these licensing restrictions are far behind the times. With individuals having the ability to access any website from any place around the world, it does not seem prudent for copyright holders to restrict access of material purely on the basis of physical location. Networks could still maintain control over who views licensed copyrighted content by continuing to require sign-ons or through a subscription service. The physical location of a viewer of

⁵² See *About Hulu*, HULU, <http://www.hulu.com/press/about> (last visited Nov. 19, 2015); Marshall Honorof, *What is Amazon Prime?*, TOM’S GUIDE (Nov. 10, 2015, 2:30 PM), <http://www.tomsguide.com/us/what-is-amazon-prime,news-18041.html>.

⁵³ Jacob Kastrenakes, *CBS Becomes First Major Network to Launch Internet TV Service*, THE VERGE (Oct. 16, 2014, 10:09 AM), <http://www.theverge.com/2014/10/16/6987543/cbs-all-access-streaming-service-no-cable-required-launches>.

⁵⁴ Ryan Waniata, *HBO Breaks Free of Cable, Will Offer Online-Only Subscriptions in 2015*, DIGITAL TRENDS (Oct. 15, 2014), <http://www.digitaltrends.com/home-theater/hbo-go-break-free-cable-chains-2015/>.

⁵⁵ *Terms of Use*, HULU (June 16, 2015), www.hulu.com/terms.

⁵⁶ See *Where is Netflix Available?*, NETFLIX, <https://help.netflix.com/en/node/14164> (last visited Nov. 19, 2015).

⁵⁷ *ITV Services - Terms and Conditions of Use*, ITV (Feb. 18, 2014, 4:30 PM), www.itv.com/terms (explaining that geo-blocking measures prevent users from accessing the ITV platform and services outside of the United Kingdom).

streamed media does not play any rational role in the allowance of viewing online content, especially when accessed through legal means.

When otherwise legally streamed content is blocked from being viewed by such an asinine reason as geographic location, individuals attempt to find another way. This creates a situation in which people who would have, and even attempted to, follow the law look for an alternative route that is not necessarily legal. Viewers can illegally obtain streamed content by pirating it from another source. The closest route to still obtaining streamed content legally is by using a virtual private network (VPN) to access websites and content that is otherwise blocked. VPN's allow users to virtually fake where their computer is located. This allows a viewer in France to pretend they are in the United States in order to access Hulu.

New Zealand provided a fantastic example on the use of VPNs and the direction in which ISPs, Networks, and copyright holders need to go. Up until this year, Netflix was not available in Australia and New Zealand.⁵⁸ With its reputation as an incredible and popular service, hundreds of thousands of Aussies used VPNs to gain access to the American website in order to purchase a subscription and use the service.⁵⁹ Despite the fact that these "VPN pirates" pay for a subscription for a legal service, their actions are still considered illegal as the use of VPNs likely violates terms of service agreements for either the ISP or the streaming service.⁶⁰

In an unprecedented acceptance of such actions, Slingshot, an ISP in New Zealand, offered users a service they aptly named "Global Mode."⁶¹ This service was released in June of 2013 and allowed users to access any website from anywhere in the world without being geo-blocked.⁶² Global Mode was offered to all Slingshot customers at no additional cost.⁶³ Initially, Slingshot claimed to be offering the service for foreign visitors trying to access their usual websites.⁶⁴ However, Slingshot later dropped that pretense and announced that the service

⁵⁸ Ernesto, *Netflix Wants to Make VPN Piracy Obsolete*, TORRENT FREAK (Mar. 25, 2015), <http://torrentfreak.com/netflix-wants-to-make-vpn-piracy-obsolete-150325>.

⁵⁹ Andy, *VPN Users 'Pirating' Netflix Scare TV Networks*, TORRENT FREAK (Mar. 3, 2014), <https://torrentfreak.com/vpn-users-pirating-netflix-scare-tv-networks-140303>.

⁶⁰ See Nic Healey, *New Zealand ISP's 'Global Mode' Gives Users Access to Netflix and More*, CNET (Jul. 7, 2014, 6:38 PM), www.cnet.com/news/new-zealand-isps-global-mode-gives-users-access-to-netflix-and-more.

⁶¹ See *id.*

⁶² See *Slingshot Grants Global Access*, SCOOP (June 19, 2013, 3:56 PM), <http://www.scoop.co.nz/stories/BU1306/S00666/slingshot-grants-global-access.htm>.

⁶³ *Id.*

⁶⁴ *Id.*

was made available to all Slingshot users as a way to combat piracy.⁶⁵ Slingshot fully believes that it is “bizarre” that a website’s content is blocked simply because the person attempting to access the content is in New Zealand.⁶⁶ To support the company’s position, Hamilton argues, “We know people want to pay for content, this lets them do so.”⁶⁷ Following in Slingshot’s steps, a newly formed Australian ISP, cleverly named “Yournet,” was launched in August 2015.⁶⁸ Rather than providing customers with the option to use a VPN, like Global Mode, Yournet automatically bypasses geo-block measures for its customers.⁶⁹ Raj Bhuva, the founder of Yournet, shares the same sentiment as Slingshot, arguing that Yournet is “an anti-piracy ISP” meant to give its customers “the option to pay for content” rather than resorting to piracy.⁷⁰

Netflix, despite its geographical licensing agreements, is starting to be more open about believing in Slingshot and Yournet’s sentiments. Reed Hastings, CEO of Netflix, believes that VPN piracy is not the real issue with which the industry needs to be concerned.⁷¹ The root cause of content piracy and VPN piracy is that the viewer is unable to access desired content.⁷² For VPN pirates, this issue is easy to fix because, unlike content pirates, VPN pirates are willing to pay for content that is blocked by some artificial barrier.⁷³

The lack of access to content legally available elsewhere in the world is not the only incentive for finding other means. Generally if content is available elsewhere it will eventually be available in the geo-blocked viewer’s region. However, this creates a situation in which the subject matter of the content is revealed, or “spoiled,” by individuals posting on the Internet. Although an argument can be made that viewers should just avoid reading about television shows they are waiting to gain access to, it is not as simple as that.

⁶⁵ Graeme Philipson, *Kiwi ISP Gets Around Geoblocking*, iTWIRE (Jul. 14, 2014), <http://www.itwire.com/your-it-news/entertainment/64724-kiwi-isp-gets-around-geoblocking>.

⁶⁶ Josh Taylor, *NZ Media Companies Order ISPs to Stop ‘Global Mode’ Access*, ZDNET (Apr. 2, 2015, 8:59 PM), <http://www.zdnet.com/article/nz-media-companies-challenge-global-mode-access/>.

⁶⁷ *Supra* note 65.

⁶⁸ Adam Turner, *‘Global Mode’ to Offer US Netflix and HBO Now as Aussie ISP Fights Geo-blocking*, THE SYDNEY MORNING HERALD (July 8, 2015, 1:18 PM), <http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/global-mode-to-offer-us-netflix-and-hbo-now-as-aussie-isp-fights-geoblocking-20150707-gi79ti.html>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Ernesto, *supra* note 58.

⁷² *Id.*

⁷³ *See id.*

“Spoilers” can appear in all the various forms of social media such as angry tweets by fans to the show’s official twitter; screen shots taken by Instagram viewers or the Network; or blog posts discussing a recent episode in detail. In addition to the thousands of posts, tweets, and pictures placed on the Internet about the geo-blocked content, Internet browsers now focus advertisements and suggestions based on viewing history. Just a few searches for the US airing date of BBC’s *Downton Abbey* will inevitably lead an Internet viewer to some spoiling content. So, rather than eventually having the surprising twist in the story line spoiled by the Internet, viewers who have to wait a delayed period for content, purely based on geographical location, have a higher reason to find alternative means to view the content.

Those in favor of geo-blocking argue that it allows copyright holders to freely decide and contract (1) who distributes their material and (2) where the license allows this material to be distributed.⁷⁴ This includes charging higher prices for their material if it is accessible in more places.⁷⁵ For example, Sony has different contracts with Netflix depending on where the content is to be aired (be it Canada, Mexico, or the UK).⁷⁶ An additional argument is that websites hosting streamed digital media suffer from a lack of infrastructure to support worldwide viewing.⁷⁷ A year later, Netflix backed its public stance by announcing the use of technology that will block users who are using proxy devices from accessing the service as if they were in a different country.⁷⁸ But it should be noted that it is highly unlikely that all of the world viewers would create a need for a dramatic increase in infrastructure. Due to the nature of human habits and time zones, the millions of additional viewers would be accessing the content at the same time. Furthermore, advocates for geo-blocking also claim that there is a lack of demand to make any real changes. However, if this were the case, then they would not be so concerned with the circumvention of geo-blocking measures.

Alternatively, charging more to view content based on the geographical location of the viewer is seen as unfair and a form of discrim-

⁷⁴ See, e.g., Elise Dalley, *Who Wants to But Online for Less?*, CHOICE (Aug. 13, 2014), <https://www.choice.com.au/electronics-and-technology/internet/internet-privacy-and-safety/articles/bypass-geo-blocking>.

⁷⁵ See *id.*

⁷⁶ See Ernesto, *supra* note 58.

⁷⁷ See SOPHIE DE VINCK ET AL., EUR. COMM’N, FRAGMENTATION OF THE SINGLE MARKET FOR ON-LINE VIDEO-ON-DEMAND SERVICES: POINT OF VIEW OF CONTENT PROVIDERS 34 (2014), <http://kreatywna-europa.eu/media/wp-content/uploads/2014/08/Fragmentation-of-the-Single-Market-for-on-line-VoD-services.pdf>.

⁷⁸ *Evolving Proxy Detection as a Global Service*, NETFLIX MEDIA CENTER (Jan. 14, 2016), <https://media.netflix.com/en/company-blog/evolving-proxy-detection-as-a-global-service>.

ination.⁷⁹ This geographical discrimination is reminiscent of that attempted by booksellers in *Kirtsaeng*. Although the basis of that decision dealt with the first sale doctrine, the concept of the right to require a higher price for an identical copyrighted item based off of geographical locations is starkly mirrored in video streaming.⁸⁰ Even with Netflix's proxy detection announcement, the company still made a point of saying that there would be no need for this if they were able to offer the same content globally.⁸¹ Another argument against geo-blocking and the allowance of VPNs is that the circumvention of geo-blocks in order to pay for a legal service is seen as a parallel import. A parallel import occurs when something is imported without the permission of the copyright owner.⁸² This is what occurred, and approved by, in *Kirtsaeng*.

C. *Legality and Rationality for Geo-Blocking and VPNs*

Article 11 of the WIPO Copyright Treaty of 1996 made the use of a VPN illegal when it is used to circumvent "protective" measures like geo-blocking. Article 11 obligates parties to provide legal protection and remedies against the use of technologies that circumvent measures taken to protect rights granted under WIPO and by the Berne Convention.⁸³ The main right implicated by this legislation is the copyright holder's right to distribution. Member States of WIPO were required to adopt the treaty into their laws. The United States adoption of circumvention protection is found under § 1201 of Title 17, which states, "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."⁸⁴ Interestingly, both Australia and New Zealand are member states of WIPO.⁸⁵ Accordingly these countries are supposed to follow the internationally accepted policies of copyright protection, however some companies in Australia and New Zealand, as discussed earlier, seem to

⁷⁹ See Andrus Ansip, Eur. Comm'n, Building a Digital Space for Europe – the Challenges Ahead: Speech by Vice-President Ansip at the #Digital4EU Stakeholder Forum (Feb. 23, 2015), https://ec.europa.eu/commission/content/building-digital-space-europe-challenges-ahead-speech-vice-president-ansip-digital4eu_en.

⁸⁰ See *Kirtsaeng*, *supra* note 11, at 1355.

⁸¹ *Supra* note 78.

⁸² Parallel Imports, WORLD TRADE ORGANIZATION GLOSSARY, https://www.wto.org/english/thewto_e/glossary_e/parallel_imports_e.htm.

⁸³ WIPO Copyright Treaty art. 11, WIPO Doc. CRNR/DC/94 (adopted on Dec. 20, 1996), http://www.wipo.int/treaties/en/text.jsp?file_id=295166#P87_12240.

⁸⁴ See 17 U.S.C. § 1201(a)(1)(A) (1998).

⁸⁵ See *Information by Country: Australia*, WIPO, http://www.wipo.int/members/en/details.jsp?country_id=10 (last visited Nov. 21, 2015); *Information by Country: New Zealand*, WIPO, http://www.wipo.int/members/en/details.jsp?country_id=134 (last visited Nov. 21, 2015).

welcome the use of VPN to circumvent “protection” that is offered by geo-blocking. However, four media companies were not as welcoming to the circumvention methods offered by ISPs. In April of 2015, Sky Television, Television New Zealand, Lightbox, and Mediaworks threatened Slingshot and Bypass Network Services Limited with a lawsuit over Global Mode, claiming copyright infringement.⁸⁶ Rather than attempting to change New Zealand and international law, Slingshot and Bypass gave in to the media giants.⁸⁷ The settlement between the parties required that Global Mode could no longer be provided after September 1, 2015.⁸⁸

The argument here has nothing to do with whether Copyright holders have the right to determine whom, when, and how their protected content gets viewed. Rather, the argument is that geo-blocking is more detrimental than it is beneficial. As previously mentioned, geo-blocking content only provides an incentive and a reason for attempted viewers to find alternative means for streaming the content. Whether the alternative means is through a VPN or by pirating the content depends on the user.

Piracy is what copyright holders really want to prevent. Pirates are the ones stealing the potential money from the copyright holders. This potential revenue includes gains from advertisements and gains from paying for either subscription services, pay-per-episode, or payments for the ISP. When a copyrighted work is pirated, it is downloaded without any permission or general knowledge of the copyright owner. Generally nothing is paid for the download, and therefore the copyright holder receives no profit or gains.

VPN users, instead, are attempting to gain access to websites that legally host the content. As shown in New Zealand, they are even willing, and do, pay for the content, unlike normal IP pirates. When accessing host cites that use a commercial model, such as Hulu, VPN users also have to sit through the commercials that provide billions of dollars of income each year.⁸⁹ Although copyright holders certainly have a right to make sure that their content is viewed through legal

⁸⁶ See *Internet Provider Stands by Global Mode*, RADIO NEW ZEALAND (April 16, 2015, 8:55 AM), <http://www.radionz.co.nz/news/national/271316/internet-provider-stands-by-global-mode>.

⁸⁷ See, *Global Mode Dropped After Legal Action*, RADIO NEW ZEALAND (June 24, 2015, 8:52 PM) <http://www.radionz.co.nz/news/national/277042/global-mode-dropped-after-legal-action>.

⁸⁸ See *id.*

⁸⁹ See, e.g., Todd Spangler, *Digital-Video Advertising in U.S. to Hit \$6 Bil in 2014, But It's Not Displacing TV Dollars*, VARIETY (June 12, 2014, 6:30 AM), <http://variety.com/2014/digital/news/digital-video-advertising-in-u-s-to-hit-6-bil-in-2014-but-its-not-displacing-tv-dollars-1201219027/>.

means, should they have a right to require geo-blocking simply to exploit money from more remote areas?

IV. NEW LAWS FOR A NEW AGE

A. *Social Beliefs and Companies*

In order for a solution to occur, the law will have to change in a way that prevents geo-blocking or allows for viewers to use VPNs to work around geo-blocks. Unfortunately, the law rarely changes before public policy and social norms change. Once companies start wanting to change and the public begins to demand a change, the law will catch up. Fortunately, public policy is in the midst of changing. Companies are changing their policies and laws are in the works to prevent geo-blocking. Not only is this change good for the consumer, but it is necessary in order for the law to keep up with the realities of how consumers are using technology. The Internet is used to access information from all over the world, not simply from the country the user is located. This same ideal should match the way media is licensed to stream.

Slingshot has helped by being part of the forefront of social change. The company's implementation of Global Mode was filled with foresight and understanding not only regarding how individuals are using the internet on a global scale, but also regarding how laws need to be changed to match technology and the usage. Although the legality, under WIPO, of Slingshot's Global Mode is certainly debatable, the ISP has provided a way for its users to pay for streaming subscriptions as opposed to pirating the shows. The potential lawsuit against Slingshot could be the first determination that either explicitly grants or denies the use of VPNs or geo-blocking.

In line with Global Mode, Netflix has also had a change in attitude towards geo-blocking. Netflix, as a company, has certainly considered expanding its subscribers. To better enhance its global business, Netflix is expanding from being available in 81 countries to around 200 within the next year and a half.⁹⁰ Currently, this is the only option available to Netflix that doesn't break pre-existing contracts. As recently as January 2015, Netflix has reiterated that potential customers should not attempt to subscribe to its content via a

⁹⁰ See, e.g., Todd Spangler, *Netflix Wants the World: Can It Really Expand to 200 Countries in 2 Years?*, VARIETY (Jan. 22, 2015, 11:27 AM), <http://variety.com/2015/digital/news/netflix-wants-the-world-can-it-really-expand-to-200-countries-in-2-years-1201411740/>; see also *Help Center: Where is Netflix Available?*, NETFLIX, <https://help.netflix.com/en/node/14164> (last visited Nov. 22, 2015).

circumvention service.⁹¹ Individuals generally circumvent geo-blocked Netflix either because Netflix subscriptions are unavailable in their country or they are trying to obtain content available on a different country's Netflix subscription. Although disapproving of circumvention is Netflix's official stance, Reed Hastings, the CEO of Netflix, feels that VPN 'piracy' is not the real issue because those going through that route are willing to pay, but are being blocked.⁹² In line with globalizing their product, Netflix is also breaking ground by providing global premieres in multiple countries on the same day, like with the show "Orange is the New Black".⁹³ HBO is also planning on globalizing with a new stand-alone application, which will include live airing of new shows such as the popular "Game of Thrones" series.⁹⁴

Companies could change on their own as a solution. Rather than requiring multiple contracts for multiple locations, copyright holders could just charge a greater price for one single contract and do away with multiple contracts, as more money would be gained from ad revenue if more people were able to legally stream the media online. There would most likely be a large drop in piracy caused by a lack of access due to geographical locations, as Hastings asserted in stating that "the basic solution is for Netflix to get global and have its content be the same all around the world so there's no incentive to [use a VPN]."⁹⁵

In a surprising shift, it appears that Netflix is not the only business to start implementing changes. For over forty years, England's BBC and the United States' PBS have had a partnership in which certain shows are aired in both the US, through Masterpiece PBS, and in the UK, through BBC, though generally they aired at separate times.⁹⁶ However, this is starting to change. It has been announced

⁹¹ See, e.g., *Netflix Upholds Geoblocking Rules Amid Reports of Crackdown*, CBC NEWS: BUSINESS, <http://www.cbc.ca/news/business/netflix-upholds-geoblocking-rules-amid-reports-of-crackdown-1.2889895> (last updated Jan. 5, 2015, 5:06 PM).

⁹² See Luke Hopewell, *Netflix CEO Reed Hastings on the NBN, Piracy and Launching in Australia*, GIZMODO AUSTRALIA (Mar. 19, 2015, 8:00 AM), <http://www.gizmodo.com.au/2015/03/netflix-ceo-reed-hastings-on-the-nbn-piracy-and-launching-in-australia/>.

⁹³ See *Netflix to Launch in Australia on 24 March from \$8.99 a Month*, NETFLIX MEDIA CENTER (Mar. 23, 2015), <https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=2011>.

⁹⁴ See Ryan Waniata, *Cord Cutting 101: How to Quit Cable for Online Streaming Video*, DIGITAL TRENDS (Feb. 5, 2015), <http://www.digitaltrends.com/home-theater/how-to-quit-cable-for-online-streaming-video/>.

⁹⁵ Hopewell, *supra* note 90.

⁹⁶ See *BBC Worldwide and Masterpiece Announce Co-Production Deal for The Paradise and The Lady Vanishes*, BBC WORLDWIDE PRESS ROOM (Oct. 9, 2012), <http://www.bbcwprssroom.com/sales-and-co-productions/press/bbc-worldwide->

that on January 1, 2016, *Sherlock*, one of the partnership's more popular shows, will premiere in the US and the UK on the same day.⁹⁷ The simultaneous premiere of such a popular show provides promising evidence that Networks are recognizing the issues caused by geo-blocking and are willing to change.

B. Change in Law

Following the change of social beliefs, it appears that the law might not be that far behind, as can be seen by the recent announcements by the European Commission (Commission). Some of the Commission's main goals are to propose legislation to the European Parliament, enforce law implemented by the EU, and implement EU policies.⁹⁸ The Commission has named "Digital Single Market" as one of its top ten priorities.⁹⁹ Part of the goal is to make it so that all EU countries have the same rules for IP law. Additionally, the Commission hopes to modify the law so that it reflects the current status of technology and how technology is used.¹⁰⁰

To support the Commission's goals, it has released a fact sheet to show just how much the Internet is a global economy. According to the fact sheet, 315 million Europeans use the Internet on a daily basis.¹⁰¹ Of this global economy, US-based online websites make up 54% of the market.¹⁰² Importantly, content such as films and games are the most popular activities for Internet users. Additionally, the Commission estimates that one out of every five Europeans wishes to stream digital content from other countries. Although the fact sheet focuses on online shopping for goods, as opposed to Netflix-type services, the document does bring up the importance of having faster broadband services available.

One ideal behind the Digital Single Market is the focus of this paper. The Commission wants to provide the ability to enjoy the same online content and services regardless of which EU country one is

and-masterpiece-announce-co-production-deal-for-the-paradise-and-the-lady-vanishes/.

⁹⁷ *Sherlock Special Premieres Jan. 1, 2016*, PBS (Oct. 24, 2015), <http://www.pbs.org/wgbh/masterpiece/programs/features/news/sherlock-special-premiere-january-2016/>.

⁹⁸ *About the European Commission*, EUR. COMM'N, http://ec.europa.eu/about/index_en.htm (last visited Nov. 22, 2015).

⁹⁹ *Priorities*, EUR. COMM'N, http://ec.europa.eu/priorities/index_en.htm (last visited Nov. 22, 2015).

¹⁰⁰ *See Digital Single Market*, EUR. COMM'N, http://ec.europa.eu/priorities/digital-single-market/index_en.htm (last visited Nov. 18, 2015).

¹⁰¹ *Why We Need a Digital Single Market*, EUR. COMM'N, http://ec.europa.eu/priorities/digital-single-market/docs/dsm-factsheet_en.pdf (last visited Nov. 18, 2015).

¹⁰² *Id.*

in.¹⁰³ Part of this ability to view the same content despite the geo-location is the idea that there needs to be simple rules for copyrightable content.¹⁰⁴ If copyright law internationally reflects the type of copyright treaties that the United States sets up with foreign countries, then copyrights will be recognized on a larger international basis.¹⁰⁵ As it stands, many countries offer protection for foreign copyrights only if they meet certain criteria. The international organizations and groups like the Berne Convention and WIPO help international cooperation for copyright and other IP protection as well as cohesion in laws. For example, all of the WIPO member countries have worked WIPO's copyright directive into each countries respective laws.¹⁰⁶

By looking at examples of recently implemented laws passed through by WIPO and the current direction of the Commission, it is hopeful that geo-blocking will soon be a thing of the past. On May 6, 2015, the Commission released sixteen initiatives to begin creating a Digital Single Market.¹⁰⁷ Of these sixteen initiatives, seven of them are focused on issues surrounding geo-blocking measures and the arguments against them.¹⁰⁸ The forefront of the seven directives calls out geo-blocking as an unjustified "discriminatory practice" that is used to advance commercial success at the detriment of the consumer. The other six are aimed at fixing the potential problems that arise with geo-blocking and could arise when geo-blocking is no longer allowed. This includes setting up an anti-trust inquiry into cross border "barriers" that impair e-commerce competition.¹⁰⁹ Additionally, the Commission hopes to create one universal and updated copyright law, unifying protection of copyrightable material across Europe as well as access to it no matter where the consumer is located. Finally, the Commission hopes to determine how broadcasters can increase their transmissions and determine what is needed to in order to bring telecom rules and infrastructure into the 21st century.¹¹⁰

¹⁰³ *Citizens' Dialogue: Vice-President Ansip "Goes Digital" in Sofia*, EUR. COMM'N (Apr. 17, 2015), http://europa.eu/rapid/press-release_IP-15-4790_en.htm.

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g.*, U.S. COPYRIGHT OFFICE, 38A.0915, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES (2014), <http://www.copyright.gov/circs/circ38a.pdf>.

¹⁰⁶ *See infra* Parts I-II.

¹⁰⁷ *A Digital Single Market for Europe: Commission Sets Out 16 Initiatives to Make It Happen*, EUR. COMM'N (May 6, 2015), http://europa.eu/rapid/press-release_IP-15-4919_en.htm.

¹⁰⁸ *Id.*

¹⁰⁹ *See Antitrust: Commission Launches E-Commerce Sector Inquiry*, EUR. COMM'N (May 6, 2015), http://europa.eu/rapid/press-release_IP-15-4921_en.htm.

¹¹⁰ *See supra* note 99.

The Commission's recognition of geo-blocking as a discriminatory practice is a good sign that a change in the law is no longer unattainable. Hopefully the same countries that accepted the WIPO treaty will also understand the benefits of doing away with such an arbitrary barrier. A legislative change will help companies, such as Netflix, to be able to have contracts for content that are not based on the physical location of the viewer, but rather on the amount of content that is viewed. In turn, this will allow companies to lose less ad revenue and allow individuals to access an infinite amount of new ideas, shows, and content. Deleting geo-blocking from streamed media is the only legitimate solution that will simultaneously open up the Internet to its full potential and reduce the harm caused by IP pirates.