

## GEOBLOCKING AND THE LEGALITY OF CIRCUMVENTION

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### CONTENTS

I.	Introduction.....	386
II.	Geoblocking and Digital Rights Management.....	388
	A. Geoblocking Defined .....	388
	B. Digital Rights Management (DRM) .....	390
	1. DVD Region Codes .....	394
III.	On the Uses of Geoblocking.....	396
	A. Staggered Release Dates .....	397
	B. Price Discrimination and Parallel Imports .....	398
	C. Distribution and Licensing Arrangements .....	400
IV.	On the Consequences of Geoblocking.....	402
	A. Consumption.....	402
	B. Competition.....	403
	C. Cultural Rights .....	404
	D. Censorship.....	405
	E. Additional Consequences.....	406
	1. Harmful to Innovation.....	406
	2. Free Speech.....	407

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3. Questions of Effectiveness.....	408
V. Circumvention.....	410
VI. Legality of Geoblocking Circumvention .....	412
A. Territorial internet? .....	412
B. Liable Parties .....	413
C. Is Geoblocking Circumvention Legal? .....	414
1. Terms of Service Obligations .....	414
2. Legislation.....	415
3. Legality in Israel .....	417
VII. Should Circumvention Be Legal? .....	418
A. Legalizing Trimble’s Cybertravel.....	419
B. Yu’s “Modest Proposals” .....	421
1. Voluntary Removal.....	421
2. Multiregion Players.....	422
3. A Right to Circumvent.....	422
C. An Alternative Legal Model: The “Australia Tax” Parliamentary Inquiry .....	424
VIII. Conclusion .....	427
A. Geoblocking in the Long Term.....	427
B. In Sum.....	429

## I. INTRODUCTION

“This content is currently unavailable in your region.” This is a phrase familiar to many internet users who have attempted to access, for example, certain copyright protected videos on YouTube. Geoblocking, simply put, is the limiting of access to digital content based on the user’s

geographical location. It is one of the most prevalent contemporary iterations of Digital Rights Management (DRM)—presumably operating under logic guided by reasons legal (intellectual property rights ownership), economic (an attempt to maximize profit by licensing content separately to different regions), or both—to limit access to content by region. In this paper, I examine the uses and consequences of geoblocking in order to determine whether or not the legal and economic justifications hold water. Space will also be devoted to the case of region coded DVDs, which operated under a similar logic and are by now virtually extinct, due in large part to technological circumvention of the system. As we shall see, geoblocking has spawned a cottage industry designed to bypass it and may actually encourage piracy of content available freely in other parts of the world.

I will begin with an introduction to geoblocking and DRM, surveying aspects both technological and practical. I will then use the case of region coded DVDs, and a theoretical framework provided by Peter Yu, to analyze the uses and consequences of geoblocking. In light of this, I will survey geoblocking circumvention techniques, while attempting to answer the question of whether they are legal today, and more importantly, whether they should be. To do so, I will present three possible models of legality.

I believe that geoblocking is of extremely limited utility, appears to be ineffective economically, and has many negative side effects. It constitutes a *de facto* territorialization of the internet, without this being given due consideration on the part of the public.

It is in the nature of investigations such as these that more questions will be raised than answered, but as this is a relatively young field, these are questions that need contemplating and deliberating. Sooner or later, courts and legislatures will have to give these issues the attention they

deserve. The more they are wrestled with, the better. At stake is no less than the nature of the internet.

## II. GEOBLOCKING AND DIGITAL RIGHTS MANAGEMENT

### A. *Geoblocking Defined*

Geoblocking is most simply defined as limiting the user's access to digital content, by the content distributor, based on the user's geographical location. The content in question is almost always copyrighted, and can be of many natures, whether a television show, song or music album, or software. Such content is often available *via* streaming format, though it may also be available for download to a personal device. Geoblocking is applied to content, both paid-for (e.g., the Netflix subscription service) or free (e.g., YouTube videos).

Geoblocking relies on a set of technologies known as geolocation. Geolocation identifies the physical location of the user, though it usually falls short of identifying the actual specific user.<sup>1</sup> These tools run the gamut from the simple to the sophisticated. The most basic involve “self-reporting,” for example the common requests by websites that users select their location from a dropdown menu.<sup>2</sup> These methods, though quite common, are unreliable, in that they provide no real guarantee of the user's location.<sup>3</sup> Other, more sophisticated methods might utilize hardware with GPS capabilities, which can usually pinpoint the user's precise location, as in the case of most contemporary

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<sup>1</sup> Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 567, 592 (2012).

<sup>2</sup> *Id.* at 592–93.

<sup>3</sup> *Id.* at 636.

smartphones. But GPS functions aren't necessary. Far more commonly, IP (Internet Protocol) addresses are used. These are strings of unique numbers assigned to all devices with access to the internet. As the assignment is geography-based, such addresses allow for a rough approximation of the user's location. Though somewhat dynamic in their nature (they are often not permanently assigned), they can usually provide a reliable "ballpark" estimation of the user's location.<sup>4</sup> This is effective enough for the purposes of geoblocking, where the user's rough location will suffice to determine whether to make the content available to her or not.

Though often used to block access to content, geolocation tools were developed initially to help tailor advertising to users based on their physical location, or to help direct users to the content best suited to them (e.g., the international edition of the New York Times, or Google France).<sup>5</sup> Later, they came to help enforce domestic regulation, for example barring the sale of products to certain countries because of local safety restrictions or denying access to online casinos when users reside in countries that have outlawed online gambling.<sup>6</sup> Sometimes the use of geoblocking is even mandated by domestic legislation for the enforcement of said legislation, particularly in the field of online gaming.<sup>7</sup>

Trimble offers the following typology of instances where geolocation might be implemented for providing different content or blocking content based on the user's location: 1) localization of content (e.g., weather reports

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<sup>4</sup> James A. Muir & Paul C. Van Oorschot, *Internet Geolocation: Evasion and Counterevasion*, 42 **ACM COMPUTING SURVEYS** 4:1, 4:6 (2009).

<sup>5</sup> Trimble, *supra* note 1, at 586.

<sup>6</sup> *Id.* at 586–88.

<sup>7</sup> *Id.* at 589–90.

tailored to the user's location), 2) abiding by contractual obligations to make copyrighted content available only in certain countries, 3) compliance with domestic laws (e.g., preventing access to online gambling sites in countries where that is illegal), 4) a general desire to avoid jurisdiction and/or liabilities in certain countries, 5) general reasons of security (e.g., the assumption that a log-in attempt traced to North Korea, for example, is likely to be fraudulent).<sup>8</sup> As our focus will be on the circumvention of geolocation (particularly that relating to geoblocked content), it should be clear at this point that circumvention appears not to be problematic in the first instance mentioned (an expat wishing to view content tailored to residents of his hometown), but could easily be problematic for the other instances.<sup>9</sup>

Just how accurate and successful geolocation tools actually are in achieving their goals is unclear, as claims by developers of such tools would appear to be skewed, and often disregard the possibility of active circumvention on the part of users.<sup>10</sup>

### ***B. Digital Rights Management (DRM)***

Geoblocking of content is an iteration of DRM, which encapsulates a broader set of technologies that control access to copyrighted digital content. There are two generations of DRM technology. The first generation limits the copying of content, usually by preventing copying altogether.<sup>11</sup> The second generation places limitations upon

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<sup>8</sup> *Id.* at 647–48.

<sup>9</sup> *Id.* at 607.

<sup>10</sup> *Id.* at 598.

<sup>11</sup> This is hardly a new concept. The use of colored paper, for example, to inhibit analog photocopying predates the digital age, while anti-forgery techniques (which serve a slightly different purpose) go back centuries.

the access to content. For example, users might be able to access content for a limited amount of time (allowing for a sort of digital rental), or of views. Because digital content theoretically allows for endless sharing, access to content might be limited to a maximal number of devices, so as to prevent content purchased by one user being accessed subsequently by dozens of users, or more. Software might allow for only a limited number of installations per copy purchased (enough for a household but not a computer lab). A DRM-protected electronic text (i.e., an e-book version of a novel) might not allow for printing. DRM protections often also prevent alteration of content or its sampling.<sup>12</sup> For example, while Amazon's Kindle electronic book reader allows for the export of highlighted text—a valuable feature for serious readers and researchers—publishers may place limits on the extent of that export.<sup>13</sup>

Some of the more prominent examples of the use of DRM involve technologies that are essentially defunct today. Up until the year 2009, Apple's popular iTunes Store used a proprietary technology called FairPlay, which encrypted audio and video content and allowed users to access that content only on authorized devices. It is worth noting that those limitations placed Apple itself at an advantage: Customers of the iTunes store who wished to access their purchases using mobile devices were essentially forced to use one of a short list of devices, most of them manufactured by Apple itself (the iPhone, iPod, etc.). Having said that, according to Apple, the FairPlay DRM protection scheme was instigated at the behest of record

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<sup>12</sup> S. R. Subramanya & K. Yi. Byung, *Digital Rights Management*, 25 IEEE POTENTIALS 31, 31 (2006).

<sup>13</sup> Bakari Chavanu, *Kindle iOS vs iBooks 3: An Intro of Their Newest Features*, MAKEUSEOF (Nov. 10, 2012), <http://www.makeuseof.com/tag/kindle-ios-ibooks-3-intro-newest-features-ipad/> [<http://perma.cc/MM2T-FPNX>].

labels—that is to say, the copyright owners—and when those agreed to have their content sold without limitations, FairPlay was discontinued.<sup>14</sup> Whether or not the motivations behind FairPlay were the result of Apple’s business interests, those of the record companies, or a happy convergence of both, FairPlay serves as a helpful reminder that due to the software–hardware (or content–hardware) divide, copyright limitations can sometimes serve the interests of hardware producers as well as those of the actual copyright holders, especially if, as in Apple’s case, the hardware producers manage to create a product, like iTunes, which serves as a gateway to content.

It is self-evident that first generation DRM technologies are intended chiefly to enforce the protection of copyrighted content, primarily the prevention of copying said works. This is an understandably relevant challenge in the digital world. Whereas the duplication of analog-based content was almost always time consuming and tedious, with copies often suffering in quality, digital technology allows for the fast creation and dissemination of virtually limitless copies of pristine quality. To put it another way, a DRM-free version of popular copyrighted content can and almost invariably will find its way around the world within minutes, for example *via* torrent-based file sharing software, picking up speed exponentially as more and more users download and share it. Thus, the classical justifications for the protection of intellectual property—whether personality-based, utilitarian, or Lockean—surely apply to the use of classical, first-generation DRM technology (i.e. prevention

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<sup>14</sup> *Apple to End Music Restrictions*, BBC NEWS (Jan. 7, 2009), <http://news.bbc.co.uk/2/hi/technology/7813527.stm> [<http://perma.cc/K93V-HXXW>].

of copying).<sup>15</sup> Critiques of said justifications, while worthy, are beyond the scope of this paper. We will, however, observe that even first-generation DRM limits often inhibit sales, while their removal encourages them. And as demonstrated above, DRM technologies, when used for geoblocking, also serve less traditional purposes, and they are the primary subject of my critique.

In the next sub-chapter, I will present the case of DVD region codes—an early, hardware-based form of geoblocking. This discussion will serve as a segue into my critique of contemporary geoblocking. Before proceeding, however, it is worth noting what I perceive to be the key difference between DVDs and streaming content, namely the difference between ownership and licensing. As some have noted, most people are probably “[not] aware that they don’t really own their iTunes library of over 10,000 tracks”, even though those tracks came at no small price.<sup>16</sup> Rather, they own a *license to use*—for instance, a short story e-book, subject to terms and conditions, which is often longer than the story itself!<sup>17</sup> Though use of all copyrighted material is subject to certain legal limitations (and one could make the argument that region coded DVDs aren’t exactly free-to-use), when content resides on the cloud (as in the case of streaming content) or on a device that is frequently connected to the internet, the user’s relationship to the content bears little resemblance to what we think of traditionally as ownership. Perhaps the most famous

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<sup>15</sup> *Intellectual Property: Justifications and Critiques*, STANFORD ENCYC. PHILOS. (September 22, 2014), <http://plato.stanford.edu/entries/intellectual-property/#JusCri> [<http://perma.cc/UE6H-98KY>].

<sup>16</sup> UNESCO, WHAT EXACTLY AM I BUYING? OWNERSHIP VS LICENSING IN THE DIGITAL AGE 1 (Feb. 26, 2013), [https://www.unesco-ci.org/cmscore/sites/ci-csm-core/files/11\\_ownership\\_licensing\\_ifla.pdf](https://www.unesco-ci.org/cmscore/sites/ci-csm-core/files/11_ownership_licensing_ifla.pdf) [<http://perma.cc/Z3YX-YXW8>].

<sup>17</sup> *Id.* at 2.

example would be when Amazon unilaterally and remotely deleted copies of Orwell's *1984* and *Animal Farm* off of Kindle e-book reading devices because they had been sold by a company that did not own the rights to them—a troubling solution clearly unimaginable prior to the digital age.<sup>18</sup>

### 1. DVD Region Codes

A good example of less traditional goals behind DRM technologies can be found in the case of the DVD region codes, essentially an early hardware-based form of geoblocking. Put in place when DVDs gained ubiquity in the late 1990s, region coding divides the globe into six regions.<sup>19</sup> DVDs and players in each region are uniquely encoded. In order for a DVD to play properly, a match is required between the code of the player and that of the DVD itself.<sup>20</sup> Europeans returning from a visit to the United States would find their American DVD purchases to be useless with their devices at home, unless they had bought an American DVD player as well.

Region codes did not enjoy the same convergence of interests—those of the content distributors and those of the hardware manufacturers—that the aforementioned, FairPlay scheme did. Region codes allowed for film studios to stagger their global releases, without having to worry about imported DVDs from abroad pre-empting a film's late

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<sup>18</sup> Matt Honan, *Remote Wipe of Customer's Kindle Highlights Perils of DRM*, WIRED (Oct. 22, 2012), <http://www.wired.com/2012/10/amazons-remote-wipe-of-customers-kindle-highlights-perils-of-drm> [<http://perma.cc/PGB7-TTRX>]; Brad Stone, *Amazon Erases Orwell Books from Kindle*, NEW YORK TIMES (July 17, 2009), <http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html> [<http://perma.cc/TX67-GCDJ>].

<sup>19</sup> Peter K. Yu, *Region Codes and the Territorial Mass*, 30 CARDOZO ARTS & ENT. L.J. 187, 193 (2012).

<sup>20</sup> *Id.* at 194–95.

release and harming ticket sales.<sup>21</sup> Manufacturers of DVD players, however, had very little to gain from the system, and they were quick to seize on consumer frustration. Unofficially, and then semi-officially, many manufacturers begin implementing region-free access, available to those in the know (i.e., those who entered codes that were widely available on the internet), allowing for the circumvention of the region codes.<sup>22</sup> Others created entirely region-free players.<sup>23</sup> While such region-free players solved the problem, they did not constitute an ideal solution. As they tended to be costlier than region coded DVD players, they effectively require customers who legally purchased a DVD from a foreign zone to pay an additional price for access to it.<sup>24</sup>

By the early 2000s, the region code system was understood to be on the verge of collapse.<sup>25</sup> Though the system seems to have remained on the verge of collapse for an uncomfortably long period of time—the system is essentially still in place—there has been some change. The next-generation of consumer digital video technology, Blu-ray disks, implemented a much simpler region-coding system with only three regions.<sup>26</sup> In practice, the majority of Blu-ray releases are un-encoded;<sup>27</sup> this could be seen as a

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<sup>21</sup> *Id.* at 200–02.

<sup>22</sup> *Id.* at 255.

<sup>23</sup> *Id.* at 239.

<sup>24</sup> *Id.* at 256.

<sup>25</sup> *Border Controls Crumble in DVD Land*, BBC NEWS (Aug. 19, 2002), [http://news.bbc.co.uk/2/hi/in\\_depth/sci\\_tech/2000/dot\\_life/2197548.stm](http://news.bbc.co.uk/2/hi/in_depth/sci_tech/2000/dot_life/2197548.stm) [<http://perma.cc/G5R9-W2CZ>].

<sup>26</sup> Mike Ryan, *Burning Question: Why Do We Still Have Region Codes for DVDs?* WIRED (Apr. 26, 2011, 12:00 PM), [http://www.wired.com/2011/04/pr\\_burning\\_dvds/](http://www.wired.com/2011/04/pr_burning_dvds/) [<http://perma.cc/QPB2-FYK7>].

<sup>27</sup> *Id.*

“market-driven correction” to the problem of the DVD region codes.<sup>28</sup> In my view, the failure of the DVD region codes is indeed a prime example of free-market interests trumping the narrower interests of intellectual property owners. I will explore this point in greater depth later in this article.

In his excellent article, *Region Codes and the Territorial Mess*, Peter K. Yu identified the (limited) benefits and (unintended) consequences of DVD region codes and proposed changes to the regime. Though published in 2012, somewhat late in the game considering the fact that the region code death knell had first been sounded over a decade earlier, Yu’s article offers an excellent theoretical framework for my own, decidedly more modest, paper—particularly as regards the benefits (or uses) and consequences of geoblocking. It is thus worth reiterating Yu’s basic points, which I will add to as I see fit, primarily vis-à-vis their applicability to the geoblocking of streaming content.

### III. ON THE USES OF GEOBLOCKING

As a preliminary note, it is worth mentioning an important benefit *not* provided by geoblocking: namely, the limitation of copying. Though this is the classic goal of DRM technologies (or at least of first generation DRM technologies), it is simply not served by geoblocking.<sup>29</sup> I will not dwell at length upon the fairly obvious and overarching benefit of geoblocking (and DRM at large) in that it allows intellectual property owners to do as they

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<sup>28</sup> Yu, *supra* note 19, at 252–53.

<sup>29</sup> Though services that utilize geoblocking mechanisms will often prevent the copying of content, this is not necessarily the case. Content (most often of a textual nature) can be available “DRM-free” in certain areas and not be available at all (or available only for a price) elsewhere.

please with the intellectual property that they own: the simple exercise of their property rights. Instead, I will examine the motives (or justifications) behind the exercise of those rights in this specific way, and the problems raised by such exercise.

**A. *Staggered Release Dates***

As mentioned briefly above, films have traditionally been released around the world over an extended period of time. The reasons for this are both logistical (the costs of global marketing and distribution are high, and a sequential release can help mitigate them) and geo-cultural (traditional “summer blockbusters” released in the United States and Europe in July might be less relevant during those same months in the wintry, Southern hemisphere). DVDs purchased legally in one market, though, will quickly find their way to other markets where the film has yet to be released (or is in the initial stages of its release, with the DVD release still a ways off), negatively affecting ticket sales there. Region coding of DVDs theoretically helps mitigate this negative effect. Scheduling the availability of films to different regions *via* streaming sites such as Netflix achieves a similar effect.

This benefit has weakened with the passing years, in no small part due to the availability of region-free DVDs and general internet-based piracy. Those, in turn, have spurred the simultaneous, or near simultaneous, international release of most major films to cinemas (which is cheaper to achieve in this age of digital projection) and later on DVD, Blu-ray, and streaming sites.<sup>30</sup> It is worth mentioning that a similar phenomenon can be observed regarding television series. Today, the international premiere broadcasts of episodes of

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<sup>30</sup> Yu, *supra* note 19, at 200–05.

popular television shows is near simultaneous, perhaps even more so than in the case of films.<sup>31</sup>

### ***B. Price Discrimination and Parallel Imports***

Price discrimination is a method of maximizing profits. Simply put, it is the sale of identical products in different markets at different prices. Prices are usually set at the highest possible price customers in each market are willing to pay for access to the product. Despite the negative connotations of the word “discrimination,” price discrimination is not necessarily negative. It allows for the sale of products at prices that are affordable to each market, benefiting both customers in generally low-income markets, who could not otherwise afford the products, and the retailers in those markets, who, if required to sell at a global fixed rate, would be hard pressed to make any sales in those markets.<sup>32</sup> Many sophisticated marketing techniques are essentially types of price discrimination.<sup>33</sup> Thus, in theory, even if films were released theatrically and later *via* DVD or streaming services at the same dates around the world, region codes and other forms of geoblocking could kick in to facilitate price discrimination.

Without the limits imposed by geoblocking, parallel import—the typically legal but always unauthorized sale of authentic goods imported from abroad—would soon occur. For example, a product sold at a cheap rate in Zone A and at a more expensive rate in Zone B would be bought in Zone A

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<sup>31</sup> Holden Frith, *Game of Thrones Simulcast: US–UK Time Lag Hits Zero*, THE WEEK (Mar. 28, 2014), <http://www.theweek.co.uk/tv-radio/57895/game-thrones-simulcast-us-uk-time-lag-hits-zero> [<http://perma.cc/3TCD-HH57>].

<sup>32</sup> Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 850 (1997).

<sup>33</sup> *Id.* at 869.

and exported to Zone B. In Zone B, it would be resold with smaller profit margins (the process known as arbitrage), thereby minimizing price discrimination.<sup>34</sup>

Without region coding, DVDs sold for half the price in third-world countries would flood the markets of first-world countries at competitive rates (creating so-called “grey markets”). Online sales or rentals of streaming content add additional complexities, because the pricing strategies implemented can be even more dynamic, differentiating prices at a far higher resolution than six regional zones. Thus, one of the problems with DVD regions, namely that those regions include a mix of both high- and low-income markets, is somewhat mitigated. On the other hand, some countries have access to only limited streaming services, both in the number of actual services and the scope of content provided by those services. Thus, despite what appears to be substantial demand, limited supply creates a market failure.<sup>35</sup> In such markets, consumers may be particularly motivated to utilize circumvention techniques in order to satisfy that demand.

Another question, somewhat beyond the scope of this paper, is whether it is precise to use the term parallel imports when speaking of the circumvention of geoblocking in order to access online streaming content, because there is no physical import, no calculated act of arbitrage, and indeed, no actual “reselling” involved.

Prima facie, price discrimination would appear to be a compelling argument in favor of geoblocking. As Yu

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<sup>34</sup> Frederick M. Abbott, *Parallel Importation: Economic and Social Welfare Dimensions*, INT’L INSTIT. SUSTAINABLE DEV. 4, 6 (2007), [http://www.iisd.org/pdf/2007/parallel\\_importation.pdf](http://www.iisd.org/pdf/2007/parallel_importation.pdf) [<http://perma.cc/3L3A-XKMJ>].

<sup>35</sup> *Netflix USA vs. The World: Content Libraries Compared*, FINDER.COM (Jan. 8, 2016), <https://www.finder.com/netflix-usa-vs-world-content> [<http://perma.cc/E39V-SZHX>].

notes, however, there is a prominent gap between theory and reality. Films are often not affordably priced even in low-income markets, so the economic benefits of price discrimination may not come into play.<sup>36</sup>

### *C. Distribution and Licensing Arrangements*

Distribution of popular content is traditionally decentralized. Film studios and music companies long ago recognized the benefits of reaching agreements on the state level with local distribution companies specializing in specific markets. Similar to the thinking behind staggered release dates, the reasons behind this are both logistical and cultural, with local companies far more adept at the physical distribution and the tailoring of marketing to local audiences. In the case of film and television, those agreements often include the sale of the content on DVD or Blu-ray and increasingly streaming rights as well, which often preclude the authorized distribution of the content by other players. In the case of region-based DVDs, Yu notes, this benefit does not hold water, largely because of the aforementioned “shared markets” of each region.<sup>37</sup> Region 2, for example, includes both Europe and Japan—undoubtedly terrain covered by countless individual distributors, each with their own separate agreements, effectively afforded no protection by the region code.<sup>38</sup> It is worth noting again that geoblocking of streaming content offers infinitely more comprehensive classification of markets than the relatively primitive DVD region codes that are the subject of Yu’s critique. Still, none of the supposed benefits of region coding appear any more effective under geoblocking.

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<sup>36</sup> Yu, *supra* note 19, at 206–09.

<sup>37</sup> *Id.* at 213.

<sup>38</sup> *Id.* at 212.

In his article, Yu argues that DVD region codes—being too general—do a poor job in dealing with the varying censorship policies and regulatory standards in different countries.<sup>39</sup> It seems to me that online geoblocking potentially performs better at that, though it would presumably be unnecessary in markets where state censorship is rampant, as those states would probably implement their own content-blocking technology. Even were that not the case, it seems preposterous to suggest that one of the sole, clear benefits of geoblocking is the facilitation of censorship.

DVD region codes are thought to be a form of DRM. But according to Yu, it is unclear whether they actually help manage rights.<sup>40</sup> Rather, it seems that they are utilized to “provide post-sale control of media content,” as they only come into play after a lawful purchase has been made.<sup>41</sup> To this, one might argue that the region codes are meant to shape behavior—i.e., that most customers will not knowingly buy a DVD which they cannot actually watch. Still, there is merit to Yu’s argument, in that rights management does not appear to be the primary goal of geoblocking.

Building upon Yu’s theoretical framework, I’d like to posit that the further away DRM technologies get from their original, first-generation purpose—the traditional protection of intellectual property from illegal copying and distribution—the less effective they become. Furthermore, as they become less effective, they become more difficult to justify, putting at stake not only geoblocking but the entire suite of DRM technologies. Legal consumers, who are perfectly happy to pay for their content, are far more likely

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<sup>39</sup> *Id.* at 213–16.

<sup>40</sup> *Id.* at 259.

<sup>41</sup> *Id.* at 240.

to be frustrated by second-generation DRM technology and may soon find themselves drawn to piracy. I will return to this idea in the next chapter.

#### IV. ON THE CONSEQUENCES OF GEOBLOCKING

##### A. *Consumption*

An international lifestyle, coupled with the cumbersome nature of geoblocking, could easily have negative effects upon the legal consumption of content and possibly even attract users to piracy. A decade ago, a consumer would have to think twice before purchasing a DVD abroad as a souvenir or gift for a friend back home, as the chances were high that it would be rendered unplayable because of differences in region codes. Today, subscribers of streaming content services, such as Netflix, travelling abroad might encounter wildly varying content owing to differences between how the service is offered in different countries or, more likely, have difficulty accessing the service at all (without the use of a circumvention method, that is).

Faced with the high probability of inconvenience, at best, and wasted cash, at worst, consumers are likely to proceed with caution, almost certainly resulting in lost sales, especially amongst those consumers most prone to travel and relocation—this is particularly problematic, because such jetsetters are often the most lucrative consumers. The most extreme example occurs when the geoblocked content is available for legal purchase or is accessible exclusively in one region, as is often the case with many non-American films.<sup>42</sup> Even then, there is a decent chance it will be available illegally online. Why take the risk, one might

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<sup>42</sup> *Id.* at 200.

argue, of wasting money on a geoblocked purchase when the product is freely available online?<sup>43</sup>

**B. Competition**

The “divide and conquer” nature of region-based distribution that facilitates price discrimination also has a chilling effect on competition. As products become more limited in their potential geographical reach, it follows that consumers are presented with fewer choices, making markets less competitive. This is something distributors are aware of, but rather than flatten geographical barriers, they are more likely to simply choose not to distribute content in markets where it is perceived to have less marketing potential. When content is geoblocked, beyond the risk that smaller markets will be subject to price discrimination (in the negative sense of the term) insofar as local distribution goes, there is also a high chance that much of the more obscure content will not be locally distributed at all and importing will be of no use because of the geoblocking measures.<sup>44</sup> This runs contrary to global marketing trends best exemplified by Amazon.com and print-on-demand services (and, ironically, by Netflix)—nicknamed “the long tail.” Such platforms attract consumers precisely because of their ability to readily offer niche and obscure backlist content, beyond the same old best-sellers and blockbusters that populate traditional brick and mortar shops.<sup>45</sup>

In his article, Yu surveys various legal investigations into the perceived anti-competitive and antitrust violating

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<sup>43</sup> *Id.* at 217–20.

<sup>44</sup> *Id.* at 220–21.

<sup>45</sup> Chris Anderson, *The Long Tail*, WIRED (Oct. 2004), <http://archive.wired.com/wired/archive/12.10/tail.html> [<http://perma.cc/4738-4DLQ>].

nature of DVD region codes.<sup>46</sup> As I have pointed out, that mechanism managed to defeat itself before any legal consensus could emerge against it. Later in this paper, I will address the various legal models that directly address geoblocking, many of which echo the deep skepticism that faced the DVD region codes.

### C. *Cultural Rights*

When the dissemination of cultural content—film, music, literature—is limited, cultural rights are harmed. While weakly protected as human rights (despite being enshrined in international law),<sup>47</sup> the importance of such rights in the age of globalization is ever-growing. Of particular importance is the ability of émigrés and expats to enjoy access to cultural content originating from their respective homelands, whether for their own personal enjoyment or to help give their children a sense of shared heritage.<sup>48</sup> Obviously, such access is also of great importance to those wishing to learn about foreign cultures and languages.<sup>49</sup> Yu waxes poetic on the importance of DVDs in this respect; the vast majority of any given country’s film releases (save, perhaps, the United States) and especially its back-catalogue, is available only in that country. Surely, as streaming technology and the ubiquitous cloud become increasingly voluminous, the potential for cross-cultural sharing, unencumbered by geoblocking,

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<sup>46</sup> Yu, *supra* note 19 at 222–25.

<sup>47</sup> Universal Declaration of Human Rights [UDHR], G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), Article 27(1) (speaking of “the right [to] freely participate in the cultural life of the community”); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3., Article 15(1)(a) (features similar language).

<sup>48</sup> Yu, *supra* note 19, at 227.

<sup>49</sup> *Id.* at 227–28.

becomes ever greater.<sup>50</sup> In a similar vein, Trimble speaks of a “right of access to information” wherever it may be located.<sup>51</sup> Since our focus is usually on popular, commercial culture, it is easy to forget that the exercise of these rights is particularly crucial in educational contexts: In countries that have less readily accessible content due to geoblocking, teachers and educational institutions have a more difficult time exposing students to global culture. And, because of the nature of educational institutions, the likelihood of them utilizing circumvention technology to bypass the geoblocking limitations seems doubtful.

Unlike Yu, who professes some belief that treating DVD region codes—and by extension, geoblocking—as a human rights infringement has some chance of success, I am of the opinion that the grounds for real action on this basis are weak. As Land reminds us, “after all, they are only region codes.”<sup>52</sup> So long as immigrants, for example, have access to *some* content from their homelands, it is difficult to say that their rights have truly been trampled upon.<sup>53</sup> However, I do think this may possibly be the strongest argument against geoblocking precisely because it mixes common sense benefits with a powerful moral stance.

#### **D. Censorship**

Yu is of the belief that region coding technology helps facilitate censorship in countries already prone to such behavior.<sup>54</sup> That is to say, it adds another layer of difficulty that individuals in repressive countries must deal with in

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<sup>50</sup> *Id.* at 226–30.

<sup>51</sup> Trimble, *supra* note 1, at 642.

<sup>52</sup> Molly Land, *Region Codes and Human Rights*, 30 CARDOZO ARTS & ENT. L.J. 275, 277 (2012).

<sup>53</sup> *Id.* at 277–78.

<sup>54</sup> Yu, *supra* note 19, at 230–31.

their attempt to access content deemed subversive by the powers-that-be (even if they manage to smuggle in subversive content, they will still have to deal with the DRM measures put in place). American companies should surely feel a special responsibility in such cases, argues Yu: Even if the content in question is not overtly political in nature, it still may offer a glimpse of a free way of life.<sup>55</sup>

While I agree with the gist of Yu's argument, it's worth pointing out that the majority of the content in question is now available online (both legally and pirated), and this has led to the weakening importance of the censorship factor (insofar as companies are concerned). In states that control internet access, it appears that even the best efforts on the part of Western corporations to advance free access to content will be unsuccessful due to the almost absolute censorship imposed by the states in question. On the micro level, the most effective solution is the constant development of more advanced circumvention methods, while on the broader level the focus should be on affecting political change.

### *E. Additional Consequences*

While the four negative consequences identified by Yu make for a compelling argument against region coding, I have identified several additional consequences worth considering. They do not necessarily make for effective legal arguments, but as they shift the focus from user to creator, they serve as a reminder that geoblocking does not only create a crisis of *access* (often the focus for much of the writing on the topic) but also a crisis of creation and speech.

#### **1. Harmful to Innovation**

When technological barriers are placed on the effective distribution and consumption of content, the result

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<sup>55</sup> *Id.* at 231.

is a chilling effect on innovation both creative and technological. Content serves as a source of inspiration for artists of all kinds, and the less readily available it is, the less sources of inspiration there are. This is not an argument against the enforcement of intellectual property (with or without the help of DRM technology), but it is certainly an argument in favor of creative intellectual property being made accessible everywhere, for a fair price, to the greatest extent possible.

Barriers on content availability are also harmful to technological innovation (save for the arms-race style development of additional geoblocking measures to cope with new circumvention measures, continuing *ad infinitum*). As creative content and technological innovation are increasingly linked, certainly in fields such as film and the gaming industry, competition almost inevitably breeds technological innovation. Thankfully, content consumption is almost undoubtedly increasing exponentially in spite of geoblocking, and so there is no lack of creative and technological innovation today. But I argue that geoblocking serves as a hindrance to even more innovation.

## 2. Free Speech

The paradox at the heart of geoblocking—that the same technologies that allow for more widespread dissemination of content than ever before are essentially the same technologies that can place effective limitations on that dissemination—brings into play the question of free speech of artists. Somewhat complementary to Yu’s cultural rights argument is that of free speech, similarly protected under international law.<sup>56</sup> While filmmakers, for example, have usually forfeited the intellectual property rights for their films, which would allow them to control their films’ distribution, a strong argument can be made that filmmakers,

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<sup>56</sup> UDHR, *supra* note 47, at article 19.

authors, singers and other artists have a right that arbitrary geoblocking measures that place blanket geographical limits on access to content not be applied to their works, lest their right to be heard be impinged upon.

### 3. Questions of Effectiveness

As mentioned earlier, the effectiveness of DRM technologies is unclear. Nearly all DRM-protected content will find its way to the hacker capable of lifting the protection and releasing it to the world unprotected. This will usually happen quite fast, undermining the basic purpose of first generation DRM, namely the prevention of copying.<sup>57</sup>

Therefore, it is important that we ask whether DRM, in general, and geoblocking, in particular, are effective in furthering the predominantly commercial aims of the rights owners that implement them. A qualified answer to this question requires real-world data that is largely unavailable. However, recent research offers a tantalizing hint, confirming earlier, non-empirical behavioral models.<sup>58</sup> After removing first-generation DRM limits from their music (which primarily limited copying), the digital sales at four major American record labels increased by 10% overall.<sup>59</sup> The impact on top-selling albums was insignificant, but came to 30% on lower-selling albums.<sup>60</sup>

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<sup>57</sup> Stuart Haber, Bill Horne, Joe Pato & Tomas Sander, *If Piracy is the Problem, is DRM the Answer?* HP LABS. CAMBRIDGE 7 (May 27, 2013), <http://www.hpl.hp.com/techreports/2003/HPL-2003-110.pdf> [<http://perma.cc/R2BN-NRQW>].

<sup>58</sup> Dinah A. Vernik, Devavrat Purohit & Preyas S. Desai, *Music Downloads and the Flip Side of Digital Rights Management*, 30 *MARKETING SCI.* 1011, 1011–27 (2011).

<sup>59</sup> Laurina Zhang, *Intellectual Property Strategy and the Long Tail: Evidence from the Recorded Music Industry*. 1, 1 (Oct. 27, 2014), <http://ssrn.com/abstract=2515581> [<http://perma.cc/NZG5-8RZ2>].

<sup>60</sup> *Id.*

The conclusion is almost obvious: easier access helps facilitate the discovery of niche content (that same “long tail” content that online shopping helps facilitate the sale of).<sup>61</sup>

In other words, even if DRM-free content is distributed in ways that might be problematic in the traditional copyright sense (for example, shared among friends), that distribution prompts others to purchase that content, particularly when said content is more obscure in nature.

Another point worth considering is that of the ownership versus licensing issues raised earlier: DRM-free content is a product truly owned (as much as a string of digital bytes can be truly owned), and in that way is more like buying an audio cassette tape that one can share with friends and even make copies of. That a free alternative exists is of little consequence, as long as the price is reasonable and the service reliable.<sup>62</sup> Time and again, competitively priced products succeed in combating piracy where enforcement and education fail.<sup>63</sup> And lest we forget, many people take pride in paying a premium for high-quality content, from high-quality purveyors. That is the reason people donate money to (freely available) public radio, and independent book stores have not been completely driven out by chains and Amazon.<sup>64</sup> People are not always rational

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<sup>61</sup> *Id.* at 5.

<sup>62</sup> Yu, *supra* note 19, at 236 n.212.

<sup>63</sup> Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, 10, 79 (2011), <http://www.ipo.gov.uk/ipreview-finalreport.pdf> [<http://perma.cc/6GX8-Q8XE>].

<sup>64</sup> Joseph Esposito, *Thinking Through a Strategy for Digital Rights Management*, THE SCHOLARLY KITCHEN (Apr. 23, 2012), <http://scholarlykitchen.sspnet.org/2012/04/23/thinking-through-a-strategy-for-digital-rights-management/> [<http://perma.cc/ZUG4-ZS5Q>].

actors in the classical economic sense, searching for the best deal; sometimes they are happy to just be good citizens.

It is worth providing a caveat: What is true for the music industry might not necessarily be true to the same extent for e-books or films (a DRM-free film shared with friends is probably less likely to be re-purchased legally, because music usually has more replay value than most films). But these findings are enough to disprove the fundamental assumption that DRM technologies are *required* in order to prevent a sales slump. In some cases (perhaps even in most cases), the opposite is true.

## V. CIRCUMVENTION

For those who wish to circumvent geoblocked services and content, there are a wide number of methods available,<sup>65</sup> beginning with tools that allow for remote access to distant computers, or an “old-fashioned” dial-up connection to an internet service provider abroad, both making the user appear to be physically located elsewhere.<sup>66</sup> Another form of circumvention is piracy: Some users attempting to legally access content made unavailable by geoblocking may turn to file-sharing networks and download the content that way.<sup>67</sup> As Trimble notes, copyright laws have done little to prevent online piracy on their own. Commercial enterprises, such as Netflix, were

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<sup>65</sup> I favor the term circumvention, but I will sometimes use the terms evasion and cybertravel, preferred by Trimble. Another common term is geo-dodging.

<sup>66</sup> Muir & Oorschot, *supra* note 4, at 4:13.

<sup>67</sup> This method is clearly of extremely dubious legality on the part of users (or downloaders), and downright criminal on the part of the “pirates” uploading the content, if such a distinction can even be made between those parties.

necessary to provide a solution, in the form of a “legal and viable alternative to piracy”.<sup>68</sup>

The circumvention method most relevant for the purposes of this paper is the use of a proxy. Essentially this means the rerouting of one’s connection *via* an IP address located elsewhere, masking the location of one’s own device with that of one in a different country.<sup>69</sup> This can be done *via* a free-to-use website (often less effective), or a paid subscription service, often referred to as a VPN (Virtual Private Network).<sup>70</sup> The motives for using such a technique could include the desire for anonymity (for example when there is a risk of oppressive action by the local government, or alternatively, in order to shield illicit behavior), or simply access to content unavailable from one’s own location.<sup>71</sup>

The field of circumvention techniques is ever-changing, as various methods are detected by distributors and protected against (most commonly, IP addresses that serve proxy users are identified and placed on “black lists”).<sup>72</sup> In the future, geolocation methods might implement technology that will make evasion even more difficult. The increasing prevalence of GPS (global positioning service usage) enabled devices—utilizing satellites to pinpoint precise geographical locations—points to that as a fairly obvious candidate.<sup>73</sup>

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<sup>68</sup> Trimble, *supra* note 1, at 649.

<sup>69</sup> Muir, *supra* note 4, at 4:13–:14.

<sup>70</sup> It is worth noting that even when using a VPN, additional techniques might still be necessary in order to gain access to a content-streaming service. These might include providing a false foreign address upon registration, or even a foreign credit card number.

<sup>71</sup> Trimble, *supra* note 1, at 602–03.

<sup>72</sup> *Id.* at 604.

<sup>73</sup> *Id.* at 605.

It is nearly impossible to say how widespread a phenomenon circumvention is. However, it is safe to assume that it remains today the domain of relatively advanced users. Indeed, one key problem with circumvention is that it requires some technological prowess, alongside a willingness to take risks (even under a legal framework that would acknowledge a right to circumvention, the act itself would probably still void many consumer warranties). Thus, until circumvention becomes particularly user-friendly, it would most likely serve only a select minority of users.

## VI. LEGALITY OF GEOBLOCKING CIRCUMVENTION

### A. *Territorial internet?*

When discussing the legality of circumvention, it is helpful to first consider the nature of the internet itself. The internet, as a decentralized medium with no central authority, is commonly perceived to be a borderless space. But in reality, as we have seen, it is increasingly partitioned—by governments and corporations alike—in ways that echo traditional territorial borders.<sup>74</sup> This is not necessarily a negative development: It is the inherently borderless nature of the internet that allows for the regulatory actions of governments and other players on the supposedly domestic level to have global ramifications for the internet.<sup>75</sup> In that sense, the raising of territorial borders could be helpful to protect against such actions.<sup>76</sup>

Trimble posits that the use of geoblocking is bound to become more widespread as more internet players comply with territorially defined regulation.<sup>77</sup> This, in turn will

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<sup>74</sup> *Id.* at 570–71, 575.

<sup>75</sup> *Id.* at 577.

<sup>76</sup> *Id.* at 582.

<sup>77</sup> *Id.* at 572–73.

bring about more attempts to circumvent geoblocking. As circumvention becomes more widespread, beyond the exclusive scope of enthusiasts, the necessity to define its legal status becomes all the more pressing.<sup>78</sup> This is an important policy decision awaiting the international community: “whether people should be free to break the territorial limits that governments and other entities attempt to impose on the Internet—whether Internet users should have the freedom to travel in cyberspace.”<sup>79</sup>

**B. *Liable Parties***

The parties likely to be found liable for such circumvention are the providers of the tools that facilitate the action and the users of those tools.<sup>80</sup> Insofar as users are concerned, there is a fairly complicated question of jurisdiction: Should it be based on their physical (“real”) location or their cyberspace location? For example, if they access the internet *via* a proxy IP located abroad, the jurisdiction could be based on the location of that proxy.<sup>81</sup> The convoluted architecture of the internet, where actions might be routed through servers in a third country, further complicates matters. It is beyond the scope of this paper to fully survey, let alone settle, these complexities, but it should be clear that any comprehensive attempt to regulate the legal status of geoblocking circumvention must address them.

When the liability in question relates to possible copyright infringement, the question becomes even more convoluted: We must ask ourselves not only whether the action in question constituted an infringement of copyright? But also, according to whose laws? Those of the user’s

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<sup>78</sup> *Id.* at 605.

<sup>79</sup> *Id.* at 569.

<sup>80</sup> *Id.* at 606–07.

<sup>81</sup> *Id.* at 607–08.

physical location, or perhaps those of the “virtual” location—the site of the proxy? There is no legal consensus regarding the answer to either of these questions.<sup>82</sup>

The liability of the providers of circumvention tools is of particular importance, chiefly for reasons of efficiency: It is easier to pursue the provider of a proxy service than the many individual users of that service.<sup>83</sup> The provider could be found liable not only for the actions of its users but also as a direct facilitator of illegal activity, such as gambling.<sup>84</sup>

### ***C. Is Geoblocking Circumvention Legal?***

It is difficult to pinpoint legislation or case law specifically outlawing the use of geoblocking circumvention methods (though naturally it is only a matter of time before legislatures and courts alike will be forced to directly address these issues). Several legal dimensions can and should be taken into account when attempting to answer this question.

#### **1. Terms of Service Obligations**

The use of circumvention methods would appear to almost always constitute a breach of contract vis-à-vis terms of service obligations incurred when using a service that utilizes geolocation methods.<sup>85</sup> A typical example can be seen in the Netflix terms of service document:

You may view a movie or TV show through the Netflix service primarily within the country in which you have established your account and only in geographic locations where we offer our service and have licensed such movie or TV show. The content that may be available to watch will vary by geographic

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<sup>82</sup> *Id.* at 610.

<sup>83</sup> *Id.* at 628.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 624.

location. Netflix will use technologies to verify your geographic location.<sup>86</sup>

As the inherently geoblocking nature of such services is well known, the fact that most users probably skip reading the terms of service would appear to be inconsequential. Netflix, for example, reserves the right to “terminate or restrict . . . use of our service,” if suspicions of circumvention are aroused.<sup>87</sup> I have been unable to obtain any evidence of such actions on the part of Netflix or similar services. As these services profit from their “cybertravelling” users, this should come of little surprise. Since it seems the vast majority of these users do so for lack of a viable domestic option (as opposed to classic cases of parallel imports), this would appear to be a situation where the terms of service are unlikely to be enforced.

## 2. Legislation

Probably the most prominent legislation that may affect geoblocking circumvention is the World Intellectual Property Organization Copyright Treaty (WCT), which, in its article on “Obligations concerning Technological Measures,” states:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights . . . .<sup>88</sup>

This is a clear reference to any form of DRM circumvention. As geolocating tools are understood to be measures used in

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<sup>86</sup> *Terms of Service*, NETFLIX, § 6.C, <https://www.netflix.com/TermsOfUse> [<http://perma.cc/SB7C-NY9R>].

<sup>87</sup> *Id.* § 6.H.

<sup>88</sup> WIPO Copyright Treaty art. 11, Dec. 20, 1996, S. Treaty Doc. No. 105-17.

connection with the exercise of intellectual property rights, any circumvention attempts would appear to run awry of the treaty.

The Digital Millennium Copyright Act implements the treaty in US law, with a comprehensive section dedicated to prohibiting circumvention of copyright protection systems.<sup>89</sup> No consensus has emerged in the federal courts on whether a nexus must be shown between the circumvention and the copyright infringement.<sup>90</sup> This is of some significance, as I have called into question whether geoblocking is in fact primarily used to enforce copyright. It follows that many acts of circumvention would not necessarily constitute an attempt to infringe on copyright (for example, the attempt to pay for streaming content not available in one’s own country, or even more obviously, the attempt to access free, streaming content, which is not available—not even for a price—in one’s own country, for example content blocked on YouTube). At least insofar as geoblocking is concerned, this remains pure speculation, as the courts have yet to hear cases on geoblocking circumvention. This is understandable if one takes into account the fact that most “victims” of geoblocking are not North American or European.<sup>91</sup> The issue is more pressing in countries such as Australia, as we shall see later in this paper.

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<sup>89</sup> 17 U.S.C. § 1201 (2006).

<sup>90</sup> Trimble, *supra* note 1, at 616.

<sup>91</sup> While, as mentioned above, significant expat communities resort to circumvention in order to access content from back home, it seems that the routes of most “cybertravellers”, similar to real-world immigration patterns, travel in the direction of first world countries where services such as Netflix are most readily available.

### 3. Legality in Israel

The legal status of circumvention methods in Israel, which has signed (but not ratified) the WCT,<sup>92</sup> is slightly more clear. While anti-circumvention legislation (in the form of an amendment to Israel's law of copyright) was proposed in mid-2012, it has yet to be enacted. Though the wording of the proposed legislation is similar in tone to the WCT's provisions, its explanatory notes are worth examining. The notes stress that the technological measures, which are circumvented, must have copyright protection as their *primary purpose* and not as a secondary or incidental result of their use.<sup>93</sup> While these notes will not become binding law, even if the legislation is enacted, courts often refer to them when interpreting the law. Thus, Israeli courts might not necessarily interpret the law as one that forbids all acts of geoblocking circumvention.

A particularly instructional case, in the Israeli context, is that of *Telran v. Charlton*.<sup>94</sup> Charlton, the licensed broadcaster of the 2006 FIFA World Cup soccer championship games, took issue with Telran, which had sold Israeli clients cards that decoded scrambled satellite broadcasts of the games, emanating from Jordan.<sup>95</sup> After a

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<sup>92</sup> World Intellectual Property Organization [WIPO], *WIPO-Administered Treaties*, [http://www.wipo.int/wipolex/en/wipo\\_treaties/parties.jsp?treaty\\_id=16&group\\_id=1](http://www.wipo.int/wipolex/en/wipo_treaties/parties.jsp?treaty_id=16&group_id=1) [<http://perma.cc/X9VT-5NGC>].

<sup>93</sup> Memorandum of Law: Intellectual Property Law (Technological Safeguards and Electronic Information on Intellectual Property Management), 2012.

<sup>94</sup> CA 5097/11 Telran Communication (1986) Ltd. v. Charlton Ltd. (2013) Nevo Legal Database (by subscription, in Hebrew) (Isr.), *translated in* Telran Communications Ltd. v. Charlton, Ltd., *VERSA OPINIONS OF THE SUPREME COURT OF ISRAEL*, <http://versa.cardozo.yu.edu/opinions/telran-communications-ltd-v-charlton-ltd> [<http://perma.cc/WM86-CLF2>].

<sup>95</sup> *Id.* ¶ 2.

district court held Telran culpable of copyright infringement, the Supreme Court reversed the decision.<sup>96</sup> The broadcast of the games could indeed qualify as copyrighted subject matter, but there was no direct infringement on the part of Telran, because the broadcasts carried by Charlton were not decoded by Telran’s cards, nor were they rebroadcast by the cards.<sup>97</sup> Rather, the broadcasts in question were those of a third party. Furthermore, the court did not hold Telran culpable of statutory indirect infringement or of contributory infringement (the question of unjust enrichment was returned to the district court to determine).<sup>98</sup> Though the copyright law applied by the court was the old law (circa 1911), Justice Zylbertal, after analyzing the contemporary legislation, stated clearly that “Israel has not applied a legislative framework determining that the bypass of technological safeguards constitutes a copyright infringement”.<sup>99</sup>

The circumvention of geoblocking in Israel, then, while not necessarily legal in the fullest sense of the term, is decidedly *not illegal*.

## VII. SHOULD CIRCUMVENTION BE LEGAL?

The current legal status of geoblocking circumvention around the world is, as I have shown, ambiguous. Many laws could be applicable to geoblocking, but there are few clear-cut answers, and so courts might rule either way. Circumvention allows for a wide spectrum of behavior, and it follows that there is an equally wide spectrum of legal choices to be made: banning

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<sup>96</sup> *Id.* ¶ 39.

<sup>97</sup> *Id.* ¶ 19.

<sup>98</sup> *Id.* ¶¶ 19, 34.

<sup>99</sup> *Id.* ¶ 22.

circumvention entirely, allowing it entirely, or somewhere in between.

In this chapter, I will examine various options across this spectrum, which I hope will be helpful in facilitating further thinking on the subject. I will begin with Trimble's proposal, which I believe falls short of providing a comprehensive solution to the issues at hand, but is nonetheless worth examining for its compelling conceptualization. I will continue with Yu's "modest proposals," which go a step further. Finally, I will present the findings and recommendations of the "Australia Tax" parliamentary inquiry, which takes the most activist approach of the three. As Trimble notes, "it would be a mistake to think that cybertravel will continue to remain outside the scope of legal inquiry." This is an issue well worth wrestling with.<sup>100</sup>

#### *A. Legalizing Trimble's Cybertravel*

In Trimble's view, the circumvention of geoblocking is well on its way to being properly outlawed, so as to allow for the ongoing territorial partitioning of the internet.<sup>101</sup> Such an act might involve the allocation of permanent IP addresses—the IP address would be a positive ID for all intents and purposes (instead of the usually arbitrary IP address assigned to devices today). Attempting to misrepresent one's IP address would essentially be an act of fraud.<sup>102</sup> This would bring about a privacy crisis on an Orwellian scale: Every online act—every message posted, each file downloaded—could be attributable to a specific device, if not necessarily to a person (in the event that the device is shared). Even if provisions were to be made

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<sup>100</sup> Trimble, *supra* note 1, at 636.

<sup>101</sup> *Id.* at 569–70

<sup>102</sup> *See id.* at 636–37.

allowing for anonymity, they might still require the use of an IP address traceable to a specific location, so the problem of geoblocking circumvention would remain unsolved.<sup>103</sup> In response, Trimble offers a “right to cybertravel,” analogous to one’s right to engage in international travel: Essentially, this is the right to access the internet, whether *via* proxy or otherwise, as if from another country.<sup>104</sup>

Though initially compelling, the key weakness of Trimble’s “cybertravel” analogy lies in the inherently different natures of the two sorts of travel: “Real” international travel is highly regulated, with intense scrutinizing of both passengers’ identities and their cargo (for customs purposes)—not to mention visa requirements—whereas much of the attraction of cybertravel is in its anonymity and the possibilities it holds for the circumvention of various costs (the equivalent of customs).

Trimble suggests that cybertravel be limited so as to permit only “legitimate” goals. Of course, the definitions of legitimacy can vary wildly, but the example she gives—the ability to access one’s own bank account from a foreign country—seems so slight so as not to warrant the meticulous legal constructions she sets forth in her work.<sup>105</sup>

Cybertravel could be made legal with the use of a “virtual passport,” linked to one’s permanent IP address, which would provide positive identification, including an individual’s location, though not necessarily her personal information. The registered location might be one’s current physical location or one’s permanent place of residence. Using the latter might allow for access to content legally available to persons of that place of residence regardless of their temporary physical location (for example, access to

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<sup>103</sup> *Id.* at 638.

<sup>104</sup> *Id.* at 640–42.

<sup>105</sup> *Id.* at 648–49.

Netflix USA for American tourists abroad).<sup>106</sup> Knowing the user's real location would, in theory, facilitate the providing of legal access to heretofore geoblocked content with the content distributors now able to pay licensing fees to rights holders based on the points of origin of the various viewers, under collective rights-management schemes (the idea of the "celestial jukebox"). Under such a reality, and setting aside other issues (primarily of anonymity and associated uses of cybertravel in the exercise of free speech and access to information), Trimble's virtual passport solution might strike a decent balance for copyright purposes. But as Trimble herself notes, such a grand solution would involve significant transaction costs,<sup>107</sup> which would probably be borne by users. More realistically, the headache involved means that this is not a viable vision for the foreseeable future. What then, should be the legal solution today?

### ***B. Yu's "Modest Proposals"***

Yu's proposals go beyond the scope of Trimble's more limited approach. Though geared towards the issues raised by DVD region codes, his third proposal imagines a general right of circumvention, that is fleshed out in more practical terms by the Australian inquiry.

#### **1. Voluntary Removal**

As seen above, the demand for content unavailable due to geoblocking is large and growing. For want of an alternative, some of that demand is funneled into attempts to acquire access illegitimately (*via* piracy), even though the majority of users would be happy to pay for access to said content, if that were a viable option. Similar to the research surveyed above, Yu is of the opinion that content providers would profit if they rethought their DRM strategies,

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<sup>106</sup> *Id.* at 650.

<sup>107</sup> *Id.* at 651.

specifically their reliance on geographically based distribution, and cease their use of geoblocking.<sup>108</sup> That rights to content are traditionally held on a regional basis need not be a barrier to this; revenues accumulated *via* a single global distribution platform can be redistributed to the various rights holders in various regions (though it is clear that in the long term, a truly global distribution strategy for content is more desirable).<sup>109</sup>

As I will elaborate below, I am of the opinion that increasing demand for content, along with technological literacy that enables circumvention, will render geoblocking as ineffective as DVD region codes. I agree that a preemptive move on the part of content distributors—the voluntary removal of those mechanisms—is therefore most desirable. Conversely, though, they might tighten those restrictions.

## 2. Multiregion Players

Yu proposes that countries declare the legality of region-free DVD players so as to encourage their spread, whether *via* local production or import. This would require the amendment of anti-circumvention legislation that could currently be understood to consider such devices illegal. The risk remains that content providers will simply strengthen their restrictions in such a way that will make the region-free players useless.<sup>110</sup> In his final proposal, Yu extends this idea to a general right to circumvent.

## 3. A Right to Circumvent

Yu proposes establishing a general right to circumvent technological measures so as to allow for access

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<sup>108</sup> As we have seen above, DRM removal seems to result in an increase in sales.

<sup>109</sup> See Yu, *supra* note 19, at 235–39.

<sup>110</sup> *Id.* at 239–40, 244.

to content, so long as said circumvention does not result in a copyright infringement. Such a right will restore the balance established by intellectual property: “fair hacking” (or “fair circumvention”) as analogous to fair use.<sup>111</sup> Yu proposes a right to circumvent with justifications extending beyond the scope of fair use to include the need to protect fundamental human rights of expression and culture.<sup>112</sup> According to this concept, users, having made a legal purchase of the content, hold a “free license” based on human rights, to circumvent.<sup>113</sup> This could be in the form of a positive right or as a defense of circumvention. Such a right, however, would be limited to the circumvention of mechanisms that prevent access to content legally purchased, as in the case of a region protected DVD purchased abroad (that is to say, the human rights based approach does not engender a right to piracy).<sup>114</sup> Additionally, as Land reminds us, this is a human rights *based* approach, somewhat limited in scope, and not a full-fledged human right to circumvention.<sup>115</sup>

This raises the question of whether the use of circumvention methods (such as VPNs) to access and pay for a subscription service like Netflix would be protected by such a right. On the one hand, the service and content would be paid for, but if in the case of region-free players the circumvention is limited to securing the means to access protected content that was paid for legally, in the case of VPNs the circumvention first facilitates a purchase that geoblocking mechanisms were put in place to inhibit. The difference is not merely on the temporal level. In the first scenario, the content could easily have been procured over

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<sup>111</sup> *Id.* at 246.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 248.

<sup>114</sup> *Id.* at 245–49.

<sup>115</sup> Land, *supra* note 52, at 282.

the course of a bona fide purchase, for example while on a trip abroad. The bona fides of a VPN user knowingly outwitting geoblocking mechanisms, which are designed to prevent access to users outside of a specific geographical location (in addition to using a VPN, a false address is often used), are far more questionable.

As late as 2012, Yu somewhat underplays the potential problem of geoblocking on streaming platforms. Though he acknowledges the danger, he cites the growing popularity of Netflix, YouTube and other streaming platforms to users as a solution to the problem of region coding rather than a new and even more efficient iteration of the same.<sup>116</sup> Just one year later, the “Australia Tax” inquiry conducted a thorough investigation of geoblocking—albeit largely limited to its effect on Australian consumers—and offered even bolder recommendations.

### ***C. An Alternative Legal Model: The “Australia Tax” Parliamentary Inquiry***

Probably the most radical governmental approach to the problems of geoblocking is to be found in the recommendations of the “Australia Tax” parliamentary inquiry. In May 2012, in response to what the report gently referred to as “growing interest in the differentials that exist in prices for IT [information technology] hardware and software sold in Australia,”<sup>117</sup> the Australian Communications Minister tasked a parliamentary committee to investigate the following:

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<sup>116</sup> Yu, *supra* note 19, at 253, 257.

<sup>117</sup> House of Representatives, Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax*, THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA (July 2013), [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=ic/itpricing/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm), 1.

- Whether a difference in prices exist between IT hardware and software products, including computer games and consoles, e-books and music and videos sold in Australia over the internet or in retail outlets as compared to markets in the US, UK and economies in the Asia-Pacific;
- Establish what these differences are;
- Determine why these differences exist;
- Establish what the impacts of these differences might be on Australian businesses, governments and households; and
- Determine what actions might be taken to help address any differences that operate to the disadvantage of Australian consumers<sup>118</sup>

In July 2013, after a year of conducting research and hearings, the committee released an extensive report, titled *At What Cost? IT Pricing and the Australia Tax*. The report documented evidence of dramatic differences between prices of identical products in Australia and the United States,<sup>119</sup> resulting in negative effects on Australians (particularly those with lower incomes,<sup>120</sup> the higher education sector,<sup>121</sup> small businesses,<sup>122</sup> and so forth). Regarding digitally delivered content, it concluded that “many IT products are more expensive in Australia because of regional pricing strategies implemented by major vendors and copyright holders.”<sup>123</sup> Referring specifically to geoblocking, the committee found that many IT vendors appear to use geoblocking as a means to raise prices by restricting consumers’ abilities to access the global

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<sup>118</sup> *Id.* at XI.

<sup>119</sup> *Id.* at 17–18.

<sup>120</sup> *Id.* at 34–35.

<sup>121</sup> *Id.* at 36–37.

<sup>122</sup> *Id.* at 45–47.

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

marketplace<sup>124</sup> (indeed, several corporate representatives spoke quite openly on the subject).<sup>125</sup>

The committee recommended the following:

- a. The further easing of restrictions on parallel importation, continuing a trend already present in Australian law.
- b. The amendment of the Australian Copyright Act’s anti-circumvention provisions to clarify and secure consumers’ rights to circumvent technological protection measures that control geographic market segmentation
- c. The investigation by the government of options for educating Australian consumers and business as to the extent to which they may circumvent geoblocking mechanisms in order to access cheaper legitimate goods, the tools and techniques they may use to do so, and the ways in which their rights under the Australian Consumer Law may be affected if they do so.
- d. That the government consider the creation of a “right of resale” of digitally distributed content, and clarification of “fair use” rights for consumers, businesses, and educational institutions, including restrictions on vendors’ ability to “lock” digital content into a particular ecosystem.
- e. As an option of last resort, the Australian government should consider enacting a ban on geoblocking, should the market failure persist in spite of changes made on the basis of the report’s recommendations.
- f. The government should consider amending the Competition and Consumer Act so as to void contracts and terms of service that aim to enforce geoblocking.<sup>126</sup>

The recommendations speak for themselves. They constitute, if nothing else, a bold, strongly consumerist

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<sup>124</sup> *Id.* at 14–15.

<sup>125</sup> *Id.* at 79–80.

<sup>126</sup> *Id.* at XII–XIII.

stance on the part of the committee. They are also my preferred model for a possible future legal regime vis-à-vis geoblocking circumvention (though of course they extend beyond the realm of geoblocking). If and when the recommendations are implemented, it will be interesting to witness the economic results of such an unprecedented move. But it is also worth noting that Australia is in a unique position: As the most remote of the large and powerful first-world countries, it suffers somewhat on account of its isolation, yet its international heft (and Commonwealth membership) will ensure that content distributors won't abandon it even if, in light of the recommendations, they will face a more difficult playing field. That is to say, Australia is one of the few countries that could get away with pulling off such a reform.

A somewhat less isolated—but also somewhat less economically powerful—country is Israel. It is interesting to note that while the “cost of living” issue has become an enormously important one here in recent years, there seems to be little of the widespread awareness and frustration of the costs of geoblocking that spurred the forming of the Australian inquiry. That the cost of milk products abroad is so central a preoccupation for Israelis while “IT pricing” is not, seems to me to be something of a blind spot.

## VIII. CONCLUSION

### A. *Geoblocking in the Long Term*

At the risk of sounding cliché, I believe the proponents of geoblocking may soon find that they are on the wrong side of history. As Yu concludes in *Region Codes and the Territorial Mass*:

Although region-based restrictions have some benefits, they are slowly becoming obsolete. They do not sit well with today's rapidly globalizing world, where goods and people are increasingly mobilized

and where lifestyle and consumer preferences continue to change. Even worse, they stifle the vast potential created by the internet and new communications technologies while at the same time intruding on our fundamental rights to free speech, education, and cultural development.<sup>127</sup>

Is geoblocking doomed to failure? As demand for content increases, distributors will have to keep up, or come to accept the realities of piracy and circumvention: as any remotely computer-savvy consumer of culture knows, there is no longer any reason to wait months for the season finale of a much-loved television show to make its way to one's shores or to accept defeat when its broadcast is cancelled by the local networks. Technology has rendered those two options irrelevant, at least for the minority of users wise to the latest circumvention techniques. But they will likely not remain a minority for long: technological literacy will grow. Even if no right to circumvention is ever recognized, in full or in part, by domestic and international legislatures, geoblocking of streaming content will ultimately be rendered as ineffective as DVD region codes, if not more so. The future may even hold a “seamless global digital marketplace of entertainment content”—whether as a commercial reaction to increasing circumvention, or as an effective, organic result of such practice.<sup>128</sup>

To be fair, some thinkers hold far more pessimistic outlooks. In addition to Trimble, Gillespie envisions a “more likely scenario . . . the technique behind regional coding might develop into an even more intricate cascade of purchase and use options . . . . With the shift to digital

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<sup>127</sup> Yu, *supra* note 19, at 263–64.

<sup>128</sup> Peter K. Yu, *A Seamless Global Digital Marketplace of Entertainment Content*. RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT, Megan Richardson and Sam Ricketson, eds., Edward Elgar Publishing, 265-89 (2017).

distribution, technically enforced regionalized pricing can be deployed even more effectively,” allowing for “price discrimination on a much more complex scale.”<sup>129</sup> Of course, such a scenario assumes no adverse legal action on the part of governments and courts, even though many of those may end up adapting a model similar to the recommendations of the Australian inquiry.

**B. In Sum**

Are distributors within their legal rights when limiting access to copyrighted content on the basis of territory? They very well may be. But as I have shown, the motivations behind the exercise of such rights seem less likely candidates for legal protection. The consequences of geoblocking towards users are largely negative and what’s more, in their inefficiency, seem not to serve the best interests of distributors (the opposite is true). In its hindrance of innovation and erection of territorial borders online, the effects of geoblocking are far reaching, and deserve at the very least the sort of public hearing afforded them so far only in distant Australia.

On the state level, we’ve surveyed various legal models: the somewhat ambiguous language, which characterizes most WIPO signatories, including the United States; the even more passive approach—“deciding not to decide”—which Israel has taken; and the activist approach recommended by the Australian inquiry. Though my model of choice is the Australian one, the Israeli status quo—as exemplified by the *Telran* ruling—could, if coupled with more consumer awareness, eventually result in a positive outcome for Israeli users.

That a phenomenon is widespread, almost ubiquitous, is clearly not always an argument in favor of its

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<sup>129</sup> TARLETON GILLESPIE, *WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE* 267 (2007).

legalization; the debate regarding the benefits of legalizing “soft” drugs and prostitution will probably rage on forever. This is certainly not an argument in favor of legalizing piracy. But, the reality regarding the circumvention of geoblocking is that it is widespread and will probably only increase, with self-styled cybertravellers forever one step ahead of the geoblockers. That reality, when coupled with the problems enumerated above, should be enough to raise serious questions regarding the utility of geoblocking.