Implications of territoriality for online copyright enforcement measures

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Exploring International Copyright’s Gaps and Flexibilities
Columbia Law School
New York, 6th of October 2017
Copyright enforcement without borders?

Territoriality  Internet
What type of enforcement?

Judicial

Administrative → Self-help

→ Administrative

→ Self-help
Impact of territoriality on enforcement

Geo-blocking
- Anti-piracy measures
- Enforcement of territorially restricted licensing agreements
- Geo-localisation can be circumvented through virtual private networks (VPNs)
- Legally protected TPMs?

Site-blocking measures
- Judicial measures
- Targeted at ISPs and online intermediaries
- Effects limited to one jurisdiction
- Controversial in legal systems where they are regarded as excessively broad
<table>
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<th>GAPS</th>
<th>FLEXIBILITIES</th>
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<td>• Uniform notion of authorship and of national copyright ownership regimes (e.g. Art 14-bis Berne Convention)</td>
<td>• Choice of law</td>
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<td>• Protection of moral rights under the TRIPS Agreement (no inclusion of Berne 6-bis)</td>
<td>• Choice of forum (multi-territorial enforcement measures?)</td>
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<td>• No specific reference to enforcement in the online environment (ACTA and its Art 27 never came into force)</td>
<td>• Protection of geo-blocking measures as TPMs (Art 11 WCT)</td>
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<td>• Fair and equitable enforcement procedures, not un-necessarily complicated or costly (Art 41 TRIPS Agreement)</td>
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The European approach

- Unification of private international law, achieved through EU regulations (i.e. equivalents of federal law):
  - 2012 Brussels Regulation (choice of forum: general principle of the forum of the defendant’s country of domicile)
  - 2008 Rome Regulation (choice of law for contracts)

- Single laws applicable to cross-border transmissions:
  - law of the country of origin for satellite transmissions (1993);
  - law of the country of establishment for cross-border broadcasts and webcasts (1989 & 2007);
  - law of the country of origin/residence of the subscriber of “portable” online content services (2017)
Geo-blocking

- Territoriality of copyright law justifies the implementation of geo-blocking measures whenever online markets prove to be territorially restricted because of commercial and/or cultural factors
  - These technologies can be regarded as TPMs used in connection with the exercise of copyright
  - Anti-circumvention law can include also anti-trafficking provisions (as in the US and EU) aimed at outlawing the manufacturing of technologies or devices (e.g. VPNs?)

- Territoriality might be challenged by emerging technologies facilitating exploitation and enforcement of copyright on a cross-border basis and (possibly) reducing the relevance of geo-localisation (e.g. Blockchain)
Site-blocking measures

- Injunctions are normally granted on a country-by-country basis and have territorially restricted effects (i.e. *lex loci protectionis*; cf. Art 5.2 BC)

- To avoid multiplicity of laws (and fora) the criterion of the ‘country where protection is sought’ could be interpreted differently (Ginsburg)

- **Single points of attachment:** e.g. country of initiating act? country where the claimant has her centre of interests or where the persons targeted by a given exploitation of copyright works are located (CJEU)?

- EU ‘Brussels’ Regulation designates the place “where the harmful event occurred or may occur” (Art 7), paving the way for a multiplication of courts in case of cross-border infringement
Thanks!

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