

## 10. GEO-BLOCKING AND VIRTUAL PRIVATE NETWORKS: A COMPARATIVE DISCOURSE IN COPYRIGHT LAW

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### ABSTRACT

This article represents a modest attempt to disentangle the complex application of copyright law to the use of Virtual Private Networks (VPNs) that enable users to circumvent geo-blocking measures that are put into place by copyright owners or their licensees in order to give effect to territorial copyright licensing arrangements. The article first sets out some of the recent trends and developments concerning geo-blocking and VPNs and then proceeds to consider the legality of the use of VPNs to bypass geo-blocking measures—i.e. whether this practice amounts to an infringement of copyright and/or a circumvention of a Technological Protection Measure. The discussion is carried out in a comparative fashion by considering the application of copyright laws in the European Union, Singapore, and Australia in the context of geo-blocking and VPNs.

### 1. INTRODUCTION

The internet, and the digitisation of content, has in many ways, challenged the traditional understanding and application of the law. Copyright law is an area that is, and will continue to be, challenged by technological innovation more often, and to a much greater extent, than most other areas of the law. The very idea of copyright is to provide right-holders (that is, creators of literary, artistic, musical or dramatic works or sound recordings or broadcasts) exclusivity in the way their works are reproduced and disseminated. Importantly, the rights enjoyed by copyright owners include the exclusive right to engage in or authorise the reproduction of their works<sup>1</sup> and communicate their works to the public.<sup>2</sup> Thus, copyright seeks to control and limit the reproduction and distribution of works in which copyright subsists.

In contrast, the internet postulates the idea of universal access—a notion that does not sit comfortably within the realms of copyright law. Although the internet is very much part of our physical world (computers, servers and

network cables all forming part of the physical infrastructure comprising the internet), it is perceived as omnipresent, defying the idea of national borders, and a platform that provides access to a global database of content. Yet, in reality, this is far from the truth—the exercise of copyright being one of the causes for this outcome.<sup>3</sup>

In light of the conflicting interests between those who produce content for the internet and those who consume such content via online platforms, this article focuses on geo-blocking—a controversial technology that gives effect to the rights of copyright owners, and their licensees, by geographically restricting access to content that is made available on the internet.

The first part of the article sets out some of the current trends and traces the legal developments that underpin geo-blocking technology in the field of copyright. In the second part, the article focuses on a technology—known as Virtual Private Networks (or VPNs)—that possesses the potential to by-pass geo-blocking measures and are often used by the more tech-savvy online users to gain access to geographically restricted content. In particular, this article reflects on whether flouting geo-blocking measures amounts to a violation of copyright law. In engaging in this discourse, the article adopts both a doctrinal and comparative approach. Doctrinal because it sets out and analyses the legal provisions that relate to the use of geo-blocking and VPNs. Comparative because the article focuses on the laws of (and approaches adopted in) the European Union (EU), Singapore, and Australia—nicely representing the Northern and Southern hemispheres and everything in-between.

### 2. CURRENT TRENDS AND CALLS FOR COPYRIGHT REFORM

Geo-blocking is not a technology that is exclusive to the field of copyright and has been commonly employed as a means of achieving legal compliance in other areas—e.g. online gambling.<sup>4</sup> In the copyright context, geo-blocking is used to give effect to contractual obligations between copyright owners and their licensees—as illustrated by this example:

...when Czech Television obtains a license from BBC to the *Doc Martin* TV show, BBC might limit the

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<sup>1</sup> See, Berne Convention for the Protection of Literary and Artistic Works 1979 (Bern Convention), art.9 (dealing with literary and artistic works) and Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 (Rome Convention), art.10 (dealing with phonograms or sound recordings).

<sup>2</sup> See, Bern Convention, art.11 (dealing with dramatic, dramatico-musical and musical works) and art.11bis (dealing

with literary and artistic works). See also, Rome Convention, art.7 (dealing with the rights of performers) and art.13 (dealing with the rights of broadcasting organisations).

<sup>3</sup> Juan Llamas-Rodriguez, 'Tunnelling Media: Geoblocking and Online Border Resistance' in Ramon Lobato and James Meese (eds), *Geoblocking and Global Video Culture* (Institute of Network Cultures 2016) 32.

<sup>4</sup> Marketa Trimble, 'The Role of Geoblocking in the Internet Legal Landscape' (12<sup>th</sup> International Conference on Internet, Law and Politics, Barcelona, July 2016).

license to the territory of the Czech Republic with the result that the Czech Television must use geoblocking to prevent users who connect from outside the Czech Republic from viewing the show on their platform.<sup>5</sup>

In essence, geo-blocking has become a necessary tool for content providers that offer audio-visual (or other forms of) content in which copyright subsists, so that such content providers are assured that their services are not consumed in breach of their license agreements in cases where they are limited in territorial scope.

A consequence of the practice of territorial copyright licensing, and geo-blocking, is the fragmentation of markets. On the one hand, content providers are restricted in terms of their consumer base—e.g. where a content provider has obtained licenses that are geographically limited to a single jurisdiction, then it cannot extend its consumer base beyond the geographic area designated in the licenses. Obtaining licenses covering a larger number of countries is likely to be more expensive, a cost not all content providers can bear. That being said, more economically powerful content providers have the capacity to adopt a decentralised approach to content delivery, as in the case of Netflix. Such content providers maintain their services by geographical region and are able to attract a larger consumer-base. On the other hand, despite subscribing to a content service provider that has a global presence, users in a particular country or geographic region may not have access to content that is exclusively made available in other regions. In fact, Netflix, which now has a presence in almost all countries,<sup>6</sup> could not maintain its promise to ‘offer a globally syndicated streaming service’ in light of the difficulties in acquiring global licenses for the content it streams.<sup>7</sup> Netflix’s Chief Executive Officer, Reed Hastings has traced the problem to territorial copyright licensing:

We still have territorial licensing, that’s a legacy from the last 7 or 8 years. We’re moving as quickly as we can to have global availability of all the content on Netflix so that there are no regional distinctions. We’re still somewhat a prisoner of the current distribution architecture, we’re trying really hard to get there.<sup>8</sup>

Even for large content providers, navigating the myriad of Collective Management Organisations (CMOs), which represent the interests of right-holders, to obtain the

right to deliver content in multiple jurisdictions is an arduous task. Apple’s iTunes illustrates the difficulty associated with expanding content services across jurisdictions:

On September 27, 2011, more than seven years after the iTunes Music Store (iTunes) was first made available to select European consumers, Apple launched iTunes in all remaining countries within the European Union. Expecting that they would have full access to the world’s most popular online music store, consumers and artists initially rejoiced. They soon learned, however, that this European expansion came with certain caveats and, indeed, was not truly “European” at all. Each country had its own version of iTunes, accessible only within that country’s borders and with content localized to that country.<sup>9</sup>

An obvious solution to the problem of market fragmentation that has emerged in relation to the provision of online content services is to promote the possibility of multi-territorial, if not global, copyright licensing. This would allow both large and small-scale content providers to obtain licenses that are not geographically restrictive, allowing them to provide consumers in multiple jurisdictions with access to content.

The issue of territorial copyright licensing and geo-blocking has attracted the attention of policymakers both regionally and nationally. The European Commission (EC) has taken the consistent view that market fragmentation as a result of geo-blocking is inconsistent with the fundamental freedoms upon which the EU is built. This is apparent in a recent piece of EU legislation—the Geo-blocking Regulation—aimed at abolishing the practice of geo-blocking, which in its recitals provides:

In order to realise the objective of ensuring good functioning of the internal market, as an area without internal frontiers in which the free movement of *inter alia* goods and services is ensured, it is not sufficient to abolish, as between Member States, only State barriers. *Such abolition can be undermined by private parties putting in place obstacles inconsistent with internal market freedoms. That occurs where traders operating in one Member State block or limit the access to their online interfaces, such as websites and apps, of customers from other Member States*

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<sup>5</sup> Marketa Trimble, ‘Geoblocking, Technical Standards and the Law’ in Ramon Lobato and James Meese (eds), *Geoblocking and Global Video Culture* (Institute of Network Cultures 2016) 56.

<sup>6</sup> Netflix is available all over the globe except in China, Crimea, North Korea and Syria – see, Emily Steel, ‘At CES, Netflix Adds Over 130 Countries to Streaming Service’ *The New York Times* (6 Jan 2016).

<sup>7</sup> Matthew Dunn, ‘Netflix angers customers around the globe with a House of Cards licencing agreement fail’ *news.com.au* (14 Mar 2016).

<sup>8</sup> Shruti Dhapola, ‘Can’t see House of Cards on Netflix India? Here is why’ *The Indian Express* (8 Jan 2016).

<sup>9</sup> Jacklyn Hoffman, ‘Crossing Borders in the Digital Market: A Proposal to End Copyright Territorial Licensing’ (2016) 49 *The Geo. Wash. Int’l L. Rev.* 143.

wishing to engage in cross-border commercial transactions (a practice known as geo-blocking).<sup>10</sup>

More specifically in the copyright context, the promotion of a policy for multi-territorial licensing has been in the EU's agenda for over a decade tracing back to a recommendation that was made in 2005,<sup>11</sup> albeit limited only to musical works. Nine years later, the CRM Directive was enacted giving effect to this policy.<sup>12</sup> Recital 38 of that Directive explicitly acknowledges the problem that geo-blocking gives rise to in the following terms:

While the internet knows no borders, the online market for music services in the Union is still fragmented, and a digital single market has not yet been fully achieved. [...] This situation is in stark contrast to the rapidly growing demand on the part of consumers for access to digital content and associated innovative services, including across national borders.

The solution envisioned by the CRM Directive is '...to provide a set of rules prescribing basic conditions for the provision by collective management organisations of multi-territorial collective licensing of authors' rights in musical works for online use, including lyrics.'<sup>13</sup> While these developments have allowed music to be made available, and accessible, to online users gaining access to content service providers from multiple EU Member States, the problem associated with territorial copyright licensing has not yet been fully resolved in relation to other categories of works that attract copyright protection, particularly audio-visual works—a category of works which has become highly sought after in view of popular streaming technology. It must be acknowledged,

however, that in relation to copyrighted works in general, and audio-visual works in particular, the Portability Regulation provides some relief by obligating providers of an online content service to ensure that their subscribers are able to access these services when they are temporarily present in an EU Member State, in the same manner in which they access the services in the Member State of their residence.<sup>14</sup> Notably, however, the Portability Regulation does not address the impact of geo-blocking on the cross-border availability of audio-visual works at a more general level.

Unfortunately, the more recent legislative efforts in the EU for achieving a digital single market by *inter alia* prohibiting unjustifiable geo-blocking have expressly excluded discussions on copyright.<sup>15</sup> Notably, the Geo-blocking Regulation, which was an outcome of these legislative efforts and came into operation on 22 March 2018, provides that the assessment whether the abolition of geo-blocking as envisioned by the Regulation ought to be extended to 'electronically supplied services, the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter' will be carried out at the end of two years after the entry into force of the Regulation<sup>16</sup>—an evaluation that is likely to take place in the year 2020 or thereafter.

Outside the EU, geo-blocking has become the subject of debate in Singapore and Australia. In Singapore, the Government had called for public consultations in 2016 on the issue of geo-blocking and VPNs when it initiated the process for copyright reforms in the country.<sup>17</sup> Yet, the Government seems rather hesitant about making a

<sup>10</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (Geo-blocking Regulation), Recital 1 (emphasis added).

<sup>11</sup> See, European Commission, Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services [2005] OJ EU L 276/54. Recital 8 of the Recommendation provided '[i]n the era of online exploitation of musical works, however, commercial users need a licensing policy that corresponds to the ubiquity of the online environment and which is multi-territorial. It is therefore appropriate to provide for multi-territorial licensing in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services, increasing, in turn, the revenue stream for right-holders.'

<sup>12</sup> See, Council Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online

use in the internal market, [2014] OJ EU L 84/72 (CRM Directive).

<sup>13</sup> CRM Directive, Recital 40.

<sup>14</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (Portability Regulation).

<sup>15</sup> See Council of the European Union, *Geo-blocking: Council agrees to remove barriers to ecommerce* (Press Release 692/16, 28 Nov 2016). Notably, the prohibitions on unjustifiable geo-blocking does not apply to "to services where the main feature is the provision of access to or use of copyright protected works or other protected subject matter, or the selling of copyright protected works in an intangible form, such as ebooks or online music." It seems that geo-blocking concerns affecting copyright will be considered in future proposals for copyright reform in the EU (see, European Parliament, *Geo-blocking and discrimination among customers in the EU* (EU Legislation in Progress Briefing, Jul 2016).

<sup>16</sup> Geo-blocking Regulation, art.9(2) (emphasis added).

<sup>17</sup> See, Irene Tham, 'Reviewing VPN Concerns' *The Straits Times* (25 Aug 2016).

commitment to reforming Singaporean copyright law in order to deal with the increasing usage of VPNs to circumvent geo-blocking measures:<sup>18</sup>

There has been public interest in how this review will cover the use of Virtual Private Networks (VPNs). VPN is a neutral technology with many different and legitimate uses, apart from accessing geo-blocked content. *As there is currently no international legal consensus or approach on such practices, we are not making any recommendations regarding the use of VPNs but wish to gather the views of various stakeholders for our consideration.*<sup>19</sup>

In Australia, the Productivity Commission, which is the Australian Government's independent research and advisory body on a range of economic, social, and environmental issues affecting the welfare of Australians, has taken the view that the use of VPNs to get around geo-blocking measures ought not to be outlawed.<sup>20</sup> The Productivity Commission recommended that the Australian Government should take steps to:

1. amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geo-blocking technology; and
2. avoid any international agreements that would prevent or ban consumers from circumventing geo-blocking technology.<sup>21</sup>

In contrast, the Copyright Council of Australia, which is an independent non-profit organisation, has taken the opposite view:

It will be a copyright issue if using a VPN involves infringing copyright in some way. It is an infringement of copyright in Australia to use material protected by copyright in one of the ways reserved to the copyright owner without permission and if an exception does not apply. If someone in Australia uses a VPN to download a copy of material from an overseas website and they do not have permission from the copyright owner to download the material in Australia, it is likely to be an infringement of copyright in Australia. This is because downloading involves making a copy, which is a right exclusively controlled by the copyright owner. Similarly, if someone in Australia uses a VPN to stream material

from an overseas website and they do not have permission to stream the material in Australia from the copyright owner, it is likely to be an infringement of copyright in Australia.<sup>22</sup>

To-date, however, it is unclear whether the Australian Government will propose any legislation amending the Copyright Act 1968 (Cth) in order to clarify the legality of VPN use.

The discussion hitherto highlights some of the recent trends and reform attempts surrounding the practice of geo-blocking and territorial copyright licensing. Yet, despite the attention, there is no consensus about the legal status of geo-blocking in the copyright context. Thus, the use of this technology is not going to fade in the near future, and will continue to protect the interests of copyright owners in giving effect to the practice of territorial licensing which they are currently engaged in. Accordingly, there is utility in considering consumer responses to geo-blocking and its legality. The next part of this article is devoted to this task.

### 3. CIRCUMVENTION OF GEO-BLOCKING MEASURES

In an effort to pierce through artificial (and virtual) borders—that significantly limit access to a greater variety of content (especially on streaming services)—online users are increasingly adopting the use of VPNs. This technology allows users to circumvent (i.e. bypass) geo-blocking technology by enabling users to appear as though they were accessing the internet from a jurisdiction to which the geo-block does not apply.

A key question that arises in this context is whether the use of circumvention technology amounts to a violation of copyright law. There are two aspects to this. The first concerns the bundle of rights associated with copyright itself. Thus, in the event the use of VPNs results in the user engaging in one or more of the acts exclusively vested in copyright owners under the law, then the use of VPNs is an infringement. The second aspect concerns circumvention of Technology Protection Measures (TPMs). The use of VPNs to circumvent geo-blocking will violate anti-circumvention provisions often found in copyright statutes, in the event it is established that geo-blocking is a TPM. These two aspects are considered at length below.

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<sup>18</sup> See, Irene Tham, 'VPN technology can't be outlawed: British minister' *The Straits Times* (22 Sept 2015).

<sup>19</sup> See, Ministry of Law (Singapore), *Public Consultation on Proposed Changes to Copyright Regime in Singapore* <<https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-proposed-changes-to-copyright-regime-in-s.html>> (accessed 10 Nov 2017) (emphasis added).

<sup>20</sup> Peter Ryan, 'Geoblocking: Consumers not breaching copyright by circumventing with VPN, Government agency says' *ABC News* (29 Apr 2016).

<sup>21</sup> Australian Government, *Intellectual Property Arrangements* (Productivity Commission Inquiry Report No 78, 23 Sept 2016) 145.

<sup>22</sup> Australian Copyright Council, *Geo-blocking, VPNs and Copyright* (Information Sheet G127v03 2016) (ACC info-sheet) 3.

## A. COPYRIGHT INFRINGEMENT

As noted before, two of the key rights that copyright owners rely on are the right to reproduce (right to copy), and make available (communicate) to the public, their works. In the event online users utilise VPNs to engage in these acts, without the consent of the right-holders, then the use of VPNs *could* amount to an infringement. The following examples are useful for the purposes of this analysis.

### Example 1:

Assume that a content provider maintains a database of films allowing anyone subscribing to the service to *download* in a permanent form and view the films on their respective devices.<sup>23</sup> Assume also that a CMO (on behalf of the respective copyright owners) has entered into a license agreement with the content provider authorising the latter to permit its users in the United States of America (USA) to download and view a particular film. In these circumstances, a user from Singapore makes use of a VPN to access and download a copy of the movie (essentially reproducing the film in a *permanent* form in the user's own device) that was exclusively meant for use in the USA. Has the user engaged in copyright infringement?

### Example 2:

Assume that Netflix has entered into a license agreement permitting it to stream a particular film. Assume further that the license is geographically limited to the USA. Thus, only users who gain access to the internet from the USA are permitted to stream the film on Netflix. A user in Singapore, desirous of streaming the film, utilises a VPN to gain access, and subscribe, to Netflix USA—allowing this user to view and enjoy the entire Netflix-USA library including the film concerned. Has this user engaged in copyright infringement?

### Note:

(1) *In technical terms streaming and downloading operate in different ways. While downloading results in a permanent copy being stored in the user's device, streaming results only in temporary or transient copies of the content being made, enabling the content to be displayed on the screen of the user's device (e.g. a computer screen) during the streaming process. Once the streaming ends, reproduced parts*

*of the content are deleted. As such, streaming does not result in the permanent reproduction of any works, any reproduction being only temporary or transient.*

(2) *Although for the purposes of this example a user in Singapore gains access to geographically restricted content from the USA, in light of the comparative nature of this article, the example is also used to discuss the legal position of the hypothetical user under Australian and EU law.*

Since the user in the above examples gained access to the internet from and downloaded (either in permanent or temporary form) the films concerned onto a device in Singapore, the question of infringement must be determined under Singaporean copyright law. In respect of 'films', the Copyright Act 1987 exclusively vests the right of reproduction and communication to the public of the film in the copyright owner.<sup>24</sup> This means that the right-holder has complete discretion in determining the terms upon which the reproduction of the film, or its communication to the public, takes place—entitling the right-holder to permit the film's reproduction and/or communication in select jurisdictions. In essence, making a copy of the film (i.e. downloading a copy) in a jurisdiction where the right-holder did not authorise that right to be exercised is an infringement of copyright, even in circumstances where the party that downloaded the film did so after paying the content provider. While the payment was made for the content to be downloaded in the USA, that does not permit the user to engage in the act in any other jurisdiction—in this case, Singapore. Thus, the response to the question posed in Example 1 is that the user infringes copyright in the film. The outcome is the same in Australia and the EU, as in both jurisdictions the unauthorised reproduction of a protected film (audio-visual item) is an infringement.<sup>25</sup>

The second example is less straightforward. Unlike downloading, which makes a permanent copy in the user's device, streaming only makes a *temporary* or *transient* copy. In order to cater to innovation on the internet, and to ensure that online intermediaries (e.g. Internet Service Providers (ISPs)) are not unnecessarily caught up in copyright litigation, copyright law does not impose liability when temporary copies of works (in which copyright subsist) are made in the course of communications. Thus, s 107E<sup>26</sup> of the Copyright Act 1987 in Singapore provides that copyright in an audio-visual item (which includes a film) is not infringed by the

<sup>23</sup> This is a feature that was recently introduced to Netflix permitting users to both stream content or download to view offline: see, Anita Balakrishnan, 'Netflix adds "download" feature to allow offline viewing' *AsiaOne* (1 Dec 2016).

<sup>24</sup> Copyright Act 1987, s 83.

<sup>25</sup> For Australia, see, Copyright Act 1968 (Cth), s 86 read with s 101. In the EU, see, Directive 2001/29/EC of the European

Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Info-Soc Directive), art.2.

<sup>26</sup> In relation to literary, dramatic, musical and artistic works—see Copyright Act 1987, s 38A.

making of a temporary or transient copy of the audio-visual item if:

1. the copy is made incidentally as part of the technical process of making *or receiving a communication*; and
2. the *act of making the communication itself does not constitute an infringement*.

In the second example, when the user streams the film in Singapore, a temporary copy of the film is made in the user's device 'as part of a technical process' and in the course of 'receiving a communication'. However, the second condition—i.e. that the act of making the communication itself must not constitute an infringement—raises a difficult point. Interpreting s 38A of the Copyright Act 1987 (which is identical to s 107E), Shaun Ming has submitted:

Where a licensee acquires a territorial licence from the copyright owner to disseminate the copyright subject-matter only within a particular territory, the licensee is usually required to implement geoblocks and prohibit-through a term in a licensing agreement with the end-user—the streaming of such subject-matter outside that territory. Thus, circumventing geoblocks to stream content from a licensee's website would amount to an infringing communication as the licensee is unauthorised to make that communication.<sup>27</sup>

Yet, this conclusion is not without problems. First, from a practical standpoint, the content provider makes the communication (comprising the film) to a server located *within* the authorised geographic territory, except that the communication is subsequently *tunnelled* to the user's device in Singapore via a VPN, which fact is unknown to the content provider. Thus, insofar as the content provider is concerned, it has made a communication of the copyrighted content to a point *within* the territory in which it was authorised. Secondly, it defies logic to suggest that the act of *making* a communication should be regarded as infringing based on the conduct of the receiver of the communication. In fact, 'communicate', and hence 'communication' is defined in the Copyright Act 1987 to mean an act of transmission of a work (or other subject matter) by electronic means, 'whether or not it is sent in response to a request.'<sup>28</sup> This potentially means that there could be instances where a content provider is authorised to make an internet transmission (e.g. of a live sporting event) to *anyone* gaining access to the transmission from a particular territory. Such a communication is not made as a response to a request (or on demand), and it would be

strange to suggest that the making of such a communication should be regarded as infringing merely because a user from a third state gained access to it utilising a VPN. Thirdly, Shaun Ming himself has suggested that if it is the copyright owner, and not a licensee, who makes the communication, whilst applying geo-blocks to restrict access to it, then gaining access to such content in Singapore via a VPN would not render the communication itself an infringement because 'the copyright owner could not infringe his own exclusive right to communicate the subject-matter to the public.'<sup>29</sup> If that position was right, the temporary reproduction exception would apply to protect the act of streaming geo-blocked content in circumstances where the communication originates from the copyright owner directly, although not when it originates from a licensee—which is an odd outcome. Lastly, to determine that the making of a communication is an infringement, thus excluding the applicability of the temporary reproduction exception, on the basis that the content provider's Terms of Use had been breached,<sup>30</sup> is in effect a contractual override of a statutory exception—the legitimacy of which is hotly debated.<sup>31</sup>

For the foregoing reasons, it must be concluded that the act of *making* the communication in Example 2 (above) —which was an act on the part of the content provider (i.e. Netflix)—does not constitute an infringement. Thus, it is difficult to suggest that the content provider's act of making the communication *itself* constitutes an infringement of copyright for the purposes of 107E(1)(b) (and s 38A(1)(b)) of the Copyright Act 1987.

However, the Singaporean exception makes two carve-outs. Accordingly, the exception does not apply to the making of a temporary or transient copy of an audio-visual item, *if the copy of the audio-visual item that is communicated*:

1. *is an infringing copy* of the audio-visual item; or
2. *is a copy that, if it had been made in Singapore, would have been an infringing copy of the audio-visual item*.<sup>32</sup>

In essence, if the 'copy' of the audio-visual item that is 'communicated'—meaning the source copy from which the communication is made—is an 'infringing copy', then the exception does not apply to any temporary copy made of that communication. Yet, in the second example, Netflix uses a lawful (and not an infringing) copy from which the communication originated and therefore it cannot be said that the copy of the audio-visual item that was communicated was an infringing copy. This part of the carve-out is aimed at ensuring that anyone who

<sup>27</sup> Shaun Woo Jian Ming, 'Geoblocking, VPN, and Copyright' (2017) 35 Sing. L. Rev. 66, 77.

<sup>28</sup> Copyright Act 1987, s 7(1).

<sup>29</sup> Ming (n 27) 77-78.

<sup>30</sup> Ming (n 27), 77.

<sup>31</sup> See n 44 below.

<sup>32</sup> Copyright Act 1987, s 38(3) (and 107E(2), in relation to audio-visual works).

streams content from a source that is infringing (i.e. without any authorisation from the right-holder) will not benefit from the exception. The second carve-out appears to deal with a very specific scenario—i.e. to cover instances where the work that is transmitted via the communication is not protected under the copyright law in the jurisdiction from where the communication originates.<sup>33</sup> In essence, the second carve-out is merely to extend the operation of the first carve-out. Accordingly, if the interpretation afforded to s 107E (and s 38A) of the Copyright Act 1987 in this article is accurate, then the conclusion must be that engaging in streaming activities as in Example 2 (above) does not amount to an infringement in Singapore. The corresponding exception in Australia adopts very similar language, except that only the first, and not the second, carve-out is included.<sup>34</sup> As such, it is unlikely that an Australian user engaging in conduct as set out in Example 2 would infringe Australian copyright law.

Determining the status of a user in the EU that engages in the conduct of streaming (as described in the second example) is the most challenging. This is because of the intricate and complex interplay between EU intellectual property law, competition law, and the fundamental freedoms (in particular, the free movement of services) enshrined in the Treaty on the Functioning of the European Union.<sup>35</sup> The Info-Soc Directive, which has harmonised substantive copyright law in EU Member States, in setting out the temporary reproduction exception, uses vastly different language from the Singaporean and Australian legal texts. Art.5(1) of the Info-Soc Directive provides that temporary acts of reproduction, which are transient or incidental and an integral and essential part of a technological process, are exempt from liability provided that the sole purpose of those acts *are to enable*:

1. a transmission in a network between third parties by an intermediary; or
2. a lawful use of a work or other subject-matter to be made, and which have no independent economic significance.

<sup>33</sup> See, Rajah & Tann, 'Copyright (Amendment) Bill undergoes first reading on 16 May 2005' (May 2005)

<[http://eoasis.rajahtann.com/eoasis/lu/pdf/Copyright\(1\).pdf](http://eoasis.rajahtann.com/eoasis/lu/pdf/Copyright(1).pdf)> (accessed 10 Nov 2017). The latest editions of texts on Singaporean Intellectual Property Law do not deal with the interpretation of either s 38A or s 107E. It is also to be noted that neither s 38A, nor s 107E, of the Copyright Act 1987 has been subject of any litigation.

<sup>34</sup> See, Copyright Act 1968 (Cth), s 111A.

<sup>35</sup> See, Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art.26 (originally signed in Rome in 1957 as the Treaty establishing the European Economic Community).

It has been suggested that the first limb of the exception applies to intermediaries (e.g. ISPs), whereas the second limb applies to end-users.<sup>36</sup> Thus, if Example 2 is modified such that the user engages the VPN to access Netflix USA from an EU Member State (instead of Singapore), does the user infringe copyright? There is no direct authority that answers this question, *albeit* some of the rulings of the Court of Justice of the EU (CJEU) are instructive.

In this regard, reference must be made to *Brein v Filmspeler*<sup>37</sup>—a case that concerned unlawful streaming. In this case, the subject matter of the dispute was a media player that allowed users to install add-ons enabling them to 'watch on a television screen, freely and easily, audio visual material available on the internet *without the consent of the copyright holders*.'<sup>38</sup> This was a reference to the CJEU from a Dutch court raising *inter alia* the following question:

Should Article 5 of [the Info-Soc Directive] be interpreted as meaning that there is no "lawful use" within the meaning of Article 5(1)(b) of that directive if a temporary reproduction is made by an end user during the streaming of a copyright-protected work *from a third-party website where that copyright-protected work is offered without the authorisation of the right holder(s)*?<sup>39</sup>

In the course of the hearing (at the CJEU), the EC suggested that streaming is a temporary act that is transient or incidental, and an integral and essential part of a technological process, and the mere reception of transmissions of protected works does not amount to unlawful use for the purposes of Art.5(1) of the directive.<sup>40</sup> The Advocate General however differed from this view in setting out his opinion:

It cannot be said that there is 'lawful use' of protected works when the end user has access to those works *in the circumstances at issue in the present case; that is to say, when the holders of the relevant copyright have refused to allow or have restricted the distribution of the digital content concerned and have not authorised unrestricted communication to the public of that content...*<sup>41</sup>

<sup>36</sup> See, Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Springer 2008) 62-63.

<sup>37</sup> Case C-527/15 *Stichting Brein v Jack Frederik Wullems* (CJEU, 26 Apr 2017) (*Brein v Wullems*).

<sup>38</sup> *Brein v Wullems*, para 18 (emphasis added).

<sup>39</sup> *Brein v Wullems*, para 22 (emphasis added).

<sup>40</sup> The EC's stance was referred to in the Advocate General's opinion. See, Case C-527/15 *Stichting Brein v Jack Frederik Wullems*, Opinion of AG Campos Sánchez-Bordon (*Brein v Wullems* [AG Opinion]), para 38

<sup>41</sup> *Brein v Wullems* (AG Opinion), para 66.

The CJEU, responding to the question posed by the Dutch court, reiterated its stance in previous cases<sup>42</sup> that ‘a use should be considered lawful where it is authorised by the right holder or where it is not restricted by the applicable legislation.’<sup>43</sup> In light of the circumstances of the case—i.e. where the third parties that offered the streaming services were not authorised by the copyright owners—the CJEU had to consider the second prong of the lawfulness test. That is, whether the use was restricted by applicable *legislation*.<sup>44</sup> That determination required the Court to assess whether the use made of the protected work conflicted with a normal exploitation of the work and unreasonably prejudiced the legitimate interests of the right holder.<sup>45</sup> On the facts of the case, the CJEC concluded:

It must also be held that, as a rule, temporary acts of reproduction, on a multimedia player such as that at issue in the main proceedings, of copyright-protected works obtained from streaming websites belonging to third parties offering those works without the consent of the copyright holders are such as to adversely affect the normal exploitation of those works and causes unreasonable prejudice to the legitimate interests of the right holder, because, as the Advocate General observed in points 78 and 79 of his opinion, that practice would usually result in a diminution of lawful transactions relating to the protected works, which would cause unreasonable prejudice to copyright holders.<sup>46</sup>

Although instructive, applying *Brein v Wullems* to the scenario in Example 2 (above) is problematic. In Example 2, since the copyright owners had licensed the film to Netflix to be streamed only in the USA, it cannot be said that streaming that film via a VPN in the EU is something that is authorised by the right-holder. Thus, the second prong of the lawfulness test has to be considered. The CJEU’s ruling as regards the second prong in *Brein v Wullems* was context specific—i.e. to streaming that originates from an infringing source. However, Example 2 differs significantly as Netflix (unlike the third parties in *Brein v Wullems*) is authorised to stream the film. Thus, to what extent could the violation of a copyright owner’s right to limit the exploitation of a work to a specific geographic area be regarded as contrary to the normal exploitation of the work or prejudicial to the interests of the right-holder? These are questions that must be addressed in determining the lawfulness of the temporary reproductions made during the streaming process in Example 2. In this light, reference must be made to *FAPL v QC Leisure*, which concerned the use of decoders in the United Kingdom (UK) to gain access to content (sports broadcasts) that were exclusively made available via satellite in another EU Member State at a price comparatively cheaper than in the UK. The Football Association Premier League Ltd (FAPL) argued:

...such activities are harmful to its interests because they undermine the exclusivity of the rights granted by licence in a given territory and hence the value of those rights. Indeed, according to FAPL, the

<sup>42</sup> See, joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and others v QC Leisure and others* [2011] ECR I-09083 (*FAPL v QC Leisure*), para 168 and Case C-302/10 *Infopaq International A/S v Danske Dagblades Forening* [2012] ECR I-0000 (*Infopaq v DDF*), para 42.

<sup>43</sup> *Brein v Wullems*, para 65.

<sup>44</sup> Notably, according to the CJEU, the second prong of the lawfulness test requires an assessment as to whether the use (of the protected works) under consideration was restricted by applicable *legislation*. The CJEU came to this conclusion citing Recital 33 of the Info-Soc Directive. Yet, Recital 33 of the Info-Soc Directive provides that a ‘...use should be considered lawful where it is authorised by the rightholder or not restricted by *law*.’ It appears that the CJEU’s use of the phrase ‘applicable legislation’, as opposed to ‘*law*’, could impact how the lawfulness test is applied. For instance, a point to ponder is whether the act of streaming (thus making use of a protected work) contrary to the content provider’s Terms of Use (TOU) could be regarded as contrary to law, as it is arguably in breach of a contract. For instance, para 4.3 of Netflix’s TOU provides—‘You may view the Netflix content 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 content. The content that may be available to watch will vary by geographic location and will change from

time to time.’ Thus, had the CJEU adopted the broader language of ‘*law*’, instead of ‘applicable legislation’, a Netflix user’s act of using a VPN to stream content exclusively meant for users of another Member State, or outside of the EU, may arguably be regarded as a use restricted by *law*—it being a use in breach of the contractual terms incorporated in Netflix’s TOU. It must be acknowledged, however, that whether contracts between private parties could alter the scope and applicability of a copyright exception is a hotly debated issue. See e.g., Lucie Guibault, *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002); Wenwei Guan, ‘Copyright v Freedom of Contract: The “Contract Override” In Hong Kong’s Copyright Amendment’, (2017) 47 Hong Kong Law Journal 1. In the UK, for instance, certain copyright exceptions cannot be overridden by contract—UK’s Copyright Designs and Patents Act 1988 (CDPA 1988), s 29 (research and private study), s 30A (Caricature, Parody or Pastiche) and s 50B (Decompilation of a computer program). Notably, however, the temporary reproduction exception does not contain a provision that prohibits a contractual override.

<sup>45</sup> *Brein v Wullems*, para 66. The exceptions referred to in art.5 paras 1 to 4 of the Info-Soc Directive must satisfy this requirement that is laid down in para 5 of that provision.

<sup>46</sup> *Brein v Wullems*, para 70.



broadcaster selling the cheapest decoder cards has the potential to become, in practice, the broadcaster at European level, which would result in broadcast rights in the European Union having to be granted at European level. This would lead to a significant loss in revenue for both FAPL and the broadcasters, and would thus undermine the viability of the services that they provide.<sup>47</sup>

Territorial copyright licensing in relation to sports broadcasts transmitted via satellite, raise similar questions posed by geo-blocking on the internet—and therefore is relevant to this discussion. The CJEU in *FAPL v QC Leisure* ruled:

Mere reception as such of those broadcasts—that is to say, the picking up of the broadcasts and their visual display—in private circles does not reveal an act restricted by European Union legislation or by that of the United Kingdom, as indeed follows from the wording of Question 5 in Case C-403/08, and that act is therefore lawful. Furthermore, it follows from paragraphs 77 to 132 of the present judgment that such reception of the broadcasts *must be considered lawful in the case of broadcasts from a Member State other than the United Kingdom* when it is brought about by means of a foreign decoding device.<sup>48</sup>

More importantly, the CJEU referring to EU competition law principles found that the scheme of territorial copyright licensing practiced by FAPL cannot be justified:

Having regard to the foregoing, it is to be concluded that the restriction which consists in the prohibition on using foreign decoding devices cannot be justified in light of the objective of protecting intellectual property rights.

Doubt is not cast on this conclusion by the judgment in *Coditel I*,<sup>49</sup> which has been relied upon by FAPL [...] in support of their arguments. It is true that, in paragraph 16 of that judgment, the Court held that the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment of intellectual property rights have agreed upon in order to protect the author and his assigns and that the mere fact that the geographical limits in question coincide, in some circumstances, with the frontiers of the Member States does not require a different view.

However, those statements were made in a context which is not comparable to that of the main proceedings. In the case which led to the judgment in

*Coditel I*, the cable television broadcasting companies communicated a work to the public *without having, in the Member State of the place of origin of that communication, an authorisation from the right holders concerned and without having paid remuneration to them*.

By contrast, in the main proceedings the broadcasters carry out acts of communication to the public while having in the Member State of broadcast, which is the Member State of the place of origin of that communication, an authorisation from the right holders concerned and by paying them remuneration—which can, moreover, take account of the actual and potential audience in the other Member States.<sup>50</sup>

In Example 2, Netflix is authorised (and indeed Netflix would have remunerated the relevant copyright owners) to communicate the film to the public (*albeit* exclusively in the USA). If the use of decoders to intercept a satellite transmission exclusively meant for consumers in another territory (as in *FAPL v QC Leisure*) can be analogised to the use of VPNs to gain access to content streamed exclusively in another territory, then, arguably, the reasoning in *FAPL v QC Leisure* could be applied to the context of Example 2 (above)—*albeit* with an important caveat. That is, *FAPL v QC Leisure* dealt with the use of decoders in one EU Member State to access sports broadcasts made available exclusively in another EU Member State. However, what Example 2 is concerned with is the use of VPNs in an EU Member State to access content made exclusively available in a non-EU territory (i.e. USA). Since the content concerned was first made available outside the EU, it is unlikely that EU competition law would prevent IP owners from exercising their rights to prevent the use of VPNs to access content outside the EU. Thus, arguably, insofar as Example 2 is concerned, the use of the VPN to stream content from outside the EU would amount to an infringement, as the purpose is not a lawful one precluding the application of the temporary reproduction exception in the Info-Soc Directive. Therefore, whether the use of a VPN in an EU Member State to stream content that is exclusively made available in another geographic territory is an infringement would depend on the territory in which the streaming service operates (i.e. whether outside or within the EU).

## B. VIOLATION OF TPMS

For circumvention of geo-blocking to be regarded as a violation of a TPM, it must be first established that

<sup>47</sup> *FAPL v QC Leisure*, para 43.

<sup>48</sup> *FAPL v QC Leisure*, para 171 (emphasis added).

<sup>49</sup> Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECR 881.

<sup>50</sup> *FAPL v QC Leisure*, paras 117-120 (emphasis and citation added).

geo-blocking technology is a valid TPM. This begs the question—what are TPMs?

Legal provisions dealing with TPMs can be traced back to two treaties administered by the World Intellectual Property Organisation (WIPO). They are the WIPO Copyright Treaty 1996 (WCT), a special agreement between states party to the Bern Convention, and the WIPO Performances and Phonograms Treaty 1996 (WPPT). In respect of literary and artistic works, computer programmes and databases, the WCT requires state-parties to 'provide for 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 under this Treaty or the Berne Convention* and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.'<sup>51</sup> The WPPT imposed an identical obligation in connection with the rights of performers and producers of phonograms.<sup>52</sup> These technological measures are sometimes referred to as 'technological protection measures' or TPMs in national legislation.

In Singapore, the Copyright Act 1987 defines a 'technological measure' to include two kinds of measures—'access control' measures and 'technological protection measures'. An 'access control measure' means 'any technology, device or component that, in the normal course of its operation, effectively *controls access to a copy of a work or other subject matter or a performance*'.<sup>53</sup> A 'technological protection measure' means '*any technology, device or component that, in the normal course of its operation, effectively prevents or limits the doing of any act comprised in the copyright in the work or subject matter*'.<sup>54</sup> What is noteworthy is that the meaning attached to 'technological measures' in the Singaporean Copyright Act 1987 is broader in scope than the meaning given to the same phrase in the two WIPO treaties. This is because in the WIPO treaties 'technological measures' are measures used *in connection with the rights conferred on right-holders under those treaties* (i.e. the right of reproduction, communication to the public etc). In contrast, in the Singaporean context, the term 'technological measure' includes measures that prevents others from doing acts that are comprised in the copyright, as well as measures

that control *access* to a copy of a work or other subject matter. A similar distinction is also maintained in Australia. The Copyright Act 1968 (Cth) defines 'technological protection measure' to include both access control measures and measures that restrict acts that are comprised in the copyright.<sup>55</sup> In the EU, Art.6 of the Info-Soc Directive deals with the circumvention of 'effective technological measures'. Although the first sentence of Art.6(3) which defines what 'effective technological measures' are does not expressly distinguish between access control and other technology measures,<sup>56</sup> the very next sentence of the same provision refers to 'access control' and 'protection measures'. Accordingly, this 'leads to the presumption that [the Info-Soc Directive] does analytically distinguish between access and copy-controls...'.<sup>57</sup>

As previously stated, whether the use of VPNs to by-pass geo-blocking flouts an anti-circumvention provision would depend on whether the application of geo-blocking in a given instance amounts to either an access control measure or a technological protection measure (other than an access control measure). Thus, in considering the legality of the conduct of the hypothetical user in the two examples set out above, it would be first necessary to consider whether the technological measure (i.e. geo-blocking) adopted by the copyright owner (or right-holder) counts as a valid TPM in each case.

Example 1 concerns the use of a VPN in Singapore to download a copy of a film exclusively made available to users in the USA. There is no doubt that geo-blocking in this case 'effectively controls access to a copy of a work'—thus, qualifying as a 'technological access control measure' as defined in Singapore's copyright legislation.<sup>58</sup> Singaporean law prohibits anyone from doing any act that he knows, or ought reasonably to know, circumvents a technological access control measure.<sup>59</sup> The copyright owner or a licensee (any right-holder) may institute an action against a person such as the user in Example 1 for circumventing an access control measure.<sup>60</sup> It may also be concluded that the user, in circumventing the geo-blocking measure, also circumvents a 'technological protection measure' as defined in the Singaporean copyright legislation, because downloading (i.e. making a reproduction of) a movie that

<sup>51</sup> WCT, art.11 (emphasis added).

<sup>52</sup> WPPT, art.18.

<sup>53</sup> Copyright Act 1987, s 261B(1) (emphasis added).

<sup>54</sup> Copyright Act 1987, s 261B(1) (emphasis added).

<sup>55</sup> Copyright Act 1968 (Cth), s 10(1).

<sup>56</sup> Info-Soc Directive, art.6(3) (first sentence) – 'For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to *prevent or restrict acts, in respect of works or other subject-matter, which*

*are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law.*' (emphasis added).

<sup>57</sup> Urs Gasser, 'Legal Frameworks and Technological Protection of Digital Content: Moving Forward towards a Best Practice Model' (2006) 17 *Fordham Intell. Prop. Media & Ent. L.J.* 39, 67.

<sup>58</sup> Copyright Act 1987, s 261B(1).

<sup>59</sup> Copyright Act 1987, s 261C(1)(a).

<sup>60</sup> Copyright Act 1987, s 261C(2).

was only available to users in the USA is clearly an act comprised in the copyright. In fact, this conclusion is consistent with the finding that the Singaporean user in Example 1 was a copyright infringer (see discussion in preceding section). Despite that, the Copyright Act 1987 does not provide a civil remedy against an individual circumventing a ‘technological protection measure’,<sup>61</sup> as opposed to a ‘technological access control measure’.

The position in Australia is identical—i.e. a cause of action exists in respect of anyone who circumvents an ‘access control technological protection measure’,<sup>62</sup> whereas (as in the case of Singapore) the remedy as regards the circumvention of a ‘technological protection measure’ (other than an access control measure) is against the secondary parties that manufactured, imported, sold, distributed, or offered to the public the device capable of circumventing a TPM.<sup>63</sup>

The position in the EU is slightly different. In the case of the UK (which usefully represents how Art.6(3) of the Info-Soc Directive has been implemented in an EU Member State), a person who circumvents an ‘effective technological measure’ (which includes both access control and copy control measures) will be treated as a copyright infringer in terms of s 296ZA(3), read with s 296ZA(1), of the CDPA 1988.<sup>64</sup> As such, had the user in Example 1 been residing in the UK, the right-holder may institute action not only under the provisions that proscribe copyright infringement, but also on the basis that the user had circumvented an ‘effective’ TPM.

The application of legislative provisions dealing with TPMs to Example 2 (above) presents some difficulties, as with the discussion in the previous section on copyright infringement. It must be recalled that in Singapore the user circumventing the geo-blocking measure in order to stream (as opposed to download) content exclusively made available in the USA, does not infringe copyright, because the temporary reproduction exception applies. But could it be said that the user nevertheless violates the anti-circumvention provision (i.e. s 261C(1)) in the

Copyright Act 1987? Clearly, by using the VPN, the user does circumvent a ‘technological access control measure’, and this means that the right-holder should be entitled to litigate under s 261C(2) of the Act. The exceptions to the prohibition on circumvention<sup>65</sup> do not capture a user that engages a VPN to stream content exclusively made available in another territory. As such, it might be reasonably concluded that even though the user in Example 2 does not infringe any copyright in Singapore, the possibility still exists for the right-holder to take legal action in terms of the provisions that proscribe the circumvention of ‘technological access control measures’.<sup>66</sup>

The position is similar in Australia. Although it was concluded that the user in Example 2 does not commit a copyright infringement—in view of the application of the temporary reproduction exception—the use of a VPN to by-pass a geo-blocking measure would amount to a circumvention of an access control technological protection measure.<sup>67</sup> The act described in Example 2 is not exempted by any of the exceptions to the prohibition on circumvention.<sup>68</sup> Accordingly, if the user in Example 2 had utilised a VPN from Australia to stream a film that was exclusively made available to Netflix’s subscribers in the USA, the act of circumvention would give rise to a cause of action under s 116AN(1) of the Copyright Act 1968 (Cth).

The position in the EU (which is reflected in the UK’s CDPA 1988), as regards the legality of the acts described in Example 2, depends on the location from which the streaming takes place. As was noted before, the Info-Soc Directive does not structurally (although it arguably does so conceptually) distinguish between access control and copy control measures (the latter being described in Singapore and Australia as technological protection measures, or just technological measures). The CDPA 1988 reflects this feature by broadly defining ‘technological measures’ as ‘any technology, device or component which is designed, in the normal course of its

<sup>61</sup> The remedy as regards the circumvention of ‘technological protection measures’ is against anyone who ‘manufactures, imports, distributes, offers to the public, provides or otherwise traffics in any device, product or component, or offers to the public or provides any service, capable of circumventing a technological protection measure’ (see, Copyright Act 1987, s 261C(1)(b) and (c)).

<sup>62</sup> Copyright Act 1968 (Cth), s 116AN(1).

<sup>63</sup> Copyright Act 1968 (Cth), s 116A(1).

<sup>64</sup> These provisions of the CDPA 1988 (i.e. s 296ZA to s 296ZF) give effect to art.6(3) of the Info-Soc Directive.

<sup>65</sup> Copyright Act 1987, s 261D(1). These exceptions include acts done by non-profit organisations (such as libraries etc), acts prescribed by the Minister, acts done in good faith in relation to computer programs in order to achieve interoperability, acts done to undertake research on encryption technology etc.

<sup>66</sup> If at all, the only obstacle to reaching this conclusion is s 261B(3)(c) of the Copyright Act 1987. This provision provides that ‘[n]othing in this Part shall affect any limitation on copyright in a work or other subject-matter, or on a right in relation to a performance or a recording thereof, under any provision of this Act.’ Arguably, this would include the limitation imposed in respect of the temporary reproduction of copyrighted subject matter in the course of technical communications. If so, and if that limitation would exempt an individual engaging in the circumvention of a TPM from liability for copyright infringement, it might be that s 261B(3)(c) extends the limitation to the context access control measures as well.

<sup>67</sup> Copyright Act 1968 (Cth), s 116AN(1).

<sup>68</sup> Copyright Act 1968 (Cth), s 116AN(2) - (9).

operation, to protect a copyright work.<sup>69</sup> However, in order to acquire legal protection, the technological measure must be one that is 'effective'. A measure is effective 'if the use of the work is controlled by the copyright owner through—(a) an access control or protection process [...] or (b) a copy control mechanism, which achieves the intended protection.'<sup>70</sup> However, and importantly, the reference to the phrase 'use of the work' does not extend to any use of the work that is 'outside the scope of the acts restricted by copyright.'<sup>71</sup> Insofar as Example 2 is concerned, the 'use' described is the act of streaming the film, which is controlled by geo-blocking acting as an access control mechanism. Thus, for the geo-blocking measure to be an 'effective' technological measure, *vis-a-vis* anyone streaming the film from the UK, that act of streaming must be within the scope of acts restricted by copyright.

As was noted in the previous section, an act of gaining access, from within an EU Member State, to content that was exclusively made available for streaming outside the EU is likely to be regarded as an infringement—i.e. an act that is restricted by copyright. In contrast, in light of the CJEU's ruling in *FAPL v QC Leisure*, it is unlikely that accessing content that was exclusively meant for streaming in another EU Member State will be regarded as an infringement. Thus, geo-blocking would be an 'effective' access control measure only as against content that is exclusively made available for streaming outside the EU. If this logic is applied to Example 2, provided we assume that the user accesses Netflix from the UK, the right-holder will have a viable cause of action against the user that engaged the VPN in terms of s 296ZA(3) of the CDPA 1988, in addition to any cause of action premised on copyright infringement.

#### 4. CONCLUSION

The first part of this article mapped out the current trends and legal developments that underpin geo-blocking technology in the copyright context. What was observable is that despite the attention geo-blocking has attracted on the part of policymakers, there is still much to be done to overcome the root cause for the use of geo-blocking technology—i.e. the practice of territorial copyright licensing. It was noted that the obvious solution is to encourage copyright owners to adopt multi-territorial licensing—a practice which the music industry in the EU is increasingly adopting in view of the CRM Directive that provides a legislative framework for this practice. Unfortunately, much less progress has been made in the audio-visual sector, although things are likely to improve in 2020 (or soon after) once the provisions of the Geo-blocking Regulation (which proscribed geo-blocking in the EU) is extended fully to the copyright context. In contrast, both in

Australia and Singapore, while territorial copyright licensing and geo-blocking have given rise to active debate amongst stakeholders, the respective governments have failed to take a firm stance in relation to the issue. Accordingly, it was concluded that geo-blocking and the issues that it gives rise to in the copyright context will not be resolved in the near future.

It was against this backdrop that the second, and larger, part of this article focused on a counteractive practice adopted by consumers of online content that has the effect of circumventing geo-blocking measures—i.e. the use of VPNs. The legality of the use of VPNs to both 'download' and 'stream' content exclusively made available in a particular jurisdiction was considered under the copyright laws of Singapore, Australia and the EU. It was concluded that where copyrighted content is made exclusively available in a particular jurisdiction (e.g. in the USA), the act of gaining access to that content from outside that jurisdiction via a VPN leading to the content being 'downloaded' on the user's device amounts to a copyright infringement under the copyright laws applicable in all three jurisdictions. In contrast, it was concluded that the use of a VPN to 'stream' copyrighted content exclusively made available in a particular jurisdiction will not amount to a copyright infringement in Singapore and Australia, in view of the application of the 'temporary reproduction' exception. The EU position differs—in that, in light of the ruling in *FAPL v QC Leisure*, it is likely that a user engaging in such a practice within an EU Member State (thus gaining access to content exclusively made available to non-EU users) will be infringing EU copyright law, as the acts contemplated are likely to be 'unlawful' in light of EU competition law principles—in effect preventing the user from becoming entitled to the 'temporary reproduction' exception. Yet had the streaming originated from within an EU Member State, where the content provider has a license to stream the copyrighted content exclusively within that Member State, the use of a VPN to stream that content from another EU Member State would remain a lawful act captured by the 'temporary reproduction' exception.

Insofar as TPMs are concerned, it was concluded that geo-blocking measures are easily classified as 'access control' measures, as that is precisely what they do—i.e. prevent access to content from outside the authorised geographic area. Thus, utilising a VPN to gain access to, and 'download' or 'stream', content that was exclusively made available to users in another jurisdiction amounts to a circumvention of an 'access control' measure leading to a civil cause of action against the violating user under both Singaporean and Australian copyright laws. However, the position in the EU is more complex. When a user engages a VPN to 'download' copyrighted content

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<sup>69</sup> CDPA 1988, s 296ZF(1).

<sup>70</sup> CDPA 1988, s 296ZF(2) (emphasis added).

<sup>71</sup> CDPA 1988, s 296ZF(3)(b).

exclusively made available outside the EU, civil action may be instituted against that user for circumventing an 'effective' TPM. Nevertheless, whether the use of a VPN to 'stream' content, exclusively made available to users in a particular jurisdiction, circumvents an 'effective' TPM would depend on the origin of the streaming. This is because for a measure to be deemed an 'effective' TPM, it must enable the copyright owner to control any use of a work that is restricted by copyright (i.e. any use that would be an infringement). Accordingly, where the streaming originates from outside of the EU, any access control measure that seeks to restrict access to that content from within the EU would be deemed an 'effective' TPM, the circumvention of which gives rise to a civil cause of action. Where the streaming originates from within an EU Member State however, the use of the content so streamed within another Member State would not be an act that is restricted (by analogy from the CJEU's ruling in *FAPL v QC Leisure*). As such, geo-blocking in such an instance will not be deemed an 'effective' TPM, disentitling the right-holder from litigating against the user engaging in the circumvention.

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