

JUMPING THE WALL: GEOBLOCKING, CIRCUMVENTION AND THE LAW

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Geoblocking is the restriction of access to online content based on the physical location or address of the user. This article examines the legality of the circumvention of geoblocking measures in Australia. It concludes that despite considerable uncertainty, it is likely that circumvention is prohibited in Australia. The article evaluates the international discussions on the subject and the views of the Productivity Commission. It concludes that the law should be clarified in favour of prohibition.

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I INTRODUCTION

Geoblocking is the restriction of access to online content based on the physical location or address of the user.¹ Two common geoblocking mechanisms are IP address filtering and credit card discrimination. IP filtering determines a user's location on the basis of the IP address of the device used to access the service,² and credit card discrimination uses the billing address of a user's credit card to restrict access.³ Geoblocking is used to control access to many forms of digital media on the internet, including music, television shows, movies, computer games and software.⁴ It is also used to restrict access to physical goods and services such as online gambling.⁵

In relation to copyright materials, geoblocking is used for a number of reasons. First, distribution rights are often sold or licenced to different distributors in different regions, and in the case of online distribution it will often be a term of the contract to have geoblocking measures in place.⁶ Licensing distribution to different companies in different regions has many benefits - local distributors may have existing infrastructure,⁷ better familiarity with the local market and local regulations,⁸ and can better take advantage of targeted advertising. Secondly, geoblocking facilitates price discrimination between geographic regions, which allows rights holders to maximise profits.⁹ Thirdly, geoblocking allows staggered release dates, which can be easier to coordinate than a single global release, and can also be timed to maximise profit.

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¹ Australian Government Productivity Commission, *Productivity Commission Inquiry Report: Intellectual Property Arrangements*, Report No 78 (2016) 142 [5.2]; House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) ('IT Pricing Report') [4.56].

² James Muir, 'Internet Geolocation: Evasion and Counterevasion' (2009) 42(1) *ACM Computing Surveys* Article 4, 4.

³ Isabella Alexander et al, *Australian Productivity Commission Inquiry into IP Arrangements: Submission in Response to Draft Report* (3 June 2016) 6.

⁴ Isabella Alexander et al, *Australian Productivity Commission Inquiry into IP Arrangements: Submission in Response to Draft Report* (3 June 2016) 6.

⁵ Marketa Trimble, 'Geoblocking, Technical Standards and the Law' (2016) *William S Boyd School of Law Scholarly Works* 947, 56.

⁶ Marketa Trimble, 'Geoblocking, Technical Standards and the Law' (2016) *William S Boyd School of Law Scholarly Works* 947, 55.

⁷ Sabrina Earle, 'The Battle against Geoblocking: The Consumer Strikes Back' (2016) 15 *Richmond Journal of Global Law and Business* 1, 13.

⁸ Marketa Trimble, 'Geoblocking, Technical Standards and the Law' (2016) *William S Boyd School of Law Scholarly Works* 947, 54.

⁹ Kimberlee Weatherall, *Submission to the Standing Committee Inquiry into IT Pricing* (25 April 2013), 8.

Geoblocking often results in differences in both price and availability of online content between countries.¹⁰ In Australia, it is common for television shows and movies to be released months later than overseas. These delays are frustrating for consumers, particularly given the prevalence of spoilers on social media.¹¹ This, combined with higher prices of locally-available content, creates strong incentives for consumers to circumvent geoblocking measures. Many Australian consumers do so by using virtual private networks ('VPN's) and similar tools. These mechanisms circumvent IP address filtering by routing the consumer's internet connection through a server in another country where the content is available, or available at a lower price.¹² There are also ways to circumvent other forms of geoblocking, for example businesses which provide fake physical addresses in the US.¹³

This paper focusses on technological geoblocking measures, and the lawfulness of circumventing such measures in Australia. First, it looks at Australia's international obligations, particularly under Article 11 of the *WIPO Copyright Treaty*. Secondly, it examines the legal status of circumvention under domestic law, particularly the *Copyright Act 1968*. Finally, it evaluates the policy arguments for and against geoblocking and circumvention, concluding that the benefits of geographical segmentation outweigh the disadvantages. Consequently, it recommends clarifying the law in favour of prohibiting circumvention.

II WCP ARTICLE 11 AND CIRCUMVENTION

A Article 11

Australia is a signatory to the *WIPO Copyright Treaty* ('WCP')¹⁴, a treaty that seeks to achieve international recognition of copyright in literary and artistic works, while balancing the rights of authors against the general public interest.¹⁵ Article 11 provides as follows:

Article 11: Obligations concerning Technological Measures

¹⁰ Isabella Alexander et al, *Australian Productivity Commission Inquiry into IP Arrangements: Submission in Response to Draft Report* (3 June 2016) 8.

¹¹ Sabrina Earle, 'The Battle against Geoblocking: The Consumer Strikes Back' (2016) 15 *Richmond Journal of Global Law and Business* 1, 12-13.

¹² House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) ('IT Pricing Report') [4.63].

¹³ House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) ('IT Pricing Report') [4.62].

¹⁴ *World Intellectual Property Organisation Copyright Treaty*, signed 20 December 1996, [2007] ATS 26 (Entered into force 27 July 2007) ('WCT').

¹⁵ WCT Article 1.

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 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

The technological measures referred to in this provision clearly include encryption methods and digital locks used to prevent copying of digital audio files duplication of physical media, but it is unclear whether they should be interpreted to include geoblocking measures.¹⁶

B *Interpretation of Article 11*

Treaties must be interpreted in good faith according to the ordinary meaning of the words, in their context and in light of their object and purpose.¹⁷ Supplementary materials, including preparatory work of the treaty and circumstances of its conclusion, may be considered in case of uncertainty or ambiguity.¹⁸ Geoblocking could be said to ‘restrict acts, in respect of their works, which are not authorised by the author’. For example, geoblocking may prevent viewing of a television series in one region on terms only authorised in another region. Furthermore, many geoblocking methods clearly fall under the ordinary definition of ‘technological measures’, although there are some notable exceptions such as credit card filtering. Thus, geoblocking may fall within the ordinary meaning of the words of Article 11, but the absence of specific words means that there may be a degree of ambiguity.

It must be noted that Article 11 was drafted at a time when geoblocking had not yet emerged as a copyright protection measure. Furthermore, DVDs had only been invented the previous year,¹⁹ so analogy to region coding is unhelpful. It follows that ‘technological measures’ could only have contemplated mechanisms that prevented unlawful copying and distribution of copyright material. This is supported by the fact that discussions at the Conference only contained references to measures that prevented unlawful copying.²⁰

¹⁶ Christopher Hilliard, ‘Evaluating the legitimacy of geo-location circumvention in the context of Technical Protection Measures’ (2015) 5(2) *Queen Mary Journal of Intellectual Property* 157, 169.

¹⁷ *Vienna Convention on the Law of Treaties* [1974] ATS 2, Article 31.

¹⁸ *Vienna Convention on the Law of Treaties* [1974] ATS 2, Article 32.

¹⁹ Encyclopaedia Britannica Inc, *Encyclopaedia Britannica* (14 May 2017) ‘DVD’.

²⁰ WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, *Summary Minutes, Main Committee I* (20 December 1996) [518].

It is also noteworthy that the original wording of the provision referred to a ‘protection-defeating device’, which was to be defined as “...any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty”.²¹ The final wording was proposed by the South African delegation, solely due to a perceived risk that no provision would be adopted if the original level of specificity was maintained.²² This supports the view that ‘technological measure’ refers to discrete devices employed to circumvent anti-copying measures, and not broader techniques used to bypass distribution schemes.

In conclusion, it is possible that geoblocking is captured by the ordinary meaning of the words of Article 11. However, if there is any perceived ambiguity in Article 11 and recourse is had to supplementary materials, it becomes evident that ‘technological measure’ was not intended to refer to measures such as geoblocks. In the end, the practical implication of Article 11’s nonspecific language is that signatories will exercise broad discretion in when implementing it.²³

III COPYRIGHT ACT 1968 AND CIRCUMVENTION

A *Uncertainty in the law*

In Australia, the *Copyright Act 1968* (Cth) (*‘Copyright Act’*) defines ‘technological protection measure’ (‘TPM’) and contains a number of provisions which make it unlawful to circumvent TPMs. It is unclear whether these provisions apply to geoblocking measures such as IP filtering, and this question has not been tested in Australian courts.²⁴ In 2013, the IT Pricing Report²⁵ noted that “...evidence may suggest that the TPM provisions of the Copyright Act are not intended to protect geoblocking mechanisms”, but ultimately concluded that the

²¹ WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, *Basic proposal for the substantive provisions of the Treaty on Certain Copyright and Neighbouring Rights Questions* (30 August 1996), 57.

²² WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, *Summary Minutes, Main Committee I* (20 December 1996) 76 [519].

²³ Kimberlee Weatherall, *Submission to the Standing Committee Inquiry into IT Pricing* (25 April 2013), 13; Christopher Hilliard, ‘Evaluating the legitimacy of geo-location circumvention in the context of Technical Protection Measures’ (2015) 5(2) *Queen Mary Journal of Intellectual Property* 157, 169.

²⁴ House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) (‘IT Pricing Report’) [4.67].

²⁵ House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) (‘IT Pricing Report’).

law was uncertain.²⁶ The 2016 Productivity Commission Report in IP Arrangements likewise concluded that the law was uncertain.²⁷

B *Technological Protection Measures*

Division 2A of the *Copyright Act* allows a copyright owner or licensee to bring an action against anyone who circumvents an ‘access control technological protection measure’ (‘ACTPM’), manufactures a device to circumvent a TPM, or provides a service to circumvent a TPM.²⁸ Each of these is a criminal offence if done on a commercial scale.²⁹ TPM is defined as follows:³⁰

technological protection measure means:

- (a) an access control technological protection measure; or ^[17]_[SEP]
- (b) a device, product, technology or component (including a computer program) that:
 - (i) is used in Australia or a qualifying country by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and ^[17]_[SEP]
 - (ii) in the normal course of its operation, prevents, inhibits or restricts the doing of an act comprised in the copyright
 but does not include such a device, product, technology or component to the extent that it:
 - (c) if the work or other subject-matter is a cinematograph film or computer program (including a computer game)—controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia; or
 - (d) if the work is a computer program that is embodied in a machine or device—restricts the use of goods (other than the work) or services in relation to the machine or device.

‘An act comprised in the copyright’ is defined in section 13 as an act that the owner has the exclusive right to do,³¹ which refers to acts such as reproduction and communication to the public.³² Geoblocking only restricts activities such as

²⁶ House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) (‘IT Pricing Report’) [4.75].

²⁷ Australian Government Productivity Commission, *Productivity Commission Inquiry Report: Intellectual Property Arrangements*, Report No 78 (2016) 145 [5.2].

²⁸ *Copyright Act 1968* (Cth) ss 116AN-116AP.

²⁹ *Copyright Act 1968* (Cth) s 132APC-132APE.

³⁰ *Copyright Act 1968* (Cth) s 10(1).

³¹ *Copyright Act 1968* (Cth) s 13.

³² *Copyright Act 1968* (Cth) s 31.

viewing, listening and playing, which are not exclusive rights of the copyright owner. Thus, geoblocking does not involve “preventing, inhibiting or restricting the doing of an act comprised in the copyright”, and is unlikely to fall under subsection (b) of the definition of a TPM. As a result, a geoblocking mechanism must be an ACTPM in order to be a TPM. ACTPM is defined as follows:³³

access control technological protection measure means a device, product, technology or component (including a computer program) that:

(a) is used in Australia or a qualifying country: ^[(1)](i) by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and ^[(2)](ii) in connection with the exercise of the copyright; and ^[(3)]

(b) in the normal course of its operation, controls access to the work or other subject-matter; ^[(4)]

(The same two exceptions apply as for TPMs)

controls access: a device, product, technology or component (including a computer program) controls access to a work or other subject-matter if it requires the application of information or a process, with the permission of the owner or exclusive licensee of the copyright in the work or other subject-matter, to gain access to the work or other subject-matter

Whether a particular geoblocking mechanism falls within the definition of an ACTPM depends on the outcome of a number of inquiries.³⁴ First, is the mechanism a ‘device, product, technology or component (including a computer program)’? Secondly, is it used in connection with the exercise of copyright? Geoblocking is used for wide commercial purposes, and may fall outside a narrow interpretation of these words. Thirdly, does the mechanism ‘control access to the work or other subject-matter’? The definition of ‘controls access’ refers to mechanisms that require the application of information or processes to gain access, and it is not obvious whether geoblocking mechanisms meet this requirement. Fourthly, does it fall within the exception in (c)? Geoblocking measures certainly control market segmentation, but it is unclear whether they prevent “...playback in Australia of a non-infringing copy”, particularly given that in most cases, a non-infringing copy is never provided in the first place.

C Interpretation – Legislative History

³³ *Copyright Act 1968* (Cth) s 10(1).

³⁴ Kimberlee Weatherall, *Submission to the Standing Committee Inquiry into IT Pricing* (25 April 2013), 10.

Section 10(1) was first amended to define ‘technological protection measure’ by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).³⁵ The original definition was limited to access codes and processes, and copy control mechanisms,³⁶ and was inserted as part of the implementation of Article 11 of the WCT.³⁷ In *Stevens v Kabushiki Kaisa Sony Computer Entertainment* (‘*Stevens v Sony*’)³⁸ a High Court majority adopted a narrow interpretation of ‘technological protection measure’, defining it as “...a device or product which utilises technological means to deny a person access to a copyright work [or other subject matter], or which limits a person’s capacity to make copies of a work [or other subject matter] to which access has been gained, and thereby ‘physically’ prevents or inhibits the person from undertaking acts which, if carried out, would or might infringe copyright in the work”.³⁹ In that case, a device in a Playstation console that prevented it from playing unauthorised games was found not to be a TPM.

D Interpretation – Extrinsic Materials

In interpreting an Act of the Commonwealth Parliament, the interpretation that would best achieve the purpose or object of the Act must be preferred,⁴⁰ and extrinsic material may be taken to determine the meaning where a provision is ambiguous.⁴¹

The ‘TPM’ definition was amended to its present form by the *Copyright Amendment Act 2006* (Cth), which also inserted the definition of ‘ACTPM’.⁴² This amendment deliberately reversed the position established in *Stevens v Sony*, although this was done primarily to fulfil Australia’s implementation obligations under AUSFTA.⁴³ In his second reading speech, the Minister stated that “technological protection measures...such as technical locks, passwords or encryption, are an essential tool for the protection of copyright material, especially in the online environment. They provide an effective means for copyright owners to protect their material against the threat of piracy.”⁴⁴

³⁵ *Copyright Amendment (Digital Agenda) Act 2000* (Cth) Schedule 1 s 15B.

³⁶ *Copyright Amendment (Digital Agenda) Act 2000* (Cth) Schedule 1 s 15B.

³⁷ Explanatory Memorandum, *Copyright Amendment (Digital Agenda) Act 2000* (Cth) 57.

³⁸ (2005) 224 CLR 193.

³⁹ *Stevens v Kabushiki Kaisa Sony Computer Entertainment* (2005) 224 CLR 193, [38].

⁴⁰ *Acts Interpretation Act 1901* (Cth) s 15AA.

⁴¹ *Acts Interpretation Act 1901* (Cth) s 15AB.

⁴² *Copyright Amendment Act 2006* (Cth) Schedule 12 s 1.

⁴³ Explanatory Memorandum, *Copyright Amendment Act 2006* (Cth) 1.

⁴⁴ Second Reading Speech, *Copyright Amendment Act 2006* (Cth) 2.

The explanatory memorandum to the *Copyright Amendment Act 2006* sets out the intent behind each element of the definition of ‘ACTPM’. ‘Device, product, technology or component (including a computer program)’ was intended to include physical devices, computer programs, and “technical processes where hardware requires codes or instructions provided by the material to be played on that hardware in order to gain access to the material”.⁴⁵ This suggests a narrow focus on encryption and digital rights management technologies.

The intention behind the words ‘in connection with the exercise of copyright’ was to “require a measure to have been applied in circumstances where the copyright owner or exclusive licensee is exercising an exclusive right”.⁴⁶ Geoblocking measures are applied in circumstances where the copyright owner or licensee exercises the exclusive right to distribute copyright material in a particular region, and would appear to fall meet this requirement.

The exception in subsection (c) was intended to “...exclude geographic market segmentation technologies such as region coding from the definition of an access control TPM”.⁴⁷ However, the exclusion was “...not intended to apply to geo-location or geo-filtration measures” since those measures block the initial acquisition of material, not the playback of material already acquired.⁴⁸

On one hand, it is obvious that the TPM protections specifically targeted measures such as passwords and technical locks, and the words of the provision are not well-suited to apply to geoblocking mechanisms. On the other hand, there is a direct statement in the explanatory memorandum that the exception in subsection (c) is not intended to apply to geo-location or geo-filtration measures. One could argue that the exclusion of geoblocking measures from the exception implies their inclusion in the rule, but it may not be easy to convince a court to draw an affirmative conclusion from a negative premise.

E *Interpretation – Presumptions*

Where a legislative provision is ambiguous, there is a presumption that Parliament intended to conform to Australia’s international obligations.⁴⁹ As

⁴⁵ Explanatory Memorandum, Copyright Amendment Act 2006 (Cth) 201.

⁴⁶ Explanatory Memorandum, Copyright Amendment Act 2006 (Cth) 202.

⁴⁷ Explanatory Memorandum, Copyright Amendment Act 2006 (Cth) 203.

⁴⁸ Explanatory Memorandum, Copyright Amendment Act 2006 (Cth) 203.

⁴⁹ Glen Cranwell, ‘Treaties and the Interpretation of Statutes’ (2003) 39 *Australian Institute of Administrative Law Forum* 49, 55.

concluded above, Article 11 of the WCT is in broad terms and does not clarify Australia's international obligations relating to the protection of geoblocking measures. The protections in the *Copyright Act* for ACTPMs were introduced in order to conform to Australia's obligations under Article 17.4 of AUSFTA,⁵⁰ but the words of that treaty are equally vague in relation to geoblocking.

In deciding whether to adopt a broad or narrow construction of legislative provisions, a court will also take into account the penal character of the legislation.⁵¹ Sections 116APC-116APE of the *Copyright Act* create offences relating to the circumvention of TPMs when done on a commercial scale.⁵² The maximum penalty for circumventing an ACTPM is currently \$10,800 and the maximum penalty for manufacturing a device or providing a service for circumventing TPMs is \$99,000 and five years' imprisonment.⁵³ This will weigh in favour of a narrow interpretation of 'ACTPM'.

F Interpretation - Policy of the Copyright Act 1968

The *Copyright Act* supports the division of copyright based on geographical location. Section 196 allows for assignment and licencing of copyright, and provides that "An assignment of copyright may be limited in any way, including...so as to apply to a place or part of Australia".⁵⁴ Geographic market segmentation is generally viewed as beyond the ordinary rights conferred by copyright,⁵⁵ however it is arguable that allowing for the division and assignment of copyright on a geographical basis would be ineffectual if market segmentation were not enforced. As a result, the policy of the *Copyright Act* may lean in favour of interpreting 'ACTPM' to include geoblocking measures.

G Conclusion – Interpretation

The law is unclear, but it is submitted that Courts will be likely to favour a broad interpretation of 'ACTPM'. Three factors weight in favour of this. First, extrinsic materials show that the legislature intended to exclude geoblocking measures from the exception, so there is an *expressio unius* argument in favour of

⁵⁰ *Australia – Unites States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (Entered into force 1 January 2005) Article 17.4.

⁵¹ *Stevens v Kabushiki Kaisa Sony Computer Entertainment* (2005) 224 CLR 193, [45].

⁵² *Copyright Act 1968* (Cth) ss 116APC-116APE.

⁵³ *Crimes Act 1914* (Cth) s 4AA.

⁵⁴ *Copyright Act 1968* (Cth) s 196(2)(b).

⁵⁵ Submission of the Australian Copyright Council to the Attorney-General's Department, *Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968* (Cth), Round 2 Submission, 12.

including them in the rule. Secondly, the policy of the *Copyright Act* favours geographical segmentation, and section 196 may be rendered otiose in without effective geoblocking. Thirdly, the legislature clearly intended to broaden the scope of protections following *Stevens v Sony*, and a narrow interpretation would defeat that legislative intention.

IV POLICY CONSIDERATIONS

A *Rights of copyright holders*

As noted above, copyright can be assigned and licenced on the basis of geographical regions. Furthermore, copyright is fundamentally a bundle of national rights.⁵⁶ As a result, copyright holders would appear to have a right to exercise their copyright separately in each region, and in the internet age this may only be possible if effective geoblocking is available. However, the scope and nature of the rights conferred by copyright law is ultimately a matter of economic policy,⁵⁷ so circumvention should only be prohibited if it is in the best interests of the nation. This requires consideration of consumers, content creators and industry, both in the short term and the long term.

B *Market segmentation and price discrimination*

Geographical market segmentation provides a basis for price discrimination, and geoblocking is often done for this reason.⁵⁸ Price discrimination allows copyright holders to charge a different profit-maximising price in each market, achieving a higher overall profit than a single global profit-maximising price.⁵⁹ This is a lawful business practice, but it is perceived by consumers as unfair discrimination.⁶⁰ The effect of this sort of price discrimination is that people in wealthier countries will be forced to pay much more for the same content as people in poorer countries. For this reason, both the IT Pricing Report (2013) and the Productivity Commission Report (2016) recommended clarifying the law in favour of permitting circumvention of geoblocking measures.⁶¹ However, the benefits to

⁵⁶ Giuseppe Mazziotti, 'Is geo-blocking a real cause for concern in Europe?' (2015) *EUI Working Papers* No. 43, 3.

⁵⁷ Kimberlee Weatherall, *Submission to the Standing Committee Inquiry into IT Pricing* (25 April 2013), 8.

⁵⁸ Australian Government Productivity Commission, *Productivity Commission Inquiry Report: Intellectual Property Arrangements*, Report No 78 (2016) 142 [5.2].

⁵⁹ Encyclopaedia Britannica Inc, *Encyclopaedia Britannica* (18 May 2017) 'Price Discrimination'.

⁶⁰ House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) ('IT Pricing Report') [4.56].

⁶¹ House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) ('IT Pricing Report'),

consumers of an open internet must be weighed against the potential detriment to content creators.

C *Smaller markets and local content*

One argument in favour of geographical market segmentation is that it allows smaller companies to acquire distribution rights, thus allowing local distributors to stay in business.⁶² It has been suggested that Australian content providers would not have the resources to acquire global distribution rights, and this would result in Australian consumers getting all their content from foreign distributors.⁶³ Furthermore, Australian broadcasters are required to screen a minimum amount of locally-produced content each year.⁶⁴ This condition is a major driver of production of films and television shows in Australia.⁶⁵ Geoblocking allows local distributors to acquire the distribution rights to foreign content, and then charge higher prices in order to support their local content requirements.⁶⁶ If geoblocking can be easily circumvented, Australian consumers will purchase content from foreign distributors, who may be unable to effectively prevent access. Foreign providers may be contractually bound to geoblock, but it is unrealistic to expect geoblocking to be perfect.⁶⁷ Thus, the potential damage to local distributors and local content is a strong reason to prohibit contravention of geoblocking measures.

D *Online piracy*

Geoblocking often results in content being made available in different countries at different times, frustrating eager consumers and creating the potential for spoilers.⁶⁸ The result is that many consumers are driven to piracy.⁶⁹ The negative impacts of piracy may in many cases outweigh the benefits of market

Recommendation 5; Australian Government Productivity Commission, *Productivity Commission Inquiry Report: Intellectual Property Arrangements*, Report No 78 (2016) 145, Recommendation 5.2.

⁶² Australian Government Productivity Commission, *Productivity Commission Inquiry Report: Intellectual Property Arrangements*, Report No 78 (2016) 144 [5.2].

⁶³ Foxtel Australia, *Response to Productivity Commission Draft Report: Intellectual Property Arrangements* (December 2015) 2.

⁶⁴ *Broadcasting Services (Australian Content) Standard 2016* (Cth).

⁶⁵ Australian Government Productivity Commission, *Productivity Commission Inquiry Report: Intellectual Property Arrangements*, Report No 78 (2016) 144, [5.2].

⁶⁶ Australian Government Productivity Commission, *Productivity Commission Inquiry Report: Intellectual Property Arrangements*, Report No 78 (2016) 144, [5.2].

⁶⁷ Marketa Trimble, 'Geoblocking, Technical Standards and the Law' (2016) *William S Boyd School of Law Scholarly Works* 947, 59.

⁶⁸ Sabrina Earle, 'The Battle against Geoblocking: The Consumer Strikes Back' (2016) 15 *Richmond Journal of Global Law and Business* 1, 12.

⁶⁹ Sabrina Earle, 'The Battle against Geoblocking: The Consumer Strikes Back' (2016) 15 *Richmond Journal of Global Law and Business* 1, 12.

segmentation.⁷⁰ However, the real cause of piracy is the difference in content availability between geographical regions, which is not a necessary implication of geoblocking.⁷¹ Prohibiting circumvention of geoblocking measures will only have the effect of driving consumers to piracy if rights holders fail to make the content available in all regions. In other words, rights holders will have created their own problem.

V CONCLUSION

Is it lawful to circumvent geoblocking, and should it be? The prevalence of geoblocking circumvention and wide availability of circumvention tools and services means that these questions will come before the courts or the legislature sooner or later. The law is uncertain, but there are a number of factors which suggest that geoblocking falls within the definition of ‘ACTPM’, and is thus prohibited. As a matter of public policy there is also no clear answer, but the effect of an open internet on local distributors and content creators is likely to trump any benefits to consumers. The wall should be reinforced, and the legislature clarify the law in favour of geoblocking.

⁷⁰ Sabrina Earle, ‘The Battle against Geoblocking: The Consumer Strikes Back’ (2016) 15 *Richmond Journal of Global Law and Business* 1, 13.

⁷¹ Isabella Alexander et al, *Australian Productivity Commission Inquiry into IP Arrangements: Submission in Response to Draft Report* (3 June 2016) 8.