

Internet Law: Class 1

Professor Marketa Trimble

Class 1 (11 July 2022):

1. Introduction and administrative matters
2. The terms “internet” and “internet law” in context
3. Physical infrastructure and regulation of the Internet
4. Localization on the internet and geolocation
5. Geoblocking and circumvention of geoblocking
6. Localization requirements
7. Regulatory jurisdiction on the internet

Class 2 (13 July 2022):

1. Adjudicatory jurisdiction on the internet
2. Choice of law
3. Recognition and enforcement of foreign judgments
4. Internet domain names
5. Metatags, keywords, and adwords

Class 3 (15 July 2022):

1. Immunity and liability of internet service providers
2. Notice and takedown under the DMCA
3. DSM Directive
4. Immunity from suit under the CDA
5. Blocking orders

Class 4 (18 July 2022):

1. Private ordering and content moderation
2. Network neutrality, search neutrality, and cloud neutrality
3. Antitrust issues in the ISP ecosystem
4. Future of norms on the internet
5. Conclusions—the current realities of the Internet

Class times (Munich time):

14:00 – 15:00 **class**
15:00 – 15:15 **break 1**
15:15 – 16:15 **class**
16:15 – 16:30 **break 2**
16:30 – 17:25 **class**

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INTERNET LAW

COURSE MATERIALS

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MIPLC 2022

11, 13, 15, and 18 July 2022

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INTERNET LAW IN MIPLC | PROFESSOR MARKET TRIMBLE



"Internet Law"

11 - 18 July 2022

This course covers a variety of internet law topics while addressing a theme that is arguably emerging as the major theme of the decade for internet law: the role that internet service providers (such as access providers, search engines, and social media) are playing in shaping speech, norms, and the society. In its commercial beginnings, the internet was a space for a limited group of expert users; later, the internet became an alternative to other media and commercial spaces. Lately, and even more so during the Covid-19 pandemic, the internet has become the primary space for human endeavors and interactions. The role of ISPs has developed and has grown commensurately with this development, but the law has not kept up with the increase in the ISPs' role. The course will discuss topics such as regulation of and on the internet, geoblocking, ISP liability for user-generated content, private ordering, and network neutrality. Issues of privacy and data protection, while mentioned in the course, will not be covered because other MIPLC courses focus on those issues.



Marieta Trimble is the Samuel S. Lionel Professor of Intellectual Property Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. In her research she focuses on intellectual property and issues at the intersection of intellectual property and private international law/conflict of laws; this focus leads her to the investigation of various internet law problems. She has authored numerous works on these problems, including the first comprehensive study ever published (2012) on the legal implications of the evasion of geolocation. She is also the author of the book "Global Patents: Limits of Transnational Enforcement" (Oxford 2012) and the co-author of the casebook "International Intellectual Property Law: Cases and Materials" (Foundation Press 3d ed. 2012, 4th ed. 2016, 5th ed. 2019).

<http://internetlawinmplc.com/>

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Class 1 (Monday, 11 July 2022)

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What Is the Internet?

“The system for connecting computers around the world that allows people to share information, visit websites, communicate using email, etc.”

Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/internet>

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What Is Cyberspace?

Cyberspace is “the interdependent network of information technology infrastructures, and includes the Internet, telecommunications networks, computer systems, and embedded processors and controllers in critical industries.”

THE WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE/NSPD-54 3, 8 January 2008,
<https://fas.org/irp/offdocs/nspd/nspd-54.pdf>

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What Is Internet Law?

- A particular area of law or an industry perspective?
- Judge Easterbrook (7th Cir.): “law of the horse”

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What Is Internet Law?

- Norms of Internet governance
 - Example: domain name system
- Norms governing conduct on the Internet
 - Internet-specific
 - Liability of Internet intermediaries (v. liability of any intermediaries)
 - Generic
 - Commercial law (v. e-commerce-specific rules)
- National, regional, international, v. extra-national
 - E.g., Convention on Cybercrime (Council of Europe)

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What is Internet Law?

Four modalities of Internet Law:

Law	Architecture
Market Forces	Social norms

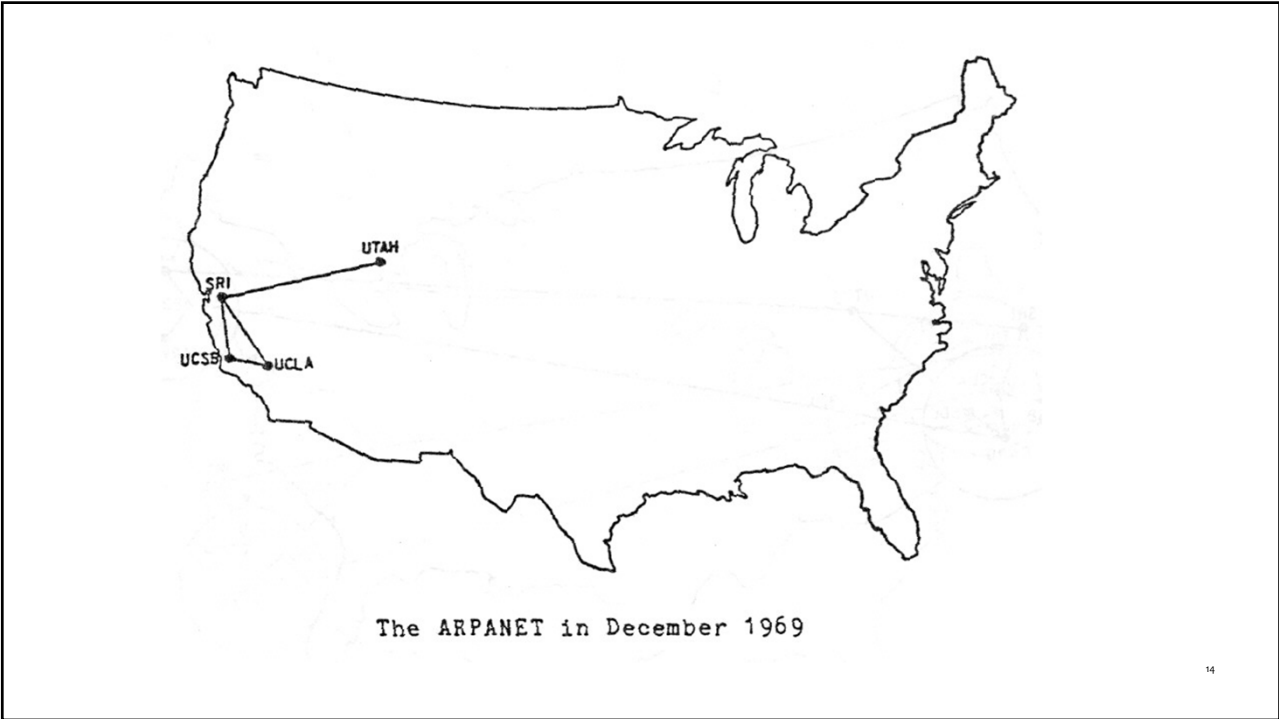
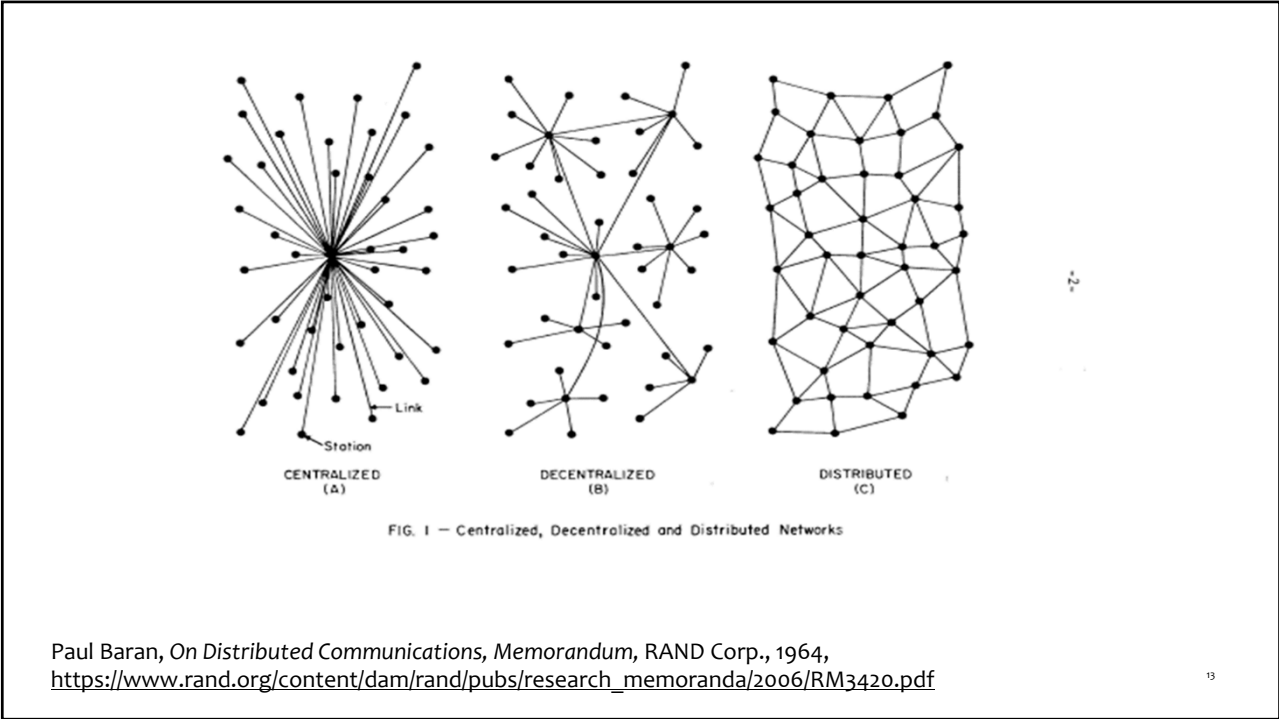
Lawrence Lessig, Code and Other Laws of Cyberspace, 1999

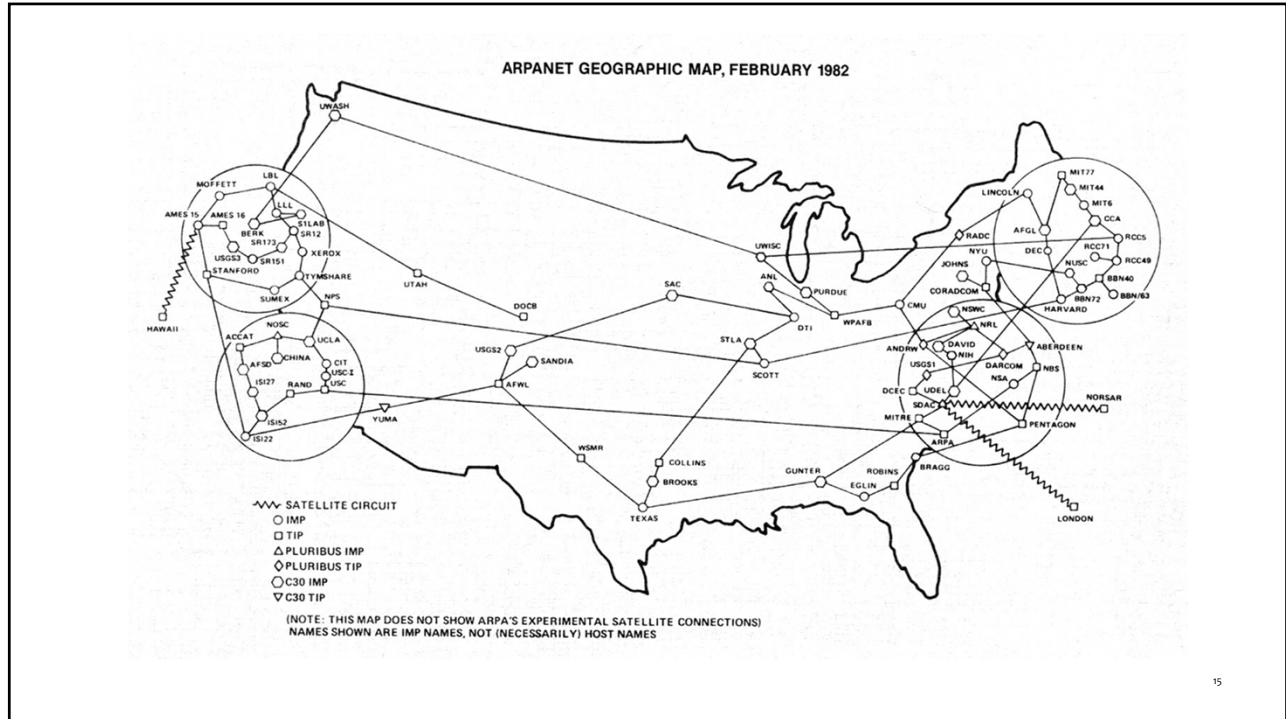
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The Architecture of the Internet?

- A distributed network (Baran)

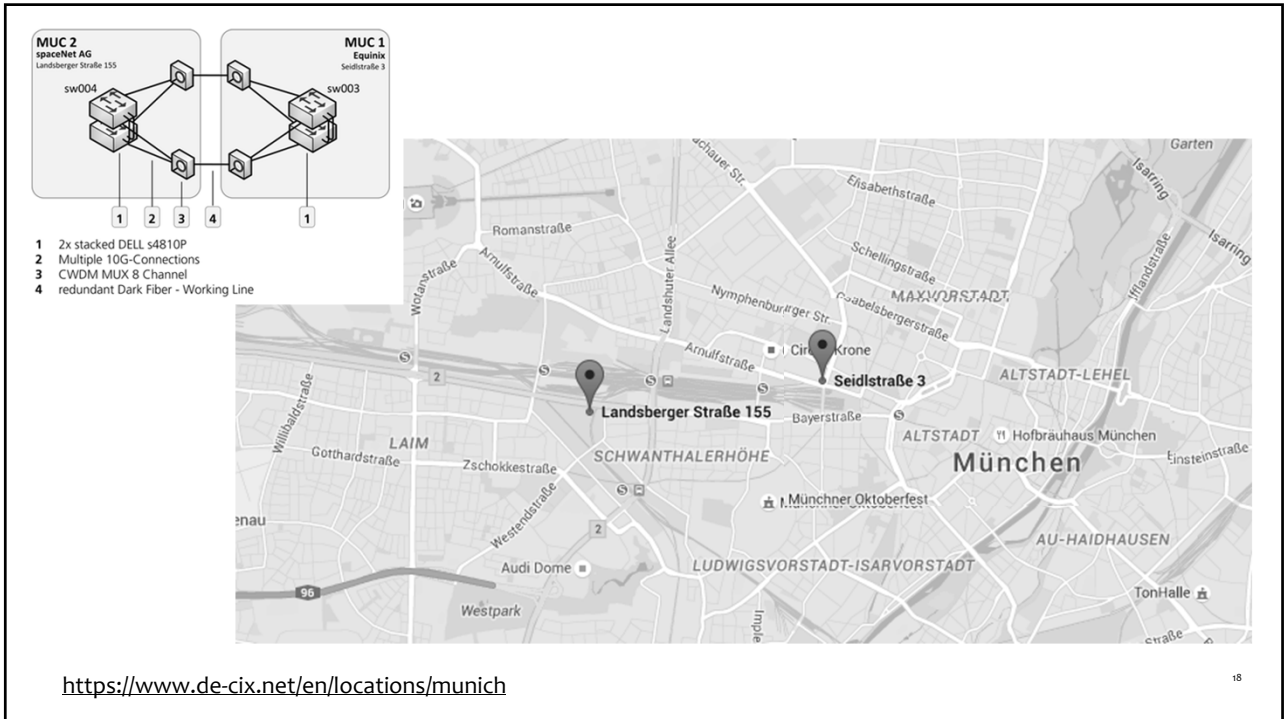
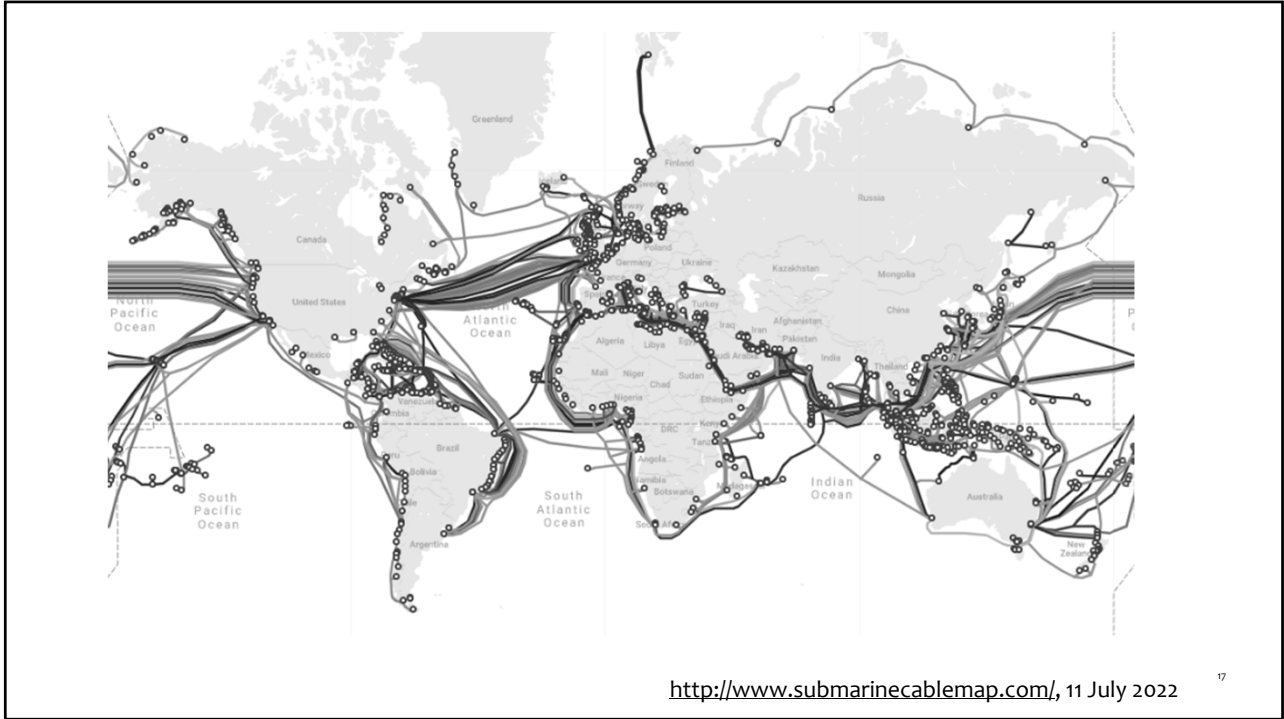
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The Architecture of the Internet

- Devices
- Routers
- Gateways
- Hubs or Internet exchange points (IXPs)
- Datacenters
- Cables



Who Governs the Internet?

Models of governance:

- (1) Self-governance (libertarian)
- (2) Global Transnational (transnational legal institution)
- (3) Code and Internet Architecture (voluntary organizations)
- (4) National Governments and Law
- (5) Market-Based or Economic-Based Regulation

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Localization
Geolocation
Geoblocking

Physical Location and Physical Territory and the Internet

- Internet governance
- Regulatory/Prescriptive jurisdiction
 - Choice of applicable law
- Adjudicatory jurisdiction
 - Personal jurisdiction; subject-matter jurisdiction
- Enforcement jurisdiction

Physical Locations on the Internet

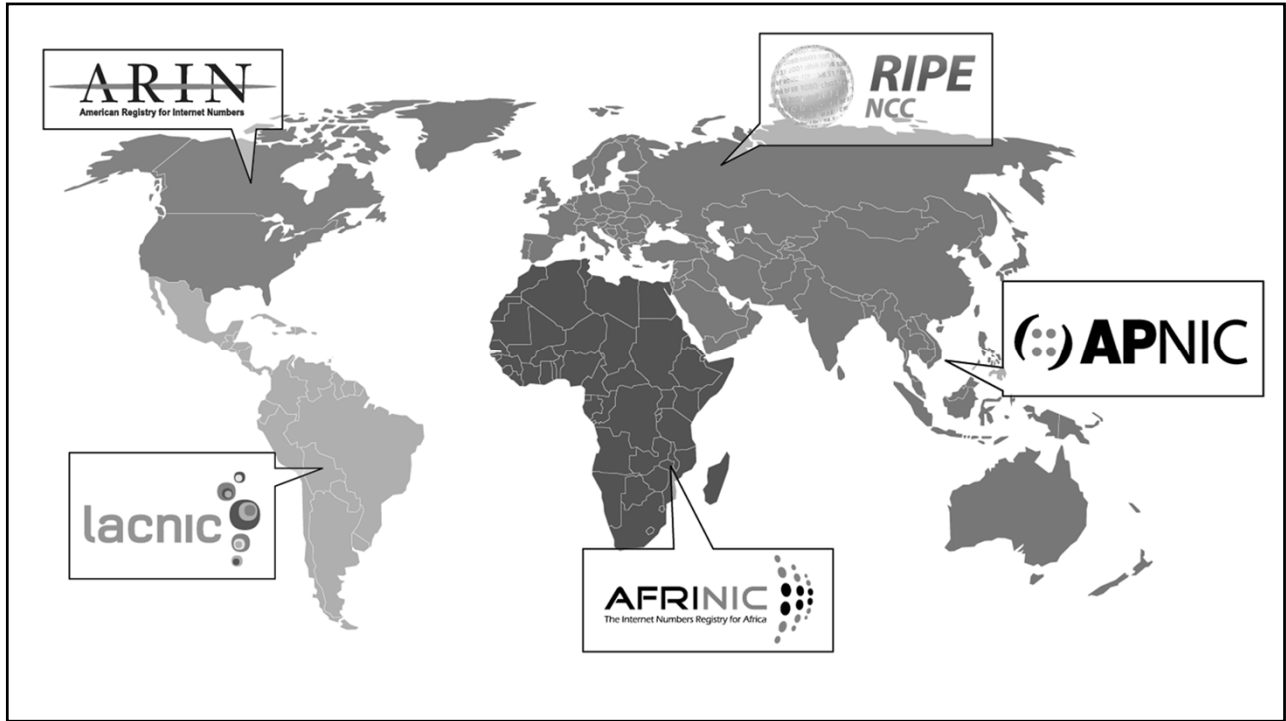
- User (recipient, viewer of content)
- Website operator
- Content creator (uploader)
- ISP
 - User connection
 - Website hosting
- Domain name registrar
- Domain name registry

Physical Locations on the Internet

- User (recipient, viewer of content)
- Website operator
- Content creator (uploader)
- ISP
 - User connection
 - Website hosting
- Domain name registrar
- Domain name registry
- Computer / device
- Server
- Network (gateways, routers, switches, cables)

IP Addresses

- Internet protocol addresses
 - IPv4 192.0.2.53
 - IPv6 2001:odb8:582:ae33::29
- Domain names
- User connections
- Any location on the internet



IP2LOCATION^{Lite} Home Free Databases IP Addresses Free Plugins FAQs Contact

Home > IP Address Ranges by Country

IP Address Ranges by Country

This page displays the complete IPv4 address ranges organized by country. There are 249 countries listed below, and each link will bring you to a new page containing the respective IP address ranges.

If you are interested to learn more about the ranking of IP addresses allocated for each country, please visit [IP Address Reports](#) for details.

Afghanistan	Aland Islands	Albania
Algeria	American Samoa	Andorra
Angola	Anguilla	Antarctica
Antigua and Barbuda	Argentina	Armenia
Aruba	Australia	Austria
Azerbaijan	Bahamas	Bahrain
Bangladesh	Barbados	Belarus
Belgium	Belize	Benin
Bermuda	Bhutan	Bolivia (Plurinational State of)
Bonaire, Sint Eustatius and Saba	Bosnia and Herzegovina	Botswana
Bouvet Island	Brazil	British Indian Ocean Territory
Brunei Darussalam	Bulgaria	Burkina Faso

IP Addresses

- Static v. dynamically assigned IP addresses

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Which Are Known and to Whom?

- User (recipient, viewer of content)
- Website operator
- Content creator
- ISP
 - User connection
 - Website hosting
- Website registrar
- Website registry
- Computer / device
- Server
- Network (gateways, routers, switches, cables)

Location v. Identity

- Attribution problem
- Domain names & Whois databases

Location v. Identity

- Attribution problem
- Domain names & Whois databases
- Computer fingerprinting
 - <https://panopticlick.eff.org/>

Geolocation

- There are various means to determine the location of a user
- Might be based on a user's answer to a question
- Might be based on an IP address

Geolocation

- There are various means to determine the location of a user
- Might be based on a user's answer to a question
- Might be based on an IP address
- Might be based on a combination of indicators
 - IP address
 - Cookies
 - GPS signal
 - WiFi signal
- Might provide detailed localization

Examples of Geolocation Uses

- Content localization
 - Advertising
 - Tailored content (beyond advertising)
- Security
- “Soft” market partitioning, price discrimination
- Identifying the location of a user for jurisdictional purposes (e.g., John Doe suits in the U.S.)

(Il)legality of Geolocation

- Detection of location
- Collection of location data
- Storing of location data
- Tracking location over time

- Anonymized v. identifiable data

- Personal data?

EU Directive on privacy and electronic communications

- Location data “more precise than necessary for the transmission of communications” which “are used for the provision of value added services”
- Processing only if data anonymous or with consent of the users to the extent and for the duration necessary for the provision of the value added service

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector

EU GDPR

- “Natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. ...” (Recital 30)
- “‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person...” (Article 4(1))

Geoblocking

Examples of Geoblocking Uses

- Security
- Effective market partitioning
 - Different pricing (price discrimination)
 - Staggered release of content
 - Safety standards, territorially-limited warranties
- Delimitating jurisdictional reach
- Compliance with contractual obligations (e.g., territorially-limited copyright licenses)
- Compliance with territorially-limited national laws

(Il)legality of Geoblocking

- Market partitioning
- WTO rules
- EU and other regional internal market/free trade rules
- National (internal) rules (e.g., the U.S. Dormant Commerce Clause)
- National competition (antitrust) laws
- Anti-discrimination rules
- EU anti-geoblocking rules

EU Cross-Border Portability

- 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

EU Cross-Border Portability

Definition of cross-border portability

Article 1:

“This Regulation introduces a common approach in the Union to the cross-border portability of online content services, by ensuring that **subscribers to portable online content services which are lawfully provided in their Member State of residence can access and use those services when temporarily present in a Member State other than their Member State of residence.**”

EU Cross-Border Portability

Services covered by the Regulation

Article 2(5):

- “ ‘online content service’ means a service as defined in Articles 56 and 57 TFEU that a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is:
 - (i) an audiovisual media service as defined in point (a) of Article 1 of Directive 2010/13/EU, or
 - (ii) a service the main feature of which is the provision of access to, and the use of, works, other protected subjectmatter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner;...”

EU Cross-Border Portability

- “The provider of an online content service provided **against payment of money** shall enable a subscriber who is temporarily present in a Member State to access and use the online content service in the same manner as in the Member State of residence, including by providing access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities.” Art. 3(1)
- “The provider of an online content service provided **without payment of money** may decide to enable its subscribers who are temporarily present in a Member State to access and use the online content service on condition that the provider verifies the subscriber’s Member State of residence in accordance with this Regulation.” Art. 6(1)

EU Cross-Border Portability

- **Impact on localization (choice of law & jurisdiction)**
 - “The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber’s Member State of residence.” Art. 4
- **Impact on privacy**
 - “At the conclusion and upon the renewal of a contract for the provision of an online content service provided against payment of money, the provider shall verify the Member State of residence of the subscriber by using not more than two of the following means of verification and shall ensure that the means used are reasonable, proportionate and effective...” Art. 5(1)

EU Cross-Border Portability

- **Impact on licensing practices**
 - “Any contractual provisions, including those between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, as well as those between such providers and their subscribers, which are contrary to this Regulation, including those which prohibit cross-border portability of online content services or limit such portability to a specific time period, shall be unenforceable.” Art. 7(1)
- **Impact on geolocation and geoblocking**

EU Anti-Geoblocking Regulation

- 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...

EU Anti-Geoblocking Regulation

- “A trader shall not, through the use of technological measures or otherwise, block or limit a customer's access to the trader's **online interface** for reasons related to the customer's nationality, place of residence or place of establishment.” (Art. 3.1)
- “A trader shall not apply different general conditions of **access to goods or services**, for reasons related to a customer's nationality, place of residence or place of establishment...” (Art. 4.1)
- “A trader shall not, within the range of means of payment accepted by the trader, apply, for reasons related to a customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union, different conditions for a **payment transaction...**” (Art. 5.1)

EU Anti-Geoblocking Regulation

- However, geoblocking is permitted for example in cases of 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, including the selling of copyright protected works or protected subject matter in an intangible form...” (Art. 4.1(b))
- A review shall be conducted to assess “whether this Regulation should also apply 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, including the selling of copyright protected works or protected subject matter in an intangible form, provided that the trader has the requisite rights for the relevant territories” (Art. 9.2)

Circumvention of Geoblocking

Circumvention of Geoblocking

- Means
 - Proxies
 - VPNs
 - TOR

Examples of Uses of Circumvention of Geoblocking

- To access content that is not available in the user's current physical location
- To bypass security
- To avoid market partitioning
- To access content that is illegal in the current location (gambling, copyrighted content, censorship)
- To anonymize

(Il)legality of Circumvention of Geoblocking

- Terms of service of the circumvention tool provider
- Terms of service of the content provider (e.g., SAT1)
- Access/content limitations
- Digital rights management tool under copyright law?
 - 1996 WIPO Treaties
 - U.S.: 17 USC 1201
- Anti-hacking laws?
- 1998 EU Conditional Access Directive?
- Secondary transmissions (e.g., Aereo)?

Circumvention of Geoblocking

- Global Mode dispute in Australia
- BBC's iPlayer
- VPN advertisements and other statements

- Additional issues
 - Cybertravel from a country where content is legal to a country where it is illegal
 - Inadvertent cybertravel to a random jurisdiction

Data Localization Requirements

Localization v. Location

To “localize” means

“to adapt oneself ... in order to conform to local circumstances or surroundings,”

“to make local in character,” or

“to associate with a particular place or location” in the sense of “to find or determine the location of.”

To “locate” means “to establish, site, or place in a particular location”

(Oxford University Press. <http://www.oed.com/view/Entry/109560?redirectedFrom=localize&>)

USMCA
(effective 1 July 2020)

Canada
Mexico
United States

(NAFTA 2.0)

CPTPP
(effective 30 December 2018)

Australia
Brunei
Canada
Chile
Japan
Malaysia
Mexico
New Zealand
Peru
Singapore
Vietnam

USMCA

Article 15.6: Local Presence

No Party shall require a service supplier of another Party to establish or maintain a representative office or an enterprise, or to be resident, in its territory as a condition for the crossborder supply of a service.

CPTPP

Article 10.6: Local Presence

No Party shall require a service supplier of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.

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USMCA

Article 19.12: Location of Computing Facilities

No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.

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CPTPP

Article 14.13: Location of Computing Facilities

1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

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EU Regulation on a framework for the free flow of non-personal data in the European Union (2002)

Article 4(1)

Data localisation requirements shall be prohibited, unless they are justified on grounds of public security in compliance with the principle of proportionality.

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GDPR

Article 1(3)

The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.

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EU Data Act Proposal

Article 27(1)

Providers of data processing services shall take all reasonable technical, legal and organisational measures, including contractual arrangements, in order to **prevent international transfer or governmental access** to non-personal data held in the Union where such transfer or access would create a conflict with Union law or the national law of the relevant Member State, without prejudice to paragraph 2 or 3.

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Regulatory/Prescriptive Jurisdiction

Who Regulates Conduct on the Internet?

- Conduct on the internet v. the functioning of the internet
- Prescriptive jurisdiction (national laws)
 - Conduct occurring in the country's territory
 - Conduct having an effect in the country's territory
 - Conduct by the country's citizens, even if they are abroad

Territorial Scope of National Laws

- Extraterritoriality of national laws
 - Intentional extraterritorial design
 - The result of localization
 - Indirect extraterritorial effects
- Localization of conduct
 - Ex.: online sale, free on board sale (FOB)
 - Ex.: copyright infringement (*Viewfinder*)

Principles of Regulation

- Point-of-source principle
 - E.g., EU E-Commerce Directive; EU SatCab Directive
- Point-of-consumption principle
 - Country-of-reception principle
 - E.g., the current U.K. online gambling regulation

South Dakota v. Wayfair

- U.S. Supreme Court, 2018
- A sales tax imposed in the U.S. state of the consumer (South Dakota)
- Can an out-of-state seller be required to collect and remit the tax for online sales?

South Dakota v. Wayfair

- A State “may tax exclusively interstate commerce as long as the tax does not create any effect forbidden by the Commerce Clause”

A tax must

- (1) Apply to an activity with a substantial nexus with the taxing State;
- (2) Be fairly apportioned;
- (3) Not discriminate against interstate commerce; and
- (4) Be fairly related to the services the State provides.

South Dakota v. Wayfair

- The “physical presence requirement”
 - From the U.S. Supreme Court’s decisions from 1967 and 1992
 - Mail-order companies with no physical presence in the taxing states
- The Court: “Each year, the physical presence rule becomes further removed from economic reality...”
- The nexus requirement is closely related to the due process requirement
 - Personal jurisdiction – no need of physical presence

GDPR

“Each supervisory authority should be competent on the territory of its own Member State to exercise the powers and to perform the tasks conferred on it in accordance with this Regulation. This should cover in particular the processing in the context of the activities of an establishment of the controller or processor on the territory of its own Member State, the processing of personal data carried out by public authorities or private bodies acting in the public interest, processing affecting data subjects on its territory or processing carried out by a controller or processor not established in the Union when targeting data subjects residing on its territory. ...”

(Recital 122)

GDPR (General Data Protection Regulation)

1. This Regulation applies to the processing of personal data in the context of the activities of **an establishment of a controller or a processor in the Union**, regardless of whether the processing takes place in the Union or not.
2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a **controller or processor not established in the Union**, where the processing activities are related to:
 - (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
 - (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.
3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

Principles of Regulation

- Point-of-source principle v. point-of-consumption principle
 - Which principle is better from the enforcement point of view?

Digital Services Act Proposal**Article 1(3)**

This Regulation shall apply to intermediary services provided to recipients of the service that have their place of establishment or residence in the Union, irrespective of the place of establishment of the providers of those services.

Digital Markets Act Proposal**Article 1(2)**

This Regulation shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service.

Principles of Regulation

- Party autonomy? Can parties choose?



Internet Law: Class 1
Professor Marketa Trimble