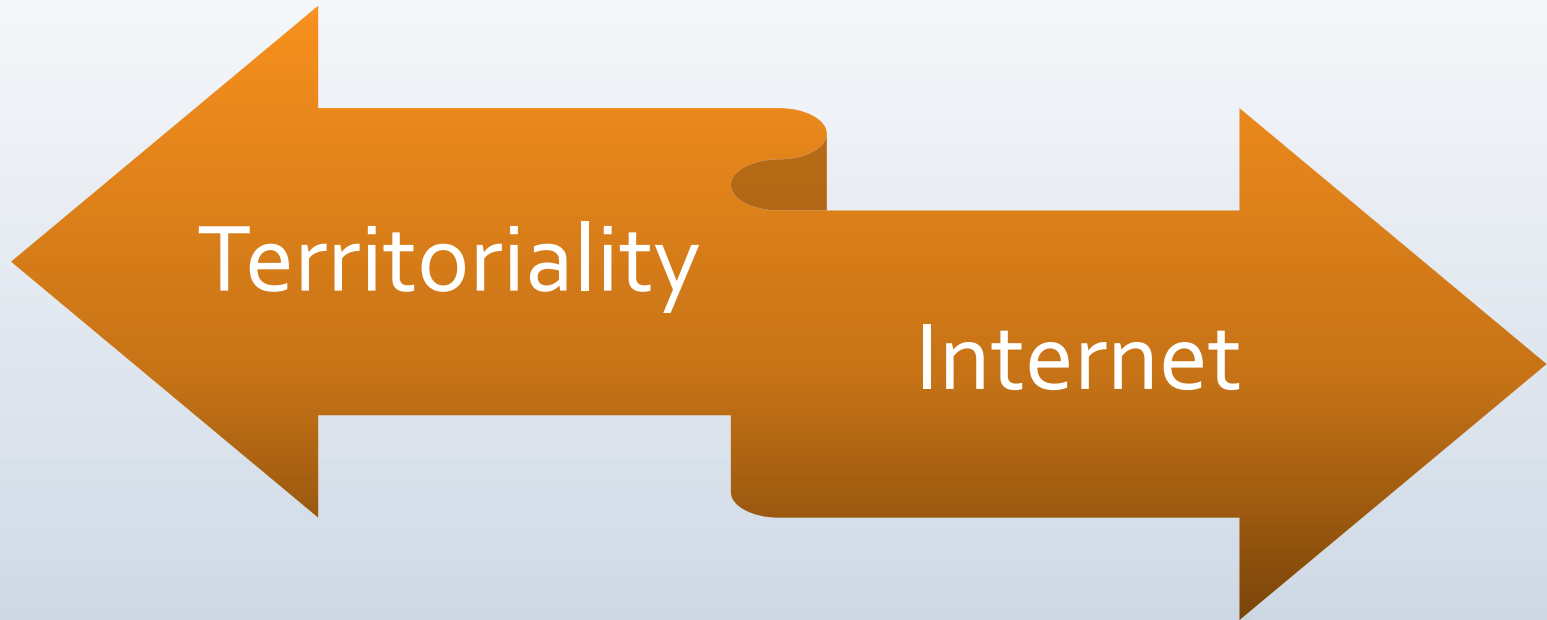


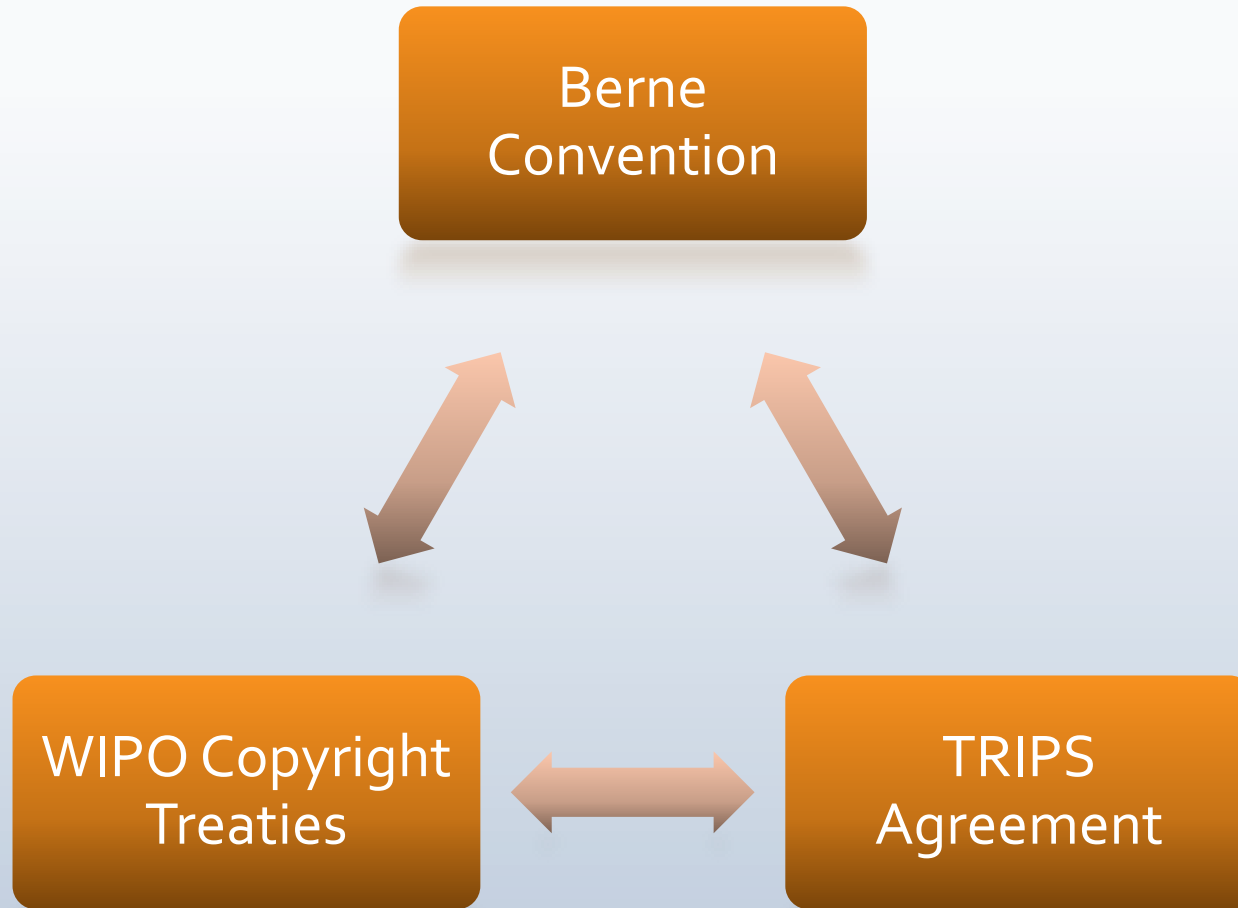
Implications of territoriality for online copyright enforcement measures

Dr. Giuseppe Mazziotti
Trinity College Dublin
*Exploring International Copyright's Gaps and
Flexibilities*
Columbia Law School
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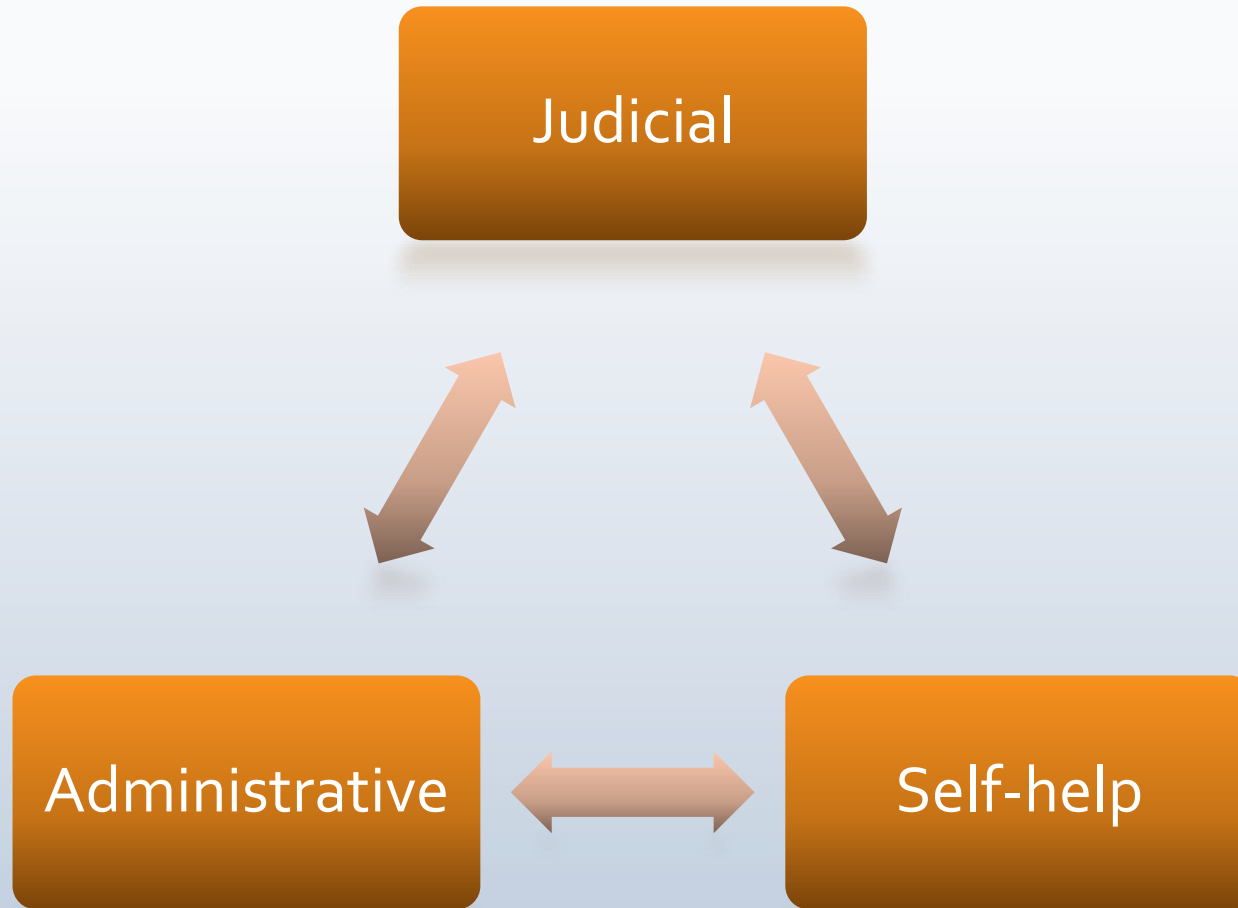
Copyright enforcement without borders?



International treaties



What type of enforcement?



Impact of territoriality on enforcement

Geo-blocking

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

Site-blocking measures

- Judicial measures
- Targeted at ISPs and online intermediaries
- Effects limited to one jurisdiction
- Controversial in legal systems where they are regarded as excessively broad

Enforcement under international copyright

GAPS

- Uniform notion of authorship and of national copyright ownership regimes (e.g. Art 14-bis Berne Convention)
- Protection of moral rights under the TRIPS Agreement (no inclusion of Berne 6-*bis*)
- No specific reference to enforcement in the online environment (ACTA and its Art 27 never came into force)

FLEXIBILITIES

- Choice of law
- Choice of forum (multi-territorial enforcement measures?)
- Protection of geo-blocking measures as TPMs (Art 11 WCT)
- Fair and equitable enforcement procedures, not un-necessarily complicated or costly (Art 41 TRIPS Agreement)

The European approach

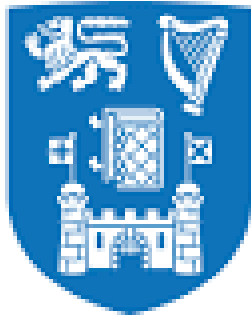
- Unification of private international law, achieved through EU regulations (i.e. equivalents of federal law):
 - 2012 Brussels Regulation (choice of forum: general principle of the forum of the defendant's country of domicile)
 - 2008 Rome Regulation (choice of law for contracts)
- Single laws applicable to cross-border transmissions:
 - law of the country of origin for satellite transmissions (1993);
 - law of the country of establishment for cross-border broadcasts and webcasts (1989 & 2007);
 - law of the country of origin/residence of the subscriber of "portable" online content services (2017)

Geo-blocking

- Territoriality of copyright law justifies the implementation of geo-blocking measures whenever online markets prove to be territorially restricted because of commercial and/or cultural factors
 - These technologies can be regarded as TPMs used *in connection* with the exercise of copyright
 - Anti-circumvention law can include also anti-trafficking provisions (as in the US and EU) aimed at outlawing the manufacturing of technologies or devices (e.g. VPNs?)
- Territoriality might be challenged by emerging technologies facilitating exploitation and enforcement of copyright on a cross-border basis and (possibly) reducing the relevance of **geo-localisation** (e.g. Blockchain)

Site-blocking measures

- Injunctions are normally granted on a country-by-country basis and have territorially restricted effects (i.e. *lex loci protectionis*: cf. Art 5.2 BC)
- To avoid multiplicity of laws (and fora) the criterion of the 'country where protection is sought' could be interpreted differently (Ginsburg)
- Single points of attachment: e.g. country of initiating act? country where the claimant has her centre of interests or where the persons targeted by a given exploitation of copyright works are located (CJEU)?
- EU 'Brussels' Regulation designates the place "where the harmful event occurred or may occur" (Art 7), paving the way for a multiplication of courts in case of cross-border infringement



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Thanks!

giuseppe.mazziotti@tcd.ie