

# The Stealthy Rise of Targeting in Europe & Bird & Bird

Aberystwyth Jurisdiction Symposium

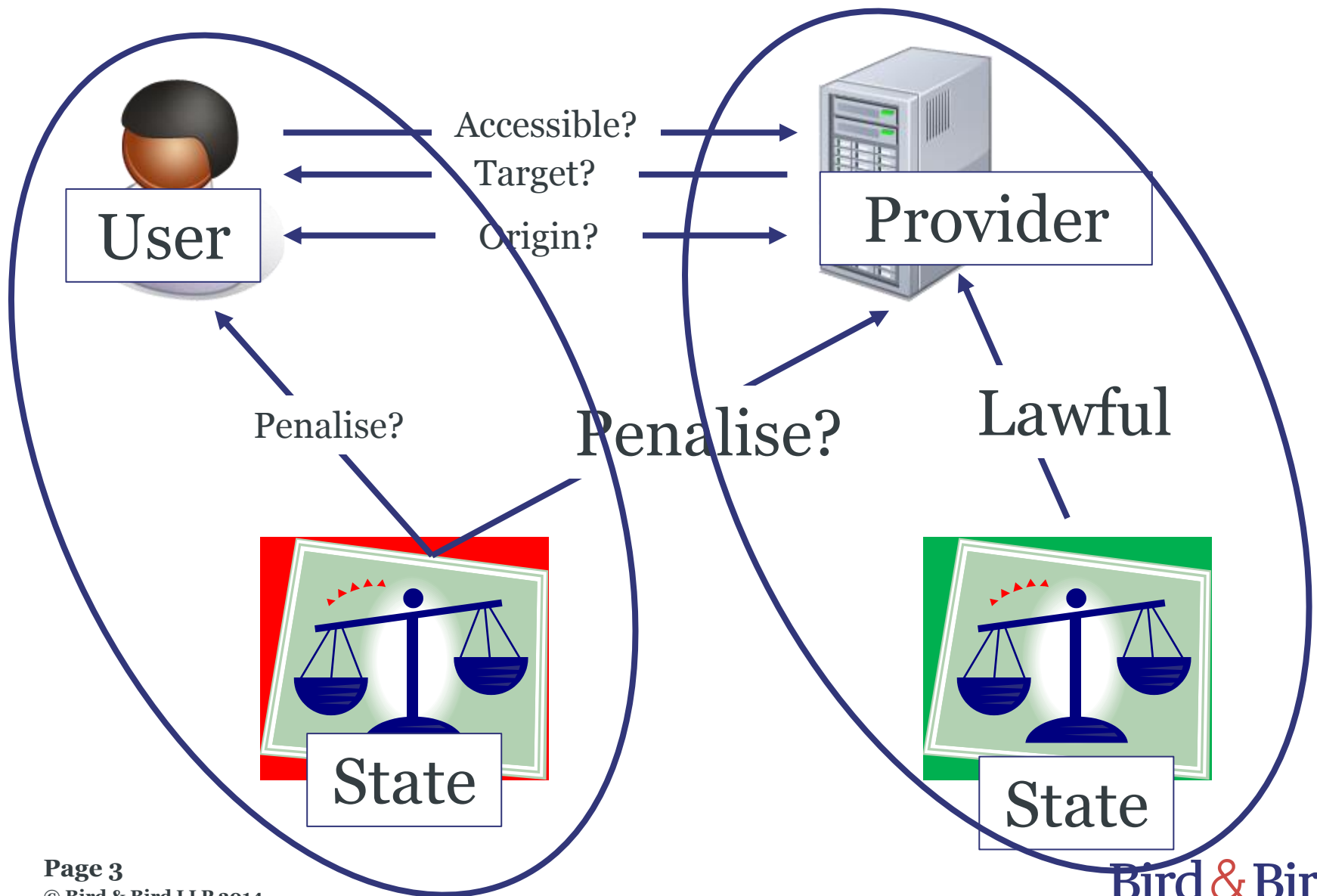
10 September 2014

Graham Smith

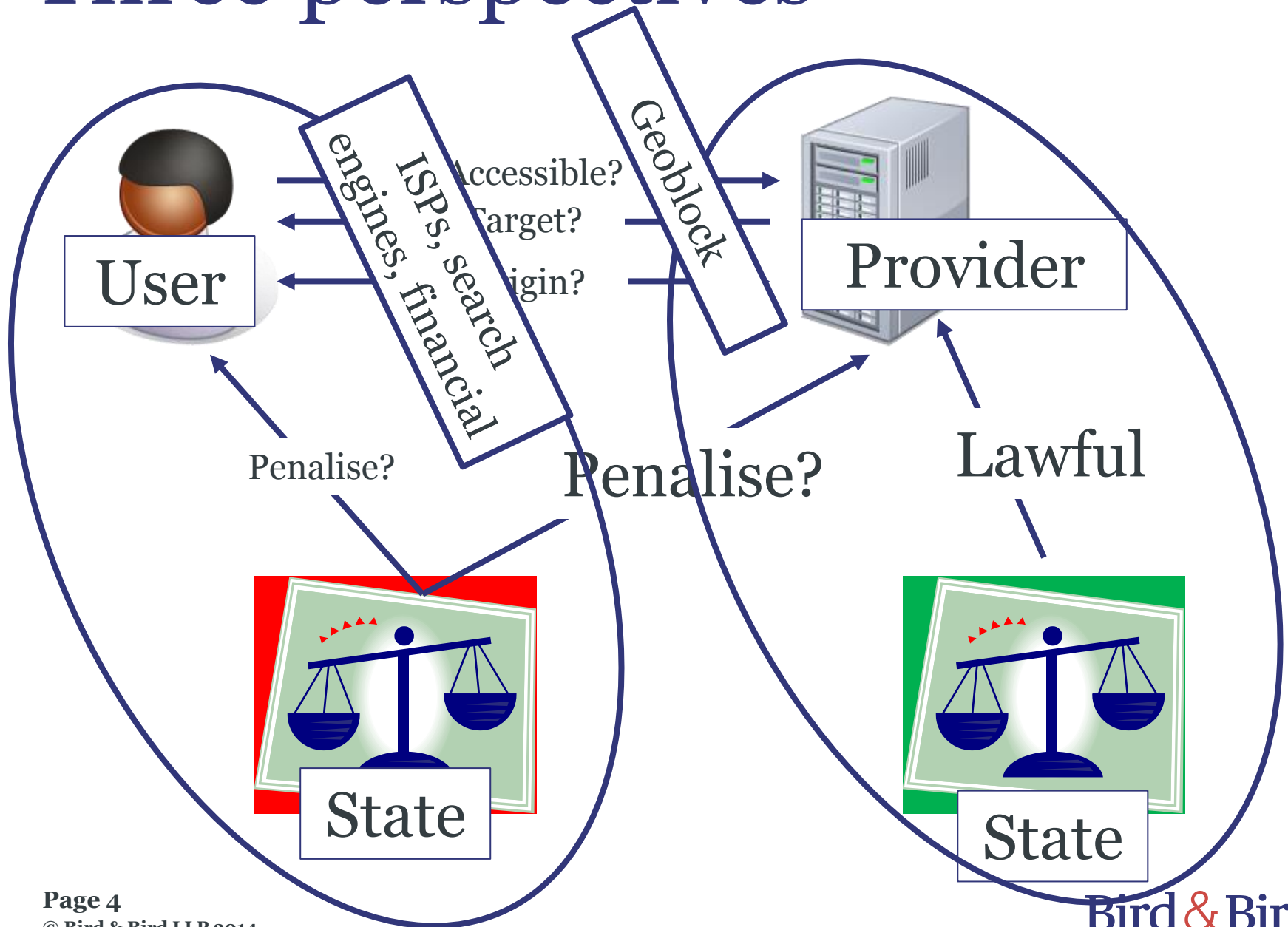
Bird & Bird LLP

# *Targeting as a type of legal rule*

# Three perspectives



# Three perspectives



# Controlling State to Emancipated User

## State-centric

- Military models and metaphors
- Foreign means threatening
- Local law monopoly
  
- Travel bans
- Sealed borders
- Jammed broadcasts
- State control

## User-centric

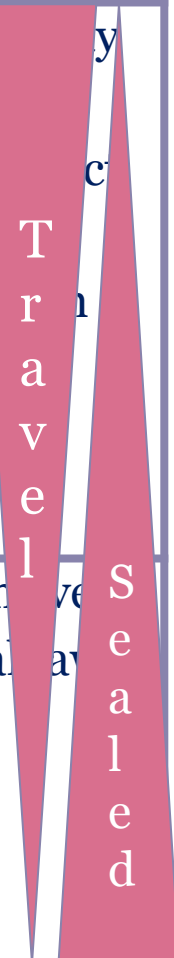
- Civilian rights and freedoms
  
- Foreign is just different
- Exposure to multiple legal systems
  
- Foreign travel
- Porous borders
- Cross-border information
- Autonomy, choice, self-determination

# Localisation v Balkanisation

	<b>Nature</b>	<b>Principle</b>	<b>Features</b>	<b>Type of rule</b>
<b>Localisation</b>	Voluntary, customer led	Country of origin	.uk, .fr, .de	Territoriality of national laws, conflict of laws, jurisdiction
	Incentivised localisation	Targeting	Manageable liability and forum exposure	
<b>Balkanisation</b>	Incentivised fragmentation	Country of receipt	Geo-blocking	Substantive local laws
	Compelled fragmentation; mandatory rules	Impermeable borders, monopoly control	National firewalls; mandatory local data storage; data export bans	

# Localisation v Balkanisation

	Nature	Principle	Features	Type of rule
<b>Localisation</b>	Voluntary, customer led	Country of origin	.uk, .fr, .de	Territoriality of national laws, choice of laws jurisdiction
	Incentivised localisation	Targeting	Manageable liability and forum exposure	Territoriality
<b>Balkanisation</b>	Incentivised fragmentation	Country of receipt	Geo-blocking	Substantive national law
	Compelled fragmentation; mandatory rules	Impermeable borders, monopoly control	National firewalls; mandatory local data storage; data export bans	Substantive national law



# Localisation v Balkanisation

	Nature	Principle	Features	Type of rule
<b>Localisation</b>	Voluntary, customer led	Country of origin	.uk, .fr, .de	Territoriality of national laws, choice of laws jurisdiction
	Incentivised localisation	Targeting	Manageable liability and forum exposure	Territoriality
<b>Balkanisation</b>	Incentivised fragmentation	Country of receipt	Geo-blocking	Travel
	Compelled fragmentation; mandatory rules	Impermeable borders, monopoly control	National firewalls; mandatory local data storage; data export bans	Sealed



## The travel analogy

"In *800-Flowers* I rejected the suggestion that the website owner should be regarded as putting a tentacle onto the user's screen.

... the very language of the internet conveys the idea of the user going to the site—'visit' is the word."

Jacob J., *Crate & Barrel*, 2001

# The evolution of targeting rules

Year	Country of Origin	Targeting	Country of receipt
<b>Pre-internet</b>			
...	USA Defamation Single publication	USA Jurisdiction Purposeful availment	UK et al Defamation Read where comprehended
1989	EU Internal market TV Without Frontiers Directive		
1993	EU Internal market Satellite and Broadcasting Directive		
<b>Internet</b>			
1997		USA Jurisdiction <i>Zippo</i>	
1998			UK Passing off <i>Mecklermedia</i>

Year	Country of Origin	Targeting	Country of receipt
2000			France Display of Nazi memorabilia <i>LICRA v Yahoo!</i>
	EU Internal market Electronic Commerce Directive		
2001		UK Trade marks <i>1-800 FLOWERS, Crate &amp; Barrel</i>	
		EU Jurisdiction (consumer contracts) Brussels Regulation Art 15	EU Jurisdiction (tort) Brussels Regulation Art 5(3)
2002			Australia Defamation <i>Gutnick v Dow Jones</i>

Year	Country of Origin	Targeting	Country of receipt
2002			UK Obscene publication <i>R v Perrin</i>
2004			UK Defamation <i>King v Lewis</i>
2006		UK Copyright (issuing copies to public) <i>Sony v Pacific Game Technology</i>	
2008		EU Applicable law (consumer contracts) Rome I Regulation	
2009		UK Patent (offer for sale) <i>Boegli-Gravures v Darsail-Asp</i>	

Year	Country of Origin	Targeting	Country of receipt
2010		EU Jurisdiction (Consumer Contracts) <i>Pammer/Alpenhof</i>	
	EU Internal market AVMS Directive		
2011		EU Trade Mark <i>L'Oreal v eBay</i>	
	EU ECommerce Directive (Defamation/privacy) <i>eDate/Martinez</i>		EU Jurisdiction (Defamation/privacy) <i>eDate/Martinez</i>
2012			EU Jurisdiction (Trade Mark) <i>Wintersteiger</i>
		EU Copyright (distribution right) <i>Titus Donner</i>	

Year	Country of Origin	Targeting	Country of receipt
<b>Internet</b>			
<b>2012</b>		<b>EU</b> Database right (making available) <i>Football Dataco v Sportradar</i>	
<b>2013</b>		<b>UK</b> Copyright (making available) <i>EMI v BSkyB</i>	
			<b>EU</b> Jurisdiction (copyright) <i>Pinckney</i>
<b>2014</b>			<b>UK</b> Misuse of private information <i>Vidal-Hall v Google</i>
			<b>UK</b> Data protection <i>Vidal-Hall v Google</i>

# Targeting rules in the ascendancy?

- Gaining...
- But not universal
  - Defamation, privacy, data protection, tort jurisdiction
- How robust is the rule?
  - Temptation to adopt receipt-oriented interpretation
  - Self-denying ordinance
- Generic sites?
  - *LICRA v Yahoo!*
  - *Pammer/Alpenhof*



Thank you & Bird & Bird

Graham Smith

[graham.smith@twobirds.com](mailto:graham.smith@twobirds.com)

[@cyberleagle](#)

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 15 Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.

[twobirds.com](http://twobirds.com)