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# Jurisdiction and the Internet

## 1. The global net versus national laws

### *A. A story about eggs*

A long time ago hens did not lay white or brown eggs but eggs in primary colours: red, yellow and blue.[1] Since, depending on the colour of the eggs, their taste and quality varied, the farming industry split into red, yellow and blue industries catering for different markets. Those industries which dealt with the respective eggs became over the years highly competitive. And what was initially no more than a common understanding, namely, that hens laying red eggs belonged to the red industry, while hens laying blue and yellow eggs belonged to the blue and yellow industries, turned over the years into customary egg law, with each industry having its clearly demarcated area of competence. As it happened, due to interbreeding, some hens normally laying, for example, red eggs would very occasionally lay purple or orange eggs. These eggs presented a problem, albeit not a severe one, as they remained very much the exception. Hens laying blue eggs were kept apart from hens laying red eggs and from those laying yellow eggs. Nevertheless, solutions to these problematic eggs had to be found. On occasions the red, blue or yellow industries would unilaterally declare, but only after close analysis and in accordance with their own complex rules about subtle colour variations (known as conflicts-of-egg law) that the egg in question belonged to its industry or to one of the other industries. These decisions were generally but not always accepted by the other industries. In respect of particularly big eggs there was a consensus at the higher farming level about the rules on who had a right to them. Again, these rules were equally complex and occasionally gave rise to

[1] This story was inspired by Tony Bradney, 'Law Schools and the Egg Marketing Board' (2001) 22 *SPTL Reporter* 1, and first published in 'Eggs, Jurisdiction and the Internet' (2002) 51 *International and Comparative Law Quarterly* 555.

arguments, but all in all the hen industry lived in peace and harmony for a long time.

And then something happened, what can only be called a miracle of nature. Hens could be fertilised through the air. While this was in itself not a problem and indeed made breeding hens so much easier and produced stronger, healthier hens with better, bigger and tastier eggs, the hen industry was in deep shock. Sure enough, the number of discoloured eggs increased drastically and, with it, the burden on the industries to work out which egg belonged to whom. But not only that, the frequent interbreeding produced totally new colour variations, meaning that the traditional rules had to be further and further refined, leading to what must have seemed totally arbitrary results. The teams of colour experts increased. Universities taught whole degrees on eggs and colours. Research on how to optimise and improve the solutions to allocating the non-primary coloured eggs was booming. Meetings between the red, blue and yellow industries took place frequently and yes, they did agree on further common rules, even in relation to the small eggs, for working out which one belonged to whom. Of course, every industry was very concerned about its own interest, none wanting to surrender too many eggs to the others. In an attempt to mitigate the uncontrolled and uncontrollable interbreeding, they built high walls around their hen farms, but to no avail. They also resorted to keeping eggs which they knew belonged to one of the other industries, which then caused more arguments and even reprisals. But one fact stubbornly remained: there was a constant relentless increase in non-primary coloured eggs, and their relative proportion to primary coloured eggs rose and rose. And these eggs were hardly distinguishable from one another in terms of quality or taste.

It took the farming industry a long time to acknowledge that its system of dividing the non-primary coloured eggs had broken down. Some even questioned whether it still made sense to divide eggs according to colour at all. But they were laughed at. The industries, though, finally grudgingly admitted to themselves that they were wasting time and effort to try to distinguish between eggs that could not really be distinguished. They had to find a new and more efficient way of distributing control over these difficult eggs. Some suggested a new industry dedicated entirely to these eggs. Yet, what happened between then and the time when all eggs became brown or white remains a mystery.

History repeats itself. Today it is no longer the issue which non-primary coloured egg belongs to which hen industry; the issue is

which transnational event or activity belongs to, or should be regulated by, which State. Is it France or Japan or Australia which has the right to regulate a transnational event which is not quite French, Japanese or Australian but a bit of each? And today it is not a miracle of nature which has thrown the traditional rules into disarray and questions their viability, but a miracle of science, the Internet. The number of transnational events is not only skyrocketing but gives rise to colour variations not known before. Finally, States are today struggling with accommodating these difficult events within their allocation rules based on location, so much so that there have been some calls to abandon the territorially-based system of regulation.

### *B. Mapping the legal landscape*

This book does not solve any mysteries. It does not start where the above story stops and does not provide neatly packaged answers for governments, lawyers and businesses as to how to respond to the transnational Internet.[2] Its aim is simply to retell the story and make it comprehensible. The book sets out to map the legal landscape within which the Internet falls, focusing on its transnational nature; a map with a legend which allows the interested traveller to read and disentangle the legal web of the web; it sets out to explain the common themes running through seemingly discrete transnational problems and why some apparently similar transnational cases are fundamentally as distinct as a capital city from a big city. Finally, this book hopes to show the basic options open to regulators to remodel our legal landscape to suit the new online demands better, as well as the costs and benefits of those models.

Essentially, the discussion maps battlefields, wars fought on innumerable fronts. What all these scenes of conflict have in common is that they present a clash between the transnational Internet and national law. The law struggles with the global reach of the Internet, while everyone else revels in it. Being able so easily to cross borders and enter foreign places to chat, see, meet, do research, arrange, shop, sell, in short to conduct so many daily activities, means that the world has shrunk; the global village

[2] In this book, the term 'Internet' is generally used interchangeably with the World Wide Web, although this is strictly speaking incorrect. The focus of the book is generally on websites, although many of the arguments raised are also applicable – with some adaptation – to other Internet services such as email, chat rooms or discussion groups. Chapter 7 considers commercial email.

has more than ever become a reality.[3] Physical distance still matters, but far less so. The opportunities arising from this bottom-up globalisation are immense and exist on many levels, economic, cultural or political: some have been seized, such as trading opportunities, others need more time; for example, it has been argued that in the long term the Internet is likely to be a force for democracy even though authoritarian regimes appear capable in the short to medium term of halting its democratising effect.[4]

And yet, despite all these opportunities, or indeed because of them, in legal terms the global nature of the Internet is first and foremost problematic.[5] The reason is simple. Law and regulation have been organised on the assumption that activities are on the whole geographically delimited: the right to regulate conduct is shared out between geographically defined States on a predominantly geographic basis – each State can regulate what occurs within its territory. Location is the criterion for the sharing of activities. This basic allocation rule works well when conduct is generally located within a single territory. Then it is clear what belongs to whom. Yet online activity is not by default located in a single territory. *Prima facie*, a website can be accessed everywhere. Does this mean that every State can regulate every site and, if not, which State can and which State cannot? Where is the site located for the purposes of establishing which State can assert a regulatory right? Although regulators have for years struggled with rising transnationality, in the form of global trade and transnational corporations, the Internet presents an entirely new dimension to the problem of squeezing transnational activity into the national legal straitjacket.

So this book provides a map of these scenes of conflict, but what exactly is its scale? There is no doubt about it: it is a world map. This is true in a number of aspects. First, this book trades in ideas and generic arguments illustrated by reference to specific archetypal examples. No encyclopaedic account of all relevant legal developments is given or

[3] Marshall McLuhan tends to be credited with coining the phrase 'global village' in the 1960s (alternatively, P. Wyndham Lewis). It encapsulates the idea that the media recreates (and strive towards recreating) the village experience. This idea is well explored in Paul Levinson, *The Soft Edge – A Natural History and Future of the Information Revolution* (London: Routledge, 1997).

[4] Shanthi Kalathil and Taylor C. Boas, 'The Internet and State Control in Authoritarian Regimes: China, Cuba and the Counterrevolution' (2001) Carnegie Endowment Working Papers, Global Policy Program No. 21, www.carnegieendowment.org/files/21KalathilBoas.pdf.

[5] This is not to say that the Internet does not also provide governments, the law and lawyers with significant opportunities.

intended. The assumption is that the generic arguments and ideas can be applied to other instances, but listing all of them would be as tedious as it would be unnecessary. The aim is to allow the traveller to locate any specific points of inquiry within this wider legal map, but for a street plan of any particular city more specialised treatises need to be consulted. However, by explaining one or two cities, it is hoped it will become clear how cities are organised and the problems to which they give rise, at least in principle. The finer details are then child's play. Secondly, and interrelatedly, the discussion is not restricted to any one area of substantive law, cutting across private or civil law (such as contract, tort and intellectual property law) to various areas of public or criminal law (such as hate speech and gambling law). However, each chapter makes one of these substantive areas the trigger for the generic issues without excluding other areas. Despite contrary appearances, the focus is always narrow, not examining the substantive law, but merely asking the question in what circumstances is the law of a State applicable.[6] In what circumstances has a State the right to make, apply and enforce its contract or tort or criminal law in respect of online activity, and what happens when that right runs concurrently with the rights of other States?

Thirdly, not only does the inquiry extend over various substantive areas of law but it also shows no respect for national legal boundaries. The discussion freely crosses oceans, cultures and languages (as far as practicable) and examines comparable jurisprudence of the UK, the US, France, Germany, Canada and Australia. Indeed, if this book shows one thing, it is that we are all in this together, and not just in terms of being exposed to the same problem. States are hard pushed to realise their regulatory objectives without talking to each other; they can no longer pretend to be regulatory islands. Such talks in various forms are already well underway;[7] also in the online context, judges, legislators and academics now routinely take note of foreign legal developments. For such talks to be fruitful, there is a need for robustness with one's own

[6] In this context, 'law' includes both the substantive and procedural law of a State as well as its legal processes, such as adjudication or executive action.

[7] Of the enormous number of such 'talks', a high-profile example is the World Summit on the Information Society (an initiative of a UN agency, the International Telecommunications Union), www.wsis.org, which met for the second time in Tunis in 2005. An initiative arising from the summit was the creation of the multi-stakeholder Internet Governance Forum, www.intgovforum.org. A highly active international institution in this field is the Organization for Economic Co-operation and Development (OECD), www.oecd.org.

peculiarities, and a willingness to focus on the commonalities. In any event, in so far as the discussion concerns jurisdiction in respect of criminal and other public law, it is customary international law which provides the source of the legal rules in question. Thus, ascertaining how various States have responded to the same or similar transnational problems, far from being indulgent and unrestrained, is essential to establish the relevant State practice and *opinio juris*.[8] Yet, private international lawyers accustomed to dealing with one national system at a time, may feel ill at ease with the agility with which the discussion – any national peculiarities aside – jumps from one system to another.[9] By way of justification, I can only reiterate the above and add that it seems time that private international lawyers do their name justice and become more international.

In short, this book's ambition is nothing less than to provide a world map of the attempts of national legal systems to absorb the transnational online world, the problems associated with these attempts and actual and likely solutions.

### C. *Who cares?*

So, does anyone really care? The sheer amount of literature on the topic generated by governments, professional and industry bodies[10] and international institutions (such as United Nations agencies,[11] the

[8] For an overview of the jurisdiction principles under customary international law, see Bernard H. Oxman, 'Jurisdiction of States', in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law* (1987) Vol. 10, 277.

[9] By the same token, the discussion implicitly rejects the scepticism some have voiced in respect of comparative law and the ability to compare diverse legal solution given 'the difficulty of identifying similar legal issues in diverse societies and cultures': Peter Thomas Muchlinski, 'Globalisation and Legal Research' (2003) 37 *International Lawyer* 221, 227f. The discussion not only shows that many States face exactly the same Internet-related legal issues but also that the technical differences in national laws tend to mask similar underlying concerns and policy decisions.

[10] One of the most comprehensive general treaties on competence in the online environment is: American Bar Association, 'Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet' (2000) 55 *The Business Lawyer* 1801, www.kentlaw.edu/cyberlaw/docs/drafts/draft.rtf. Government reports tend to be on specific substantive topics, with competence issues being one of the issues considered; see, for example, UK Law Commission, *Defamation and the Internet – A Preliminary Investigation*, Scoping Study No. 2 (December 2002), www.lawcom.gov.uk/docs/defamation2.pdf.

[11] For example, the United Nations Commission on International Trade Law (UNCITRAL) focusing on the harmonisation of national law affecting e-commerce, www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html.

Organization for Economic Co-operation and Development,[12] the Hague Conference on Private International Law[13] and the World Trade Organization[14]) certainly suggests that the topic under consideration is not just of academic interest.[15]

The reason for its prominence lies first and foremost in the need to respond to real and immediate disputes arising out of online activity. The growth of online activity has been matched by a corresponding growth of transnational civil disputes – a trend which is likely to continue with the further growth of Internet presence: by the end of 2005 the worldwide Internet population was estimated to be 1.08 billion and is projected to almost double by 2010.[16] Apart from private disputes, governments too are under real pressure to deal with online

[12] The OECD has produced a vast amount of literature on various transnational aspects of e-commerce and Internet governance generally. See, for example, OECD, *OECD Input to the United Nations Working Group on Internet Governance (WGIG)* (2005) DSTI/ICCP(2005)4/FINAL, www.oecd.org/dataoecd/34/9/34727842.pdf; OECD, *The Use of Authentication Across Borders in OECD Countries* (2005) DSTI/ICCP/REG(2005)4/FINAL, www.oecd.org/dataoecd/1/10/35809749.pdf; OECD, *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* (2003), www.oecd.org/dataoecd/24/33/2956464.pdf; and *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (2002).

[13] Hague Conference on Private International Law (Andrea Schulz, ed.), *Proceedings of the International Conference on the Legal Aspect of an E-Commerce Transaction 2004*, http://hcch.e-vision.nl/index_en.php?act=progress.listing&cat=9/.

[14] See, for example, World Trade Organization (WTO), *Electronic Commerce and the Role of the WTO*, Special Study 2 (1998), www.wto.org/english/res_e/booksp_e/special_study_2_e.pdf.

[15] The amount of academic literature on the topic of competence is enormous. Some of the more comprehensive treatises are: Adam Thierer, and Clyde Wayne Crews Jr (eds.), *Who Rules the Net? Internet Governance and Jurisdiction* (Washington DC: Cato Institute, 2003); Henricus Snijders and Stephen Weatherill (eds.), *E-Commerce Law: National and Transnational Topics and Perspectives* (The Hague: Kluwer Law International, 2003); Paul Schiff Berman, 'The Globalisation of Jurisdiction' (2002) 151 *University of Pennsylvania Law Review* 311; Karsten Bremer, *Strafbare Internet-Inhalte in International Hinsicht – Ist der Nationalstaat wirklich überholt?* (Frankfurt a. M.: Peter Lang Verlag, 2001), http://ub-dok.uni-trier.de/diss/diss60/20000927/20000927.pdf; Bradford L. Smith, 'The Third Industrial Revolution: Law and Policy for the Internet' (2000) 282 *Recueil des Cours* 229 (a more general discussion of Internet governance which also addresses competence issues); and a special edition on jurisdiction in *The International Lawyer* (Vol. 32, 1998).

[16] See ClickZ, *Population Explosion*! (3 November 2005), www.clickz.com/stats/sectors/geographics/article.php/5911_151151. Note that, by the end of 2002, an estimated 655 million people worldwide were using the Internet. United Nations Conference on Trade and Development (UNCTAD), *E-Commerce and Development Report 2002* (2002) UNCTAD/SDTE/ECB/2. For more recent world statistics on Internet usage, see OECD, *OECD Input to the United Nations Working Group on Internet*

activity, to protect children from unsuitable websites and to protect local, legally compliant businesses from unfair online competitors, and, to those pressure groups, it matters little whether the online activities come from abroad or not. So these are tangible and immediate needs that the general debate on regulatory competence addresses and into which this book taps.

More generally, there can be no doubt that finding solutions to competence issues is pivotal to maintaining law and order: 'There is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances. Without that allocation of competence, all is rancour and chaos.'[17]

If it is not clear who is in charge of a particular situation or activity (if too many or too few take it upon themselves to get involved), the situation or activity is unlikely to be effectively regulated. So an inadequate system for allocating regulatory responsibility undermines the effectiveness of substantive laws, which is the underlying worry. And such ineffectiveness is not neatly restricted to the online space. A failure to regulate the Internet effectively undermines the credibility and effectiveness of the regulation of equivalent offline activity. What is the point of, and how can you justify, a prohibition of physical gambling operations, if similar online gambling operations are beyond the regulatory reach? Does it make sense to insist on a prescription for a drug if that same drug can be bought freely online, and, if so, why?

This leads directly to a further concern on a perhaps more distant but no less serious level: currently, the whole system of allocating regulatory competence and the territoriality principle are deeply embedded in the notion of statehood. Control over a State's territory is not just a consequence of statehood but also an essential attribute:[18] having a territory and control over it is part of what it means to be a State. The colour of eggs did not just provide the criterion for allocating eggs

*Governance (WGIG)* (2005) DSTI/ICCP (2005)4/FINAL, www.oecd.org/dataoecd/34/9/34727842.pdf.

[17] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon, 1994), 56.

[18] Helmut Steinberger, 'Sovereignty', in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law* (1987), Vol. 10, 397, 413, where the author notes: 'Exclusivity of jurisdiction of States over their respective territories is a central attribute of sovereignty.' Note that a delimited territory is an element of statehood; see Art. 1 of the Montevideo Convention on Rights and Duties of States (1933) and e.g. Jochen Frowein, 'Recognition', in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law* (1987), Vol. 10, 340, 341: 'the recognition of States presupposes the existence of the criteria for statehood, i.e. a fixed territory, a population and an effective government.'

but defined the egg industries as such. Take away the colour and you take away the *raison d'être* of the industries in their various shapes and sizes. Similarly, as the Internet undermines the criterion of territoriality as a basis for sharing regulation,[19] it chips away at the State itself; the State which is the territorially defined and territorially empowered regulatory institution. As the notion of statehood is so elementary to our understanding of law and indeed life in general, it is hard to envision either without the State.[20] It is also counterintuitive to see the State not simply as an institution subject to the territoriality principle but as its very personification. But that is what it is. How tightly the notion of regulatory power, territoriality and statehood are interwoven shines through the words of Mann: 'International jurisdiction is an aspect or an *ingredient* or a consequence of sovereignty (or of territoriality or of the principle of non-intervention – the difference is merely terminological).'[21] When Mann uses 'sovereignty' interchangeably with 'territoriality' and the 'principle of non-intervention', he could also have referred to the sovereign territorial State.

With online events it is harder than ever to say with ease and certainty that 'this is yours and this is mine'. But, even when that is decided, States often lack the actual power to impose their will on those sites which relentlessly penetrate their borders. While States have a theoretical entitlement to 'control' what happens on their territory, they often lack the practical means to do so.[22] This has prompted some to argue that, long-term, the State is not viable. However, the State has proved rather hardy in respect of previous challenges such as the rise of transnational corporations; the Internet is not the first phenomenon to

[19] David R. Johnson and David Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367; Henry H. Perritt, 'Cyberspace and State Sovereignty' (1997) 3 *Journal of International Legal Studies* 155; Henry H. Perritt, 'The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance' (1998) 5 *Indiana Journal of Global Legal Studies* 423; Jack L. Goldsmith, 'The Internet and the Abiding Significance of Territorial Sovereignty' (1998) 5 *Indiana Journal of Global Legal Studies* 475.

[20] Although within legal and political scholarship 'the contingency of the nation state' has long been recognised: Berman, above n. 15, 321, 441ff; more generally see, for example, Günther Teubner, *Global Law without a State* (Aldershot: Dartmouth, 1997).

[21] F. A. Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 186 *Recueil des Cours* 9, 20 (emphasis added). See also F. A. Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 1, reproduced in F. A. Mann, *Studies in International Law* (Oxford: Clarendon Press, 1973). Generally on sovereignty, see Steinberger, above n. 18.

[22] This relates to enforcement jurisdiction: see below and Chapter 6.

undermine State control over its territory[23] and trigger a prognosis of doom for the State. '[S]overeignty over territory will disappear as a category from the theory of international society and from its international law . . . [I]nternational society will find itself liberated at last to contemplate the possibility of delegating powers of governance not solely by reference to an area of the earth surface.'[24]

So far, these predictions have not been realised,[25] and so perhaps equal sentiments about the demise of the State expressed in relation to the online world need to be treated with caution:

> The Internet has neither changed the central position of the nation state in world politics nor the classic power games. Yet, it further strengthens existing restrictions on the possible actions of nations and promotes the creation of a global civil society. Both will in the long term affect the position and actions of the nation state. It is not going to disappear, but it will change . . . The Internet, like the invention of the printing press, is likely to deeply change culture, society and politics, yet its long-term effects are as unpredictable as the effects of the printing press at the time of the first books.[26]

What form, if any, the State will take long-term is largely speculative and will not be further discussed here. Nevertheless, one positive practical effect of abandoning the notion of statehood as a *sine qua non* without which law could not possibly function, is that it frees the debate on

[23] Again, there is a vast literature on this topic in various contexts. For one example, see Robert McCorquodale and Raul Pangalangan, 'Pushing Back the Limitations of Territorial Boundaries' (2001) 12 *European Journal of International Law* 867, 879: '[T]he exclusive territorial sovereign power of the state is being diminished and states are increasingly being shown to be unable to control the activities of transnational corporations.'

[24] Philip Allott, *Eunomia: A New Order for a New World* (Oxford: Oxford University Press, 1990), 329.

[25] Although there are some who argue that the sovereign State is already in the process of significant transformation. See, for example, Christopher Harding, 'Legal Subjectivity as a Fundamental Value: The Emergence of Non-State Actors in Europe', in Kim Economides *et al.* (eds.), *Fundamental Values* (Oxford: Hart Publishing, 2000), 115; cf. Peter Thomas Muchlinski, 'Globalisation and Legal Research' (2003) 37 *International Lawyer* 221 (where the author, although acknowledging various legal globalisation trends, cautions against overestimating the impact of supranational law).

[26] Karl Kaiser, 'Wie das Internet die Weltpolitik verändert' (2001) 3 *Deutschland – Zeitschrift fuer Politik, Kultur, Wirtschaft und Wissenschaft* 40, 45 (translation by the author). See also Saskia Sassen, 'The Impact of the Internet on Sovereignty: Unfounded and Real Worries', in Christoph Engel and Kenneth H. Keller (eds.), *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Baden-Baden: Nomos, 2000), 195, www.mpp-rdg.mpg.de/pdf_dat/sassen.pdf.