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Aims and Scope

The International Law FORUM covers all aspects of public and private international law with an unmatched interdisciplinary approach. Its authors include both distinguished practitioners and scholars as well as fresh, new voices in international law. The objective editorial policy allows readers to form their own opinions based on the balanced coverage and diversity of news presented.

Each issue contains: *Editorial*, *In the News*, *Recurring Themes*, a *Profile*, *Work in Progress*, *Conference Scene*, and the *Bookshelf* of a distinguished guest. Pocket-sized and affordably priced, the FORUM provides an accessible way for academics and practitioners to stay current in the field.

Thought-provoking and controversial, it is also up-to-date and truly international.

* * *

La revue FORUM du droit international privilégie une approche inter-disciplinaire sans précédent pour couvrir tous les aspects du droit international public et privé. Parmi les auteurs qui y contribuent figurent d'éminents praticiens, professeurs et chercheurs ainsi que de nouveaux auteurs en droit international. La politique objective de la rédaction permet aux lecteurs de se forger leur propre opinion basée sur la diversité des informations présentées couvrant de manière équilibrée l'actualité.

Chaque numéro comporte les rubriques suivantes: *Editorial*, *Actualité*, *Thèmes récurrents*, *Profil*, *Travaux en cours*, *Le tour des conférences* et *La bibliothèque* d'un éminent invité. De petite taille et pour un prix raisonnable, FORUM constitue un outil accessible pour les universitaires et les praticiens qui souhaitent suivre l'actualité du droit international.

C'est une revue à jour et réellement internationale qui pousse à la réflexion et à la discussion.

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*The opinions expressed herein are those of the authors and
do not necessarily reflect the views of the
International Law Association.*

Editorial

Volume 2, No. 3

This issue of the Forum is devoted almost entirely to examining the ways in which the exponential growth of the Internet is rapidly altering traditional notions of law. The advent of “cyberspace” raises issues in such varied fields as jurisdiction, intellectual property, securities regulation, criminal law, civil liberties, freedom of expression, privacy, libel, liability, dispute resolution, sovereignty, and national security. It seems only fitting that the very technology that has fostered the Internet explosion has stimulated the creativity of the international legal community and enabled it to respond to these new challenges with unprecedented speed and volume. A simple query to the major search engines reveals that there is no area or aspect of law, international or domestic, with a stronger presence on the World Wide Web than the “law” of Internet and cyberspace.

In an effort to further identify and explore this “law”, the Forum has asked a number of contributors to shed light on such elements as jurisdiction, norms, democracy and social repercussions. These contributions are synthesized in an introduction by the Forum’s Editor-in-Chief, Catherine Kessedjian, and our distinguished guest editor for this issue, Professor Katharina Boele-Woelki of Utrecht University.

The focus on “cyberlaw” carries over into other sections, with Marike Vermeer reporting in *Conference Scene* on the electronic commerce issues examined at the Fordham Conference on Intellectual Property Law and Policy, held in New York in April 2000. This issue of the Forum is not, however, monothematic: it also includes contributions on the temporal aspects of law (*Conference Scene*) and state succession (*Work in Progress*). Finally, *In the News* provides a brief summary of recent decisions by the International Court of Justice.

Regular readers of the Forum may notice the absence of two heretofore regular features: *Profile* and *Bookshelf*. These have not been discontinued, but had to be left out of the present issue because of space constraints caused by the length of the *Recurring Themes* section. The Editorial Board would warmly welcome your suggestions of persons to profile, and to invite to share the contents of their bookshelves, in future issues.

In the News / Actualité

International Court of Justice

Provisional Measures in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*

On 1 July 2000, the Court issued an Order indicating provisional measures in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.

The Congo's request for the indication of provisional measures was submitted to the Court on 19 June 2000. Referring to its earlier Application, dated 23 June 1999, whereby it initiated proceedings against Uganda, the Congo called its request "a direct outgrowth of the dispute".

That dispute involves alleged "acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity". The Congo has filed similar Applications against Rwanda and Burundi.

In its request for the indication of provisional measures, the Congo asserted that, despite unanimous condemnation, in particular by the United Nations Security Council, the resumption, since 5 June 2000, of fighting between the armed troops of the Republic of Uganda and another foreign army had caused substantial damage to it and to its population. The Congo accused the Republic of Uganda of pursuing a "policy of aggression, brutal armed attacks and acts of oppression and looting", constituting evidence of military and paramilitary intervention, and of occupation.

According to the request, "each passing day causes to the Democratic Republic of the Congo and its inhabitants grave and irreparable prejudice". The provisional measures sought from the Court included immediate and complete withdrawal of Ugandan troops from Kisangani; cessation of all military activity, of commission of war crimes, and of all illegal exploitation of natural resources on the territory of the Democratic Republic of the Congo; and respect for the sovereignty, political independence and territorial integrity, and the fundamental rights and freedoms of all persons on the territory of the Democratic Republic of the Congo.

Basing its finding of a *prima facie* basis upon which its jurisdiction might be founded in the present case on the two Parties' declarations recognizing the jurisdiction of the Court, the Court ordered both Parties to "prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make

it more difficult to resolve". It further ordered them to take all measures necessary to comply with all of their obligations under international law, in particular the Charters of the UN and the OAU, and UN Security Council resolution 1304 (2000) of 16 June 2000, and to take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.

The Court rejected Uganda's argument that, because the request for the indication of provisional measures filed by the Democratic Republic of the Congo on 19 June 2000 concerned essentially the same issues as the United Nations Security Council resolution 1304 (2000) of 16 June 2000 (with which it claimed to be in compliance), the Court should, as a matter of propriety and judicial prudence, refrain from indicating interim measures. The Court distinguished the political functions of the Security Council and the purely judicial functions of the Court, pointing out that "while there is in the Charter a provision for a clear demarcation of functions between the General Assembly and the Security Council . . . there is no similar provision anywhere in the Charter with respect to the Security Council and the Court".

According to the Court's Order, neither the presence of Ugandan forces engaged in combat in the territory of the Congo, nor the commission there of "grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities", could be disputed. This led the Court to conclude that "persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable, and that there is a serious risk that the rights at issue in this case . . . may suffer irreparable prejudice", and therefore, that "provisional measures must be indicated as a matter of urgency in order to protect those rights".

The Order emphasized that the indication of provisional measures in no way prejudged the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the merits themselves.

Case concerning Kasikili/Sedudu Island (Botswana/Namibia)

The Court gave its Judgment in this case on 13 December 1999. The Court had been asked to determine, on the basis of the Anglo-German Treaty of 1890 (an agreement between Great Britain and Germany regarding the spheres of influence of the two countries in Africa) and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island.

The Court found, (1) by eleven votes to four, that the boundary between the Republic of Botswana and the Republic of Namibia followed the line of deepest

soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island ; (2) by eleven votes to four, that Kasikili /Sedudu Island formed part of the territory of Botswana ; and (3) unanimously, that in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, the Republic of Botswana and the Republic of Namibia should enjoy equal national treatment.

Case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)

In its Judgment of 21 June 2000, the Court ruled on the question of its jurisdiction over the claim brought by Pakistan against India in respect of the destruction of a Pakistani aircraft. India had raised preliminary objections to the Court's jurisdiction.

The Court held, by fourteen votes to two, that India was entitled to invoke a reservation to its Declaration of 15 September 1974 accepting the jurisdiction of the Court under Article 36 (2) of the Statute. That reservation excluded from India's acceptance of jurisdiction all disputes involving India in respect of any State which "is or has been a member of the Commonwealth of Nations".

The Court held that it therefore had no jurisdiction to entertain the claim of Pakistan.

FM & BS

Recurring Themes / Thèmes récurrents

Internet – Introduction

KATHARINA BOELE-WOELKI* et CATHERINE KESSEDJIAN

Sans en avoir peut-être une pleine conscience, nous vivons une révolution sociale et économique dont nous ne pouvons encore tirer toutes les conséquences. La mise en réseaux d'ordinateurs personnels sur une échelle mondiale, avec des protocoles de langage de communication permettant à toutes ces machines de correspondre, d'envoyer et de recevoir des masses importantes de données et donc d'information, dans un laps de temps record et à un coût défiant toute concurrence, modifie profondément les éléments de base des sociétés dans lesquelles nous vivons (voir, notamment, les articles de D. Curtin, B. Stern et B. Taxil).

Cela commence par la langue utilisée. Il est bien entendu possible de traduire en langage ordinateur toutes les langues du monde. Mais est-il vraiment fortuit que la très grande majorité des sites soient en langue anglaise ? Certes, l'une des raisons est certainement que le réseau des réseaux (la Toile) a été mis en œuvre et développé d'abord aux États-Unis¹. Mais pense-t-on toujours suffisamment à la complexité du programme qui doit traduire plusieurs milliers de caractères japonais ou chinois nécessaires à la communication électronique dans ces langues ? De plus, tant que les ordinateurs ne seront pas équipés de programmes de traduction automatique si puissants et fiables qu'ils pourront être crus « sur parole », les internautes continueront à dialoguer dans une langue dont le niveau d'aisance est assez aisément atteint.

Mais la langue n'est pas seulement un véhicule de communication, c'est l'avenue de la pensée, la route par laquelle cheminent les concepts, la culture et les valeurs de la personne humaine et des communautés auxquelles elle appartient. L'utilisation prédominante d'une langue sur la Toile engendre une homogénéisation, un nivellement des cultures. Certes, d'aucun penseront que ceci étant inévitable, il est inutile de le déplorer. Les auteurs de cette introduction, responsables de la rubrique dans laquelle elle prend place, se situent parmi ceux qui veulent tout mettre en œuvre pour éviter ce qu'elles considèrent comme un appauvrissement et une régression. Comme la pensée unique en politique (qu'elle soit interne ou internationale),

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¹ Toutefois, le langage de communication a été inventé par un chercheur du CERN.

la culture unique est nécessairement le résultat d'une domination d'une culture sur les autres. Le langage binaire des ordinateurs, pour certaines mauvaises langues, serait le reflet de l'appauvrissement de la culture. Nous laissons nos lecteurs deviner où va notre préférence.

La Toile constitue désormais une communauté à part entière (pour un exemple pris dans la communauté des juristes, voir l'article de J. de Kreek). Mais cette communauté n'est pas accessible à tous. Le fossé digital (the digital divide) sépare à nouveau profondément les pays développés de ceux qui, moins développés ne peuvent mettre à la disposition de leurs citoyens les moyens matériels leur permettant de participer à cette nouvelle communauté. Certes, quelques initiatives peuvent être saluées pour essayer de minimiser ce fossé². Mais à l'heure où se mettent en place les normes qui vont présider au fonctionnement de cette communauté pour de longues années à venir, il est fort à craindre que, comme par le passé, ce soient les pays développés qui dictent leur volonté aux autres. Chacun d'entre nous, dans les fonctions qui sont les siennes, doit être vigilant à cet égard.

Pour être une communauté humaine, celle des internautes présente des particularités qui lui confèrent un caractère unique. Tout d'abord, les psychologues notent que les internautes ressentent une immunité beaucoup plus grande lorsqu'ils agissent à travers la Toile que si leur comportement prenait place dans le monde matériel habituel. Cela tient au caractère impalpable des communications électroniques (d'où la notion de virtualité si souvent utilisée pour les décrire) encore accru par la possibilité d'organiser son anonymat³. On parle désormais de « cyber-guerre » en notant que la guerre du Kosovo a été une guerre d'information via la Toile, comme la guerre du Golfe l'avait été via la télévision. Les hackers qui « prennent d'assaut » et détruisent les sites de leurs adversaires ne se sentent certainement pas aussi responsables que s'ils devaient entrer par effraction dans des bureaux et brûler des masses de documents, sans parler de l'impossibilité probable pour les « forces de l'ordre » de « mettre la main » sur eux⁴.

² Voir, notamment, la publication par l'UNITAR et l'UNESCO du CDrom "Internet au Sud" rendant accessibles des informations multiples et fort utiles dans le cadre du développement d'Internet.

³ Cet anonymat est contraire aux principes qui ont présidé à la création d'Internet puisque, au début, la Toile était régie par le principe selon lequel, chaque machine connectée ayant une identification, elle pouvait toujours être reliée à une personne ou une entité donnée. Désormais, des logiciels sont proposés qui détruisent toute trace interdisant ainsi de pouvoir remonter la chaîne des identifications.

⁴ Les exemples récents de succès rencontrés par les forces anti-piraterie informatique aux Etats-Unis n'ont été possibles que parce que les hackers en cause ont bien voulu laisser des traces de leurs infractions.

De plus, les comportements sur la Toile ont le don d'ubiquité. Les conséquences sont ressenties par un très grand nombre de personnes, situées dans des pays très éloignés les uns des autres. Ces caractéristiques posent aux juristes des questions qui, sans être nouvelles en elles-mêmes, n'en sont pas moins renouvelées dans leurs composantes et leur ampleur. Par exemple, il devient de plus en plus douteux que l'on puisse maintenir la distinction des activités nationales ou internes par opposition à celles qui sont internationales. Sur la Toile, toute activité est internationale par nature. Mais le débat de savoir si l'Internet exige ou non des normes nouvelles différentes et séparées (voir les articles de S. Guillemard et de D. Goddard) a encore de beaux jours devant lui.

Par ailleurs, l'utilisation de plus en plus fréquente de robots, logiciels d'intelligence artificielle, permettant à chacun d'entre nous d'analyser des centaines d'information et d'en tirer des conséquence économiques ou juridiques, adaptées aux besoins spécifiques prédéfinis, peut modifier profondément les rapports de force des intervenants dans cette nouvelle communauté, notamment les rapports entre professionnels et consommateurs.

Le don d'ubiquité de la Toile et son caractère décentralisé renforcent aussi la remise en cause des Etats en tant qu'organisations politiques établies sur la base de frontières géographiques permettant de préserver leur souveraineté territoriale. Quelles seront exactement les conséquences d'Internet pour les Etats Nations ? Seront-ils remis en cause par cette nouvelle démocratie directe ou libertaire (voir l'article de L. Müller) ? C'est encore trop tôt pour le dire. Toutefois, on peut déjà remarquer la grande difficulté que chaque Etat rencontre lorsqu'il cherche à lutter, unilatéralement et de manière isolée, contre des comportements qu'il considère comme illicites. L'affaire Yahoo, encore pendante devant les tribunaux français à la date où nous bouclons ce numéro de FORUM, en est le meilleur paradigme. Dès lors, c'est avec un regain d'actualité que l'on doit examiner l'assertion de compétence par les Etats sur les activités électroniques (voir l'article de T. Vartanian).

Nous pourrions poursuivre longuement cette liste de caractéristiques spécifiques qui doivent être prises en considération par le juriste pour réfléchir aux questions normatives qui se posent. Toutefois, comme chacune des contributions qui suivent mentionne les éléments qui paraissent essentiels à l'auteur pour sa propre réflexion, nous préférons limiter cette introduction aux aspects qui nous ont paru les plus significatifs pour une réflexion générale de juriste sur Internet et le commerce électronique.

Nous avons donc demandé à des auteurs de presque tous les continents de s'exprimer sur ces questions. Nous les remercions vivement d'avoir accepté de partager leurs idées avec nous. Bien entendu, nous avons conscience de ne pas avoir épuisé le sujet, loin de là. Nous avons abordé seulement quelques questions,

et encore de manière incomplète. Mais nous offrons aux lecteurs de FORUM une première ébauche sur laquelle nous continuons à travailler. Le tableau complet sera complété par touches successives, comme nos maîtres impressionnistes nous ont appris à le faire.

Democracy and the Internet: The European Union in the Avant-garde?

DEIRDRE M. CURTIN*

1. Introduction

The potential of the Internet for democratic theory and practice is both radical and under-explored to-date. It is however a truism that advanced information technology is changing the nature of the physical world we live in, a physical world in which borders are rapidly becoming irrelevant. Cyberspace has a clear relevance for democratic theory in several respects. Digital networks potentially transform the way we create, exchange and access information as well as the way we interact in private and in public. It is the facilitation of a genuine social dialogue among citizens by the new means of communication which can be of such significance to democratic theory. Digitisation opens up social dialogue to more people by enhancing the accessibility of means of creation and communication. It not only enhances the ability of individuals to access relevant information that may be crucial for will formation purposes but also enables individuals to access the deliberative process as active participants rather than as simply passive receivers of messages and information.¹ Deliberative democracy stresses the formative nature of politics which it understands as an ongoing dialogue among citizens. It emphasises active dialogic participation rather than the sporadic passive procedural participation (voting) as the key for democratising decision-making processes. However one understands democracy access to information is a sine qua non of the crucial will formation processes. The public cannot participate in government decision-making unless it knows what the government (or the bureaucracy) is up to. And public participation necessarily renders government decision-making more transparent. Public access to information (or documents) has long been considered highly appropriate to ensure that a lively public debate took place with the possibility of participation and deliberation by the public and their associations on issues of public relevance and concern.²

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¹ See further, D. Curtin, *Postnational Democracy. The European Union in Search of a Political Philosophy*. (Kluwer, 1997)

² See further, D. Curtin, "Civil Society and the European Union: Opening Spaces for Deliberative Democracy?" in *Collected Courses of the Academy of European Law*, Volume vii, Book 1, pp. 185-280.

Access to information about political and administrative decision-making processes has long been associated with an ideal of Nation-State democracy. What is new is the increasing awareness of the importance of the subject at the international level and the attempt to implement it in the context of several international organisations (for example, the World Bank, the United Nations, the Council of Europe et cetera). The point of interest for the current contribution is that it is the European Union which is slowly (and at times perhaps even hesitantly) emerging as a pioneer among international organisations in that regard. Moreover, the path it has embarked upon may force some Member States to reconsider the adequacy and appropriateness of their legal regulation in that regard. For other more advanced national systems the struggle is rather to ensure that the adoption of freedom of information provisions at the EU level does not undermine the achievements in that regard at the national level. Finally in the evolution of the principle of access to information as a key element of the democratisation process of the EU Internet has played at times a surprisingly pivotal role in forcing the pace of change. The digital phenomenon has in practice facilitated a rather active transnational social dialogue among citizens of the EU and their associations enabling unforeseen and informal access to the deliberative process. This effect will be briefly documented in section 3 of this contribution. First it is however necessary to understand the status quo and context governing the regulation of access to EU information by members of the public.

2. A bird's eye view of EU access to information

Access to information is a relatively new topic for the EU.³ Its first appearance was in the aftermath of the Treaty of Maastricht in 1993 and the reality of much public disillusionment with the European integration process as well as the evident alienation of the public in various Member States from the political decision-makers. This led to the adoption on a purely voluntary basis of decisions by various institutions and organs granting the public access to their documents. These decisions were based on the respective institutions' internal rules of procedure and were adopted in the absence of any general regulation of the subject at the level of the EU or any explicit Treaty provision. Nevertheless these decisions laid down a clear procedure to be followed in the event that a member of the public's access to information was refused. The latter could either bring the matter before the EU Ombudsman who would investigate whether any maladministration had taken place and make recommendations to the institution in question or alternatively bring a case to the Court of First Instance in Luxembourg (and on appeal to the

³ See further, D. Curtin, "Citizens Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?", 37 *Common Market Law Review* (2000), pp. 7-41.

Court of Justice). The latter route has been used quite often over the course of the past five years with the result that there is now an established body of case-law on the subject with the Court being given the opportunity to tease out the procedural and substantive parameters of the principle at the EU level.

In the early test cases which came before the Court of First Instance the Court adopted a rather cautious approach, insisting that the decisions refusing access must be properly reasoned but otherwise steering clear of any limitation of the discretion of the institution in question as to the actual access to the information in question. In so doing the Court has stressed the function of the rules adopted by the institutions as being to ensure that their internal operation is in conformity with the interests of good administration. Such terminology does not at first sight imply a very fundamental standard and certainly does not conceive the issue in terms of fundamental rights or principles. Nevertheless the Court has gradually moved in more recent case-law to impose more exacting standards on the institutions in question as well as to emphasise the fundamental nature of the principle in question (it even speaks recently of a right to information). The Court moreover has imposed a balancing of interest requirement on the institutions when considering whether to refuse access to specific documents under the so-called “discretionary” exception (“the interest of the institution in the confidentiality of its own proceedings”). Moreover it requires the Council (and implicitly the other institutions) to grant partial access to their documents if necessary by the practice of “blinking out” confidential information before granting access. In more structural terms it has ruled that the principle applies not only to those institutions and organs which adopted specific decisions on access to their documents but that it also applies in a vertical sense within the scope of operation of such institutions. This means in particular that the expert, advisory and working parties of the Council are covered by the obligation to provide access and also the notoriously opaque comitology committees within the Commission. And finally in this initial phase the Court of First Instance also interpreted the principle of granting citizen access to documents of specific institutions as applying not only to the so-called “supra-national” European Communities but also to the inter-governmental policy areas included in the Treaty of Maastricht (justice and home affairs and foreign and security policy). This latter interpretation in particular considerably broadened the reach of the principle of access to information at the EU level. The Court’s role in this initial period was essentially one of filling the legislative and Treaty breach on the subject. The Treaty of Amsterdam put an end to this period by including a specific Treaty base (Article 255TEC) for more general Union regulation on access to information. However this secondary legislation was specifically limited to three EU institutions only (the Commission, the Council and the European Parliament), the main actors

in the EU decision-making processes. Nevertheless it marked the beginning of a new era with a specific Treaty provision removing the subject from the realm of internal decision-making once and for all. Moreover Article 1 of the Treaty on European Union itself indicated in what fundamental terms the principle has henceforth to be considered. It provides that: "This treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen". I have argued elsewhere that this provision is so fundamental to understanding the nature of the European Union that it can be considered as constituting an "object and purpose" of the Treaty on European Union within the meaning of Article 18 of the Vienna Convention on the Law of Treaties.⁴ The next phase in the access to information story will undoubtedly be the adoption of the piece of secondary legislation provided for in the Treaty of Amsterdam itself. The Commission published a short time ago a draft regulation providing citizen access to the documents of the Council, the European Parliament and the Commission itself.⁵ In accordance with the procedure laid down in the Treaty this draft regulation must be adopted in accordance with the so-called co-decision procedure, in other words jointly by the Council and the European Parliament. This very fact will ensure a more open deliberative process than adoption by the Council on its own which as is well known still legislates in certain policy fields behind closed doors.

3. Civil society and the Internet: testing some limits of access to information

The advent of Internet has been of significance in at least two respects concerning the evolution of the principle of access to information at the level of the European Union. First some of the institutions have adopted a rather pro-active approach to putting much of the information relating to decision-making processes on the Internet. For example, it is not uncommon for many of the institutions and organs of the EU to have their own web guide to their own information and decision-making processes and even to at times put some information on the Internet which would not otherwise be publicly available and accessible. However on the whole the institutions and organs have a tendency to restrict the available information to that which will ultimately be printed as, for example, is the case with regard to the Court of Justice and the availability of Court judgements on the Internet immediately they are pronounced. The Council is in my view the front-runner in this regard these days in terms of the amount and usefulness of the information it pro-actively makes available on the Internet. A particularly far-reaching initiative on its part is

⁴ See, D. Curtin, *op. cit.* n. 2.

⁵ Not yet published in the Official Journal.

to add to its Europa-server as and from 1 July a register of all its documents, long in advance of their being a legal obligation to even establish a register of information.⁶ The second way in which Internet has been used is on the initiative of organised civil society. One particularly active civil rights non-governmental organisation in the UK, Statewatch, has been responsible for making available on its web page a host of information relating to the actual rule-making process regarding EU access to information which would not otherwise have entered into the public domain.⁷ As a result of such unofficial “leaking” into the public domain civil society (and national parliaments) have been able to take cognisance at a very early stage in the decision-making process and have been able to participate in a deliberative process on the subject with feed-back into the formal political process.

The first example of civil society input arose, curiously enough, in the context of the process of decision-making concerning the legal instrument to be adopted post-Amsterdam on access to information. Remarkably the Commission did not formally issue a discussion paper on the subject nor did it consult widely with interested actors before actually drawing up draft legislation. Its approach was largely to focus on certain practices in individual Member States and to attempt to transplant them to the EU context. What is moreover particularly striking is the fact that the Commission in what was meant to be draft legislation applying to three EU institutions focussed on problems which it as an institutions had experienced in practice and which thus acquired disproportionate emphasis in its final draft. This led to what can only be considered as highly questionable restrictions on the scope of the proposed legislation. Not surprisingly the Commission's approach has been the subject of quite some criticism as indeed has the substantive content of its proposal. The draft regulation contained a number of provisions which a substantial body of expert opinion believes would constitute a step backwards compared with the status quo prior to the adoption of such a regulation. It is beyond the scope of the current contribution to detail at any length the content of the Commission's proposal other than to mention that it is problematic in three key regards. First, the Commission proposes to exclude from the scope of the regulation all “internal documents” of the affected institutions in order to provide their officials with the requisite “space to think”. In particular it proposes to exclude all E-mail messages from the scope of the regulation as being, in its view, more in the nature of “telephone conversations”. This proposal flies in the face of the ever-increasing reality that

⁶ See, for the Register of the Council, <http://register.consilium.eu.int/>. See the European Council at <http://ue.int/en/info/eurocouncil> ; the Commission at <http://europa.eu.int/comm/sg/citguide/en/citgu.htm> and Europol at <http://www.europol.eu.int/> .

⁷ See, <http://www.statewatch.org/news1.htm>.

E-mail is being used more and more extensively to agree texts of provisions between civil servants in national capitals and civil servants in Brussels. Second, the Commission interprets the notion of “public interest” as consonant with a wide variety of (Union and private) interests which would enable the institutions in question to refuse access to the documents requested and constitutes a wider range of exceptions than is currently the case. Finally, the suggestion is implicit in the Commission’s proposal that once this regulation enters into force then citizens will no longer be able to obtain access to EU documents under national access laws which are more favourable. In other words the EU regulation will in practice take precedence over national legislative and constitutional provisions over an increasingly broad range of policy areas. This is obviously a highly problematic result given that action at the EU level is meant to increase the rights of citizens at national level by supplementing the existing status quo.

Fortunately even before the Commission’s controversial draft saw the light of day civil society was alert and active. Statewatch again obtained copies of drafts before they had been agreed upon by the Commission formally as a body in December 1999. They immediately were put in full on the web page of Statewatch and thus entered the public domain. Organised civil society and in particular journalists and non-governmental organisations with whom Statewatch maintained contact were informed about the direction that the proposal of the Commission was taking and were enabled to engage in a deliberative process as a result, also alerting national political representatives and other interested parties. The outcome in a nutshell was a revised proposal (albeit still problematic in certain respects) adopted by the Commission after the Christmas and Millenium recess.

The second Internet “incident” involving the Commission speaks volumes about the difficulty in getting institutions with a long and entrenched culture of secrecy to actually change their culture and their mentalities. The EU Ombudsman, a Swede and a rather new institution at the EU level, took the unusual step of publishing a criticism of the final official Commission draft regulation on access to information in the *Wall Street Journal Europe*. The title of his article was “The Commissions transparent bid for opacity” and his comment to the effect that: “Alas, what the present system seems to do is offer token measures of transparency while making it possible for some of the Commission’s most important work . . . to remain cloaked in secrecy. Former Research Commissioner Edith Cresson once defended such a system by saying that it makes public administration more effective. That argument looks particularly rich in the light of the shenanigans that went on during her tenure on the Commission.”⁸

⁸ *Wall Street Journal*, 24 February 2000.

The Commission President Romano Prodi was by all accounts furious at this public denouncement from an unexpected source within the EU but outside the formal political decision-making process. He not only published a rebuttal (a rather ill-informed one on several key points) in the same newspaper but in addition took the extraordinary step of writing confidentially to the President of the European Parliament seeking, as the body which had appointed the Ombudsman, that the Ombudsman be (severely) disciplined.

The point of interest in the current context is not so much the sensitivities of institutional balance at the EU level but the fact that this entire correspondence (with reply and counter-reply) almost immediately appeared on Statewatch's web site and thus dramatically entered the public domain. Not surprisingly MR. Soderman's attempt to give the perspective of the EU citizen was not censured by the European Parliament nor the subject of further action by Europe's political leaders. But clear lessons have emerged from the use of an organisation such as Statewatch of the Internet. No longer can our decision-makers shelter behind their opaque walls but must start coming to terms with the fact that what they consider confidential letters and even E-mails may well fall within the scope of access to information provision. Moreover, the weapon of the Internet can be used to great practical effect by a civil society which is becoming increasingly alert and mobilised and using Internet with verve and aplomb.

4. Conclusion

Is the European Union really committed to transparent administration? And how can one be serious about open administration and not be prepared to conduct the debate on its reform openly? Fortunately civil society watch-dogs are there fulfilling a public function informing and stimulating public deliberation and debate, and using the technological means available including the Internet to great practical effect. As an international organisation it is my belief that the EU is definitely in the avant-garde in terms of the amount of information it voluntarily puts on Internet (as well as ultimately in making it available elsewhere). But it can and probably will go substantially further. For example, I believe that the institutions and organs of the EU should be obliged to pro-actively make available via Internet any documents or other information which they have granted access to individual citizens. Moreover, one might consider imposing an obligation on all the institutions and organs of the EU to put the registers of all their documents and other information on the Internet (including those documents which can be considered partially or entirely subject to a confidentiality obligation). This would at least enable the citizens and their representatives to know what information is available and how it can be accessed.

The imposition of such obligations really is the vista of the future and provides the means of radically reducing the financial and physical barriers to granting access to information by means of finding, copying and distributing paper documents. By using search engines and hyperlinks the citizen or his representatives is able to decide what information is relevant, the reproduction is perfect and more or less free and can be accessed at any time in any place. The development of such specific obligations can arguably also be viewed in the context of fundamental rights, in particular the possibility that a right to digital information will evolve, a right suitably tailored and fashioned for the new millenium.⁹ The implications of digital access for democratic theory are striking and important also from the perspective of democratic accountability and control in a sophisticated international organisation such as the EU.

⁹ See further, M. Bovens, *De digitale rechtsstaat: beschouwingen over informatiemaatschappij en rechtsstaat* (1999, Samson).

Internet comme système social

BRIGITTE STERN et BÉRANGÈRE TAXIL*

1. Introduction

« Assiste-t-on à la naissance d'un nouveau monde ? », s'interroge, à propos d'Internet, Isabelle Falque-Pierrotin, rapporteur général du rapport du Conseil d'Etat français paru en 1998 sur « Internet et les réseaux numériques ».

Depuis son apparition à la fin des années 1970, le réseau Internet est devenu un outil de communication et d'information pour tous.

Internet remet-il en cause les structures établies et favorise-t-il l'émergence, même si c'est de façon relativement embryonnaire, d'une nouvelle structuration de la société des hommes ? Autrement dit, la technique à l'œuvre sur la Toile est-elle un moyen de transformation radicale du lien social ?

On sait que la technique n'est jamais neutre : elle est le produit d'une société, comme elle la produit. S'il est vrai qu'il y a une part de vérité dans les affirmations de Mac Luhan selon lesquelles « le message c'est le média, parce que c'est le média qui façonne le monde », il apparaît a priori évident qu'Internet, qui bouleverse la manière dont les hommes communiquent entre eux, ne peut pas ne pas avoir des répercussions sociales profondes, même s'il est sans doute trop tôt pour faire plus que les esquisser.

Internet crée indiscutablement une nouvelle inscription de l'homme dans l'espace-temps, aussi bien à l'échelle nationale qu'internationale, si tant est que ces distinctions puissent encore faire sens face à ce nouveau média. Quelles sont les conséquences de cette nouvelle donne ? Il est clair qu'Internet crée une plus grande fluidité dans les rapports traditionnels, une « facilitation » du lien social¹. Mais ce ne sont là que des différences de degré. La question se pose de savoir si Internet ne bouleverse pas la nature même des relations sociales, inventant par la même une nouvelle société.

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¹ Ainsi certains se plaisent à souligner qu'Internet peut favoriser la démocratie. Les organes étatiques sont plus accessibles, par exemple par le biais des sites officiels. On peut aussi bien avoir accès aux travaux de l'Assemblée nationale française ou du gouvernement français, que du Congrès américain et de la Maison Blanche. La transparence du travail législatif est un atout pour la démocratisation. Le recours des citoyens au courrier électronique devient plus fréquent, pour exposer leurs attentes aux élus qui les représentent. Dans l'autre sens, on assiste à la création de nombreux sites web des autorités publiques qui collectent les opinions et doléances.

2. D'un système social vertical à un système social horizontal ?

Nos systèmes sociaux sont avant tout basés sur un fonctionnement vertical, hiérarchisé. Entre la base et le sommet, il n'existe pas en principe de relations directes ; elles sont médiatisées par une foule d'intermédiaires, médias, groupements politiques, économiques etc. Nos sociétés sont hiérarchisées à tous les niveaux. Par exemple, l'ouvrier d'une grande entreprise, souhaitant communiquer avec son employeur, doit franchir plusieurs intermédiaires (chefs de service, représentants du personnel, etc.) pour présenter ses doléances. De même, le citoyen ne dispose pas (ou peu) d'accès direct aux élus, locaux comme nationaux.

Internet permet des rapports directs, sans médiation, entre individus, où qu'ils se trouvent dans le monde, favorisant ainsi un fonctionnement social à caractère horizontal, qui vient renverser l'ordre ancien.

L'individu réside désormais au centre du monde, pouvant avoir instantanément accès à l'universel : il a accès à l'information, il a accès à la parole, il a accès à l'économie, il a accès au monde. On est même allé jusqu'à parler de « cybercitoyenneté planétaire », ce qui paraît cependant aller un peu loin dans l'immédiateté du rapport entre l'individu et la planète toute entière.

On sait que l'*information* est une richesse qui accroît le pouvoir de celui qui la possède. Il y a aujourd'hui une extraordinaire diversification des sources d'information, et un accès ouvert et gratuit à toutes les données ainsi véhiculées. Internet favorise donc une diffusion du pouvoir. Le savoir n'est plus détenu par quelques-uns au sommet d'une hiérarchie du savoir, mais est de plus en plus disséminé : prenant ce phénomène en compte, Microsoft vient, par exemple, de recruter des adolescents comme consultants pour orienter sa stratégie. La hiérarchie des pouvoirs est ébranlée.

Il peut désormais y avoir une *prise de parole* directe par chacun, pris dans sa singularité : forums, sites militants, communautés d'intérêts témoignent du foisonnement des interactions qui se produisent sur le réseau. Internet, essentiellement par le biais du web, des groupes de discussion et du courrier électronique, permet une communication immédiate, riche, diversifiée. Est-ce un hasard si Internet a explosé au moment de la fin des idéologies qui prétendaient détenir une vérité pour tous ? Toujours est-il qu'il sert de support à une prolifération de discours, une multiplication des pôles culturels. Internet apparaît ainsi comme un outil de diffusion de tous les discours, aussi bien les discours dominants que les discours contestataires. La hiérarchie des valeurs est ébranlée. La diversification culturelle a cependant ses limites, si l'on sait que 80% des sites web sont en anglais, alors que moins de 10% des personnes dans le monde maîtrisent cette langue.

Au niveau de *l'économie*, il est dès à présent concevable de pouvoir facilement participer à la vie économique d'un pays sans être président d'une grande entreprise.

Le phénomène des “starts-up” en est un exemple parmi d’autres. La dépendance économique du réseau envers Microsoft est en passe d’être compensée par l’apparition de logiciels libres et gratuits (comme Linux, par exemple), qui proposent les mêmes services et constituent un élément supplémentaire de fluidité.

Nouveau démiurge, grâce à la puissance d’Internet, l’individu isolé, seul face à son ordinateur, se sent un peu comme le *maître du monde* : il est le seul à tenir la barre de sa propre « navigation » sur Internet, lorsqu’il ouvre son ordinateur, s’il n’est pas déjà « connecté » en permanence. Le récit de soi peut enfin advenir sans contraintes : l’internaute peut même vouloir se donner corps et âme en spectacle au monde, d’où le succès des sites sur lesquels certains ont choisi de dévoiler tous les recoins de leur vie sur la place publique mondiale.

Quelles sont les conséquences de ce délitement du tissu social traditionnel ?

Cette abolition d’un lieu d’ancrage, d’une inscription claire dans l’espace-temps fait d’Internet une sorte d’espace en apesanteur qui échappe à la « surdétermination verticale des pesanteurs socio-économiques et des codes culturels dominants »². Il semble donc qu’il y ait là, dans cette création d’« horizontalité », un extraordinaire facteur de liberté.

3. D’une société internationale formée d’Etats à une communauté sans frontières ?

Internet est indifférent aux frontières et donc, dans une certaine mesure, à l’emprise étatique sur les individus, notamment à la censure. Le réseau permet ainsi de relier des personnes parfois extrêmement éloignées, provenant de cultures différentes, pour un coût minime. Le réseau permet des relations d’intégrations croisées entre les Etats, les économies, les sociétés, les individus. Internet apparaît ainsi incontestablement comme un puissant facteur de mondialisation, qui est elle-même porteuse d’une certaine uniformisation, partiellement contradictoire avec le foisonnement des discours rendus possibles par le web.

Internet renouvelle également le rôle de la société civile face à la société politique que constitue l’Etat. Naguère la société civile s’exprimait au sein des Etats, désormais, grâce à Internet qui facilite la mobilisation politique au niveau international, la contestation ou l’action se font planétaires et mettent en cause les Etats de l’extérieur. Les exemples peuvent être multipliés : “C’est ainsi grâce à l’Internet qu’un débat s’est ouvert en France, début 1998, sur l’AMI de l’OCDE, qui avait échappé à l’attention des médias”³; les contestataires de Seattle ont fait savoir que leur mobilisation

² Marie Josèphe Bertini, « La prise de parole, clef de voûte d’un monde en réseau », *Etudes*, avril 2000, p. 484.

³ Thierry Vedel, “L’Internet et la démocratie”, in *L’Internet*, Cahiers français de la Documentation française, no 295, mars-avril 2000, p.27.

n'aurait jamais été un tel succès sans l'utilisation des réseaux électroniques⁴. De plus, Internet fournit des moyens d'action inédits aux opposants : c'est ainsi, par exemple, que les Indiens du Chiapas et le colonel Marcos ont fait connaître et soutenir leur cause dans le monde entier, grâce à une mobilisation par Internet ; c'est ainsi également que les Tigres Tamouls – rebaptisés pour l'occasion les Tigres noirs de l'Internet – ont bloqué les boîtes aux lettres électroniques de toutes les ambassades sri-lankaises dans le monde.

Internet facilite donc le surgissement de réseaux sociaux internationaux, qui ne prennent consistance qu'à travers les multiples liens créés sur son réseau et qui ont une dimension, une crédibilité, une force qui leur permettent d'entrer en confrontation avec les Etats.

4. Internet, un nouveau structuralisme mondialisé ?

Si Internet bat en brèche les structures nationales ou internationales qui existent, sommes-nous pour autant en train de vivre la naissance d'une nouvelle société ?

On est indiscutablement au-delà d'un simple phénomène technique : comme le souligne une publicité affichée récemment sur les murs de New-York, il y a « *A human behind every click* ».

Les métaphores en tout cas ne manquent pas, qui soulignent que le réseau qui est en train de se développer sous nos yeux est porteur de sens. Certains ont pu souligner que la vie sur Internet ressemble à la vie urbaine, avec ses accès (portails), sa circulation gratuite sur les trottoirs d'Internet et sur les autoroutes de l'information, ses cafés (forums de discussion), ses boutiques (e-commerce), ses lieux de loisirs (sites musicaux, musées virtuels), mais aussi l'insécurité (hackers, cybercriminalité⁵). D'autres y voient encore un degré d'intégration supérieure, Internet étant parfois identifié à un nouveau corps social ayant même ses maladies (virus) qui se propagent comme des épidémies, même si ce sont des épidémies d'amour (*Iloveyou*)... Il est vrai que comme les êtres humains et les systèmes très complexes, Internet est fragile, comme en témoignent diverses alertes mondiales...

S'il y a atomisation des individus, destructuration des groupes sociaux traditionnels, il y a aussi création de nouveaux liens, en apparence plus anarchiques mais sans doute fondés sur des convergences essentielles de sensibilités, de goûts, de culture.

Internet est une société ludique, inattendue, où les liens hypertextes permettent une créativité multipliée. Internet est également une société conviviale, puisque

⁴ Voir le site www.super-secrétaire.com, réseau de sites web organisant l'opposition à cette conférence.

⁵ En 1999, 60% des 520 plus grosses sociétés américaines ont été victimes d'actes de piraterie.

l'adresse électronique devient une sorte de point d'ancrage au delà des déplacements et déménagements, qui permet de rester en contact, puisqu'également la multiplication des moteurs de recherche permet aujourd'hui, avec son seul nom de retrouver l'ami d'autrefois perdu de vue depuis si longtemps...

5. Espace de liberté absolue ou de liberté contrôlée ?

Toute société a besoin de normes de régulation⁶. Est aujourd'hui posé le problème de l'articulation entre l'espace de liberté que constitue Internet et les espaces nationaux, qui relèvent des structures verticales de pouvoir mentionnées antérieurement.

Entrent en considération ici aussi bien des données techniques que des données juridico-philosophiques.

Selon Lawrence Lessig, professeur de droit à Harvard, Internet est déjà surdéterminé et contrôlé par des *lois invisibles* qui régissent l'architecture du réseau, règles d'autant plus anti-démocratiques qu'elles sont inconnues : dans un article publié par *Libération* le 2 juin 2000, il donne ainsi l'exemple de l'architecture d'AOL (American On Line) où il n'y a pas d'espace public prévu pour que des centaines d'internautes puissent se rencontrer, mais seulement des « *chat rooms* » où un maximum de 23 personnes peuvent discuter ensemble.

Mais au-delà de ces déterminants techniques se pose le problème de la réglementation juridique. La philosophie américaine, inscrite dans la liberté d'expression absolue garantie par la Constitution américaine s'oppose à la philosophie latine, pour laquelle le respect de certaines valeurs fondamentales pose des limites à la liberté d'expression.

Deux écoles émergent donc : celle de l'*auto-régulation*, qui laisse aux utilisateurs le soin de gérer le système au mieux, et celle d'un *contrôle juridique* plus ou moins souple, et modulé selon les domaines concernés : respect de l'ordre public, confidentialité des données personnelles, e-commerce et protection des consommateurs.

Le contrôle des données qui circulent est extrêmement difficile, mais les Etats ne renoncent pas pour l'instant à l'imposer dans certains cas : à titre d'illustration, le juge des référés du tribunal correctionnel de Paris, se fondant sur sa compétence territoriale, vient d'ordonner, le 22 mai 2000, à la société Yahoo, fournisseur d'accès, de rendre impossible l'accès pour les internautes français, aux sites de vente aux enchères proposant des objets nazis. Déjà se profile l'idée d'un passeport électronique permettant des accès sélectifs aux seuls sites qui ne sont pas illégaux selon la loi

⁶ « Si Internet est la métaphore de la ville », nous dit François Ascher, « l'ordinateur personnel est une métaphore de la maison. Nul doute que demain surgiront des policiers et des vigiles, en plus des portes blindées et des alarmes », in « Bienvenue à Internet ville », *Le Monde*, 10 mars 2000, p. 17.

nationale du détenteur du passeport... Les frontières ont la vie dure... On arrive à ce paradoxe qu'Internet, qui est par excellence sans frontière, va se trouver confronté à la nécessité de respecter les lois des différents Etats.

Certains Etats (Irak, Corée du Nord, Libye) n'offrent aucun accès à Internet. Les Etats qui, comme la Chine (exemple typique mais loin d'être unique), interdisent l'accès à de nombreux sites, sont confrontés à l'impossibilité de tout contrôler : le *Monde interactif* du 31 mai 2000 souligne ainsi qu'« en dépit de la volonté officielle, la Grande Muraille virtuelle ne peut être érigée ». D'autres Etats utilisent des moyens de censure indirects : l'Arabie saoudite par exemple, fait passer toutes les connexions Internet par un Centre des sciences et de la technologie, et utilise des « *firewalls* » pour interdire l'accès aux sites proposant des informations « contraires aux valeurs islamiques ».

Le visage de la nouvelle société en train d'être façonnée par Internet va essentiellement dépendre du système de régulation qui l'emportera.

6. Conclusion

Internet ne peut en tout cas être qu'une matrice de la nouvelle cybersociété, plus ouverte, plus libre, plus conviviale, qui se dessine sous nos yeux, car il ne touche à l'heure actuelle qu'un nombre restreint de personnes. Dans une vision particulièrement pessimiste du phénomène, Internet peut aussi être facteur d'inégalités : à l'intérieur d'une même société, entre ceux qui peuvent disposer de l'outil technique et des connaissances d'utilisation, et les autres ; davantage encore entre les pays développés et les pays en développement. Le rapport mondial sur le développement humain du PNUD de 1999, contient ainsi un chapitre très critique sur les "nouvelles technologies et la course mondiale au savoir". Sait-on qu'il n'y a que 1% de la population mondiale qui a aujourd'hui une adresse électronique ? Et que les pays de l'OCDE avec 19% de la population mondiale comptent 80% des utilisateurs d'Internet ? Ou encore que dans l'espace Europe/Etats-Unis, 1 personne sur 6 utilise Internet, alors qu'en Afrique ce chiffre est de 1 personne sur 5000 ? L'internaute typique est en effet un homme de moins de 35 ans ayant fait des études supérieures, disposant de revenus élevés, parlant anglais et habitant une ville occidentale. Une proposition du PNUD vise à pallier ce handicap : elle consiste à établir une taxe de 0,01 dollar sur chaque centaine de messages électroniques...soit 7 centimes : cela représenterait 70 milliards de dollars par an pour aider les pays en développement à s'équiper en ordinateurs : cela serait également un nouvel aspect de l'aide au développement, à laquelle chaque individu pourrait participer. Mais ce ne sont là pour l'instant que des spéculations...

Serions-nous, comme souvent, devant un nouveau moyen technique, qui peut se révéler la meilleure ou la pire des choses selon l'usage qu'en fera l'humanité, et qui peut donner naissance à un système social étouffant ou libérateur ?

Cybersociety

LORENZ MÜLLER*

1. Introduction

Everything is becoming Cyber: We read about Cyber-space, Cyber-reality, Cyber-culture, Cyber-communities, Cyber-markets, Cyber-economy, Cyber-feminism, Cyber-criminality, Cyber-wars and even Cyber-sex. And most popular: Cybersociety, describing the community of Internet users as a social system.

What is Cybersociety? Despite the frequent use of the term it is, however, difficult, if not impossible, to find a sufficient answer. To name but a few definitions often quoted on the Internet: Is Cybersociety “a virtual community, in which production, distribution and communication to a great extent takes place in virtual rooms”, as Bühl states.¹ And, if yes, are “virtual communities passage points for collections of common beliefs and practices that united people who were physically separated”?² Is Cyberspace the “new home of Mind”,³ or “a new civilization founded in the eternal truths of the American Idea”?⁴ as “A Magna Charta for the Knowledge Age” says? Or is Cybersociety, simply enough, a society that “relies, of course, on the forms of CMC (Computer Mediated Communication) allowed by current computer network structures.”⁵

Cybersociety is at first a libertarian dream of a free, borderless and self-determined society of equals, which came true in many respects (2.). But the dream also was unfulfilled in many respects, and its realization is becoming ever more improbable due to economic, demographic and technological developments of Cyberspace

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¹ Achim Bühl: *CyberSociety. Mythos und Realität der Informationsgesellschaft*, Köln 1996.

² Allucquère Rosanne Stone: “Will the Real Body Please Stand Up?”, online available at: <http://www.rochester.edu/College/FS/Publications/StoneBody.html>.

³ John Perry Barlow: “A Declaration of the Independence of Cyberspace”. (<http://www.eff.org/~barlow/Declaration-Final.html>).

⁴ Esther Dyson, George Gilder, George Keyworth, Alvin Toffler: “Cyberspace and the American Dream: A Magna Charta for the Knowledge Age”, Release 1.2., August 22, 1994 (http://www.pff.org/position_old.htm).

⁵ Steven G. Jones. “Introduction” in: Steven G. Jones: (ed.) *Cybersociety: computer-mediated communication and community*, Thousand Oaks, CA, 1995, (<http://www.december.com/cmc/mag/1995/mar/jones.html>).

and Cybersociety (3.). It can be assumed that Cybersociety in future will become more similar to societies, regulated to a similar extent, but with more power to control and to enforce regulations. (4.).

2. The Libertarian Dream of Cybersociety

Most of the idea of an independent Cybersociety is characterized by a certain libertarian attitude. This “hype” of cyber-libertarian, als Lawrence Lessig puts it⁶, describes Cyberspace as independent, self-contained, self-ruled and unregulable by traditional regulation tools: Thus, Cybersociety is a free society, free from constraints of real space. A good expression of this attitude can be found in the influential “Declaration of the Independence of Cyberspace” by John Perry Barlow⁷, a former lyrics of the “Grateful Dead” and co-founder of the Electronic Frontier Foundation. According to this declaration Cyberspace is free from the control of the “governments of the industrial world”, which are no more than “weary giants of flesh and steel”. Cybersociety is building a borderless social space “naturally independent of the tyrannies” governments want to impose without any moral right and without effective methods of enforcement. Cybersociety is forming its own Social Contract and establishing governance emerging “from ethics, enlightened self-interest, and the commonweal” according to the conditions of it’s different world society. Cybersociety is a society “without privilege or prejudice accorded by race, economic power, military force or station of birth.” The only law that the constituent cultures of Cybersociety” would generally recognize is the Golden Rule”, while laws proposed and imposed by nation states like “China, Germany, France, Russia, Singapore and the United States” are “increasingly hostile and colonial measures.”

The libertarian dream came true in many respects. The Internet facilitates global communications independent from political and geographical borders. The Internet is cheap and has thus an egalitarian effect. It enables individuals and groups all over the world to share and pursue common interests with more power. And in particular, the Internet proved to be immune to regulatory attempts of governments. Therefore, it is a threat to authoritarian governments. Since the Internet is representing freedom of information and, at the same time, of already enormous and steadily increasing economic significance, authoritarian governments and totalitarian societies have to face the dilemma either to try to stifle the new communication technologies at high economic and political costs or to loose control when permitting or even promoting the new technologies.

⁶ Lawrence Lessig: “The Laws of Cyberspace”, Draft 3, (<http://cyber.law.harvard.edu/lessig.html>).

⁷ Barlow (footnote 4).

See for example the Mexican Zapatista movement, whose “ability to communicate with the world, and with Mexican society, propelled a local, weak insurgent group to the forefront of world politics.”, as a study⁸ ordered by the U.S.-army states. The study comes to the conclusion that “as a result of the Information revolution, a range of new social movements (...) are being redefined by the rise of networking, decentered form of organization.” It observes the construction of a new “electronic fabric of struggle”, which helps to interconnect and inspire activist movements around the world:

“The Zapatista movement substantiates the growth of ‘global civil society’ and has helped to catalyze it, showing it can reach from the global down to the local level and influence the policies of states. This netwar has affected not just Chiapas and Mexico; it is galvanizing a new presence in world politics that challenges the primacy of the nation-state in some issue areas.”⁹

3. The Reality of Cybersociety

But the libertarian dream was and is also wrong in many respects. In the beginning, Cybersociety was rather a society of well educated young white men living in wealthy countries in Northern America and Western Europe than a global society without privileges. Since then, the number of users has increased. But although the Internet has the potential to give everybody equal access to knowledge and databases, the predicted “egalitarian explosion”¹⁰ did not happen. Until now, the Internet rather has deepened existing differences. Less than 0,1 percent of all websites is hosted in Africa, a continent which still has less telephone connections than downtown Tokyo. Even in the field of education which is supposed to be one of the most suitable areas for improvements due to the information and communication technologies a healthy scepticism is in order. A report of the American College Board¹¹ states: “The virtual campus may widen opportunities for some, but not by and large for those at the low end of the socio-economic scale who have traditionally been underrepresented in

⁸ David F. Ronfeldt; John Arquilla; Graham E. Fuller; Melissa Fuller: “The Zapatista Social Netwar in Mexico”, 1998, 114, (<http://www.rand.org/publications/MR/MR994/MR994.pdf/#contents>).

⁹ Ronfeldt *et al.* (footnote 9), 120, 121.

¹⁰ Dyson *et al.* (footnote 5).

¹¹ Lawrence E. Gladieux; Watson Scott Swail: “The Virtual University and Educational Opportunity – Panacea or False Hope”, Prepared for Conference on the Lifelong Learning Challenge: Competition or Co-operation? Programme on Institutional Management in Higher Education, Organization for Economic Co-operation and Development, Paris, France, 7 September 1998.

higher education. Virtual space is infinite, but it does not promise universality or equity, nor is it appropriate for many students whose experience with technology is limited – and who might benefit far more from traditional delivery systems.”

What about the other features ascribed to Cyberspace and Cybersociety? Are they borderless? Certainly, each homepage and each mailing list has the potential of global reach. But – besides economic constraints to access – there are language borders in Cybersociety. The overwhelming majority of Germans in Cyberspace is primarily surfing German websites like the overwhelming majority of Germans in real space primarily reads German newspapers and journals and watches German TV. The same applies to Arab, Japanese, French and Spanish users. Leaving aside a polyglot elite, the Cybersociety is at least partially breaking down into language and culture zones corresponding to the established societies in real space.¹² The development is similar to the development of other media. When CNN started people thought that global television had arrived.¹³ But CNN has been followed by numerous French, British, German, and Arabic news channels, also with global reach but being watched primarily by French, British, German and Arab audiences. In addition, more and more closed communities emerge on the Internet. This is not only true with regard firewalled web sites of firms and privatized “tunnels” characterized by Saskia Sassen as “the new citadels on the Net.”¹⁴ It is also true with regard to other communities. See for example the virtual community “brainstorms” of Howard Rheingold, author of numerous works on the Cybersociety.¹⁵ “Brainstorms” is reduced to “a few hundred people of all kinds from all over the world.” A personal invitation is needed for participation.

Is Cybersociety self-ruled? Do Internet participants regulate their own behaviour in a sufficient manner? Obviously not. See for example the field of privacy protection, which was supposed to be good area for self-regulation. But, as the U.S.-Federal Trade Commission stated recently, in reality “self-regulatory initiatives to date fall

¹² See Christoph Engel: “The Internet and the Nation State”, in: Christoph Engel; Kenneth H. Keller (eds.) *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Law and Economics of International Telecommunications 42), Baden-Baden 2000, 201-260 (217).

¹³ Paul Treanor: “Der Hyperliberalismus des Internet”, in: *Telepolis 1996*, (<http://www.heise.de/tp/deutsch/inhalt/te/1996.html>)

¹⁴ Saskia Sassen: “The Impact of the Internet on Sovereignty: Unfounded and Real Worries”, in: Christoph Engel; Kenneth H. Keller: *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Law and Economics of International Telecommunications 42), Baden-Baden 2000, 187-200 (195).

¹⁵ See <http://www.rheingold.com>.

far short of broad-based implementation of effective self-regulatory programs”.¹⁶ The Commission thus concluded that such efforts alone are not enough and recommended to enact legislation that “will ensure adequate protection of consumer protection online.” Even the Netiquette, a few rules, which were supposed to be a kind of Cyberlaw, is to a large extent neither accepted nor enforced. See for example the increasing distribution of spam the Netiquette tried to avoid. The net, becoming a mass medium and more and more commercialized, has to face many of the problems in Cyberspace, that traditional law is meant to solve in real space: To name but a few: Fraud and deception, sale of firearms, dealing with drugs, hate speech, harassing, copyright-violations. In most cases no self-regulation at all is applied or enforced in Cybersociety. Even if attempts of self-regulation and enforcement are made, they often rather bring to mind pre-modern times than the principles of modern legal systems. See for example the “walls of shame” established in Cyberspace to publish photographs, addresses and IP-numbers of people supposed to be e.g. animal maltreaters, animal killers (hunters) or pornographers.

Is Cybersociety an independent, self-enclosed community living in a separate space? Certainly not. As Jack Goldsmith states, “Internet participants are no more self-contained than telephone users, members of the Catholic Church, corporations, and other private groups with activities that transcend jurisdictional borders.”¹⁷ Despite the associations of the “Cyber”-word Internet users live in real space in front of a real screen. Their behaviour can cause real threats, real harms and real costs in the real space, which the Internet community has not internalized and cannot internalize. This applies not only to copyright violations, kiddie porns and hate speech, but also to hacker attacks and virus-writing.

Finally: Are Cyberspace and Cybersociety unregulable? Of course, it is difficult to regulate a network which has the potential of borderless and, in particular, anonymous and secret communication. But these features of the Internet are not unchangeable natural phenomenons. The architecture of the net, or, as Lessig puts it, the “code” of Cyberspace, can be modified.¹⁸ The information flow on the Internet can already be controlled through several means, e.g. conditioning access, filtering devices and geographical discrimination.¹⁹ See for example the “Rights Protection

¹⁶ “Privacy Online. Fair Information Practices in the Electronic Marketplace”. A Report to Congress, Federal Trade Commission May 2000, p. ii.

¹⁷ Jack Goldsmith: “The Internet, Conflict of Regulation and Harmonization”, in: Christoph Engel; Kenneth H.Keller (eds.): *Governance of Global Networks in the Light of Differing Local Values* (Law and Economics of International Telecommunications [volume number to be specified]) Baden-Baden 2000 (forthcoming), 197-207 (203, footnote 15).

¹⁸ Lessig (footnote 7), 8.

¹⁹ See Goldsmith (footnote 18), 201.

System” (RPS) favored by the phonographic industry, which is designed as a national protection system and creates the opportunity to enforce national law on the Internet by enabling “on-border-seizures” in Cyberspace. Systems like RPS have the potential to reduce the borderlessness and thus the jurisdictional problems that impede enforcement of national laws. Even the “sacred cow” of libertarian Cyberculture, anonymity, could be slaughtered: Technical and regulatory tools for identification are available ranging from serial numbers of processors, to biometric devices, to digital ID-systems, to the imposition of severe penalties on Internet Providers for giving anonymous access to the Internet.

4. The future of Cybersociety

The libertarian view still dominates many descriptions of Cybersociety and Cyberspace, it is still characterizing the culture of many communities on the Net and it is the predominant attitude expressed in “Wired” and other popular online-magazines. It was and perhaps is strong enough to disturb and even to stop regulatory measures directed against its values: See for example the several attempts of the U.S.-Government to implement rules and techniques allowing the interception of encrypted messages, which failed due to the opposition of the Internet community. Or see the conviction of the former head of Compuserve Germany, Felix Somm, by a Bavarian court, which led to an worldwide uproar and real-space demonstrations in San Francisco, participants of which poured out German beer and appealed to boycott German products.

However, the influence of the libertarian attitude in Cyberspace and Cybersociety is decreasing. With the development of the Internet into a mass medium, the application and enforcement of traditional and new rules by public authorities will be more and more accepted. The libertarian view of Cybersociety was developed in the early 1990s, when the Net was relatively small and homogeneous, but since then the demographic and technological development have made it plain that not everyone going online shares the same ideals.²⁰ People will experience Cybersociety not as a better society than real space society and thus rather vote for more control than existing today in Cyberspace. Contrary to the assessment of John Perry Barlow²¹ most Netizens do not become libertarians when entering Cyberspace. It is rather likely that members of societies, which prefer a certain degree of law and order in real space, will prefer to have similar rules in Cyberspace.

The political will to use the regulatory and technological tools is increasing

²⁰ Wendy M. Grossman: *Net.Wars*, New York 1997, Ch. 14, (<http://nyupress.nyu.edu/netwars/contents/contents.html>)

²¹ Grossman (footnote 21).

accordingly. To name but a few recent indicators: In March 2000, the European Parliament's Committee on Citizen's Freedoms and Rights, Justice and Home Affairs demanded the end of anonymity on the Internet. At the same time, a Report of the U.S.-President's "Working Group on Unlawful Conduct on the Internet", came to the conclusion, that "balancing the need for accountability with the need for anonymity may be one of the greatest policy challenges in the years ahead." In France, a draft law is under discussion, which imposes prison sentences and fines on Internet providers and users enabling or having anonymous communication on the Internet. Smaller states, dependent on trade with the U.S. and the European Community, will be forced to implement similar rules. The international agreements on the protection of copyright in the framework of the World Intellectual Property Organization show how international harmonization can work.

Cyberspace and Cybersociety in future will be more regulated. In this respect they will become more similar to real space. But regulation in Cyberspace can be a more dangerous threat for personal liberties than regulation in real space. Despite of the alleged unregulability control and law enforcement can be much more effective in Cyberspace than in real space. The technology that facilitates global communications also facilitates constant global monitoring and tracking of individual behaviour. The effects of an abuse of this potential will be not restricted to Cybersociety but have an impact also on real society. Tyrant's worst nightmare could become tyrant's most effective tool. Therefore, it will be most important to discuss ways to ensure that the same liberties enjoyed in real space can be enjoyed also in Cyberspace. In the words of Larry Lessig: We have "to find a way to translate what is salient and important about present day liberties and constitutional democracy into this architecture of the Net."²²

²² Lessig (footnote 6) 15.

“By means of electricity, the world of matter has become a great nerve, vibrating thousands of miles in a breathless point of time ... The round globe is a vast ... brain, instinct with intelligence!”

Nathaniel Hawthorne, 1851

Your Space or Mine?*

JEROEN DE KREEK**

Introduction

In the early 1980s only a few people could even imagine Cyberspace – yet the Internet has been in existence for 30 years now. Until the mid-1990s only a few people had any idea of what The Digital Entrepreneur, The Digital Government or The Digital Lawyer were – yet we are just at the beginning of the developments.

The World Wide Web changes the thinking about economics and law. Changes the theories about state and power. Changes the fantasies about society and man. Fundamentally! Individuals are blossoming. Entrepreneurs are tapping into new markets. Governments are contemplating new basic laws. World-wide! Because the Internet is there to be taken advantage of. In all strata of the population!

How do lawyers benefit from the Internet? How advanced is the legal digitalisation process? Is Internet already *the* source of law? What do lawyers do in Cyberspace?

Legal Stuff in Cyberspace

Cyberspace is a virtual world. The world of the free spirit. It is a world to which everyone has access, without preference, without reservations and without privileges. Access regardless of race, sex, political preference, power, strength or origin. Cyberspace consists of activities, connections and thoughts circulating throughout the world.

And the Internet, the world-wide network, is the medium. Of everyone. For everyone. It owes its great success to its openness. Openness! And the freedom the user has. This freedom is essential. The network has no central authority, no central

* All websites in this article were visited on June 2, 2000.

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organisation. It offers everybody the chance to arrive at a free, open understanding with anyone else.

Every Internet user can develop into a publisher, printer, broadcaster or marketer. No expensive production process is necessary. And the distribution channel is ready to use.

The Internet is like a knife which cuts both ways. Therefore, it is also an ideal instrument for every citizen who wants to make the most of his freedom of expression, who wants to see his right to information put into practise quickly and easily. And so it is also the ideal instrument for lawyers to inform themselves. To acquaint themselves quickly and directly about current developments, events and facts. It is even the instrument for obtaining immediate, straightforward access to current legislation and jurisprudence.

You can look at the Internet as if it were a great, free, undisciplined gang. As if it were a user-unfriendly tangle of sites which you have to wrestle your way through with difficulty. Or – and this is much more interesting – you can look at Internet as resource for your core business. As a resource for obtaining, disseminating and processing information.

A Shot Across the Bows

Two years ago Dutch lawyers received a shot across the bows from the Undersecretary, Jacob Kohnstamm. As far as he was concerned, law, legislation and jurisprudence would already become an integral part of the Internet. Free access for everyone. He wanted to have all government information free on the Internet within three years. On April 16, 1998 in the *Volkskrant* he said, “Dutch people are expected to know the law. It is unacceptable that they have to pay for this”.¹

In the past two years the Netherlands government has indeed taken a number of substantial steps, particularly with the arrival of a portal to government information.² Via a simple search system it is possible to search the individual sites of the more or less one thousand government organisations which are already on-line (government departments, high councils of state, provinces, local councils, independent administrative bodies, etc). Via this general government site, Internet users have had access to all parliamentary documents and all legislation and regulations from *Staatsblad* [Law Gazette], *Staatscourant* [Official Gazette] and *Tractatenblad* [Treaty Paper] since 1995. In addition, a site has been opened with specific information on jurisdiction.³

¹ <http://www.volkskrant.nl/nieuws/archief/215002212.html#4?history=/i345028200/i215002228>

² <http://www.overheid.nl>

³ <http://www.rechtspraak.nl>

Furthermore, the idea that all documents should be made directly accessible via Internet has taken root in most government departments. This is exceptionally welcome, especially when new legislation is being written. All developments, reports and memorandums which are the preparation for this legislation are published via the Internet. A website is opened at once concerning new legislation with all the information necessary for both the citizens *and* the legal professional group.⁴ In some cases Internet users themselves are invited to give their comments beforehand.⁵

But in spite of this large amount of information and potential, Dutch lawyers still do not appear to be going on-line in great numbers. Two years ago the Dutch legal profession was still far away from being digital.⁶ At the beginning of this new millennium, the juridical Netherlands is still lagging far behind the enterprising Netherlands. Of the more than 10,000 Dutch lawyers, just 11% are connected to the Intranet of the Nederlandse Orde van Advocaten [the Netherlands Bar Association] and therefore the overwhelming majority have no access to the on-line administration of the courts. Of the 2,500 Dutch law offices, just under 5% have their own site on the Internet.⁷ Nice to know that most of these offices are small: fewer than 10 lawyers.

If you visit these 5% via Internet you will discover that this unique instrument is, regrettably, too often only used to invite you “to come and see the office premises”. Colleagues with whom E-mail can be exchanged often ask in addition for written confirmation by snail-mail.

How up-to-date is Kohnstamm’s image of the future when, for example, the American legal system is already many years ahead?

The Examples

In 1994 two Americans were the first lawyers to offer their services via the Internet. Laurence Cantor & Martha Siegel were specialised in American immigration law. They wanted to give “the world” a helping hand in winning the Green-Card lottery. They did this by “spamming” (sending a message to a large number of mailing lists and newsgroups, regardless of whether these lists and groups had anything to do with the subject of the message) all mailing lists and newsgroups on the Internet. This rather unfortunate action was punished immediately and rigorously. Their electronic post-box was skilfully filled and blocked. The lawyers were even sent

⁴ <http://www.wsnp.rvr.org>

⁵ <http://www.minbzk.nl/gdt/index2.htm>

⁶ Information systems or decision-supporting systems were rejected by the majority of the courts and public prosecutors. IT was seen as a strange phenomenon. Digitalisation of the flow of information was associated with hacking.

⁷ <http://www.recht.nl/cs/advocaten.php3>

complete digital translations of the Bible, by the thousands. Since then Cantor & Siegel are at the top of the “Blacklist of Internet Advertisers”.⁸

In the United States, however, the question of whether and how lawyers should make use of communication technology (ICT) has been adequately answered. There, computers are *the* alternative to time-consuming paper “information retrieval”. Lawyers, courts of law and governments exchange digital information on a large scale. In a large number of American law offices Internet has already been clearly integrated into daily practice.⁹ And practically every American organisation related to the legal business has a site on the Internet. The American Bar Association, the “American Establishment” so to speak, has a site which is custom-made for both the 900,00 American lawyers and for the public.¹⁰ Internet users can consult the site for decisions by the Supreme Court, information on legal training, “How do I find the right lawyer” and extensive provision of news. And everyone can make use of the “pre paid service plan” via the Internet, a subscription to fast legal advice.

Notable initiatives have been taken closer to home too. The European Union sites are a classic example of digitalisation of government information internationally. In this way, the European Parliament gives interpretation to its obligation to make European legislation accessible to the citizens of the member states. Internet users from European member states can view the site with legislation in their own language – without changing languages.¹¹ But the EU offers the most complete website¹² in specialised fields such as e-commerce also.

The French government has also made a start with putting French legislation and jurisprudence on the Internet.¹³ Although not all legal texts have been processed yet, this does set a good example for the European partners. The Belgians are not lagging behind in this either. The Flemish Bar Association placed a comprehensive site on the Internet not very long ago.¹⁴ Besides addresses of lawyers, information about the legal system and answers to frequently asked questions concerning

⁸ <http://math-www.uni-paderborn.de/~axel/BL/blacklist.html>

⁹ E.g: the site of the American office Arent Fox: www.advertisinglaw.com is famous. This deals entirely and completely with advertisement law. Clients and potential clients obtain a large amount of specialised information there. All this information is free. And for the very reason that it is free, it is a source of income for Arent Fox. Because this site acts as a powerful connection and marketing instrument with the ultimate positive spin-off for everyday practice.

¹⁰ <http://www.abanet.org>

¹¹ <http://europa.eu.int>

¹² <http://www.ispo.cec.be/ecommerce/legal/legal.html>

¹³ <http://www.legifrance.gouv.fr>

¹⁴ <http://www.advocaat.be>

legislation and jurisdiction, Internet users can find a large number of practical links to organisations and institutions offering information on law.

The Potential

Where Dutch lawyers still have a pigeon-hole at court, where even judicial decisions are posted in pigeon-holes, where judicial documents have a long, long postal journey ahead of them, the computer is used in America. That is *the* quick alternative. It is *the* one way of keeping down the costs of the legal system.

No, so far few lawyers have paid heed to Under-secretary Kohnstamm's progressive idea. And that is truly amazing. Because government information is exempt from copyright. Nothing has to be paid for it.

This is also what Pavle Bojkovski, a law student, thought. No sooner thought than done. Pavle put a substantial part of Dutch law on the Internet. For this, he used the CD-Rom with the collection of Dutch Legislation by publisher Vermande. This collection contains about sixty laws and regulations. Pavle copied all of this. And he also copied the headings and footnotes Vermande had added to the laws.

Vermande got angry. Vermande summoned Pavle. Consequently, he removed Vermande's additions from his site. He left the laws. A lawsuit followed. The court ruled against the publisher, since, on the basis of article 11 of Dutch Copyright Law, legal texts are exempt from copyright. And as far as Vermande's additions were concerned, the judge ruled that these were, from a quantitative and qualitative point of view, such insignificant sections of the whole text that there was no question of a derivation in a copyright sense.¹⁵

Why this example? Because Pavle Bojkovski's initiative clearly reveals that the Internet is a source of new facts and new law. Because the initiative of one student reveals that the Internet can be both a source of law and a legal source. Because it is a good indication of how valuable the Internet can be to a lawyer. And because it reveals that there is still a great deal more to come with the Internet.

The Flip Side

Each coin has a flip side. The same here. For an individual initiative-taker it is, as yet, *too* laborious to process all new jurisprudence and every change in law on one site. Due to this not all the information offered is necessarily applicable, complete and up-to-date.

In addition, publications such as those from www.rechtspraak.nl and www.overheid.nl do not have the status of official publications in the sense of article 88

¹⁵ At the time of this case, the databank guidelines were not yet implemented into the Netherlands legislation and whether the verdict would then be the same is a subject of discussion among lawyers.

of the constitution and the disclosure law.¹⁶ And a lawyer cannot bear the thought that he will 'go down' in a legal process if it proves that the digital text of a law is not up to date. In formal judicial matters the Internet is not a legal source on which you can rely. The law has to be adapted for this. In that regard, of that all those off-line lawyers are still judicially in the right so far.

So far, I say this emphatically, so far, because the development could happen very quickly. The development could in fact happen so quickly that before long you may well be considering the possibilities of digital litigation. The development of the potential of the Internet for the legal professional group is irreversible.

The Repêchage

At the beginning of the new millennium Dutch lawyers received another shot across the bows. This time from the state committee for "basic rights in the digital age" appointed on February 23, 1999.¹⁷ With an eye on digital developments, this committee argued for a new basic right: the right to access to government information. On 24 May 2000 the final report of this committee was published. Besides a technique of neutral re-formulation of a number of "old" civil rights of freedom, the committee also formulated the new basic right to access to government information. Digital developments, according to the committee, are associated with changes which influence the way a democratic constitutional state operates. Quick and easy dissemination of information, according to the committee, levels the barriers, existing from time immemorial, to create more direct forms of control on the part of individual citizens. In addition, with application of the information and communication technology it is possible in a more effective way to fulfil the legality principle, in particular the requirements of recognisability, legal security and equality of rights. At the moment every member of the public has by rights access to the information held by the government via the Law on Management of Publicity. But this does not guarantee that effective access is also always safeguarded.

The ease with which, with the help of ICT, access can be gained from a physical, financial and intellectual point of view was of decisive importance to the committee; therefore, the government is obliged by the basic new rights to make all government information voluntarily available.

This proposal by the state committee is not static. It is a continuous process. Because law, jurisprudence and literature are renewed every day. In this way something indispensable has begun. Because it would be unthinkable that you,

¹⁶ Article 88 of the constitution: The law regulates the disclosure and coming into force of the laws. They do not come into force until they have been disclosed.

¹⁷ <http://www.minbzk.nl/gdt>

who make it your profession to judge on the basis of current information, would not have permanent, immediate and direct access to the information concerned. That you should have to waste valuable time searching for it – surely not?!

I'll tell you what I think about this. Internet is the finest source of law that I, as a lawyer, could wish for. But as long as lawyers still look askance at the Internet, as long as lawyers regard the computer as a better sort of typewriter, a sort of calculator, or a sort of awkward novelty and as long as *we* from *our* profession do not make a case for the direct passing on of judicial information and opinions via the most straightforward channel, via the Internet, for *that* long the Internet will never be the legal source which *you* would wish for.

Quelques arguments en faveur d'un nouveau normatif

SYLVETTE GUILLEMARD*

L'énumération des activités possibles dans le cyberspace évoque pour le juriste un florilège de questions: respect de la vie privée et de la réputation, atteintes à la sécurité nationale, responsabilité civile, délits, peut-être même crimes, éthique, protection de la propriété intellectuelle, validité et exécution des contrats, défense des consommateurs, problèmes fiscaux pour n'en citer que quelques-unes. Et bien sûr, possibilités de conflits, de différends. Les juristes raisonnant en termes de normes, c'est vers celles-ci qu'ils vont se tourner pour trouver des réponses à ces questions. D'ailleurs, tout le monde s'entend sur ce point : comme toute activité humaine, celles qui se déroulent dans le cyberspace exigent des règles pour les régir. En revanche, là où une fracture se produit, c'est lorsque l'on s'interroge sur la nécessité de créer ou d'admettre des règles spécifiques au monde virtuel. Comme le rappelle le thème de cette rubrique, le cyberspace nécessite-t-il de nouvelles normes ou au contraire, peut-il se satisfaire des règles de droit, lois, textes internationaux existants?

Donnons quelques exemples, parmi tant d'autres, de divers sujets qui malmènent nos raisonnements presque ataviques et qui militent en faveur d'un nouveau normatif.

En premier, il existe, dans le cyberspace, des notions, des questions jusque-là totalement inconnues. Il en va ainsi des noms de domaine. Indéniablement, ceux-ci "constituent un nouvel objet de droit, propre aux nouveaux environnements électroniques"¹. Toujours au registre des nouveautés, que penser, en regard de nos connaissances "traditionnelles", de documents, d'actes, d'ententes, de contrats, etc. dont le texte originel n'est pas directement lisible d'une part, le cerveau humain n'étant normalement pas apte à comprendre des séries de 0 et de 1 et d'autre part dont il n'existe aucun original? En effet, celui-ci reste dans l'ordinateur d'origine, sous forme dématérialisée et ce qui est transmis d'un ordinateur à un autre est toujours une copie.

D'autres notions, connues, peuvent revêtir un visage différent ou avoir des conséquences insoupçonnées. Ainsi, en matière de délit, jusqu'à récemment, nous savions que lorsque quelqu'un commet une faute, elle peut évidemment atteindre parfois un grand nombre de personnes, ce nombre est toutefois relativement limité.

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¹ Pierre TRUDEL et al., *Droit du cyberspace*, Montréal, Les éditions Thémis, 1997, p. 17-1. Pour mémoire, rappelons qu'il s'agit des dernières lettres d'une adresse de site, par exemple, .com ou .fr.

Dans le cyberspace, un comportement négligent peut réellement causer un “préjudice mondial”², en touchant chacun des internautes, dont le nombre est actuellement de l’ordre de plusieurs millions. Les notions de consommateurs et de commerçants sont peut-être également à revoir en termes cyberspatiaux. Plusieurs notent que l’attitude du consommateur change : il peut facilement se renseigner, comparer, etc. Il n’est donc peut-être pas aussi “faible” que dans le monde réel. On insiste moins sur la position du commerçant qui, elle aussi, évolue également. Ainsi, grâce à l’Internet, on voit apparaître des entreprises internationales “unipersonnelles”. En matière de propriété intellectuelle, selon la perspective habituelle, une œuvre est liée à une personne; dans le cyberspace, en raison de l’interactivité, le concept se transforme. Dans ce cadre, il repose plus sur la création collective qu’individuelle et ce, dans un processus en constante évolution.

Et que dire de la vénérable institution qu’est le contrat? Dans le monde réel, au moins depuis environ deux siècles, nous en avons une vision presque romantique : deux personnes, mues par le désir de mener à bien une aventure commune, unissent dans un même élan l’expression de leurs volontés, sous l’œil bienveillant de la liberté. L’une propose, l’autre accepte et les voilà liées. Or, maintenant, le contrat électronique est plutôt “le résultat d’une réponse positive donnée par un individu ou une entreprise, voire une machine mise en place par lui ou elle, à une proposition standardisée, dont les modalités s’imposent en dehors d’une acceptation véritable”³.

D’aucuns ne manquent pas d’invoquer la multitude des normes actuelles, appelons-les traditionnelles. Parmi celles-ci, quelques-unes ont certainement vocation à résoudre plusieurs problèmes cyberspatiaux. Enfin, elles n’ont pas réellement “vocation à” mais on peut les appliquer, *mutatis mutandis*, au monde virtuel. Certains vont s’empresse de sortir de leur bibliothèque code civil, code commercial, code pénal, loi sur la protection du consommateur, législation sur l’audiovisuel, code de procédure civile, conventions et chartes sur les droit de la personne, loi protégeant la langue, loi sur le droit d’auteur, loi sur l’audiovisuel, loi sur la presse, en n’oubliant pas la Convention de Vienne de 1980 sur la vente internationale de marchandises, la Convention de Bruxelles de 1968 sur la compétence judiciaire et l’exécution des décisions en matière civile et commerciale, la Convention de Rome sur les obligations contractuelles, l’Acte uniforme portant sur le Droit commercial général, les Principes d’UNIDROIT, etc. Comment ne

² Catherine KESSEDJIAN, “Internet et le Règlement des différends”, in F.W. Grosheide & K. Boele-Woelki (eds), *Molengrafica 1999-2000*, Koninklijke Vermande 2000, (à paraître).

³ Jérôme HUET, “Aspects juridiques du commerce électronique : approche internationale”, (1997) *Petites affiches*, 6, 8.

pas trouver au milieu de cette multitude de normes celle qui résout la question?

Pour eux, la notion de *vide juridique* n'existe pas : là où la loi ne donne pas de réponse, les principes généraux du droit y suppléent. Loin de nous l'idée de s'opposer à cette affirmation. En revanche, un peu de pitié pour le droit! Même s'il est assez souple pour s'adapter à la nouveauté, il ne faut quand même pas exiger de lui d'être un contorsionniste. Il nous semble y avoir deux catégories de raisons principales qui incitent à favoriser la création de normes spécialement conçues pour le monde virtuel. Aux nouveautés engendrées par le cyberspace, dont nous avons présenté quelques illustrations plus tôt, s'ajoute le fait que les normes traditionnelles revêtent certaines caractéristiques incompatibles ou très difficilement conciliables avec le monde virtuel.

Ni le papier ni le pays ne font partie, au contraire, du monde cyberspatial. Or le droit tel que nous le connaissons est essentiellement fondé sur la notion de papier et sur celle de pays ou de territoires souverains. En ce qui concerne la première, les historiens et les sociologues du droit enseignent que la conception du droit diffère notablement de la civilisation orale à celle qui connaît le papier, tant dans sa production, sa structure que dans bon nombre d'éléments qu'il prend en considération. Autrement dit, le droit évolue et se modifie avec la technologie. Il serait difficile de nier que les communications numériques ne soient pas nouvelles ni promises à un avenir durable. Les règles conçues, façonnées en fonction du support qui est le nôtre depuis des siècles ne sont pas adaptées à cette nouvelle technologie et doivent évoluer avec elle.

Pour ce qui est du territoire, les normes traditionnelles émanent généralement de législateurs étatiques, imposant des règles applicables à l'intérieur de leur frontières, limites d'un pays ou d'un ensemble de pays. Or tout le monde sait que, dans le cyberspace, le concept de frontière ne signifie rien. D'autre part, les normes habituelles régissent des événements en fonction du lieu où ils ont cours : où le délit a-t-il été commis? Où le contrat a-t-il été exécuté? Où le paiement a-t-il été effectué? Etc. Dans le cyberspace, il n'y a pas à proprement parler de lieu, du moins au sens où nous l'entendons généralement, c'est-à-dire qu'il est difficile d'établir un lien – aussi bien conceptuel que pratique – entre un événement et un lieu terrestre.

Imaginons un cyberconsommateur qui cherche à acheter un livre par le biais de l'Internet. Il ouvre son ordinateur, effectue sa connexion et entre son mot de passe. Aussitôt qu'il inscrit l'adresse de la cyberlibrairie, il accède au site, comme s'il entrait dans un magasin. À ses yeux, et il a raison, il est alors, par le biais de son ordinateur, non pas dans tel ou tel pays mais dans telle librairie virtuelle qui lui permet de trouver l'ouvrage recherché. La plupart du temps, il ne sait même pas à quel pays la "boutique" pourrait être rattachée – et souvent, il lui est très difficile de le déduire

d'après l'adresse URL – et cela lui importe peu. En revanche, il sait qu'il est dans le cyberspace, puisqu'il a franchi une sorte de frontière en se branchant au réseau, en indiquant un mot de passe, etc.

L'inadéquation des repères géographiques est encore plus criante lorsque le cybernaute achète un produit en ligne, comme par exemple, un logiciel qui sera téléchargé directement sur son ordinateur. Il va se rendre sur un site où se procurer le logiciel. Celui qui l'expédie doit connaître l'adresse électronique – au sens large de l'expression – de celui à qui il le transmet, c'est tout. Son adresse dans le monde réel n'est d'aucune utilité pour la transaction même, encore moins lorsque le paiement est également effectué en ligne. Quant à celui qui reçoit les données, de la même façon que sa localisation n'avait aucune importance lors de la commande, lors de la réception il peut être situé n'importe où sur la terre. En réalité, les données envoyées ne se rendent pas chez la personne, ni à son bureau, elles arrivent dans son ordinateur ou plutôt dans la place qu'elle occupe dans le cyberspace, et ce, par l'intermédiaire de son matériel informatique.

Plutôt que de chercher à résoudre la quadrature du cercle, d'essayer de concilier l'inconciliable et d'ébaucher des raisonnements voués à l'échec, considérons le cyberspace comme un lieu, un espace autonome, un nouveau territoire. Bien sûr, la proposition est de l'ordre de la fiction⁴ et pourquoi, tant qu'à parler de concepts indémontrables, ne pas devenir pascalien? Faisons le "pari" que le cyberspace est un lieu : on n'a rien à y perdre mais tout à y gagner.

Force est de constater que la question de la localisation – en termes terrestres – pose d'énormes problèmes à tous ceux qui réfléchissent aux problèmes soulevés par la nouvelle technologie. Chacun échafaude un raisonnement puis à un moment ou à un autre, selon le champ de réflexion, se pose invariablement la question fatidique : où? Ce simple petit mot se dresse alors comme un obstacle infranchissable qui, constituant un barrage, oblige le penseur à rebrousser chemin et réduit l'édifice de son raisonnement à néant. Du moins, tant que le penseur s'obstine à vouloir rattacher les données cyberspatiales au monde réel.

L'adverbe interrogatif "où?" n'a pas de raison d'être lorsque l'on réfléchit aux relations cyberspatiales, nouées via l'Internet. Du moins ne doit-il recevoir qu'une réponse : dans le cyberspace! Entendons-nous bien. Cela ne signifie pas, évidemment, que les affaires cyberspatiales n'aient aucun lien avec le monde réel. Il ne pourrait en être autrement puisqu'elles émanent d'êtres humains mais pour faire

⁴ La fiction juridique "sert à emporter l'adhésion à ce qui serait rationnellement inacceptable : qu'un oiseau soit un immeuble, que la personne du mort se continue, que le temps ne se soit pas écoulé. Si elle est dotée d'une certaine efficacité, ce peut être parce qu'elle évite d'exprimer une innovation troublante". (Christian ATIAS, *Théorie contre arbitraire*, Paris, P.U.F., 1985, p. 149.)

progresser le raisonnement, il faut admettre l'existence de ce lieu juridique non pas indépendant mais propre.

Même avec du “raccourci” juridique⁵, les normes traditionnelles, étrangères aux spécificités techniques et relationnelles du cyberspace, sont inefficaces dans le monde virtuel. Il faut donc accepter l'idée qu'il nécessite des normes propres, respectueuses et adaptées aux phénomènes qu'il engendre.

Ceux que “la nouveauté désempare et pour qui une conception neuve n'est compréhensible que si elle est habillée des défroques du passé”, comme disait René Clair au moment de l'avènement du cinéma parlant, n'oublie certainement pas que le droit évolue au fil des siècles, voire des ans. Ces modifications normatives, rendues nécessaires par des changements de société, répondent à ses nouveaux besoins. Évolution ou révolution, le droit doit s'adapter. Pourquoi nier la réalité, pourquoi refuser d'admettre que le cyberspace provoque des modifications importantes que le droit actuel n'est pas capable, bien souvent, d'appréhender⁶?

La réflexion doit s'articuler autour de deux grands axes, que nous nous contenterons d'ébaucher, soit les sujets et les méthodes de la création normative.

Sur quoi doivent porter les nouvelles normes? Évidemment sur les sujets qui constituent des notions totalement inconnues jusqu'ici, dont la nouveauté provient soit du phénomène lui-même soit de l'ampleur qu'il prend grâce à la technologie, et sur tous ceux qui impliquent support et localisation. Parmi ceux-ci, le droit de la preuve⁷ et les actes juridiques. À ce propos, si l'on pense spontanément à tout le domaine contractuel et en particulier au domaine commercial⁸, qu'il s'agisse de relations entre commerçants ou avec les consommateurs, nous entrevoyons également quelques difficultés liées à certains actes juridiques non commerciaux ou non contractuels. Ainsi, que se passera-t-il lorsque quelqu'un rédigera son testament uniquement sous forme de courrier électronique afin de le communiquer à un proche? En droit québécois et en droit français, par exemple, la validité formelle de ce testament sera nulle.

Il n'y a pas de formule magique pour l'élaboration des normes substantielles; en

⁵ Vincent GAUTRAIS, *L'encadrement juridique du contrat électronique international*, thèse de doctorat, Faculté des Études supérieures, Université de Montréal, 1998, p. 216.

⁶ D'ailleurs, le mouvement de réforme normative est déjà bien entamé, puisqu'il existe, à ce jour, plus d'une centaine de textes nationaux et internationaux en vigueur liés au commerce électronique.

⁷ À ce sujet, signalons que le Québec a eu la chance de bénéficier récemment d'une grande réforme du Code civil. Elle a donc pu tenir compte des nouveautés technologiques comme en témoignent les articles 2837 et 2838 C.c.Q. portant sur les inscriptions informatisées en tant que moyens de preuve.

⁸ Ces domaines font d'ores et déjà l'objet de nombreuses réflexions et de travaux divers.

revanche, il est primordial d'adopter une certaine attitude intellectuelle : afin de s'orienter dans la bonne direction et d'en venir à des solutions efficaces, il importe de se détacher de plusieurs notions et repères habituels et des concepts connus. Abstenons-nous de raisonner en termes terrestres et matériels, à coup de transpositions et d'analogies⁹. Au contraire, gardons toujours à l'esprit les mécanismes et conséquences des particularités technologiques des réseaux numériques.

Le droit international privé, qui gère la diversité des droits, ne devrait-il pas également être repensé afin de tenir compte à la fois du nouvel espace et des règles qui lui sont propres, autrement dit pour faire le lien, indispensable, entre les normes cyberspatiales et les règles de droit terrestre?

D'autre part, et, ceci fait déjà l'objet de polémiques, quelle est la méthode la mieux adaptée pour créer ces normes? Doit-on passer par la voie de la réglementation – et si oui, émanant de quelles instances? – ou peut-on envisager une autorégulation, par laquelle ce sont les utilisateurs qui développent leurs propres règles? Ou doit-on favoriser la corégulation, qui réconcilie en quelque sorte les deux autres méthodes?

Ce qui dérange, face à l'idée d'un renouveau normatif, c'est peut-être l'urgence et la rapidité de la mutation nécessaire, liée, justement, à celle, brutale et fulgurante, des moyens de communication et à la naissance ou à la découverte d'un nouvel espace. Ce qui effraye aussi, c'est l'ampleur de l'imagination qu'il faut déployer pour aboutir à des résultats satisfaisants. Toutefois, n'oublions pas, comme le rappelait le doyen Cornu¹⁰ que "l'imagination est une force intellectuelle, l'une des énergies qui mènent le droit".

⁹ Ainsi, Jérôme Huet estime, à juste titre, l'analogie entre messages électroniques et des messages écrits "inexacte, nuisible et inutile". (Voir Jérôme HUET, "Aspects juridiques de l'EDI, Échange de Données Informatisées (Electronic Data Interchange)", (1991) *Recueil Dalloz Sirey*, 1991, 181.)

¹⁰ Lors d'une conférence prononcée à la faculté de droit de Montréal en octobre 1998.

Does the Internet Require New Norms?

DAVID GODDARD*

The editors of this special issue set, as the topic for this article, the deceptively simple question of whether the Internet requires new norms. The question can be asked more concisely than I, at any rate, am able to answer it. In summary, I suggest that:

- the Internet provides a renewed impetus for legal co-ordination exercises;
- many norms need to be reviewed to ensure that they make sense in the context of the Internet, and modern technology generally;
- however it would be a mistake to attempt to develop Internet-specific conventions. We should resist the lure of an omnibus convention on the Internet, or even of conventions on topics such as “Internet contracts”, “Internet torts”, or “Internet consumer protection”;
- when working on generic co-ordination exercises (eg conventions on jurisdiction in civil cases, or applicable law in contract), we should ensure that any norms which are adopted are technology neutral, and draw distinctions relating to use of different technologies only where those distinctions are directly relevant to the substantive issue to which the norm is addressed. If we take this approach, it is most unlikely that Internet-specific norms (which are in principle undesirable) will be required.

I explore each of these limbs in more detail below.

The Internet and other technologies

Before beginning, it is worth reminding ourselves that there are real dangers in too close a focus on the Internet, and too swift an assumption that the Internet is a unique phenomenon that raises unique issues.

First, it is important to remember that many of the hard questions posed by the Net are, on closer examination, simply new forms of old questions, arising with greater frequency. Thus to the extent that the Internet facilitates cross-border trade in tangible commodities, it is in many ways just a new form of catalogue shopping, and from a legal perspective there is often little to differentiate placing orders using the Net from phone or fax orders. Before becoming too entranced by the “novel” issues posed by the Net, and coming up with a Net-specific answer, it is always important to step back and ask whether the same issues are in fact raised by “old”

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technologies like the telephone, fax or even postal services.

Second, and perhaps more importantly, the Internet is simply one (albeit extremely significant) manifestation of broader technological developments which are delivering high capacity, low cost telecommunications and ever cheaper facilities for data capture, manipulation, storage and transfer. These broader developments are affecting cross-border dealings in contexts other than the Internet. As these developments continue, and as what have hitherto been distinct technologies converge, the Internet and other applications of these technologies are constantly evolving. If laws are arbitrarily limited to the Internet (assuming for the moment that we could define this limit satisfactorily), or to particular technologies currently used in the Internet, there is a real risk both of obsolescence, and of distorting innovation as technology evolves in response to those laws rather than in response to market incentives.

The Internet reinforces the case for co-ordination of laws

The first limb of my answer is the least controversial. Many other commentators have emphasised the need for increased co-ordination of laws in response to the dramatic increase in cross-border dealings brought about by the Internet, and other modern technologies.¹ The ease of dealing across borders – indeed, in many cases the invisibility and (apparent) irrelevance of borders when using the Internet – means a dramatic increase in the number of cross-border transactions, and in particular of transactions:

- of relatively low value;
- entered into by individuals or small and medium-sized businesses with no particular experience in dealing across borders, who are less likely to appreciate the special issues that arise when transactions cross borders, or to address those issues expressly in their dealings.

More generally, whenever anyone makes information available on the web, the default position is that it is available the world over. The Internet has dramatically enhanced the ability of anyone – even a private individual – to communicate with a broad audience, across borders. Information posted on the web is also exposed to

¹ See for example Pierre Sirinelli “L’adéquation entre le village virtuel et la création normative – remise en cause du rôle de l’Etat?” and Catherine Kessedjian “Rapport de Synthèse” in Boele-Woelki and Kessedjian (eds), *Internet – Which Court Decides? Which Law Applies? Quel tribunal décide? Quel droit s’applique?* (Kluwer Law International, The Hague, 1998). For a general analysis of the rationale for legal co-ordination across borders, and an approach to setting priorities at regional and multilateral levels, see David Goddard “Making Business Law: The CER Dimension” (Report for New Zealand Ministry of Commerce, 1999) available at http://www.med.govt.nz/gbl/bus_pol/bus_law/cergoddard/index.html.

unanticipated (and possibly undesired) access from anywhere in the world. It is possible to limit access to a site to certain persons (eg with a password), but making a site publicly available subject to geographical limitations is not practicable.

Facilitating a global marketplace

One of the great attractions of the Net is the promise of a world-wide market, unconstrained by borders and the tyranny of distance, delivering significant benefits to consumers through an increased number of potential suppliers and increased access to information. The Net has reduced the transaction costs involved in identifying distant suppliers, and dealing with them, and also in some cases of delivering the product in question (consider music, or software, or services provided on-line). This means more competition, greater choice, lower costs and – over time – stronger incentives for providers of goods and services to seek out new and improved ways to satisfy their customers.

Among the most significant remaining barriers to development of a global marketplace, and the benefits that will bring, are legal barriers created by:

- uncertainty as to which countries' rules will apply to particular on-line dealings, and where and how those rules might be enforced;
- the (apparent) need for a supplier of goods and services to comply with the mandatory laws of all jurisdictions into which those products might be sold – or perhaps even all jurisdictions in which the supplier's website might be accessed;
- the risk of exposure to legal proceedings (civil or criminal) in multiple jurisdictions.

Users of the Internet today confront a complex and costly legal Babel, with many rules clamouring to be applied. The paradox is that few of these putatively applicable rules – sometimes none – are capable of effective application and enforcement. This results in risks which are difficult to assess and manage, and significant costs for those who attempt to do so.

Some commentators have suggested that the legal risks identified above simply mean that suppliers of goods and services must comply with the strictest applicable regime. Alas, it is not that easy: regulatory regimes can conflict, so that compliance with all is not possible, or can be cumulatively impractical to comply with. Even where standards are the same, separate approvals from each country's regulator may be needed to supply certain goods or services. And the cost of obtaining information about all the relevant rules, and acting on it, is itself very significant. These factors lead some suppliers to decline to deal with customers outside a limited set of countries (so far as that is possible), reducing the potential benefits from the

Net. Many others simply gamble on most (or all) of the applicable laws not being enforced against them in practice – hardly a satisfactory state of affairs, from anyone’s perspective.

At a superficial level, at least, it seems to make more sense for the legal consequences of any given activity carried on by a particular person or business to be governed by one readily identifiable set of rules, which would be applied by a readily identifiable tribunal, the decision of which is then given the widest possible effect. While politics and differing national approaches to certain forms of regulation may make this difficult or impossible to achieve, it seems to me that it is the right goal to steer towards, even if we will not always arrive. This goal can be pursued by States in a number of ways, including unification of law, agreement on which law will apply and which jurisdiction will determine disputes, or recognition of regulatory outcomes (eg agreement that goods which can lawfully be sold in country A can also be sold in country B without needing to comply with the corresponding regulatory requirements of country B). The choice of an appropriate approach will vary from issue to issue, and will also depend on the States involved, and their legal, political, social and economic links. What all these solutions have in common, however, is that they are the product of co-ordination and co-operation between States – they cannot be achieved unilaterally.

Deterring and remedying cross-border wrongs

The discussion above focuses on the benefits of a wider market place for consensual dealings. Turning to non-consensual dealings, the Internet provides a new and extremely effective mechanism for a malicious (or just plain careless) person to inflict harm at a distance, without ever entering the State in which the victim resides, or sending any physical object across its borders. Consider, to give but a few examples:

- defamation on a web site or a bulletin board, accessible world-wide;
- hacking into a computer system in a foreign country, and interfering with data or with the system itself;
- sending a computer virus to email recipients in a number of countries;
- posting false rumours about a company (whether positive or negative) on a bulletin board, and exploiting the subsequent share price movements to the detriment of other investors and, quite possibly, the company itself;
- posting on a website apparently authoritative, but incorrect, information about medical issues (eg use of drugs), read and relied on by users around the world.

An important goal of civil and criminal laws in most countries is to deter the commission of such acts, penalise wrongdoers, and compensate victims. But mandatory rules of this kind will only be effective if their reach extends across borders commensurately with the ability of wrongdoers to inflict such harms across borders. Because the Internet has dramatically increased the ease with which harm can be inflicted across borders, it has correspondingly increased the need for cross-border co-ordination to make the relevant mandatory rules effective in practice. The extent to which the Internet has eroded the regulatory reach of single States (especially small ones like New Zealand) in some significant respects, and the need for co-ordination to ensure that important regulatory objectives can be achieved, should not be underestimated.

Self-regulation alone cannot resolve these concerns

It is sometimes argued that all this is better left to self-regulation, and that new State-made norms are not required. I agree that there is a very important role for self-regulation in the context of the Internet, and that many issues can best be resolved in this way. I would include in this category online dispute resolution, and many aspects of consumer protection. However two problems that cannot be solved by self-regulation are:

- the application of mandatory rules of several jurisdictions, which cannot be contracted out of. The costs of overlapping regulation cannot be addressed by self-regulation alone – at the least, States would need to agree that subject to certain requirements, self-regulatory regimes (or one selected legal regime) would be permitted to displace domestic mandatory rules;
- the protection of third parties from torts, criminal offences and other wrongs committed via the Internet. Precisely because these wrongs involve imposing harm on third parties (externalities, in the language of economics), the various players involved in Internet self-regulation initiatives (predominantly businesses using the web, and ISPs) do not have appropriate incentives to address these issues unilaterally, or in a voluntarily adopted self-regulatory regime. Nor (obviously) can any self-regulatory regime replicate the full range of penalties that the law imposes for criminal offences. If the values protected by these mandatory laws are to continue to enjoy effective protection in the modern era, co-ordination and co-operation between States in relation to the application of such laws, and their enforcement, is essential.

Summary

In summary, co-ordination of generally applicable laws – facilitative and mandatory – should ensure that individuals and firms in participating countries can obtain the full benefits of the Internet, in terms of increased competition, wider choice

and lower prices, while at the same time enjoying more effective protection from wrongs committed via the Internet under the mandatory rules which, through co-operation between States, can be more readily enforced even where the wrongdoer is in another State.

General rules of law need to make sense when applied to modern technology

The second limb of my answer is that the Internet, and modern technology generally, certainly does require some change in the way we frame legal rules. Our laws need to make sense in a world where modern technology makes it possible to enter into and perform transactions electronically, and to deal swiftly and at very low cost at great distances, across borders.

Removing impediments to use of electronic technology

This observation has a number of implications. The first, and most widely recognised, is that legal impediments to use of appropriate electronic technology need to be removed to enable individuals, businesses and governments to achieve the efficiency gains, and other social and economic benefits, that modern technology can facilitate. Many laws are “technology-specific” in that they assume the use of paper-based methods of communication, publication, record-keeping etc: they need to be modified to allow the use of other appropriate technologies. The work of UNCITRAL in this field, founded on the concepts of functional equivalence and technology neutrality, has been particularly influential.²

Rules must make practical sense in relation to dematerialised transactions

The second implication of this observation is that legal rules should be framed in a manner which can be applied in a meaningful way to “dematerialised” dealings. In particular, where rules turn on the place an act is done (eg where a contract is entered into, or performed, or breached), it will sometimes be difficult to identify such a place in the context of an electronic transaction, and there is a real risk that the place identified will be essentially arbitrary, and irrelevant so far as the policy rationale for the substantive rule is concerned.

² The Model Law on Electronic Commerce prepared by UNCITRAL addresses legal impediments to use of electronic technology by making provision for the use of electronic functional equivalents to satisfy various legal requirements including requirements for writing, signatures, retention and production of originals and retention of records generally. The Model Law has influenced legislation in several jurisdictions, with more in the pipeline. Further work is currently being undertaken by UNCITRAL on electronic signatures. For the text of the Model Law, and information in relation to its implementation, as well as UNCITRAL's current work programme, see www.uncitral.org.

For example, Article 6 of the preliminary draft of the proposed Hague Convention on Jurisdiction and Foreign Judgments provides for jurisdiction in contract cases in (inter alia) the place of supply of goods or services.³ There appears to be widespread agreement that this Article is unsatisfactory in relation to contracts entered into and performed electronically. There are real difficulties in identifying the place of performance of such a contract, and it is far from obvious that any place so identified would be an appropriate jurisdiction.⁴ Two basic approaches to addressing this issue have been put forward. The first would involve a mechanism for “localising” the place of performance – rules which treat performance as occurring at the place of business of the purchaser, for example. So the rule would apply, but with a “deemed place of performance”. The second approach emphasises that this is only a default rule in relation to contract cases, since the parties can agree on a forum. It makes sense as a default rule in traditional cases such as international sales of goods because the courts in the place of performance are likely to have advantages in respect of:

- access to evidence about the performance of the contract, and any defects in that performance;
- dealing with interim issues such as control of goods supplied, and sale pending resolution of the dispute, where the subject-matter of the transaction is located (as it often is) in the place where performance occurred.

However no arbitrarily selected forum, based on “deemed place of performance” rules, has these advantages in relation to electronic transactions. It makes more sense, on this approach, to say that the default rule is that the claim must be brought in the defendant’s place of habitual residence (or of course in any other applicable

³ The preliminary draft of the proposed Convention is available at <http://www.hcch.net/e/workprog/jdgm.html>.

⁴ Concerns in relation to the proposed Article 6 were identified at a Round Table jointly organised by the Hague Conference and the University of Geneva held in Geneva in September 1999, and at an Expert Group Meeting in Ottawa in February/March 2000: these meetings are summarised in a very helpful report entitled “Electronic Data Interchange, Internet And Electronic Commerce” prepared by the Deputy Secretary-General of the Hague Conference, available at ftp://hcch.net/doc/gen_pd7e.doc. These concerns provide a good illustration of how the Internet increases the frequency with which issues arise, rather than creating new legal issues – precisely the same difficulties arise where for example a client in country A obtains advice by telephone from a lawyer based in country B who makes the call from country C where she is travelling on another client’s business. So this is not a new “Internet issue” – it is also raised by “old” technologies like the telephone – but it is an issue which has become more acute with the advent of the Net.

default jurisdiction (eg where the branch of the business which entered into the contract is located), and that a party wishing to be able to sue elsewhere needs to contract for that right. The rule providing for jurisdiction in the place of performance could either be deleted entirely or, alternatively, limited to sales of goods and other circumstances where there is a physical place of performance.

Lawyers the world over have a tendency to respond to new issues by adding another layer to the existing stock of rules. This is the first approach – since there has traditionally been a jurisdiction founded on place of performance, it is suggested that we should add new rules defining a “place of performance” in a new context where it would not otherwise be clear what that place might be. The second approach is, to my mind, more satisfactory: it addresses new challenges to the application of an established rule by inquiring into the underlying purpose of the rule, and the implications of that policy in the light of the new facts. It is an approach which is closely related to the concept of functional equivalence – it asks what function the existing rule serves, and how that function would be served in an electronic environment.⁵

Rules should be capable of effective enforcement

Another important implication is that if a mandatory rule cannot be enforced effectively in the modern environment, its retention needs to be very carefully reviewed. In particular, the question that needs to be asked is whether, having regard to the practical difficulties surrounding enforcement of some rules against foreign breachers, it remains appropriate to attempt to regulate the matter in question in the same way.

In some cases, the answer will be that in the foreseeable future much of the evil against which the law is directed will continue to occur domestically, and it is desirable to continue to address as much of this as possible, even though there will be real difficulty in enforcing the laws against foreign wrongdoers. In other cases, the answer will be that domestic regulation needs to be adapted given the increased ease of dealing across borders. For example, the conclusion may be that although unilateral attempts to regulate the issue are increasingly ineffective, the regulatory goal is so important that it should be pursued multilaterally, through co-ordination

⁵ This analysis is reinforced by the fact that the proposed Article 6 is not in fact comprehensive, since it does not apply to contracts which involve neither supply of goods nor supply of services. A contract for the sale of shares or other securities, for example, is not caught by Article 6. This makes sense in the light of the policy rationale for the Article, since there is no place of performance with practical advantages as a forum. Electronic transactions of all kinds are better seen as analogous to contracts of this kind than to real-world supplies of goods and services – and can be treated equivalently, by disapplying Article 6.

with other States – many aspects of intellectual property law are being addressed in this way. And in some cases, the answer will be that domestic regulation is counter-productive and should be removed, where it achieves little or nothing in terms of controlling the relevant activity but imposes compliance costs on domestic providers that place them at a competitive disadvantage.

This test has important implications for consumer protection rules which purport to apply to all overseas suppliers dealing with local consumers. There is a reasonable argument that it is unhelpful and misleading to consumers to suggest to them that they are protected by domestic rules, and can obtain remedies in domestic tribunals, whenever they deal online. This is often inaccurate from a practical perspective, since an overseas supplier that chooses not to defend a claim and allows judgment to be entered by default will not face any real risk of enforcement in many countries. Even if the judgment is in principle enforceable in the supplier's home jurisdiction, the cost of obtaining judgment in the consumer's home jurisdiction then enforcing the judgment elsewhere will be prohibitive for most consumer claims. And reputational sanctions are weaker than in the domestic environment (absent some form of self-regulatory system designed to reinforce these, of which the supplier is a member).

Thus, the argument runs, leading consumers to believe that they are protected by local rules distracts attention from the real issue, which is what is being offered by the overseas supplier in terms of effective assurances that complaints will be resolved (eg membership of an organisation which sets standards and resolves disputes with customers), and the trade-off between advantages such as a lower price or convenience of dealing online on the one hand, and different – and possibly reduced – remedial options, on the other hand.

This argument points towards restraint in the application of domestic consumer protection rules – for example, by giving effect to clear and express choices of a self-regulatory regime, or of another country's rules and tribunals. That result is also consistent with the goal of reducing overlapping regulation of the same supplier's activities, and thus compliance costs, and thus prices to consumers. Within the constraints of this short article, it is not possible to develop these arguments in detail, let alone to explore the contrary arguments and seek to reach a firm conclusion – but at least the nature of the inquiry has been outlined.

Internet specific norms are not required – and are in principle undesirable

Having identified the need for enhanced coordination, and for review of general rules of law to ensure they make sense when applied to modern technology, the question then becomes what form that work should take. Should we embark on an omnibus convention on law and the Internet? Or should we work on conventions

dealing with the application of particular fields of law to the Internet – for example, a convention on Internet contracts, or Internet torts, or Internet consumer protection? Or should we focus on generic coordination exercises – and if so, what is the relevance of the Internet in this context?

Internet conventions are in principle undesirable

The case against seeking to develop new conventions which apply only to the Internet has four elements:

- first, nothing is gained – no work will in fact be saved – by restricting the development of new conventions in this way. The Internet is simply a vehicle for carrying on a wide range of activities which raise legal issues across the entire spectrum of civil, commercial and criminal law. It is simply not possible to avoid dealing with all these policy issues, since co-ordination of “Internet law” means co-ordination of contract law, tort law and the entire law of obligations, property law, law relating to jurisdiction and enforcement of judgments in civil matters, laws relating to jurisdiction and extradition in criminal cases, and so forth. And where (as is often the case) precisely the same principles should apply to dealings on the Internet and other dealings, it seems particularly pointless to restrict the application of new norms to the Internet alone;
- second, any co-ordination exercise which is limited to particular technologies risks bringing about significant distortions as between different methods of entering into and performing substantively equivalent transactions. This may breed significant inefficiencies in use of technology and investment, and distort innovation;
- third, legal distinctions based on the technology employed in the dealings in question will give rise to a whole new range of contested borderline issues. And the difficulty and complexity of any attempt to delineate the scope of Internet-specific conventions should not be underestimated, especially as different technologies converge;
- fourth, any co-ordination exercise which is tied too closely to a particular technology, let alone a particular application of technologies, runs a very real risk of swiftly being superseded, and becoming obsolete, given the pace of technological advance. Even domestic legislatures are finding it difficult to keep pace with technology. The glacial pace of international legal co-ordination exercises, and the practical barriers to amending conventions and other multilateral instruments, make it imperative that new norms be principled and technology neutral, so that they can be applied equally sensibly to all existing technologies which serve the same substantive end, as well as to new technologies that we are not yet aware of that will be able to be used for the same purposes, raising the same legal issues.

In short, there is nothing to be gained, and much to be lost, from developing conventions to be applied solely in relation to the Internet. It might be easier to obtain initial support for an omnibus “Convention on the Internet” – but the task would be huge and complex, would raise difficult borderline issues, could distort the development of markets and technologies, and would risk becoming obsolete as technology evolves. Similarly, separate conventions on “Internet torts” or “Internet contracts” or “Internet consumer protection” would need to cover the entire substantive field, and would have a number of unsatisfactory consequences.

It would be much better, in my view, to mobilise concern about co-ordination of laws generated by the Internet to support broader co-ordination exercises, paying careful attention to issues thrown up by the Internet when setting priorities and when crafting appropriate general rules. This should involve no more work, but generate wider benefits, while avoiding undesirable distortions. This brings us to the question of whether generic co-ordination exercises will need to develop Internet-specific norms.

Internet-specific norms are probably unnecessary, and in principle undesirable

It seems to be widely accepted that most basic legal norms in relation to eg contracts, torts, crimes and so forth are no less relevant in relation to Internet dealings than other dealings, and do not require fundamental modification to be applied to the Net. I cannot pretend to have considered this question, in detail, in relation to each and every field of law. But from first principles, it seems to me that there is nothing in the nature of the Net which affects basic norms of civil or criminal law, and I am not aware of any plausible arguments to the contrary.⁶ In other words, if one were to set out to draft a convention on applicable law in relation to contracts, or torts, or obligations generally, or on consumer protection or privacy for that matter, the vast majority of the norms that would be included would be common to dealings on the Net and other forms of cross-border dealings. This has certainly been the experience of those involved in work on the proposed Hague Convention on Jurisdiction and Foreign Judgments: a few Articles raise real difficulties when applied to electronic dealings, but the majority of the principles and provisions developed are of perfectly general application.

One context in which problems are encountered in applying existing norms to the Internet is the selection of connecting factors in private international law to

⁶ This is not the same as saying that these norms may not need to be extended to apply to new factual situations raised by modern technology – eg the extension of criminal and civil liability to high-tech wrongs such as hacking, to protect the value that now resides in the integrity of computer systems and data. Note that extensions such as these apply much more broadly than just to the Internet.

determine jurisdiction or applicable law, where those factors turn on the place where an act is done or where a specified event occurs. For example, because the place of performance of a contract entered into and performed online is hard to ascertain, and essentially irrelevant, rules which refer to that place as a connecting factor need to be modified, as discussed above. Difficulties of this kind are real, and need to be addressed. New norms are required. But these need not be Internet-specific, or even modern technology-specific. The choice lies between three basic approaches:

- revisiting the basic rule to ensure that it makes sense when applied to the Internet and other modern technology (in which case there is a new, generally applicable rule); or
- adding a gloss to the rule to facilitate its application in the online environment (eg a deemed place of performance); or
- selecting some quite different connecting factor for online cases – for example, some commentators have suggested that at least in online cases, consumers should always be able to bring proceedings in the jurisdiction of their habitual residence, under domestic consumer protection laws.

It is difficult to address these issues in the abstract, rather than in the context of particular proposals for new norms. What does seem clear, however, is that at the least those new norms should apply to all technologies (modern or otherwise) which raise the same issues, and should not be limited to the Internet alone. Technology neutrality is essential.⁷ And there are strong reasons for preferring a new generally applicable norm to new norms limited to the Internet or other specified technologies, analogous to those outlined above for preferring general conventions: in particular, avoiding economic distortions caused by different rules applying to different methods of performing the same function, avoiding the creation of new contested borderline issues, and avoiding technological obsolescence.

Thus when working on new coordination exercises, it seems to me that the starting point should be to attempt to craft generally applicable rules which can be applied to all dealings, whatever technology is involved. Where there are inescapable differences between technologies, work should focus on concepts of functional equivalence. That is, distinctions should be drawn on a functional basis, rather than by specifying particular technologies or particular applications of those

⁷ Thus there might well be some rules that turned on whether “real-world” acts were done in certain places (as with the proposed Hague Convention on Jurisdiction and Foreign Judgments, discussed above) – but this is quite different from adopting rules based on whether or not the Internet has been used.

technologies.

If this approach is adopted, it seems highly unlikely that Internet-specific norms will be required.

Final comments

In this complex and developing field, it would be overly ambitious – and probably foolish – to attempt to state absolute propositions. It is possible that circumstances may arise in which Internet-specific norms are required, if the Internet poses legal issues that do not otherwise arise.

But the thrust of my argument is that we should not set out to look for Internet-specific answers, unless driven to do so by unique legal issues posed by the Net. Instead, our efforts should focus on renewed commitment to general coordination exercises, such as those undertaken by the Hague Conference and UNCITRAL. These have become far more urgent with the rise of the Internet and other modern technologies. Pursued with commitment, and framed in technology-neutral and principled terms, international co-ordination exercises can support the advances which modern technology makes possible, and facilitate the economic and social gains which those advances will bring.

Whose Laws Rule the Internet? A U.S. Perspective on the Law of Jurisdiction in Cyberspace*

THOMAS P. VARTANIAN**

The transcendence of geographic borders is the hallmark of Internet commerce. Because of that, there is no more fundamental issue to the development of efficient electronic distribution channels than the question of what laws apply to them. Jurisdictional certainty is critical to the entrepreneurial and business instincts of every “dotcommer.” In business-speak, executives must know whose laws apply in order to price their products and understand their liabilities. Perhaps, there is no greater example of this than the recent decision by a French court requiring Yahoo! Inc. to block access in France to U.S.-based auction sites that were displaying and selling products prohibited in France.

Should the jurisdictional principles applied to commerce in Cyberspace be any different from those that are applied to commerce in the physical world? Certainly, global commerce is not a unique or new development. Many principles do not need to be altered significantly even though the use of Cyberspace has changed some of the accepted dynamics of commerce. But the creation by Cyberspace of a new “environment” in which commerce can flourish does provide a basis for these questions to be raised. For example, it allows governments that see the assertion of jurisdiction as the precursor to the imposition of taxation, or businesses which see jurisdictional confusion as a shield behind which they can hide, to leap into the void purportedly created by these new dynamics. In cross-border Cyberspace transactions, who should protect the consumer? Who should be able to levy taxes? Who should enforce the terms of a commercial transaction?

To decide what laws apply in Cyberspace, those responsible for the creation of laws must first decide whether Cyberspace is a place, a means of communication,

* This article is an adaptation of a speech given by the author at the 2000 Global Summit on March 14, 2000, at George Mason University. See www.internetsummit.org.

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or a state of mind. I submit that the Internet represents yet another means of communication along a continuum of technological developments that date back to the discovery of electricity.

Second, if this new means of conducting business is to fully succeed and be as efficient and economical as possible, commercial rules that are at least predictable, if not certain, must be developed. Predictability requires a legal infrastructure that allows participants to an electronic transaction to consummate it without undue concern over the risk of repudiation, the means of enforcement, or the rules of dispute resolution. Jurisdictional predictability for a business may suggest that the law of the country of origin should apply, while for a consumer, it will mean that the law of the country of destination should apply. Is there an easy compromise to these polar alternatives?

The Dynamics of Online Commerce

When an online purchase is made, either directly or through the intervention of an electronic agent or "BOT," has the buyer stepped into a new *place* or simply used a different means of communication, much like a phone, fax or satellite link, to affect that purchase? Should it matter where the hardwires, servers and routers are?

If a purchaser orders a book online from her home in Virginia from a seller physically located in Paris, is it as if the bookseller boarded a plane and delivered the book to the purchaser in Virginia, or as if the purchaser flew to Paris to buy the book off his shelf? Does the "push" and "pull" of technology make a difference in how the law of jurisdiction should be applied?

The argument that jurisdiction should not attach where digital transmissions are "pulled" into a locale was unsuccessfully made in *United States v. Thomas*, 74 F.3d 701, 706-07 (6th Circuit 1996), a criminal case in which Mr. Thomas argued that he had not "pushed" pornographic pictures into Tennessee from his server in Los Angeles and should not be subject to Tennessee's pornography laws. Rather, he asserted that, given the way digital technology works, the 0's and 1's he transmitted were actually "pulled" into Tennessee by a computer that must have had a less than noble intent, as it took those 0's and 1's and created a pornographic picture. A difficult argument to make, perhaps, but the question seems valid. Should a business be subject to the laws of whatever jurisdiction into which a consumer drags its digital message? What are the commercial costs of such a result? And how are such results enforced?¹

¹ See also Vartanian, "The Confluence of International, Federal and State Jurisdiction Over E-Commerce, Parts I and II," *Journal of Internet Law*, Volume 2, Numbers 5 and 6 (November and December, 1998); Vartanian, "A US Perspective on The Global Jurisdictional Checkpoints in Cyberspace," *Pike & Fischer Internet Law and Regulation* (May 1999).

A similar set of issues were raised in *Minnesota v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431 (Minn. Dist. Ct. Dec. 11, 1996), *aff'd*, 568 N.W.2d 715 (Minn. Ct. App. 1997) and *aff'd*, 576 N.W.2d 747 (Minn. 1998), which applied the laws of Minnesota to an online gambling business located in Las Vegas that operated through a server in the country of Belize. Sweeping legal assertions that every transmission viewable in a state is subject to the criminal and civil laws of that state, such as Minnesota has made, are difficult to harmonize, since they essentially mean that each such state regulates the entire Internet! Can every jurisdiction impose its advertising, gambling, consumer protection and tax laws to every website that can be seen by a visitor to that site? At least one federal court in New York has concluded that such a result would violate the Commerce Clause of the U.S. Constitution and that the Internet should be viewed as a federal presence. (See *American Library Association v. Pataki*, 969 F. Supp. 160 (1997).

While understanding where one may be haled into court is worthwhile, the issues subsumed by the concept of jurisdiction in Cyberspace are far broader and more important. For example, when an online distributor of financial products located in the United States sells mutual funds through a German division to a German speaking resident person who happens to reside in Morocco, there are regulatory jurisdictional questions that both parties should be interested in beyond the question of where one party may sue the other over a dispute:

1. Where does the seller reside for organizational purposes?
2. What countries can regulate Cyberspace solicitations and/or sales transactions?
3. Who can tax the business as well as the transaction?
4. Under which laws are the terms of the transaction enforceable?
5. In what country(ies) must the product be registered?

Some transactions are even more difficult to analyze than would appear at first blush. For example, if the words of a book are sold online and are downloaded to the purchaser, rather than actually shipping a hard copy of the book, has a *product* been sold or a *service* provided? Electronic commerce actually blurs the lines of demarcation between products and services, a distinction which could be critical to regulation and taxation of electronic transactions. And, if an electronic agent or BOT executes decisions for a party in a way that does not necessarily suggest a physical location for the action, how is the jurisdictional analysis affected?

New Jurisdictional Paradigms

To attempt to answer these questions, or at least establish the academic and practical boundaries for their exploration, the American Bar Association established its “Transnational Jurisdiction Project” in April 1998, through the sponsorship of six separate sections,² and under the direction of the Cyberspace Law Committee of the Business Law Section. More than 130 lawyers in approximately 25 countries have worked together toward the release of a white paper at the July 2000 meeting of the ABA in London. The paper will explain how the rules of jurisdiction have traditionally operated, how the Internet has affected it and what options are available to the market to deal with these changes in the areas of (a) taxation, (b) the sale of goods and services, (c) financial services and securities, (d) intellectual property, (e) public laws and gambling, (f) consumer protection, and (g) data protection. The Project’s complete work product is at www.kentlaw.edu/cyberlaw/.³

In an attempt to develop alternative sets of principles that may be used to solve the jurisdiction question, certain jurisdictional paradigms are being evaluated and explored by the ABA:

1. *Deference and Harmonization*: Deference principles assume that the contractual obligations, rights and protections “negotiated” between parties control the relationship, no matter where the seller and buyer are located. To the extent that the laws of all jurisdictions begin to become “harmonized” and look alike, the issue of jurisdiction becomes somewhat less important. Country A would be more likely to allow the laws of Country B to determine the rights of a consumer in Country A if the laws and protections of each were identical. But, the political and legal practicality of harmonization seems highly questionable.

2. *The Development of Global Protocol Standards (“GPS”)*: The technology that created these issues can assist interested industries in their solution by combining concepts of deference with the use of universal electronic protocols that employ multilingual, intelligent electronic agents to:

- 2.1. communicate the country of origin;
- 2.2. disclose to each other the laws, rules, respective protections and dispute mechanisms that would apply; and
- 2.3. rely upon the user’s preprogrammed choices to reject the “site” or give the user the choice to override the program and transact business under terms that do not match the preprogrammed preferences.

² The ABA Sections involved are Business Law, Intellectual Property, International Law, Public Utilities, Science & Technology and Taxation.

³ See also, Vartanian, “It’s a Question of Jurisdiction – Irreconcilable Differences in Cyberspace,” *Business Law Today* (July/August 1999).

3. *Targeting*: The maintenance of a website alone should not create a jurisdictional basis in every location where it can be viewed.⁴ Language, graphics and software can be used to focus the direction of a website. Thus, the law of jurisdiction can benefit from an exploration of how parties use the Internet to target commerce to particular jurisdictions. A set of uniform principles could be established to govern how sellers should electronically target, screen and filter users so that they could predictably know where they will be subject to laws and regulations. At the other end of the spectrum, the success of targeting and screening mechanisms requires certain information, such as the parties disclosing their habitual residence to each.⁵

4. *Systemic Chokepoints*: Should the junctions in the flow of electronic commerce and money be employed to impose or enforce jurisdictional standards and rules? For example, payments flow through credit card, automated clearinghouse, central bank and bank sponsored payments systems. Most links to the Internet are through Internet service providers. Is it productive or counterproductive to use such systemic junctures to enforce jurisdictional rules or even monitor the collection of taxes? Should such burdens be placed upon the private sector?

5. *The Hunter & the Prey*. Electronic commerce may require a reevaluation of the extent to which certain legal principles meant to protect users may need to be altered. Electronic commerce has changed the leverage between the seller and the buyer and, perhaps, the kinds of protection which consumers need. For example, to the extent that markets become transparent to empowered purchasers who can identify, with the use of technology, every seller of a product, every term of sale, and every price at which the product is available on the planet, the need for intermediaries changes, and the user has greater control of the purchasing process. To what extent does that affect the protections that the user needs? Might there be situations in which the enfeebled seller needs protection from the empowered buyer?

Conclusions

The development of global jurisdictional principles raises some of the more difficult and complex issues that countries face when they confront cross-border transactions. But, if agreement is to be reached and that agreement is to work, the world's nations must consider the following:

⁴ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 2 ILR (P&F) 286 (W.D. Pa 1997).

⁵ At least one court has determined that the failure of a seller to adequately screen residents of a particular jurisdiction from using the site to purchase unregistered securities and engage in online gambling left the seller susceptible to the laws of that jurisdiction. *New York v. World Interactive Gaming Corp.*, 1999 N.Y. Misc. LEXIS 245 (N.Y. Sup. Ct. July 22, 1999).

1. Governmental entities should be cautious about imposing jurisdictional oversight and protections that will have extra-jurisdictional implications.
2. A multinational Global Online Commerce Commission should be impaneled to study jurisdiction issues and develop a uniform code by a specific and proximate sunset date.
3. Technology – such as intelligent electronic agents that can discern the jurisdictional implications of sites based on pre-programmed preferences of the user – should be considered to solve the jurisdiction issues that Internet commerce has raised. In that way, the right to enter into private contracts can play a more prominent role in creating jurisdictional balance.
4. Dispute mechanisms must be responsive to the borderless, real-time features that commerce is taking on. Online dispute resolution and voluntary industry dispute tribunals should be promoted in both the business-to-consumer and business-to-business contexts.
5. The location of servers and other physical embodiments of electronic commerce should not be viewed as proxies for a traditional physical presence until the economic and legal impact of such positions are completely understood.
6. Disclosure of the users and sellers place of origin should play a role in the allocation of rights and responsibilities between them.
7. The concept of “targeting” needs to be refined and global standards that encourage it should be explored so that sellers can enjoy a greater sense of certainty regarding where they must comply with local laws.
8. Rules of tax jurisdiction in Cyberspace should be more closely related to other rules or prescriptive jurisdiction than has generally been the case.

Work in Progress / Travaux en cours

The International Law of State Succession

MATTHEW CRAVEN*

State succession is an issue that only infrequently comes to the attention of international lawyers, and when it does, it usually attracts remarks to the effect that it is 'undeveloped', 'confused', or 'lacking in precision'. In some degree one follows from the other. It is apparent that State succession is an issue that only usually arises at transitional moments in international relations, and normally in quite distinctive circumstances. In the last century, for example, there were several discrete 'eras' in which succession became an issue: the post-war reconstructions of 1918 and 1945, the period of decolonisation in the 1950s and 1960s, and more latterly the 'restructuring' of the former Soviet bloc. Each of these periodic reconfigurations of the 'world map' had certain distinctive hallmarks (even if one might suggest that the prevalence of claims to self-determination was a constant) and the principles applied during one era did not necessarily translate too readily into the circumstances of another. One only has to pose the question: could the emergence of Czechoslovakia in 1918 be readily assimilated to that of Ghana in 1957, or indeed, that of Bosnia in 1992? Were there not very distinct processes at work in each case, and were they not affected by the very particular legal or political environment prevailing at each time? Even if this is only partially correct, the problems facing the 'development' of a law of state succession have certainly been exacerbated by the apparent discontinuous nature of the practice upon which it is based.

We are, at present, in a period of relative activity as regards the law of state succession. In the past decade, there have been numerous developments relating to treaty law and practice, membership in international organisations, the allocation of assets and debt, the issue of nationality and that of State responsibility, to name but a few. The actors involved have ranged from non-governmental organisations (such as those concerned with the Roma minority in the Czech Republic), to third States (such as Hungary with respect to the Gabčíkovo dam project), to international financial institutions and sundry other courts, tribunals and ad hoc 'arbitration commissions' (such as the Badinter Commission in the former Yugoslavia¹). Several

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¹ See, Craven M., 'The European Community Arbitration Commission on Yugoslavia', 66 B.Y.I.L. (1995) 333.

new legal instruments have been drafted including, for example, the ILC draft articles on State succession and nationality,² and the Venice Declaration,³ and the International Court of Justice has delivered several recent decisions that impact upon the current law (including, for instance, the *Gabcikovo Case*⁴ and its decision on preliminary objections in the *Bosnia case*⁵). Whilst one would not expect this level of activity to continue for too much longer, it is clear that several matters remain to be resolved, particularly in respect of Yugoslavia. Included here are the apportionment of assets and debts, the Federal Republic of Yugoslavia's membership in the United Nations and issues of responsibility arising from the conflict in that country.

The problems facing decision-makers in all of these forums are quite profound. Whilst it has never really been the case that law of state succession has suffered from a lack of relevant State practice or that there has been an absence of deliberation on the issues arising, there has, however, been remarkably little consistency in either. In traditional terms, the difference in views has been manifested in a choice between one of two theses: the 'universal succession' thesis, or the 'clean slate' thesis. Neither of these theses has much to recommend itself as a 'theory of succession' (if that is what they are) and neither really captures the complexity of practice. They are, at best, initial presumptions which have to be subsequently qualified by a series of caveats. It is thought that the future development of the law of state succession ultimately depends upon avoiding the terms of this sterile debate, but in order to do so, it will have to originate from a different starting point. The major task, then, will be one of determining how to proceed.

It seems that there are several important questions that need to be resolved before any real progress will be made. One concerns the central role played by the concept of State identity in the structure of the law of succession and the obvious problems of determining continuity / discontinuity. There may be a case for arguing that the existing 'all or nothing' approach should be discarded in favour of an idea of 'relative identity' which would enquire as to the degree to which the successor state(s) partake of the legal character, or identity, of the predecessor. After all, it is only because so much is seen to depend upon the rather tenuous argument of

² UN Doc. A/CN.4/L.573 (1999).

³ *The Venice Declaration on the Consequences of State Succession for the Nationality of Natural Persons* adopted by the European Commission for Democracy through Law, September 1996

⁴ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* ICJ Rep. (1997) 3.

⁵ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. (1996) 595.

'continuity in face of discontinuity' that the resolution of issues in the former Yugoslavia have become so difficult. A concept of relative identity may leave the way open for arguments concerning the degree of participation of the successor State in the acts and agreements of the predecessor, or the extent of benefits accrued by any such arrangements, and may in turn give more salience to the principle of self-determination. There is, however, much to be clarified on this score and, at present, it is little more than one road of enquiry.

Another point that requires some clarification is the extent to which rules of succession are to be regarded as merely parasitic of more general rules of international law. The approach of the ILC has consistently been one of viewing the question of succession as an addendum to the standard rules that might apply in any particular subject area. This was certainly the approach adopted by Waldock in drafting the rules of succession in respect of treaties, and is also apparent in Mikulka's work on state succession and nationality. Whilst this approach may superficially recommend itself as a way of dealing with successional issues, there are several conceptual difficulties and practical problems associated with it. The first concerns the extent to which a subject-specific approach may encourage a different conceptual framework which, whilst it would not produce incompatible results, would certainly lead to inconsistency in the process of argument or explanation. Taking the two Vienna Conventions of 1979 and 1983⁶ as an example, one may ask why a distinction between a case of cession, on the one hand, and a case of separation-cum-union on the other may be relevant in case of property, archives and debts, but not as regards treaties? The issue of 'consent of the population' that apparently underlay the distinction between articles 13 and 16(2) of the 1983 Convention would appear to be equally relevant in other contexts. If we are to tolerate such inconsistencies, one would have to ask whether we can sustain the view that a State may be considered the 'continuation' of the predecessor in some contexts, but not in others?

The second problem concerns the limitations of the general framework governing a particular issue. To take one example, in case of nationality, the decisions of the PCIJ in the *Nationality Decrees Case*⁷ and that of the ICJ in the *Nottebohm Case*⁸ suggested that the role of international law was primarily, if not exclusively, a negative one – concerned with the 'delimitation' of respective jurisdictions rather than their establishment *ab initio*. If this was to be the governing principle in case of succession,

⁶ Vienna Convention on Succession of State in Respect of Treaties 1978; Vienna Convention on Succession of States in Respect of Property, Archives and Debt 1983.

⁷ *Nationality Decrees in Tunis and Morocco*, PCIJ Rep., Series B., No. 4 (1923).

⁸ ICJ Rep. (1955) p. 23.

all we might say is that successor States are simply prevented from claiming as their 'own' those who were more closely (or 'genuinely') connected with other States. There would be no obligation upon successor States to confer their nationality upon individuals or groups, and they would be entirely free to 'disown' those who may have a genuine connection with the territory, but who are simply not 'wanted'. Undoubtedly, general human rights considerations may be relevant here as indeed may be the general principles concerning statelessness, but it needs to be recognised that the point of difficulty arises from the faulty assumption that rules of succession may simply be generated by means of an extrapolation of other more general principles. Succession is as much concerned with the 'creation' or 'establishment' of jurisdictional claims by successor States as it is with their delimitation. If the law of state succession is to develop in any proper way, therefore, it will need to retain a conceptual distance from standard principles (such as the *pacta tertiis* principle in the case of treaties) and allow an enquiry into matters that may not necessarily form part of everyday legal discourse.

These problems represent only a few of the many difficulties facing the development of a coherent law of State succession fit for the twenty-first Century. They do, however, give an indication of the very fundamental nature of the challenge particularly insofar as they ask us to look behind some of our basic assumptions of international legal discourse. We cannot simply rely upon the blithe assertion that 'states are states' but necessarily have to ask 'who are they?' or 'what are they?', and 'what role does law have in their emergence or demise?'

Conference Scene / Le tours des conférences

E-commerce at the Fordham Conference on Intellectual Property Law and Policy New York, 27-28 April 2000

MARIKE VERMEER*

The Conference

The growth of the Internet has led to an increase in electronic commerce and in the number of disputes arising from commercial use of the Internet. Many of these disputes concern the infringement of intellectual property rights, making this a timely subject for the Fordham University's Annual Conference on Intellectual Property Law and Policy, which took place in New York on April 27 and 28. Approximately 70 speakers and commentators from the judiciary, government, academia and the private sector, addressed current issues in patent law; trademark law; multinational intellectual property litigation and harmonization of law; TRIPS; United States and European patent litigation; copyright and related databases; antitrust, competition law and intellectual property; international exhaustion and parallel trade, and; copyright and trademark issues. Electronic commerce was discussed in many of these sessions, and primarily in the sessions on trademark and copyright law.

Trademark Law

One important topic was the domain name issue. Professor Marshall Leaffer discussed "cybersquatting": the registration of another's trademark as a domain name. He introduced the recent U.S. Anticybersquatting Consumer Protection Act, which creates a new federal cause of action and provides remedies under a new section 43(d) of the Lanham Act. Cybersquatting is the bad faith use, registration, or trafficking in a domain name that is identical to, confusingly similar to, or dilutive of another's trademark or service mark, with intent to profit from the goodwill of such mark. Leaffer pointed out that the Act does not resolve the problem of registration of the same domain name by different persons having legitimate rights to a mark or to innocent domain registrations by those unaware of another's right. Nor does the Act deal with the problem of "warehousing" of domain names for the purpose of later selling them at a profit. Leaffer also discussed the use of trade names in metatags, and cited two recently-decided U.S. cases¹.

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¹ *Brookfield Communications, Inc v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir.1999); *Playboy Enterprises, Inc. v. Welles*, 78F.Supp. 2d 1066 (S.D. Cal. 1999).

Professor Graeme Dinwoodie, commented on the domain name issue in his presentation on “The rational limits of trademark law”, Neil Wilkof discussed registration of generic marks, such as “drugstore.com”, which, in his view “has the potential to reconfigure the balance between the private and public interests with respect to generic marks by conferring market-valuable rights in words that would not be protected under the classic principles of trademark law”. Shira Perlmutter of the World Intellectual Property Organization (WIPO) discussed dispute resolution with respect to trademark/domain name issues, focusing on the WIPO Arbitration and Mediation Center’s online procedure, which was established in December 1999 and has approximately 120 cases pending at present.

Copyright Law

Another important aspect of intellectual property law affecting electronic commerce is copyright. The conference addressed such issues as liability for intermediaries, electronic rights, licenses and related rights such as those with respect to databases. Professor Jan Rosen discussed the 1998 Swedish Act on Responsibility for Electronic Bulletin Boards. This Act is considered unique because it imposes upon the intermediary a duty to monitor and broadens intermediary liability. Liability of information location providers² was the title of the presentation by Professor Alain Strowel. He discussed whether a hyperlink can be considered a copyright infringement, referring to such cases as *Shetland Times*, *Washington Post v. Total News*, the MP3 case, and more recently, *Ticketmaster v. Tickets.com*, which held that a hyperlink did not constitute copyright infringement. Professor Bernt Hugenholtz addressed the question of ownership of the rights to new digital uses of existing works of authorship. Reviewing the “state of the art” with respect to electronic rights in Austria, Belgium, France, Germany, The Netherlands and the United States, he concluded that, although courts all over the world seem to agree that authors retain their rights in respect of any subsequent use in new media, media companies will likely find other, contractual, ways to deal with the electronic copyright issue.

Daniel Gervais spoke about online licensing of copyright through an Electronic Rights Management System, a database containing information about the works and the authors or other right holders that may give automatic licenses. Professor Adrian Sterling proposed an international codification of copyright law, setting out uniform and binding rules regarding the recognition of copyright and related rights, accompanied by a global enforcement system in the form of an “e-justice

² He defined information location providers as “service providers which refer users to content available on the Internet by using “*information location tools, including a directory, index, reference, pointer, or hypertext link*” (Art. 512(d) US DMCA), as well as a search engine, metasearcher, smartbrowser”.

system". This method of conducting legal proceedings through electronic communication would involve an administrative committee composed of judges and practitioners from all participating countries, and a central registry through which all notifications, proceedings and actions could be effected. Pleadings, evidence, the arguments and the decision could be done by e-mail, fax or video-conferencing.

Legislative initiatives

Dr Jörg Reinbothe discussed legislative initiatives in the field of copyright and the information society in the European Union, pointing out that in March 2000 the EU decided to adhere to the two WIPO "Internet" treaties of 1996 (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)). Reinbothe also discussed the proposed Directive on Copyright in the Information Society, which is expected to be adopted by the end of this year, and is a pre-condition for ratification of the WIPO "Internet" Treaties by the EU and its Member States. Reinbothe also announced the forthcoming international copyright conference, organized by the European Commission, from 9 to 11 July in Strasbourg on the "Management and Legitimate Use of Intellectual Property".

The draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of the Hague Conference on Private International Law was discussed *inter alia* by Professor Martin Adelman and Jeffrey Kovar in the session on multinational intellectual property litigation and harmonization of law. Professor Catherine Kessedjian, Deputy Secretary General of the Hague Conference on Private International Law, spoke about exclusive jurisdiction and multinational intellectual property litigation. Professors Rochelle Cooper Dreyfuss and Jane Ginsburg examined the rules of the draft Hague Convention in the light of the Internet. This draft Convention elicited many comments from the public, including one on the absence, in contrast with the Brussels Convention, of a supranational review body.

Conclusion

Electronic commerce played an important role at this conference. The issues addressed by the various speakers were diverse and gave a good general overview of the most pressing problems currently facing electronic commerce and intellectual property law, as well as the most recent developments. One suggestion for future conferences would be to group electronic commerce into one or more separate sessions, rather than dividing it among so many different sessions.

**Compte-rendu du Colloque de Paris sur “Le droit international et le temps”
(SFDI – mai 2000)**

ERIC WYLER*

Si le temps est parfois pris en compte explicitement par le droit, sa présence s’y décèle généralement au titre moins honorifique d’implicite. En tant que phénomènes, le droit et la science du droit s’inscrivent évidemment dans la temporalité et sont soumis à l’irréversibilité, dont on se plaît à saluer aujourd’hui l’inéluctabilité.

Mais s’il y a un temps du droit, quel peut bien être le droit du temps ?

Cette interrogation, rapportée au droit international et à son éventuelle spécificité à cet égard, représente le défi que le Colloque de Paris organisé par la SFDI se proposa de relever, au risque de sacrifier à un certain air ... du temps.

Qu’aucune réponse définitive n’ait pu être apportée ne saurait ni surprendre ni décevoir, encore qu’à l’issue des conférences et débats, l’auditeur se prenne à douter de l’existence d’un véritable “droit international du temps”. Par son immatérialité et son omniprésence même, le temps paraît en effet résister à toute captation, fût-elle conceptuelle.

Une chose est sûre. Le temps a droit de cité en droit international ; il y a même des droits.

En témoigne nombre de notions juridiques empreintes de déterminations temporelles : “délai raisonnable”, “entrée en vigueur”, “terminaison”, “suspension” ou “extinction” (d’un traité, par exemple), “fait illicite instantané” ou “continu” ... Elles expriment généralement la révérence du droit international au temps qui les lui impose, les façonne, bref, se les assujettit, à l’image de la contemporanéité entre durée de vie d’une norme et situation de fait consacrée par le principe, fondamental, de non-rétroactivité.

Mais si le temps imprègne et limite le droit international, celui-ci le lui rend bien, qui cherche à l’utiliser, le manipuler, voire le déformer.

Aux fins d’y rattacher des effets juridiques déterminés, le droit international tantôt étire, épaissit le temps – c’est (ou c’était) la “prescription acquisitive”, la “consolidation historique” ou la “possession immémoriale” – tantôt le contracte, l’amincit – ce sont les “clauses d’urgence”, “mesures conservatoires”, ou “état de nécessité”. Il va parfois jusqu’à se l’approprier, le prenant comme objet ou discipline : en atteste le droit intertemporel, exerçant une sorte de contrôle des naissances et

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décès des normes. Dans cette perspective, peu importe la “source formelle” de la règle internationale, coutumes et traités vivant plus ou moins longtemps.

De tous ces aspects, le Colloque de Paris, qui ne se voulait au demeurant pas exhaustif, porte témoignage.

Parmi ses parents pauvres, trois figures semblent dignes de considération.

D’abord la norme, certes évoquée dans sa dimension “futuriste”, chargée d’un projet social, mais négligée dans sa dimension “passéiste”. Pour peu qu’elle ne soit pas imposée “d’en haut”, par un pouvoir politique peu soucieux des mœurs (ethos), mais réellement émergée d’une pratique dont elle s’enrichit à mesure, elle révèle sa structure duelle, tournée vers les occurrences passées dont elle est le fruit, simultanément déjà anticipative des occurrences à venir.

Quant à son présent, on le peut circonscrire dans l’acte interprétatif, deuxième “oublié” de marque. L’herméneutique juridique nous rappelle que l’interprète, dans sa tentative de s’approprier un passé, celui du texte et de son contexte, indissolublement liés, réalise (à son insu) la rencontre entre deux horizons, le passé et le présent. Le présent exerce sa détermination sur l’interprétation alors même que l’interprète pense l’occulter dans sa quête d’un mythique sens “historique”, d’une chimérique “intention” de l’auteur. Comment l’interprétation ne serait-elle en effet pas tributaire du “moment” qui la constitue ? Au-delà de l’abolition du temps qu’elle veut opérer par fusion du passé et du présent, elle dissimule mal sa troisième inscription temporelle : effectuée en vue de la solution d’un cas concret, elle “fixe” la norme également pour l’avenir ... jusqu’à sa prochaine interprétation.

Enfin, le célèbre droit universel-impératif aurait mérité une place d’honneur à la cour du droit international du temps, peut-être au titre de représentant d’une authentique spécificité.

Son originalité ne prête en effet pas au doute : s’autorisant d’une prétendue ubiquité, c’est à se libérer de toute chaîne temporelle qu’il vise, s’auto-proclamant de validité absolue, vérité éternelle et immuable, droit *naturel* des ordres juridiques contemporains. Que cette revendication heurte les réalités multiples, changeantes et éphémères de notre monde sublunaire, il n’en a cure.

Le temps, qui nous manque à tous, ne manque pas au droit, en particulier international. C’est ce qu’ont prouvé, avec une éloquence souvent brillante, les conférenciers du Colloque de Paris, dont on se réjouit déjà de lire les textes dans les “Actes” (à paraître).

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Sur la couverture

Pour son deuxième volume, le Comité de rédaction a choisi une sculpture, oeuvre d'Edmée Guyon, intitulée "La Paix". L'artiste en met gracieusement la photo à la disposition du FORUM.

"Chacune des sculptures d'Edmée Guyon est comme la synthèse d'un mouvement où s'unissent forme physique et aspiration spirituelle" a écrit Jean Selz, historien d'art.

La Paix a été inspirée à l'artiste par les femmes du désert qui, assises par terre, forment un triangle avec leurs voiles et leur robe. La sérénité et l'épure qui se dégagent de cette image, révélée par la sculpture, lui ont donné son titre. Qu'elle inspire le travail du Comité de rédaction durant cette deuxième année d'existence.

Edmée Guyon peut être jointe au 18, rue Henri Barbusse, 75005 Paris (tel: +33.1.43.26.34.79).

On the Cover

The Editorial Board has chosen to illustrate the cover of its second volume with a sculpture by Edmée Guyon entitled "*La Paix*", a photograph of which the artist has kindly made available to the FORUM.

According to the art historian, Jean Selz, "each of Edmée Guyon's sculptures is like a synthesis of motion, uniting physical form with spiritual aspiration".

The artist's inspiration for *La Paix* was the triangle formed by the veils and garments of desert women, seated on the ground. The title of the sculpture is attributable to the serenity and purity emanating from it.

Edmée Guyon can be reached at 18, rue Henri Barbusse, 75005 Paris (tel: +33.1.43.26.34.79).

Information for Authors

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