Transnational Internet Law: where is it going?

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Menu

- The Internet: Yesterday and Today
- Three Ages of Internet Law
- International Institutions
- EU Directives
- Ten Legal Problems of the Mass Age
CONTEXT
Years of Use of the Internet (QC2)

% that uses the Internet

Current users. OxlS 2005: N=1,309; OxlS 2007: N=1,578; OxlS 2009: N=1,401

The Internet In Britain 2009: http://www.oii.ox.ac.uk
First Age

- Long ‘pre-commercial’ period
- Changing role of US government
- Development of an ‘Internet culture’
- Birth of WWW
- ‘Cyberlibertarian’ arguments
- Defining battles, e.g. Communications Decency Act 1996
First Age

- *Reno v ACLU (1997)* 521 US 844: first Supreme Court case
- ‘Jurisdiction’ cases in US: active v passive
- Developing role of intellectual property
- Ad-hoc attempts to provide for e-law (electronic evidence, electronic signatures ..)
- *Or is it just the ‘law of the horse’?*
Second Age

- Understanding of ‘regulation’
- ‘Dot-com’ boom
- Statutory responses
- Significant UN & NGO activity
Second Age

- Goldsmith & Wu, *Who Controls The Internet: Illusions of a Borderless World*

- Gradual reassertion of state sovereignty ... but also further shifts to electronic transactions, communications, media ...

- Electronic Commerce acts in many jurisdictions
Mass Age

- ‘Everyday’ transactions
- Public services online
- User-generated content
- Social networking
- ‘Web 2.0’

### US User-Generated Content Creators, by Content Type, 2008-2013 (millions)

<table>
<thead>
<tr>
<th>Content Type</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>User-generated video</td>
<td>15.4</td>
<td>18.1</td>
<td>20.6</td>
<td>22.7</td>
<td>24.9</td>
<td>27.2</td>
</tr>
<tr>
<td>Social networking</td>
<td>71.3</td>
<td>79.7</td>
<td>87.7</td>
<td>94.7</td>
<td>100.1</td>
<td>105.3</td>
</tr>
<tr>
<td>Blogs</td>
<td>21.2</td>
<td>23.9</td>
<td>26.7</td>
<td>28.5</td>
<td>30.2</td>
<td>32.1</td>
</tr>
<tr>
<td>Virtual worlds</td>
<td>11.6</td>
<td>13.9</td>
<td>15.4</td>
<td>16.9</td>
<td>18.4</td>
<td>19.9</td>
</tr>
<tr>
<td>User-generated content creators</td>
<td>82.5</td>
<td>88.8</td>
<td>95.3</td>
<td>101.7</td>
<td>108.0</td>
<td>114.5</td>
</tr>
</tbody>
</table>

Source: eMarketer, January 2009
1008833
Mass Age

- And the hardware...
- Always-on / broadband
- Mobile (and now smartphone)
- Location-aware
- Appliances
Mass Age

- Power of intermediaries
- ‘Generative’ v ‘Tethered’ debate: Zittrain, The Future Of The Internet ... and how to stop it (2008)
INTERNATIONAL RESPONSES
Which organisation?

- International Telecommunications Union (ITU)
- Historic role in radio and telecommunications standardisation
- Latter-day role in ‘development agenda’ (ICT4D)
- Some involvement in solving satellite problems
- Political v technical
Which organisation?

- UN Educational, Scientific & Cultural Organisation (UNESCO)
- Mass media / communications brief
- ‘New World Information & Communications Order’ (70s/80s)?
- Multilingualism, digital divide, cultural diversity
- Membership: lacking US for long period
Which organisation?

- World Intellectual Property Organisation (WIPO)
- Steered through ‘Internet Treaties’ on copyright in 1996
- Strong links with trade agenda e.g. WTO
- Internet law = more than copyright?
Which organisation?

- **World Trade Organisation (WTO)**
- Dealt with telecommunications (GATT) and also trade-related IP (TRIPS)
- Interesting goods v services questions
- **UN Commission on International Trade Law (UNCITRAL)**
- Influential Model Laws (especially e-commerce)
- Clear importance of Internet in globalisation... but is global trade the right filter?
Which organisation?

- UN General Assembly
- Connecting all the pieces - or vague aspirations?
- World Summit on the Information Society (WSIS) 2003 and 2005
- Internet Governance Forum (ongoing)
ICANN

- Internet Corporation for Assigned Names & Numbers (http://www.icann.org)
- Private non-profit California corporation
- Contract with the US government
- Very detailed governance structures
- Established 1999, last major revision 2009
• Board based on constituencies (but not direct election)

• Governmental Advisory Committee

• Consensus-based?

• Large international meetings

• Multiple forms of oversight

http://www.icann.org
Domain Names

- Control through Top-Level Domains (TLDs)
- Generic (gTLD), .com, .net, .info, .cat, .xxx
- Country-code (ccTLD), .uk, .es, .cn
Regional

- Council of Europe

- Wide range of initiatives, but particular success of:
  - Convention on Cybercrime

- But: familiar problems re international criminal law: and this is global, not just international!
European Union

- **Internal market usual starting point**
- **Broader interest e.g. Lisbon Agenda (‘growth and jobs’)**
- **Impact of other developments (e.g. Brussels Regulation)**
Four Directives

- Audiovisual Media Services Directive (2007/65) (former TVWF)
Data Protection

• DP rules as obstacle to internal trade
• DP as fundamental right (CFR arts 7/8)
• ‘Third country’ control (e.g. transfer of passenger data to US re air travel)
• ‘California effect’ = success of EU?
Electronic Commerce

- Incorporation of UNCITRAL Model Law
- Status of electronic contracts
- Basic rules for e-commerce (Information Society Services)
- Protection of intermediaries (mere conduit, cache, host)
Telecoms Package

- Liberalisation of telecoms regulation
- Market regulation where necessary, e.g. ‘local loop unbundling’ for former State monopoly operators
- Recent concerns re transparency, quality of service, disconnection
- Net neutrality (not) dealt with in 2009
AVMS

- Landmark Television Without Frontiers: country of origin and freedom of reception principles for **television**
- Extension (technological neutrality?)
- Division into **linear** and **non-linear** (or TV and ‘TV-like’ on-demand)
- Backlash re scope / impact on UGC
TEN PROBLEMS
Net Neutrality

- Three-way relationship between **ISP**, **content provider** and **user** (consumer? creator? customer?)
- Challenge to ‘end-to-end’ principle
- Competition issue? Which market?
- Respond ex ante or ex post?
- What if ISP = provider?

Picture sources: Save The Internet, Hands Off The Internet, icanhascheezburger.com
IP (Copyright)

• First there was Napster ...
• Now there is Pirate Bay ...
• Broadband = from music to movies?
• UK and France taking ‘three strikes’ approach (graduated response)
• Filtering / ISP responsibility?
Filtering

- Duty on ISP to block
- If so, what? In practice, ‘voluntary’ schemes (e.g. for child pornography); what about terrorism? hate speech? phishing?
- Related issue: filtering by web host
- Various pressures e.g. on YouTube
- Trade barrier? Public v private?
Spam / Phishing

- Limited impact of Cybercrime Convention
- Tension between freedom and protection
- Astonishing volume of spam ... and even more limited impact of legislation
- Cybercrime as a tool of war (Estonia?)
- Cybersecurity agenda (e.g. in US)
WHAT SPAM IS WORTH
An analysis of pharmaceutical spam emails sent out over one month in 2006 by just 1.5 per cent of one botnet called “Storm” reveals that few people click on the links - but that spam still makes money.

35 MILLION SPAM EMAILS SENT

8.2 million made it to mail servers. The rest were sent to non-existent addresses or bounced back to the sender.

10,500 recipients clicked the link in the mail.

28 bought products - a conversion rate of 0.000008%.

Extrapolated over the whole network, Storm generated an estimated $3.5 million in pharmaceutical sales alone in 2008.

- Non-spam emails per day: 47 bn
- Spam emails per day: 200 bn

Source: Communications of the ACM, Vol. 52, P.39

Source: New Scientist, April 2010
Domain Names

- Extension of gTLDs - good or bad?
- Trademark problems (www.deusto.???)
- Zoning / segregation (.xxx dispute)
- Unresolved political questions re ICANN
- Success (maybe) for Internationalised Domain Names (IDNs)
- ccTLD - never far from dispute
Search

- Who’s afraid of Google?
- AdWords cases (e.g. ECJ 2010)
- Fairness / neutrality of search results
- International dispute e.g. Google China
- Again, competition and IP issues (Google Books)
- Not to mention privacy (especially Street View)
Privacy

- Are US and EU on different page (e.g. Lindqvist case)?
- “Privacy is dead - get over it”?
- Contextual and behavioural advertising
- Facebook policy changes - law in the real world or much ado about nothing?
Social Networking

- User safety (MySpace in US)
- Ownership of IP rights
- Data protection (relevant?)
- New opportunities to defame / insult
- Are sites too powerful? Network effects of adoption and ‘walled gardens’
Virtual Worlds

- Property? Contract? Copyright? Trademark?
- In-game transactions and gambling
- Theft
- Again, control of ‘God’ / designer
The Missing Tenth

Image: http://www.flickr.com/photos/debord/4932655275/sizes/m/in/photostream/
Further Reading

- Some classics:
  - *A Declaration of the Independence of Cyberspace* [classic statement of the ‘cyberlibertarian’ case]
  - Easterbrook, ‘Cyberspace and the Law of the Horse’ [1996] University of Chicago Legal Forum 2007 [or the counterargument to cyberlaw]
  - UNCITRAL Model Law on Electronic Commerce 1997

- Some good books:
  - Gillies, *Electronic commerce and private international law* (Ashgate, 2008)
  - Mathiason, *Internet Governance* (Routledge, 2008)

- And some recent articles:
  - Berman, ‘Preface’ in Law and Society Approaches to Cyberspace (Aldershot: Ashgate, 2007) [an alternative version of the three-ages argument]
  - Grimmelmann, ‘Saving Facebook’ (2009) Iowa Law Review 1137,
Thank you!

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UEA Law School: http://www.uea.ac.uk/law
My blog: http://www.lexferenda.com