

The Internationalization of Cyberspace:

An E-qual Regime between developed and developing countries

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If it is up-to-date to underline the *de facto* digital divide, it is not to forget that there is also a *de jure* inequality. Although the Internet is a transnational space *per se*, governments try to impose their legislation and thus their own cultural views in Cyberspace. The result is that strong countries can override weak countries. We do find a good example in the famous freedom of speech debate, focusing today on the *Yahoo* case, opposing the American liberal approach to the French restrictive philosophy - or in a more general way the controversy between Common Law and Civil Code countries. However, it is a fact that remains out of the debate the views of African, Asian or Latin American countries and their particular legal systems. The will to establish national frontiers in Cyberspace finally results in consecrating worldwide one single criteria defined by a few but powerful States.

It seems to us that in order to insure cultural diversity, one has to maintain legal diversity. And paradoxically, we believe that the objective could be achieved through the abolishment of national territorial approaches to the digital phenomena. In a salomonian way, the trick consists in saying if the Internet ought not to belong to some countries, and if some countries do not want that it belongs to all countries, well then it should belong to no country at all! Legally speaking, the idea is to internationalize Cyberspace, as the International Community had done it before for the High Sea.

In this sense, some Latin American scholars adopted during the First World Congress for Informatics and Law in Quito (2001) a resolution inviting all the users in the Internet to join a common interest group - the *Group for Internationalization of Cyberspace* - in order to obtain from the States Community the internationalization of Cyberspace through an multilateral treaty, which should insure the defense of Human Rights, an

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equal access for all to the resources of the Internet and a multi-cultural environment of freedom.

But to achieve this goal, one ought first of all to demonstrate why the Internet is an international space in the meaning of International Law.

I.

We will not undertake here the whole demonstration why Internet is an international space. We would just like to mention one main argument. If delimitation of spaces are undertaken by municipal law, their opposability relies on the sole *jus gentium*. Two kinds of spaces may be identified. First, we have the “space-thing”, where space is treated like a possession above which States have certain rights and assume a number of obligations. So it is for physical territories, where States for example exercise their jurisdiction over residents because they do stay on the State’s *dominium*. The latter is the source of the power. But there are also spaces, which are not physically appropriatable – the “space-area”. For instance, the legal space of a country is much more an area than the mere *dominium* of its territory: a State may pursue a national for having committed a crime abroad. Its jurisdiction is not based on a territorial link, but on an abstract link constituted by nationality. In other words, jurisdiction is not *de jure dominii*, but *de jure imperii*.

This distinction is the key for States’ jurisdiction in Cyberspace. The source of power cannot be any longer the national territory in its primary sense. The model to follow is the one of the Holy Sea. Canonical law does not apply because an infringement has been committed on the territory of the Vatican, but because the infringement has been committed by or against a person belonging to the Catholic Church. In the same manner, a cybercrime is not committed on a national territory, as the first judges wrongly ruled in the German *Somm* case, but by or against a national one. The crime itself is localized in an international space. It seems to us, however, that passive territorialism can go hand in hand with the international status of the Internet. At least, under the main condition that the virtual act can really be physically and permanently localized on a territory. A contract concluded in the Internet regarding the sell of a house situated in New York can be located in the United States. A contract concluded in the Internet regarding the sell of a digital photography stored on a server situated in New-York, cannot be permanently localized in the United States, as the server can be moved at any moment; the picture can be stored on an other server somewhere around the world; etc.

More broadly, the internationalization of Cyberspace also has as consequence that no State can proclaim any sovereignty over it. Like the Ether, Cyberspace does not belong to one; it does belong to no one because it belongs to every one. Only the global community of Internet-users can reign over it. As we have already stressed it out, this does not mean that States may not rule in respect of virtual activities. They may continue with their legislative work, but based on the *imperium* and not based on their *dominium*, at least not on the principle of active territorialism.

According to the status of an international space is nothing revolutionary. We already have the example of the High Sea, ruled by the 1982 Montego Bay Convention, delimiting the *espacium clausum* of territorial seas under States' sovereignty and the *espacium liberum* of the High Sea. Unfortunately, since Grotius' appeal, 400 years had to pass before the international Community consented to confirm formally the international character of the High Sea and its principle of freedom. Do we have to wait that long for the Internet as well? We do not hope so. Freedom of Cyberspace does not mean a lawless place open to renegades. On the contrary, freedom generates in a natural way responsibility.

The Internationality of the Internet will ensure a social-regulated space to the net-users – Johnson's Netizenship. It will contribute to an equal use for all countries, whatever their origin and their economical-technological development.

II.

The initiative presented by the *Group for the Internationalization of Cyberspace* (www.alfa-redi.org/GIC), under the auspices of the *Alfa-Redi Community*, aims to resolve most of the actual legal problems that are discussed on national and international level. The Internet being transnational by its nature, regulators do accord that there is a real need for some international regulation. However, their will of protection of sovereignty does not permit today to find a global solution. Although, some treaties have been achieved (e.g. the *Cybercrime Treaty* of the European Council) or will be achieved (e.g. the *Jurisdiction Convention* of the Conference of the Hague), no international organization does treat Internet and its issues as a whole. Beneath specific topics like e-signatures or cybercrimes, there are other issues like the digital divide and the respect of fundamental freedoms.

As we said before, we do already have in practice a regime that functions well: the status of the High Sea with its 1982 *Montego Bay Convention* and its established Authority. Such a mechanism fits well to Cyberspace: on one hand States' sovereignty is well-kept; on the other hand, Cyberspace will remain free and will be regulated by consensus of the International Community. However, on the contrary to the *Montego Bay* system, Cyberspace's Authority should also include, beneath State representation, representatives of the Internet Community. Although a first step has been made in this direction with the establishment of the ICANN, it is a fact that, however, for one part, its goal is limited to DNS problems, and, for other part, there is no real equal representation.

The Internationalization of Cyberspace could be beneficial to all Internet users, may they be States, organizations, merchants or individuals and seems to us the unique way to guarantee an e-equal access and rule-making-power of all the States and not only by some "happy few" ...at least in our opinion.

