ROUTLEDGE RESEARCH IN IT AND E-COMMERCE LAW

International Internet Law

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Preface

In only a few years, the Internet has revolutionized trade, health, education, and, indeed, the very fabric of human communication and exchange. Moreover, its potential is far greater than what we have seen in the relatively short time since its creation. In managing, promoting, and protecting its presence in our lives, we need to be no less creative than those who invented it. Clearly, there is a need for governance, but that does not necessarily mean that it has to be done in the traditional way, for something that is so very different.[1]

K. Annan

The Internet has, in a relatively short time, become an essential instrument of modern social functioning. As of late 2011 the global network includes an estimated 2.5 billion users[2] which means that every third resident of the world uses the Internet. The growing awareness of the social, economic, and political impact of the Internet on society has brought the question of governing the Internet as a whole into sharper focus. However, the process of regulating legal and social consequences of technological solutions always falls behind technological innovations and their implementation. This applies to the Internet as well, if not most of all. It has become apparent that the Internet requires a comprehensive regulation to prevent the loss of its functionality (which may be an unavoidable consequence of gradual fragmentation) and to maintain its efficiency and interoperability. Moreover, laying down common legal principles governing the Internet as a whole would facilitate the protection of users' rights and formulate straightforward and uniform responsibilities of their relevant groups. Currently, the international community conducts negotiations on Internet governance. The World Summit on the Information Society (WSIS), held in Geneva in December 2003, officially placed the issue of Internet governance on agendas of diplomatic meetings and discussions. The *Declaration of Principles* and *Action Plan* adopted at WSIS provided for the implementation of a number of initiatives in

1 The United Nations Secretary-General, K. Annan, during the Global Internet Governance Forum, New York, March 2004; see E. Gelbstein and J. Kurbalija (2005), *Internet Governance, Issues, Actor and Divides*, Msida: Diplo Foundation, p. 7.

2 All statistical data as per Miniwatts Marketing Group, *Internet World Stats*. <http://www.internetworldstats.com/stats.htm> (accessed 17 February 2009 based on statistics last updated 9 February 2009).

the field of Internet governance, including the establishment of a Working Group on Internet Governance (WGIG).[3] WSIS and WGIG comprised the first phase of the process of establishing international mechanisms to govern the Internet, which should result in the clarification of Internet governance issues, as well as introduce new related procedures and mechanisms. The international forum which is expected to produce solutions to the burning issues could be the Internet Governance Forum (IGF), under the auspices of the Secretary-General of the United Nations.[4]

All abovementioned efforts have contributed to the establishment of the foundations of a new, international and interdisciplinary branch of law, which may be referred to as the 'International Internet Law'. This is the area combining both national and supranational efforts overlapping all branches of law, closely related to issues of the technical structure of the global network. The basic notion requiring clarification (which underlies the entire debate on the form of the new branch of law) is the concept of Internet governance. Until now, the only attempt at establishing international definition of this quite difficult idea has been made by the World Summit on the Information Society. The final document of the WSIS in Tunis in 2005 comprised the definition of "Internet governance" as "more than Internet naming and addressing". It also includes "other significant public policy issues such as, *inter alia*, critical Internet resources, the security and safety of the Internet, and developmental aspects and issues pertaining to the use of the Internet".[5] Moreover, the document includes a call on all members of the Internet community to extend and modify the proposed definition so that "Internet governance" is democratic and transparent with the involvement of governments, the private sector, civil society and international organizations. Internet governance should "ensure a stable and secure functioning of the Internet, taking into account multilingualism".[6] It seems that the essence of the problem lies in the lack of consensus as to the scope of the notion itself: whether Internet governance should take account of network technical administration and related competence of state authorities only or, more reasonably (due to practical impossibility of separating strictly technical issues), look far ahead in directions specified by WSIS ("development-oriented aspects"). What is more, in this context, even the very definition of the term "Internet", which usually includes only the physical elements of the global network, proves disputable: the definition definitely does not reflect the

3 Article 50 of the (2003) *Declaration of Principles* (WSIS-03/GENEVA/DOC/4-E <http://www.itu.int/wsis/docs/geneva/official/dop.html> (accessed 14 January 2009) reads as follows: "International Internet governance issues should be addressed in a coordinated manner. We ask the Secretary-General of the United Nations to set up a working group on Internet governance, in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, involving relevant intergovernmental and international organizations and forums, to investigate and make proposals for action, as appropriate, on the governance of Internet by 2005".

4 More about all entities involved in the debate on global network governance, their role and achievements can be found in chapter 4.

5 United Nations (2005) *World Summit on the Information Society Tunis Agenda for the Information Society*, Geneva: ITU. <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html> (accessed 4 January 2011), para. 77.

6 Ibid., item 29.

current nature of this phenomenon.[7] For the purposes hereof, the term "Internet governance" – being essential to considerations on the form of international Internet law – includes issues directly related to the technical administration of electronic resources, including private entities, as well as any and all actions performed by state authorities using legal instruments and international organizations exerting a direct impact on activities performed using the electronic medium, including those outside a regulating state. This definition enables us to focus on the priority goal of the international community, namely to establish common international standards as to the freedoms and obligations of all categories of entities involved in electronic activities and set limits of their mutual influences, particularly by using instruments specifying the distribution of jurisdictional competence at international level. Apart from state authorities developing national regulations, other entities that affect Internet governance include private-law entities (with particular regard to ICANN, but also all other entities involved in Internet governance), international organizations such as ITU[8] or WTO (acting mainly as consultants and experts rendering their forum available for initiating and stimulating international debate) as well as end users – natural persons who have *de facto* become the object and not the subject of national and international regulations on the electronic network. Actions of state authorities are intended to produce effects at national level, even though, in reality, they often produce effects at international level. The actions of other entities, such as international and social organizations which most often unite network users, are of an international nature, though without legally binding force.

As a result of the foregoing discussions, an obvious and still unresolved dispute has arisen between the supporters of new "cyberlaw" (gathered around non-governmental organizations and universities), and those who believe that issues, including those relating to the Internet, are sufficiently regulated by "old" legal provisions if these are applied appropriately (such a position may be proved, for instance, by the practice of applying national law provisions to cyberspace related situations).[9] Supporters of the latter argue that the Internet does not constitute a new object: the Internet is just another new device, no different from the telegraph, the telephone, or radio. Representatives of this approach argue that existing laws can be successfully applied to the Internet with only minor adjustments for, as long as it involves communication between people, the Internet is no different from the telephone or the telegraph, and it can be regulated like other telecommunications media. Proponents of the approach that promotes the need for new regulations on electronic activities, on the other hand, argue that the Internet is a fundamentally different device from all previous devices to which it is compared by cyber-law opponents, and thus that it requires new regulation. This approach was particularly popular in the early days of the Internet;[10] today,

7 For more about the definition of the Internet, please refer to chapter 2.

8 International Telecommunication Union.

9 See chapter 3.

10 See Barlow, J. P. (1996) 'A Declaration of the Independence of Cyberspace', paper published online. <https://projects.eff.org/~barlow/Declaration-Final.html>. The declaration was made on 8 February 1996 in Davos.

the main assumption is that the Internet has detached social and political reality from the world of sovereign states.[11] Cyberspace is different from real space and it requires a different form of governance. (The influence of this approach is noticeable in the creation of ICANN and the manner in which this organization functions.) Supporters of cyberlaw argue that existing laws on jurisdiction, cybercrime and contracts cannot be properly applied to the Internet and that new laws must be established. There are still no convincing counterarguments to those allegations – there are more and more instances in which traditional norms have proven inadequate or insufficient.[12] The assessment that the current infrastructure management of the Internet is a public good still remains disputable.[13] Currently most of the infrastructure on which the Internet is based is owned by (private and state) companies, typically telecommunication operators. One might point here to the analogy of shipping of goods by sea which requires the use of sea areas free from individual ownership title. However, sea routes are open and regulated by the Law of the Sea, based on the concept of *res communis omnium* (open sea), while the backbones of the Internet are owned by private entities. This raises a number of questions which still remain unanswered. Existing legal frameworks do not allow private companies to be required to use their private property in the public interest, for they do not necessarily consent to the notion that the Internet, or parts of it, is to be considered a public good. There is also no final position on whether the concept of *res communis omnium* may be applied to the Internet, as was the case with regulating the Law of the Sea. The current state of affairs is the effect of Internet evolution (or revolution). However, it is not the consequence of deliberate decisions on the part of the international community or the entities using the network themselves. The exclusive reason is the genesis of the development and success of the Internet itself; what once constituted the property of the United States became the grounds for development of a global network. The issue of ownership of the components thereof was not subject to debate. It seems, however, that without such debate it will be difficult to maintain the current Internet development level. The main challenge of the discussion (on the superiority of private over public ownership) is whether there can be a guarantee of further development of the Internet as a public good, combining elements of state power and civil rights (including protection for private ownership).

The aspect which has exerted the strongest impact on the need to reform the way state jurisdiction has been perceived and understood so far, is that the world perceived through the prism of the Internet is opposed to traditional geography. One of the first assumptions regarding the Internet was that it crossed national borders and

11 The premise is especially noticeable assuming the concept of cyberspace "independence" as an area beyond the powers of state authorities, international authorities and legal systems as such. Contrasting the traditional territoriality with the Internet's aterritoriality enables one to show that the consequences of actions in "free" cyberspace are not subject to any authority. Notwithstanding that this radical view is supported only by a few, even from among the most ardent cyber-liberals, the idea on which the assumption was based is still attractive – cyberspace is, *de facto*, a new area of human activities of different quality, which requires relevant legal regulation.

12 See chapter 3.

13 See chapter 4, where the proposal of recognizing cyberspace as international space is discussed.

was independent of a mistakenly understood idea of state sovereignty. The "Declaration of the Independence of Cyberspace" by J. P. Barlow sent an explicit message to all state authorities.[14] This declaration is an example of the predominant techno-optimism typical of the early 1990s – since the declaration, the concept of independence on the Internet has considerably changed, including as a result of significant modifications to the software, now allowing geo-location of users.[15] It is obvious that the more the user-identifying software is efficient, the less is the need for separate regulations pertaining especially to the Internet, and the existing conflict of laws rules prove useful.[16] Nowadays, however, there are still insufficient technical facilities to fully disregard the issue of the aterritoriality of the Internet and the consequences of this fact for users at each level of community organization. Furthermore, arguments against the development of mechanisms precisely identifying all users of the network have been enunciated, resulting from the need to protect privacy and counteract the gathering of personal data by state authorities against the will of the persons concerned.[17]

Notwithstanding that the technologies of Internet regulation and administration are at a level satisfying the international community's expectations and thus allow sustainable use of the global network, the legal and commercial mechanisms of Internet governance are at least at an inadequate technical level of their evolution, for there is no international organization which would decide about the form and manner of the distribution of resources and represent all entities active in cyberspace.[18] Experience of regulating other areas of law shows that regimes regulating areas common for all entities of the international community (for instance environment protection law, air transport or control of armaments) are based on frameworks of legal references; that is, specific values, common understanding of causation, comprehension or terminology. Such a mechanism is yet to be developed with respect to the Internet. What is more, it is still difficult to even talk about a common international forum competent to initiate works aiming at similar goals. Each possible international Internet governance

14 "You are not welcome among us. You have no sovereignty where we gather. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. Cyberspace does not lie within your borders": J. P. Barlow, op. cit.

15 Although, today, it is still difficult to identify exactly the entity using a particular computer connected to the network, it is relatively easy to identify the Internet service provider. The latest national laws require Internet service providers to identify their users and, if requested by the authorities, to provide necessary information about them (see chapter 3).

16 This concept of reinforcing the geo-location of Internet users is supported by M. Geist, in (2001) 'Is There a There There? Toward Greater Certainty for Internet Jurisdiction', Ottawa: University of Ottawa. <http://arxiv.org/ftp/cs/ papers/0109/0109012.pdf> (accessed 6 February 2007), pp. 50ff. and J. Zittrain (2003) 'Be Careful What You Ask For: Reconciling a Global Internet and Local Law', 60 *Harvard Law School Public Law Research Papers*. <http://ssrn.com/abstract_id395300> (accessed 28 December 2006). The chance for the implementation of the intention may be the "integrated identity" (Identity 2.0) – see: M. Strzelecka (2007) Nadchodzi Epoka Internetu z Otwartą Przyłbicą?' *Gazeta Wyborcza*. <http://gospodarka.gazeta.pl/gospodarka/1,52981,3937067.html> (accessed 6 March 2009). For more information see OpenID <http://openid.net/>.

17 See chapter 2.

18 IGF has no mandate to regulate electronic activities, and in any case, its incomplete representativeness and the voluntary nature of participation therein is an issue, whereas ICANN still has little international legitimacy.

regime will certainly be a complex structure involving a large number of participants, mechanisms, procedures and instruments. Nevertheless all these elements will have a common ground – international agreement allowing for the opinions of all parties concerned.

Despite the abovementioned difficulties, fundamental principles, which should be followed by decision-makers on key global network issues,[19] have already been successfully developed. Some of these principles have been explicitly provided for in instruments of the WSIS, whereas others have been introduced, mainly impliedly, through the application of various regulations onto the Internet. Any initiative in the field of Internet governance should result from existing regulations, which can be divided into three groups: 1) those provided specifically for the Internet (e.g. relating to ICANN) 2) those that require considerable adjustments in order to address Internet (e.g. trademark protection, taxation) and 3) those that can be applied to the Internet without significant adjustments (e.g., to a large extent, the protection of human rights). It is obvious that adjustment of existing principles would significantly increase stability and reduce the complexity of the Internet governance regime. This, however, is not always possible. Internet governance must, above all, meet one condition: it must maintain the current functionality and dynamics of Internet development, being at the same time flexible enough to effectively adopt occurring changes. Only such mechanism would allow increased functionality and higher efficiency. It is the need for stability and resilience of the Internet that should underlie Internet governance reform. The stability of the Internet should be preserved through, *inter alia*, the practice developed at an early stage of Internet development, that is, the gradual introduction of new solutions and their careful testing.

Given the absence of international consensus and co-ordinated debate, the Internet has become one of main objects of state authorities' interest, even though prevention of crime is not the exclusive reason for which governments want to exercise control over the Internet. Financial aspects are of considerable importance (such as taxes, intellectual property rights, commerce and gambling). States' willingness to effectively enforce due benefits grows along with their willingness to regulate Internet-related issues. The consequence of the absence of an international agreement as to the area and manner of regulating Internet actions is the fact that states' national or local regulations to the Internet are often in conflict with one another. It is essential to determine the manner of regulating cyberspace, and more accurately, identify the entity or entities authorized to implement such regulation. May one state enforce its laws so that they affect the entire world? How far may particular states go in regulating cyberspace? Is one document of international extent, which regulates the scope of national powers, a possible and sufficient solution? Should we vest an international organization, possibly established on the basis of a treaty, with competence to regulate the Internet and to set limits for national regulations, and would such an organization be legitimate?

The purpose of this study is to juxtapose basic principles of international law governing jurisdiction (deriving from the principle of the sovereignty of states) with new

19 See chapter 4.

factual circumstances, namely the effects of actions taken in cyberspace. As a result of this analysis, an attempt will be made to identify criteria which enable states to regulate behaviors in cyberspace, prosecute those violating the standards and enforce their own laws conclusively. At the same time, it is also necessary to specify the scope of actions which are admissible without interference in the exclusive sphere of competence of other states. Such an analysis requires the juxtaposition of the current national practices of sovereigns which play key roles in the electronic arena.[20] It seems necessary to verify not only practices of particular states, but also all areas of legal regulation which have proved to be inadequate with respect to the actual circumstances arising from the "Internet revolution". It seems to be of key significance in determining the source and scope of competence of states in cyberspace to establish the limits of state jurisdiction and the possibility of applying its traditional principles to the "space" of new quality. It is only when based on such an analysis that one may provide a legal assessment of the behaviors of states and international organizations and the scope of their competence. To this end, it is necessary to present traditional principles governing states when exercising their cross-border competence (chapter 1). Then one should examine how the Internet has revolutionized the existing legal system and point to major problems to be faced by the national, and most of all, international law makers (chapter 2). To show discrepancies present in national regulations, the author will analyze the most multifarious and at the same time representative approaches of national law makers (users subject to their laws constitute in excess of half the total number of Internet recipients – chapter 3). Finally, the author will sum up the efforts of international negotiators and organizations so far in developing a uniform regulation, at least of a framework nature, on Internet-related legal issues and will analyse these against other existing international law regimes (chapter 4). In the course of these considerations, the author will prove the need to develop an international framework treaty which will serve as the basis for national law makers to implement local legal solutions concerning the global Internet in a correlated manner.

20 Based on the number of users in a given state. These include states mentioned in chapter 3: the United States, China (including the regulation of another fast-developing Asian country, Singapore, as an example of a completely different approach to controlling content of the Internet) and European Community member states.

Abbreviations

APEC	Asia-Pacific Economic Co-Operation Forum
ASIL	American Society of International Law
ccTLDs	Country Code Top-Level Domains
CoE	Council of Europe
DoC	United States Department of Commerce
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECSG	Electronic Commerce Steering Group of APEC
EJIL	European Journal of International Law
ETS	European Treaty Series
GNSO	Generic Names Supporting Organisation
gTLDs	Generic Top-Level Domains
IANA	Internet Assigned Names Authority
ICANN	Internet Corporation for Assigned Names and Numbers
IESG	Internet Engineering Steering Group
IETF	Internet Engineering Task Force
IGF	Internet Governance Forum
ILI	International Law Institute
ILO	International Labor Organisation
ISOC	Internet Society
IT-UT	International Telecommunications Union Standardization Sector
NATO	North Atlantic Treaty Organisation
OECD	Organisation for Economic Co-operation and Development
RIAA	Recording Industry Association of America
TGI	Tribunal de Grande Instance
UIIPA	Uniform Interstate and International Procedure Act (United States model law)
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNTS	United National Treaty Series
UST	United States Treaties
WGIG	Working Group on Internet Governance
WIPO	World Intellectual Property Organization
WSIS	World Summit on the Information Society
WTO	World Trade Organization

Table of cases and statutes

Cases

Domestic constitutions, legislation and legislative codes

International legal and quasi-legal documents