

Law and Borders: The Rise of Law in Cyberspace

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I. Breaking Down Territorial Borders

A. Territorial Borders in the "Real World"

We take for granted a world in which geographical borders - lines separating physical spaces - are of primary importance in determining legal rights and responsibilities. Territorial borders, generally speaking, delineate areas within which different sets of legal rules apply. There has until now been a general correspondence between borders drawn in physical space (between nation states or other political entities) and borders in "law space." For example, if we were to superimpose a "law map" (delineating areas where different rules apply to particular behaviors) onto a political map of the world, the two maps would overlap to a significant degree, with clusters of homogeneous applicable law and legal institutions fitting within existing physical borders.

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2. When Geographic Boundaries for Law Make Sense.

Physical borders are not, of course, simply arbitrary creations. Although they may be based on historical accident, geographic borders for law make sense in the real world. Their logical relationship to the development and enforcement of legal rules is based on a number of related considerations.

Power. Control over physical space, and the people and things located in that space, is a defining attribute of sovereignty and statehood. Law-making requires some mechanism for law enforcement, which in turn depends on the ability to exercise physical control over, and impose coercive sanctions on, law-violators. For example, the U.S. government does not impose its trademark law on a Brazilian business operating in Brazil, at least in part because imposing sanctions on the Brazilian business would require assertion of physical control over business owners. Such an assertion of control would conflict with the Brazilian government's recognized monopoly on the use of force over its citizens.

Effects. The correspondence between physical boundaries and "law space" boundaries also reflects a deeply rooted relationship between physical proximity and the effects of any particular behavior. That is, Brazilian trademark law governs the use of marks in Brazil because that use has a more direct impact on persons and assets within Brazil than anywhere else. For example, a large sign over "Jones' Restaurant" in Rio de Janeiro is unlikely to have an impact on the operation of "Jones' Restaurant" in Oslo, Norway, for we may assume that there is no substantial overlap between the customers, or competitors, of these two entities. Protection of the former's trademark does not - and probably should not - affect the protection afforded the latter's.

Legitimacy. We generally accept the notion that the persons within a geographically defined border are the ultimate source of law-making authority for activities within that border. The "consent of the governed" implies that those subject to a set of laws must have a role in their formulation. By virtue of the preceding considerations, those people subject to a sovereign's laws, and most deeply affected by those laws, are the individuals who are located in particular physical spaces. Similarly, allocation of responsibility among levels of government proceeds on the assumption that, for many legal problems, physical proximity between the responsible authority and those most directly affected by the law will improve the quality of decision making, and that it is easier to determine the will of those individuals in physical proximity to one another.

Notice. Physical boundaries are also appropriate for the delineation of "law space" in the physical world because they can give notice that the rules change when the boundaries are crossed. Proper boundaries have signposts that provide warning that we will be required, after crossing, to abide by different rules, and physical boundaries - lines on the geographical map - are generally well-equipped to serve this signpost function.

B. The Absence of Territorial Borders in Cyberspace

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Cyberspace has no territorially based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location. Messages can be transmitted from one physical location to

any other location without degradation, decay, or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another. The Net enables transactions between people who do not know, and in many cases cannot know, each other's physical location. * * *

[Power] But efforts to control the flow of electronic information across physical borders - to map local regulation and physical boundaries onto Cyberspace - are likely to prove futile, at least in countries that hope to participate in global commerce. Individual electrons can easily, and without any realistic prospect of detection, "enter" any sovereign's territory. The volume of electronic communications crossing territorial boundaries is just too great in relation to the resources available to government authorities. * * *

By asserting a right to regulate whatever its citizens may access on the Net, these local authorities are laying the predicate for an argument that Singapore or Iraq or any other sovereign can regulate the activities of U.S. companies operating in Cyberspace from a location physically within the United States. All such Web-based activity, in this view, must be subject simultaneously to the laws of all territorial sovereigns.

[Effects] Nor are the effects of online activities tied to geographically proximate locations. Information available on the World Wide Web is available simultaneously to anyone with a connection to the global network. The notion that the effects of an activity taking place on that Web site radiate from a physical location over a geographic map in concentric circles of decreasing intensity, however sensible that may be in the nonvirtual world, is incoherent when applied to Cyberspace. A Web site physically located in Brazil, to continue with that example, has no more of an effect on individuals in Brazil than does a Web site physically located in Belgium or Belize that is accessible in Brazil. Usenet discussion groups, to take another example, consist of continuously changing collections of messages that are routed from one network to another, with no centralized location at all. They exist, in effect, everywhere, nowhere in particular, and only on the Net.

[Legitimacy][Notice] Territorial regulation of online activities serves neither the legitimacy nor the notice justifications. There is no geographically localized set of constituents with a stronger and more legitimate claim to regulate it than any other local group. The strongest claim to control comes from the participants themselves, and they could be anywhere. And in Cyberspace, physical borders no longer function as signposts informing individuals of the obligations assumed by entering into a new, legally significant, place. Individuals are unaware of the existence of those borders as they move through virtual space.

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II. A New Boundary for Cyberspace

Traditional legal doctrine treats the Net as a mere transmission medium that facilitates the exchange of messages sent from one legally significant geographical location to another, each of which has its own applicable laws. But trying to tie the laws of any particular territorial sovereign to transactions on the Net, or even trying to analyze the legal consequences of Net-based commerce as if each transaction occurred geographically somewhere in particular, is most unsatisfying. A more legally significant, and satisfying, border for the "law space" of the Net consists of the screens and passwords that separate the tangible from the virtual world.

A. Cyberspace as a Place

Many of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct "place" for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the "real world." Using this new approach, we would no longer ask the unanswerable question "where" in the geographical world a Net-based transaction occurred. Instead, the more salient questions become: What procedures are best suited to the often unique characteristics of this new place and the expectations of those who are engaged in various activities there? What mechanisms exist or need to be developed to determine the content of those rules and the mechanisms by which they can be enforced? Answers to these questions will permit the development of rules better suited to the new phenomena in question, more likely to be made by those who understand and participate in those phenomena, and more likely to be enforced by means that the new global communications media make available and effective.

1. The New Boundary is Real.

Treating Cyberspace as a separate "space" to which distinct laws apply should come naturally. There is a "placeness" to Cyberspace because the messages accessed there are persistent and accessible to many people. Furthermore, because entry into this world of stored online communications occurs through a screen and (usually) a password boundary, you know when you are "there." No one accidentally strays across the border into Cyberspace. To be sure, Cyberspace is not a homogenous place; groups and activities found at various online locations possess their own unique characteristics and distinctions, and each area will likely develop its own set of distinct rules. But the

line that separates online transactions from our dealings in the real world is just as distinct as the physical boundaries between our territorial governments - perhaps more so.

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B. Other Cyberspace Regimes

Once we take Cyberspace seriously as a distinct place for purposes of legal analysis, many opportunities to clarify and simplify the rules applicable to online transactions become available.

1. Defamation Law.

Treating messages on the Net as transmissions from one place to another has created a quandary for those concerned about liability for defamation: Messages may be transmitted between countries with very different laws, and liability may be imposed on the basis of "publication" in multiple jurisdictions with varying standards. In contrast, the approach that treats the global network as a separate place would consider any allegedly defamatory message to have been published only "on the Net" (or in some distinct subsidiary area thereof) - at least until such time as distribution on paper occurs. This re-characterization makes more sense. A person who uploads a potentially defamatory statement would be more able to determine the rules applicable to his own actions. Moreover, because the Net has distinct characteristics, including an enhanced ability of the allegedly defamed person to reply, the rules of defamation developed for the Net could take into account these technological capabilities - perhaps by requiring that the opportunity for reply be taken advantage of in lieu of monetary compensation. The distinct characteristics of the Net could also be taken into account when applying and adapting the "public figure" doctrine in a context that is both global and highly compartmentalized and that blurs the distinction between private and public spaces.

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III. Will Responsible Self-Regulatory Structures Emerge on the Net?

Even if we agree that new rules should apply to online phenomena, questions remain about who sets the rules and how they are enforced. We believe the Net can develop its own effective legal institutions.

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IV. Local Authorities, Foreign Rules: Reconciling Conflicts

What should happen when conflicts arise between the local territorial law (applicable to persons or entities by virtue of their location in a particular area of physical space) and the law applicable to particular activities on the Net? The doctrine of "comity," as well as principles applied when delegating authority to self-regulatory organizations, provide us with guidance for reconciling such disputes.

The doctrine of comity, in the Supreme Court's classic formulation, is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its law." * * * Comity arose as an attempt to mitigate some of the harsher features of a world in which lawmaking is an attribute of control over physical space but in which persons, things, and actions may move across physical boundaries. It functions as a constraint on the strict application of territorial principles that attempts to reconcile "the principle of absolute territorial sovereignty [with] the fact that intercourse between nations often demands the recognition of one sovereign's lawmaking acts in the forum of another." In general, comity reflects the view that those who care more deeply about and better understand the disputed activity should determine the outcome. Accordingly, it may be ideally suited to handle, by extension, the new conflicts between the nonterritorial nature of cyberspace activities and the legitimate needs of territorial sovereigns and of those whose interests they protect on the other side of the cyberspace border. This doctrine does not prevent territorial sovereigns from protecting the interests of those individuals located within their spheres of control, but it calls upon them to exercise a significant degree of restraint when doing so.

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Because controlling the flow of electrons across physical boundaries is so difficult, a local jurisdiction that seeks to prevent its citizens from accessing specific materials must either outlaw all access to the Net - thereby cutting itself off from the new global trade - or seek to impose its will on the Net as a whole. This would be the modern equivalent of a local lord in medieval times either trying to prevent the silk trade from passing through his boundaries (to the dismay of local customers and merchants) or purporting to assert jurisdiction over the entire known world.

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