

Comments on first draft of
ISOC Concept Note “The Internet and extra-territorial effects of laws”
Comments by Richard Hill¹
14 September 2018

0. The Concept Note appears to me to suffer from what I consider to be some misconceptions: (1) that there is something new or unusual about extra-territorial effects of national laws; (2) that we, ISOC, have some special skills/knowledge that entitles us to pontificate on how to address these issues for what concerns the Internet; (3) that the particular principles that we, ISOC, believe are important should be imposed on all constituencies.

I believe that these are misconceptions because: (1) the extra-territorial effects of national laws is a long-standing and well known issue that has long been addressed by international law; (2) the Internet affects all walks of life, so the issues are complex and transcend a narrow technical view; (3) other constituencies may have legitimate principles which may differ from or complement our principles and much discussion and collaboration will be required to come to agreed solutions.

I would suggest to redraft the paper so that it focuses on a specific area of law with extra-territorial effects that is of particular relevance to the Internet, namely data protection/privacy.

My criticism is set forth in detail below.

1. The beginning of the Concept Note states: *“The Internet is global, so regulations and court decisions that affect it inevitably have some extra-territorial effects. The question is twofold: a) how mindful are states about avoiding harmful and unnecessary impacts on others; and, b) how willing are they to minimize negative effects?”*

Extra-territorial effects of laws and court decisions are nothing new, and long predate the Internet. Since the 1648 Treaty of Westphalia, states have been mindful about the extraterritorial effects of their laws, and have in many instances agreed ways and means to minimize negative effects.

The primary method used to agree on how to avoid harmful and unnecessary impacts on other states, and on how to minimize negative effects, has been to agree treaties, or soft-law in the form of resolutions or other internationally agreed norms.

This Concept Note appears to suffer from not taking this historical background into account and from considering that the Internet is a phenomenon that should be considered on its own, without reference to what has been done for many areas, such as transportation, postal services, telecommunications, commercial law, international dispute resolution, criminal law, family law, human rights, etc.

2. The Executive Summary states *“If we undermine [the Internet invariants], we risk all the benefits the Internet brings”*.

First of all, the “Internet invariants” have been agreed by a very small and special constituency (ISOC/IETF) and one cannot expect that democratic states would necessarily constrain their

¹ rhill@alum.mit.edu

laws on the basis of those “invariants” (unless of course parliaments were to enact the “invariants” into law, which is not the case at present).

Second, the degree to which the benefits of the Internet might be degraded by changing the way in which the “invariants” are implemented in practice probably varies depending on which invariant is at stake, and how it is implemented (or not). For example, the Internet in China is nowhere near as “open” as elsewhere, yet it continues to bring economic benefits to China.

Third, “competition” is not an “invariant”, as can be seen from the dominant positions of major players such as Google, Facebook, etc. In fact, the increasing concentration (and hence lack of competition) of many aspects of Internet services is well known and a source of concern.

For sure competition is a goal that we should strive for, but we have to recognize that it is not “built into” the current technical infrastructure, so it is not an “invariant” but rather an “aspiration”.

3. The Executive Summary states: *“Right now, decision-makers in many states are imposing rules that spill over onto the Internet elsewhere, hamper innovation, deter investment and risk making their own people into ‘second class citizens’ on the Internet”.*

I would agree that decision-makers in some states are doing that, but a converse statement is also true: decision-makers in many states are failing to impose appropriate rules on the Internet, with the consequence that innovation is hampered, and certain human rights (in particular privacy) are violated.

As mentioned above, we are seeing increasing concentration, which hampers competition. While there are various reasons for this, lack of anti-trust enforcement is, at least in some states, an important reason.

It is inappropriate to cherry-pick particular acts by particular states that have negative effects on some aspect of the Internet without also referring to lack of acts by states that also have negative effects.

4. The Executive Summary states: *“Decision-makers can mitigate these problems by encouraging decentralized collaborative structures to develop laws and policies that shape the Internet, checking international and regional best practice, and considering unintended consequences.”*

I fully agree, and in fact this has been done for centuries. It is called “international law”², which is primarily enshrined in treaties. Treaties create both negative obligations (don’t do something) and positive obligations (do something) for states.

The modern world would not exist without the dense network of treaties that favors commerce, transportation, telecommunications, mobility of individuals, etc.

The only way to avoid chaotic and counterproductive national laws that affect the Internet is to develop global norms, and the tried and true way of doing that is through international

² https://en.wikipedia.org/wiki/International_law

organizations. For sure these organizations should be more open to non-state actors, but that's a different topic.

5. The Executive Summary states: *"First, do no harm."*

The "do no harm" principle is an ancient medical/bioethical principle.³ It is based on the fact that, in medicine, it may be better to do nothing than to risk doing more harm than good. This makes sense because humans (and all living things) have elaborate self-healing mechanisms, so many diseases will actually be cured without the need for much external intervention.

The principle makes little sense for technology, because the whole premise of technology is innovation, and innovation inevitably drives out older ways of doing things.

So innovation "harms" the old methods. For example, the invention of automobiles harmed the horse carriage industry.

If one wants to talk about reducing "harm", first one has to decide what to apply it to. In medicine, it is obvious: the physician should not harm the patient that she is treating.

In other areas (e.g. technology, economics), it is not so obvious. Should one avoid harming the old industry (e.g. prohibit automobiles in order to avoid harming the horse carriage industry)? Or should one avoid harming consumers (e.g. break up dominant monopolies so that consumers are not harmed, even if this reduces the profits of those monopolies)?

"Do no harm" has often been used by dominant monopolies to argue that new technology should not be allowed. For example, AT&T and other former monopolies used to prohibit the use of modems other than their own, even though their own modems did not perform as well as third-party modems. The reason for the prohibition was that the third-party modem might "harm" the network.

Further, "do no harm" cannot be applied to only one particular type of action/intervention. That is, a physician would not apply "do no harm" only to surgery, while not applying it to the administration of pharmaceuticals.

The Concept Paper appears to take the view that "do no harm" should apply to the enactment of new laws or the enforcement of existing laws.

But it should also apply to the absence of laws (e.g. the sort of treaty that Microsoft is calling for⁴), or to the lack of enforcement of existing laws (e.g. anti-trust laws).

Finally, it should be noted that a variant of "do no harm" that is often advocated for technological developed is the "precautionary principle"⁵, and I don't think that we should advocate applying that to the Internet.

So let's not talk about "do no harm" as a principle that should apply to legislation that may affect the Internet or its users.

³ https://en.wikipedia.org/wiki/Primum_non_nocere

⁴ <https://www.wired.com/2017/05/microsoft-right-need-digital-geneva-convention/>

⁵ https://en.wikipedia.org/wiki/Precautionary_principle

6. The Background states; *“Many national laws are intended to have extra-territorial effect; they apply to people or companies outside the borders of the state that made the laws. Examples include: ... ”*

Actually large bodies of law are intended to have extra-territorial effect⁶, for example:

- Criminal law
- Tort law (defamation being a special case which is particularly relevant for the Internet)
- Family law
- Tax law
- Banking/financial services law
- Contract law (if the parties are not in the same country)
- Consumer protection law
- Competition/anti-trust law
- Human rights law (data protection being a special case which is particularly relevant for the Internet)

It makes no sense to cherry-pick particular examples without recognizing that there vast areas of law which have long had extra-territorial effect, and which apply to the Internet (offline law applies equally online).

What I would suggest is to pick a few areas which are of particular relevance for the Internet, and to analyze them in depth, rather than to expound generic principles (1) which are not widely known – much less agreed – outside the narrow ISOC community and (2) whose impact on particular laws is not obvious (e.g., how does the principle of “interoperability” apply to criminal law?).

It appears to me that data protection and privacy laws are an area which is of specific relevance for the Internet, so I would suggest that the Concept Paper be redrafted to discuss that area in depth, while noting in passing that many other areas of law also affect the Internet, both nationally and extra-territorially.

7. The Background states: *“Decision-making with extra-territorial effect is increasing once again, and risks destroying what made the Internet such a powerful and positive force.”*

I think that the increase in extra-territorial effects is mostly due to the fact that the Internet is affecting more and more walks of life, and so use of the Internet (and the provision of services over the Internet) is more and more affected by the many areas of law that have always had extra-territorial effects.

I agree that improper application of existing laws could have negative effects. But failure to apply or to adapt existing laws could also have negative effects. So I would rephrase the statement as follows: “Decisions having extra-territorial effects must be taken in ways that will enable the Internet to be a powerful and positive force.”

8. The section Internet Invariants is useful, in the context of a legal discussion, as some sort of background explanation for why the technology evolved as it did. But it cannot be seen as a

⁶ https://en.wikipedia.org/wiki/Extraterritorial_jurisdiction

normative framework. As already mentioned, no national parliament or international organization has formally agreed that particular formulation of principles, even if some of the general principles (e.g. innovation) are widely agreed.

There is a hierarchy of norms: mandatory international law (e.g. human rights), national constitutions, national law and case law, national executive decrees. The “invariants” do not have priority over those norms. At best, the “invariants” can be considered to be technical norms, and factors to be considered when applying, modifying, or developing national and international law.

However, it is important to note that some of the “invariants” mentioned in the Concept Note are not widely agreed, nor even implemented. For example, censorship of various forms (e.g. the Great Chinese Firewall, or European laws against hate speech) prevents the implementation of “An ‘end to end’ Internet where information sent from any point can get to any other.”

Further, some countries might have very legitimate priorities that are not explicitly enunciated in the list found in the Concept Paper, for example affordable access.

Finally, other industries (e.g. transport, banking) and other constituencies (e.g. human rights activists, environmental activists) also have general principles that they ask governments to keep in mind when making laws that have extra-territorial effects. That’s legitimate. But we should not single out the “Internet invariants” as principles that are hierarchically superior to all the other principles that other constituencies might consider important.

9. The section on What Makes Extra-territoriality So Problematic does not appear to me to add much value: anybody who knows anything about law knows about this, in particular because, as already noted, vast bodies of law have extra-territorial effects.

10. The section on Negative Externalities also does not appear to me to add much value, again because this is well known stuff.

Furthermore, if there were such a section in a revised version of the paper, then it would have to be balanced by a section on Positive Externalities, of which there are many. I will cite here only one important example: arbitration awards can be enforced extra-territorially and this is an important facilitator of international commerce.

11. In the section Principles for Dealing with Internet-related Decisions and Regulation, there should be absolutely no mention of “do no harm”, see point 5 above.

12. The Annex with the list of specific laws is inappropriate. As already mentioned, there are vast areas of law that have extra-territorial effects and that impact the Internet and its use. It makes no sense to list all of them, or to cherry pick a few.

Unless the exercise is limited to a very specific area of particular relevance to the Internet, for example data protection/privacy.