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Between a rock and a hard place – An international law perspective of the difficult position of globally active Internet intermediaries

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ABSTRACT

With its ability to create a global legal risk exposure, combined with contradicting rights and duties, and limited enforcement possibilities, the Internet has created a unique environment where persons and corporations legitimately can question whether they should comply with all the laws that apply to them. Focussing on the role of globally active Internet intermediaries, this article attempts to tackle this issue by discussing the potential for, and potential features of, an international law doctrine of selective legal compliance.

1. Introduction – what is the problem?

One of the most characteristic features of Internet communication is the prominent role played by various intermediaries. In legal discourse, Internet intermediaries are often discussed from the perspective of intermediary liability – questions such as, 'When do Internet intermediaries have sufficient notice to be vicariously liable?' are often given centre stage, and rightly so. A related question of equal importance is how Internet intermediaries should approach the complex regulatory patchwork they are exposed to by acting internationally, indeed often globally. In a sense, this is a macro issue compared to micro issues such as the sufficient notice question. In any case, I argue that for globally active Internet intermediaries, the conundrums stemming from an exposure to multiple laws is equally worthy of attention as other issues surrounding Internet intermediaries. Indeed, if we can solve this issue, other issues may be easier to address.

Debates about this question are often characterised by clashing extremist points of view. For example, free speech advocates (typically from the US) frequently seek to impose an uncompromising free speech regime, where any restrictions imposed by an Internet intermediary on what is uploaded by Internet users is seen as a gross violation. Such extreme views, while ultimately unhelpful, are understandable from an 'ask for everything to get something' perspective. However, this may be an area in which the saying 'be careful what you wish for' is of particular relevance.

An absolute, or near absolute, right to free speech online will clearly clash with the reasonable, indeed necessary, goals of addressing eg online bullying, defamation and online child abuse. At the same time, the problem is obvious; as soon as we abandon the ideal of absolute free speech, Internet intermediaries are faced with the difficult, and I suspect unwelcomed, task of being the judges and enforcers of 'good

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taste' – Internet intermediaries become the censors and gatekeepers of speech.[1] This is a role for which Internet intermediaries typically are unsuitable. Indeed, we may legitimately question whether society should assign such a crucial role to private entities with the types of agendas normally held by private entities.

On the one hand, news papers, as well as radio and TV broadcasters, have for a long time acted in a censoring role in deciding what content to make available. But on the other hand, the role of the Internet intermediary may be so fundamentally different that we cannot, and should not, draw a comparison with such media outlets. Indeed, the argument is often made that Internet intermediaries are more like the postal service, passively distributing other people's content without interference. To avoid stepping into the quagmire of analogies, I will here simply observe that no previous intermediaries in the history of the mankind have been faced with the scale of user generated content with which Internet intermediaries are faced. In my view, this difference in quantity amounts to a difference in character, and the role of Internet intermediaries must be approached with fresh eyes, free from the contamination of preconceived notions based on comparisons with the roles of other intermediaries.

Now to the other side of the coin. Just as the views of the free speech extremist may be hard to accept, so are the extremist views in the legal compliance camp. The problem is this: while most people would expect Internet intermediaries to abide by the law of their respective countries, they would probably not wish for Internet intermediaries to abide by all laws of all other countries in the world. In the end, such compliance would lead to Internet intermediaries being forced to take account only of the most restrictive laws from all the countries in the world. Such a race to the bottom is, I suggest, an unhealthy direction for the Internet.

If this is not what we want, we need to consider the issue from the perspective of a globally active Internet intermediary. Can such a company be excused for not complying with all the laws around the world? Is it time to construct *an international law doctrine of selective legal compliance?* If we answer that question in the affirmative, what features ought such a doctrine to have, and how should globally active Internet intermediaries decide which laws they abide by? These are, at least to a degree, novel and unique questions in international law.

2. To comply or not to comply, that is the question

Two typically central pillars in any discussion of law are (1) that the law applies equally to everyone and (2) that legal compliance is mandatory as opposed to discretionary. In light of this, it may be difficult to even begin to imagine any form of a doctrine of selective legal compliance – a doctrine legitimising the failure to comply with all relevant law. Can it be accepted that globally active Internet intermediaries are not expected to comply with all laws around the world?

A wealth of arguments may be presented for and against a strict insistence on globally active Internet intermediaries complying with all laws around the world. I will here only focus on some such arguments.

First of all, we may consider the burden involved in such compliance. A globally active Internet intermediary would need to consider the private international law rules (or 'conflict of laws' rules) of every state on the planet as well as the substantive laws of all those states. This is a heavy burden indeed. In fact, one would imagine that this burden may represent an unsurmountable obstacle for any Internet start-up. Thus, insistence on strict compliance with all the laws worldwide may be anticompetitive as only the largest companies stand any chance to cope with the burden of such compliance.

Secondly, as hinted at above, much of the law Internet intermediaries may have to comply with forces them to make judgement calls about whether to allow or to remove content posted by third parties. The research of Professor Sartor has highlighted that placing Internet intermediaries in such a position may lead to 'collateral censorship'.[2] In fact, as Professor Sartor correctly points out, the problem may be such that Internet intermediaries are tasked with deciding whether certain content is legal or illegal where it is questionable whether there are objective standards conclusively determining that matter.[3] Arguably, in any such situation we are setting Internet intermediaries up to fail – they are, as the saying goes, 'damned if they do and damned if they don't'.

Finally, we need to confront the complicated issue of 'true conflicts' as distinct from 'false conflicts'. One often sees the adherence to the harshest rules as a proposed solution to the difficulty of variances in legal standards where more than one standard applies to specific conduct. Such suggestions rely on notions such as that articulated by Justice Souter, that '[n]o conflict exists, […] where a person subject to regulation by two states can comply with the laws of both.'[4]

As I have stressed elsewhere,[5] I object to this duties-focused approach. Essentially what Justice Souter and others are saying is that we should only focus on the duties imposed by law. If the *duties* do not conflict, the laws do not conflict. This is too simplistic a perspective. It completely neglects the importance of the *rights* that laws provide. Importantly, the correlative relationship between rights and duties to which we may be accustomed from a domestic law setting does not necessarily survive when transplanted into a cross-border environment; that is, rights provided under one country's

[1] Google, for example, has stated that 'Google is not, and should not become, the arbiter of what does and does not appear on the web. That's for the courts and those elected to government to decide.' (Rachel Whetstone, 'Free expression and controversial content on the web' (14 November 2007) <http://googleblog.blogspot.com/2007/11/free-expression-and-controversial.html>.

[2] Giovanni Sartor, 'Provider's Liability and the Right to Be Forgotten' in Dan Jerker B Svantesson & Stanley Greenstein eds, *Nordic Yearbook of Law and Informatics 2010–2012: Internationalisation of Law in the Digital Information Society* 101–137, 111 (Ex Tuto, 2013).

[3] Ibid.

[4] W S Dodge, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' [1998] 39 Harv Int'l LJ 101, 136.

[5] Dan Svantesson, 'Ignorance or arrogance – A US court claims the right to regulate the Internet world-wide' (*Blaw Blaw*, 3 April 2014) <http://blawblaw.se/2014/04/ignorance-or-arrogance-%e2%80%93-a-us-court-claims-the-right-to-regulate-the-internet-world-wide/>.