

## Who Rules the Net: Internet Governance and Jurisdiction

Edited by Adam Thierer & Clyde Wayne Crews Jr.  
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Reviewed by Brian Salisbury  
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There are no sign posts or border checkpoints in cyberspace. The packets of information traveling over the myriad of networks that make up the World Wide Web do not know, nor care to know, where they are traveling or who is on the other side of the computer screen. Their job is to efficiently carry information to whomever, wherever requested. However, the 600 million people sitting on the other side of the computer screen live in a world where physical location does matter. Among other things, your physical location determines whether you have a legal right to access or view information available through the Internet. Your location determines whether you can profit from or disseminate that information. To the extent you are legally injured by the conduct of other Internet users, your physical location determines what legal recourse is available to you.

The Internet's "ubiquitous" character is challenging our traditional notions of jurisdiction based on physical location. Historically, regulation largely confined itself to the physical boundaries of the regulating state. Generally speaking, what one state allowed, or did not allow, had little impact on those outside of that state.<sup>1</sup> However, the Internet's inter-connectedness is blurring boundaries.<sup>2</sup> The Internet is causing regulations to "leak" from one jurisdiction to another. Just as a single user's actions on the Internet can have immediate consequences

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<sup>1</sup> Dan L. Burk, *Federalism in Cyberspace Revisited*, in *Who Rules the Net? Internet Governance and Jurisdiction* 119, 148 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

<sup>2</sup> *Id.* at 126.

thousands of miles away, Internet regulation in one area of the world has profound consequences for all other links in the Internet chain.

Given the global nature of the Internet and given the many Internet-related issues facing society today (online privacy, spam, freedom of speech, cyber torts, pornography, identity theft, intellectual property infringement, domain names disputes, and online gambling), just who should establish rules for the Internet? Does the Internet require special rules or are the traditional rules already established good enough? What difference does it make who regulates the Internet? Why should people care? What form should Internet regulation take? Is regulation even necessary? In *“Who Rules the Net: Internet Governance and Jurisdiction”* editors Adam Thierer and Clyde Wayne Crews Jr., of the Cato Institute, assembled thirteen essays that attempt to address these issues.

The Cato Institute is a conservative think-tank based in Washington D.C. dedicated to the libertarian ideals of “limited government, individual liberty, free markets and peace.”<sup>3</sup> Adam Thierer is the Director of Telecommunication Studies at the Cato Institute and Clyde Wayne Crews Jr. is the Director of Technology Policy. Together, Thierer and Crews have published two other Cato sponsored books entitled *“What’s Yours Is Mine: Open Access and the Rise of Infrastructure Socialism”* and *“Copy Fights: The Future of Intellectual Property in the Information Age.”*

*“Who Rules the Net”* is divided into two broad sections. The first seven articles fall under the title “General Framework for Global Internet Governance.” These chapters discuss the theoretical concepts underlying the Internet regulation debate. The remaining six articles are grouped under “Current Disputes in Internet Governance”. These chapters analyze actual current issues in cyberspace regulation.

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<sup>3</sup> See <http://www.cato.org/startpage.html> (Jan 1, 2005).

The first essay is entitled “*Establishing Global Internet Freedom: Tear Down This Firewall*” written by Representative Christopher Cox, Republican Congressman from California. In his informative essay, Cox outlines how some nations are restricting Internet access to its citizens through censorship, taxation or outright prohibition. Cox calls on the U.S. Government to develop a broad Internet freedom policy that exploits the Internet’s vast capability to facilitate the free exchange of ideas and to promote democracy around the world.

Harvard Law School professor Jonathan Zittrain looks at the dangers presented in local Internet regulation in “*Be Careful What You Ask for: Reconciling a Global Internet and Local Law*.” Multiple sovereigns each with a unique Internet regulatory scheme forces Internet providers into a precarious legal balancing act. Without consistent legal guidelines Internet providers cannot guard against potential jurisdictional pitfalls. Lingering basic legal questions such as: “If a case should arise, who would have jurisdiction?”, “Which laws would be applied?”, and “How are rulings to be enforced if defendants do not maintain a physical presence or assets in the complaining jurisdiction?” would stifle Internet expansion. Zittrain suggests providers will conform to the most restrictive laws or would simply avoid “unfriendly” jurisdictions all together.

Jack Goldsmith, professor at the University of Chicago Law School, argues in his essay “*Against Cyberanarchy*” that regulation of the Internet does not present any new problem that has not already been addressed in the physical world. He contends that a large body of transnational “physical world” law has already developed in response to the same jurisdictional issues plaguing the Internet. Any regulation shortcoming not addressed by transnational law can be regulated through the structure of the Internet itself or through emerging filter technologies.

In “*Against Against Cyberanarchy*” Temple Law Professor David Post questions Goldsmith’s assertions that existing “physical world” regulations are capable of effectively dealing with the Internet. Post claims that Goldsmith fails to consider just how different cyberspace is in comparison to the real world. Specifically, Post feels Goldsmith fails to recognize the speed and scale of the Internet.<sup>4</sup>

“*The Shift Toward Targeting for Internet Jurisdiction*” by Michael Geist, chair of Internet and E-Commerce Law at the University of Ottawa, examines the different standards courts use to determine if they have jurisdiction over an Internet based claim. Geist argues that the current standard, which distinguishes between passive and active websites, is outdated.<sup>5</sup> Instead, he suggest a three-part targeting standard which would focus on, (1) the presence of any choice of law agreements between the user and the internet site, (2) the use of technology to target or avoid a certain jurisdiction and (3) the actual or implied knowledge of the website operator that he was targeting that specific jurisdiction.

Dan L. Burk’s “*Federalism in Cyberspace Revisited*” shifts the focus of Internet regulation from the global environment to our Federal system of government. He examines the impact of state regulation on the Federal system largely through economic gaming models which require broad assumptions and theoretical environments. His conclusion, not surprisingly, is that uncoordinated state regulation causes the same problems as in the international arena.

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<sup>4</sup> David G. Post, *Against Against Cyberanarchy*, in *Who Rules the Net? Internet Governance and Jurisdiction* 71, 78 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

<sup>5</sup> Under the current standard approach, jurisdiction largely hinges on whether the website in question can be described as “active” or “passive.” Active websites seek out and engage Internet users. Active sites tend to be e-commerce sites looking to engage in sales transactions. Passive websites do not seek out users and tend to be informational in design. The distinction is premised on foreseeability. Operators of an active site can foresee being subject to the regulations of a foreign jurisdiction if they actively engage users in that jurisdiction. Michael Geist, *The Shift Toward Targeting for Internet Jurisdiction*, in *Who Rules the Net? Internet Governance and Jurisdiction* 91, 98-99 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

Bruce Kobayshi, professor of law at George Mason University and Larry Ribstein, professor of law at the University of Illinois College of Law, co authored “*Multi Jurisdictional Regulation of the Internet.*” In their essay, they conclude that state law is superior to federal law in regulating the Internet. They feel state law is more dynamic and decentralized which is better suited to the “evolving nature of electronics.” As to the desirability of creating a haphazard legal landscape for Internet providers, they somewhat unconvincingly argue that choice of law contracts would insulate Internet providers from the inconsistencies between state law.

“*Caught in the Seamless Web: Does the Internet’s Global Reach Justify Less Freedom of Speech?*” by Robert Corn-Revere examines the impact foreign court rulings have on the Freedom of Speech in the United States. Revere, a practicing attorney, uses the case against *Yahoo!* for selling Nazi memorabilia in France as a backdrop for his analysis.<sup>6</sup> In that case, the French government ordered *Yahoo!*, a U.S. company, to remove content from its site. Revere suggests this kind of unilateral judicial action could have unfortunate consequences for the First Amendment. Revere argues that Internet providers will restrict speech to the lowest common denominator. He concludes that the First Amendment must not yield to such transnational legal pressures.

In the same vein, Kurt Wimmer’s “*International Liability for Internet Content, Publish Locally, Defend Globally*” examines the impact of foreign Internet libel cases against U.S. Companies. Wimmer argues that U.S. media companies will self censor to protect against foreign liability. Wimmer argues that U.S. courts should not enforce foreign rulings if it violates the protection of the First Amendment.

“*If it Ain’t Broke, Why is Everyone Trying to Fix It?*” by Michael S. Greve of the American Enterprise Institute, examines taxation of commerce traveling through the Internet.

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<sup>6</sup> *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 379 F.3d 1120 (9th Cir., 2004).

Specifically, he reviews the desirability of the two competing theories of taxation: destination-based tax versus the origin-based tax.<sup>7</sup> Greve's concludes origin-based taxation lends itself better to the online environment.

In "*Privacy Protection and the Quest for Information Control*" Indiana University School of Law professor Fred Cate examines privacy on the Internet. Cate reviews six models of privacy regulation that have emerged over time. He then compares the advantages of "control" laws, which allow users to control uses of their personal information, with "command" laws that mandate certain limits on user information.

Harold Feld of the Media Access Project discusses the failure of ICANN to live up to its intended goals in "*Structured to Fail: ICANN and the Privatization Experiment*."<sup>8</sup> According to Feld, the current structure of ICANN, who oversees domain name registration, is inherently flawed and should be reevaluated. Feld suggests that ICANN should assume a ministerial role and allow market forces, rather than governmental intervention, to regulate the domain name system.

"*Does Cyberspace Need Antitrust*" by Eric P. Crampton, economic lecturer at the University of Canterbury, and Donald J. Boudreaux, chairman of the Department of Economics at George Mason University, reviews the need for antitrust regulation in cyberspace. They conclude that the same economic principles that apply to real world commerce apply equally to e-commerce. The immense size of the Internet marketplace provides an automatic check against

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<sup>7</sup> Taxes imposed on merchandise crossing jurisdictional boundaries are classified according to where the tax is levied. Taxes imposed in the seller's home jurisdiction are referred to as "origin-based." Taxes imposed in the buyer's tax jurisdiction are referred to as "destination based." Michael S. Greve, *If it Ain't Broke, Why is Everyone Trying to Fix it? Taxing E-Commerce In A Destination-Based World*, in *Who Rules the Net? Internet Governance and Jurisdiction* 269, 270 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

<sup>8</sup> In 1997, The Clinton Administration undertook to privatize the domain name governance system by creating a self-regulating, contract-based governance structure. Harold Feld, *Structured to Fail: ICANN and the "Privatization" Experiment*, in *Who Rules the Net? Internet Governance and Jurisdiction* 333 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

any one actor achieving market dominance. Any antitrust regulation of the Internet should be the product of a broad global consensus among nations.

In the Introduction to *“Who Rules the Net”*, Thierer and Crews state that the assembled essays “reflect a varied of reasoned approaches to generally keeping bureaucracy and overgrown government out of cyberspace.” This statement, to some degree, is true. As suggested by many of the essays, any regulation on the local or national level is not compatible with the global nature of the Internet. An online environment checkered with different regulatory schemes creates legal uncertainty for Internet providers. Uncertainty, leads to self censorship and pandering to the most restrictive legal jurisdictions.

However, the thrust of the book leaves the reader with the conclusion that the only real answer to the question of who *should* rule the Internet is a broad international body whose sole purpose would be to regulate and enforce internet policy on a worldwide stage. What is needed is not less regulation, but more coordinated regulation. Less government coordination would simply not resolve any of the issues discussed in the book.

*“Who Rules the Net”* does an excellent job of flushing out the arguments surrounding Internet regulation. However, taken together, the essays fail to clearly answer the question proposed in the title of the book. The book does not suggest, as it states in its Introduction, that less regulation of the Internet is better than more. Rather, more coordinated regulation on a global scale is needed to solve the jurisdictional questions going unanswered in today’s online environment.