

Ignorance is no Defence, but is Inaccessibility? On the Accessibility of National Laws to Foreign Online Publishers

Uta Kohl*

Abstract

The article examines, first, to what extent the legal exposure of online actors to multiple foreign laws creates a legal obligation on States to make their laws easily accessible to them and whether a State by failing to do so breaches any human rights. Second, it is examined what 'easy accessibility' actually entails. The discussion builds upon the premise that the Internet has created an environment where transnational trade or publications are no longer the prerogative of resource-rich multinational companies with large in-house legal departments to advise them on their respective legal position in different jurisdictions. Yet, there is growing world-wide consensus that online content providers have to comply with the laws of the places where their sites can be accessed. This raises the issue of whether the legal expectation of States on foreign online actors goes, or should go, hand in hand with an obligation to cater for the special regulatory needs of foreign actors.

1. Introduction

This paper explores the interrelationship between legal normativity and transparency, or accessibility, of legal rules in the context of transnational online regulation. Starting from the widely accepted premise that a secret law is an anomaly, it will be examined whether the lack of accessibility of legal norms (beyond undermining their legitimacy) could provide a defence to legal accountability and, if so, what is the legal source of that defence: is there a human right or other enforceable legal right to accessible laws? The paper then goes on to explore the more woolly issue of what accessibility generally, and more specifically in the transnational online context, actually entails. Where is the boundary between a secret and an open law; how much effort can law-makers reasonably expect from individuals to find out about his or

her legal obligations? Is it enough merely to formally publish laws even if they are freely available on the Internet?

The background against which these issues are explored is that of the global village and transnational online regulation. Rightly or wrongly, there is a growing judicial and governmental consensus worldwide that online actors should not be accorded more lenient treatment than traditional transnational publishers and enterprises,¹ and should thus be subject to the laws of the States which they 'enter' with their websites (which is not infrequently every State²) as, for example, in the high-profile French Yahoo case.³ States have taken this stance across the broad spectrum of online regulation, ranging from public law regulation such as gambling, privacy, securities and obscenity regulation to private law matters such as defamation or contract law in the consumer context.⁴ The question is what are the implications of this stance for the accessibility of domestic norms in the transnational context, and vice versa the implications of insufficient accessibility on this legal position. Do

¹* Lecturer in Law, University of Wales, Aberystwyth, utakohl@hotmail.com. I am grateful for the comments by Professor Chris Harding and Professor Ryszard Piotrowicz. This article is based upon my paper presented at the 6th Conference on Computerisation of Law via the Internet in Paris in November 2004 and was first published in *Information and Communications Technology Law Journal*.

There are a few notable exceptions to that consensus where States have opted for the country-of-origin approach. See, for example, EU E-Commerce Directive 2000/31/EC, OJ L 178, 17/07/2000 P. 0001 – 0016. Also see current UK *Gambling Bill 2003* and commentary at http://www.culture.gov.uk/gambling_and_racing/gambling_bill.htm.

² Screening devices or selling or subscription policies often entail that only users from certain jurisdictions can either access the site or enter into transactions through the site. This in turn may mean that these users do not 'enter' the excluded jurisdiction for regulatory purposes.

³ *LICRA & UEJF v Yahoo! Inc* (Paris, 20 Nov 2000) at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>; for commentary and further material see Center for Democracy & Technology at <http://www.cdt.org/jurisdiction/>; Uta Kohl 'Yahoo! - but no Hooray! for the international online community' (2001) 75 *Australian Law Journal*, 411.

⁴ For example, EU consumer protection: eg. European Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No 44/2001 of 22 December 2000, OJ L 012, 16/01/2001 P. 0001 - 0023; US gambling regulation: *US v Ross* 1999 WL 782749 (SDNY); Dutch gambling law: *National Sporttotaliser Foundation v Ladbrokes Ltd* District Court, The Hague, 27 January 2003; Australian securities regulation: Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.5, 141.14, 141.16; Australian defamation law: *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; UK obscenity regulation: *R v Perrin* [2002] EWCA 747; German law on nazi propaganda: *R v Töben* BGH, Urf. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift* (NJW) 624. These are all examples of the country-of-destination approach to regulatory competence, according to which online actors have to comply with the laws of the States where the effect of their activities is felt. States have been unmoved by the objections to this approach, which range from arguments based on the undesirability and impossibility of having to comply with the law of multiple or all States, to arguments about the illegitimacy of States imposing their laws on foreigners whose activity only marginally affects them.

States owe an obligation to foreign online businesses and publishers to publish their laws for free on the Internet and, if so, is such online publication the end of the problem? What exactly are a State's obligations in the accessibility quest, and what happens if they fail to meet that obligation? To what extent does the changed profile of the transnational actor impact on the State's accessibility obligation?

2. A Legal Right to Accessible Laws?

2.1. Rationales for Transparency

Few would dispute that there should be no secret laws; that is, the very notion of law to some extent entails transparency. There are two reasons for this, the first focusing on the rights of the legal subject and the second on the objectives pursued by the law-maker.

Firstly, the need for transparency arises to protect the individual from being punished or made liable for something s/he could not have known about – this is a matter of fairness and fundamental justice. This is not to say that individuals need actually to have known about the law as a precondition for being made accountable for their non-compliance. Generally speaking, ignorance is no defence⁵ - a maxim that encourages individuals to familiarize themselves with their legal obligations. The rule against secret laws ensures that individuals could – if they wanted to - find out about their legal obligations prospectively. Whether they actually do so is up to them.

Secondly, and perhaps at times overlooked,⁶ transparency of legal norms is generally also necessary in terms of making laws efficient, that is achieving

⁵ But note David Luban, 'The Publicity of Law and the Regulatory State' (2002) 10 *The Journal of Political Philosophy* 296, 299ff, citing a number of cases when ignorance of the law was a successful defence, also note Tom McMahon, 'Improving Access to the Law in Canada with Digital Media' (March 1999) 16 *Government Information in Canada*, at <http://www.canadalegal.com/gosite.asp?s=3364>, part 2.

⁶ But mentioned, for example, in Peter W Martin, 'Legal Information – A Strong Case for Free Content, An Illustration of How Difficult "Free" May be to Define, Realize, and Sustain' (2000) at <http://www4.law.cornell.edu/working-papers/open/martin/free.html>, at para II.A.: 'whatever goals the law is pursuing and through whatever immediate means, the prime instrument is communication. Efforts to make law more accessible, more understandable, more clearly expressed are ultimately efforts to make law more effective and in a democracy, more accountable.'

the outcome they are designed to achieve. This requires not one hundred percent compliance but widespread compliance. Such compliance presupposes that people know about the law. For example, the law in the UK prohibiting drivers from using their mobile phones whilst driving is designed to reduce the number of accidents caused by distracted drivers. This aim can only be achieved if most drivers comply with the law, which in turn depends on them knowing about the prohibition in advance.⁷ 'Ex post facto' State action in the form of prosecuting non-compliant drivers is likely to affect the particular driver's future behaviour but unlikely to have a ripple effect on the wider driving population (which is one of its main functions), unless again it is accompanied by publicity.⁸ Accordingly publicity or transparency of a new law, and of any actions taken to enforce it, is critical to achieve its objective. The accessibility of laws is not something the individual has to assert against an otherwise totally unmotivated State: the State itself has a self-interest in ensuring it.⁹ This applies less in respect of those rules which are facilitative or excusatory rather than restrictive; also it applies less to those rules which regulate conduct indirectly rather directly. An example of the former is the rule that the victim of a nuisance may resort to self-help to abate it. Here the law seeks to condone retrospectively or validate certain 'natural' or customary behaviour as opposed to trying to prospectively shape it¹⁰ - which makes transparency of the rule far less significant. Similarly, the transparency of norms is less significant in the case of indirect regulation. An example is allowing councils to build road bumps near schools. These bumps affect the behaviour of drivers regardless of their knowledge or ignorance of the

⁷ At times a law's objective may also be achieved by leaving margins of safety for undercompliance which penalises those who comply with a law at the expense of those who do not.

⁸ It has been observed before that people often obey the law 'not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves', Lon Fuller, *Morality of Law* (New Haven: Yale University Press, 1967) 49. As will be discussed below, these patterns may be seen as an indirect way of publication upon which the legislator can legitimately rely to some extent.

⁹ Cf David Luban, above n 5, 299, where the discussion appears to be based upon the assumption that the State has an interest in 'burying every regulation in a mountain of other regulation.'

¹⁰ Most facilitative rules are also to some extent restrictive as they impose conditions upon which the law validates or condones the action. For example, in respect of self-help to abate a nuisance, the victim needs to give reasonable notice of the intended actions to the perpetrator. This condition then becomes a restriction on the person exercising self-help. Note also, that it has been argued that 'it is better if most people do not know exactly what criminal defences the law makes available, because knowing the full range of defences might create perverse incentives to commit the crimes.' Luban, above n 5, 313.

relevant law on speed restriction or on building road bumps.¹¹

While few would question the general undesirability of secret laws, the following sections explore whether individuals enjoy a *legally enforceable* right to accessible/transparent laws. Could online publishers successfully argue that foreign laws are not binding on them when inadequately accessible to them, despite perhaps being sufficiently accessible to local people?

2.2. A Rule-of-Law Requirement - An Enforceable Legal Right?

Generally the starting point here is the rule of law. According to Raz, a proponent of a formalist meaning of the rule of law:

‘the literal sense of the ‘rule of law’... has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it... it is with the second aspect that we are concerned: the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law, but he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it.’¹²

From this it follows *inter alia* that ‘[t]he law must be open and adequately publicised.’¹³ But could reliance on this concept be used to make a law, otherwise properly passed by parliament, non-binding ‘just’ because, let us say, it lacks clarity or was inadequately accessible? If one were to follow Fuller’s opinion on this subject-matter the answer appears to be yes:

‘Lon Fuller argues that the rule of law rests on a kind of social contract between lawgivers and those they govern... Like any contract, this *rule-of-law* contract is valid only if it satisfies the basic conditions of feasibility and comprehensibility... Without publicity, citizens cannot know what the law requires, and then the rule-of-law contract cannot bind them.’¹⁴

¹¹ On indirect regulation see Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999) Ch 7.

¹² J Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 198. Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467. Note ‘access to law’ activities of the Council of Europe, at http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Law_making/Access_to_law/.

¹³ Raz, *ibid*.

¹⁴ Luban, above n 5, 296. See also Fuller, above 8, 49.

The problem with this argument is that it is not supported by the legal reality where laws which blatantly offend the rule of law and therefore - according to Fuller – are not binding, are still routinely enforced against citizens. So, although these laws *should not* be binding, in fact they are. Perhaps Fuller acknowledges this when he notes that ‘there can be no rational ground for asserting that a man can have a *moral* obligation to obey a rule that does not exist, or is kept secret from him...’¹⁵ But morality and law do not always coincide. In the case of *Merkur Island Shipping Corp v Laughton* – where the law was clearly inaccessible because of lack of clarity - the House of Lords acknowledged that ‘[a]bsence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it.’¹⁶ Lord Diplock went on to state that the law under consideration which the court had ‘to piece together into a coherent whole... can, in my view, only be characterised as most regrettably lacking in the requisite degree of clarity.’¹⁷ Yet no matter how regrettable it was, there was no question of the defendant being absolved from liability on the basis of the law’s obscurity or inaccessibility. So is there any other legal jacket which the transparency or accessibility requirement can wear?

2.3. A Human Right to Accessible Law?

Beyond some specific obligations imposed by World Trade Organisation Agreements to publish certain proposed and adopted regulations,¹⁸ a general and perhaps practically fruitful avenue is the human rights route. The rule-of-law concept is reflected in a number of common civil and political rights, such as the prohibition on retrospective incrimination or the right to a fair trial.¹⁹ But most relevant for the purposes of this discussion is the right to freedom of expression, given that restrictions imposed on online content providers could all broadly be categorised as limitations on that right. In *Sunday Times v UK (No 1)*²⁰ [hereafter *Sunday Times*], in the process of interpreting the right to

¹⁵ Fuller, above n 8, 39 [emphasis added].

¹⁶ *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, 612.

¹⁷ *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, 612.

¹⁸ For a discussion of some of these see Tom McMahon, above n 5, part 2. See also Art 252 of the EC Treaty.

¹⁹ Art 6 and 7 of the *European Convention on Human Rights*.

²⁰ *Sunday Times v UK (No 1)* [1979] 2 EHRR 245, see also David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, Oxford: OUP, 2002) 755f.

freedom of expression under Art 10 of the *European Convention on Human Rights* and interferences with that right, the European Court of Human Rights explained the phrase 'prescribed by law' (- a precondition for a permissible restriction). This phrase also appears in the context of other potentially relevant rights such as Art 9 (freedom of thought, conscience and religion).²¹ Its interpretation would probably also be valid beyond the European context as Art 19(3) of the *International Covenant on Civil and Political Rights* similarly provides that restrictions on the freedom of expression must be 'provided for by law'. The European Court of Human Rights noted:

'The following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'²²

So if the restriction imposed by the State is inadequately accessible, then the interference with the right to freedom of expression is unlawful under Art 10.²³ It is unfortunate that the Court did not spell out what adequate accessibility actually entails. However, it seems that the party seeking to avoid the effect of a law needs to make out a strong case indeed. In *Sunday Times* the Court was confronted with the rather vague common law of contempt and very adventurous judicial reinterpretation and reconceptualisation of old rulings. The court first noted that the common law – or 'unwritten law', as the Court called it – is certainly within the meaning of the word 'law' in the expression 'prescribed by law'.²⁴ So just because the law is 'hidden' in innumerable cases

²¹ It is also used in other human rights and constitutional instruments as, for example, the New Zealand Bill of Rights Act 1999, discussed in D J Harvey, 'Free Public Access to Law: The Problem & the Solution' at <http://www.law.auckland.ac.nz/learn/itlaw/FreePub.doc>.

²² *Sunday Times v UK* (No 1) [1979] 2 EHRR 245, para 49; see also *Silver v UK* (1983) 5 EHRR 347.

²³ In *Silver v UK* (1983) 5 EHRR 347, para 88, a case concerned with State interferences with prisoners' correspondence, the Court noted 'that although those directives did not themselves have the force of law, they may - to the admittedly limited extent to which those concerned were made sufficiently aware of their contents - be taken into account in assessing whether the criterion of foreseeability was satisfied in the application of the Rules'. Note, the relevant Orders and Instructions were not made available to the public or prisoners, although the prisoners received, by means of cell cards, information about certain aspects of the control of correspondence (para 26).

²⁴ *Sunday Times v UK* (No 1) [1979] 2 EHRR 245, para 47.

does not make it inaccessible.²⁵ In the context of vagueness, the Court held - and quite rightly so - that all laws are to some extent vague and subject to interpretation,²⁶ and that in the present case there was adequate accessibility and foreseeability. Although again in *Sunday Times* accessibility was primarily discussed in terms of clarity, as opposed to obtaining actual access to the law, the words of the Court are easily broad enough to encompass also the latter meaning.

So far - to the author's knowledge - in only one recent English case concerning online obscenity did the online publisher invoke the *Sunday Times* ruling,²⁷ which, regrettably, was not addressed by the judge. Whether it can in future be successfully invoked to absolve foreign online content providers from liability is questionable, and not just because of the judicial acceptance that legal obligations are often only more or less accessible and foreseeable to the ordinary citizen. As is shown below, to determine whether a law is sufficiently accessible would require more than a mere focus on the formal publication of the law; it would require a holistic approach - which sits uneasily with judicial pragmatism and may have significant resource implications. Nevertheless the following discussion attempts to flesh out the concept of accessibility - if for nothing else than to provide States with a sense of their new legal obligation towards foreign subjects, even if these obligations will rarely if ever be enforceable.

3. When is Accessible Accessible Enough?

3.1. One-Size-Fits-All Once-and-For-All?

What is and what is not adequately accessible is relative and time-dependant. It is argued below that regulation which may be easily accessible to certain subjects may be inaccessible to others; or whatever was reasonably accessible at some point may not stand the test of time. Making a law

²⁵ But in Michael Kirby, 'Free the Law - beyond the "Dark Chaos" - Launch of the National Law Collection of AustLII' (1999) at <http://www.austlii.edu.au>, where the author refers to Jeremy Bentham's critique of the common law as the 'dark chaos' and the author himself describes it as a 'messy system'.

²⁶ *Sunday Times v UK* (No 1) [1979] 2 EHRR 245, para 49.

²⁷ *R v Perrin* [2002] EWCA 747, para 34.

accessible requires 'more than merely formal publication of law...' ²⁸ - what exactly is required depends on the circumstances.

When laws are written, they are not and should not be written with the intention of being only applicable to particular persons ²⁹ - which is what the principle of equality before the law, non-discrimination and indeed the very notion of law demands. But that does not mean that different laws do not distinguish at all between different characteristics of persons or their activities: some laws are applicable only to doctors or only to drivers, those earning money or only to mentally handicapped people or artificial persons. ³⁰ Only within these groups are the rules aimed at the abstract doctor or abstract driver rather than at Mr Jones or Ms Davies in particular. The same notion of the abstract person with special characteristics is also fundamental to the issue of fair notice of, and reasonable access to, legal rules. New laws are published through governmental publishing services ³¹ and propagated by government departments, ³² professional bodies and associations and the media to bring them to the attention to those to whom they pertain, but not to bring them to the attention of anyone in particular. So whether Mr Jones is able and willing to inform himself of the new rules is irrelevant, provided the abstract reasonable person is given adequate access. But again that is not to say that the law-makers can disregard special characteristics of the group subjected to a set of rules. ³³ This idea, that different laws require different approaches in bringing them home to their intended subjects, is reflected in

²⁸ Luban, above n 5, 302.

²⁹ *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501, para 30: 'The distinctive characteristic of a bill of attainder, marking it out from other ex post facto laws, is that it is a legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence. Other ex post facto laws speak generally, leaving it to the courts to try and punish specific individuals.'

³⁰ Lord Wright, 'Liberty and the Common Law' [1945] *Cambridge Law Journal* 2, 4: 'all are equally subject to the law, though the law as to which some are subject may be different from the law to which others are subject.'

³¹ See Her Majesty's Stationary Office at <http://www.hmsso.gov.uk/about/hmsso.htm>.

³² Department of Trade and Industry on the use of a hand-held mobile telephone whilst driving, at http://www.dft.gov.uk/stellent/groups/dft_rdsafety/documents/page/dft_rdsafety_025216.hcsp.

³³ *Incorporated Council of Law Reporting for England and Wales v AG & Anor* [1971] 3 All ER 1029, 1034, where Russell LJ noted: 'in many instances the ordinary member of the public either does not attempt to, or cannot by study, arrive at a true conclusion of their import, or because the true understanding is largely limited to persons engaged professionally or as public servants in the field of any particular enactment or otherwise interested in that field...'

the words of Lord Donaldson in *Merkur Island Shipping Corp v Laughton* in the context of clarity of legal norms:

‘My plea is that parliament, when legislating in respect of circumstances which directly affect the ‘man or woman in the street’ or the ‘man or woman on the shop floor’ should give as high a priority to clarity and simplicity of expression as to the refinements of policy...’³⁴

So, a law which is aimed at large corporations with in-house legal departments would require a different approach to making it accessible than one which is aimed at small businesses or consumers. Similarly, the subject-matter of a law may dictate different approaches to publicity: a law which coincides with clear domestic moral values³⁵ is likely to require less publicity than one which is not accompanied by, or is even contrary to, established values. As shown below, both these aspects are of interest in the global online context. Generally though, it may be concluded that the textual differences in the application of different laws mean that there cannot be a one-size-fits-all approach to the transparency/accessibility of legal norms.

It is, of course, tempting to argue that what was good enough before the Internet era should be good enough now. So, for example, if a person chooses to publish on the Internet and thereby becomes a transnational publisher or entrepreneur, he or she must be taken to have implicitly accepted the legal framework applicable to traditional multinational enterprises. Consequently it is up to them to adjust rather than expect national law-makers to put in a greater effort to make their laws accessible to them. And this is the legal fiction upon which law-makers or judges worldwide rely.³⁶ But a fiction it is and one which is neither legitimate nor wise. The profile of the abstract

³⁴ *Merkur Island Shipping Corp v Laughton and Others* [1983] 2 AC 570, 595.

³⁵ In respect of some types of activities State regulation is reasonably foreseeable eg. law against murder or theft, or areas in which States have traditionally taken a regulatory interest eg. drugs, firearms), see Luban, above n 5, 297, where the author also explains why there has been a massive increase in the type of regulation which is not easily predictable.

³⁶ Explicitly, for example, in *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 39: ‘It was suggested that the World Wide Web was different from radio and television because the radio or television broadcaster could decide how far the signal was to be broadcast. It must be recognised, however, that satellite broadcasting now permits very wide dissemination of radio and television... However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.’

transnational actor has significantly changed since the Internet dawn: transnational trade is no longer the prerogative of the giant resource-rich multinational company.³⁷ The down-sizing of the transnational actor goes hand in hand with a smaller capacity to access a wide variety of legal norms. The changing demographic make-up of transnational publishers and the changing technology available to law-makers cannot but affect the content of the law-maker's obligation to provide access to their law. Otherwise we might as well go back to town criers:

'In medieval times the law was a public process. It was disseminated from the pulpit or by means of the town crier to a largely illiterate public. Because of the size of communities, juries were self-informing bodies. The invention of the printing press was of advantage only to those who were literate. The demise of the village and rural communities during and after the Industrial Revolution raised concerns about access to law.'³⁸

As the demise of the village raised new imperatives for ensuring the accessibility of law, so does the rise of the global village create new imperatives for making at least certain domestic legal norms accessible world-wide. Before outlining what this might entail let us briefly examine the nature of the change to which law-makers should as a matter of sensible policy, and must as a legal obligation, respond.

3.2. Notice of Domestic Laws in The Global Village

Why does the emergence of the global village create new imperatives for the accessibility of certain domestic legal norms? The fundamental reason is the insistence by States that foreigners who 'enter' or target their territory virtually, ie. through their websites, have to comply with local norms³⁹ - which accords with the traditional legal position of transnational entrepreneurs. If States expect compliance by foreign online providers then they must also make these norms accessible to them. And here it is important to repeat that many

³⁷ See, for example, statistics in OECD, *Measuring the Information Economy* (2002) 40f at <http://www.oecd.org/dataoecd/16/14/1835738.pdf>.

³⁸ Harvey, above n 21, 1.

³⁹ See above n 4. In respect of harmonised rules, online actors only have one set of laws which they need to know and comply with. If States adopted the country-of-origin approach to regulatory competence, then online businesses only need to be familiar with their local rules, but their foreign customers now need to know their rights and obligations under multiple sets of laws. Effectively the country-of-origin approach shifts the notice requirement from the business to the consumer.

of the online actors affected⁴⁰ do not resemble at all their traditional giant counterparts, but are small-to-medium actors for whom the traditional one set of local rules often proves burdensome and requires significant efforts by the State to ensure compliance.⁴¹ Even the new online giants like Amazon, Ebay or Google are heavily burdened by that insistence⁴² – yet at least they tend to have the local legal machinery to ensure compliance. In any event the fact that more actors have to comply with more sets of rules creates the imperative to make these rules much more easily accessible, to making it faster and cheaper to find and understand each set.

But it would be over-simplistic to say that the new ‘notice’ imperative in the global village arises merely because many more and significantly smaller actors are expected to know and comply with more sets of regulations. The problem thus stated would appear to lead to the relatively straightforward, albeit still costly, solution to publish online more laws, in more languages and in more easily understood terms.⁴³ Yet, the problem of the global village is more complex than that. In the local context, many legal norms do not require active publicity after perhaps an initial period following their introduction, but are known simply through the pool of common knowledge:

‘The law must be made available for anyone, at least anyone with a good lawyer, to peruse and discover. But passive publicity of this sort seems an inadequate substitute for active publicity unless something alerts us that we ought to look at the law. In the case of many laws, this is no problem, either because their existence is common knowledge – we all knew that there are laws against smuggling... or because the law codifies a universally recognised moral obligation.’⁴⁴

So in the vast majority of cases, notice of legal rules occurs in more subtle ways than through people reading up about them through official sources: the

⁴⁰ Namely potentially all those who make their sites accessible outside their home jurisdiction.

⁴¹ For example, a recent survey by the Australian Competition and Consumer Commission found that more than 50 per cent of the Australian sites surveyed which sold goods or services illegitimately attempted to disclaim consumers' warranty rights or limit liability. See ACCC, *ACCC issues warning to on-line traders: 'shape-up' sites* (25 June 2004) at <http://www.accc.gov.au/content/index.phtml/itemId/519730/fromItemId/2332> ; also see ACCC, *Shopping Online – Rights and Obligations when trading online* (June 2004) at <http://www.accc.gov.au/content/index.phtml/itemId/513872>.

⁴² This is reflected, for example in the number of high-profile publishers who intervened in *Dow Jones & Co Inc v Gutnick* [2002] HCA 56 and argued strongly for a radical change in the law.

⁴³ The ideal solution is harmonisation or at least convergence of domestic laws which, at least in respect of certain areas of law, is very difficult to achieve.

⁴⁴ Luban, above n 5, 297.

common knowledge. Even when the common knowledge does not provide individuals with the intricacies of rules; it nevertheless serves as an alerting device; it alerts us to the possibility of regulation in respect of certain activities, things and matters. For example, in Britain there would not be an expectation of regulation in respect of meetings in a public place or political commentary; but in respect of owning or selling fire arms there clearly is, so much so that anyone wanting to acquire one could reasonably be expected to inform himself of his legal duties.⁴⁵ But would they indeed need to go to that effort?

In respect of much regulation, there are hotspots of knowledge that effectively absolve others from the burden of having to know. Often these intermediaries also ensure compliance through legal restrictions on their own activities.⁴⁶ So the shop owner selling fire arms will inform prospective buyers of their rights or duties in relation to fire arms, and not sell them any unless they meet the prerequisites. The chemist knows what drugs can be sold to whom, when and in which quantities. The news agency, bookshop and TV companies know which publications or programmes are legal or restricted and the publican knows to whom alcohol may or may not be served or what games may or may not be played on the premises.⁴⁷ And often these hotspots are mere links in a much longer chain along which regulation occurs and notice expectations are spread. So the chemist can rely on the licensed drug manufacturer or distributor to offer and sell only approved drugs and the news agency can rely on newspaper publishers to know the rules on defamation or obscenity. In short, law-makers often rely on structure and hierarchies along which the need-to-know is spread and often shifted away from the ultimate end-user.

The common knowledge either provides subjects with the content of legal norms (eg. the rule against stealing or selling heroine) or alerts them to the

⁴⁵ But note for contrary US position see *Staples v US* 511 US 600 (1994), discussed below.

⁴⁶ 'It is rather easy to observe that the largest part of behaviour regulation is not generated in today's capitalist societies by the relational networks of sociality but as a result of operating within institutional frames of activity.' Michalis Lianos, 'Social Control after Foucault' (2003) 1 (3) *Surveillance & Society* 412, 414, at <http://www.surveillance-and-society.org> See also L Hancher and M Moran, 'Organizing Regulatory Space' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford: OUP, 1998) 148.

⁴⁷ At times this may also involve public agency, eg social security agency which means that the law does not require the self-application by citizens.

possibility of regulation (eg. possession of fire arms). But even in the latter case, the onus to find out about the legal norms is often shifted away from the individual to higher links in the transactional chain. The question now is how these more subtle notice devices function in the global village. The simple answer is: not very well.

To start with, beyond a core of universally accepted norms eg. against theft, murder or breaching contractual promises,⁴⁸ there is very little in the way of a global common knowledge serving as an alert system; and this also applies to commercial activity where, in particular, consumer protection regulation varies significantly from State to State. So, in respect of those very areas where States do not share harmonised rules and where online actors would need to know about the divergent standards, there is no global common knowledge to trigger legal alertness. And it would seem that the absence of this common knowledge is particularly troublesome for smaller actors and businesses that do not have the benefit of in-house legal advice.

It may though be argued that there is certainly a global consciousness that rules vary from place to place and that this should be enough to put individuals and businesses on enquiry as to the foreign legal norms when going online. There are two problems with that argument. Firstly, although online actors may know in principle that rules are different elsewhere, in the particular circumstances our legal imagination is often too tied up with our local common knowledge even to predict the possibility of a divergent foreign legal standard. For example, it is unlikely to occur to publishers in Britain to check Chinese defamation standards when writing about a dead Chinese person simply because under the common law you cannot defame the dead.⁴⁹ In the US, where public figures are subjected to very robust free speech, at least smaller publishers might never stop to think other States might not recognise the 'obvious' distinction between private and public figures. In a State where the laws do not distinguish between consumers and

⁴⁸ For an excellent evaluation of the extent of harmonised legal standards see Marc D Goodman and Susan W Brenner, 'The Emerging Consensus on Criminal Conduct in Cybercrime?' (2002) 10 *International Journal of Law and Information Technology* 139 .

⁴⁹ Sallie Spilsbury, *Media Law* (London: Cavendish, 2000) 77, where the author notes that the 'reputation of a dead person is deemed to die with him.'

businesses in commercial transactions, as for example in Tanzania, it is unlikely that locals would foresee that other States might make that distinction. Secondly, and perhaps more worryingly, it is doubtful whether many of the smaller online businesses and publishers even realise that foreign law may apply to their online activities - which makes the substantive foreign law even less accessible.⁵⁰

But it is not just the inadequacies of the global common knowledge that create new 'notice' imperatives in the online environment. Traditional legal hierarchies, where intermediaries carry the 'notice' burden on behalf of other businesses or end-users, have also broken down in the online global village. This is illustrated, for example, by the fairly very common clause in Marks & Spencer's 'Terms and Conditions':

'Marks & Spencer make no representation that any products or services referred to in the materials on this website are appropriate for use, or available, in other locations. *Those who choose to access this site from other locations are responsible for compliance with local laws if and to the extent local laws are applicable.*⁵¹

Similarly, Amazon.co.uk's 'Conditions of Use & Sale' include the following:

'Additionally, please note that when ordering from Amazon.co.uk, you are considered the importer of record and must comply with all laws and regulations of the country in which you are receiving the goods.'⁵²

These clauses are insightful because they show that even substantial businesses are overwhelmed by the global regulatory requirements and that they attempt to handle it by shifting the notice and compliance burden to the foreign end-user. Whether these clauses are in fact effective in absolving them from possible breaches of 'excluded' foreign law is very questionable: generally it is not possible to contract out of public law or even some private law, such as defamation law. In particular, though, for small online businesses and publishers, such clauses might be the only realistic answer to the legal 'expectation' overload. In any event their use may indeed be legally

⁵⁰ To make foreign substantive law accessible it is necessary that online publishers realise that foreign substantive law may be applicable to them.

⁵¹ Marks and Spencer, *Terms and Conditions*, at <http://www.marksandspencer.com/> [emphasis added].

⁵² Amazon, *Conditions of Sale & Use*, at <http://www.amazon.co.uk>, clause 16.

defensible in so far as it applies to foreign laws that are insufficiently accessible to the online business. From the State's perspective this abdication of responsibility (whether legally valid or not) by the traditional intermediaries, particularly, to the rather unreliable end-users is worrying as the latter may neither be able nor willing to inform themselves and comply. It is like letting the owner of the firearms shop sell firearms to everyone with the proviso that it is up to them to comply with the law – no doubt the number of illicit firearms owners would drastically increase. But equally, from the perspective of the law-abiding citizen, these clauses expect rather too much and frequent accidental non-compliance is also likely to ensue.

In summary, the above discussion shows that it would be over-simplistic to state that the new 'accessibility' imperative in the global village simply arises by virtue of the fact that more and smaller actors have to comply with many more national sets of rules. Such description would fail to acknowledge the reality that the global village lacks key 'notice' mechanisms – such as the common knowledge and knowledge hotspots - which in the domestic context play a critical role either in bringing rules to the attention of their subjects or in relieving them of knowing them. Any realistic governmental attempt to make domestic norms accessible to foreign online actors – in an effort to achieve greater compliance - must be sensitive to these more subtle concerns.

Whether though it can really be expected of a judge to take these concerns into account when dealing with the question of whether a legal restriction was sufficiently accessible not to breach an individual's human right, is doubtful. It would seem that, in the name of certainty, the judiciary is likely to view accessibility as requiring no more than the formal publication of the law. Having said that, there are at least some US precedents that might be used to support the contrary conclusion. For example, in the case of *Staples v US*⁵³ the US Supreme Court had to deliberate on the issue whether owning an assault rifle is conduct that should have put the accused on notice about the possibility of State regulation. It concluded that 'buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than

⁵³ *Staples v US* 511 US 600 (1994), discussed in Luban, above n 5 , at 303ff.

would buying a car.⁵⁴ This case is noteworthy, firstly, because the common knowledge, or the lack thereof, provided in the eyes of the judges an excuse for non-compliance. Secondly, this ruling is utterly remarkable from a European perspective where the common knowledge would have rung alert bells, not to say alert sirens, as to the possibility of regulation. It is not difficult to see how in the transnational online context this approach could frequently absolve online content providers from liability under foreign law. But whether it would meet judicial approval is another matter.

3.3. Making Domestic Laws More Accessible Globally

The final issue that remains to be addressed is what can and should be done to make certain domestic legal norms adequately accessible to foreign online publishers, businesses or other actors. Three preliminary points can usefully be made. The first point is that, no matter how accessible domestic laws are made to foreigners, there is a ceiling as to what States can legitimately expect from them. Ultimately regulatory restraint is an imperative in respect of online activity originating abroad, particularly if States are serious about creating an orderly, legally compliant global village.⁵⁵ The second point is that, although States often lack the ability to enforce their laws over foreign providers,⁵⁶ many respectable foreign businesses and publishers are still likely to make an attempt at legal compliance if that is a realistic option. The third point is that not all, or even most, domestic legal norms are of interest in the global arena and thus it would make sense to be selective in terms of the regulation requiring greater exposure. For example, planning and land laws, traffic or municipal regulations would appear to be of minimal interest to the transnational online actor, while advertising, sale of goods, intellectual property and consumer protection regulation are invariably relevant.

⁵⁴ *Staples v US* 511 US 600, 614 (1994).

⁵⁵ Such restraint is shown, for example, in adopting the targeting or directing approach to jurisdiction, ie. only those sites which target a State, must comply with the State's laws, as opposed to all websites that can be accessed in the State.

⁵⁶ Under international law, while States may extend their laws to foreigners and foreign activities in certain circumstances, they can never take enforcement action on the territory of another State. But note private parties may approach a foreign court for the enforcement of a civil judgment.

This then brings us to the accessibility of domestic legal norms to foreign online providers. The starting point must be that there is already a massive amount of law, especially of developed countries, out there on the Internet and it is continuously increasing. Many sites are accessible for free - an attribute hailed by many commentators.⁵⁷ These include government and court sites, semi-public sites such as Austlii or the Legal Information Institute,⁵⁸ and private sites such as Findlaw. In addition there are the giant subscription sites, such as Westlaw or Lexis or juris.de in Germany.⁵⁹ In fact, for the interested English-speaking legally trained person it probably has never been easier to access laws and court decisions from around the globe. So the law is there, but is it indeed accessible? It is in terms of sheer physical access. Nevertheless to the average online actor much relevant law remains firmly behind closed doors. It is like giving a book to the blind or the illiterate. How easy would it be for the owner of a small gambling site or site offering alternative medicines to find out which States are legally hospitable and which are not, from which States it is safe to have customers and from which one it is not. Could these goods and services be delivered to France or Britain without rebuke?

For all but the legally trained and a few other professionals, the problem with much online law is that it is still far too 'raw' – although raw to varying degrees.⁶⁰ At one end of the scale there are sites such as the official UK government⁶¹ and court sites which simply post cases or legislation in chronological order. At the other end of the scale are those sites providing updated legislation, powerful search engines, a variety of metadata and categorisation by topics, such as Austlii,⁶² the Legal Information Institute, Findlaw or the subscription giants. Some may object to the classification of these latter sites as raw-data sites given that they provide many value-added services. Indeed for most lawyers, academics, students, public servants and certain professionals these sites provide excellent collections of well-ordered

⁵⁷ For example Harvey, above n 21. But note also Peter W Martin, above n 6, para V, where the author explains the barriers to free access.

⁵⁸ See <http://www.austlii.edu.au> and <http://www.law.cornell.edu>.

⁵⁹ See <http://www.westlaw.com>, <http://www.lexis.com> and <http://www.juris.de/jportal/index.jsp>.

⁶⁰ For a discussion of why 'access to law' should generally mean more than 'access to raw data' and what it may entail see McMahon, above n 5, part 6.

⁶¹ See <http://www.hmso.gov.uk/acts.htm>

⁶² See <http://www.worldlii.org/catalog/33.html>

raw material.⁶³ However for many online actors who are the focus of this paper, these sites can hardly be said to make the law accessible.

So the solution would appear to be the greater provision of digested legal data⁶⁴ - into practical solutions, guidelines and check lists. In the UK there are certainly some relevant sites. For example, the Department of Trade and Industry provides a regulatory site specifically targeted at businesses,⁶⁵ and further sites giving guidance for businesses on specific rules, such as distance selling rules or e-commerce regulations,⁶⁶ as well as a one stop site for consumers.⁶⁷ A similar site is provided by the Australian Competition and Consumer Commission entitled 'eBusiness – doing business on the internet',⁶⁸ which provides a one-point access to regulatory concerns for online businesses. Yet, in terms of the transnational element its commentary remains vague and rather unhelpful:

'What about my competitors in other jurisdictions, are they subject to the same laws? This will depend on the circumstances. If your online competitors are carrying on a regular business in selling goods or services to customers within Australia, then they are *likely to be subject* to Australian competition laws. *Don't forget that if you are carrying on a business in other countries, you may need to comply with those laws as well.*'⁶⁹ [emphasis added]

The main problem with these sites is that they are invariably aimed at local businesses. Also, often the focus is on domestic and EU regulation as if the Internet did not reach beyond it. These sites do not inform local online providers about their possible legal obligations abroad (or outside the EU), nor do they provide foreign online actors with easy access to their legal rights and obligations under domestic laws. Ideally there should a single access

⁶³ See for example statistics on Austlii in Kirby, above n 25.

⁶⁴ Kirby, above n 25, also suggests more legal education for the average citizen: 'Providing undigested legal material is not enough. It is essential that we provide citizens with the tools of thinking through problems, finding the applicable legal rules and deriving from legislation and case law any principle that must be obeyed... a huge mass of undigested legal data will not truly make the law free and more accessible.' It is doubtful how realistic that solution is.

⁶⁵ See http://www.dti.gov.uk/for_business.html and for guidance on regulation see http://www.dti.gov.uk/for_business_regulations.html. See also <http://www.businesslink.gov.uk> (IT & E-Commerce)

⁶⁶ See <http://www.dti.gov.uk/ccp/topics1/ecommm.htm>
http://www.dti.gov.uk/industry_files/pdf/smallbusinessguidance.pdf

⁶⁷ <http://www.consumer.gov.uk/ccp/topics1/ecommm.htm>,

⁶⁸ <http://www.accc.gov.au/content/index.phtml/itemId/54056/fromItemId/3669>

⁶⁹ ACCC, *Dealing with my competitors online* (2003) at <http://www.accc.gov.au/content/index.phtml/itemId/54070/fromItemId/54056>

point which alerts foreigners to their possible legal duties, with links to more specialised sites.

An international site in several languages which explicitly caters for the needs of transnational online consumers is the [econsumer.gov](http://www.econsumer.gov),⁷⁰ a multi-state initiative adopted in 2001. The site is primarily reactive to the needs of cross-border actors in that its primary focus is disgruntled consumers and their complaints. It is only very mildly proactive by providing some legal information or links to such information⁷¹ for online businesses. This is perhaps appropriate, judging by its complaints statistics, according to which roughly 50% of the complaints in the first half of 2004 concerned either non-delivery of goods or services or misrepresentations.⁷² So the agency appears to be dealing with complaints concerning mainly rough businesses which are unlikely to be too concerned about their legal obligations anywhere.

Perhaps the most promising attempt to make 'online' laws accessible internationally so far has been made by the Council of Europe with its *Convention on Information and Legal Co-operation concerning "Information Society Services"* (Moscow, 2001)⁷³ which – broadly modelled on the EU regulatory transparency directives⁷⁴ - was signed in March 2004 by the European Union and is open for signature internationally.⁷⁵ Although the

⁷⁰ See <http://www.econsumer.gov>.

⁷¹ For information on the Member States of the International Consumer Protection Enforcement Network ICPEN (<http://www.imsnricc.org/>), <http://www.econsumer.gov> (Member Countries Information).

⁷² Other common complaints: the merchant cannot be contacted, the unauthorised use of identity/account information, the billing for merchandise or services not ordered, see <http://www.econsumer.gov/english/contentfiles/pdfs/PU15%20-%20Jan-Jun%202004.pdf>.

⁷³ See <http://conventions.coe.int/Treaty/en/Treaties/html/180.htm> and <http://www.coe.int/T/E/Legal%5Faffaires/Legal%5Fco%2Doperation/Information%5FSociety%5Fservices/>

⁷⁴ See for example *Explanatory Report* to the Convention, para 7, at <http://conventions.coe.int/Treaty/en/Reports/Html/180.htm>. For a summary of the EU legislation on the information procedures regarding technical standards and regulations and regulation on information society services see <http://europa.eu.int/scadplus/leg/en/lvb/l21003.htm>. Of particular relevance are Directive 98/48/EC which amends Directive 98/34/EC (laying down a procedure for the provision of information in the field of technical standards and regulations) and extends the application of the information procedures to information society services, i.e. the services rendered against payment, electronically and at the individual request of a services recipient. In the EU which for the purposes of many online activities has established the country-of-origin approach to regulation, the need for the accessibility of foreign norms is reduced.

⁷⁵ Sabina Gorini, 'Council of the European Union: EU joins Council of Europe Convention on Notification of Rules on Information Society Services' (2004) 5:3 *IRIS*, at <http://merlin.obs.coe.int/iris/2004/5/article3.en.html>. The Convention is open for signature to

primary aim of the Convention is to foster co-operation in the drafting of domestic laws affecting online content providers⁷⁶ (and implicitly harmonisation or at least convergence of domestic laws) it also envisages the creation of a central database of adopted domestic regulation. Article 4(7) states:

‘Upon receipt of the text of the adopted domestic regulations ..., the Secretary General of the Council of Europe shall make them available, where practicable by electronic means, and shall keep this information in a single database within the Council of Europe.’

Such a database would certainly ease the accessibility of foreign domestic laws. The Convention has not yet entered into force, and the online database is disappointingly empty.⁷⁷ From the perspective of this article, a definite shortcoming of the Convention is that it excludes ‘rules which are not specifically aimed at the Information Society Services.’⁷⁸ So it excludes all technology-neutral rules (as, for example, the defamation law) which may be numerous and are likely to vastly outnumber the technology-specific rules. So even if the envisaged database was fully updated, it would only ever reveal the tip of the regulatory iceberg to the online services providers.

In short, while there is certainly a lot of law out there on the Internet, it is inadequately packaged and thus inaccessible to many. Such packaging is particularly critical in so far as States expect foreigners to comply with their domestic laws.

4. Conclusion

To make law workable and efficient it sometimes has to rely on legal fictions. One such fiction is the presumption that everyone knows the law – a the 45 Member States of the Council, observer States such as the US and Canada as well as the EU.

⁷⁶ See Art 1(1) ‘... the Parties shall exchange texts, where practicable by electronic means, of draft domestic regulations aimed specifically at “Information Society Services” and shall co-operate in the functioning of the information and legal co-operation system set up under the Convention.’ Art 2(a) defines Information Society Services as ‘any services, normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’

⁷⁷ See

<http://www.coe.int/T/E/Legal%5Faffairs/Legal%5Fco%2Doperation/Information%5FSociety%5FServices/Texts%20and%20summaries.asp#TopOfPage>

⁷⁸ Article 2(b) of the Convention.

presumption driven by the need to give subjects an incentive to inform themselves of their legal obligations and which is justifiable and fair in so far as everyone could know about it as it is published. But of course even the latter fact is to some extent a fiction, given that many people could not find out about the law, at least through its official sources, since much law in its technical detail is inaccessible to the ordinary person. Nevertheless this fiction is, in the domestic context, hardly troublesome as people can know about their legal obligations and in fact do broadly know about them - either through the media or common knowledge. This article sought to show why this fiction becomes a real fairy tale in the transnational context, particularly now in the online context given the very limited existence of a global common knowledge. This then sits very uneasily with the expectation by States of legal compliance by foreign online actors. In fact, this article has shown that online actors could argue that - unless the restrictions imposed by States on their online activities are adequately accessible - such restrictions are in breach of their human right to freedom of expression. And again, just because these restrictions are adequately accessible to domestic subjects does not make them adequately accessible to foreigners or generally to the new breed of 'poor' transnational enterprises. This article has sought to make the above case by relying on legal sources from different jurisdictions which, of course, are only binding in limited circumstances. Yet, the underlying assumption supporting this approach was that most States would, as part of their commitment to the rule of law, concur with the substance of the arguments.

In practical terms, States essentially have two options. The first option is to scale back their regulatory claims, for example, in favour of self-regulation or the country-of-origin approach to regulatory competence. This option provides a clear example of how practical limitations may at times inform legal developments. Nevertheless so far it has only to a very limited extent been taken up by States. The other option is for States to cater far more explicitly for their foreign clientele and find substitutes for the domestic notice mechanisms. This then would perhaps dictate the need for an online one-point regulatory stop, provided in a number of languages, which would at the very least alert foreign actors to the potential regulatory pitfalls arising out of

online activity in that State. In addition, given the difficulty faced by online actors in locating relevant material in foreign jurisdictions, an international point of access to the various national sites might also be asked for. Of course, at the end of the day States could also just stick to their current policy of keeping their heads firmly stuck in the sand.