



## INTERNET & JURISDICTION

A GLOBAL MULTI-STAKEHOLDER  
DIALOGUE PROCESS

# HOW TO ADDRESS THE TENSION BETWEEN A CROSS-BORDER INTERNET AND NATIONAL JURISDICTIONS?

The Internet & Jurisdiction Project, launched in 2012, facilitates a global multi-stakeholder dialogue process to address growing jurisdictional tensions on the Internet. This neutral platform engages more than 80 key entities from governments, business, civil society, technical community and international organizations to jointly develop and implement a voluntary policy standard: a transnational due process framework for the submission and handling of cross-border requests for domain seizures, content takedown and user identification.

## I - A COMMON CHALLENGE

The Internet allows billions of people from diverse national jurisdictions to cohabit in shared online spaces. These services produce unique social, political and economic benefits for mankind and transnational interactions become the new norm. As a result, more and more diverse social, cultural, religious and political sensitivities and applicable national norms have to co-exist in cyberspace.

The traditional legal system bases jurisdiction on the physical boundaries of national territories. However, Internet platforms and services represent cross-border “digital territories” where users become subject to the “law” of global Terms of Service. This growing dynamic tension increasingly leads to difficult questions of applicable jurisdiction and legal uncertainty for all. Potential conflicts proliferate regarding privacy, defamation, freedom of expression or consumer protection.

Furthermore, as online interactions increasingly involve Internet platforms, technical operators, servers and users based in different physical locations, determining one single applicable law on the basis of traditional territorial criteria becomes difficult or even impossible.

This is especially evident for user-generated content and in particular speech-related issues, for which national rules greatly vary: what is legal in one country can be illegal in others. Moreover, the Terms of Service of private operators can conflict with national laws. Normative collisions between these often incompatible national laws and rules create increasing conflicts between public authorities, Internet platforms or operators, and users across jurisdictions. Such tensions would further increase with the ultimate global penetration of the Internet.

### **The cost of inaction**

Maintaining transnational spaces requires coordinated efforts. However, traditional Westphalian mechanisms of inter-state cooperation are not sufficient. In particular, Mutual Legal Assistance Treaties (MLATs) only deal with relations between states, do not exist among all countries, are most often limited to criminal issues and do not scale up to the growing number of cases that need to be addressed. Meanwhile, a global harmonization of content-related national laws appears unworkable.

In the absence of appropriate frameworks to manage shared online spaces, governments, cross-border platforms and technical operators adopt uncoordinated and potentially incompatible approaches. This includes efforts to enforce local legislations online either by requiring re-territorialization of cyberspace or by extraterritorial extensions of national sovereignty.

Should this trend continues, it could have the unintended consequence of a creeping fragmentation of the Internet and a forced realignment along national cyberspaces. Such a jurisdictional arms race might threaten the very nature of the Internet as a global distributed network allowing seamless transnational user interactions and services. Not only would this jeopardize the benefits the Internet has brought to mankind, but it would also hamper innovation and economic growth.

### **A concern for all stakeholders**

The current situation represents a rare issue of common concern for all stakeholders:

- Companies find it hard to develop global Terms of Service respectful of a patchwork of national legislations;
- Governments face difficulties of enforcement and fear the impact of other countries' legislation on their own citizens;
- NGOs worry that universal human rights principles are overlooked in the interaction between business and governments;
- Technical operators fear that the neutrality of the DNS layer will be threatened;
- International organizations trying to establish principles in that domain are afraid of ending up competing against each other.

Given the transnational nature of the Internet's logical and application layers, it is not always possible to determine one single applicable jurisdiction. The Internet thus forces actors to manage commons, rather than trying to separate territories. Since no stakeholder group – let alone individual actors - can solve this conundrum alone, the creation of appropriate and viable frameworks requires a multi-stakeholder approach and new modes of cooperation between actors.

## **II – DUE PROCESS AND TRANSPARENCY**

The Internet & Jurisdiction (I&J) Project was launched in 2012 to provide a needed neutral platform for a global multi-stakeholder dialogue to address this issue. It responded to the desire of the various actors to explore the elaboration of common framework(s) to enable interoperability between heterogeneous stakeholders and normative orders.

### **Shared Principles and Norms**

Several initiatives by governments, international organizations, business groupings or civil society coalitions have produced proposals for Internet Principles that exhibit a significant degree of convergence. Further consultations revealed operational objectives that could potentially constitute shared norms acceptable to all stakeholders, including:

- Availability: ensuring the broadest possible accessibility of (legal) content
- Granularity: proportionality in any limitation of availability of content
- Transparency: appropriate visibility, traceability and predictability of restrictive measures
- Due Process: clarity of procedures for both platforms and states

### **Three areas of cooperation**

Transnational cooperation is required to enable Digital Coexistence in cross-border spaces, diffuse tensions and avoid fragmentation. Numerous public and private meetings involving key stakeholders

held around the world by the I&J Project identified three issue areas to focus upon:

- Domain Seizures
- Content Takedowns
- Access to User Identification

In the absence of international arrangements, requests by public authorities for domain seizures, content takedowns and access to user data are increasingly sent directly, i.e. transnationally, to Internet platforms or operators in other countries. This solution however currently lacks clear procedures and transparency.

To ensure due process in the management of such transborder requests, agreed “procedural interfaces” and norms are needed between states, platforms and operators, as well as users to simultaneously streamline the treatment of the various requests and enable the coexistence of diverse laws in shared cyberspaces.

### **III – TOWARDS A TRANSNATIONAL FRAMEWORK**

In 2013, participants in the Internet & Jurisdiction Global Dialogue Process identified six fundamental building blocks for such a transnational due process framework: Authentication, Transmission, Traceability, Determination, Safeguards and Execution. Numerous consultations with stakeholders around the world have since then defined corresponding operational components. As a result of further work conducted during 2014 and early 2015, a draft architecture emerged for the intended framework, based on two pillars respectively related to the two phases of request submission and request handling.

#### **Request submission system**

Interoperability between heterogeneous actors (public requesters and private requestees) can be achieved via two components establishing due process and transparency by design:

- a) A standardized request submission format would structure requests through a shared set of markup tags specifying, among others:
  - Authenticated Points of Contact for requesters and requestees
  - Request types and categories
  - The national legal basis and the procedure followed
  - Request details and justification for necessity and proportionality
- b) In addition, mutualized databases would automatically collect relevant elements from each request, in order to allow:
  - Production of transparency reports by multiple actors from open data statistics
  - Progressive compilation of the relevant national laws and procedures
  - Request logging

#### **Request handling procedures**

Beyond the mechanisms above, participating stakeholders identified the need to further enhance how requests are processed and potential tensions across jurisdictions are handled:

- a) The predictability of the decision-making workflow used by platforms and operators in response to transborder requests could be improved via:
  - Common procedural norms and standards
  - Shared sets of evaluation criteria

- Neutral advisory panels for situations of uncertainty
- b) Transnational dispute management mechanisms could better safeguard users' rights and diffuse tensions, via in particular:
- Procedural appeals
  - Pre-established channels to foster dialogue between parties in situations of tension

After three years of intense deliberations, the benefits of such a neutral dialogue space have been demonstrated and work is progressing towards practical pilot implementation.

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Solutions to the most pressing issues related to Internet governance can only emerge through close dialogue and cooperation among relevant actors. This pioneering effort pragmatically explores new ways to produce the innovative transnational arrangements required by a revolutionary medium that now underpins almost all human activities.

The ongoing commitment of major actors to the Internet & Jurisdiction Process and their willingness to explore practical avenues for enhanced cooperation is deeply encouraging.

More information is available at: [www.internetjurisdiction.net](http://www.internetjurisdiction.net)

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