

Jack L. Goldsmith, *Against Cyberanarchy*
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Consider the predicament of one of the scores of companies that offer, sell, and deliver products on the World Wide Web. Assume that the web page of a fictional Seattle-based company, Digitalbook.com, offers digital books for sale and delivery over the Web. One book it offers for sale is *Lady Chatterley's Lover*. This offer extends to, and can be accepted by, computer users in every country with access to the Web. Assume that in Singapore the sale and distribution of pornography is criminal, and that Singapore deems *Lady Chatterley's Lover* to be pornographic. Assume further that Digitalbook.com's terms of sale contain a term that violates English consumer protection laws, and that the publication of Digitalbook.com's *Lady Chatterley's Lover* in England would infringe upon the rights of the novel's English copyright owner. Digitalbook.com sells and sends copies of *Lady Chatterley's Lover* to two people whose addresses (say, anonymous@aol.com and anonymous@msn.com) do not reveal their physical location but who, unbeknownst to Digitalbook.com, live and receive the book in Singapore and London, respectively.

The skeptics claim that it is difficult for courts in Singapore or England to regulate disputes involving these transactions in accordance with geographical choice-of-law rules. In addition, they argue that English and Singaporean regulations will expose Digitalbook.com to potentially inconsistent obligations. Finally, the skeptics claim that Digitalbook.com can easily evade the Singaporean and English regulations by sending unstoppable digital information into these countries from a locale beyond their enforcement jurisdiction.

On the normative side, the skeptics are concerned that the application of English and Singaporean law to regulate Digitalbook.com's transactions constitutes an impermissible extraterritorial regulation of a U.S. corporation. Because Digitalbook.com might bow to the English and Singaporean regulations, and because the company cannot limit its cyberspace information flows by geography, the English and Singaporean regulations might cause it to withdraw *Lady Chatterley's Lover* everywhere or to raise its price. The English and Singaporean regulations would thus affect Digitalbook.com's behavior in the United States and adversely affect the purchasing opportunities of parties in other countries. The skeptics believe these negative spillover effects of the national regulations are illegitimate. They also think it is unfair for England and Singapore to apply their laws in this situation because Digitalbook.com had no way of knowing that it sold and delivered a book to consumers in these countries. * * *

The skeptics are in the grip of a nineteenth century territorialist conception of how "real space" is regulated and how "real-space" conflicts of law are resolved. This conception was repudiated in the middle of this century. The skeptics' first mistake, therefore, is to measure the feasibility and legitimacy of national regulation of cyberspace against a repudiated yardstick. * * * Changes in transportation, communication, and in the scope of corporate activity led to an unprecedented increase in multijurisdictional activity. These changes put pressure on the rigid territorialist

conception, which purported to identify a single legitimate governing law for transborder activity based on discrete territorial contacts. So too did the rise of the regulatory state, which led to more caustic public policy differences among jurisdictions, and which pressured the interested forum to apply local regulations whenever possible. * * *

Today, the Constitution permits a state to apply its law if it has a “significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” In practice, this standard is notoriously easy to satisfy. It prohibits the application of local law only when the forum state has no interest in the case because the substance of the lawsuit has no relationship to the state. Customary international law limits on a nation’s regulation of extraterritorial events are less clear because there are few international decisions on point, and because state practice does not reveal a settled custom. Nonetheless, it seems clear that customary international law, like the United States Constitution, permits a nation to apply its law to extraterritorial behavior with substantial local effects. In addition, both the Constitution and international law permit a nation or state to regulate the extraterritorial conduct of a citizen or domiciliary. In short, in modern times a transaction can legitimately be regulated by the jurisdiction where the transaction occurs, the jurisdictions where significant effects of the transaction are felt, and the jurisdictions where the parties burdened by the regulation are from. * * *

A nation can purport to regulate activity that takes place anywhere. The Island of Tobago can enact a law that purports to bind the rights of the whole world. But the effective scope of this law depends on Tobago’s ability to enforce it. And in general a nation can *only* enforce its laws against: (i) persons with a presence or assets in the nation’s territory; (ii) persons over whom the nation can obtain personal jurisdiction and enforce a default judgment against abroad; or (iii) persons whom the nation can successfully extradite.

A defendant’s physical presence or assets within the territory remains the primary basis for a nation or state to enforce its laws. The large majority of persons who transact in cyberspace have no presence or assets in the jurisdictions that wish to regulate their information flows in cyberspace. Such regulations are thus likely to apply primarily to Internet service providers and Internet users with a physical presence in the regulating jurisdiction. Cyberspace users in other territorial jurisdictions will indirectly feel the effect of the regulations to the extent that they are dependent on service or content providers with a presence in the regulating jurisdiction. But for almost all users, there will be no threat of extraterritorial legal liability because of a lack of presence in the regulating jurisdictions. * * *

[T]he * * * choice-of-law issues implicated by cyberspace * * * are no more complex than *** the same issues in real space. They also are no more complex or challenging than similar issues presented by increasingly prevalent real-space events such as airplane crashes, mass torts, multistate insurance coverage, or multinational commercial transactions, all of which form the bread and butter of modern conflict of laws. Indeed, they are no more complex than a simple products liability suit arising from a two-car accident among residents of the same state, which can implicate the laws

of several states, including the place of the accident, the states where the car and tire manufacturers are headquartered, the states where the car and tires were manufactured, and the state where the car was purchased. * * * Resolution of choice-of-law problems in these contexts is challenging. But the skeptics overstate the challenge that occur in real space all the time.