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The Legal Equivalent of HIV? - An Analysis of the Global Nature of the Internet.

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`[The] notion of the global village is itself of course a rear-view mirror, or an attempt to understand the new world of electronic media via reference to the older world of villages. But indeed, what *is* a metaphor, if not a rear-view mirror that seeks to make the new more explicable by attaching it to something we feel we already know, inside out.' (Paul Levinson, *Digital McLuhan - A Guide to the Information Millennium*, 1999, Routledge, 175.)

'Global' - a term used habitually by almost everyone and anyone who looks at the effect of the Internet on law and regulation; a term used to signify that we are dealing with a very difficult issue which is as unlikely to be resolved in the near future as international legal harmonization is to take a great leap. And there seems to be a consensus that if there is a single aspect of the Internet more legally challenging than any other aspect, it is its global character, turning the world into a global village. Yet, what exactly is it that makes the Internet more global than say the telephone, and why is its global nature so profoundly new as to justify the explosion of legal activity. This paper attempts to answer these questions by looking into a rear-view mirror and by using the metaphor of a virus to explain the global character of the Internet and the reasons why it so deeply challenges long established assumptions that law and regulators have built upon.

The trigger for this discussion was the realisation that the Internet is in many ways no more global than existing communication media. For example, if one wanted to compare the extent to which various media are global by reference to the dispersion of the medium's physical infrastructure across national boundaries or by reference to the extent to which the human actors, through those media, transcend their nations in the process of communication, the Internet is certainly nothing new or unique. Dispersion of both physical infrastructure and actors across the globe is, to a greater or lesser extent, also typical for other media such as the telegraph, the telephone and TV, in particular satellite or cable TV. Broadly, they all allow for communication over large distances. Similarly the Internet cannot currently be said to be more global than other media simply on the basis of number crunching. For example, the total numbers of people connected world-wide to the telephone network is one billion while 'only' 260 million people are connected to the Net. And although it may be argued that the Internet is still in its very early days and the number of people connected to it is expected still to rise exponentially, it must be remembered that the Internet via personal computers and modems since the 1980s have piggybacked on the voice lines and networks put in place for the

telephone - which indicates that the number of Internet connections is unlikely to exceed the number of telephone connections on which they rely. And yet, it appears that the Internet is nevertheless more global than the telephone.

An Analogy

The reason why the globalness of the Internet is so problematic can be explained by analogy to a virus. The comparison of a new phenomenon and its legal consequences with disease is not new and so, for example, the spread of the Mafia has often been compared to that of a disease, such as cancer, and the carrier of that disease is said to be migration. The Internet is merely the latest legal disease, or epidemic. Or is it? Take, for example, a virus. What makes a virus dangerous? The danger posed by viruses depends on a combination of two things: on its nature or effect and on the ease by which it is transmitted. As to the first point, the danger of a virus depends on the nature of the virus and what effect it has on humans. Does it affect you at all; does it make you feel slightly unwell, or seriously unwell or does it even kill you? Does it give you a cold or rabies or Aids? The second aspect relates to the infectiousness of the virus. Is it easily transmitted and how is it transmitted? Is it transmitted through air or through blood or through water? But it is only a particular type of combination of these two factors which turns a virus into a monstrosity. For example, a virus that is easily transmitted but has only a slight effect on your health is relatively harmless. Equally, a virus that kills but is not easily transmitted and thus fairly rare is, on an overall public scale, similarly harmless. The really dangerous virus is a virus which kills *and* is easily transmitted.

From the perspective of regulators, the Internet seems to be the legal equivalent of HIV or the foot-and-mouth disease. The Internet appears to allow for a combination of potent content and great ease of transmission. Neither of these two factors is by itself a novelty or even legally problematic; it is the *combination* of these two factors which presents the real challenge. **To appreciate the analogy, it is important to realise that comparing a highly infectious lethal virus to the Internet is intended to do no more than indicate the severity of the problem the Internet presents to regulators, rather than comment in any way on the usefulness and merit of the Internet in general.**

On this understanding, one may develop the analogy as follows. Firstly, what is in the context of a virus the transmission medium, such as air, water or blood, is in the online environment the Internet itself, that is the medium of communication, which 'transmits' information. The nature of the transmission medium largely determines whether the virus is easily transmitted, potentially highly infectious or not. Comparing the Internet to previous 'transmission media', it seems that its transmission potential is comparable to that of air which is highly and seemingly inherently diffuse. But whether and to what extent a virus will spread and take advantage of the diffusive potential of air or any other transmission medium depends on the virus itself. For example, many viruses cannot spread through air at all. Similarly, in the Internet context, some types of communication or services offered on it can take greater advantage of the diffusiveness of the Internet than others. So for example, one-to-one email seems an inherently less diffuse type of communication than websites and discussion groups, providing respectively one-to-many and many-to-many communication. These latter types of communication exploit the diffuse potential of the transmission medium, ie. the Internet, to the fullest.

While so far it has been asserted that the Internet is a highly diffuse transmission medium and that some types of online communications are comparable to a highly infectious virus, making the most of the highly diffuse transmission medium, all this would not matter if communication on the Internet was comparable to a virus which gave you no more than a common cold. (It was argued above that it is only the particular combination of ease of transmission and the deadly nature of the virus which turns a virus into a serious problem.) Are online communications the equivalent of a killer virus? In the context of law and regulation, the question must be: what would, from a

regulators' point of view, be a highly potent or 'killer' form of communication? The broad answer must be: any communication or activity, the regulation of which is so essential to the effective administration of justice, that regulators cannot afford to lose control over it.

Last but not least, the extent of the danger posed by any virus also depends on whether the virus is easily diagnosed. Can it be established easily whether and where the virus has hit, where it comes from, how it spread and the path it travels. The ability accurately to diagnose the disease goes hand in hand with the practical ability ultimately to control it. Again, the analogy to the Internet appears at hand. The diagnostic problems arising out of online communications are well acknowledged and often it is this inability to make an accurate diagnosis of the whereabouts and identity of online content providers which prevents effective regulatory control being achieved. This third aspect of diagnosis does not so much challenge existing legal doctrines but rather traditional law enforcement methods and the practical means to implement the legal norms.

So it is argued that the challenge posed by the Internet is not due to its global nature per se, but rather due to the deadly combination of (1) ease of transmission, (2) potent content and (3) the difficulty of making an accurate diagnosis. It is only the combination of these three aspects which makes the Internet a serious threat to national regulators. For reasons of space, the discussion will only focus on the first two aspects without, however, implying that the third is of less significance.

The discussion concludes that no previous communication medium, even if it allowed for easy international transmission, was so well suited to the transmission of potent content as the Internet. But, although online communications certainly pose a threat to national regulators, their grave need not yet be dug.