

NOTES

Preface

- 1 Thank you to Marie Hockenhull-Smith for drawing my attention to the concept of the Sublime.

Chapter 1

- 1 See, for example, B. Anderson, N. Sharma and C. Wright, 'Editorial: Why No Borders?' (2009) 26 *Refuge* 5; D. Levi-Faur, 'Regulatory Capitalism and the Reassertion of the Public Interest' (2009) 27 *Policy and Society* 181 (describing regulation as one important manifestation of the reassertion of the state).
- 2 There is a vast amount of literature on this topic; see, for example, P. S. Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Review* 1155; M. Watt and F. Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press, 2014); R. Nobles and D. Schiff, *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Routledge, 2016).
- 3 A. Wimmer and N. G. Schiller, 'Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences' (2002) 2 *Global Networks* 301; B. Jessop, 'Reflections on Globalization and Its (Il)logic(s)' in K. Olds, P. Dicken, P. Kelly, L. Kong and H. Wai-chung Yeung (eds) *Globalization and the Asia-Pacific: Contested Territories* (Routledge, 1999) 19.
- 4 M. Foucault, *The History of Sexuality* (1976), 95.
- 5 D. Osborne, 'Apple may end up in Supreme Court after defying US government order to hack iPhone of San Bernardino shooter', *The Independent*, 17 February 2016.
- 6 P. Mounier, 'Internet Governance and the Question of Legitimacy' in E. Brousseau, M. Marzouki and C. Méadel (eds) *Governance, Regulations and Powers on the Internet* (Cambridge University Press, 2012), 170.
- 7 N. Choucri, *Cyberpolitics in International Relations* (MIT Press, 2012).
- 8 Often this is a question of emphasis rather than an either/or issue. See, for example, the varied contributions in Brousseau, Marzouki and Méadel (eds), *Governance, Regulations and Powers* or Karl-Hein Laduer, *Public Governance in the Age of Globalisation* (Ashgate, 2004).
- 9 D. R. Johnson and D. G. Post, 'Law and Borders – the Rise of Law in Cyberspace' (1996) 45 *Stanford Law Review* 1367.
- 10 For a nuanced critical overview of 'network governance' in the digital environment, see M. L. Mueller, *Networks and States: The Global Politics of Internet Governance*

- (MIT Press, 2010) chapter 2; S. Sassen, 'Digital Networks and the State: Some Governance Questions' (2000) 17 *Theory, Culture & Society* 17.
- 11 For a rejection of the mirror theory of law, see B.Z. Tamanaha, 'Law and Society' (2009) *St John's Legal Studies Research Paper No.09-0167*.
 - 12 As settled in *Authors Guild v. Google* 954 F Supp 2d 282 (2013).
 - 13 See Art 5(3) of the ePrivacy Directive 2002/58/EC, as amended by Directive 2009/136/EC.
 - 14 S.L. Malcomson, *Splinternet: How Geopolitics and Commerce Are Fragmenting the World Wide Web*' (OR Books, 2016).
 - 15 E. Schmidt and J. Cohen, *The New Digital Age: Reshaping the Future of People, Nations and Business* (John Murray, 2013), 92.
 - 16 The European Consumer Organisation (BEUC), 'European Commission: it is time to #STOPGEOBLOCKING!' 5 April 2016.
 - 17 A. Mills, 'The Private History of International Law' (2006) 55 *International and Comparative Law Quarterly* 1, 44; see also J.R. Paul, 'The Isolation of Private International Law' (1988) 7 *Wisconsin International Law Journal* 149.
 - 18 *Ibid.* See also, H. Muir Watt, 'The Relevance of Private International Law to the Global Governance Debate' in Watt and Arroyo (eds), *Private International Law*, 1.
 - 19 *Richardson v. Facebook* [2015] EWHC 3154.
 - 20 *Richardson v. Facebook* [2015] EWHC 3154, [60]–[63].
 - 21 The judge also rejected that Facebook performs a 'function of a public nature' following *YL v. Birmingham City Council* [2007] UKHL 27, [61]–[66]; see also House of Lord, House of Commons, Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act – Seventh Report of Session 2003-2004* (3 March 2004) HL Paper 39, see esp. [40].
 - 22 No Civ-02-1457-M (WD Okla 13 January 2003); R.L. Kerr, *The Corporate Free Speech Movement: Cognitive Feudalism and the Endangered Marketplace of Ideas* (LFB Scholarly Publishing, 2008); K. Sanneh, 'The Hell You Say', *New Yorker*, August 2015; A. Hern, 'Forget Conspiracy Theories – Here's Why Google's "Conservatives Are" Blacklist is Worrying', *The Guardian*, 8 February 2016.
 - 23 J. Preston, 'Facebook Deactivates Protest Pages in Britain', *The New York Times*, 29 April 2011; C. Cahalane, 'Facebook Refuses to Reinstate 'Negative' Meningitis Now Advert', *The Guardian* 20 November 2015.
 - 24 *Richardson v. Facebook* [2015] EWHC 3154 [7].
 - 25 B.Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.
 - 26 D. Beetham, *The Legitimation of Power* (Palgrave, 1991).
 - 27 A.D.I. Kramer, J.E. Guillory and J.T. Hancock, 'Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks' (2004) 111 *PNAS* 8788. B.M. Frischmann, 'Human-Focused Turing Tests: A Framework for Judging Nudging and Techno-Social Engineering of Human Beings' (2014) *Burns Institute for Advanced Legal Studies*, Faculty Research Paper No 441.
 - 28 Tamanaha, 'Law and Society', 20f; N. Lacey, 'Legal Construction of Crime' in M. Maguire, R. Morgan, R. Reiner (eds), *The Oxford Handbook of Criminology* (4th ed, Oxford University Press, 2007), 192.
 - 29 Mueller, *Networks and States*, at 1, see also 185ff.
 - 30 D. Vogel, 'Private Global Business Regulation' (2008) *Annual Review of Political Science* 261.

- 31 D.G. Post, 'Internet Infrastructure and IP censorship' (2015) *IP Justice Journal Internet Governance and Online Freedom Publication Series*, No. 1.
- 32 M. Birnhack and N. Elkin-Koren, 'The Invisible Handshake: The Reemergence of the State in the Digital Environment' (2003) *Virginia Journal of Law & Technology*.
- 33 V. Mayer-Schönberger and K. Cukier, *Big Data* (John Murray, 2013), 145f.
- 34 S. Marks and H. Davies, 'Revealed: How Google Enlisted Members of US Congress It Bankrolled to Fight \$6bn EU Antitrust Case', *The Guardian*, 17 December 2015.
- 35 *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v. Viaticum SA and Luteciel SARL* (C-237/08) and *Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and Others* (C-238/08), (CJEU, 23 March 2010); *Google AdWords* C-236/08, C-237/08 and C-238/08 (Advocate General, 22 September 2009).
- 36 *L'Oréal SA and Others v. eBay International AG and Others* C-324/09 (CJEU, 12 July 2011).
- 37 *Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González* C-131/12 (CJEU 13 May 2014).
- 38 Schmidt and Cohen, *New Digital Age*, 1f (emphasis added).
- 39 *Ibid* 257 and Chapter 3.
- 40 See, for example, J.N. Rosenau, M.D. Townes, 'People on the Internet as Agents of Change' in Brousseau, Marzouki and Méadel (eds), *Governance, Regulations and Powers*, 112.
- 41 E. Stepanova, 'The Role of Information Communication Technologies in the "Arab Spring" – Implications Beyond the Region' (2011) PONARS Eurasia Policy Memo No. 159.
- 42 Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006).
- 43 S. Sassen, 'Towards a Sociology of Information Technology' (2002) 50 *Current Sociology* 365, 382; Choucri, *Cyberpolitics*, 72.
- 44 Sassen, 'Towards a Sociology', 366.
- 45 K. Hampton, L. Rainie, W. Lu, M. Dwyer, I. Shin and K. Purcell, 'Social Media and the "Spiral of Silence"' (2014) *Pew Research Center - Internet, Science & Tech*.
- 46 L. Alexander, 'Do Google's 'Unprofessional Hair' Results Show It Is Racist?', *The Guardian*, 8 April 2016.
- 47 For a slightly dated, but still instructive study, see Otify, *The Changing Face of SERPs: Organic Click Through Rate* (April 2011).
- 48 S. Johnson, 'Is Facebook the Enemy of Truth and Civic Unity?', *The Guardian*, 2 January 2016.
- 49 R. Crilly, 'FBI Chief: Isil's Social Media Strategy Makes It Bigger Threat for US than al-Qaeda', *The Telegraph*, 23 July 2015; UK Home Office, *Counter-Terrorism Strategy (CONTEST)* (2011); C. Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 *Stanford Law Review* 1395.
- 50 Regulation (EU) 2015/2120 on open internet access and on roaming on public mobile communications networks.
- 51 A. Lafrance, 'Facebook and the New Colonialism', *The Atlantic*, 11 February 2016.
- 52 *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354.
- 53 See, for example, Google's Transparency Report.

- 54 Out-law.com, ‘Microsoft: Irish data disclosure case “fundamental to the future of global technology”’ (18 December 2014).
- 55 Marks and Davies, ‘Revealed’.
- 56 R.J. Deibert, M. Haraszi, J.G. Palfrey, R. Rohozinski and J. Zittrain, *Access Controlled (Information Revolution and Global Politics)* (MIT Press, 2010).
- 57 For the complexity of interests affecting the private ordering of user generated content platforms, see N. Elkin-Koren, ‘Governing access to user-generated content: the changing nature of private ordering in digital networks’ in Brousseau, Marzouki and Méadel (eds), *Governance, Regulations and Powers*, 318.
- 58 UN, Human Rights Council, D. Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (22 May 2015, A/HRC/29/32), which ‘concludes that encryption and anonymity enable individuals to exercise their rights to freedom of opinion and expression in the digital age and, as such, deserve strong protection’.
- 59 Mueller, *Networks and States*, 186. See also U. Kohl, *Jurisdiction and the Internet – Regulatory Competence over Online Activity* (Cambridge University Press, 2007), ch. 7.
- 60 See, for example, S. Beaulac, ‘The Westphalian Legal Orthodoxy – Myth or Reality?’ (2000) 2 *Journal of the History of International Law* 148; A. Osiander, ‘Sovereignty, International Relations and the Westphalian Myth’ (2001) 55 *International Organization* 251; P. Piirimäe, ‘The Westphalian Myth and the Idea of External Sovereignty’ in H. Kalmo and Q. Skinner, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press, 2011).
- 61 C. Shines, ‘Treaties and Turning Points’ (2016) 66 *History Today* 4, 5.
- 62 See M. Wiesner-Hanks, *Early Modern Europe, 1450-1789* (Cambridge University Press, 2006), pp. 292–93.
- 63 Beaulac, ‘Westphalian Legal Orthodoxy’, 168f.
- 64 Sometimes also referred to as ‘new Medievalism’ – see Scholte’s chapter.
- 65 L. Gross, ‘Peace of Westphalia 1648–1948’ (1948) 42 *American Journal of International Law* 20.
- 66 *International Law – Rules Regulating the Intercourse of States in Peace and War* (Bancroft & Co, 1864), pp. 14–15. Beaulac cites the 2nd edition of this book (Beaulac, ‘Westphalian Legal Orthodoxy’, p. 148).
- 67 Osiander, following his own process of reasoning, settles on the French revolution and industrialisation (Osiander, ‘Sovereignty’, p. 281).
- 68 *Allgemeines Staatsrecht* (J.G. Cotta, 1868), translated into English as ‘The Theory of the State’ (Batoche, 2000).
- 69 Blunschti settles on his own date of 1740. Discussion starting on p. 50 of the Batoche edition.
- 70 Tamanaha, ‘Understanding Legal Pluralism’.
- 71 For an insightful account of how ideas of ‘the state’ took root, see C. Harding and N. Harding, ‘Who Designed the Westphalian System? Probing the Epistemology of the Westphalian Debates: “Moses Was but a Juggler and King James the New Solomon”’ (2006) 2 *Law, Culture and the Humanities* 299.
- 72 See, for example, M. van Crevel ‘On Globalisation: The Military Dimension’ in Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalization* (Ashgate, 2004), 197, on the decline of Westphalia paradigm in the context of war post 1945.
- 73 Wimmer, ‘Methodological Nationalism’, 322.

- 74 Beaulac, ‘Westphalian Legal Orthodoxy’, 177: ‘the idea (perhaps, even the ideal) of distinct separate corporate-like polities enjoying supreme and exclusive control and authority over a relatively well-defined territory which is nowadays associated with the term sovereignty, constitutes a subjective construct of consciousness fulfilling [sic] social functions and changing over time.’
- 75 *Ibid.* See also K-H. Lateur, ‘Globalisation and Public Governance – A Contradiction?’ in Lateur (ed), *Public Governance*, 10, where the author states the concept of governance (as opposed to government) describes the ‘forms of permeability of the state which establish themselves beyond the more structured relationships between state and society in the “corporate state” which has stable relationships with large/major “representative organizations”.’
- 76 It takes 587 hours on foot from Aberystwyth to Moscow, according to Google Maps.
- 77 J. Rabkin, ‘National Sovereignty: Why it is Worth Defending’ (2000) *World Family Policy Forum* 78 (sovereignty also provides a basis for definite law, reliable rights, meaningful responsibility and safeguarding a highest authority); H.J. Miller, ‘Space-Time Data Science for a Speedy World’ (2015) 10 *Journal of Law and Policy for the Information Society* 705.
- 78 Choucri, *Cyberpolitics*, 83.
- 79 For an overview of the concept, see J.E. Noyes, ‘The Common Heritage of Mankind: Past, Present, and Future’ (2012) 40 *Denver Journal of International Law & Policy* 447.

Chapter 2

- 1 www.unesco.org/new/en/Internetstudy.
- 2 The ‘package’ being designated in the acronym ROAM – www.unesco.org/new/en/communication-and-information/crosscutting-priorities/unesco-Internet-study/Internet-universality/.
- 3 See one discussion of the ‘effects’ in J. Golbeck and J. Hendler, ‘Metcalfe’s Law, Web 2.0, and the Semantic Web’ (2008) 6 *Journal of Web Semantics* 14.
- 4 Additional complexities arise in relation to debates over data ‘nationalization’ or ‘localization’ versus dynamic transnational ‘cloud’ storage and services, and these subjects also impact on the size of the network and subnetworks, and the frequency and quality of interconnections.
- 5 It can be noted nevertheless that a 2015 report by the Global Network Initiative titled ‘Data Beyond Borders: Mutual Legal Assistance in the Internet Era’ suggests reforms to make MLATs more efficient. <https://globalnetworkinitiative.org/news/new-gni-report-offers-reforms-manage-rising-number-international-law-enforcement-requests-user>.
- 6 See R. MacKinnon, E. Hickok, A. Bar and H. Lim, *Fostering Freedom of Expression Online: The Role of Internet Intermediaries* (UNESCO, 2015) <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>.
- 7 See J. Zittrain, ‘Don’t force Google to ‘forget’’, *New York Times*, 14 May 2014.
- 8 See <http://business-humanrights.org/en/un-guiding-principles>; *Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises* (UNHRC, 2008).
- 9 See UNESCO Study, *Keystones for the Internet* (2015) www.unesco.org/new/en/internetstudy, which has a section on the debate about the meaning of ‘multistakeholderism’.

- 10 See its General Comment No. 34 on Article 19 of the ICCPR, available online at <http://bangkok.ohchr.org/programme/documents/general-comment-34.aspx>.
- 11 General Comment No. 34.
- 12 L. Bollinger, 'Defending Free Speech in the Digital Age', *Foreign Policy*, 26 November 2012.

Chapter 3

- * This contribution builds on, and further expands, aspects of my book *Media Freedom as a Fundamental Right*, (Cambridge University Press, 2015).
- 1 Although they are neither semantically nor conceptually fully congruent, the terms 'freedom of expression' and 'freedom of speech' are used interchangeably here.
- 2 There are further rationales and interests to explain freedom of expression, such as social interaction and community, or balance between stability and change; see T.M. Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy & Public Affairs* 204; C.E. Wells, 'Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence' (1997) 32 *Harvard Civil Rights – Civil Liberties Law Journal* 159, 166; T.I. Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 877, 884–86. For a general overview, see E. Barendt, *Freedom of Speech* (Oxford University Press, 2nd edn, 2005), 6–30.
- 3 See in particular A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper Brother Publishers, 1948); A. Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245; R.H. Bork, 'Neutral Principles and some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1, 20; C.R. Sunstein, 'Free Speech Now' (1992) 59 *University of Chicago Law Review* 255, 263; J. Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine' (2011) 97 *Virginia Law Review* 491.
- 4 See M. Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000), 48.
- 5 Emerson, 'Toward a General Theory', 881; F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982), 15.
- 6 See C.E. Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 *UCLA Law Review* 964, 967; S. Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) *Duke Law Journal* 1; P. Garry, 'The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept' (1989) 72 *Marquette Law Review* 187, 191; S.C. Pugh, 'Checkbook Journalism, Free Speech, and Fair Trials' (1995) 143 *University of Pennsylvania Law Review* 1739, 1751; E. Volokh, 'In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection' (2011) 97 *Virginia Law Review* 595, 596.
- 7 *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes J, dissenting). See also *Whitney v. California*, 274 U.S. 357, 375–78 (1927) (Brandeis J, concurring); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); House of Lords, *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.
- 8 V. Blasi, 'The Checking Value in First Amendment Theory' (1977) *American Bar Foundation Research Journal* 521, 553.
- 9 See Blasi, 'The Checking Value' (1977), 554; Barendt, *Freedom of Speech*, 6–7; D. Milo, *Defamation and Freedom of Speech* (Oxford University Press, 2008), 55; G. Marshall, 'Press Freedom and Free Speech Theory' (1992) *Public Law* 40, 44; P. Wragg, 'Mill's Dead Dogma: The Value of Truth to Free Speech Jurisprudence' (2013) *Public Law* 363.

- 10 J.S. Mill, *On Liberty* (1869) (republished The Walter Scott Publishing Co., 1989), 127–28.
- 11 R.C. Post, ‘Racist Speech, Democracy, and the First Amendment’ (1991) 32 *William and Mary Law Review* 267, 316.
- 12 See, amongst many other decisions, *Sunday Times v. United Kingdom* (No. 1) [1979] App. no. 6538/74 [65]; *Lingens v. Austria* [1986] App. no. 9815/82 [41]; *Lindon, Otchakovsky-Laurens and July v. France* [2007] App. nos. 21279/02 and 36448/02 [45]; *Frankowicz v. Poland* [2008] App. no. 53025/99 [38]; *Axel Springer AG v. Germany* (No. 1) [2012] App. no. 39954/08 [78].
- 13 See, for example, *United States v. Alvarez*, 567 U.S. ____ (2012), 1.
- 14 See, for example, *Cohen v. California*, 403 U.S. 15 (1971), with the famous quote ‘one man’s vulgarity is another’s lyric’ on p. 25.
- 15 See, for example, *New York Times Co. v. Sullivan*, 376 U.S. 254.
- 16 See B. Russell, *History of Western Philosophy* (1946) (republished Routledge, 2004), 84.
- 17 See Plato, *Theaetetus* (c. 369 BC) (translation by R. Waterfield, Penguin Classics, 2004), para. 161c ff.
- 18 M. Foucault, *Discourse and Truth: The Problematization of Parrhesia*, 6 lectures given by Michel Foucault at the University of California at Berkeley, Oct.-Nov. 1983, edited by Joseph Pearson in 1985, available at http://foucault.info/system/files/pdf/DiscourseAndTruth_MichelFoucault_1983_0.pdf, p. 6; M. van Raalte, ‘Socratic *Parrhesia* and its Afterlife in Plato’s *Laws*’, in I. Sluiter and R.M. Rosen, (eds), *Free Speech in Classical Antiquity* (Brill, 2004), 279, 280.
- 19 Diogenes Laërtius, ‘The Life of Protagoras’ (c. 200 AD) (republished in J. Dillon and T. Gergel, *The Greek Sophists*; Penguin Classics, 2003), para. 51. The original source is supposed to be Protagoras’ lost book ‘Truth’.
- 20 Dillon and Gergel, *The Greek Sophists*, xvi.
- 21 Schauer, *Free Speech*, 24–25, rightly highlights the distinction between truth and certainty.
- 22 *Ibid.*, 20.
- 23 Compare Dillon, and Gergel, *The Greek Sophists*, xvi.
- 24 Schauer, *Free Speech*, 20 including fn. 6; R.C. Post, ‘Reconciling Theory and Doctrine in First Amendment Jurisprudence’ (2000) 88 *California Law Review* 2353, 2360.
- 25 Russell, *History of Western Philosophy*, 83.
- 26 Barendt, *Freedom of Speech*, 21–23; Schauer, *Free Speech*, 81, 148, 162–63: ‘distrust of government’.
- 27 E. Volokh, ‘Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You’ (2000) 52 *Stanford Law Review* 1049, 1089. See J. Rubinfeld, ‘The First Amendment’s Purpose’ (2001) 53 *Stanford Law Review* 767, 787–88 (2001); L.L. Berger, ‘Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication’ (2003) 39 *Houston Law Review* 1371, 1411; C.E. Baker, ‘The Independent Significance of the Press Clause under Existing Law’ (2007) 35 *Hofstra Law Review* 955, 1015; E. Volokh, ‘The Trouble with ‘Public Discourse’ as a Limitation on Free Speech Rights’ (2011) 97 *Virginia Law Review* 567, 594.
- 28 See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) on imminent lawless action; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) on criminal conduct; *Watts v. United*

- States*, 394 U.S. 705 (1969) on true threats; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) on fighting words.
- 29 *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990).
- 30 ECtHR, *Leroy v. France* [2009] App. no. 36109/03 [27]; *Perinçek v. Switzerland* [2013] App. no. 27510/08 [47].
- 31 *Perinçek v. Switzerland* [2013] App. no. 27510/08 [46].
- 32 Compare K. Popper, *The Open Society and Its Enemies* (1945) (republished Routledge, 2002), note 4 to chapter 7.
- 33 J. Milton, *Areopagitica*; A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, To the Parliament of England (London, 1644), 13.
- 34 Mill, *On Liberty*, 65.
- 35 *United States v. Alvarez*, 567 U.S. ____ (2012), 1, 11–15 (Kennedy J). See, by contrast, German Federal Constitutional Court, Case 1 BvR 1376/79 [1982] 'CSU = NPD of Europe'.
- 36 See Mill, *On Liberty*, 15; *New York Times Co. v. Sullivan*, 376 U.S. 254, 304; *United States v. Alvarez*, 567 U.S. ____ (2012), 1, 4 (Breyer J, concurring).
- 37 Human Rights Committee, *Faurisson v. France* [1996] Communication no. 550/93 [9.6]; ECtHR, *Lehideux and Isorni v. France* [1998] App. no. 55/1997/839/1045 [47]; *Garaudy v. France* [2003] App. no. 65831/01. See also German Federal Constitutional Court, Case 1 BvR 23/94 [1994] 'Auschwitz denial'; Canadian Supreme Court, *R v. Keegstra* [1996] 3 S.C.R. 667.
- 38 ECtHR, *Alithia Publishing Company Ltd and Constantinides v. Cyprus* [2008] App. no. 17550/03 [67]; see also *Pedersen and Baadsgaard v. Denmark* [2004] App. no. 49017/99 [78].
- 39 *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).
- 40 Compare Schauer, *Free Speech*, 141.
- 41 *Ibid.*, 142.
- 42 *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Compare D. Murray, 'Freedom of Expression, Counter-Terrorism and the Internet in Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights' (2009) 27 *Netherlands Quarterly of Human Rights* 331, 340.
- 43 This was the formula applied before *Brandenburg v. Ohio*, established in *Schenck v. United States*, 249 U.S. 47 (1919).
- 44 ECtHR, *Sürek v. Turkey* (No. 1) [1999] App. no. 26682/95 [61]; *Şener v. Turkey* [2000] App. no. 26680/95 [40]; *Erdoğan v. Turkey* [2000] App. no. 25723/94 [62]. See also Human Rights Committee, *A.K. and A.R. v. Uzbekistan* [2009] Communication no. 1233/2003 [7.2].
- 45 Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users (Adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers' Deputies), para. 1.
- 46 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).
- 47 On the 'imminent lawless action' test, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969); on obscenity, see *Miller v. California*, 413 U.S. 15 (1973); on child pornography, see *New York v. Ferber*, 458 U.S. 747 (1982).
- 48 M.B. Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 *California Law Review* 935, 942 n.24; J. Weinstein, 'Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply' (2011) 97 *Virginia Law Review* 633, 638–39.

- 49 Compare U.S. Supreme Court, *New York Times Co. v. Sullivan*, 376 U.S. 254; ECtHR, *Lingens v. Austria* [1986] App. no. 9815/82.
- 50 Compare Article 34(c) of the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, ILO Convention No. 182 on the Worst Forms of Child Labor (Article 3-b); Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ 2011 No. L335, 1. U.S. Supreme Court, *New York v. Ferber*, 458 U.S. 747 (1982).
- 51 U.S. Supreme Court, *New York Times Co. v. Sullivan*, 376 U.S. 254; ECtHR, *Alithia Publishing Company Ltd and Constantinides v. Cyprus* [2008] App. no. 17550/03 [67]; see also *Pedersen and Baadsgaard v. Denmark* [2004] App. no. 49017/99 [78].
- 52 See ECtHR, *Markt intern Verlag GmbH and Klaus Beermann v. Germany* [1989] App. no. 10572/83; *Jacobowski v. Germany* [1994] App. no. 15088/89 [26]; *Hertel v. Switzerland* [1998] App. no. 59/1997/843/1049 [47]; but see also, mutatis mutandis, *VgT Verein gegen Tierfabriken v. Switzerland (No. 1)* [2001] App. no. 24699/94 [66]; U.S. Supreme Court, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 25 (1976); *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).
- 53 ECtHR, *Ashby Donald and others v. France* [2013] App. no. 36769/08; *Neij and Sunde Kolmisoppi v. Sweden* [2013] App. no. 40397/12; U.S. Supreme Court, *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

Chapter 4

- 1 Notable institutions whose internet research centres are hosted by law schools include Harvard University, New York University, Stanford University and Yale University.
- 2 M. Aronczyk, *Branding the Nation: The Global Business of National Identity* (New York: Oxford University Press, 2013); G. Bolin and P. Ståhlberg, 'Between Community and Commodity: Nationalism and Nation Branding', in A. Roosvall and I. Salovaara-Moring (eds.), *Communicating the Nation: National Topographies of Global Media Landscapes* (Goteborg: Nordicom, 2010); C. S. Browning, 'Nation Branding, National Self-Esteem, and the Constitution of Subjectivity in Late Modernity', *Foreign Policy Analysis* 11 (2015); J. L. Comaroff and J. Comaroff, *Ethnicity, Inc.* (Chicago: University of Chicago Press, 2009); N. Kaneva, *Branding Post-Communist Nations: Marketizing National Identities in the 'New' Europe* (New York: Routledge, 2012).
- 3 M. E. Price, *Free Expression, Globalism and the New Strategic Communication* (New York: Cambridge University Press, 2015), 110.
- 4 Price, *Free Expression*; M. E. Price, *Media and Sovereignty: The Global Information Revolution and Its Challenge to State Power* (MIT Press, 2002).
- 5 Price, *Free Expression*, 19.
- 6 A. Wimmer and N. Glick Schiller, 'Methodological Nationalism and Beyond: Nation-state Building, Migration and the Social Sciences', *Global Networks* 2 (2002), 301.

- 7 C. Calhoun, *Nations Matter: Culture, History, and the Cosmopolitan Dream* (London: Routledge, 2007).
- 8 Aronczyk, *Branding the Nation*.
- 9 Price, *Free Expression*.
- 10 Ibid.
- 11 H. Clinton, 'Remarks on Internet Freedom', U.S. Department of State, January 21, 2010.
- 12 N. Choucri, *Cyberpolitics in International Relations* (Cambridge: The MIT Press, 2012); L. DeNardis, *The Global War for Internet Governance* (New Haven: Yale University Press, 2014); A. R. Galloway and E. Thacker, *The Exploit: A Theory of Networks* (University of Minnesota Press, 2007); J. L. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (New York: Oxford University Press, 2006); M. Mueller, *Networks and States: The Global Politics of Internet Governance* (Cambridge: The MIT Press, 2010); S. M. Powers and M. Jablonski, *The Real Cyber War: The Political Economy of Internet Freedom* (Champaign: University of Illinois Press, 2015).
- 13 DeNardis, *Global War*, 9.
- 14 Price, *Free Expression*, 130. Note that we use the terms 'internet freedom' and 'internet sovereignty' as metaphors for certain political-economic visions, not to refer to any specific objective project.
- 15 M. Carr, 'Internet Freedom, Human Rights and Power', *Australian Journal of International Affairs* 67 (2013), 621.
- 16 D. McCarthy, *Power, Information Technology, and International Relations Theory: The Power and Politics of US Foreign Policy and the Internet* (New York: Palgrave Macmillan, 2015).
- 17 See http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf. Some have challenged this belief: Vint Cerf, inventor of the TCP/IP protocol, retorted that although internet access is undoubtedly an important means to improving the human condition, we should not be 'pretending that access itself is such a right'. See V. Cerf, 'Internet Access Is Not a Human Right', *The New York Times*, January 4, 2012.
- 18 Mueller, *Networks and States*, 5.
- 19 Goldsmith and Wu, *Who Controls the Internet*, 23.
- 20 L. Lessig, *Code: Version 2* (New York: Basic Books, 2006), 31.
- 21 R. Deibert, J. G. Palfrey, R. Rohozinski, and J. Zittrain, *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* (Cambridge: The MIT Press, 2010).
- 22 Mueller, *Networks and States*, 82.
- 23 Powers and Jablonski, *The Real Cyber War*, 24.
- 24 In the case of China these are united under the broader socio-political vision of a 'harmonious society'.
- 25 See <https://ccdcoe.org/sites/default/files/documents/UN-150113-CodeOfConduct.pdf>
- 26 DeNardis, *The Global War*, 148.
- 27 D. Polatin-Reuben and J. Wright, 'An Internet with BRICS Characteristics: Data Sovereignty and the Balkanisation of the Internet', paper presented at 4th USENIX Workshop on Free and Open Communications on the Internet (FOCI 14), San Diego, California, July 7, 2014, 1.
- 28 See, e.g., the 2011 and 2015 International Code of Conduct on Information Security proposals to the United Nations; and the Final Acts of the World Conference on International Telecommunications 2012.

- 29 K. Giles, 'Russia's Public Stance on Cyberspace Issues', in C. Czosseck, R. Ottis, and K. Ziolkowski (eds.), 2012 4th International Conference on Cyber Conflict (NATO CCD COE Publications, 2012).
- 30 U.S. Department of State. 'Internet Freedom'. 2015. See <https://www.humanrights.gov/dyn/issues/internet-freedom.html>
- 31 Giles, 'Russia's Public Stance', 65.
- 32 Clinton, 'Remarks on Internet Freedom'.
- 33 J. Kerry, 'Remarks to the Freedom Online Coalition Conference', U.S. Department of State, April 28, 2014. The Freedom Online Coalition (FOC) is an intergovernmental organisation of thirty member-states founded in 2011 at the initiative of the Netherlands. The FOC institutionalises the internet freedom agenda at the level of nation states.
- 34 E. Morozov, 'WikiLeaks and the Perils of Extreme Glasnost', *New Perspectives Quarterly* 28 (2011) 7, 9–10.
- 35 McCarthy, *Power*, ch. 5.
- 36 T. Malinowski and C. Painter, 'Freedom Online Coalition Conference in Estonia', *DipNote* (blog), U.S. Department of State, May 9, 2014.
- 37 'How Did Estonia Become a Leader in Technology?' *The Economist*, July 30, 2013; P. Kingsley, 'How Tiny Estonia Stepped out of the USSR's Shadow to Become an Internet Titan', *The Guardian*, April 15, 2012; M. Scott, 'Estonians Embrace Life in a Digital World', *The New York Times*, October 8, 2014.
- 38 M. D. Kennedy, *Cultural Formations of Postcommunism: Emancipation, Transition, Nation, and War* (Minneapolis: University of Minnesota Press, 2002).
- 39 D. Dzenovska, 'Remaking the Nation of Latvia: Anthropological Perspectives on Nation-Branding' *Place Branding and Public Diplomacy* 1 (2005); S. Curry Jansen, 'Redesigning a Nation: Welcome to Estonia, 2001–2018,' in N. Kaneva (ed.), *Branding Post-Communist Nations*; A. Park, "'Selling" a Small State to the World: Lithuania's Struggle in Building its National Image' *Place Branding and Public Diplomacy* 5 (2009).
- 40 Aronczyk, *Branding the Nation*, 139–144.
- 41 V. Mosco, *The Digital Sublime* (Cambridge: The MIT Press, 2004).
- 42 T. Ilves, 'Welcome to Estonia: President's Greetings', Estonian Ministry of Foreign Affairs video, March 3, 2010. See <https://www.youtube.com/watch?v=L-zr2qWJcK>.
- 43 Brand Estonia, 'Future Facing Nation', Brand Estonia video. September 18, 2012. See <https://www.youtube.com/watch?v=ATyTayNiQk8>.
- 44 N. MacFarquhar, 'Russia Quietly Tightens Reins on Web With "Bloggers Law"', *The New York Times*, May 6, 2014.
- 45 A. Tselikov, *The Tightening Web of Russian Internet Regulation*, Berkman Center Research Publication No. 2014–15.
- 46 F. Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).
- 47 A. Melville and T. Shackleina, *Russian Foreign Policy in Transition: Concepts and Realities* (Budapest: Central European University Press, 2005), 28.
- 48 Ibid.
- 49 Price, *Media and Sovereignty*, 98–99.
- 50 Concept of State Information Policy (*Koncepciya gosudarstvennoi informacionnoi politiki*), Russian National Public Library for Science and Technology. See http://www.gpntb.ru/win/ntb/ntb2000/6/f06_01.html.

- 51 R. Rohozinski, *Mapping Russian Cyberspace: Perspectives on Democracy and the Net*, UNRISD Discussion Paper No. 115 (United Nations Research Institute for Social Development, 1999), 24.
- 52 D. Carman, 'Translation and Analysis of the Doctrine of Information Security of the Russian Federation: Mass Media and the Politics of Identity', *Pacific Rim Law & Policy Journal* 12 (2002), 349.
- 53 Ministry of Foreign Affairs of the Russian Federation, Information Security Doctrine of the Russian Federation. Moscow: Ministry of Foreign Affairs of the Russian Federation, 2008. See www.mid.ru. Legal restrictions on freedom of information are also common in Western contexts. For example, the European Convention on Human Rights includes provisions for certain conditions, restrictions or penalties 'in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals', among other circumstances.
- 54 S. M. Fish, 'Ten Years After the Soviet Breakup: Putin's Path', *Journal of Democracy* 12 (2001), 72.
- 55 H. Kalmo and Q. Skinner, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2011).
- 56 N. Petrov, *From Managed Democracy to Sovereign Democracy: Putin's Regime Evolution in 2005* (PONARS Policy Memo no. 396), 182.
- 57 S. Shuster, 'Inside Putin's On-Air Machine', *Time Magazine*, March 5, 2015.
- 58 R. Deibert and R. Rohozinski, 'Control and Subversion in Russian Cyberspace', in R. Deibert et al. (eds.), *Access Controlled*, 15; K. Alexanyan et al., Exploring Russian Cyberspace: Digitally Mediated Collective Action and the Networked Public Sphere (Berkman Center Research Publication no. 2012-2).
- 59 Tselikov, *The Tightening Web*.
- 60 S. Oates, *Revolution Stalled: The Political Limits of the Internet in the Post-Soviet Sphere* (Oxford: Oxford University Press, 2013), ch. 7.
- 61 N. Duffy, *Internet Freedom in Vladimir Putin's Russia: The Noose Tightens* (American Enterprise Institute, 2015).
- 62 F. Zakaria, 'The Rise of Putinism', *The Washington Post*, July 31, 2014.
- 63 V. Putin, 'Vladimir Putin Meets with Members [of] the Valdai International Discussion Club'. Transcript of the Speech and the Meeting. Valdai Club, September 9, 2013.
- 64 Aronczyk, *Branding the Nation*.
- 65 Price, *Free Expression*, 110.
- 66 Ibid, 246.
- 67 We are grateful to Shawn Powers for this insight.
- 68 Calhoun, *Nations Matter*, 170.
- 69 R. Mansell, *Imagining the Internet: Communication, Information, and Governance* (Oxford: Oxford University Press, 2012).
- 70 DeNardis, *The Global War*.
- 71 Price, *Free Expression*, 251.

Chapter 5

- 1 J. Goldsmith, T. Wu, *Who Controls the Internet? Illusions of A Borderless World* (Oxford University Press, 2006); J. Lee, C. Liu, and W. Li, 'Searching for Internet

- Freedom in China: A Case Study on Google's China Experience' (2013) 31 *Cardozo Arts & Entertainment Law Journal* 405.
- 2 The Information Office of the State Council, The Internet in China (White Paper, 9 June, 2010), www.chinadaily.com.cn/cndy/2010-06/09/content_9952206.htm 'China takes Internet development as a significant opportunity to boost its reform and open-up policies and modernisation drive.'
 - 3 The Great Firewall (GFW) is the multiple sets of internet network censorship systems of People's Republic of China in its jurisdiction. The main techniques used in the GFW system include national entrance gateway IP blocking, key word filtering, domain name hijacking, and HTTPS certificate filtering.
 - 4 Article 57, 'Telecommunications Regulations' 《中华人民共和国电信条例》2014; Article 15, 'Administrative Measures on Internet Information Services' 《互联网信息服务管理办法》2000.
 - 5 D. Beetham, *The Legitimation of Power* (Palgrave Macmillan, 1991), 29.
 - 6 'Personal space' is the social networking type of internet service where users can post multiple types of content, including word, video, and picture, and interact with friends. The most popular of these is QQ zone hosted by Tencent Company.
 - 7 *Weibo* (or Microblog in English) platforms are the most popular Chinese Twitter-like social media platforms currently, as Twitter and Facebook are blocked in China. There are multiple *Weibo* service providers in China, and the most influential ones are *Sina Weibo* and *Tencent Weibo*. It was said that, 'By the end of December of 2012, the number of registered users of *Sina Weibo* had reached 500 million, and the number of daily active users was 46,2 million.' http://news.xinhuanet.com/info/2013-02/21/c_132181760.htm.
 - 8 The statistics come from 'the 33th China Internet Development Statistics Report' of China Internet Network Information Center (CNNIC). CNNIC, approved by the Ministry of Information Industry, was established in 1997, and is in charge of the Chinese domain name registration and running the domain name root servers. The report is an authoritative report that was published in December, 2013. Since 1998, CNNIC has launched thirty-two national internet development statistics reports successively. In January and July of each year, CNNIC publishes annual internet development statistics reports.
 - 9 The statistics come from the survey on the Chinese internet statistic platform, which is operated by CNNIC. www.cnidp.cn/enterprise/rankAnalysis.do
 - 10 K. Lewin, 'Frontiers in Group Dynamics' (1947) 1 *Human Relations* 143.
 - 11 J. Zittrain, 'A History of Online Gatekeeping', (2006) 19 *Harvard Journal of Law & Technology* 253, 254. See E.B. Laidlaw, 'A framework for identifying Internet information gatekeepers' (2010) 24 *International Review of Law, Computers & Technology* 263, 276; see also I.S. Nathenson, 'Super-intermediaries, code, human rights' (2013) 8 *Intercultural Human Rights Law Review* 119, 175.
 - 12 D.G. Post, *In Search of Jefferson's Moose: Notes on the State of Cyberspace* (Oxford University Press, 2009) 162.
 - 13 See A. Murray, 'Nodes and Gravity in Virtual Space', (2012) 5 *Legisprudence* 203; Laidlaw, 'A framework'.
 - 14 B. Koops, M. Lips, S. Nouwt, C. Prins and M. Schellekens, 'Should Self-regulation Be the Starting Point?' in B. Koops et al. (eds), *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-Liners* (T.M.C. Asser Press, 2006), 124.

- 15 A. Murray and C. Scott, 'Controlling the New Media: Hybrid Responses to New Forms of Power' (2002) 65 *The Modern Law Review* 491, 503. See also L. Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999).
- 16 Murray, 'Nodes and Gravity'.
- 17 Lee, Liu and Li, 'Searching for Internet Freedom', 412.
- 18 In the Chinese internet regulatory system, ISP and ICP are two internet-related service providers. ISP refers to the internet service provider that provides internet access service and other access supporting services. ICP is the intermediaries that provide internet content service and value-added services. Accordingly, there are two types of administrative licences: ISP licence and ICP licence.
- 19 'Sina was withdrawn two ICP licences because of online pornography.' '新浪涉黄被吊销两执照', www.cfi.net.cn/p20140425001611.html.
- 20 Article 36, Tort Liability Law 2010.
- 21 Zittrain, 'A History'.
- 22 The Administrative Measures on the Business Operation of Internet Cafés (互联网上网服务营业场所管理办法) 2002, Article 19, the internet information industry has to create a self-discipline system to monitor their services. See the Regulations on the Protection of Personal Information of Telecommunications and Internet Users' (电信和互联网用户个人信息保护规定) 2013, Article 21; or *Weibo* platform providers are also required to self-censor end users' postings. Several Provisions on the Development Management of *Weibo* in Beijing 2011, Article 12. See Several Provisions on the Development Management of *Weibo* in Beijing 2011, Article 12.
- 23 *Sina Weibo*, *Sina Weibo* Community Convention, available at <http://service.account.weibo.com/roles/gongyue?rightmod=1&wvr=5>.
- 24 *Sina Weibo* community convention, Article 1, *ibid*.
- 25 *Weibo* Community Committee Institution, Article 2, <http://service.account.weibo.com/roles/zhidu>.
- 26 The Administrative Provisions of *Sina Weibo* Community, Article 6 and Article 8 <http://service.account.weibo.com/roles/guiding>.
- 27 *Weibo* Community Committee Member Promotion rules, <http://service.account.weibo.com/committee/rule>.
- 28 See 'the spokesman of the internet content administrative department of Beijing municipal government answers reporters' questions' (*Sohu IT*, 17 December 2011).
- 29 Ireland considered a real name policy to stem cyberbullying in 2013, see L. Edwards, 'From the Fantasy to the Reality: Social Media and Real Name Policies' in *Festschrift for Jon Bing* (Oslo, 2013), 6.
- 30 Edwards, 'Fantasy to Reality'.
- 31 See also L. Yongqing, 'The Debate of the Pros and Cons of Internet Real Name Policy' (*People News*, 13 April 2010).
- 32 H. Qiheng, 'China is Planning to Implement Limited "Internet Real Name Policy"' (*China.com.cn*, 29 November 2006).
- 33 Yongqing, 'The Debate'.
- 34 See 'the spokesman of the internet content administrative department of Beijing municipal government answers reporters' questions' (*Sohu IT*, 17 December 2011).
- 35 Several Provisions on the Development Management of *Weibo* in Beijing 2011, Article 9.

- 36 The Regulations on Phone Users' Real Identity Information Registration of MIIT 2013, Article 5.
- 37 The Regulations on Phone Users' Real Identity Information Registration of MIIT 2013, Article 7.
- 38 The Provisions on the Protection of Telecommunications and Internet Users' Personal Information of MIIT 2013, Article 2.
- 39 *Sina Weibo* Launched the 'Verified identity' real name system. 新浪微博推出'微身份'实名认证, www.chinaz.com/news/2012/0228/237346.shtml.
- 40 *Caijing* Report, 'Sina: Weibo Real Name Policy may Adversely Affect the Company' (*Caijing*, 28 February 2012).
- 41 For example, *Sina Weibo* has established a precise real identity verification procedure. The verification standards are users' profession; the system provides 34 different profession classifications and 542 sub-classifications for individuals to identify themselves. Applicants are required to submit official digital documents of their work information, such as official proofs of service, valid professional certifications, and works and award certifications to finish the verification.
- 42 To be able to apply for real identity verification, the required fan amount is more than 100 in *Sina Weibo*, *Tencent Weibo* requires applicable users with a minimum of 50 fans, and the requirement of *Neteasy Weibo* is more than 500 fans.
- 43 The statistics come from the official introduction of *Sina Weibo*, <http://ir.weibo.com/phoenix.zhtml?c=253076&p=irol-homeProfile&t=&id=&>.
- 44 Loretta Chao, 'Microblogs Survive Real-Name Rules – So Far' (The Wall Street Journal, 30 April 2012) <http://blogs.wsj.com/chinarealtime/2012/04/30/microblogs-survive-real-name-rules-so-far/>.
- 45 In recent years, new internet regulatory strategies related with online speech and privacy have become increasingly sensitive for the general public, such as the hot debates on the regulation of 'human flesh search', 'real name policy' and the criminalisation of certain online postings. See H. Ling, *Real Name System on the Internet: Origins, Practices and Reflections* (中国网络实名制管理:由来、实践与反思, forthcoming) 2010, available at: http://works.bepress.com/Henry_hu/7/; H. Ling, *Speech and Expression in the digital Era* (中国网络言论自由表达的规制), 2011, available at: http://works.bepress.com/henry_hu/18. Beijing Youth Daily, is blocking spam an infringement of citizens' freedom of correspondence? (封杀截堵垃圾邮件是否侵犯公民通信自由?) <http://www.yesky.com/homepage/219001851301855232/20030915/1728482.shtml>; Xinhua Net, Real Name System Arouses Controversy Again: Does the local government have the power to ban posting anonymously? (网络实名制再起争议:地方有权立法禁匿名发帖?) http://news.xinhuanet.com/legal/2007-07/16/content_6380376.htm.

Chapter 6

- 1 Although tourism to far-flung countries to participate in illicit activities rarely causes host countries to liberalise laws, contiguous jurisdictions may choose to compete with one another rather than lose entertainment dollars. This phenomenon is clearly seen in the pattern on U.S. states adopting casino gambling and lotteries as their border neighbours did so. See J.L. Mason and M. Nelson, *Governing Gambling* (Century Foundation Press, 2001), 36.

- 2 See M. Trimble, 'The Future of Cybertravel: Legal Implications of the Evasion of Geolocation' 22 *Fordham Intellectual Property Media & Entertainment Law Journal* 567; Kevin F. King, 'Geolocation & Federalism on the Internet: Cutting Internet Gambling's Gordian Knot' (2010) 11 *Columbia Science & Technology Law Review* 41.
- 3 The differences in libel laws in a world without informational borders creates forum-shopping opportunities for purported libel victims to seek out courts in libel havens, namely England, to get judgements against foreign authors. See *Polanski v. Conde Nast Pubs. Ltd.*, [2005] UKHL 10; *Berezovsky v. Michaels*, [2000] UKHL 25, *Lewis v. King*, [2004] EWCA (Civ.) 1329 (Eng.). Sometimes, the purported victims have been U.S. citizens trying to trade up to harsher laws when it suits them.
- 4 In 2010, the United States passed the SPEECH Act (Securing the Protection of our Enduring and Established Constitutional Heritage Act), 28 USC. §§4101-05, which declares foreign libel judgements unenforceable in the United States unless the speech would not be protected in the United States, allows the defendant to ask for a declaratory judgement, provides for jurisdiction over the libel plaintiff, and provides for damages against the libel plaintiff. This statute was passed in large part because of a case involving a book, *Funding Evil: How Terrorism is Financed and How to Stop It* (Multi Educator, 2003) by Rachel Ehrenfeld. Ehrenfeld was sued by Saudi Arabian nationals in London for alleged libellous statements in the book, and the court there entered a default judgement against her. When Ehrenfeld turned to the New York courts for a declaratory judgement that the allegations were false and the judgement unenforceable, the court held that New York did not have jurisdiction against the Saudi plaintiffs. See *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (2d Cir. 2007). New York then passed 'Rachel's law' before the US legislature acted. See Libel Terrorism Protection Act, N.Y.C.P.L.R. § 302, 5304.
- 5 All forms of gambling were illegal until 1931, when Nevada turned to casino gambling to revitalise its depressed economy. Nevada was the only state in which gambling was legal until 1976 when New Jersey legalised casino gambling in Atlantic City. See Mason & Nelson, *Governing Gambling*, 33.
- 6 Currently, twenty states allow commercial (non-tribal) casinos.
- 7 Currently, thirty states allow tribal casinos owned and operated by Native American tribes on reservations.
- 8 Only six states prohibit lotteries: Alabama, Alaska, Hawaii, Mississippi, Nevada and Utah.
- 9 Only seven states prohibit pari-mutuel betting on horse races, either live or off-track: Alaska, Georgia, Hawaii, Mississippi, North Carolina, South Carolina and Utah. A bill has been introduced into the Georgia General Assembly to amend the state constitution to allow pari-mutuel betting on horse racing. See Ga. H.B. 2 (2015–2016).
- 10 Currently, seven states allow EGDs outside of casinos and racetracks: Illinois, Louisiana, Montana, Nevada, Oregon, South Dakota and West Virginia. See W.R. Shelley, 'End of the Chase: Using North Carolina as a Guide for Ending Other States' Video Sweepstakes Legislative Merry-Go-Round in the Wake of *Hest Technologies v. North Carolina*' (2013) 36 *North Carolina Central Law Review* 41; M.W. Dunbar and D.R. Russell, 'The History of Internet Cafés and the Current Approach to their Regulation' (2012) 3 *UNLV Gaming Law Journal* 243.
- 11 See R.R. Bridwell and F.L. Quinn, 'From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling' (2002) 72 *Mississippi Law Journal* 565.
- 12 Interstate Wire Act, 18 USC. § 1084 (2012).

- 13 After the passage of the Professional and Amateur Sports Protection Act of 1992, only the three states that had legalised sports betting at that time may continue to do so: Nevada, Oregon and Delaware. In fact, Nevada is the only one of these three states with a robust sports betting industry. See 28 USC. § 3701.
- 14 Statement of Kevin V. Di Gregory, Deputy Assistant Attorney General, Crim. Div., before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Rep., Concerning Gambling on the Internet (24 June 1998), available at www.usdoj.gov/criminal/cybercrime/kvd0698.htm.
- One appellate court disagreed with the U.S. Department of Justice that the Wire Act applied to online gambling that was not sports betting. See *In re Mastercard Int'l Inc. Internet Gambling Litig.*, 313 F.3d 257, 263 (5th Cir. 2002). But see *United States v. Lombardo*, 639 F.Supp.2d 1271 (D. Utah 2007).
- 15 See Letter from Jon P. Jennings, Acting Assistant Attorney, Department of Justice, to Sen. Patrick J. Leahy, Committee on the Judiciary, U.S. Senate (June 9, 1999).
- 16 See L. Woellert, 'Can Online Betting Change Its Luck' *Business Week*, 20 December 2004, at 66; K. Komando, 'In Battle Against Online Gambling: Don't Bank on It' *Chicago Sun-Times*, 25 April 2005, at 63.
- 17 See K. Eichenwald, 'At PartyGaming, Everything's Wild' *N.Y. Times*, 26 June 2005, at A1. Although PartyGaming was popular in the United Kingdom and listed its shares on the London Stock Exchange, it was licensed by Gibraltar. PartyGaming, which saw huge losses following the U.S. anti-gambling legislation, later merged with European gaming company bwin to form bwin.party. Another popular site based in Gibraltar, 888 Holdings PLC, is listed on the LSE. In early 2006, Merrill Lynch helped Sportingbet PLC privately place 8.4 million shares. See Christine Hurt, 'The Intersection of Securities Trading and Gambling, Part Two (Merrill Lynch & Sportingbet)' *Conglomerate* (3 February 2006).
- 18 See, e.g., *US v. Cohen*, 260 F.3d 68 (2d Cir. 2001). New York had also prosecuted bettors under state law and the Wire Act. See *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 185 Misc. 2d 852 (Sup. Ct. 1999). In that case, a Delaware corporation operated an online casino through an Antiguan subsidiary.
- 19 See, e.g., H.R. 21, 108th Cong. (13 March 2003); H.R. 2143, 108th Cong. (19 May 2003); S. 627, 108th Cong. (13 March 2003).
- 20 See, e.g., *Proposals to Regulate Illegal Internet Gambling: Hearing on Proposals to Regulate Illegal Internet Gambling, Including S. 627, to Prevent the Use of Certain Payments Instruments, Credit Cards, and Fund Transfers for Unlawful Internet Gambling: Before the S. Comm. On Banking, Housing and Urban Affairs, 108th Cong.* 8 (2003); *Internet Gambling Prohibition Act of 1997: Hearings on H.R. 2380 Before the Subcomm. On Crime of the H. Comm. On the Judiciary, 105th Cong.* 81 (1998).
- 21 See G. Manter, 'The Pending Determination of the Legality of Internet Gambling in the United States' (2003) *Duke Law & Technology Review*, 0016.
- 22 See C. Kaminski, 'Online Peer-to-Peer Payments: PayPal Primes the Pump, Will Banks Follow?' (2003) 7 *North Carolina Banking Institute Journal* 375; 'PayPal Settles Offshore Gambling Payment Charges Letter No. 262', *Guide to Computer Law*, 2003 WL 26452877 (8 August 2003).
- 23 See *Casino City, Inc. v. US Dep't of Justice*, No. 04-557-B-M3 (M.D. La. 15 February 2005); M. E. Frese, 'Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?' (2005) 15 *Fordham Intellectual Property Media & Entertainment Law Journal* 547.

- 24 A. Lowrey, 'Caribbean Nation Gets an International Go-Ahead to Break US Copyright Laws', *NY Times*, 29 January 2013, at B4; J. M. Kelly, 'Clash in the Caribbean: Antigua and US Dispute Internet Gambling and GATS', (2005) 10 *UNLV Gaming Research & Review Journal* 15.
- 25 Specifically, Articles II, VI, VIII, XI, XVI and XVII, and the US Schedule of Specific Commitments ('Other Recreational Services (except sporting)').
- 26 Once the dispute settlement body established a panel to hear the dispute, other member countries reserved their rights against the United States for similar claims: Canada, Chinese Taipei, EC, Japan, Mexico and China.
- 27 Report of the WTO Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285R (10 November 2004). The Panel Report cited three federal laws: the Wire Act, the Travel Act and the Illegal Gambling Business Act) and online gambling laws in four states: Louisiana, Massachusetts, South Dakota and Utah). These laws were held to violate GATS, and the United States was held not to prove that the federal laws were 'necessary' for moral purposes.
- 28 Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (20 April 2005).
- 29 Report of WTO Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT-DS285/13 (19 August 2005).
- 30 The United States could have excluded gambling prior to signing as other countries such as Canada did. See Kelly, 'Clash in the Caribbean', 16.
- 31 See K.F. King, 'Geolocation and Federalism on the Internet: Cutting Internet Gambling's Gordian Knot', (2010) 11 *Columbia Science & Technology Law Review* 41.
- 32 Antigua had originally argued that the amount of damages caused by U.S. violations was \$3.4 billion.
- 33 See Lowrey, 'Caribbean Nation'. Antigua had asked to retaliate under TRIPS and not GATS because Antigua does not import many goods or services from the United States beyond travel and tourism.
- 34 See E.J. Drake, 'Antigua and US Dispute Proposed Withdrawal of Intellectual Property Rights Protections as Authorised WTO Retaliation: Implications for the WTO Dispute Settlement System', *Stewart Law*, 7 March 2013.
- 35 Multiple proposed bills addressing online gambling had failed, but the House of Representatives passed the Unlawful Internet Gambling Enforcement Act of 2006 (H.R. 4411) in July 2006. However, H.R. 4411 was not passed by the Senate. Instead, parts of H.R. 4411 were tacked on to the end of The SAFE Ports Act (H.R. 4954) shortly before that bill was passed by both houses, almost unanimously, and signed by then President George W. Bush.
- 36 UIGEA, 31 USC. §5363.
- 37 UIGEA, 31 USC. § 5362(10).
- 38 UIGEA, 31 USC. § 5362(1)(E)(ix).
- 39 See S. Bowers & A. Clark, 'Founders of Gambling Accounts Firm Arrested', *The Guardian*, 16 January 2007. See US Att'y S.D.N.Y., Press Release, 'Neteller Founder Pleads Guilty to Conspiring to Promote Illegal Internet Gambling Businesses' (10 July 2007).
- 40 See A. R. Sorkin & S. Saul, 'Gambling Subpoenas on Wall St.' *New York Times*, 22 January 2007.
- 41 See *US v. Scheinberg*, 10 Cr. 00336 (S.D.N.Y. 10 March 2011), available at 2011 WL 1449655 (Superseding Indictment); US Att'y S.D.N.Y., Press Release, 'Manhattan

- US Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds' (15 April 2011).
- 42 Poker fans argue forcefully that poker is a game of skill, not a game of chance, and therefore playing poker for money is not gambling. Memorandum in Support of Motion to Dismiss, *US v. Elie*, No. 10-Cr.-0036 (S.D.N.Y. 3 October 2011), 2011 WL 6959148. In addition, the gambling websites argued that the poker sites weren't engaged in betting or wagering because the website took a 'rake' for each hand played that was not contingent on whether any player won or lost. See Memorandum of Law in Support of Motion to Dismiss the Indictment, *US v. Campos*, No. S3 10-Cr.-336 (S.D.N.Y. 30 September 2011), available at 2011 WL 695145.
- 43 See, e.g., *US v. Rubin*, 743 F.3d 31 (2d. Cir. 2014); *US v. Lyons*, 740 F.3d 702 (1st Cir. 2014).
- 44 Assistant Attorney General, Criminal Division, 'Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act' (20 September 2011).
- 45 Legislators in New Jersey took the position that a wager is a contract that is created when the offer is accepted; therefore, an online wager takes place in Atlantic City if the servers are located there. This position is in contrast to the position that the United States took before the WTO that a bet must be legal both where the bettor is and where the online casino is.
- 46 See S. Casabona, *The EU's Online Gambling Regulatory Approach and the Crisis of Legal Modernity* (EU Centre in Singapore Working Paper No. 19, January 2014).
- 47 See K.A. Lovejoy, 'A Busted Flush: Regulation of Online Gambling in the European Union', (2014) 37 *Ford Int'l L.J.* 1525.
- 48 *ibid*, 1564–66.
- 49 *Pfleger and Others*, Case 390/12, (CJEU, 30 April 2014).
- 50 I do not include here any utility function for the online gambling site. Here, I am comparing the activities of speakers and gamblers, not commercial firms that provide the tools for speech or gambling.
- 51 See *Interactive Media Entertainment and Gaming Ass'n v. US*, 580 F.3d 113 (3rd Cir. 2009). See also *AK Tournament Play, Inc. v. Town of Wallkill*, 444 Fed. Appx. 475 (2d Cir. 2011); *Allied Veterans of World, Inc. v. Seminole County*, 783 F.Supp.2d 1197 (M.D. Fla. 2011).
- 52 Relatedly, a country might have more interest in projecting its laws into situations in which speech is restricted because of its important nature, unlike a weak interest in projecting liberal gambling laws into other jurisdictions. See Trimble, 'The Future of Cybertravel'.

Chapter 7

- 1 For a litigation concerning the video, see *Garcia v. Google Inc* (9th Cir, 18 May 2015) overturning *Garcia v. Google Inc* 743 F3d 1258 (9th Cir 2014), amended by *Garcia v. Google Inc* 766 F3d 929 (9th Cir 2014); B. Hartman, 'YouTube may show 'Innocence of Muslims' film: U.S. court' (18 May 2015) *Reuters*.
- 2 *Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González* C-131/12 (CJEU 13 May 2014); *Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González* C-131/12 (Opinion of Advocate General, 25 June 2013).

- K. O'Hara, 'The Digital Citizen: The Right to be Forgotten: The Good, the Bad and the Ugly' (2015) 19 *IEEE Internet Computing* 73.
- 3 95/46/EC; this Directive has now been replaced by the General Data Protection Regulation (Regulation EU 2016/679) adopted on 24 May 2016.
 - 4 *Maximillian Schrems v. Data Protection Commissioner* C-362/14 (CJEU 6 October 2015). P. Bernal, 'Cats, Chickens and Elephants' (27 November 2015) *The IT Law Community*.
 - 5 Y. Pouillet, 'Data Protection between Property and Liberties', in H.W.K. Kaspersen and A. Oskamp (eds), *Amongst Friends in Computers and Law* (The Hague: Kluwer, 1990) 161; J. Kokott, C. Sobatta 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and ECtHR' (2013) 3 *International Data Privacy Law* 222; Data protection rights may also come into conflict with property rights: *Productores de Música de España (Promusicae) v. Telefónica de España* C-275/06 [2008] ECR I-271.
 - 6 M. L. Mueller, *Networks and States: The Global Politics of Internet Governance* (MIT Press, 2010) 188.
 - 7 See, for example, J. Micklethwait, A. Wooldridge, *The Fourth Revolution – the Global Race to Reinvent the State* (Allen Lane, 2014).
 - 8 A. Orłowski, 'Europe's Shock Google Privacy Ruling: the End of History?' (14 May 2014) *The Register*.
 - 9 *Google Spain* CJEU [94].
 - 10 In fact, the CJEU avoids using the phrase 'freedom of expression', and its only explicit mention in the judgement is in the context of citing the wording of Article 9 of the Directive, which provides exemptions where the processing is 'solely for journalistic purposes' which in any event would not benefit search engines, but might benefit the publisher of the web page *Google Spain* CJEU [9], [85].
 - 11 There is no need for the data subject to have suffered harm.
 - 12 Even in the offline context, data protection has occasionally raised freedom of expression concerns, as was mentioned in the privacy/freedom of expression cases: *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy* C-73/07 (CJEU, 16 December 2008). Data protection was also raised in *Campbell v. MGN Ltd* [2004] 2 AC 457 and *Douglas & Ors v. Hello! Ltd & Ors* [2003] EWHC 786.
 - 13 Emphasis added. Some indirect wider protection of freedom of expression is provided for by Article 3(2) of the Directive which takes 'purely personal or household activity' outside its scope.
 - 14 *Google Spain* CJEU [85].
 - 15 The UK implementation requires consideration of whether 'given the special importance of the public interest in freedom of expression, publication would be in the public interest.' Data Protection Act s32.
 - 16 See Article 1(1) and (2) of the Directive which refer to both aspects, as the EU did not have competence to enact fundamental rights legislation. O. Lynskey 'Deconstructing Data Protection: The "Added-Value" of a Right to Data Protection in the EU Legal Order' (2014) 63 *International Comparative Law Quarterly* 569. It is no accident that the European Convention on Human Rights does not list data protection as a protected right, whilst the EU Charter of Fundamental Rights, fifty years later expressly provides for it as distinct right in itself in Article 8. See also OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980) and Council of Europe Convention 108 (1981).
 - 17 See also *Lindqvist* C-101/01 [2003] ECR I-12971, [74].

- 18 Explicitly acknowledged in Recital 7 of the Directive.
- 19 Emphasis added.
- 20 See Recital 3 and 9 of the Directive.
- 21 V. Mayer-Schönberger, K. Cukier, *Big Data* (John Murray, 2013) 98ff; Bernal, ‘Cats, Chickens’.
- 22 But note, even national law that deals with non-expressive online conduct has as an inevitable by-product the erection cyberborders and is thus in a wider sense also speech inhibiting.
- 23 *Lindqvist* C-101/01 [2003] ECR I-12971.
- 24 *Lindqvist* [86].
- 25 *Lindqvist* [87] – [90].
- 26 *Lindqvist* [88].
- 27 *Google Spain* AG [79] and [30] respectively, see also at [29]: ‘anyone today reading a newspaper on a tablet computer or following social media on a smartphone appears to be engaged in processing of personal data.’
- 28 But see *Google Spain* AG [93], where he held that Google would be a data controller over the content of what it indexed if it did not ‘comply with the exclusion code on a webpage . . . [and] where the internet search engine provider does not update a web page in its cache despite a request received from the website’.
- 29 *Google Spain* AG [84] – [87].
- 30 *Google Spain* AG [90], which would especially be the result in relation to extra-sensitive personal data that are subject to Article 8.
- 31 *Google Spain* CJEU [32] – [34].
- 32 Other than in the context of summarising Google’s argument, see *Google Spain* CJEU [63].
- 33 See, for example, L. Mirani, ‘Here’s how much tax Google paid on its European operations last year’ (25 July 2014) *Quartz*.
- 34 Article 7(f) of the Directive, as a basis for deciding whether the data subject has a right of rectification, erasure or blocking of data under Article 12(b). See also Article 7(e) which legitimises ‘processing . . . carried out in the public interest’.
- 35 Article 14(a) of the Directive [emphasis added].
- 36 *Google Spain* CJEU [81]. The court whilst pointing to Articles 7 and 8 of the Charter of Fundamental Rights of the EU (data protection and privacy) avoid any reference to Article 11 of the Charter (freedom of expression).
- 37 See *Google Spain* CJEU [81] depending on ‘the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subjected in public life.’ Article 29 Working Party, *Guidelines on the Implementation of the CJEU Judgment on “Google Spain v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González”* C-131/12 (26 November 2014) [2].
- 38 *Google Spain* AG [31].
- 39 *Google Spain* AG [120] - [125].
- 40 *Google Spain* AG [121].
- 41 K. O’Hara and N. Shadbolt, ‘The Right to be Forgotten: Its Potential Role in a Coherent Privacy Regime’ (2015) 3 *EDPL* 1, 7–9.
- 42 *Ibid.* J. Menn, ‘Social Media Companies Step Up Battle against Militant Propaganda’ (7 December 2015) *Reuters*; 2015 UN Forum on Business and Human Rights, ‘Digital Rights – Corporate Accountability’ (23 November 2015).

- 43 For a contextual, nuanced assessment of data protection on the internet, see H. Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press, 2009).
- 44 See also B. van Alsenoy, M. Koekoek, 'Internet and Jurisdiction after *Google Spain*: The Extra-Territorial Reach of the EU's "Right to be Forgotten"' (2015) 5 *International Data Privacy Law* 105.
- 45 Articles 25–26 of the Directive. For the interaction of both regimes, see L. Colonna, 'Article 4 of the EU Data Protection Directive and the Irrelevance of the EU-US Safe Harbor Program?' (2014) 4 *International Data Privacy Law* 203.
- 46 Articles 4(1)(a) & (c), respectively, of the Directive.
- 47 A. Charlesworth, 'Clash of the Data Titans? US and EU Data Privacy Regulation' (2000) 6 *European Public Law* 253; Susan Mann, 'Oceans Apart: Data Transfers between the EEA and USA' (2010) 21 *Computers and Law* 22; R. Corbet 'EU v US Data Protection – Exploring the Similarities' (2013) 13 *Privacy & Data Protection* 3.
- 48 Y. Pouillet, 'Data Protection Legislation: What is at Stake for our Society and Our Democracy?' (2009) 25 *Computer Law & Security Report* 211; D. J. Solove, "'I've Got Nothing to Hide" and Other Misunderstandings of Privacy' (2007) 44 *San Diego Law Review* 745.
- 49 Article 4(1)(a) of the Directive. See also Article 29 Working Party, Opinion 1/2008.
- 50 *Google Spain* CJEU [56]. For the possible application of this holding to Facebook's operations, see European Commission Recommendation No. 04/2015 (May 2015).
- 51 *Google Spain* CJEU [53].
- 52 Recital 19 of the Directive.
- 53 See, for example, definition of 'establishment' in Article 4 of *Directive on Services in the Internal Market* 2006/123/EC.
- 54 *Google Spain* CJEU [60], see also *Google Spain* AG [68].
- 55 *Lindqvist* [69].
- 56 *Ibid.*
- 57 Article 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgement on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González"* C-131/12 (26 November 2014).
- 58 *Ibid* [7].
- 59 CNiL, 'Right to Delisting: Google Informal Appeal Rejected' (21 September 2015).
- 60 *LICRA v. Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 22 May 2000), affirmed in *LICRA & UEJF v. Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 20 November 2000); *Yahoo! Inc v. LICRA & UEJF* 433 F 3d 1199 (9th Cir 2006).
- 61 Mueller, *Networks and States*, 207f.
- 62 European Commission Recommendation No. 04/2015 (May 2015).
- 63 Article 2(e) of the Directive. For a useful description of Facebook's corporate-structure response to EU data protection law, see T. Van Overstraeten, G. Couneson, 'EU – Data Protection Authorities Fight to Regulate Facebook' (15 June 2015) *Linklaters*.
- 64 Articles 25–26 of the Directive.
- 65 2000/520. As a result of the Schrems decision, the Safe Harbour has now been replaced by the EU-US Privacy Shield. See http://ec.europa.eu/justice/data-protection/international-transfers/eu-us-privacy-shield/index_en.htm.
- 66 *Schrems* CJEU [67] to [106].

- 67 See also S. Thielman, ‘Nationality in the Cloud: US Clashes with Microsoft over Seizing Data from Abroad’ (2 September 2015) *The Guardian*; Russian law requires personal data of Russian citizens to be stored on servers inside the country: Reuters, ‘Kremlin to address firm’s concerns over personal data law’ (13 July 2015) *Reuters*.
- 68 *Schrems* CJEU [85].
- 69 *Schrems* CJEU [94].
- 70 *Schrems* CJEU [73], [74].
- 71 For example, in the United Kingdom, see activities of the Internet Watch Foundation.
- 72 *Google Spain* CJEU [84] where the court expressly refers to this as a reason for targeting Google.
- 73 As of December 2015, Google Transparency Reports, European Privacy Requests for Search Removals: www.google.com/transparencyreport/removals/europeprivacy/?hl=en.
- 74 Mueller, *Networks and States*, 4, 187f, 211f.
- 75 *Schrems v. Data Protection Commissioner* [2014] IEHC 310 [63].
- 76 *Google Spain* CJEU [36], [37].
- 77 *Google Spain* CJEU [80], [87].
- 78 U. Kohl, ‘Google: The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond’ (2013) 21 *International Journal of Law and Information Technology* 187.
- 79 *Google Spain* AG [75].
- 80 J. Ausloos and A. Kuczerawy, ‘From Notice-and-Takedown to Notice-and-Delict: Implementing the Google Spain Ruling’ (5 October 2015) ICRI Research Paper 24.
- 81 For a discussion of some of these appeals, see M. Peguera, ‘In the Aftermath of Google Spain’: How the ‘Right to be Forgotten’ is Being Shaped in Spain by Courts and the Data Protection Authority’ (2015) 23 *International Journal of Law and Information Technology* 325.
- 82 J. Kiss, ‘Dear Google: Open Letter from 80 Academics on ‘Right to be Forgotten’ (14 May 2015) *The Guardian*.
- 83 This is not to suggest that those mechanisms are particularly successful in making public bodies accountable.
- 84 Cf Mueller, *Networks and States*, 197–211 (where the author argues the reverse).
- 85 This is not inconsistent with one of the rationales of data protections being ‘informational self-determination’. O’Hara, ‘Digital citizen’; Lynskey ‘Deconstructing Data Protection’.

Chapter 8

- 1 For those unfamiliar with Lessig’s writing on regulatory mechanisms, ‘code’ simply refers to physical measures that affect our behaviours and that may be influenced by the law-maker to further regulatory aims (e.g. road bumps to slow cars down). See L. Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999) and L. Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 *Harvard Law Review* 501.
- 2 *ibid.*
- 3 D. L. Burk, J.E. Cohen, ‘Fair Use Infrastructure for Copyright Management Systems’ (2001) 15 *Harvard Journal of Law and Technology* 41; more recently Christopher Marsden, Ian Brown, ‘Regulating Code: Inter-Disciplinary Empirical Case Studies in

- Governance and Regulation' (25 September 2011) TPRC 2011, <http://ssrn.com/abstract=1989676>.
- 4 M. Trimble, 'The Future of Cybertravel: Legal Implications of the Evasion of Geolocation' 22 *Fordham Intellectual Property Media & Entertainment Law Journal* 567 where she refers to 'cybertravel'.
 - 5 *Macquarie Bank Limited & Anor v. Berg* [1999] NSWSC 526.
 - 6 M. Horten, 'EU Announces Radical Copyright Overhaul for Cross-Border Content' (6 May 2015) *IPtegrity.com*. Note in this case the European Commission's announcement to 'enable users to legally access copyright content across borders . . . upset the entertainment and music industries . . . [as] the changes will cut right through their copyright-supported distribution infrastructure.'
 - 7 Commission Staff Working Document: A Digital Single Market Strategy for Europe - Analysis and Evidence (Brussels, 6.5.2015) SWD(2015) 100 final, 22.
 - 8 It is interesting to note the significant impact mobile devices are having. Ten years ago, the common arrangement may have been for each family to have a shared PC. However, today the PC has become truly personal in that each individual is carrying her/his own computer in the form of a smart phone or pad.
 - 9 KF King, 'Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies' (2011) 21 *Albany Law Journal of Science & Technology* 61, 66–7 (internal footnotes omitted).
 - 10 For computing devices equipped so as to communicate via mobile phone antennas, various methods of measuring power levels and antenna patterns (e.g. so-called triangulation) can provide highly accurate positioning. The accuracy is, however, typically dependent on the density of antennas. Nick Doty, Deirdre K Mulligan and Erik Wilde Privacy Issues of the W3C Geolocation API' (UC Berkeley School of Information Report 2010-038, 2010) 6, 12.
 - 11 M. Watts et al., 'Do European Data Protection Laws Apply to the Collection of WiFi Network Data for Use in Geolocation Lookup Services?' (2011) 1 *International Data Privacy Law* 149, 149–50 (internal footnotes omitted).
 - 12 For example, a message along those lines greets you if you seek to access Netflix from some countries.
 - 13 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* Case C-70/10, CJEU, 24 November 2011 where the court held the users' IP addresses are protected personal data.
 - 14 See further: K.F. King, 'Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies' (2011) 21 *Albany Law Journal of Science & Technology* 61, 73.
 - 15 *ACLU v. Clapper* (US Court of Appeals for 2nd Cir, 7 May 2015) holding that the NSA's bulk telephone metadata collection programme was not authorised by the Patriot Act §215.
 - 16 *LICRA & UEJF v. Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 22 May 2000) affirmed in *LICRA & UEJF v. Yahoo! Inc & Yahoo France* (Tribunal de Grande Instance de Paris, 20 November 2000).
 - 17 See activities of the Internet Watch Foundation in the United Kingdom www.iwf.org.uk/.
 - 18 *Twentieth Century Fox Film Corp & Ors v. British Telecommunications Plc* [2011] EWHC 1981.
 - 19 *Google Spain SL, Google Inc v. Agencia Española de Protección de Datos C-131/12*.
 - 20 *CG v Facebook Ireland Ltd and Joseph McCloskey* [2015] NIQB 11.

- 21 *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, para 156.
- 22 Where one law forbids what another law demands in contrast to most ‘conflicts’ where there are two or more prohibitions in respect of the same topic but of varying strictness and thus compliance with all standards is possible by complying with the strictest prohibition.
- 23 2000/31/EC.
- 24 Contrast to the approach taken in s.5 and 10 of the UK Defamation Act 2013.
- 25 Article 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on ‘Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeka González’ C-131/12*, 26 November 2014, p 3, 9.
- 26 Joined Cases C 585/08 and C 144/09, judgment of 7 December 2010.
- 27 The Brussels Regulation (Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).
- 28 Opinion of Advocate General Trstenjak delivered on 18 May 2010, para 32.
- 29 See, e.g., D. Svantesson, ‘What Should Article 7 – Consumer Contracts, of the Proposed Hague Convention, Aim to Accomplish in Relation to E-Commerce?’, (2001) 17 *Computer Law & Security Report* 318.
- 30 Now Article 17(1)(c) of EU Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
- 31 We can here see a convergence of geo-identification technologies and what we can call ccTLD-blocking (blocking based on the ‘country code’ in a given ‘top-level domain’).
- 32 Twitter support page:<https://support.twitter.com/articles/20169222-country-with-held-content>.
- 33 This could, however, be remedied by a prominent icon indicating with which country’s content the users are being presented.
- 34 Not always possible, e.g. in Germany only google.de is accessible.
- 35 See also M. Trimble, fn 4.
- 36 D. Svantesson, ‘Pammer and Hotel Alpenhof – ECJ Decision Creates Further Uncertainty about When E-Businesses “Direct Activities” to a Consumer’s State under the Brussels I Regulation’, (2011) 27 *Computer Law & Security Report* 298’ D. Svantesson, ‘What Should Article 7 – Consumer Contracts, of the Proposed Hague Convention, Aim to Accomplish in Relation to E-Commerce?’, (2001) 17 *Computer Law & Security Report* 318.
- 37 Article 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on ‘Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeka González’ C-131/12*, 26 November 2014, 3 [emphasis added].
- 38 Fn 16.
- 39 *Max Mosley v. Google Inc and Google France* TGI Paris, November 6, 2013, RG 11/07970), see also *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, para 149.
- 40 *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063.
- 41 *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, para 148 [emphasis added].
- 42 BBC News, ‘Gmail access appears to be blocked in China’ (30 December 2014).
- 43 *Max Mosley v Google Inc and Google France* TGI Paris, November 6, 2013, RG 11/07970).

- 44 Y Shavitt and N Zilberman, *A Study of Geolocation Databases* (1 July 2010) Cornell University Library <<http://arxiv.org/abs/1005.5674>> 3.
- 45 B. Edelman, 'Shortcomings and Challenges in the Restriction of Internet Retransmissions of Over-the-air Television Content to Canadian Internet Users' <<http://cyber.law.harvard.edu/people/edelman/pubs/jump-091701.pdf>> 6. The 'unique difficulties' Mr Edelman speaks of are multiple. First, a number of ISPs offer their services in both the United States and Canada. Second, the proximity and economic ties between the two countries mean that many companies have offices in both countries. Third, the widespread use of intranets with a single access point to the internet. Fourth, communication between Canada and the United States is not particularly likely to pass through well-known 'peering points' or contain the telltale transoceanic time delays.
- 46 Earlier (November judgement), fn 16.
- 47 *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, para 152.

Chapter 9

- 1 M. Trimble 'The Future of Cybertravel: Legal Implications of the Evasion of Geolocation', (2012) 22 *Fordham Intellectual Property Media & Entertainment Law Journal* 567, defines the right to cybertravel in terms of the legality or otherwise of using tools to evade technical obstacles (such as geoblocking) placed in the way of accessing information across borders. The focus of this chapter is different, concentrating on the types of legal rule that may discourage, encourage or mandate the erection of such cyberborders at the outset.
- 2 Technologies such as satellite broadcasting created limited overspill issues. However no previous technology has enabled individual users in their millions to read and publish with worldwide availability.
- 3 Equating offline with online is related to the common but mistaken assumption that technological neutrality is always a desirable goal. See further G. Smith 'Are Techlaw Principles in the Ascendancy?' (2014) 96 *Intellectual Property Forum: Journal of the Intellectual and Industrial Property Society of Australia and New Zealand*.
- 4 Views differ on the extent to which international law may constrain exorbitant exercise of jurisdiction in the civil jurisdiction field: J. Crawford, *Brownlie's Principles of Public International Law*, (8th ed., Oxford University Press, 2012) 471–72.
- 5 Trimble, 'Future of Cybertravel', 571: 'Increasingly, geolocation is not only a matter of voluntary adoption by internet actors but also a matter of decree: governments and courts are beginning to mandate the use of geolocation tools as a valid means of achieving compliance with the laws of particular jurisdictions.'
- 6 'Jurisdiction' is used here in the broad sense of a state asserting some kind of legal authority over foreign internet sites and their content. The term encompasses prescriptive jurisdiction (the making of a law), adjudicative jurisdiction (a court's ability to hear and determine a dispute) and investigatory and enforcement jurisdiction.
- 7 While examples of deliberate circumvention do exist, cross-border issues mostly arise in other contexts. The multitude of small and micro-businesses and individual bloggers and users of social media are not in a position to take strategic country location decisions. A. Chander in 'Trade 2.0' (2009) 34 *Yale Journal of International Law* 281, 287 *et seq* describes the history of online gambling sites run outside the

- United States in the early 2000s. Trimble, 'Future of Cybertravel', 582, n. 58, suggests that in practice even large businesses have not generally engaged in a regulatory 'race to the bottom'.
- 8 In *Gutnick v. Dow Jones & Co Inc* [2002] H.C.A. 56, Callinan J. said: 'If [the appellant's submission] were accepted, publishers would be free to manipulate the uploading and location of data so as to insulate themselves from liability in Australia, or elsewhere: for example, by using a web server in a "defamation free jurisdiction" or, one in which the defamation laws are tilted decidedly towards defendants. Why would publishers, owing duties to their shareholders, to maximise profits, do otherwise? . . . I agree with the respondent's submission that what the appellant seeks to do, is to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications.'
 - 9 T. Scassa and R.J. Currie 'New First Principles? Assessing the Internet's Challenges to Jurisdiction' (2011) 42 *Georgetown Journal of International Law* 1017, 1033, observe in relation to the qualified territoriality principle (concerning jurisdiction over events occurring in the territory of more than one state): 'the criteria for its application are more easily met via the internet than in perhaps any other setting on earth.'
 - 10 Chander, 'Trade 2.0', 321, refers to 'the international version of the golden rule (or the Kantian categorical imperative) applied to extraterritorial jurisdiction: a nation-state should assert jurisdiction only when such an assertion is universalisable, that is, when it would feel comfortable with other nation states also asserting jurisdiction in similar cases.' To similar effect is Microsoft's opening brief in the Warrant case: 'The Golden Rule applies as much to international relations as to other human relations': <http://digitalconstitution.com/2015/09/about-microsofts-warrant-case/>.
 - 11 An act that gives rise to liability such as storage or copying (as in the copyright reproduction right) will tend to be localised at the place in which the copy exists. There is more scope for debate over the location of acts involving an element of communication such as use (trade mark), publication (defamation), making available to the public (copyright and database right) and offering for sale (trade mark).
 - 12 *EMI Records Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch).
 - 13 A separate question may arise as to whether the common law threshold for criminal jurisdiction is surmounted.
 - 14 Where applicable, for instance to intellectual property rights. Not all law has a substantive territorial component.
 - 15 In Case C-523/10 *Wintersteiger* ECLI:EU:C:2012:220 the CJEU rejected targeting as a criterion for taking jurisdiction under Article 5(3) of the Brussels Jurisdiction Regulation (based on place of the damage). For copyright see Pinckney and Pez Hejduk, main text page 139. In Case C-324/09 *L'Oréal v eBay* [2011] ECR I-06011 the CJEU adopted targeting as a test for substantive cross-border online trade mark infringement.
 - 16 *Equustek Solutions Inc. v. Jack (Google, Inc, 3rd party)*, 2015 BCCA 265.
 - 17 Thus in *R v. Hape* 2007 SCC 26 the Canadian Supreme Court's explanation of potential jurisdiction over Canadian nationals while abroad focused on the circumstances in which the French state might object to it.
 - 18 A. Mills *The Confluence of Public and Private International Law* (Cambridge University Press, 2009) 84; J. Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315, 325–26.

- 19 Mills, *Confluence*, 88.
- 20 Waldron, 'Are Sovereigns Entitled', 326.
- 21 Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet and Maxwell, 2012) 4; and see discussions in D.J.B. Svantesson *Private International Law and the Internet* (2nd edn, Wolters Kluwer, 2012) 73–84 and Mills, *Confluence*, 8–10.
- 22 M. Rheinstein, 'The Place of Wrong: A Study in the Method of Case Law' (1944) 19 *Tulane L. Rev.* 4. Mills, *Confluence*, 245, notes that while some regard the internet as making territorial connections less significant, others take it as a reason to reassert territoriality.
- 23 Rheinstein's discussion was limited to two-state scenarios.
- 24 *Gutnick v. Dow Jones & Co Inc* [2002] H.C.A. 56.
- 25 D. Post, 'No personal jurisdiction in CA arising from allegedly defamatory Facebook postings targeting CA residents (Herein of Post's Second Law of Judicial Decision-Making)', *The Washington Post*, 20 January 2015. As a matter of international law, M. Akehurst 'Jurisdiction in International Law' (1975) 46 *BYIL* 145, 155, suggests that a requirement for effects to be substantial would prevent jurisdiction being exercised over a radio station by every state where the broadcast was heard; and that in borderline cases it would be legitimate to examine whether the broadcast was aimed at the country claiming jurisdiction.
- 26 For a detailed discussion of foreseeability of foreign legal exposure in the context of the internet see U. Kohl *Jurisdiction and the Internet* (Cambridge University Press, 2007) chapter 4.
- 27 *Perrin v. United Kingdom* (App No 5446/03 ECtHR Admissibility Decision 18 October 2005).
- 28 'The rule of law on the internet and in the wider digital world', Issue Paper published by the Council of Europe Commissioner for Human Rights, 8 December 2014.
- 29 For simplicity, the example assumes that the State B provider and its servers are located in the same country. That will not necessarily be the case. The provider may be headquartered in one country and the servers located in another country. In the case of cloud storage content may be switched frequently between servers in several different countries or split into fragments stored in different locations.
- 30 The example specifically concerns content that is lawful in the foreign country and unlawful in the home country, since that raises the starkest issues. Other cross-border scenarios are also possible. For example the content may be of uncertain legality in the foreign country, or it may be taken to be unlawful in the foreign country but enforcement may be said to be difficult or impossible. In *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) the court considered the viability of a series of enforcement measures that the (upheld on appeal [2016] EWCA Civ 658) defendants (internet service providers) unsuccessfully argued the claimants should have pursued in respect of foreign internet sites before seeking a blocking injunction against the ISPs.
- 31 It may be thought that a state's regulatory power is theoretical unless it has an available means of exercising enforcement jurisdiction. Whilst State A may under its own law attach legal consequences to foreign activities, under international law it cannot take enforcement action on the territory of State B without the consent of State B. For criminal law State A therefore has typically to look to extradition or to enforcement against local assets or personnel. However enforcement may still prove to be possible, even in criminal cases. In the mid-2000s some online sports betting

- companies based in the United Kingdom had significant customer bases in the United States. Various arrests, extraditions and prosecutions followed. In one case against a payment processor the U.S. District Attorney said ‘Blatant violations of U.S. law are not a mere ‘risk’ to be disclosed to prospective investors. Criminal prosecutions related to online gambling will be pursued even in cases where assets and defendants are positioned outside of the United States’ (U.S. Department of Justice, Press Release, 16 January 2007). Even if an internet actor could be confident of avoiding a state’s enforcement jurisdiction, reliance on inability to enforce is a potentially costly strategy when matters such as relations with that country’s government and possible inhibition of future international activities are taken into account.
- 32 Chander, ‘Trade 2.0’, 281, characterises as ‘unfortunate’ a hypothetical decision by an American digital bookseller to remove *Lady Chatterley’s Lover* from its offerings worldwide rather than to geo-block jurisdictions that label the book indecent. Whatever the merits or otherwise of a single decision, a cumulative chilling effect can arise from incentivising many such decisions even if, as Chander suggests, cyberspace is ‘filled with those who would make less craven decisions’.
- 33 See, for instance, the discussion of *LICRA v Yahoo!* in G.J.H. Smith, *Internet Law and Regulation* (4th edn, Sweet and Maxwell, 2007) 928–29. If the court has ordered access from a locality to be prevented but accepts that use of an imperfect geo-blocking tool would be adequate to comply with the order that is different from specifically ordering that geo-blocking be implemented.
- 34 In the United Kingdom, while mere possession of obscene material is not an offence, having an obscene article for publication for gain is (Obscene Publications Act 1959, Section 2(1)). This is not an invariable rule. So for instance in the United Kingdom mere universal distinction indecent photograph of a child (Section 160 Criminal Justice Act 1988), of an extreme pornographic image (S.63 Criminal Justice and Immigration Act 2008) or of information of a kind likely to be useful to a person committing or preparing an act of terrorism (S.58(1) Terrorism Act 2000) can give rise to criminal liability.
- 35 One example is copyright, the extension of which to individual users and consumers as a result of digital technology has resulted in an unprecedented level of public awareness of and debate about the merits and demerits of copyright law.
- 36 EU data protection laws restricting transfers of personal data to third countries lacking equivalent protection fall under this heading.
- 37 Targeting as the trigger for law or jurisdiction implies that it should be possible to operate a universally accessible generic site which, if it does not positively target any particular countries, is subject only to the laws of its home country. Reluctance to admit such a possibility may result in weak targeting rules akin to country of receipt. Thus it may be suggested that such a generic site targets the whole world: ‘it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has ‘targeted’, when in truth he has ‘targeted’ every jurisdiction in which his text may be downloaded’ (*King v. Lewis* sub nom. *Lewis v. King* [2004] EWCA Civ 1329 rejecting targeting as a component of *forum conveniens*). See also *Pammer/Alpenhof* (CJEU, Joined Cases C-585/08 and C-144/09, Judgment 7 December 2010), stating that use of a .com domain name can be a factor indicative of targeting ([83]).
- 38 The U.S. ‘purposeful availment’ jurisdiction threshold can be seen as a type of targeting rule. Chander, ‘Trade 2.0’, 319, commenting on the reluctance of the U.S.

- Supreme Court to dispense with purposeful availment as a condition for jurisdiction over non-U.S. defendants, observes: ‘Restraining assertions of jurisdiction in cyberspace will prove crucial for reducing Balkanisation or for avoiding chilling speech.’
- 39 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
- 40 Within the EU, country of origin control has been regarded as inherent in the EU Treaty’s free movement of goods and services principles. The country of origin principle was implemented to some degree in the 1989 TV Without Frontiers Directive (Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities) and the 1993 Satellite and Broadcasting Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission). A European Commission consultation on the Review of Directive 93/83/EEC raised the question whether the country of origin rule embodied in that Directive should be extended to TV and radio programmes provided over the internet.
- 41 The term adopted in the Directive is an ‘information society service provider’.
- 42 This general rule is subject to various limitations in scope (excluding, for instance, intellectual property rights) and to the possibility of derogating in respect of a particular service on specified grounds.
- 43 Joined cases C-509/09 and C-161/10 *eDate Advertising GmbH v. X and Olivier Martinez and Robert Martinez v. MGN Limited* ECR 2011 I-10269.
- 44 *Ligue Contre le Racisme et L’Antisemitisme v. Yahoo! Inc*, No RG:00/05308 (TGI Paris, 20 November 2000).
- 45 Now Article 7(2) of the recast Regulation.
- 46 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.
- 47 Note 25 in this chapter.
- 48 Para 51.
- 49 Case C-441/13 *Pez Hejduk v. EnergieAgentur.NRW GmbH* ECLI:EU:C:2015:28.
- 50 Opinion of Advocate General Jääskinen delivered on 13 June 2013.
- 51 These were said to justify the attribution of jurisdiction ‘for reasons relating to the sound administration of justice and the efficacious conduct of proceedings’ and ‘to enable the court objectively best placed to determine whether the elements establishing the liability of the person sued are present to take jurisdiction’. The CJEU gave similar justifications for adopting a plaintiff’s ‘centre of interests’ basis for jurisdiction in *eDate/Martinez*.
- 52 *Gutnick v. Dow Jones & Co Inc* [2002] H.C.A. 56.
- 53 There does have to be evidence not merely that the statement was accessible in the jurisdiction, but that someone within the jurisdiction has read it. ‘The mere fact of course that an article is available on the internet does not give rise to a presumption that publication has taken place.’ *El Diwany v. Hansen & Anor* [2011] EWHC 2077 (QB) Sharp J. [57]. However this evidential requirement does not detract from the ‘country of receipt’ nature of the legal doctrine, it being sufficient that the statement was received in the country in question.

- 54 In *King v. Lewis* sub nom. *Lewis v. King* [2004] EWCA Civ 1329 it was accepted that in the light of the authorities there was no dispute that publication took place at the place of download. In *Richardson v. Schwarzenegger* [2004] EWHC 2422 QBD the court was able to say that it was ‘well settled’ that ‘an internet publication takes place in any jurisdiction where the relevant words are read or downloaded’. The Court of Appeal in *King v. Lewis* rejected ‘out of hand’ an argument that targeting was relevant to *forum conveniens* (para 34).
- 55 *Vidal-Hall & Ors v. Google Inc* [2014] EWHC 13 (QB).
- 56 ‘Damage is alleged to have arisen from what the Claimants, and potentially third parties, have, or might have, seen on the screens of each Claimant. That is what in libel is referred to as publication, and was referred to as publication by the Court of Appeal in *Douglas* . . . (‘The cause of action is based on the publication in this jurisdiction and the complaint is that private information was conveyed to readers in this jurisdiction.’) So publication to the Claimants plainly was effected in this jurisdiction’. (paragraph 77)
- 57 *800-FLOWERS Trade Mark* [2001] EWCA Civ 721.
- 58 *Euromarket Designs Inc v. Peters* [2001] F.S.R. 288, Ch D..
- 59 N 15.
- 60 Actual sale and delivery of physical goods into an EU Member State does, however, infringe an EU registered trade mark in the absence of targeting (Case C-98/13 *Martin Blomqvist v. Rolex SA and Manufacture des Montres Rolex SA* ECLI:EU:C:2014:55).
- 61 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- 62 Now Article 17(1)(c) of the recast Brussels Jurisdiction Regulation No 1215/2012 of 12 December 2012.
- 63 Article 15(1)(c).
- 64 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
- 65 Joined cases C-585/08 and C-144/09 *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller* 2010 I-12527.
- 66 The CJEU’s approach probably treats the subjective intention of the trader as irrelevant. However, the judgment does not state this categorically. One of the Court of Appeal’s reasons for rejecting targeting in *King v. Lewis* was the difficulty in ascertaining subjective intention: ‘Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to ‘target’, it would in our judgment be liable to manipulation and uncertainty, and much more likely to diminish than enhance the interests of justice.’
- 67 The CJEU added that the evidence had to demonstrate that the trader was envisaging doing business with consumers domiciled in other Member States ‘in the sense that it was minded to conclude a contract with those consumers’. This comment is probably specific to the specific context of consumer contracts. The CJEU has since gone on to treat the *Pammer/Alpenhof* criteria as relevant to the territorial scope of substantive tortious rights (trade marks, database right) in which the existence or otherwise of a contract does not arise.
- 68 In *L’Oreal v. eBay* (n.15) , a case concerning application of targeting to substantive trade mark infringement, the CJEU added: ‘When the offer for sale is accompanied by details of the geographic areas to which the seller is willing to dispatch the product, that type of detail is of particular importance in the said assessment.’

- 69 Cf *King v. Lewis* extract quoted earlier (Note 37). Neither should the ‘failure’ of a website proprietor to take steps to exclude access from other countries be taken as indicative of targeting those countries. See G. Smith ‘Directing and Targeting - The Answer to the Internet’s Jurisdiction Problems?’ (2004) 5 *Computer Law Review International* 145.
- 70 Case C-173/11 *Football Dataco Ltd and Others v. Sportradar GmbH and Sportradar AG* ECLI:EU:C:2012:642.
- 71 *EMI Records Ltd & Ors v. British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch), [49]. Arnold J said: ‘it appears from the judgment of the CJEU in *Football Dataco v Sportradar* at [35]-[46] that it is relevant to take into account, by analogy, criteria which the CJEU has treated as relevant to the issue of targeting in a number of other contexts.’ Arnold J. also took account of some factors not mentioned in *Pammer/Alpenhof*. In *Omnibill (Pty) Ltd v. Egpsxxx Ltd & Anor* [2014] EWHC 3762 (IPEC) Birss J. similarly held that factors other than those mentioned in *Pammer* might be relevant. Both took into account the number of visitors accessing the website from the United Kingdom. While that may be relevant in a particular case, the number or proportion of visitors from a particular country does not necessarily indicate that the website proprietor intended to target that country, either subjectively or objectively. An approach too strongly based on number or proportion of visitors could effectively throw upon the proprietor an obligation to prevent access from countries whose users have taken a particular interest in the site, even if the proprietor of the site has done nothing to target that country. The Council of Europe ‘Rule of Law on the Internet’ Issue paper suggests (pp. 58–59, in its discussion of *R v. Perrin*) that number of visitors may be a relevant consideration in evaluating closeness of connection with a particular country.
- 72 T. Zick in ‘The First Amendment in Trans-Border Perspective: Towards a More Cosmopolitan orientation’, 52 *Boston College Law Review* 941 (2011) argues for an explicit connection between freedom of movement and freedom of expression. See also Trimble, ‘Future of Cybertravel’, 640–43.
- 73 Waldron, ‘Are Sovereigns Entitled’, 325 (emphasis added).
- 74 Sex tourism involving minors is a well-known UK example. Others include treason, murder, bigamy, soccer hooliganism and breach of the Official Secrets Act. Some non-common law countries have a stronger tradition of asserting jurisdiction over their nationals abroad, emphasising personal rather than territorial connection (Crawford, *Brownlie*, 460). For an international survey see International Bar Association Report of the Task Force on Extraterritorial Jurisdiction (14 April 2009). In civil litigation domicile of the defendant is the primary basis for jurisdiction under the EU Brussels Jurisdiction Regulation. France permits jurisdiction in civil disputes on the basis of the nationality of the plaintiff.
- 75 Akehurst, ‘Jurisdiction’, 156: ‘a state has an unlimited right to base jurisdiction on the nationality of the accused’. See also *R v. Hape* 2007 SCC 26 [63], in which the Canadian Supreme Court discussed the hypothetical example of the Canadian Parliament passing legislation making it a criminal offence for Canadian nationals to smoke in the streets of Paris. A renewed emphasis on personal or cultural rather than territorial foundations of international law (cf Mills, *Confluence*, 256–57) could suggest that if elements of home law travel with you when abroad, the baggage may include restrictive as well as permissive or protective aspects. As well as the practical considerations of existing within even a partial home law bubble while travelling

- this would raise from a human rights perspective the possibility of a chilling effect on the ability to move freely between countries.
- 76 See Waldron, 'Are Sovereigns Entitled'.
- 77 The human right of freedom of expression includes the right to receive as well as to impart information.
- 78 This proposition may challenge the exclusive aspect of domestic state sovereignty: 'jurisdiction, prima facie exclusive, over a territory and the permanent population living there', Crawford, *Brownlie*, 447. Chander, 'Trade 2.0' advocating a country of receipt-oriented 'glocalisation' rule for consumer services, appears to suggest that in respect of local mandatory laws the consumer has no right to choose a foreign law in the absence of endorsement by a political process: 'But with respect to mandatory law *democracy demands glocalisation*, at least until "We the People" elect to subject ourselves to foreign rules'.
- 79 Parallels with physical travel may lead in different directions. Trimble, 'Future of Cybertravel', 657 suggests a kind of digital passport, by analogy with the passport that is regarded as a reasonable limitation on physical international travel. However in free societies the function of passports has been primarily to regulate entry, not exit. The distinction between exit and entry may be hard to sustain in a virtual environment.
- 80 At [24].
- 81 A 'strong' targeting rule is one that does not by virtue of its content collapse into a country of receipt rule. See discussion in Smith, 'Directing and Targeting'.

Chapter 10

- 1 Most people think of space in absolute Euclidean terms, but globalization has produced a new geography based on relative distances (i.e. time and cost).
- 2 A. Wimmer and N.G. Schiller, 'Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences' (2002) 2 *Global Networks* 301 [emphasis added].
- 3 M. Dodge and R. Kitchin, *Mapping Cyberspace* (Routledge, 2000); M. Castells, *The Internet Galaxy* (Oxford University Press, 2001); A. Kellerman, *The Internet on Earth: A Geography of Information* (John Wiley, 2002); J. Crampton, *The Political Mapping of Cyberspace* (Edinburgh University Press, 2003); M. Zook, *The Geography of the Internet Industry* (Wiley-Blackwell, 2005); M. Zook, 'The Geography of the Internet' (2005) 40 *Annual Review of Information Science and Technology*, 53; E. Malecki and B. Moriset, *The Digital Economy: Business Organisation, Production Processes, and Regional Developments* (Routledge, 2008).
- 4 Respectively F. Cairncross, *The Death of Distance: How the Communications Revolution Will Change Our Lives* (Harvard Business School Press, 1997), R. O'Brien, *Global Financial Integration: The End of Geography* (Council on Foreign Relations Press, 1992), T. Friedman, *The World is Flat: A Brief History of the 21st Century* (Picador, 2005).
- 5 D. Morley, K. Robins, *Spaces of Identity* (Routledge, 1995), 222, citing Committee on Foreign Affairs, 1964.
- 6 B. Warf, 'International Competition between Satellite and Fibre Optic Carriers: A Geographic Perspective' (2006) 58 *Professional Geographer*, 1.

- 7 C. Chaffee, *Building the Global Fibre Optics Superhighway* (Springer, 2001); E. Malecki and H. Wei, 'A Wired World: The Evolving Geography of Submarine Cables and the Shift to Asia' (2009) 99 *Annals of the Association of American Geographers*, 360.
- 8 S. Korupp and M. Szydlik, 'Causes and Trends of the Digital Divide' (2005) 21 *European Sociological Review*, 409.
- 9 P. DiMaggio, E. Hargittai, W. Newman, and J. Robinson, 'Social Implications of the Internet' (2001) 27 *Annual Review of Sociology*, 307.
- 10 N. Selwyn, 'Reconsidering Political and Popular Understandings of the Digital Divide' (2004) 6 *New Media & Society*, 341.
- 11 B. Warf, 'Islam Meets Cyberspace: Geographies of the Muslim Internet' (2010) 13 *Arab World Geographer*, 217.
- 12 M. Crag, T. Crosbie, and S. Graham, 'Variable Geometries of Connection: Urban Digital Divides and the Uses of Information Technology' (2006) 43 *Urban Studies*, 2551; A. Goldfarb and J. Prince, 'Internet Adoption and Usage Patterns are Different: Implications for the Digital Divide' (2008) 20 *Information Economics and Policy*, 2; S. Korupp and M. Szydlik, 'Causes and trends of the Digital Divide' (2005) 21 *European Sociological Review*, 409; D. Stevens, *Inequality.com: Money, Power and the Digital Divide* (Oneworld Publications, 2006).
- 13 B.F. Mills and B.E. Whitacre, 'Understanding the Non-Metropolitan – Metropolitan Digital Divide' (2003) 34 *Growth and Change*, 219.
- 14 OpenNet Initiative, *Country Profile: Kyrgyzstan* (2010), http://opennet.net/sites/opennet.net/files/ONI_Kyrgyzstan_2010.pdf.
- 15 OpenNet Initiative, *Country Profile: Turkmenistan* (2010), <http://opennet.net/research/profiles/turkmenistan>.
- 16 S. Singh, 'Digital Divide in India: Measurement, Determinants and Policy for Addressing the Challenges in Bridging the Digital Divide' (2010) 1 *International Journal of Innovation in the Digital Economy*, 1.
- 17 M. Castells, *The Information Age, Volume II: The power of identity* (Blackwell, 1997), 351.
- 18 B. Warf, 'Geographies of Global Internet Censorship' (2011) 76 *GeoJournal*, 1.
- 19 J. Eriksson and G. Giacomello, 'Who Controls What, and Under What Conditions?' (2009) 11 *International Studies Review*, 206.
- 20 M. Quirk, 'The Web Police' (2006) *Atlantic Monthly* (May).

Chapter 11

- 1 M.L. Mueller, *Networks and States: The Global Politics of Internet Governance* (MIT Press, 2010).
- 2 J.S. Nye, *The Regime Complex for Managing Global Cyber Activities* (Centre for International Governance Innovation, 2014).
- 3 L. DeNardis, *The Global War for Internet Governance* (Yale University Press, 2014).
- 4 C.T. Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge University Press, 2011).
- 5 S. Antonova, *Powerscape of Internet Governance: How Was Global Multistakeholderism Invented in ICANN?* (VDM, 2008); J. Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum* (Terminus, 2008); M. Flyverbom, *The Power of Networks: Organizing the Global Politics of the Internet* (Elgar, 2011). Most edited volumes on internet governance have rightly given much attention to the involvement

- of national governments alongside other regulatory institutions (cf. L.A. Bygrave and J. Bing (eds), *Internet Governance: Infrastructure and Institutions* (Oxford University Press, 2009); I. Brown (ed), *Research Handbook on Governance of the Internet* (Elgar, 2013); J. Hofmann et al, *Between Coordination and Regulation: Conceptualizing Governance in Internet Governance* (HIIG Discussion Paper Series No. 2014-04, 2014); R. Radu, J. Chenou and R. H. Weber (eds), *The Evolution of Global Internet Governance: Principles and Policies in the Making* (Springer, 2014)).
- 6 D.W. Drezner, 'The Global Governance of the Internet: Bringing the State Back In' (2004) 119 *Political Science Quarterly* 447.
 - 7 K. Ohmae, *The End of the Nation State: The Rise of Regional Economies* (Free Press, 1995); S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press, 1996).
 - 8 J. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press, 2008).
 - 9 J.A. Scholte, *Globalization: A Critical Introduction* (Palgrave, 2005, 2nd edn) and Scholte, 'Governing a More Global World' (2010) 10 *Corporate Governance* 459.
 - 10 D. Archibugi et al. (eds), *Global Democracy: Normative and Empirical Perspectives* (Cambridge University Press, 2012); D. Bray and S. Slaughter *Global Democratic Theory: A Critical Introduction* (Polity, 2015).
 - 11 R.O. Keohane and J.S. Nye (eds), *Transnational Relations and World Politics* (Harvard University Press, 1971); R.W. Mansbach et al., *The Web of World Politics: Nonstate Actors in the Global System* (Prentice-Hall, 1976).
 - 12 G. Marks, 'Structural Policy and Multilevel Governance in the EC' in A. Cafruny and G. Rosenthal (eds), *The State of the European Community* (Rienner, 1993), p. 391.
 - 13 A.C. Cutler et al. (eds), *Private Authority in International Affairs* (SUNY Press, 1999); K. Ronit and V. Schneider (eds), *Private Organizations in Global Politics* (Routledge, 2000).
 - 14 P. Rosenau Villancourt (ed), *Public-Private Policy Partnerships* (MIT Press, 2002).
 - 15 W. Reinicke, *Global Public Policy. Governing without Government?* (Brookings Institution Press, 1998).
 - 16 J. Friedrichs, 'The Meaning of New Medievalism' (2000) 7 *European Journal of International Relations* 475.
 - 17 J. Rischard, *High Noon: Twenty Global Problems, Twenty Years to Solve Them* (Perseus, 2002).
 - 18 J.N. Rosenau, *Distant Proximities: Dynamics beyond Globalization* (Princeton University Press, 2003).
 - 19 K. Raustiala and D.G. Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277.
 - 20 J. Severino and O. Ray, *The End of ODA (II): The Birth of Hypercollective Action* (Center for Global Development, 2010).
 - 21 C. Lund, 'Fragmented Sovereignties: Land Reform and Dispossession in Laos' (2011) 38 *Journal of Peasant Studies* 885.
 - 22 G.F. Thompson, *The Constitutionalization of the Global Corporate Sphere?* (Oxford University Press, 2012).
 - 23 S. Gill and A.C. Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press, 2014).
 - 24 A. Slaughter, *A New World Order* (Princeton University Press, 2004); B.W. Kingsbury and N. Krisch (eds), 'Symposium on Global Governance and Global

- Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law*, 1.
- 25 R. MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (Basic Books, 2012).
 - 26 H. Cleveland, 'Coming Soon: The Nobody-in-Charge Society' (2000) 34 *The Futurist*, 52.
 - 27 J. Severino and O. Ray, *The End of ODA (II): The Birth of Hypercollective Action* 12.
 - 28 M. Hajer, *Authoritative Governance: Policy Making in the Age of Mediatization* (Oxford University Press, 2009).
 - 29 J.G.S. Koppell, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"' (2005) 65 *Public Administration Review* 92.
 - 30 J.A. Scholte, 'Reinventing Global Democracy' (2014) 20 *European Journal of International Relations* 3.
 - 31 D. Miller, *On Nationality* (Oxford University Press, 1995); J. De Wilde, 'The Mirage of Global Democracy' (2011) 19 *European Review* 5.
 - 32 W. Bello, *Deglobalization: Ideas for a New World Economy* (Zed, 2004).
 - 33 A. Moravcsik, 'Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis' (2004) 39 *Government and Opposition* 336.
 - 34 R.O. Keohane et al., 'Democracy-Enhancing Multilateralism' (2009) 63 *International Organization* 1.
 - 35 C. Dany, *Global Governance and NGO Participation: Shaping the Information Society in the United Nations* (Routledge, 2012).
 - 36 A.L. Strauss, *Taking Democracy Global: Assessing the Benefits and Challenges of a Global Parliamentary Assembly* (One World Trust, 2005); H. Patomäki, 'Towards Global Political Parties' (2011) 4 *Ethics & Global Politics*, 81.
 - 37 T. Tännsjö, *Global Democracy: The Case for a World Government* (Edinburgh University Press, 2008).
 - 38 H. Klein, 'Global Democracy and the ICANN Elections' (2001) 3 *Info* 255; J. Palfrey, 'The End of the Experiment: How ICANN'S Foray into Global Internet Democracy Failed' (2004) 17 *Harvard Journal of Law & Technology* 409.
 - 39 J.A. Scholte, *Global Cooperation through Cultural Diversity: Remaking Democracy?* (Centre for Global Cooperation Research, Global Dialogues 8, 2015).
 - 40 K. Dingwerth, *The New Transnationalism: Transnational Governance and Democratic Legitimacy* (Palgrave Macmillan, 2007); T. Macdonald, *Global Stakeholder Democracy: Power and Representation beyond Liberal States* (Oxford University Press, 2008).
 - 41 J.A. Scholte (ed), *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge University Press, 2011).
 - 42 J. Tallberg et al., *The Opening Up of International Organizations: Transnational Access in Global Governance* (Cambridge University Press, 2013).
 - 43 M.L. Mueller, 'ICANN, Inc.: Accountability and Participation in the Governance of Critical Internet Resources' (Internet Governance Project, Syracuse University, 2009).
 - 44 J. Bohman, *Democracy across Borders: From Dêmos to Dêmoi* (MIT Press, 2007); D.W. Drezner, 'The Global Governance of the Internet: Bringing the State Back In' (2004).
 - 45 C. Mouffe, *On the Political* (Routledge, 2005).
 - 46 S.K. Sell, (2013) 'Revenge of the "Nerds": Collective Action against Intellectual Property Maximalism in the Global Information Age' (2013) 15 *International Studies Review* 67.
 - 47 B. Haggart, *Copyright: The Global Politics of Digital Copyright Reform* (University of Toronto Press, 2014).

- 48 M. Chango, 'Accountability in Private Global Governance: ICANN and Civil Society' in J.A. Scholte (ed), *Building Global Democracy? Civil Society and Accountable Global Governance*, 267.
- 49 JustNet (2015) Website of the JustNet Coalition, <http://justnetcoalition.org/>.
- 50 ISF (2015) Website of the Internet Social Forum, www.internetsocialforum.net/.
- 51 A. Bhuiyan, *Internet Governance and the Global South: Demand for a New Framework* (Palgrave Macmillan, 2014).
- 52 J.A. Scholte, L. Fioramonti and A. Nhema (eds), *New Rules for Global Justice: Structural Redistribution in the Global Economy* (Rowman & Littlefield, 2016).
- 53 J.A. Scholte, *Global Cooperation through Cultural Diversity: Remaking Democracy?*
- 54 J.A. Scholte, 'Reinventing Global Democracy' (2014).

Chapter 12

- * The research which resulted in this publication has been funded by the European Research Council under the Starting Grant Scheme (Proposal 336230—UNI JURIS) and the Dutch Organization for Scientific Research under the VIDI Scheme (No 016.135.322).
- 1 The classic philosophical treatises of the early modern time indeed define sovereignty as absolute territorial control. See J. Radon, 'Sovereignty: A Political Emotion, Not a Concept' (2004) 40 *Stanford Journal of International Law* 195, 196.
 - 2 F. Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System' (1986) 39 *World Politics* 27, 42 (although also noting 'the erosion of boundaries through the increasing interdependencies of modern economic life').
 - 3 K. Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford University Press, 2009), 5.
 - 4 L. Catá Backer, 'Governance without Government: An Overview' in G. Handl, J. Zekoll and P. Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalisation* (Martinus Nijhof Publishers, 2012) 87, 91; D. Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 *European Journal of International Law* 9, 14.
 - 5 P. Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism' in Handl, Zekoll and Zumbansen (eds), *Beyond Territoriality*, 59–60.
 - 6 Kratochwil, 'Of Systems', 50.
 - 7 D.S. Koller, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem' (2014) 25 *European Journal of International Law* 25, 28.
 - 8 Compare M. Koskenniemi 'The Politics of International Law' (1990) 14 *European Journal of International Law* 4, 14 (terming the 'pure fact view' of sovereignty the view that sees '[s]overeignty and together with it a set of territorial rights and duties' as 'something external to the law, something the law must recognise but which it cannot control', and contrasting this with the 'legal view' which 'holds sovereignty and everything associated with it as one part of the law's substance, determined and constantly determinable within the legal system, just like any other norms').
 - 9 H.L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 *American Journal of Comparative Law* 631, 635.

- 10 See also J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87 (arguing that the distinction between territorial and extraterritorial legislation is often unclear).
- 11 M. Koskeniemi, 'Constitutionalism, Managerialism, and the Ethos of Legal Education' (2007) *European Journal of Legal Studies* 8.
- 12 R.T. Ford, 'Law and Borders' (2012) 64 *Alabama Law Review* 123, 127.
- 13 Bethlehem, 'End of Geography', 10.
- 14 A. Mills, 'The private history of international law' (2006) 55 *International and Comparative Law Quarterly* 7.
- 15 Radon, 'Sovereignty', 196. Admittedly, feudalism was essentially a set of reciprocal legal and military obligations among noblemen, with the king at its apex. See F.L. Ganshof, *Feudalism* (Longmans Green Publisher, 1952). But at the same time, suzerains granted possession of *fiefs* – these are *lands* or *territories* – to their vassals in return for certain duties performed by the latter.
- 16 J.G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 *International Organization* 139, 157–60 (pointing to changes in ecological, demographic and economic conditions, but also in social epistememes – a collectivity's mental equipment to imagine its existence – in particular Brunelleschi's introduction of the single fixed viewpoint in visual representation, i.e., the point of view of a single subjectivity 'against which all other subjectivities were plotted in diminishing size and depth toward the vanishing point'. Ruggie considered territorial sovereignty as the doctrinal counterpart – the spatial organisation of politics – of this development.
- 17 Ford, 'Law and Borders' 134 ('[J]urisdiction is not a historical fixture of political organisation. Instead, the emergence of jurisdiction is the product of the coincidence of two innovations, one technological – the science of cartography – and one normative – the ideology of rational, humanist government.') See also R. T. Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 *Michigan Law Review* 843, 874–75
- 18 Radon, 'Sovereignty', 199.
- 19 Ford, 'Law's Territory', 929.
- 20 B. Anderson, *Imagined Communities* (2nd edn, Verso, 2006).
- 21 L.H. Morgan, *Ancient Society or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization* (MacMillan, 1877); Kratochwil, 'Of Systems', 29.
- 22 Ruggie, 'Territoriality', 149.
- 23 Ford, 'Law's Territory', 873; J. Gordley, 'Extra-territorial Legal Problems in a World without Nations: What the Medieval Jurists Could Teach Us' in Handl, Zekoll and Zumbansen (eds), *Beyond Territoriality*, 40–41.
- 24 This approach goes back to Roman times. See J. Plescia, 'Conflict of Laws in the Roman Empire' (1992) 38 *Labeo* 30, 45–46, noting that aliens – *peregrini* – were not subject to the Roman *jus civile*, but to the *jus gentium* or even their *jus originis*.
- 25 We use the term 'interplace' instead of 'international', because at the time, the (concept of the) nation-state did not yet exist. The term 'international' may only make sense from our current international law perspective. P.R. Milgrom, D.C. North and B.R. Weingast, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges and the Champagne Fairs' (1990) 2 *Economics & Politics* 1, 19; W.P. Blockmans, 'Vertretungssysteme im Niederländischen Raum im Spätmittel-alter' (1986) 7 *Der Ost- und Nordseeraum: Hansische Studien* 180.

- 26 A. Greif, P. Milgrom and B. R. Weingast, 'Coordination, Commitment, and Enforcement: The Case of the Merchant Guild' (1994) 102 *Journal of Political Economy* 745, 747.
- 27 *Ibid.* 757.
- 28 Milgrom, North and Weingast, 'Role of Institutions', 3–5. The local Guild would keep track of 'foreign' merchants' reputations and could check a potential trading partner's recorded reputation at the Guild. Local merchants in non-compliance or trading with such people risked being ostracised: O. von Gierke, *Community in Historical Perspective* (Cambridge University Press, 1990) 69; Greif, Milgrom and Weingast, 'Coordination, Commitment and Enforcement', 761.
- 29 Greif, Milgrom and Weingast, 'Coordination, Commitment and Enforcement' 750; S. Ogilvie, *Institutions and European Trade: Merchant Guilds, 1000–1800* (Cambridge University Press, 2011) 9 and 196–97.
- 30 Ogilvie, *Institutions*, 202–05.
- 31 See for instance the Genoese and Venetian trader associations.
- 32 See for instance F.W. Maitland, *Select Pleas in Manorial and Other Seigneurial Courts* (B. Quaritch, 1889) and L.E. Trakman, 'The Twenty-First-Century Law Merchant' (2011) 48 *American Business Law Journal* 775, 775–834. This view is not uncontested, however. See for instance S.E. Sachs, 'From St. Ives to Cyberspace: The Modern Distortion of the Medieval Law Merchant' (2006) 21 *American University International Law Review* 685, 686–812, who puts forward that although merchant law was indeed sometimes referenced in proceedings, is a very large number of cases, there was no mention of it at all, which indicates that another set of rules was in fact used.
- 33 Gierke, *Community*, 49 and 52.
- 34 *Ibid.* 54 and 55; J.-P. Peeters, 'Het Verschijnsel der Gilden en Hanzen in de Middeleeuwse Steden in de Nederlanden' (1984) 62 *Revue Belge de Philologie et d'Histoire* 271, 274 and Blockmans, 'Vertretungssysteme'.
- 35 Gierke, *Community*, 52; Sachs, 'From St. Ives to Cyberspace', 708.
- 36 Many states even today continue to deal with the Holy See, the 'government' of the Catholic Church, as if it were a *state* rather than just a non-state actor. Note that the Holy See had a territorial base until the Italian unification (ending in 1871), and could thus qualify as a state in its own right (the 'Papal States'). See at length C. Ryngaert, 'The Legal Status of the Holy See' (2011) 3 *Göttingen Journal of International Law* 829.
- 37 Such as, for instance, P.J. Stern, "'Bundles of Hypens": Corporations as Legal Communities in the Early Modern British Empire' in L. Benton and R.J. Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York University Press, 2013) 21, 25.
- 38 Gierke, *Community*, 56 and 59; Stern, 'Bundles of Hypens', 21–23.
- 39 R.J. Ross and P.J. Stern 'Reconstructing Early Modern Notions of Legal Pluralism' in Benton and Ross (eds), *Legal Pluralism*, 109, 112.
- 40 See for instance Grotius' statement about the rights of the private trading company VOC to engage in offensive warfare, Martine van Ittersum, *Profit and Principle, Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615* (Brill, 2006).
- 41 Ross and Stern, 'Reconstructing Early Modern Notions', 109, 113 and 129.
- 42 For instance the East India Company claimed as a general principle that 'the Company must always have Preference in India as His Majesty justly hath

- [in England]. . .’ and that Company Laws and orders had to be considered ‘As good Law as Magna Charta is to England’, Stern, ‘Bundles of Hyphens’, 21, 9; see also Ross and Stern, ‘Reconstructing Early Notions’, 109, 141.
- 43 Amongst others Massachusetts, Maryland, Carolina, New England, Wyoming etc. Stern, ‘Bundles of Hyphens’, 21, 28, 31 and 33.
- 44 Stern, ‘Bundles of Hyphens’, 21, 29–31, 34 and 37.
- 45 L. Benton and R. J. Ross ‘Empires and Legal Pluralism: Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World’ in Benton and Ross (eds), *Legal Pluralism*, 1, 1.
- 46 Stern, ‘Bundles of Hyphens’, 21, referencing Charter of Massachusetts Bay (1629) – full text: <http://avalon.law.yale.edu/17th_century/mass03.asp>.
- 47 M.S. Bilder, ‘Salamanders and the Sons of God: The Culture of Appeal in Early New England’ in C.L. Tomlins and B.H. Mann (eds), *The Many Legalities of Early America* (University of North Carolina Press, 2008).
- 48 See, e.g., the abolition of the Guilds during the French revolutionary period by the Le Chapelier Law of 14 June 1791, translated in J.H. Stewart, *A Documentary Survey of the French Revolution* (Macmillan, 1951), 165–66.
- 49 See, e.g., P.S. Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’ (2005) 51 *Wayne Law Review* 2005 1105, 1109. Somewhat similarly Ford refers to ‘organic jurisdictions’ (Ford, ‘Law’s Territory’, 859), as the natural outgrowth of a social, economic, or cultural community before state intervention. It appears, however, that Ford was referring to a group historically controlling *territory*, people tied to the land.
- 50 P.S. Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 485, 515 (noting the disjuncture of place and culture, drawing on anthropological work).
- 51 Bethlehem, ‘End of Geography’, 21, citing Thomas Friedman, *The World is Flat*.
- 52 *A contrario* J. Zekoll, ‘Jurisdiction in Cyberspace’ in Handl, Zekoll and Zumbansen (eds), *Beyond Territoriality*, 341.
- 53 Bethlehem, ‘End of Geography’, 22.
- 54 A. Themelis, ‘The Internet, Jurisdiction and EU Competition Law: The Concept of Over-territoriality in Addressing Jurisdictional Implications in the Online World.’ (2012) 35 *World Competition Law and Economics Review* 325, 337 (arguing that the ‘consumer extends the jurisdictional reach by shopping online outside the EU’, and terming this form of jurisdiction ‘over-territoriality’).
- 55 Section 403(2)(a) of the Restatement (emphasis added). Note, however, that the same section in (c) and (d) also refers to ‘the character of the activity to be regulated’ and ‘the existence of justified expectations that might be protected or hurt by the regulation’. These criteria may well accommodate a community-based model.
- 56 Backer, ‘Governance without Government’, 110 and 114.
- 57 The anthropological distinction between a *civitas* and a *societas* harks back to Morgan, *Ancient Society*, ch. 1. See also Zumbansen, ‘Defining the Space’, 57 (observing that under his ‘transnational law’ approach society becomes ‘world society’, as specific states lose their salience).
- 58 Backer, ‘Governance without Government’, 122.
- 59 For some field experiments: P. Resnick and others, ‘The Value of Reputation on eBay: A Controlled Experiment’ (2006) 9 *Experimental Economics* 79; L. Cabral and

- A. Hortaçsu, 'The Dynamics of Seller Reputation: Evidence from eBay' (2010) 58 *The Journal of Industrial Economics* 54. It might be possible to shake a bad reputation by changing your identity, but it is very hard to recreate a new 'good' reputation so the cost of losing a good reputation is dear. This is what makes a threat to ban non-compliant trade effective.
- 60 Of course this does not work flawlessly or in every single instance, see: B. Rietjens, 'Trust and Reputation on eBay: Towards a Legal Framework for Feedback Intermediaries' (2006) 15 *Information & Communications Technology Law* 55.
- 61 J. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press, 2006), 143–145.
- 62 Sachs, 'From St. Ives', 693 (indicating, however, that the regular courts apparently included merchants' customs in their deliberations too, and questioning the strict division between local law and merchant law) and Ogilvie, *Institutions*, 253–67.
- 63 EVE online is a game in a science fiction space setting. It is a sandbox MMOG meaning many players are playing the same game at the same time and the game has no set 'win' conditions. Instead players can choose a goal for themselves and strive to achieve it. This results in much 'content' that is player driven. CCP – the game's publisher – is proud of this so-called emergent gameplay.
- 64 CCP only enforces against abuse of coding errors and (extreme) malicious in-game conduct called 'griefing'. A hint may be taken from the rap song performed by CCP employees titled 'harden the f*** up', which is widely accepted as the unofficial game motto.
- 65 This would in fact place them within the reach of provisions of criminal law even where theft of data or virtual goods has not been specifically criminalised. See for reference the Dutch case law of Habbo Hotel (Rechtbank Amsterdam, 2 April 2009, ECLI:NL:RBAMS:2009:BH9789) and Runescape (Hoge Raad 31 January 2012 (Runescape) ECLI:NL:PHR:2012:BQ9251) where the court decided that virtual items (in these specific surroundings) were 'goods' that could in fact be stolen.
- 66 A. Eisen, 'CCP Investigates Eve Online FanFest Panel for Mocking Suicidal Player', *GamePolitics.com*, 26 March 2012; Eve Forum, 'Cyber Bullying, a Definition, a Letter to The Mittani and Time for Some of You to Wake Up', *Eve Online*, 2009.
- 67 <www.pcmag.com/article2/0,2817,2457800,00.asp> and www.themittani.com/features/monumental-mistakes-lessons-vandalism>.
- 68 <https://forums.eveonline.com/default.aspx?g=posts&t=342705>
- 69 CCP reports approximately 500.000 active subscriptions in 2013 (although the actual number of people involved might be smaller since it is not uncommon to have multiple accounts) CCP, 'CCP 6 Month Update' (CCP, September 2013) <www.ccpgames.com/media/47392/ccp%206%20month%20update%20september%2023%202013.pdf>.
- 70 Within the game, sets of players banding together adhere themselves to communal sets of rules not at the direction of CPP but according to the mores of their own group, creating yet another layer of 'legal' pluralism.
- 71 See also: A. Jankowich, 'EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds' (2006) 8 *Tulane Journal of Technology and Intellectual Property* 1, 5.
- 72 Reputation is also a powerful aspect within the third sphere of EVE – players amongst each other. The majority of the content considered most valuable amongst players is at least partly dependent upon having a good reputation – at least with the groups one wishes to interact with. Similarities with earlier times spring to mind.

- 73 See Jankowich, 'EULaw', 21, referencing F. G. Lastowka and D. Hunter, 'The Laws of the Virtual Worlds' (2004) 92 *California Law Review* 3, 54–55.
- 74 *Ibid* 7. Note that there is some 'law' and 'law-enforcement' in parts/areas of the game. Moreover, in-game groups can and do set additional rules of conduct beyond the ones that are enforced by the environment. Whether all these qualify as law is very much dependent on the outlook on law one takes. See for instance: R. Michaels, 'The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 *Wayne Law Review* 1209.
- 75 At the time of writing, EU Data Protection Directive 95/46/EC was still in place, but was about to be replaced by a new EU Data Protection Regulation (draft COM (2012) 11 final 2012/0011 (COD)).
- 76 A rather thorough and easily accessible overview of recorded statements and lobbying regarding the new EU Data Protection Regulation can be found here <https://wiki.laquadrature.net/Lobbies_on_dataprotection>. This list is maintained by an internet (civil) rights group.
- 77 See on extraterritoriality of EU data privacy law in particular: D.J.B. Svantesson, 'The Extraterritoriality of EU Data Privacy Law - Its Theoretical Justification and Its Practical Effect on U.S. Businesses' (2014) 50 *Stanford Journal of International Law* 53.
- 78 E. P Fanner, 'French Agency Faults Google for Reply on Policy' *New York Times*, 24 May 2012, and S. Davies, 'Google declares open war on Europe's privacy rights', *The Privacy Surgeon*, 20 February 2013.
- 79 C-131/12 (Google Spain in SL, Google Inc. v. Agencia Espanola de Proteccion de Datos, Mario Costeja González).
- 80 Future of Privacy, 'Google Responds Promptly to ECJ Ruling on "Right to be Forgotten"', *Future of Privacy Forum*, 30 May 2014.
- 81 For instance: R. Waters, 'Google's Larry Page Resists Secrecy but Accepts Privacy Concerns', *Financial Times*, 30 May 2014.
- 82 See for instance: S. Davies, 'Time for Europe to get Serious about Investigating Google', *The Privacy Surgeon*, 30 July 2012 and N. Lomas, 'Google Super Successful At Spinning Europe's Right To Be Forgotten Ruling As Farce', *TechCrunch*, 4 July 2014.
- 83 For example: Deutsche Welle, 'Google to "Take Time" Over Privacy Ruling', *Deutsche Welle*, 13 May 2014; D. Drummond, 'We Need to Talk About the Right to be Forgotten', *The Guardian*, 10 July 2014.
- 84 L.C. Williams, 'Google Packs "Right To Be Forgotten" Review Panel With Experts Who Hate The Law', *Think Progress*, 11 July 2014.
- 85 A. White, 'Google Trawls Europe to Search for Right-to-Be Forgotten Answers', *Bloomberg*, 6 September 2014.
- 86 *Ibid*.
- 87 L. Sandoval, 'Google Deletes Search Results in Europe, Abides by "Right to be Forgotten" Rule', *Tech Times*, 30 June 2014; Waters, 'Google's Larry Page'.
- 88 P. Bernal, 'Is Google Undermining the "Right to be Forgotten"?' *CNN*, 7 July 2014 and Letter from Peter Fleischer to Ms Falque-Pierrotin, 31 July 2014.
- 89 J. Ball, 'EU's Right to be Forgotten: Guardian Articles Have Been Hidden by Google', *The Guardian*, 2 July 2014; R. Peston, 'Why Has Google Cast Me into Oblivion?', *BBC News*, 2 July 2014.
- 90 Letter from Peter Fleischer.

- 91 Compare: Bernal, 'Is Google Undermining', Davies, 'Time for Europe' and A. Orłowski, 'Slippery Google Greases up, Aims to Squirm out of EU Privacy Grasp', *The A Register*, 17 June 2014.
- 92 Inspectie Leefomgeving en Transport (ILT).
- 93 Inspectie Leefomgeving en Transport, 'Inspectie Waarschuwt Illegale Taxichauffeurs', *Ministerie van Infrastructuur en Milieu*, 21 August 2014.
- 94 NOS, "Huidige wetgeving onduidelijk en verouderd", *NOS*, 30 July 2014. Google makes an appearance again here: Google is Uber's main investor, and its Chief Legal Officer David Drummond has joined Uber's board of directors; R. Hof, 'As Google Ventures Invests \$250 Million In Uber, What's Next? Driverless Cars On Demand?', *Forbes*, 23 August 2013. By voice of Eric Schmidt CEO, Google has also told Europe that, in respect of Uber-offered taxi services, it needs to 'accept and embrace disruption'. See E. Schmidt, 'Embracing a New Digital Era in Europe', *European Commission*.
- 95 Frankfurt am Main Zivilkammer, 'Beschluss' *Frankfurt am Main Zivilkammer*, 25 August 2014; Reuters, 'Uber Taxi App Banned in Germany Following Court Ruling', *EurActiv*, 3 September 2014.
- 96 S. Dörner, 'Uber will deutschlandweites Verbot ignorieren', *The Wall Street Journal*, 2 September 2014; Julana, 'Keep Calm and Uber On', *Uber*, 2 September 2014.
- 97 See www.sixcalifornias.com; P. Bump, 'There's a plan to split California into 6 states. Here's what it might look like', *The Fix*, *Washington Post*, 15 July 2014; T. Kleinpaste, 'Voor Silicon Valley is democratie de grootste vijand van vooruitgang', *de Correspondent*, July 2014.
- 98 *Ibid.*
- 99 See O.S. Balloun, 'The True Obstacle to the Autonomy of Seasteads: American Law Enforcement Jurisdiction over Homesteads on the High Seas' (2010) 24 *University of San Francisco Maritime Law Journal* 409; P.L. Bernardini, 'Storia e Normativa del Seasteading Corredata da Esempi Pratici' (2013) *Università degli Studi dell'Insubria* 1; more to be found at <www.seasteading.org/law-and-policy/>.
- 100 Buxbaum, 'Territory, Territoriality', 635.
- 101 T. Schultz, 'Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' (2008) 19 *European Journal of International Law* 799.
- 102 D.R. Johnson and D. Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367, 1378.
- 103 Ford, 'Law and Borders', 123–24.
- 104 J.L. Goldsmith, 'Against Cyberanarchy' (1998) 65 *University of Chicago Law Review* 1199, 1240.
- 105 J.R. Reidenberg, 'Technology and Internet Jurisdiction' (2005) 153 *University of Pennsylvania Law Review* 1951, 1971 (in so doing, through architectural design, cyberspace participants may subject them to *safe* jurisdictional zones).
- 106 H.B. Holland, 'The Failure of the Rule of Law in Cyberspace?: Reorienting the Normative Debate on Borders and Territorial Sovereignty' (2005) 24 *John Marshall Journal of Computer and Information Law* 1 (arguing that cyberspace has its own nature, and that the traditional jurisdictional rules may have to be adapted).
- 107 J.E. Cohen, 'Cyberspace as/and Space' (2007) 107 *Columbia Law Review* 210.

- 108 M. Hildebrandt, 'Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace' (2013) 63 *University of Toronto Law Review* 196, 224. She does not indicate, however, how exactly this 'distributed control' has to be operationalised. In fact, she remains agnostic as to what road to take in real-life jurisdictional dilemmas (e.g., where she refuses to take sides in the dispute whether states should be allowed to carry out remote searches on computers and networks located outside their territory). Cohen, 'Cyberspace', 222 (only warning of the dangers of 'a-legal *occupatio*').
- 109 See, e.g., H.P. Hestermeyer, 'Personal Jurisdiction for Internet Torts: Towards an International Solution' (2006) 26 *Northwestern Journal International Law & Business* 267, 288 (advocating the adoption of a multilateral convention on the cyberspace 'targeting' approach).

Chapter 13

* The author would like to thank Uta Kohl for her enthusiasm and help in editing this chapter.

- 1 A. Bailly, *Dictionnaire Grec-Français* (Hachette, 1985).
- 2 F. Gaffiot, *Dictionnaire Latin-Français* (Hachette, 1978).
- 3 O. Bloch and W. von Wartburg, *Dictionnaire étymologique de la langue française* (Presses Universitaires de France, 1932; t. 1, rééd. 1994).
- 4 G. Le Bras, 'Asile', in A. Baudrillart, A. de Meyer and E. van Cauwenbergh (eds), *Dictionnaire d'histoire et de géographie ecclésiastiques* (Letouzey et Ané éd., 1930). In the 1980s and 1990s, some tried to make it effective again in several countries by claiming it for irregular foreigners threatened with expulsion, see J.L. Carro, 'Sanctuary: The Resurgence of an Age-Old Right or Dangerous Misinterpretation of an Abandoned Ancient Privilege' (1985–1986) 54 *U. Cin. L. Rev.* 747; Ph. Ségur, 'Le droit d'asile religieux, un droit moribond?' in P. Huot-Pleuroux, *Droit d'asile, devoir d'accueil* (Desclée de Brouwer, 1995); *ibid.*, 'Asylum: Religious Dimension in the Current Debate', in S.M. Tomasi (ed), *Pastoral Dictionary on Migration and Human Mobility* (Center for Migrations Studies of New York & G. B. Scalabrini Federation of Centers for Migrations Studies Publ., 2002).
- 5 Old Testament, *1 Kings*, 1, 50–52.
- 6 J. Gaudemet, *L'Eglise dans l'Empire romain (IV^e-V^e siècles), Histoire du droit et des institutions de l'Eglise en Occident*, t. III (Sirey, 1958), 285. In 419, some ship builders who had committed the crime of disclosing to the Barbarians their building techniques escaped the death sentence thanks to a bishop.
- 7 H. Leclercq, 'Droit d'asile', in F. Cabrol and H. Leclercq (eds), *Dictionnaire d'Archéologie Chrétienne et de Liturgie*, (Letouzey et Ané éd., 1921), t. IV, vol. 2, col. 1551.
- 8 L.R. Misserey, 'Asile en occident', in R. Naz (ed), *Dictionnaire de droit canonique* (Letouzey et Ané éd., 1935), t. I, col. 1089.
- 9 C. Robillard de Beaurepaire, *Essai sur l'asile religieux dans l'Empire romain et la monarchie française*, (Hachette BNF, 1854, new ed, 2013).
- 10 E. Westermarck, 'Asylum' in J. Hastings (ed), *Encyclopaedia of Religion and Ethics* (T. & T. Clark, 1909), 161–64; M. Gorce and R. Mortier, *Histoire générale des religions*, (Extrême-Orient, A. Quillet éd., 1952), 395; K. Elmadmad, 'Asylum in Islam and in Modern Refugee Law' (2008) 27 *Refugee Survey Quarterly* 51.
- 11 Gaudemet, *L'Eglise*, 286.

- 12 *Sermo Morin Guelferbytanus* 25, PLS 2, col. 608–09.
- 13 William Blackstone, *Commentaries on the Laws of England*, 1769, Book 4, Ch. 27, vol. 4, 358.
- 14 Tacite, *Annales* I, III, ch. LX (C.U.F., 1923), 156.
- 15 A. Bouché-Leclercq, *Histoire des Lagides*, t. 3, I, *Les institutions de l'Égypte ptolémaïque* (E. Leroux, 1906), 207.
- 16 E. Magnin, 'Immunités ecclésiastiques' in A. Vacant and E. Mangenot (eds), *Dictionnaire de théologie catholique* (Letouzey et Ané, 1922), t. VII, part I, col. 1253.
- 17 J.-L. Gazzaniga, *L'Église du midi à la fin du règne de Charles VII* (thesis, Toulouse, 1973), 228.
- 18 Saint Grégoire de Tours, t. 2, VII, chap. XXII, 95.
- 19 *ibid.*, t. 2, VII, chap. XV, 90.
- 20 *ibid.*, t. 1, V, chap. XLIX, 324.
- 21 Caillemer, 'Asylia' in C. Daremberg and E. Saglio (eds), *Dictionnaire des Antiquités grecques et romaines* (Hachette, 1877); K.J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (California University Press, 1997).
- 22 Euripides, *Les suppliantes*, 267–268 (C.U.F., 1923), 113.
- 23 Tacitus, I, III, chap. LX.
- 24 A. Ducloux, *Ad ecclesiam confugere: Naissance du droit d'asile dans les églises* (De Boccard, 1994), 253.
- 25 J. Flach, *Les origines de l'ancienne France*, t. 2, *X^e et XI^e siècles, Les origines communales, la féodalité et la chevalerie*, (L. Larose et Forcel, 1893), 165.
- 26 Misserey, 'Asile en occident', col. 1098–1099; Gazzaniga, *L'Église*, 84. The eight categories broadly comprised: (1) bandits and highwaymen; (2) those who destroyed fields and crops; (3) those who committed homicide or corporal mutilation in churches or cemeteries; (4) those who committed homicide by betrayal, that is who had killed their parents, friends or benefactors; (5) those who had committed murder for money; (6) the heretics; (7) those who had plotted against, hurt or kill the holders of the sovereign power; (8) The falsifiers of apostolic letters, the producers of counterfeit money and the thieves of pawnshops and other financial places of public interest.
- 27 Old Testament, *Deut.* 4, 41–43; 19, 1–13; M. Greenberg, 'The Biblical Conception of Asylum' (1959) 78 *Journal of Biblical Literature* 125.
- 28 Strabo, t. 3, V, 3, 2, 79–80; Ovid, *Fasti*, 1, t. I.
- 29 Leclercq, 'Droit d'asile', col. 1550.
- 30 Tacitus, I, I, chap. XXXIX, 31.
- 31 M. Eliade, *Le Sacré et le Profane* (Gallimard, 1965), 29
- 32 R. Caillois, *L'homme et le sacré* (Gallimard, 1963); Eliade, *Le Sacré*, also see the same author's *Mythes, rêves et mystères* (Gallimard, 1970) and *Aspects du mythe* (Gallimard, 1973); G. Gusdorf, *Mythe et métaphysique* (Flammarion, 1984).
- 33 Magnin, 'Immunités ecclésiastiques', col. 1258; L. Choupin, 'Immunités ecclésiastiques' in A. d'Alès (ed), *Dictionnaire apologétique de la foi catholique* (Beauchesne, 1915), t. II.
- 34 J. Chanteur, 'Fondements philosophiques du droit d'asile et du devoir d'accueil' in P. Huot-Pleuroux (ed), *Droit d'asile, devoir d'accueil* (Desclée de Brouwer, 1995), 128.
- 35 Herodotus, I, 26.
- 36 Plutarch, *Solo*, 12, 1.

- 37 Ducloux, *Ad ecclesiam confugere*, 256.
- 38 J. Imbert, *Les temps carolingiens (741-891): L'Eglise : les institutions in Histoire du droit et des institutions de l'Eglise en Occident*, t. V (Cujas, 1994), 71.
- 39 P. Valéry, *Regards sur le monde actuel* (Paris, Stock, 1931) 23.
- 40 The same function was also fulfilled by previous social malpractice rites, such as Saturnalia, carnivals or fools' name-days.
- 41 Leclercq, 'Droit d'asile', col. 1549.
- 42 K.L. Reyerson, 'Flight from Prosecution: The Search for Religious Asylum in Medieval Montpellier' (1992) 17 *French Historical Studies* 603.
- 43 Saint Augustine, *Epist.* CLII, 393.
- 44 *Leges Burgundionum*, tit. LXX, 2, p. 96; tit. II, 125.
- 45 *Lex Wisigothorum*, VI, 518, 283.
- 46 Gaudemet, *L'Eglise dans l'Empire*, 285
- 47 Joesph Ax, 'Google book-scanning project legal, says U.S. appeals court', *Reuters*, 16 Oct 2015.
- 48 Damien McGuinness, 'Germany urges paedophiles out of the shadows', *BBC News*, 13 July 2015.
- 49 Magnin, 'Immunités ecclésiastiques', col. 1219.
- 50 J.J.E. Proost, *Histoire du droit d'asile religieux en Belgique* (Nabu Press, 1870, new ed, 2012).
- 51 P. Ségur, *La crise du droit d'asile* (PUF, 1998).
- 52 P. Timbal Duclaux de Martin, *Le Droit d'asile* (Sirey, 1939), 290.
- 53 Gazzaniga, *L'Eglise*, 230.
- 54 The first very important limitations took place in the sixteenth century; by the eighteenth century, a very restricted asylum still existed in Spain, Italy and Germany. Abolition occurred in 1743 in Silesia, in 1769 in Tuscany, in 1776 in Austria and in 1794 in Prussia. In Paris, the asylum existed until 1789 in the churches of Saint-germain-des-Prés, Saint-Martin-des-Champs and Sainte-Geneviève.
- 55 Bernabe Africa, *Political Offences in Extradition* (Benipayo Press, 1926) 7.

Chapter 14

- 1 Modern cartography claimed to produce maps which represent the world in an objective way – just like a mirror of reality. The Critical Cartography-debate since the 1980s however criticised this idea as being a myth. Critical Cartography conceives maps as presentations – always specific and contingent images. The use of brackets in (re)presentations aims to refer to both the claim to representation and the critical voices conceiving maps as presentations.
- 2 D. Wood, *Rethinking the Power of Maps* (Guilford, 2010) 20. See also P.D.A. Harvey, 'Medieval Maps: An Introduction' in J.B. Harley and D. Woodward (eds), *Cartography in Prehistoric, Ancient, and Medieval Europe and the Mediterranean* (University of Chicago Press, 1987).
- 3 R.L. Kagan and B. Schmidt, 'Maps and the Early Modern State: Official Cartography' in D. Woodward (ed), *Cartography in the European Renaissance: History of Cartography Volume Three (Part 1)* (University of Chicago Press, 2007) 663.
- 4 Harvey, 'Medieval Maps'.
- 5 *Ibid*, 283; see also J. Branch, 'Mapping the Sovereign State: Technology, Authority, and Systemic Change' (2011) 65 *International Organization* 1, 9.

- 6 J. Strandsbjerg, 'The Cartographic Production of Territorial Space: Mapping and state Formation in Early Modern Denmark' (2008) 13 *Geopolitics* 335; Branch, 'Mapping', 12; M. Biggs, 'Putting the state on the Map: Cartography, Territory, and European state Formation' (1999) 41 *Comparative Studies in Society and History* 374.
- 7 J. Dünne, 'Die Karte als Operations- und Imaginationsmatrix.: Zur Geschichte eines Raummediums.' in J. Döring and T. Thielmann (eds), *Spatial Turn. Das Raumparadigma in den Kultur- und Sozialwissenschaften* (Transcript, 2008); Wood, *Rethinking*.
- 8 T. Winichakul, *Siam Mapped. A History of the Geo-Body of a Nation* (Silkworm, 1994).
- 9 K. Culcasi, 'Cartographies of Nation Building: Creating and Contesting the Egyptian Geo-body' (2013) 16(1) *The Arab World Geographer/Le Géographe du Monde Arabe* 30.
- 10 A.H. Robinson, *Early Thematic Mapping in the History of Cartography* (1st edn, University of California Press, 1982); T. Barnes and M. Hannah, 'The Place of Numbers: Histories, Geographies, and Theories of Quantification' (2001) 19 *Environment and Planning D* 379; T.M. Porter, *The Rise of Statistical Thinking 1820–1900* (Princeton University Press, 1986); M. Friendly, 'The Golden Age of Statistical Graphics' (2008) 23 *Statistical Science* 502; J. Crampton, 'Cartographic Calculations of Territory' (2011) 35 *Progress in Human Geography* 92.
- 11 R.J.P. Kain and E. Baigent, *The Cadastral Map in the Service of the State: A History of Property Mapping* (University of Chicago Press, 1992).
- 12 J. Black, 'Government, state, and Cartography: Mapping, Power, and Politics in Europe, 1650–1800' (2008) 43 *Cartographica* 95.
- 13 W. Sachs, 'Satellitenblick: Die Ikone vom blauen Planeten und ihre Folgen für die Wissenschaft' in I. Braun and B. Joerges (eds), *Technik ohne Grenzen*. (Suhrkamp-Taschenbuch Wissenschaft vol 1165, 1994) 318.
- 14 D.E. Cosgrove and W.L. Fox, *Photography and Flight* (Exposures, Reaktion 2010).
- 15 *ibid.*
- 16 B. Warf, 'Dethroning the View from Above: Toward a Critical Social Analysis of Satellite Ocularentrism' in L. Parks and J. Schwoch (eds), *Down to Earth: Satellite Technologies, Industries, and Cultures* (Rutgers University Press, 2012).
- 17 Sachs, *Satellitenblick*.
- 18 Cosgrove and Fox, *Photography and Flight*, 73.
- 19 W.A. McDougall, ... *The Heavens and the Earth: A Political History of the Space Age* (Basic Books, 1985); see also United Nations Treaties and Principles On Outer Space, 2014 (United Nations - Office for Outer Space Affairs), especially the UN Outer Space Treaty from 1966.
- 20 Cosgrove and Fox, *Photography and Flight*, 73.
- 21 As indexical signs bearing a physical relation to the signified.
- 22 Warf, 'Dethroning the View', 51.
- 23 L. Kurgan, *Close Up at a Distance: Mapping, Technology, and Politics* (MIT Press, 2013) 19–36.
- 24 L. Parks and J. Schwoch (eds), *Down to Earth: Satellite Technologies, Industries, and Cultures* (Rutgers University Press, 2012) 3.
- 25 D.E. Cosgrove, *Apollo's Eye. A Cartographic Genealogy of the Earth in the Western Imagination* (John Hopkins University Press, 2001).

- 26 J.C. Baker, R.A. Williamson and K.M. O'Connell, 'Introduction' in J.C. Baker, K.M. O'Connell and R.A. Williamson (eds), *Commercial Observation Satellites: At the Leading Edge of Global Transparency* (MR/Rand Corporation MR-1229. Rand; ASPRS 2001).
- 27 Baker, O'Connell and Williamson, *Commercial Observation Satellites*. In 2014 the U.S. based company Digital Globe announced that they are legally and technically able to provide data at a resolution down to 0,31m – thus cars and even persons become detectable on these commercially available images (<http://investor.digitalglobe.com/phoenix.zhtml?c=70788&p=rsslanding&cat=news&id=1939027>).
- 28 D. Sui and R. Morrill, 'Computers and Geography: From Automated Geography to Digital Earth' in S.D. Brunn, S.L. Cutter and J.W. Harrington (eds), *Geography and Technology* (Kluwer Academic Publishers, 2004). See also T. Foresman, 'GIS Early Years and the Threads of Evolution' in T. Foresman (ed), *The History of Geographic Information Systems: Perspectives from the Pioneers* (Prentice Hall, 1998).
- 29 W.R. Tobler, 'Automation and Cartography' (1959) 49 *Geographical Review* 526.
- 30 N. Smith, 'History and Philosophy of Geography: Real Wars, Theory Wars' (1992) 16 *Progress in Human Geography* 257.
- 31 H. Bray, *You are Here: From the Compass to GPS, the History and Future of How We Find Ourselves* (Basic Books, 2014) 91.
- 32 Kurgan, *Close Up*, 39.
- 33 J. Abbate, *Inventing the Internet* (MIT Press, 1999).
- 34 T. O'Reilly, 'What Is Web 2.0' (2005).
- 35 M. Graham, M. Zook and A. Boulton, 'Augmented Reality in Urban Places: Contested Content and the Duplicity of Code' (2013) 38 *Transactions of the Institute of British Geographers* 464.
- 36 C.M. Dalton, 'Sovereigns, Spooks, and Hackers: An Early History of Google Geo Services and Map Mashups' (2013) 48 *Cartographica* 261, 268.
- 37 According to a study of the marketing company iHumanMedia, Google Maps was the most installed App on smartphones worldwide in 2013 (<https://ihumanmedia.files.wordpress.com/2014/02/google-maps-market-share.jpg>). Newer studies reveal a growing market share of the web mapping App from competitor Apple which follows a comparable business model (see, for example, Ph. Elmer-DeWitt, 'Why 3.5 times more Apple users choose Apple Maps over Google Maps' *The Fortune* 16 June 2015).
- 38 API: *application programming interface*.
- 39 J. Crampton, *Mapping. A Critical Introduction to Cartography and GIS* (Wiley-Blackwell 2010) 25.
- 40 J. Crampton, 'Keyhole, Google Earth, and 3D Worlds: An Interview with Avi Bar-Zeev' (2008) 43 *Cartographica* 85.
- 41 Dalton, 'Sovereigns, Spooks and Hackers', 265.
- 42 *ibid*, 268.
- 43 J. Brotton, *A History of the World in Twelve Maps* (Penguin Books, 2012) 405.
- 44 <http://wiki.openstreetmap.org/wiki/About>.
- 45 The Ordnance Survey like many other state-based cartography administrations in Europe had built their business model partly on the sale of the geodata which had been established by these public administrations and consequently restricted the reuse of these data.

- 46 D. Hristova and others, 'The Life of the Party: Impact of Social Mapping on OpenStreetMap' (*Proceedings of the AAAI International Conference on Weblogs and Social Media*, 2013).
- 47 J.J. Arsanjani and others, 'An Introduction to OpenStreetMap in Geographic Information Science: Experiences, Research and Applications' in J.J. Arsanjani and others (eds), *OpenStreetMap in GIScience: Experiences, Research, and Applications* (Springer, 2015).
- 48 Certainly, this loss of control has its proper geography: the U.S. government still assures itself a very privileged access to digital geodata and many nation states have made the question of geodata a political priority (see, for example, the European INSPIRE- or GALILEO-program).
- 49 A.M. Florini and Y.A. Dehqanzada, 'The Global Politics of Commercial Observation Satellites' in Baker, O'Connell and Williamson, *Commercial Observation Satellites*.
- 50 B.H. Bratton, 'On Geoscapes and the Google Caliphate: Reflections on the Mumbai Attacks' (2010) 26 *Theory, Culture & Society* 329.
- 51 S. Kumar, 'Google Earth and the Nation State: Sovereignty in the Age of New Media' (2010) 6 *Global Media and Communication* 154.
- 52 C.C. Miller and K.J. O'Brien, 'Germany's Complicated Relationship With Google Street View' *New York Times* 23.April 2013.
- 53 For a critical review see: L. Parks, 'Digging into Google Earth: An Analysis of 'Crisis in Darfur'' (2009) 40 *Geoforum* 535.
- 54 See: <http://crisismappers.net/> and <http://hotsm.org/>.
- 55 S.B. Liu and L. Palen, 'The New Cartographers: Crisis Map Mashups and the Emergence of Neogeographic Practice' (2010) 37 *Cartography and Geographic Information Science* 69.
- 56 M. Schmitt, F. Gottschlich, W. Schäfer, C. Turk, G. Glasze, 'Crisis Mapping – Eine empirische Untersuchung zu Strukturen und Praktiken partizipativer Krisen- und Konfliktkartographien während der Umbrüche in Libyen und Syrien 2011–2013' (2014) 60 *Mitteilungen der Fränkischen Geographischen Gesellschaft* 57.
- 57 see www.google.org/crisisresponse/ (27.07.2015).
- 58 P. Meier, 'How Crisis Mapping Saved Lives in Haiti' *National Geographic* (July 2012).
- 59 Often related to questions of postcolonial continuities.
- 60 G. Glasze, 'Sozialwissenschaftliche Kartographie-, GIS- und Geoweb-Forschung' (2014) *Kartographische Nachrichten*.
- 61 For example the Indian government lamented the presentation of wrong borderlines with Pakistan and China.
- 62 Kumar, 'Google Earth and the Nation State'.
- 63 T. Joliveau, 'Chacun sa carte? Le nouveau Google Maps' (2013) 110 *Mappemonde*.
- 64 P.L. O'Connell, 'Do-It-Yourself Cartography' *New York Times Magazine*, 11 December 2005.
- 65 C. Perkins and M. Dodge, 'The Potential of User-generated Cartography: A Case Study of the OpenStreetMap Project and Manchester Mapping Party' (2008) 8 *North West Geography* 19.
- 66 C. McLaren, 'New Cartographers: How Citizen Mapmakers Are Changing the Story of Our Lives' *Guggenheim Lab Blog*, 18 Jan 2012.
- 67 www.google.com/intl/en/about/company/.

- 68 Kumar, 'Google Earth and the Nation State', 155.
- 69 See the Google-financed study by IPSOS Media CT in 2015 (https://storage.googleapis.com/think-emea/docs/research_study/Report_Google_Local_Search_Behavior_DE_1.pdf).
- 70 C. Barreneche, 'Governing the Geocoded World: Environmentality and the Politics of Location Platforms' (2012) 18 *Convergence* 331, 341.
- 71 G. Glasze and C. Perkins, 'Social and Political Dimensions of the OpenStreetMap Project: Towards a Critical Geographical Research Agenda' in J.J. Arsanjani and others, *OpenStreetMap in GIScience*.
- 72 M. Haklay, 'Neogeography and the Delusion of Democratisation' (2013) 45 *Environment and Planning A* 55; see also R. Steinmann and others, *Gender Dimensions in UGC and VGI – A Desk-Based Study* (AGIT, 2013).
- 73 C. Bittner, 'Reproduktion Sozialräumlicher Differenzierungen in OpenStreetMap: das Beispiel Jerusalem' 2014 *Kartographische Nachrichten* 136.
- 74 Glasze and Perkins, 'Social and Political Dimensions'.
- 75 N.R. Chrisman, *Exploring Geographic Information Systems* (2nd ed, Wiley, 2002).