

Cross-border access to data

Bridging cyber-investigation needs and international law

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- B.J. Koops & M.E.A. Goodwin, *Cyberspace, the cloud, and cross-border criminal investigation. The limits and possibilities of international law*, The Hague/Tilburg: WODC/TILT, December 2014
<http://www.wodc.nl/onderzoeksdatabase/2326-de-gevolgen-van-cloudcomputing-voor-de-opsporing-en-vervolging.aspx>

Background and problem statement

- cyber-investigation often involves cross-border aspects
- challenges compounded by cloud computing (so-called 'loss of location')
- limitations of mutual assistance procedures
- many discussions, little progress
- the abiding significance of national sovereignty in a globalising world
- Question: What limits and what possibilities exist within international law for cross-border cyber-investigations?
- Solutions?
 1. substance (the product)
 2. procedure (the process)

Part 1: substance (the product)

International law: strict and broad interpretations

- strict interpretation: cross-border access only with prior state consent
 - through a treaty
 - or on case-by-case basis
- also when investigating officer is not aware of cross-border nature or of exact location (!)
 - there is no 'loss of location' but a 'loss of *knowledge of* location'
 - lack of knowledge does not excuse a breach of national sovereignty
- broad interpretation: building an argument to legitimate cross-border access to data *within the framework of international law*

Sources of inspiration for a plausible account

possible analogies in international law

- high seas and flag jurisdiction
- universal jurisdiction for piracy
- common concern of mankind
- **remote sensing and the 'Open Skies' principle**
 - cross-border search as satellite imaging
 - reaching an agreement on a new principle: 'open skies' ~ 'open cyberspace'?
 - give and take: sharing benefits
 - information repository at UN level

reinterpreting art. 32(b) Cybercrime Convention

- search with lawfully obtained credentials constitute 'lawful consent' of service provider

Part 2: procedure (the process)

Bridging the gap

- a **huge** gap between the communities of cyberinvestigation and international law
- bridging the gap requires:
 - a sound conceptual framework (metaphors, concepts, clarity of problem)
 - communication
 - agenda-setting: recognition of cyberinvestigation challenges at international policy level
 - moving forward towards a multilateral instrument
 - give and take
 - aim for the necessary minimum (absolute must have, not 'need' or 'nice' to have)

‘Early adopter’ countries

- some countries can take the lead
 - advance a plausible account: what is acceptable under international law?
 - practice what you preach
 - be transparent

Thank you for your attention

Questions?

Comments?

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