WHERE NO LAWYER HAS GONE BEFORE? WHAT A CYBERSPACE ATTORNEY CAN LEARN FROM SPACE LAW'S LEGACY

David S. Weitzel*

I. BACKGROUND

This article examines the application of space law concepts to the creation and evolution of cyberlaw. Space law developed rapidly over its first two decades, and this originally military-based technology emerged from its infancy into a multi-billion dollar commercial industry. From its inception, space law transcended borders, applied new previously unimagined technology, faced new issues regarding personal rights and privileges and was played out on an international stage. Similarly, the modern evolution of cyberspace includes the intense use of technology in a rapidly commercializing international environment.

Like the emergence of space technology, the development of cyberspace is being played out on the world stage while also challenging sovereignty, jurisdiction and even citizenship. Thus, cyberlaw practitioners can learn from air law and space law, which faced all these challenges during their rapid evolutions earlier in the twentieth century. Additionally, cyberlaw should be able to teach space law practitioners how to deal with issues such as personal freedoms, international cooperation with only limited government intervention, managing rapid growth and avoiding centralization by a power elite. Finally, space law seems to have abandoned the "hard law" of treaty making and formal international agreements and replaced it with the "soft law" forms upon which cyberspace seems to rely.

Despite the apparent parallels, several factors that applied to space law's evolution do not apply to cyberlaw's maturation. Space law was developed in an atmosphere of a bilateral superpower struggle with two antagonistic fingers poised on a nuclear button. Space law was developed at a time of greater trust of international bodies to as-

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* Senior Principal, Mitretek Systems, McLean, VA, 22102; (703) 610-2970; dweitzel@mitretek.org.

1 See Ruwanti S. I. R. Abeyratne, State Responsibility in Classical Jurisprudence: Reflections on the Global Navigation Satellite System, 29 ANNALS AIR & SPACE L. 1, 5 (1998) [hereinafter "State Responsibility"] (stating that "space law constitutes one of the most recent additions to international jurisprudence").

2 Hard law is the law of formal legal processes such as legislation and formal treaty making. See SOVEREIGNTY INTERNATIONAL, SUSTAINABLE DEVELOPMENT, NEW TREATY IN THE MAKING, COVENANT ON ENVIRONMENT AND DEVELOPMENT 1, at http://www.sovereignty.net/p/sd/covenant.htm (last visited Oct. 11, 2001).

3 See id. Soft law, in contrast to hard law, is the law using informal agreements, standards and contracts. An example of the soft law form can be seen in the creation and operation of ICANN, the International Corporation for Advanced Names and Numbers that manages the Internet's domain name system and the process which led to its creation. Id.

4 See Valérie Kayser, From the Sky to the Stars: Air Lawyer's and Space Lawyer's Perspectives on Future Legal Issues and Legal Teaching, 20-1 ANNALS AIR & SPACE L. 367, 370 (1995) [hereinafter Kayser] (describing how there has been no space law treaty since the ill-received Moon Treaty twenty years ago); see also Marco Ferrazzani, Soft Law in Space Activities, in OUTLOOK ON SPACE LAW OVER THE NEXT 30 YEARS: ESSAYS PUBLISHED FOR THE 30TH ANNIVERSARY OF THE OUTER SPACE TREATY 429 (Gabriel Lafferranderie & Daphné Crowther eds., 1997) (describing how "soft law" forms have been used in space law and space technology standards organizations) [hereinafter Ferrazzani].

5 See Manfred Lachs, The Law-Making Process for Outer Space, in NEW FRONTIERS IN SPACE LAW 16 [Edward McWhinney & Martin Bradley eds., 1969] [hereinafter Lachs]. Lachs argued that there are three possible applications of current international law to a new environment: (1) Full applicability; (2) Applicability after adaptation or amendment; and (3) Non-suitability with replacement by new rules. Id.

6 Space law emerged in the wake of the Sputnik launch in 1957. During this time both the United States and the Soviet Union were testing nuclear weapons, developing intercontinental nuclear launch vehicles and deploying advanced launch detection systems. See NASA, SPUTNIK AND THE DAWN OF THE SPACE AGE, at http://www.hq.nasa.gov/office/pao/History/sputnik/ (last modified Oct. 16, 2000); see also NATIONAL AIR AND SPACE MUSEUM, SPACE RACE 1, at http://www.nasa.gov/galleries/gall14/ (last modified Sept. 29, 2001) [hereinafter SPACE RACE].
sist in the management of distrust between sovereign nations. The use of space technology was not a tool of any but the wealthiest nations and was continuously integrated with those nations' military readiness. Economic leadership, while having some role, was not the main policy goal of the countries involved in the early development of space technology.

Internet technology emerges from the same military roots as space technology but lives in a very different place and in a very different world than was faced by the rapid development of early space technology. Rather than being a Cold War "weapon," the Internet is seen as a new technology infrastructure upon which economic growth will develop. While large companies are already in control of much of the Internet infrastructure, small companies have made the Internet popular.

Cyberspace, like space technology before it, exploded in size and has undergone rapid commercialization. Recent estimates indicate the Internet/e-commerce industry is already a multi-hundred billion dollar industry and will grow to be a trillion dollar industry by 2002. This rapid decade of growth requires laws and the underlying norms to quickly catch up. To do so, the cyberlaw practitioner must learn from the precedents set by the technology and business sectors. Cyberlaw must examine and apply all precedents that are relevant and discard those that are not. Space law is one sector that deserves close inspection. Space law's antecedents in air law and admiralty law are similarly instructive.

After a brief introduction to space law in section II, this paper examines space law's legacy in two main areas. First, section III discusses the concept of sovereignty and borders. Second, section IV looks to the issues of jurisdiction over disputes and liability from mishaps in the borderless environment of space. Finally, section V highlights lessons learned in space law and wraps up with a list of potential next steps for cyberlaw practitioners to examine.

II. INTRODUCTION TO SPACE LAW AND CYBER LAW

Space law can be seen as having its origin in the launch of Sputnik in 1957. At once, the challenge of a space satellite crossing borders at astonishing speeds past the edge of the atmosphere focused policymakers and legal theoreticians on the present situation. The United Nations acted immediately. Conferences were held, resolutions were passed and eventually numerous treaties were...
developed, signed and ratified. Today space technology is a well-established multi-billion dollar industry and a forum for international research cooperation on projects such as the International Space Station ("ISS"). Space law involves issues such as sovereignty, jurisdiction, freedom of speech, tort, contract law, insurance law, military law and even criminal law. Worldwide conferences are held regularly to deal with emerging issues.

United Nations-sponsored meetings occur for coordination of asset location and frequency use in space.

Cyberlaw's origin is less well-defined. As e-commerce, cyberlaw is tied to the evolution of computer, data communications and data protection laws. However, it is probably best to link modern cyberlaw to a single event. The best candidate for the event marking the emergence of cyberlaw is a change to an otherwise obscure cooperative agreement between the National Science Foundation ("NSF") and a small government contractor named Network Solutions. Network Solutions' cooperative agreement to manage the Internet's Domain Name System ("DNS") was modified to provide for payments of annual registration fees by commercial users. This modification permitted commercial users to acquire domain names for commercial purposes. Since that modification in 1993, the use of the DNS has exploded from 1,500 users in 1993 to over five million today. Recent estimates put the dollar value of e-commerce in the billions with a continuing rise.

14 See id. at 349.
17 See id. at 265 n.28 (citing Agreement Between the United States and Italy for the Design, Development, Operation and Utilization of Two Mini Pressurized Logistics Modules and a Mini Laboratory for the Space Station Freedom, with Memorandum of Understanding, art. II, IV, June 1, 1992, U.S.—Italy, 1992 WL 466066). The Agreement identified that each nation retains jurisdiction over its nationals and space station components.
21 See Watson & Schmidt, supra note 15, at 164 (citing Article 5 of the Uniform Code of Military Justice, which applies its reach to military members in "all places"); see also Maj. Douglas S. Anderson, A Military Look Into Space: The Ultimate High Ground, ARMY LAW, Nov. 1995, at 19 (citing the importance of an understanding of space law to the modern military lawyer).
22 See Ratner, supra note 19, at 323 (describing the role of criminal law in the International Space Station); see also Watson & Schmidt, supra note 15, at 168.
23 See Unispace III Features Space Law Workshop, AEROSPACE AM, May 1999, at 86 (announcing the Third United Nations World Conference on the Peaceful Uses of Outer Space, which was held in Vienna, Austria from July 19 — 30, 1999).
24 Network Solutions became a part of VeriSign after it was purchased for $21 billion in 2000. However, at the time of its cooperative agreement with the National Science Foundation, Network Solutions was operating under the Small Business Administration's 8(a) program as a small disadvantaged business. The original cooperative agreement called for a five-year operation for $4.5 million between the NSF and Network Solutions. Surely, the success of Network Solutions can be seen as one of the great success stories of the 8(a) program and of the Internet economy. See Brian McWilliams & Maura Ginty, VeriSign Buys Network Solutions for $21 Billion, INTERNETNEWS.COM, at http://www.internetnews.com/bus-news/article/0,3_316101,00.html (Mar. 7, 2000); see also 8(a) Business Development, 13 C.F.R. §124.102 (2001).
25 MEDIA ADVISORY, NATIONAL SCIENCE FOUNDATION, DOMAIN NAME COOPERATIVE AGREEMENT TRANSFERRED TO DEPARTMENT OF COMMERCE, at http://www.nsf.gov/search97cgi/vtopic (Sept. 17, 1998) (announcing that the cooperative agreement had been transferred from the National Science Foundation to the Department of Commerce). Another candidate for this honor is the change to the National Science Foundation's funding of the Internet backbone. This change led to the creation of regional backbones and the rapid emergence of the modern Internet Service Provider or ISP. See Dave Kristula, The History of the Internet, 2, at http://www.davesite.com/webstation/net-history.shtml (last modified Aug. 1, 2001).
26 The domain name system is the method used to link easily readable Uniform Resource Locator ("URL"), e.g., Pepsi.com, at http://www.pepsi.com (last visited Mar. 5, 2002), to its numeric Internet protocol address. See generally DNS RESOURCES DIRECTORY, at http://www.dns.net/dnrd (last visited Oct. 6, 2001).
into the trillions annually by 2003. An alternate touchpoint for the emergence of cyberlaw is the ending of the National Science Foundation’s funding of the Internet backbone network.

Like outer space technology a generation ago, the Internet and its management is being coordinated on a world stage. As for the current state of cyberlaw’s evolution, the American Bar Association (“ABA”) manages much of its activities from within its Section on Business Law. Organizations such as the Internet Law and Policy Forum (“ILPF”) have also formed to coordinate legal and policy issues surrounding the Internet. The Internet Engineering Task Force (“IETF”) and Internet Society have continued their work in the areas of technical coordination and Internet advocacy. The Internet Corporation for Assigned Names and Numbers (“ICANN”) has been able to awkwardly bootstrap the current management structure for domestic Internet policies to international Internet policy coordination. So far this technique has worked very well. But the rapid deployment of the technology and its use may lead to certain “Internet have nots” who will eventually use the intergovernmental world stage to call for their inclusion in the digital marketplace.

When one sees the dollar values being associated with e-commerce development, there is little reason to doubt that the international computer and communications companies, along with the retail and service industries, will be at the table as the law of cyberspace evolves.

The time and circumstances surrounding the evolution of space law similarly called for close international scrutiny and interaction. Both the United States and Soviet Union were gravely concerned that every step in the development of space launch technology was also a step forward in ICBM launch technology. International meetings were called. Thus, the world community—assembling under the auspices of the United Nations—developed space law. Entities such as the United Nations, the Committee On Peaceful Uses of Outer Space (“COPUOS”) and the International Law Association all played a role. Along the way, United Nations resolutions were passed. Launch verification regimes were demanded.


See generally Internet Law And Policy Forum, Overview 1, at http://www.ilpf.org/about/ (last visited Oct. 20, 2001). The ILPF is an organization of large technology companies that serves as a forum to share information about emerging cyberlaw issues. ILPF has sponsored conferences and created white papers to help facilitate the exchange of this information. Id.


See Internet Corp. for Assigned Names & Numbers, Overview, at http://www.icann.org/general/abouticann.htm (last visited Oct. 20, 2001). Currently, the United States government has used cooperative agreements to allow ICANN to operate. This system is not without its critics. See Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution, 50 DUKE L.J. 17 (2000); see also ICANNWatch, About Us, at http://www.icannwatch.org/article.php?sid=7 (last visited Oct. 20, 2001).


See generally Space Race, supra note 6, at 1.


Vertic, Submission to Foreign Affairs Committee Enquiry into Weapons of Mass Destruction 1, at http://www.vertic.org/current/FACESWMD.htm (last visited Jan. 1, 2002). "Verification is essential to all regimes dealing with
Treaties were negotiated, signed and ratified.\textsuperscript{39} Eventually, exchanges of technology and cooperation evolved. Commercialization never jumped into the forefront during the early years of the Space Race. A common heritage and exploration ethic undergirded the development of Internet policy and its legal regime.\textsuperscript{40} A desire for technological superiority and to control the “high ground” during the Cold War were both evident in the actions of technologists and policymakers.\textsuperscript{41} Such is not the case with the Internet. Commercialism is at its forefront. Despite the common roots of space and Internet technology, most of the practitioners of cyberlaw do not have a background in the prior evolutions of space law. To that end, this article reviews space law and its antecedents. It intends to show, through the evolution of space law doctrine, the issues to be examined, the lessons learned and the guideposts to be considered to assist the cyberlaw practitioner along the developing path of cyberlaw.

III. BORDERS & SOVEREIGNTY

On its first day of existence, space law dealt with the issue of borders and sovereignty.\textsuperscript{42} Crossing

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  \item weapons of mass destruction. It helps detect non-compliance, deter potential violators and builds confidence by giving treaty parties opportunities to demonstrate their compliance. See also Nat’l Security Council, Discussion at the 443rd Meeting of the National Security Council, May 5, 1960 2-5, available at http://www.hq.nasa.gov/office/pao/History/Sputnik/may60.html (last visited Jan. 1, 2002).
  \item See Twibell, supra note 16, at 263 n.18 (describing the activities occurring immediately after the Sputnik launch).
  \item Space Law determined that sovereignty and appropriation had no place in outer space. See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, arts. 2, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter OS Treaty]. Some have claimed that this utopian ideal is one of the reasons that space technology and space exploration is far from meeting its potential. See Keefe,跨界 quickly and possibly without detection was a founding hallmark of space technology.\textsuperscript{43} At times, legal regimes such as admiralty and aerospace law did little to help space law in these areas except to act as counter-examples.\textsuperscript{44} For example, the modern space shuttle orbit around the globe takes approximately 45 minutes. This can be contrasted to modern jet airplane technology, which allows a commercial jetliner to pass through a time zone, 1/24th of the earth, in about twice that time.\textsuperscript{45} Yet, cyberspace, operating at the speed of the modern telecommunications network, beats them both.\textsuperscript{46} The Internet, while “traveling” through wires rather than space, can learn from space law’s early challenges in the crossing of borders. As a technology that comes out of military research and as a technology that uses a previously unused medium to project power, the Internet has some historical antecedents in aerospace and space technology. However, data protection laws notwithstanding, the border crossings in cyberspace are rarely considered to be a threat unless the electronic transaction under way is itself illegal.\textsuperscript{47} Nevertheless, the sanctity and protection of one’s borders is considered to be one of the defining as-
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pects of sovereignty.\textsuperscript{48}

Protecting one’s citizens both inside and outside of one’s borders is fundamental to our view of nationhood.\textsuperscript{49} Furthermore, nationhood itself is sometimes seen as the linking of a set of social norms of a people to the place that the people inhabit.\textsuperscript{50} All of these concepts are challenged by both outer space and cyberspace.\textsuperscript{51} Cyberspace comes into the home and interacts with the residents often in total secrecy through the use of encryption technology. Thus, in cyberspace, unlike space vehicle blastoffs and detectable telemetry information, laws and social norms may be

challenged without any ability to detect the infrac-

\textsuperscript{tion.\textsuperscript{52}}

A. Sovereignty and Borders in Air Law

In the years leading up to the launch of the Space Age, air law scholars\textsuperscript{53} looked to the history of admiralty\textsuperscript{54} and air law\textsuperscript{55} to examine and establish the foundations leading to space law’s views of sovereignty and borders.\textsuperscript{56} The early space law practitioners cited the Romans,\textsuperscript{57} Grotius,\textsuperscript{58} Pufendorf\textsuperscript{59} and other scholars\textsuperscript{60} to explore the history of the Latin phrase that has guided air law

also Senate Comm. on Aeronautical and Space Sciences, 87th Cong., Legal Problems of Space Exploration—A Symposium 271 (Comm. Print 1961) [hereinafter Senate Comm. Symposium 271]; Well Heinrich, Prince of Hanover, Air Law and Space, reprinted in 5 St. Louis U. L.J. 11 (1958) [hereinafter Heinrich]. This 1953 dissertation by the Prince of Hanover is a thorough and concise review of the issues to be faced by space law as it developed. See generally Senate Comm. on Aeronautical and Space Sciences, 87th Cong., 1st Sess., Legal Problems of Space Exploration—A Symposium 779a-79h (Comm. Print 1961) [hereinafter Senate Comm. Symposium 779a-79h] (citing American Bar Foundation, The Law Of Outer Space (1960)). The article stated that the newly-formed space agency, NASA, had asked the American Bar Foundation to examine the status of space law. See also State Responsibility, supra note 1, at 5-6 (reciting the history of sovereignty as explained by Bodin, Grotius, Hobbes and Locke).

\textsuperscript{54} See State Responsibility, supra note 1, at 8 (stating in “international aviation, the concept of sovereignty is the fundamental postulate upon which all other norms are based”). See also Cooper, supra note 53, at 39. Professor Cooper cited Justice Joseph Story in The Marianna Flora, 24 U.S. (11 Wheat.) 1, 48 (1826):

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all... Every ship sails there with the unquestionable right of pursuing her own lawful business... she is bound to pursue it in such a manner as not to violate the rights of others.

\textsuperscript{55} See Cooper, supra note 55, at 79 (citing 2 Hugo Grotius, De Jure Belli Ac Pacis ch. 2 § 3 (1625): “The extent of the ocean is in fact so great that it suffices for any possible use on the part of all peoples...”); see also Stephen Gorove, Sovereignty and the Law of Outer Space ReExamined, 2 Annals Air & Space L. 311 (1977) [hereinafter Gorove] (describing Jean Bodin, Six Livres de la Republique (1576) and analyzing the foundation of sovereignty).

\textsuperscript{56} See Cooper, supra note 53, at 79 (citing Hugo Grotius: “Fowling, therefore, and similar pursuits, are subject to the law laid down by him who has control of the land.” Grotius, ch. 2 § 3 (1625)); see also Cooper, supra note 53 at 81 (citing a 1687 law dissertation of Jean-Etienne Danck, De Jure Principia Aereae, as the first legal work dealing exclusively with air law).

\textsuperscript{57} See Cooper, supra note 53 at 59.

\textsuperscript{58} See id. at 79.

\textsuperscript{59} See id. at 81.

\textsuperscript{60} See id. at 60-61 (analyzing the writers who have studied the Roman law; the consensus opinion seems to center on
for almost a millennium. That phrase, "Cujus est solum, ejus est usque ad coelem" has guided both air and space law since the founding of each. Professor Cooper, an aviation law expert, examined the phrase in a 1951 article researching the Justinian Digest and Institutes. Grotius, English common law, the French, the age of flight, to turn of the century developments. He came to the conclusion that the landowners' right was not absolute, but the sovereign rights of the nation were absolute.

A significant development in air law is the 1910 International Air Navigation Conference in Paris. It was during this conference that national rights over airspace were officially recognized for the first time. Differing positions by the French, Germans and British were debated and largely reconciled, but not able to be finally agreed upon. Despite the apparent lack of agreement, by the time of World War I, sovereignty over airspace had become customary international law.

The work of the 1910 Paris Conference and the experience of World War I led the way for the Paris Convention of 1919 to adopt national sovereignty over airspace as the absolute rule. Thus, the issue of air sovereignty was "removed from speculation" by the adoption of a general rule. Although the United States signed but never ratified the Paris Convention, there was never any doubt as to the United States' views on air sovereignty. The United States' view of absolute sovereignty was codified in the Air Commerce Act of 1926. Through the Civil Aeronautics Act of 1938, this sovereignty was clarified to be national in scope rather than vested in the states or landowners. Furthermore, the Supreme Court supported the view of absolute sovereignty over the air. Near the end of World War II, all of the previous models of air sovereignty were again re-
viewed and agreed to in 1944 at the Convention on International Civil Aviation in Chicago by the granting of absolute air sovereignty rights to the signatory states.\textsuperscript{82} Such was the situation regarding the five-decade-old challenge of aeronautical technology to sovereignty and borders when the United States and the rest of the world began to face the issues of the Cold War\textsuperscript{83} and the Space Race.

B. Sovereignty and Borders in Space Law

Regarding sovereignty over airspace, by the late 1940s the world community had either rejected the sovereignty by the sea approach or extended to air law the equivalent of "territorial waters" to all airspace within the uppermost limit of flight.\textsuperscript{84} The developments of rocket technology continued to challenge this view. By 1949 rockets had reached the altitude of 250 miles.\textsuperscript{85} By 1951, some scholars were examining the issue of jurisdiction over spacecraft and satellites.\textsuperscript{86} The time typically used for the slow evolution of customary international law was not available.\textsuperscript{87} Instead, international agreements were necessary and served as foundations for current international entities such as the United Nations and the International Civil Aviation Organization ("ICAO").\textsuperscript{88} But what was to be regulated?\textsuperscript{89} The current rules may well have viewed a spacecraft as an illegal challenge to sovereignty.\textsuperscript{90} To remedy the apparent inapplicability of air law to space law, many legal scholars

\textsuperscript{82} See Convention on International Civil Aviation, Dec. 7, 1944, art. 1, 146 U.S.T. 1944 [hereinafter Chicago Convention]; see also International Air Services Transit Agreement, Dec. 7, 1944, art. 1, 59 Stat. 1685, E.A.S. No. 487 (citing International Civil Aviation Conference, Final Act and Related Documents 60 (1944): "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."); see also Diederiks-Verschoor, supra note 68, at 9 (describing the various competing positions of various delegations to the Chicago Convention and their eventual compromise); but see Kayer, supra note 4, at 367 (comparing the diametrically opposed air and space law views of sovereignty).

\textsuperscript{83} See Cooper, supra note 53, at 171–93 (commenting on an article entitled Airspace over the Arctic, which was written for the never unpublished Encyclopedia Arctica); see also id. (stating that Professor Cooper reviewed the rights of the Arctic border nations as Cold War tensions mounted and that this issue was of special concern since the U.S.S.R. was not a signatory to either the Paris Convention or the Chicago Convention); see also id. at 195–202 (commenting on an article entitled Space Above the Seas, written for the "JAC Journal" in 1959, in which Professor Cooper distinguishes between the lack of sovereignty rights over the high seas and the existence of sovereignty rights over territorial seas).

\textsuperscript{84} See Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 1, 15 U.S.T. 1606, T.I.A.S. No. 5639 [hereinafter Convention on the Territorial Sea]; see also Cooper, supra note 53, at 907 (comparing the Convention on the Territorial Sea, which recognized the right to extend sovereignty, to a territorial sea by using the phrase "belt of sea adjacent to its coast.")

\textsuperscript{85} See Cooper, supra note 53, at 260.

\textsuperscript{86} See Heinrich, supra note 53, at 271 (analyzing the background and issues of sovereignty in outer space); see also Cooper, supra note 53, at 292 (stating that from "the international lawyers' point of view the question then arises: Does such an artificial satellite, flying several times per day around the earth and passing far above the surface territories of many States, enter and leave the territory of each of such States when immediately above their surface boundaries"); see also id. at 257 (citing a 1932 article by Vladimir Mandel entitled Das Weltraumrecht: Ein Problem Der Raumfahrt, which stated "this sovereignty must have a territorial boundary... and cannot extend endlessly").

\textsuperscript{87} See Cooper, supra note 53, at 323 (stating that "any sound and effective framework will require new international agreement . . ."); see also Lachs, supra note 5, at 15 ("Yet it soon became obvious . . . that law-making for outer space could not be left to custom and practice only.").

\textsuperscript{88} See Cooper, supra note 53, at 277, 280 (discussing whether the International Civil Aviation Organization ("ICAO") or a new organization was appropriate for overseeing the regulation of space and Russian concerns with ICAO given its status as a non–signatory). For the constitutive provisions establishing ICAO, see Chicago Convention, supra note 82, at art. 43.

\textsuperscript{89} See Senate Comm Symposium 271, supra note 53, at 345–48 (citing Oscar Schacter, A Preview of Space Law Problems Warning: Early Unilateral Positions, N.Y. County L. Ass'n, at 33–36, 1958); see also Cooper, supra note 53, at 275 (concerning Professor Cooper's call for the adoption of a view of airspace with its historic view of sovereignty, contiguous space where sovereignty would still extend and outer space, which would be free from sovereignty claims); see also id. at 277 (stating how Professor Cooper was concerned with the nationality of any spacecraft and whether the concept of attaching a "flag" to any spacecraft would be the best view).

\textsuperscript{90} See Nicholas Matteesco Matte, Aerospace Law 125–30 (1969) [hereinafter Matte] (reviewing the possible role of ICAO); see also Cooper, supra note 53, at 274 (citing the ICAO Convention, which provided that pilotless aircraft were not to be flown over another State without special authorization); see also id. at 263 (stating the competing views of sovereignty with the primary objective that sovereignty should extend to any height from which a falling object could damage the geography below); id. at 329 (stating that any ship without a "flag" designating national status is considered "piratical in character" under international maritime law). But see id. at 274 quoting C. Wilfred Jenks: 

... space beyond the atmosphere of the earth is and must always be incapable of appropriation by the projection into such space of any particular sovereignty based on a fraction of the earth's surface. . . It would seem important to accept this principle fully from the earliest stages . . .

called for a new agreement. At that time, the only thing for certain was the observation that "for the second time in the present century science and engineers have far outstripped the law." Many of these discussions regarding satellite overflight occurred in conjunction with the International Geophysical Year ("IGY").

All of the theoretical discussions by lawyers, policymakers and scientists came to an abrupt end upon the launch of Sputnik. The international response was immediate. Some international organizations were seen as having abdicated any effective role. Limits were seen as needing practical definition and uncertainty of applicable law was widespread. Customary international law was not seen as an appropriate method of creating the legal regime for outer space. The lack of assertion of sovereignty was seen as distinct from any establishment of a non-sovereignty concept like the law. Furthermore, issues regarding sovereignty during spacecraft ascent into and descent from orbit caused special concern.

The United Nations helped remedy the lack of formal agreements by quickly creating the ad hoc Committee on the Peaceful Uses of Outer Space ("COPUOS"). After several years of discussion, the United Nations, through COPUOS, took formal action regarding outer space sovereignty in 1965. This agreement was argued to have created instant international customary law. After
the United Nations later agreed to negotiate a treaty. the concept of nonappropriation was included as part of the 1967 Outer Space Treaty. This theme of nonappropriation was carried forward in other space–related treaties culminating in Article XI of the Moon Treaty of 1978. The only real challenge has come from several equatorial nations who have asserted rights to satellite positions over their countries. Notwithstanding the views of these Bogotá Declaration signatories, those nations who have signed the Outer Space Treaty and other non–signatory nations who respect the customary international law, which has evolved over the past forty years, all recognize the fundamental proposition that outer space is free of claims of sovereignty. Despite these established views, modern space law scholarship and practice has begun to question whether the protections providing non–appropriation have actually been an impediment to the use of space. Others have looked to the day where sovereignty over outer space will be determined by its inhabitants rather than from nations on earth,

be regarded as instantaneous international custom); see also Cooper, supra note 53, at 322 (arguing that the unanimous adoption of UNR 1962 gives evidence of customary international law that subadjacent states have no right to exercise sovereignty in outer space); see also id. at 349 (citing D. Goedhuis, Regimes of Air Space and Outer Space, 2 Recueil Des Cours 295, 295–97 (1963) and Wilfred JENKS, SPACE LAW 171 (1965)) (claiming that instantaneous international law was created upon unanimous adoption of UNR 1962; however, Professor Cooper also cited contrary views held by Hungary, Italy, France and the Soviet Union).

See MATTE, supra note 90, at 108 (citing U.N. Res. 2130, U.N. GAOR, 20th Sess. (1965) that called for COPUOS to prepare a draft of an international treaty dealing with the peaceful exploration of outer space).

See OS Treaty, supra note 45 (stating that Art. 1 of the treaty declares that outer space, the moon and other celestial bodies “shall be the province of all mankind” and Art. 2 declares that none of these “is subject to national appropriation by claims of sovereignty,” appropriation or use); see also Martieta Bendo & Kai–Uwe Schrogel, Article 1 of the Outer Space Treaty Reconsidered After 30 Years, in OUTLOOK ON SPACE LAW OVER THE NEXT 30 YEARS 67 (Gabriel Lafferranderie & Daphné Crowther eds., 1997) [hereinafter Bendo & Schrogel].


See generally D. Goedhuis, Influence of the Conquest of Outer Space on National Sovereignty: Some Observations, 6 J. Space L. 37 (1978) (describing the activities surrounding the 1976 Bogotá Declaration, which included claims by the signatory nations over sovereignty and territorial rights for geostationary orbits above their respective countries).

See Gorove, supra note 55, at 311 (reviewing the concept of sovereignty and how it was viewed in the various space treaties); see also V. S. Vereshchetin, On the Principle of State Sovereignty in International Space Law, 2 ANNALS AIR & SPACE L. 429 (1977) (giving the Soviet view regarding the freedom from claims of sovereignty in outer space).

Keefe, supra note 13, at 358 (arguing the preclusion of sovereignty in outer space limits space development); accord Twibell, Circumnavigating, supra note 16, at 259 (describing the great expense of investing in space technology and the risk incurred by not knowing what claims might arise from sharing the fruits of that investment); Glenn H. Reynolds, International Space Law: Into the Twenty-First Century, 25 VAND J. TRANSNAT’L L. 225, 233 (calling for a clarification of current treaties or the creation of new treaties to examine the allocation of property rights in space); see also Rana, supra note 45, at 225. But see Bendo & Schrogel, supra note 106, at 67 (discussing the role of lesser developed countries in space and the activities of COPUOS over the last decade to promote that role).

See generally George S. Robinson, Frontier Law at L-5, 4 ANNALS AIR & SPACE L. 617 (1979) (describing the history of sovereignty in space law, its relation to the history of colonialism and the possible evolution of space nations and citizens who might deserve special rights upon their visits to Earth).

For instance, astronauts Walter Schirra and John Glenn were both military test pilots, and astronaut Deke Slayton was a World War II B-1 Bomber pilot. See WALTER SHIRRA, SHIRRA’S SPACE (1995); JOHN GLENN, JOHN GLENN: A MEMOIR (1999); DEKE SLAYTON, DEKE!: U.S. MANNED SPACE: FROM MERCURY TO THE SHUTTLE (1995). See generally Tom Wolfe, The Right Stuff (1980) (giving a fictionalized account of the early space program and its first astronauts).

See MATTE, supra note 90, at 353 (discussing extraterrestrial emigration and its impacts).

IV. JURISDICTION AND LIABILITY

Astronauts physically go into space. The stunning launch of a large and dangerous rocket is a clear signal that travel is taking place in a manner previously unforeseen. All early astronauts were also members of the military chosen from the ranks of top test pilots. They were glory–bound soldiers doing the duty that their nation had called upon them to do. They did not attach any particular rights to their status as astronauts or their travels into outer space. The very term “mission” is quite telling of their perspective on their role and function. During this time it was the futurists who were considering the need for defining space citizenship sometime in the future. Even today, such concepts of space citizenship seem like a quaint remnant of the early Space Age. Only in the context of Mars missions, manifesting the ISS and the future colonization of the moon and planets do the rights of a citizen in
space take on any meaning.\textsuperscript{114}

For their travels into cyberspace, most cybernauts never leave their chair in front of the computer. Nevertheless, cybernauts do surf around the world and may well be caught in a jurisdictional battle just as real as landing a space vehicle in an unintended country.\textsuperscript{115} But they are not envoys of mankind.\textsuperscript{110} Cybernauts are merely people who have become users of a new and fascinating technology whose early creators passed along a technology that has revolutionized human interaction and rivals inventions like the telegraph and telephone.\textsuperscript{117}

Unlike cyberlaw, in space law, both technology and legal issues were largely intergovernmental for the first several decades.\textsuperscript{118} This factor allowed technologists and policymakers to seek economic gain in the new Internet economy. The focus was on the other space power's ability to develop and deploy technology.\textsuperscript{110} In cyberlaw, the national mandate was muted by the "gold rush mentality."\textsuperscript{120} Rather than "asking what one can do for one's country" modern cybernauts asked what cyberspace can do for them and for their financial gain.\textsuperscript{121} The interests of all mankind gave way to self-interest. Thus, while the issues of jurisdiction may well have parallels, the management of disputes and assignment of liability in cyberlaw are likely to be crafted very differently than first envisioned for space law. However, given that much of what now happens in space is itself commercial, namely the use of commercial satellites, modern space law may not be as foreign to cyberspace commercialism as first imagined. Both have challenged the classical ideals regarding the parties and situs of jurisdictional and liability-based disputes. Hopefully, cyberlaw practitioners can learn from the trail blazed by space law pioneers only one generation ago.

\textsuperscript{114} See Ratner, supra note 19, at 323; see also Watson, supra note 15, at 163; but see V.S. Vershchugina, Legal Status of International Space Crews, 3 Annals Air & Space L. 545, 546–53 (1978) (describing the current understanding regarding jurisdiction and control over multinational space station crews); accord Gabriella Catalano Sgrosso, Legal Status, Rights and Obligations of the Crew in Space, 26 J. Space L. 163, 179–86 (1998) [hereinafter Sgrosso] (describing the rights of astronauts to health, safety and compensation for damages and the duties of astronauts to observe civil jurisdiction, submit to criminal jurisdiction and to protect intellectual property).


\textsuperscript{116} See Allan R. Stein, The Unexceptional Problem of Jurisdiction in Cyberspace, 32 Int'l L. & Pol'y 1167, 1172–73 (1998) [hereinafter Stein] (arguing that cyberspace deserves no special jurisdiction and netizens do not have legal standing). Cybernauts do not explore and interact in the same manner as astronauts. While they "explore cyberspace," they are merely conducting conversations and interactions that otherwise could be done via mail or telephone.

\textsuperscript{117} See id. at 1167; see also ILPF Conference, supra note 115 (stating that the attendees of the conference concentrated on issues that included jurisdiction in cyberspace, commercial law, consumer protection and data privacy; and within the realm of commercial law, questions were raised as to whether the law of the seller's nation or the buyer's nation prevailed in a dispute).

\textsuperscript{118} Space law was managed through the creation of the treaties described in this article. See Peter Malanczuk, Actors: States, International Organizations, Private Entities, in Outlook on Space Over the Next 30 Years 23, 28–50 (Gabriel Lafferrandie & Daphné Crowther eds., 1997). The commercialization of space was limited to supporting government space programs or international communications satellite programs such as Intelsat. See id. at 34. Cyberlaw, until now, has not had any treaty activity or formal international agreements among nations; however, cyberspace has been rapidly commercialized over the years.

\textsuperscript{119} Again, the backdrop of the Cold War and the creation of improved launch vehicles for intercontinental ballistic missiles can be seen. See Reynolds & Merges, supra note 44, at 82–83 (discussing the reliance by the United States and the Soviet Union on ballistic missiles at the time when the Outer Space Treaty was negotiated).

\textsuperscript{120} The rapid growth of the Internet had a component where venture capitalists seemingly seized on and funded any business plan that involved the Internet. These companies were then rushed into existence and rapidly set to be sold to the public through an Initial Public Offering ("IPO"). See generally Kip Crosdy, Anatomy of a System, Forbes, Sept. 10, 2001, at 54–55. In more traditional venture capital investments, the company is allowed to grow for five or more years before an IPO is contemplated; thus, the timeframe gives the company time to mature and its executives some seasoning while under the watchful eye of their venture capital investors. See id. at 55.

\textsuperscript{121} The reference here, of course, contrasts President Kennedy's call to America from his first inaugural speech ("And so, my fellow Americans: Ask not what your country can do for you—ask what you can do for your country.") with the Internet economy's apparent "me first" explosion of young wealthy entrepreneurs with no sense of duty beyond their stock options. See John F. Kennedy, Inaugural Address, available at http://www3.cnn.com/SPECIALS/cold.war/episodes/13/documents/jfkinaugural/ (Jan. 20, 1961).
A. Jurisdiction

In classic common law jurisprudence, one gets jurisdiction through having control of a person (in personam) or a thing (in rem)\textsuperscript{122} that can be called before the court having proper jurisdiction over the area of law in controversy (subject matter jurisdiction).\textsuperscript{123} Regarding space law, jurisdictional considerations were made along similar lines.\textsuperscript{124} The following four considerations from earlier air law were made regarding how to gain jurisdiction: (1) the law of the first takeoff state; (2) the law of the first landing state; (3) the law of the state flown over; or (4) the law of the aircraft’s state registration designation.\textsuperscript{125} Using the fourth jurisdictional predicate as its foundation, ships and aircraft were associated with a sovereign nation through a registration system.\textsuperscript{126} The term nationality is often used to describe this doctrine. Each “ship” carries a designating “flag” that has specific meaning in international law.\textsuperscript{127} Passengers and cargo are given the protection of national and international laws.\textsuperscript{128} Furthermore, in aircraft and ships, captains and crew must conform to special rules.\textsuperscript{129}

One special concept of maritime and air law is worthy of special concern in cyberspace. It is the concept of cabotage.\textsuperscript{130} In early coastal navigation, the concept of cabotage laid down the rule that for such navigation, exclusive rights to trade could be retained by the state containing both the departing and arriving port.\textsuperscript{131} Furthermore, the state retained jurisdiction. This concept was brought forward to air law with some adaptation. The concept has been a burden upon free navigation and trade in both maritime and air transport law.\textsuperscript{132} By declaring that Internet cabotage should not be allowed, some experts have proposed “national intranets,” which exclude other nations’ trade and interaction.\textsuperscript{133}

For outer space, like its air and maritime ante-
cedents, a nationality-based registration system has been adopted. Space ships carry the flag of their sponsoring nation. The protection of people and objects in space is provided for in its own separate treaty. Any nation finding astronauts or space vehicles within their borders is to promptly return them to the launching country. But, despite the language of space law treaties, the reality of jurisdiction over space activities in the modern era has far more to do with choice of law provisions in private contracts than with the international treaties that would otherwise apply. For nations, it is often bilateral agreements that determine which state’s laws apply.

Jurisdiction in cyberspace is still in flux. Contracts often state their own venue provisions. Cybercrime conventions, as well as federal cybercrime statutes, have been crafted to manage new forms of crime. Privacy law is also being adapted to deal with cyberlaw issues. The Hague Convention is being used as the setting to manage the international cooperation with contracts and civil judgments in cyberspace.

B. Liability

Air law assigns liability through international convention and customary international law. Space law has developed its own methods to deal with liability. As for cyberlaw, cyberpiracy, hacking, industrial espionage and “information warfare” all lurk underneath cyberspace and call for assignment of liability for crimes and controversies in cyberspace. Although space law dealt with real world mishaps, it can inform cyberlaw as it faces these challenges.

Space law practitioners knew from its outset that they were dealing with dangerous technology and with possibly lethal power. The missions conducted in space and the vehicles used in space should be considered ultrahazardous activities. Its early scholars and policymakers looked to their air law roots to evaluate what forms of liability should be applied. They evaluated whether any existing air law liability models made sense. The United States and other nations looked to these scholars and determined its national posi-

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134 See OS Treaty, supra note 43, at art. 8 (providing that a state party who self-registers a space object “shall retain jurisdiction and control” over objects launched into space); see also Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, arts. 2, 4, 28 U.S.T. 695 (providing in Article 2.1 that launching states shall register their space objects in a national registry and in Article 4 that such information shall be forwarded to the Secretary General of the United Nations "as soon as practicable." ) [hereinafter Registration Convention]; Bin Cheng, Space Objects and Their Various Connecting Factors, in OUTLOOK ON SPACE LAW OVER THE NEXT 30 YEARS 203, 204 (Gabriel Lafferranderie & Daphné Crowther eds., 1997) (describing the registration provisions of space law, the application of jurisdiction and control and the effects of private contracts on the provisions of the treaties).

135 See Registration Convention, supra note 134, at arts. 5-6 (describing in Article 5 that the information to be provided includes a “designator” or “registration number,” while Article 6 describes the sharing of marking information with other nations).

136 See Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, arts. 1–10, 19 U.S.T. 7570 [hereinafter RRA].

137 See id. at arts. 1–2, 4 (calling for immediate notification, assistance, protection and return).

138 See REYNOLDS & MERGES, supra note 44, at 285 (stating that private contracts are replacing international agreements).

139 See Ratner, supra note 19, at 325 n.6 (reviewing the various bilateral agreements making up the corpus of agreements under which the ISS will be operated).


143 See DIEDERIKS–VERSCHOOR, supra note 68, at 53–99, 119–46 (reviewing the Warsaw Convention and its associated protocols addressing the issues of liability, surface damage and collisions in air law.).

144 See Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, art. 2, 24 U.S.T. 2389 (assigning absolute liability to the launching state) [hereinafter Liability Convention].


146 See Senate Comm., supra note 55, at 1305–28 (listing numerous failures among the many launches during the early years of the Space Age).

147 See id.

148 See COOPER, supra note 53, at 312–13 (reviewing liability in the case of a collision).

149 See MATTE, supra note 90, at 345–48 (looking at the nature and limits of liability as analogized between damages to third parties on the surface caused by air and aerospace
navigation as well as recounts the six alternatives for liability assignment put forward by Dr. Gerald Fitzgerald: (1) Liability assumed by an international organization; (2) Liability assumed by all state members of an organization or the launching state; (3) Liability would be borne only by the state members of the international organization; (4) Liability would be borne by the state of registration; (5) Liability would be borne by the state of the victim's choosing; and (6) Liability would be in the form of a two-stage process, first by international organization, then by member states); see also Cooper, supra note 53, at 313 (evaluating whether the Rome Convention on liability to third parties should apply with Professor Cooper concluding that such a model should be followed).

150 See MATTE, supra note 90, at 335–37, 340–42 (describing the early work of the ad hoc COPUOS and early treaties); see also Cooper, supra note 53, at 313.

151 See OS Treaty, supra note 43.

152 See RRA, supra note 136.

153 See OS Treaty, supra note 43, at art. 5.

154 See RRA, supra note 136, at art. 5.

155 See Reynolds & Merges, supra note 44, at 212 (describing the Liability Convention); see generally Liability Convention, supra note 144.

156 See Reynolds & Merges, supra note 44, at 212–14 (describing the well-defined liability rules in space law).


158 See James A. Beckman, Citizens Without a Forum: The Lack of an Appropriate and Consistent Remedy for United States Citizens Injured or Killed as the Result of Activity above the Territorial Air Space, 22 B.C. INT'L & COMP. L. REV. 249 (1999) (recounting how the realities of space law and international indemnification do not always meet the needs of U.S. citizen litigants); see also id. (describing the OS Treaty, the Liability Convention, the Federal Tort Claims Act, the Foreign Sovereign Immunity Act, contractual arrangements and product liability as grounds for raising claims involving outer space).

159 See Reynolds & Merges, supra note 44, at 309 (reviewing the role of contracts in outer space).

160 See Reynolds & Merges, supra note 44, at 515.

161 It has been very rare for space-based assets to damage people or property on earth, thus it is the contracts and their forum clauses controlling these assets that are as important as the assets themselves. See generally INT'L SPACE INFO. SERV., COMM. ON THE PEACEFUL USES OF OUTER SPACE, TECHNICAL REPORT ON SPACE DEBRIS, at http://www.ooas.unvienna.org/isis/pub/sdtechrep1/index.html (last visited Oct. 25, 2001).

162 See Lawrence Lessig, Code and Other Laws of Cyberspace 20 (1999) (arguing that technical architectures themselves define the laws that attempt to control those architectures).

163 New forms of dispute resolution have been attempted in cyberspace. See, e.g., INTERNET CORP. OF ASSIGNED NAMES & NUMBERS, UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, at http://www.icann.org/udrp/udrp-policy-24oct99.htm (last visited Oct. 25, 2001); see also Michael Geist, Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP, available at http://
V. LESSONS LEARNED AND NEXT STEPS

A. Sovereignty & Borders

The sovereignty rules of the high seas and outer space are a better guide for cyberspace than the sovereignty rules of air law. Like outer space, in cyberspace there is no tangible res ["thing"]. But, cyberspace is not something to be conquered because it is not a res nullis ["thing of no one"]. Like outer space, cyberspace should be considered a res extra commercium ["a thing outside commerce"] or a res communes ["common thing"].

B. Jurisdiction and Liability

Regarding jurisdiction and liability, launching and landing have parallels between outer space and cyberspace. For cybercrimes and cyberpiracy, the application of universality principles, like those applied to sea and air piracy should be considered. Also, private contracts should be utilized due to their adaptability and ability to be narrowly tailored to the issue at hand.

C. Interested parties

For cyberspace, nations should be predominately concerned with respect to their respective citizens and infrastructure. Corporations should be involved in cyberspace as builders, architects and experts of investment optimization. Citizens may not have a significant role in the management and coordination of cyberspace, but they will have a large role as informed and active consumers.

D. Next Steps

Although, not expected in the immediate future, cyberlaw should anticipate a phase of international coordination and formalization of agreements. As seen with space law, all technology reaches a point where its continued evolution is more predictable. This is seen as prices drop, new features are added at no extra cost and new down-market opportunities are pursued. Space law's regulation and laws were adapted during this phase to manage the changes being faced, but most importantly, space technology has shown that transformative technology can lead to transformations in society, its laws and regulations and even the society's view of itself.

Cyberlaw can learn from space law's past and adapt itself as it moves forward. Cyberlaw practitioners should be mindful of space law's legacy of infrastructure development, while being mindful of universal goals such as the good of all mankind. They should continue to look to the use of "soft law" structures as well as the role of private agreements when dealing with complex international legal issues. The development of cyberlaw should serve as a catalyst, rather than a roadblock, to private commercial interests. Cyberlaw should allow private contractors to make choice of law and forum decisions unless there is unequal bargaining power between the parties. Finally, cyberlaw practitioners should evaluate other legal specialties such as banking law, securities law as well as shipping & transport law.

VI. CONCLUSION

This article has evaluated the history and evolution of air law and space law. It has looked to the evolution of the concepts of sovereignty, borders and jurisdiction to draw parallels between cyberlaw and space law. Finally, this article has summarized lessons learned and looked to some next steps guided by the challenges that air law and space law have faced in their respective evolutions.

166 BLACK'S LAW DICTIONARY 1307 (7th ed. 1999) (defining res as "an object, interest, or status, as opposed to a person . . . ").
167 Id. at 1312 (defining res nullis as "a thing that can belong to no one; an ownerless chattel").
168 Id. at 605 (stating that "this phrase was used in Roman and civil law to describe property dedicated to public use and not subject to private ownership").
169 Id. at 1308 (defining res communes as "things common to all; things that cannot be owned or appropriated, such as light, air, and the sea").