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**From the Selected Works of Subhajit Basu**

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**CRITiCal.pdf**

Subhajit Basu



Available at: <https://works.bepress.com/subhajitbasu/92/>

# Cloud (Space) and the Law

## Combatting cRiminals in the Cloud (CRITiCal)

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- What kind of cross-jurisdictional issues arise from cloud based crime?
- How might investigators legally trace a cloud based incident and what happens if they have reasons to suspect the perpetrators may be based elsewhere?
- What international networks currently exist to deal with cloud crime?

- JJ deals with **Counterfeit Clothing** and sells them on a website hosted by a Cloud provider. He pays his cloud provider, MCloud, with different stolen credit cards. Police have learnt about the website and need to prosecute JJ.
  - JJ is located in County A (same as police)
  - Mcloud in Registered in Country B
  - Servers are in Country C.
- Who has jurisdiction in this case?
- Country A, because prosecutor and accused are residents in this country; Country B, because Mcloud is registered there; or Country C, because the servers and the data are physically located there?

- The “loss of Location”
- Jurisdiction to investigate a cloud crime
  - Brussels I Regulation describes the rules to determine if European Union Member States have jurisdiction in cases with links to other European Union countries
- Search Warrant: Physical location of the cloud provider?
  - No physical access to servers
  - Competence and trustworthiness cloud providers
  - Data Location and Collection
  - Volume of data
  - Data Integrity

# "Is iCloud part of iPhone?"



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Retrieving data from the Cloud for investigation/prosecution purposes.

- Is the Cloud an extension of the physical or a different entity?
- Is the cloud a storage extension of the device?
- Is it possible to investigate devices (e.g. mobile phones) connected to cloud services?

- Remote data retrieval differs in nature from the seizure of a suspect's device it is not same as taking of property, it is about making a copy of the relevant data:
  - Breach of confidentiality constitutes an interference with a person's 'possessions', under Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR)
  - It could be a privacy issue under Article 8 of the Convention
- **Cybercrime Convention refers both to the seizure and copying of data (Council of Europe Convention on Cybercrime)** Article 19 of the Cybercrime Convention provides for an extended network search, i.e., extending an existing search (e.g., in a house) to computers lawfully accessible to the computer on the search location; this extended search, however, should remain within the national borders, i.e. can only search on computers or servers within the state's territory. Article 32 of the Cybercrime Convention allows a cross-border search

Accessing Cloud data is interception (under the IP Act/RIPA) - it is lawful if a statutory power of search/seizure is being used:

*IP ACT S6 (1) (c) (ii)... in the exercise of any statutory power that is exercised for the purpose of obtaining information or taking possession of any document or other property*

- The offence to be 'serious' (thus excluding many justifiable enquiries for volume offences, harassment, stalking etc....)
- It requires the authorisation of a Chief Constable - again disproportionate if the desire is to deploy the tool for volume offending (it can be argued is where it's greatest demand lies)



- Is Cloud a “Place” or a “Space”?
- Equipment interference is currently carried out using powers in the Intelligence Act 1994 and the Police and Criminal Evidence Act

## **PACE Section 18(1)(5) Power of Entry & Search:**

“...may search **any premises**” “although theoretically “any place” could mean any open-air site, but should it be restricted to something that is capable of being premises in the ordinary sense of the word (“that is, it should be a distinct piece of land in single occupation or ownership”)

Two EU legal Frameworks need to be considered when considering how to enhance judicial cooperation in the criminal field

- European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20/04/1959, ETS No.030
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130



- Multilateral Treaty on Data Protection
- Recognition of extraterritorial jurisdiction (based on “reasonableness”)
- Development of International Cloud Policy
- Multilateral Treaty on Cloud Crime
- International Rules on Evidence and enforcements
- International Cloud Standards (harmonisation of laws, resolution of cross border conflicts)