

Forum

CONTRACTS, CUSTOM, AND COURTS IN CYBERSPACE

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INTRODUCTION

As happens with every new technology, the arrival of the Internet has occasioned spasms of academic and governmental activity. Whether the innovation has been automobiles or video games, there has always been a reaction. With a little perspective, we can see that the Internet fits the pattern of modern life without exceptionalism at all.

I approach the topic more as a consulting anthropologist than in my usual role as a spokesmodel for American justice. First, we will consider other technologies and our experiences with them. Then, we will think about sources and functions of law. Last, we will look at the Internet as community, seeing the mechanisms of civil society there.

PERSPECTIVE

Now, perspective. Let's start with the technological revolution that still surpasses every other one except the domestication of fire. Gutenberg successfully produced a practical system of moveable type in 1456. The digital revolution is more akin to the adoption of hydraulic brakes for cars in place of mechanical ones than it is to the shift from the manuscript world to moveable type.

In the first forty-five years of printing—from 1456 to 1501—30,000 titles were issued. That is a rate of 667 new works every year. In those forty-five years, eighteen million books were sold. While today that may be just one run of the latest Harry Potter book, in 1500 there were only six million literate people in Europe. In forty-five years in a poor society, almost three books per literate person were produced.

Jumping ahead 400 years, President Thomas Jefferson had to use the

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This Forum Piece is adapted from remarks delivered by Judge Hughes at Northwestern University School of Law's Fourteenth Annual Symposium on Intellectual Property Law and the Corporate Client in October of 2001.

same means of communication and transportation as Julius Caesar. It was not until Mr. Jefferson's second term that Fulton applied steam power to commercial navigation. Andrew Jackson was in the White House before steam was successfully employed in land transportation. In 1817, it took fifty-two days to get goods from Cincinnati to New York, but by 1852 it took only seven days by rail. That is a quantum leap.

The invention of the telegraph was close to the Internet. Instantaneous transmission to remote locations was a marvel. In its first decade, from 1844 to 1854, we in America strung 23,000 miles of telegraph cable, a huge investment. The telegraph gave us our first experience with contract formation by facsimile signatures. Interestingly, the telegraph produced personal misuse. During the Civil War, General Grant repeatedly had to intervene to stop the military telegraph from being clogged with personal traffic. You may notice on reflection that the telegraph was a binary, digital system—dots and dashes.

Although the public telegraph office has declined to insignificance over the last forty years, private teletype communication has been the principal means of national and international trade until recently.

By 1884, we had added the long-distance telephone to our instruments of commerce—New York to Boston. Its potential for misuse is great, but because its "text" is not fixed—written—and because its messages when relayed secondhand are not, therefore, particularly reliable, the telephone has not had much of its own jurisprudence. Despite the volume and occasional importance of oral expressions, we sensibly maintain a fetish for documentation in important transactions.

Skipping the details of typewriters, carbon paper, photocopiers, and pagers, society was going along reasonably well, until the late 1970s, when the devil showed up with cheap, reliable facsimile transmission.

Lawyers went semibersek. Of course, most of you are too young to have seen a real telegram. Telegrams were signed "in type," as it is called. The Agriculture Department has a full-page form that you must sign if you want it to rely on your signature sent by facsimile. For the 135 years from 1844 to 1979, the world had been working in millions of deals worth trillions of dollars using telegrams and telexes. Faxes are just easy telexes. Yet still today, you put one-half page of disclaimer on a fax cover page. You would not do that to a letter, telex, or telegram.

But, you say to yourself, quietly, those telex deals were large commercial ones, and the Internet will cover minor consumer transactions. Well, the bulk of the value of Internet transactions will always be wholesale and otherwise commercial. Also, the retail Internet boom simply parallels the explosion of retail catalog sales. Over the last twelve years, cheap long distance telephone service and wide ownership of credit cards have caused remote sales of consumer goods to explode.

What has been our other, recent experience with remote transactions?

Between 1970 and 1990, America's foreign trade went from about one billion dollars per day to about three, without the aid of the Internet. Since 1990, it has increased to about \$3.5 billion a day, with the help of the Internet.

In 1990, without the Internet, in hundreds of thousands of transactions, people traded \$1.2 trillion in currencies a day. Since then, although the volume has not changed much, the Internet has lowered transaction costs and improved trading opportunities significantly.

FUNCTION OF LAW

With the exception of things like the United States Constitution, law serves three limited functions in a modern society.

First, it furnishes the background rules for transactions when the parties have not agreed. Largely procedural, these are the standards in default of the parties having specified their own choices. In torts, of course, the transaction is involuntary for at least one of the parties; they are nevertheless free to work out a consensual resolution against the background rules.

In contracts, we need background rules consisting of what normal people would expect, since it would be wholly impracticable for every deal to be embodied in a fully-specified document. Besides, it is really hard to negotiate complex contingency terms at two o'clock in the morning with an automatic electronic gasoline pump.

Second, law furnishes a forum—a mechanism—to resolve disputes. Courts resolve conflicts with a view to justice but with a grasp of practicality. Ultimate truth may have value, but tens of thousands of open disputes are actively wasteful: wasteful in the resources tied up pending resolution; wasteful in transaction costs consumed; and wasteful in community friction. I do not mean to offend patent lawyers, but as a matter of principle, at some point, litigation should end.

Third, through law the community sets limits on consensual deals and unilateral impositions. It does this by making some agreements unenforceable and by punishing other acts. In its civil form it usually impedes innovation, raises costs, and limits choices. In its criminal form, it does those things while confiding excessive power to the government. The Texas legislature meets every other year, and for the last twenty years, each bienium, it has adopted about one page of new law for every 3,000 people in Texas—man, woman, and child. It is cumulative. At its best, that is mostly sand in the gears.

SOURCES OF LAW

Law comes to us three ways. It is evolved, it is negotiated, or it is imposed. In America, the last fifty years have seen the triumph of the reformist-progressive school of politics. In the progressive vision, some group—moderns, elites, intellectuals, experts—decides that the common man with

direct responsibility for the consequences of his choices using the average experience of ages and multitudes cannot be trusted. These “leaders” have a pathological aversion to disorder. Free people, free inquiry, free markets, and free science are messy. No one outside a capitol building would expect a developing industry or an innovative medium to be tidy.

The desire for certainty compels people to ask for specific rules for the Internet, but the social and economic experience of the last three hundred years has shown that the simplicity of general rules applied to functionally parallel transactions works. A sale of goods is a sale of goods, whether the deal was consummated by Internet, semaphore, or carrier pigeon. In practical transactions, a change in medium is not a change in structure.

No discontinuity in the law has been required during the transition from mail to telegram to telex to telephone to fax. None will be required in the move to e-mail.

Judge Frank Easterbrook has pointed out that there no more should be a “law of cyberspace” than a “law of the horse.” As he said, cases “deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses.” Although, alas, there may be courses on the Law & Music or Law & Sports, the curriculum has not been cluttered with Law & the Horse. And, like the others, if we had had one, it would have been shallow, with no “unifying principles.”

CLAIMS OF DIFFICULTY

There may be unique difficulties in applying law to cyberspace, but none have been articulated and supported. Let’s look at a few.

The first claim against normal law in the context of the Internet is that national sovereignty is eroded by these millions of evanescent, anonymous communications. Free communication always scares governments, including ours. Ultimately governments have only two “sovereign” interests in the electronic traffic—repression and taxation. It is illustrative that the first national act in America about the Internet was on the subject of decency, not efficiency.

You are saying to yourself, again, what about security? Vandalism and terrorism on the Internet should be prosecuted, but prosecuted in parallel with other forms of those same wrongs. Ultimately, the best defense is for the government to leave the scientists and markets free to devise and sell defenses. In general, government is not particularly successful in its internal-security function. In the aggregate, Americans spend more on private security than governments do on public police.

The next public interest is prevention of fraud. We collectively have an interest in the prevention and prosecution of fraud committed through the Internet. The arrival of the age of the automobile was a shock to law enforcement because they were not ready to respond effectively to crooks

with this new, high mobility. We got a bunch of car-specific laws. This time, police departments will be disoriented briefly by this new medium. We need the police to adapt their procedures to the new context, not to adopt new laws. Fraud by Internet looks, at law, just like fraud by quill pen.

As with credit cards, the principal cost of ineffectual law enforcement will be higher costs to everybody. Left alone, however, people will come up with things like the Underwriters Laboratories, Good Housekeeping seals, third-party warranties, and things we cannot now imagine. If things are “fixed” by regulation, we will be saddled with some bureaucratic rigidity.

Remember, there was fraud with telegrams in 1850, and like now, as bad as it was for the victim, it was a miniscule fraction of one percent of the whole traffic.

The proponents of a new legal regime for cyberspace argue that jurisdiction is a unique problem because law is based on geography. No. Law is based on real world transactions—sales, investments, leases—not geography. If the goods are agreed to be delivered Freight on Board Baltimore, that is the geography—the space—that counts. We can safely ignore the locations of intermediate servers in the Internet communications as we do with the route of telephone calls.

It is true that courts and statutes are territory-bound. That argues against passing new statutes since they will almost always be limited to the location of one end of the deal.

Also, on commercial subjects laws are remarkably consistent around the world. The biggest problem for world trade—by electron or by carbon paper—is that many countries do not have the private and public institutions to give *life* to that law.

Remember, the legal system matters only in default. Most law is decided privately through contract; the parties choose their rights and obligations. And, when things go wrong, most disputes are fixed privately. This is partly true because the state mechanisms are slow and costly, but it is mostly true because the parties can fashion better remedies than the courts. Private settlement is parallel to the opportunity to negotiate agreements in the first place that are more productive than government-required, expert-designed deals would have been.

In America, the Internet has arrived in a country that has done its trade among up to fifty states for over two hundred years, and today about one-quarter of its trade is spread among the other nations of the world.

The American experience has included states persistently trying to protect their markets for local business. This has been thwarted by the constitutional establishment of an American economic union—a free market. State courts tend to find jurisdiction for their own citizens to sue people elsewhere on the flimsiest association. Nations behave the same way.

Provincialism and protectionism will infect cases arising through the Internet, but with an occasional courageous judge, rigorous academic, and long-sighted trade association, the Internet will survive the occasional infections to thrive.

After all this candor about the modest abilities of government, another problem with regulation needs mentioning. The slogans of consumer protection, local impact, and ruinous competition often mask the use of governmental authority to cartelize a business for the benefit of current participants; in another new technology, this collusion between industry and government gave us forty years of stifling network television.

COMMUNITY AND CYBER-PEOPLE

When common law judges found law, they did not look at tea leaves; they looked at what fully informed, reasonable people did in similar situations. They found the law in custom, in practice.

Laymen are aggravated by the law's inability to do better than a standard of the "reasonable person." When it is done well, however, this approach allows for informal, subtle adjustment. It reflects the expectations of normal people who are disinterested in a particular case or class of cases. It reflects an average practice by people who bear the consequences of their choices.

The strangers who transact on the Internet are hard to imagine as a community. They are unlike the diamond merchants in New York whose lives are socially, religiously, and economically tightly bound. But Internet users are no more an undifferentiated mass of random atomized individuals than the Illinois Bar is a homogenous lump of parallel interests. The users are divided into multiple, overlapping clusters.

Heating oil traders, for instance, are a relatively small group who deal repeatedly with each other. A currency broker may belong to several sub-communities on the Internet just as she may in Colorado. On the Internet, she may trade Swiss francs as well as baseball cards; in Denver, she may broker Norwegian kroner as well as breed golden retrievers.

In its short life thus far, the Internet has begun to develop, to evolve its practices. It appears that norms arise in cyberspace exactly as they do in shopping malls. In a look at chat rooms, it was found that the degree of civility was positively correlated with three factors.

The first factor was the value of the substantive transaction—medical advice was more civil than football speculation. Second, civility was higher if the participants were likely to meet each other or to meet people who knew them both—chatting about bridge was civil because of the frequency that the chatters went to bridge tournaments. Third, the longer the same people chatted the more likely they were to be civil. These factors help determine civility in real space, too.

Parenthetically, the anonymity of the Internet may help avoid acts

based on prejudice. To illustrate: a web site can appear to be an American operation. A person who might be hostile to doing business with a Mexican, say, may accept a deal on its merits in ignorance that the other party happens to live in Monterey. Like many other markets, the Internet can “depersonalize” transactions in the sense that it helps us omit cultural garbage that still burdens much of society.

CONCLUSION

Custom was the foundation of the law for mercantile and maritime trade, and those practical arrangements should be the first recourse in questions about the Internet.

Excessive particularization and premature formalization waste current opportunities and impede future improvement—technical and commercial. We all must resist seductive proposals by bureaucrats—whether academic, governmental, or corporate—to replace cooperation with compulsion in their pursuit of some vision. Just let the people wheel, deal, cooperate, design, innovate, cross-fertilize, negotiate, tinker, and improve.

Let us, in the law, have broad horizons. We, in the law, ought to articulate the continuities, patterns, and verities. We ought to remind people that law is prospective, neutral, and general.

Our advice should be: solutions are found when everyone gets back to work, and when no one monkeys with the rule of law.

