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SYMPOSIUM ON THE INTERNET AND LEGAL THEORY

SYMPOSIUM EDITORS
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Dan L. Burk 943

The development of globalized digital networks offers the opportunity to explore the relationship between interlaced markets in digital goods and regulatory goods. The low marginal cost of networked electronic distribution can be expected to facilitate consumer “exit” from their own jurisdiction to seek more favorable prices for digital goods. This environment may cause a breakdown of the traditional rationale for intellectual property protection, as nations “race to the bottom” attempting to attract electronic commerce in digital goods. Such a “race to the bottom” can be curbed by international centralization of intellectual property regulation, but potentially by sacrificing beneficial consequences of international regulatory competition. The trade-off between these regulatory options should prompt us to reexamine the structure of international regulatory structures, as well as the desirable level of global harmonization of intellectual property law.

THE INTERNET IS CHANGING INTERNATIONAL LAW
Henry H. Perritt, Jr. 997

The Internet is changing international law because it is accelerating the erosion of the dominance of traditional sovereign states at the same time that it facilitates new institutional mechanisms for making, applying, and enforcing law. Sovereignty itself is becoming a diffuse concept, accommodating new kinds of nongovernmental organizations performing traditional sovereign functions. Democratization increases the potency of international law, and cultural diffusion and interpenetration of formal legal decisions and norms erode geographically based boundaries. The Internet accelerates all the phenomena shaping international law by making it easier to establish, access, and enforce norms. For the Internet to have desirable effects, there must be freedom of access to public
information and a competitive structure at every level of the “stack” of communications and content elements of the world’s telecommunications and information infrastructure. International freedom of information should be extended by decisional law and by national implementation of the core principles of the American Freedom of Information Act.

“CHAOS PREVAILING ON EVERY CONTINENT”: TOWARDS A NEW THEORY OF DECENTRALIZED DECISION-MAKING IN COMPLEX SYSTEMS

David G. Post & David R. Johnson 1055

Cyberspace represents a domain of human interaction that is as divorced from considerations of physical geography as any in human history. As we spend more and more of our time there, it will begin to stimulate new questions about, and insights into, the very fundamental role played by physical space, physical proximity, and physical power in legal and other rule-making systems. We have chosen to explore these questions through the lens of the theory of complex systems. We discuss one efficient method of finding optimal configurations of complex systems—what Stuart Kauffman calls “patching,” the division of a system into non-overlapping but coupled self-optimizing parts—and show that the efficiency of this problem-solving algorithm appears to depend crucially on the relationship between within-patch and between-patch spillover effects (“externalities”). Decentralized decision-making processes in socio-legal systems—systems of “competitive federalism”—may represent examples of this patching algorithm at work in the complex system of human rule-making institutions. We discuss the normative implications of this view for the design of such institutions where existing patch boundaries are being substantially perturbed (as is the case for interactions among geographically separated but newly connected individuals in cyberspace).

THE EMPIRE STRIKES BACK

A. Michael Froomkin 1101

Arguing that the common theme of the Burk, Post and Johnson, and Perritt papers is the relationship of the Internet to the causes and consequences of the rise of supra-nationalism, Professor Froomkin suggests that what was intended and promoted as a great anarchistic, liberating, democratizing technology may in fact spur a reaction so strong as to make the world significantly less democratic. Governments and vested interests may conclude that the only way to maintain their position is to band together with like-minded counterparts in other countries and enact multi-lateral treaties or vest increasing power in supra-national organizations. As a result, the power of existing democratic institutions could be reduced worldwide. Professor Froomkin dubs this “the great looming Internet irony.”

REGULATION OF THE INTERNET: THREE PERSISTENT FALLACIES

Jack Goldsmith 1119

In this essay, Professor Goldsmith contends that the principal papers each illustrate a fallacy that pervades the Internet regulation literature. He argues that the argument by David Post and David Johnson erroneously assumes that cyberspace is a place hermetically separate from the “real” world; that Dan Burk’s analysis of the Internet’s effect on
national copyright regulation rests on a common but incomplete understanding of how nations regulate transnational transactions; and that Dean Perritt's claim that the Internet will strengthen international law exemplifies the Internet literature's unjustified optimism about the promise of cheap, plentiful information. Professor Goldsmith claims that each of these errors results from focusing on what is new about the Internet at the expense of focusing on what is old about it.

THE POWER OF CHAOS

Roberta Katz 1133

In reviewing the Burk, Perritt, and Post and Johnson papers, Ms. Katz finds the source of the Internet's power as a social phenomenon in its chaotic diversity. The Internet is not now, and should not become, a unified system. People understandably try to force new phenomena into old paradigms but that can limit the Internet's potential and deny to us a valuable tool for examining again the age-old question, "what is law anyway?"

BEFORE CYBERSPACE: LEGAL TRANSITIONS IN PROPERTY RIGHTS REGIMES

Richard A. Epstein 1137

Technology innovations neither preclude nor require changes in the legal regimes that govern the creation of property rights or the enforcement of contracts. Where a system of exclusive private rights and contracts allows the continued operation of competitive markets, then normally no transition in legal rules is needed. The appropriate adjustments in legal rights can be funneled through changes in the terms of private contracts. But once technology gives rise to new network industries, then the appropriate benchmark becomes the historical law of common carriers, with its duties of universal access on nondiscriminatory terms. In these network industries, the choice of an optimal property regime will be both contested and uncertain. The Telecommunications Act of 1996 offers ample testimony to the mistakes in system design that follow from rapid fire technological innovation.

COPYRIGHTS IN CYBERSPACE—RIGHTS WITHOUT LAWS?

Niva Elkin-Koren 1155

The information market in cyberspace is shifting from a regulatory regime into a private ordering regime. Cyberspace facilitates such a regime by allowing information providers to distribute their works subject to contracts. These self-made norms are gradually displacing copyright rules and change the terms of access to information. Private ordering advocates argue that this emerging regime is superior to the copyright regime, and that priority should be given to terms of access created by contracts even when they conflict with copyright policies. This view is based on two seemingly different types of arguments: one is an economic argument and the other is based on political theory. This paper critically examines the arguments made by the two approaches and highlights their shared assumptions. It argues that contracts alone cannot secure public access to information on reasonable terms and cannot guarantee the vitality of the public domain. It therefore concludes that private ordering should be subject to scrutiny under copyright principles.
The premise of this essay is a prediction: the creators of intellectual products suitable for distribution on the Internet will soon come to rely less and less on copyright law to enable them to charge consumers who wish access to their products and more and more on a combination of contractual rights and technological protections. The essay argues that courts and legislatures should facilitate and reinforce that shift but should require that creators (and consumers), when setting up such "private" arrangements, abide by restrictions designed to protect the public interest.

THE LAW AND ECONOMICS OF INTERNET NORMS

Mark A. Lemley

A number of scholars have suggested that the law should defer to social norms on the Internet, either by abdicating its role entirely to cyberspace self-governance, or by carving out particular roles for nonlegal rulemaking. Professor Lemley challenges these assertions. He argues that Internet norms are elusive and rapidly changing, and that in most cases there is nothing like the consensus required for norm creation. He contends that Internet norms are likely to be inefficient, particularly when they are enforced by the underlying threat of exclusion from the network itself. Finally, Professor Lemley suggests that neither Net "vigilantes," judges, nor code itself can be relied upon to identify and enforce Internet norms with an appropriate sensitivity to efficiency and policy concerns.

THE MYTH OF PRIVATE ORDERING: REDISCOVERING LEGAL REALISM IN CYBERSPACE

Margaret Jane Radin & R. Polk Wagner

Much of the present discussion casts the debate about the form of governance for cyberspace in stark terms— "top-down" hierarchical rules versus spontaneous "bottom-up" coordination—with self-ordering based on contracts and private agreements rather than public laws appearing both preferable and more likely to evolve. Following up on arguments presented by Professors Fisher and Elkin-Koren in this symposium, Radin and Wagner point out that the dichotomy between top-down and bottom-up obscures that a self-ordering regime brought about by networks of contracts cannot stably exist without an established background of laws against which to enforce these agreements. They argue that cyberspace advocates should be debating the ingredients of good mixtures of private and public ordering rather than positing the choice between state control and anarcho-cyberlibertarianism. Because the enforcement of rules in cyberspace will depend largely upon the ultimate remedy of banishment, Radin and Wagner argue that such enforcement will test the restraint of territorial sovereigns to whom any banishment might be appealed; unless there is considerable agreement about baseline rules among territorial sovereigns, any self-enforcement in cyberspace may well be unstable. They therefore conclude that a necessary ingredient for self-ordering in cyberspace is the development of global minimal background standards of due process and public policy limits on private agreements—and that such
harmony has a better chance of emerging if advocates do not forget that contractual self-ordering cannot exist without it.

**THE INTERNET, SECURITIES REGULATION, AND THEORY OF LAW**  
*Tamar Frankel* 1319

The Internet has transformed the way we retain, transfer, and exchange information. The use of the Internet has already begun to change the way information about securities is disseminated and the way securities are traded, two activities regulated by the securities laws. This article addresses the question of whether and how the securities laws should be adapted to the use of the Internet, and more generally, to begin an inquiry on how we should think about adapting law to a changing environment of actors and actions subject to law. Professor Frankel suggests that law changing is surprisingly similar to the way new scientific theories are fashioned: conflicting with some parts and containing and reaffirming other parts of their predecessors. She then applies the generalizations to select changes in the securities acts that address the Internet environment, including the choice of adaptive mechanisms.

**SHOULD THE SEC REGULATE THE CYBER SECURITIES MARKET?**  
*A RESPONSE TO PROFESSOR FRANKEL*  
*Omri Yadlin* 1355

Professor Yadlin comments on Professor Frankel’s view that current SEC regulatory mechanisms are appropriate for governing the emerging Internet-based securities market. The traditional mechanisms may impede the evolution of an efficient cyber stock market. Laws limiting issuer and investor freedom of speech do not allow agents to interact as effectively as the Internet allows. Cooperation and interaction between the SEC and the market should be based on consent and on competition between regulators rather than on coercion.

**INTELLECTUAL PROPERTY AS PRICE DISCRIMINATION:**  
*IMPLICATIONS FOR CONTRACT*  
*Wendy J. Gordon* 1367

As people become enamored with the possible benefits of allowing price discrimination in contracts for intellectual goods, they should realize that traditional intellectual property law works by fostering price discrimination among customers. This simple fact has implications for federal pre-emption, and is a reminder of the complexity of the economic issues involved. Increasing a seller’s ability to price discriminate will often involve increasing his monopoly power, with dubious welfare effects.

**STUDENT COMMENT**

**PARADISE LOST BUT RECAPTURED: PROSECUTION HISTORY ESTOPPEL WEAKENED IN WARNER-JENKINSON CO. V. HILTON DAVIS CHEMICAL CO.**  
*Jeremy E. Noe* 1393

Courts apply prosecution history estoppel to limit how far the doctrine of equivalents can broaden a patent’s scope. In *Warner-Jenkinson*, the Supreme Court declared that the presumption that prosecution history estoppel applies may be rebutted by the patentee.
Mr. Noe argues that making the presumption rebuttable increases the uncertainty surrounding the scope of a valid patent, and thereby erodes the notice function of patent claims. To remove this burden of uncertainty, Mr. Noe suggests that the Federal Circuit narrowly and clearly confine the manner in which the patentee can attempt to rebut the presumption, bounding any such attempts by the public record.
SYMPOSIUM ON
RACE AND CRIMINAL LAW

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