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On the net, no one knows you are a dog!

The authority of law in times of cyberspace

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The global information infrastructure, usually referred to as the Internet, is a rather peculiar development. First, it is big. According to the current tally, the Internet connects some 20+ million computer and networks around the world. And people are using it. The US National Science Foundation Network, the “backbone” of the American part of Internet, reported its last usage statistic (they stopped doing statistics thereafter) in April 1995, when during that month alone 13.530 billion characters were sent over the net, over 3.518 billion characters transmitted only for people “surfin’” around. Second, the network is culturally popular. For a couple of years now, it has time and again seized the attention of the media and the public. It emerged in matters of months at the beginning of the nineties, when network use reached a critical mass—not among the public at large, of course, but among young, trendy opinion-leaders, who coincidentally also happen to be mostly white, male, educated and affluent.

Some think the net has created a unique culture, an instance of postmodernism more honest to its canon than other existing representations of it. Others argue that postmodern culture and society have already taken control over the enormously flexible structure of the net, thereby shaping it accordingly.¹

“On the net” has become the stereotypical answer to the question where things are happening. The Internet is a household-word. Listing email addresses on business cards is *tres chic*. Even lawyers have email accounts.²

Life, it seems, must be made bearable by adding the prefix “Cyber” to everything. Indeed, there is a term describing this phenomenon of cyber-philia, net-mania and web-phoria: Cyber-hype.³ Some early net advocates have recently changed sides and now attack the information infrastructures for not delivering what in cyber-hype everyone is ex-

1. *Lorenzo C. Simpson*, *Technology, Time and the Conversations of Modernity* (1995); *Richard Coyne*, *Designing Information Technology in the Postmodern Age* (1995); *Wilhelm Steinmüller*, *Riskante Netze* (1990)

2. Lexis, through its Counsel Connect subsidiary, offered free email account, to which West Publishing responded with a free email address and a personally edited web page for free for every lawyer.

3. Cf. *Mayer-Schönberger*, *Revolution am Datenhighway?*, unpublished manuscript (on file with author).

pecting. The battle intensified with hacker hero Clifford Stoll's latest book⁴, a polemic frontal assault against the net.

But I do not, for the purpose of this essay, want to indulge into superficial Cyber-bashing and instead focus on one aspect of cyberspace: its connection with and influence on the authority of law. My attack then, if it classifies as an attack at all, is one on a meta-level, an indirect assault, playful, imaginary and *un-real*, but an assault nevertheless.⁵

Setting the stage

First the "authority of law" and its role in our society: To ease a rather difficult issue, I will use, knowingly, a rather simplistic set of assumptions⁶: "Doing law" is a social integratory tool, a kind of practice⁷, a custom, through which we all participate in a largely formalized, constantly reiterating and self-replicating⁸ exchange of what is right and what is wrong. It is an act of continuous repetition of bits of in itself mostly formalized arguments within a never ending stream of dialogue⁹ that forms what we so happily label the "legal discourse". "Doing law" then strengthens, through it, its own authority and the authority of what we mystifyingly call the law.¹⁰

The Information Infrastructure, on the other hand, is a technological artifact. But it is also a communicative space, and like every communicative structure, not a "neutral container"¹¹.

4. *Clifford Stoll*, *Silicon Snake Oil* (1995).

5. This essay can not obscure it's (quasi-)poststructural bend. *Baudrillard*, *Simulations* (1983).

6. They are in its communicative-procedural perspective based on *Habermas*, *Theorie des kommunikativen Handelns*. For someone more dogmatically inclined: on the procedural aspect of law and its application I point to *John Hart Ely*, *Democracy and Distrust* (1981).

7. *Kelman*, *A Guide to Critical Legal Studies* (1987), at 13; *Alexander Somek*, *From Kennedy to Balkin: Introducing Critical Legal Studies from a Continental Perspective*, 42 *Kansas L.Rev.* 759 (1994), at 773-774.

8. *Somek*, *Introduction*, at 779.

9. *Somek*, *Introduction*, at 769, citing *Ronald Dworkin*, *A Matter of Principle* (1985), at 119.

10. *Derrida*, *Deconstruction and the Possibility of Justice*, 11 *Cardozo L.Rev.* Nr. 5 (1990). [deutsch: *Derrida*, *Gesetzeskraft - Der "mystische Grund der Autorität"* (1991)].

11. *Samarajiva*, *Surveillance by Design: The Public Networks and the Control of Consumption*, in *Silverstone (ed.)*, *Communication by Design*, Oxford University Press (forthcoming); *Gottdiener*, *Recapturing the Center: A Semiotic Analysis of Shopping*

To be sure, I do not advocate a simple model here of the technological structure impacting on society, like ricocheting billiard balls.¹² or that society itself molds the technological structures, that technology is an expression of culture.¹³ Rather, I caution for a more indeterminate view, “social constructivism”¹⁴, in that technological structures, like the net, and society influence each other without imposing a certain and determinate change or outcome on one another.¹⁵ The information infrastructure then, is a communicative space¹⁶, that—itself influenced by society—functions as a “material force that reflects back upon social processes”¹⁷.

These two groups of assumptions on law and communicative structures provide the stage for the following “play”, in four acts, each representing a particular outlook people advocate for on and about the net:

Malls, in *Gottdiener - Lagopoulos (ed.)*, *The City and the Sign: An Introduction to Urban Semiotics* (1986), at 288; *Soja*, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (1989); *Weisman*, *Discrimination by Design: A Feminist Critique of the Man-made Environment* (1992).

12. This “impact”-theory founded by Ogburn is today largely discredited, and justifiably so. *Ogburn*, *The Influence of Invention and Discovery, in Recent Social Trends* (1933), at 122ff; critical on Ogburns approach f.e. *Daniels*, *The Big Questions in the History of American Technology*, 11 *Technology and Culture* 1 (1970); somewhat more refined *Kern*, *The Culture of Time and Space, 1880-1918* (1983); *Meyerowitz*, *No Sense of Place: The Impact of Electronic Media on Social Behavior* (1985).

13. *Williams*, *Television, Technology, and Cultural Form* (1975); *Schumacher*, *Small Is Beautiful: A Study of Economics as if People Mattered* (1975); *Kohr*, *Overdeveloped Nations: The Diseconomies of Scale* (1976); *Winner*, *Autonomous Technology: Technics-out-of-Control as a Theme in Political Thought* (1977).

14. This is the title of the central work on this theory by *Bjiker - Hughes - Pinch (ed.)*, *Social Construction of Technological Systems* (1987); see also *Fisher*, *America Calling - A Social History of the Telephony to 1940* (1992), at 16.

15. See also *Marvin*, *When Old Technologies Where New: Thinking About Electric Communication the Late Nineteenth Century* (1989); *Fisher*, *America Calling*, at 17.

16. See generally *Mayer-Schönberger*, *Infrastrukturgestaltung durch Informationssordnung* (1995), at 9ff.

17. *Samarajiva*, *Surveillance by Design*. Soja calls it the “socio-spatial dialectic”: *Soja*, *The Socio-spatial Dialectic*, 70 *Annals of Ass. Amer. Geogr.* 175 (1980); generally *Simpson*, *Technology*.

Act One: Collision Course

The stage is empty, except for a middle-aged white male in conventional dress, sitting on a better-than-average stool in the middle, talking to himself, over and over again, advancing arguments which sound somewhat similar. They are combined without any obvious order to a long stream of mumbled utterance. A dialogue is taking place, and the repetition has, it seems, an encouraging, even energizing effect upon the actor. Him I want to call the "authority of law".

Enters from the left an object of strange appearance, a person veiled in white linen, undefined and undefinable, headed towards the actor. "Cyberspace" this is.

Slowly first, then harder and intense, they start to quarrel, then to fight. The confrontation ends with total victory. "Authority" returns to its chair, starting his recitation anew, now with "Cyberspace" following suit on all fours, like a faithful pet trailing its master.

The first scenario sees Cyberspace as an open challenge to the authority of law. Consequently, people viewing the development of cyberspace in this manner formulate rather bluntly: "The net is illegal."¹⁸ As a challenge to the authority of law, it must be brought in line, it must in time be subjugated under the law. And its subordination symbolizes the acceptance of the law as *the* authority and of cyberspace existing under it, neither next to, nor above it.¹⁹

In this scenario, the positions are clear. Cyberspace is undermining existing authority. The consequential subordination is a necessary symbolic act within the discourse of law, to re-enforce the authoritative claim of the law. Like any good Hollywood movie, even the outcome is predictable from the outset. The challenger is designated to loose the challenge. The authority not only remains intact but emerges re-enforced.

18. Verene Novotny, "Das Internet ist illegal!" - Interview mit Dr.Hans Zeger, ARGE Daten, NEWS 33/1995. Cf. critical *Ernst Brandl - Viktor Mayer-Schönberger*, Die Haftung von Online-Diensten für übermittelte Inhalte, *ecolex* 1996, p. 129-

19. Cf. the Communication Decency Act - which explicitly restricts speech and interaction only in cyberspace, but based on content. 47 U.S.C. § 609 et seq. What is so special about the CDA is that it is specifically targeted at the net, as an attempt to symbolically bring the information infrastructure under the authority of law. It is symbolic, because unquestionably do existing statutes extend to the net as well. The specific statute therefore does not serve a particular legislative purpose other than the subordination.

Act 2: Almost Dejavue

The beginning is familiar. The actor on its chair, reciting—„authority of law” at work. “Cyberspace” entering, a short moment of tranquillity, then tension slowly mounting, followed by struggle, fight, and battle. While both are struggling, “Cyberspace” is pulling a gun, firing a single shot. The “authority of law” is hit, falls over—dead. “Cyberspace” is dominating the stage, whistling to itself a new, original tune.

Victory of existing authority is only one of the possible outcomes. Some predict that instead of the newcomer, the “old system” is more prone to collapsing. Mitchell, for example, argues that Cyberspace will not create a new “legal system” or an “authority-facilitating” discourse.²⁰ Instead the information infrastructure already embodies through its technical components the complete set of rules, hard-coded.²¹ The physical and organizational structure of the net, exemplified through computer code, then is the new “set of rules” in the communicative space.

Accordingly, “Doing Law” is elevated to the level of system and infrastructure design: not lawyers and legislators, but technicians and network managers are the actors accentuating and effectuating the societal discourse on rules and limits. Under this conception, current authority of law is collapsing, and law with its discourse is being replaced through a deliberate process, at least in the domain of Cyberspace, by software and structural design.

Act 3: Ruling Rules

Same stage, same actor, same chair. Again, the veiled person appears from the left, but this time stops a couple of feet away from muttering “authority”. After a short brake, “Cyberspace” starts to chatter and mumble as well. Both remain on stage, independently acting, like a scene taken from a drama of the absurd, where the acting persons have nothing to share, nothing to exchange, where they themselves have no idea where they come from and where they are headed to.

Advocates of this scenario want to make us believe not that the net is outside the law and its authority, but that this really doesn't matter.

20. Mitchell, *City of Bits - Space, Place, and the Infobahn* (1995), at 111ff.

21. Mitchell calls these rules “coded conditionals”. Mitchell, *City of Bits*, 111.

They assume that it is possible to decouple in one society the formal discourse of “doing law” and the discourse happening on the net.

In its most radical conception, some see the net as an anarchic communicative medium, in which any regulatory intrusion is inapplicable²² or, even if tried, negligible.²³

However, in practice cyberspace is not bereft of any rules. On the contrary, people violating the unspoken and unarticulated rules of the net, the so-called “netiquette” are loosing their communicative voice. An example makes explicit the fact that cyberspace is not an anarchic domain.

In a system called LambdaMOO, one of the most popular recreational social virtual realities on the Internet, the participants, thousands of users from around the world, decided voluntarily to enact a “Constitution” of acceptable behavior together with enforcement and amendment mechanisms.²⁴

A related conception of the net as outside the law, argues for cyberspace to have decoupled itself from the “real life” discourse. Reality and virtuality are seen as coexisting next to but not interfering with each other, creating two domains, one real, one virtual and each retaining authority in its area.

According to this conception, rules of geographic proximity for example, work differently in the real and virtual community. My virtual neighbors, it is argued, are not the ones living next door, but the ones I

22. For the area of speech regulation based on content see *Rheingold*, Why Censoring Cyberspace is Futile, Computer underground Digest 6.40; *Lively*, The Information Superhighway: A First Amendment Roadmap, 35 B.C. L.Rev. 1067 (1994); *Note*, The Message is the Medium: The First Amendment on the Information Superhighway, 107 Harv.L.Rev. 1062 (1994); *Teree E.Foster/Viktor Mayer-Schönberger*, Regulating Free Speech and the Global Aspects of Information Infrastructure, in *Brian Kahin and Charles Nesson*, eds., *Borders in Cyberspace: Information Policy and the Global Information Infrastructure* (1996).

23. For a contention that this is true in the area of authority of copyright law on the Internet, see Clau-Dia, in *Pl@net*, November 1995, at 17.

24. The LambdaMOO consists of more than 20.000 objects and “rooms” through which people can stroll and in which they can interact virtually. A couple of thousand people use the MOO on a regular basis, with concurrent use being in between 30 and over 150 users at any given time, 24 hours a day, 365 days a year. *Bruckman - Curtis - Figallo - Laurel*, *Approaches to Managing Deviant Behavior in Virtual Communities*, Proceedings CHI '94, at 183.

meet on the net, because we share similar interests, we are mental neighbors.

In a recent actual case, lawyers have tried this line of argument in court. Two Californian residents, operating an electronic Bulletin Board System of sexually explicit pictures, for members throughout the United States, were tried for violating federal obscenity laws. The prosecution brought the case to court in conservative Memphis, Tennessee. The choice of location was deliberate. Obscenity is to be decided based on community standards. The lawyers for the defense, on the other hand, applying a theory of two domains, one virtual, one real, argued that the correct standard is one that focuses on the neighborhood in cyberspace. The Court thought otherwise and stuck to local Tennessee standards.²⁵

These three scenarios—side A wins, side B wins, it is a tie—of what happens when Cyberspace meets law's authority represent a view of the relation between the two sides that is rather static and binary in a dramaturgic sense: the two sides might clash, but they don't engage one another communicatively. It is framed in terms of total fight or utter self-autonomy, eternal peace or bloody war, if you will.

Such dramatic rigidity signifies a lack of thematic richness, and is a symbol of conceptual poverty. Against such a static backdrop one needs to juxtapose a conception of the relation between Cyberspace and the law that is more discursive, dialectic, taking better into account the exchange, the dialogue between the two sides, the theatrical communication going on.

Act 4: Dialogue and Discourse

Our familiar figures on stage, this time engaged in an intense dialogue, in which—it seems—"cyberspace" is speaking "authority"²⁶'s language. At least, our white male feels understood, encouraged, reassured. Over time, he gets himself into a state of euphoria, talking faster and faster, higher and higher, until he begins to sing, to chant a tune resembling the one sung by "Cyberspace" in the previous Act.

25. United States v. Thomas, 74 F.3d 701 (6th Cir. 1996). Cf the extensive documentation on the case available on the net at <http://www.eff.org/pub/archives>.

26. I use here "law" and "authority of law" as interchangeable metaphors. In real life, of course, they are not. But for the purpose of positioning one vis-a-vis the other in a theatrical context, this blurriness is acceptable.

In the previous Acts we have seen authority being challenged, but re-enforced, challenged and destroyed or left untouched. Now, we look at authority transformed.

In a number of ways cyberspace is re-enforcing existing structures of authority: For instance, it widens the gap between the rich, the well-educated, the urban on the one hand and the poor, the illiterate, the provincial²⁷, on the other. It divides society between information-haves and information-have-nots.

But, at the same time cyberspace fundamentally displaces existing structures of authority, largely—as paradoxically as it might sound—by promoting it. In a very metaphorical sense, cyberspace is a trojan horse. I will attempt three examples:

(1) Individualized, but not individual

Modern information infrastructures provide a bidirectional communicative link. People can, technically, engage each other in intense civic debate on issues of current affairs. Referring to the Habermasian idyll of discourse by engaged and engaging *citoyen*²⁸, a number of authors²⁹ have pointed at this quality of the net as an eternal spring, a rejuvenating force of the antic *agora*. Through the net it is, we are told, now technically feasible to replace uni-directional mass-media with a bi-directional global electronic town hall.

The truth, however, is more mundane. In an economy of mass production, mass media fulfills its specific role of facilitating the generation of economic demand.

But mass production has evolved into the model of flexible production, in which through techniques like Just-in-time assembly (JIT) and Computer-integrated-manufacturing (CIM), supply is produced to meet specific demand. Communication then is not necessary to generate, but to relay information of specific demand to production facilities. Cyberspace offers this bi-directionality.

At the beginning, people will listen to individual information feedback over the net. Quickly, however, this “civic discourse”, under the pressure of sheer numbers, must degenerate to a formalized routine,

27. This is one of Stoll's main criticism. *Stoll*, Silicon Snake Oil. See also *Mayer-Schönberger*, *Infrastrukturgestaltung*.

28. *Habermas*, *Strukturwandel der Öffentlichkeit* (1961).

29. *Mitchell*, *City of Bits*; *Bruck*, *Communications for and against democracy* (1988).

that only simulates substantive discursive engagement. The White House computer responds automatically with a polite boiler-plate email-reply and immediately discards the message received without ever anyone reading it. Just as well, because most messages to the White House are sent by automatic mailers anyway. Two machines talking with each other, keeping alive in a highly formalized manner the idea of a people engaged in civic discourse.

Software in use by other luminaries is even more sophisticated. Boiler-plate answers become so customized, that automatically generated electronic mail replies are difficult to distinguish from human ones.³⁰ The electronic *agora* then is a meeting place of machines, exchanging polite messages with each other and with human beings who don't mind.

What is troubling about this formalized, automatic *agora* is the illusion it creates of the actuality of wide-spread participation in civic and other discourse. It ostensibly realizes dialogue, while at the same token relegating it to a content-free practice of message exchange. In the short run, this formalization will strengthen through the now "enhanced" discourse the overall authority of law. But in the long run, it is prone to displace the very foundation it is built on.

(2) Authentic, but not original

The emphasis of form over content extends to the question of content authenticity—both for the subject and the object.

Authenticity in general loses much of its connotation in cyberspace. Made-up news stories have repeatedly surfaced on the net: of an Eskimo chess player who successfully defeated three Russian chess masters and of a rare disease causing human skulls to explode in cases of extensive brain activity.

What is much more important than these spoofs, however, is the reaction of the people on the net: They engage in discussion on the story, they even question the factuality of it, but they do not care to find out the truth. Usenet newsgroups have debated the Eskimo chess story a half dozen times over the last year, it is an old-time favorite and appears regularly. Every time the debate starts anew, no one cares that only a couple of months earlier the case had already been settled.

30. Software for creation of such boiler-plate answers, ephemerally referred to as document assembly, is "hot".

In addition to caring little about the authenticity of information, people on the net hardly worry about the authenticity of the communicative partner they interact with. People in cyberspace are known by their network names. Nobody can be certain whether the other, the communicative partner, is indeed the one she pretends to be, or whether the entire communication, the whole interaction has been a farce.

In 1994, computer human interaction specialist Brenda Laurel conceded that while participating in a social virtual reality on the net, the MediaMOO, she had a half-hour wild, hot and steamy flirt with a bartender in a virtual bar until a third person entered the virtual room and told her that the virtual “bartender” was a simple software program, responding automatically to her comments. Laurel then admitted that she felt betrayed, not by the software program, but by the human being depriving her of the illusion of a flirt.³¹ The simulacrum of the flirt is as good as the real thing.

(3) *Doing and Possessing*

A third example is devoted to the issue of process in cyberspace. One of Simpson’s projects is to show that what he refers to as “contraction of time” in cyberspace, a “culture in which space ‘displaces’ time”³², causes the devotion to process. He argues that despite our deep-rooted cultural inclination to posses, we now prefer to consume. (Post)-Capitalism and cultural postmodernism are displacing in our society the mode of ownership and possession with the mode of consumption, process is succeeding status and functionality is the “name of the game”.³³ For Simpson, “in the era of hyperreality we become merely terminals of multiple information networks; we are constituted by our place in information flows. [...] Everything is seen in functional terms.”³⁴

The process-orientation will cause, I believe, a profound transformation of the authority of law. Despite the fact that our legal discourse, “doing law” in general is already seen as a process, the “rules”

31. Laurel at the panel “Approaches to Managing Deviant Behavior in Virtual Communities” at CHI ‘94 Boston.

32. *Simpson*, *Technology*, at 147.

33. *Simpson*, *Technology*, 142-144

34. *Simpson*, *Technology*, 144, 151.

it produces, and the societal status it creates are static. In the future not the possession will constitute authority, only process.

Already, in the field of copyright—for over a century a stronghold of property and symbolized by ownership—discussions have drastically shifted to envisioning transaction-centered systems, in which the taking place of a legal transaction is valued higher than the actual property rights involved.³⁵

Act Four then is the postmodern version of the interplay between legal authority and cyberspace, in which Balkin's legal discourse, the "continuing series of struggles between various sets of opposed ideas"³⁶, is facing a hidden challenge more subtle, encroaching and pervasive than the ones of Acts One to Three. What is happening is not an open feud, a public undermining of existing authority. To speak in terms of the play: there is no open struggle, on the contrary, there is ostensible understanding. The formalized practices and de-naturalized discourses reiterate their subordination under existing authority, only to ultimately displace it with a set of its own.³⁷

Let me sum up: Cyberspace will not demolish the authority of law, but rather reinvent it, and elevate it, if you want, to its own level of hyper-reality. The Act of discourse then, the dialogue on stage, or to remain in terms of virtual game play, the "game" is not "over", we have just reached "the next level".

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35. See eg *Brunnstein - Sint (ed.)*, Proceedings KnowRight '95 (1995).

36. *Balkin*, The Crystalline Structure of Legal Thought, 39 Rutgers L.Rev. 1 (1986), at 3.

37. This is Habermas, and not Gadamer, no doubt. *Simpson*, Technology, at 6.