



UiO : University of Oslo

Lex Informatica and Cyberspace

JUS5650 – Spring 2017

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30.01.2017



Course overview

- Lex informatica and cyberspace
- Self-regulation and co-regulation
- Cybercrime
- Dispute resolution
 - Jurisdiction and enforcement
 - » Essay question
 - Applicable law
 - Alternative dispute resolution
 - » Submit draft term paper
- Legal risk management
- Essay workshop
- Enforcement in cloud computing
- Cyberspace and information security
 - » Submit final term paper

Agenda

- Introduction
 - Normative cyberspace theory
 - Lex informatica
- Theory and concepts
- Problems
- Implications
- Examples and case studies

NORMATIVE CYBERSPACE THEORY

Digital libertarianism

“Information wants to be free” (Stewart Brand)

“The Net interprets censorship as damage and routes around it” (John Gilmore)

Declaration of independence of cyberspace

“Your legal concepts ... do not apply to us”

“You have no sovereignty where we gather”

“... nor do you possess any methods of enforcement
we have true reason to fear”

John Perry Barlow

<https://projects.eff.org/~barlow/Declaration-Final.html>

Digital realism

- The internet presents no serious difficulties, so the “real space” “rule of law” can simply be extended into cyberspace, as it has been extended into every other field of human endeavor
- No distinction between actions in the “real” world and actions in “cyberspace” — they both have territorial consequences
- The medium that transmitted the harmful effects is irrelevant

Digital realism

- **Easterbrook:**

“When asked to talk about “Property in Cyberspace,” my immediate reaction was, “Isn’t this just the law of the horse?” I don’t know much about cyberspace; what I do know will be outdated in five years (if not five months!); and my predictions about the direction of change are worthless, making any effort to tailor the law to the subject futile. And if I did know something about computer networks, all I could do in discussing “Property in Cyberspace” would be to isolate the subject from the rest of the law of intellectual property, making the assessment weaker.

This leads directly to my principal conclusion: Develop a sound law of intellectual property, then apply it to computer networks.”

- There is no need to develop a “cyber-specific” code of law

- **John Goldsmith:**

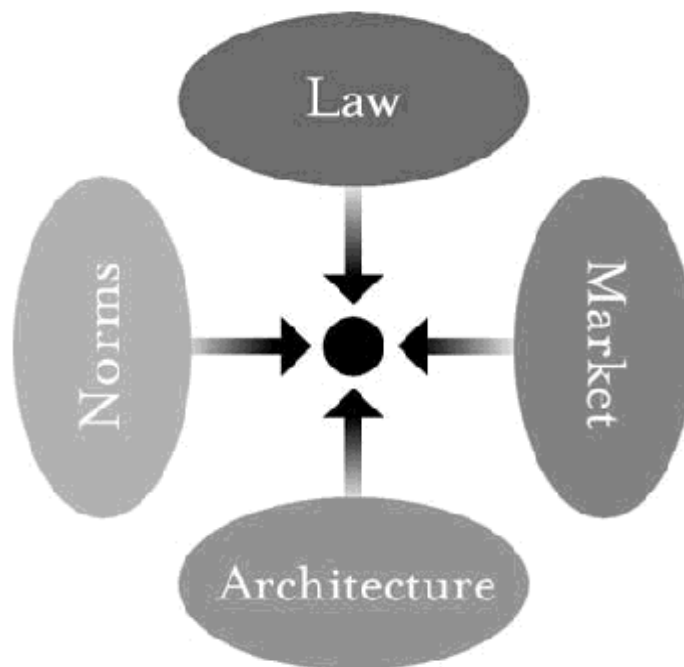
“The territorial effects rationale for regulating these harms [in internet cases] is the same as the rationale for regulating similar harms in the non-internet cases”.

- A traditionalist, conflict of law standpoint
- Regulation of cyberspace is feasible and legitimate from the perspective of jurisdiction and choice of law

LEX INFORMATICA

Lex informatica

- From lex mercatoria to lex informatica
- The regulatory role of technology
- Code is law



Lex informatica

	Legal regulation	Lex informatica
Framework	Law	Architecture standards
Jurisdiction	Physical territory	Network
Content	Statutory/court expression	Technical capabilities
Source	State	Technologists
Customization	Contract (negotiation)	Configuration (choice)
Enforcement	Court	Automated, self-execution



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HAPPENING NOW: World Economic Forum Session On Threats To Global



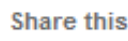
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Google ordered to remove Max Mosley sex party images

BY ALEXANDRIA SAGE

PARIS | Wed Nov 6, 2013 12:17pm EST

3 COMMENTS



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Nov 6 (Reuters) - A French court ordered Google on Wednesday to find a way to remove recurring links to nine images of former motor racing Formula One chief Max Mosley, who was photographed in 2008 at an orgy with prostitutes.

The civil dispute in the Paris Superior Court relates to photographs of Mosley published by the defunct London British



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Google to block abuse images

Web searches for child abuse images will be blocked for the first time by Google and Microsoft after mounting pressure. New software is to be introduced that will automatically block 100,000 "unambiguous" search terms which lead to illegal content.



Latest ITV News reports



Dramatic new steps will make internet safer for children



Search engines step up to the plate with reforms

2:25 PM, MON 18 NOV 2013

Microsoft: Online abuse images 'an evolving problem'

Microsoft's Nicola Hodson said online child abuse content is "an evolving problem", making it "difficult to say whether anyone has done enough".

Ms Hodson told ITV News: "There is always much more to do, so we welcome the focus and we

**The answer
to the machine is
in the machine
(Charles Clark)**

THEORY AND KEY CONCEPTS

Lex informatica

- American theorists:
 - Lessig, Reidenberg, Boyle
- European theorists:
 - Fiedler, Schartum, Magnusson Sjöberg
- Different focus
 - Europeans focus on translation of legal norms into software and accompanying issues for rule of law (*Rechtssicherheit*)
 - Americans focus on effect of software on regulating behaviour
- United in their underlying concerns
 - Software/code matters
 - Lawyers must get involved in processes of software development and standards setting

Conceptual issues:

Code and lex informatica

- Code (Lessig)
 - Code is law
 - determine what users can or cannot do
 - Ambiguous – sometimes mere software, sometimes software and protocols ... hardware too?
 - Cf. Greenleaf's preference for "architecture"
 - "Information system"?
- Lex informatica (Reidenberg)
 - "Set of rules for information flows imposed by technology and communication networks"

PROBLEMS

Lex and lex informatica

- Symbiosis of law and lex informatica
 - Law may encourage development of lex informatica
 - Law may sanction circumvention of lex informatica
- Important examples:
 - Data protection legislation with respect to PETs (privacy by design)
 - IPR legislation with respect to DRMs (digital rights management system)

Lex informatica and technological determinism

We are determined by technology

- Our behaviour is constrained and regulated by technology
- Technological **determinism**

We determine technology

- “With respect to the architecture of cyberspace and the worlds it allows, we are God” (Lessig)
- Technological **voluntarism**

IMPLICATIONS

Basic premises

Technology

1. is not immutable but plastic
2. is not value-neutral

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From the WSJ

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4:33 pm

Jan 23, 2014

SECURITY

Schmidt Says Encryption Will Help Google Penetrate China

ARTICLE

COMMENTS (5)

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By Rebecca Blumenstein

Davos, Switzerland – [Google](#)**GOOG +4.01%**

Chairman Eric Schmidt said the company is intent on using encryption technologies to penetrate countries with strict censorship rules, such as China and [North Korea](#).

"It is possible, within the next decade, using encryption, we would be able to open up countries that have strict

Google Chairman [Eric Schmidt](#). —Bloomberg News

Implications

Need to rethink traditional regulatory strategy

- More emphasis on “bottom-up” regulation?

More emphasis on setting of technical standards

- Also by legislation

Legislators

- Need to engage more directly with way in which information systems are hardwired
- Directive 2016/1148 concerning measures for a high common level of network and information security across the EU

EXAMPLES AND CASE STUDIES

Case study 1

Privacy enhancing technologies

- Most data protection laws contain little direct support for PET use
- Article 17 and recital 46 of Data Protection Directive are concerned *prima facie* with security measures

Privacy by design

- “‘Privacy by design’ and ‘privacy by default’
 - ... [has become] essential principles in EU data protection rules
 - this means that data protection safeguards should be
 - built into products and services from the earliest stage of development, and that
 - privacy-friendly default settings should be the norm –
 - for example on social networks or mobile apps.”
- » **European Commission – MEMO/14/60 27/01/2014.** Data Protection Day 2014: Full Speed on EU Data Protection Reform
- » **General Data Protection Regulation of 2016.**

Case study 2: DRMs

- Digital rights management systems
 - potentially privacy-invasive
 - limit freedom to choose our own actions



Circumvention

- Judgment in Case C-355/12 Nintendo and Others v PC Box Srl and Others
 - Circumvention of protection systems of “DS” consoles and “Wii” consoles.
 - Protection and recognition systems are installed to prevent the use of illegal copies of video games.

Circumvention



EU court rules that it may be lawful to circumvent console protections

By Tracey Lien on Jan 23, 2014 at 8:30p

Judgment in Case C-355/12 Nintendo and Others v PC Box Srl and Others

Ruling:

- “It is for the national court to determine whether other measures or measures which are not installed in consoles could cause less interference with the activities of third parties or limitations to those activities, while still providing comparable protection of the rightholder’s rights.”
- “The national court may, in particular, examine how often those devices, products or components are in fact used in disregard of copyright and how often they are used for purposes which do not infringe copyright.”

Thank you!

Note:

Some of the slides are revised versions of Tobias Mahler's slides presentation for JUS 5650 Spring 2016.