JUR 5630 – 2010
Lecture 12
Lex informatica and cyberspace (I)
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1. Disposition

- History of Internet development and emergence of cyberspace
  - Changing nature of Internet
- *Lex informatica* and cyberspace
  - Theoretical approaches to nature of regulation of cyberspace
- Implications for Internet governance
  - What role should be played by legal regulatory processes?

2. Characteristics of cyberspace

- Inherently global & flexible; loose, fragmented, horizontal control
- Open/non-proprietary; low entry barriers
- Supports one2one and one2many communication
- Largely indifferent to public/private distinction and geopolitical boundaries

NB. These characteristics are largely result of basic "code" or architecture of Internet as communications network, and fact that this code is built upon "end-to-end" principle

3. Trends in cyberspace development

- Growing commercialisation
  - military>academia>non-profit social groups>business/e-commerce
- Increasing State dirigism
- Increasing organisational empowerment at some expense to individual empowerment
- Less privacy(?)

4. Digital libertarianism

- Tenets:
  1. "Information wants to be free" (Brand)
  2. "The Net interprets censorship as damage and routes around it" (Gilmore)
  3. "On the Internet no-one knows you're a dog" (New Yorker magazine)
  4. "Your legal concepts … do not apply to us" (Barlow)
  5. "You have no sovereignty where we gather" (Barlow)
  6. "… nor do you possess any methods of enforcement we have true reason to fear" (Barlow)
- Note "anti-law" theme

5. Digital realism

- Critical of digital libertarianism's anti-law approach and argues that many of its assumptions are PITS ("PieInTheSky")
- Digital realism = important pt of departure for "lex informatica" theorists.

6. Lex informatica (l.i.)

- Best-known theorists are American: Lessig, Reidenberg, Boyle
- Their central work on point published in late 1990s

- Regulatory importance of software already recognized by some Europeans (Fiedler, Schartum, Magnusson Sjöberg) but different focus to American theorists
    1. Europeans focus on translation of legal norms into software and accompanying issues for *Rechtssicherheit*
    2. Americans focus on effect of software on regulating behaviour
    3. Both are united in their underlying concerns, especially that (1) software/code matters; (2) lawyers must get involved in processes of software development and standards setting
- Lessig's notion of "code" is ambiguous – sometimes mere software, sometimes software and protocols … Hardware too?
    - Cf. Greenleaf's preference for "architecture";
    - What about "information system"?
- Reidenberg: l.i. = "set of rules for information flows imposed by technology and communication networks"

7. Lex *vs.* lex informatica

- L.i. is distinguished from "legal rules". Note parallels set out in *Texas L Rev* article, p. 566
- L.i. may constrain or replace law (is l.i. thereby threat?)
- Main strengths of l.i. relative to law:
    1. Jurisdiction (l.i. tends to transcend geopolitical boundaries)
    2. Flexibility (customised solutions may be reached with minimal effort)
    3. Enforcement (automated and ex ante),
        - Cf. Reidenberg "States and Internet Enforcement" (2004)
- NB. "The power of Lex Informatica to embed non-derogable, public-order rules in network systems is not benign" (Reidenberg)

8. Lex *and* lex informatica

- Symbiosis of law and l.i.:
    1. Law may encourage development of l.i.
    2. Law may sanction circumvention of l.i.
- Important example: IPR legislation with respect to DRMS; cf. data protection legislation with respect to PETs

9. Lex informatica and technological determinism

- Ambiguous relationship betw. l.i./code theories and technological determinism:
- 2 messages:
    1. we are determined by technology (in sense that our behaviour is constrained and regulated by it);
    2. we determine technology and should be aware of that (technological voluntarism)
        - "With respect to the architecture of cyberspace and the worlds it allows, we are God" (Lessig)
- Basic premises are that technology is not immutable but plastic, and that technology is not value-neutral

10. Implications

- Need to rethink traditional regulatory strategy; more emphasis on "bottom-up" regulation?
- More emphasis on setting of technical standards – also by legislation; must privacy law engage more directly with this process?
- Who sets those standards today?
- In terms of safeguarding privacy interests, how much are DPAs involved?