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LAW IN THE DIGITAL ERA

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Abstract

This paper revisits the discussion on “Cyberanarchy” between the unexceptionalists (with Jack Goldsmith as their spokesman) and the regulation-skeptics (represented by David G. Post). The latter’s “scale matters” thesis is illustrated briefly for copyright law, privacy and freedom of expression. The conclusion is that scale matters indeed, and that “old” legal solutions need reconsideration.

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1. Introduction

The fundamental questions that were raised in the early days of the Internet remain unresolved; only the vocabulary used, and the focus of the questions has changed somewhat. Back in 1996, John Perry Barlow famously declared the Independence of Cyberspace.¹ A few years later similar ideas re-emerged when rights were claimed for Avatars in virtual worlds.² In opposition to recent initiatives in copyright enforcement, the same ideas echo.³ Is it true that the Internet, Cyberspace, the information superhighway, or virtual worlds for that matter, should be seen as separate realities, parallel universes,⁴ where law does not apply, should not apply, or even if it does and should, cannot be effectively enforced?

After at least 15 years of attempted regulation and enforcement, some would consider it time to take stock. However, my aim in this paper is more modest. Due to limitations of time and space, the scope of this paper is limited to indicating some of the fundamental challenges that the law is faced with in the digital era. I will revisit the discussion on "Cyberanarchy" between the unexceptionalists (with Jack Goldsmith as their spokesman) and the regulation-skeptics (represented by David G. Post), but I will aim to approach any unsettled questions with a more contemporary perspective. Ultimately, "we", in the physical world, are still "here" and the Internet is still "there". Regulation and enforcement are problematic, but "we" are still going strong.

Section 2 of this paper will briefly summarise the Goldsmith-Post-debate, and will then outline the strengths and weaknesses of each position. In Sections 3, 4 and 5, illustrations of Post's "scale matters" thesis will be discussed briefly. This paper will conclude with a short list of challenges for the law.

2. The Goldsmith-Post debate

In 1998 "Against Cyberanarchy" by Jack Goldsmith appeared in the *University of Chicago Law Review*.⁵ In this thought-provoking article, Goldsmith argues that there is nothing fundamentally different between communication mediated by the Internet on the one hand, and communication mediated by more traditional means on the other. It is still a matter of human beings of flesh and blood communicating with other human beings of flesh and blood, all behind their computing devices somewhere in the physical world of bricks and mortar. Nothing new under the sun, so to speak. Law has evolved to regulate communication between people, and international private law and international criminal law deal with issues concerning cross-border activities.

¹ J Barlow, "A Declaration of the Independence of Cyberspace" (1996) available at <https://projects.eff.org/~barlow/Declaration-Final.html> (accessed 23 November 2012).

² R Koster, "Declaring the Rights of Players" (27 August 2000) available at <http://www.raphkoster.com/gaming/playerrights.shtml> (accessed 23 November 2012).

³ Anonymous, "Operation Blackout" (20 November 2011) available at <http://www.youtube.com/watch?v=M9iOSg9CHTI> (accessed 23 November 2012).

⁴ Reminding one of the ideas expressed by Carlos Castaneda's protagonist Don Juan in: C Castaneda, *A Separate Reality: Further Conversations With Don Juan* (New York: Simon and Schuster, 1971).

⁵ J Goldsmith, "Against Cyberanarchy" (1998) 65 *University of Chicago Law Review* 1199-1250.

This is not to say that application of the law is always straightforward or uncontroversial. Cross-border application of the law of one country may lead to so-called spill-over effects in other countries. It may turn out to be impossible to enforce the law. And it may very well be that, theoretically, more than one national legal system applies to one legal problem, possibly resulting in contradictory results. All this is "the bread and butter" of international private law and international criminal law. These issues arise, whether the communication is mediated by the Internet, by mail, telephone or even smoke-signal. The transactions are functionally equivalent.

In 2002 an article entitled "Against Cyberanarchy" was published by David G. Post in the *Berkeley Technology Law Journal*.⁶ As the title indicates, Post argues a point which states exactly the opposite of Goldsmith's paper. His main thesis is that "scale matters". In other words, communication on the Internet takes place on such a different scale compared to communication mediated by more traditional means, that it becomes a completely different matter. A quantitative difference, when big enough, turns into a qualitative difference - the move from the pre-Internet era to today's digital era serves as one such example of a scale-changing occurrence. It is worthwhile to examine Internet related legal questions from this "scale matters" perspective. This author agrees with Post's thesis which maintains that a fundamental restructuring of the old solutions to similar offline issues is required in the face of the challenges that Internet-mediated communications pose to the law. In the next three sections of this paper, I will provide support for Post's "scale-matters" thesis by employing three core areas of Internet law today: Copyright, privacy and freedom of speech, chiefly from the perspective of my own legal system, that of the Netherlands. I will contrast the situation from the time before the Internet, the analogue era, with the situation in the digital era. I will argue that a fundamental reconsideration of the legal solutions devised to cope with issues which arose in the analogue era is needed to meet the corresponding issues arising today on a different scale in the digital era. The issues are not functionally identical and call for separate legal solutions.

3. Copyright law

Copyright law prohibits publishing, copying and distributing creative works without permission of the copyright holder.⁷ However, exceptions exist,⁸ so that temporary copies can be made,⁹ and so that the public may utilize copyrighted works for

⁶ D Post, "Against "Against Cyberanarchy"" (2002) 17 *Berkeley Technology Law Journal* 1-23.

⁷ Articles 6 and 9 Berne Convention; art 6 and 8 WIPO Copyright Treaty; s 16 of the UK Copyright, Designs and Patents Act 1988, § 106 U.S. Copyright Law; art 1 Dutch Copyright Law (*Auteurswet*). See also art 2, 3 and 4 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive).

⁸ Article 5 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive).

⁹ Section 28A of the UK Copyright, Designs and Patents Act 1988; art 5.1 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive).

research and private studies,¹⁰ for criticism, review and for news reporting.¹¹ These allowances are collectively referred to as "fair use" exceptions.¹²

"Downloading" *avant la lettre* existed long before the Internet. Recording music from the radio on audio-cassettes, recording films from television on VHS-cassettes, and photocopying books borrowed from the library were all actions which took place in the analogue era. These were invariably expensive and/or time-consuming processes, leading to a serious loss of quality in the copy. "Distribution" of protected works had a physical component whereby tangible copies were literally passed onto others.

In the digital era, however, downloading is instant, and produces exactly the same quality as the original. Moreover, many copyrighted materials are available for free to wherever a person happens to be with his or her smartphone, tablet or laptop computer. Thus, publishing, copying and distributing have evolved and become very different from their analogue counterparts. The commercial interest of copyright-holders has produced some developments in copyright law, or rather, in the way it is enforced. Litigation against various ways of facilitating file exchange established that facilitating and profiting from copyright infringement by others is unlawful.¹³ Because cooperation of Internet Service Providers (ISPs) is needed to enforce any measures against infringers or to block users from accessing copyrighted material that is illegally published, ISPs have become the target of legal measures¹⁴ and court orders.¹⁵ There is discussion on the exception for personal use.¹⁶

Perhaps even the business-model of the creative industry needs to be reimagined: Does society still need intermediaries like record labels and publishers? How will it reward creative minds for their effort? This is assuming, of course, that society still values a rewards-system. Why does copyright exist in the first place?¹⁷ And is it not possible to reach the same goal of providing a monetary reward for innovation and cultural enrichment by using other means aside from the current legal setup, which

¹⁰ Section 29 of the UK Copyright, Designs and Patents Act 1988; art 16b and 16c of the Dutch Copyright Law (Auteurswet).

¹¹ Section 30 of the UK Copyright, Designs and Patents Act 1988; art 15 of the Dutch Copyright Law (Auteurswet).

¹² Article 10 Berne Convention, § 107 U.S. Copyright Law.

¹³ *A&M Records, Inc v Napster, Inc*, 239 F 3d 1004 (9th Cir. 2001); *MGM Studios, Inc. v Grokster* (2005), Ltd, 545 US 913; *Zoekmp3* (2006), Hof Amsterdam 15-6-2006, LJV AX7579 (in Dutch); *The Pirate Bay, Stockholms Tingsrätt* (2009), No. B 13301-06, 17 April 2009.

¹⁴ Among others: Articles 12-15 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (e-Commerce Directive); Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights; The Anti-Counterfeiting Trade Agreement.

¹⁵ High Court of Justice (Chancery Division) 2 May 2012, [2012] EWHC 1152 (Ch), [2012] 3 C.M.L.R. 15; 1.Voorzieningenrechter 's-Gravenhage 10 mei 2012, LJV BW5387 (in Dutch).

¹⁶ See among others: M van der Heide, "Dutch cabinet discusses future of private copying levy" (5 July 2012) available at <http://www.futureofcopyright.com/home/blog-post/2012/07/05/dutch-cabinet-discusses-future-of-private-copying-levy.html> (accessed 23 November 2012).

¹⁷ Article I, Section 8, Clause 8 of the United States Constitution.

involves granting an exclusive right to the author? Furthermore, with broadband Internet more widely available, maybe today's focus on downloading and file-sharing issues will no longer be relevant in a few years when all works may be made available in streams to smartphones or even implanted in chips. The future of technology is certainly uncertain to say the least.

Nonetheless, what does appear to be certain is that scale does indeed matter. Even though the issue is essentially the same (the public's desire to enjoy protected works without sufficient payment) the legal response needs to be reconsidered.

4. Privacy

Privacy is a human right, listed, among others, in the Universal Declaration of Human Rights,¹⁸ and in the European Convention on Human Rights.¹⁹ Privacy is notoriously hard to define.²⁰ For present purposes, it can be said that the right to privacy provides everyone the right to a personal sphere—providing both spatial and informational protections so that each person is given the opportunity of self-determination. The notion of informational privacy was introduced in 1966 by Westin as the right to determine for ourselves who knows which personal details about us, and to control how these personal details are used, by whom, and for what purposes.²¹

The idea is, briefly, that human dignity requires that each person should be able, as much as it is possible, to control the image that other people have of his or her own self. Every person has a different role in society. Personal details that are relevant in one role, may be harmful to a person's image in another role - even if it is, strictly speaking, completely irrelevant for this other role. But even if it has nothing to do with image, or no harm will arise from releasing these details in any sense, it is also justified to maintain a certain degree of privacy with respect to the fact that this is personal information.²²

The legal rules protecting privacy, in particular informational privacy, were made in a time when computers already existed, but not the Internet as we know it today. The notion that a person should be able to control, to a certain extent of course, how personal data are collected and used, was implemented by the European Data Protection Directive²³ and individual European Union members' national legislation implementing the directive. The rules located within the directive are aimed at organizations collecting personal data from the public's computers. These rules

¹⁸ Article 12 Universal Declaration of Human Rights.

¹⁹ Article 8 European Convention on Human Rights.

²⁰ A Moore, "Defining privacy" (2008) 39 *Journal of Social Philosophy* 411-428; D Solove, *Understanding Privacy* (Cambridge: Harvard University Press, 2008).

²¹ A Westin, "Science, Privacy and Freedom: Issues and Proposals for the 1970's: Part II, Balancing the Conflicting demands of Privacy, Disclosure and Surveillance" (1966) 66 *Columbia Law Review* 1205-1253, at 1210.

²² D Solove, "'I've Got Nothing to Hide' and Other Misunderstandings of Privacy" (2007) 44 *San Diego Law Review* 745-772.

²³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 , 23/11/1995 P. 0031 – 0050, online available: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>.

proscribe that personal data may only be collected for well-defined, legitimate purposes, that the data may be kept only as long as it is needed for those purposes, that the data collected may not be superfluous, and that the data-subject has some rights.²⁴ For example, the grounds for processing data are limited, with the data subjects' permission weighs in heavily in that decision.²⁵ The procedural guidelines are somewhat analogous to a person arriving at a front-desk of an organization, and completing a form, thereby giving his or her permission to store and use these personal data for a specific purpose. If further use of these data is desired, permission from the data subject is required. In this sense, people are able to keep track of who holds their personal data, and for which purposes, and can request the data to be removed if they so wish.

In the analogue era, privacy was protected by closing window-curtains, or by putting up a fence between one's own garden and the neighbour's. Privacy was protected by buying one's daily bottle of sherry at different stores each day of the week, by getting one's dirty books from the other side of town, or by steering clear of the family doctor for one's embarrassing, personal pharmaceutical needs etc. Privacy was invaded by prying eyes and by gossip.

Today, in the Internet age, the situation is rather different. Many websites require that people create an account, and in doing so they are essentially required to provide some personal details in exchange for access to the site. This resembles filling out the paper forms of the analogue world. However, Internet users are also unwittingly inviting spyware and cookies onto their computers, which track all online activity, and then pass the collected information on to unfamiliar third-party organizations and data-warehouses. Individuals are then 'profiled' on the basis of the information known about them, and become the targets of behavioural advertising, or automated prejudice, so to speak. Theoretically, Internet users may at some point have given their permission by accepting a privacy policy when downloading a program, or by not disabling browser cookies, or by not running anti-spyware software every day. However, the problem is that all this is usually non-transparent to the subjects involved; typically, they are kept unaware of the profiles in which they are placed, and on the basis of which information.²⁶ Additionally, Internet users inadvertently provide many interesting details about themselves and others on social media platforms (SMPs) like YouTube, Twitter and Facebook. On most SMPs, the possibility exists for anyone to tag other Internet users' photos, which, used in conjunction with powerful face-recognition software, makes one wonder what is left of the right to self-determination.

In this particular field, there are some developments worth noting. The European Commission has announced a comprehensive reform of the data protection rules.²⁷

²⁴ Articles 6 and 12 Directive 95/46/EC.

²⁵ Article 7 Directive 95/46/EC.

²⁶ A McClurg, "A Thousand Words are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling" (2003) 98 *Northwestern University Law Review* 63-143.

²⁷ European Commission, "European Commission Proposes a Comprehensive Review of the Data Protection Rules" (25 January 2012) available at http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm (accessed 23 November 2012).

The new “cookie”-Directive²⁸ requires an opt-in regime for collection of personal data, and media attention was drawn to the questionable privacy policies of many internet giants.²⁹

Is it true, as is sometimes claimed, that the Internet-generation no longer cares about (informational) privacy?³⁰ That law-abiding citizens who have “nothing to hide” do not need privacy?³¹

Scale matters. Even though the issue is basically the same (the right to be let alone, to control the image that other people have of you) the extent of this right and the way it can be protected by law need to be reconsidered.

5. Freedom of expression

Traditionally, freedom of expression meant that prior government permission to voice a particular view was not required, i.e. there was no censorship.³² The press is attributed the role of public watchdog, an essential feature of a democratic society. Freedom of expression is not needed for apple pie recipes, but for speech that “shocks, offends and disturbs”.³³ Freedom of expression is not unrestricted. In the United States, obscene speech and fighting words (i.e. words designed to incite imminent violence) are not protected by the first amendment,³⁴ and in Europe Section 2 of art. 10 ECHR lists many grounds for national law restrictions. Such restrictions are embodied in criminal law; certain expressions constituting criminal offences, alternatively, the restrictions may take the form of providing the offended private parties a remedy (an action) in tort law.³⁵

²⁸ Directive 2009/136/EC of the European Parliament and of the Council 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:en:PDF> (accessed 23 November 2012).

²⁹ R Winkler, “Facebook and Google Are Risking an Invasion of Privacy From Regulators” (17 February 2012) *The Wall Street Journal*, available at <http://online.wsj.com/article/SB10001424052970204792404577229613295011198.html> (accessed 23 November 2012).

³⁰ See G Philipson, “You have zero privacy. Get over it” (15 August 2012) available at <http://www.itwire.com/2012-06-01-13-40-03/browse/c-level/56213-you-have-zero-privacy-get-over-it> (accessed 23 November 2012); J Palfrey and U Gasser, *Born Digital, Understanding the first generation of digital natives* (New York: Basic Books, 2008), in particular ch. 3 at 53-82.

³¹ D Solove, “‘I’ve Got Nothing to Hide’ and Other Misunderstandings of Privacy” (2007) 44 *San Diego Law Review* 745-772.

³² Article 10 ECHR, First Amendment to the US Constitution, art 19 Universal Declaration of Human Rights.

³³ *Handyside v. United Kingdom* (5493/72) [1976] ECHR 5.

³⁴ *Miller v California* (1973), 413 US 15 and *Chaplinsky v New Hampshire* (1941), 315 US 568.

³⁵ Some well-known cases include *Dow Jones & Company, Inc v Gutnick* M3/2002 (28 May 2002), online at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html; *Harrods Limited v Dow Jones & Co Inc* [2003] EWHC 1162. An American court decided that the case could be decided in England: *Dow Jones & Co. Inc v. Harrods* (2002), WL 31307163.

In the analogue era ordinary citizens (as opposed to journalists) could print and distribute pamphlets, or could rent a hall and hold speeches for whoever cared to listen. However, the possibility of really reaching large audiences was restricted to traditional media outlets such as broadcasting corporations and newspapers. These traditional media function as a public watchdog on the one hand, but on the other hand they act as a filter for hate speech, discrimination, child pornography, terrorists' handbooks and state secrets, which are not afforded the same protection by many state governments.

Again, it is easy to see that the situation in the digital era is totally different: anyone could potentially reach a worldwide audience, instantly and at negligible costs. The traditional media-filter on unprotected expressions is no longer in place, making these expressions immediately available to anyone with Internet access.

Enforcement of national laws prohibiting certain content (in both criminal law and private law) is difficult, if not impossible. It may lead to the spill-over effects recognized in the Goldsmith-Post debate. This is most clearly demonstrated in the well-known *Yahoo! Inc v. LICRA*-case.³⁶ Free-speech advocates fear the "chilling effect" of cross-border enforcement of national free speech restrictions.³⁷

The rights to privacy and freedom of speech often collide.³⁸ Once certain content is made public, the harm cannot really be undone. This is also true for mudslinging among citizens, like (false) accusations³⁹ or embarrassing video clips⁴⁰ and even things that were true, once, but that are no longer relevant, like sins of one's youth. How to deal with newspaper archives put online and indexed by Google, compared to the same archives on paper or on microfiche?⁴¹

³⁶ Tribunal de Grande Instance de Paris, Orders of 22 May 2000, 11 August 2000 and 20 November 2000, and the cases in the US: 145 F. Supp. 2d 1168 (ND Cal. 2001), 379 F. 3d 1120 (9th Cir. 2004) and 433 F. 3d 1199 (9th Cir. 2006); See, among others: M Greenberg, "A Return to Lilliput: The *LICRA v. Yahoo* - Case and the Regulation of Online Content in the World Market" (2003) 18 *Berkeley Technology Law Journal* 1191-1258 and E Okoniewski, "*Yahoo, Inc. v. LICRA*: The French Challenge to Free Expression on the Internet"(2002) 18 *American University International Law Review* 295-339, who advises France to prosecute their own citizens for internationally accessing forbidden material, or to repeal the article from their criminal code.

³⁷ See for example "Chilling Effects" (2012), available at www.chillingeffects.org (accessed 23 November 2012).

³⁸ See, among others, *Karakó v. Hungary* (39311/05) [2009]; *Mosley v. United Kingdom* (48009/08) [2012] EMLR 1.

³⁹ An example is *Don King v. Lennox Lewis, Lion Promotions, L.L.C. and Judd Burstein* [2004] EWCA Civ 1329, the first libel case where an English judge had to decide in a case where a publication was only on the Internet. The court ruled: "If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of liability in those jurisdictions in which the publication is not lawful and inflicts damage." In other words: spill-over effects accepted!

⁴⁰ For example: the video clip of the drunk Dutch law student, see "Drunk Student wins Damages from Shock Blog" (23 November 2012) available at http://www.dutchnews.nl/news/archives/2010/08/drunken_student_wins_damages_fro.php (accessed 23 November 2012), and the decision in Dutch: *Rechtbank Amsterdam* 14 juli 2010, LJN BN4359.

⁴¹ *Times Newspapers (Nos 1 and 2) v United Kingdom* (3002/03 and 23676/03) [2009] EMLR 14.

Again: scale matters. Even though the issue is basically the same (restrictions on the freedom of expression) the enforcement difficulties are such that you might wonder if the law has any more than a symbolic value, unless you are prepared to throw out the baby with the bath water and abolish freedom of expression altogether.

6. Conclusion

As of 2012, it is fair to say that scale matters indeed. Recent developments in information and communication technology pose major challenges to the law. In this paper I have only briefly touched upon some areas where the transactions taking place online are not functionally equivalent to their offline counterparts, but take place on such a different scale that they become a separate matter altogether.

Lawyers, politicians, and society at large, need to reconsider the old legal solutions. How will society reward creative minds for their work, while at the same time stimulating cultural enrichment? What does the notion of privacy mean nowadays? Can people be protected from harmful content while at the same time recognizing freedom of expression as a fundamental human right? Clearly, there are many other issues (cybercrime, identity, virtual worlds, to mention a few) that also require the full attention of legal scholarship.

The digital era is new under the sun.