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**Law Uncertainty and
Technology**

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Law of the Horse?

Challenge by digital economy to law

Existing law applied to relations within the digital sphere?

New digital law?

Does existing civil and public law cope with conflicts within the digital world?

Uncertainty

Easy (core) vs hard (penumbra) cases:

Easy cases are hard to define...but

- 1) Easy cases are those whose solution does not demand interpretation of rules (clear meaning)
- 2) Easy cases are those which do not involve external argumentation (justification of the normative premises)- simple deduction

e.g.

Rule: It is forbidden to kill another human being, unless in self-defense or state of necessity.

Case: Is the husband authorized to kill his wife in case of adultery?

Hard Cases in the penumbra

1) **Overregulation**

Conflicts: different rules or set of rules derive both an obligation to do and a permission to omit the same action

Solution: choice of the rule (by criteria *lex superior, specialis, posterior*) to be applied

2) **Novelties:**

Normative gaps: normative system does not provide a solution to a relevant possible case

Solution: creation of a solution, usually by extension of a rule concerning the subject or by application of analogy or a *contrario* (among other argument schemes)

Vagueness: uncertainty about inclusion of a case in the extension of a concept

-moral concepts: good faith

-habits: uses of commerce

-novelties: meaning of “conception” concerning use of embryos for research

Solution: definitions and distinctions of subsets of each extension

Hard Cases in the core

Abnormalities (Inexact legal propositions): conflict between rule's content and its underlying purpose (ratio) in a given case

- acquisition of a failing firm generating monopoly
- abortion of na anencephalic fetus

Solution: adjust the core admitting exceptions, using restrictive interpretation or by redefinition of the concept

In Hard Cases...

solutions are derived within the Normative System's framework:

relations among rules of the systems or appeal to underlying values (values which justify the creation of the rule)

Insurmountable

Turn of the 19th century

Liberal platitude: protection of property, freedom of contract
(autonomy)

Metaphor: labour as property/asset
- work as an item to be sold

Turn:

... Labour as expression of human dignity

social concern (rights): Protection of *balance* between labour and employer

... extended to private law (balance of contracts)

Background Values: Freedom and Equality

Insurmountable

Emergence of antitrust law: prevent the concentration of economic power

- How to conciliate with freedom of enterprise? Public or private law?

Instantiation of metaphor in the core:

- first antitrust cases were against Labour Unions

Turn: antitrust does not protect individual rights of competitors, but a collective interest on competition

Present Challenges

Internet

Metaphor of “space”: site, homepage, cyberspace, chatroom

Internal perspective: applications experienced by the user (virtual reality)

External perspective: communication among end-users (net of computers)

E-Bay vs Bidders Edge

BE was trespassing E-Bay’s Chattel

-website (public) was property invaded by BE (capacity of computer server)

-Proof of harm (1% of capacity- potential harm by proliferation of practice)

-used a portion of property impeding free disposition by owner (real state)

External perspective: requesting info and receiving (demand of licence would make internet inviable)

- Communication internet as joint cooperative activity: to some extent action by BE was not cooperative (not only with owner, but with community)

Present Challenges: free software

- **Product (functional dimension)**
 - **encoded – object code**
 - **end:** informatic solution (utility)
 - **private inclination (exclusive *res- control of use*)**

- **Informatic Knowledge**
 - **source code**
 - **program:** series of commands (content/arquitecture)
 - **end:** development of informatic knowledge
 - **public-communitarian inclination**

Ofelia Anunciato (Dona Ofélia)



Softoven + Hardoven = Apple Pie



Chain of Misleading Metaphors



Challenge

- **Free software**

- ✓ Right to see the source code

- ✓ Reciprocity (copyleft):

- Author of derived work must licence with copyleft

Problem: derived author is proprietary of his derivation

Doctrinal solution (insistence on metaphor):

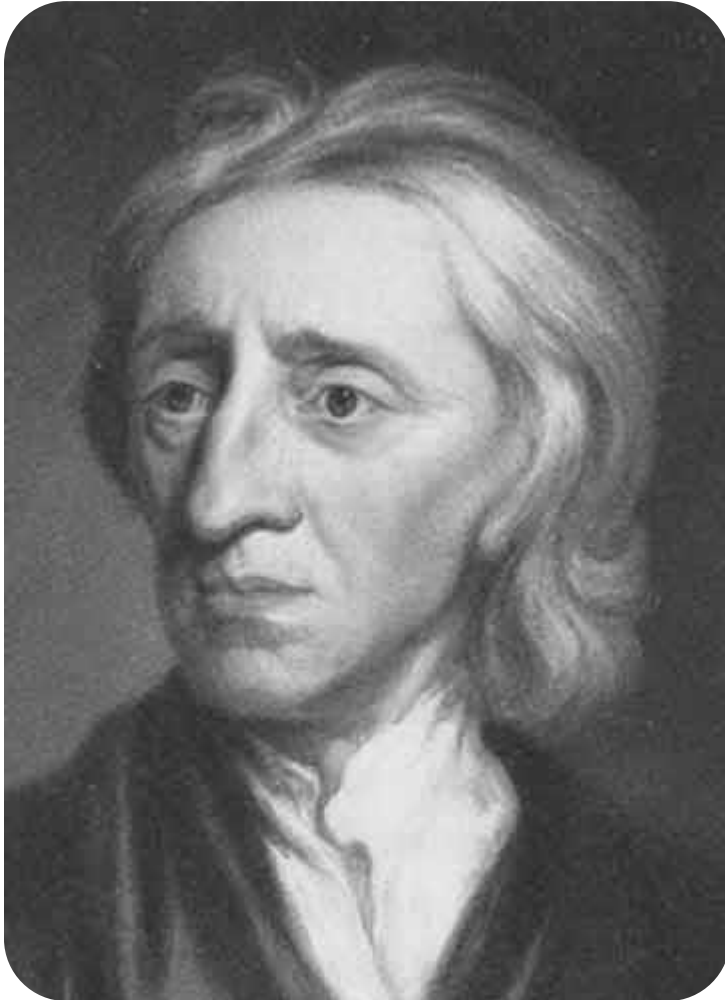
- social function of property

- expropriation in public interest

Being author *is* a social function (authoral work depends on its communication with public- author/work/public)

Joint cooperative activity: *freedom as reciprocity*

Individual ✖ Reciprocal Freedom



Credit: Mikael Damkier

IT Challenge

Turn of 19th Century

- Infusion of equality into freedom
- systematic change of the core

Turn of 20th century (IT- communication)

- freedom as reciprocity (not from but through others)
- experiencing conflicts and deadlocks

Insurmountable cases: change of the core and new framework connecting values and core instantiations