

Cyberspace as Place and the Limits of Metaphor

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Although the internet is little more than a vast network of computers, it is often thought of in spatial terms. The very term 'cyberspace' implies that it is a place, albeit one separate from physical space. While the 'cyberspace as place' metaphor has evolved since the early days of the internet, its use continues and has been widely adopted by courts as a way to understand the new medium. As a result, the metaphor has led some American courts to treat the internet as a property-based regime and therefore subject to legal doctrines, such as trespass, that are based on real property. This article examines the use of the 'cyberspace as place' metaphor in the creation of the legal concept of 'cybertrespass', examines the consequences of the use of that metaphor to the free flow of information on the internet, and evaluates alternative metaphors for understanding the new medium.

Metaphors, the internet, and the law

That metaphors have been used to understand and describe the internet is not surprising. It is natural, when confronted with a new technology, to draw comparisons between it and more familiar technologies.

Understanding comes from drawing parallels and finding common ground with subjects with which one is more familiar, so that the new subject is more approachable because it does not seem as foreign. The use of metaphor, as well as the particular choice of metaphor to understand a subject, influences how that subject is viewed. More than mere rhetorical flourish, metaphor

is much more fundamental, not a matter of words but a matter of thought. Indeed, most of anyone's ordinary conceptual system is metaphorical in nature. Each culture has unique foundational metaphors which play a part in shaping the way members of that culture conceptualise their experience. Identifying those metaphors provides valuable clues about how a society thinks about things and defines its reality.¹

While some early metaphors in common usage for the internet evoked a transportation network ('information superhighway', 'Infobahn'),² the dominant metaphors used to describe the components, uses, and environment of the communications network that is the internet have tended to evoke a sense of place. We 'visit' a web 'site' by typing in its 'Uniform Resource Locator'. We 'surf' the web. We 'enter' chat 'rooms'. The list goes on and on.

If metaphors are useful in popular discourse about new technologies, they are equally at home in the legal arena. Indeed, the very foundation of case law rests on the use of analogies: A judge must compare the facts of the instant case with the facts of cases that have been previously decided and apply the same rule of law that was applied in the past. If a fact pattern or concept is unprecedented, the judge must draw on analogies that may not seem specifically on point. The following example shows how new technologies can present difficulty for judges in drawing parallels between what is new and what has come before:

If the world's first automobile loses control and plows up your garden, how do courts 'follow existing valid law' when no law whatsoever refers to automobiles? There is law for the horse and buggy, law for public nuisance, law for trespass, and law for captive wild animals that have escaped captivity (to cut the list arbitrarily short). Which of these is the rampaging automobile most like? Is it more like a horse and buggy than a pigsty within the city limits? Is it more like either of these than a trespassing vagrant whose campsite ruins the garden? Is it more like any of these than a marauding circus bear? The liability of the owner, driver, seller, and manufacturer of the automobile depend on which analogy we think is strongest.³

This example shows that, in completely new situations, judges must resort more overtly to metaphor in order to see how the new concept fits within the existing legal framework. The 1997 case of *Reno v. ACLU*⁴ is a real-world example of how the justices of the US Supreme Court used metaphor to better understand an unfamiliar technology – in this case, the internet. *Reno v. ACLU* was a landmark case primarily because it was the first attempt by the Supreme Court to determine what level of speech protection was required for speech on the internet. In making this decision, the justices relied heavily on the use of metaphor.

In its opinion, the Court likened the internet to a telephone network, 'a vast library', 'a sprawling mall' (pp. 885, 886), and a public forum from which 'any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox' (p. 870). In the end, the justices explicitly rejected the analogy of broadcasting and the lowered standard of speech protection applicable to that medium. Instead, it analogised the internet to the print medium and thus conferred to it a high level of First Amendment protection. The justices' choice of metaphor directly dictated the constitutional analysis that was applied and thus the freedoms that would be afforded the new medium.

While the internet can certainly be likened to a library, it also looks a lot like television. Choosing the proper metaphor is often difficult because the options may be incomplete or inexact:

Metaphors not only structure experience, they do so selectively. Since they compare things that are not in fact identical, metaphors emphasize some traits of their subject and exclude others. In forcing us to focus on one aspect of a concept, a metaphor can keep us

from focusing on other aspects of the concept that are inconsistent with that metaphor.⁵

If metaphors selectively structure experience, what consequence does the 'cyberspace as place' metaphor have for our experience of the internet? Some legal scholars have argued that treating cyberspace as a place had led to the proprietisation of the internet, with ominous results. Dan Hunter has argued that, by treating cyberspace as real property, rather than a linked network like a telephone system, courts have made it easy to transfer legal concepts based on real property from the physical world to the internet. The end result is increased privatisation and the end of the internet as a public 'commons' available to all.⁶ Nowhere is the tendency to apply real-world property concepts to cyberspace more evident than in the reemergence of trespass to chattels, an ancient common law tort that some courts have merged with traditional trespass claims to create a new cause of action christened 'cybertrespass'.

Cybertrespass and metaphor

The birth of cybertrespass represents the application of 'real-world' common law torts to the internet, based both on place and on material goods. Its use shows the blending that has occurred of two distinct types of trespass into one cause of action in the context of the internet. These two types of trespass traditionally allowed at common law are 'trespass to real property' and 'trespass to chattels'.

A person is liable for 'trespass to real property' if he intentionally enters land in the possession of another, 'irrespective of whether he thereby causes harm to any legally protected interest of the other'.⁷ 'Trespass to chattels' provides a legal claim against unauthorised use of or 'intermeddling' with another's personal property. A chattel is defined as physical, tangible property and is distinguished from both real property and intellectual property.⁸ The trespass must be intentional, unauthorised, and 'substantial', but does not rise to the level of conversion.⁹

The biggest difference between the two types of trespass has to do with the type of property – real or personal – that is being interfered with. But another important difference – the level of harm that is required – has become muddled in the transfer from the physical world to the virtual world of cyberspace. No showing of harm need be made in order to prove trespass to real property. In order to prove trespass to chattels, however, some harm must be shown in order for the trespass to be considered 'substantial'.

While trespass to real property was commonly used over the years, trespass to chattels fell into disuse until its application online made it 'the darling of cyberspace lawyers', according to Dan Burk, who criticised the reemergence of the tort for use online.¹⁰ Its use points out both the dominance of the 'cyberspace as place' metaphor and the twisting of property-based legal concepts that has occurred as a result.

Trespass to chattels was revived as a way to combat unwanted commercial email or spam by analogising unwanted electronic contact to intrusion on physical property or interference with personal property. In

CompuServe v. CyberPromotions, a federal court ruled that the unwanted electronic signals that made up the spam messages that were being sent to internet service provider CompuServe's users were sufficient to constitute trespass to chattels.¹¹ Rather than requiring a showing of direct harm to its business, the court allowed CompuServe to show indirect harm, such as a loss of customer good will and employee time to deal with the spam messages. The court in *CompuServe* thus resurrected a largely unused common law tort – trespass to chattels – and applied it as if it were trespass to real property by disregarding the harm requirement. Courts in subsequent cases followed the lead of the *CompuServe* court, similarly applying trespass to chattels in a real-property way.¹²

More recently, a California trial court in *Intel v. Hamidi* extended the trespass to chattels rule to unwanted email of a non-commercial nature. In this case, the court took the cybertrespass concept, which had successfully been used to combat spam, and used it to restrict an individual's free speech rights. The *Hamidi* case illustrates the problem that arises when courts have confused the two trespass doctrines and applied trespass to chattels to the online environment, a confusion that can be traced to the 'cyberspace as place' metaphor.

Kenneth Hamidi was a disgruntled former employee of the Intel Corporation. He began sending email messages to current employees of the company airing his complaints against the company. When he refused Intel's request to stop the bulk emailing, Intel sued and eventually won an injunction against Hamidi based on trespass to chattels. The lower court rejected Hamidi's First Amendment argument and again overlooked the traditional requirement of a showing of harm to the chattel, in this case Intel's computer network. Unlike the nuisance factor and employee time required to deal with large amounts of spam, as in *CompuServe*, in this case the actual volume of email messages was quite small; instead, it was the content of the messages that Intel argued was harmful to its network.

The California Supreme Court reversed the lower court's ruling, ruling that 'in the absence of any actual damage, a cause of action for trespass to chattels will not lie'.¹³ The California court, in so ruling, overturned the strong, albeit short, precedent set by *CompuServe* and its progeny in intermixing the two trespass torts and allowing a finding of electronic trespass without a showing of harm. In doing so, it explicitly rejected the idea, urged by *amicus curiae* parties, to go one step further and apply a real property metaphor that would equate a trespass to Intel's electronic servers with a trespass to real property.

Writing on behalf of business and technology companies as *amicus curiae*, Richard A. Epstein had urged the court to 'extend [] the rules of trespass to real property to all interactive web sites and servers', thus eliminating the need, as in trespass to chattels, for a showing of harm. 'In effect', the court wrote in rejecting the request, 'Professor Epstein suggests that a company's server should be its castle, upon which any unauthorized intrusion, however harmless, is a trespass' (p. 1360).

In a law review article that based its reasoning explicitly on the 'cyberspace as place' metaphor, Epstein depended specifically on the 'cyberspace as place' metaphor to argue that trespass to real property, not trespass to chattels, is the proper cause of action for cases such as *Hamidi*.¹⁴ He asked, 'Does a website look more like an ordinary chattel or more like real property?' and answered the question by drawing on the 'the descriptions of cyberspace offered by those who champion the distinctive nature of the cyber community, which appeals to an analogy drawn from ordinary understandings of real property' that includes such place-based online concepts as 'addresses', 'sites', 'architecture', and 'cybersquatters' (pp. 82–83).

The California Supreme Court disagreed with this view and warned that Epstein's reliance on the 'familiar metaphor of the internet as a physical space' might be misplaced. While much of the language of the internet reflects that metaphor, the court said, the term 'web' suggests neither personal nor real property, and 'cyberspace' itself has come to be known by the oxymoronic phrase 'virtual reality', which would suggest that any real property 'located' in 'cyberspace' must be 'virtually real' property. 'Metaphor', the court warned, 'is a two-edged sword'.¹⁵

The California high court rightly stopped the indiscriminate use of trespass to chattels to block protected speech when it travels over network computers. The idea that an email message presents a 'trespass' of any kind presents troubling questions for the future freedom of the internet. If a company or ISP can use the trespass doctrine to block unwanted speech based merely on content, with no showing of actual harm, the normal commerce of speech online would grind to a halt.

The cybertrespass cases are instructive because they are examples of the implicit nature of the 'cyberspace as place' metaphor. Even when courts explicitly use a different metaphor – that of trespass to chattels, not real property – their opinions reflect the intuitive sense that cybertrespass involves an invasion of someone's space, not just interference with their *things*. The underlying metaphor thus leads courts to apply real-property-based legal rules, as in the *CompuServe* case, and allows a property-centred view of the world to dominate, even when, as in cases having to do with the free flow of speech on the internet, it should not.

Alternative metaphors for cyberspace

If the 'cyberspace as place' metaphor has as its unfortunate side effect the tendency to skew the view of legal decision-makers – to make everything look like property – what alternatives exist that might better serve the public in maintaining an open and free internet? Alfred C. Yen and Anna Mancini have offered alternative metaphors for the internet, one based on the internet as feudal society and one based on ancient Egyptian law.

According to Yen, cyberspace shares two distinctive characteristics with feudal societies of the ninth and tenth centuries: the treatment of political authority as an incident of private property and the fragmentation of the power of the state.¹⁶ European monarchs divided their land into 'fiefs' and turned their control over to loyal followers called 'vassals', who exercised judicial, police, and regulatory powers over their fiefs,

superseding the power of the monarch and creating a collection of 'mini-states' based on private land holdings. As the monarch's land was further subdivided, his authority was similarly fragmented until, according to Yen, significant power was transferred to local lords who 'often administered justice over their subjects with relative impunity' (p. 1235).

Those subjects, the peasants or 'serfs' of the fief, were the source of labour to exploit the land economically, and the relationship between the serf and the fief holder or 'lord of the manor' was an important one, but it was not equal: serfs were subjected to exploitation by the lords and, while they could escape to another fief, had very little economic power. 'Feudal society was clearly divided' Yen wrote, 'between its haves and have-nots' (p. 1236).

Yen argued that internet authority has been handed over to non-governmental entities such as the Internet Society (ISOC) and the Internet Corporation for Assigned Names and Numbers (ICANN), thus privatising state power in a manner reminiscent of feudalism.¹⁷ 'In particular', Yen argued, 'ICANN is a private entity that controls a most precious commodity – cyberspace 'land' in the form of domain names. Like a feudal king, ICANN grants 'cyberfiefs' to those who promise to pay money and abide by ICANN's rules in exchange for internet domains' (pp. 1239–1240). The 'cyberland' is divided and management is delegated to 'cyberlords' such as domain name registrars, internet service providers (ISPs), businesses, and others who obtain economic interests in the internet. These cyberlords have great power and a relatively free hand in the rules that they may impose on their customers, who like the serfs of feudal times have relatively few options. An ISP, for example, controls its users' access to the internet and with little real competition regarding rates and service and thus its users are readily exploited through connection rates, exposure to advertising, and collection of personal data (pp. 1244–1247).

Yen offered the feudal society metaphor as an alternative to the 'Western frontier' metaphor, one he criticised as 'both powerful and persistent' when he wrote in 2002:

The Feudal Society metaphor contradicts the idea that plentiful land and minimal government regulation ensure widespread freedom and prosperity. Indeed, the metaphor implies that such conditions support the fragmentation of political authority and the private exercise of political power. By doing so, the metaphor draws attention to the many instances where, as in medieval Europe, weak states created political vacuums ultimately filled by powerful individuals and clans who governed for private gain (p. 1248).

While the Western frontier metaphor was arguably the dominant metaphor among early adopters of the new technology, Yen was mistaken in his insistence that the 'Western frontier' metaphor survived intact into the twenty-first century. Instead, it represented an early way of thinking about the internet that may have been the source of the 'cyberspace as place' metaphor that continues in a different form today. Other commentators have written about the early internet's resemblance

to the Western frontier, exemplified by the general lack of governmental regulation and the prevalence of the idea that anyone could 'stake a claim' in cyberspace. But this metaphor lost its power as the web became increasingly commercialised and privatised. Fences went up, legal rules were enforced, and the digital 'wild West' was enclosed and divided into private parcels complete with 'keep out' signs.¹⁸

Yen's feudal society metaphor, then, was offered as an alternative to a metaphor that was no longer dominant, if it ever was. Still, his metaphor remains useful to explain why the Western frontier myth could not survive online. In the early years of cyberspace real questions arose about whether the new medium was subject to the 'law of the land' or required a completely new set of rules.¹⁹ Yen showed that this early legal uncertainty led private interests, such as ISPs, to create their own rules to fill the vacuum. These developments represent what Yen saw as a step back from neutral law enforcement by the government to something more akin to the privately maintained feudal system of justice.²⁰

Yen was correct, therefore, in his view of cyberspace as a place in which private interests hold sway, and he acknowledged that private interests may not protect the best interests of individuals. Yen therefore called for judicious use of the law to 'realize the internet's promise' and protect the freedom and prosperity of ordinary individuals – 'cyberserfs' – online (p. 1263).

Anna Mancini was similarly concerned with the rights of the individual, but her alternative view of cyberspace was not as well drawn. In her book *Ancient Egyptian Wisdom for the Internet*, Mancini argued that modern legal rules do not fit well within the online world because they are territorial in nature and therefore overly bound to physical space. Instead, she claimed, internet law should borrow from ancient laws that properly balanced the physical with the 'virtual' or metaphysical.

In particular, Mancini offered the concept of 'Maat', an ancient Egyptian moral code based on the immaterial world of life energy that required an understanding of the universe and of one's place in it.²¹ For Mancini, the focus of Egyptian justice on the non-physical world made it a useful metaphor for understanding the workings of the internet. Mancini would approach internet regulation with the goal of encouraging the free flow of information and therefore maintaining the modern psychic energy that parallels the life energy that the Egyptians drew from the sun. Her call was to inject something like morality into legal reasoning in order to protect the essential nature of the internet and the 'acceleration of information flow'. In cyberspace, Mancini wrote, 'people, with their dreams, thoughts, relationships, and intangible needs have come to the fore of the legal stage' (p. 103)

Mancini would therefore make people the focus of the legal regime rather than property or even territorial sovereignty and would rely on something akin to the ancient world's 'intuitive but nevertheless practical mentality' to determine the proper legal rules (p. 103). The fundamental problem with Mancini's view, however, is that it is short on specifics and, unlike Yen, does not include a baseline value from which to judge

conflict in cyberspace. Mancini shared Yen's mistrust of the private entities that have moved in to enforce a private ordering of rights online. But she failed to offer any real guidelines for combating this, and her insistence that the law must focus on the immaterial denies the necessity of some rules regarding property, at least in the physical world. In the end, Mancini's over-reliance on what was in essence a religious code of justice in the ancient world, known by all intuitively and seemingly enforceable by none, is too romantic a notion to offer any real instruction for how to view the online world today.

The alternative metaphors presented by Yen and Mancini, although imperfect, offer insights into the folly of making legal rules based on a property-based analysis of the internet. Furthermore, their emphasis on social relationships rather than the physical world may provide an appropriate framework for deciding cases such as *Hamidi*. After all, even the California Supreme Court's ruling was materially based. The ruling centred on a finding that no harm had been shown rather than on a rejection of the application of trespass to chattels to the online world altogether. Yen's feudal society metaphor, because it looks at the dependencies and authority that private entities wield online, may have been more useful in the *Hamidi* case to highlight the unequal power structure at play. For the law to allow Intel to claim the power to declare Hamidi's email messages 'unwanted' based solely on their content and to therefore transform them into actionable trespasses would give far too much private power to Intel to patrol its 'cyberfief' and would make 'cyberserfs' of anyone who was not in favour with the 'cyberlord'. Yen's concern that individual rights may fall victim to the whims of the private entities that control cyberland is well placed, and his metaphor provides a way to bring the unfair power structure to the fore instead of hiding it behind the language of property.

In the end, Mancini's reliance on mythical connections and the justice of the immaterial world does not provide enough guidance for principled decision-making in the real world, physical or virtual. At the same time, her commitment to the free flow of information is a fundamental value that should form the basis for any legal regime that purports to govern the internet.

The courts' misapplication of trespass rules to the virtual world is an unfortunate consequence of the 'cyberspace as place' metaphor and threatens to undermine the opportunities for the free flow of expression and information that the internet can and should provide. Because of their role in shaping reality, whether in the law or in the 'real world', metaphors matter. If the trend toward privatisation and 'fencing in' of the internet is to end, one of two things must occur: either a more appropriate metaphor will be discovered and adopted by the courts or the courts will learn to examine more closely the assumptions they make based on unthinking adherence to the metaphor of 'cyberspace as place'.

- Notes**
1. Elizabeth G. Thornburg, 'Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System', *Wisconsin Women's Law Journal*, 10 (1995), p. 229.

2. See, for example, Al Gore, 'Building the Information Superhighway', speech delivered to the Information Superhighway Summit, UCLA, 11 January 1994, at <http://www.uibk.ac.at/sci-org/voeb/texte/vor9401.html> (accessed 17 January 2005); John Perry Barlow, 'Jackboots on the Infobahn', *Wired*, April 1994, at <http://www.wired.com/wired/archive/2.04/privacy.barlow.html> (accessed 17 January 2005).
3. Peter Suber, 'Analogy Exercises for Teaching Legal Reasoning', *Journal of Law and Education*, 17 (1988), at <http://www.earlham.edu/~peters/writing/analogy.htm> (accessed 17 January 2005).
4. *Reno v. ACLU*, 521 US 844 (1997).
5. Thornburg, p. 230.
6. Dan Hunter, 'Cyberspace as Place and the Tragedy of the Digital Anticommons', *California Law Review*, 91 (2003), pp. 472–473.
7. *Restatement of the Law, Second: Torts* (St. Paul, Minn.: American Law Institute, 1965), section 158.
8. W. Page Keeton (ed), *Prosser and Keeton on the Law of Torts* (St. Paul, Minn.: West, 1984), section 14.
9. *Restatement of the Law, Second: Torts*, section 217.
10. Dan L. Burk, 'The Trouble with Trespass', *Journal of Small and Emerging Business Law*, 4 (2000), p. 27.
11. *CompuServe v. CyberPromotions*, 962 F. Supp. 1015 (S.D. Ohio 1997).
12. See, for example, *Hotmail v. Van\$ MoneyPie*, 1998 Westlaw 388389 (N.D. Cal. 1998); *AOL v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998).
13. *Intel v. Hamidi*, 30 Cal. 4th 1342, p. 1357 (2003).
14. Richard A. Epstein, 'Cybertrespass', *University of Chicago Law Review* 70 (2003), p. 80.
15. *Intel v. Hamidi*, pp. 1360–1361.
16. Alfred C. Yen, 'Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace', *Berkeley Technology Law Journal*, 17 (2002), p. 1234.
17. ISOC, through its Internet Architecture Board (IAB), oversees standards for the technical protocols – Transmission Control Protocol/Internet Protocol (TCP/IP) – that allow computers to 'speak' to each other on the net. ICANN administers the Domain Name System (DNS), which gives out domain names (e.g. 'amazon.com') to identify numerical IP addresses. Yen, p. 1237.
18. See, for example, James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', Conference on the Public Domain (November 2001), at <http://www.law.duke.edu/pd/papers/boyle.pdf> (accessed 17 January 2005).
19. See, for example, Llewellyn Joseph Gibbons, 'No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace', *Cornell Journal of Law and Public Policy*, 6 (1997), p. 475; Shamoi Shipchandler, 'The Wild Wild Web: Nonregulation as the Answer to the Regulatory Question', *Cornell International Law Journal*, 33 (2000), p. 435.
20. Yen, pp. 1258–1259.
21. Anna Mancini, *Ancient Egyptian Wisdom for the Internet* (Washington, DC: University Press of America, 2002), p. 64.