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Who writes the communication rules that underpin internet legal practice?

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This article explores the importance of debates about the broader politics of internet regulation to internet law in practice. It considers how internet law making is impacted by the formation of internet protocols like RFCs¹, anti competitive practices, and open source and free software positions on IP rights and licensing terms.

We tend to think of internet law in terms of discrete areas, however there are ideas and values that cut across many areas of internet legal practice. These ideas create an ‘internet culture’ expressed in the form of communication rules that affect all the areas of internet law. The law draws on the discourses and conventions that originate and circulate in engineering communities. It is not the case that law necessarily defers to these technological law makers, but legal practice needs to take these community views and debates into account in order to understand and anticipate conflicts and better serve the IT community.

Legal rules and best technical practice

What can you do when you find access to your .com.au site has been blocked, but there is nothing legally suspect about the content or the traffic? This happened to more than one site in 2001. The entire .com.au domain space was affected.

The blacklisting came about because of a policy of auDA, the Australian Domain Name Authority. However from an Australian perspective, there was no legal problem with the auDA policy. auDa had simply removed public access to some personal identifying data of registered domains in accordance with obligations under Australian privacy laws. The problem was that this privacy obligation happened to conflict with an old internet standard designed by an international groups of engineers, the Internet Engineering Task Force (IETF).² A standard, RFC 954, had been written way back in October 1985 when internet related privacy concerns were barely a blip of the computing radar. Openness was the primary technical and cultural value of those times. Accordingly this RFC mandated open, accessible records, including postal and fax numbers of registrants, and because of the changed legal environment in Australia, the auDA policy was now “RFC non-compliant”.

A private clearinghouse, RFC-ignorant, noticed non-compliance. From their view, “the ‘cooperative interoperability’ the net has enjoyed is based upon everyone having the same ‘rule book’ and following it . . . RFC-ignorant.org does not block anyone. We document who has chosen not to implement certain protocols described in the RFCs, and provide a means for allowing people to determine for themselves if they wish to communicate with non-compliant systems.”³

These overseas operators were probably ignorant of Australian law, as it is only compliance with technical rules that matters to them. But their services are used by many to help manage network weaknesses and locate vulnerable systems. Consequently many others using this clearinghouse’s lists started to block access to the .com.au domain.

How can you get “legal” problems like these addressed? On the one side you have the obligations of national law, but on the other side there is just a ‘voluntary’ standard. There are many internet standards - building blocks of efficient connectivity. They operate like mandatory rules, but they are not designed by lawyers. An RFC is not, of course, a law as such, but a statement of best technical practice developed through a consensus of engineers by an organisation with open membership. There are no obvious mechanisms for accountability for the impact these voluntary standards may have on anyone. Removing, redressing or anticipating regulatory problems such as these requires a different approach to law. It requires an awareness and engagement with the global policy making context of internet law. It requires an understanding of the informal law-making processes of standard setting and the values and priorities of these organisations and technical communities.

Should law support the best technology?

Let’s move to 2002. Microsoft has been found liable for anti-competitive conduct in relation to its operating system software.⁴ It was accepted by the court that the course of innovation, and corporate successes must have been impacted negatively. But given the tremendous pace of technological change since the legal action was initiated, can you fashion practical legal orders to redress the wrongs at this point in time? Further law usually acts on evidence. But what evidence, what proof, can you show of alternate successful operating systems and web browsers that ‘but for’ this unlawful conduct might have been? In any case, unlike in science fiction, the courts cannot turn back the clock and “make it so”. Given the practical constraints, the pressure to negotiate a settlement was enormous.

The US court accepted that as Microsoft has significant market power in the operating system market, a level playing field can be re-established by rules that allow vendors to choose what programs to install. Middleware programmers have to have access to interface and technical information so they can interoperate with Microsoft’s server operating products.⁵

The legal resolution to market failure was based on the establishment of particular communication rules for technology makers - setting the terms for who can access and deploy what code, subject to what conditions.

We are accustomed to the language of ‘access to code’, ‘openness’ and ‘freedom’ in relation to licensing terms as discussed by the open source and free software movement. However what is not fully appreciated is how those values and ideas about innovation permeate all the legal environments of IT more generally. As with the RFC-compliance example, here the legal discourse revolves around presumptions about the value and virtue of open technical knowledge for innovation in a market economy. There is again, an expression of support for the notion of free choice in regard to technical decision-making. In place of the notion of choosing to apply a blacklist, here we have respect for the freedom of software developers and vendors and customers to ‘choose’ their current preferred platforms and be able to access and use desirable code in their products and services.

There are two ideological bases to this anti-trust resolution: in a “technologically dynamic marketplace” innovation can generally look after itself, and the concept of “network effects” means that the technically ‘best’ software, such as Netscape Navigator

compared to Internet Explorer, may not inevitably succeed.⁶ Efficient or rational market behaviour might still lead to a choice of Explorer, even by customers who don't like the package, because so many others already use it. While the court acknowledged that there is much debate by economists about the significance of network effects in technology markets, they were reluctant to interfere with the marketplace freedom of developers, retailers and consumers to select and use their preferred code - whether that code is subject to proprietary, open source, or free software licensing. So if the technical environment is to be altered, this is to be achieved through consensus about the value of innovation and code in the marketplace - the sum of incremental, voluntary individual investment, development, purchasing and marketing decisions.

Should law require use of particular code?

It is interesting to contrast this situation with the freedom to choose preferred technology when it involves digital content, especially that owned by the entertainment conglomerates. There is clearly an overwhelming demand to port content from one platform, player or portable device to another. Sharing technology comes pre-set in Microsoft's basic operating systems. The iPod and its successors are here to stay, regardless of the outcome of the current review of fair dealing and the status of personal use exceptions to copyright infringement.⁷

Yet attempts, such as those currently being played out in the US over the "broadcast flag" are likely to emerge here, down the line. The broadcast flag is code that accompanies digital television signals to prevent redistribution of the digital content over the Internet. The marker signals 'compliant' devices to limit or prevent copying of the signal. It blocks transfer to non-compliant devices. The proposed regulation, recently found to be beyond the powers of the Federal Communications Commission to enact, would have required all TV-handling consumer electronics devices sold in the US after 1 July 2005, to be broadcast flag compliant.⁸ That is, all television sets, digital players and personal computers would be required to support that code.⁹ Perhaps with copyright reform in Australia we will see a trade off with the emergence of a limited personal use exception to address our current absurd levels of infringement, coupled with a 'ban' on access to the next generation of technology if does not support particular electronic rights management restrictions to prevent the current problem continually recurring with new innovations.

Clearly for this kind of regulation to proceed a choice must be made to intervene with innovation and the marketplace, notwithstanding that mandating compatibility with code owned and developed by certain interests slows the pace of innovation. However regulating code compliance duplicates the concerns for abuse of market power and of access and control to required code, played out in the Microsoft anti-trust litigation.

Whatever way we decide to deal with this particular regulatory problem in Australia, the reality remains that innovation that facilitates the ease of communication and interoperable application is of premium value in technology markets. Technological protection measures, anti-circumvention laws and copy restrictions on access to technology and content available in other markets does not just creates dilemmas about the capacity of our national jurisdictions to practically control information flows through the internet. This kind of regulation conflicts with the logic of internet culture as established by protocols dating from the 1970s, and adopted as common sense by many technology makers. The attraction of portable, ease to use, interoperable copying devices

is reflected in the marketing of many IT commodities, especially those targeting the general consumer. Given the already relatively slow take up of digital television services in Australia, one wonders what the impact of mandating stronger electronic rights management, that interferes with the 'ease' and 'freedom' of use of the medium would be on the market?

US influence on communication rules

For lawyers skilled in the art of categorisation and dissection of legal issues into ever finer points, there is perhaps little in common between the informal rule making by global organisations of engineers like the IETF, outcomes of competition law and digital copyright law reform. However what these areas have in common is that each has to confront the culture of connectivity and design communication rules in the global marketplace. These are ideas that have developed from at least the 1970s. Legal policy making needs to confront this history sensitively.

'Internet law' remains diffuse - comprising privacy, security, content restrictions, cybercrimes, ISP liability, IP licensing, trademark, spam, e-commerce, defamation, jurisdictional issues and so on. But decisions that are made in any one area can never successfully ignore the bigger picture. All internet laws need to take technological standards, alternatives and restrictions, local and global market realities, and the question of the impact of further innovation, into account.

Regulatory areas have their own distinctive cultures and different policy priorities that affect how they understand the broader communication, access and innovation issues. There are different communities of legal and technical experts and interest groups that engage in the various policy debates. But the efficacy of a communication rule made in one area is affected by the way it impacts on and intersects with the decisions of other technical and legal policy making communities in Australia and beyond. This means a knowledge and understanding of the broad range of internet law-making communities, their histories, values, dominant personalities, and interests is important. We should appreciate how these groups have managed the politics of communication rules and understood the nature of their responsibility to various positive law and informal law makers.

It is clear that a knowledge of such matters requires an engagement with developments in the US. However the Gutnick case¹⁰ demonstrates an Australian legal awareness of the ability for us to forge our own attitude and traditions to legal regulation of the internet. Nonetheless it remains the case that it is the US that predominantly sets the agenda for how we talk about and understand communication rules in law. US presence is not just felt through the volume of litigation, journal comments and net legal news that we see on a regular basis. It is also legally embodied through an extraordinary level of participation in informal law making through global bodies such as the IETF, World Wide Web Consortium (W3C)¹¹ and the World Summit on the Information Society (WSIS)¹². US influence affects the way we understand the potential of technology and innovation in internet law and policy matters. However, even though free speech and free market ideas generally do predominate (particularly outside of the copyright arena), there is not an homogenous US view on communication rules. Further in every forum the values of free speech and the free market present in different aspects.

The socio-political context of internet regulation matters to legal practice because much of the publicly visible regulation - statutes, co-regulation, litigation - draws on technology discourses that openly circulate in 'private' spaces - from computing engineers, their employers and customers. Engineers also manage legal conflict about rights to code, the implications of sponsoring one technical solution over another, corporate pressures to adopt particular technical solutions, and the implications for other innovators in the global marketplace. As lawyers we should learn more about the histories, traditions and conflicts that take place in the technical communities that regulate the internet. These are the people that developed, and continue to propagate, communication values like openness and interoperability, globally. An awareness of this culture is essential to devising practical and effective legal strategies for clients, big, medium or small.

¹ The Requests for Comments (RFC) document series is a set of technical and organizational notes about the Internet (originally the ARPANET), beginning in 1969. See <<http://www.rfc-editor.org/>>

² <<http://www.ietf.org>>

³ RFC-ignorant.org is located at <<http://www.rfc-ignorant.org/>>

While the IETF was aware of the difficulties with the old RFC and a Working Party was already established to address revisions to the protocol, it took till October 2004 for RFC-ignorant to accept that compliance with the RFC could be based on "incomplete" publicly accessible data.

⁴ Final Judgment, United States v Microsoft Corp. CA No. 98-1232 (CKK), filed 12 November 2002 (DDC 2002).

⁵ Final Judgment, United States v Microsoft Corp. CA No. 98-1232 (CKK), filed 12 November 2002 (DDC 2002).

⁶ United States v Microsoft Corp. 253 F.3d 34, 49-50 (DC Cir. 2001); 346 US App. DC 330, 345-6.

⁷ Attorney-General's Department, "Fair Use and Other Copyright Exceptions. An examination of fair use, fair dealing and other exceptions in the Digital Age", Issues Paper, May 2005. Available at

<<http://www.ag.gov.au/agd/WWW/agdhome.nsf/0/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>>

⁸ American Library Association, Et Al., Petitioners V. Federal Communications Commission And United States Of America, Respondents Motion Picture Association Of America, Inc., Et Al. Interveners. No. 04-1037b. (US App. DC Cir. 6 May 2005).

⁹ For the ongoing legal issues surrounding the broadcast flag in the US see <<http://www.publicknowledge.org/>>

¹⁰ Dow Jones & Company Inc. v Gutnick [2002] 194 ALR 433.

¹¹ <<http://www.w3.org/>>

¹² <<http://www.itu.int/wsis>>

For readers interested in exploring the socio-political context of internet regulation, Kathy Bowrey's book, *Law & Internet Cultures*, is published Cambridge University Press, 2005. It focuses on complex questions about the influence of the internet and how it is regulated, US influence and the limits of contemporary law making in relation to technology issues.