

## Cyberspace and the Law of the (Electronic) Horse, or Has Cyberspace Law Come of Age?

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Several years ago, at a conference on the "Law of Cyberspace" at the University of Chicago Law School, Judge Frank Easterbrook of the 7<sup>th</sup> Circuit Court of Appeals gave a talk entitled "Cyberspace and the Law of the Horse." He recounted an anecdote involving a former Dean of that law school, Gerhard Casper, who had expressed pride in the fact that the University of Chicago did not offer a course in "The Law of the Horse"; while there were, of course, lots of cases dealing with sales of horses, or with people kicked by horses, or with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows, any effort to collect these strands into a separate course on "The Law of the Horse" was, in Judge Easterbrook's view, "doomed to be shallow and to miss unifying principles." The best way to learn the law applicable to specialized endeavors, Easterbrook suggested, is to study general rules; far better for most students--better, even, for those who plan to go into the horse trade--to take courses in property, torts, commercial transactions, and the like, adding to the diet of horse cases a smattering of transactions in cucumbers, cats, coal, and cribs. Only by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the *law* about horses.

His point, of course, was that the "law of cyberspace," or the "law of the Internet," is much like the "law of the horse": a specialized endeavor best understood with reference to familiar general principles of contract, intellectual property, privacy, free speech and the like, but which does not need, and does not deserve, its own separate category.

I find myself thinking about these comments not infrequently. After all, I teach the very course of which Easterbrook was so disdainful, a seminar on "Cyberspace Law"; am I just giving my students a modern version of the law of the horse? Why are we perfectly comfortable with some specializations -- law school courses, law firm specialties, and endowed chairs at our leading law schools, in the "law of the family," the "law of banks," the "law of negotiable instruments," -- but not others (like the "law of the horse")?

These are, if one thinks about it, fascinating questions about, among other things, the sociology of the legal profession. The market for ideas, not unlike the market for tangible commodities, has its own complex forces of supply and demand. One reason, for example, that we've never had a "law of the horse" -- no courses, no casebooks, no scholarly writing, etc. -- is that up until recently it would have been virtually impossible to collect together all of the cases involving horses; how would one have known if courts *were* developing special principles applicable to horses in the far-flung corners of the legal landscape when, in pre-Lexis and pre-Westlaw days, there was no relevant "Horse Law" category in the West Digest system? (I've written previously in this column about the influence of the digest categories on the development of legal specialties; see "The Law is Where You Find It," March 1996). Student demand also plays a role in the development of these categories; law schools, after all, do compete with one another, to some extent at least, for students, and if students begin to demand courses on the law of the horse, or begin to look favorably upon institutions known to be strong in the *lex equinus*, you can be relatively certain that law schools will respond. Casebooks will then be produced, symposia organized, etc. Client demand is yet another major factor -- the extent to which your clients seek out lawyers with special equine expertise to advise them about their problems helps to determine the extent to which lawyers will promote themselves as possessing such expertise, which in turn helps to determine the extent to which law students possessing such expertise have success in the job market, which in turn helps to determine the demand for courses providing such expertise at the law schools.

It is far too early to guess how these pressures will ultimately shape the development of cyberspace law.

Certainly, the technology itself makes constructing a new sub-discipline much easier; I have, delivered to my desktop each day, the full text of any opinion issuing from any United States court including the words "Internet," "cyberspace," or "online." As students have begun to ask for courses on the law of cyberspace, a number of law schools have begun offering them, with more sure to follow as casebooks come into circulation (I personally know of four separate "law of cyberspace" casebooks now in preparation, and I suspect there are many more). Scholarly writing in the area appears to be fairly active, and I seem to detect a trend whereby more and more firms are advertising their expertise in this area (holding client seminars on Internet legal issues, for example).

But it is all a maddeningly complex system -- and, as in most complex systems, small events can sometimes have large consequences, "tipping" the system from one relatively stable state to another very different state -- like water turning suddenly, when the temperature is low enough, to ice. Such a tipping event, I suspect, may have taken place on December 11 of last year, in the federal courtroom in Washington where the latest round in the legal tussle between Microsoft and the Department of Justice was being played out.

I will have considerably more to say about the merits of these positions in my next column, so you will just have to wait to find out who's right and who's wrong here. My focus now is on Judge Jackson's appointment of Professor Lawrence Lessig of Harvard Law School as the "special master" in the case, charged with supervising discovery and with "propos[ing] findings of fact and conclusions of law for consideration by the court on the issues raised by this case."

My strong suspicion is that, whatever else happens in this case, the Lessig appointment is going to be seen as a turning point in the development of the law of this particular horse, as it were. That Judge Jackson felt he needed some assistance in sorting through these difficult issues is perhaps not surprising. But more interesting is that he chose not an antitrust expert -- though Lessig is not unfamiliar with antitrust law, having taught it in the past, he is certainly not among the ranks of specialists in that discipline -- nor a true "geek," a computer engineer with expertise in the underlying technology (as courts in complicated computer cases have sometimes done in the past). Though Lessig has written about many fields of law, and began his career as something of a specialist in constitutional law, what undoubtedly brought him to Judge Jackson's attention is his reputation (well-deserved, in my view) as an expert in -- gasp! -- "cyberspace law." His appointment represents a kind of official recognition that such expertise might really exist, that new ways of thinking about the law in the special conditions of cyberspace might be illuminating in the context of this dispute, that the markets for operating systems and browsers and other cyberspace tools may not behave at all like the markets for ordinary tangible goods. Indeed, Lessig's appointment has a kind of double meaning; not only is he a cyberspace law specialist, he is best-known (in "cyberspace law" circles, at least -- if there really are such circles) for helping to develop a body of theory to explain just how cyberspace law is in fact different from the law of the real world, how the tools that may suffice for the regulation of real space conduct may be inadequate in the special conditions of cyberspace, where the very structure of the place itself -- its 'physical laws' akin to gravity in the real world -- is a product of the software through which the user interacts with the 'place' and its 'inhabitants.'

We should, perhaps, not make too much of this. Lessig may not even serve out this appointment; Microsoft has challenged this appointment on general grounds and specifically on the ground that Lessig is biased (charges that I must say, as a friend and colleague of his, strike me as ill-founded and slightly hysterical), and the DC Circuit Court of Appeals will rule on the matter this April. But Judge Jackson may have seen something that Judge Easterbrook did not. Quite apart from the outcome in this particular case, Judge Jackson, by granting a form of intellectual respectability to this field of study, may have altered in one move the entire landscape of the profession for some time to come. Is it time to saddle up?