Access to Justice: Putting the 'I' of 'Intelligence' into Wiki - Can Wikis Bend the Rule of Law?*

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1 Intro

Good morning. Let me immediately aim for something that (i) will be of interest to you, that (ii) fits in this workshop's main theme and that (iii) relates to my current research.[1] All in all, I think that I may best serve these purposes by framing this talk into the discussion of two propositions. The first may seem a bit outlandish in this setting - I will try to make amends further on - and reads like this:

> *Proposition (1): Putting the 'I' of 'Intelligence' into wiki is completely beside the point for the Law and IT research community - that is: if we read 'I' as the 'I' in 'AI'*

And the second one reads like this and suggests that it would be wise to focus on something else:

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[1] See, for instance, Aernout Schmidt, Wilfred Dolfsma and Wim Keuvelaar, *Fighting the War on File Sharing*. T.M.C. Asser Press, 2007; A.H.J. Schmidt; Jeroen Donkers et al., editors, Chap. Ought Computers Adjudicate? In Liber Amicorum Jaap H. van den Herik. MICC, Universiteit Maastricht, 2007 ⟨URL: `http://www.cs.unimaas.nl/jaap60/papers/B20_schmidt.pdf`⟩; Aernout Schmidt, IT and the judiciary in the Netherlands – A state of affairs. Computer Law & Security Report, 23 2007:5.

> *Proposition (2): Wikis may bend the Rule of Law, just like the Rule of Law may bend wikis. Understanding how and why should be in the focus of attention of the Law and IT research community.*

I hope that the discussion of these propositions is of interest to the participants of the workshop, that it addresses the workshop's main theme and that it allows me to present some of the concepts and results of my current research. It is by no means my intention to stop anyone being enthusiastic about IT services for the law. What I will be trying to point out, however, is that the strength of combined efforts by law scholars and IT scholars lies in what I call legal requirements engineering, not in the design of intelligent applications *per se*.[2]

2 A simple patent-law situation

Let me start by presenting a perfectly ordinary legal case in order to gain some access to practical issues about access to justice. A simple patent-law issue might be the following. Imagine a small company, happily serving our government institutions, for over 15 years now, by publishing government messages in local papers that are delivered weekly at every doorstep in the Netherlands, using the publication space that remains when the paper is being typeset. Out of the blue, this company receives the order to immediately stop their practice, since it infringes a patent that has been registered two years ago. The patent concerns a poorly described business method that at first sight seems incredibly mundane.

However. The small company has to hire a lawyer - and patent lawyers do not come cheap. The lawyer has to comply with procedure, which includes soliciting for a report by the Patent Office that evaluates the case on fitness for court procedure. This report is mainly prepared by technicians, not by lawyers. Without a positive report, there will be no access to the court.

[2] As seems to be current trend in the law-and-ICT research community called JURIX: approximately half the author base of the 1991 proceedings was educated in law; in the 2004 proceedings, legal authorship had vanished almost completely. See: http://www.jurix.nl/index.php?option=com_proceedings&Itemid=30

There is a hitch, though. Of any discussion between technicians and lawyers, outcomes are unpredictable. So a good lawyer hires a specialized technician to present his case. The Patent Office procedure includes a hearing of both parties. When the hearing is done, both parties have at least invested $ 70.000,- each. And there is another hitch. The claim may well be inspired by the public secret that patent lawsuits are expensive and may end strategically and prematurely in settlement, in order to avoid excessive litigation costs (which average to an amount of well above 1 million Euro per case).

3 Law and ICT

When we look at this example, we may ask ourselves several questions. One might be about the cost of access to justice. Another one might be about the unpredictability of the preliminary procedure and its consequences for the rule of law: the system supports unwarranted claims to result in financial gain for predatory behavior. Still another one might be about what ICT-services, for instance wikis, may contribute to the situation and in what ways.

By chance, I noticed yesterday that in the JURIX conference proceedings there is a contribution on patent information. It is called: "A Modular Framework for Ontology-based Representation of Patent Information" and is written by a consortium of seven authors, originating from four different countries. The paper aims to help make the examination and classification tasks of the patent offices much more straightforward. I will use the objective of this paper as an illustration for my main intuition: that - although undoubtedly important - the *legal* problem with patent law is not about finding and comparing patent information at all. That problem is of technical and economic interest. It should be solved by technicians and economists, not by law scholars. The *legal* problem with patent law is its incidental incoherence with the rule of law. My intuition makes me feel that there lies the domain where law and ICT may meet productively. My message is that the law and ICT research community is well advised to focus on how ICT may contribute to the rule of lawness of legal arrangements, rather than on how ICT may

contribute to their economics. My question concerns the issue of how ICT may contribute to the rule-of-lawness of legal systems. In this workshop we are talking about artificial intelligence that may help. Considering the patent law example I want to know what the Law and IT discipline can contribute? Where do wikis enter into this equation? Or is the patent-law example unfit for our discipline? In order to address these questions I need to do some ground work first.

4 Putting the 'I' of 'Intelligence' into ...

Let me therefore talk a bit about my first proposition. Phrases like "Putting the 'I' of 'Intelligence' into ..." reveal the belief that adding intelligence to IT services will improve them. In my experience, this is not rocket science and quite often a misconception. I have seen intelligent word processors change the names of important people into the nearest natural-language neighbour with devastating results, and I have seen them change the name of our principal research funding institute NWO into NOW once too often. And I have also seen intelligent filters blocking important messages and letting through dangerous SPAM once too often. Artificial intelligence is interesting and alluring, but by no means the better option by default. I suggest that

- the introduction of something HTTP-like by Berners-Lee in 1989,
- the take-off of graphical browsers (Mosaic, Navigator) in 1994,
- the introduction of wiki by Howard Cunningham in 1995 and
- the founding of Google Inc. in 1998

are landmarks in ICT for intelligence, missed by the AI research community altogether. Neil Larsen, who designed several browser forerunners declined joining the Mosaic team in 1989 because he preferred knowledge modeling and creation over distributing information, provides a point in case. When we are talking wiki, we are talking about collective knowledge sharing and -management, often considered trivial in the world of AI. Before spending

energy in the injection of artificial intelligence in wikis, we better make sure it will have added value. Let me transform my misgivings into one neutral statement, instantiated with the currently most important wiki on earth:

> We only want AI-tools for Wikipedia, if we are sure that they will improve at least both the quality of the information base *and* the commitment of the Wikipedia community.

If we agree on this, we can get somewhere towards an argument for my first proposition. Key concept is community-member commitment. Consequently, a key issue is how artificial intelligence may work on commitment of human individuals. A simple, analytical argument emerges from 'intelligence' as understood in AI. This type of intelligence is designed to displace human intelligence, to make it obsolete in context. It will result in humans, no longer needing their intelligence for the task at hand. As such, it will reduce commitment. And, consequently, the ambition to inject artificial intelligence into wiki indiscriminately is a dangerous one.

5 ... is completely beside the point for the Law and IT research community

But my first proposition goes beyond possible danger. It states that injecting AI in wiki is completely beside the point for the IT and Law research community. Again the reasoning is analytical and simple. Wikis are social phenomena of incredible social potential. They support global cooperation, global understanding and global information sharing at the individual level. As such, they are completely new and have become astonishingly important social institutions, brought about by and dependent of - in hindsight - the simplest of technical ideas, wedded to the availability of Internet access and personal computing devices, in almost complete organizational freedom. Wikis themselves are social systems in cyberspace. How to design wiki technology is almost irrelevant from a scholarly legal position. What matters to legal scholarship is to know how wiki communities manage to perform legally - that is to study and understand what regulatory arrangements enhance

social commitment in wikis and what regulatory arrangements reduce it. As soon as we know something about that, we may look for adequate IT support by formulating requirements and offer them to our ICT colleagues. This is what I call legal requirements engineering. That is: requirements engineering for community commitment, not for intelligence. Aiming for wiki intelligence for artificial intelligence's sake is completely beside the point for the law and IT research community.

6 Wikis may bend the Rule of Law ...

So far so good, I have managed to get past my first proposition and am now ready to address the second, with still ten minutes on the clock. Lets dive into it. "Wikis may bend the Rule of Law ..." reads the first part of the proposition. As such, it provides a positive answer to the title of this contribution, a title - by the way - that I owe to Laurens Mommers' creative and informed mind. And because the Rule of Law concept is very flexible, it may be appropriate to provide some circumscription of how I see it. The concept is central to public international law, where people are looking desperately for legal instruments that may help further world peace and world prosperity - yes, ambitions are high. In this scene, it is considered a received postulate that the Rule of Law will help to achieve these things, which - as u natural result of continuous failures - leads up to unending discussions on what the concept may mean.[3] Generally, in the Western world, two types are distinguished: a 'lean' and a 'material' concept of Rule of Law. The lean concept coincides largely with the eight moralities of duty as presented by Fuller[4]

Eight Routes of Failure for any Legal System[5]

1. The lack of rules or law, which leads to ad-hoc and inconsistent adjudication.

[3] See, for instance, HiiL, *Rule of Law Inventory Report - Academic Part*. 2007 – Technical report ⟨URL: `http://www.hiil.org/uploads/File/1-947-Rule_of_Law_Inventory_Report_2007.pdf`⟩.

[4] Lon L. Fuller, *The Morality of Law, revised edition*. Yale University Press, 1967

[5] Source: Wikipedia

2. Failure to publicize or make known the rules of law.

3. Unclear or obscure legislation that is impossible to understand.

4. Retroactive legislation.

5. Contradictions in the law.

6. Demands that are beyond the power of the subjects and the ruled.

7. Unstable legislation (ex. daily revisions of laws).

8. Divergence between adjudication/administration and legislation.

(some add power-equilibrium and feedback requirements to this basic set[6]),

and the material concept is enhanced by the basic set of human rights. Essentially, the Rule of Law is not a thing, but a quality, it is a reference to that minimal quality of law systems that legitimates the powers of enforcement within. And as such, the concept is being frequently abused by Rulers, claiming their Law System to have Rule of Law.

Wikis may bend the Rule of Law, by feedback and information sharing. They may help the discussion about the quality of government. And that possibility is in itself to be considered a change for the better in the rule-of-lawness of law systems. As such, wikis deserve to be nursed. Full stop.

7 ... just like the Rule of Law may bend wikis

Of course, the Rule of Law may bend wikis too. Wikis are social systems where the input of individuals is decisive. When the Rule-of-Lawness in the real-world context of these individuals changes, their behaviour may change with it. We have a rather unsettling example from right here, in the Netherlands. Let me quote a message from the local Dutch Reuters, the ANP:

[6] See, *e.g.,* Schmidt (as in n. 1)

> "THE HAGUE, November 17 - Approximately 30.000 civil servants, subservient to the Dutch Minister of Justice have been forbidden to surf to the digital Internet encyclopedia Wikipedia. Thus has been confirmed by a spokesman of the Department. Jokes and offensive changes introduced into Wikipedia by civil servants, using their workstations at the Department caused the ban."

I consider this event a change in the Dutch rule of law because it shows that the divergence between the behaviour of the administration and the gist of valid legislation (against vandalism) seems to be widening. And Dutch civil servants are not the only source of Wikipedia vandalism. The continuously growing stream of vandalism and other attacks may force Wikipedia to change its local rules and their enforcement, and to start proactive policing (or moderating). This, I think, is the phenomenon that should be in the main focus of the Law and ICT research community.

8 Wikis having rule-of-lawness are successful for whatever purpose ...

By now I have finished my main argument. Wikis are valuable social systems. They are important to our law systems because they enhance their rule-of-lawness. They need protection against outside and inside attacks. We should investigate what the law can do for these issues. And we should know how our plans to employ wikis for legal tasks will influence our commitment to our legal systems. There is a lot to be learned here. Maybe Law and IT research can help: I wouldn't know where else to look.

Let me finish by changing my perspective to what I assume to be the mainstream perspective in this workshop and look for the meaning of what I just proposed regarding, for instance, the employment of wikis in legal education and in the patent litigation problem schetched before.

8.1 Legal education

Wikis in education are wonderful. They will support collaborative projects brilliantly, as long as students commit themselves. Since the relationship between teachers and students is basically hierarchical, this will work best when the setup of the wiki supports the feeling all around that the effort invested individually is less then the collective returns gained by the same individuals. Such equilibriums will enforce genuine commitment. One successful experiment in Leiden resulted in a collective paper by students, that got published in a serious Dutch Law journal. Lessig showed, however, that such setups (not a class wiki, but a class discussion list) are vulnerable to malicious attack.[7] All this shows that wikis belong to the family of law systems themselves. Wikis have rule-of-lawness. And the better it is, the better we may expect it to function as a social system. Research for how wiki rule-of-lawness works makes good sense.

8.2 Patent law

The patent law issue is much more difficult. The institutional setting with a Patent Office, expert technicians, patent lawyers, contesting parties and courts does not easily translate into a social system, committed to cooperation. Access being hampered by excessive costs will not be remedied by any IT service. Research for the causes for and facilitators of patent-claim abuse are more to the point, so it seems. As this is not easily understood to be a law and IT issue, however, there seems little room for Law and IT research here.[8]

9 Conclusion

Our legal systems are law systems. Wikis are law systems. For the Law and IT research community, knowledge about rule-of-lawness dynamics may be

[7] Lawrence Lessig, *Code and Other Laws of Cyberspace*. Basic Books, 1999

[8] During the workshop, an example was shown of a potentially successful wiki, by and for technicians investigating patentability of inventions. Although such a system may enhance the efficiency of technical reporting, it does not address the issue sketched.

a fruitful investment, before attempting to put the ‘I’ of ‘Intelligence’ into wiki.

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