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Law as a Function of Technology: The Problem of Legal Qualification.

THIS paper aims to demonstrate how new law emerges from the coming about of new technology. There's hardly any domain of human endeavor that is yet to be impacted by technology in some shape or form. The field of law is no different. Few decades ago, not many would have believed that today, courts of law would be using computational techniques and algorithms to predict recidivism among offenders. It would have also been farfetched to think that there would be new domains bordering at the intersection of innovation and technology such as intellectual property law. However, all of these and much more are reality today. The fields of law and technology have mutually intersected. And Technology by its dynamic nature, with all the risks and promises it offers has increasingly become a legal catalyst; creating issues with nuances and subtleties that the legal system has to respond to.

This, however, was not always the case. The initial push of technology into many fields has not been without some form of resistance. Unsurprisingly, the field of law was not expeditious in its response to technology. The challenge of technology and law at its onset was unique in its own ways. Foremost is that the legal issues created by the advancement of technology were in most cases novel and uncharted. They were issues that raised questions at the cutting-edge of scientific knowledge whose understanding to even the best of legal experts were beyond grasp. In addition, where scientific understanding was not the basis for resolution, these legal issues presented variations and elusiveness that challenged the prevailing understanding of law.

Fitting New Technology Into Old Categories.

In the face of this limitation in experience, knowledge and understanding, the inadequate response of the legal system to law and technology issues was to play by the existing rules or to at least try. In essence, the legal system approach was to find ways to adapt and define new technology and law issues to the preexisting legal categories. In the legal system, lawyers and judges are trained to work in a system of precedent that depends on the categorization of cases according to existing legal rules.The typical response to an issue is to analogize them to existing legal categories. "The right to reason by analogy from things which are settled in order to establish principles to govern things which are unsettled" is an established practice of how the system of law operates (Tranter 2018).

This response is often rational and may perhaps appear intuitive. Nonetheless, where new issues arise as a result of technological change, the old categories most often, no longer apply. I will now proceed to discuss classical to contemporary court cases that demonstrate this early approach of the legal system to technologically related legal disputes.

- ***Parks v. Alta California Telegraph Co(1859).***

The case of Parks v. Alta California was a case in the nineteenth century that shows that preexisting legal categories may no longer apply for new law and technology issues. And consequently may require creation of new laws and legal categorization. The case of *Parks v. Alta California Telegraph Co*; relates to a business agreement under which the Telegraph company was to send a telegraph message for Parks. Alta failed to deliver the message in record time, consequently incurring a loss for Parks. In response, Parks sued Alta for the damages incurred. The contention in this case is that the outcome of the case was hinged on whether a

telegraph was a common carrier. Common carriers were companies that transported goods. During this time, common carriers were automatically vested responsibility for the delivery of their consignments. Their legal responsibilities included both transporting the goods and ensuring its delivery. By implication, if Alta was a common carrier, then it insured the delivery of Parks' message and had to bear responsibility for the loss to Park. If it was not a common carrier, then it did not insure the message and would only be liable for just the cost of the telegraph.

The court in its decision held that telegraph companies were common carriers, since companies (common carriers) that delivered goods before the creation of telegraphs also delivered letters. These companies were the insurers of the letters they delivered and were held liable for any failure in delivery. In the court's reasoning, "there is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same". This was the entire basis of the court's decision. Quite ridiculous right ? Any average person would agree that carrying a message along a wire is not the same thing as carrying a physical letter by train. It's that obvious.

But In the court's judgment "the rules of law which govern the liability of Telegraph companies are not new. They are old rules applicable to new circumstances. What this court did was compare the delivery of a message by telegraph to the delivery of a message (a letter) by physical means. And since carriers of letters were common carriers, its conclusion was that telegraph companies must be no different. The average literate person (can read and write) would call out the flaws in the basis of the court's judgment in this case. A common carriers' message is contained in a physical letter that is assumed intact during the entire course of the transportation

as long as the letter is in the possession of the carrier, right to the moment of its delivery. This is not the case with a telegraph's message. Transmission of telegraphs was by electrical signals. The medium of transport though the same message is fundamentally different in each case.

It's not surprising that the court refused to acknowledge all these glaring nuances in the case. But rather chose to take what one would consider the easy way out because that was the obvious, lower hanging fruit in this case. What is interesting in this case is the court did not provide a basis for its legal rationale.

- ***Breese v. U.S Telegraph (1871).***

Breese v. U.S Telegraph is a related case with a different outcome. This involved a dispute over a telegraph message. Breese had an undertaking with the U.S Telegraph to transmit a message to buy seven hundred dollars worth of gold. But the message received was to buy seven thousand dollars worth of gold. Regrettably, the price of gold dropped and Breese sued U.S Telegraph for its loss. In this situation, the U.S Telegraph's form included a note that, for important messages the sender should have the message sent back at an additional cost, to ensure that there was no error in delivery. In the event that this message was not returned, the form specified that U.S Telegraph would not be responsible for any inaccuracy.

Similar to the Parks' case, Breese was contingent on whether a telegraph company was a common carrier. If they were, then U.S Telegraph would be the insurer of the message and would not get off of the liability based on its requirement for resending the message to avoid errors. As it happened, the court's decision held that telegraph companies were not common carriers. The court did not provide a basis for its legal construct, except stating that in this case, the law of

contract takes the upperhand. How is it that both courts reached different conclusions despite basing their judgment on the same notion of whether a telegraph company was a common carrier.

The court in the Alta case believed that telegraph messages were not essentially different from the conventional methods of delivering messages at the time, as such telegraph companies had to be common carriers. In the second case, the court regarded telegraph messages to be a different form of message delivery, noticeably distinct from the conventional forms, and as a result should not be subject to the common carrier categorization, but only to the contract. While the second court had a better view of the case, neither took the effort to engage in the necessary analysis to understand whether telegraph companies ought to be held as common carriers or even be liable for inaccuracies in the delivery of messages. They were both oblivious to the technology component that should have formed the basis for their legal rationale for liability in both cases.

- ***CompuServe Inc. vs Cyber Promotions, Inc.(1997)***

The proliferation of the internet and email usage in the 1990s resulted in a drastic rise in unsolicited email and messages. These messages were what became known as the “spam”, seemingly after a popular Monty Python skit in which spam is a persistently ubiquitous menu item. Spam is a significant source of annoyance for internet and email users. For internet service providers, who are forced to store extra messages or possibly lose customers offended by spam, it is an even greater predicament.

CompuServe, an internet service provider, brought litigation against an especially exasperating spammer, Cyber promotions. Prior to the suit, CompuServe had asked Cyber promotions to stop sending spam. Cyber promotions responded by sending more spam.

CompuServe tried to modify its software to keep spam out; Cyber responded by changing their methodology. A technique known as spoofing. CompuServe claimed it had received threats from its customers to discontinue their services because of the spam. Customers paid CompuServe in time increments, so the spam costs them more money. CompuServe claimed that the spam emails placed a significant burden on its equipment. In light of all these grievances, CompuServe decided to seek a legal injunction.

The challenge in CompuServe's legal case was that the use of its email system by a non-client did not seem to create an obvious cause of action in contract, tort, property, or other domain of law. So CompuServe developed an inventive claim – that Cyber promotions was trespassing on its personal property (computer hardware) violating an ancient doctrine known as trespass to chattels. Trespass to chattels is an intentional interference with another person's lawful possession of a personal property. A chattel refers to any property, moving or unmoving. A valid trespass to chattels requires that a person dispossesses the owner of the chattel; the chattel is impaired as to its condition, quality or value; the possessor is deprived of the use of the the chattel for a substantial amount of time, bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest. The application of all of these requirements to spam is not exactly direct and obvious. Spam does not make physical contact with a computer, does not appear to dispossess a computer and does not seem to effectively harm a computer.

CompuServe argued and the court held, however, that the electronic signals by which the email was sent constituted physical contact with the chattel, the spam draining CompuServe's disk space and computing power. Additional harm was done to CompuServe's reputation and

goodwill, which was actionable since many subscribers discontinued their service with it as their service provider.

The courts' sympathy for CompuServe's plight is understandable. But the courts made the same errors as in the cases of Parks and Breese – it failed to consider the basis for legal categorization before analogizing to new legal disputes created by novel technology. It did not recognize the difference between usage of an email system and the use of physical property. CompuServe could have hinged its case solely on the interference with its official legal business operations and customers and won. If the courts extensions to CompuServe were to hold today, all unsolicited email, telephone calls and physical mail would constitute trespass to chattels. Imagine the amount of lawsuits there would be per single person. Such a result would allow for people to sue telemarketers, for advertisements on radio and televisions, all on the basis of trespass to chattels. It would be absurd.

Creation of New Legal Categories.

Bullying is an age-old problem. It is an unwanted, aggressive behavior among school-aged children, young adults and grown ups in some cases that involves a real or perceived imbalance of power. This behavior has the potential to be repeated and victims of bullying can suffer lasting physical and psychological damages. With the coming of information technology, a bully can conceal their identity behind an electronic veil, and the offense can circulate very quickly. A legal term used to describe bullying that happens online is called cyberbullying. It takes a variety of forms including threats to kill, extorting someone sexually, posting or texting obscenity, commiting crimes based on race, gender, religion etc.

Cyberbullying has become an epidemic, culminating in widely publicized suicides in the U.S and globally. This problem is an old one in new guise, given the technological setting, it undoubtedly generated new challenges as well as new opportunities for legal response. Expectedly, the political response across the world has been an outpouring of statutes with rules on prevention and punishment of bullying and cyberbullying. The most common legal response to cyberbullying has been delegating the responsibility to schools boards; criminalization of harmful conduct and civil liability. There have been civil lawsuits for online and real-life bullying. In 2019, the student university president of American University, Taylor Dumpson sued Andrew Anglin, the founder and editor of a neo-Nazi website for initiating a racist online troll storm against her that made her fear for her life and disrupted her ability to pursue her education. She won the lawsuit.

IN CONCLUSION, lawyers work with legal categorization, and these legal categories usually control the legal implications. From a conventional standpoint, much in law is about placing factual circumstances in the appropriate legal boxes. At the intersection of law and technology, this will not always be the case. According to U.S court of Appeals Judge and professor at Chicago law, Richard Posner, “the products of new technologies are sometimes hard to fit into the law’s pigeonholes. Computer software is a kind of text, which implies that copyright is the proper regime; a kind of machine, which implies that patent is the proper regime; and a kind of algorithm, which traditionally has not been protected by either body of law.” “The emergence of new technologies has further caused the law to lose its bearings”. He added. We are seeing in increasing measure that new technologies are confounding the legal classification as we know it.

What we have seen is that technological innovation will bring about questions of whether technologies are identical enough to what is already known so that it could be governed by already existing rules or whether the new technologies are classical enough and require the creation of new and different rules that govern it. These questions cannot be resolved by merely comparing the function of the new to the old. With careful examination of the basis, pre existing categories may be applicable to new law and technology disputes, in other cases, it may not. As technology continues to evolve, decision makers must be willing to review, create, and recreate categorizations for the resolution of law and technology disputes.

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