

## GOVERNING THE EGALITARIAN CORE OF THE INTERNET

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### ABSTRACT

Few would claim that regulators, or academics working on regulatory policy, have neglected the Internet. However, most of their work is attracted by the global character of the Internet. Admittedly, this is a serious challenge to regulation, but it is not the only, and probably not even the most disquieting one. In the regulatory discourse, short shrift is given to the fact that the Internet originated in the egalitarian culture of American university computer labs. Its architecture was shaped during that period. Up to the present day, many key functions for Internet management are held by people coming from that culture.

This paper argues that the egalitarian challenge to Internet governance has been largely overlooked. The challenge is serious, but not unmanageable. Nevertheless, regulators must use appropriate concepts to understand the challenge. A subfield of sociology, cultural theory, is particularly instrumental for that purpose. In order to address the challenge, regulators must use a set of governance tools that deviates considerably from standard regulatory responses.

### INTRODUCTION

#### *The Problem*

Regulators are not good at multi-tasking. Admittedly, no one would claim that regulators have neglected the Internet. After all, there is a flurry of regulatory activity all over the world,<sup>1</sup> and an almost intractable amount of academic work on Internet-related subjects.<sup>2</sup> Most of this work is driven by the global character of the Internet. Admittedly, this poses a serious challenge to regulation,<sup>3</sup> but it is not the only one, and probably not even the most disquieting one. The Internet empowers libertarians to challenge the legal system from within. Most regulatory tools

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<sup>1</sup> For an overview, *see generally*, KLAUS W. GREWLICH, GOVERNANCE IN "CYBERSPACE". ACCESS AND PUBLIC INTEREST IN GLOBAL COMMUNICATIONS (1999).

<sup>2</sup> An excellent overview is provided by *Cyberspace Law Abstracts*

[http://papers.ssrn.com/sol3/JELJOUR\\_Results.cfm?form\\_name=journalbrowse&journal\\_id=225](http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=225) (Oct. 31, 2005).

<sup>3</sup> For my own contribution to this debate, *see*, Christoph Engel, *The Internet and the Nation State*, in UNDERSTANDING THE IMPACT OF GLOBAL NETWORKS ON LOCAL SOCIAL, POLITICAL AND CULTURAL VALUES 201 (Christoph Engel et al. eds., 2000).

have a hard time in matching the tremendous speed of the Internet's evolution. Moreover, Internet use is almost entirely decontextualised, and therefore almost entirely without social control.<sup>4</sup>

Another largely overlooked challenge to governance is cultural. The Internet originated in the egalitarian culture of American university computer labs.<sup>5</sup> Its architecture was shaped at that period. Up until now, many, if not the most key functions for Internet management have been held by people coming from that culture.<sup>6</sup> This paper presents three arguments. First, the egalitarian challenge to Internet governance has been largely overlooked. Second, the challenge is serious, but not unmanageable. Third, regulators must employ appropriate concepts to understand the challenge, alongside a set of governance tools that deviates considerably from standard regulatory responses.

#### *Four Basic Solidarities*

At first sight, culture appears to be the amorphous result of historical contingency. From a sufficient distance, however, two factors help explain most of cultural variance. Academics pushing this approach even claim that these factors are exhaustive.<sup>7</sup> *Mary Douglas* has dubbed them grid and group.<sup>8</sup> The group parameter measures the extent to which an individual is incorporated into a larger social unit. The grid parameter characterizes the degree to which an individual's life is predetermined by heteronomous prescriptions. This is not the place to quarrel about the rigidity of the approach, nor to debate its correctness. It is sufficient to show that the approach may help understand the egalitarians.

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<sup>4</sup> More on these challenges, from the angle of governance by law, from Christoph Engel, *The Role of Law in the Governance of the Internet* (Max Planck Inst. for Research on Collective Goods, 2002), available at [http://www.mpp-rdg.mpg.de/pdf\\_dat/2002\\_13.pdf](http://www.mpp-rdg.mpg.de/pdf_dat/2002_13.pdf).

<sup>5</sup> For an impressive account, see, MICHAEL DERTOUZOS, *WHAT WILL BE. HOW THE NEW WORLD OF INFORMATION WILL CHANGE OUR LIVES* (1997).

<sup>6</sup> Despite all external attempts, this statement continues to hold true to the present day. For more on this, see MILTON MUELLER, *RULING THE ROOT. INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* (2002).

<sup>7</sup> M. THOMPSON ET AL., *CULTURAL THEORY* 13-15, 57 and passim (1990).

<sup>8</sup> MARY DOUGLAS, *Cultural Bias*, in *IN THE ACTIVE VOICE* 183, 190-92 and 201-03 (Mary Douglas ed., 1982).

Figure 1: Four Solidarities

		group	
		high	low
grid	high	hierarchic	fatalistic
	low	egalitarian	individualistic

Cultural theory maps four basic solidarities to the grid group framework. High group and high grid make for hierarchists. Low group and low grid make for individualists. High grid and low group make for fatalists. And high group and low grid make for egalitarians.<sup>9</sup> These four represent idealized types, the cultural extremes. However, real world comparative illustrations may be made: for hierarchy, the high-caste Hindu villager; for individualism, the stock exchange trader; for fatalism, the unemployed East German skinhead; and for egalitarianism, the Green-peace activist.<sup>10</sup>

*Defining Egalitarians*

Academic attempts to understand egalitarianism did not start with cultural theory.<sup>11</sup> There has been considerable work done on social movements, and in particular on totalitarianism.<sup>12</sup> Lawyers might also see a parallel to integration theory.<sup>13</sup> The normative underpinnings of egalitarianism have in recent years often been heralded under the title of communitarianism.<sup>14</sup> But cultural theory offers by far the most encompassing and precise picture of egalitarians. This

<sup>9</sup> THOMPSON ET AL., *supra* note 7, at.6.

<sup>10</sup> More illustrations from *id.* at 8 and *passim*.

<sup>11</sup> For a survey of the doctrinal predecessors of cultural theory as such, *see, id.* at 103-214.

<sup>12</sup> *See*, FRANZ LEOPOLD NEUMANN, BEHEMOTH. THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM (1942); HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951).

<sup>13</sup> For the foundation of this theory, *see*, RUDOLF SMEND, *Verfassung und Verfassungsrecht, STAATSRECHTLICHE ABHANDLUNGEN UND ANDERE AUFSÄTZE* (Rudolf Smend ed., Duncker & Humblot 1968). The element of integration theory that comes closest is the stress it puts on community building by appealing to people's emotions.

<sup>14</sup> *See*, AMITAI ETZIONI, THE ESSENTIAL COMMUNITARIAN READER (1998). For a German voice, *see*, WINFRIED BRUGGER, LIBERALISMUS, PLURALISMUS, KOMMUNITARISMUS. STUDIEN ZUR LEGITIMATION DES GRUNDGESETZES Nomos (1999).

picture is also particularly helpful in understanding the specific problem under review here, the egalitarian influence on the architecture and management of the Internet.

Egalitarian thinking starts from an implicit or explicit view of the world. Nature is thought to be ephemeral. “The world...is a terrifyingly unforgiving place and the least jolt may trigger its complete collapse.”<sup>15</sup> Resources are defined as fixed<sup>16</sup>. Since people can do nothing about them, their only available strategy is to decrease their own personal needs.<sup>17</sup> The most optimistic vision egalitarians are willing to consider is thus a zero sum game. One person’s gain inevitably is another person’s loss. With a little trembling here and there, a negative sum game is even more likely;<sup>18</sup> “[n]ature is so precarious that the least inequality in the distribution of its resources will bring calamity.”<sup>19</sup> Consequently, egalitarians stress risks, rather than opportunities.<sup>20</sup> They take thought for little else than the precarious future.<sup>21</sup>

While the egalitarians’ view of nature is gloomy, their concept of man is strikingly optimistic. Human nature is seen as caring and sharing.<sup>22</sup> Thus, “[h]umans are born good but are corrupted by evil institutions,”<sup>23</sup> and “[h]uman nature is not only good but is also highly malleable.”<sup>24</sup>

Along with all other people else, egalitarians tend to select information such that it confirms their worldview. They highlight events apparently proving that the world is getting out of control,<sup>25</sup> and that the blame can be placed on governmental or market intervention.<sup>26</sup> Therefore, “egalitarians are not in the business of delivering. Their business is criticizing”.<sup>27</sup> By doing this, they also create internal cohesion.<sup>28</sup> Egalitarians thus need competing ways of life as forces to be pitted against.<sup>29</sup> As such, “[s]olidarity is maintained by portraying external forces as monstrous, and by accusing deviants of secretly importing evil ways [...] to corrupt the membership.”<sup>30</sup>

<sup>15</sup> THOMPSON ET AL., *supra* note 7, at 26.

<sup>16</sup> *Id.* at 44.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, *see also id.* at 29.

<sup>19</sup> *Id.* at 44.

<sup>20</sup> *Id.* at 64.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> Michael Thompson, *Global Networks and Local Cultures. What Are the Mismatches and What Can Be Done About Them?*, in UNDERSTANDING THE IMPACT OF GLOBAL NETWORKS ON LOCAL SOCIAL, POLITICAL AND CULTURAL VALUES 131 (Christoph Engel et al. eds., 2000).

<sup>23</sup> THOMPSON ET AL., *supra* note 7, at 34 .

<sup>24</sup> *Id.*

<sup>25</sup> THOMPSON, *supra* note 22, at 125.

<sup>26</sup> THOMPSON ET AL., *supra* note 7, at 59 .

<sup>27</sup> *Id.* at 10.

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* at 60.

Given this, egalitarians “maximize their transactions by keeping their group apart from others,<sup>31</sup> by constructing a ‘wall of virtue.’”<sup>32</sup>

Internally, egalitarians govern by conviction, not coercion.<sup>33</sup> They aim at bringing a learning process about, relying on “exposure (of the failing of the other solidarities) and revelation (good and bad in black and white)”<sup>34</sup>. Among themselves, they stress symmetry and accountability.<sup>35</sup> “Leadership is resisted and equality prized”.<sup>36</sup> By equality, they do not mean equality of opportunity, but of outcome.<sup>37</sup> Moreover, those at the bottom are supposed to have access to vital knowledge that is inherently inaccessible to those on the top.<sup>38</sup>

Consequently, egalitarians have a strong preference for one institutional arrangement: the common pool resource.<sup>39</sup> In terms of technology, egalitarians “prefer small-scale and emancipating technologies: technologies that ... are likely to equalize differences”.<sup>40</sup>

### *Understanding the Governance Problem*

Ideal types never fully match reality, but interpreting reality against the backdrop of them casts a lot of light on the Internet case. From the vantage point of cultural theory, it becomes understandable why the two classic regulatory approaches—regulation by incentive and regulation by order—are not likely to be effective. There are several ways of describing the challenges for governance inherent in egalitarian addressees. The most generic would demonstrate that governance must be probabilistic rather than deterministic. A somewhat more specific interpretation sees the challenge in the social embeddedness of behaviour characteristics of the members of egalitarian actors,<sup>41</sup> and aims at overcoming this. Another interpretation stresses the constructivist character of the challenge.<sup>42</sup> In this perspective, governance could address the cognitive and the motivational aspects of social construction. A further

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<sup>31</sup> *Id.* at 12.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> THOMPSON, *supra* note 22, at 125.

<sup>34</sup> *Id.* at 125.

<sup>35</sup> Tommy Tranvik et al., *Doing Technology (and Democracy) the Pack-Donkey's Way. The Technomorphic Approach to Ict Policy*, GOVERNANCE OF GLOBAL NETWORKS IN THE LIGHT OF DIFFERING LOCAL VALUES 165 (Christoph Engel et al. eds., 2000).

<sup>36</sup> THOMPSON, *supra* note 22, at 127.

<sup>37</sup> Tranvik et al., *supra* note 35, at 165.

<sup>38</sup> THOMPSON, *supra* note 22, at 121 note 5.

<sup>39</sup> *Id.* at 121; on such institutional arrangements see ELINOR OSTROM, GOVERNING THE COMMONS. THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); ELINOR OSTROM ET AL. ED., THE DRAMA OF THE COMMONS (2002).

<sup>40</sup> TRAVNIK ET AL., *supra* note 35, at 165.

<sup>41</sup> Basic Marc Granovetter, *Economic Action and Social Structure. The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985).

<sup>42</sup> A key reference on constructivism is BERGER, PETER L. & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY. A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1967).

approach borrows from systems theory.<sup>43</sup> The key conceptual tool of systems theory is autopoiesis. Systems theorists have long been trying to understand how governance is possible in the face of autopoiesis.<sup>44</sup> Their suggestions could be used to govern egalitarians as well. Limited space does not permit to pursue any of these approaches. Rather, an attempt to directly derive implications for governance from cultural theory is undertaken. The paper concludes by sketching the implications for the Internet case.

## THE INTERNET CASE

### *Competing Stories*

Cultural theory is constructivist.<sup>45</sup> Constructivism would violate its own intellectual basis if it pretended to know how a social phenomenon like the Internet "really" is. It also could not pretend to have conceptual certainty about the normative foundations for governing the Internet.<sup>46</sup> Put differently, cultural theory starts from fundamental conceptual and normative relativity.<sup>47</sup> Cultural theory does not, however, deny reality. In theoretical jargon: it adheres to soft, not to hard constructivism. Reality can indeed surprise observers and actors, and force them to change their minds.<sup>48</sup>, but cultural theory insists that no observer can have certainty about reality. It thus adheres to the epistemological view that reality can only be seen through the lens of theory driven hypotheses.<sup>49</sup> For cultural theory, it therefore does not come as a surprise that a social phenomenon as complex and rich as the Internet can be interpreted in very different ways. It therefore is not difficult to tell stories that see the basic danger of the Internet in the empowerment of the individualists (section a below), the hierarchists (section b) or the fatalists (section c). However, this paper does not only maintain that the egalitarian danger is one among many. To the degree possible from a soft constructivist starting point, it is convinced that, for the time being, the egalitarian danger looms largest (section d).

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<sup>43</sup> Unfortunately, the translations of Luhmann's work into English are not very good. Readers with a command of German should best go to NIKLAS LUHMANN, *ÖKOLOGISCHE KOMMUNIKATION. KANN DIE MODERNE GESELLSCHAFT SICH AUF ÖKOLOGISCHE GEFÄHRDUNGEN EINSTELLEN?* (1986). Although seemingly tangential, this is the most succinct presentation of Luhmann's system.

<sup>44</sup> Key sources are GUNTHER TEUBNER, *RECHT ALS AUTOPOIETISCHES SYSTEM* (1989); See also Gunther Teubner, *Reflexives Recht. Entwicklungsmodelle Des Rechts in Vergleichender Perspektive*, 68 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 13 (1982); not the term, but the idea of contextual governance is also prominent in HELMUT WILLKE, *DIE ENTZAUBERUNG DES STAATES. ÜBERLEGUNGEN ZU EINER SOZIETALEN STEUERUNGSTHEORIE* at part 4 (1983).

<sup>45</sup> See THOMPSON ET AL., *supra* note 7, at 296.

<sup>46</sup> The opposite is made explicit in THOMPSON, *supra* note 22; see also Travník et al., *supra* note 35.

<sup>47</sup> From a governance perspective see Christoph Engel, *Offene Gemeinwohldefinitionen*, 32 *RECHTSSTHEORIE* 23 (2001).

<sup>48</sup> Cultural theory even has a theory of surprises as one of its building blocks, see THOMPSON ET AL., *supra* note 7, at 3 and 69-75.

<sup>49</sup> Basic HANS ALBERT, *TRAKTAT ÜBER RATIONALE PRAXIS* (1978).

a) *Individualistic Danger* – Many observers see the Internet as a gigantic empowerment machine for profit-seeking firms. The claim is that the Internet bounces the production frontier up to their benefit.<sup>50</sup> "The invisible hand, through commerce, is constructing an architecture that perfects control—an architecture that makes possible highly efficient regulation".<sup>51</sup> Via the Internet, individualists can to a considerable degree even free themselves from the need for hierarchic support. For now they can generate and enforce their own institutions. It is no longer necessary for them to rely on the democratically controlled legislator or on the court system to shape the institutional framework for markets as they will. Copyright management systems,<sup>52</sup> electronic watermarks,<sup>53</sup> click – wrap contracts,<sup>54</sup> and electronic money illustrate such potential.<sup>55</sup> A firm is not only able to exploit the Internet to escape regulatory authority.<sup>56</sup> It can also use it to directly mine its customers. This is behind the concerns of consumerists.<sup>57</sup> Consumers risk having their personality checked out without even noticing,<sup>58</sup> or being paternalistically directed without ever having asked to be.<sup>59</sup> Consumers are left with little more than self help mechanisms,<sup>60</sup> i.e. some forms for building electronic countervailing power.

b) *Hierarchic Danger* – A competing story runs under the heading "Athens or Orwell". It is a remake of the well-known Big Brother story.<sup>61</sup> Economically speaking, the Internet does not only extend the production frontier of firms, but also of governments.<sup>62</sup> Authoritarian regimes all over the world are strengthened, as demonstrated by cases like China or Cuba.<sup>63</sup> Com-

<sup>50</sup> Joel P. Trachtman, *Cyberspace, Sovereignty, Jurisdiction and Modernism*, 5 IND. J. GLOBAL LEGAL STUD. 561 at note 12 and passim (1998).

<sup>51</sup> LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999).

<sup>52</sup> Comprehensive STEFAN BECHTOLD, VOM URHEBER- ZUM INFORMATIONSRECHT. IMPLIKATIONEN DES DIGITAL RIGHTS MANAGEMENT (2002).

<sup>53</sup> STEFAN KATZENBEISSER ET AL. EDS., INFORMATION HIDING TECHNIQUES FOR STEGANOGRAPHY AND DIGITAL WATERMARKING (2000).

<sup>54</sup> Margaret Jane Radin et al., *The Myth of Private Ordering. Rediscovering Legal Realism in Cyberspace*, 73 CHICAGO KENT LAW REVIEW 1295 (1998).

<sup>55</sup> LORENZ MÜLLER, ELEKTRONISCHES GELD (2002).

<sup>56</sup> More on this from Travnik et al., *supra* note 35, at 179.

<sup>57</sup> For an overview see Arthur Waldenberger, *Verbraucherschutz Im Internet*, MULTIMEDIARECHT Kap. 13.4 (Thomas Hoeren et al. eds., 2000).

<sup>58</sup> RealNetwork secretly collected information about the listening habits of customers who bought Real Jukebox, including listening to CDs on their computers Yochai Benkler, *Net Regulation. Taking Stock and Looking Forward*, 71 COLORADO LAW REVIEW 1203 at note 221 (1999).

<sup>59</sup> This is a standard criticism of commercial filtering systems. They tend to have many "false positives", and they typically do not make their filtering policy transparent, Lawrence Lessig et al., *Zoning Speech on the Internet. A Legal and Technical Model*, 98 MICH. L. REV. 395, 425 (1999); NATIONAL RESEARCH COUNCIL, Youth, Pornography, and the Internet (2002).

<sup>60</sup> Kenneth W. Dam, *Self-Help in the Digital Jungle*, 28 J. LEGAL STUD. 393 (1999).

<sup>61</sup> See DERTOUZOS, *supra* note 5, adding some sceptical remarks; see also James Boyle, *Foucault in Cyberspace. Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 178 and passim (1997).

<sup>62</sup> Trachtman, *supra* note 50, at note 12.

<sup>63</sup> More from WILLIAM YURCIK ET AL., THE GREAT (FIRE)WALL OF CHINA. INTERNET SECURITY AND INFORMATION POLICY ISSUES IN THE PEOPLE'S REPUBLIC OF CHINA (1996); Shanthy Kalathil et al., *The Internet and State Control*

puter-aided regulation is no bounty for addressees.<sup>64</sup> Government can control gateways<sup>65</sup> and identify individual recipients<sup>66</sup> and the character of the content.<sup>67</sup> It can even change the architecture of the Net in the interest of making it more "regulable".<sup>68</sup> Moreover, the Internet provides the government with highly vulnerable regulatory targets, in particular the technical intermediaries.<sup>69</sup> This view will also point to the military origin of the Internet, meant to keep communication alive even after a successful atomic strike.

The hierarchic and the individualistic danger can even be compounded, resulting in an opaque, but powerful conglomerate of firms and governments.<sup>70</sup> A graphic example is the following: a radical minority Senator forced Congress to add the Communications Decency Act to the overhaul of the telecommunications legislation. As expected by most, the courts struck the statute down. But industry was triggered to develop fairly powerful filtering technology. This technology cannot only be used by parents to protect their children, but also by an authoritarian government.<sup>71</sup>

c) *Fatalist Danger* – A third group of observers tells a story of fatalist danger originating from the Internet. They point to pornographers,<sup>72</sup> Nazi groups,<sup>73</sup> gamblers,<sup>74</sup> and criminals all empowered by the Internet. Again, the story is not without factual backing. As is often repeated, the nucleus of the Internet, ARPANET, has been designed such that even the violent interruption of communication lines could not stop communication altogether.<sup>75</sup> This is why Internet traffic is

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in Authoritarian Regimes. China, Cuba, and the Counterrevolution (2001) (Carnegie Endowment of International Peace Working Paper 21).

<sup>64</sup> JAY P. KESAN ET AL., NEITHER BOTTOM-UP NOR TOP-DOWN. A TACIT PUBLIC-PRIVATE COOPERATIVE SOLUTION FOR INTERNET REGULATION (2001).

<sup>65</sup> Lessig et al., *supra* note 59, at 415 ; Franz C. Mayer, *Europe and the Internet. The Old World and the New Medium*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 149, 161 (2000). Currently, 45 countries restrict Internet access.

<sup>66</sup> Lessig et al., *supra* note 59, at 404 .

<sup>67</sup> *Id.* at 404 f., 09 f., 11.

<sup>68</sup> LESSIG, *supra* note 51, at 43 and passim.

<sup>69</sup> Lessig, *supra* note 59, at 403f.

<sup>70</sup> See again the quote from LESSIG, *supra* note 51, at 6: "The invisible hand, through commerce, is constructing an architecture that perfects control – an architecture that makes possible highly efficient regulation."

<sup>71</sup> The story is told by Yochai Benkler, *Internet Regulation. A Case Study in the Problem of Unilateralism*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171, 176 (2000); for a further story see *Id.* at 182.

<sup>72</sup> See only NATIONAL RESEARCH COUNCIL, *supra* note 59.

<sup>73</sup> Carolyn Penfold, *Nazis, Porn and Politics. Asserting Control over Internet Content*, JOURNAL OF INFORMATION, LAW AND TECHNOLOGY (2001); Ulrich Sieber, *Die Bekämpfung Von Hass Im Internet. Technische, Rechtliche Und Strategische Grundlagen Für Ein Präventivkonzept*, 34 ZEITSCHRIFT FÜR RECHTSPOLITIK 97 (2001); National Research Council, *Global Networks and Local Values* National Academy of Sciences 23 (2002); Christoph Engel, *Die Internet-Service-Provider Als Geiseln Deutscher Ordnungsbehörden. Eine Kritik Der Verfügungen Der Bezirksregierung Düsseldorf*, 6 MULTIMEDIA UND RECHT Beilage 4, 1 (2003).

<sup>74</sup> Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECHNOLOGY LAW JOURNAL 1021 (1999); ROGER A. CLARKE ET AL., THE TECHNICAL FEASIBILITY OF REGULATING GAMBLING ON THE INTERNET (2001).

<sup>75</sup> On the history of the Internet see NATIONAL RESEARCH COUNCIL, *supra* note 73.



packet switched. All communication is cut into small morsels, seeking their way separately through a worldwide interconnected network. This makes interception of Internet traffic practically impossible. If users want even better protection, they can encrypt their traffic,<sup>76</sup> and they can use anonymizers.<sup>77</sup> All these features allow fatalists to escape outside control with very little effort.

*d) Egalitarian Danger* – As admitted at the outset, none of these stories is false. But they all overlook another, the egalitarian danger. This danger looms at least as large as the others. It stems from the fact that the Internet has not only largely been shaped by egalitarians (section 2). They have even hardwired their way of life in the Internet architecture (section 3). This general point can be illustrated by two salient bones of contention. Copyright opposes egalitarians with individualists (section 4), content regulation does the same between egalitarians and hierarchists (section 5). But the competing (active)<sup>78</sup> ways of life should take care when they defend their position vis-à-vis the egalitarians. They might well have the power to fix their problems once and forever. But such radical responses would not be in their own long term interest. For they need the egalitarian base of the Internet as an infrastructure to allow themselves to thrive (section 6).

### *The Egalitarian Technology*

The Internet does not only have egalitarian roots (section a). It conserves many egalitarian traits (section b). The Internet is organised along the egalitarians' preferences, namely as a commons (section c). It is a machine for egalitarian empowerment (section d). This is at least, how the facts can be stylised. But even if one admits some caveats, the egalitarian elements remain strong (section e).

*a) Egalitarian Roots* – The military prelude notwithstanding, the evolution of the Internet has been driven by engineers basically uncontrolled by either government or market. The other ways of life had different, less viable plans for transnational data transfer. They realized the potential of the Internet only when it was already in place.<sup>79</sup> This allowed the techies to give the network their flavour. Not surprisingly, this flavour was basically egalitarian, because many of

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<sup>76</sup> Comprehensive NATIONAL RESEARCH COUNCIL, *Cryptography's Role in Securing the Information Society* (1996).

<sup>77</sup> See only A. Michael Froomkin, *Flood Control on the Information Ocean*.

*Living with Anonymity, Digital Cash, and Distributed Databases*, 15 UNIVERSITY OF PITTSBURGH JOURNAL OF LAW AND COMMERCE 395 (1996).

<sup>78</sup> Fatalists by definition take their environment as is. Accordingly there is no such thing as a fatalist Internet policy, pitching fatalists and egalitarians against each other. In cultural theory, fatalism is therefore called the passive way of life, as opposed to the other three active ways.

<sup>79</sup> See again Travnik et al., *supra* note 35, at 178; NATIONAL RESEARCH COUNCIL, *supra* note 73, at 571.

the decisive steps were taken in University computer labs.<sup>80</sup> And even those computer activists working in industry basically shared the same professional culture.<sup>81</sup>

b) *Egalitarian Traits* – The Internet does not only have an egalitarian history. It also preserves many egalitarian traits. The most visible is a borderline case. The open source movement, and Linux in particular, does not concern the Internet itself, but a major condition necessary for the Internet to become effective. The open source movement has attracted a lot of academic interest, because it radically deviates from the business model of the traditional economy.<sup>82</sup> In line with this, quite a lot of the business done over the Internet is best characterized by the idea of a gift economy.<sup>83</sup> The core electronic product is often given away for free, aiming at voluntary contributions from users for the production costs, or at sales on ancillary markets.<sup>84</sup> Many of those driving the evolution of the Internet think that scarcity is not the problem, but that, at most, the unpredictable rise of demand is.<sup>85</sup>

Internet activists do herald their egalitarian conviction.<sup>86</sup> As is characteristic for egalitarians, Internet activists are tied together by a common enemy, be it Microsoft or big business more generally. This explains the emotional, sometimes even violent reaction to what the activists have called spam, i.e. unsolicited e-mail.<sup>87</sup> The vigorous response to spam is all the more indicative if compared to virus attacks. Both challenges can best be parried by installing filters. In the case of viruses, most Internet users have long accepted this, and they have their filters updated several times a day. Spam is easier to filter, and its nuisance value is by far smaller than that of viruses. Nonetheless the emotional reactions are reserved to spam. It originates from the identity

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<sup>80</sup> Joel Reidenberg, *Lex Informatica. The Formulation of Information Policy Rules through Technology*, 76 TEX. L. REV. 553, 571 (1998).

<sup>81</sup> Impressive in its richness DERTOUZOS, *supra* note 5.

<sup>82</sup> From the rich literature see Josh Lerner et al., *The Simple Economics of Open Source* (2000) (National Bureau of Economic Research Working Paper 7600); James E. Bessen, *Open Source Software. Free Provision of Complex Public Goods* (2001); URSULA HOLTGREWE, *Kreativität Als Norm - Zum Erfolg Verdammt? Open-Source Software Zwischen Sozialer Bewegung Und Technischer Innovation*, GUTE GESELLSCHAFT? VERHANDLUNGEN DES 30. KONGRESSES DER DEUTSCHEN GESELLSCHAFT FÜR SOZIOLOGIE IN KÖLN 2000 399 (Jutta Allmendinger ed., 2001); Jennifer W. Kuan, *Open Source Software as Consumer Integration into Production* (2001); David McGowan, *Legal Implications of Open-Source Software*, U.ILL. L. REV. 241 (2001); DAN HUNTER, *CYBERSPACE AS PLACE, AND THE TRAGEDY OF THE DIGITAL ANTICOMMONS* (2002); Bernard Reddy et al., *Government Preferences for Promoting Open-Source Software. A Solution in Search of a Problem* (2002).

<sup>83</sup> KEVIN KELLY, *NEW RULES FOR THE NEW ECONOMY. 10 RADICAL STRATEGIES FOR A CONNECTED WORLD* 60-62 (1998).

<sup>84</sup> *Id.* at 63-64.

<sup>85</sup> Characteristic Daniel J. Farber, *Predicting the Unpredictable - Technology and Society*, UNDERSTANDING THE IMPACT OF GLOBAL NETWORKS ON LOCAL SOCIAL, POLITICAL AND CULTURAL VALUES 29 (Christoph Engel et al. eds., 2000).

<sup>86</sup> Characteristic the “inaugural speech” of the German at large member of ICANN, ANDY MÜLLER-MAGUHN, <http://www.datenreisen.de/papers/Regierungserklaerung.html> (Januar 17, 2004).

<sup>87</sup> For a definition see <http://www.cli.org/selford/Spam.htm> ; on a key event see Henry H. Perritt, *Cyberspace Self-Government. Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECHNOLOGY LAW JOURNAL 413, 438 (1997).

defining enemy. Finally, egalitarianism is present in social norms for Internet use, as epitomized by the "netiquette"<sup>88</sup>.

c) *Internet as Commons* – Cultural theory would expect organisation to follow the predominant belief system. The characteristic institutional arrangement for egalitarians is a jointly managed commons.<sup>89</sup> And the Internet does indeed have many traits of a commons.<sup>90</sup> A closer look is even more elucidating. On the Internet, it is not unusual for data packets to make large geographical detours. If a German national wants to retrieve information from a German server, it is well nigh possible that many of the data packets go via the U.S. This can make sense, since, due to its technical history, the backbone capacity in the U.S. is larger than anywhere else in the world. Moreover, once a user pays a fee to his local Internet Service Provider, he can access any web or e-mail server all over the world. Functionally, the Internet is thus indeed a commons. Technically and economically, this is different however. For the local Internet Service Provider must himself buy the right to transmit traffic to parts of the backbone. The routers managing Internet traffic will only let those data packages pass that have paid for transport via the originating Internet Service Provider.<sup>91</sup> The functional commons thus results only from the high redundancy of the commercially organised backbone network.

d) *Egalitarian Empowerment* – "By its very nature as a child of the industrially wealthy and democratic nations of the world, the information market place will act as a gigantic flywheel of egalitarian customs and habits".<sup>92</sup> "Egalitarians [...] foresee this free-floating system of zic zac electronic paths as a technology that is likely to equalize differences, since it is designed to circumvent gates and gate-keepers".<sup>93</sup> "When are all these technologies finally going to let us hear from the voiceless millions of this earth?"<sup>94</sup> These citations by *Yehudi Menuhin* and others highlight how much the Internet serves as a machine for egalitarian empowerment.

Many of its features add to the effect. The very basic technical protocol TCP/IP is radically egalitarian. Irrespective of contents, sender or receiver, it cuts all communication into small pieces that are treated equally. Since these bits are so small, the least bandwidth allows for at least some Internet communication. Information is available everywhere in the world. Receivers need no longer go through some technical or economic gate to get access to information. No

<sup>88</sup> Sally Hambridge, *Netiquette Guidelines* (1995) ; critical Radin, *supra* note 54, at note 44.

<sup>89</sup> See the rich material provided by OSTROM, *supra* note 39.

<sup>90</sup> More from Peter Kollock et al., *Managing the Virtual Commons. Cooperation and Conflict in Computer Communities*, COMPUTER-MEDIATED COMMUNICATION. LINGUISTIC, SOCIAL AND CROSS-CULTURAL PERSPECTIVES 109 (Susan Herring ed., 1996); Alok Gupta et al., *The Internet: A Future Tragedy of the Commons?*, COMPUTATIONAL APPROACHES TO ECONOMIC PROBLEMS 347 (Hans Rustem Amman et al. eds., 1997); Dan Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons* (2002).

<sup>91</sup> More from European Commission, *Internet Network Issues*, CEPT, ETNO & EICTA WTSA-2k doc. (00)122 Rev. 002 of September 11, 2000; see also Jay P. Kesan et al., *Fool Us Once Shame on You- Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 WASH. U. L. Q. 89 (2001).

<sup>92</sup> DERTOUZOS, *supra* note 5, at 294.

<sup>93</sup> Travnik et al., *supra* note 35, at 180.

<sup>94</sup> YEHUDI MENUHIN, cited to DERTOUZOS, *supra* note 5, at 284.

more than a standard personal computer and flat rate access to the Internet is needed to become an information provider. This allows for radical decentralization, disempowering both hierarchy and market.<sup>95</sup>

Most important for egalitarians is the fact that the Internet makes organising groups easier than ever before. Economically speaking, the organisation cost drops to nearly zero. This strongly reduces the traditional comparative disadvantage for social movements vis-à-vis stricter forms of organization. Put in the influential terminology of *Mancur Olson*: These interests are no longer diffuse.<sup>96</sup> Civil society becomes a much more realistic option. Neighbourhood can be virtual.<sup>97</sup> Community no longer presupposes propinquity.<sup>98</sup> Civil society has not hesitated to seize the opportunity. The Internet has been decisive in striking down the Multi-lateral Agreement on Investment.<sup>99</sup> Internet activists have brought the case of Chiapas in Mexico to the attention of the world.<sup>100</sup> Others have used the Internet to de-stabilize the belligerent regimes in Bosnia and Kosovo.<sup>101</sup>

*e) No Pure Case* – As impressive as all these observations are, they should not be misunderstood. As cultural theory posits, the four solidarities are ideal types. Reality nearly never entirely obeys one of them. The Internet is no exception to this. Even at its egalitarian core, non-egalitarian elements are to be found. Linux uses copyright to protect itself against outsiders. And IBM is part of the Linux coalition.<sup>102</sup> A reputation gain within Linux is valuable human capital on the labour markets.<sup>103</sup> Linux has surrounded itself with professional service providers on the periphery, managing the interface between the egalitarian core and a more commercial environment.<sup>104</sup> Thus pure egalitarianism is not the issue; an unusually strong egalitarian component is. Understanding the pure theoretical case is, however, the best preparation for effectively reacting to this egalitarian component.

### *The Hardwired Way of Life*

Each of the three active ways of life has an important contribution to make. The mere fact that the Internet creates opportunities for egalitarians is thus not normatively problematic. Egalitarians are no less accountable than hierarchists or individualists.<sup>105</sup> What creates a problem,

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<sup>95</sup> Many of these traits are highlighted by THOMPSON, *supra* note 22, at 123.

<sup>96</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION. PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

<sup>97</sup> DERTOUZOS, *supra* note 5, at 157-60.

<sup>98</sup> THOMPSON, *supra* note 22, at 123.

<sup>99</sup> More from NATIONAL RESEARCH COUNCIL, *supra* note 73, at 85.

<sup>100</sup> More from *Id.* at 86.

<sup>101</sup> More from *Id.* at 94.

<sup>102</sup> ROBERT MNOOKIN pointed me to both facts.

<sup>103</sup> JOSH LERNER ET AL., *THE SIMPLE ECONOMICS OF OPEN SOURCE* (National Bureau of Economic Research Working Paper 7600, 2000).

<sup>104</sup> More from Holtgrewe, *supra* note 82, at 416(f).

<sup>105</sup> David R. Johnson, Susan P. Crawford & John G. Palfrey, *The Accountable Net: Peer Production of Internet*

however, is that, to a considerable degree, the egalitarian way of life is embedded in the technology of the Internet.

Cultural theory defines the normative goal as follows: no way of life is ever to fully win out over its competitors. Since each solidarity highlights elements of nature and solidarity that are really out there, none of them should be allowed to be in a safe harbour.<sup>106</sup> In accord with that perspective, a frequent observation in the academic discourse on the Internet becomes relevant. These observers claim that on the Internet, power is embedded in technology.<sup>107</sup> Technical "code is law".<sup>108</sup> Governance is hardwired.<sup>109</sup> Due to the history of the Internet, this hardwiring favours egalitarianism to a considerable degree.<sup>110</sup>

Hardwiring implies excessive rigidity. Policy changes require that the infrastructure be rebuilt.<sup>111</sup> "Problems can be programmed away".<sup>112</sup> Code is self-enforcing, and thereby free from any implementation deficit.<sup>113</sup> Even resistance often comes too late, for code is often regulation that goes unnoticed.<sup>114</sup>

The point should not be overstated, however. Only the technological basis is hardwired, not the complementary social infrastructure of Internet egalitarians. Moreover, the way of life as such is not hardwired, but only an opportunity structure that is advantageous for egalitarian self-organisation.

*Copyright: The Bone of Contention with Individualists*

What does this mean in more practical terms? By way of illustration, one of the bones of contention between Internet egalitarians and individualists, and with hierarchists, shall be portrayed in somewhat greater detail. Both conflicts go to the core of the competing ways of life. Disabling copyright essentially forces individualists not to use their defining way of coordinating

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*Governance*, (2004), available at [http://ssrn.com/abstract\\_id=529022](http://ssrn.com/abstract_id=529022).

<sup>106</sup> THOMPSON ET AL., *supra* note 7, at 83-86.

<sup>107</sup> Boyle, *supra* note 61, at 177 and *passim*.

<sup>108</sup> LESSIG, *supra* note 51; see also Jay P. Kesan & Rajiv C. Shah, *Deconstructing Code*, 6 YALE J.L. & TECH. 277 (2003).

<sup>109</sup> Joel Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L. J. 911 (1996); Boyle, *supra* note 61, at 177(f); Reidenberg, *supra* note 80, at 555 and 86; LESSIG, *supra* note 51.

<sup>110</sup> Cf. Travnik et al., *supra* note 35, at 166: "the technological design that the winning solidarity has locked us all into"; THOMPSON ET AL., *supra* note 22, at 126.

<sup>111</sup> Reidenberg, *supra* note 61 (1996); cf. *id.* at note 80, at 587: "Policymakers must be involved early in the development phases of new technologies to assure that options and flexibility are maximised."

<sup>112</sup> LESSIG, *supra* note 51, at 13.

<sup>113</sup> On the implementation problem, see GERD WINTER, *DAS VOLLZUGSDEFIZIT IM WASSERRECHT. EIN BEITRAG ZUR SOZIOLOGIE DES ÖFFENTLICHEN RECHTS* 74 (1975); RENATE MAYNTZ, *IMPLEMENTATION POLITISCHER PROGRAMME. EMPIRISCHE FORSCHUNGSBERICHTE* (1980).

<sup>114</sup> Paul Schiff Berman, *Cyberspace and the State Action Debate. The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. OF COLO. L. REV. 1263, 1265 (2000).

behavior, the market. Likewise, disabling the power of government to control Internet contents is paramount to disabling the defining demand of hierarchists, internal sovereignty<sup>115</sup>.

The most primitive market needs at least three institutions in order to work: property rights, contract, and an enforcement mechanism.<sup>116</sup> For digital products like music recordings, the Internet might make it possible to do away with them to a considerable degree, for the cost of distributing such products falls to trivial sums. Artists no longer need the big music companies as intermediaries. Via the Internet, they can reach their public directly. They can decide themselves whether they are content with giving recordings away for free if this entices enough listeners to contribute in different ways to the production costs. Tickets to live performances, or the purchase of CDs, as some sort of a premium service, are the most popular options.<sup>117</sup>

The music industry took this as *casus belli*. It sued MP3.com, which offered the digitally compressed contents of music CDs for download.<sup>118</sup> After the court case was won, one of the big players in the music industry bought MP3.com and thereby made it mute.<sup>119</sup> Napster used a more intelligent scheme. The company did not itself offer music files for download. It only organised file sharing among its customers. But this did not help the company either. It also got sued and lost its case.<sup>120</sup> Recently, the music industry has also started suing Internet Service Providers for giving their clients access to music file-sharing systems from abroad.<sup>121</sup>

The music industry also got support from the legislator. The U.S. Digital Millennium Copyright Act 1998 transposes provisions of the World Copyright Treaty into U.S. law. Article 11 of the treaty asks the contracting parties to provide effective legal remedies to prevent the circumvention of technological measures used by authors to protect their rights. Article 12 asks contracting parties to make it a criminal offense if an outsider hacks electronic rights management systems, or distrib-

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<sup>115</sup> Actually, this might not even be the most frightening attack by Internet egalitarians to governmental power. Under less public scrutiny, a number of hacking activists are fighting cybercrime investigators and the secret services by technical means. Steve Bell, *The Web's Most Wanted*, THE GUARDIAN, Aug. 1, 2002, at <http://www.guardian.co.uk/print/0,3858,4472989-104917,00.html>.

<sup>116</sup> For greater detail see Christoph Engel, *Die Soziale Funktion Des Eigentums*, BERICHT ZUR LAGE DES EIGENTUMS 1-107, 47-50 (Otto Depenheuer et al. eds., 2002).

<sup>117</sup> More from Janis Ian, *The Internet Debacle – an Alternative View* (2002), at [http://www.janisian.com/article-internet\\_debacle.html](http://www.janisian.com/article-internet_debacle.html); Janis Ian, *Fallout - a follow up to The Internet Debacle* (2002), <http://www.janisian.com/article-fallout.html>; Raymond Shih Ray Ku, *The Creative Destruction of Copyright. Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002).; see also A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 903 (N.D. Cal. 2000).

<sup>118</sup> UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (D.N.Y. 2000).

<sup>119</sup> Peter K. Yu, *How the Motion Picture and Recording Industries Are Losing the Copyright War by Fighting Misdirected Battles*, FINDLAW'S LEGAL COMMENTARY Aug. 15, 2002 (2002).

<sup>120</sup> 114 F Supp 2d 896; A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

<sup>121</sup> A first case was lost, however, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003); more on the case from Alice Kao, *RIAA v. Verizon: Applying the Subpoena Provision of the DMCA* 19 BERKELEY TECH. L.J. 405 (2004); for background see Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653 (2003); Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, (July 2004). U CHICAGO L. & ECON., Olin Working Paper No. 217, available at [http://ssrn.com/abstract\\_id=573502](http://ssrn.com/abstract_id=573502).

utes information about how to do that.<sup>122</sup> Relying on these provisions, a Russian cryptographer was arrested for giving a presentation of how his company was able to remove security protection from Adobe e-books. And the publisher of the hacker magazine *2600* was enjoined from posting, on his website, the computer code that cracked the encryption technology used for protecting DVDs. Many who work on hacking no longer dare publish their results.<sup>123</sup> The latest scoop of the music industry was a bill introduced by U.S. Rep. Howard L. Berman (D-CA). If this had become the law, the music industry would even have been allowed to hack the computers of those who are guilty of violating their copyrights.<sup>124</sup> The music industry even prepared technical attacks on peer-to-peer networks.<sup>125</sup>

Egalitarian activists have not just let that happen. In response to the Berman bill, they hit the website of the Recording Industry Association of America's website with denial-of-service attacks.<sup>126</sup> They have made copyright an issue of American high politics, mobilizing resistance from legal scholars, cryptographers, technology developers, civil libertarians and, last but not least, consumer advocates<sup>127</sup>. Most importantly however, they have transposed music distribution to parts of the Internet that are almost impossible to control.<sup>128</sup> There are many,<sup>129</sup> the most popular being *KaZaA*<sup>130</sup> and *Gnutella*.<sup>131</sup> Another option is Internet radio going off-shore.<sup>132</sup> All in all, a serious copyright war between the music industry and hackers has been started.<sup>133</sup>

### *Content Regulation: The Bone of Contention with Hierarchists*

<sup>122</sup> Transposed into 17 U.S.C. §§ 1201 and 1202.

<sup>123</sup> Yu, *supra* note 119.

<sup>124</sup> Proposed 17 U.S.C. § 514 (a); on the background, see the section-by-section analysis, prepared by Representative Berman, <http://www.heise.de/newsticker/meldung/29456> ; Representative Berman withdrew his bill in Spring 2003, <http://www.heise.de/newsticker/data/anw-25.02.03-002/> .

<sup>125</sup> An example is reported at <http://www.heise.de/newsticker/data/cp-18.01.03-002/> .

<sup>126</sup> John Borland, *RIAA Site Comes Under Second Attack*, CNET NEWS.COM, Aug. 28, 2002, at <http://zdnet.com.com/2100-1106-955776.html>.

<sup>127</sup> Yu, *supra* note 119; Jeroen van Wijk, *Dealing with Piracy. Intellectual Asset Management in Music and Software* (2002) (ERIM Report Series 2002/86); Guy Pessach, *Copyright Law as a Silencing Restriction on Non-Infringing Materials – Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV. 1067 (2003).

<sup>128</sup> Ann Bartow, *Arresting Technology*, 1 BUFFALO INTELLECTUAL PROPERTY LAW JOURNAL 95 (2001).

<sup>129</sup> The topic has become popular among Internet lawyers. From the most recent sources see Kamiel J. Koelman, *P2P Music Distribution: a Burden or a Blessing?*, (2003) at [http://ssrn.com/abstract\\_id=618961](http://ssrn.com/abstract_id=618961); Peter K. Yu, *P2P and the Future of Private Copying*, 75 U. COL. L. REV. (forthcoming 2005), available at [http://ssrn.com/abstract\\_id=578568](http://ssrn.com/abstract_id=578568); Dan Hunter & F. Gregory Lastowka, *Amateur to Amateur*, 46 WM. & MARY L. REV. 951 (2004).

<sup>130</sup> <http://www.kazaa.com/us/index.htm> .

<sup>131</sup> <http://www.gnutellanews.com/> . Yu, *supra* note 119 reports on competing file-sharing systems.

<sup>132</sup> Ian, *supra* note 117.

<sup>133</sup> Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004), available at [http://ssrn.com/abstract\\_id=436693](http://ssrn.com/abstract_id=436693).

Egalitarians and hierarchists are opposed in a similarly harsh conflict. In many countries, governments try to control Internet content by their classic, hierarchic devices. A Bavarian court convicted the country manager of CompuServe for giving its customers access to pornographic parts of the Internet.<sup>134</sup> Another German court convicted an Australian for maintaining, on a website posted on an Australian server, that the Holocaust had never happened.<sup>135</sup> A local German authority has ordered all locally based Internet Service Providers to ban access to two American Nazi websites.<sup>136</sup> A French court ordered Yahoo! to make it impossible for French inhabitants to trade Nazi memorabilia on the American website of the company.<sup>137</sup> September 11 has further spurred government attempts at getting the Internet under control, and even at transforming it into a tool for controlling the citizenry.<sup>138</sup>

<sup>134</sup> Amtsgericht München 8340 Ds 465, Js 172158/95, 28.5.1998, MULTIMEDIA UND RECHT 1998, 429 = Neue Juristische Wochenschrift Computer Report 1998, 356, see also Gunnar Bender, *Bavaria Vs. Felix Somm. The Pornography Conviction of the Former CompuServe Manager*, INTERNATIONAL JOURNAL OF COMMUNICATIONS LAW AND POLICY 1-4 (1998); Jack Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, at note 106-11 (1998), Franz C. Mayer, *Europe and the Internet. The Old World and the New Medium*, 11 EUROPEAN J. INT'L L. 149, 151 (2000).

<sup>135</sup> BGH 12.12.2000, BGHSt 46, 212 – Toeben; see also Irimi E. Vassilaki, *Anmerkung [Zu Bgh 12.12.2000 – Ausschwitzlüge]*, COMPUTER & RECHT 262 (2001); Karsten Bremer, *Radikal-Politische Inhalte Im Internet – Ist Ein Umdenken Erforderlich?*, MULTIMEDIA UND RECHT 147 (2002); Arnd Koch, *Zur Strafbarkeit Der "Auschwitzlüge" Im Internet – BGHSt 46, 212*, JURISTISCHE SCHULUNG 123 (2002).

<sup>136</sup> Bezirksregierung Düsseldorf 6.2.2002, available at <http://www.odem.org/material/verfuegung/>; second decision of [http://www.nps-brd.nrw.de/BezRegDdort/hierarchie/themen/Sicherheit\\_und\\_Ordnung/Medienmissbrauch/Widerspruchsbescheid\\_zur\\_Sperrverfuegun8229.php](http://www.nps-brd.nrw.de/BezRegDdort/hierarchie/themen/Sicherheit_und_Ordnung/Medienmissbrauch/Widerspruchsbescheid_zur_Sperrverfuegun8229.php); on that case see also Engel, *supra* note 73. More on control via the Internet Service Providers from Michael Birmhack & Niva Elkin-Koren, *The Invisible Handshake. The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 1 (2003); Zittrain, *supra* note 121.

<sup>137</sup> Tribunal de Grande Instance de Paris, ordonnance de référé, 11/20/2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm>; *id.* Document de travail sur le rapport d'expertise, 11/6/2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001106-rp.htm>; *id.* Ordonnance de référé, 8/11/2000, [http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord\\_tgi-paris\\_110800.htm](http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord_tgi-paris_110800.htm); Ordonnance de référé, 5/22/2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte>.

See also Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal., 2001); Brendon Fowler et al., *Can You Yahoo!? The Internet's Digital Fences*, 2001 Duke L. & Tech. Rev. 12; Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 at note 16 (2001); *The Legal Implications of the Yahoo! Inc. Nazi Memorabilia Dispute: an Interview with Professor Michael Geist*, JURISCOM January/March (2001), at <http://www.juriscom.net/en/uni/doc/yahoo/geist.htm>; Carolyn Penfold, *Nazis, Porn and Politics. Asserting Control over Internet Content*, J. INFO., L. & TECH. nn. 53-80 (2001), at <http://elj.warwick.ac.uk/jilt/01-2/penfold.html>; PAUL SCHIFF BERMAN, *THE INTERNET, THE NATION-STATE, AND THE SOCIAL MEANING OF LEGAL JURISDICTION* (2002); Joel Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002).

See also Tribunal de Grande Instance de Paris 10/30/2001, Az. 01/57676 – Front 14.

<sup>138</sup> More from Charles H. Kennedy & Peter Swire, *State Wiretaps and Electronic Surveillance After September 11*, 54 HASTINGS L.J. 971 (2003).



But again, the egalitarian opponents did not just let it happen. Their battle cry is: "The Net interprets censorship as damage and roots around it."<sup>139</sup> Or shorter: "Keep your laws off our Net."<sup>140</sup> They are backed by the U.S. constitution and its absolute protection of free speech.<sup>141</sup> And they again divert traffic to peer-to-peer schemes like *KaZaA* and *Gnutella*.<sup>142</sup> Alternatively they advise using multiple access points, like the proverbial cyber café.<sup>143</sup>

Hierarchists retaliate in their own way. They conduct software searches through the Net for illegal contents.<sup>144</sup> Governments are considering denial of service and virus attacks on illegal websites.<sup>145</sup> And they aim to change the Internet architecture such that the identification of users and the establishment of virtual fences between nation-states become feasible.<sup>146</sup>

### *The Egalitarian Infrastructure*

Many observers are convinced that the individualistic and the hierarchic attempts to impose their solidarity on the Internet are futile anyhow.<sup>147</sup> But even if it were otherwise, it would be very unwise for individualists or hierarchists to try to do so. Economically speaking, it is not so much the out-of-pocket cost, but the opportunity cost that is at stake. If individualists or hier-

<sup>139</sup> Boyle, *supra* note 61, at 178, citing JOHN GILMORE. <--rest of the cite?.

<sup>140</sup> *Id.* at 189.

<sup>141</sup> For a comparative analysis see Friedrich Kübler, *Äußerungsfreiheit Und Rassistische Propaganda. Grundrechtskonflikte Im Zugwind Der Globalisierung*, 37 SITZUNGSBERICHTE DER WISSENSCHAFTLICHEN GESELLSCHAFT AN DER JOHANN WOLFGANG GOETHE-UNIVERSITÄT FRANKFURT AM MAIN 149 (2000); Bernd Holznagel, *Meinungsfreiheit Oder Free Speech Im Internet. Unterschiedliche Grenzen Tolerierbarer Meinungsäußerungen in den USA und Deutschland*, 33 ARCHIV FÜR PRESSERECHT 128 (2002), National Research Council, *supra* note 73, at 106-32 (2002).

<sup>142</sup> More from NATIONAL RESEARCH COUNCIL, *supra* note 59, at 2.5 and 12.1.2 (2002).

<sup>143</sup> *Id.* at 2.5.

<sup>144</sup> This is basically what jugendschutz.net does, a joint subsidiary of the German Länder Ministries on Youth Protection, Bernd Holznagel et al., *Möglichkeiten Und Risiken Bei Der Bekämpfung Rechtsradikaler Inhalte Im Internet*, MULTIMEDIA UND RECHT 347 348 (2001).

<sup>145</sup> More from Reidenberg, *supra* note 136, at note 70.

<sup>146</sup> More from Patricia Jacobus, *Taming the Web. Building Fences, One by One* CNET NEWS.COM, April 19, 2001, at <http://news.com.com/2009-1023-255774-2.html>; JEAN-RAYMOND LEMAIRE, *FILTERING TECHNIQUES AND METHODS* (2001).

<sup>147</sup> Out of the rich literature see Ulrich Sieber, *Kontrollmöglichkeiten Zur Verhinderung Rechtswidriger Inhalte in Computernetzen. Zur Umsetzung Von § 5 Tdg Am Beispiel Der Newsgroups Des Internet*, COMPUTER & RECHT 581 und 653 (1997); Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453 (1997); Kristian Köhn-topp et al., *Sperrungen Im Internet. Eine Systematische Aufarbeitung Der Zensurdiskussion*, 1 KOMMUNIKATION UND RECHT 25 (1998); Reidenberg, *supra* note 80, at 557; ULRICH SIEBER, *VERANTWORTLICHKEIT IM INTERNET. TECHNISCHE MÖGLICHKEITEN UND MULTIMEDIARECHTLICHE REGELUNGEN. ZUGLEICH EINE KOMMENTIERUNG VON § 5 TDG UND § 5 MDSTV* (1999); Dirk Fox, *Technische Systeme Zur Gewährleistung Von Jugendschutz Im Internet*, ALLIANZ VON MEDIENRECHT UND INFORMATIONSTECHNIK ? ORDNUNG IN DIGITALEN MEDIEN DURCH GESTALTUNG DER TECHNIK AM BEISPIEL VON URHEBERRECHTSSCHUTZ, DATENSCHUTZ, JUGENDSCHUTZ UND VIELFALTSCHUTZ 79 (Alexander Roßnagel ed., 2001); LEMAIRE, *supra* note 146; NATIONAL RESEARCH COUNCIL, *supra* note 59, in particular see 2.5 and 12 .

archists effectively impose their will on the Internet egalitarians, they risk hampering or even destroying the infrastructure on which more and more of their own activity is built. Due to the dramatic decline in transaction costs, and distance costs in particular, a vast array of new markets has been created. Moreover, the transaction cost of policing institutions has been fallen so much that private, tailor-made institutions have become a more realistic option.<sup>148</sup> Likewise, hierarchists, and governments in particular, increasingly rely on the Internet. The catchy term is e-government.<sup>149</sup> Due to the Internet, government can gain greater and significantly better information than ever before. Along with this, regulatory cost has dropped dramatically in many areas, making central intervention more swift and powerful.

At first sight, the individualists and hierarchists might accept the argument, but declare it irrelevant on a forward looking basis. In accordance with this perspective, Internet egalitarians would have done their job by creating the Internet, in a similar manner as the egalitarians in East Germany ran the peaceful revolution who virtually disappeared from the political scene afterwards. Seemingly, there is even a sound economic argument pointing in this direction. The technical core of the Internet is the TCP/IP standard. The key problem with technical standards is proliferation. Only when the standard succeeds in attracting a sufficient number of users is it to survive. The Internet, due to egalitarian efforts, has certainly been able to generate this critical mass. Once this is achieved, the argument goes, path dependence ensues.<sup>150</sup>

Yet this misinterprets the success of the Internet. It contains as much of a social infrastructure as a technical one. The very fact that the Internet has become so extremely popular generates a need to permanently readapt it to a changed environment. The Internet is a living entity. What makes it an infrastructure for competing ways of life is not so much a historic achievement, as its high evolutionary potential. This is not to say that the individualists or the hierarchists should give up their core concerns. On the contrary, isolated egalitarianism is no better than isolated individualism or isolated hierarchy. But the competing ways of life should carefully avoid damaging the egalitarian infrastructure of the Internet. In other words, they should seek more intelligent ways of governing the egalitarians without the isolation.<sup>151</sup>

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<sup>148</sup> See above 1 a.

<sup>149</sup> See e.g., Symposium, *International Applications of Electronic Government (E-Government): Research Practice and Issues*, 18 GOV'T. INF. QUART. 75 (2001).

<sup>150</sup> From the rich literature see e.g., Paul A. David, Understanding the Economics of Qwerty. The Necessity of History, in *ECONOMIC GROWTH IN THE LONG RUN. A HISTORY OF EMPIRICAL EVIDENCE* 281 (Bart van Ark ed., 1997); Paul A. David, The Internet and the Economics of Network Technology Evolution, in *UNDERSTANDING THE IMPACT OF GLOBAL NETWORKS ON LOCAL SOCIAL, POLITICAL AND CULTURAL VALUES* 39 (Christoph Engel et al. eds., 2000).

<sup>151</sup> The point apparently has not been made in literature. But see Kollock, *supra* note 90, at n. 9 (managing the virtual commons presupposes respecting the ability of community members to devise their own rules); Lessig, *supra* note 59, at 423 (“We might make the Net safe for kids, but in consequence make it a fundamentally regulable space.”); Thomas B. Nachbar, *Paradox and Structure. Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 247 (2000) (regulators should care about how users “perceive”

## RESTORING THE BALANCE BETWEEN THE WAYS OF LIFE

### *Introduction*

If they see no other way, hierarchists would call for state intervention. Having recourse to the sovereign powers of the state is their natural response to a social ill. Individualists find it equally natural to rely on market power as a cure. Both solidarities may even join forces for this purpose. As we have seen in the content regulation and in the copyright cases, none of this is mere theory. Is there a way to avoid these unwise moves? Is it thus not only desirable, but also feasible to rebalance the ways of life? The problem transcends the Internet case. Firstly this problem needs to be investigated at the abstract level of cultural theory. In the concluding part of this paper, implications for the Internet case will be sketched.

In principle there are ways to (re-)balance the competing solidarities. Yet unfortunately the original problem repeats itself. Even if the partisans of each way of life acknowledge the desirability of a proper balance between all ways of life, each of them has its own preferred way how to do that (section 2). Occasionally, the existence of other ways of life will ensure that at least one partisan gets its will at the meta-level. But a more promising approach is seeking for a more neutral technology that would balance the conflicting interests. The competing ways of life are thus best served by hybrid approaches, mixing elements from several ways of life (section 3).

### *The Three Archetypes of Balancing*

Cultural theory convincingly explains why the different ways of life must be balanced. But it is less interested in how rebalancing can be brought about if a society has gotten out of balance. The following is an attempt to explore the options. It fleshes out three balancing archetypes. It is no coincidence that each archetype follows the logic of one of the three ways of life. Organising co-existence is the egalitarian way to achieve balancing (section a below). Negotiation is the individualistic way (section b). And governance is the hierarchical solution (section c). Relying on one archetype for rebalancing is thus far from perfect. But experience demonstrates that it may nonetheless work (section d).

a) *Organising Co-Existence* – According to Thompson’s cultural theory, balancing just happens. Thompson argues that “change is essential to stability”.<sup>152</sup> This is because, “stability is not like being in limbo, suspended, motionless, with no energy required. Rather, stability requires constant energy, running, as it is said, just to stay in place”.<sup>153</sup> So it follows that “always in disequilibrium, always on the move, never exactly repeating itself, always having a definite

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the Internet, once it is regulated differently).

<sup>152</sup> THOMPSON ET AL., *supra* note 7, at 80.

<sup>153</sup> *Id.* at 66; *see also* THOMPSON ET AL., *supra* note 7, at 80 (“Stability without change is like trying to balance oneself on a bicycle without turning the pedals”).

shape, yet never staying in same shape, the system itself is indestructible".<sup>154</sup> Likewise, Thompson's metaphor of a flock of starlings captures the idea: "Since there is no generalissimo starling to tell each bird when to move and where to move to, individual starlings must be responding to some easily read signals that are built into their relationship with their fellows."<sup>155</sup>

The quotes are telling. On a closer look, cultural theory as it stands has an egalitarian bias. It accepts the other solidarities out there. But when it comes to balancing the competing solidarities out, it wants to have it the egalitarian way: every single individual fully engaged in a man versus man fight for social betterment. At the meta-level, either society adopts egalitarian mores, or it is doomed to failure.

The egalitarian way of balancing the competing solidarities is feasible. Evolutionary game theory even offers elegant models for describing the process.<sup>156</sup> Computer simulations in what is now normally called "agent based modelling" generate interesting, often even unexpected insights.<sup>157</sup> Psychological research into persuasion makes it possible to understand how partisans of other ways of life can indeed be won over, or at least made more responsive, to competing needs.<sup>158</sup>

*b) Negotiation* – Individualists would however prefer a very different strategy for balancing out the competing ways of life, negotiation.<sup>159</sup> The ways of life come to the real or imaginary negotiation table with their predetermined preferences. Rational choice theory can analyse such negotiations easily. The basic prediction is that the outcome depends on breakdown values. No negotiation partner is forced to agree. He will not if the status quo ante is more favourable.<sup>160</sup> Since cultural theory demonstrates that an unbalanced society is, in the long run, detrimental to all ways of life, the negotiation range should be sufficiently large. But there is scope for strategic interaction, and the building of different coalitions. Rational choice oligopoly theory demonstrates why this is a thorny setting for negotiations.<sup>161</sup> In game theoretic terms, balancing is a positive sum game, but it has several equilibria. These equilibria have different distribution effects.<sup>162</sup>

<sup>154</sup> THOMPSON ET AL., *supra* note 7, at 86.

<sup>155</sup> *Id.* at 85.

<sup>156</sup> An impressive application to the problem of competing solidarities (named differently, however), is to be found at Daniel G. Arce, et al., *An Evolutionary Game Approach to Fundamentalism and Conflict*, 159 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 132 (2003).

<sup>157</sup> For an overview see Leigh Tesfatsion, *Introduction to the Special Issue on Agent-Based Computational Economics*, 25 JOURNAL OF ECONOMIC DYNAMICS AND CONTROL 281 (2001).

<sup>158</sup> For an overview see SARAH TRENHOLM, *PERSUASION AND SOCIAL INFLUENCE* (1989).

<sup>159</sup> Cf. James G. March et al., *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943, 950 (1998): negotiation fits the logic of consequentialism.

<sup>160</sup> An easily accessible summary is to be found in JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* at chapter 5 (1992).

<sup>161</sup> Comprehensive JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* (1988).

<sup>162</sup> See generally Katharina Holzinger, *Transnational Common Goods: Strategic Constellations, Collective Action Problems, and Multi-level Provision* (2003), Max Planck Society, at

c) *Governance* – The hierarchical way of bringing about a balance between competing ways of life is through governance. A benevolent central authority intervenes on behalf of society at large. It does so based on the best expertise available. In this case, the expertise would be taken from cultural theory. Cultural theory would thus provide legitimacy for central intervention. Hierarchists would introduce a formal procedure, and entrust an organisation with the balancing task. The quintessential institution of the hierarchical way of life is government, but an independent balancing authority, following the model of institutions like the central bank, would also be in line with hierarchic thinking.<sup>163</sup>

d) *Relying on the Archetypical Solutions* – From the counterfactual perspective of a social planner, it would be desirable to impose balancing early enough, but how can this be done in a reality that has no outside actor hovering above the struggling ways of life?<sup>164</sup> A first, tentative answer is: each way of life can use its own resources for the purpose. Egalitarians can start a man by man fight against those who adhere to different ways of life. Hierarchists can mobilize the sovereign powers of government for the purpose. And individualists can offer those groups abiding by other ways of life, or their individual members, a deal. Any of these strategies is, however, likely to trigger reactance by the competing ways of life.

### *Hybrid Approaches*

Seeking out other, more neutral ways of balancing the competing solidarities is more promising. There are indeed many hybrid approaches, mixing elements from two, or even from three of the active ways of life. Cultural theory does even have a term for them, rather it calls such approaches “clumsy”.<sup>165</sup> The unappealing term serves as a healthy reminder. The important thing with balancing technologies is not their conceptual purity; it is their performance that counts. Many cultural theorists even make it their business to write case studies carrying this point home. They demonstrate that clever muddling through is often smarter than employing a grand theoretical design that fails miserably in practice.<sup>166</sup>

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[http://www.mpg.de/bilderBerichteDokumente/dokumentation/jahrbuch/2003/recht\\_gemeinschaftsgueter/forschung\\_sSchwerpunkt/index.html](http://www.mpg.de/bilderBerichteDokumente/dokumentation/jahrbuch/2003/recht_gemeinschaftsgueter/forschung_sSchwerpunkt/index.html) (last visited Feb. 12, 2005) (offers a highly stimulating application of game theory to the understanding of such problems).

<sup>163</sup> See, e.g., Giandomenico Majone, *Nonmajoritarian Institutions and the Limits of Democratic Governance. A Political Transaction-Cost Approach*, 157 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 57 (2001).

<sup>164</sup> In its original version, cultural theory had such a fifth solidarity called the one of hermits, see M. THOMPSON ET AL., *supra* note 7, at 8, 29-33 and *passim*. In more recent versions this fifth solidarity has disappeared, see, e.g., M. Thompson, *supra* note 22. Even in the earlier version, the hermit has been defined as being a pure observer, not an actor, see M. THOMPSON ET AL., *supra* note 7, at 10. The hermit cannot, therefore, step in to restore the lost balance.

<sup>165</sup> See, e.g., Michael H. Shapiro, *Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555 (1988).

<sup>166</sup> See Marco Verweij, *A Snowball against Global Warming: An Alternative to the Kyoto Protocol* (2001), Max Planck Society, at [http://www.mpp-rdg.mpg.de/pdf\\_dat/2001\\_11.pdf](http://www.mpp-rdg.mpg.de/pdf_dat/2001_11.pdf) (last visited Feb. 12, 2005).

It follows from the foregoing that any analysis of hybrid balancing technologies can only be illustrative. Three characteristic approaches shall be highlighted here: arguing (section a below), the law (section b below) and addressing individuals as multiple selves (section c below). If one wants to impose some order on them, one might interpret arguing as an extension of negotiations, the law as an extension of hierarchy and addressing individuals as multiple selves as an extension of organising co-existence. That way, arguing would represent soft individualism; the law, soft hierarchy; and addressing individuals as multiple selves, soft egalitarianism.

a) *Arguing* – In the above, negotiation has been identified as the individualistic style of balancing. This statement is seemingly contradicted if arguing is now introduced as a hybrid approach. For arguing is a way of negotiating. The apparent contradiction disappears if the concept of negotiation is unpacked. For the sake of clarity, the purely individualistic component can be called bargaining. All come to the bargaining table with predetermined preferences, and with fully defined property rights. But in reality, negotiations are rarely as limited as that. On the proverbial Turkish bazaar, the trader portrays the shabby merchandise as if it were a marvel from the thousand and one nights. He praises the unheard of beauty of the buyer's wife. And he draws a gloomy picture of ruin if he squanders his goods for such a trifle sum. This is not just for show. The owner of this tatty little shop tries to transform a routine transaction on the spot market into a passionate affair.

In the case of the shop keeper, not many tourists are trapped these days. Some take it as a game and pay the exaggerated price in exchange for a good performance. The others go by and make their deals in a more neutral environment. This example highlights the power of words. This power can be exploited in the interest of balancing competing ways of life. In the interest of winning egalitarian support, the other ways of life can use the accompanying words to create a mutual sense of trust and fairness. They can ask the egalitarians for their position on the issue, and make an effort to say in their words why there is a need for rebalancing.

A hierarchic element can also be introduced into negotiations. Government can withhold unilateral interventions as long as possible. It can thus transform its sovereign powers into bargaining chips. This is what happens in bargaining under the shadow of hierarchy.<sup>167</sup> And arguing allows government to bring its expertise to bear. Rather than just transforming the result of experts' work into an order, government has an opportunity to explain the underlying reasons to potential addressees.<sup>168</sup>

b) *The Law* – In the above, governance has been characterised as the mode of balancing that matches the hierarchic way of life. The law is the classic governance tool. As with negotiation, it may therefore appear contradictory to present the law as a hybrid approach. Yet for reasons similar to those that apply to arguing, the law can legitimately be interpreted as a "clumsy"

<sup>167</sup> FRITZ WILHELM SCHARPF, GAMES REAL ACTORS PLAY: ACTOR-CENTERED INSTITUTIONALISM IN POLICY RESEARCH (1997), at 201-204.

<sup>168</sup> See generally Thomas Risse, "Let's Argue!": Communicative Action in World Politics, 54 INT'L ORG. 1 (2000) (discussing the many facets of arguing).

tool.<sup>169</sup> For governance by law is fuzzy on purpose.<sup>170</sup> Legal governance is text-bound. The authorities entrusted with its application listen to the addressee and explain themselves. The addressee, therefore, knows what the law is heading for. The discourse reminds the addressee of normative expectations.<sup>171</sup> It also provides the addressee with an opportunity to raise concerns about the adequacy of the rule. By its discursive character, the law has access to the cognitive models on which the addressees base their view of the world. The law can occasionally exploit this opportunity to reshape the preferences of its addressees.

c) *Addressing Individuals as Multiple Selves* – In the above, organising co-existence has been said to be the egalitarian way of balancing the competing solidarities. Therefore, it may appear surprising to present an approach as hybrid that precisely targets the convictions of isolated individuals. Yet again, the surprise disappears upon closer inspection. Egalitarianism is not just about individual convictions. It is about individuals holding egalitarian convictions. There are some who indeed are to very large extent just egalitarians. But most people are not that one-sided. They may hold egalitarian beliefs in family matters and with respect to environmental issues, but when seeking a new job or buying a new car, they may well behave like hard-nosed individualists. They may even believe that when it comes to drug abuse or vandalism, the police should step in. Most people thus do not exclusively adhere to one way of life. They typically are multiple selves, holding different, even inconsistent beliefs in different areas of their lives.

This characteristic inconsistency in individual belief systems can be harnessed to rebalance ways of life. For outsiders can try to appeal to those sides of a personality that are more resonant with the solidarity disregarded in the issue at hand.

## LESSONS FOR THE INTERNET CASE

If the reader accepts the story told in section II, Internet governance is out of balance. The egalitarian way of life is hardwired in the architecture of the Net, and it has a dominant position in the social core that sees at the dynamic evolution of Internet technology. The two competing active ways of life would not be well advised to simply impose their will on reluctant egalitarians. Thus they should neither simply rely on (hierarchical) sovereign powers, nor on (individualistic) market power to break the egalitarian will. It is in their best interest to keep the egalitarian core of the Internet thriving. If they follow this advice, the two competitors face a second order problem. Hierarchists and individualists have preferences for the method of serious, fair rebalancing that differ from the egalitarian meta-preference. Imposing their will on this second, meta-

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<sup>169</sup> SHAPIRO, *supra* note 165 (explicitly interpreting the law as a “clumsy tool”; See also Christoph Engel, *Die Grammatik Des Rechts*, INSTRUMENTE DES UMWELTSCHUTZES IM WIRKUNGSVERBUND 17 (Hans-Werner Rengeling ed. 2001) and ENGEL, *supra* note 4.

<sup>170</sup> Cf. MAYNTZ, *supra* note 113, at 69.

<sup>171</sup> See generally IRIS BOHNET, KOOPERATION UND KOMMUNIKATION: EINE ÖKONOMISCHE ANALYSE INDIVIDUELLER ENTSCHEIDUNGEN (1997).

level is less pernicious than simply ignoring egalitarian thought altogether. But they are likely to meet less egalitarian resistance, and hence stand a greater chance of sustainable success, if they look out for hybrid methods for bringing the balance between the ways of life about.

To achieve this balance, they could rely on any of the three hybrid technologies outlined in the previous section. They could soften and enrich individualistic negotiation to arguing. They would then invite members from the egalitarian community to express their concerns and intentions, and they would discuss their point of view in all fairness, with an eye to eventually forging a solution acceptable to all voices present at the table. In many other areas of life, arguing has proven helpful; it triggered creative win-win solutions,<sup>172</sup> and helped change actors' mental models.<sup>173</sup> Alternatively, the other active ways of life could capitalize on the richness of law, as opposed to mere sovereign order. And they might rely on verbal and non-verbal means for addressing the non-egalitarian traits in the key figures from the egalitarian core of the Internet.

Balancing out the competing ways of life is a demanding endeavour. While compromise solutions may work, creatively overcoming the apparent tension is more promising. Perfection is normally not within reach. The main contribution of this paper is enlightenment. It hopefully makes those engaged in the respective battles properly construe the goal. It also advises them where to search. Those thoroughly immersed in the issue are most likely to invent solutions that will eventually work. By way of illustration, two such approaches shall be mentioned.

The first approach is organisational. It attempts to bring a better balance about by inviting, or imposing, representatives from the competing solidarities to egalitarian actors. Of course, this presupposes some degree of cooperation, for the representative cannot possibly speak to most members of an egalitarian movement individually. A similar approach has been successfully used by governments to make firms more responsive to environmental matters. In many countries, environmental law obliges firms to hire representatives for the environment in general, or for more specific issues like waste management or emissions control.<sup>174</sup> To a degree, ICANN follows this model. It works under a charter from the U.S. government, thus guaranteeing hierarchical input. The at large representatives are meant to be the egalitarian component,<sup>175</sup> and individualists get their share through the scheme for electronically settling disputes over cyber squatting.<sup>176</sup>

<sup>172</sup> "Win-win" is a buzzword which means that the result of a negotiations benefits each of the opposing parties.

<sup>173</sup> See THOMAS RISSE ET AL., *DIE MACHT DER MENSCHENRECHTE: INTERNATIONALE NORMEN, KOMMUNIKATIVES HANDELN UND POLITISCHER WANDEL IN DEN LÄNDERN DES SÜDENS* (2002).

<sup>174</sup> See Christoph Engel, *Regulierung Durch Organisation Und Verfahren*, in *FESTSCHRIFT FÜR ERNST-JOACHIM MESTMÄCKER* 119 (Ulrich Immenga et al. eds. 1996) (discussing German law).

<sup>175</sup> Note that the experiment in basic democracy has not survived. See John Palfrey, *The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed*, 17 *HARV. J.L. & TECH.* 409 (2004); Jose MA. Emmanuel A. Caral, *Lessons from ICANN. Is Self-Regulation of the Internet Fundamentally Flawed?*, 12 *INT. J.L. & INF. TECH.* 1 (2004).

<sup>176</sup> The term cyber squatting denotes the abusive reservation of domain names that are identical, or that closely resemble, trademarks and names of firms. For more information on ICANN, see generally Milton Mueller, *ICANN and Internet Governance. Sorting through the Debris of 'Self-Regulation'*, 1 *INFO* 497 (1999); A. Michael Froom-



The second approach stems from the area of digital music distribution. The following fact finding mission has been proposed: The music industry has huge archives of recordings. It holds copyrights on them, but it neither sells them presently, nor does it expect future sales. The music labels could themselves set up an electronic library. It could offer these recordings in compressed format for download for a truly small price. If the claims of egalitarians are true, this should not only generate additional revenues from these payments. More importantly, a new demand for music should be generated that was not marketable before. Such ideas have met some response in the music industry; there have been offers for free downloads over a the course of a week,<sup>177</sup> another publishing house has offered music partitions for free download,<sup>178</sup> there are also industry run platforms like iTunes.<sup>179</sup> Market research has demonstrated that the scheme works reasonably well, in that it attracts additional demand.<sup>180</sup> Another compromise formula would have to be implemented by the legislator. The legislator could allow free file swapping, but would impose a levy for non-commercial use,<sup>181</sup> or would put a royalty on hardware or software, to be collected by an intermediary, and handed out to artists and recording companies

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kin, *Wrong Turn in Cyberspace. Using ICANN to Route around the APA and the Constitution*, 50 DUKE L. J. 17 (2000); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L. J. 187 (2000). All of the above authors are rather critical of ICANN.

<sup>177</sup> In Europe, this program was called the Digital Download Day, at <http://www.heise.de/newsticker/data/wst-21.01.03-000> (December 16, 2004). WARNING TO EDITORS – THIS LINK IS BROKEN – 404 FILE NOT FOUND

<sup>178</sup> See Capella Software at <http://www.whc.de/> (last visited Feb. 12, 2005).

<sup>179</sup> Urs Gasser, *iTunes: How Copyright, Contract and Technology Shape the Business of Digital Media – A Case Study*, available at [http://ssrn.com/abstract\\_id=556802](http://ssrn.com/abstract_id=556802) (last visited Feb. 12, 2005).

<sup>180</sup> Jevan Jaisingh, *Piracy on File Sharing Networks. Strategies for Recording Companies*, available at [http://ssrn.com/abstract\\_id=567681](http://ssrn.com/abstract_id=567681) (last visited Feb. 12, 2005).

<sup>181</sup> This proposal is further developed by Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free P2P File-Swapping and Remixing*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=352560](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=352560) (last visited Feb. 12, 2005). This proposal closely resembles how German law treats Xerox copies from books for personal use. The copies are legal, but the manufacturers of Xerox machines must pay a levy.