

BOOK REVIEW

THE INTERNET IN 2006: A GLOBAL, CORPORATE OR COMMUNITY CONSTRUCT?

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Who Controls the Internet?: Illusions of a Borderless World by Jack Goldsmith and Tim Wu (New York: Oxford University Press, 2006) pages i–xii, pages 1–219. Price A\$59.95 (hardcover). ISBN 0 19 515266 2.

The Wealth of Networks: How Social Production Transforms Markets and Freedom by Yochai Benkler (New Haven: Yale University Press, 2006) pages i–ix, 1–491. Price US\$40.00 (hardcover). ISBN 0 300 11056 1.

In 1996 David G Post and David R Johnson published their article ‘Law and Borders — The Rise of Law in Cyberspace’.¹ In that article, they argued that the internet undermined the traditional justifications for territorially based law. In short, they declared that efforts to control electronic communications would most likely prove futile and that it would be sensible to recognise cyberspace as a distinct place to which distinct laws should apply. They revisited the views presented in that article on its 10th anniversary earlier this year.² They reiterated their belief that cyberspace should be thought of as a separate place (or a multiplicity of separate places) for the purposes of legal analysis. They attempted to clarify their earlier, more sweeping arguments by stating that this does not mean that all ‘online spaces’ should automatically be considered to have separate law-making or law enforcement status, but in many instances this would solve the problem of trying to determine *which* laws should apply. They concluded:

Sovereigns should allow their citizens who wish to travel to online spaces [to do so] and, while there, to be governed by the rules applicable there, provided that those rules don’t allow the online spaces to become havens for actions causing substantial harm to outsiders. Just as governments now defer to private ordering by organizations of all kinds that primarily ‘govern their own affairs’,

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¹ David G Post and David R Johnson, ‘Law and Borders — The Rise of Law in Cyberspace’ (1996) 48 *Stanford Law Review* 1367.

² David G Post and David R Johnson, ‘The Great Debate — Law in the Virtual World’ (2006) 11(2) *First Monday* <http://firstmonday.org/issues/issue11_2/post/index.html>.

they will be persuaded to defer to congruent online regimes — because this will allow the resources of local governments to be devoted to the real world problem only they can solve.³

Whilst this conclusion represents a slight modification of their earlier views, it still reflects the authors' particular aspirational views on the nature of cyberspace regarding the extent of liberty that should be granted to internet users.⁴

For a long time specific consideration of internet governance has been put in the too hard basket and discussed solely in the context of the battle over the control of the domain name system.⁵ Similarly, the clarification of jurisdictional issues in the internet context has proven controversial and inconclusive.⁶

However the debate regarding the shape and nature of the internet and who should be responsible for determining matters of control and governance has taken an interesting leap forward with the publication of several new works in this area.⁷ A particularly interesting and useful contribution to this debate is Jack Goldsmith and Tim Wu's *Who Controls the Internet?: Illusions of a Borderless World*.⁸

Goldsmith and Wu have written a concise, compact and highly readable book canvassing more than their basic question of 'who controls the internet?'. It is a sweeping review of all of the key concerns of internet history, lore and law over the last 20 years. They consider, in particular, the continued relevance of the competing 'world views' of the internet, that is, the cyber-utopians who believed in the creation of a separate cyberstate in which like minded people 'shared the dream' of an open, cooperative and creative online world, versus the people who feared the dark side of cyberspace as a haven for pornography, fraud, terrorism and anarchy.⁹

Goldsmith and Wu capture both of these views with appropriate historic reverence but go on to establish that, in their view, the internet has emerged as a 'bordered network where territorial law, government power, and international relations matter as much as technological invention.'¹⁰ They argue that the

³ Ibid.

⁴ See Joel Reidenberg, 'Technology and Internet Jurisdiction' (2005) 153 *University of Pennsylvania Law Review* 1951, 1951: 'Jurisdiction fits within a broader struggle over the respect for the rule of law in the Information Society.'

⁵ See, eg, the outcomes of the World Summit on the Information Society: International Telecommunication Union, *World Summit on the Information Society Outcome Documents: Geneva 2003 – Tunis 2005* (2005) 75–85 <<http://www.itu.int/wsis/outcome/booklet.pdf>>; and, in particular, the work of the Internet Governance Forum <<http://www.intgovforum.org>>.

⁶ Note the difficulties with the proposed *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, which was discarded for the *Convention on Choice of Courts Agreements*, opened for signature 30 June 2005 (not yet in force) <http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98>.

⁷ See, eg, Jonathan Zittrain, 'The Generative Internet' (2006) 119 *Harvard Law Review* 1974, where the author explores the cultural shift that is occurring as consumers are demanding a safer, more reliable, more predictable internet experience. This is turn may lead to a less open and more regulable internet. For a further exploration of the underlying cultural influences in cyberspace, see Kathy Bowrey, *Law and Internet Cultures* (2005).

⁸ Jack Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of a Borderless World* (2006).

⁹ Ibid ch 2.

¹⁰ Ibid vii.

internet is becoming more, rather than less, bordered as people are tailoring their portals and online services to suit their geographical location and to service their needs and cultural wants more accurately. In other words, all of our assumptions regarding the future of the internet have been wrong: territorial regulation is possible and is in fact being demanded by users; the predominant language of the internet will not always be English; the internet has not brought about the death of distance; and we do not have access to a 'digital jukebox' of infinite bandwidth.

One of the key features of this book is its reference to and incorporation of many of the key 'stories' of internet law: the LambdaMOO rape revealed to the world by Julian Dibbell,¹¹ John Perry Barlow's *A Declaration of the Independence of Cyberspace*,¹² the tragedy of Jon Postel and his 'test' redirection of the root servers,¹³ the establishment of HavenCo on Sealand,¹⁴ the battle over sale of Nazi memorabilia on Yahoo!¹⁵ and so on. Each one of these stories is well known to internet lawyers but they are retold in a manner that fits them neatly into what is effectively a history of the internet as it evolved from a research network into a core communications medium. It is also valuable to revisit these events with the benefit of hindsight.

In addition to the discussion of these key events, Goldsmith and Wu provide an insight into the underlying politics and personalities of the internet community, with clear explanations of the jargon and the frequently unwieldy terminology (and acronyms) that dominate the area.

Goldsmith and Wu conclude that governments as much as technology will shape the future of the internet. Although much has been made of the power of the internet to remove intermediaries, it has reinstated a new level of intermediaries — internet service providers — who *can* be regulated by government.¹⁶ Of course, the authors concede there is still the capacity for small, secret groups of users who can escape filtering and share files. However, their success will be limited by this secrecy as there will be no critical mass of users if they are difficult to find. Hence, they argue, the large, openly accessible, unlicensed file sharing services, such as Napster and Grokster, are a thing of the past.¹⁷ The

¹¹ Ibid 14–17.

¹² Ibid 17–22. See also John Perry Barlow, *A Declaration of the Independence of Cyberspace* (8 February 1996) <<http://homes.eff.org/~barlow/Declaration-Final.html>>.

¹³ Goldsmith and Wu, above n 8, ch 3.

¹⁴ Ibid ch 5.

¹⁵ Ibid ch 1.

¹⁶ See, eg, the content regulation system which operates in Australia under *Broadcasting Services Act 1992* (Cth) sch 5.

¹⁷ This does not mean the end of file sharing itself, as the enormous use of BitTorrent is estimated to account for up to 80 per cent of internet traffic in some markets: see Jeremy Reimer, 'ISPs Fight against Encrypted BitTorrent Downloads' (31 August 2006) *Ars Technica* <<http://arstechnica.com/news.ars/post/20060831-7638.html>>. However in Goldsmith and Wu, above n 8, 123, the authors argue it has caused the movement to go underground, burrowing 'into the depths of the Internet, masking the identity of both the file-sharing service and its users.'

internet therefore is not a lawless frontier, but a system which is dependent upon underlying laws.¹⁸

This book will certainly be of interest to anyone researching, teaching or studying in the area of internet governance, but further it will be a comprehensive and enjoyable resource for those who have not witnessed the turbulent last decade of internet development.

Weighing in at the opposite end of the scales is Yochai Benkler's wordy tome, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*.¹⁹ By publishing both in the traditional sense as a book available for purchase from retailers and as a downloadable online version available pursuant to a *Creative Commons Attribution — Non-Commercial — Sharealike 2.5 Licence*,²⁰ Benkler is attempting to practise what he preaches in the book itself: that non-commercial modes of production made possible by the internet make a significant contribution to society.

Benkler offers an idealistic and utopian view of the networked information economy. He argues that as a consequence of the new modes of information creation and dissemination made possible by the internet 'culture is becoming more democratic: self-reflective and participatory.'²¹ This provides us with the opportunity to choose to adopt new models of cultural production, models that are social rather than commercial. Social production is any form of cultural output that is not undertaken for any financial gain but rather to satisfy a social or psychological need, such as providing help to a neighbour, contributing to a community group, creation undertaken for educational purposes and recreation. Benkler highlights that such models of production have long been a part of our society — they just have not been recognised as being valuable in an economic sense. He cites SETI@home,²² Wikipedia²³ and Open Source Software as key examples of this form of production in the digital networked environment.²⁴

Benkler tracks the rise of the proprietary model of production and the increased capture of the end products of the creative process by intellectual property laws. He argues that strong intellectual property protection stifles rather than promotes creative output. However, he does not predict an end to market-driven production, rather, that it will co-exist with social production, which occurs in times and contexts that would otherwise have been wasted.²⁵

Benkler attempts to anticipate and to fend off the critics of his point of view by raising in advance arguments against the success of his model, such as the

¹⁸ See, eg, Goldsmith and Wu, above n 8, 139–42, where the authors refer to eBay, which presents itself as a 'community' but actually has a well developed security system dependent upon traditional laws.

¹⁹ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006).

²⁰ Available at Yochai Benkler <<http://www.benkler.org>>.

²¹ Benkler, *The Wealth of Networks*, above n 19, 15.

²² An acronym for 'Search for Extra-Terrestrial Intelligence', SETI@home is a scientific experiment using internet connected computers: SETI@home <<http://setiathome.berkeley.edu>>.

²³ Wikipedia is a multilingual web-based free content encyclopedia: Wikipedia <<http://www.wikipedia.org>>.

²⁴ See Benkler, *The Wealth of Networks*, above n 19, 5–6, 104–6, 462–3.

²⁵ *Ibid* 122.

problems of information overload, fragmentation of users into small communities of interest in the face of this information onslaught and the fact that many of the information providers are, in fact, market-driven. He highlights the growing role of blogs, discussion lists and wikis in supplementing and, in many cases, supplanting the mass media. In particular, he discusses the example of the computer voting controversy during the 2002 US elections, when the manufacturer of the electronic voting machines, Diebold Election Systems, was unable to stop the dissemination of damaging company information on the internet, a story which was not being covered by the print or television media.²⁶

Interestingly Benkler comes to a conclusion similar to that of Goldsmith and Wu regarding the potential for geographical fragmentation of the internet. He considers the effect of connectivity on the nature of human communications and concludes: 'Human beings, whether connected to the Internet or not, continue to communicate preferentially with people who are geographically proximate rather than with those who are distant.'²⁷ He further observes that people who are connected to the internet communicate more with people who are geographically distant, including relatives and friends, as well as making new connections. However, this connectivity does not supplant or erode local family and community connections. Therefore, there is an overall enhancement of connectivity, with people choosing to remain firmly and primarily entrenched in their local community.²⁸

Benkler has a message: that the internet needs less regulatory protection rather than more. Internet users should be trusted and indeed empowered, to write their own rules and develop their own business models. Ultimately, his message is not dissimilar to that of the cyber-utopians²⁹ of the early 1990s: we have new ways of doing things and we should not be expected to shore up the outdated business models of Hollywood and the recording industry.³⁰

Operating alongside Benkler's book is a Wealth of Networks wiki, which is described as offering a space for a variety of contributions. It includes summaries of the core ideas and claims of the book, chapter summaries, commentaries on the ideas presented in the book, links to materials referred to in the text and further resources, examples of the phenomena described in the book and examination of the usefulness of the wiki itself in expanding the usefulness and accessibility of the book.³¹

The wiki has certainly attracted a large number of visitors and some enthusiastic posters, although only a small number of actual postings had been made at the time of writing this review. One of the key disadvantages of the set-up is that it is difficult to distinguish between the original text that is being expanded and commented upon and the comments themselves (given the nature of a wiki, this

²⁶ Ibid 225–33.

²⁷ Ibid 364, citing Barry Wellman, 'Computer Networks as Social Networks' (2001) 293(5537) *Science* 2031.

²⁸ Benkler, *The Wealth of Networks*, above n 19, 364.

²⁹ See, eg, Barlow, above n 12.

³⁰ See, eg, Benkler, *The Wealth of Networks*, above n 19, 410.

³¹ *Main Page* (28 November 2006) The Wealth of Networks <http://www.benkler.org/wealth_of_networks/index.php?title=Main_Page>.

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is to be expected). Some of the comments in the WikiNotes highlight the length of Benkler's sentences and paragraphs, which are somewhat unwieldy even to a native English speaker.³² The book could certainly have done with a serious edit to cut down its size and to have made the core ideas more accessible. Benkler notes in his acknowledgements that the book 'has been more than a decade in the making.'³³ It certainly reads like a labour of love. In places the clarity of the message would be improved by brevity — by over labouring some points Benkler runs the risk of losing the reader altogether.

Benkler's commitment to his message is to be applauded. It is a brave thing to subject your creation to such a fundamental review process, outside the bounds of academic politeness and it is perhaps in the wiki that the 'book' finds its most useful and unique contribution. Benkler is certainly engaging in the open creative process he is advocating. However, he is writing in a community of like-minded academic actors, so as a social experiment, its application is limited.

Both books advance the 'future of the internet' debate well past the Internet Corporation for Assigned Names and Numbers/International Telecommunication Union governance debate³⁴ and provide a refreshing and interesting approach to law-making in this area. A thoughtful response to the relevance of cyberlaw, such as these books offer, was well overdue.

³² *Growing This Wiki* (28 November 2006) The Wealth of Networks <http://www.benkler.org/wealth_of_networks/index.php?title=Growing_this_Wiki>.

³³ Benkler, *The Wealth of Networks*, above n 19, x.

³⁴ See above nn 5–6 and accompanying text.