Jean Nicolas Druey

Berkman Center, March 9, 2011
Revised paper

# From Information Law to Communication Law*

Earthquake Safety for Legal Constructions

Again one of these terribly abstract Continentals, so you may think, claiming your interest without offering any statistics, without support by any figure or scheme, promising intellectual profit from chewing mere concepts, like trying to suck juice by gnawing dry pieces of wood.

Your suspicion, I am afraid, is correct. I nevertheless sit here, winged by the conviction that the following half hour will allow me to say something not only on my topic, but on this very question of methods, in other words that communicating on communication over the Atlantic is worthwhile.

## Language

Let me start with a preliminary remark on language – a problem that can hardly be overstated. To be sure, there is the general problem of conversing in different tongues. But today's globalization has assigned these tasks: One has to speak and write in English, and whoever has been raised elsewhere does well to limit his goals to conveying the essence of his thoughts and to refraining from jokes and refined linguistic creations that require more than a common language to be understood. For the native Anglophones the task, then, is to remain patient and attentive in the midst of the struggling with words being fought in front of them.

However, the problem lies deeper than the lexicographic layer. It is caused precisely by those terms that belong to the globalized language, which is being used everywhere and at all times. One would therefore expect to be on the safe side with these kinds of expressions, but exactly the opposite is true, because their popularity causes a kind of self-enhancing effect. In this sense, we have to be extremely cautious – in each specific language, but particularly on a multinational level – with terms like "institution" or "value" or "system" or "culture," even if we find them in the dictionary translated by the word of the same origin. For some, "value," for example, has to do with subjective preferences, whereas, for others, it is precisely the point of orientation above all subjectivisms. Language requires centuries of common understanding to grow; its high-speed creation in a world of highly differentiated intellectual areas, as we confront it today, cannot but produce a sort of gigantic grass instead of solid timber.

* Dedicated to Rolf H. Weber.

**The information age is aging**

Information and communication are also concepts of this kind. Information received the honor of naming a whole age. Of course, like the "stone age" or the "bronze age," the name points to a *technology* – information technology is the most salient feature of this recent age. But the name "information age," speaking of *information* in the singular form, refers to a common phenomenon that necessarily is more than any of these particular technologies. "Information" is above all a *conceptual* discovery, and, as such, it bears consequences of its own, not in the real world of technologies, but in the world of *norms.* To be sure, information is as old as humanity, but all those phenomena that were organized under names such as message, knowledge, statement, sentence, secret, etc. found their common denominator under the flag of information. All is information, transferred information, stored information, uttered information, withheld information, but still: information. One thinks of Monsieur Jourdain, in Molière's "Bourgeois Gentilhomme," who discovered that all that he spoke was "prose" and took enormous pride in this as a result.

With respect to information, the 20th century tended to make M. Jourdains of us all. Under the impression of its discovery, the concept of information received a generally positive connotation, which, as we more and more come to realize, it does not necessarily deserve. Depending on its quality, information may not only be useless, but damaging. It may be false or misleading; there may be an overload, or it causes an inadequate mass movement (think of the subprimes!). All information is incomplete and needs processing using further information. However, the M. Jourdain-view, the idea of information as being a *value* – or, in other words, of insufficient information having to be cured by still *more* information – is so deeply rooted in our society that it will require several further subprime crises and atomic panics to learn that the attribution of information by the law is a much more complex equilibrating task. Anyway, law will never be able to actually grasp the subject; information is not a pot available for dips but is of an extremely volatile quality.

And the information age has widened the gap to the law. Treating information as a valuable object has brought about two tendencies, i.e.
- atomization, the splitting into minimal entities ("information" becoming "data") and
- horizontalization, the idea of maximum distribution ("information" becoming "communication" or "network").
Both tendencies reflect an economic, utilitarian approach. Information is seen as a good per se. But how can a datum constitute a value per se? What is it worth to know that "Berkman" is spelled with only one 'n'? It is valuable for the person

wanting to address a correct letter to the Berkman Center, but, for the billions of people not wanting that, it encumbers their information storage with unnecessary information. And in turn, horizontalization takes information farther away from a sensible disclosure order by the law. Since knowledge of everything by everybody is an unattainable goal, information law is confronted with still another highly complex task: Policies and titles for receiving or withholding information have to be set by the law which are by no means contained in the concept of information itself. To the contrary, this attributive task of the law stands in the shadow of big dilemmas that go down to fundamental questions about justice. To name just one of these issues: The idea of a level playing field for all is confronted by of the consideration that information already available to a person enhances the efficiency of further information allocation, since the previous information helps understanding the new one. And the problems of justice are topped by those of legal technique: The law on information would never be in a position to identify its object; is it an amount of entropy in Shannon's sense, or is it a specific combination of data which serves any personal use? The first is senseless, since it disregards *personal use*, and the second is entirely personal and disregards the function of law to *anticipate* the relevant situations.

In short, we will never have something called information law which assigns information to people as property law assigns goods. This means that we stand at a crucial point; a Copernican turnaround of our views is required. If steering of information is not to be expected from the law, it has to be done *by the participants themselves.* That is exactly what the concepts of "communication" or "network" indicate. Movements of information essentially are a *private* matter occurring in relationships between participating individuals.

**Law needs foundations**

Before taking this up again, we have to scrutinize the other side. Speaking of information law raises questions not only about information but also about the law. I hope you can agree with the conclusion I am drawing from the preceding considerations: Information law cannot be drawn by simple analogy from any other law, in particular not from property. A piece of information (whatever is a "piece") is not a toothbrush and not to be treated *like* a toothbrush. The difference is not just accidental but *essential*, as I tried to expose in this Center seven years ago.[1] Information does not stand beside the toothbrush as the horse beside the cow – taking up and respectfully contradicting Frank Easterbrook's famous language, for reasons other than those of Lawrence Lessig, but concurring with them.

On the other hand, law cannot avoid answering the question "What do you do with information?" in all its brutal generality. The answer cannot be "On computers the law is this, on television that, and on telecommunications there is a variety of

[1] http://cyber.law.harvard.edu/publications/2004/Information_Cannot_Be_Owned

special laws, etc." The very detection of information as a phenomenon of its own, the mere fact that the Internet and TV both have to do with information, forces the law to promulgate a consistent view on how to deal with information. And because it does not offer it, we have to *construct* new law and make it minimal in the sense that it decides for non-involvement in private relations.

And in so doing, we have to be aware that a *policy* and a law is *not the same.* A specific law may reflect a specific policy stating, e.g. everybody's access to the Internet, but no specific law stands for itself; it has to be integrated into the body of the law as a whole. New technologies are typical in this sense. All the new risks that the appearance of railways, automobiles, airplanes etc. produced in the 19th and 20th centuries generated new laws, but, more than that, they gave new actuality to old legal rules about causality, assessing damages, etc. And, reverting to information, those attempts to draw an analogy to physical goods are typical in the same way.

This legal part in the debate about law on information has up to now been very much neglected and the existing research has remained unconsidered. The legal handling of information being, as yet, almost entirely technology-driven reminds me of a reversed pyramid: an immense body based on a tiny surface, and this surface is weak because it has not been prepared to hold such a weight. For example, consider the right of privacy. It is deemed to serve as counterpart to all the rights to information or transparency, but it has never really got beyond those good, but vague, ideas of the Warren/Brandeis article of 1890 and the Griswold case of 1964. I think that, exactly as for tangible construction, there must be a proportion of the above-ground part and the basement of the law. If the building has insufficient foundation, it is not earthquake-proof and may even yield to a strong wind. Law draws much of its authority from being durable; it also should be "earthquake-proof" and offer the bases upon which more specific norms may rest.

I have chosen to devote my research to this question, and what follows here is a very brief sketch of one branch of my itinerary. The other branch, which requires at least the same amount of attention, is the determination of the normative nature of the rules considered, since communication and network, as I intend to illustrate in a minute, primarily engender non-legal, i.e. "moral," norms – with "moral" to be understood in a very broad sense. I do my job here just as a lawyer and not as social scientist or a philosopher, although I consider it as necessary always to keep an eye on those neighboring disciplines for inspirations, which, in fact, they richly grant.

**Information and communication as unequal twins**

In the center of my reflections stands the idea that information governance is secured by communication. Information and communication, as a consequence of the conceptual blow-up of information, tend today to be mixed up in common

language. They are like twins: you say the name of both to be sure to catch the right one.

However, language, especially common language, is treacherous. We say that one "gives" (a piece of) information, but one "makes" (a) communication; in the first case the stress lies on a "something" being transferred, in the second on the act of transferring. And if we look at the various scientific disciplines, we see, with more or less clarity, that the vision of communication is larger: it indicates a process evolving between *persons*. They "are communicating," and they are communicating "*with each other."*

Following up these linguistic clues, we detect *communication*, compared to information, as a world completely of its own. Trying to draw its profile we can ascribe to it the following essential qualities, none of which is essential to information (e.g. as used in "a piece of information"):
- Communication is *relational*; it is based on a relationship among persons.
- This relationship is a *community*, and this is not only due to its etymological and historical roots in the spiritual community with God. It is a mutual and open-ended engagement among persons for certain topics in which the participants do not appear in a specific role but simply as humans on an equal footing.
- Communication has a *temporal* dimension. It is not determined by a transaction, but exclusively by the willingness of the participants to continue their exchange.
- Communication is *free*, being an utterance, an expression of one's self; even if the content conveyed is banal, it shows a personal interest. No communication is established by utterances that are extorted or ordered with a threat of sanction or induced by deceit.
- Free communication is a *general value* of the highest rank, being the source of life of all social contacts, the cell so to speak, and thus also of the law itself.
- In this sense, communication is *global* as a phenomenon *and* as a value.
- A community is governed by *rules*, be they heteronomous or autonomous. Communication thus is a *source of norms.*

This should make the difference of information and communication sufficiently clear. Essential is the last-mentioned quality of communication, i.e. the steering function that it takes over in the realm of information. So let us look a bit closer at these communication rules.

**Communication as a source of rules**

Whenever we interact with others we apply a code which we are carrying with us, a code which is not set forth in any formal law and does not depend on a local culture: An Eskimo knows as well as a diplomat what it means to have a talk together. One part of that code relates to the cognitive aspect, the language or the pictures or gestures, etc. indicating the content of the message. But there is another part of how the relationship is to be affected, what speech act theory calls the illocutionary aspect. By polite reception of someone's words, you show your

esteem; by a sigh, you transmit that in your view the speaker is getting dull; etc. Another part of this illocutionary code is what interests us here: It is *metacommunication*, i.e. communication on how the communication is meant to be guided, in other words the organization of communication. These organizational norms exist, as I claim, wherever humans get in touch with each other, but these preexisting rules may be customized by specific cultures – and they may even be totally changed, using mostly implicit signals, by the parties to a particular relationship.

In this sense, the normative message may be "Speak freely on the subject, all will remain among us" or "I should have your answer soon" or "Think it over again, your words might be too sweeping" or "I have not understood anything" or "I am tired of this fruitless debate." An interlocutor might expect that discussion participants would name all arguments available to them, that an adversary would leave enough time for answering, that subsequent new facts of recognizable relevance would be communicated, etc.

All these norms (in the sense of statements of what should be) stand before the background of the *freedom* of communication. The parties may themselves shape the frame of their interactions, but they do not thereby enter into formal contracts. They just create *expectations* – a key term in the context of information law. The parties remain free, not only against the state, but also against each other, though an expectation generated intentionally by a participant towards his partner(s) should not be disappointed without good reason.

Rules of this kind do not only matter in a direct conversation. Mass media or extended networks also practice communication. Their stability over a longer period of time opens up even more space for the establishment of expectations. And the one-sidedness of activities in such networks renders self-presentation more stringent; a newspaper, for instance, which explicitly or implicitly claims objectivity for itself invites persistent, heightened expectations in this respect.

**Help!**

The deeper I plunge into the analysis of communication, the more I realize its importance for the existing law and for forthcoming legal processes.

I spoke of its norm-generating power. This leads to the further question, how much of it is incorporated in the law itself. What about procedural law? E.g. the Federal Rules on Civil Procedure present themselves to a large degree as a kind of model code of conversing. Or what about freedom of speech? Considering the recent debate in the *Harvard Law Review* following the Citizens United case, I cannot but see the freedom of expression at stake, thus the freedom of communication. Am I biased by article 10 of the European Convention on Human Rights? And then privacy: In my view, private is what is relational, determined by what the relation says about the availability for third parties of the information exchanged.

"Territorial" criteria, such as discussing whether and when there is privacy in the porch or in the garden, just make fun of this central issue of our time. Or what does "equality of speech" mean, as provided in the law or the by-laws of a firm, with respect to shareholder meetings? Certainly not that everything already said can interminably be repeated. Only when the basic communication principle of cooperation in finding common understanding is applied – when the communicative nature of the exchange is recognized – will a fair solution be reached.

We will not be done with this. Discovery may go down to a still deeper level, where not the content, but the life-conditions of the law and of social life in general are at stake. Communication is an active source on this level as well, in a twofold manner: Communication is an indispensable source of social energy and of trust. *Social energy*: Detecting communication means to see at work a great and general driving force of humans. Our view of the world, inclined as it is to compensate for complexity with oversimplification of the basic theories, tends to reduce human motivation to economic profit or conservation of species or whatever the shorthand formula may be. We should not overlook the enormous impulse triggered simply by need for interaction. *Trust*: Resolving social frictions means to build up trust. Trust is the oil in the social machine, smoothing out the always existing differences of views of those having to work together. Trust has to be learned in human contacts.

What immense perspectives! And how challenging to elaborate on them! Who helps?

For today, let me express my thanks to you for listening and for your preparedness to consider my reflections, which may go in an unfamiliar direction compared with your regular preoccupations. My request is just that you do not throw away my proposals from the outset. Maybe the oldest code of conversing with binding force were the guidelines that the delegates to the Constitutional Assembly of the United States gave to themselves in 1787, where it is said, among other rules: "Don't rush to judgment." But judge!