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Introduction Legal Science Institute.

1. Long time practioner of TOC.
2. Former Technology Consultant.
3. Technology Attorney
4. Formed the Legal Science Institute
5. Digitechlegal.org
1. Non-profit, Non-partisan
2. Intent of bring science to the law
3. Legal Science/Management Science
4. Creating Law
The issue.

1. Resolve Digital Era disputes with law that was written in the physical era.

2. Courts attempting to resolve digital era disputes is like fitting a square peg in a round hole.

3. Yet there is no consensus in the legal community.
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Digital Era Technology with Physical Era Law.

1. Existing Law is sufficient if applied flexibly.
2. New law is needed. Technology is just too different.
3. New genre of law is needed - Cyberlaw.
4. Some say no government law at all is appropriate.
Digital Era Technology with Physical Era Law.

Digital Age Dilemma: How should the law react, if at all, to changes in technology?
Digital Era Technology with Physical Era Law.

1. Ideologies based on the sanctity of the law to the worship of the technology.

2. For simplicity into two categories: Existing law is sufficient/Existing law is not sufficient.
1. Existing Law is sufficient.
2. New law is needed
3. New genre of law is needed - cyberlaw.
4. Some say no law at all is appropriate.
1. What is at the dividing line of Existing Law is Sufficient/Existing Law is Insufficient?
2. Existing law....Not Existing Law
3. Case law shows it is one of analogies!
4. Every area of law and every level of law!
1. Agreement that technology has no precedent.

2. Create an Analogy of unprecedented technology to a physical world era object or method.

3. Then treat the Digital Era technology as it was its analogy and apply the law normally.
1. The two camps I simplified everyone into really just argue if the analogy is precise.

2. They argue normally by finding subtle differences in the object’s analog components.
Gender Discrimination Lawsuit

1. Lawsuit over discrimination
2. Plaintiff asks court to compel defendant to turn over digital archive.
3. Claims it is analogous to paper documents.
4. Court disagrees.
1. Discovery. Electronic Discovery.
2. Lawsuit over discrimination
3. Asks court to compel defendant to turn over digital archive.
4. Claims it is analogous to paper documents.
5. Court disagrees.
1. Digitally Archived Files are Electronic Documents.
2. Electronic Documents are analogous to Paper Documents.
3. If Paper Documents, motion to compel would likely be granted.
4. But Court disagrees that Paper Documents and Electronic Documents are the same.

1. Jones was a DC nightclub owner.
2. Law enforcement (joint task force of DC police and DEA)suspected him of narcotics violations.
3. They needed more information on him.
1. Covertly placed a GPS satellite tracking device on the jeep he was driving.

2. Satellites tracked him for 28 consecutive days!

3. Law enforcement subsequently convicted him.

1. Govt did all this w OUT a warrant!
2. The case goes to the Supreme Court.
3. The Govt unabashedly argues that they don’t need a warrant.

1. Defendant argued the government violated his Fourth Amendment right under the Constitution *against unreasonable search and seizure* by tracking him for 28 days.

2. The Government said the Constitution does not prevent them from doing this.

3. However, The Supreme Court said 9-0 unanimously that the Government did in fact *violate* the US Constitution!

1. 9-0 yes. But three opinions were drafted.
2. And in at least two of the opinions, they were sharply split on the key question of how the law should react to changes in technology.
3. In fact, two of the Justices argued back and forth over the use of Analogies to resolve this problem!
1. Justice Alito stated that there was no way to create an analogy from today’s technology, like GPS satellite tracking, back over 200 years at the time of the ratification of the Fourth Amendment against unreasonable search and seizure.

2. He thought that the best scenario was to hope for new laws from Congress.

1. But Justice Scalia argued you could create an analogy.

2. A constable hiding in a horse carriage for the purpose of collecting information to lead to a conviction.

3. Can use existing law. A very thoughtful analogy!

1. Does it work? What is the problem? Sounds like a good solution!

2. Think about it.

1. Justice Alito still doesn’t believe in the analogy.

2. The key is not that he doesn’t believe in it, but “why” he doesn’t believe in it.

3. Justice Alito gives the most convincing analysis to date for why analogies are not possible from digital era to physical era world.

1. He didn’t argue the objects or methods didn’t have similar properties.

2. Rather, he argued they had different levels of “practicality”.

1. In terms of capabilities, the two eras are different. One era has more capability than the other.

2. By definition, those can never be analogous.

3. Following someone for 28 days in the pre-digital era was not practical. Too much resources.

1. Technology has allowed us more capabilities.
2. We were limited in one era. Where we are not limited anymore.
3. CONSTRAINTS!
How should the law react to changes in technology?

1. If the law functions as a rule or condition, drafted to accommodate the limitations, and those limitations are then overcome, then

2. there is a point in time where the law becomes logically inadequate, inappropriate or insufficient for the dispute at hand.
How should the law react to changes in technology?

1. The law at some point is overcome by technology.

2. It can’t be logically applied anymore to a dispute where the constraint has been overcome.
How should the law react to changes in technology?

1. Wipes out one entire category in this debate of those who say the existing law will always be sufficient.

2. Can’t create a situation where 55=35.
Is the law tied to a constraint??

1. Constraint Analysis.

2. Technology can be a benefit if and only if it diminishes a limitation. (Goldratt Beyond the Goal)
Is the law tied to a constraint??

1. Doesn’t mean technology “WILL” be a benefit if it diminishes a limitation.

2. But it means that in order to be a benefit, technology must diminish a limitation.
Is the law tied to a constraint??

1. We have to design rules around a constraint, or we run smack dab into the constraint.

2. MRP.
Is the law tied to a constraint??

1. MRP – Run Once a Month
2. MRP Technology - Expensive Calculator
Is the law tied to a constraint??

2. Tampa Bay Chamber of Commerce.
3. Millions of dollars of implementations.
Is the law tied to a constraint??

1. Society must accommodate a constraint.

2. Working 5 miles from home 200 years ago versus today.

3. We don’t see it as a constraint but we see it as a fact of life. A reality.
Is the law tied to a constraint??


2. 1876-Pennoyer v. Neff.

3. Oregon sued a resident of California.
Is the law tied to a constraint?

1. Oregon Resident was sued in abstentia.
2. His land in Oregon was seized.
3. Oregon sued. Case went to the Supreme Court.
Is the law tied to a constraint??

1. Supreme Court said Oregon cannot do that!

2. Personal Jurisdiction was a function of territory. You must serve defendant in the territory. (caveats)

3. Anything else would lead to fraud oppression and injustice.
Is the law tied to a constraint??

1. 1945-International Shoe v. Washington


3. Shoe had no plants, offices, directors, merchandise, or otherwise in Washington.

4. Only had agents transmitting orders.
Is the law tied to a constraint??

1. Case went to the Supreme Court.
2. International Shoe said no territory, no jurisdiction.
3. Supreme Court disagreed.
4. What changed?
Is the law tied to a constraint??

1. Correlation between “modern” technology-transportation and telecommunications-

2. Intrastate economy to an interstate economy.
Is the law tied to a constraint??

1. Pennoyer-Jurisdiction was a function of territory. 1876

2. International Shoe-1945 ”certain minimum contacts with [the state] such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice.”
Is the law tied to a constraint??

1. We were constrained to a limited physical presence to territory or locality in order to affect or avail ourselves of that territory or locality.

2. Society congregated around them.
Is the law tied to a constraint??

1. 1876
   1. ICC was formed
   2. First patent for the telephone
   3. 1900’s Ford mass produced cars.

2. Overcome the constraint of being physically located near a territory.
Is the law tied to a constraint??

1. People didn’t have to be so close to a place anymore to avail themselves of the opportunities of the location or to affect the location!
Is the law tied to a constraint??

1. We restricted ourselves to territories with customs and rules because we had to so we wouldn’t run into the limitations of practicality.

2. But that changed from Pennoyer to International Shoe.
Is the law tied to a constraint??

1. Salespersons no longer needed to have permanent offices in the locale of their clients.
2. Salespersons no longer had to see their clients personally on a regular basis.
3. Corporate Headquarters didn’t have to be located with the manufacturing plant. They could separate.
4. Remote Marketing of perishable goods became possible.
5. Transportation became more prevalent and cheaper.
Is the law tied to a constraint??

1. Society blasted past a constraint.
2. We no longer had to be physically located near something to substantially avail ourselves and affect it.
Is the law tied to a constraint??

1. Pennoyer-Jurisdiction must be a function of territory in order to maintain due process and avoid injustice.

2. Our ability to affect or avail ourselves of a place was due to our physical proximity to it.

3. The law cannot force a result that would require society to act past its constraint. Achieve more output than possible
Is the law tied to a constraint??

1. When that constraint was surpassed, the law couldn’t enforce a rule that acted as if that constraint was still there.

2. People moved past the constraint. That is the reality of technology.

3. The formula was to manage the constraint. That constraint no longer exists.

4. Thus the formula can’t be applied.
The law must manage the constraint.

1. The law meets at the constraint.
2. The law must prevent society from running into the constraint.
3. The law must avoid conditions requiring output greater than the constraint.
4. The law must never prohibit the breaking of a constraint.
Is the law tied to a constraint??

1. Where society was restricted from efficient travel outside the territory, asking society at large to defend itself in far away jurisdictions was not practical.

2. When the constraint was broken and we could avail ourselves at a distance, preventing jurisdictional authority meant we were no longer managing the right constraint.

3. The new law managed the new reality.
1. International Shoe—”certain minimum contacts with [the state] such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice.”

2. So it was an analysis of whether or not it was possible to avail oneself in that instance.

3. Took into account the burden of traveling to a distance jurisdiction for the suit.
1. Technology Legal Constraint Process
2. Breaking down precisely how law is attached to constraints.
3. And how the law should react to new constraints or the breaking of those old constraints.

1. Background
   1. Rosetta Stone
   2. Google

2. Dispute over adwords.

3. Led to counterfeiting and fraud.

1. Trademark—Logos, Coca-Cola, Apple Logo. These are marks that identify a particular company.

2. They are given legal protection.
1. Direct Trademark Infringement
2. Chris’s Cola. And I put a logo on my can that looks just like Coke or Pepsi.
3. Use someone else’s trademark without consent or a similar mark in commerce in such a way as to cause confusion.
Search Engine Advertising

1. You type in word/s.
2. Those keywords are bid on by advertisers.
3. You type in “language lessons”.
4. Auction style, businesses bid for their ad to display on the search results page when language lessons pop up.
5. Top of the page and straddle the right hand side.
Search Engine Advertising

1. Search engine gets paid when a user clicks on the ad.

2. Google changed their policy and began allowing third parties to bid on trademarked terms if it met a legitimate reason.

3. Meant they were allowing someone other than the trademark owner to bid on those trademarked terms.
1. Third parties not associated with Rosetta Stone began bidding on the Rosetta Stone keyword advertising they were resellers.

2. Some turned out to be counterfeiters.

3. Rosetta Stone believed they were harmed and sued for trademark infringement.
1. Someone uses your mark or similar in commerce without your consent where such use is likely to cause confusion.

1. Court made in some cases what I deemed a tortured analysis of the elements and factor test that was necessary to find direct trademark infringement.

2. Basically ruled summary judgment for Google on the issues.
1. There was no likelihood of confusion of anyone confusing Rosetta Stone’s language service products with Google’s language service products.

2. International Shoe-”certain minimum contacts with [the state] such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice.”
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Rosetta Stone v. Google.

1. Google is akin to a newspaper.
2. They just offer ad space.
3. They are not trying to confuse customers.
4. Analogy.
1. We cannot make analogies of capabilities.

2. We can make them of objects properties or methods.

3. Here the court sees the analog components where both offer space of some sort for advertising.
Rosetta Stone v. Google.

1. It looks like a reasonable analogy.

2. But the key is again to examine through the technology constraint framework, whether or not the law was tied to constraints or limitations.
1. Is Direct Trademark Law tied to any constraints?

2. A reading of the statute and of the likelihood of confusion test indicated that it is indeed tied to constraints.
1. More specifically we have to ask ourselves is the concept of advertising goods with trademarks tied to a constraint.

2. We are really dealing with advertising.

1. Statute itself mentions newspapers.

2. Newspapers are a type of “periodical” that have “print cycles” that lead to publication!

3. Clearly you can see certain limitations of newspapers.
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Rosetta Stone v. Google.

1. They are “periodic”; they are limited to “print cycles”.

2. The law states that as long as they are “innocent”, they are not liable for trademark infringement.

3. But they must remove the infringing ad.
1. Only if they haven’t gone into print cycle for their publication.

2. The court has to consider the constraints of printing on them before making a remedy.

3. So here the law is managing constraints at the time of what is practical.

4. Like it was not feasible at one time to run MRP more than once a month
1. It was only feasible and practical due to constraints of data collection, manipulation, placement, printing, and delivery to run newspapers in print cycles and periodicals.

2. The law is giving a hint immediately that it was considering the constraints.
So again the level of practicality was considered.

And in that newspaper world, the advertising displays were limited and periodic.

Further analysis demonstrates they are clearly not analogous in terms of capability.
1. Search Engines: Search Engines are “data mashing machines”.

2. They take a data input, the search keyword/s, and align it to ads supposedly related to that keyword and instantly display.
There are no limits of keywords, like there are limits of pages in a newspaper.

Limits of time are not there because you can automatically search another keyword.

There are no limits of advertisers.
1. Court invoked Functionality Doctrine of Trademark Law.
2. Functionality doctrine means the “design” of a product cannot be a trademark.
3. For instance the shape of an earplug if functional cannot be a trademark.
4. What you are claiming is not a trademark and therefore you have no rights to it.
Law needs to meet at the constraint.

1. Protect the technology to meet a benefit.

2. Not have to type in basketball player who played for Chicago Bulls who won many MVP awards... but type in the name.
Law needs to meet at the constraint.

1. Not going to restrict what data can be used in a search.

2. Trademarks have an indexing function in search engines that make searches more efficient and thus we can’t impede that.

3. Not have to type in basketball player who played for Chicago Bulls who won many MVP awards... but type in the name.
Law needs to meet at the constraint.

1. Rosetta Stone is a family owned business success story trying to prevent counterfeiters or free riders from capitalizing on its goodwill.
Flourish as a robust engine of economic growth

Protect the technology’s benefits

Protect legitimate business interests

Permit Control trademarks in cyberspace

Prevent control of trademarks in cyberspace
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- Protect legitimate business interests
- Permits control of trademarks in cyberspace
- Prevent control of trademarks in cyberspace/Exercised the Functionality Doctrine
- Flourish as a robust engine of economic growth
- Protect the technology’s benefits
Flourish as a robust engine of economic growth

Protect legitimate business interests

Permit Control of trademarks in cyberspace

Protect the technology’s benefits.

Prevent Control of trademarks in cyberspace
Law needs to meet at the constraint.

1. Right to use the trademark in commerce for your particular good or service.

2. Doesn’t mean you own the dictionary term.

3. Pseudo property right appurtenant to a particular use.
Law needs to meet at the constraint.

1. Trademarks have meaning and association, creates a certain branding.

2. Really, the key is to control the meaning of the trademark to the consumer.
Law needs to meet at the constraint.

1. Trademark law was designed in part because we have limited means of accessing and analyzing data.

2. And trademarks give us information. They can be the answer to the question asked.

3. Especially if we have an association to it.
Law needs to meet at the constraint.

1. Question asked may not always be apparent.
2. But the limitation overcome by search engines is one of data mashing capabilities.
3. Availability, silos, querying language, the topics, the integration.
4. We made decisions based on limited availability of data, which meant at times we didn’t have the information.
5. What we are searching for is information. Not data.
6. Bad trademarks mean a lack of information.
7. The law should protect from the lack of information just like it does now but in a different manner.
Law needs to meet at the constraint.

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Law needs to meet at the constraint.

1. Court assumed that the benefit we were looking for from the technology was the mashing of data.
2. But really the benefit we were looking for is information.
3. The two are not the same. The court had a faulty assumption of what the technology’s benefits were and thus felt a need to completely prevent control of the trademark.
4. By not protecting the trademark to the extent that of its association in commerce, the decision devalued this potential information system.
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Legal Science

1. Digitechlegal.org

2. First to create legal science to this level in this era.

3. A whole new way to create digital age laws.
Law needs to meet at the constraint.

1. Don’t worship the technology.
2. Technology can be beneficial only if it diminishes a limitation.
3. Need to understand the precise benefits.
4. Need to realize there is a relationship between the law and technology because there is a relationship between the law and constraints.