

**Report:
Peer-to-Peer Law and the Commons**

Professor Melanie Dulong de Rosnay

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The last LTS lecture of the summer term was delivered by Professor [Melanie Dulong de Rosnay](#). A research associate professor at the French National Centre for Scientific Research ([CNRS](#)), and former visiting fellow at the London School of Economics and Political Science ([LSE](#)), she is heading the joint [Information and Commons Research Group](#) at CNRS/Paris Sorbonne and acting as a work package lead of the H2020 CAPS project [netCommons](#) on community wireless networks. Her research focuses on techno-legal infrastructure and policy for information and digital commons, but also touches upon algorithmic regulation, distributed architectures, peer production, open access, and licensing.

The first part of Melanie Dulong de Rosnay's lecture outlined the dynamic relationship between law and technology, in particular the internet. Much of this relationship used to be fairly one-sided: For a long time, legal thinking was ill-equipped to face the staggering speed at which technology and innovation advanced. As a result, the binding norms regulating society and individual lives were no longer set by law alone, but increasingly by technology and code. Dulong de Rosnay calls this "The Myth of [Digital Golems](#)", the impression that uncontrollable and unaccountable creatures are blindly enforcing the orders of their designers.

The advances introduced by both *Cyberlaw* (L. Lessig) and *Lex Electronica* were a turning point for legal thinking. Not only did they conceptualise how law could regulate code, but they also considered how legal values could be embedded in regulation *by* code. In a sense, this was an attempt to invert the relationship of technology and law from one of domination to one of cooperation.

Dulong de Rosnay proposed the concept of Peer-to-Peer Law as a further step in the evolving relationship between law and technology. In this hybrid model of regulation, law shall continue to "infect" code with its values. However, in a dialectical turn, some of code's technical design features shall in turn be "exported" to law and its core concepts.

The second part of the lecture illustrated this alternative way of thinking through the example of peer-to-peer architectures, such as community networks (CNs) or distributed storage. These distributed architectures allow for fragmented and decentralised networks with an unstable group of participants ("peers"). In many cases these peers can be anonymous or pseudonymised, especially where CNs are used to promote privacy or to shield political activism from state control of the internet. Such technologies fundamentally challenge traditional legal reasoning, because most legal concepts rely on identifiable individual subjects whose actions can be ascribed to a time and space. Peer-to-peer married to the idea of the Commons may allow for new alleyways to (re)think core legal concepts, such as property and liability.

Property is traditionally thought of as a bundle of rights; it allows one to use (*usus*), process (*fructus*), and dispose exclusively of, or even destroy (*abusus*), a certain good. Although the law had the means to cope with the fragmentation of property between multiple users, further development is possible. For instance, the Free Software and Creative Commons movements were able to "hack" copyright by dissolving it into components specifying the scope of rights for future, potential users. Environmental law also developed ways to recognise the rights of a collective of users; Italy bans the privatisation of movement on water and elsewhere rights to water or land have been awarded to collectives. Further, some legislatures recently endowed natural features such as mountains and rivers with subjective rights that could be exercised by an unstable group of interested peers. For Dulong de Rosnay, such legal "hacks" constitute a particularly useful source of inspiration for the legal conceptualisation of the Commons, a good or set of goods accessible to anyone within a given (offline or online) community.

Liability is another legal concept that may be disrupted by peer-to-peer networks and reinterpreted for the Commons. Dulong de Rosnay mentioned peer-to-peer car insurance schemes as an example for distributed liability in off-line activities. However, the distribution of liability depends on the distribution of trust. In the context of on-line peer-to-peer networks with an unstable group of potentially unidentifiable peers, such distribution of trust and liability is much more problematic and may – if at all possible – be undesirable.

The lecture fuelled a rich and engaging discussion. Debates focussed on ways to rekindle trust in today's societies, the possibility of fully distributed digital networks, the added value provided by peer-to-peer architectures, as well as the role of law in facilitating and regulating them. The questions on recent developments in internet and copyright law were particularly topical; as technology has the potential to fundamentally challenge basic legal concepts, this is equally true for the relationship between the internet and copyright. Or shall we say *was*?

The internet is no longer the space where John Perry Barlow [declared](#) "your legal concepts of property, expression, movement, and context" not to apply. If "copyright has always been at war with technology" ([Lessig, 2006](#), p. 172) then it seems today that copyright is not only prevailing, but using both technology *and* law to promote its purposes. For instance, the [new EU Copyright Directive proposal](#) includes a so-called "link tax" (Art. 11) and "upload filters" (Art. 13). Critics say these measures would mean the end for the internet as we know it and do "[irreparable damage to our fundamental rights and freedoms](#)". For now the EU Parliament has [rejected](#) the proposal and sent it back to the Commission. There is no doubt that further developments in this domain will be thoroughly scrutinised by both the legal profession and society at large.

Daniel Romanchenko, June 2018

