# The discovery of technological law in the digital Bukovina: Lawrence Lessig's *Code and other Laws of Cyberspace*

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[1] Lawrence Lessig's book which has dominated the US-American Cyber Law Discourse since its publication in 1999, has now been translated into German and published by Berlin Verlag. Considering that "Code and other Laws of Cyberspace" has been the talk of the town in cyberspace since it first appeared, it is somewhat surprising that it comes out only now in German. Be this as it may, even if one can assume that those interested in cyberlaw, the governance of the internet and the intricate constitutional issues involved, will already have read the book and, possibly, even Lessig's new one, also published in October(1) , Berlin Verlag has placed an already "classic" title on the German book market. Lessig's sophisticated insights into how Cyberspace is and can be regulated, provide us with new perspectives on law and governance in this fascinating and fast evolving area.

[2] Lessig, a constitutional lawyer and now – after teaching at Chicago and Harvard - a law professor at Stanford, argues that the internet demands a new understanding of regulation. Lessig defines regulation as the complex interaction of four different regulatory forces: The first three are law, markets and social norms. A fourth and somewhat unexpected regulator of human behaviour, not only in cyberspace, is "architecture". According to Lessig "architecture" stands for the combined factual constraints of physics, nature and technology that define the borders of human behaviour in a specific situation or place. Lessig introduces -most persuasively- a differentiated understanding of regulation. Market structures as well as every other constraint on behaviour ("architecture") is a regulatory "modality".

[3] In search for an analogy to depict the specific way in which "architecture" regulates our behaviour in Cyberspace, Lessig proposes the term "Code". Code is the interplay of software and hardware elements, constituting a set of constraints on how users can behave in different "places" in Cyberspace. Such technologically enforced constraints can be password requirements or specific personal information, "mouse droppings", or rules ( *e.g.* "outlawing" indecent language) users in an AOL-chatroom have to follow. These features are selected and designed by "code writers". Lessig compellingly demonstrates how different architectures of Internet places embed different value choices. His examples concerning the regulation of human behaviour in cyberspace persuasively illustrate the enormous regulatory power of Code (in other words: *the architecture of Internet places*). In Lessig's observation, the Codes of Cyberspace set free degrees of power that architectures in the real space do not have.

[4] Lessig's brilliant analysis shows how the invisible hand of technology is shaping our online lives. Lessig's sociological understanding of law allows him to call "Code" law.
Like the Austrian jurist Eugen Ehrlich, who discovered the regulatory forces of the "living law" (*Das lebende Recht*) co-existing with the formal law of the Austrian Empire in the villages of the Bukovina before the First World War, Lessig also discovers "Code" as the technological law of the Cyberspace in the AOL and Yahoo-Villages co-existing with formal state created law. Even though the vagueness of Lessig's definition of law can be criticized, this discovery is of the deepest importance for our understanding of law and governance in the Internet. As can easily be noted, Lessig's book has already profoundly changed the discourse about the Internet and Cyberlaw.

[5] Lessig's reasoning has inspired comparisons to Kubrik movies and Orwell's "1984": Code can, in Lessig's observation, - in contrast to the original architecture of the Net - make Cyberspace a place of oppressive control. Lessig thus depicts the dangers of a new world in which effective regulatory powers shift from law to code, "from sovereigns to software" (p. 206). Lessig fears that with the increasing power of individual Internet Providers, significant threats to privacy, free speech, as well as other fundamental liberties may come from private entities. They decide which data can be collected, which degrees of anonymity are possible, to whom access is granted or denied and which voices will be heard. The perfection of private control for Lessig is the greatest danger of the computer mediated twenty first century. All throughout Lessig's book, a strong, possibly extreme distrust in market forces prevails.

[6] Lessig forcefully argues that the technical architectures of cyberspace should be subject to constitutional scrutiny. He opts for government control and dismisses private filter regimes. In that sense, he wants to bring the state back in. At one point, Lessig writes

*"Choices among values, choices about regulation, about control, choices about the definition of spaces of freedom-all this is stuff of politics. Code codifies values, and yet oddly, most people speak as if code were just a question of engineering. Or as if Code is best left to the market. Or best left unadressed by government. (...) If there is no*

*government to insist on these values, who will do it?"* (p. 219-220)

As opposed to numerous cyber libertarians, which tend find the necessary regulatory measures as being provided by the market itself, for Lessig the Internet is a space that can and ought to be regulated by state created law or by international treaties. There is no reason, according to Lessig, to conclude that the Codes of Cyberspace are inherently *unregulatable*.

[7] Lessig's book stimulates a new debate about what kind of place we want Cyberspace to become. Even though Lessig does not give us a specific answer to the question what kind of political institutions are needed to actually make the global value choices, we now know that these choices are predominantly about architecture. For this ground-breaking analysis the book has been praised by experts and the media as a masterpiece and the most important book ever published about the Internet. and the most important book ever published about the Internet. We agree: If Lessig had not taken us for a walk through the villages of the digital Bukovina, we would not have understood the regulatory challenges of the information age.

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(1) *See* Lawrence Lessig, Code und andere Gesetze des Cyberspace, Berlin Velag, Berlin 2001, (Transl. Michael Bischoff) ISBN: 3-8270-0404-7; DM 44,-- (http://www.randomhouse.de/book/editiondetail.jsp?edi=85538); Lawrence Lessig, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD, Random House, October 2001, ISBN: 0375505784, $ 30.