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Slippery Slope or Solid Ground?
Living with the 'cyberspace is place' metaphor

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'The greatest thing by far is to be master of the metaphor … A good metaphor implies an intuitive perception of the similarity in dissimilars.'   Aristotle.

'You're everywhere and nowhere, baby …' Jeff Beck.

1. Introduction

The 'cyberspace is place' metaphor is now so familiar that most habitual users of the internet and World Wide Web rarely stop to think about it. The language of the net is redolent with spatial metaphors the majority of which have been absorbed into the argot of the internet such that it becomes increasingly difficult, if not nigh impossible, to discuss the internet, together with the activities it makes possible, without reference to such metaphors. Inevitably, their adoption and use has influenced academic and judicial examination of activities which take place in cyberspace. Over the years, there has been much discussion of spatial metaphors by both their proponents and opponents and it continues to remain a live issue. In particular, Hunter has demonstrated how the meaning of the 'cyberspace is place' metaphor, although originally used to denote the 'other-worldliness' of the internet has metamorphosed and has come to denote the fact that cyberspace is merely a space within the real world.[1] Although some commentators have argued that spatial metaphors are inappropriate and unnecessary, their use suffuses our comprehension of cyberspace to such an extent that locating a universally acceptable alternative would probably be

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[1] Dan Hunter 'Cyberspace as place and the tragedy of the digital anticommons' (2003) 91 Cal. L. Rev. 439.

impossible. As Hunter remarks the 'place may be inchoate and virtual but no less real in our minds.'[2]

2. The nature of slippery slope arguments

There are many other terms for the 'slippery slope', with varying degrees of familiarity depending on the audience. E.g. camel's nose, thin end of the wedge, floodgates, also one use of the expression that 'big trees from little acorns grow'. Many commentators use these terms virtually interchangeably for as Schauer[3] comments 'the single argumentative claim supported by each of these metaphors, as well as by many others, is that a particular act, seemingly innocuous when taken in isolation, may yet lead to a future host of similar but increasingly pernicious events.' This was graphically illustrated by Volokh, in particular, who includes in his article a cartoon picture of a camel with its nose in a tent which collapses causing a monkey to dislodge the thin end of the wedge which in turn opens the floodgates causing water to rush down the slippery slope and irrigate the acorn from which springs the fully grown oak.[4]

Academic analysis of slippery slope arguments might present fewer difficulties, however, if there were consensus over the meaning of the phrase. Closer examination reveals that there are a number of types of 'slippery' reasoning and some important differences between them. The term is used colloquially, usually as a pejorative term or warning against what is deemed to be fallacious reasoning. Indeed some commentators would confine the term to such cases; Rizzo and Whitman,[5] for instance, identify the following characteristics of slippery slopes; an initial acceptable argument; a 'danger case' – a later argument and decision that are unacceptable; followed by a 'process' by which accepting the first raises the likelihood of later accepting the second. However, Walton has identified a number of types of slippery slope, not all of which can be categorised by the presence of fallacious reasoning.[6] A number of these rely on incrementalism or what Walton refers to as the 'argument

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[2] Ibid p. 452.
[3] Frederick Schauer 'Slippery Slopes' (1985) 99 Harv. L. Rev. 361.
[4] Eugene Volokh 'The Mechanisms of the Slippery Slope' (2003) 116 Harv. L Rev. 1026, 1031.
[5] Mario J Rizzo and Douglas Glen Whitman *The camel's nose is in the tent: rules, theories and slippery slopes* (2003) 51 UCLA L Rev 539
[6] Douglas Walton *Slippery Slope Arguments* Oxford: Clarendon Press (1992)

from gradualism' in which the proponent moves the argument forward in very small steps, seducing the respondent into accepting an overall conclusion which he or she might initially have rejected. A slippery slope argument can also be used to oppose the argument from gradualism on the basis that the incremental steps in the reasoning employed inexorably lead to a slide down the slippery slope, more of the camel getting into the tent etc.

Warnings against the 'floodgates of litigation' heard for instance in response to pleas to extend the duty of care in tort are typically arguments against gradualism. Such arguments are not really based on fallacious reasoning but on fear of the potential or possible result of such incremental drift. However both courts and commentators seem, all things considered, to be sceptical that opening of the floodgates is a probable outcome and in that sense, the floodgates argument could be said to be misleading. Footnote e.g.s

The 'slippery'/elusive nature of definition of a slippery slope argument. Although for instance, the argument that

Law and legal argument provides fertile ground for slippery slope arguments to flourish for as Schauer concludes law, as distinct from other disciplines, 'pays allegiance to the past while guarding the future.'

3. Comprehension and the use of metaphor

Are metaphors mere figurative and linguistic devices or are they an essential component of cognition? Are they misleading and deceptive, leading us ineluctably towards the slippery slope, or are they essential tools in the application of existing arguments and precedent to new and novel situations? At this stage in the discussion it is important to note that the important facets of the use of metaphor are those that aid understanding, and not those used in literary writing, where the success of a metaphor may actually depend far more on its dissimilarity from the object being described. In contrast, cognitive metaphors are used as an aid to understanding the unfamiliar and as such are more likely to be chosen for their similarity to the subject under consideration.

Metaphors can assist comprehension of the new and novel by building on an understanding of the familiar. They are used in a wide variety of disciplines and are themselves the subjects of study by, inter alia, linguists, cognitive scientists and philosophers.[7] Metaphors can be more than merely literary devices since, although not literally true, they can assist the reader or listener in recognising some 'truth' about the matter under study which can convey meaning about how things actually 'are'[8].

Metaphors are used in education, for creative thought, for rhetorical purposes and for problem solving and a number of cognitive scientists have even suggested that metaphor is epistemologically necessary for learning something that is radically new.[9] So, aside from their obvious use in literature and art, metaphors can be thought of as tools which facilitate the exploration of new developments. However they can also be devices for manipulating meaning. The metaphorical statement 'information wants to be free' is actually a translation of 'we don't want any constraints on it.' Many metaphors are in reality no longer construed as metaphors since they have been absorbed into natural language and been imbued with a specific meaning in the same way that proprietary names such as Biro and Hoover have. 'Visiting' websites, 'surfing' the web and 'accessing' computers could be deemed to fall into this category.

Neither do metaphors necessarily stop being useful just because some aspects of the identity or comparison are later shown to be invalid. A good example of this is found in the use of some scientific models. Like metaphors, successful models can denote the relationships between the essential components of the system under study. Also like metaphors, they may not provide a literal mapping. Indeed, complex systems may be represented by a number of different models each focusing on a separate modus operandi. Models are particularly useful for visualising objects and systems which are not so easily apprehended through the normal physical senses. Good examples are

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[7] See e.g. Max Black *Models and Metaphors: Studies in Language and Philosophy* Ithaca, NY: Cornell University Press (1962), Warren Shibles ed. *Essays on Metaphor* Whitewater, Wisconsin: The Lnguage Press (1972) and Andrew Ortony ed. *Metaphor and Thought* Cambridge: Cambridge University Press (1979).

[8] See also Max Black 'More about metaphor' in Ortony ed ibid.

[9] See e.g. Stephanie A Gore 'A rose by any other name: Judicial use of metaphors for new technologies' (2003) U Ill J L Tech & Pol'y 403 and references cited therein.

provided by the scientific models for atoms, molecules and crystal structure. The planetary model of the atom developed by Bohr revolutionised the way scientists thought about atomic structure. Subsequently it was discovered that electrons also exhibit wave-like properties and yet the Bohr atom is still a useful model and certainly much easier to represent visually even though quantum mechanical descriptions might be technically more accurate.

Metaphors and models are chosen not because they are a perfect replica of the object they are describing or even their supposed similarity to it (although in some cases this is important) but, more generally, for their ability to illuminate particular facets. The use of all metaphor and model needs to be informed by not only the similarities between the metaphor and the system under study but, more importantly, the differences since neglecting these may invalidate the comparison. Metaphors can draw us into the world as represented by the metaphor and although this may enhance our understanding at the outset it also carries the risk of obfuscation. They can colour our subsequent thinking about a subject and incur loyalty to the original metaphor even where experience and reality suggest that it should be discarded and a more appropriate one selected.

4. The 'cyberspace is place' metaphor

The place metaphor has become very familiar to the extent that it is now tremendously challenging to describe the use, manifestation and modus operandi of the internet and World Wide Web without the use of words which suggest place and location. We 'visit' websites, create 'home' pages, communicate in chat 'rooms', and so on.

Metaphors sometimes appear to arise almost spontaneously – perhaps because they do mirror or describe many people's understanding. This could be said to be the case with the cyberspace is place metaphor for as Yen remarks 'even if the cold-blooded realist rejects the whole thing as mass delusion, the fact remains that society talks about cyberspace as if it were real, and it is undeniably true that something of social

significance is happening "out there".'[10] This does not, of course, mean that such metaphors are necessarily more appropriate or successful and they can still suffer from the same limitations as others. On the other hand, some metaphors are more consciously selected; arguably this is the case with metaphors based on the notion of the 'information highway'. Yen makes the case for the choice of 'feudal society' rather than 'place' as a metaphor for the organisation of cyberspace believing it to be more appropriate in its description of the effects of modes of internet governance and regulation.[11] While this argument may have some force in an academic sense, given that the vast majority of today's internet users have no practical experience of life in a fiefdom, such a metaphor is unlikely to exhibit as much collective resonance as the 'place' metaphors.

While lawyers may not subscribe to some of the wilder and more graphic visualisations of cyberspace, nevertheless, some vivid images have been evoked which depict both ethereal and more concrete aspects of the supposed virtual space. An abstract description is found in the US Supreme Court decision in *Reno v ACLU* where cyberspace was described as a 'unique medium … located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.'[12] In a consciously contradictory attempt to describe the enigmatic nature of cyberspace, it has also been said that the Internet 'negates geometry ... it is fundamentally and profoundly anti-spatial. You cannot say where it is or describe its memorable shape and proportions or tell a stranger how to get there. But you can find things in it without knowing where they are. The [Internet] is ambient – nowhere in particular and everywhere at once."[13] An apparently more down to earth description by Kirby J, nevertheless alludes to the extra-terrestrial properties of cyberspace 'The Internet is essentially a decentralised, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. It is ubiquitous, borderless, global and ambient in its nature. Hence the term "cyberspace". This is a word that recognises that the interrelationships created by the

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[10] Alfred C Yen 'Western Frontier or Feudal Society?: metaphors and perceptions of cyberspace.' (2002) 17 Berkeley Tech LJ 1208, 1216.
[11] Ibid.
[12] *Reno v ACLU* 521 US 844, 851.
[13] *Doe v. Roe*, 955 P.2d 951, 956 (1998). Cited in *ACLU v. Reno* 217 F.3d 162, 169 (2000).

Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge.'[14]

The internet has been visualised 'as its own thriving city'.[15] A French court has commented that for the purpose of organising and carrying out an auction, the Internet consists of a vast auction room extending to infinity.[16] Metaphor is used not only for the 'place' but to describe and interpret what happens there. A good example is the judicial interpretation of 'visiting' a web site. In *Playboy Enterprises v Chuckleberry* accessing an Italian web site from the US was likened to travelling by plane to Italy to buy the requisite magazine.[17] Jacob J in *Euromarket Designs v Peters* agreed that accessing a site in Ireland was 'like the user focusing a super-telescope into the site concerned … Via the web you can look into the defendant's shop in Dublin. Indeed the very language and the Internet conveys the idea of the user going to the site – "visit" is the word'. Hunter notes that 'thinking of cyberspace as a place has led judges, legislators and legal scholars to apply physical assumptions about property in this new, abstract space.'[18] Such physical assumptions are reflected in the coining of words such as 'cybersquatting' which is clearly consonant with a place, or perhaps more accurately, a property metaphor.

Using metaphors for legal reasoning should not be confused with gaining a deeper understanding of the technology itself, merely the extent to which its functionality impinges on the application of legal rules and principles. Use of metaphors is not, as implied by Gore, inevitably a by-product of technophobia which can only be overcome by invoking metaphors of the familiar.[19] Whether or not those who referred to the railway engine as the 'iron horse' were technophobic is beside the point. It didn't look like a horse, or act like one, but within a limited scope it performed some of the same functions. The search for the perfect metaphor or all-embracing model is

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[14] *Dow Jones v Gutnick* para 80.

[15] *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.* 939 F.Supp. 1032, 1037.

[16] *Chambre Nationale des Commissaires Priseurs v Nart SAS* [2001] ECC 24, Tribunale de Grande Instance, Paris para 25.

[17] 939 F.Supp. 1032, 1039.

[18] Hunter 443. It should not be thought that they are in isolation in this respect and for many other disciplines, the concept of cyberspace as place is central to their analysis and observations of the organisation of and behaviour in this virtual space. See e.g. www.casa.ucl.ac.uk/martin/isocnl/, www.cybergeography.org/atlas/atlas.html, www.opte.org/maps/ and www.mappingcyberspace.com/gallery/index.html.

[19] Ibid.

destined to be a fruitless one. If we accept that metaphors are an important prerequisite for understanding the new or the unfamiliar, then it is hardly surprising that the internet has spawned so many and that these need not be regarded as mutually exclusive. Metaphors are a vital, some would say essential, device for understanding and, in that capacity, will continue to be required to illuminate and demystify our perception of cyberspace and its manifestations. The challenge is to ensure that they fulfil their cognitive function without precipitating a slide down the slippery slope of legal reasoning – a possibility which will be explored in the next section.

5. Does the 'cyberspace is place' metaphor beget slippery slope arguments?

To what extent does the 'cyberspace is place' metaphor enhance or obscure the understanding of how legal principles should be applied to activities which take place in cyberspace? Do they assist in enabling legal principles to be applied equitably, uniformly and with certainty? Arguably two of the most important factors are recognition of the limitations of the choice of metaphor and, crucially, whether these are *legally* significant. Hunter points out that a number of legal commentators would persuade us that the notion of cyberspace is discredited for legal purposes but that as a matter of fact, the majority of people whether judges, legislators or whatever, actually think of cyberspace as a place.[20] Indeed he notes that Wu has remarked that 'this idea must count as among recent legal history's more quixotic episodes'.[21] Nonetheless as Hunter himself notes, other disciplines have not been so fastidious and continue to use, develop and embellish their analysis of relationships, organisations and behaviour in the virtual world of cyberspace by recourse to a conceptual view of cyberspace as place. Does this view exert 'a strong and unrecognised influence on the regulatory regimes of cyberspace'?[22] Given the ubiquity of this metaphor it is unsurprising that, notwithstanding the scepticism and circumspection of some legal academics, it has been used, although not necessarily relied upon in the courts. In this respect there is, perhaps unsurprisingly, a difference between cases discussing fundamental human rights such as freedom of expression, and those related to economic rights and claims.

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[20] Hunter p 446-7. This paper is not the place for a quasi historical account of the rise and fall of the 'cyberspace is place' metaphor – those interested are referred to part 1A of Hunter's paper and references cited therein.

[21] Citing Timothy Wu, 'When Law & the Internet First Met', (1999-2000) 3 Green Bag 2d 171.

[22] Hunter p. 441.

With respect to the former, it was not surprising, given the resonance of place metaphors that there was an attempt to apply the US concept of community standards for regulating obscene material to the internet in the Child On-line Protection Act (COPA). In the subsequent challenge to the validity of this statute, the Supreme Court disagreed with the Third Circuit Court of Appeals[23] that community could not be defined in cyberspace.[24] The point of disagreement was whether or not community had to be defined by reference to geographical boundaries in real space or whether it could be applied to a class of adults, a standard which could have some meaning on the internet. If the former then upholding the statute would have the inevitable effect of requiring internet content providers to abide by the strictest community standard, but if the latter then it would be possible to arrive at a generalisation based on the US as a whole. However although apparently initiated in response to the idea of communities in cyberspace, the court did not develop this line of reasoning but instead focused on the scope of the definition and interpretation of existing precedents on community standards. Interestingly however, Justice Stevens, dissenting noted that the purpose of community standards in the US obscenity law standard was to act as a shield to protect speakers from the least tolerant and also to protect audience members by allowing 'people to self-sort based on their preferences'. But he warned that 'this sorting mechanism, however, does not exist in cyberspace; the audience cannot self-segregate. As a result, in the context of the Internet this shield also becomes a sword.'[25] In other words, speaking metaphorically, cyberspace is a place of conflicting metaphors!

Although cases involving other content based issues, notably defamation, have alluded to the specific nature and properties of the internet and world wide web, their decisions cannot be said to have relied on these differences and characteristics. Kirby J, in the leading case of *Dow Jones v Gutnick*, remarked that 'when a radically new situation is presented to the law it is sometimes necessary to think outside the square. In the present case this involves a reflection upon the features of the Internet that are

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[23] *ACLU v Reno II* 217 F3d 162

[24] *Ashcroft v ACLU* 535 US 564. The case was then remanded to the Third Circuit 322 F 3d 240, (3rd Cir. 2003) and the subsequent appeal to Supreme Court based on different grounds *Ashcroft v ACLU* 124 S Ct 2783 (2004).

[25] 535 US 564, 603.

said to require a new and distinctive legal approach'[26] and that 'viewed in one way, the Internet is not simply an extension of past communications technology. It is a new means of creating continuous relationships in a manner that could not previously have been contemplated.'[27] However, in spite of the fact that Kirby went on to remark that the internet was 'indeed a revolutionary leap in the distribution of information, including about the reputation of individuals …'[28] there was no reliance on metaphorical assumptions and it is possible to analyse the court's overall analysis as merely an application of traditional principles of defamation law to publication in another jurisdiction.[29] In the later case of *Dow Jones v Jameel*,[30] the UK Court of Appeal decided the case without recourse to any discussion of the specific attributes or nature of the Internet.[31]

A range of rather different cases have led to what Hunter terms the 'tragedy of the digital anticommons' in which instead of cyberspace developing into a democratising space, individuals and legal persons appear to want to exert their own quasi-property based claims to a portion of cyberspace. As we have seen above courts have not automatically surrendered to the inevitable consequences of the cyberspace is place metaphor. The courts in a number of trade mark cases have often used place metaphors quite graphically as a cognitive aid to explain their reasoning as evidenced by the examples from *Playboy v Chuckleberry* and *Euromarket v Peters* cited above. Arguably in both these cases the reasoning and outcome demonstrate a relatively non-controversial application of standard principles of trade mark law. However potentially unfortunate or perhaps unintended consequences of the place metaphor have arguably proved not so easy to resist where rights which are more easily aligned with quasi-property rights are at stake.

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[26] *Dow Jones v Gutnick* [2002] HCA 56 para. 112.
[27] Ibid. para. 118.
[28] Ibid para. 164.
[29] Albeit Kirby also remarked, in a reference to *Duke of Brunswick v Harmer* (1849) 14 QB 185, that 'the idea that this Court should solve the present problem by reference to judicial remarks in England in a case, decided more than a hundred and fifty years ago, involving the conduct of the manservant of a Duke, despatched to procure a back issue of a newspaper of minuscule circulation, is not immediately appealing to me.' Ibid para. 92.
[30] [2005] EWCA Civ 75.
[31] However in relation to defamation Svantesson has returned to the idea of a separate jurisdiction for the internet albeit not one based on self-regulation. See Dan Jerker B Svantesson 'Borders on or border around – the future of the internet' (2006) Albany Law Journal of Science and technology – forthcoming.

Some of the litigation in the US has featured claims which have resulted in the resurrection of the previously obsolescent tort of trespass to chattels. Such an argument clearly cannot succeed without an acceptance of property based rights in cyberspace. The basis for such claims is that any express or implied permission granted to access a website has been exceeded[32] and this was one of the arguments relied on by the plaintiff in the *Register.Com v Verio*.[33] The relevant standard for trespass to chattels is that a person who uses a chattel with the consent of another will be liable for trespass for any harm to the chattel which is caused by any activity which exceeds the consent. The judge did not specifically consider whether the website, or at least the database on which the website was built, was capable of being a chattel but appeared to take this for granted. First, the judge considered whether Verio's particular use of the database was authorised. From the time Verio was notified that such use was not authorised the permission, if it ever had existed, had ceased, and it then became necessary for the court to decide whether the unauthorised access had caused any harm to Register.Com's chattels. Although there was no physical damage to the computer system there was no doubt that what Verio was doing reduced the capacity of Register's system and this was deemed sufficient to establish a trespass.

In *E-bay v Bidders Edge*[34] the court found that the analogy of harm favoured by eBay of 'sending in an army of 100,000 robots a day to check the prices in a competitor's store' was inappropriate[35] but instead allowed the injunction on the basis that ebay's server and its contents were personal property and that a search which uses even only a tiny amount of the system's capacity would suffice as there can be no right to use the property of another without permission.[36] However a website can be stored on any server without the awareness of the user i.e. the collection of software files containing the intangible code which represents the website is essentially quite separate from the physical medium which is the server. At the conceptual level therefore it may be more appropriate to consider the website itself as intangible and equating it to personal

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[32] Such cases typically involve a web crawler or spider being used by one party to extract information from publicly inaccessible parts of the other party's website.
[33] 126 F Supp 2d 238, 250 (SDNY 2000) affirmed 356 F 3d 393 (2nd Cir 2004).
[34] *E-bay Inc v Bidder's Edge Inc* 100 F Supp 2d 1058 (ND Cal 2000).
[35] Ibid at 1065.
[36] Ibid at 1070.

property could be regarded as a step onto the slippery slope towards inappropriate decisions.[37]

One situation where courts and others should beware of slippery reasoning is in the proliferation of so-called 'licences to link'. A Google search will reveal a number of examples of these. Why should they be necessary? A general acceptance seems to have arisen that when a website is created, this act creates an implied licence to access or link to that site. Why should this be the case? If there is indeed a quasi-property right in the website, and the verb 'visit' is, of course, suggestive of this then the notion of what could almost be equated with a 'cybereasement' may be tenable. On the other hand, if a different version of the place metaphor is employed, and the activity is likened instead to placing a poster in a public place which can then be viewed by all who come across it, an implied licence to view would surely never be contemplated. Is there a difference predicated on the choice of verb as 'visit' or 'view'? Is going beyond viewing to actual linking significant? Does the purpose of links extend beyond that of the 'signpost' referred to in *Reimerdes*[38] and elsewhere? If not then surely no tacit permission is needed and the need to imply a licence is redundant assuming the link concerned is not of a deceptive nature and it is clear to the user that they are activating a link from one site to another. Nonetheless a number of courts appear to have been sufficiently seduced by the property implications of websites to support reliance on implied licences to link[39] even though they also note that links are fundamental to the operation of the Web and one of the factors that makes it unique. There would be little point in having a site which had neither links to it nor from it since it could never be visited.

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[37] See also discussion in Diane Rowland and Andrew Campbell 'Content and Access Agreements: An analysis of some of the legal issues arising from linking and framing.' (2002) 10 Int JLIT 23.

[38] *Universal City Studios v Reimerdes* 111 F Supp 2d 294, 340 (SDNY) 2000 "links bear a relationship to the information superhighway comparable to the relationship that roadway signs bear to roads but they are more functional. Like roadway signs, they point out the direction. Unlike roadway signs, they take one almost instantaneously to the desired destination with the mere click of an electronic mouse."

[39] See e.g. *Algemen Dagblad BV v Eureka Internetdiensten* (the Kranten.com case). Case 139609/K GZA 00-846 [2002] ECDR 1

6. Conclusion

Models are neither intended to be exact replicas nor to provide predictions as to how to proceed, but merely to elucidate a system as it is. This is important as one of the problems of the slippery slope – possible even one of the reasons it arises – is that of basing argument on a metaphor or model for a system when that metaphor was only intended to provide an aid to comprehension of the system or a useful depiction of something abstract, complex or both. Further Aristotle's view quoted at the beginning of this article should perhaps be balanced by the necessity for a perception of the dissimilarity of similars since cognitive metaphors will arguably have more similarities than dissimilarities to their object but, nevertheless, it is the dissimilarities which are capable of leading to the slippery slope. Cumbow warns against too unthinking adoption of metaphor since while 'we may use spatial metaphors for convenience … the internet … is not a place but a medium.'[40] But in any situation the choice of metaphors provides the opportunity for indulgence in semantic objection.

Many of the place metaphors have already become embedded in our own individual understanding of what cyberspace 'is' or have passed into general use within everyday language. Even if it was desirable, attempts to eliminate them would be futile. Svantesson refers to various cyberspace metaphors as 'abstract and undeveloped descriptions' which are of limited value[41] and that may be so, but that does not mean that we should not utilise that value or that we should be looking for or expecting one-to one correspondence.[42] As shown above a number of courts have neither used metaphors uncritically nor without an appreciation of their limitations.

On the other hand, it is easy to succumb to the seduction of a particular metaphor or be misguided by an inappropriate analogy and be both reluctant to dispense with it or resist the temptation to use it far beyond the originally intended scope. Use of metaphor is so endemic to legal argument that we may even forget that a metaphor is in use.

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[40] Robert C Cumbow 'Cyberspace must exceed its grasp or what's a metaphor? Tropes, trips and stumbles on the info highway' (1997) 20 Seattle U L Rev 665, 668.

[41] Dan Jerker B Svantesson 'The characteristics making internet communication challenge traditional models of regulation – what every international jurist should know about the internet' (2005) 13 Int JLIT 39.

[42] See also Lemley ibid.

Often the main problem of those arguments categorised as slippery slopes is that, instead of using metaphor or model as a device to enable understanding, it is used as a device to show how to move forward. In the former it might be possible to rely on the security of solid ground but, as steps are taken towards the latter, a descent down the slope becomes more probable. In other words, it is not the fact of the use of the metaphor as such which is critical, but the manner of its use. Some of the above discussion shows that in some cases where courts allude to specific properties of cyberspace they do not use these as the sole, or even the main, basis of their reasoning but in other cases there is both conscious and unconscious use of metaphor. Arguably, the majority conception of the place metaphor, whether accurate or not, is of a 'public place' where users can roam and browse freely. Whilst there has been a move away from the almost literal 'place' occupied by 'cyberinhabitants' and 'cybercommunities' which was fashionable in the latter half of the 1990s, the place metaphor certainly lives on. Has this metaphor given rise to some of the slippery reasoning based on property claims such as trespass and the 'licence to link'? Hunter seems to suggest that such proprietary claims are an inevitable development of the ubiquity of the place metaphor and denote a consequent move towards a 'digital anti-commons where no one will be allowed to access others' cyberspace "assets" without using some form of licensing or other transactionally expensive permission mechanism.'[43] However they could also be understood as an application of another distinct, but perhaps related metaphor, that of cyberspace as property. It is perhaps significant that in linking and trespass cases the litigants tend to be business and commercial actors and that the rise of these cases can be correlated with a change in the creator/user base on the internet.

As such organisations have colonised the web, this distant cousin of the place metaphor has flourished as enterprises seek the ability to calculate, quantify and value their perceived assets in cyberspace with the inevitable corollary of exerting the requisite control over those assets and denying rights to others. Courts being in the historical habit of protecting property seem far more likely to be propelled down the slippery slope by the insidious effects of a property metaphor than a place metaphor even where the latter is referred to overtly. Having to live with a 'cyberspace is property' metaphor may provide the real threat to the commons.

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[43] Hunter ibid p. 446