SAFE HARBOUR
The Unsettled Future of the Global Knowledge-Based Economy

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Beneath the ongoing dispute between the United States and the European Union about a 'safe harbour' for the personal information of European citizens lay deeper, darker legal waters. The dispute is serious. It threatens the future of the global knowledge-based economy especially business models based in the 'cloud'. So what is the problem?

On the surface it is about the Snowden Revelations of the US National Security Agency (NSA) spying on social media and all electronic and other forms of communication. Quite simply the Europeans do not trust the American government to protect the personal information of European citizens. They doubt there is a safe harbour once information reaches servers subject to American jurisdiction. Given European as well as Russian and Chinese security agencies do the same as the NSA this sounds hollow.

First, the obvious. Russian and Chinese as well as other 'authoritarian' regimes regard personal information about their citizens (and everyone else) as State property. Arguably, this is a holdover from the Marxist-Leninist legal ideology that once ruled many such Nation States. In the United States it is a question of post-9/11 national security trumping privacy, *e.g.*, the *Patriot Act*. To tweak an adage coined at the height of the Nixon 'imperial presidency': No honest American (or Russian or Chinese) should fear being monitored!

Second, the subtle. The immediate dispute is more subtle but nonetheless fundamental - a clash of legal philosophies about knowledge as property. In this dispute the US will serve as legal proxy for the entire Anglosphere.

In addition to the English language the Anglosphere is rooted in English Common Law & Equity. Common Law follows the law of precedent guiding decisions of guilt or innocence, right or wrong based on judge-made verdicts in the past and setting, in the present, precedents for the future. In this sense Common Law is evolutionary growing and changing case by case. Equity, on the other hand, is the law of fairness guiding decisions by principles like *unlike treatment of unlike* and *like treatment of like*. In theory, Equity takes precedence over Common Law.

The European Union, excepting the United Kingdom, practices the Civil Code rooted in the legal theory of Natural Rights

emerging from the Republican Revolutions of the late 18th to mid-19th centuries. While the American Declaration of Independence and Constitution are phrased in terms of Natural Rights the US adopted English Common Law & Equity after their revolution overturned an ancient regime of subordination by birth. Like Equity the Civil Code primarily guides decisions by principle, not precedent.

A truly Natural Rights legal regime began with the French Revolution of 1789 that overthrew not only an ancient regime of subordination by birth but also an archaic, fragmented and feudal system of common law. Drafting began in 1793 drawing heavily on the *Institutes of Justinian* that had consolidated Roman law in the 6th century of the Common Era. The new legal code came into force in 1804 initially called the Napoleonic Code but subsequently the Civil Code.

Excepting trial by jury under Common Law and trial by inquisition, *i.e.,* by an investigating magistrate under the Civil Code, there are two chief differences between the two legal systems. First is treatment of knowledge as property. Second is that under Common Law & Equity a Natural and Legal Person (a body corporate or corporation) enjoy the same rights, *e.g.,* recent US Supreme Court decisions in *Citizens United* and *Hobby Lobby*. Under Civil Code Natural and Legal Persons cannot have the same rights because a body corporate does not possess a human personality.

In the Anglosphere knowledge, specifically codified knowledge as the written word, image or sound, is protected by copyright that historically emerged as printer's rights, *i.e.,* the right to copy belonged and continues to belong to the printer not the author. All rights of the author were, and remain, subject to assignment in full or in part depending on the bargaining power of the individual. Put another way, knowledge is treated like any other property subject to sale by contract. When the US adopted Common Law & Equity they accepted copyright precedents established in the United Kingdom. In fact the first US Copyright Act of 1780 had a title and provisions almost identical to the English *Statute of Queen Anne* of 1710.

The Civil Code, on the other hand, views a created work as an extension of a human personality following the philosophy of Immanuel Kant (1724-1804). As an extension of a human personality a created work is treated as different from other forms of property and subject to *impresciptable* moral rights, *i.e.,* such rights are not subject to contract, they cannot be signed away. In fact, rather than being called copyright, in the Civil Code tradition it is *Author's Rights*. These moral rights belong even to employees unlike under Common Law & Equity. Such rights, however, take

two forms: economic and moral. Economic rights may be assigned and transferred in whole or in part but moral rights cannot be transferred except to an heir, *i.e.,* another Natural Person.

The three most important moral rights are: (1) the paternity right - the right to be identified as the creator of a work and protected from plagiarism; (2) the integrity right - the right to protection against alteration or deformation of one's work, and the right to make changes in it; and, (3) the publication right including the right not to publish at all. The most succinct statement of their nature is they are "inalienable, unattachable, impresciptible and unrenounceable". In the Anglosphere, however, Jeremy Bentham (1748-1836), an English legal philosopher and contemporary of Kant, declared that Natural Rights were nonsense and impresciptable Natural Rights were nonsense on stilts. In effect Bentham further neutered the concept of Natural Rights in Anglosphere jurisprudence.

This brings us to the current EU/US dispute about safe harbour. Basically under Common Law & Equity personal information given though an electronic check-box contract to a corporation is like any other piece of corporate property to be bought and sold according to corporate interest at any point in time subject only to national law especially national security legislation. Under Civil Code, however, personal information is an extension of a human personality and subject to "inalienable, unattachable, impresciptible and unrenounceable" moral rights. That moral rights is an inherent principle of the Civil Code is demonstrated by the fact that in France no statutory requirement existed until 1957, arguably, among other things, due to US pressure to formalize the principle.

The recent clash of legal philosophies arguably made its first appearance when the European Court recently recognized (2012) the 'right to be forgotten' on all internet search engines. There is no doubt that European e-competitive envy of the 'American Big Five'- Amazon, Apple, Facebook, Google and Microsoft – adds fuel to the fire. The reality, however, is that personal information in the EU is subject to moral rights alien to Anglosphere Common Law and Equity. How is such a fundament clash of legal philosophies to be resolved?

Normative and exploratory forecasting are two ways by which to see into the future. Exploratory forecasting essentially involves projecting existing trends. Normative forecasting involves imposing one's values on a preferred future.

With respect to exploratory forecasting if past is prelude then the EU and US will reach some functioning compromise that may not even address the inherent clash of legal philosophies. This may be partially explained by the fact that EU entertainment corporations have significant financial investments in the Anglosphere market

and are more profitable when product is produced under Common Law & Equity. Specifically, it absolves them of all moral rights obligations to creators. It makes contracting so much easier and cheaper than in their own EU home markets.

With respect to normative forecasting I see the American as an Unfinished Revolution. Founded on Natural Law principles and based on the individual the US has through Common Law precedent progressively diminished the Natural Rights of individuals and consolidated the power of Legal Persons. If it were to return to its declared intentions (the Declaration of Independence and Constitution) the Kantian philosophy would triumph. Given an increasingly global knowledge-based economy, increasing contract and self-employment and growth of income inequality such a normative future is to be desired.

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