UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

Tort Law & Community Networks

Internet L@w Research Colloquium
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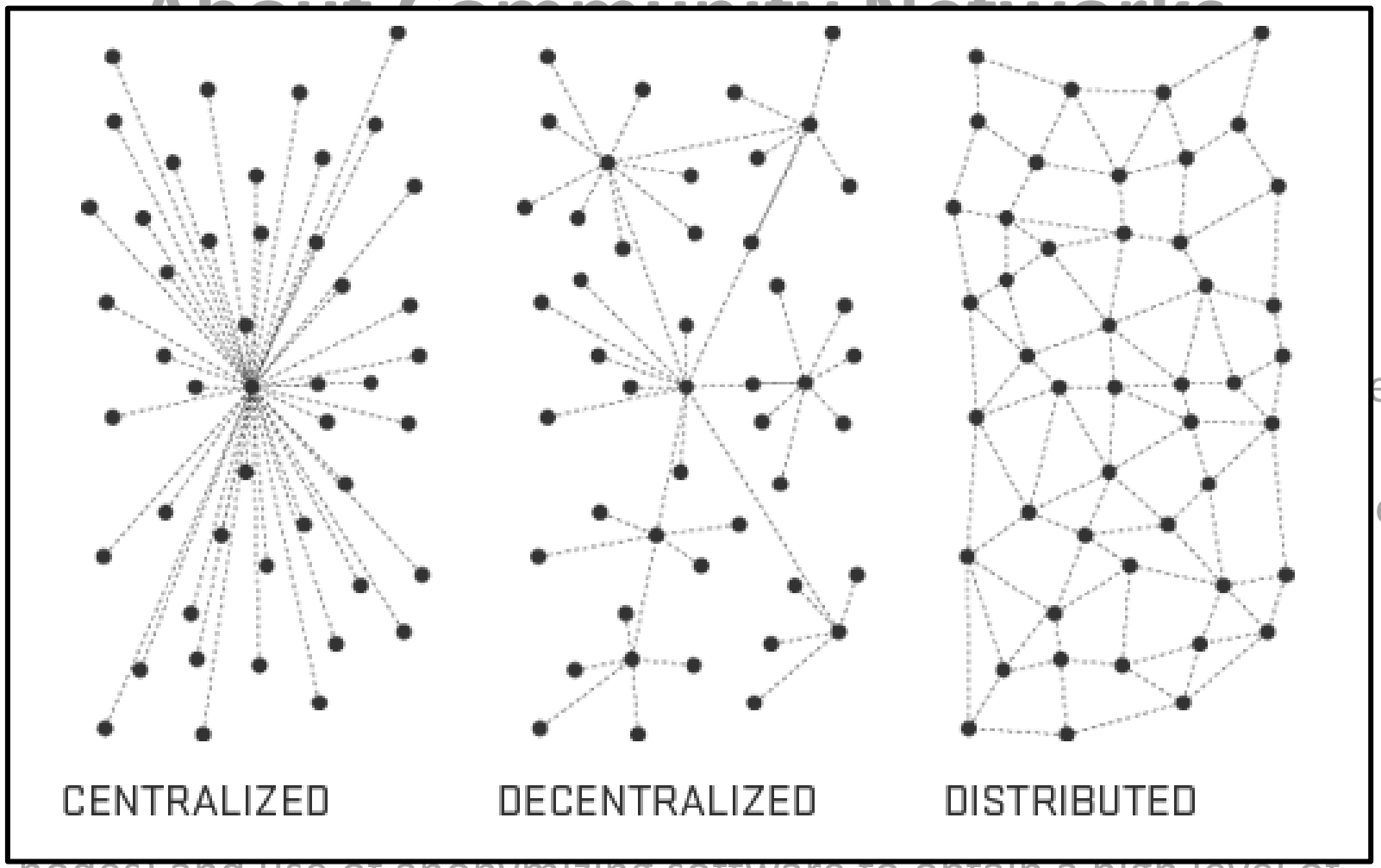
Outline

- Introduction to Community Networks
- Tort law & CNs
- Possible solutions to an “enforcement failure”
- Open questions

About Community Networks

- **Bottom-up approach**: users are peers and create a **network** with hardware **distribution**
- Some CNs have only **wireless connections**, some rely on mixed connections (wired and wireless)
- Some are associations/foundations or even professional ISPs; some **do not have a legal status**
- Some are **self-organized** and **self-governed**; have no written rules or contracts, except for the PicoPeering Agreement; others rely on a **licence**, such as the FONN Compact
- (Might be) opened to the **Internet** through so called «**gateway nodes**»
- **No** pre-assigned **Internet Protocol** addresses (except for gateway-nodes) and use of anonymizing software to obtain a high level of anonimity

About Community Networks



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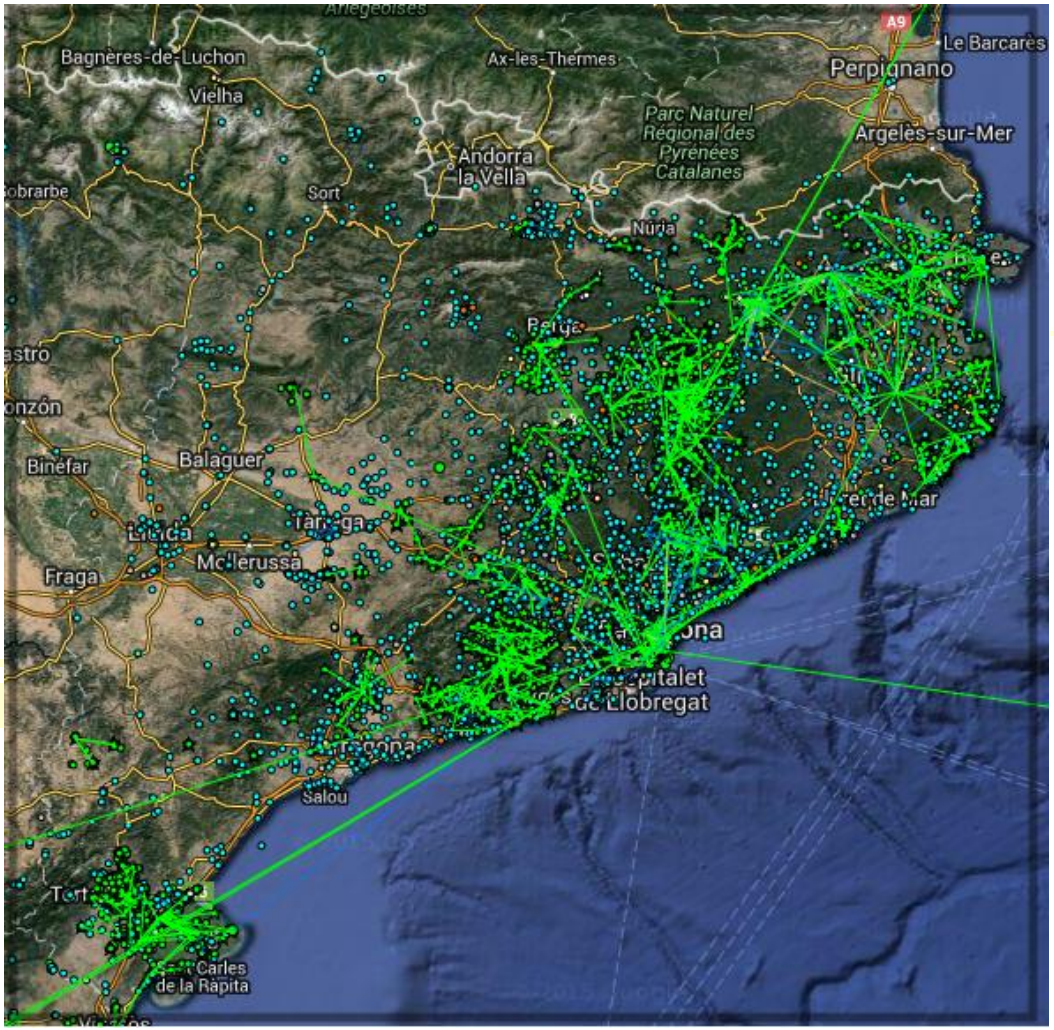

Tort Law & CNs

Who can be held accountable in case a damage is caused to someone, either within or outside the WCN?

- *The user?*
  - *The ISP?*
    - *The CN?*

User's Liability

Users' identification:

- Each user can choose and modify her own IP address
- IP addresses are not public and are not retained as it happens for the Internet
- It is practically impossible to identify the single user
- This constitutes a barrier to the enforcement of infringed rights

BUT: in case the wrongdoing is committed through the «gateway», the owner of the gateway-node will be identifiable through her public IP number, due to her Internet connection

→ This might be a deterrent to sharing the connection

In particular: Liability for wi-fi sharing

Some European countries consider a person liable for wi-fi sharing in case of third party's copyright infringement

France:

Code de la propriété intellectuelle, art. L336-3, as amended by LOI n° 2009-669 of 12 june 2009 (Loi "HADOPI").

"The person with access to communication services to the online public has a duty to ensure that this access is not subject to use for reproduction, representation, provision or public communication of works or objects protected by copyright or related right without the permission of copyright holders".

In particular: Liability for wi-fi sharing

Germany:

Störerhaftung: indirect liability for third party‘s conduct

- BGH decision «Sommer unseres Lebens» of 12 May 2010
  - a private person operating a Wi-Fi network with Internet access may be regarded as an indirect infringer (‘Störer’) where he has failed to make his network secure by means of a password and thus enabled a third party to infringe a copyright or related right.
- Amendments to the «Telemediengesetzes» to eliminate third party’s liability for «open wireless»
  - Critics due to the lack of clarity

In particular: Liability for wi-fi sharing

Request for a preliminary ruling by the Landgericht München I: CJEU, Case C-484/14, **Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH**

→ *Whether and to what extent a professional who, in the course of business, operates a Wi-Fi network that is accessible to the public free of charge may be held liable for copyright infringements committed by users of that network.*

→ *Should the liability limitation of Dir. 2000/31 be applicable to such a person?*

→ Advocate General Maciej Szpunar's opinion (March 16, 2016) is that the liability limitation is applicable and the imposition to make wi-fi network secure does not strike a correct balance among the different rights at stake

Provider's Liability Under EU Dir. 2000/31

If the wrongdoing is committed through a «**gateway**»:

- «**Caching**» and «**hosting**» providers will be held liable under EU Dir. 2000/31 (national implementations), for the memorizing activity, regardless of the source from which the infringing data come
- «**Mere conduit**» providers can protect themselves by means of the binding contract with the gateway-user (EU Dir. 2000/31 would anyway be applicable)
- The «**gateway-node**» user will be identifiable through her IP number and contractually liable towards the provider
- The **user** who actually committed the wrongdoing will remain unknown

CN's liability

Is it possible to consider the network as an accountable entity?

- Whenever there is no legal personality: **no, it is not possible**
- Whenever a legal personality exists: **specific rules** will be applied (for example: liability of associations or foundations)

To summarize…

a. Users are hardly identifiable (except for the gateway node)
b. ISPs are protected by safe harbors and by contractual ‘terms & conditions’
c. WCNs cannot be sued

→ *WCNs seem to constitute a ‘tort law enforcement failure’*

CNs and Tort Law

Research questions:

→*What kind of regulations could be envisioned?*

→*Should regulations actually be adopted?*

→*Should CNs be regulated «from the outside» or should they self-regulate themselves?*

Hypothetical Liability Regimes

1. **Imposing a liability on WCN**
   a formalization of the network would be necessary, but this would undermine the genuineness of WCNs
   + WCN might not have sufficient economic capacity
2. **Users' identification system**
   would frustrate one of the main characteristics of WCN: anonymity

Such regimes would frustrate WCNs' potentialities and positive effects,
without bringing any concrete solution

Is State Intervention Desirable?

- WCNs internal relationships are mainly based on **informal rules.**
- The adoption of «**best practices**» or «**codes of conduct**» might be promoted, using **social norms** as a leverage.
- Users place high **importance** on the **network** and its features, so they will tend to **exclude** – or not accept – **unreliable users**.
- This could **decrease wrongdoing** cases and could constitute a **defense** in case of litigation, **without** excessively **frustrating** WCNs **potentialities**.

Self-regulation

Some CNs already rely on **contracts**:

Guifi.net relies on the **Free, Open & Neutral Network** (FONN) Compact

- It is binding for anyone joining the network
- It comprises sanctions for those who do not respect the rules
- It includes an easy and cheap conflicts resolution system

Thank you!

netCommons.eu

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