

Beyond Geography: Nuisance in Virtual Communities

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The common law of nuisance and its civilian cousin, *troubles de voisinage*, seek to set the threshold for tolerance between neighbours, who were traditionally understood as owning adjacent parcels of land. During and after the Industrial Revolution, as technological advances enabled pollution to spread more widely, judges began adapting nuisance to recognize increasingly distant "neighbours." Now, as the internet brings into contact—and facilitates disputes between—individuals who are so distant that they have never met in person, judges should consider adapting nuisance once again by recognizing these individuals as virtual neighbours. Such adaptation, as illustrated in two case studies, is enabled by nuisance's inherent flexibility and its concern with balancing interests. Further, this enlargement in the size and scope of neighbourhoods aligns with judges' occasional recognition of virtual communities, and more broadly with their frequent acknowledgement of experiential (rather than geographic) communities. Finally, applying nuisance in virtual contexts forces both judges and laypersons to acknowledge and to challenge their common, unquestioned tendency to imagine online interactions in spatial terms. Though cyberspace is not a "place," and though it does not merit a separate normative order, it may still provide a fertile environment for nuisance to take its next steps.

Avec le délit de nuisance en common law et son cousin en droit civil, les *troubles de voisinage*, on a cherché à établir le seuil de tolérance entre voisins qui, selon la définition traditionnelle, étaient les propriétaires de terrains adjacents. Pendant et depuis la Révolution industrielle, au fur et à mesure que les progrès technologiques ont permis à la pollution de se propager à grande échelle, les juges ont commencé à adapter la nuisance en fonction de leur reconnaissance croissante du concept de voisins « à distance ». De nos jours, avec l'Internet qui met en relation des individus, et favorise l'éclosion de différends entre eux, éloignés l'un de l'autre au point de ne s'être même jamais rencontrés en personne, les juges sont de nouveau appelés à adapter le concept de nuisance en considérant ces individus comme des voisins virtuels. Ce sont la souplesse inhérente au concept même de nuisance ainsi que le souci de concilier des intérêts divergents qui rendent possible une telle adaptation, comme l'ont illustré les deux études de cas citées. Qui plus est, l'élargissement de la définition et de la portée de la notion de voisinage correspond à la reconnaissance que les juges ont accordée, de manière occasionnelle, aux communautés virtuelles et de manière plus générale, à leur reconnaissance fréquente de l'existence de communautés expérientielles (plutôt que géographiques). Enfin, l'application de la nuisance aux contextes virtuels oblige les juges aussi bien que les citoyens ordinaires à reconnaître et à remettre en question leur tendance habituelle, voire incontestée, à concevoir les interactions en ligne en termes spatiaux. Bien que le cyberspace ne soit pas un « endroit » en tant que tel, et qu'il ne puisse être classé comme un ordre normatif distinct, il n'en reste pas moins qu'il constitue un terrain propice à l'évolution de la notion de nuisance.

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I. INTRODUCTION

The internet provides a new opportunity, another venue, for human interaction. Like any human interactions, those that occur online are not universally positive. Conflicts occur; claims are made and contested.

In our world of bricks and mortar, flesh and bone, some of our first and many of our primary claims involve the space we occupy. Yet our uninhibited use and enjoyment of this space is impossible, inevitably infringing the use and enjoyment of others. These people, our neighbours, have claims no less legitimate than our own—so within our space we moderate our actions, anticipating that they will do likewise. Neighbourhood, or *voisinage*, thus “implies a fragile equilibrium, or give-and-take, between my neighbour and me.”¹ This equilibrium is upset when neighbours do not share similar expectations about the amount or nature of giving and taking.

Enter the law of nuisance, or *troubles de voisinage*.² Focussing on what is “normal” for a given neighbourhood, nuisance seeks to set the threshold for neighbours’ tolerance of one another. Thus, “[n]uisance does not demand a clear resolution of ... differing perceptions. Indeed, it demands demonstrated willingness to live with considerable conflict.”³ This conflict, however, can be productive: it can foster dialogue—inside or outside the courts—propelling neighbourhoods toward change.

1 Shauna Van Praagh, “View from the *Succah*: Religion and Neighbourly Relations” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 21 at 23. See also *JurisClasseur Québec: Collection*, vol 1, fasc 8 by Robert P Godin, para 28.

2 From this point onwards, I will use only the English term to refer to both English and French (as well as corresponding common and civil law) conceptions—except where differentiation between the words is important. Unless otherwise indicated, the reader should thus understand “neighbour” to mean “neighbour and *voisin*”, “neighbourhood” to mean “neighbourhood and *voisinage*”, “nuisance” to mean “nuisance and *troubles de voisinage*” and so on.

3 Van Praagh, *supra* note 1 at 25.

A significant change of late has been the alleged decline in importance of physical neighbourhoods and the corresponding rise of online, “virtual” communities.⁴ Judges have struggled to respond by applying old legal concepts to new and shifting technological contexts, gradually adapting the laws of contract and property to virtual communities.⁵

The law of nuisance, however, is a notable exception. Despite its inherent flexibility, it has played almost no role in virtual communities. Some writers have called for its use,⁶ but they have done so in a largely cursory manner: they consider only new applications of nuisance law, failing to discuss the implications of such applications both for the law itself and for law’s conception of neighbourhoods and communities.

In the pages that follow, I seek to remedy this deficit. I explore whether, and how, we can apply nuisance to virtual communities, and I ask what we learn about virtual communities (and communities generally) in so doing. I draw on scholarship and jurisprudence from common and civil law jurisdictions, though the subject matter requires that I rely heavily on American sources.⁷ I find that nuisance’s flexibility renders it a useful tool for regulating virtual communities, and that some courts have already laid the groundwork for such regulation by recognizing non-geographic neighbourhoods. Throughout, I address the metaphoric use of “cyberspace”: our common tendency to imagine the internet as a place. I find that this metaphor has perhaps detrimentally stifled some avenues of legal analysis, but that it also enables the creative application of nuisance to internet-based civil suits.

4 I do not pretend that “virtual” has a legal meaning: see Elizabeth Townsend Gard & Rachel Goda, “The Fizzy Experiment: *Second Life*, Virtual Property and a 1L Property Course” (2008) 24 Santa Clara Computer & High Tech LJ 915 at 954. Instead, I use it simply to mean “not physically existing but made by software to appear to do so”: *The Canadian Oxford Dictionary*, 2d ed, *sub verbo* “virtual”, online: Oxford Reference Online <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t150.c76437>>.

5 For an example of the uncertainty regarding contract principles in virtual interactions, see the differing decisions regarding the importance of checkboxes permitting users to indicate their agreement to a click-through license in *Ticketmaster v Tickets.com*, 2003 US Dist Lexis 6483 (CD Cal 2003) and *Register.com v Verio*, 356 F 3d 393 (2d Cir 2004). For one of the many examples of a confused application of property law to virtual interactions, see *Intel v Hamidi*, 114 Cal Rptr 2d 244 at 252 (App Ct 2001), rev’d 71 P3d 296 (Cal) (2003) [*Hamidi*] (struggling to identify physical ownership of e-mail servers as entailing control or ownership of internet traffic).

6 See Maureen A O’Rourke, “Property Rights and Competition on the Internet: In Search of an Appropriate Analogy” (2001) 16 Berkeley Tech LJ 561 at 588 [O’Rourke, “Property Rights”]; Maureen A O’Rourke, “Shaping Competition on the Internet: Who Owns Product and Pricing Information?” (2000) 53 Vand L Rev 1965 at 2001-02 [O’Rourke, “Shaping Competition”]; Dan L Burk, “The Trouble with Trespass” (2000) 4 J Small & Emerging Bus L 27; Mark A Lemley, “Place and Cyberspace” (2003) 91 Cal L Rev 521 at 540.

7 See Justin Hughes, “The Internet and the Persistence of Law” (2003) 44 BCL Rev 359 (“[b]ecause the initial wave of immigrants to cyberspace was overwhelmingly American (both natural and juridical persons), American courts were usually the first to address novel legal issues about the Internet The initial wave of legal scholars drawn to the Internet were, on the whole, experts in American . . . law.” at 360-61).

II. NOTIONS OF NEIGHBOURHOOD

A. Who Is My Neighbour?

The *Canadian Oxford Dictionary* uses somewhat geographic terminology to describe a “neighbour” as “a person, institution, etc., resident or established *next door to* or *near* or *nearest* another.”⁸ This conception of a neighbour reflects the word’s origins, a combination of Old English *nēah* (near) with *gebūr* (dweller).⁹ Only one (“next door to”) of the three geographic indicators in the dictionary’s definition of “neighbour,” however, and no aspect of the word’s etymology, requires that a “neighbour” occupy a physically contiguous space.¹⁰

The challenge in bounding a neighbourhood is thus to determine who is “near(est).” The task, however, cannot simply be to assign “near” a physical measurement, establishing around each person a radius within which all those “resident or established” are neighbours. Such a conception would make neighbourhoods ever-fluctuating: your neighbourhood would change as you moved, and those who lived on your block would be neighbours only when you were at home.¹¹ Rather, the neighbours at issue here are those who are “near” in some other sense. The word “near” is itself relatively flexible, meaning, *inter alia*, “close to, in place or time,” “closely related,” “intimate,” or “similar.”¹² Our neighbourhood, then, could consist of those who are proximal, or alternatively those to whom we are similar—or both, in gated neighbourhoods, ethnic enclaves or ghettos.

8 *The Canadian Oxford Dictionary*, 2d ed, *sub verbo* “neighbour”, online: Oxford Reference Online <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t150.e46521>> [emphasis added].

9 *The American Heritage Dictionary of the English Language*, 4th ed, *sub verbo* “neighbor”.

10 See Anne-Marie Patault, *Introduction. historique au droit des biens* (Paris: Presses Universitaires de France, 1989) (interestingly, in an effort to avoid neighbourly conflict, Roman jurists proposed unowned buffer zones between landholdings, thus rendering all landholdings non-contiguous at para 123).

11 This mobile notion reflects the idea of neighbourhood as understood by the law of negligence. Lord Atkin wrote in *Donoghue v Stevenson* that:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question ([1932] AC 562 at 580, [1932] All ER Rep 1 at 11 (HL)).

Lord Atkin describes persons who are neighbours for the purpose of assessing proximity or the “duty of care”, conceptions useful in the law of negligence but—for now—*hors de propos* in this discussion of the separate tort of nuisance. Neighbours in nuisance are seen to present “a whole different scenario” from neighbours in negligence (Tony Weir, *A Casebook on Tort*, 9th ed (London: Sweet & Maxwell, 2000) at 421) because the two torts protect different interests (see Beth Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991) at xi). In Part IV(B), below, however, I briefly question whether the two notions need be so separate.

12 *The Canadian Oxford Dictionary*, 2d ed, *sub verbo* “near”, online: Oxford Reference Online <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t150.e46379>>.

We reach a similar conclusion in examining the French *voisin*, for which the definitions include not only “[q]ui est à une distance relativement petite” and “[p]ersonne qui vit, habite le plus près” but also “[q]ui présente un trait de ressemblance.”¹³ This range of meanings reflects the word’s origins in the Latin *vīcīnus*, meaning not only “neighbouring,” but “near,” “similar” and “like.”¹⁴ Thus, Adrian Popovici writes that “[a]utruï est mon prochain, mais pas mon voisin. Mon voisin est néanmoins et parfois même souvent autruï; mais il est mon voisin.”¹⁵

B. The Elements of Nuisance

The tort of nuisance and its civilian cousin, *troubles de voisinage*, moderate the relationships between neighbours.¹⁶ This moderation is expressed austere by article 976 of the *Civil Code of Québec* (“CCQ”): “[n]eighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.”

A great deal is entailed by this apparently straightforward provision. First, it says nothing about the rights of neighbours. Before the 1994 reform of Québec’s civil law, *troubles de voisinage* were seen by some as an *abus de droit*, the use of a right contrary to its social function.¹⁷ The only rights entailed by the post-reform article 976, however, are exegetical. The first is the right of neighbours to annoy each other “normally”: each may engage in conduct that could be illegal elsewhere—in other words, each has the right to infringe upon a neighbour’s (rightful) enjoyment of property—as long as such conduct is normal in the neighbourhood.¹⁸ This right

13 *Le nouveau Petit Robert de la langue française 2009*, sub verbo “voisin”.

14 SA Handford, Langenscheidt’s Pocket Latin Dictionary (Berlin: Langenscheidt KG, 1966) sub verbo “vīcīnus” [Langenscheidt].

15 Adrian Popovici, “La poule et l’homme: sur l’article 976 C.c.Q.” (1997) 99 R du N 214 at 237.

16 The justification for such moderation may be to restore neighbourly harmony, to improve human relations more generally, to manage the interactions of conflicting rights or to prevent the abuse of rights: see Guy Courtieu & Denis Courtieu, *Troubles du voisinage* (Paris: Litec, 2002) at paras 3-9, 55ff; Philippe Malauric & Laurent Aynès, *Droit civil: Les biens*, 2d ed (Paris: Defrénois, 2005) at 316ff; Gérard Cornu, *Droit civil: Introduction. Les personnes. Les biens*, 12th ed (Paris: Montchrestien, 2005) at paras 1086-1110; François Terré & Philippe Simler, *Droit civil: Les biens*, 7th ed (Paris: Dalloz, 2006) at para 321ff. Ultimately, however, multiple justifications may—like good neighbours—coexist: see Terré & Simler, *ibid* at para 328.

17 This reform replaced the 1866 *Civil Code of Lower Canada* (CCLC) with the CCQ. Under the CCLC and associated jurisprudence beginning with *Drysdale v Dugas* (1896), 26 SCR 20 at 23, 1896 Carswell Que 5 (WL Can), “abuses of proprietary rights” were actionable “nuisances” in the civil law [Drysdale cited to SCR]. See also Popovici, *supra* note 15; Jean-Louis Baudouin & Patrice Deslauriers, *La responsabilité civile*, vol 1, 7th ed (Cowansville, Que: Yvon Blais, 2007) at 190. Art 976 CCQ, however, codified *troubles de voisinage* in what is now understood as a *sui generis* regime independent of other proprietary rights (see Godin, *supra* note 1 at paras 32-37; Québec, Ministère de la justice, *Commentaires du ministre de la justice*, t 1 (Québec: Publications du Québec, 1993) at 573 [Québec, *Commentaires du ministre*]; Marie-Ève Arbour & Véronique Racine, “Itinéraires du trouble de voisinage dans l’espace normatif” (2009) 50 C de D 327 at 345).

18 “Normal” annoyances may include those contrary to the general obligation under art 1457 CCQ, the civilian equivalent of a common law “duty of care.” Thus, Popovici construes art 976 as limiting art 1457: *ibid* at 226-27.

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could inversely be read as an obligation *not* to act abnormally: common law judges in nuisance cases often deploy the maxim *sic utere tuo ut alienum non laedas*.¹⁹ The second implied right is the right not to suffer abnormal annoyances, perhaps also better articulated as an obligation: “Le principe n’est point l’obligation de réparer les inconvénients anormaux, mais bien l’obligation de supporter les inconvénients normaux.”²⁰

This obligation brings us to the second characteristic of article 976: it focuses not on the fault of the annoying party, but on the neighbour’s annoyance. Otherwise put, “[c]e n’est pas le *comportement*, mais le *résultat* (un trouble anormal, un inconvénient excessif) qui est pris en considération.”²¹ This result is to be judged objectively, with a court finding liability only where there is material interference with the “ordinary comfort”²² of an “ordinary occupier.”²³ There need be no harm done: once the threshold of normalcy is passed, responsibility follows, making nuisance a no-fault liability regime in both common and civil law.²⁴

A third characteristic of article 976 is relativity: the “nature or location of [the annoyed party’s] land or local custom” determines what is or is not “normal.” Judicial assessments of tolerable inconvenience thus vary “selon que l’on est à la ville ou à la campagne,”²⁵ the civilian equivalent of the famous common law assertion that “what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.”²⁶

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- 19 Such an obligation is found in the limiting conditions imposed by art 947 CCQ (“Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law”) and finding a historical antecedent in *Drysdale*, *supra* note 17 at 23 (“*sic utere tuo ut alienum non laedas* is as much a rule of the French law of the province of Québec as of the common law of England”). In the common law context, see Cento G Veljanovski, “The Economics of Tort Law: Nuisance” (Law and Economics Workshop Series, No WSIII-9, delivered at the Faculty of Law, University of Toronto, November 1980) at 5-1; RA Buckley, *The Law of Nuisance* (London: Butterworths, 1981) at 3-4; Hendrik Hartog, “Pigs and Positivism” (1985) *Wis L Rev* 899 at 933.
- 20 Jean Carbonnier, *Droit civil: Les biens. Monnaie, immeubles, meubles*, t 3, 12th ed (Paris: Presses universitaires de France, 1988) at 264. See also Popovici, *supra* note 15 at 237; Québec, *Commentaires du ministre*, *supra* note 17 at 569.
- 21 Popovici, *ibid* at 221 [emphasis in original]. This focus on effect rather than conduct accords with the CCQ’s codification of *troubles de voisinage* as a *sui generis* regime detached from the general (fault-based) obligation at art 1457 CCQ (see *supra* note 17 and accompanying text). See also Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed (Markham, Ont: LexisNexis Canada, 2006) (the common law of nuisance “describes a type of harm that is suffered, rather than a kind of conduct that is forbidden” at 559; See also Bilson, *supra* note 11 at xi).
- 22 *Walter v Selfe* (1851), 4 De G & Sm 315 at 322, 20 LJ Ch 433 at 435 (Ch D), Knight Bruce V-C [*Walter*].
- 23 Linden & Feldthusen, *supra* note 21 at 568.
- 24 See *Barrette c Ciment du St-Laurent*, 2006 QCCA 1437, [2006] RJQ 2633 (the Québec Court of Appeal held that art 976 CCQ created a reciprocal passive obligation owed to a neighbouring property, not to the neighbour herself, and that personal actions against this neighbour required—like all other actions in civil responsibility under art 1457 CCQ—proof of *fault*, causation, and damage at 163-79), rev’d *St Lawrence Cement v Barrette*, 2008 SCC 64, [2008] 3 SCR 392 (finding that liability in *troubles de voisinage* “does not require proven or presumed fault” at para 75) [*St Lawrence Cement*].
- 25 Jean Hétu, “L’application de la théorie des troubles de voisinage au droit de l’environnement du Québec” (1977) 23 McGill LJ 281 at 283.
- 26 *Sturges v Bridgman* (1879), 11 Ch D 852 at 865 (CA), Thesiger LJ. In the Canadian context, see *Appleby v Erie Tobacco Co* (1910), 22 OLR 533 at 536, OJ No 64 at 3 (Ont Div Ct) [*Appleby*].

Finally, and despite figuring in the CCQ's chapter on "Special Rules on the Ownership of Immovables," article 976 does not limit its scope to "ownership." If it did, nuisance would be actionable only by and against landowners. Instead, possessors (including lessors)—and even in some cases (illegal) occupiers, reversioners and mortgagees—can bring suits and have suits brought against them.²⁷ What is important is that there exists "une situation ou une relation de *voisinage*, qui implique une certaine permanence ou stabilité."²⁸ This stability is grounded in the canonical example of two landowners living side by side but, in order to simplify litigation and to encourage good neighbourly relations, it is in no way limited to such a relationship.²⁹ At common law, the producer of a nuisance can be liable even if this person has no rights over the land from which the nuisance emanates.³⁰

C. Balancing Interests and Enlarging Neighbourhoods

The neighbourhood's nature, and the relationship of neighbours to it and to each other, are crucial in courts' efforts to delineate its scope. In drawing lines around groups of people, judges may react to the views of litigants or the public or, instead, they may proactively reshape neighbourhoods. Thus, "while the structure of nuisance law refers to the already-established nature of the particular neighbourhood, it also allows for potential change."³¹

Until recently, the greatest and most obvious potential change was that presented by the Industrial Revolution, with its accompanying increase in pollution (a classic annoyance). Nuisance decisions reflecting the *status quo ante* would have restrained growing industries. Lord Wensleydale thus wrote that "where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, 'I will bring an action against you for this and that, and so on.'"³² Allowing attitudes favourable towards industry to shape their decisions,³³ judges "modified the law explicitly

27 At common law, see *Foster v Urban District Council of Warblington*, [1906] 1 KB 648 at 659-60 (CA) [*Foster*]; *Howard v Walker*, [1947] 2 All ER 197 at 199E, [1947] KB 860, Lord Goddard, CJ; Buckley, *supra* note 19 at 5-6, 73-75; Bilson, *supra* note 11 at 10-14. In the civil law, any form of a right of use (*usage*) or enjoyment (*jouissance*) may undergird an action in *troubles de voisinage* (see *St Lawrence Cement*, *supra* note 24 at para 83; Denys-Claude Lamontagne, *Biens et propriété*, 6th ed (Cowansville, Que: Yvon Blais, 2009) at 175, n 67; Godin, *supra* note 1 at paras 10-14; Popovici, *supra* note 15 at 241-43; Francis Caballero, *Essai sur la notion juridique de nuisance* (Paris: R Pichon et R Durand-Auzias, 1981) at 206).

28 Popovici, *ibid* at 237 [emphasis in original]. See also Caballero, *ibid* at 205-06; Jennifer Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930" in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 1 (Toronto: University of Toronto Press, 1981) 281 at n 22.

29 See Godin, *supra* note 1 at paras 10-18.

30 See e.g. *Esso Petroleum Co Ltd v Southport Corporation*, [1956] AC 218, [1955] 3 All ER 864 (HL) (captain of a ship that released oil while on the Plaintiff's property held liable in nuisance) [*Southport*].

31 Van Praagh, *supra* note 1 at 24. See also Godin, *supra* note 1 at para 156.

32 *St Helen's Smelting v Tipping* (1865), 11 HL Cas 642 at 643, 11 ER 1483.

33 See Nedelsky, *supra* note 28 at 311.

in order to meet the requirements of industrialization,³⁴ allowing developers and builders to enter residential neighbourhoods.³⁵

Some see this judicial influence over neighbourhoods—the “zoning” function of nuisance³⁶—as not only reasonable but required: “[i]t does not seem wise to protect pockets of ancient land use that have become incompatible with a changing neighbourhood.”³⁷ Others see it as a result of the “necessarily dynamic” interactions of individuals within neighbourhoods,³⁸ prompting judges to moderate otherwise jarring changes.³⁹ Still others see it as an inappropriate judicial foray into social policymaking⁴⁰ or a wasteful use of judicial resources.⁴¹

Normative evaluations aside, nuisance requires judges to balance interests,⁴² and the weight they give to each interest is the source of their power to define neighbourhoods. Describing the law of nuisance as having “elasticity,”⁴³ they apply flexible standards in case-by-case assessments.⁴⁴ Judges also have flexibility in assigning remedies: they may grant full injunctions,⁴⁵ limited injunctions,⁴⁶ delayed injunctions,⁴⁷ damages⁴⁸ or punitive damages.⁴⁹

Returning to the Industrial Revolution, we see this flexibility in judicial treatment of neighbourhoods. With industrialization, the scope of pollution—that is, both its variety and its dispersion—increased greatly; the number of people potentially annoyed rose correspondingly. Courts reacted by enlarging the area surrounding the source of the pollution within which a nuisance case could be brought. Thus, in law, *neighbourhoods themselves expanded*: whereas contiguity between plaintiff and defendant had been a requirement in earlier nuisance cases, proximity would

34 *Ibid* at 284. Nedelsky also notes the conservatism of the Canadian courts during this period: *ibid* at 284-85.

35 See Van Praagh, *supra* note 1 at 25; Bilson, *supra* note 11 at xi-xii; Godin, *supra* note 1 (for a brief description of the equivalent progression in the civil law at para 11).

36 Bilson, *ibid* at 6.

37 Philip H Osborne, *The Law of Torts*, 2d ed (Toronto: Irwin Law, 2003) at 353. See also Bilson, *ibid* at 4; Veljanovski, *supra* note 19.

38 Van Praagh, *supra* note 1 at 36.

39 See John PS McLaren, “Nuisance Law and the Industrial Revolution: Some Lessons from Social History” (1983) 3 *Oxford J Legal Stud* 155.

40 See Joel Franklin Brenner, “Nuisance Law and the Industrial Revolution” (1974) 3 *J Legal Stud* 403; Nedelsky, *supra* note 28 at 282-83.

41 See Veljanovski, *supra* note 19 at 5-7.

42 See Nedelsky, *supra* note 28 at 286-87; *St Lawrence Cement*, *supra* note 24 at para 86.

43 *Colls v Home and Colonial Stores Ltd*, [1904] AC 179 at 185, 73 LJ Ch 484 (HL). See also Godin, *supra* note 1 at paras 5-6, 44.

44 See Nedelsky, *supra* note 28 at 288; *Sedleigh-Denfield v O’Callaghan*, [1940] AC 880 at 902-03, [1940] 3 All ER 349 (HL), Wright LJ.

45 See e.g. *Walter*, *supra* note 22.

46 See e.g. *Gestion Serge Lafrenière c Calvé*, [1999] RJQ 1313, 1999 CarswellQue 1198 (WL Can) (CA).

47 See e.g. *Appleby*, *supra* note 26.

48 See *Drysdale*, *supra* note 17; *Coalition pour la protection de l’environnement du parc linéaire “Petit train du Nord” c Laurentides (Municipalité régionale de comté des)*, [2005] RJQ 116, [2005] RDI 171 (CS).

49 See e.g. *Samson c Dion*, 2006 QCCQ 2152, [2006] RDI 366.

now suffice.⁵⁰ In more modern times, this proximity has been stretched further, with a Québec court recognizing as “*voisins*” a plaintiff and defendant who were one and a half kilometres apart.⁵¹

D. Public Nuisance

Alongside private nuisance in the common law sits public nuisance, in which actions can only be brought by the Attorney General. One branch of public nuisance encompasses those nuisances that would qualify as private, but of which the source is widespread or indiscriminate. In Lord Justice Romer’s classic formulation, “any nuisance is ‘public’ which materially affects the reasonable comfort and convenience of life of a class of Her Majesty’s subjects. The sphere of the nuisance may be described generally as ‘the neighbourhood’ ...”⁵² The Lord Justice’s use of “neighbourhood” here is important: it signals that an identified class of victims on whose behalf the Attorney General brings an action composes—or at least shares—a neighbourhood.

This common law notion of neighbourhood is significantly larger and more disparate than that addressed by private nuisance in either the common or civil law.⁵³ It can, for example, comprise both those who dwell on and stretch power lines across a lake, and the pilot from elsewhere who gets tangled in these lines when trying to land a seaplane, as well as, presumably, anyone else whose use and enjoyment of the lake might be disrupted by the lines.⁵⁴ It can equally comprise, where there are railroad tracks running down the centre of a busy street, all those whose feet or cycle tires might be caught in a gap between the asphalt and the flangeway.⁵⁵

Such neighbourhoods are expansive indeed: they could even include those who come from far away (to use the lake or to cross the tracks) and who would likely not even imagine themselves as belonging to the neighbourhood. Additionally, there is no necessary connection between public nuisance and “enjoyment of ... *land*.”⁵⁶

50 See Godin, *supra* note 1 at paras 6, 17; Caballero, *supra* note 27 at 202-03; Linden & Feldthusen, *supra* note 21 at 569; *Carey Canadian Mines Ltd c Plante*, [1975] CA 893 at 899.

51 *Théâtre du Bois de Coulonge c Société nationale des Québécois et Québécoises de la Capitale*, [1993] RRA 41 at 43, 1992 CarswellQue 1176 (WL Can) (Sup Ct) [*Théâtre du Bois de Coulonge* cited to RRA].

52 *Attorney-General v PYA Quarries Ltd*, [1957] 1 All ER 894 at 902, [1957] 2 WLR 770 (CA) [PYA Quarries cited to All ER].

53 There is no equivalent civilian tradition of public nuisance, though class actions may constitute a functional substitute in Québec (see Baudouin & Deslauriers, *supra* note 17 at 206). Godin identifies in Québec’s growing number of environmental class-action suits an extension of *troubles de voisinage* into public, and particularly environmental, law: *supra* note 1 at para 3. Though plaintiffs in such suits may not see themselves as “neighbours,” they may imagine themselves as members of a “community”: see Part III(A), below.

54 See *Stephens v MacMillan*, [1954] OR 133, 2 DLR 135 (HCJ).

55 See *Ryan v Victoria (City of)*, [1999] 1 SCR 201, 168 DLR (4th) 513.

56 Buckley, *supra* note 19 at 5-6, 56.

From these points we can draw two related conclusions. First, it is nuisance, rather than location, that makes someone a neighbour under this branch of the common law. Second, a neighbourhood, as recognized by the courts, can be both large in size and non-geographic in nature.

E. Statutory Nuisance

Statutory nuisance seeks, in civilian and common law jurisdictions, to serve “certain ... societal goals” by “deeming particular activities to constitute a nuisance.”⁵⁷ Thus, for example, does Saskatchewan’s *Municipalities Act* authorize municipalities to pass bylaws respecting “nuisances, including property, activities or things that affect the amenity of a neighbourhood.”⁵⁸ Québec’s *Municipal Powers Act* contains similar provisions.⁵⁹ On a larger scale, New Brunswick’s *Health Act* permits regulation of industry “for the purpose of preventing nuisance.”⁶⁰ Larger still, the federal *Telecommunications Act* gives a commission powers “to prevent ... nuisance.”⁶¹

Like private nuisance, “statutory nuisance protects people not property”⁶² by encouraging “give and take, live and let live.”⁶³ In statutory nuisance, however, the neighbourhood—though never explicitly stated as such—is significantly larger. In private nuisance, only a neighbour may sue. In statutory nuisance, conversely, the government can bring an action if any citizen breaches or suffers a breach of the relevant statute—suggesting that everyone within the jurisdiction is a neighbour, and more importantly that the entire jurisdiction is a neighbourhood.⁶⁴

We could thus argue that the municipalities envisaged by Saskatchewan’s and Québec’s acts are neighbourhoods, that New Brunswick is a neighbourhood under its *Health Act* and that Canada is a neighbourhood for telecommunications purposes.⁶⁵ Neighbourhoods can also regroup multiple jurisdictions: in the United States, a greenhouse gas-related statutory nuisance claim brought by several states was recently allowed on appeal.⁶⁶ If cross-border environmental damage can potentially

57 Bilson, *supra* note 11 at 167. See also Godin, *supra* note 1 (statutes can equally, however, immunize certain activities against nuisance suits at paras 113-21); Linden & Feldthusen, *supra* note 21 at 588.

58 *Municipalities Act*, SS 2005, c M-36.1, para 8(1)(d).

59 *Municipal Powers Act*, RSQ c C-47.1, ss 4(6), 59-61. See also Godin, *supra* note 1 (providing an extensive description of *voisinage* as considered through the lens of environmental legislation in Québec at paras 100-53).

60 *Health Act*, RSNB 1973, c H-2, para 6(1)(s).

61 *Telecommunications Act*, SC 1993, c 38, s 41.

62 Robert McCracken, Gregory Jones & James Pereira, *Statutory Nuisance*, 2d ed (Haywards Heath, UK: Tottel Publishing, 2008) at para 1.09.

63 *Bamford v Turnley* (1860), 3 B & S 62 at 84, 122 ER 25, Bramwell B (Ex Ch).

64 See Québec’s *Environmental Quality Act*, RSQ c Q-2, s 19.3, though it does not explicitly mention nuisance, permits both the government and private citizens to bring an action. Godin, *supra* note 1 (this statute is an enlargement of the scope of *voisinage* at para 19).

65 Godin, *supra* note 1 (depending on the nature of the claim, a neighbourhood could encompass “un quartier, un arrondissement, une ville, une province, un État” at para 5).

66 *Connecticut v American Elec Power Co Inc*, 582 F 3d 309 (2d Cir 2009), rev’g 406 F Supp 2d 265 (SDNY 2005).

constitute a public nuisance, then international environmental accords like the *Kyoto Protocol*⁶⁷ may, in effect, internationalize the scope of statutory (or rather, treaty-based) nuisance and, in so doing, envision the entire world as a neighbourhood.

I do not seek to prove through tenuous argument that the world *is* a neighbourhood; rather, I intend to show that neighbourness,⁶⁸ as understood in nuisance legislation, is flexible enough to *conceive of* very large groups of people as neighbours. This development militates in favour of a wider application of nuisance in new domains.

F. Not Just Next Door

I have shown that nuisance seeks to order neighbourly relations, and that the question “Who is my neighbour?” is answered with an ever-larger show of hands. But can a neighbourhood expand *beyond geography*? Perhaps it already has, at least in the eyes of some. Beth Bilson writes of the common law that a nuisance victim need not have a “relationship with neighbouring or other property . . . of a particular kind” because nuisance simply “aims to redress the unfavourable impact on an owner or occupier of property of activity carried on elsewhere.”⁶⁹ In Québec, Adrian Popovici maintains that *troubles de voisinage* are inconveniences caused to persons rather than land, so there is no reason why, in theory, neighbourly relations could not extend to those sharing an office.⁷⁰ Studying the French context, Francis Caballero sees *voisinage* as “le cadre géographique, sociologique et juridique dans lequel s’exerce la responsabilité. Cadre extrêmement souple . . . et pratiquement affranchi de toute contrainte,” and this “souplesse” leads him to conclude that neighbourhoods could, in theory, be limitless.⁷¹

To hem in such potentially unchecked expansion of neighbourhoods, something additional or alternative to proximity must identify neighbours. Additional criteria, however, are nebulous and inconsistent⁷²—thus providing not only the flexibility that has enabled the zoning function of nuisance described above, but also ambiguity and frustration for those who see their neighbourhoods changed or changing before their very eyes.

67 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148, 37 ILM 22 (entered into force 16 February 2005).

68 Here and subsequently, I use “neighbourness” to refer to the state of being a neighbour—at least, in the eyes of the law.

69 *Supra* note 11 at 14. See also *Foster, supra* note 27 (*de facto* occupation can ground a plaintiff’s interest); *Southport, supra* note 30 (defendant liable for nuisance originating in his boat on the ocean).

70 *Supra* note 15 at 225, 243.

71 *Supra* note 27 (Caballero abandons such a proposition only because nuisance is *traditionally* grounded in geography at 201, 203-04).

72 See Godin, *supra* note 1 at para 6; Marguerite Blocaille-Boutelet, *Le voisinage: Étude comparée en droit privé et en droit public* (Doctoral Thesis, Faculté de droit et de science politique, Université de Bourgogne à Dijon, 1981) [unpublished] t 1, no 3 at iv.

If neighbourhoods in nuisance are growing in size and scope, then not only judges and legislators but also laypersons need to know whose enjoyment of property they must respect, as well as whose “abnormal inconveniences” they must “suffer.” Fairness and efficiency in nuisance law are only possible if we all have an idea of who our neighbours are. Perhaps, for that purpose, we should look towards the literature on community—which provides a voluminous (and refreshingly non-legal) analysis of the geographic and non-geographic ties that bind us.⁷³

III. CONCEPTS OF COMMUNITY

A. “Virtual Communities”?

1. *Communities of Experience*

Though “community” can mean “all the people living in a specific locality” (or the locality itself), it can equally indicate a “fellowship of interests.”⁷⁴ The French “communauté” likewise refers to a “[g]roupe social dont les membres vivent ensemble, ou ont des biens, des intérêts communs.”⁷⁵ Etymologically, both words ultimately derive from the Latin *commūnis* meaning, amongst other things, “common” and “universal.”⁷⁶ But what needs to be common or universal among members for their group to become, or to be considered, a community?

A traditional, geographic conception of community—the “territorialist” idea that communities consist of people who live, work or otherwise “are” together—is sometimes seen as under attack by modern (that is, modern Western) life. In its strongest form, this view maintains that “[m]odernity has destroyed the physical conditions under which the intimate relationships that characterize communities may develop.”⁷⁷

An alternative, experiential conception of community may either fill the void left by the alleged collapse of the territorialist model or simply supplement existing geographic communities. If, however, experiential communities are “voluntary associations, in which solidarity is based on transitory convergences of instrumental objectives,”⁷⁸ the challenge is to define which convergences do or do not form a community.

73 I am not the first to suggest such a linkage: Godin writes that “[p]our ce qui est du terme voisinage, il fait d’abord référence à une relation . . . La nature de cette relation peut être immédiate, locale, mais aussi communautaire” (*ibid* at para 5) [emphasis added].

74 *The Canadian Oxford Dictionary*, 2d ed., *sub verbo* “community”, online: Oxford Reference Online <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t150.c14389>>.

75 *Le nouveau Petit Robert de la langue française 2009*, *sub verbo* “communauté”.

76 *Langenscheidt*, *supra* note 14, *sub verbo* “commūnis”.

77 Gregory S Alexander, “Dilemmas of Group Autonomy: Residential Associations and Community” (1989) 75 *Cornell L Rev* 1 at 24. See also Barry Wellman, “Which Types of Ties and Networks Provide What Kinds of Social Support?” (1992) 9 *Advances in Group Processes* 207.

78 Alexander, *ibid*. See also Patrick T Egan, “Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?” (1996) 30 *Suffolk UL Rev* 117 at 132; William S Byassee, “Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community” (1995) 30 *Wake Forest L Rev* 197 at 199.

2. *The Birth of Cyberspace*

In his 1991 book, Howard Rheingold lauded the potential of “virtual communities,” a term that he coined to describe a particular kind of experiential community formed amongst users of the newly developed internet:

People in virtual communities use words on screens to exchange pleasantries and argue, engage in intellectual discourse, conduct commerce, exchange knowledge, share emotional support, make plans, brainstorm, gossip, feud, fall in love, find friends and lose them, play games, flirt, create a little high art and a lot of idle talk. People in virtual communities do just about everything people do in real life, but we leave our bodies behind.⁷⁹

Ironically, however, at the same time as they insisted that their non-geographic communities were communities nonetheless,⁸⁰ Rheingold and his “netizen”⁸¹ followers described these communities geographically. They co-opted William Gibson’s 1984 neologism “Cyberspace,”⁸² and the metaphor grew as users visited chat rooms or web sites with online addresses, and as companies leased domain names to host their web presence. Although the internet occupies no more geographic space than the machines that house it, Joshua AT Fairfield points out that:

The “space” in cyberspace refers to something in particular: the rivalrousness, or “spatial” nature, of certain internet resources, like URLs, domain names, email accounts, virtual worlds, and more. We use the term cyberspace not because we are bad analogists, but because many online resources mimic physical properties. For example, a chat room is, in many ways, similar to a conference room; a URL is similar to real estate in the real world.⁸³

79 Howard Rheingold, *The Virtual Community: Homesteading the Electronic Frontier*, 2d ed (Cambridge, Mass: The MIT Press, 2000) at xvii [*Virtual Community*].

80 See *ibid* at 132; Mike Godwin, “The First Amendment in Cyberspace” (1994) 4 Temp Pol & Civ Rts L Rev 1 at 8; Amber Jene Sayle, “Net Nation and the Digital Revolution: Regulation of Offensive Material for a New Community” (2000) 18 Wis Int’l LJ 257 at 257-58; Byassee, *supra* note 78 at 202. Questioning, however, did not imply rejection: Rheingold’s followers insisted that the new communities would supplement geographic communities by allowing people to compensate for modern isolation and alienation (see Godwin, *ibid* at 11-12; “Developments in the Law: The Law of Cyberspace” (1999) 112 Harv L Rev 1574 at 1593 [HLR, “Law of Cyberspace”]), catalyzing a new era of civic engagement (see Matthew Collins, *The Law of Defamation and the Internet* (Oxford: Oxford University Press, 2001) at para 24.02; Lawrence Lessig, “The Path of Cyberlaw” (1995) 104 Yale LJ 1743 at 1745-46; HLR, “Law of Cyberspace”, *ibid* at 1588).

81 Michael Hauben, “What is a Netizen?”, online: Columbia University <<http://www.columbia.edu/~hauben/text/WhatsNetizen.html>>.

82 William Gibson, *Neuromancer* (New York: Ace Books, 1984).

83 Joshua AT Fairfield, “Virtual Property” (2005) 85 BUL Rev 1047 at 1052-53 [footnotes omitted].

Netizens attached to the notion of cyberspace-as-place⁸⁴ began to argue for treating cyberspace as a separate legal jurisdiction. As judges struggled to adapt laws and jurisprudence to new challenges posed by the internet, netizens insisted that such adaptation was impossible:⁸⁵ they argued that the laws of meatspace (that is, the real world) should not apply in “institutionally distinct” cyberspace.⁸⁶ Thus began a debate over the “sovereignty” of cyberspace⁸⁷—a debate whose consequences bear directly on the ability of nuisance to apply to online interactions.

3. *No Different and Nowhere*

One group of critics responded to declarations of the internet’s separateness by asserting, simply, that interaction in cyberspace is not unique: the ability of internet transactions to span borders is “challenging, but no more challenging than similar problems raised in other transnational contexts.”⁸⁸ Such critics frequently drew on the analogy of long-distance telephone calls to argue that internet transactions do not merit a distinct legal environment.⁸⁹ The internet may create communities with shared interests and norms, but other “transnational autonomous communit[ies]” (the international banking community, for example) are governed by their own norms and yet they are not exempt from—and in fact may require—state intervention.⁹⁰

A second strand of criticism simply maintained—and continues to maintain—that the very idea of cyberspace-as-place is faulty. Timothy Wu argues that this metaphor developed because it was both “interesting” and “[t]he path of least resistance,” and was adopted “immediately,”⁹¹ but he notes that “the Internet was

84 The term is my own, but the expression “cyberspace as place” is used in Dan Hunter, “Cyberspace as Place and the Tragedy of the Digital Anticommons” (2003) 91 Cal L Rev 441.

85 See James Boyle, “Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors” (1997) 66 U Cin L Rev 177 at 178; David R Johnson & David Post, “Law and Borders: The Rise of Law in Cyberspace” (1996) 48 Stan L Rev 1367; David G Post, “Governing Cyberspace” (1996) 43 Wayne L Rev 155; John T Delacourt, “The International Impact of Internet Regulation” (1997) 38 Harv Int’l LJ 207; Joel R Reidenberg, “Governing Networks and Rule-Making in Cyberspace” (1996) 45 Emory LJ 911.

86 Rheingold, *supra* note 79 at 349. See also Byassee, *supra* note 78 at 199; Sayle, *supra* note 80 at 264; John Perry Barlow, “A Declaration of the Independence of Cyberspace” (8 February 1996) online: Electronic Frontier Foundation <<http://homes.eff.org/~barlow/Declaration-Final.html>>. The term “meatspace” was originally used by John Perry Barlow, “Is There a There in Cyberspace?” (1995) online: UTNE Reader <<http://www.utne.com/archives/IsThereaThereinCyberspace.aspx>>.

87 I acknowledge that the term “sovereignty” is loaded; however, I use it to reflect the efforts of some early “netizens” to establish a distinct normative order in cyberspace. As the remainder of this Part shows, however, the push for sovereignty in any meaningful sense was both brief and ill-fated.

88 Jack L Goldsmith, “Against Cyberanarchy” (1998) 65 U Chi L Rev 1199 at 1250. See also Timothy Wu, “When Law & the Internet First Met” (2000) 3 Green Bag (2d) 171 at 173; Joseph H Sommer, “Against Cyberlaw” (2000) 15 Berkeley Tech LJ 1145 (adding that law “breaks” on social rather than technological lines, so it is no more sensible to discuss “internet law” than it is to discuss “railroad law” at 1151).

89 See Bruce P Keller, “The Game’s the Same: Why Gambling in Cyberspace Violates Federal Law” (1999) 108 Yale LJ 1568 at 1572; Lemley, *supra* note 6 at 524; Hughes, *supra* note 7 at 366.

90 Sommer, *supra* note 88 at 1191-92. See also Keller, *ibid* at 1603.

91 *Supra* note 88 at 171.

never designed to be 'like' a place."⁹² Andrew L. Shapiro is even blunter: "cyberspace is not elsewhere."⁹³

While acknowledging that a metaphorical approach to the internet is a natural human attempt to familiarize the unfamiliar, Alfred C. Yen maintains that "it is important to separate the application of metaphor from the complete apprehension of reality."⁹⁴ This separation is difficult, however, both because our metaphors affect our perception,⁹⁵ and because, in the case of cyberspace, one metaphor has attained such dominance that we no longer consider other possibilities.⁹⁶ Dominance, however, need not be accepted blindly: we should carefully consider the consequences of imagining the internet as "a special, separate place."⁹⁷

I will address such consequences below, but meanwhile, we can draw three conclusions from these criticisms. First, critics seem to have bested internet-sovereignists: there is no distinct body of "cyberlaw," because legal principles have proven capable of adapting (if not always comfortably) to the internet age. Second, because cyberspace is not actually a place, it is difficult not to reject the idea of cyberspace as a separate normative space; it also cannot escape notice that the volume of literature espousing separateness has lessened in recent years. And yet—for the third conclusion—the idea of cyberspace-as-place persists; cognitive scientists have shown that, "purely as a descriptive observation, we do think of cyberspace as a place."⁹⁸ These conclusions will prove important as I turn from theory to jurisprudence, analyzing judicial treatment of geographic and virtual communities.

92 *Ibid* at 172-73.

93 Andrew L. Shapiro, "The Disappearance of Cyberspace and the Rise of Code" (1997) 8 Seton Hall Const LJ 703 at 710. See also Lemley, *supra* note 6 at 523.

94 Alfred C. Yen, "Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace" (2002) 17 Berkeley Tech LJ 1207 at 1209. See also Michael J. Madison, "Rights of Access and the Shape of the Internet" (2003) 44 BCL Rev 433 at 445.

95 See Clay Calvert, "Regulating Cyberspace: Metaphor, Rhetoric, Reality, and the Framing of Legal Options" (1998) 20 Hastings Comm & Ent LJ 541 at 542; Dan Hunter, *supra* note 84 at 458-72.

96 See Hunter, *ibid* at 471; Yen, *supra* note 94 at 1209. Interestingly, Rheingold himself wrote that "[n]o single metaphor completely conveys the nature of cyberspace": *supra* note 79 at 45. For other (failed) candidate metaphors, see *EDIAS Software International v BASIS International Ltd*, 947 F. Supp. (D. Ariz. 1996) ("highway", "shopping mall", "telephone system" at 419); Jon M. Garon, "Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas" (1999) 17 Cardozo Arts & Ent LJ 491 ("portal" at 589); I. Trotter Hardy, "Copyright Owners' Rights and Users' Privileges on the Internet: Computer RAM 'Copies'—A Hit or a Myth?: Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns" (1997) 22 U. Dayton L. Rev. 423 (cardiovascular system, highway system at 436-37); Andy Johnson-Laird, "The Anatomy of the Internet Meets the Body of the Law" (1997) 22 Dayton L. Rev. 465 ("global copying machine" at 469); Stephen McGeady, "The Digital Reformation: Total Freedom, Risk, and Responsibility" (1996) 10 Harv. J.L. & Tech. 137 ("Gutenberg Press", "Reformation" at 139-41); Tom W. Bell, Book Review of *Law and the Information Superhighway* by Henry H. Perritt, Jr. (1997) 28 J. Mar. L. & Com. 185 ("ocean" at 186).

97 Yen, *ibid* at 1216. See also Jonathan G.S. Koppel, "No 'There' There: Why Cyberspace Isn't Anyplace" *The Atlantic Monthly* 286:2 (August 2000) 16 at 18.

98 Hunter, *supra* note 84 at 443.

B. Communities in Court

Judges most frequently address the question “What is a community?” in the context of criminal-obscenity.⁹⁹ The American Supreme Court has held that the “common conscience of the community” in the location where the jury sits should be the measure by which putatively obscene material is judged,¹⁰⁰ thus asserting a fully geographic idea of community. The Supreme Court of Canada has followed suit, adopting a “community standards” test¹⁰¹ according to which obscenity is judged using “the standards of the Canadian community generally, not [those of any] particular community.”¹⁰²

Although there are many challenges in applying territorially bound standards to putatively obscene material passing through several locations and never acquiring physical form,¹⁰³ most judges in internet-related obscenity cases have retained a geographic idea of community. In *United States v Thomas*, the Court of Appeal for the Sixth Circuit expressly rejected a “community of cyberspace,” holding that “there is no need for this court to adopt a new definition of ‘community’ for use in obscenity prosecutions involving electronic bulletin boards.”¹⁰⁴

American military courts, however, have provided a valuable counterpoint, finding that experiential community standards may indeed prevail. The court held in *United States v Dyer* that “we may have little choice in obscenity cases other than to apply a military community standard.”¹⁰⁵ It reached this conclusion despite acknowledged diversity within and between military service branches and stations,¹⁰⁶ and was followed by at least one other military court.¹⁰⁷ In *United States v Maxwell*, the court held “that an Air Force community standard was most likely the appropriate community” to consider in the criminal obscenity trial of an Air Force officer.¹⁰⁸

If soldiers from disparate backgrounds deployed worldwide can form a community with common standards, I would argue that internet users can do the same. The *Maxwell* court even raised this possibility, finding that “the entire community of subscribers to the AOL [America On-Line, an internet service provider]

99 I am aware that “communities” nonetheless exist in other legal contexts: see discussion at note 113, *infra*.
 100 *Roth v United States*, 354 US 476 at 489-90 (1957). See also *Miller v California*, 413 US 15 at 24 (1973). Most lower courts have interpreted this instruction as indicating that state lines bound such “common standards”: see Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) at 43.
 101 *R v Towne Cinema Theatres Ltd.*, [1985] 1 SCR 494, 18 DLR (4th) 1.
 102 *R v Mara*, [1997] 2 SCR 630 at para 26, 148 DLR (4th) 75. *Contra Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120, 193 DLR (4th) 193.
 103 See Egan, *supra* note 78 at 151; Bret Boyce, “Obscenity and Community Standards” (2008) 33 *Yale J Int’l L* 299 at 347.
 104 *United States v Thomas*, 74 F 3d 701 at 712 (6th Cir 1996) [*Thomas*].
 105 *United States v Dyer*, 22 MJ 578 at 582 (ACMR 1986) [*Dyer*].
 106 See *ibid* at 583.
 107 *United States v Hullett*, 40 MJ 189 at 191 (CMA 1994).
 108 *United States v Maxwell*, 45 MJ 406 at 426 (CAAF 1996) [*Maxwell*].

service or the members of AOL who use a specific bulletin board” might also have been—expressly despite the contrary holding in *Thomas*—a suitable community to consider.¹⁰⁹

Although Canadian courts have not yet heard arguments regarding virtual community standards, they have adopted the language of cyberspace-as-place—and, importantly, cyberspace-as-different-place—to describe online interactions in other contexts. One court described the internet as having “created a whole new territory independent of conventional geography ... [u]nlike a ‘real’ territory with fixed borders.”¹¹⁰ Similarly, the decision in *Barrick Gold v Lopehandia* referred to “virtual communities” made possible by “a medium which does not respect geographic boundaries.”¹¹¹ The *Barrick* Court also asked, “[i]s there something about defamation on the Internet ... that distinguishes it ... from defamation in another medium? My response to that question is ‘Yes’.”¹¹²

IV. MAKING SPACE FOR NUISANCE

A. Nuisance in New Neighbourhoods

1. By Any Other Name

I demonstrated above that courts have often treated neighbourhoods flexibly but communities rigidly. This differentiation is perhaps surprising: nuisance originally sought to protect people’s use and enjoyment of their *land* despite their (next-door) neighbours’ annoyances. We would, therefore, imagine neighbourhoods to be geographically bounded, and we would expect communities, having no real meaning in law, to be correspondingly more flexible.¹¹³

109 *Ibid.*

110 *Pro-C Ltd v Computer City* (2000), 7 CPR (4th) 193 at para 1, [2000] OJ No 2823 (QL) (Sup Ct J), rev’d on other grounds (2001), 55 OR (3d) 583, 205 DLR (4th) 568. See also *Dow Jones v Gutnick*, [2002] HCA 56 at para 80, 194 ALR 433, Kirby J, concurring [*Dow Jones*], cited with approval in *Warman v Grosvenor* (2008), 92 OR (3d) 663, 2008 CarswellOnt 6629 (WL Can) (Sup Ct J).

111 Matthew Collins, *The Law of Defamation and the Internet* (New York: Oxford University Press, 2001) at para 24.02, cited in *Barrick Gold v Lopehandia* (2004), 71 OR (3d) 416 at 422, 239 DLR (4th) 577 [*Barrick*]. This judgment was cited with approval by other courts (see *Beidas v Pichler* (2008), 294 DLR (4th) 310 at para 47, 238 OAC 103 (Ont Sup Ct J); *Bains v Sadhu Singh Hamdard Trust*, 2007 CarswellOnt 1773 (Sup Ct J) (WL Can)). Other Canadian cases in which the term “virtual community” was used without question include *Re Guild of Canadian Film Composers*, 2003 CarswellNat 5269 (WL Can) at para 47 (Canadian Artists and Producers Professional Relations Tribunal); *Telecom Decision CRTC 94-19*, 1994 CarswellNat 3191 (WL Can) at para 31 (Canadian Radio-television and Telecommunications Commission).

112 *Barrick*, *ibid* at para 28.

113 I recognise that “community” does have a specific meaning in particular laws and related jurisprudence (see the former *Taxation Act*, RSBC 1960, c 376 and its application in *Re Piers Island Association and Area Assessors for Saanich and the Islands* (1976), 71 DLR (3d) 270 at 275, 1 BCLR 279 (BCSC); *Community Planning Profession Act*, RSS 1978, c C-21). Such laws, however, are relatively new and thus do not carry the same weight of history and judicial interpretation as does the tort of nuisance. Further, much as “neighbour” has distinct meanings in negligence and nuisance, I would argue that “community” has a distinct meaning in the context in which I use it.

As courts have already taken neighbourhood and community in opposite directions from their expected trajectories, it is no great distortion to consider the two terms flexible enough to overlap. I quote again from Lord Justice Romer in *PYA Quarries*:

[A]ny nuisance is “public” which materially affects the reasonable comfort and convenience of life of a class of Her Majesty’s subjects. The sphere of the nuisance may be described generally as “the neighbourhood”; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case.¹¹⁴

He uses the word “neighbourhood” to describe a group *within which* a “community” exists. The “community” at issue, however, is actually the group of nuisance victims, who are themselves supposed to be “neighbours.”

In Canada, neighbours—at least under statutory nuisance—can live on opposite sides of the country. This national neighbourhood maps onto the Canadian community imagined in obscenity cases. Meanwhile, in the United States, nuisance victims on either side of a state border can form a neighbourhood but not a community—unless they are in the military, in which case they are community members but perhaps not neighbours.

At this point, it seems that the words have lost their relevant distinction, at least in the judicial context. Should it matter whether the test for obscenity is judged in terms of “community standards” or “neighbourhood values”? Should it make a difference whether we refer to nuisance amongst the “community of internet users” or “virtual neighbours”? If neighbourhoods and communities are sufficiently coterminous, the legal principles that bind neighbours and community members should persist regardless of their formulation.¹¹⁵

2. A Flexible Response

Whether addressing neighbourhoods or communities, nuisance cases typically involve non-physical interference with the use or enjoyment of property.¹¹⁶ Recent Canadian common law jurisprudence, however, has expanded the traditional scope of nuisance far beyond paradigmatic cases of pollution.¹¹⁷ The court in

114 *Supra* note 52 at 902.

115 See Lemley, *supra* note 6 at 542. Focusing on substance, not semantics, aligns with Canadian jurisprudence (see e.g. *R v Nette*, 2001 SCC 78, [2001] 3 SCR 488 at para 72).

116 In the common law, other torts address other types of disruption: physical interference with property is resolved through trespass; physical damage to property, through negligence (see Weir, *supra* note 11 at 421-22). In Québec’s civil law, physical interference is treated by arts 987-92 CCQ, while physical damage falls within the general regime of liability under art 1457 CCQ.

117 Other common law jurisdictions have also engaged in atypical applications of nuisance: see *Thompson-Schwab v Costaki*, [1956] 1 All ER 652, [1956] 1 WLR 335 (diminished enjoyment and value of a home resulting from the operation of a nearby prostitution business qualified as nuisance); *Bank of New Zealand v Greenwood*, [1984] 1 NZLR 525 (bright light reflecting from a glass roof constituted nuisance).

Motherwell v Motherwell found that the recipient of a series of unwanted telephone calls was the victim of nuisance regardless of the distance between the calls' source and her home (and despite the fact that she was simply the occupant and not the owner or lessor of this home).¹¹⁸ The court also wrote that "[t]he telephone system is so much the part of the daily life of society that many look on it as a necessity It *virtually makes neighbours* not only of the persons close at hand, but those in distant places, other cities, other countries."¹¹⁹ Two years later, the judgment in *Nor-Video Services Ltd v Ontario Hydro* held interference with television signals to be nuisance because these signals were "simply one of the benefits and pleasures commonly derived from domestic occupancy of property."¹²⁰ This same court also held that "[t]he category of interests covered by the tort of nuisance ought not to be and need not be closed . . . to new or changing developments associated from time to time with the normal usage and enjoyment of land."¹²¹

Though *Nor-Video* limits its scope to "domestic occupancy of [real] property" and "land," it demonstrates the adaptability of nuisance to new technologies and challenges. *Motherwell*, meanwhile, refers to "virtual neighbours." We thus see that, just as in the Industrial Revolution, nuisance today shows "resilience and flexibility in the face of changing social demands,"¹²² making it a helpful tool in the regulation of new, online interactions.

If, as the British Columbia Supreme Court recently wrote, "[a]ctivities designed to annoy one's neighbours and having little or no redeeming social utility are unreasonable and should be discouraged by the law,"¹²³ then why should someone who annoys a virtual neighbour for no social purpose be any less subject to liability in nuisance than someone who annoys a geographic neighbour? Here, nuisance can step in to regulate those online interactions that—because of our shared conception of cyberspace-as-place—are analogous to the disputes between meatspace neighbours. When hackers *break into* a website to conduct a virtual sit-in, when search engines *intrude* without permission *into* supposedly private *areas within* a web *domain*, when teenagers harass others with malicious *postings* on their Facebook *walls* or MySpace pages, nuisance has a role to play.

3. Courts and Critics

Currently, common law judges employ trespass to regulate the kinds of disputes described above. Conceiving of the internet as a place, they liken an unpermitted

118 *Motherwell v Motherwell* (1976), 73 DLR (3d) 62, [1976] 6 WWR 550 (Alta SC (AD)) [*Motherwell* cited to DLR].

119 *Ibid* at 75 [emphasis added].

120 *Nor-Video Services Ltd v Ontario Hydro* (1978), 19 OR (2d) 107 at 117, 84 DLR (3d) 221 (Ont H Ct J), aff'd [1979] OJ No 1792 (QL) [*Nor-Video* cited to DLR]. *Contra Hunter v Canary Wharf*, [1997] AC 655, [1997] 2 All ER 426 (HL).

121 *Ibid* at 232. See also *Stoakes v Brydges*, [1958] QWN 9 at 10, Townley J (Qld SC), cited in *Motherwell*, *supra* note 118 at 75-76.

122 Bilson, *supra* note 11 at 6.

123 *Suzuki v Monroe*, 2009 BCSC 1403 at para 100, 87 RPR (4th) 68.

presence on a website to an intruder onto property, and conclude that trespass is the appropriate response. The paradigmatic example of such reasoning is *eBay v Bidder's Edge*, heard by the District Court for the Northern District of California in 2000.¹²⁴ Bidder's Edge had used a "spider" program to trawl various auction websites—including eBay's—and then to provide customers with comparative pricing data, despite eBay's ban of such spiders on its site. Interestingly, the Court did not find that Bidder's Edge had trespassed onto eBay's *website*; trespass would not have generated liability since a website is neither realty nor a chattel. Rather, the Court held that the use by Bidder's Edge of eBay's *system capacity* (sc. its server, a chattel), which foreclosed eBay's use of that same capacity, constituted trespass.¹²⁵

This decision and others like it¹²⁶ have prompted a flurry of theorizing, much of which concerns the alleged absurdity of a verdict hinging on the Court's focus on eBay's bandwidth and capacity rather than its server.¹²⁷ Choice of metaphor has again become key as writers ask whether a server is more like a public space or a locked box, and whether a website is more like a book in a library or realty.¹²⁸ Others take umbrage with the Court's blending of two different torts: trespass *to land* (designed to protect the inviolability of realty) simply requires invasion even if intangible, whereas trespass *to chattels* (designed to protect the possession of personalty) requires not only tangible invasion but also interference with the chattel.¹²⁹ The Court in *eBay* found trespass to chattels based on *intangible* invasion,¹³⁰ thus merging two distinct torts and "revers[ing] several hundred years of legal evolution . . ."¹³¹

Critics also object to the implications of *eBay* and similar cases. The precedent set by using trespass to chattels to regulate cyberspace could be dangerous, they argue, as it could extend to many types of intangible invasion, including television signals and radio waves.¹³² Many critics also argue that trespass to chattels is the wrong tool for the job: it involves "murky" questions of entry and consent that cannot find easy answers in the ever-growing array of internet-based applications.¹³³ The use of trespass to draw "property lines" around components of the internet, they argue, will additionally "do . . . harm to the digital commons," chilling

124 *eBay v Bidder's Edge*, 100 F Supp (2d) 1058 (ND Cal 2000) [eBay].

125 *Ibid* at 1069-72.

126 See *Compuserve, Inc v Cyber Promotions, Inc*, 962 F Supp 1015 (SD Ohio 1997); *Hamidi*, *supra* note 5.

127 See O'Rourke, "Property Rights", *supra* note 6 at 580; Hunter, *supra* note 84 at 486.

128 See O'Rourke, *ibid* at 581-96.

129 See O'Rourke, *ibid* at 581; Burk, *supra* note 6 at 32-33; Hunter, *supra* note 84 at 487-88.

130 *Supra* note 124 at 1069-72.

131 Burk, *supra* note 6 at 33.

132 See *ibid* at 34. See however *Nor-Video*, *supra* note 120 (the court used nuisance to regulate a dispute over the disruption of television signals).

133 Burk, *ibid* at 44-47. See also O'Rourke, "Property Rights", *supra* note 6 at 589-90; Hunter, *supra* note 84 at 486-87.

both innovation and expression.¹³⁴ Finally, critics make the related complaint that the sole available remedy in trespass cases is absolute exclusion, which may not always be appropriate online.¹³⁵

These same critics propose nuisance as a better way to mediate disagreements in cyberspace—better, they say, for two reasons. First and foremost, nuisance (at least, in the common law) requires a balancing of interests,¹³⁶ an important factor “when considering the creation of a fundamentally new right that would change the established patterns of behavior on the Internet.”¹³⁷ Second, the available remedies are flexible: they may include damages, an (exclusionary) injunction, or some combination thereof.¹³⁸ Meanwhile, nuisance allows judges to continue using the cyberspace-as-place metaphor with which they have proven themselves comfortable.¹³⁹

4. *The Balancing Act*

As mentioned above, the strongest argument for the application of nuisance in virtual communities is—at least, in common law jurisdictions—its case-by-case balancing approach to plaintiffs’ and defendants’ interests.¹⁴⁰ In discussing which elements should factor into this balancing, Maureen O’Rourke suggests: the burden to the objecting site of processing “requests” from the offending site; any lost revenue resulting from unwanted access; the degree to which the offending site is “free-riding” (that is, using information that the objecting site expended resources to acquire); the nature of any information taken; and whether the impugned activity places the objecting and offending sites in competition.¹⁴¹ To this list I would add the reputational loss to the objecting site, motivation of the offending site, relative social values of the objecting and offending sites’ activities, availability of alternatives to the impugned action, and cost to the wider virtual community of excluding or restricting access.

But what interest would this balancing test defend? If nuisance in geographic communities—though it now finds other justifications—first sought to protect a landowner’s use and enjoyment of land, then what interest would nuisance protect

134 Burk, *ibid* at 52. See also O’Rourke, *ibid* at 614; HLR, “Law of Cyberspace”, *supra* note 80 at 1602.

135 See Lemley, *supra* note 6 at 540.

136 See Part II(C), above. See also O’Rourke, “Property Rights”, *supra* note 6 at 588; O’Rourke, “Shaping Competition”, *supra* note 6 at 2001-02; Robert J. Aalberts, Percy Poon & Paul Thistle, “Trespass, Nuisance, and Spam: 11th Century Common Law Meets the Internet” (2007) 50:12 *Communications of the ACM* 42 at 43.

137 Lemley, *supra* note 6 at 540. See also Burk, *supra* note 6 at 53.

138 See notes 45-49 and accompanying text; Burk, *supra* note 6 at 54; Steven Kam, “Intel Corp. v. Hamidi: Trespass to Chattels and a Doctrine of Cyber-Nuisance” (2004) 19 *Berkeley Tech LJ* 427 at 452.

139 See Lemley, *supra* note 6 at 540.

140 Civilian judges may also weigh these relative interests, but such weighing would be incorporated into the assessment of how normal a given annoyance is considered to be, and the corresponding threshold of tolerance.

141 “Shaping Competition”, *supra* note 6 at 2002.

in virtual communities? “Use and enjoyment” may remain, but the other elements must change. As described in Part II(B) above, occupation or usage rather than “ownership” will suffice. “Land” or “immovables”, too, must give way to cyberspace. Thus, I submit that nuisance in virtual communities would seek to secure *the use and enjoyment of cyberspace by an occupant of cyberspace*.¹⁴²

This notion of “occupying” cyberspace allows us to consider an individual’s activities in cyberspace as encompassing more than just operating a website (the metaphorical equivalent of owning realty), such that we can move beyond O’Rourke’s application of nuisance in a solely (web)site-to-(web)site context. Individuals can occupy cyberspace by sending and receiving e-mails, chatting online, subscribing to news services, or undertaking a wide variety of other activities that fit less comfortably with the notion of cyberspace-as-place. Nuisance in a virtual community could thus consist of accidentally or intentionally sending an e-mail that contains a virus, of writing insulting instant messages to an ex-lover, or of hacking a news service such that its normal recipients do not receive their daily feed. I do not argue that nuisance *must* regulate these activities, as there might be more efficient or appropriate means of doing so; rather, I argue that nuisance *could* regulate these activities, if we free ourselves of the geographic constraints that traditionally defined nuisance and reflect upon the geographic terms in which we usually conceive of cyberspace. In so doing, we would ensure that nuisance continues to promote the “*paix chez soi*” that all neighbours seek within the (cyber)space that they occupy.¹⁴³

Perhaps my use of the language of “occupation” will raise eyebrows, as I simultaneously employ this geographic term and critique our geographic conception of cyberspace. Given that nuisance law has progressed from recognizing only ownership to recognizing occupation as well, I see occupation as a progressive term in the context of nuisance. Further, using occupation rather than another term allows judges to stay within the comfortable metaphor of cyberspace-as-place, while simultaneously forcing them to question what it means to occupy a metaphorical space rather than to own or possess it. Thus, I will not claim to bound the term “occupation” with fixed limits or a rigid definition, but will remain purposely (and purposefully) vague in this regard. As I have described above, the beauty of nuisance lies in its flexibility.

B. Challenges to Nuisance

This novel application of nuisance to virtual communities could be met with resistance on four main fronts. The first would be formed by those who still see cyber-

142 Here, I do not stray too conceptually far from a classic civilian notion of *voisinage*: Courtieu & Courtieu, *supra* note 16 (“[l]e voisinage est un terme collectif et une notion spatio-temporelle qui traduit l’idée de l’occupation de l’espace par des personnes, dont certaines, par leur situation de proximité, ont des droits et des devoirs spécifiques les unes par rapport aux autres” at 9).

143 See Terré & Simler, *supra* note 16 at para 268. See also Van Praagh, *supra* note 1 at 23.

space as a separate jurisdiction, to whom I presented responses in Part III(A)(3) above. A more moderate form of this criticism, however, would consist of objections to the regulatory imposition of nuisance law. To such objections, Margaret Jane Radin and R Polk Wagner provide a succinct response: “nuisance law ... is ... arrived at by bottom-up coordination among neighbours. Top-down legislative regimes are no less the result of social evolutionary processes than are bottom-up regimes of norms.”¹⁴⁴

A second obstacle to the expansion of nuisance would be an assertion of judicial conservatism. Given that Canadian courts have historically been reluctant to use nuisance law creatively,¹⁴⁵ and given that most American courts have refused to recognize a “virtual community standard” in obscenity cases, some might say that applying nuisance to cyberspace would be asking judges to make too large a leap. Judges, however, are already applying trespass to cyberspace; the court in *Hamidi* did so in a manner that involved a balancing of interests more akin to a nuisance test than to a trespass analysis,¹⁴⁶ and Judge Whyte in *eBay* engaged in similar balancing.¹⁴⁷ Further, some judges have accepted a non-geographic “military community standard” in criminal obscenity cases. Finally, judges regularly refer to the non-geographic nature of virtual communities in other contexts, demonstrating that the leap that nuisance demands of them would in fact be relatively small.

Such a leap could in fact be reassuring to conservative judges, in that it would make the notion of neighbourhood more consistent across the law. *Negligence* already considers a neighbour to be anyone whom an individual’s act or omission could harm. By extending nuisance so as to make neighbours of those harming and those harmed—or rather, by acknowledging that nuisance can create neighbourhoods and does not simply operate within them—the changes proposed by this paper might in fact regularize neighbourhoods rather than distort them.

The third strand of criticism would concern enforcement and private international law: how could nuisance law possibly be imposed on a medium that courts have recognized does not respect geographic boundaries?¹⁴⁸ What rules would govern the choice of forum and substantive law? There is no doubt that the internet’s non-territoriality creates challenges to effective regulation;¹⁴⁹ some even argue that “[w]e are now seeing an era where the government simply cannot keep pace with the technology.”¹⁵⁰ But while those who hold such views therefore argue that separate laws¹⁵¹ or fully private ordering¹⁵² is the answer, I would maintain that

144 Margaret Radin & R Polk Wagner, “The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace” (1998) 73 *Chicago-Kent L Rev* 1295 at 1298.

145 See Nedelsky, *supra* note 28.

146 *Supra* note 5. See also Kam, *supra* note 138 at 443.

147 *Supra* note 124.

148 See Dow Jones, *supra* note 110 at para 80; Barrick, *supra* note 111 at para 1.

149 See Yaman Akdeniz, “Governing Racist Content on the Internet: National and International Responses” (2007) 56 *UNBLJ* 103 at 112.

150 Sayle, *supra* note 80 at 258.

151 See *ibid* at 281-84.

152 See Akdeniz, *supra* note 149 at 143-56.

law has been able to adapt to other transnational problems and that no other transnational communities are exempt from legal intervention.¹⁵³ Private claims in the context of international banking, telecommunications, investment, and travel have all found domestic mechanisms for legal enforcement—so why not private claims in the context of internet activity?

The fourth challenge to nuisance in cyberspace, meanwhile, would come from those who would argue that cyberspace is not a place, so nuisance cannot operate “there.” The common law strand of this criticism would remind us that nuisance is meant to apply to real property, whereas websites—as Judge Whyte found in *eBay*¹⁵⁴—are hosted on servers, which are chattels. My response, however, would be that our perceptions of cyberspace are informed by the metaphor that we use to describe it. If we all collectively conceive of cyberspace as a place—even as some of us realize that it is not—then there is no reason why law should not partake in this conception through the selective and intelligent use of legal concepts whose origins are historically geographic.

Just as judges during the Industrial Revolution were willing to link technological development with neighbourhood expansion and to facilitate such expansion for the commonweal, modern judges should be willing to do the same. For it is willingness that matters: rather than nuisance occurring amongst those recognized as neighbours, *neighbours are those whom a judge recognizes as coming within the scope of nuisance law*.¹⁵⁵ The result is that, as in the nineteenth century, today’s neighbours are yesterday’s strangers; technology has effected a potential change that judges have simply to realize through recognition. If communities can expand beyond geography, and if communities and neighbourhoods elide, then there is no reason why neighbours need still be next-door. Again, much of the work developing such elision of principle and reality has already been done by judges who have applied elements of trespass to land to online interactions.

Civilian critics, however, are likely to be less forgiving. They might assert that online interactions involve not property but incorporeal concerns having no place under the regime of art 976 CCQ; such interactions belong, if anywhere, in a separate body of law akin to intellectual property. If they did not make this argument, they could still point to the appearance of article 976 in a chapter on the “Ownership of *Immovables*.”¹⁵⁶ They would argue that the law of *troubles de voisinage*

153 See *supra* note 90 and accompanying text; Fairfield, *supra* note 83 at 1094; Sommer, *supra* note 90 at 1162, 1189ff.

154 *Supra* note 124.

155 For example, in *St Lawrence Cement*, the Supreme Court of Canada found that “all members living in the neighbourhoods adjacent to the plant [that produced pollution prompting the suit] were neighbours of the plant for the purposes of [art 976 CCQ] on the basis that they lived close enough to it” (*supra* note 24 at para 96)—close enough, that is, to have been disturbed by the pollution in question. Godin goes slightly further: “il semble que la qualification de voisin soit plus tributaire du lien de causalité entre l’activité et l’inconvénient causé que d’une véritable proximité [géographique]” (*supra* note 1 at para 18).

156 Emphasis added.

is meant to facilitate equitable sharing of physical space by vindicating immovable property rights infringed beyond the threshold of normality. Online interactions, conversely, entail no sharing of anything immovable;¹⁵⁷ they engage no rights—real or personal—recognized under law.

Such criticisms may be more difficult to overcome—but not impossibly so. Turning first to whether there is a place for the internet in the civil law of property, this law has already moved from recognizing only corporeal goods as property to an acceptance that property (for example, bank accounts) can be incorporeal. This movement has been reflected textually: the *Civil Code of Québec*, unlike its predecessor, refers to “property” (*biens*) rather than “things” (*choses*),¹⁵⁸ and the first article in the book “On Property” provides for incorporeal property.¹⁵⁹ Thus, for example, is intellectual property given codal recognition amongst other *biens*. Intellectual property, however, has a long history of legislation distinct from that applying to other property,¹⁶⁰ and in Canada is governed by federal (that is, common law) legislation.¹⁶¹ Such separateness, stemming from intellectual property’s unique and settled attributes, is inadvisable with respect to the new domain of online interactions, as described in Part III(A)(3) above. If existing categories can encompass new developments, the civil law, with its interest in categorization and stability,¹⁶² will prefer that they do so. Other transactions involving incorporeal, non-intellectual property have found a place within the civil law of property, so online interactions can and should do so as well—at least until their attributes are fully settled and understood to be entirely incompatible with this law.

157 Art 899 CCQ divides all property into movables and immovables. Arts 900-904 enumerate the categories of immovables. Arts 905-906 specify two types of movables, with art 906 specifically mentioning “[w]aves or energy harnessed and put to use by man ...” Art 907 provides that “[a]ll other property, if not qualified by law, is movable.” Strictly speaking, then, an online presence is—whether seen as “harnessed energy” under art 906 or considered under the residual provision of art 907—movable property, if it is property at all.

158 *Bien* remained purposefully undefined during reform of Québec’s civil code: “Le chapitre sur la distinction des biens ... ne définit pas cependant la notion de bien, celle-ci étant, dans le code, utilisée généralement dans son sens juridique de chose susceptible d’appropriation ou appropriée ou, à l’occasion, dans son sens économique de chose matérielle procurant une utilité” (Québec, *Commentaires du ministre, supra* note 17 at 527). If “appropriation” refers to purposeful acquisition, then online resources may indeed qualify as *biens*. A later reference to the notion of *bien* as “englobant en même temps la chose et le droit que l’on a sur cette chose” (*ibid* at 528), in its use of *chose*, is already at odds with the recognition of incorporeal property in art 899 CCQ, unless *choses* may be incorporeal—in which case online resources may be *choses* as well as *biens*. This understanding of *chose* is supported by jurisprudence: see e.g. *Régie Intermunicipale de l’Est de Portneuf c Tremblay*, 1981 CarswellQue 1097 (CS Qc) (WL Can) (an incorporeal *bien* is a *chose* that can only be understood through thought, can only be conceived by the mind, has no material form, and cannot be perceived by the senses).

159 Art 899 CCQ.

160 In France, the history of patents and of *droit d’auteur*—the civilian counterpart to copyright—goes as far back as the sixteenth century (see M Frumkin, “The Origin of Patents” (1945) 27 J Pat Off Soc’y 143ff; Anne Latournerie, “Petite histoire des batailles du droit d’auteur” *Multitudes* 5 (May 2001), online: <<http://multitudes.samizdat.net/Petite-histoire-des-batailles-du>>).

161 See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(22)-(23), reprinted in RSC 1985, App II, No 5.

162 See John EC Brierley & Roderick A Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 34-37.

But is online nuisance, having no tangible connection to immovable property, thus incompatible with the law governing *troubles de voisinage*? I maintain that it is not. Article 976 CCQ may appear under the heading “Special Rules on the Ownership of Immovables” but, as described in Part II(B) above, *ownership* is no longer at issue: any holder of a real right of usage, or of a personal right of lease, can bring an action in nuisance if her enjoyment of property is infringed abnormally.¹⁶³ Ownership originally merited protection because of its primacy under the civil law,¹⁶⁴ but achieving harmony between neighbours has required protection to be extended.¹⁶⁵ As technological developments provide new venues for contestation, why not continue to seek harmony by permitting a corresponding attenuation of “immovables” to encompass online nuisances—particularly if we conceive of the internet as a place?¹⁶⁶ The special status reserved by the law for immovables has already been diluted through the extension to movables of, for example, hypothecary rights,¹⁶⁷ so why not continue the progression?

Whereas art 976 CCQ permits the harmonious sharing of land, however, critics will argue that there is no corresponding sharing online. To them I offer two responses. The first is that land rights may be protected because of land’s rivalrous nature—and, despite the non-geographic nature of the internet, online interactions nevertheless involve rivalrous components including, as Fairfield points out, “URLs, domain names, [and] email accounts . . .”¹⁶⁸ These components will remain rivalrous even as technological developments render others, such as bandwidth, less so. Land rights may alternatively be protected because land cannot be relocated to a location independent of neighbours—it is, after all, immovable. Similarly, the internet is a single network:¹⁶⁹ would-be netizens cannot implicate themselves in an alternative online participatory arrangement. Global participation rendering the internet such a useful tool and wealth of information simultaneously renders it conceptually immovable.¹⁷⁰

163 The maximal extent of this conceptual distance from ownership—that is, exactly which rights may found an action in *troubles de voisinage*—has not been fully explored, but the point remains: ownership is not uniquely at issue.

164 Art 544 CcF, from which Québec’s property law descends, maintained that “[l]a propriété est le droit de jouir et disposer des choses de la manière la plus absolue . . .”

165 See Godin, *supra* note 1 at paras 13-14.

166 Even if the word “immovable” is diluted, online nuisance must still contend with the statement in art 976 CCQ that the “limit of tolerance” for neighbourly inconveniences is set by “the nature or location of [the afflicted neighbour’s] land or local custom.” The use of “or” in “land or local custom,” however, may leave space for a land-free understanding of *troubles de voisinage*, if “local” is understood liberally to encompass, for example, virtual communities; such a reading is compatible with the French-language version of art 976 CCQ.

167 Hypothecs were restricted to immovables under art 2016 CCLC, but under art 2660 CCQ may attach to movables or immovables.

168 *Supra* note 83 at 1052-53.

169 Some have worried recently that the internet may fragment into a group of distinct “internets”: see e.g. “The Web’s New Walls” *The Economist* 396:8698 (4-10 September 2010) 11, but I maintain that, for the time being, there is only one internet.

170 I also acknowledge the unlikely possibility that Québec’s legislators could declare online property or interactions to be immovable, bringing them within the “if not qualified by law” exception under art 907 CCQ.

My second response is that, as with common law nuisance, actions in *troubles de voisinage* delineate the scope of neighbourhoods, rather than *vice versa*. While some may argue that neighbourliness exists independent of such actions (entailing, for example, the requirement to suffer normal inconveniences), it is abnormal inconveniences that determine the nature of sharing between neighbours—indeed, that inform individuals of their neighbourliness under the law. Because *troubles de voisinage* is a *sui generis* regime,¹⁷¹ neighbourliness under article 976 CCQ is distinct from neighbourliness under other laws or provisions, and can take the shape that article 976's purpose requires of it. This purpose is, *inter alia*, to improve quality of life and to restore harmony,¹⁷² so there is cause to extend neighbourliness to those who disrupt harmony in an increasingly important component of human life. If geographically contiguous neighbours can be subject to the law of *troubles de voisinage* by annoying each other physically but escape it by doing so online, there will be harmony in neither cyberspace nor meatspace.

Turning next to the right that is violated when one neighbour abnormally annoys another, it is tempting to assert that an action in *troubles de voisinage* protects a real right in immovable property.¹⁷³ The Supreme Court of Canada, however, firmly rejected this view in *St Lawrence Cement*, holding that *troubles de voisinage* is linked instead to personal rights.¹⁷⁴ This position not only protects occupants and lessors—themselves titularies of personal rather than real rights—by confirming that they may institute an action, but also recognizes that “a person, and not land, actually suffers the annoyances and claims compensation.”¹⁷⁵

But if the resulting damage is incurred “dans le contexte bien spécifique du ‘voisinage’, terme qui n’est pas limité par les notions de droit réel ou de droit personnel,”¹⁷⁶ how can we articulate the right protected by an action in *troubles de voisinage*? Here the Supreme Court of Canada provided a neatly ambiguous answer: such an action protects “the right to enjoy a neighbourhood without excessive disturbances . . .”¹⁷⁷ This right is very different from the right to the enjoyment of an *immovable* entailed by a real or personal right with respect to the immovable itself.¹⁷⁸ It is also different from the right of one neighbour to infringe another’s enjoyment of property, a “droit de nuire” necessarily incidental to the use of property and

171 See Godin, *supra* note 1 at para 47; Popovici, *supra* note 15 at 253; Québec, *Commentaires du ministre*, *supra* note 17 at 573; Marie-Ève Arbour & Véronique Racine, *supra* note 16 at 345.

172 See Godin, *supra* note 1 at para 22.

173 Under art 904 CCQ, rights to immovable property are themselves immovable property.

174 *Supra* note 24 at paras 81-84.

175 *Ibid* at para 82.

176 Godin, *supra* note 1 at para 15, n 1.

177 *St Lawrence Cement*, *supra* note 24 at para 83.

178 Holding a real right in immovable property entails the enjoyment of this property: see arts 947 (on ownership), 1120 (usufruct), 1172 (use), and 1195 (emphyteusis) CCQ. These articles, however, make no mention of the neighbourhood surrounding this property. Similarly, leaseholders have a right to enjoyment of the leased immovable (art 1851 CCQ), but not to the enjoyment of other property in the neighbourhood.

determinative of the “limit of tolerance” under article 976 CCQ.¹⁷⁹ Rather, the right as articulated by the Court—and found nowhere in codal provisions—seemingly attaches once one person becomes neighbour to another, a status that is often meaningless until one neighbour is annoyed abnormally. Such a right to enjoy a *neighbourhood*, rather than an immovable, maps onto my proposal to protect an online occupant’s use and enjoyment of cyberspace.

To summarize my response to civilian critics, then, actions in *troubles de voisinage* are at present personal actions, brought by the titularies of real or personal rights to the enjoyment of immovables, against other persons whom they may not have considered their neighbours until they were annoyed abnormally, in order to vindicate their right to enjoy their neighbourhoods. If, as I argue above, there is a rationale for permitting *troubles de voisinage* to stray from its immovable origins, then the right to enjoy a neighbourhood is no less worthy of protection in cyberspace than in meatspace.

C. Nuisance Applied

Having described it in general terms, I will now seek to demonstrate nuisance’s utility by applying it to two hypothetical conflicts between virtual neighbours. I begin with “spidering,” the source of the suit in *eBay* that was (wrongly, many say) decided using trespass; this scenario is a more straightforward venue for the use of nuisance because of the relative ease with which the cyberspace-as-place metaphor can be deployed. I then move to a discussion of spam mail, which, in its departure from this metaphor, renders the use of nuisance law more conceptually attenuated—but, I argue, no less useful.

1. Scenario 1: “Spidering”

Recall the facts of *eBay*: Bidder’s Edge, using a “spider” program, aggregated in one regularly updated database the information available on several online-auction websites. In other words, with the click of a button, a customer at Bidder’s Edge could “visit” many auction sites at once: convenient for this customer, but frustrating to the auction sites that would both lose the benefits accruing when customers visited them individually and see their system capacity diminished by this resource-intensive spider program (and others like it).

Seeking to avoid such undesirable results, the online-auction site *eBay* had incorporated into its User Agreement a prohibition on unpermitted spidering.¹⁸⁰ Unable to agree with Bidder’s Edge on the appropriate use of its spider program, *eBay* denied it permission—and when Bidder’s Edge persisted, accessing *eBay*’s

179 Juliana Karila de Van, “Le droit de nuire” (1995) RTD civ 533. See also *supra* note 18 and accompanying text.

180 *eBay*, *supra* note 124 at 1060.

site up to 100,000 times daily,¹⁸¹ eBay sued for preliminary injunctive relief. Judge Whyte found for eBay, holding that Bidder's Edge had likely engaged in trespass to chattels by interfering with eBay's "server and its capacity" in an unauthorised (though intangible and not necessarily substantial) manner.¹⁸²

Having already described the limits of trespass law, I will now discuss what might have happened had *eBay* been decided using nuisance rather than trespass.¹⁸³ A judge hearing such a case would undertake two interrelated analyses: whether the elements of nuisance—including neighbourliness and abnormality—were made out, and whether the associated balancing of costs and benefits militated in favour of finding a nuisance.

Neighbourliness and abnormality. The companies eBay and Bidder's Edge certainly shared a stable relationship—they were in regular communication, and Bidder's Edge almost constantly trawled eBay's website—but was this relationship neighbourly? Assessed from a point of view adopting the cyberspace-as-place metaphor, neighbourliness was evident: Bidder's Edge operated a website, eBay operated a website, and an emanation from the former interfered with use and enjoyment of the latter. Assessed from a point of view more sceptical of such a metaphor, however, Bidder's Edge and eBay were not "locations," so the application of nuisance seems more tenuous. Rather, the two companies were simply engaged in related businesses, working through the same medium to serve the same clientele. But if their conflicts need to be regulated by some body of law, why not that capable of providing the most nuanced, flexible, and fair solution—in other words, why not nuisance? As discussed above, individuals are not necessarily neighbours until nuisance law recognizes them as such.

Such recognition could take the form of an acknowledgement that both Bidder's Edge and eBay *occupied cyberspace*. Even if the interactions of Bidder's Edge and eBay were considered as no more than flows of electrons, both companies staked a claim to a particular aspect of these flows; both occupied rivalrous attributes of online activity. Occupation need not be associated with physical ownership of realty, as nuisance law has already shown us. Rather, occupation is simply presence stable enough to create a nuisance. Surely, trawling eBay 100,000 times daily was enough to render Bidder's Edge a stable presence from eBay's point of view.

Such stability of presence (that is, occupation) has advantages over other potential indices of neighbourliness in regulating the conduct of spider programs. Bidder's Edge explicitly tried to avoid eBay's preventive efforts by rotating between the servers from which it operated.¹⁸⁴ A demand that nuisance be anchored in a geographic location would thus mean that the shifting origin of the interference

181 *Ibid* at 1063.

182 *Ibid* at 1069-72 (the case eventually settled out of court, such that neither side made the more nuanced arguments that an action for a permanent injunction would have necessitated).

183 In so doing, I build upon O'Rourke's work in "Shaping Competition", *supra* note 6 at 2001-03.

184 See *eBay*, *supra* note 124 at 1062-63.

might frustrate eBay's claim. The more flexible notion of occupation—with the occupation of cyberspace by Bidder's Edge being consistent despite its attempts at evasion—is a far more flexible, and thus powerful, regulatory tool.

A judge hearing *eBay* would then consider whether the impugned action generated an “abnormal” inconvenience. If eBay operated a brick-and-mortar store, Bidder's Edge would not have been permitted to send 100,000 robots to this store every day¹⁸⁵—but a website is not a brick-and-mortar store. Different standards apply as between virtual neighbours: aggregators are common online phenomena, and eBay permitted some aggregators to trawl its site under restricted conditions. Bidder's Edge, however, used a significant proportion of eBay's server capacity without authorisation, and the (potential) inefficiencies resulting from this use constituted the basis on which Judge Whyte found an action in trespass. The efficient functioning of servers is an ordinary and reasonably expected incident of their purchase and operation by eBay. The inconvenience to eBay caused by the spider program could thus be found abnormal. Because an abnormal inconvenience is actionable regardless of fault, the fact that Bidder's Edge intentionally deployed its spider program would be irrelevant to the judge.

Balancing costs and benefits. If a judge were to find that Bidder's Edge had inconvenienced eBay abnormally, a judgment for eBay would necessarily follow. Finding abnormality, however, may not be as simple as just suggested. Judges, more explicitly in the common law than in the civil law, often rely for this purpose on the balancing exercise for which nuisance is known—the same balancing exercise that permitted a changing conception of normality during the Industrial Revolution. Suggested components of this analysis with respect to online nuisance are described above, and, on the facts of *eBay*, a judge would likely find the following with respect to each:

- **Burden on plaintiff: finding for eBay.** The spider program used only approximately one per cent of eBay's system capacity at a given time,¹⁸⁶ and thus did not interfere with the experience of eBay's customers.¹⁸⁷ The unregulated, mass spidering that a judgment in favour of Bidder's Edge could promote, however, might yield “irreparable harm” to eBay through “reduced system performance, system unavailability, or data losses.”¹⁸⁸ Such an implications-based analysis, which (despite its use by Judge Whyte) has no theoretical place in a trespass action, may explicitly form part of a common law judgment in nuisance.¹⁸⁹

185 See *ibid* (for an expanded discussion of the robot analogy and its limits at 1065-66).

186 See *ibid* at 1063.

187 See *ibid* at 1065-66.

188 *Ibid* at 1066.

189 See *supra* notes 32-35 and accompanying text. Otherwise put, eBay would be asserting that Bidder's Edge had made it too difficult for eBay to do what it normally would do in “its” (cyber)space.

- **Lost revenue: neutral.** Again, eBay alleged revenue losses not through spidering by Bidder's Edge, but rather through the (potential) "irreparable harm" of mass spidering;¹⁹⁰ again, implications trump specifics and support eBay's case. The judge would also, however, have to consider the damage that an injunction against spidering would impose on Bidder's Edge. As 69 per cent of its database consisted of data garnered from eBay,¹⁹¹ such damage would be substantial: Bidder's Edge predicted a one-eighth reduction in its company value.¹⁹² Judge Whyte noted that courts will not acknowledge damage caused by an injunction against a recognized trespass¹⁹³—but the flexibility inherent in nuisance may entail a different finding.
- **Defendant's "free-riding": neutral.** Bidder's Edge was "free-riding" by making available to its customers information that eBay had expended considerable resources in acquiring. However, eBay itself simply provided a forum within which individuals could auction their own goods, and was thus arguably free-riding on the work invested by its virtual auctioneers and buyers. Further, Bidder's Edge expended resources in developing its spider and in maintaining its website.
- **Nature of the information taken: finding for Bidder's Edge.** The information taken from eBay was public rather than private in nature.¹⁹⁴
- **Direct competition between plaintiff and defendant: finding for eBay.** Ostensibly, Bidder's Edge did not use information gained from eBay in competition with eBay itself, given that items listed on eBay could not be purchased through Bidder's Edge. A customer using Bidder's Edge to find information on eBay's auction items, however, would not see the advertisements posted on eBay's website (and might see advertisements on Bidder's Edge instead), thus compromising part of eBay's business model.
- **Reputational loss to plaintiff: finding for eBay.** Plaintiff eBay also alleged "irreparable harm" from the "lost consumer goodwill" that spider-induced losses in system capacity would engender.¹⁹⁵ Judge Whyte refused to consider reputational harm because the trespass-associated remedy of injunction was not tailored to address it.¹⁹⁶ As non-injunctive remedies would be available in a nuisance action, however, the implications of spidering on eBay's reputation could be considered, and would militate against Bidder's Edge.

190 *eBay*, *supra* note 124 at 1066.

191 *See ibid* at 1063.

192 *See ibid* at 1068.

193 *See ibid* at 1069.

194 *Ibid* (eBay's original (federal) claim under copyright legislation was dismissed at 1072). O'Rourke assumes that eBay's information was not protected by copyright: "Shaping Competition," *supra* note 6 at 2002.

195 *eBay*, *ibid* at 1066.

196 *See ibid* at 1064.

- **Defendant's motivations: finding for eBay.** The motivations of Bidder's Edge were almost entirely grounded in profit. Though Bidder's Edge did not host auctions and did not generate income from spidering eBay and other auction sites, it did offer other "auction-related services and information."¹⁹⁷ It also likely generated revenue through sale of advertising. Including eBay amongst its spidered sites was important because "eBay is by far the biggest consumer to consumer on-line auction site."¹⁹⁸ The "motivation" component likely weighs against Bidder's Edge because, while profit may have underpinned the actions of companies that judges have decided to protect against actions in nuisance, these judges have typically focused on the wider social purpose of these companies rather than on their bottom line¹⁹⁹—and, as described next, Bidder's Edge had no particularly compelling purpose that could shield it from liability.
- **Wider purpose of plaintiff's and defendant's actions: neutral.** Bidder's Edge provided convenient access by potential buyers to a range of auction sites, and thus to a larger market than eBay alone. In so doing, it also offered eBay's virtual auctioneers a wider market for their wares by attracting customers perhaps unwilling to invest time and energy in visiting individual auction websites. Meanwhile, eBay—a pioneer in online auctioning—developed a new form of information exchange serving as the foundation upon which businesses like Bidder's Edge could rise. Permitting unchecked spidering could weaken this foundation, simultaneously frustrating all customers and providing disincentives to future entrepreneurs.
- **Defendant's available alternatives: finding for eBay.** Bidder's Edge had options for aggregating data that would have used fewer of eBay's resources than the regular spidering of eBay's website. It could have used its spidering program when queried by a customer about a particular item, rather than constantly running the program to compile a database of all items.²⁰⁰ Alternatively, Bidder's Edge could have negotiated a license with eBay, an option that it pursued but eventually abandoned.²⁰¹
- **Costs to the wider community of excluding or restricting defendant's actions: neutral.** Bidder's Edge would, as aforementioned, suffer if excluded from eBay's data—and its customers would suffer accordingly. However, eBay did license some other aggregators to use its data, demonstrating its willingness to compromise between free exchange and proprietary interest.

197 *Ibid* at 1061.

198 *Ibid* at 1062.

199 See *supra* notes 32-35 and accompanying text.

200 See *eBay*, *supra* note 124 at 1062.

201 *Ibid*.

The judge could reasonably conclude, therefore, that such compromise is key. The components of the cost-benefit analysis seem to weigh slightly in eBay's favour, but the injunction sought by eBay would create its own harms. As such, a solution more tailored to address the concerns and needs of each company would be preferable—and nuisance could provide just such a solution, in both common and civil law jurisdictions.

Remedy. A judge who found for eBay could deploy an array of possible remedies, including damages and a limited or delayed injunction. Such a combination would avoid the binary choice offered by an injunctive remedy in common law trespass, thus addressing both the “slippery slope” concerns about unchecked spidering that would flow from a refusal to grant an injunction, and worries over suppression of entrepreneurship and privatisation of the internet that would accompany a full injunction.

The judge could issue an injunction against constant spidering by Bidder's Edge, permitting spidering only in response to a customer's query. The judge could issue a delayed injunction preventing Bidder's Edge from engaging in spidering using more than a threshold amount of eBay's system capacity. The judge could award damages to eBay for lost system capacity (though calculation of such damages would be difficult).²⁰² The judge could award damages for eBay's lost advertising revenue. The possibilities are varied, and would be responsive to the facts at hand; further, they would see Bidder's Edge internalize the cost of its activities while society enjoyed the benefits.²⁰³ Such is the beauty and flexibility of nuisance—characteristics that would also facilitate its application to e-mail spam.

2. Scenario 2: Spam

E-mail has become a valuable, perhaps indispensable, tool of connectivity and information-sharing. It has simultaneously become “the single most important means of intrusion into our daily lives.”²⁰⁴ The most common form of such intrusion is spam, the familiar term for unsolicited bulk or commercial e-mail. Though anti-spam programs and other forms of protection are available to individual e-mail users, there is currently no feasible or common legal remedy. Nuisance may be able to fill the breach.

Neighbourness and abnormality. A judge hearing a successful spam-related action in nuisance would have to locate a stable, neighbourly relationship between sender and recipient. Here, the application of nuisance initially seems more tenuous: whereas the cyberspace-as-place metaphor easily lets us imagine an inconvenience by one website to another, the receipt of unwanted e-mails is less metaphorically spatial in nature. Two avenues remain, however, for recognizing spam senders and recipients as neighbours.

202 eBay did assert a quantum of damages, but only to support its claim for an injunction: *ibid* at 1063.

203 See Kam, *supra* note 138 at 452.

204 Jeremiah Kelman, “E-Nuisance: Unsolicited Bulk E-mail at the Boundaries of Common Law Property Rights” (2004-2005) 78 S Cal L Rev 363 at 363.

The first avenue, grounded in *Motherwell*, is to see e-mail as necessarily incident to the enjoyment of a home. The *Motherwell* court, drawing on numerous authorities, held that an injunction against continued telephone calls to the plaintiffs' residence was justified by "the loss of the amenities of the premises in substantial degree."²⁰⁵ This reasoning maps neatly onto the example of spam: e-mail is as important to modern households as telephones were (and remain),²⁰⁶ such that interference with e-mail could constitute a nuisance.

Under a broader version of the *Motherwell* argument, it would not matter if annoying telephone calls issued from a mobile phone as opposed to a landline—and, in an era where landlines are decreasingly common, it should not matter if annoying telephone calls are received on a mobile phone. Citing *Clerk & Lindsell on Torts*, the *Motherwell* court wrote that the injunction it was about to issue stemmed from "interference with the comfort or convenience of living according to the standards of the average man."²⁰⁷ This second formulation shows no tie to realty, focusing instead on the telephone's importance in daily *life* rather than on its importance to a *home*. Again, e-mail is arguably as important to modern lives as was the telephone when *Motherwell* was decided, such that nuisance should apply.

This first avenue—in its narrow or broad version—could justify the extension of nuisance to spam, but would not situate spam in the wider argument for nuisance's application to online interactions. A second avenue, more apropos in the civil law, would thus focus on the occupation of cyberspace by spam recipients. This avenue would return to the notion, discussed repeatedly above, that nuisance makes a neighbourhood, not *vice versa*.

Maintenance of an e-mail inbox is one way in which a person may occupy cyberspace. An inbox is one of many portals linking one individual to others through the internet, and as such it instantiates (part of) that person's online presence. The non-exclusivity of an inbox is no obstacle to this instantiation: just as a meat-space mailbox forms part of an individual's home despite that anyone can send a letter for delivery to it, an e-mail inbox forms part of an individual's occupation of cyberspace despite that anyone can send a message to it. Further (and again), nuisance law has already developed such that occupation need not be associated with physical ownership, but rather with a stable presence. Inboxes stable enough to receive a nuisance-worthy quantity of spam are stable enough to constitute occupation of cyberspace, such that spam-based nuisance is actionable and may vindicate the spam recipient's right to enjoy her online neighbourhood free from abnormal inconvenience.

205 *Supra* note 118 at 74. Similarly, Roberts J wrote in *Nor-Video* that interference with television signals constituted a nuisance because the television is "simply one of the benefits and pleasures commonly derived from domestic occupancy of property" (*supra* note 120 at 232).

206 See Kelman, *supra* note 204 at 388.

207 *Supra* note 118 at 75; AL Armitage et al, eds, *Clerk & Lindsell on Torts*, 13th ed (London: Sweet & Maxwell, 1969) at para 1396.

But, given that it is arguably normal for e-mail users to receive spam, is spam a truly abnormal inconvenience? It is equally normal for telephone users to receive unsolicited phone calls, and judges have still found a nuisance in such cases.²⁰⁸ In *Motherwell*, discussed above, the judge held that “[t]he telephone system is so much the part of the daily life of society that many look on it as a necessity;”²⁰⁹ the abnormality lay not in the departure from a common level of interference but in the *interference with what was normal*. E-mail is no less normal today than telephones were when *Motherwell* was decided in 1976 (and still are today);²¹⁰ interference by spam with e-mail is thus no less “abnormal” for its frequency.

Alternatively, given spam’s prevalence, it can be seen as akin to a pre-existing nuisance to which e-mail users become subject on entering their online neighbourhood. In both common law²¹¹ and civil law²¹² jurisdictions, prior presence is no excuse for nuisance, so spam may be no less abnormally inconvenient for its ubiquity.

Balancing costs and benefits. As with spidering above, a common law judge would balance interests to determine whether nuisance, if actionable, is established; a civilian judge might consider such factors in assessing the abnormality of the inconvenience in question. The components of this analysis are the same as those described with regard to spidering:

- **Burden on plaintiff: finding for plaintiff.** The burden imposed by spam on its recipients and the associated loss in revenue are considerable. The 2009 National Technology Readiness Survey (“NTRS”) indicates that the economic impact of deleting spam is estimated at \$21.6 billion in the United States alone.²¹³ As this figure is consistent with data from 2004, when the NTRS last addressed spam,²¹⁴ other 2004 figures may also be illuminating. At that time, every adult online received approximately 18.5 spam messages per day, suggesting a total of one trillion spam messages sent per year in the United States.²¹⁵ This heavy burden may rise as recipients try to fight spam, expending time or money on their efforts, and often deleting desired e-mails in the process.²¹⁶

208 See the discussion of *Motherwell* at *supra* note 118 and accompanying text; *Wiggins v Moskins Credit Clothing Store*, 137 F Supp 764 (ED SC 1956); *Macca v General Telephone Company of the Northwest*, 495 P2d 1193 (Or Sup Ct 1972); *Brillhardt v Ben Tipp Inc*, 297 P2d 232 (Wash Sup Ct 1956).

209 *Motherwell*, *ibid* at 75.

210 See Kelman, *supra* note 204 at 388.

211 See *Miller v Jackson*, [1977] QB 966, [1977] 3 All ER 338; Buckley, *supra* note 19 at 97-99.

212 See *Lachance c Carey Canadian Mines Ltd*, [1982] RL 362 (CS Qc); Godin, *supra* note 1 at para 45.

213 “National Technology Readiness Survey”, online: Rockbridge Associates <<http://www.rockresearch.com/index.php>>.

214 *Ibid*.

215 Rockbridge Associates, “2004 National Technology Readiness Survey”, cited in Aalberts, Poon & Thistle, *supra* note 136 at 44.

216 See Kelman, *supra* note 204 at 394.

- **Lost revenue: finding for plaintiff.** A spam injunction would impose losses on spammers: in 2004, American spammers earned approximately 0.03 cents per message, for an aggregate \$300 million in revenue.²¹⁷ This figure is significantly lower than the multi-billion dollar value of time lost in deleting spam.
- **“Free-riding” / nature of information / reputational loss / motivation: neutral.** Spammers are not “free-riding”: they expend resources and ingenuity in sending their messages to the largest possible list of recipients while avoiding anti-spam efforts. They do not “take information” *per se*, instead typically marketing (real or fraudulent) products. They inflict no reputational loss except where they mimic the identity of another person or enterprise. Their motivations are typically economic. These four components of the cost-benefit analysis are thus neutral except where the spam in question is malicious (for example, containing viruses); nuisance is flexible enough to accommodate a range of possible motivations and outcomes.
- **Defendant’s available alternatives: finding for plaintiff.** Spammers have options available to them that would use fewer of their recipients’ resources. They could, for example, include opt-out provisions in their messages, enabling recipients to indicate their wish to receive no further communications. This option, however, is still relatively resource-intensive, as opting out from the aggregate quantity of messages sent by an extraordinary variety of (often ingeniously deceptive) spammers would demand considerable time and effort of recipients.²¹⁸ Better still would be opt-in lists, whereby individuals could indicate their desire to become spam recipients or otherwise to be left alone. The low uptake of spam-advertised products by presently unwilling recipients, however, suggests that those opting in would be few in number.²¹⁹
- **Wider purpose / costs of exclusion or restriction: finding for plaintiff.** E-mail serves an important social purpose by facilitating communication and commerce.²²⁰ By contrast, most spam has “low to negative social value,” as evidenced by recipients’ low response rates.²²¹ As the quantity of spam rises—some estimate that spam messages constitute over 90 per cent of all global e-mails²²²—its summative value thus changes very little while harm to society accumulates. Restrictions or limitations on spam would therefore result in social benefits. Where spam is legitimate and socially worthwhile (consider, for example, bulk e-mails from charities soliciting aid for victims

217 Aalberts, Poon & Thistle, *supra* note 136 at 44.

218 See Kelman, *supra* note 204 at 397.

219 See *ibid* at 395-96.

220 See *ibid* at 394.

221 *Ibid* at 395-96. See also Kam, *supra* note 138 at 451.

222 Jeff Hecht, “Spam Could Be Betrayed by Hidden Patterns” 202:2707 (6 May 2009) *New Scientist* 20 at 20.

of natural disasters), the calculus changes. Nuisance, however, is flexible enough to accommodate such changes, providing “different legal outcomes for the different types of situations in which unsolicited bulk e-mail could be sent.”²²³

This analysis suggests that the plaintiff in a spam-based nuisance action would succeed.

Remedy. Where a judge finds that spam constitutes nuisance, the choice of remedies would again include an array of possible injunctions, damages, or combinations thereof. Whichever remedy (if any) is chosen in a given case, however, the availability of nuisance to private parties would force spammers to internalize the costs of their activities, perhaps inspiring them to self-regulate in order to ensure their ongoing existence.²²⁴

Public or statutory nuisance. Though an action in nuisance could lie against spammers, it may not be feasible for individual recipients to sue each spammer separately. Such situations would invite the application of public nuisance, whereby the Attorney General brings an action against the source of a nuisance both too indiscriminate to qualify as private and “materially affect[ing] the reasonable comfort and convenience of life of a class of Her Majesty’s subjects.”²²⁵ Public nuisance makes neighbours of those who inconvenience and those who are inconvenienced—whether the people in question live close together or very far apart.

Statutory nuisance could provide another route to the regulation of spam. Though not explicitly codified with nuisance in mind, the much-maligned American *CAN-SPAM Act of 2003*²²⁶ is arguably just such a nuisance statute. Recent efforts by the Canadian government to pass anti-spam legislation can be similarly classified.²²⁷ All such legislation, seen through the lens of nuisance, makes neighbourhoods of entire nations—or at least of the internet users within these nations.

3. Further Frontiers

The hypothetical scenarios above have demonstrated that the application of nuisance to online interactions is neither as tenuous nor as improbable as sceptics might

223 Kelman, *supra* note 204 at 398.

224 See Aalberts, Poon & Thistle, *supra* note 136 at 45. I do not, however, mean to downplay the potential difficulties in locating the defendant in a spam-related nuisance action, or the related possibility that spammers might simply become more adept at concealing their location rather than internalizing their costs.

225 *PYA Quarries*, *supra* note 52 at 902.

226 *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003)*, 15 USC §§ 7701-13; 18 USC § 1037 (2006).

227 Bill C-27, *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radiotelevision and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, 2nd Sess, 40th Parl, 2009 (as passed by the House of Commons 30 November 2009).

suggest. Nuisance need not, however, operate alone. The victim of malicious postings to a MySpace page or Facebook wall could find recourse in nuisance, but could also seek to resolve such difficulties through enforcement of the User Agreements to which all MySpace and Facebook clients agree. These Agreements, however, operate as between the client and the website operator, whereas nuisance would enable the victims themselves to seek redress. Similarly, the operator of a hacked website or internet service would receive no personal compensation if the hacker were prosecuted under the *Criminal Code*,²²⁸ which recognizes only the accused party and the state. The victim operator could therefore bring an action in nuisance—perhaps in addition to others asserting civil claims—in order to obtain such compensation.²²⁹

CONCLUSIONS: BEYOND GEOGRAPHY

The analysis of nuisance's applicability to online interactions has yielded several important lessons. First, it has demonstrated nuisance's flexibility in both shaping communities (and the relationships between community members) and responding to technological change. If nuisance was able to adapt to the profound technological and social changes of the Industrial Revolution, there is no reason why it cannot adapt again to the internet era.

Additionally, this analysis has shown the elasticity of the judicial notions of neighbourhood and community. Both have changed with technology; both have been liberated from their originally geographic ties. Two consequences follow. First, these developments do not justify the legal autonomy of any given neighbourhood or community. Neighbourhoods and communities may have their own internal norms, perhaps enforceable in a closed system, but once the "real world" gains access then its laws must follow. Second, if neighbours are no longer simply those who live near us, and if the scope of those whom we may "annoy" at "normal" levels is greatly broadened, we must ask why we were at any point permitted to annoy those who were close to us either more or less than those who were far away.

Perhaps most strikingly, however, this analysis has demonstrated the persistence of the cyberspace-as-place metaphor. Courts have adopted the metaphor, and the result has dramatically affected their perception of online interactions. However, "[c]ourts must ... understand that metaphor is no substitute for legal analysis."²³⁰ We cannot replace the metaphor because it is too deeply ingrained—but we can reconsider its implications.²³¹

228 *Criminal Code*, RSC 1985, c C-46, ss 342(1), 430.

229 I recognize that such a claim might begin to seem more like a battery or defamation action than a suit in nuisance; I maintain, however, that the more inflexible components and remedies in a battery or defamation claim reinforce the notion that nuisance is the tort of choice.

230 Lemley, *supra* note 6 at 542.

231 See *ibid* at 526; Hunter, *supra* note 84 at 515-18.

One such implication is that it is tempting—though unhelpful and impractical—to view the internet as a separate jurisdiction. Another is that we may sometimes fail to ask objectively “whether the particular activity under review takes on a different complexion when it occurs over the Internet as opposed to other contexts”²³² because we can only conceive of the activity as taking place “elsewhere.” Further, we may blind ourselves to the potential application of non-spatial (that is, non-property) law to internet-based interactions. Conversely, however, thinking about the internet in spatial terms does allow us to apply property law creatively to online interactions, and “provides us with a useful tool for separating the intellectual property interest from the property interest” in the code on which the internet runs.²³³

How we apply laws to cyberspace “will be crucial in determining what sorts of communities thrive in cyberspace and what sorts of communities do not.”²³⁴ If we continue to perceive virtual communities as (largely empty and available) spaces, and if we continue using trespass and other exclusive proprietary measures to parcel off elements of cyberspace, we risk undermining the public nature that has made the internet such a successful and useful tool.²³⁵ By contrast, if we do not provide virtual communities with means to define their boundaries, these communities may cease to exist.²³⁶ Both outcomes would be unfortunate, as the internet offers such intense potential to link individuals with common purpose. It is for this reason that nuisance is an appropriate tool to regulate interactions in cyberspace: its insistence on balancing interests rather than seeking absolutist outcomes enables us to consider all factors in play, including the need to retain the internet as a venue for not only convenient communications and entertaining diversion but also productive collaboration across real and virtual communities.

For what is certain is that—despite worries about those in virtual communities becoming isolated from their flesh-and-blood peers—real and virtual communities are increasingly interacting with one another.²³⁷ Students chat online with each other both in and out of class; terrorists hatch internet-based plots to cause physical damage; microcredit corporations use the World Wide Web to administer donations and loans. The way that we foster, manage, and police these communities will thus shape both meatspace and cyberspace in the years ahead.²³⁸ Nuisance may be just one tool, but it merits our attention and our consideration. Our neighbours—virtual and real, present and future—will thank us for our efforts.

232 Keller, *supra* note 89 at 1572.

233 Fairfield, *supra* note 83 at 1102.

234 HLR, “Law of Cyberspace”, *supra* note 80 at 1587.

235 See Hunter, *supra* note 84.

236 See HLR, “Law of Cyberspace”, *supra* note 80 at 1602.

237 See F Gregory Lastowka & Dan Hunter, “The Laws of the Virtual Worlds” (2004) 92 Cal L Rev 1 at 10.

238 See Hughes, *supra* note 7 at 364, 373-93.