Not fudging nudges:
What Internet law can teach regulatory scholarship

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Internet Law Case Study:

Private Regulation and Enforcement in the EU from the citizen's perspective

1. Introduction: Context

The Internet is an interactive communications medium based on a network of networks (about 50,000 Autonomous Systems) of global reach. Because binary digital code can be used to transport and assemble complex artefacts via the Internet Protocol (IP – after which the Internet is named), is can be considered the 'Medium of Media' – many formerly separate communications media are converging on the Internet, including newspapers, television and radio, text-based information such as books and journals, photography. Because the medium is interactive, it has increasingly been used for business- and consumer electronic commerce (e-commerce) with huge implications for governance (Cowhey and Aronson 2017). It is the largest repository of human knowledge and information ever assembled (OECD 2017). Over 30 trillion World Wide Web ('web') pages were indexed by Google's search engine web crawler in 2015.

Half of the world's population accesses the Internet as of 2017, with a further quarter able to access via mobile telephone networks. Half of the world's ten largest public companies by capitalisation are computer technology, Internet-based advertising, media and e-commerce conglomerates: Google (trading as Alphabet Inc.), Apple, Facebook, Amazon and Microsoft. These are known as the GAFAM companies. Note that only Apple is in the global top twenty corporations by revenues, with two telecoms access providers in the top thirty (AT&T and Verizon). Note that these high valuations reflect both better growth prospects in their sectors and a superior regulatory environment for these Internet companies.

While the move into virtual space itself has some distance to go, with the OECD showing only 20% of companies even in the developed world actually sell to the public online (OECD 2017), it is also the case that Internet companies have very high profit margins driven in part by their avoidance of high sales taxes, corporate taxes and transfer pricing, as well as merger activity. In 2017, the European Commission found all these companies guilty of anticompetitive conduct. It found Apple in Ireland, and Amazon in Luxembourg, had received illegal state aid of respectively €13billion and €1.5billion. It found Google had abused its dominance through its search business, imposing a €2.3billion fine. It also found Facebook had flagrantly breached the terms of its merger with WhatsApp in 2014, with the total fine awaited. Microsoft had been found guilty of abusing its dominance three times since 2007, fined a total of €2.2billion. This total of €19billion fines and counting is a record as are the individual instances of fines. These same companies made 436 acquisitions worth a total $131billion in the decade to June 2017 (EC 2017).

The size and scale of their operations makes their regulation more difficult than the equivalents in other industries – for instance the infamous 'Seven Sisters' energy companies whose regulation inspired both energy and, to some extent, environmental law (Sampson 1973). Such regulation between states and firms has been termed 'para-diplomacy' (Ducachek 1984, Stopford and Strange 1991), and it is constantly engaged in by the GAFAM group.

The companies that provide most of the Internet's most popular sites can be divided into two types: Internet service providers (ISPs) such as Facebook and Google, and Internet access providers (IAPs) which are fixed and mobile telecommunications operators (and WiFi access providers). While much

regulatory attention is given to ISPs, which encompasses virtually all Internet companies, the latter IAP category is critical for Internet law. Note that telecoms companies have physical assets in the networks they provide to customers within each sovereign nation's jurisdiction. ISPs, by contrast, may not even have an office in the nation whose citizens they serve. An extreme example of this type of 'footloose' multinational is WhatsApp, the free messaging application which has over a billion users, yet whose offices are found in only one nation, and whose regulation depends on locating the parent (Facebook) company's executives. Though WhatsApp is encrypted, technical means are available for IAPs to block service at the command of government or courts.

This short chapter can only set out the directions in which regulatory research should lead to examine these rather fundamental issues It does so by considering the case study of intermediary liability, in which private enforcement of law is severely challenged by the Scylla and Charybdis of privacy and free speech rights. Networks which depart from neutrality to influence individual Internet users' speech rights (notably the right to receive information free of censorship) can only do so having already invaded their privacy rights in ascertaining how those users access the Internet. That governments choose to co-conspire with the access networks to invade both privacy and speech rights of users provides not the legitimacy of access network behaviour but the illegitimacy of government conspiracy with those access networks to undermine user autonomy.

Section 2 explains the involvement of private actors in Internet regulation, notably through co-regulation. The typology of co-regulation may be very familiar to some readers, who may proceed to Section 3. Co-regulation is the dominant legal arrangement for the Internet in Europe, and I explore in some depth the implications of co-regulation by corporations such as Google in regulating privacy law in Europe. In Section 4, I explain that digital information policy is critically concerned with relationships between existing government-industry actors and 'prosumer' groups, whose role in production, distribution and consumption is growing rapidly, and whose motivations and activism are often non-monetary, requiring a more sophisticated interdisciplinary method for assessing contributions, motivations and sustainability of the 'prosumption economy', the growth of the virtual polity and social communities online, and a new prosumer law and policy to govern the regulation of the digital information ecology. This calls for a new form of consumer and citizen protection, which I term 'prosumer law'. I exaplain its application in social networknig regulation to conclude the section. In the concluding Section 5, I eargue that it is a mark of Internet regulation's specialisation in Europe, and mainstream regulation and competition law's failure to fully absorb the insights of that scholarship, that in 2017 the debate surrounding nudges and privacy affecting competition outcomes has yet to reinvent the 1990s wheel of nudge limitations. Learning their Internet regulatory history can help competition and regulation scholars herald and shape the arrival of prosumer law, not repeat the endless farcical lessons of the 1990s Microsoft case.

2. Setting the stage for the involvement of private actors

I use the term 'Internet regulation' to refer to the range of public-private interactions covering substantive national and regional-plurilateral rules and practices governing specific Internet topics[1]. Regulation as a rules-based field existing within a wider policy discussion of governance is the approach outlined for legal scholars[2]. Governance is further discussed in much of the political science literature in terms of networks and informal rule-making institutions such as multinational corporations and - particularly relevant for Internet governance - standard-setting organisations[3]. Governance as a concept explains the networked modes of regulating, by the governments concerned, by market actors in collaboration, by civil society stakeholders[4]. The position adopted in the United Nations Working Group on Internet Governance[5] distinguished direct Internet governance mechanisms from those that more properly are placed within telecommunications or media law. The discussion of co-regulation is unsurprisingly also associated with the rise of discussions of 'governance' as distinct from 'government', which also arose in the late 1980s in political science literature, though earlier in organisational and business studies. Varying definitions of governance have been adopted by practitioners and academics, falling into what might be termed 'minimalist' and 'maximalist' areas[6].

Liability for ISPs more broadly is limited by rules that at least in Europe and North America were set in the late 1990s. These rules allow ISPs to receive 'Notice and Take Down' (NTD), where they host content for third parties – i.e. citizens and companies. If the content offends against the ISP's Terms of Service (ToS), breaches copyright, or is criminally illegal (for instance, in some jurisdictions, promotes

hatred, defames government leaders, incites terrorism), and Notice is given to the ISP, it then removes the content subject to appeal by its owner.

This distinction between access and service providers is critical to understanding Internet law. For example, 'open Internet' (or network neutrality) laws only apply to access providers, as does much telecommunications law and regulation. Service providers simply could not operate without the cooperation of access providers, and governments can and do command these access providers to cut off service to individual companies, sectors and even the entire Internet in extreme cases. The latter has been the case during controversial elections, and for the entire country of Cuba and – at times- Iran and China. The regulation of Internet access therefore raises profound questions of sovereignty and censorship of communications.

The term 'ISP' has different meanings in different contexts, though it is used much more often than more legally specific terms. In Europe, a provider of internet access is an Electronic Communications Network Provider (ECNP), whereas a provider of content and services is termed an Information Society Service Provider (ISSP)[7] or an Audiovisual Media Services (AVMS) provider where it is the editorial controller of video.[8] Under European law:

> 'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services.[9]

The definition explicitly excludes ISSPs 'which do not consist wholly or mainly in the conveyance of signals on electronic communications networks'. In the US, the access provider is an Internet Access Provider (IAP), and the service provider an Online Service Provider (OSP) under the Digital Millennium Copyright Act 1998 (DMCA),[10] though a further distinction lies between access providers classified under Title I and Title II of the Telecommunications Act 1934.[11] In Section 512 an OSP is defined as 'an entity offering transmission, routing, or providing connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received' or 'a provider of online services or network access, or the operator of facilities thereof.'[12] This broad definition includes network services companies such as access providers, search engines, bulletin board system operators, and even auction web sites. It should be noted that most (if not all) access providers are also service providers, and in fact the largest IAPs are also amongst the largest service providers.

Service providers, whose connection with citizens must occur via access providers, are regulated by the entire gamut of Internet liability rules, which are explored in the next section. Note that almost all access providers are also service providers – services such as hosting files and providing email service to citizens. Where an IAP deliberately blocks WhatsApp or other ISPs at its own command, that is a breach of net neutrality rules, subject to limited exceptions in law. However, these rules are of recent origin, vaguely drafted and are poorly enforced, or their implementation is neglected, by National Regulatory Agencies (NRAs) in most cases. Examples include the recent decisions of the ACM, the NRA for the Netherlands (ACM 2017).

Co-Regulation and the Internet

It is commonly agreed is that the modern state has faced twin demands for less and better designed regulation[13]. This argued for an industry-led response to the complexity inherent in many modern regulated industries, notably the complexity associated with globalisation of businesses and the rise and ubiquity of modern technology, notably nano-, bio-medical, information and communications technologies. These technologies led to spectacular growth in financial and other markets beyond the reach of individual national regulators, in the period since 1980. This trait towards co-regulation does however suggest a rolling back from the spectacular neo-liberal drive towards self-regulation[14], with an involvement of public interest groups as well as government, to create greater representation in the co-regulatory bodies and therefore it is hoped greater transparency, internal democracy and respect for fundamental rights. However, wider re-regulatory optimism may be misplaced, as banking reform has been far more minimal than predicted at the depth of the Great Recession in early 2009[15].

Ayres and Braithwaite stated: "Practical people who are concerned with outcomes seek to understand the intricacies of interplays between state regulation and private orderings... administrative and regulatory practice is in a state of flux in which responsive regulatory innovations are politically feasible."[16] Responsive regulation reflects a more complex dynamic interaction of state and market, a break with more stable previous arrangements[17]. Teubner viewed European conceptions of law as "moving away from the idea of direct societal guidance through a politically instrumentalised law... Instead, reflexive law tends to rely on procedural norms that regulate processes, organisation, and the distribution of rights and competencies"[18]. This applies to other globalising phenomena than the Internet, for instance financial and environmental law[19], where negative externalities are highlighted for public concern. Price and Verhulst assert the limits of both government and private action in this sphere, and assert the interdependence of both – there is little purity in self-regulation without at least a lurking government threat to intervene where market actors prove unable to agree. They draw on empirical studies of advertising and newspaper regulation, demonstrating that in the media, government preference in liberal democracies is for co-regulation[20].

The Internet developer community has cherished self-regulation based on the Codes of Conduct[21] and Terms of Use that early Internet users employed in the scientific institutions that first developed the protocols and social standards. In the Information Society, governments have broadly accepted that a more flexible and innovation-friendly model of regulation is required[22], particularly in view of the rapid growth, complex inter-relationships and dynamic changes taking place in Internet and games development. Though this amounted to an illusory "article of faith" for the libertarian Internet users at the start of commercial Internet use[23], for governments it was a pragmatic acceptance that the models used for regulation should be as flexible as possible, to permit significantly greater user innovation and freedom than with other types of communications (notably telecoms and broadcasting). This includes using both hard law and much softer forms of regulation[24].

This self-regulatory paradigm is increasingly challenged by the growth and evolution of the Internet. The forms of technological, social and economic innovation are posing new challenges to regulators, especially in view of the ubiquitous use of broadband connections by domestic consumers in developed nations, creating new security risks, rights and responsibilities for users. Whereas in 1997, when the self-regulatory paradigm was being formed[25], there were fewer than a million European households connected to the Internet on narrowband speeds, in 2017, mobile and fixed Internet use is ubiquitous on broadband connections. The cycle of regulation lags the apparent pattern of adoption, which has been well recognised in for instance the Gartner 'hype cycle' that explains how products are released, their benefits exaggerated resulting in a 'trough of disillusionment', before a later more robust version of the product appears, attracting a more mature mass market, at which point the 'slope of enlightenment' gives way to the 'plateau of improved productivity'[26].

The baseline for policymakers deciding on new forms of regulation was described by Samuelson as five key policy challenges:

> "1. whether they can apply or adapt existing laws and policies to the regulation of Internet activities, or whether new laws or policies are needed to regulate Internet conduct;
>
> 2. how to formulate a reasonable and proportional response when new regulation is needed;
>
> 3. how to craft laws that will be flexible enough to adapt to rapidly changing circumstances;
>
> 4. how to preserve fundamental human values in the face of economic or technological pressures tending to undermine them; and
>
> 5. how to coordinate with other nations in Internet law and policy making so that there is a consistent legal environment on a global basis."[27]

The fourth is a vital addition to the 1997 Clinton-Gore 'Global Framework for Electronic Commerce', which had four policy goals, predictability, minimalism, consistency, and simplicity[28]. By this extra human rights factor, Samuelson moves towards the European Information Society paradigm and a balance between rights and responsibilities. We can identify various areas in which human rights can be maintained using market-based solutions, and there are bright lines of human rights protection that should not be traded for economic benefit. One such might be thought to be the two-sided coin that is

privacy and freedom of expression. Such rights are backed by constitutions from the US and French Bills of Rights forwards to the European Charter of Fundamental Rights[29]. The Internet environment is a powerful technology for society and individuals to express their rights, as well as an environment in which such rights can be abused and curtailed due to legal, economic, technological, security and other incentives for powerful actors. Consider three shades of sectoral regulatory regime.

1. *'Heavy' regulation*: a system imposing uniformly high costs such as the broadcast regime.
2. *Light-touch regulation:* in which companies compete freely from a liberalised low cost base.
3. *No specific regulation*: general civil and criminal law.

The latter has been the situation for Internet content since its inception, despite a variety of new laws. The application of criminal law in specific European cases has resulted in unintended consequences and content provider losses: consider, for instance, the 1998 German conviction of former Compuserve general manager Felix Somm[30], or the *LICRA v. Yahoo!* case[31]. There cannot be a 'no regulation' option without reference to national law.

A Typology of (Internet) Regulation

Huyse and Parmentier distinguish between the following state/self-regulatory relationships focussing on the role of states: Subcontracting in which the state limits its involvement to setting formal conditions for rule making, but leaving it up to parties to shape the content; Concerted action in which the state not only sets the formal, but also the substantive conditions for rule making by one or more parties; Incorporation in which existing but non-official norms become part of the legislative order by insertion into statutes[32]. Black states that a taxonomy of self-regulation runs from:

- "mandated private regulation, in which a collective group, an industry or profession for example is required or designated by the government to formulate and enforce norms within a framework defined by the government, usually in broad terms[33];
- sanctioned private regulation, in which the collective group itself formulates the regulation which is then subjected to government approval[34],
- coerced private regulation, in which the industry itself formulates and imposes regulation but in response to threats [of]... statutory regulation, and
- voluntary private regulation, where there is no active state involvement direct or indirect..."[35]

Cafaggi states in regard to sanctioned regulation: "An intermediate hypothesis between delegated private regulation and ex post recognized private regulation is that in which private regulation, produced by the private or self-regulator, has to be approved by a public authority to become effective. Unlike ex post recognition, where private regulation operates in any case in the private sphere, here regulation is subject to approval in order to become effective on regulatees; and, unlike delegation, in such a case no ex ante principles or guidelines are provided."[36] In other words, the decision on recognition is binary and incapable of negotiation, simply a take-it-or-leave-it option for government.

This would apply to many Internet standards, for instance the Institute of Electrical and Electronic Engineers (IEEE) 802.11x standards for WiFi which were finally approved in Europe but made in the US, whereas a separate European standards process had produced an incompatible solution[37]. By accepting the US standard, European governments knew that they were signing the death warrant of their own standard. In the non-standards environment, such life-or-death decisions are less frequent, and Cafaggi's case is less likely to apply, as the EC and Member States have more flexibility, as for instance in the reshaping of content regulators. Cafaggi points out that the recognition is of the standard, not of the process or the regulator, which leaves much greater discretion for both sides. Moreover, he indicates that *Wouters* may prove the basis for the ECJ to decide more minutely the application of competition law to self-regulation[38].

A Resolution was passed in 2007 on the basis of a report by MEP Medina Ortega Manuel, which chastises the Commission for its over-use of soft law and self-regulation. It states:

> "whereas Article 211 of the EC Treaty provides that "[i]n order to ensure the proper functioning and development of the common market, the Commission shall formulate recommendations ...

on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary"[39].

Resolution notes that both Parliament and Council cannot use such 'soft law' procedures, and this can be seen as a constitutional shot across the Commission's bows, particularly in the area of copyright and the Internet, the specific area in which its use of soft law was criticized (Recital U):

> "the Commission is putting particular policy options into effect by soft-law means" and it goes on to make clear "the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality under Article 5 of the EC Treaty, and may result in the Commission's acting ultra vires."

It claims "a public perception of a 'superbureaucracy'...willing to reach accommodations with powerful lobbies in which the negotiations are neither transparent nor comprehensible to citizens", concluding:

> "the better-legislation agenda should not be subverted in order to allow the Community executive effectively to legislate by means of soft-law instruments, thereby potentially undermining the Community legal order, avoiding the involvement of the democratically-elected Parliament and legal review by the Court of Justice and depriving citizens of legal remedies."

The dangers of soft law and self-regulation, to properly reflect citizen interests, could not be clearer.

The European Economic and Social Committee has also criticized the use of soft law, and set up an online observatory of such instruments which was launched in 2008[40]. In its 2008 hearing, Senden specifically asked about "IAs carried out by the Commission most of which did not mention the way in which alternative instruments had been envisaged"[41], the exact question this book examines.

Specifically, the issue is that IA must open up the 'no change' Option Zero to consider which types of self-organsation, self-regulation or co-regulation might be appropriate short of full regulatory harmonisation. Cafaggi asked about the distinction between self- and co-regulation, in particular under competition law and saw accountability of self-regulation to "include such aspects as transparency, accountability, duty to give reasons (this however should indeed also apply to co-regulation), and competition issues.[42] The options for accountability would include governance separation between service provider and rule-maker, competition between a plurality of self-regulators, and increasing legal liability for self-regulators.

Defining Co-Regulation in Internet Practice

Within the European context, co-regulation is described by van Schooten and Verschuuren as an element of 'non state law' backed by "some government involvement"[43]. They explain that since Hart's *The Concept of Law*[44], it has been recognised that what is of interest in regulation is generally secondary rules rather than primary legislation, and that what is of interest in this secondary rule-making is how much involvement government actually devolves to private actors[45]. The variety of rules and rule-making in Internet governance describes a law that is about compliance and negotiation rather than a monopoly of force, reflecting Hart's insight. They see co-regulation as one of the emerging forms of smart regulation, alongside certification and audited standard making as an interim step between state-provided regulatory agency action and more self-regulatory forms. OECD in 2006 tried to detail the uses of co-regulation[46].

Co-regulation is a relatively novel phenomenon, given that state regulation and self-regulation are as old as markets. Co-regulation has been discussed since the late 1980s, in the Australian context as a hybrid of state and self-regulation[47]. By the mid-1990s, it had moved from a proposed technique to a detailed advertising industry rule-making procedure, with the replacement of the industry self-regulatory body by a co-regulatory scheme[48]. This was undertaken by the Australian Competition and Consumer Commission (ACCC) within its powers to exempt collective agreements under the Trades Practices Act 1974[49]. It is explained that: "Co-regulation is self-regulation in the context of other, external regulation or monitoring—for example, legislative and governmental regulation. Under the co-regulation model, alcohol producers are committed to active and effective self-regulation and, at the same time, are also monitored by independent bodies and/or are expected to comply with codes and regulations established and enforced by outside agencies and authorities."[50] The key issue here is that federal government and

competition agency were involved in making sure the new codes would be negotiated with their involvement, as well as that of the formal federal consumer representation body. The Alcohol Beverages Advertising Code was developed in conjunction with the federal government, the Australian Consumers Association and the ACCC[51]. There is an independent Complaints Adjudication Panel for the Code[52], and a federal bureaucrat sits on the management committee. Recent criticisms notwithstanding which describe the system as 'self-regulation' (note that 2 of 105 complaints were upheld in 2005), the Code has been renewed under the same process until 30 June 2011[53]. At its renewal, it was compared with the UK self-regulatory Portman Code founded in 1989, which was favourably cited as an example of independent self-regulation, praised and cited for its effectiveness by the UK government Better Regulation Executive[54].

The term 'co-regulation' encompasses a range of different regulatory phenomena, which have in common the fact that the regulatory regime is made up of a complex interaction of general legislation and a self-regulatory body. The varying interests of actors result in different incentives to cooperate or attempt unilateral actions at the various points of the value chain. Without regulation responsive to both the market and the need for constitutional protection of freedom of expression and protection of minors at national levels, Internet co- and self-regulatory measures cannot be sufficiently responsive to economic and cultural environments to be self-sustaining. It has enriched conceptions of 'soft law' or 'governance' in the literature in the past ten years, but like those umbrella terms, refers to forms of hybrid regulation that do not meet the administrative and statute-based legitimacy of regulation, yet clearly perform some elements of public policy such that it cannot be ascribed to self-regulation, in the absence of the nation-state or European law[55]. It is often identified with the rise of the 'new governance' in the late 1990s in environmental and financial regulation, yet its growth can also be traced to the birth of Information Society policy in the mid-1990s. Co-regulation constitutes multiple stakeholders, and this inclusiveness results in greater legitimacy claims. The state, and stakeholder groups including consumers, are stated to explicitly form part of the institutional setting for regulation. However, direct government involvement including sanctioning powers may result in the gains of reflexive regulation – speed of response, dynamism, international cooperation between ISPs and others – being lost. It is clearly a finely balanced concept. The growing gulf between states' preference for regulatory and self-regulatory solutions, and citizens' preferences for greater control if not ownership of vital regulated industries, had led to a crisis of legitimacy. The term 'governance' began to be used widely in political science literature in the 1990s, to describe intermediate forms of self-regulation in the post-Cold War globalization literature[56]. The EC 2001 White Paper intended to:

> "adopt new forms of governance that bring the Union closer to European citizens, make it more effective, reinforce democracy in Europe and consolidate the legitimacy of the institutions. Moreover, the European Union must contribute to the debate on world governance and play an important role in improving the operation of international institutions."[57]

The European adventure in co-regulation in Internet and wider consumer protection legislation, as well as standards setting, was made detailed in 2002[58], and became official policy in December 2003, with the Inter-Institutional Agreement on Better Law-Making[59] which defines co-regulation:

> 18. Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations). This mechanism may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned.
>
> 20. In the context defined by the basic legislative act, the parties affected by that act may conclude voluntary agreements for the purpose of determining practical arrangements... the Commission will verify whether or not those draft agreements comply with Community law (and, in particular, with the basic legislative act).

Paragraph 21 sets out in some detail the types of monitoring needed: "The competent legislative authority will define in the act the relevant measures to be taken in order to follow up its application."

This suggests substantial work programmes on compliance and adaptation of the legislative act in the case of co-regulation, an area in which the Commission monitors co-regulation. The annual report on Better Lawmaking focuses on legislative acts and the relationship with national lawmakers[60]. The Agreement goes on to define self-regulation in Paragraphs 22-23.

Self-regulation is viewed as making standards and practices across industry that the Commission, or a Member State, views agnostically in legislative terms (or pre-legislative, given the focus on areas that are emerging and which are not yet regulated), but which intends to monitor to analyze the extent to which the self-regulation approaches the standards of 'representativeness' which co-regulation is meant to demonstrate as a best practice. The emphasis on emerging areas that have not yet been subject to regulation does suggest to the cynical commentator that the European spider will eventually trap the self-regulatory fly, but the Commission's insistence that this is not an inevitable journey is backed by its actions in such areas as technical standard setting. The Commission also confirms that forms of regulation short of state regulation: "will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States."

Academic authors have always been somewhat cynical about the legitimacy and representation in co-regulation[61], especially as regards industry Codes of Conduct that are supported by government agencies, but Collins maintains that the 'Social Dialogue' has helped create "labour law [as] the field in which co-regulation has been most successful"[62], explaining its condition for success as that "self-regulation has only been the credible threat of imminent action by the [European] Council."[63] Moreover, the Court of First Instance has established that co-regulation is only legitimate where the "representativeness" of relevant stakeholders is well displayed[64]. However, supervision and judicial review is still a necessary fudge in co-regulatory decision-making.

Howells asked: "who will decide what is so unimportant that it can be decided by co-regulation?"[65] This is particularly the case where human rights law is increasingly being applied commercially in various forms. It is self-evident that the more supervision and review resembles that in full state regulation, the less the benefits of flexibility and industry participation. Kleinstuber explained

> "If the State and the private regulators co-operate in joint institutions, this is called co-regulation. If this type of self-regulation is structured by the State but the State is not involved the appropriate term is regulated self-regulation."[66]

This follows the nomenclature used by Hoffman-Riem in his classic study of broadcasting[67]. It has been expanded on by Latzer[68]. The UK Better Regulation Executive has itself described co-regulation in detail, and has broken down elements short of 'classic' regulation that can enable regulatory compliance:

1. taking no action
2. providing information or guidance
3. using market based instruments
4. co-regulation
5. self-regulation
6. social partner agreements
7. issuing recommendations
8. using New Approach Directives (which permits compliance via standards) and flexible Directives (its' example being the revised Audio Visual Media Services Directive, an example explored later in this chapter) which permit wide discretion in the manner and form of implementation[69].

They claim the advantage of co-regulation "is that it provides a degree of certainty due to the backstop legal provisions whilst also encouraging innovation by allowing a flexible approach to implementation" and claim that "Co-regulatory initiatives are more likely to be successful as those being regulated have scope to use their experience to design and implement their own solutions."[70] The case studies in the book suggest that success is mixed and many factors can jeopardise its success.

The Commission in 2005 went on to analyze co-regulation in terms of 'better regulation'[71]. This was immediately made part of internal EC practice in the IA Guidelines[72] which the Commission must follow before bringing forward a new legislative or policy proposal. Ofcom's own managerial and regulatory analysis of co- and self-regulation conducted in 2008 arrives at similar conclusions[73]. Verhulst and Latzer provide excellent analysis of the types of co-regulation beginning to develop and their institutional path dependency[74]. As Latzer explained[75], SROs form as single issue bodies, often crisis-driven. We should therefore first ask whether they are an emergency solution or an ideal solution, and assume the former. He notes that there are different incentives for self-regulation, and economic as well as political analysis is needed, together with attention to the loss of constitutional guarantees[76]. He identifies five types of regulation short of statutory agency-led regulation:

1. Co-regulation,
2. State-supported self-regulation,
3. Collective industry self-regulation,
4. Single company self-organisation,
5. Self-help/restriction by users including rankings to impose restrictions on access to content.

He notes the direction of travel: both bottom-up transformations from self- into co-regulatory bodies, and and top-down delegation from regulation into co- but not self-regulation. He also notes examples of 'zombie' self-regulation - where no-one will declare the patient dead or switch off the life support machine. In a report for the EC, I described these as 'Potemkin' self-regulators[77], where there was a website and the appearance of a regulator but few resources, no physical address containing offices and little or no apparent adjudication and enforcement. We should note the gains and losses in life cycle of regulation – will self-regulation ossify if it stays true to its principles of self-regulation? If ossification would result, does it matter other than to self-regulatory purists if a mature self-regulator is then made into a co-regulator? Price and Verhulst[78] contained significant focus on AOL and internal self-organisation. They identify increasing realism in recognising competition problems, emerging monopolies and dominance. Baird suggested that the 'bottom-up' approach from national regulation does not negate the vital role of government – in fact she suggests that they are clearly the leading policy player[79]. Verhulst focuses on the scope as well as function of self-regulation, and a grid pattern forming of national, regional and global responses.

Co-regulation is a little-described or understood technique in US literature and regulatory policy, and my approach is based on European literature and policy. The concept of co-regulation is alien to the binary approach to regulation of much US law and economics scholarship,[80] though governance scholars from political science see the many shades of grey I have described. Joskow and Noll state:

> "regulation must accord rights of participation and policy review to anyone substantially affected by its policies, which invites strategies and tactics that, at best, retard the competitive process and, with depressing frequency, invite cartelization."[81]

Competition law is one lens through which to view self-regulation, and therefore co-regulation can be seen to obscure the antitrust case against cartels, and it is clearly the case that the US has historically taken antitrust more seriously than its fast-improving students in the European Union[82]. Newman and Bach state:

> "In the U.S., the government induces self-regulation largely through the threat of stringent formal rules and costly litigation should industry fail to deliver socially desired outcomes. Industry thus views self-regulation as a pre-emptive effort to avoid government involvement. The relationship between the public and private sector is spotty, formal and frequently adversarial. We label the ideal-typical U.S. model legalistic self-regulation."[83]

By contrast to this legalistic self-regulation, they claim that: "In Europe, public sector representatives meet with industry and agree on a joint course of action. Here, private and public sectors view each other as partners in an often-informal self-regulatory process. Coordinated self-regulation is the term we use to describe the European ideal-typical model." They explain that in the EU:

> "the public sector is generally accepted as a participant in the self-regulatory process, albeit mostly as a facilitator. The EC will make use of its control over R&D funds to sponsor self-

> regulatory initiatives and to foster the growth of transnational industry networks. The executive branch is also likely to play a role in the creation of intermediary institutions should business alone fail. It will thus play a catalytic role in the process of self-regulation."[84]

They identify the mid-way between 'market regulation' (what Latzer calls self-organization) and regulation in 'carrot-and-stick': public involvement in self-regulation:

> "has greater carrot capacity if it can offer financial and logistical incentives to bring about sustained participation of organized private interests in the regulatory process. Toward the high end of a scale is its ability to formally delegate regulatory authority to organized private interests and/or to make industry rules enforceable in the courts, an arrangement ... aptly called "private interest government."[85]

This 'private interest government' is a model readily observable in Internet regulation. They explain the variety of regulation as well as co-regulation: "Just as carrot capacity should not be thought of as a binary variable, stick capacity takes on multiple forms with varying degrees of intensity. For our immediate purpose, stick capacity can be considered higher the easier it is for the public sector to regulate an industry without regard for organized private interests ... Whereas the public sector in the U.S. appears better endowed with stick capacity than with carrot capacity, the opposite is true for Europe."[86]

The carrot capacity for the EC has made it pragmatic to fund standards and *ex ante* support self-regulation in cases where the US would simply *ex post* regulate via competition law:

> "government induces self-regulation largely through the threat of stringent formal rules and costly litigation should industry fail to deliver socially desired outcomes. Industry thus views self-regulation as a pre-emptive effort to avoid government involvement. The relationship between the public and private sector is spotty, formal and frequently adversarial. We label the ideal-typical U.S. model legalistic self-regulation."

This leads to substantial US-European differences of approach, which may create "transatlantic competition of standardization philosophies...[in] consumer protection systems." Data privacy and content filtering have been two such arenas in the 2000s, as has domain name governance[87].

Examples of co-regulation now abound in this field, notably in Internet security but also in child safety and filtering, as well as standard setting and social network privacy regulation. It is clear that both soft law and soft enforcement play a vital regulatory role which legal positivists would be in danger of overlooking or minimizing by a failure to consider the law in its regulatory context.

3. Legal arrangement and foundation

Co-regulation is the dominant legal arrangement for the Internet in Europe. The participation of private parties, such as the social partners or the standardisation bodies, as (co-) decision-makers in the administrative decision-making process is a prevalent phenomenon. Private rule-making has become an important regulatory mechanism in Internet law from the outset. It also applies EU administrative governance in sectors such as financial markets, food regulation, consumer protection, product safety, data protection, environmental policy. The Commission's new Better Regulation package issued in May 19, 2015 encourages the use of 'both regulatory and well-designed non- regulatory means' .

While the involvement of private parties in EU administrative governance has the clear advantage of delivering policies which are based on the expertise of the regulatees, private-party rule-making raises significant concerns in terms of its legitimacy. The EU response has been to effectively ignore the inconvenience that Internet self- or co-regulation is private censorship of free speech.

The system of co-regulation via European standardisation can be examined from the perspectives of different sectors of the EU law. We can also address the wide range of concerns raised by the phenomenon of private-party rule making of which European standardisation is a representative example.

ISPs have been acting as the fabled 'three wise monkeys' in relation to Internet content liability since the dawn of the commercial Internet[88]. These intermediaries are not subject to liability for their European customers' content under the Electronic Commerce Directive (EC/2000/31) so long as they have no actual or constructive knowledge of that content: if they 'hear no evil, see no evil and speak no evil'[89].

Regulators have also been acting as 'three wise monkeys' in ignoring evidence that net neutrality is being compromised by access providers (IAPs) decisions to block, throttle and otherwise censor users' access to content. Forms of private censorship by intermediaries have been increasing throughout the century even as the law continues to declare those intermediaries (mainly IAPs, but increasingly also video hosting companies such as YouTube, social networks such as Facebook, and search providers such as Google) to be 'Three Wise Monkeys'. The liability question may be paraphrased: will the monkeys continue to be wise conduits for speech, or will governments make them open their eyes and ears, becoming censors of speech and recorders of our every click online?

Internet operation requires the passive reproduction and distribution of material. ISPs automatically reproduce and distribute material to subscriber requests. Content creators upload to web pages by instructing the ISP's computer to store a copy of the uploaded material. The ISP's computer also makes copies of the material every time a computer asks to view the subscriber's web page and sends those copies through the Internet... that file does not travel directly to the user. Instead, it generally goes through other computers hooked up to the Internet. Each of these computers makes at least a partial copy of the relevant file. As Yen has described, "a practically unlimited scope of liability soon follows." In order that these nodes on the network between content provider and end-user are not all held strictly liable[90] for the trillions of web files they continually copy in the act of transmission, legislators in the US and European Union held that only a limited liability holds for these intermediaries, typically ISPs[91]. In the US, liability regimes have differed according to speech-based and copyright-based liabilities. The Communications Decency Act of 1996 provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider[92]. This language might shield ISPs from liability for subscriber copyright infringement as well. However, Section 230(e)(2) specifically states, "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." As Yen states:

> the general philosophy motivating these decisions—namely, that the liability against ISPs for subscriber libel would result in undesirable censorship on the Internet—remains vitally important in assessing the desirability of ISP liability.

Holznagel has indicated that US courts have applied these 'safe harbour' provisions to widely protect ISPs, even where [a] it was aware of unlawful hosted content; [b] if it had been notified of this by a third party; [c] if it had paid for the data[93]. Frydman and Rorive see courts as "in line with the legislative intent...applied the immunity provision in an extensive manner"[94].

In Europe, 'safe harbour' protection of ISPs from liability was only implemented on 17 January 2002, when the E-Commerce Directive (2000/31/EC) came into force. Article 12 protects the ISP where it provides 'mere conduit' with no knowledge of, nor editorial control over, content or receiver ("does not initiate [or] select the receiver"). Benoit and Frydman establish that it was based on the 1997 German Teleservices Act, though with "slightly more burden on the ISPs in comparison with the former German statute"[95]. Where ISPs provide hosting services, under Article 14 they are protected from liability, in two ways:

[a] the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity is apparent; or

[b] the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disrupt access of the information.

Like the proverbial three blind monkeys, ISPs, IAPs, and web hosting services should 'hear no evil, see no evil, speak no evil'. As mere ciphers for content, they are protected; should they engage in any filtering of content they become liable. Thus masterly inactivity except when prompted by law enforcement is the only – and economically most advantageous - policy open to them. Frydman and

Rorive state "undoubtedly the Directive seeks to stimulate coregulation". It does this by formally permitting national courts to over-ride the safe harbour in the case of actual or suspected breach, of national law, including copyright law.

Whereas in the US, the absolute speech protection of the First Amendment to the Constitution and procedural concerns mean that Notice and Take Down (NTD) is counter-balanced by 'put back' procedures, in Europe no such protection of free speech exists, where speech freedom is qualified by state rights. In both jurisdictions, NTD regimes cause Frydman and Rorive state that:

> "this may lead to politically correct or even economically correct unofficial standards that may constitute an informal but quite efficient mechanism for content-based private censorship"[96].

It is clear that the economic incentive for ISPs is simply to remove any content notified, otherwise do nothing to monitor content, and let end-users, the police and courts, and ultimately the ethics of the content providers decide what is stored and sent over their access networks. Frydman and Rorive argue:

> "Business operators should never be entrusted with ... guidelines defining the limits of the right to free speech and offering procedural guarantees against censorship... which belong to the very core of the human rights of a democratic people"[97].

That is nevertheless the situation which ISP co-regulation via Codes of Conduct, standards and industry practices seek to regulate.

An extreme example illustrates the point. A Spanish citizen convinced the Spanish data protection regulator and European Court of Justice to delist irrelevant older material concerning his financial affairs in the leading case *Google Spain v AEPD and Mario Costeja González*. This 'right to be forgotten' – which is really a right to be obscure as it delists search results rather than removing the original content – is now regulated by national courts and regulators based on that ruling. However, the real regulator is Google, which has set up a large-scale shadow tribunal to make initial decisions on cases, and which considered almost 2 million URLs in the three years to mid-2017 (https://transparencyreport.google.com/eu-privacy/overview). The main site for which delisting applied was its largest rival for advertising, Facebook, which has over 41,000 pages delisted. While the process is subject to judicial and regulatory overview, the effect of the case has been to make Google the de facto first regulator of RTBF (or obscure).

The European Commission has been back-sliding on its self-regulatory settlement in recent years, with its consultations on online platforms (COM(2015)192), assessment of the formally self-regulatory Code of Conduct (COM(2016)288) fighting hate speech (EC 2016), and its overall Digital Single Market strategy all employing the 'bully pulpit' to argue for greater "responsibility" by online platforms. In Euro-speak this means more private censorship.

4. Assessment vis à vis the citizens perspective

The Internet has come of age as a legal subject. The effects of law on the Internet, and the Internet on law, have been studied for over twenty years. Warnings that the liability regime would become more difficult to maintain in the face of regulatory arbitrage were issued as early as 2004 (Ahlert, Marsden and Yung 2004). However, it is no longer a regulatory sideshow – indeed, it never was in the less technophobic legal academy in the United States.

Internet law scholars conduct multi-disciplinary and multi-centred research using interdisciplinary methodologies to explore the transformative effect of digital technologies on society and the polity, and the regulation and governance of those technologies and the communities they support. The research explicitly aims to examine the role of non-traditional regulatory actors in Internet governance, notably both expert non-affiliated communities and non-governmental actors representing various engaged stakeholder communities. Multistakeholder governance (MSG) as a concept also addresses the apparent transformation of "Civil Society" resulting from digital tools and engagement[98].

Digital information policy is critically concerned with relationships between existing government-industry actors and 'prosumer' groups, whose role in production, distribution and consumption is growing rapidly, and whose motivations and activism are often non-monetary, requiring a more sophisticated interdisciplinary method for assessing contributions, motivations and sustainability of the 'prosumption economy', the growth of the virtual polity and social communities online, and a new prosumer law and policy to govern the regulation of the digital information ecology.

This calls for a new form of consumer and citizen protection, which I term 'prosumer law'. A "prosumer law" approach takes interoperability and content neutrality more seriously by European regulators, as the brutally extended Microsoft European competition litigation grinds to a conclusion. The first objection can be resolved through forcing Google to reinforce its search neutrality rather than bias results using its search algorithms (Bracha and Pasquale 2008), and the second by a relatively trivial (by Google standards) amendment to its code to allow other websites more flexibility in future listing, rather than the 'nuclear option' of a complete opt-out via the existing robots.txt convention. These code-based solutions are lighter touch than multi-billion Euro fines or structural separation of businesses (Wu 2010). This is an illustration of what we mean by a smarter 'prosumer law' approach. Prosumers enjoy using Google products, and would like to trust Google more by seeing transparency rather than bias. Google is not evil, but it is a stockholder company, and its directors' duties since it was floated publicly in 2003 are to maximise returns. Regulated Internet capitalism demands a response that works with markets and prosumers.

What should prosumer law consist of? It is not sufficient for it to permit data deletion because that only covers users' tracks; it does not entitle them to pursue new adventures, particularly where all their friends (real and imagined) are cocooned inside the Schumpeterian victor's web. It requires some combination of interconnection and interoperability more than transparency and the theoretical possibility to switch. It needs the ability for exiting prosumers to spread their wings, take their silk away from the former exploiter, cover their traces, and interoperate their old chrysalis with their new moth life. That suggests interoperability to permit exit. Consider the problem with social networking systems (SNS). First, there is the extraction of the user's proprietary data. Facebook removed data to the United States without valid consent, as the Schrems case showed. Second, data were leaked promiscuously to third-party application providers, as the Federal Trade Commission (FTC) discovered. Third, the formatting of the data and the need to access friends' data (e.g., wedding and baby photos), which are indiscoverable using a search engine, mean that the user is in the position of: "You can leave Facebook, but Facebook never leaves you" (Brown and Marsden 2013).

Descriptions of personal data as the metaphorical oil in the digital economy are wide of the mark, even for data of the deceased (Edwards 2013), unless they have seeped into the sediment. Personal data accumulate with the individual's treks into cyberspace, and therefore a better metaphor is silk, woven into the tapestry of the user's online personality. Moreover, user is a poor description of the potential creativity of the individual user in cyberspace. The hideous ugliness of the term prosumer should not hide the potential for the individual to move far beyond a caterpillar-like role as a producer of raw silk and encompass their ability to regenerate into a butterfly or moth. The verb to surf indicates the user-generated agenda of the prosumer, as does the weaving of a web by billions of prosumer-created sites. The silk has created tapestries as rich as Wikipedia, as well as Facebook (Benkler 2006). It is arguably the loss of the sense of ownership of "your space" that led to the latter's decline. The 'silkworms that turned' created a death spiral for MySpace, even though it was at first only a prosumer boycott (led by those who preferred to control their data cocooned in their own personal form: chrysalis or pupae). The problem is that such boycotts rapidly create a landscape of zombie users: many readers will have ancient Hotmail and MySpace accounts that are undead, unchecked, unmourned, useless to advertisers, and antithetical to positive network effects that alone can feed a successful business. We occupy an information landscape with a billion captured moths creating silk for ever fewer merchants, notably Google, Amazon, Facebook, Apple and Microsoft (GAFAM). Allowing those moths to evolve and choose whether to exit, control their own prosumption, or continue their silken personal data capture is a key question for prosumer law. As with silk moths, so for prosumers leaving the iron bonds of the dominant social network may only result in vainglorious (social) suicide).

Facebook's buccaneering attitude to 'monetizing' your personal intimate data, and those of your children and grandchildren, was recognised long ago as requiring greater regulatory action. The European home of half of its users has 28 state regulators of personal data, and Facebook chose one that relocated in 2006 from Dublin to Portarlington, Co. Laois, Ireland, resulting in wholesale removal or resignation of its expert staff. Google is also regulated from Portarlington. While German state and federal regulators and others may rattle sabres at Facebook, it is the Irish regulator that took action in auditing Facebook in spring 2012 and insisting on remedial action on at least nine counts.

Prosumer law suggests a more directed intervention to prevent Facebook or Google or any other network from erecting a fence around its piece of the information commons: to ensure interoperability with open standards. It also suggests that Google's attempts to adjust search in favour of its products, if proven to extend beyond preferential puffery for Google, are inimical to prosumer law. Prosumerism should be a declared policy of the European Commission alongside the European Interoperability framework (EIF). European electronic commerce consumer law is a marked departure from freedom of contract in European law. It is therefore not difficult to extend the EIF and the legal protection for prosumers in this direction in law, though implementation requires all member states to commit to such a step in practice as well as theory.

A major empirical research question is whether civil society is genuinely engaged in a meaningful process of Internet regulation and governance? This is explored using an appropriate mix of quantitative and qualitative studies, with initial examination of potential metrics by which to examine impact, fields in which to deploy case studies that can test those metrics, followed by a broader roll-out of the methodology across several policy fields that lay claim to multistakeholder models.

This prosumer law manifesto has to be placed in the wider socio-economic context of the abrupt and extended 2007-17 Great Recession demonstration of the failure of deregulation in the Western economies. The cataclysmic events of 2007-8 and the great agony of 'Austerity' in the European economy in 2010-15 were themselves presaged by the collapse of the telecoms-media-technology (TMT) 'bubble' in 2000-2[99]. Some economic historians such as Odlyzko have examined this bubble economy and its aftermath in the context of the gigantic (in relative terms) railways investment bubble of 1832-47[100]. While the latter led to recognisably modern forms of network regulation through a bureaucratic and somewhat independent form of sectoral regulation[101], the 2007-17 crisis has not yet resulted in substantial alterations to the deregulatory settlement of the 1990s.

Yet NRAs such as Ofcom no longer refer to 'light touch' regulation of communications in general, and have stepped off the fence of unregulation of the Internet upon which they had perched throughout the 'Noughties'. Both Ed Richards as Chief Executive of Ofcom and more explicitly Shadow Minister Chi Onwurah (former CTO of Ofcom) have acknowledged Ofcom has rowed back from that 'masterly inactivity' when Ofcom gathered evidence in volume but took little to no regulatory action.

More broadly, the discipline of law and the study of regulation have had to respond to insights from neuroscience and other fields. As Soete states: "changing quantitative evidence regarding behavioural and system-wide social phenomena is continuously overturning "established" analytical conclusions and challenging comfortable underlying normative justifications for policy actions or for non-intervention in the workings of market economies"[102]. Given this systemic behavioural turn, which can be captured in Internet regulation by reference to phenomena such as 'fake news', revenge pornography and network neutrality, the standard NRA-co-regulation models of the early 2000s need critical examination for their manifest inadequacies.

5. Conclusions

Richard Thaler was awarded the Nobel Prize in economics for his contribution to this behavioural insight, which has been translated for law and policy by his co-author Cass Sunstein (the most cited legal academic by his peers). Note that many social scientists, philosophers and humanities scholars have drawn attention to the almost schoolboy delight of economists and computer scientists at 'bounded rationality': the clichéd observation that human society does not follow a Cartesian clockwork pattern (Floridi 2017). This is particularly odd when one considers the effort made to perfect the 'Turing Test' to separate human qualities from those of machines (or Artificial Intelligence).. It has been pointed out that an explanation for this schoolboy surprise is that both economics (and economic analysis of law,

including much of regulatory studies) and computer science are extremely gendered academic disciplines (Bryson 2017).

Behavioural or 'nudge' regulation has become the favoured 'light touch' regulatory flavour in the decade since Thaler and Sunstein's eponymous monograph (2009). The use of behavioural psychology insights to observe changes in regulated outcomes from the 'bounded rational' choices of consumers has been commonplace in Internet regulation for much longer. It is driven by co-regulatory interactions between governments, companies and users (or 'prosumers' as the European Commission terms us). Nudging was so familiar to Internet regulatory scholars in the late 1990s that it came to be termed the leading example of the 'new Chicago School' by Lessig (1998), recognising imperfect information, bounded rationality and thus less than optimal user responses to competition remedies, driven by insights from the Internet's architecture and Microsoft's dominance of computer platform architecture. Thus recent 'nudge' concerns by regulatory scholars and competition lawyers echo 1990s concerns by Internet regulation specialists.

It is a mark of Internet regulation's specialisation in Europe, and mainstream regulation and competition law's failure to fully absorb the insights of that scholarship, that in 2017 the debate surrounding nudges and privacy affecting competition outcomes has yet to reinvent the 1990s wheel of nudge limitations. Learning their Internet regulatory history can help competition and regulation scholars not repeat the lessons of the 1990s Microsoft case discussed in the Introduction to this chapter.

The competition and regulatory aspect of attempts to direct user and market behaviour are a key empirical perspective for regulatory scholars. The Internet is a network and a real-time laboratory for the distribution and manipulation of information, which is why it is unsurprising that the adaption of that information to affect user behaviour has been a commonplace online throughout the history of the Internet. As we embark on a post-truth, Brexit and Trump-led populist 'revolution' in at least Anglo-Saxon socio-economic governance, which will impact European scholarship, it is well overdue time to reintegrate that 'nudge' Internet scholarship into mainstream regulatory theory and practice.

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[77] General Potemkin (or Potyomkin) infamously created facades of villages in 1787 to present an image of prosperity to Empress Catherine II of Russia, in which there was no substance to the buildings, a myth for which a website of equally contested veracity provides discussion http://en.wikipedia.org/wiki/Potemkin_village

[78] Price and Verhulst (2005) *Self Regulation And The Internet*.

[79] Baird Zoe (2002) Governing the Internet: Engaging Government, Business, and Nonprofits, *Foreign Affairs*, November/December 2002, p.81 at www.foreignaffairs.com/articles/58427/zoe-baird/governing-the-internet-engaging-government-business-and-nonprofi.

[80] Posner, Richard A. (1971) Taxation by Regulation, 2 *Bell J. Econ.* p.22; Noll Roger G. & Bruce M. Owen (1983) *The Political Economy of Deregulation: Interest Groups in the Regulatory Process*, AEI Studies, Washington D.C.
[81] Joskow Paul L. & Roger G. Noll (1999) The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries, 51 *Stan. L. Rev.* p.1249 at 1252
[82] Germany's post-1946 ordo-liberal rigorous enforcement of antitrust rules has been the European exception.
[83] Newman Abraham L. and David Bach (2004) Self-Regulatory Trajectories in the Shadow of Public Power: Resolving Digital Dilemmas in Europe and the United States, *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 17, No. 3, July 2004 pp. 387–413 at p.388.
[84] Newman and Bach (2004) at p.398 cite European approaches as in Duina, Francesco G. (1999) *Harmonizing Europe: Nation-States within the Common Market*, New York: State University of New York Press.
[85] Though they admit different political cultures have different abilities to intervene (ibid, P.392)
[86] Newman and Bach (2004) at p.393
[87] See the constitutional objection to delegation of state powers in Froomkin, A. Michael. 2000. Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution. Duke Law Journal 17–184
[88] For UK law, see Shetland Times Ltd v Jonathan Wills and Another, 1997 FSR (Ct Sess. OH), 24 October 1996; Godfrey v Demon Internet Service [2001] QB 201. For US law, see Cubby v CompuServe (1991) 766 F Supp 135, Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993), Stratton Oakmont Inc v. Prodigy 1995 NY Misc. 23 Media L. Rep. 1794, American Civil Liberties Union v Reno (1997) 21 US 844 of 27 June No 96–511, and Digital Millennium Copyright Act 1998, s 512(k)(1)(A–B). See generally Marsden, C. (2012) Oxford Bibliography of Internet Law, New York: Oxford University Press, section 'Origins of Internet Law'.

[89] Marsden, 2010a, pp. 105–149

[90] Some legal commentators forcefully argued that strict liability should apply. See Trotter Hardy, The Proper Legal Regime for "Cyberspace", 55 U. PITT. L. REV. 993, 1042-46 (1994) (advocating strict ISP liability); Kelly Tickle, Comment, The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards, 80 IOWA L. REV. 391, 416 (1995) (favoring limited ISP liability).
[91] See, for example, Niva Elkin-Koren, Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators, 13 CARDOZO ARTS & ENT. L.J. 345, 399-410 (1995), who argues opposing liability.
[92] Section 30, 47 U.S.C. § 230(c)(1) (Supp. II 1996).
[93] Holznagel, B. (2000) Responsibility for Harmful and Illegal Content as Well as Free Speech on the Internet in the United States of America and Germany, in C.Engel and H. Keller (eds) Governance of Global Networks in Light of Differing Local Values, Nomos, Baden Baden.
[94] Frydman, B. and Rorive, I. (2002) Regulating Internet Content Through Intermediaries in Europe and the USA, Zeitschrift fur Rechtssoziologie Bd.23/H1, July 2002, Lucius et Lucius.
[95] Ibid at 54.
[96] Ibid at 56.
[97] Ibid at 59.
[98] The international interdisciplinary regulatory challenge was recognised and explored in Snyder, F. (1995) "Out on the Weekend": Reflections on European Union Law in Context in Wilson, G.P. Frontiers of Legal Scholarship, Wiley & Sons, at 128
[99] See advances such as Stiglitz, Joseph E. (1985) Information and economic analysis: A perspective, Economic Journal 95 (supplement) pp21-41; Richardson, M. and Hadfield, G. (1999) The Second Wave of Law and Economics, Federation Press, Sydney
[100] See also Railways Act 1844. See Marsden 2017 at Chapter 2. See Baldwin and Black (2010) on financial regulation in crisis.
[101] .
[102] Soete, Professor dr. Luc L.G. (UM) farewell lecture as Rector Magnificus of Maastricht University on September 1st, 2016