

Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence

By Damian Tambini, Danilo Leonardi and Chris Marsden
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Clearly the ideal of a pristine Internet, free from regulation, is a myth, and not a particularly helpful one. Internet communication like all communication is a social practice that comes with responsibilities, ethics, norms, disputes and harms. Whether the necessary rules are formal or informal, and whether they should be agreed with the specific involvement of state institutions or formal democratic accountability are pragmatic questions best to be resolved through public debate case by case.¹

The work, *Codifying Cyberspace: Communications and Self-Regulation in the Age of Internet Convergence*, by Damian Tambini, Danio Leonardi and Chris Marsden is a forward looking discussion of the likelihood of a regulated internet with real world models for such a regulatory scheme. The work is a worthwhile read for anyone interested in the future of content that is accessible on the internet in the near future, and in getting a glimpse of very realistic future internet trends in regulation and content. Public regulation of content on the internet could easily be considered a very – airy topic. Without any real body of information to go on the authors could be free to speculate in rather baseless manner yet the authors of Codifying Cyberspace, have tried to avoid this speculative possibility. Instead they try to provide the interested reader with a practical impression of how internet regulation may eventually be accomplished through a thorough analysis of the regulation of other similar information and content delivery systems in both Europe and the United States. The authors' conclude with some

¹ Damian Tambini, Danilo Leonardi and Chris Marsden, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence*, (Routledge, 2008) at 294.

recommendations for possible future regulation systems for the internet as well as the potential free speech and free expression challenges to such regulation.

The history of the legal issues in the area is brief and difficult to discern, due to an initial unease, inability and unwillingness to develop any regulation at all. Once the internet became open for public use in 1992, the history of internet regulation is largely one of enmity toward any outside governmental regulation.² Many of the initial adapters of the public use of the internet believed and sought to treat the internet as wholly different than any other medium of communication which could not be corralled by traditional regulatory systems and instead would be a self-governing global community all its own.³ Author John Perry Barlow described the early tenets of the early years of internet self-regulation, writing:

*You claim there are problems among us that you need to solve. You use this claim as an excuse to invade our precincts. Many of these problems don't exist. Where there are real conflicts, where there are wrongs, we will address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours.*⁴

The earliest model of regulation of the internet, in terms of its content, was that of self regulation because technical barriers and a general confusion about the public's use of the internet prevented and discouraged more traditional regulation by governmental bodies in the United States and Europe.⁵ The nascent internet content regulation in both Europe and the United States was self-regulatory and was based around the Codes of Conduct and Codes of

² Tambini et al., 1-4; Gould, *Locating Internet Governance: Lessons from the Standards Process*, Chapter 10 in Marsden ed., *Regulating The Global Information Society*, (Routledge 2000) at 200

³ Tambini et al., 1-4; see also John Perry Barlow and the Electronic Freedom Foundation (1996) *A Declaration of the Independence of Cyberspace*, www.eff.org/~barlow/Declaration-Final.html, accessed February 26, 2009.

⁴ *A Declaration of the Independence of Cyberspace*

⁵ Gould, at 200; See Also Gillet, Esiner and Kapor, *The Self-Governing Internet: Coordination by Design*, in Kahin and Keller (eds) *Coordinating the Internet*, Cambridge, MA: MIT Press; L. Lessing, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869

Service for each internet service provider and each content delivering website.⁶ The rationale behind the completely self-regulated system was based around the thought the users would naturally develop a group ethos that would define objectionable/illegal content and would self-police such content.⁷ The proponents of self-regulation theorized that the individual user had the best access with which to regulate the most of the internet and had the most incentive to actively report and sanction offensive content, in order to guard their community.⁸

The end of the nineties saw a dramatic rise in the breadth of content that was presented on the internet and the amount of the public that was connected.⁹ With all this growth the original self-regulated system began to strain.¹⁰ A growing public demand arose in both Europe and the United States to provide some governmental control of internet content, particularly in response to the spread of child pornography and copyright infringement on the internet.¹¹ Europe and the United States however approached such regulation in different ways.¹² Europe attempted to institute traditional all encompassing “end to end” internet regulation by creating a ministry of European ISPS which would enforce written guidelines developed by intergovernmental agencies.¹³ The United States on the other hand developed an *ad-hoc* legislative approach to each individual problem.¹⁴ It is with this very small beginning that the authors began their analysis of possible future regulatory trends, and recommendations.

⁶ Tambini et. al., 5-8; see also Joel Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 Emory L.J. 911- 930

⁷ *A Declaration of the Independence of Cyberspace*, www.eff.org/~barlow/Declaration-Final.html

⁸ See supra notes 2 - 7

⁹ Tambini et. al, 28 - 30

¹⁰ *Id.* 5-7

¹¹ *Id.*

¹² *Id.*

¹³ See Harcourt, *Regulation of European Media Markets; Approaches of the European Court of Justice and the Commission's Merger Task Force*, 9 Utilities Law Review 276 (1998) at 276-291; Cable and Distler, *Global Superhighways. The Future of International Telecommunications Policy*, London, the Royal Institute of International Affairs (1998) at 2.

¹⁴ Kevin Rappaport, *In The Wake of Reno v. the ACLU: The Constitutional Struggle in Western Constitutional Democracies With Internet Censorship and Freedom of Speech Online*, 13 Am. U. Int'l L. Rev. 765 at 791 (2002);

The analysis of the European and American regulatory systems of other content mediums constitutes the bulk of the work done by the authors. The internet as a generally open medium with little restrictions on access makes particular systems of regulation more or less effective. Traditional large scale-regulatory systems like those that govern television or printed press, are based around and gain their legitimacy from the fact that such mediums have limited access for the average user to generate content. The authors dismiss such systems as inappropriate for the internet medium, due to their slow adaptability and cumbersome processes for enforcement. While traditional large scale regulatory measures are dismissed by the authors, the growing co-regulatory system which has been widely employed by the electronic gaming industry seems to be applicable in the context of internet regulation. The co-regulatory formula that works with the electronic gaming industry, places the responsibility of regulating the content on a board of industry insiders who create the content, in this case those, members of companies who actually produce videogames. These insiders set the parameters for content on their medium; the parameters are then communicated to all content providers who further understand the process for sanctions upon violation of the parameters. Atop the private industry directly involved with the content is a governmental body that imposes governmental sanctions in an attempt to achieve the uniform enforcement of industry standards. The co-regulatory system seemingly provides the best of both worlds. On the one hand the industry insiders setting the standards of content are the best able to adapt to changes, since they are most involved with the medium and also have the most vested interest in seeking uniform enforcement to avoid governmental intrusion. On the other hand the system gains legitimacy in the public's eye and an appearance of clarity and uniform enforcement by the enforcing stick of government sanctions.

Thomas Cabe, *Regulation of Speech on the Internet: Fourth Time's The Charm?*, 11 Media L. & Pol'y 50 T 55 (2002); Chris McMannis, *The Privatization (of "Shrink Wrapping") of American Copyright Law*, 87 Cal. L. Rev. 173-190 (1999);

After an analysis of all the available regulatory systems for content mediums, the authors pick and choose from the co-regulatory systems available to craft a possible future national or global solution for internet regulation. The authors argue for a co-regulatory system with private ISP's adopting clear regulatory policies for content on the internet that are based around what they deem the 5 C's of proper regulatory system: (1) constitution, [guidelines for content providers to follow] (2) coverage, [extension of the guidelines to all or most content providers] (3) content, [clearly defining content that is objectionable] (4) compliance, [sanction procedures for violators] (5) communication [clear lines of reporting and accepting reports about objectionable content from content providers and supporters]. Atop this independent regulatory system for internet service and content providers, the authors argue that new governmental agencies should be created in each country adopting regulation, or an international agency, to provide the sanction power to enforce the private regulation which would legitimize these privately organized regulations for content in the eyes of the public user. The authors also reason that such an agency should keep in touch with, and on top of technological changes to the internet so as to accurately determine whether current regulations and enforcement methods are effective. In theory, this practice would provide the best of both worlds for future internet regulation; a quick moving and easily adaptable private regulatory base and the legitimizing power of government sanctions.

As a whole the work by authors Tambini, Leonardi and Marseden presents itself to the reader as a thoughtful practical analysis of a topic that is in its nascent stages of growth in the legal community. While the overall concept of the work, analyzing regulation of other similar mediums to the internet in order to predict and make comments about future internet regulation, is sound, at times the reader is lead astray into areas of detail which do not add much to the

overall discussion. For example, each chapter ends with an example of model regulation for the medium being discussed and at the end of the chapter on cellular telephones the authors leave the reader with nearly 40 pages worth of a reproduction of the United Kingdom Model Code for cell phone network regulation. This huge amount of detail nearly takes away from the concise analysis of the chapter which broke down the systems for cell phone regulation and their particular challenges, and seems like filler. These small shortcomings however do not impair the overall analysis of the work.

Of particular interest in the book is the running discussion on free speech and free expression as such concepts collide with regulation of the medium of the internet. What is interesting is that the authors note in closing that the initial internet adopter fears of “Big Brother” governmental regulation clamping down on the open expression atmosphere and may be replaced by fears of “Little Brother.” Since the co-regulatory system places the control of determining content that is objectionable on the privately run industries, challenges to the limitation of content are different. Indeed, while the “Big Brother” government is bound by existing law and procedures open to the public, “Little Brother” industry is not. Further, privately run industries may be more willing to classify swathes of expression as “objectionable,” in order to ensure the government agency will not step in, and the individual user may not even be aware of such processes or remedies. This portion of the work would provide an excellent starting off point for any reader looking to begin to analyze these new possibilities in light of free speech litigation and rights.

Of further note is that although the analysis and research performed by the authors in this work is well done and substantial, the initial premise upon which it rests is not without question. Indeed, the authors begin with the initial assumption that the large-scale governmental regulation

of the internet is inevitable. However, the actual ways in which the activity of the internet has been regulated, particularly in the United States, bespeak a greater desire for large governments to address particular issues presented by the internet in an “ad hoc fashion.” For example, the Digital Millennium Copyright Act came as response to the growing issues on the internet.¹⁵ This act did not create a new regulatory body, but instead extended civil and constitutional remedies against internet content providers who knowingly violated copyright. Importantly, the duty to enforce copyright on the internet is not performed by any agency but remains on the individual, just as they are responsible in the actual world.

It may be that the internet is simply too large to either impose a general governmental regulatory body on top of it or to get all internet providers to abide by codes of conduct. This difficulty comes from the nature of the internet itself; it is not like television, printed news or radio. The internet is not localized in a particular jurisdiction, like a television or radio broadcast. Even the authors’ admit that the global nature of the internet may pose insurmountable challenges to getting the global internet community to agree on what content is objectionable or not or even illegal.¹⁶ Without substantial barriers to entry of content on the internet its nature is different than radio or television and therefore its regulation may be more similar to that of a public square. Perhaps the most practical way to regulate is the same idea for regulating the public square; not by regulating, but by relying on the good reporting of the citizens of the square to report illegal or objectionable conduct to the authorities.

Overall, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence*, is highly recommended for any reader interested in gaining a practical survey of regulatory systems for a variety of information mediums. Further, insofar as this work acts a

¹⁵ “Digital Millennium Copyright Act” 17 USCS § 1201(1998)

¹⁶ Tambini et. al.,291 – 293 (Discussing difference acts considered free speech in U.S. are legally prohibited in Europe).

practical crystal ball for future trends, this work is particularly recommended for attorneys whose work coincides with and is dependent on the internet or those attorneys looking to prepare for a new in-demand practice area. Even readers with only a casual interest in their everyday internet use will find this work an interesting and possibly telling hypothetical of the future of their everyday interactions with internet content.