Regulating Code: Towards a Prosumer Law
Chris Marsden (Essex) & Ian Brown (Oxford)
‘Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.’

John Perry Barlow
A Declaration of the Independence of Cyberspace (1996)
response to CDA 1996 (partly struck down in Reno v. ACLU 1997)
Regulation and governance

- Internet use now ubiquitous
  - but governments, legislators and regulatory agencies falling further behind rapidly changing Internet technologies and uses

- Critical analysis of regulatory shaping of “code” or technological environment
  - ‘Code is law’ and coders operate within normative framework
  - More economically efficient and socially just regulation
  - Critical socio-technical and socio-legal approach
Test the existing ‘received truths’

1. Self-regulation and minimal state involvement is most efficient in dynamic innovative industries;
   ◦ technology is never neutral in societal impact
   ◦ network and scale effects drive massive concentration

2. Self-regulation critically lacks constitutional checks and balances for the private citizen, including appeal

3. Multi-stakeholder co-regulation chance to reconcile the market failures and constitutional legitimacy failures in self-regulation
   ◦ voters will not allow governments to ignore the Internet.
Empirical investigation

- Five case studies and one ‘prior art’ (encryption, anonymity, security)
  - Multi-year empirical investigation
  - Builds on various EC/other studies including

- Reassesses prior art in view of ‘hard cases’
  - Topics with no organised regulation/self-regulation
  - Due to lack of consensus over solutions
  - Clash between market outcomes and human rights
Literature

• Previous legal focus on elephant’s trunk?
  ◦ Benkler, Wu, Lessig, Zittrain, Van Schewick
  ◦ General US scepticism of government action
  ◦ Leaves only bottom-up Wiki-panacea

• Ohm’s Myth of the Super-User

• More empirical view:
  ◦ Mueller (2010), De Nardis (2009)
  ◦ Institutional economics and political science
Prosumers not super-users

- Web 2.0 and related tools make for active users, not passive consumers
- US administrative & academic arguments
  - self-regulation may work for geeks,
  - but what about the other 99%?
- European regulatory space
  - more fertile ground to explore prosumerism
  - as both a market-based and
  - citizen-oriented regulatory tool
Case studies

1. Data protection in Social Networks
   ◦ Enforcement failures, Privacy by Design
   ◦ Dominance, network effects, corporate social irresponsibility

2. Search Neutrality
   ◦ Net neutrality argument
   ◦ Code-based solution to competition problem
   ◦ Prosumer focus cf. Microsoft
Approach embraces complexity

- No easy examples that demonstrate 'truth' of
  - technical, political, legal or economic solutions
  - based on self-, co- or state regulatory approaches.
  - Cf. Mansell (2012) *Imagining the Internet*

- Examine the deficiencies and benefits
  - Match market and social developments
  - With human rights concerns
  - E.g. In fields of privacy and freedom of expression
  - Note: analysis based on Art.19 UDHR not 1st Amendment
  - Most of world uses variants of Article 19
Government and market failure

- Industry capture of regulators & legislators
- Incumbents introduce new barriers to entry
- Continued exclusion of wider civil society
  - tenuous chain of accountability of participants
  - to voters, shareholders and NGO stakeholders.
  - effectiveness, accountability and legitimacy of these groups in representing the public interest?
Towards interoperability as prosumer law

- Solution for prosumers & competition
  - enhance competitive production of public goods
  - including innovation, public safety, and fundamental democratic rights

- Key aspect: interoperability (incl. FRAND)
  - (Note: this is detailed software interoperability, not the general description offered by Gasser/Palfrey 2012)
Prosumer law: direct intervention

• E.g. abusive dominant social networking sites

• prevent Facebook, Google+ any other
  ◦ from erecting a fence around its piece of the information commons:
  ◦ ensure interoperability with open standards
  ◦ Which lowers entry barriers (in theory!)
  ◦ Enforcement of privacy law even in Portarlington
Euro-Interoperability Framework

- Response to multi-€bn competition cases:
  - Microsoft saga (to 2009), Intel (2009), Apple (2010), Rambus (2009)
  - Google (2013?) perhaps Facebook....
  - Coates (2011: Chapters 5-6)

- Announced by DG Comp (CONNECT)
  Commissioner Kroes 2009-2010

- Bias in favour of interoperability in policy

- Concerns are broader than competition
  - Include privacy, IPR, security, fundamental rights
Kroes’ promise post-Microsoft

- Will “seriously explore all options to ensure that significant market players cannot just choose to deny interoperability.

- “The Commission should not need to run an epic antitrust case every time software lacks interoperability.”
What regulation teaches about code

- *Ex ante* + *ex post* intervention

- Interoperability
  - Procurement policy + regulation/competition

- A biased policy towards open code –
  - Data open to mash-ups (government)
  - Systems interoperable (procurement)
  - Use of alternatives to market leader (e.g. Linux)
  - Via competition remedies and sponsorship
Economics and Human Rights

- Open data, open code, and human rights
- Blizzard of Internet governance principles 2011
  - Law/economics, or human rights, do not translate
  - OECD/EC vs. UNHCR/OSCE/Council of Europe
- This apparent dialogue of the deaf
  - competition policy & corporate governance problem
- Urgent task: dialogue between discrete expert fields
  - ICT growth driver and transformative technology
  - transformative role in communication and dialogue
  - ‘arms trade’ in censorship technology; Twitter ‘revolution’ (sic)
Developing study of code regulation

• Similarities and cross-over with
  ◦ complexity science
  ◦ network science
  ◦ web science/graph theory

• Match Internet regulation to complexity theory
  ◦ Longstaff (2003), Cherry (2008), Schneider/Bauer (2007)

• Network science fusion of scientific/fundamental elements from various components

• Internet Science? EC Network of Excellence
Questions?

- Book published 22 March 2013
- ‘Prosumer law’ article (early version now on SSRN)
- Comments welcome
50 ways to leave Facebook

- Not sufficient to permit data deletion
  - as that only covers the user’s tracks.
- Interconnection and interoperability,
  - more than transparency and
  - theoretical possibility to switch.
- Ability for prosumers to interoperate to permit exit
  - Lower entry barriers tend to lead to increased consumer welfare