

BOOK REVIEW

Internet co-regulation: European law, regulatory governance and legitimacy in cyberspace, by Christopher T. Marsden, London, Cambridge University Press, 2011, 308 pp., US\$130.00 (hardcover), ISBN 978-1107003484

In the course of attending meetings and conferences on Internet law and policy, I inevitably meet officials who have this burning question in their minds: how do we regulate the Internet? The ‘should’ question has been asked and answered (‘yes’); the question now is ‘how?’ The follow-up question to how is: where should we look for rules? Implicit in this question is the rejection of US laws, for a range of reasons. Some reject US laws because of freedom of expression issues; they may need to curb racial and hate speech, for example. Others reject US laws because politically and socially, the USA is so different that to adopt American rules would be the idiomatic square peg in a round hole.

In my mind, there is one major objection to using American rules; they are rules from one country. Rule formation around the Internet, which is still a very young invention, requires multiple sources. There is, for example, no objection in the technical community to looking to the US-led and US-dominated Internet Engineering Taskforce (IETF) for rules around technical standards. Anyone around the world can join the IETF meetings, albeit at his or her expense. Because many people from the world over do turn up, one is more assured that the solutions offered are likely to be the best, at least based on the state-of-the-art knowledge then. Imagine the IETF as a one-country rule-making body; immediately, suspicions would be raised as to whether the technical standard rules that it promulgates have a hidden agenda to benefit its native companies.

An ideal rule-making body for the Internet should therefore be one that invites multiple sources of inputs, meaning different governments, while also respecting the ideals and values of the Internet. In such ideals and values, there would be greater freedom of expression, the rule of law, the triumph of good ideas and minimal politicking. Here is where I have recommended the officials to look to Europe and its two regional groupings, the Council of Europe (CoE) and the European Union (EU). By no stretch of imagination does the CoE or the EU check all the boxes of an ideal international Internet law-making body. But in an imperfect world, they come closest.

The Internet rules the two groups have proposed and are being adopted globally are the cybercrime treaty (CoE) and the data protection directive (EU). These rules are being adopted around the world because there is a legitimacy from having worked with 47 governments for the CoE and 27 governments for the EU. It may be argued that Europe is still different from Asia, Africa and Latin America. But the point is that the rules are developed against a backdrop of political, economic and social differences that had led to war in the first place. The rules are, therefore,

invariably developed after careful study and discussion. The cybercrime convention, for instance, was many years in the works. Often, academics are sought to research the new areas.

Chris Marsden was one such researcher studying the topic of regulation of the Internet. This book under review is a condensation into 'a mere 100,000' (p. vii) words of two studies totalling 400,000 words in 500 pages conducted for the European Commission (the body that proposes and implements legislation for the EU) in 2001–2004 and 2006–2008. In the book, Marsden asks: is Internet regulation a paradigm of constitutionally responsive co-regulation? For Europe, Marsden concludes that the answer is in the affirmative.

Internet regulation is defined very broadly in the book. It ranges from Internet governance at the international level to content rules that any Internet user will face as well as rules regarding technical standards that most users do not even know exist. 'Constitutionally responsive co-regulation' is defined as co-regulation that 'contributes to protecting constitutional rights within regulatory organisations' (p. vii).

The book is well organised. Chapter 1 defines self-, co- and state-regulation. Chapter 2 elaborates on co-regulation, the meat of the book. The first two chapters draw conceptual boundaries to distinguish between the modes of regulation. Four case studies in Chapter 3 make the points more clear. Chapter 4 discusses technical self-regulation or standard setting in the cases of the IETF, Worldwide Web Consortium (W3C) and the Internet Corporation for Assigned Names and Numbers (ICANN). These are three organisations critical to the functioning of the Internet, and Marsden observes that they are self-regulatory bodies. They are also critical to his thesis that the Internet can be governed through co-regulation. Chapters 5 and 6 discuss content regulation by co-regulatory agencies and through private initiatives, respectively. Chapter 7 summarises the cases in the earlier six chapters to draw some common threads and conclusions. Chapter 8 concludes with more conceptual discussions about Internet rule formation and that 'co-regulation is becoming the defining feature of Internet regulation in Europe' (p. 242).

Because the book is a condensation of a study by an academic, it is rich in background, data, frameworks, comparison tables and thorough documentation. Any student or policy-maker looking into self- or co-regulation should read the book carefully.

A rule-of-thumb for any book reviewer is that one should not review a book for what is not written. In this case, however, the rule will have to be broken. Likely readers of the book are policy-makers and students of Internet regulation. Why would they read such a book? It has to be to find answers to the question: what factors make self-regulation work or not work? If co-regulation may work for the Internet in Europe, can it not work for, say, Asia? Here is where the book is missing a critical look. The literature says that for self- or co-regulation to work, the following factors are critical:

1. An industry that is motivated, whether by a carrot or stick to self- or co-regulate.
2. The market should have a small number of large players as opposed to a large number of small players.
3. The market should be mature, that is, stable.
4. There should be a regulatory backstop to rein in the recalcitrant offender.

Considering motivation first, European companies seem more motivated to some form of self-regulation. In the context of self-regulatory initiatives in Europe, Marsden wrote: 'the lack of compulsion or state involvement has led to significant private or non-profit innovation' (p. 219). It was in Europe that the first Internet Service Provider hotline was established to report illegal content across international boundaries.

While serving on the board of the Internet Content Rating Association (ICRA), I was made aware that the GSMA, the industry association for the mobile phone industry in the UK, was looking into a content labelling programme for Internet content delivered over the mobile phone as early as 2003. The social responsibility consciousness of industry in Europe is commendable.

There is much for Asian governments and industry to learn. An Asia-wide hotline for reporting illegal contents, often child pornography, and consumer fraud will be helpful. Any such illegal content can be reported from one jurisdiction to another for removal. No free speech activist supports such content.

On the other three factors that contribute to the success of self-regulation, the case studies in fact support the point. IETF, W3C and ICANN are large players in their space; in fact they have no challengers. Any one who tries to do so will not be able to be a player in the Internet space. Which then raises the question: what about the other players on the Internet? Can self-regulation work with them? The short answer is 'probably not'. The failure of the ICRA to successfully roll out a self-labelling system suggests that not all parts of the Internet may be susceptible to self-regulation. Also, resistance may deter; in the USA, adoption of the ICRA labelling system stalled soon after civil liberty groups attacked the system as a form of censorship.

Some organisations and individuals as a matter of reflex and, sometimes, without thinking, do not favour regulation. For example, witness the hacking of websites belonging to organisations that supported the SOPA and PIPA bills in the USA.

Being the careful academic that he is, Marsden takes pains to limit the scope of his conclusion to Europe. Even so, the vision he offers for Internet regulation should not be dismissed out of hand on the grounds of different context in the rest of the world. The interesting question is whether the 'paradigm' offered will be taken up by the rest of the world. Marsden does not quite come out to say so, but there is a strong undertow in the book to suggest that he thinks so. For that reason too, this book is worth the read.

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