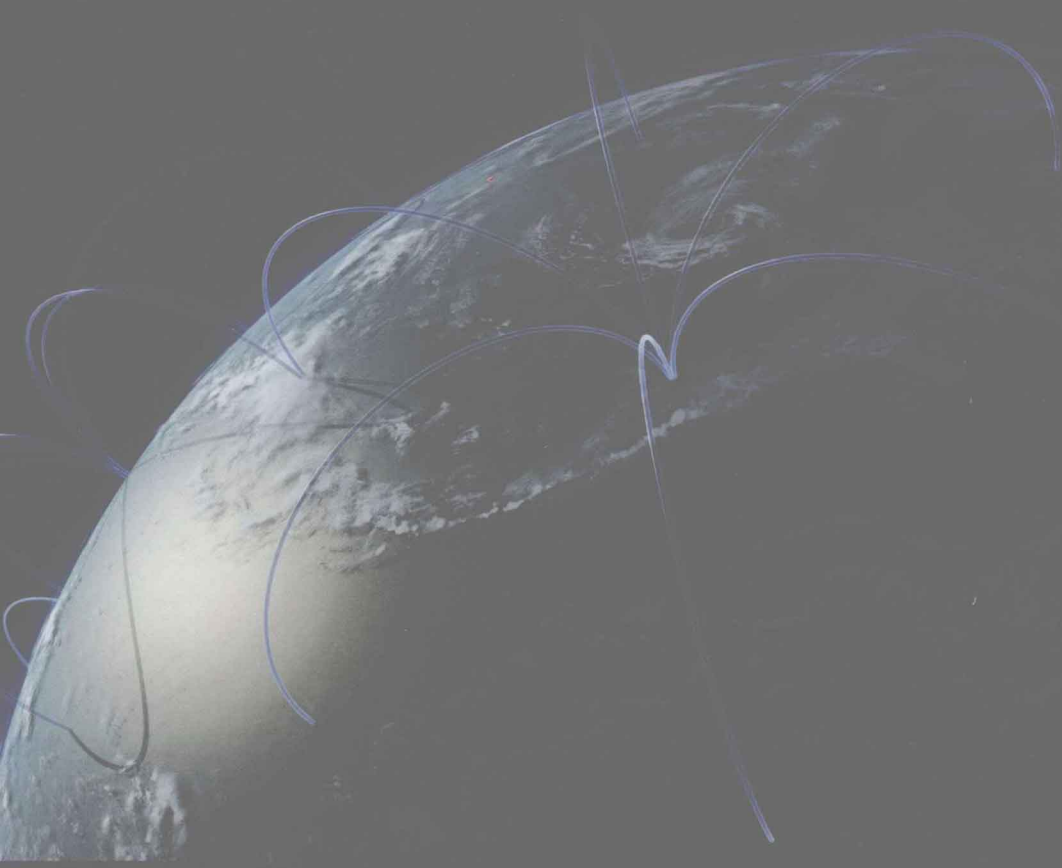


CHRISTOPHER T. MARSDEN

# Internet Co-Regulation

European Law, Regulatory Governance  
and Legitimacy in Cyberspace



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## INTERNET CO-REGULATION

Chris Marsden argues that co-regulation is the defining feature of the Internet in Europe. Co-regulation offers the state a route back into questions of legitimacy, governance and human rights, thereby opening up more interesting conversations than a static no-regulation versus state regulation binary choice. The basis for the argument is empirical investigation, based on a multi-year, European Commission-funded study and is further reinforced by the direction of travel in European and English law and policy, including the Digital Economy Act 2010. He places Internet regulation within the regulatory mainstream, as an advanced technocratic form of self- and co-regulation which requires governance reform to address a growing constitutional legitimacy gap. The literature review, case studies and analysis shed a welcome light on policy-making at the centre of Internet regulation in Brussels, London and Washington, revealing the extent to which states, firms and, increasingly, citizens are developing a new type of regulatory bargain.

CHRISTOPHER T. MARSDEN is Senior Lecturer at Essex University School of Law, where his research centres on the regulation and management of information technologies. He has twenty years' experience of exploring the Information Society and its regulation with commercial, academic, think tank and government organizations.

## ACKNOWLEDGEMENTS

This book is a revised, edited and very critical update on the body of reports I published for the European Commission in 2004 and 2007–8, especially the Phases 1–3 reports of that second, specifically co-regulatory project. Whereas those reports amount to some 400,000 words and 500 pages, this book is a mere 100,000; moreover, I have not simply reduced those reports to a concise version, and I therefore refer readers to the complete case studies where there are factual queries or questions of brevity.

My acknowledgements for this book go back twenty years, for it is there that my interest in regulation was formed, and those influences underpin my research even today. Though the empirical aspect of this work is dominant, and in particular European Commission projects of 2001–4 and 2007–8, it is to the legacy of research and practice in the 1990s that I owe most thanks. I acknowledged in my recent previous work ‘Net Neutrality’ many other influences too numerous to mention – to them also many thanks. I grew up and was educated in regulation at the London School of Economics over the period 1986–97, taking LL.B. in 1986–9, LL.M. in International Economic Law 1993–4 and pursuing doctoral studies while teaching and researching in 1994–7. During that time, I received a grounding in both practical and theoretical aspects of regulation that has influenced my approach ever since. This book is overwhelmingly based on empirical case studies, reflecting an Anglo-Saxon pragmatism that was inculcated in me by my work as research assistant on projects run by Dr Mike Hodges at CRUSA (Centre for Research on the USA) and Professor Rob Baldwin on the ‘Regulation in Question’ project for Merck Sharp Dohme (working a little with Mark Thatcher and Colin Scott on this project, I focused on gas/electricity/water privatization, as well as background literature), both in 1995–6. I also worked with Jonathans Liebenau and Barton on the ill-fated LSE Information Society Observatory in 1995–6, and held the non-job title of legal adviser there. My interest in economic theory of regulation and its human rights relationship was, however, started much earlier, as an undergraduate studying at the time of financial services deregulation,

privatization of state utilities and the creation of independent national regulatory agencies (INRAs) in the late 1980s. LSE was a crucible of these changes, and indeed it was the realization of the power of global finance to undermine apartheid in 1987–8 that led me to focus on interdisciplinary and largely theoretical study in my final undergraduate year (firsts in Anthropology of Law, Civil Liberties and Jurisprudence).

Having taken a crash course in practical transactional economics working in advertising sales at Media Week Ltd at the end of boom and start of bust in 1989–91, and start of renewed longer boom at Euromoney Ltd/World Economic Forum joint venture WorldLink in 1993, I returned to LSE in 1993–4 to study the remarkable transformations by then becoming evident in the global economy, driven by financial reform and information networks. At that point, IBM carried more international data than British Telecommunications, at the dawn of the consumer Internet era. China was rising, computing had become ubiquitous in businesses, and multinationals were seen to be losing their territorial moorings. My dissertation in 1994 focused on Rupert Murdoch's skilful changes of nationality for business and person to evade media ownership limits, as well as his corporate restructuring to avoid tax and institute captive insurance companies in such locations as the Cayman Islands. Truly he was 'Ringmaster of the Information Circus' and his adviser's claim that 'civilization is bandwidth' was an evocative image. At LSE that year, while realizing I would spend the next three years in ultimately fruitless pursuit of multimedia multinationals and a theory of regulation, I spent more intellectual time examining continental European regulatory theories, notably systems theory as well as its discontents. In a fairly unique year, the course Law and Social Theory, taught by Tim Murphy and Alain Pottage, was co-taught by visiting professor Gunther Teubner, and my dissertation concerned advertising and systems theory. We also were treated to a three-hour guest seminar by Niklas Luhmann, interrupted by a passionate rant in protest by a fragrant bohemian French professor on behalf of Foucault's opposition to Luhmann's bloodless technocracy, and the following year even the great Žižek, who came to the University of London to treat us to his unique interpretation of Lacan. Lacan and Irigaray, and of course Foucault were of great interest, though ultimately it was Habermas and his theory of the public sphere which I went on to explore in cyberspace. This book contains no reference to these giants,<sup>1</sup> but they sit in the background observing the regulatory games played by

<sup>1</sup> But see Froomkin (2003a), p. 749.

the shrinking nation state and rising multinationals, with wry bemusement. As Žižek states, we are all living in *The Matrix* now, a ubiquitous information environment in which we are bombarded with falsehoods by the Big Other and only occasional tears in the firmament remind us of a reality before globalized multinational corporations, electronic commerce and ceaseless digital media changed our environment. Žižek will have enjoyed the Hollywood parable of Internet start-ups *The Social Network* much more than Mark Zuckerberg.<sup>2</sup>

My time at LSE also coincided with the arrival from Oxford of Julia Black who has done more than any other British academic to explain the legal implications of self-regulation. My underpinnings in the pragmatic assessment of regulation owe more to Rob Baldwin, Colin Scott and herself than they will have realized. I was also the ‘supervisor’ (a nebulous term meaning mentor and party organizer) for both the LL.M. students and the new M.Sc regulation students, the latter amounting to persuading Anthony Giddens to say kind words on behalf of the university to the incoming cohort. I found myself teaching various International Business, European Politics and Development Economics courses at Richmond College through Mike Hodges’ friends and associates, and all-in-all had a crash course in basic economic theory as it then stood. LSE in 1995–6 was an intensive induction to regulation by teaching and publication, but also made me realize the vacuity of the English legislative process, as I advised both Liberal Democrat and Labour front benches on the media ownership aspects of the Broadcasting Act 1996 as part of my research interest. I should add my thanks to media regulation mentors Richard Collins and David Levy in this period and throughout the late 1990s.

Media convergence was the major regulatory phenomenon of the mid 1990s, inspired by digital satellite broadcasting in the UK as much as by any nascent ‘Information Revolution’ (which only arrived in a short giddy dot-com bubble in 1998–9). While it was established that self-regulation was appropriate for standards, albeit with substantial government input for interoperability and competition as seen in the Digital Video Broadcasting standards for set-top box technologies in 1995–7, the creation of a converged regulator that could take a ‘light touch’ approach to Internet content was supported by the Labour Party in opposition,<sup>3</sup> though

<sup>2</sup> Žižek (2008).

<sup>3</sup> The proposal was most influentially proposed in Collins and Murroni (1995) and adopted as new media policy by New Labour.

not implemented until 2004 following the 2002 Office of Communications Act. I followed these debates closely, and found myself intimately involved in both the practicalities of regulation in the dying days of OfTel (2001–2 as Regulatory Director of MCI WorldCom UK Ltd), and acting as special adviser to a hopeful for chief executive of the new regulator, then Independent Television Commission head Patricia Hodgson, in 2000. I also wrote a highly influential article on standards and convergence with Campbell Cowie in early 1998, which was cited by European Commission, OECD, ITU and national regulators thereafter. I spent a pleasant winter ‘moonlighting’ as a visiting Research Fellow at Melbourne University’s Law School, thanks to Andrew Kenyon, and Network Insight, the ‘Sydney branch’ of RMIT, thanks to Mark Armstrong. En route I paid a visit to John Braithwaite, godfather of regulatory law, whose research and example was and remains a great inspiration. All these Australian bases in late 1999 were at the cusp of self-regulation turning into co-regulation, driven by the intransigence of the Telstra and News Corporation monopolies and their implacable enemies in the various communications industries. My time as Research Fellow at Harvard’s Kennedy School 1999–2000 both convinced me that public choice was part of the story, but also interested me in Douglass North and institutional economics, as the state is not simply the Mafia! Self-regulation cannot work where the parties will not be in the same room unless with a regulatory ‘relationship guidance counsellor’. Moreover, it works less well where government is entirely in thrall to industry’s propaganda, as arguably was the case in US Internet regulation at the height of the dot-com bubble, in that heady winter. I finished writing the introduction to *Regulating the Global Information Society* on St Patrick’s Day 2000,<sup>4</sup> in the week that the bubble finally burst. The book expresses the more sober critical view that was sorely needed in the late 1990s.

In 2000, I left full-time academia for various industry-regulator roles, but stayed as research associate of first the Centre for the Study of Globalisation and Regionalisation (CSGR) at Warwick, then the Centre for Management Under Regulation (CMUR) at Warwick Business School under direction of Martin Cave in 2001–2, where I had presented a paper when it was under the direction of Catherine Wadhams and Morten Hviid in 1998. I published papers there on WiFi and standards wars, a step beyond the mobile standards debates of the previous several

<sup>4</sup> Marsden (ed.) (2000b).



years. The ‘standards wars’ literature at that time had a boost, not only from Paul David’s pioneering work as well as that of Katz and Farrell on network effects and ICT standards, but also by the empirical example of third-generation mobile phone standards, and notably the battle between European GSM and US CDMA standards. My edited collection, *Regulating the Global Information Society* (2000) featured papers by Lemley, McGowan and Gould reflecting on this. I also presented on Internet governance,<sup>5</sup> alongside Hans Klein and Milton Mueller. My work at that time was heavily influenced by then-recently deceased Susan Strange’s work on the relations between states and firms, which led me on to co-regulation studies. It also brought me into contact with Jonathan Aronson and his work with Peter Cowhey, and Susan Spar’s work on pirates, prophets, pioneers and profits – which established the historical pattern of deregulation, unregulation, self-regulation and re-regulation in communications industries, driven by state–firm relations.

The path-breaking work by Stefaan Verhulst and Monroe Price on self-regulation and its limits was also a significant influence, not least because their selfregulation.info project was awarded by the European Safer Internet Action Plan based in large measure on their insights in that theoretical work. The study on which this work is based was carried out in 2007, and written up in spring 2008. Negotiation with the publishers took the whole of 2009, which I dedicated to writing about the co-regulatory case study of network neutrality. The case studies have been substantially edited and updated in the course of 2010, but of course will be aged by the date of publication. The legitimacy of the very Act of Parliament that led to much rewriting, the Digital Economy Act 2010, is due to be judicially reviewed in spring 2011, as I write. I therefore claim the law as accurate at 1 November 2010, and the case study material as accurate at 1 January 2008 unless stated as later.

The absence of those factors that made my previous book so easy to write conspired to make this an extremely difficult task. I wrote while fully occupied with lecturing, undergraduate admissions, grant applications and other administrative tasks and university business, in the summer of many marriages (I married Kenza in Montreal in August and celebrated with the whole family in Rabat in September), and with a very ill father in hospital for long periods. That I finished the book at all owes much to

<sup>5</sup> Marsden (2000b).

my very understanding publishers at Cambridge University Press, Senior Lecturer colleagues at Essex, my wife and family, and the peace and solitude of Cambridge. This book is dedicated to my mother and father, who taught me the vital life lesson that you are remembered for the projects you finish, not those you start.

## ABBREVIATIONS

ABA	Australian Broadcasting Authority, statutory regulator replaced by Australian Communications and Media Authority
ACCC	Australian Competition and Consumer Commission, generic regulator
ACMA	Australian Communications and Media Authority, statutory regulator
ATVOD	Association for Television On Demand, UK co-regulatory body
AVMS	Audiovisual Media Services Directive 2007
BBFC	British Board of Film Classification, statutory censoring body
BIS	Department for Business, Innovation and Skills, see DTI
CAIC	IWF Child Abuse content list of alleged abuse sites blocked using ISP-level filters
CC	Creative Commons, commercial royalty-free copyright licensing system
CEOP	Child Exploitation and Online Protection Centre, Home Office policing coordinator
DEAct	Digital Economy Act 2010, UK legislation
DG INFSO	Directorate General Information Society and Media of the European Commission, established by the merger of DG INFOSOC (Information Society) and the Media Directorate of DG Culture in 2004
DNS	Domain Name System, 'telephone numbering' for IP addresses, regulated globally by ICANN, nationally by SROs such as Nominet (UK)
DRM	Digital Rights Management, method of embedding content standards and policy into computer-readable form, used to enforce copyright conditions
DTI	Department for Trade and Industry, UK ministry responsible for Internet and standards development, renamed as Department for Business, Innovation and Skills (BIS)
EC	European Commissions, executive body of the EU, responsible for developing and implementing the <i>acquis communautaire</i> , the body of EU law
ECD	Electronic Commerce Directive, Directive 2000/31/EC

ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights, highest judicial tribunal for ECHR
ECJ	European Court of Justice, highest judicial tribunal for European Union
ETSI	European Telecommunications Standards Institute, standards body
EU	European Union, as established in the Treaty of Maastricht 1992
European Council	Council of Ministers of EU Member States, representing governments
FCC	Federal Communications Commission, US federal regulator of broadcast and telecommunications
FOSI	Family Online Safety Institute
GPL	General Public Licence, OCL licence, typically for software, version 3.0 released 2007
IA	Impact Assessment, technique within Better Regulation agenda
ICANN	Internet Corporation for Assigned Names and Numbers, California-incorporated not-for-profit organization established in 1998
ICRA	Internet Content Rating Association, an international, non-profit organization of internet leaders working to develop a safer Internet, renamed in 2007 as FOSI
ICSTIS	Independent Committee for the Supervision of Standards of Telephone Information Services, UK co-regulator of Premium Rate Services for telephony, now including mobile telephony, known since 2007 as PhonepayPlus
ICT	Information and Communication Technologies
IETF	Internet Engineering Task Force, technical standards body
IGF	Internet Governance Forum, United Nations multistakeholder discussion forum initially held in Athens 2006, held annually
IIA	Inter-Institutional Agreement of 2003, between European legislative institutions
IMCB	Independent Mobile Classification Board, ratings self-regulator for mobile media
INHOPE	International Association of Internet Hotlines, European association of child sexual content hotlines
IOC	Initial Obligations Code, drawn up by Ofcom in May 2010 to implement DEAct ss.9–18 under direction of government
IP	Internet Protocol
IPR	Intellectual Property Rights

IPTV	Internet Protocol Television; video programming delivered over IP networks rather than broadcast (cable, terrestrial and satellite) networks
ISFE	Interactive Software Federation of Europe, European association of publishers of video and computer games, reference and educational works
ISOC	Internet Society, coordinating mechanism for Internet standards and policy
ISP	Internet Service Provider, company providing access to the Internet for consumers and businesses. The largest ISP in most Member States is provided by the incumbent telco. ISPs often provide content, have 'portal' pages which offer news, weather and video reports, dating, chat, search and other functions. Mobile networks are also ISPs
ITU	International Telecommunication Union
IWF	Internet Watch Foundation, UK 'hotline' for illegal content reporting
JANET	Joint Academic Network, consortium of UK universities and research institutes developing internetworking, including high-speed SuperJANET
KJM	Kommission für Jugendmedienschutz, co-regulatory body for media content in Germany
MP3	File format for digital music from Motion Picture Expert Group (MPEG)
MS	Member State of the EU, twenty-seven in total
NICAM	Netherlands Institute for the Classification of Audiovisual Media, co-regulator
NTD	Notice and Take Down, system for removal by ISPs and content hosts of alleged illegal content
OCL	Open Content Licensing, models include CC and GPL
OECD	Organization for Economic Cooperation and Development, 'think tank' for developed nations: thirty national members; membership is limited by commitment to a market economy and a pluralistic democracy. Formed in 1961 and grew out of the Organization for European Economic Co-operation (OEEC), established in 1947
Ofcom	Converged communications regulator for telecommunications, Internet and broadcasting for UK, established by Office of Communications Act 2002
PEGI	Pan European Game Information, age-rating system
PICS	Platform for Internet Content Selection, W3C website labelling standard implemented by ICRA
RMIT	Royal Melbourne Institute of Technology
SIAP	Safer Internet Action Plan, EC DG INFSO funding for awareness programmes, hotlines and other actions since 1998
SNS	Social Networking Site, such as Facebook or Bebo
SRO	Self or Co-Regulatory Organization, institution designed to provide guidance and/or enforcement of conduct or content standards, in our case including a broad spectrum from 'self-organized' to co-regulatory forms

UGC	User Generated Content, ripped mixed burned from digital files
VoIP	Voice over Internet Protocol, technology to digitize sound in packets sent over the Internet. Its primary advantage is that distance does not affect the cost of the call between two VoIP enabled phones (or PCs attached to the phone or a data system)
W3C	World Wide Web Consortium, standards body established by Tim Berners-Lee in 1994
Web2.0	Compendium description of Ajax-based technologies that permit UGC (pronounced web-two-dot-oh)
WGIG	Working Group on Internet Governance, expert group established in 2005 to report on Internet policy to the United Nations Secretary General
WSIS	World Summit on the Information Society, United Nations Internet regulatory summits formally held in Geneva (2003) and Tunis (2005)

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