

Internet Governance & Regulation

Reading List

Hilary Term 2008
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The Internet Governance & Regulation tutorial takes a closer look at the law and policy challenges of networked information technologies. The goal is to provide students with an in-depth understanding of the current struggles for control and ownership in digital media and equip them with the tools to analyze and assess these conflicts from a regulatory perspective.

The reading list has been compiled with a focus on two particular aspects:

- *Broad concept of regulation and governance:* Even though law has traditionally played an important role in the regulation of human behavior, it is not the only constraining force. The tutorial will recognize this fact by adopting a broad perspective that includes, but is not limited to, the analysis of law in the broader context of public policy.
- *Focus on the U.S. context:* Most cases and examples are taken from the U.S. context. Nevertheless, the underlying principles and problems are largely universal and can be applied in many other jurisdictions. We will occasionally cross-reference other jurisdictions by way of comparison.

Designed for students from a non-law and policy background, the tutorial takes up a unique challenge. First, it aims to provide students with an understanding of basic concepts and principles of regulation and governance. Second, it explores the social phenomenon of networked information technology. Third, it brings together these two strands to help students think independently and critically about Internet Governance & Regulation.

Students are required to participate in the 8 tutorials and prepare carefully. Based on the weekly readings, a total of 8 essays have to be written. Each essay must be e-mailed to the tutor the evening before the respective tutorial takes place. The essay question of the week will be sent to the students well in advance, often together with a selection of links to websites and puzzles relevant to the topic of the week. There is no final examination.

Readings are prioritized as follows: * = mandatory, (*) = important, but can be skipped if need be, [no label] = optional, but still interesting. If only sections of an article or book should be read, they are marked in **bold**.

Acknowledgments

This reading list builds and draws upon a couple of excellent courses and readers in the field. Most helpful in this regard were Jonathan Zittrain's course on "Cyberlaw: Internet Points of Control" at Harvard Law School, Viktor Mayer-Schönberger's course on "Information Technology, Policy, and the Future of Governance" at Harvard Kennedy School, and Paul Schiff Berman's reader on "Law and Society Approaches to Cyberspace" (2007).

Introductory Readings

These introductory readings should be helpful in clarifying some of the ideas and concepts the tutorial is based on. They are divided into two sections. The first section introduces some basic concepts and frameworks of regulation and governance from political science and legal theory. The second section lists three seminal works for understanding networked information technology and its implications for society.

A. Law, Regulation and Governance

*H.L.A. Hart, *THE CONCEPT OF LAW* **1-17** (1961)

Legal theorist *Hart* asks “What is law?,” and does not give an answer.

*Lawrence Lessig, *The New Chicago School*, 27 *JOURNAL OF LEGAL STUDIES* 661 (1998)

A piece on legal theory, in which *Lessig* proposes a framework for thinking about “regulation” in a comprehensive way.

*Stephen Breyer, *REGULATION AND ITS REFORM* (1982), chapter 1 (“Typical Justifications for Regulation”)

U.S. Supreme Court judge *Breyer* gives an overview of justifications for regulation. As you will notice, his understanding of “regulation” differs from *Lessig*’s.

(*)Gerry Stoker, *Governance as Theory: Five Propositions*, 50 *INTERNATIONAL SOCIAL SCIENCE JOURNAL* 17 (1998)

“Governance” from the perspective of a political scientist.

B. Networked Information Technology and its Impact on Society

*Nicholas Negroponte, *BEING DIGITAL* **11-20** (1995)

A classic on all things digital and still a fascinating read—especially with the benefit of hindsight. Pages 11-20 capture the core, but read more if you are interested.

Manuel Castells, *THE NETWORK SOCIETY* **3-45** (2004)

This introductory chapter (Part 1: “The Theory of the Network Society”) gives a good overview of *Castells*’ sociological theory of the network society. For another digestible summary of his argument, see Frank Webster (ed.), *THE INFORMATION SOCIETY READER* (2004), pp. 133-83.

*Yochai Benkler, *THE WEALTH OF NETWORKS* (2006), **Chapter 3**

Arguably one of the most talked-about books at the intersection of law, technology, and society at the moment. Even though some of the ideas may be difficult to understand at

this point, just browse through the book and try to read Chapter 3 to become familiar with what – in Benkler’s opinion – is the main socio-economic transformation brought about by networked information technology: a shift from consumers to users. We will get back to these ideas in the course of the tutorial.

In addition, to get first-hand experience of the Internet, try out at least the three following things (if you haven’t done so already):

1. Edit an article on *Wikipedia*.
2. Join *Second Life* or another (free) virtual world of your choice, create a character, and play.
3. Comment on five of your favorite blogs.

Topic 1: Conceptualizing “Cyberspace” from a Law and Policy Perspective – A Brief History

When the Internet gained traction in the mid-1990s, legal scholars and policy makers were struggling to integrate the emerging network of networks into their understanding of the world. How could this new sphere of communication that had so profound an impact on the ways we behave, communicate, and do business, be conceptualized from a law and policy perspective and what are the normative implications?

In this first session, we will start by going back in time and revisit some of the early approaches that still reverberate through the current debates on Internet governance & regulation. It may be helpful to look at these readings with two sets of questions in mind: a) How is the social phenomenon described? What metaphors are used? b) What are the normative consequences and models authors attach to these descriptions?

*David R. Johnson & David G. Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STANFORD LAW REVIEW 1367 (1996)

*Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 4 (1998)

(*Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIFORNIA L. REV. 395 (2000)

Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIFORNIA L. REV. 439, **452-458** (2003)

In the late 1990s, Lawrence Lessig prominently added a different perspective. He emphasized the normative role of technology and “code” for all kinds of computer-mediated communication and claimed: “code is law.”

*Lessig, CODE, AND OTHER LAWS OF CYBERSPACE **3-60** (1999)

(*Timothy Wu, *When Code Isn’t Law*, 89 VIRGINIA LAW REVIEW 679 (2003)

Joel R. Reidenberg, *Lex Informatica: The Formation of Information Policy Rules Through Technology*, 76 TEXAS L. REV. 553 (1998)

What followed were more comprehensive theories that tried to grasp the social implications of computer-mediated communication and develop an appropriate governance model.

*Viktor Mayer-Schönberger, *The Shape of Governance: Analyzing the World of Internet Regulation*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW 605, **30-74** (2003) (a “triangle” of three traditional modes of governance)

*Yochai Benkler, THE WEALTH OF NETWORKS **386-96** (2006) (an “institutional ecosystem” that can be divided into “three layers”)

(*)Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, **1980-96** (2006) (a “generative grid”)

(*)Andrew Murray, THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT **22-54** (2006) (a “web of regulation”)

Paul Schiff Berman, *Introduction*, in: P. S. Berman (ed.), *Law and Society Approaches to Cyberspace* xi, **xi-xix** (2007)

Sample essay questions:

What exactly is the regulatory model *David Johnson & David Post* envision for “cyberspace”? Discuss.

Larry Lessig argues that “code is law.” Are you convinced?

Topic 2: State Control and Private Enforcement – Internet Points of Control

From the perspective of a traditional lawyer, one of the most obvious and pressing questions of Internet governance is the one of jurisdiction. How and by whom should whose laws be enforced in a medium that crosses physical borders and easily evades traditional instruments of state control?

In this session, we will have look at the problem of the proper reach of law and analyze responses by both state and non-state regulators. For a good overview of the jurisdictional challenges, see:

*Jonathan Zittrain, *Be Careful What You Ask For: Reconciling Global Internet and Local Law*, in: Cato Institute (ed.), *Who Rules the Net?* (2003), available at <http://ssrn.com/abstract=395300>

*Dow Jones & Company Inc. v Gutnick [2002] HCA 56 (10 December 2002), available at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html (try to understand the general structure and argument of the decision without getting lost in legal technicalities)

Given these jurisdictional dilemmas, state regulators quickly moved on to more sophisticated regulatory strategies. Instead of trying to catch those who actual cause the harm, they indirectly targeted those who were in a better position to do so: information intermediaries like Internet service providers, platform operators, software companies, etc.

*Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 53 (1986)

*Jonathan Zittrain, *Internet Points of Control*, 43 BOSTON COLLEGE L. REV. 653 (2003)

Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARVARD JOURNAL OF LAW AND TECHNOLOGY 253 (2006)

Of course, regulators also realized that imposing unlimited liability on intermediaries would be counterproductive. One reaction was to create so-called “safe harbors” under Section 230 of the Communications Decency Act. The devil, however, lies as always in the details: under what conditions should the operator of an online platform be liable for third-party content?

*CDA 230, http://www.law.cornell.edu/uscode/html/uscode47/usc_sec_47_00000230_---000-.html

*Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998), available at http://epic.org/free_speech/blumenthal_v_drudge.html

*John Seigenthaler, *A False Wikipedia Biography*, USA TODAY, Nov. 29, 2005, available at http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm

(*Ken Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARVARD JOURNAL OF LAW AND TECHNOLOGY 163 (2006)

Mark A. Lemley, *Rationalizing Internet Safe Harbors*, Stanford Public Law Working Paper, No. 979836 (2007), available at <http://ssrn.com/abstract=979836>

Sample essay questions:

The plaintiff's primary argument in *Dow Jones v. Gutnick* had focused on the spectre of "a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe." Discuss.

Based on your knowledge and interpretation of CDA 230, do you think the Wikimedia Foundation should be immune from legal claims based on defamatory content on its platform? Discuss and use the Seigenthaler case as an example.

Topic 3: Regulating Speech – Freedom of Expression and the Problem of Filtering

Every action on the Internet can be regarded as some form of speech that is protected by fundamental rights in national constitutions and international law around the world. Problems occur when governments or private actors interfere with this freedom of expression—and engage in a practice commonly called “censorship.” Networked information technology forces us to rethink our conventional understanding of free speech and its limits on both a theoretical and practical level.

*First Amendment, U.S. Constitution,
<http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti>

*Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NEW YORK UNIVERSITY L. REV. 1-58 (2004)

*Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS JOURNAL 629-70 (1998)

*Ronald E. Deibert et al., ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING (FORTHCOMING 2008) (skim through)

*Global Online Freedom Act of 2006, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h4780ih.txt.pdf

John G. Palfrey & Jonathan Zittrain, *Perspective: Companies Need Guidance to Face Censors Abroad*, CNET NEWS.COM, Aug. 14, 2007, http://www.news.com/Companies-need-guidance-to-face-censors-abroad/2010-1028_3-6202426.html?tag=st.num

Sample essay questions:

Can there be legitimate Internet filtering? Discuss.

The proposed Global Online Freedom Act seeks to impose “minimum corporate standards” to promote online freedom in “designated Internet-restricting countries.” Discuss.

Topic 4: Copyright, Patents, and Other Exclusive Rights in Information

Intellectual property has been a major battleground in Internet governance and regulation. This is hardly surprising. While “property” is essentially the right to exclude, “intellectual property” is the right to exclude from the use of information. This is hard to maintain in environments where every copy is as good as the original and information can be reproduced at virtually no cost. In this session, we will critically examine the current regime of intellectual property rights in U.S. with a focus on copyright.

*Viktor Mayer Schoenberger, *In Search of the Story: Narratives of Intellectual Property*, 10 VIRGINIA JOURNAL OF LAW & TECHNOLOGY 11 (2005)

*Robert P. Merges et al., INTELLECTUAL PROPERTY IN THE TECHNOLOGICAL AGE **19-25** (2006)

*Article I, Section 8, Clause 8 of the U.S. Constitution,
<http://www.law.cornell.edu/constitution/constitution.articlei.html#section8>

*Title 17 of the U.S. Code, **Sect. 101, 102, 103, 106, 107**,
http://www.law.cornell.edu/uscode/html/uscode17/usc_sup_01_17_10_1.html

*DMCA 512, **(a)-(d), (g), (h)**,
http://www.law.cornell.edu/uscode/17/usc_sec_17_00000512----000-.html

The discussion has been especially heated with regard to copyright and peer-to-peer file sharing:

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (aka “Betamax case”)

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)

*MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913 (2005) (as always with court decisions, try to grasp the main arguments and ideas and neglect the legal technicalities)

*Yochai Benkler, THE WEALTH OF NETWORKS **413-429** (2006)

Two exemplary approaches from the extensive literature:

*Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUMBIA L. REV. 1613 (2001)

*Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMMUNICATIONS AND ENTERTAINMENT L.J. 1 (2004)

Some alternative approaches and critiques:

*Emmanuelle Fauchart & Eric A. Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, MIT Sloan Research Paper No. 4576-06 (January 2006) (focusing on the role of social norms)

*William Fisher, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004), **Chapter 6** (proposing an alternative compensation system)

Urs Gasser & Silke Ernst, *From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age*, Berkman Center Research Publication No. 2006-05 A (2006)

Yochai Benkler, *THE WEALTH OF NETWORKS* **35-58** (2006)

Sample essay questions:

Fauchart & v. Hippel show that, under certain circumstances, some of the goals pursued with an IP rights regime can be achieved without law. Could this be a model for the other industries, e.g. the software industry?

Briefly sketch *Fisher's* idea of an alternative compensation system and critically assess its potential and limits.

Topic 5: The Digital Person – Privacy, Identity, and Reputation

Informational privacy has bothered policy-makers around the world even before the Internet added a new dimension. Interestingly, the U.S. and the EU have adopted quite different regulatory approaches:

*Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STANFORD L. REV. 1315, **1325-37** (2000) (Part II describes the commonalities and differences between the two regimes)

(*Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J.(L 281) 31, http://europa.eu.int/eur-lex/en/lif/dat/1995/en_395L0046.html)

(*Federal Trade Commission, Privacy Initiatives, <http://www.ftc.gov/privacy/>)

Protecting information privacy on the Internet is even more problematic. Not only leaves every move in digital environments a trace of data that is later likely to be searchable. On a social web, which depends on the active participation of many, the very notion of “personal” data is being challenged. What is public, what is private anymore?

*Frederick Schauer, *Internet Privacy and the Public-Private Distinction*, 38 JURIMETRICS J. 555 (1998)

Several approaches have been proposed in the literature—often, of course, with different aspects of the problem in mind:

*Kenneth C. Laudon, *Markets and Privacy*, 39 COMMUNICATIONS OF THE ACM 92 (1996)

*Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STANFORD L. REV. 1125 (2000)

*Jonathan Zittrain, *THE FUTURE OF THE INTERNET – AND HOW TO STOP IT* (FORTHCOMING 2008), **Chapter 9**

*Viktor Mayer-Schoenberger, *Useful Void: The Art of Forgetting in the Age of Ubiquitous Computing*, KSG Working Paper No. RWP 07-022 (April 2007)

Sample essay questions:

At the core of current privacy regulation both in the U.S. and the EU is the concept of “personal data.” In view of privacy concerns in the context of various Web 2.0 applications, do you think this conceptual basis can be maintained? Why or why not?

Kenneth Laudon proposes to grant property rights in personal data and establish a “National Information Market.” Discuss.

Topic 6: Principles of Network Design – From End-to-End to Generativity?

One of the core issues of Internet governance is network design. What network topology allows and fosters what kinds of uses? The arguably most renowned principle at the physical layer is the end-to-end principle, which has been subject of both academic inquiry and political struggles.

*Jerome H. Saltzer, David P. Reed & David D. Clark, *End-to-end Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYSTEMS 277 (1984)

(*)Paul A. David, *The Beginnings and Prospective Ending of “End-to-End”: An Evolutionary Perspective on the Internet’s Architecture*, Stanford Econ. Dept., Working Paper No. 01-012, 2001, available at <http://wwwecon.stanford.edu/faculty/workp/swp01012.pdf>

Mark Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001)

David Isenberg, *The Rise of the Stupid Network*, May 1997, available at <http://www.hyperorg.com/misc/stupidnet.html>

The end-to-end principle also plays an important role in the current debate on “network neutrality” in U.S. (tele-) communications policy.

*Edward W. Felten, *Nuts and Bolts of Network Neutrality*, July 6, 2006, <http://itpolicy.princeton.edu/pub/neutrality.pdf>

*Timothy Wu, *Network Neutrality, Broadband Discrimination*, 2 JOURNAL OF TELECOMMUNICATIONS AND HIGH TECHNOLOGY LAW 141 (2003)

*Christopher S. Yoo, *Would Mandating Broadband Network neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 22 (2004)

Timothy Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FEDERAL COMMUNICATIONS LAW JOURNAL (2007)

Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 JOURNAL ON TELECOMMUNICATIONS AND HIGH TECHNOLOGY LAW 329 (2007)

*Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 2029-37 (2006)

(*)Timothy Wu, *A Tale of Two Platforms*, HARV. L. REV. forthcoming, available at <http://ssrn.com/abstract=993288>

Sample essay questions:

Jonathan Zittrain argues on p. 2030 that “complete fidelity to end-to-end may cause users to embrace the digital equivalent of gated communities.” What does he mean by that? Do you agree?

“Neutrality” is somewhat of a buzzword at the moment: neutral search, neutral networks, technological neutrality, Wikipedia’s neutral point of view. What, in your view, should “neutral” mean with regard to technology?

Topic 7: Order without Law – Peer-production of Governance?

So far, we have mostly focused on state law and how it regulates behavior in cyberspace. This is obviously too limited a perspective. In various online communities, users have found ways to deal with social dilemmas themselves.

*Julian Dibbell, *A Rape in Cyberspace*, <http://www.juliandibbell.com/texts/bungle.html>
(last visited Jan. 31, 2007)

*Jennifer L. Mnookin, *Virtual(y) Law: The Emergence of Law in LambdaMOO*, 2 JOURNAL OF COMPUTER-MEDIATED COMMUNICATION 645-701 (1996)

(*)James Grimmelmann, *Virtual Worlds as Comparative Law*, 47 NEW YORK LAW SCHOOL L. REV. 147 (2004)

David P. Baron, *Private Ordering on the Internet: The eBay Community of Traders*, Stanford University, Research Paper No. 1709

(*)David R. Johnson, Susan P. Crawford & John G. Palfrey, *The Accountable Net: Peer Production of Internet Governance*, 9 VIRGINIA JOURNAL OF LAW AND TECHNOLOGY 32 (2004)

The extent of user participation and cooperation in many online activities brings up another question that is currently being examined: in how far may these new patterns of social production also transform traditional state government and rulemaking?

*Beth Simone Noveck, *“Peer to Patent”*: *Collective Intelligence, Open Review, and Patent Reform*, 20 HARVARD JOURNAL OF LAW & TECHNOLOGY 123 (2006)

Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, KSG Working Paper No. RWP04-002 (January 2004)

For a more critical stance on the potential of user participation in public policy-making and other areas, see:

*Matthew Hindman, *Open-Source Politics Reconsidered*, in: Viktor Mayer-Schoenberger & David Lazer (eds.), *Governance and Information Technology: From Electronic Government to Information Government* 183-207 (2007)

Cass R. Sunstein, *INFOTOPIA* (2006)

Sample essay questions:

How would you describe the way the people on Lambda MOO dealt with Mr. Bungle: did they do “justice”? Did they “regulate”?

Beth Noveck describes one way of harnessing the “wisdom of crowds” for better policy-making with regard to patent review. What are the promises and pitfalls of such approaches? Can you envision other fields of application?

Topic 8: What Replicants Can Teach – Rights for Robots and Questions of Agency

In this last session, we will have a rather unconventional look at the future of regulation and technology. Strange as it may sound, various kinds of algorithms, engines, and machines already have a huge impact on our lives and the ways in which we exercise our freedoms. This has been a major theme for both science fiction and academic authors.

*Blade Runner (1982)

2001 – A Space Odyssey (1968)

*Judith Donath, *Being Real, in: K. Goldberg (ed.), The Robot in the Garden: Telerobotics and Telepistemology in the Age of the Internet* 296 (2001)

Alan M. Turing, *Computing Machinery and Intelligence*, 59 MIND 433 (1950)

Sherry E. Turkle, LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET (1995)

Also lawyers have started to think about the consequences of this development and the need for rethinking some fundamental doctrines of law: who is a *legal* person?

*Gunther Teubner, *Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 JOURNAL OF LAW AND SOCIETY 497 (2006)

Lawrence Solum, *Legal Personhood for Artificial Intelligences*, 70 NORTH CAROLINA L. REV. 1231 (1992)

Even though a scenario of artificial intelligence taking over seems still far away, there are other contexts in which authoritative decision-making is already automatized to an extent that may demand novel protections.

*Danielle K. Citron, *Technological Due Process*, 85 WASHINGTON UNIVERSITY L. REV. (2007)

Sample essay questions:

Gunther Teubner examines the question of granting rights to electronic agents. What exactly does he mean by “rights?” Are you convinced of his analysis?

Danielle Citron discusses the need to rethink due process guarantees in the light of automated administrative decision-making. Against this backdrop, how would you assess the risks imposed by privately run information aggregators, like reputation systems, recommendation systems, search engines?