KNOWLEDGE GOVERNANCE -
REGULATING THE DIGITAL WORLD

Internet Law in a National Context

An uncomfortable assumption

- **A sovereign state is the regulator**

Why regulate at all?

- Threat
- Potential

Fukuyama

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- **Our Posthuman Future, London 2002**

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- We love the Internet
  - Does this mean we should regulate it **more** or regulate it **less**
  - **Who** should regulate it?

WHY DO WE ALL LOVE THE INTERNET?

Why did Internet succeed?

- The Internet is **free** - it cannot be easily censored

- The Internet is **generative**: flexible and open, often taking place on the periphery (*J. Zittrain*)

- The Internet is **neutral** - it does not work differently based on the nature of the content it carries

Why is it so great?

- Low-cost

- Decentralized

- Anonymous

What enabled this

- **Three layers** (*Y. Benkler*): The architecture of the digital world opens up its liberal potential

- **The governments did not interfere** in the 90s (like they did in the 60s or 70s) imposing legacy solutions

- **The users** liked it, **participated** and self-regulated

Why is it threatened?

- Can be and often is censored

- Can be centrally controlled (Minitel, North Korea...)

- The are more demands for it being less neutral, i.e. pay to deliver and get contents faster

Why is it difficult to regulate?

- Increased **participation** = many players/participants

- The holders of **vested rights** ("old companies") are fighting innovation

- Three **layers**: the wires (telecoms law), the providers and the users

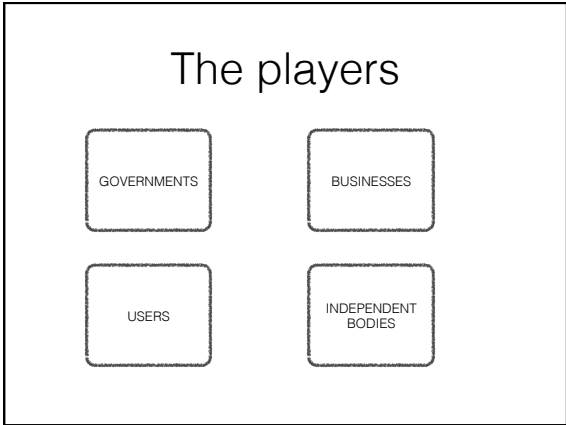- **Techonological neutrality**: laws must be future-proof

HOW TO REGULATE IT?

_____

The players

GOVERNMENTS	BUSINESSES
USERS	INDEPENDENT BODIES

_____

The players

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_____
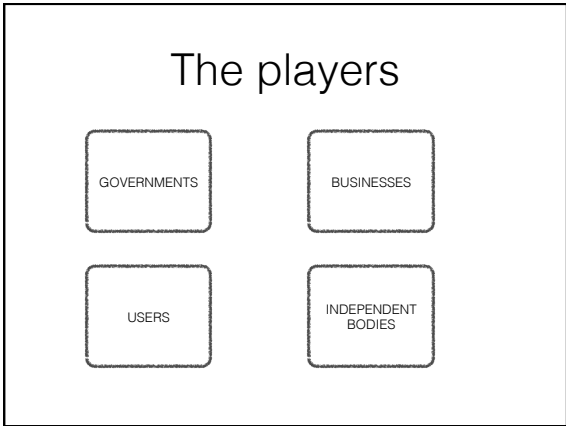
The players

GOVERNMENTS

The model: extension of territorial sovereignty.

The *Yahoo!* case

- Nazi memorabilia sold on Yahoo.com auction site, available in France

- In France, selling Nazi artifacts is illegal

- The court: a site accessible in France must repsect French laws

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The players

BUSINESSES

The model: businesses are best suited to regulate

The Clinton/Magaziner framework 1997

- Not regulated but market-driven, markets are more efficient

- Governments should remove barriers

- Governments should support and encourage

- Governments should not attempt to fit the Internet to legacy regimes for telecoms

The players

The model:
professional or international bodies should regulate

INDEPENDENT BODIES

International regulators

- Mostly standardisation bodies

- ICANN

- W3C

The players

The model: the Internet architecture itself has regulatory potential.

USERS

Lawrence Lessig

- *We can build, or architect, or code cyberspace to protect values that we believe are fundamental. Or we can built, or architect, or code cyberspace to allow these values to disappear. '*

- *Code V2.0, New York 2006*

EXAMPLES OF OVERREGULATION AND/OR BAD REGULATION

1. The *Napster* case and copyright

- Napster as a file-sharing medium shut down by a lawsuit

- Fall in CD sales, Rise in demand for digital music

- **Mistake**: frightening entreprenurs with litigation

2. Electronic signatures

- 2001 Electronic Signatures Directive

- Very low acceptance and usage rate

- **Mistake**: regulate instead of providing support for business solutions

3. The *Google* books case

- Google digitizing all the books it can get its hands on

- Lawsuit initiated in the US, EU

- **Mistake**: not have a regulatory framework which would enable new digital contents

4. Article 6 *InfoSoc* Directive

- Prohibits breaking access or copy protection independently of actual copyright (which may or may not exist), e.g. DRM

- Modelled on DMCA S.1201

- **Mistake**: protecting vested rights

5. Spam

- Huge number of unsolicited emails in circulation

- Almost every state, inlcuding the EU, has rules against it

- **Mistake**: not dealing with the source of the problem - spam comes from out of the EU

6. Patent trolling

- Large number of firms which do not do innovate but only buy patents from others

- Litigation against users

- **Mistake**: have a system centered on litigation and damages

7.Why did Sony MP3 player fail?

• DRM

• Magic disk

• **Mistake**: lobby for and provide products which the consumers hate

The 7 Dadly Sins

1. Frightening off innovators/entrepreneurs
2. Regulating something you do not understand
3. Not recognizing new trends
4. Being in the service of vested rights
5. Not recognizing the real source of the problem
6. Actively encouraging those who do not innovate
7. Aggravating your own supporters

ALTERNATIVE?

The 7 Alternative Ways

1. Write laws that attract venture capital

2. Do not regulate before something has fully developed

3. Always leave doors open to new ideas

4. Write laws that are not biased towards legacy technologies

5. Attack the source of the problem, with international cooperation, if needed

6. Do not encourage parasites

7. Rely on users/consumers

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Governance

- Movement from government to governance

- Movement from soveregin state as regulator to other actors as regulators

- Whereas states use structures, governance uses **social functions or processes** implemented by a **wide variety of organizations**

Governance

- **Governance vs regulation**

- **Governance**: the manner in which power is exercised, governing vs ruling

- **Knowledge governance**: choosing structures and mechanisms that can influence the process of sharing and creating knowledge

The main idea

- The Internet ought to be **governed** rather than purely **regulated**.

MODELS OF REGULATION

States

- Should underregulate rather than overregulate

- Should support entrepreneurship

- Should keep the network free

Self-regulation

- Delegation of regulatory powers from state to non-state entities

- Examples: codes of conduct, international standards

Some conclusions

- We need to experiment with regulatory models

- States should not be the focus of regulation