

Control of Objectionable Material on the Internet: The Lessig Model

By

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I. Introduction

- I.1. John Perry Barlow notoriously put it, “[G]overnments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace ... [Y]ou have no sovereignty where we gather ... [W]e have no elected government, nor are we likely to have one.”¹ The reason for this belligerent exhortation of anarchism is the impossible nigh onerous task of regulating matter on the internet. Thus in its infancy the net was thought to be domain free from any instruction. Though as Nani Palkhiwala reminded us, liberty without accountability is the freedom of the fool.
- I.2. Prof. Lawrence Lessig, a former Jack N. and Lillian R. Berkman Professor for Entrepreneurial Legal Studies at Harvard Law School proposed a convenient and multi pronged approach for regulating content on the internet.² This model is found to be most effective in terms of internet content regulation. In Part II the use of laws to regulate content online will be demonstrated, further in Part III the employment of social norms and the use of public morality measures will be shown, in Part IV the effort by various states to control the market dynamics of the internet will be analyzed and finally in Part V the technological architecture advances aiding regulation will be demonstrated.

II. Law

- II.1. The legislative need and approach has already been demonstrated in the preceding report, hence a repetitive exposition is not in the interest of brevity. However utility of legal controls is confirmed by the results of successful prosecution by states of virtual pedophilias. Great Britain’s success against such objectionable material is an apt illustration. Section 7(4) of the Protection of Children, 1978, which contains the definition of the term ‘Photograph’, was amended to include photographs in electronic formats by Section 84(4) of the Criminal Justice and Public Order Act, 1994.³ The UK police succeeded with ‘Operation Starburst’ and with the most recent “Operation

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¹ John Perry Barlow, A Declaration of the Independence of Cyberspace, (1996) available at: <http://homes.eff.org/~barlow/Declaration-Final.html>, last visited 13 July 2005.

² Lawrence Lessig, The New Chicago School, 27 J. LEGAL STUD. 661, 662–66 (1998).

³ See Akleniz. Y., Governing Pornography and Child Pornography on the Internet: The UK Approach. on Cyber-Rights, Protection. and Markets: A Symposium, University of West Los Angeles Law Review 247-275, (2001).

Cathedral” in identifying and prosecuting international pedophilia rings utilizing the internet.

III. Norms

- III.1. Norms control where people can smoke; they affect how people behave with members of the opposite sex; they limit what people may wear; they influence whether people will pay their taxes. Like law, norms regulate by threatening punishment ex post. But unlike law, the punishments of norms are not centralized. Norms are enforced (if at all) by a community, not by a government. In this way, norms constrain, and therefore regulate.⁴
- III.2. As an informal community evolves from a web of bilateral trust relationships, group-wide norms also evolve. Note, in this context, that it is not the existence of “close-knit” communities that generates group-wide norms, as some have contended. Instead, norms and communities can evolve simultaneously as each affects the other: the evolution of norms of cooperation lead to the development of a web of interrelationships that can become a "close-knit" community, and the development and extension of such a community in turn facilitates the evolution of more effective norms.⁵
- III.3. To see norms in action on the internet, one may only see the myriad rules of online communication which have been devised, it is appropriately called ‘netiquette’.⁶ In netiquette a sentence typed in capital letters is considered yelling by the online community.⁷

⁴ Lawrence Lessig, The Law Of The Horse: What Cyberlaw Might Teach, 113 Harv. L.R. 501, 507 (1999).

⁵ Benson, B. L., To Arbitrate or to Litigate: That is the Question, 8 European Journal of Law and Economics 91-151, (1999).

⁶ Netiquette Home Page, <http://www.albion.com/netiquette/>, last visited 14th July 2005.

⁷ Dave’s Guide to the Internet, <http://www.davesite.com/webstation/inet101/nets01.shtml>, last visited 14th July 2005.

IV. Market

IV.1. A market might be strengthened by a set of business norms; a set of social norms might be undermined by a market. Depending upon its design, cyberspace can enable a market; or depending upon its design, it can make market functions too costly. And depending upon its design, cyberspace can enable state regulation. A number of academic studies have been carried out to examine the role of the market in the control and regulation of content on the internet.⁸ Of course the market is able to constrain in this manner only because of other constraints of law and social norms: property and contract law govern markets; markets operate within the domain permitted by social norms. But given these norms, and given this law, the market presents another set of constraints on individual and collective behavior.⁹

V. Architecture

- V.1. The idea that architecture might regulate is nothing new. The *Panopticon* is a type of prison building designed by the philosopher Jeremy Bentham. The concept of the design is to allow an observer to observe (-opticon) all (pan-) prisoners without the prisoners being able to tell if they are being observed or not, thus conveying a “sentiment of an invisible omniscience”.¹⁰ By architecture of the internet, here it is signified, the software and the hardware on which it exists.
- V.II. An illustration of how effectively software can regulate internet functions is shown by net filtering software’s. In such filtering the primary and most longstanding means of blocking is at the router level, and on the basis of IP address. A recent study concluded, “China makes a systematic, comprehensive, and frequently successful effort to limit the ability of its citizens to access and to post on-line content the state considers sensitive.”¹¹

⁸ M. A. Einhorn and Rosenblatt, Peer-to-Peer Networking and Digital Rights Management: How Market Tools Can Solve Copyright Problems, Cato Institute Policy Analysis, No. 534: 1-20 (2005).

⁹ Lawrence Lessig, The Law Of The Horse: What Cyberlaw Might Teach, 113 Harv. L.R. 501, 507 (1999).

¹⁰ Wikipedia: The Free Encyclopedia, <http://en.wikipedia.org/wiki/Panopticon>, last visited 14th July 2005.

¹¹ Internet Filtering in China in 2004-2005: A Country Study, <http://www.opennetinitiative.net/studies/china/>, last visited 14th July 2005.