



Regulation

Regulating the Information Society

Class 3

18 February 2020

Information Technology Law in the Global
Society

University of Latvia Faculty of Law

Shawn Sullivan (sullivan@sullivanlaw.net)

Chapter 4 of the textbook examines different theories of whether and how the Internet may be regulated.

Some of these theories turned out to be more accurate than others.

Nevertheless, all of them reflect lasting concerns about society and the individuals who compose it; about peace and order; and about freedom and responsibility.

In its own way, each theory addresses the challenges of exercising authority in an immaterial realm that crosses territorial boundaries.

The evolution of cyberspace regulation is not over. Regulation will continue to adapt to new technologies and new ways of acting and interacting in the digital world.

Cyberlibertarianism

"Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather."

- Assumed that the law of nation states could only really be effective within the physical territory of the state.
- Assumed that law is not legitimate, and cannot be enforced, in a virtual space.

However...

- People who engage in activities on the Internet have a physical body that occupies space, and are generally subject to the jurisdiction of one or more nations.
- Principles of private international law were already equipped to deal with questions of overlapping jurisdiction.

Right: John Perry Barlow, a founder of the Electronic Frontier Foundation, a poet, and a writer of lyrics for the Grateful Dead (an American rock band of the 1960s and 1970s), wrote a "Declaration of Independence of Cyberspace," which is quoted above.

Photo by User Europeangradientschool on en.wikipedia - <http://www.egs.edu/>, CC BY-SA 2.5, <https://commons.wikimedia.org/w/index.php?curid=1824566>

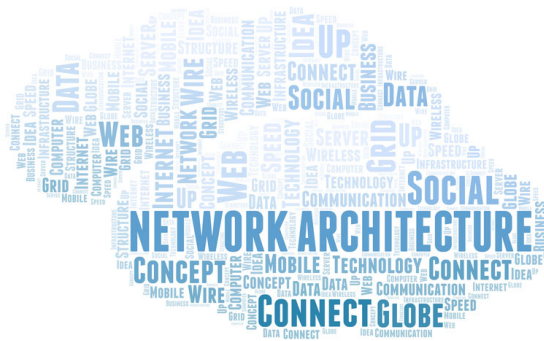




More Sophisticated Cyberlibertarian Arguments

- **Regulatory Arbitrage:** Prediction that in cyberspace, individuals could “seek the shelter of” the least restrictive jurisdiction to which they are subject.
 - E.g., obscenity laws differ widely across the globe. One of the most liberal jurisdictions in this area is the USA.
- **A Decentralized Legal System Dependent on Consent of Internet Users:** Argument that, to be effective, regulation of cyberspace must arise “organically,” with the consent of most users.
- However, do Internet users really share a common set of values about order and freedom?
- Or does the Internet isolate individuals from broader society (e.g., through the ability to filter out everything a person doesn’t already believe)?
- Whether or not Internet users agree to limit their activities, there are clearly antisocial and anti-market activities that require regulation.

Cyberpaternalism

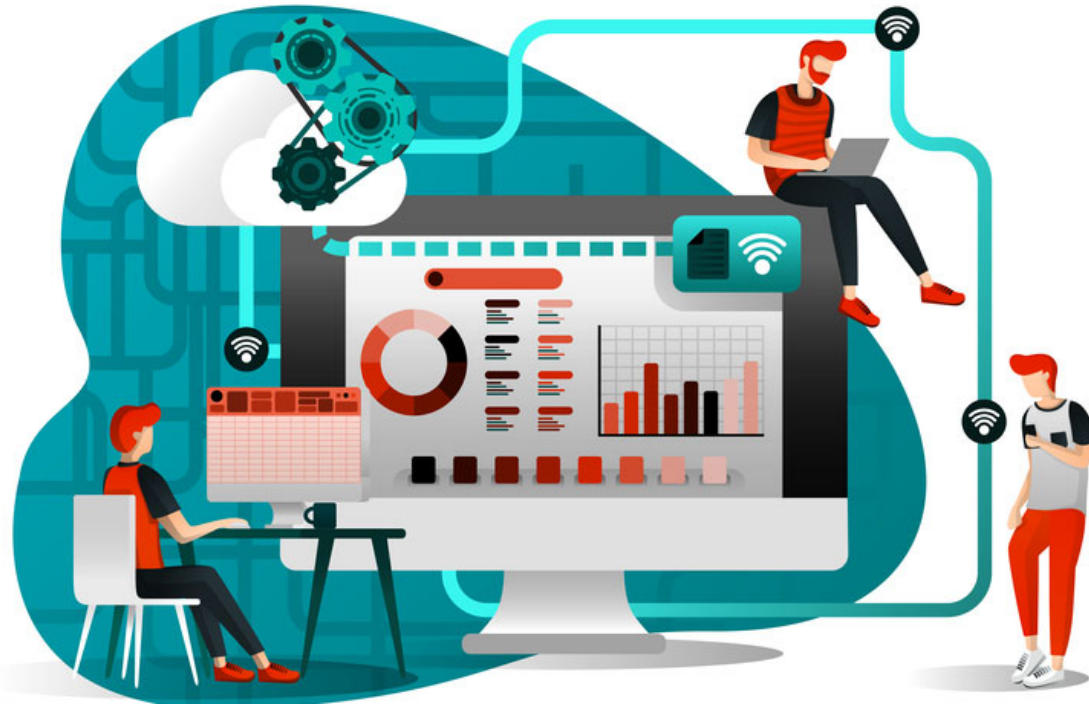


- Recognized that cyberspace isn't immune from regulation, and new means of regulation are being developed.
- Government is not as directly involved in regulating cyberspace as in some areas.
- Law is only one factor among many in governing online conduct.



Significant Sources of Cyberspace Regulation Include:

-
- Laws.
 - Customary and contractual practices of private companies and individuals.
 - Network architecture, as established by technology developers (Facebook, Google) and (sometimes) as mandated by government.
 - Lawrence Lessig wrote “Code is law,” meaning that the underlying software and hardware of the Internet regulate the architecture and infrastructure of cyberspace.
 - E.g., “smart contracts,” which are actually computer protocols used to digitally facilitate, verify, or enforce the negotiation or performance of a contract.
 - E.g., government-required encryption backdoors.
 - E.g., government-mandated age verification devices for websites that distribute materials that contain adult sexual content.
 - Social norms: Peer pressure, fear of ostracism.
 - Less effective online than in the material world, because of remoteness of actors and possibility of concealing activity in the online environment.

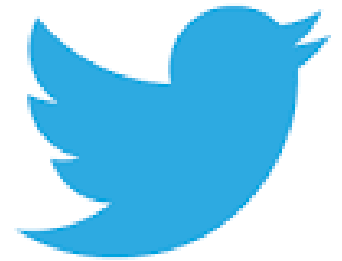


Network Communitarianism

- The author of our textbook (Andrew Murray) wants to provide a bridge between cyberlibertarianism and cyber-paternalism that developed advocating either a laissez-faire or an overprotective approach to regulating cyberspace.
- Network communitarianism emphasizes the importance providing incentives and encouragement rather than constraints or prohibitions to achieve results.

Intermediary and Platform Regulation

- Increasingly, our online activities depend upon the services of intermediaries (e.g., Internet service providers) and platforms (e.g., social media providers like Facebook & Twitter).
- In the EU and the USA, Internet intermediaries have enjoyed special protection against liabilities for the activities of their users.
 - Arts. 12-15 of EU E-Commerce Directive.
 - Section 230 of U.S. Communications Decency Act.
- But now that the Internet is no longer in its infancy, policy makers have begun to look at intermediaries and gateways as “choke points” where regulation can be relatively easily applied with effects on large numbers of users.
- Moreover, many intermediaries and platforms have abandoned their once-passive roles and take an active role in producing and managing content.



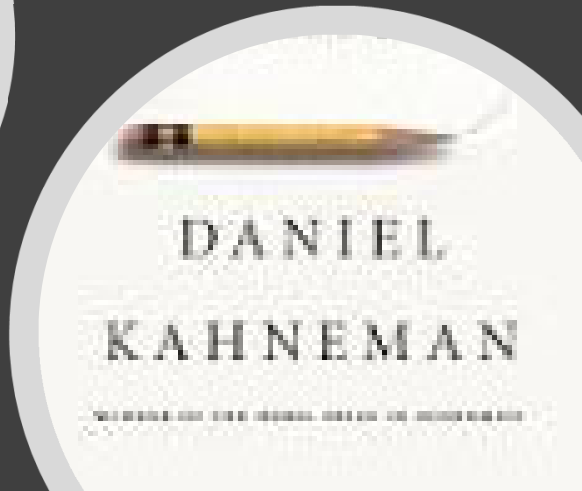
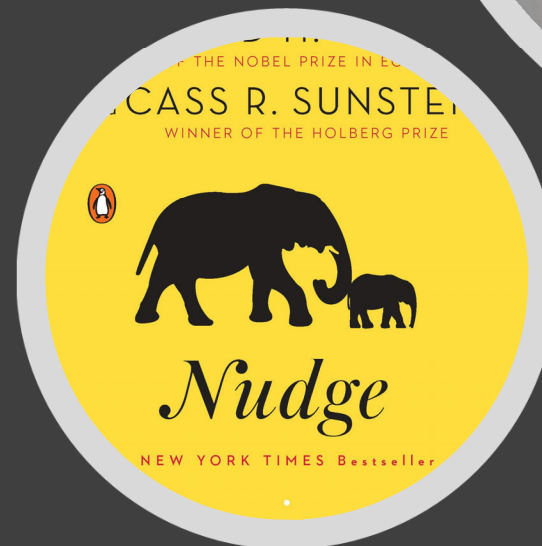


Examples of Intermediary Regulation to Achieve Broad Results

- Worldwide injunctions against search engines to prevent display of websites that distribute materials that infringe intellectual property rights.
- Directive (EU) 2019/790 on Copyright in the Digital Single Market (effective in 2021)
 - Article 15 "Protection of press publications concerning online uses" gives press publishers the right to seek remuneration from platforms for re-posting their content.
 - Article 17 requires service providers that host user-generated content to employ "effective and proportionate" measures to prevent users from violating copyright.

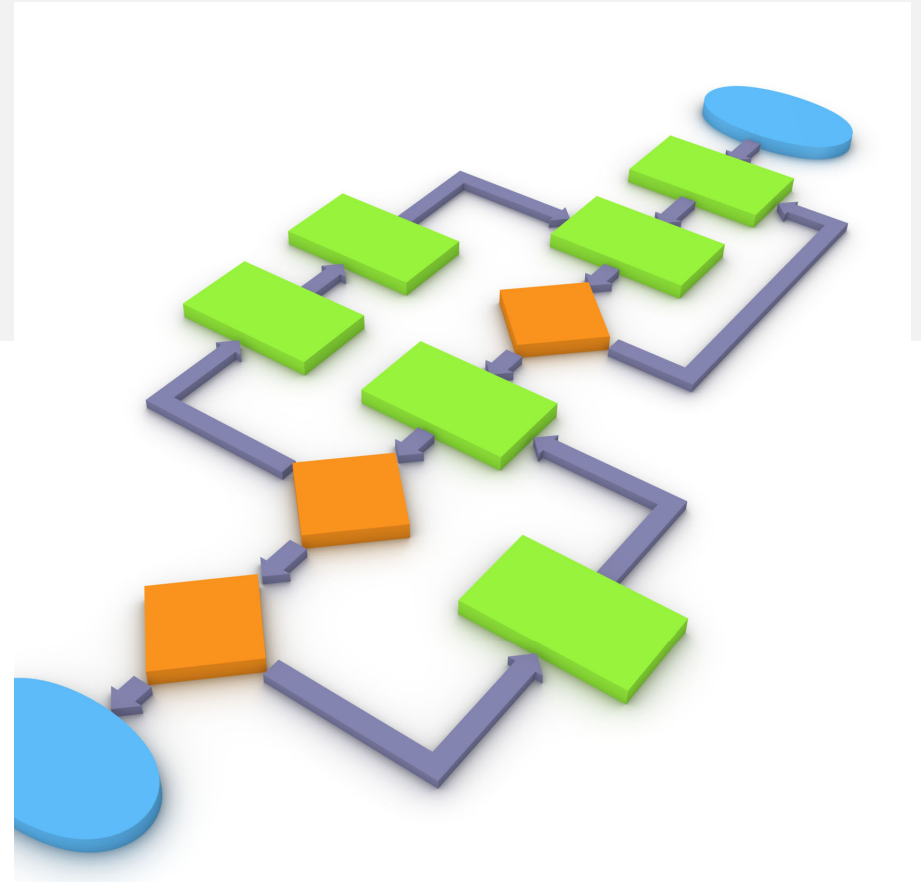
Behavioral Regulation

- Insights from psychology and economics have shown that, in many respects, human beings don't always act rationally or fully consciously.
- Nobel prize winner Daniel Kahneman and his colleague Amos Tversky demonstrated that much of human behavior is the result of heuristics (mental shortcuts) rather than fully rational thought. By understanding these mental behaviors, we can influence the human behavior toward the desired outcome without coercion.
- The possibilities for using “behavioral economics” as a soft means of (or a substitute for) regulation are explored in Cass Sunstein and Richard Thaler’s book *Nudge*.



Algorithmic Regulation

- Using digital technologies to police online activities without direct human intervention.
- “[A]lgorithmic regulation is the encoding of values (legal or community values) into software code with a process for making decisions based on input data leading to an output result.” Ch. 4, Information Technology Law: The Law & Society.



Conclusion

- All of the schools of thought mentioned in this class have illuminated some aspect of how online conduct and content may be regulated.
- Throughout the course, we will see ways in which the techniques and mechanisms discussed are used today and how they may be employed in the future.