

## REVIEW ESSAY

# From Moore's Law to More's *Utopia*: The Candy Crushing of Internet Law

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Ian Brown and Christopher T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age*, Cambridge, MA, MIT Press, 2013, ISBN 978-0-262-01882-1 (hb).

Anupam Chander, *The Electronic Silk Road: How the Web Binds the World in Commerce*, New Haven and London, Yale University Press, 2013, ISBN 978-0-300-15459-7 (hb).

Raphael Cohen-Almagor, *Confronting the Internet's Dark Side: Moral and Social Responsibility on the Free Highway*, Washington, DC, Woodrow Wilson Center Press and New York, Cambridge University Press, 2015, ISBN 978-1-107-10559-1 (hb).

Laura DeNardis, *The Global War for Internet Governance*, New Haven and London, Yale University Press, 2014, ISBN 978-0-300-18135-7 (hb).

Dimitrios Koukiadis, *Reconstituting Internet Normativity: The role of State, private actors, global online community in the production of legal norms*, Baden-Baden, Nomos Verlagsgesellschaft, 2015, ISBN 978-1-7822-5843-8 (hb).

Rebecca MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom*, New York, Basic Books, 2012, ISBN 978-0-465-02442-1 (hb).

## I. INTRODUCTION

*Quelle délicatesse!* On 25 June 2015, the BBC posted an article entitled 'Spanish man dies after bull goring incident'. The BBC informed its readers that '[a] video of the bull charging at the man has been published on several Spanish news outlets'.<sup>1</sup> It was trying to adhere to its own sense of propriety but made it easy to find the video. Looking up the article on a search engine, I also saw numerous links to videos of the event. No one is fooled by the BBC. Most interesting is the BBC's explicitly stating the obvious, the easy accessibility of horrific videos. This is exactly the online

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<sup>1</sup> [www.bbc.com/news/world-europe-33269533](http://www.bbc.com/news/world-europe-33269533) (accessed 24 April 2016).

environment everyone knows, with the BBC's faux discernment barely hiding the all too transparent. With the power of the search engines – generally paid for by advertising that much of the Internet literature decries – the videos are readily found. This example shows at once a gesture towards the BBC's traditional Mandarin ethos, while hardly dissuading those with a lurid interest in the gore.

We are in an information age where past manners may survive, if sometimes as disingenuous gesture, simultaneously being presented with the vast array of the Internet's unending offer of spectacle along with so much information from sources ranging widely in reliability and agenda. With the power of the Internet – always combined with immense data capabilities – we confront a world changing and morphing. The books under review, each in their own way, attempt to address this world in light of its need for regulation, governance, or political framework – as well as redesigning its current regulation, governance, or political framework. I will approach these books, in addition to other literature on the Internet, in terms of four themes. First, I will discuss the alarms raised by the authors. Second, I will focus on how the authors, along with Internet analysts more generally, frame Internet-related issues in a binary mode. Copyright is always the polar opposite of free speech, and privacy of corporate and government data use. Third, I will discuss their various proposals for Internet law and governance. Finally, I want to turn to what I believe is underrepresented in the books under review, the extent to which we really have a new culture, and the expanse of the digital divide, or rather, divides because differences in access, capability, and micro-cultures create an array of separations rather than a simple on-off switch.

## 2. SPECTRES OF THE INTERNET

There are significant fears around the Internet. The *Süddeutsche Zeitung* used English phraseology in a 2010 article, 'German Internet-Angst', focusing on specific German fear of the Internet, citing that 65 per cent rarely used the Internet.<sup>2</sup> There are, of course, numerous widely articulated fears, and the authors of the books under review take on the concerns in the popular imagination, including cyberbullying, paedophilia, activities of criminals and terrorists, sites encouraging suicide, cyberstalking, the impact of violent games, and the like – although they spend less time on cybersecurity than one might have thought, perhaps because it has gained more traction since these books appeared. Raphael Cohen-Almagor, in *Confronting the Internet's Dark Side*, focuses particularly on these areas of popular anxiety. Although he cautions against the exaggeration of 'moral panics', he identifies a number of horrors, such as suicide-inducing sites: 'On the Web, we find extensive discussions of suicide pills and "exit bags" (do-it-yourself suicide kits). In 2005, in Japan alone more than 17,000 Japanese websites offered information on suicide methods.'<sup>3</sup> He tells of individuals

<sup>2</sup> 'German Internet-Angst', [www.sueddeutsche.de/digital/studie-zum-netz-german-internet-angst-1.3365](http://www.sueddeutsche.de/digital/studie-zum-netz-german-internet-angst-1.3365) (accessed 24 April 2016).

<sup>3</sup> R. Cohen-Almagor, *Confronting the Internet's Dark Side: Moral and Social Responsibility on the Free Highway* (2015), 91.

encouraging others on the verge of suicide to end their lives,<sup>4</sup> and of a young killer who had played *Super Columbine Massacre RPG*.<sup>5</sup> In his book, he sets out the responsibilities of various actors, including the 'reader's responsibility', the imperative for someone coming across such material to alert the right private or public agent, as well as that of Internet Service Providers (ISPs). Without question, there are true horrors out there. Of course, writers on the Internet – except hyper-libertarians – are also aware that attempts to address them easily fall into over- and under-inclusivity. Rebecca MacKinnon in *Consent of the Networked* references a 'website campaigning against child pornography [that] was blocked twice in the Netherlands'.<sup>6</sup> Various authors talk of adopting a wide variety of screening tools like parental controls. Lawrence Lessig is self-congratulatory for thinking ahead – his son is only three – by setting up parental controls.<sup>7</sup> But this only exemplifies a narrowness of vision, not anticipating his son's likely later ability to crack his father's screening – and he is not thinking of families where parents confront access in a second language, such as immigrant or other language-minority families in the US, Europe, or elsewhere. There are generational and demographic divides invisible to Lessig.

In addressing over-inclusive responses, Chander worries that 'an American digital bookseller might remove the novel *Lady Chatterley's Lover* from its offerings worldwide rather than implement technology to block its transfer only to those few jurisdictions that label the book indecent'.<sup>8</sup> Chander likely knows the history of D.H. Lawrence's book but it is ironic that he selected an example that was the subject of a significant censorship case against Penguin in the U.K. under the Obscene Publications Act 1959 and in the US when Grove Press published it. It brings back to mind the long history of censorship cases that famously included in the US James Joyce's *Ulysses* and Allen Ginsberg's *Howl*, and the burning of Steinbeck's *Grapes of Wrath* in Bakersfield County, California – not to mention the notorious burning of 'degenerate' books by the Nazis. Alibris, the used-book site, may have been having fun when it emailed a special promotion for 'Banned Books Week', a week sponsored by organizations like the American Library Association and the American Booksellers Association<sup>9</sup> but censorship has a troubled past – and present. Beat poet Michael McClure was quite serious when he engaged in an extended essay on the word 'fuck', which he wrote when 'Gregory Corso asked me to join him in a project to free the word FUCK from its chains and strictures'.<sup>10</sup> When Milton Mueller cites Derek Bambauer's concerns about content regulation being 'overly responsive' to majorities and the potential need for 'counter-majoritarian' protections, he recognizes a need for protection from majorities.<sup>11</sup> This is an important issue and despite Alibris's playfulness, Alibris was serious: 'Celebrate your **freedom to read**

<sup>4</sup> Ibid., at 139.

<sup>5</sup> Ibid., at 121.

<sup>6</sup> R. MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (2012), 96.

<sup>7</sup> L. Lessig, *Code: Version 2.0* (2006), 252.

<sup>8</sup> A. Chander, *The Electronic Silk Road* (2013), 174.

<sup>9</sup> Email dated 18 September 2014.

<sup>10</sup> M. McClure, *Meat Science Essays* (1966), 7. McClure told me he no longer worries about the need to save that word but worries about other forms of censorship (discussion with author, 29 September 2015).

<sup>11</sup> M.L. Mueller, *Networks and States: The Global Politics of Internet Governance* (2010), 207.

**whatever you want** by choosing one of these books that are traditionally banned by schools. You'll be surprised by how many are classics.'

The largest fears raised in the literature about the Internet focus on authoritarian regimes, democratic governments acting in authoritarian ways, and major corporate powers positioned in the online world – as well as concerns about the governance of the Internet itself, including critiques of ICANN.<sup>12</sup> There is often an interconnection among these, such as the extent to which corporations are viewed as complicit with authoritarian governments.

Despite the attention given to Mubarak's Egypt, Iran's 'clean' or '*hala!*' Internet,<sup>13</sup> Saudi Arabia and a host of other countries, the central player in the authoritarian critique is China, so that MacKinnon's chapter, 'Networked Authoritarianism', focuses entirely on China before she turns elsewhere to other countries.<sup>14</sup> In the literature, there is often reference to the 'Great Firewall' of China.<sup>15</sup> For DeNardis, 'There is no single firewall but rather a collection of technologies and institutional mechanisms that block certain words, web sites, IP addresses, and applications.'<sup>16</sup> MacKinnon explains, 'China's censorship system is complex and multilayered', only the outside perimeter consisting of the Great Firewall.<sup>17</sup> In addition, China enlists many to 'Astroturf' the Internet with pro-government posts, including members of the so-called 'fifty-cent party', who are paid small amounts for each favourable post.<sup>18</sup>

A particularly pressing element for First World writers involves corporate complicity in the censorship of authoritarian regimes and outing dissidents. We are told of essentially standard content-screening tools, used by companies to screen employee activity, repurposed by authoritarian states to censor content available within their boundaries. And MacKinnon tells us that 'news reports emerged that the technology used to track down activists had been sold to two Iranian mobile phone operators by Nokia-Siemens Networks, a joint venture of the Finnish Nokia and the German Siemens'.<sup>19</sup> Then there is the torturous story – retold by Chander – of Google's attempt to create a Chinese Internet search engine that tried to mitigate its harm by informing Chinese users when their search results were blocked.<sup>20</sup> Google finally pulled up stakes and started a search engine from Hong Kong. Chander also narrates particularly troubling examples where Yahoo! subsidiaries turned over dissidents' personal information to the Chinese government, resulting in their imprisonment.<sup>21</sup> These incidents are particularly troubling and part of the writers' larger story about corporations endangering dissidents in authoritarian regimes, often not

<sup>12</sup> The Internet Corporation for Assigned Names and Numbers is a private non-profit corporation initiated by US government responsible for much of the broad structural elements of the Internet, such as Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management.

<sup>13</sup> See MacKinnon, *supra* note 6, at 55, where she describes the Iranian move in 2011.

<sup>14</sup> *Ibid.*, at 31–50.

<sup>15</sup> See, e.g., L. DeNardis, *The Global War for Internet Governance* (2014), 213 and MacKinnon, *supra* note 6, at 35.

<sup>16</sup> DeNardis, *supra* note 15, at 213.

<sup>17</sup> MacKinnon, *supra* note 6, at 35.

<sup>18</sup> *Ibid.*, at 44.

<sup>19</sup> *Ibid.*, at 56.

<sup>20</sup> Chander, *supra* note 8, at 199.

<sup>21</sup> *Ibid.*, at 48–50.

appreciating the impact of their practices. MacKinnon describes how Facebook insisted that Tunisian dissidents use real names on accounts in a way that would expose them.<sup>22</sup> Essentially, a policy against anonymity intended to address evils such as cyberbullying – or in DeNardis's words, to 'promote civility in news and blog comment areas and to foster digital citizenship'<sup>23</sup> – endangered dissidents in the Maghreb.

Chander cites the Human Rights Watch on the 'race to the bottom' where First World corporations compete in aiding the Chinese government.<sup>24</sup> Corporate sins are either those of commission or simple ignorance. In light of that, MacKinnon and Chander call for more human rights lawyers among the employees of Facebook. In Chander's words: 'Silicon Valley and Bangalore companies that seek to service the world need human rights lawyers, not just privacy officers and mergers and acquisitions counsel.'<sup>25</sup> It is difficult to imagine how enlisting lawyers trained in the human rights charters and peremptory norms would help to address these dangers. Rather, companies would be best served by having knowledgeable staff looking out for the potential impact of various corporate decisions, such as the rollout of privacy changes creating unintended harm. It is, of course, difficult for companies – think of Facebook's over one billion members<sup>26</sup> – to address all needs, especially when two 'goods' are in potential conflict.

One of MacKinnon's motifs is the myopia of Silicon Valley's denizens. Citing a woman whose very private posts were suddenly more broadly revealed, MacKinnon wrote that people like her 'somehow had not occurred to the engineers working on their sunny campus in Mountain View, California – apparently because [her] concerns are so alien to their own life experience'.<sup>27</sup> Similarly, MacKinnon describes the team tasked with identifying abusive content with a throw-away line: 'These friendly and intelligent, young, blue-jeans-wearing Californians play the roles of lawmakers, judge, jury, and police all at the same time.'<sup>28</sup> Of course, Silicon Valley has a 'culture' – even if, Chander explains, 'Google's lunchroom in Mountain View, with its multiple different cuisines to serve that global workforce, epitomizes the Valley's global roots.'<sup>29</sup> That may reflect more the countries with individuals who have technology skills sought for employment using US HB-1 visas for 'specialty occupations' rather than broader diversity – slightly expanded by Manuel Castells's citing a study that showed that:

in the 1990s of all new companies created in Silicon Valley, about 30 percent had an immigrant CEO from China or India . . . without counting the numerous cases of immigrant entrepreneurs from other nationalities, particularly from Russia, Israel, and Mexico.<sup>30</sup>

<sup>22</sup> MacKinnon, *supra* note 6, at 22.

<sup>23</sup> DeNardis, *supra* note 15, at 237.

<sup>24</sup> Chander, *supra* note 8, at 52.

<sup>25</sup> *Ibid.*, at 206.

<sup>26</sup> Now set at 1.6 billion. 'Facebook's Plan for Cheap, Global Access', *New York Times*, 24 April 2016.

<sup>27</sup> MacKinnon, *supra* note 6, at 144.

<sup>28</sup> *Ibid.*, at 154.

<sup>29</sup> Chander, *supra* note 8, at 56.

<sup>30</sup> M. Castells, *The Internet Galaxy: Reflections on the Internet, Business, and Society* (2001), 93.

If Silicon Valley, along with other international high-tech centers, produces a vast echo chamber, it may not understand how much it still digitally divides.

Large online corporate players are common subjects of invective. In Europe, especially in France, one sees constant attacks on the power of GAFA (Google, Amazon, Facebook, and Apple) as exemplified in *Le Monde diplomatique*, where ‘GAFA’ and ‘colonization’ are intertwined. It is little surprise that *Le Monde diplomatique* would publish an article, ‘Résister à l’uberisation du monde’,<sup>31</sup> by the outspoken critic of cyber-utopianism, Evgeny Morozov. It is not by coincidence that the Austrian law student who brought the case against the Irish Data Protection Commissioner, resulting in the European Court of Justice’s finding that the Safe Harbor arrangement with the United States violated the European Charter, had involved the student’s Facebook account and potential NSA access.<sup>32</sup> The case invoked the perfect storm of the corporate giant and government intrusion following Edward Snowden’s leaks. Facebook’s involvement made it particularly newsworthy and articles exploded tying the Safe Harbor to GAFA.

Despite the formulation of GAFA, the big powers in the online world are constantly replacing each other and one sees references to FANG, for Facebook, Amazon, Netflix, and Google. One-time giants like AOL are now minor players, and the various attempts to save Yahoo! are constantly in the news. Michael Moritz’s *Financial Times* opinion piece, ‘The rise and fall of technology juggernauts’ – which ranks Chinese companies, Alibaba, Tencent, and Baidu, as the fourth, fifth, and sixth technology companies in value – highlights the ongoing technology reshuffling and points to consultancy firm Fabernovel’s study identifying Netflix, Airbnb, Tesla, and Uber as the fastest growing online powers rather than the named GAFA members.<sup>33</sup> At the same time, technology powers are constantly purchasing smaller companies so as not to miss the next ‘new, new thing’ – or, in the newer trope, ‘disruptive’ technology.<sup>34</sup> Brown and Marsden in *Regulating Code* assert: ‘Where there is oligopoly, there is less or no concern for end user acceptance or resistance.’<sup>35</sup> In the online environment with ever-new efforts to engage users, this is hardly the case – end-user acceptance and resistance is essential to the online economy as companies clamber over each other. There is a reason why increasing numbers of companies are using social media as a core part of their customer-support operations. In the 1990s, companies spoke of website ‘stickiness’ – keeping eyes glued – and we simply have more sophisticated approaches to attracting and keeping users.

The reshuffling of online companies aside, the books under review focus attention on the power corporations exercise through their terms of service and privacy

<sup>31</sup> [www.monde-diplomatique.fr/2015/09/MOROZOV/53676](http://www.monde-diplomatique.fr/2015/09/MOROZOV/53676) (accessed 24/4/2016).

<sup>32</sup> European Court of Justice Case C-362/14, *Maximilian Schrems v. Data Protection Commissioner*, Judgment of 6 October 2015.

<sup>33</sup> [www.pnewsire.com/news-releases/fabernovels-new-study-explains-how-the-new-disruptors-outperform-google-and-amazon-in-the-network-economy-300173263.html](http://www.pnewsire.com/news-releases/fabernovels-new-study-explains-how-the-new-disruptors-outperform-google-and-amazon-in-the-network-economy-300173263.html) (accessed 24 April 2016).

<sup>34</sup> The *Financial Times* found Google’s restructuring of its venture fund newsworthy; ‘Google abandons European venture fund’, 11 December 2016. Regarding ‘disruption’, it ran a special section on 7 December 2015 on ‘Disruption & Technology’, if only four pages.

<sup>35</sup> I. Brown and C.T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (2013), 174.

policies. A major concern focuses on online corporations becoming censors and gatekeepers, using 'terms of use' to take down material, often at the behest of the state. We have seen MacKinnon's examples of online policies forcing activists out in the open, as she did in describing Facebook's taking down the 'We Are All Khaled Said' page (named after an activist killed by Egyptian police) because the page's administrators violated Facebook's terms of service by not using real names.<sup>36</sup> Chander describes PayPal's stopping processing of donations for WikiLeaks, noting PayPal's reliance on its 'Acceptable Use Policy'.<sup>37</sup> And he quotes Julian Assange, the founder of WikiLeaks, regarding the 'privatisation of state censorship'.<sup>38</sup> Chander's broader point, mirroring a general concern, is that '[t]here is reason to worry about corporations removing content they find undesirable on their own accord'.<sup>39</sup> In the abstract, the overreach of online firms sounds convincing but these authors fail to put themselves in the place of these corporations. Think, for example, of the difficult decisions for a collective investment scheme (mutual fund) which social media sites have to make when reviewing comments by users. Do they want to maintain posts that have no clear relationship to the site's purpose; postings with personal invective or hate speech; or posts by individuals advertising their own services as investment consultants? This is not to mention issues potentially triggering regulatory concerns. There are difficult decisions in the social media arena but firms simply have to rely on broad language in their terms of service to exercise judgment – despite the easy examples of overuse and a general understanding (bolstered by disclaimers) that the comments are not the company's views.

Brown and Marsden tell the story of Heise.de creating a 'like' button addressing the Schleswig-Holstein privacy regulator's concerns about the tracking functionality of Facebook's 'Likes'. Facebook then blocked Heise.de because it violated a Platform Policy according to which 'You must not use or make derivative use of Facebook icons, or use terms for Facebook features and functionality, if such use could confuse users into thinking that the reference is to Facebook features or functionality'.<sup>40</sup> Brown and Marsden's point is understandably about privacy, but their talk of Facebook's 'retaliating' does not address its intellectual property and actions by others potentially seen as attributable to them, and fails to ask whether Heise.de would not have similar concerns about its trademarks.

There are, of course, arguments that the mega social media providers have made themselves into open fora. Brown and Marsden cite Jillian York's argument that US free-speech court decisions recognizing shopping malls as having some of the aspects of public squares – allowing leafleting subject to reasonable standards – should apply to social media.<sup>41</sup> Brown and Marsden follow her argument pressing Facebook to allow free speech without, however, acknowledging that Facebook and

<sup>36</sup> MacKinnon, *supra* note 6, at 151.

<sup>37</sup> Chander, *supra* note 8, at 104.

<sup>38</sup> *Ibid.*, at 105.

<sup>39</sup> *Ibid.*

<sup>40</sup> Brown and Marsden, *supra* note 35, at 135.

<sup>41</sup> *Ibid.*, at 133, citing Jillian C. York, 'Policing Content in the Quasi-Public Square' (2010), available at [open-net.net/policing-content-quasi-public-square](http://open-net.net/policing-content-quasi-public-square) (accessed 24 April 2016). For a thoughtful analysis of free speech and the Internet, see A. Chander and U.P. Lê, 'Free Speech', (2015) 100 *Iowa Law Review* 501.

other social media providers – as York herself states – have created venues for the expression of extremely diverse views; or that social media providers have legitimate concerns reflected in their terms of service.

The literature on the Internet generally uses a topos of corporations hiding behind terms of service and privacy policies. It complains, as MacKinnon does, ‘When we sign up for web services, social networking platforms, broadband service, or mobile wireless networks, and we click “agree” to the terms of service, we give them false and uninformed consent to operate as they like.’<sup>42</sup> But has the Web truly changed the nature of consumer-facing agreements? If anything, there is more scrutiny and visibility than paper contracts in over-the-counter purchases, which may only be read after opening a package to find tightly folded documents. In *Reconstituting Internet Normativity*, Dimitrios Koukiadis asserts:

The General Terms and Conditions offered to the potential online users in order to become members of a social network site are either very well hidden or written in such a complicated way that no lay person can comprehend them.<sup>43</sup>

And there are those who complain that looking at online privacy policies, in Lessig’s words, ‘you will find that they are among the most incomprehensible legal texts around (and that’s saying a lot)’.<sup>44</sup> But privacy policies present a challenge of weighing simplicity of presentation and detail that might explain more. US financial institutions are encouraged to adopt privacy policies in chart format under the 2009 multi-agency ‘Model Privacy Form’.<sup>45</sup> However, when one receives one of these notices with easy ‘yes/no’ boxes, there remain questions regarding what each yes and no really means and narrative might help. I received a notice from the issuing bank of a credit card stating, ‘To protect your personal information from unauthorized access and use, we use security measures that comply with federal law.’ Because the notice covered the bank group as a whole, there was no specific credit card reference to compliance with applicable Payment Card Industry (‘PCI’) standards that are internationally critical to the data security practices of credit card information. Returning to terms of use more broadly, language should be as readable as possible – putting aside readers using a second language or with other literacy challenges (which does not get enough attention in the literature) – but some terms are simply driven by legal precedent and usage. Facebook’s current ‘Statement of Rights and Responsibilities’ shows a real effort to create a readable document but there are some references, such as those to licensing, where Facebook simply has to use terms like ‘non-exclusive’ and ‘transferable’. Furthermore, the disclaimer of liability, in all caps, based on US practices surrounding the requirement that disclaimers of warranty be ‘conspicuous’ states: ‘WE ARE PROVIDING FACEBOOK AS IS WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, IMPLIED

<sup>42</sup> MacKinnon, *supra* note 6, at xxii.

<sup>43</sup> D. Koukiadis, *Reconstituting Internet Normativity: The Role of State, Private Actors, Global Online Community in the Production of Legal Norms* (2015), 292.

<sup>44</sup> Lessig, *supra* note 7, at 226.

<sup>45</sup> [www.ftc.gov/policy/federal-register-notices/final-model-privacy-form-under-gramm-leach-bliley-act-16-cfr-part](http://www.ftc.gov/policy/federal-register-notices/final-model-privacy-form-under-gramm-leach-bliley-act-16-cfr-part) (accessed 24 April 2016).



WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.' True, terms like 'implied warranties of merchantability' and the rest of the language are technical, but the Facebook user gets the point, especially following 'YOU USE IT AT YOUR OWN RISK', that Facebook aims at broadly shielding itself from liability. There are simply times when lawyers cannot escape some of the arcane language of the law. Without question, there are immense exercises of power in the interconnected world of the Internet and palpable imbalances, but perhaps some of the specters of the Internet turn out to be rather spectral in nature.

### 3. THE BINARY INTERNET

The literature on the Internet and Internet law is marked by its binary thinking, setting out analytical binary oppositions or, commonly, setting out Manichean oppositions of good versus evil – everything is either a 'r' or a 'o'. DeNardis, for example, writes:

Some of the most intractable Internet governance questions involve conflicts among competing global values: freedom of expression versus law enforcement objectives; access to knowledge versus intellectual property rights enforcement; media freedom versus national security; individual privacy versus online business models based on data collection; and authoritarian regimes seeking to preserve absolute control over information versus democratic values of openness and freedom.<sup>46</sup>

Chander describes his effort to steer between extremes, essentially highlighting the oppositions set up in Internet legal discourse but his analytical frame follows familiar binary oppositions. Often, oppositions are set against Internet freedom. Even in DeNardis's list, many of the values, not just 'freedom of expression', translate into freedom.

A key fight in Internet law is over copyright and intellectual property. The voices arrayed against various intellectual property rights, focusing most prominently on copyright, are legion. There are numerous institutes, associations, advocates, and scholars focusing immense effort on attacking the rights of ownership in law, and pointing, for example, to the US government's use of the back-door approach of trade agreements to solidify intellectual property rights. MacKinnon argues, 'the US government continues to negotiate trade agreements that will make it easier for governments around the world to punish people for uploading and downloading content deemed illegal'.<sup>47</sup> She points to the Anti-Counterfeiting Trade Agreement that 'the US government spent four years negotiating in secret with thirty-four other countries', with an Internet section 'drafted by the United States at the strong behest of the entertainment lobby', requiring action by Internet intermediaries policing copyright.<sup>48</sup> Similarly, Brown and Marsden talk about the pressure of intellectual property owners on the European Community and Japan for copyright protections

<sup>46</sup> DeNardis, *supra* note 15, at 16.

<sup>47</sup> MacKinnon, *supra* note 6, at 106.

<sup>48</sup> *Ibid.*

in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) within GATT.<sup>49</sup> And they cite the former European Commission vice-president for fundamental rights, Viviane Reding, that ‘copyright protection can never be a justification for eliminating freedom of expression or freedom of information’.<sup>50</sup>

The background is not merely aimed at file-sharing programs – Napster and its progeny – but also the tremendous counter effort in the software arena, the development and explosion of open source software that started with a premise that software should not be owned. In *The Wealth of Networks*, Yochai Benkler argues that nonmarket generation is not only viable but it also can outpace profit-oriented production: ‘The rise of greater scope for individual and cooperative nonmarket production of information and culture, however, threatens the incumbents of the industrial information economy.’<sup>51</sup> Scholars like Pamela Samuelson, seeing anachronisms and inequities in copyright law in the online environment, call for reform.<sup>52</sup> US copyright law – and European and other regimes are not so different – protects ‘expression’ in a work. The idea itself is not protectable. In addition, the purely utilitarian is also not protected. In the struggle between proponents and antagonists of copyright protection, the protected area is smaller than often envisioned. It is easy to forget that copyright ‘expression’ may have little to do with what we normally call ‘freedom of expression’. How much of James Boyle’s ‘second enclosure movement’ impedes political or social expression?

Note, of course, that Boyle’s ‘The Second Enclosure Movement and the Construction of the Public Domain’ prominently displays: ‘Copyright © James Boyle 2003’.<sup>53</sup> That is one of the ironies about corporate interests viewed solely as copyright protection advocates. They are in a double bind. Think about any publisher – it is simultaneously interested in protecting its own intellectual property and concerned about infringement by its contributing authors. So, too, corporations carefully protect their intellectual property and simultaneously focus on the soundness of their own intellectual property. As a result, in negotiating licensing contracts, lawyers spend time on warranties and indemnifications regarding infringement.

In this context, the central US Supreme Court cases on the technological facilitation of copyright violation, *Sony v. Universal Studios* (1984) and *Metro-Goldwyn-Mayer Studios v. Grokster* (2005), provide a fascinating irony. The 1984 case held that Sony was not liable because its Betamax *could* be used for violating intellectual property rights while Grokster was differentiated because it was distributed with the very ‘object of promoting its use to infringe copyright’.<sup>54</sup> The irony not identified by Brown and Marsden and others is that Sony’s subsidiary in 2005, Sony Pictures, would clearly be on MGM’s side in Grokster, wanting the case to be differentiated from that involving its parent company. Similarly, and this is understood in the Internet

<sup>49</sup> Brown and Marsden, *supra* note 35, at 81.

<sup>50</sup> *Ibid.*, at 90.

<sup>51</sup> Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006), 2.

<sup>52</sup> See, e.g., P. Samuelson, ‘Preliminary Thoughts on Copyright Reform’, (2007) *Utah Law Review* 551.

<sup>53</sup> J. Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain’, (2003) 66 *Law & Contemporary Problems* 33.

<sup>54</sup> See, e.g., Brown and Marsden, *supra* note 35, at 77.

literature, there are significant corporate players that have pushed versions of open source, such as the adoption of Linux by IBM, Dell, and others, as an alternative to Microsoft's software. The lay of the land tends to be more complicated than the common binary frames. That is not to minimize questions about any erosion of 'fair use' in US copyright law, including the ability to use copyrighted material for a variety of purposes, such as satire, criticism, journalistic reporting, and the like. In addition, Brown and Marsden have correctly pointed to economic concerns: 'Many low-income countries have complained about the high price of software and textbooks resulting from international intellectual property agreements.'<sup>55</sup> Ultimately, that is not merely an issue of North v. South but a deeper question of economic inequity – one that receives more play in the life-and-death arena of patented pharmaceuticals. I am suggesting that the area may be muddier than suggested in much of the literature. In addition, Seunghyun Yoo tells us of the concerns in Korea raised by what is called 'scooping', that 'content transfer is a common practice among bloggers who take content from other blogs', and that a Korean survey found that '62 percent of Korean Internet users have experienced scooping'.<sup>56</sup> That further muddies the easy identification of owners and appropriators.

Privacy is also marred by binary thinking. Lessig wrote:

I've identified two distinct threats to the values of privacy . . . The first is the threat from "digital surveillance" – the growing capacity of the government (among others) to "spy" on your activities "in public" . . . The second threat comes from the increasing aggregation of data by private (among other) entities.<sup>57</sup>

The literature focuses attention on both governments and commercial enterprises following our online use – indeed, the ECJ Safe Harbor case collapsed the two, tying Facebook to the NSA. Lessig's second point, the increasing aggregation of data is not merely an Internet phenomenon. Indeed, 'big data' is often confused with the Internet because they are so often intertwined. Thus, when individuals join an affinity program for entirely offline purchases, they do so knowing that their purchasing behavior is part of the company's larger consumer analytics. They may not know 'CRM' (customer relationship management) or its analytical sophistication, but they generally understand the score.

Lessig's first point about spying is about following you online. In Castells's words, 'in our age, a significant proportion of everyday life, including, work, leisure, personal interaction, takes place on the Net'.<sup>58</sup> Drawing from Bentham's design of a prison where every action could be seen – made current by Foucault – Castells tells us that 'life in an electronic panopticon is tantamount to having half or our lives permanently exposed to monitoring'.<sup>59</sup> But mostly we are in a world made of DoubleClick (acquired by Google), which tries to gear advertising to the right

<sup>55</sup> Brown and Marsden, *supra* note 35, at 72–3.

<sup>56</sup> S. Yoo, 'Internet, Internet Culture, and Internet Communities of Korea: Overview and Research Directions', in G. Goggin and M. McLelland (eds.), *Internationalizing Internet Studies: Beyond Anglophone Paradigms* (2009) 217, at 223.

<sup>57</sup> Lessig, *supra* note 7, at 223.

<sup>58</sup> Castells, *supra* note 30, at 180.

<sup>59</sup> *Ibid.*

people. We are in a world of ‘retargeting’, where a site you visit triggers an advertisement on a second site. European Community law, including the ePrivacy Directive, focuses on informed consent regarding cookies and similar devices by an entity whose site you visit extending beyond a particular visit or session, and restrictions against cookies by third parties.<sup>60</sup> But in much of the world, specialized vendors give companies the ability to show their advertisements on other sites based on a visit to the company’s site – asking ‘are you still interested?’ Much of the Internet economy is based on the ability to sell advertising – and Internet users know that. They understand that search engines display ‘sponsored’ search results, essentially paid advertisements, and those advertisements can reflect their own geolocation. There is a general recognition that advertisements pay for much of what is free, and that some non-commercial sites, like Wikipedia, solicit donations, which is also true of *Le Monde diplomatique*. Cohen-Almagor may write: ‘I object to search engine optimization that is designed to promote narrow commercial interests.’<sup>61</sup> He also asserts that ‘Google, Facebook, and Yahoo! are heavily biased to serve the interests of big business.’<sup>62</sup> Of course, they look to the bottom line, but they survive on the experience of their core users. When Facebook adopted a purely timeline structure for its pages, it made the pages less usable for business by aiming to capture a narrative of their typical user’s daily events or streams of new entries by bloggers. Businesses had to figure out how to portray themselves like individuals narrating life experiences. Having touched upon the two most pressing themes of the Internet literature, I need to underscore that privacy is, ultimately, personal in nature, multivectoral and involves many other themes and considerations.

Koukiadis summons Habermas on the view that a constitutional system only works if ‘government officials hold out against corporate actors and bargaining partners and maintain the asymmetrical position that results from their obligation to represent the whole of an absent citizenry’.<sup>63</sup> Koukiadis argues that in the ‘privately contracting world’ of the Internet, Habermas’s ‘absent citizenry’ is simply not represented. He fears ‘[l]aw-making will be a procedure by the “present” contracting parties and aiming at serving foremostly their own self-interests and not the interests of the absent citizen and of the society at large’.<sup>64</sup> Many have turned to ‘civil society’ as the grouping of NGOs to give voice to the absent citizenry. Richard Falk has long articulated the role of ‘civil society’ as a growing and potentially powerful force within international society, speaking of ‘globalization from below’ as the antidote

<sup>60</sup> Brown and Marsden observe about US privacy law: ‘At the other end of the scale, there is clearly less protection for individual privacy in the US legal system than in most other advanced economies. Outside the federal government, regulation is patchy, sector specific, and state-by-state, with limited individual rights and enforcement only under very specific circumstances by the FTC.’, Brown and Marsden, *supra* note 35, at 64. Nevertheless, they could have added that certain areas of key concern, such as medical, financial services, and educational records, come under specific federal rules. For a good overview of US privacy law, see T.J. Toohey, *Understanding Privacy and Data Protection: What You Need to Know* (2014).

<sup>61</sup> Cohen-Almagor, *supra* note 3, at 222. Search engine optimization involves working algorithms used by search engines to order results, and businesses use specialists to enhance their sites’ moving up among the results.

<sup>62</sup> *Ibid.*

<sup>63</sup> Koukiadis, *supra* note 43, at 124, citing J. Habermas, *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy* (1995), 350.

<sup>64</sup> Koukiadis, *supra* note 43, at 124–5.

to 'globalization from above'.<sup>65</sup> In the push for multistakeholder governance, civil society is an essential ingredient. Thus, Brown and Marsden observe that the 'civil society' viewpoint envisions a 'formally inclusive multistakeholder coregulation – reintroducing both state and citizen'.<sup>66</sup>

For much of the Internet literature, civil society is simply not at the table. Brown and Marsden assert, 'There has been continued exclusion of wider civil society from the formal policy discussion, where official views do not permit easy representation of new noncorporate technical or user rights lobbies.'<sup>67</sup> For example, they observed, 'generally civil society has been kept out of or sidelined in the new negotiations leading to copyright law revisions'.<sup>68</sup> This exemplifies civil society's challenges in the international regulatory arena. But I am more interested that 'civil society' has become a common trope, seen as a specific force. Mueller at least acknowledges:

Flirting with corporatism, multistakeholderism uses broad categories – private sector, government, and civil society – as the basis for representation in deliberations and decision making. But the political views held within each of these categories are extremely diverse, and real people and real organizations can span more than one of them.<sup>69</sup>

Two corporations within the same corporate group – think of the relative positions of Sony, the electronics maker, and Sony Pictures in the two US Supreme Court cases, and two divisions within a corporation can easily have divergent views on a policy matter; even the same division or individual can be split or ambivalent on a regulatory proposal. So too, although 'civil society' is often invoked as the missing player, it hardly represents a single voice. There is no simply defined civil society, *société civile*, or *Zivilgesellschaft*.

#### 4. M(O)ORE'S UTOPIA

There is immense focus on Internet 'governance' in the legal literature. Traditionally, the term focused very specifically on the regulation of the architecture of the Internet, particularly ICANN and power over the creation of ISPs and Internet protocols and standards. A good number of the pages of Brown and Marsden, Mueller, and DeNardis's books are devoted to this version of Internet 'governance'. Mueller provides an almost blow-by-blow narrative of the effort – launched by Kofi Annan and the UN – to create the Working Group on Internet Governance (WGIG), stating that despite his admiration for the WGIG, '[a]s my colleagues and I have argued elsewhere, the WGIG . . . unwisely skipped foundational tasks required for the construction of an international regime'.<sup>70</sup> If there is a good deal of attention focused on ICANN and its US provenance and domination, in part, the focus on the architecture

<sup>65</sup> R. Falk, *Predatory Globalization: A Critique* (1999).

<sup>66</sup> Brown and Marsden, *supra* note 35, at 3.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, at 84.

<sup>69</sup> Mueller, *supra* note 11, at 265.

<sup>70</sup> *Ibid.*, at 68.

of the Internet was most famously articulated by Lessig with code as law. Lessig spoke in US-centric terms of ‘East Coast Code’ v. ‘West Coast Code’:

Because while of course code is private, and of course different from the U.S. Code, its differences don’t mean there are not similarities as well. “East Coast Code” – law – regulates by enabling and limiting the options that individuals have, to the end of persuading them to behave in a certain way. “West Coast Code” does the same.<sup>71</sup>

Nevertheless, the books I have just mentioned – whether seeing architecture as the key to broader regulation or intertwined with it – do address substantive regulatory issues like censorship and copyright. If Mueller cites the WGIG report as producing:

a broad definition of *Internet governance*: “Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet”,<sup>72</sup>

his own focus, if mostly on the core regulation of the Internet, reaches well into substantive regulation.

Finally, with all the focus on the decision-makers of Internet architecture – whether or not ICANN has been overly influenced by trademark owners<sup>73</sup> – most of the Internet literature sees the real stakes beyond the governance of architecture and standards. Most of the books under review offer their hope for addressing the substantive issues. Lessig himself envisions a pact among states in which ‘[e]ach state would promise to enforce the on servers within its jurisdiction the regulations of other states for citizens from those other states, in exchange for having its own regulations enforced in other jurisdictions’.<sup>74</sup> Although Lessig begins by meaning the US states, he quickly expands internationally but this is not exactly realistic. How could one expect nations to be able to enforce the broad range of another nation’s laws, putting aside the intricacies in understanding how various regulators view and enforce their rules? Lessig utters a simple caveat: ‘Of course, no democratic government should permit the will of a nondemocratic government to be reflected in a zoning table.’<sup>75</sup> But he misses the mere impossibility of multilateral enforcement.

The common solution to the differences among regulatory regimes is harmonization. Chander does so, with a nod to local variation. In his chapter, ‘Globalization and Harmonization’, he enumerates concerns raised by local laws or ‘glocalization’ under his headings of ‘Balkanization’, ‘Stalinization’, ‘incursions on sovereignty’, ‘futility’ and ‘cost’; but these ‘serious concerns’ require ‘ameliorative doctrines that I classify under the general heading of *harmonization*’.<sup>76</sup> And then comes his hedge:

<sup>71</sup> Lessig, *supra* note 7, at 324.

<sup>72</sup> Mueller, *supra* note 11, at 67.

<sup>73</sup> See, e.g., Chander, *supra* note 8, at 110. ‘Thus far, ICANN has chosen to apply its authority as a choke-point only on behalf of trademark holders.’ Few seem to note that trademarks are identified by specific classifications of goods and services. DeNardis is rare in acknowledging that ‘[i]n trademark law, it is possible for two registered trademarks to be identical, just registered as different classes of goods or services’. DeNardis, *supra* note 15, at 192. The classifications generally follow the 1957 Nice Agreement for the Classification of Goods and Services.

<sup>74</sup> Lessig, *supra* note 7, at 308.

<sup>75</sup> *Ibid.*, at 309.

<sup>76</sup> Chander, *supra* note 8, at 179.

'Harmonize where possible, and glocalize where necessary.'<sup>77</sup> But is that even possible considering the wide range of values? Mueller poses the issue mostly by pointing to the danger of harmonization being poisoned by totalitarian regimes and talks of 'Faustian bargains with the most authoritarian and repressive ones'.<sup>78</sup> Cohen-Almagor simply gives up on the need to include authoritarian regimes: 'Thus my concern is with Western liberal democracies that perceive human beings as ends and that respect autonomy and variety.'<sup>79</sup> Having set non-liberal societies aside does not ultimately end the issue of widely different values that make up the international sphere. Even with the host of Directives focused on so many parts of European life, the European Commission in 'A Digital Single Market Strategy for Europe' still focused on the need for increased harmonization, noting that '28 different national consumer protection and contract laws discourages companies from cross-border trading and prevents consumers from benefitting from the most competitive offers and form the full range of online offers'.<sup>80</sup>

As it turns out, the world is not as 'flat' as Thomas Friedman would have it.<sup>81</sup> Many of writers on the Internet discuss the geography of Internet production, so that Chander writes: 'Indeed, the rise of information centers such as Bangalore and Hyderabad, Silicon Valley and Seattle, attests to the continuing relevance of geography.'<sup>82</sup> Despite his comment that '[f]or the bulk of human history, geography was destiny', offering that '[t]oday geography holds fewer limitations',<sup>83</sup> he still focuses on the local factors behind Internet hot spots, such as the concentration of venture capital investment in the San Francisco Bay area. Similarly, Castells devotes a chapter to 'The Geography of the Internet: Networked Places', opening: 'The Internet Age has been hailed as the end of geography. In fact, the Internet has a geography of its own, a geography made of networks and nodes that process information flows generated and managed from places.'<sup>84</sup> Essentially, it 'redefines distance but does not cancel geography'.<sup>85</sup>

Chander, writing from an international trade perspective, focuses on trade in services rather than goods: 'Unlike trade in goods, the regulation of services occurs not at customs houses on dry docks at border ports but rather in administrative offices scattered inland.'<sup>86</sup> He asserts, 'if a Chilean downloads an album by the Black Eyed Peas or streams a Disney film from the United States, Chile cannot collect any customs duties on that action'.<sup>87</sup> That, however, is because Chander focuses on services – which does not mean that cross-border trade in services is without regulation – while a lot of online commerce involves trade in goods. When

<sup>77</sup> *Ibid.*, at 191.

<sup>78</sup> Mueller, *supra* note 11, at 186–7.

<sup>79</sup> Cohen-Almagor, *supra* note 3, at 10.

<sup>80</sup> See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN> (accessed 24 April 2016).

<sup>81</sup> T. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (2005).

<sup>82</sup> Chander, *supra* note 8, at 72.

<sup>83</sup> *Ibid.*, at 210.

<sup>84</sup> Castells, *supra* note 30, at 207.

<sup>85</sup> *Ibid.*

<sup>86</sup> Chander, *supra* note 8, at 146.

<sup>87</sup> *Ibid.*, at 40.

customers make cross-border purchases of an item to be physically delivered, they do something little different than ordering by another long-distance means. Despite the prevalence of online-only business models, customers can often purchase the same product by Internet or telephone. The business of overnight couriers testifies to the fact that trade in goods remains alive. Despite the challenges of geography identified by Chander, his call is for a mixture of glocalization and harmonization. But because there are so many different legal systems and cultural values, broad harmonization – except in very specific areas – is difficult.

Those calling for increased harmonization are hardly at the utopian end of the spectrum. Because of Habermas's focus on communication and discourse, he is often invoked for the purposes of governing the seemingly ungovernable Internet despite his own Internet skepticism:

Rather, the classical public sphere stemmed from the fact that the attention of an anonymous public was “concentrated” on a few politically important questions that had to be regulated. This is what the web does *not* know how to produce. On the contrary, the web actually distracts and dispels.<sup>88</sup>

Michael Froomkin wrote a major piece on ‘Habermas@Discourse.Net’, turning to Habermas’s ‘procedural conditions’ – in Froomkin’s words, as ‘needed to conduct a debate whose outcome deserves to be considered legitimate’.<sup>89</sup> Froomkin envisions a Habermasian model of discourse over the net. Cohen-Almagor ends his book proposing a deliberative democracy for the Internet, also marshaling Habermas:

According to Habermas, every person should receive a threefold recognition: “they should receive equal protection and equal respect in their integrity as irreplaceable individuals, as members of ethnic or cultural groups, and as citizens, that is, as members of the political community”.<sup>90</sup>

Earlier in his book on the subject of content regulation, Cohen-Almagor stated: ‘On this issue my view seeks to find a fine balance between the views of my Oxford teachers Ronald Dworkin and Joseph Raz.’<sup>91</sup> And, after balancing Dworkin and (in this case) Rawls, he suggests that ISPs, taking his ‘promotional approach’, should adopt a “soft” paternalism’.<sup>92</sup> It is not clear how he gets there, but he asserts: ‘In the long run, it would prove advantageous and profitable to Internet business.’<sup>93</sup> Cohen-Almagor proposes the creation of a Habermasian browser: ‘The first step will be to convene a Netcitizens Committee to decide what should be excluded from the new browser.’<sup>94</sup> That committee ‘will include representatives of ISPs and web-hosting companies, Internet experts, media professionals, Internet scholars, government officials, representatives of human rights and minority rights organizations and freedom of speech organizations, computer engineers, judges, lawyers, and other

<sup>88</sup> 24 July 2014 Interview on ResetDOC site: [www.resetdoc.org/story/0000022437](http://www.resetdoc.org/story/0000022437) (accessed 24 April 2016).

<sup>89</sup> A. Michael Froomkin, ‘Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace’, (2003) 116 *Harvard Law Review* 749, at 759–60.

<sup>90</sup> Cohen-Almagor, *supra* note 3, at 320.

<sup>91</sup> *Ibid.*, at 174.

<sup>92</sup> *Ibid.*, at 175.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, at 320.



interested parties'.<sup>95</sup> What an unmanageable soup just for a new browser to answer the Internet's dark side.

Koukiadis's book is an extended legal philosophical rumination about the 'production of legal norms' for the Internet. Drawing from Habermas, Luhmann, Kelsen, and Hart, he turns most heavily to Gerhard Teubner with 28 publications in the bibliography. Koukiadis may work Teubner and Habermas together:

To Teubner, what is mainly needed for the creation of a new legal order, is the structural coupling between legal norms and social system, and a deliberative heterarchical-polyarchical relationship among the social subjects; to this proposition, Habermas responds with one more element: the element of politics.<sup>96</sup>

Here '[i]n the Weberian dilemma rephrased, either decision-making spontaneous institutions gain effectiveness at the cost of democratic deliberation or they retain democracy at the cost of effective decision-making, Habermas clearly sides himself with the later'.<sup>97</sup> Ultimately, Koukiadis sides with Teubner that 'we should give up the dogma that nation states are constitutional candidates, and we should accept that constitution-making is disconnected from statehood, and that the production of constitution is decoupled from institutionalised politics'.<sup>98</sup> And yet, when, Koukiadis announces his own proposal, he does so deeply involving the state as part of a 'coregulation' model involving states/governments, private sector, and civil society, with three stages, a 'before', 'during' and 'after' stage. It seems that only in the 'before' and 'during' stages of agenda setting and negotiation are the non-state actors involved. In the 'after' stage of 'the adoption of final laws', states run the show.<sup>99</sup> Unfortunately, Koukiadis's proposal is hardly grounded in reality.

## 5. DIGITAL CULTURES AND DIGITAL DIVIDES

Riffing on Virginia Woolf's adage about human character's having changed on or about December 1910, writer Rebecca Solnit began her essay on the plugged-in life: 'In or around June 1995 human character changed again.'<sup>100</sup> Solnit provides a thoughtful rumination about how the experience of time and one's attention have changed. One finds, of course, all sorts of breathless hyperbole at both the most popular and academic ends of the spectrum. We even hear of the 'post human'. In analyzing the cultural changes of the Information Society, anthropologists have often failed us, so that E. Gabriella Coleman's *Coding Freedom*,<sup>101</sup> in which she embeds herself within 'hacker culture' becoming its advocate – not that Margaret Mead did not have an agenda in *Growing Up in Samoa* – ultimately does not tell us very much.

However, Castells has thought deeply about the social, cultural, and economic issues created by the Information Age. Playing on Marshall McLuhan's *The Gutenberg*

<sup>95</sup> Ibid.

<sup>96</sup> Koukiadis, *supra* note 43, at 126.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid., at 288–9.

<sup>99</sup> Ibid., at 312.

<sup>100</sup> R. Solnit, 'Diary', (2013) 35 *London Review of Books* 32.

<sup>101</sup> E.G. Coleman, *Coding Freedom: The Ethics and Aesthetics of Hacking* (2013).

*Galaxy*, he tells us in *The Internet Galaxy*, about the Internet's 'ushering in a new world'.<sup>102</sup> He explains that 'in our age, a significant proportion of everyday life, including work, leisure, personal interaction, takes place on the Net'.<sup>103</sup> But Castells in his many books explains how our sense of time and space, our social interaction, and our economy have changed. In his earlier *Rise of the Network Society*, he talks about the alteration of our sense of time to a 'timeless time'<sup>104</sup> and, after a long analysis of capital, the economy and time, postulates: **'the network society is characterized by the breaking down of rhythmicity, either biological or social, associated with the notion of a lifecycle'**.<sup>105</sup> He explains that a global economy is not the 'world economy' depicted by Fernand Braudel and Immanuel Wallerstein: **'A global economy is something different: it is an economy with the capacity to work as a unit in real time on a planetary scale.'**<sup>106</sup> I have argued elsewhere that the subjective sense of a world economy, even the economy of the Mediterranean, is as much globalization as Castells's global economy<sup>107</sup> but it is worth hearing him out on the 'new kind of business cycle',<sup>108</sup> explaining that:

in this new financial/technological context . . . markets value firms, and for that matter, any other object of valuation, since the new financial calculus, equipped with powerful computer models, has led to a process of securitization of almost everything.<sup>109</sup>

Castells tells us that the 'evolution towards globalization and decentralization was foreseen in the early 1960s by McLuhan'.<sup>110</sup> For *The Gutenberg Galaxy*, McLuhan marshaled immense erudition to set out exactly how print revolutionized culture and society, and witnessed a move with non-print media back away from some of the key structures of the print age.<sup>111</sup> Even in his one-page preface, he tells us that 'Printing from moveable types created a quite unexpected new environment – it created the PUBLIC.' In addition:

[w]hat we have called "nations" in recent centuries did not, and could not, precede the advent of Gutenberg technology any more than they can survive the advent of electric circuitry with its power of totally involving all people in all other people.<sup>112</sup>

McLuhan shows immense sensitivity to every element of cultural resonance, so that he follows a quote from an art historian on the transparent, diaphanous architecture of medieval cathedrals to explain, 'These effects of diaphanous stone are obtained by stained glass, but they are quite relevant to the medieval approach to the human

<sup>102</sup> Castells, *supra* note 30, at 9.

<sup>103</sup> *Ibid.*, at 180.

<sup>104</sup> M. Castells, *The Rise of the Network Society* (1996), 434.

<sup>105</sup> *Ibid.*, at 446 (bolded in original).

<sup>106</sup> *Ibid.*, at 92 (bolded in original).

<sup>107</sup> C. Landauer, 'Regionalism, Geography, and the International Legal Imagination', (2011) 11 *Chicago Journal of International Law* 557, at 579.

<sup>108</sup> Castells, *supra* note 30, at 89.

<sup>109</sup> *Ibid.*, at 85.

<sup>110</sup> Castells, *supra* note 104, at 329.

<sup>111</sup> M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (1962).

<sup>112</sup> *Ibid.*

senses and to the senses of scripture above all.<sup>113</sup> On the move from the print to the electric age, he explains:

Now, in the electric age, the very instantaneous nature of co-existence among our technological instruments has created a crisis quite new in human history. Our extended faculties and senses now constitute a single field of experience which demands that they become collectively conscious.<sup>114</sup>

All this was well before the Internet.

It is interesting how much of the Internet literature turns to thinkers writing before Solnit's 'in or around June 1995'. Indeed, Guy Debord's *Society of the Spectacle* and *Comments on the Society of the Spectacle* have much to say about our current condition. In the *Society of the Spectacle*, he tells us that '[t]he images detached from every aspect of life fuse in a common stream in which the unity of this life can no longer be reestablished'.<sup>115</sup> After describing the source of the alienation of the spectacle, Debord writes: 'This is why the spectator feels at home nowhere, because the spectacle is everywhere.'<sup>116</sup> And in *Comments on the Society of the Spectacle*, he explains that 'disinformation now spreads in a world where there is no room for verification'.<sup>117</sup> The disinformation had its 'manipulators' and 'experts' and the spectacle was 'essentially unilateral', but we could assume that the social media postings and blogs of today represent just a more sophisticated adaptation – advertisements for the self are still imbued with the culture of advertising and never very far from commodization.

In *The Second Media Age* (1995), Mark Poster draws heavily from and analyzes Habermas, Lyotard, Derrida, Foucault, Baudrillard, and de Certeau – for the most part, major authorities of the post-modern. In discussing his view that 'electronic writing also subverts the culture of print', it makes sense for Poster to turn to Derrida: 'The theory of deconstruction of Jacques Derrida anticipates in many ways changes brought about by computer writing' because he 'counters the traditional theory of writing as fixity of meaning, monumentality, the authority of the author'.<sup>118</sup> It similarly makes sense to talk about stories in cyberspace 'becoming more and more idiosyncratic, interactive and individualistic' to use Jean-François Lyotard's advocating 'a turn to the "little story", which validates difference, extols the "unpresentable" and escapes the overbearing logic of instrumentality that derives from the metanarrative of progress'.<sup>119</sup> When one turns to Baudrillard's *Simulacra and Simulation*, it is the simulacra, the double, that is the only real. It is hard to ignore the magic lantern element of cyberspace, its description without referent because it is so often the referent.

<sup>113</sup> Ibid., at 106.

<sup>114</sup> Ibid., at 5.

<sup>115</sup> G. Debord, *Society of the Spectacle*, thesis 2 (1977; originally, *La société du spectacle*, 1967).

<sup>116</sup> Ibid., at thesis 30.

<sup>117</sup> G. Debord, *Comments on the Society of the Spectacle* (trans. M. Imrie, 1990; originally *Commentaires sur la société du spectacle*, 1988), 48. Debord on McLuhan is particularly interesting: 'McLuhan himself, the spectacle's first apologist, who had seemed to be the most convinced imbecile of the century, changed his mind when he finally discovered in 1976 that "the pressure of the mass media leads to irrationality", and it was becoming urgent to modify their usage.' Ibid., at 33.

<sup>118</sup> M. Poster, *The Second Media Age* (1995), at 70–1.

<sup>119</sup> Ibid., at 36–7.

To return to the central question as to whether cyberspace has created a new culture, we should remember the writers referenced above analyzed an information society focused on data accumulation and mass media before the Internet, begging the question whether we should really be talking about an ‘Information Age’ encompassing the run-up of changes in the 1960s and 1970s rather than the Internet, the social media of Web 2.0, and the Internet of Things.

There are disturbing books about how the Internet actually changes the brain, such as Nicholas Carr’s *The Shallows* and the Susan Greenfield’s more substantial study, *Mind Change*.<sup>120</sup> Greenfield’s book is particularly disturbing on the impact of violent video games and citing studies where parts of the brain change, if sometimes reversibly. As alarming as these books are about the plasticity of the brain, its changeability has always been with us – in fact, Greenfield uses as an example London taxi drivers who gain special mental acumen by having to memorize the entire layout of London’s streets.

With the racing changes of the online world, we may forget that many of them are passing fads or, often, morph into something else. About a decade back, there was an immense focus on avatars in MMOGs (massively multiple online games). During the 2007 French presidential election, both Nicholas Sarkozy and Ségolène Royal made appearances, sponsored by their campaigns, as avatars. There are ever more sophisticated virtual realities and multi-player venues but one simply hears less about avatars. With the immense growth of online games, the explosion of the Candy Crushes, with advice sites on how to reach the next level, businesses outside of gaming think about the ‘gamification’ of customer experiences. Whether ‘gamification’ is just a stage of something that will grow and morph is hard to know but virtual realities and gamification bring us to one of the core tropes of the Internet; that it is virtual and there is a contrast between the virtual and the real. DeNardis aptly reminds us, ‘Descriptions of the Internet as a “cloud” do a disservice by portraying an ethereal and virtual void beyond the computer screen.’<sup>121</sup> There seems to be little recognition that all information has to be physically represented, the o’s and r’s in all Big Data calculations have to be physically embodied.<sup>122</sup> The very physicality and massive energy behind what is called ‘virtual’ brings us to the final issue I would like to tackle, one inadequately reflected in the books under review, the importance of the digital divide, or more accurately, digital divides, because it is not simply a question of being on or off the grid.

With over one billion Facebook users announced in August of 2015 and the focus on GAFAs, it is easy to focus less on the ‘digital divide’, which seems to have lost some of its currency.<sup>123</sup> Castells tells us of ‘switched off areas’ that ‘are culturally and spatially discontinuous: they are in the American inner cities or the French

<sup>120</sup> N. Carr, *The Shallows: What the Internet is Doing to Our Brains* (2010); S. Greenfield, *Mind Change: How Digital Technologies are Leaving Their Mark on Our Brains* (2015).

<sup>121</sup> DeNardis, *supra* note 15, at 107.

<sup>122</sup> See, e.g., R. Landauer, ‘The Physical Nature of Information’, (1996) 217 *Physics Letters A* 188.

<sup>123</sup> See M. Zuckerbergs’s Facebook post: [www.facebook.com/zuck/posts/10102329188394581](https://www.facebook.com/zuck/posts/10102329188394581) (accessed 24 April 2016). Interestingly, he exclaimed, ‘On Monday, 1 in 7 people on Earth used Facebook to connect with their friends and family’, which uses the past tense – there is no telling how many have left Facebook and also how many ‘users’ are entities.

*banlieues*, as much as in the shanty towns of Africa or in deprived rural areas of China or India'.<sup>124</sup> That divide is still very much with us despite testaments to expanded access.<sup>125</sup> If one sees the charts of 'Internet penetration' and thinks of the extent of poverty, literacy rates, and the places that lack electricity – with the accounting by various well-known sources, including the World Bank – it is hard to assess the digital divide in even its simplest terms. Each of the published statistics, in turn, creates definitional questions about what they really mean. Globalization and postcolonial literature often recognize a center–periphery divide not only among nations but also within nations. Yet, that is only a small element of the digital divides that exist.

*Internationalizing Internet Studies: Beyond Anglophone Paradigms* edited by Goggin and McLellan has done us an invaluable service by setting out just some of the variety of Internet cultures, with chapters on various parts of the world. We learn of differences in Muslim voices in Indonesia and Iran, the creation of *gyra mogi* 'gal talk' by young Japanese women and girls, and the creation of Indernet as a site for second-generation Indians in Germany.<sup>126</sup> The Internet literature acknowledges 'Balkanization', although Chander uses the term primarily to suggest the re-establishment of national borders,<sup>127</sup> and the emergence of essentialization on the Internet. Castells refers to the common response to global change often being that 'people tend to regroup around primary identities'.<sup>128</sup> But we could use more focus on narratives like that of Micó and Masip on Catalan on the Internet, where they describe how a language banned by Franco and ignored by the current Spanish government and multinationals, has an immense online presence, with more websites than native Catalan speakers.<sup>129</sup>

There are, of course, important language boundaries on the Internet, including monolingual sites, both international and intra-national linguistic hegemony,<sup>130</sup> and languages that are not represented. Sarah Kendzior wrote that Google Translate reached 65 languages in 2006 but 'two exceptions stand out: No languages from Central Asia – such as Pashto, Uzbek, and Uyghur – make the Google cut. Neither do the African languages of Hausa, Yoruba, or Zulu. The sole inclusions from sub-Saharan Africa are Swahili and Afrikaans'.<sup>131</sup> But languages are not merely interchangeable if they are difficult for the QWERTY-style keyboard of laptops and mobile devices. That is not a new issue. If German typewriters have long differed from English typewriters simply by reversing the Y and the Z and adding vowels with umlauts, and Cyrillic languages adopted their own keyboard assembly, some languages,

<sup>124</sup> Castells, *supra* note 104, at 34.

<sup>125</sup> The *Financial Times* spoke in 'Laying the Foundations', of an online population of 400 million in 2015 projected to reach 600 million by 2020 in its article on Narendra Modi's proposed initiatives (15 January 2015); it analyzed the opportunities for smartphone expansion in sub-Saharan Africa (27 January 2016); and the *New York Times* reported Facebook's goal of tripling the size of its 1.6 billion user base, which envisioned revolutionizing the cost of technology (25 April 2016).

<sup>126</sup> Goggin and McLellan (eds.), *supra* note 56.

<sup>127</sup> See, e.g., Chander, *supra* note 8, at 179, 189.

<sup>128</sup> Castells, *supra* note 104, at 3.

<sup>129</sup> J.L. Micó and P. Masip, 'The Fight of a Minority Language Against the Force of Globalization: The Case of Catalan on the Internet', in Goggin and McLellan (eds.), *supra* note 56, at 112–27.

<sup>130</sup> As Castells notes, 'most countries are creating a deeper digital divide', Castells, *supra* note 30, at 262.

<sup>131</sup> S. Kendzior, 'Worlds Unknown: The Regions Ignored by Google Translate', *The Atlantic*, 1 May 2012.

character- rather than alphabet-based languages, were always difficult to reflect on keyboards. Consider the development of a typewriter to produce thousands of Chinese or Japanese characters. Goggin and McLelland note that:

Japan and China never went through the same kind of office automation phase characteristic of Western countries because it was very difficult to create simple machines, such as typewriters, to reproduce their scripts (Japanese uses about 2,000 characters in daily life; Chinese over 10,000).<sup>132</sup>

If, as they write, ‘the QWERTY keyboard remains the main input system for many languages’,<sup>133</sup> Chinese speakers using Western-style keyboards – although more recent mobile and pad devices allow character drawing on screens – have adopted transliterations of Chinese, such as pinyin, to create Chinese characters for email and texts.<sup>134</sup> And on Roman-alphabet-only applications, Arab speakers transliterate Arabic in a phonetic use of the Roman alphabet. In both cases, one might need two languages to write one.

Even the technological elements of the digital divide are more complex than traditionally portrayed. One may see statistics on the reach of mobile access, putting aside the economic, literacy, language, other blocks referenced above. But technology is fast moving. Each producer of an application has to make choices as to what operating systems, browsers, and devices they can support, focusing on what they perceive as the technology of their likely users. People who have online access may be blocked from a particular site or application. In an odd reversal, a high-tech company choosing an Apple-only environment may dedicate a PC for regulatory filings because those filings are not Mac-compatible. But mostly, one can be left behind in the forward dash of technology, and the Internet may not be as interconnected as advertised.

To return to the broader international picture, Kendzior commented that important conflicts around the world tend to ‘get reduced to “Twitter revolutions”’.<sup>135</sup> In essence, little of the true complexity and texture surfaces. International legal writing on globalization so often focuses on the process, on the ‘ization’, missing the local geographical impact.<sup>136</sup> We find that in legal writing on the Internet. Chander does write on the reasons for the success of Bangalore over China in his argument about comparative advantages in the Internet economy and the concentration of Internet powers.<sup>137</sup> What would be useful within the analysis of Internet and law would be more focus on the local, on how the actual fibers of the net do and do not work.

<sup>132</sup> Goggin and McLelland (eds.), *supra* note 56, at 8.

<sup>133</sup> *Ibid.*, at 12.

<sup>134</sup> Although there are Chinese keyboards developed in the 1980s that provide for the elements of characters, they are not used in mobile devices.

<sup>135</sup> Kendzior, *supra* note 131.

<sup>136</sup> Landauer, *supra* note 107, at 571–81 (‘Globalization without the Globe’).

<sup>137</sup> Chander, *supra* note 8, at 59–86 (‘Eastern Entrepôt’).

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