

***Net Neutrality: Towards a Co-Regulatory Solution***

By Christopher Marsden

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A Book Review by

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More than any other area of communication policy, the study of Internet regulation requires regular rejuvenation in order to keep abreast of developments that evolve almost as rapidly as the technology in question. UK legal scholar Christopher Marsden's new book, *Net Neutrality: Towards a Co-Regulatory Solution*, examines the elusive and contentious issue of net neutrality, in its various guises, and attempts to establish a potential framework for addressing the inherent global challenges in broadband communication. This impressive work serves as a thoughtful contemporary critique of the range of efforts by industry and governments to keep pace with the exponential growth of the Internet as it enters the broadband age. Marsden then puts forward what he views as a pragmatic approach, via ex ante co-regulation, to sustain the values we have come to associate with the concept of net neutrality. What Marsden proposes is by no means a panacea; instead he offers "a partial attempt to remedy some of the issues" (232). *Net Neutrality* succeeds beyond such modest aspirations, but will inevitably be regarded with disappointment by some on both sides of the debate. Perhaps, that's a good thing.

This book is clearly timely. Net neutrality has secured its place as the foremost legal issue for Internet regulation in this new decade. Barack Obama made net neutrality a pillar of his successful 2009 election platform, and early in his tenure appointed Aneesh Chopra as the first U.S. Chief Technology Officer. As I read *Net Neutrality* in April, 2010, a D.C. Circuit Court of Appeals ruled that the Federal Communications Commission (FCC) lacks the legal authority to tell an Internet Service Provider (ISP), in this case Comcast, that it cannot block certain uses of its Internet access services. According to the court's decision, the extent of the FCC's jurisdiction in this case was not proven. Much of this debate hangs upon whether the FCC determines Internet providers to be "telecommunication services" or "information services" (Despite Ruling, F.C.C. Says It Will Move Forward on Expanding Broadband, April 14, 2010. <http://www.nytimes.com/2010/04/15/technology/15broadband.html?fta=y>). Scholars and policy makers with an interest in the legal implications of the two services will find Marsden's book of great value. Marsden brings his considerable experience and expertise in explaining the delicate nature of this dilemma and in doing so has delivered a book of great contemporary relevance.

The central position of this book will intentionally antagonize entrenched members of both camps of the net neutrality dispute. Marsden (24-25) writes:

I argue that the entire net neutrality debate has been set up as a false dialogue of the deaf between the net neutrality absolutists on one side and the neutrality refuseniks on the other.

The author's intention is to empty the rhetorical straw men inherent to each argument. Marsden starts from the position that traffic management on the Internet "is a fact of life" (25). So much for cyberspace libertarianism, as espoused by people such as John Barlow, Alvin Toffler, and a wide swath of the *Wired* readership. Citing both academic and industry reports, Marsden notes Internet traffic flows, largely brought about by increased video data, threaten to overwhelm networks in the very near future. Marsden does not accept a rigid neo-classical economic approach to Internet regulation; however, he is equally clear he does not support strict versions of net neutrality that do not allow for some degree of traffic prioritization (217). The explosive growth of the Internet has reached a point where some regulatory action is needed to preserve certain essential freedoms that have been established "by accident and design" (216) over the Internet's history. Marsden (107) emphatically makes this point observing that in both the U.S. and the UK

the regulators gave the new medium a breathing space to self-regulate and otherwise demonstrate its maturity and disprove the need for regulation. That breathing space is now over.

Pointing out the need for regulatory oversight on the Internet is not necessarily novel, devotees of legal/intellectual property scholar Lawrence Lessig have been saying this for more than a decade; the "what's next" is a far trickier proposition. Marsden's co-regulatory approach, or net neutrality lite, explicitly calls for "a consumer-and-citizen-orientated intervention" that still uses market-based solutions "as far as possible" (234-235). It's not as contradictory as it originally sounds. Key to the success of this approach will be public regulators "with sufficient comprehension and research into the issues and sharp teeth" (236). As the current dilemma surrounding the jurisdiction of the FCC in matters of Internet regulation demonstrates, governments have yet to equip regulators with the tools necessary to address some of these long-term issues. Marsden argues regulatory oversight is in the long term interest of industry and citizens.

The cusp of Marsden's argument rests upon on a co-regulatory solution to the complex problems posed by net neutrality; however, it is not until two-thirds of the way through the book (163) that he gets around to clarifying what he exactly means by co-regulation. This is not a minor quibble as the vagueness of this term has been the source of contention in the past.<sup>1</sup> The idea of allowing the industry to autonomously regulate itself (self-regulation) or in conjunction with government (co-regulation) raises legitimate questions concerning the innate power structure within the system and the pursuit of public interest objectives. The self-regulation/co-regulation split involves substantive normative issues.<sup>2</sup> Co-regulation is not a "free ride" for industry, but a way of making industry assume responsibility for some of the regulatory burden. The "stick" of government enforcement must always remain in the picture and industry must see some economic incentive, or enlightened self-interest, for taking on regulatory responsibilities. Marsden is clearly an advocate of a powerful stick and a strengthened position for a public regulator. A table entitled "A Beaufort Scale of Self-Regulation" demonstrates the range of

regulatory options involved in co-regulation, from pure unenforced self-regulation to an independent body including a stakeholder forum (225).

The publisher's summary on the back cover claims the book is an examination of the developments in Europe and United States. This is somewhat misleading. The vast majority of Marsden's study is based upon UK and European cases and policy examples. The author's examination of the American experience is largely restricted to the excellent first section of the book which identifies the inherent complexities of the net neutrality debate. It is the U.S. which provides net neutrality advocates with a "smoking gun" case of an Internet Service Provider (ISP) named Madison River Communications blocking access to a rival Internet service, in clear violation of the FCC's 2004 four network freedoms statement: Freedom to access content; use applications; attach personal devices; and obtain service plan information (34, see [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-151A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf)). Marsden observes that the legal position of this FCC statement is tenuous.

It is clear Marsden is no fan of the previous American administration. *Net Neutrality* consistently identifies the presidency of George W. Bush as an era of "extreme deregulation" (47) and Marsden seems largely in agreement with what he identifies as the "widespread European view that the George W. Bush presidency was an aberration in its adoption of neo-liberal agendas" (7). The author cites the 2005 FCC decision under Kevin Martin to effectively abolish common carrier telecoms regulation ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-150A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf)) as a clear demonstration that the regulator had become captured by the industry it was designed to supervise (41). While it is certainly accurate to say the Bush era accelerated the process of deregulation, it seems a stretch to say it was an aberration, given the previous twenty years of steady liberalization of American telecom policy. The U.S. was by no means alone in this regulatory trajectory.

Contemporary Canadian Internet policy, in particular a 2008 ruling by the Canadian Radio-Television and Telecommunications Commission against ISP Bell Canada (<http://www.crtc.gc.ca/eng/archive/2008/dt2008-108.htm>) - a decision he dismisses as "entirely unsatisfactory" (228) - provides the basis for a key section of the conclusion. The CRTC's Bell decision was accompanied by a call for comments on Internet traffic management (CRTC 2008-19) that asked questions regarding congestion that Marsden believes "the European Commission and NRAs will also have to address" (229—for the 2009 CRTC ruling see <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>).

Marsden has recently lived in Montreal (my hometown) but it appears the French language did not take hold: on page 14 he describes Montreal as the "Isle sans fils (Island without charge)"; whereas, the correct French and English interpretation would be "Île sans fils (Island without wire, or wireless island)". Further Canadian influence is clear when he observes "Broadcast regulators on the Internet are as comfortable as elephants playing ice hockey" (54).

Marsden's wit succeeds in making dry legal analysis accessible and thus broadening the range of potential readership for this fine book. The comparison between Internet regulation and the UK government's policies surrounding pubs, or *public houses*, is a clever and informative analogy. Readers from outside the UK will be amazed at the delicate balance of private enterprise, government involvement and industry self-regulation to ensure a fair trade in British beer.

Light touch regulation may have lost some of its previous lustre given the disastrous consequences generally attributed to that approach in the global financial markets; however, Marsden presents a convincing case that co-regulation with strong public and regulatory

oversight may be what is needed to preserve essential on-line values of openness and democracy. This is a very readable book on a complex subject, suitable for senior communication policy scholars, legal scholars, policy makers, and anyone with an interest in the invisible yet profoundly influential regulatory scaffolding of the Internet. The author wisely has no pretension of offering a full solution to current obstacles to the Internet's equitable growth; *Net Neutrality* is an intentional provocation, not a thorough plan.

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## Notes

- 1 A 2003 publication from the European Audiovisual Observatory entitled *Co-Regulation in the Media in Europe* emphasized that co-regulation is “particularly ambiguous” (Palzer, 4) and “not clearly defined” in the case of UK regulation (Prosser, 59).
  - 2 I should note Marsden has previously tackled the problem of defining co-regulation in his book *Codifying Cyberspace* and in an essay co-written with Jonathan Cave. See Cave, Jonathan and Marsden, Christopher T., *Quis Custodiet Ipsos Custodiet on the Internet? Self-Regulation as a Threat and a Promise* (September 28, 2008). Available at SSRN: <http://ssrn.com/abstract=1366723>.
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## About the Reviewer

Gregory Taylor completed his Ph.D. at McGill University in 2009. His dissertation is entitled *Canadian Broadcasting Regulation and the Digital Television Transition*. Dr. Taylor has published articles in the *Canadian Journal of Communication* and the *Canadian Journal of Media Studies*, as well as various opinion pieces and book reviews. In April 2010 he was an invited speaker at the Upper Canada Law Society's New Developments in Communications Law and Policy conference, appearing on a panel addressing the future of over-the-air television. Dr. Taylor has taught senior courses on broadcasting policy in the Department of Art History and Communication Studies at McGill University.

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