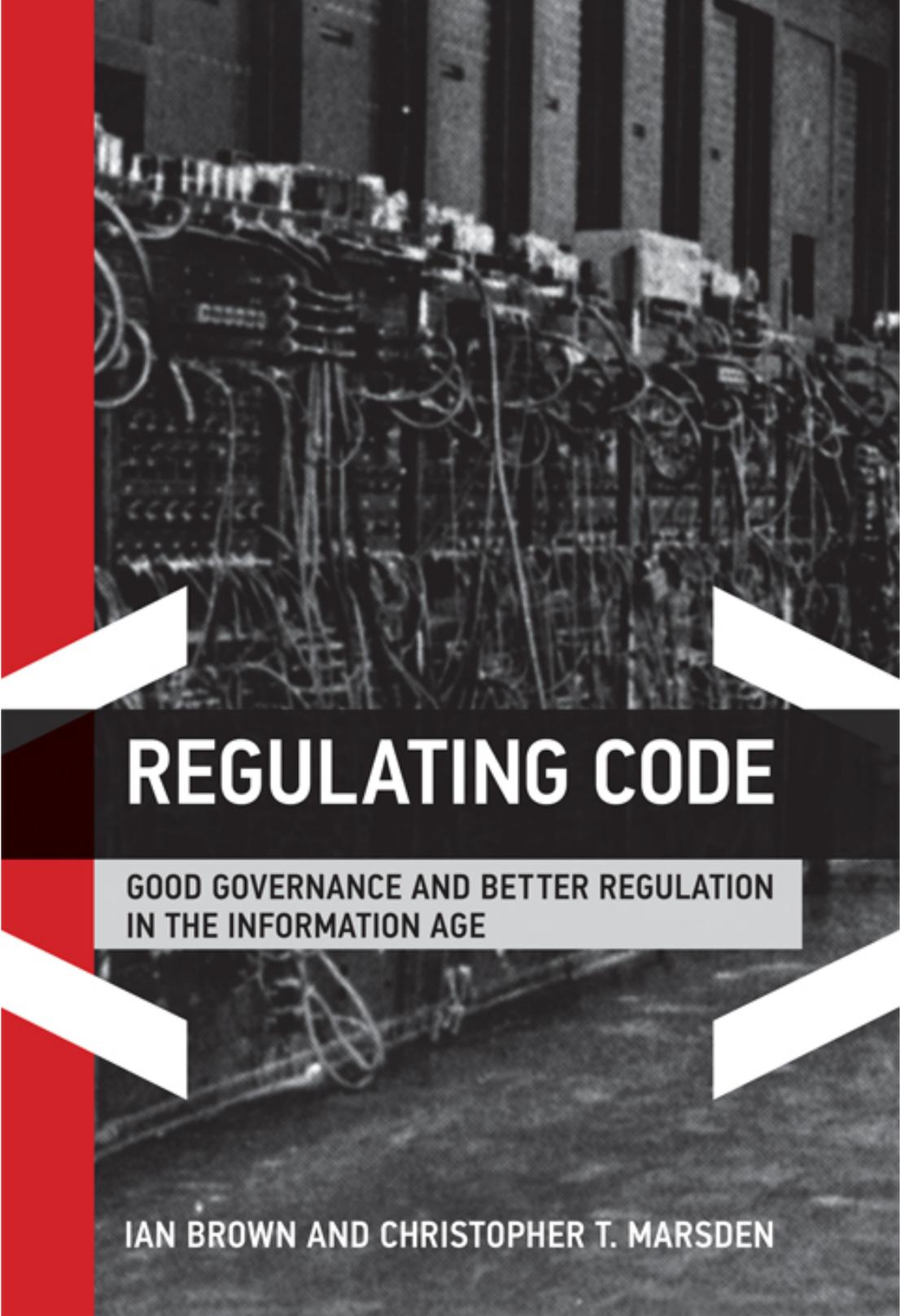


**Our Digital Futures: Technology
Without Boundaries**
An Interview With



REGULATING CODE

GOOD GOVERNANCE AND BETTER REGULATION
IN THE INFORMATION AGE

IAN BROWN AND CHRISTOPHER T. MARSDEN

Joseph Savirimuthu: Hello Ian and Chris. Glad that you could do this interview before the launch of BILETA 2013. As you may have gathered, this Conference is aimed at provoking a debate on a range of issues. It is concerned with the choices and challenges facing us as a society in the wake of affective computing and rapid technological innovations. Your book *Regulating Code: Good Governance and Better Regulation in the Information Age* is both opportune and timely - I am sure that this book will figure prominently in Internet Law courses across the country. Could you tell us a little about the genesis of the ideas that lead to this book?

Ian Brown and Chris Marsden: We've been working together for a number of years on Internet regulation, and have brought together several strands of our work in this book. Two of the most important were on the costs and benefits of various forms of self-, co-, and state regulation, which we previously explored for a European Commission study; and on the creative use of competition and consumer law in online industries, which we first proposed in a paper for the annual GikII conference (look out for this summer's in Bournemouth!) We were fortunate to have several years in which to bring together these and other ideas into a comprehensive analysis, which we hope breaks significant new ground in the Internet regulation debate.

Joseph Savirimuthu: Let me push you a little here one of the key ideas you pursue in the context of Internet regulation. Multi-stakeholder has become a catchphrase in policy circles, often portrayed as creating democratic and deliberative governance mechanisms. Others regard the term as letting industry "get away with it!" It is clear to me that your analysis of multi-stakeholder mechanisms is alive to the nuances of realpolitik. I would be most interested in hearing your thoughts on how *Regulating Code* advances our understanding of multi-stakeholder policymaking, within the context of Internet regulation.

Ian Brown and Chris Marsden: Lazy versions of "multi-stakeholder" processes are too easily captured by well-funded industry representatives that travel from continent to continent in a "flying circus" of Internet governance. These processes only improve regulation to the extent that they add both technical expertise and appeal to popular legitimacy. This can be difficult to separate from industry self-interest and heavily-lobbied government positions. Nor do they remove the need for regulation to comply with the fundamental democratic principles contained in international human rights law. In *Regulating Code*, we set out however, a framework for assessing Internet regulation for economic efficiency, democratic legitimacy *and* human rights compliance. In some cases, we show that this suggests a need for *more* state involvement (such as on privacy and freedom of expression), and problems with supposedly multi-stakeholder processes (such as the use of secret blocking lists by ISPs that are created by non-governmental child safety helplines).

Joseph Savirimuthu: Some of the ideas and processes you highlight will be the subject of paper presentations in our Internet Cultures & Governance and Technologies, Innovation & Justice streams at the Conference. As I was skimming

through your work I wondered if *Regulating Code* could have provided us with an antidote to "regulatory" and "institutional capture"? There are not many Max Schrimms about. Does *Regulating Code* provide strategies, for those amongst us who feel that governance models espousing transparency, accountability and fairness are in fact loaded against us?

Ian Brown and Chris Marsden: Behavioural economics is providing a flood of new evidence on the limits of consumer sovereignty in protecting individual interests. At the same time, much Internet policymaking to date shows how easily legislators can be captured by special interests - stretching from the US's Communications Decency Act and Digital Millennium Copyright Act, through the EU's Copyright Directive, to the more recent ACTA and SOPA/PIPA debates. We have tried to design a framework that acknowledges the need for some state intervention to protect fundamental rights and collective interests, but using "lighter-touch" mechanisms from competition and consumer law to protect individuals while enabling innovation and avoiding regulatory capture.

Joseph Savirimuthu: I guess this is where "prosumer" comes into the governance discourse. What does "prosumer" mean in policy terms? More specifically, where does this concept fit in within the governance framework?

Ian Brown and Chris Marsden: "Prosumer" is an ugly word, but best captures the idea of the growing proportion of active Internet users that are blogging, tweeting, remixing and uploading video, or sharing photos and status updates with online friends. Our framework aims to support such individuals in asserting and protecting their own rights, principally by promoting market frameworks to give them meaningful choices, while acknowledging the need in some cases for state involvement to protect the public interest in designing and enforcing regulatory codes and other forms of soft and hard law.

Joseph Savirimuthu: I have not viewed governance through this framing strategy but will be interested to hear what our Conference delegates think, when they read this interview. This brings me to a related issue governing the framing of policy discourse. We have grown too accustomed to accepting US characterisation of Internet norms and values as they relate to issues surrounding Cloud Computing, Big Data and more recently Autonomous Systems. I am sure that it is not pure chance that Chris Reed and now Andrew Murray are re-discovering the benefits of turning to fundamental constitutional norms and values rather than the "pathetic dot". How should we think about the relationship between your proposed approach to governance debates and for example, the Rule of Law?

Ian Brown and Chris Marsden: Even before the financial crisis, issues such as behavioural advertising and net neutrality were exposing the limits of a completely laissez faire approach to protecting individual interests. As Internet "giants" (such as AT&T, Google and Facebook) have solidified their market dominance, we think it's vital that regulators think carefully about how to protect individual and societal interests in this online ecosystem. Clearly, this needs to happen within

a predictable rule of law framework that takes full account of the human rights framework that has developed over several centuries. It was encouraging, for example, to see France's Constitutional Council declare the first HADOPI "three-strikes" law incompatible with the 1793 Déclaration des droits de l'homme et du citoyen.

Joseph Savirimuthu: Many will be encouraged by these observations. I want to shift the focus a little, if I may. I was pleased to see your emphasis in *Regulating Code* on the need for greater engagement between innovators, computer scientists, electrical engineers and lawyers. We are already seeing some strategic shifts in the way policymaking activities now integrate technical and design solutions (eg. 'privacy by design'). You may have noted that there are two plenaries in BILETA that attempt to initiate and promote this level of interaction and engagement. Do you think that we do enough in the UK to facilitate this level of inter-disciplinary interaction? If not, how should we address this shortcoming?

Ian Brown and Chris Marsden: Despite the lip service paid to interdisciplinary research and impact by UK universities, institutional frameworks (especially the Research Evaluation Framework) heavily penalise this type of engagement. Conference panels are worthwhile, but will have a limited impact if academics are concerned that spending much time on interdisciplinary interaction will put their careers at risk.

Joseph Savirimuthu: I agree that getting the right institutions and processes in place is critical. The strategies you propose for a responsive and adaptive framework is one which will attract nods of approval. I have a problem however - have we not been here before? I would very much like your thoughts on how the governance mechanisms you propose will address the following scenario. Imagine an advertising industry that has curated vast amounts of data to profile the responses of children above the age of 13 on a wide range of matters - games played, likes and dislikes, links clicked etc. The rules on advertising are not engaged, for example if the advertgames that are displayed on the screen are found not to be deceptive or misleading. How does a multi-stakeholder model address concerns expressed by parents that their children are being exploited? Have you any views on this?

Ian Brown and Chris Marsden: The ongoing "Do Not Track" debate in the World Wide Web Consortium shows the limits of what can be achieved without meaningful state regulation to protect fundamental rights. The "behavioural advertising" interests there seem to be doing all they can to block progress on a DNT standard that conforms to consumer expectations. In this type of situation, you may need stronger regulatory intervention - as European Commissioner Neelie Kroes and the EU national data protection authorities are threatening to do.

Joseph Savirimuthu: I wish we were joining us for the Masterclass on 12th April or even the Author Meets Audience. What is your central message to Conference?

Ian Brown and Chris Marsden: There is no "silver bullet" for Internet regulation - alongside law, you need to take into account issues typically raised in disciplines such as political economy, computer science, psychology and elsewhere. It would be very positive if BILETA and other similar venues could continue to encourage this level of cross-disciplinary interaction and engagement.

Joseph Savirimuthu: Have you a challenging research/essay question for Conference, which can be subsequently published in the Special Issue?

Ian Brown and Chris Marsden: Is the traditional ex post competition law approach adequate in online markets that frequently show such significant scale and network effects?

Joseph Savirimuthu: Imagine, 24 months from now - what do you hope *Regulating Code* will achieve?

Ian Brown and Chris Marsden: That all new governmental proposals to regulate online products and services are designed with meaningful input from affected user and technical communities, and protect privacy, freedom of expression and other key rights, as well as supporting innovation and competition to maximise economic efficiency. We can but dream...

Joseph Savirimuthu: Thank you both!