

On Neutrality of Network Regulation

Ver. 2. 11e

Hirofumi ITO *

Gist:

This article is to discuss Neutrality of Regulation as one of the problems in regulating our network society. The regulation in our network society is performed by Norm, Market, and Technology, and each regulation requires its Neutrality in the process of its performance. With figuring out each problem of those regulatory methods and by proposing a desirable amalgamation of them, I conclude the prospect of a realization of the desirable neutral network regulation.

* Professor of Law, Aichi Law School; B. A., 1980, Doshisha University; M. A., 1986, Aichi University Graduate School of Law; M. L. I 1989, University of Wisconsin Law School. Any comments will be welcomed at *mailto*: hirofumi@lawschool.aichi-u.ac.jp

This article is my translation of my original article written in Japanese, published on Journal of Aichi University Media Center Vol. 20/No. 1 (2010). In translating to English, I have edited and rewritten the original one.

Key Words:

Network society, Regulation, Neutrality, Market, Norm, Ethics, Cyber law

Table of Contents

1. Preface
2. Regulation in a network
 - 2.1. Regulation by Norm
 - 2.1.1. Regulation by Law
 - 2.1.2. Regulation by Ethics
 - 2.2. Regulation by Market
 - 2.3. Regulation by Technology
 - 2.3.1. Filtering and Zoning
 - 2.3.2. Implemented Regulatory Technology
3. Neutrality of Regulation
 - 3.1. What is Neutrality?
 - 3.2. Is Neutrality possible?
 - 3.3. Cocktail Therapy of Regulation
4. Conclusion

1. Preface

While our network society develops, various problems in our network society, as a virtual reality world, have been emerging right in front of our eyes. To cope with those problems, we are apt to use the regulatory methods. Though, in any societies or social schemes, the control by the regulatory methods are preferred to use, the disposition towards regulation, even in our network society, should be scrutinized here. As for the

regulation, the assertion that regulations should be neutral occurs as a matter of course, but we find many points to be discussed in a criterion of judging the neutrality or the construction of criterion.

This article is to discuss this regulation in our network society, and scrutinize the neutrality of regulations.

2. Regulation in a network

At fist, I discuss the *raison d'être* of regulation, so-called “network regulation theory”. The regulatory theory for the cyberspace, as a network society, has an inveterate opposite theory in the root.

Here comes first negation of network regulations. The UNIX culture that has produced the Internet stems from a counterculture in the academism and is loath to any interference from any kind of political powers.⁽¹⁾ Therefore, regulation is unnecessary there and free domain should be maintained, and thus we can recognize such an anti-regulation theory as to permit no interference. Although I can share some sympathy with their ideas of such anti-regulationist, one point should be noticed that the theory brings us no specific solutions for the problems taken place in our network society.

On the other hand, there exist some theories which allow laws or architecture (code) to regulate, because of a prerequisite that a regulation be indispensable.⁽²⁾ The gap of basic point of view between two sides

(1) See, Hirofumi ITO, *On Self-Governance of the Internet*, Bulletin of Toyohashi SOZO Junior College Vol. 18 pp. 23-38 (2001) at 27 (in Japanese). Available at <http://cals.aichi-u.ac.jp/products/articles/ISelfGov.pdf> (last visited Dec. 20, 2010).

lies in a way of the recognition of cyberspace. It is a conceptual difference to recognize cyberspace as a new world or an extension of our existing world. Thus, if the cyberspace be an extension of our society, then we would find no values to accept specificity in it. It is possible to regulate the cyberspace with our traditional normal legal systems and theories. The problem is a method to perform a regulation there. However, on the other hand, if the cyberspace be a new world, it is insufficient to cope with an existing legal theory. In this position, they do not utilize laws negatively as a regulatory method.

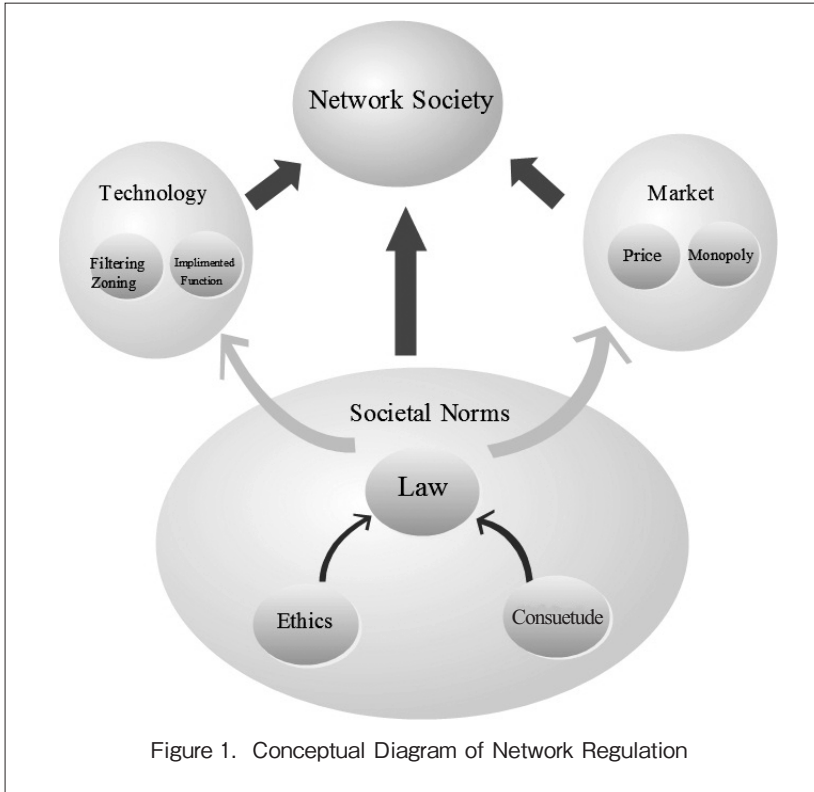
Now, it required that a new regulatory system for cyberspace should be devised in place of our traditional legal scheme and such a regulation should be limited at the minimum in accord with the recognition of assertion from both sides. And the regulatory method should be neutral, reflecting various opinions of every end-user, not be a power by organizations such as the government or a specified enterprise.

2.1. Regulation by Norm

It comes first the regulation by Societal Norm such as laws that we nominate as a type of the typical regulation methods. Norm is one of the rules that discipline a human social life, for example, is ethics, morality, consuetude, and law (*see* Figure 1). Though ethics, morality, consuetude

(2) *See*, Hirofumi ITO, *New Development in Arguments over the Internet Regulation*, Bulletin of Toyohashi SOZO Junior College, Vol. 19, pp. 13-20 (2002) at 16. *Available at* <http://cals.aichi-u.ac.jp/products/articles/InetReg.pdf> (last visited Dec. 20, 2010).

and law share intermingled domains one another, only law can be distinguished from the others by presence of the coercion power.



2.1.1. Regulation by Law

In the regulation by law, regulation is categorized into regulation by legislation or by judiciary. It cannot be denied that each regulation takes time and cost, but has a high degree of effectiveness of the regulation because of its coercion. Once a legislation passes regulatory laws, all the

behavior against the laws become illegal and can constitute injuria, therefore a deterrent effect improves. The basic difference between regulations by a legislation and by the judicature is found in neutrality. In a legislation system, the group of spokesmen who strongly insist on specific their own interests as lobbyists frequently play a big part, and the important opinions of the silent majority do not reflect there even after elections for public offices. In contrast, the judicature can lead a more preferable conclusion not supporting only the rights and interests of the specific interest group, in a meaning to measure adjustment between conflicting legal interests legally. However, I am doubtful that a case-law precedence can show an effective roll in our society as a norm, and it is quite rare the precedence could establish a clear and convincing social norm. It has a meaning only as the spin-off of its social effect.

It is reality that this regulation by law does not function well in our cyberspace, or network society. In other words, law takes too much time to function in legislation and a judicature, and can not follow the rapid speed of our network society with the rapidly changing technical innovation. In addition, the effectiveness of law is also suspicious. Besides, regulating by a nation or a country, there is a limit in regulating those cyberspace problems on the Internet built up around the world wide even though the laws have coercion power.⁽³⁾

(3) See, Hirofumi ITO, *Law and Network Technology*, Bulletin of Toyohashi SOZO Junior College Vol. 15 pp. 1-17 (1998) at 15. Available at <http://cals.aichi-u.ac.jp/products/articles/law&tech.pdf> (last visited Dec. 20, 2010).

2.1.2. Regulation by Ethics

It is described above that Norm consists of not only law but ethics, morality, consuetude as its component to constitute itself. If it be possible to justify a moral meaning in such regulations, it is also possible that we can extract an ethical and moral norm there and can perform a subjective regulation. Among basic design concepts of the Internet, there is a philosophy called “autonomy, distribution and cooperation”. This concept requires us that each end-user who is a member of the network society should choose or abandon individually his or her own decision with a free and unbiased policy from many alternatives. For this purpose to accomplished, establishment and education of ethics that individual can behave autonomously are required. However, I cannot deny the poor effectiveness of this subjective regulatory approach.

2.2. Regulation by Market

Next, I discuss Regulation by Market. The regulation by Market regulates it by a cost, a burden of price. The typical exemplar of this regulation by Market is to lose the balance of the price equilibria and restrain demand. For example, by raising the price of one cigarette from \$10 to \$1,000, most smokers substantially could not purchase the cigarette, therefore we can draw a result, “No Smoking”. By the price manipulation, smokers are encouraged to perform their voluntary prohibition of smoking in a free market.⁽⁴⁾ It is one of the typical exemplars of Regulation by Market to regulate our network society with this market principle.

Here in addition, another type of Regulation by Market is an industry

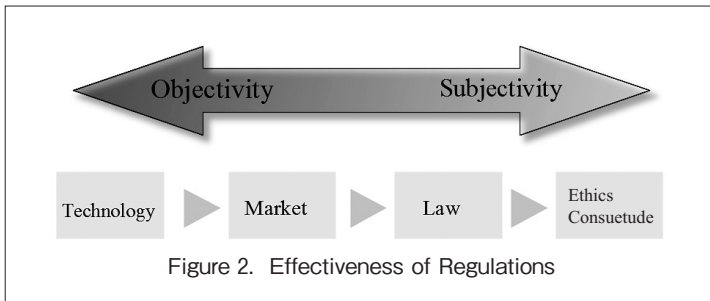
regulation. If a specific industry becomes the cartel status monolithically and conducts a common business, it may become a very controlling regulation. The problem of this industry regulation is that it is very easy to perform substantial regulation on account of the industry interest without listening to most of the end-users.

It is also to be noted here, in the regulation of Market, we should pay attention to “market failure”. In other words, some prior conditions are to be met in order for the most suitable resource allocation to be accomplished by market mechanism. On the contrary, if those conditions are not met, the optimal resource allocation by the competitive equilibrium is not accomplished.

(4) It should be noted that in order to accomplish the purpose, there exist various purposes to be achieved. Basically, in the purpose of prohibit of cigarette smoking so called “No Smoking”, there are many ways to achieve the purpose. For examples; stressing paternalistically on reduction of a health damage by the secondhand smoking; reduction of a health damages from the viewpoint of state policy to cut some social welfare budgets; the beautification of environment; eradication of drug abuse. Each approach shares the same purpose to quit smoking, but differs in its way to achieve. In the viewpoint to decrease a health damage, the fact that a smoker itself is damaging its own health as an exercise of right to self-determination is not important, but the solicitude that smoking is causing harm to the people surrounding the smoker should be considered, then separation of smokers from the area of non-smokers becomes effective.

Further more, if the harm to health is so worried because of financial difficulties, it means that there would be no need of discouraging smoking at all when abundant finance can be afforded. As stated here, much attention should be paid to the fact that the variety of behavioral purposes of No Smoking action would lead to various results caused because of the diversity of its aim.

The regulation by the market mechanism has its own limitation, and the effect is often stays to be limited to a subsidiary. It is quite general that “free” business style, such as free software which works as a priming water with priceless network contents, frequently conducted on our network society especially in the Internet. In this respect, it is obvious that the regulation by price manipulation is less effective.



2.3. Regulation by Technology

In a network society, the most effective regulatory method is a regulation by Technology (*see* Figure 2). Here this technology refers to the group of network high-techs to support the architecture forming our network society.

2.3.1. Filtering and Zoning

As a regulation in our network society, regulations such as to stop a dissemination of unfavorable contents are exposing a latent problem seriously. It is so-called “Content Regulation”. At first, as one of the methods to regulate online contents, filtering should be pointed out. As to

protect minors from unfavorable online contents through a cell-phone or mobile phone, filtering is often taken as a very effective measure. Filtering has two types, white list format and black list format, and each works with a matching list which judges the passing information whether to pass through or not. It can not be denied that the regulation method such a filtering is insufficient.

The very problem of this filtering is who makes a criterion of the filtering list, e.g., judging criterion to kill unfavorable information. For example, a web site is prohibited for minors to access because the web site is judged to disseminate unsuitable information for a minor. In this case, it is not clear what kind of criterion the filtering list was made. Though a neutral system should justly check the criterion of the filtering, each end-user is not noticed what criterion is used and how it works.⁽⁵⁾ It can be censored and may violate freedom of expression.

Next, zoning in the Internet is to create various specific areas there, on the Internet and limit the zone to the only an authorized person. “Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws.”⁽⁶⁾

For example, to regulate porn web sites which scatter obscene mate-

(5) *See*, the web site of Ministry of Internal Affairs and Communications
(http://www.soumu.go.jp/main_sosiki/joho_tsusin/d_syohi/filtering.html) (last visited Dec. 20, 2010).

(6) *See generally* the concurring opinion of Judge O'Connor in *Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al.*, 521 U. S. 844; 117 S. Ct. 2329 (1997).

rials or contents, it is desirable that such sites should be integrated into the specific virtual zoned site and to devise the structure where the only authorized person can access through a high-tech authentication system performed by an advanced security technique.

2.3.2. Implemented Regulatory Technology

As a method of regulation by implementing regulatory technology, there is a regulation by the technique to implement to storage devices. For example, in order to deter illegal duplication of copyrighted materials because of the intolerable epidemic of copyright infringement, in other words, to protect copyright holders, such a company as to produce many recording media are likely to make it unfeasible to duplicate illegally by implementing a special technology which checks the duplication be justified or not. For example, they implement special chips in DVDs or USB memory as a recording medium, and it regulates illegal duplications by putting a special encryption for the file to be recorded. CPRM (Content Protection for Recordable Media) is a typical one.

Such a regulation is, in the name of compliance with copyright law along with its self-defense against illegal copy, to limit the usage of end-users. In addition, it is such a regulation as to be called “industry-level self-regulation” that when new technology is to be innovated, whole industry must implement into the hardware devices a common technique protecting specific interests holders.

3. Neutrality of Regulation

Thus far, I described the current picture of the regulation in our network society, here I start to examine the neutrality of those regulations. The very reason why I woo the neutrality is that, in the background, many plural interests to be protected are conflicting one another, and the neutrality to balance the collision of interests is aspiring so much there. In other words, in form to take the midpoint, an optimum solution of the conflicting interests is required.

3.1. What is Neutrality?

What does the neutrality mean? It can be defined to be neutral as “taking the situation of the impartiality without deviating to both sides”⁽⁷⁾, it however is accompanied with difficulties to define the neutrality in the network regulation. There is no absolute optimum solution to explain a concept of this neutrality and it is demanded to scout out an optimum solution individually and relatively.

At first, the neutrality in Norm is given a deep significance by various concepts. For example, it is equality, fairness, justice, and fairness. In the neutrality in the regulation by laws, while expulsion of ideological bias is much stressed, the criterion in forms of such factors as equality, fairness is often taken. In the world of law, it would be neutral in the legislative

(7) Cf. the definition of “neutral (adjective)” at <http://www.merriam-webster.com/dictionary/neutral> (last visited Dec. 20, 2010).

branch that there should be no inequitable situations in equilibrating between the one group or organization gaining a profit and the other losing it in legislation process. In addition, in Judiciary, the courts play a very important roll and, in order to construe or interpret the black letter law, will judge justly having an even balance not to make any devoting too much to a specific profiting entity.

Second, because Ethics itself comes from the concepts based on morality, and religious ethnical background, it is hard to say that neutrality in Ethics has a universal generality. In extremely subjective behavioral controls such as ethics views, requiring the neutrality in ethics strongly depends on a criterion of whether the right thing can be or not.

Third, the Pareto optimum state in which the most effective resource allocation is carried out will be come the foundation of the neutrality of Regulation by Market. It, however, is obvious that price in a market is not always decided by the balance of demand and supply but external factors would affect the market mechanism.

The fourth, here comes neutrality in Regulation by Technology. Those who develop network technologies are researchers in a company having big research laboratories or university labs, and sometimes are individual computer programmers who like computer programming so much. These technologies developed by them would be tested in Test Bed on the Internet, and the technologies will be judged to be able to be a *de facto* standard or not by supports from end-users in the Internet.

It is extremely hard for the end-users to keep the neutrality in such a process. In other words, because it cannot own a criterion. Therefore, instead of lack of the criterion, the neutrality is considered to be formed in a process supported by Internet users. There exists a criterion whether

is supported by end-users or not.

3.2. Is Neutrality possible?

Then, may it be possible at all to keep a neutrality in the network society management? When some regulations were said to be required in forming a sound and sane network society, what kind of positions those who willingly want to regulate the network society are sitting on? They suppose surely to be the group of persons who want to manage the network society by all means. Derelict of the network society leads to chaotic, it tends to protect the profits for specific entities. In other words, it is reminded that those who claim some regulations in it are always facing a current bitter situation where their own assertions are not satisfied at all.

In regulating, method and effectiveness of the regulation must be considered, even if whichever alternative is taken. And the neutrality should become a compromise to produce the desirable result for all the members of the network society. It is the effective distribution of our resources, and is an enforcement of equality and fairness.

No more expectations would be funnelled onto the Congress (or the Diet) or courts as an institution creating rules and laws. They suppose to be unable to establish a new social criterion. Laws produced in the Congress (or the Diet) as the legislative branch are apt to be brought about by the demand or petition from a lobbyists or an organization protecting a specific profit.⁽⁸⁾ Although private individuals fighting against the contradiction as a systematic default caused from the legislating scheme would resort to courts which they believe would bring them equal justice with-

out favoring the specific organizations or entities, the court will give only a posteriori legal relief to them. In order to cope with those systematical problem, in our network society, a new decision marking method utilizing Collective Intelligence⁽⁹⁾ will be demanded.

3.3. Cocktail Therapy of Regulations

Now I discuss here, how do we incorporate such a regulation in network society while maintaining neutrality?

One of the suitable solutions is the Cocktail Regulations.⁽¹⁰⁾ It means a method to achieve an effective regulation by putting plural regulatory

(8) It is one of the problems of decision-making in democratic nations that the silent majority always keep silent there. In other words, every policy making is made by the compromise between the parties who insist their own interests. For example, in trying to revise the copyright law, there is not only the polarization between pro and con for the revision of the law but also among the revisionists exist the people who is a spokesman of consumer protecting groups and is a spokesman speaking of maximization of only their own profits or minimization of their loss. Even if we demands a public comment on the Internet, only the person who is a spokesman of any entities or insists on extreme logic always reply the demand for the comment. It is also suspicious that those who are said to be a representative of consumers are fully supported by all the consumers.

(9) A thought that a judgement by only professionals can not always lead a right conclusion. *See*, James Surowiecki, *The Wisdom of Crowds*, Anchor (2005). As for Collective Intelligence, *see* http://en.wikipedia.org/wiki/Collective_intelligence (last visited Dec. 20, 2010).

(10) Cocktail Therapy, or HAART (Highly Active Anti-Retroviral Therapy), which is one of the most effective therapies for cancer patients.

controls together simultaneously. It is to expect the maximum effect, by not putting regulation methods separately but performing them concurrently. Therefore, in the network society, we would encounter the problem of network governance, e.g., who decides a rule and manages its autonomy. This is a problem of great importance that would shake the root and trunk of our society as to whether the democracy would be accomplished, and to lead a renovation of our concept on a nation.

On the Internet forming the backbone of our network society, the rule-making by industry-led ruling is overwhelmingly predominant. This is fate of the Test Bed method that the Internet has chosen. After the process evolving from a network for military purpose to an academic network, the Internet, as fate of opening its gate widely to business engagements, has been to come under a strong influence from market. Along with a rapidly increasing number of the Internet users, many countries tend to be eager to meddle cyberspace in order to grasp leadership of the network society, as is the case for the battle over the Internet domain name.

In the stream to strengthen network regulation, here should we recognize a limitation of such an objective approach as Law or Technology to regulate unfavorable conducts in cyberspace objectively. Rather, subjective approach to demand a member of our network society to behave as self-disciplined should be considered from the viewpoint of autonomy as a characteristic of network society (*see* Figure 1 and 2). In short, regulation by the amalgamation of an objective control method and a subjective one, I think, is desirable in cyberspace.

4. Conclusion

Up here, I have discussed an ideal method of the regulations and its problems in our network society, cyberspace. As our society weigh the dependence on the media such as a computer network or the Internet, many social troubles on cyberspace are surfacing and it is one of our urgent tasks to deal with.

I advocate a solution to use an amalgamating approach of plural network regulations methods concurrently, that is Cocktail Therapy. Though I now have no data how it works well, it will be my task to find the suitable recipe of the cocktail and verify the effect for the future. The network society on which we are going to live from now on will be a highly controlled and administered society, but it must be the society where each member of the society can predominate.

Therefore, on the issues of network regulations, studies from many aspects will have been necessary in future.