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### Private lawmaking in commercial cyberspace

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# *Pandora's Box*

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# Private Lawmaking in Commercial Cyberspace

Eliza Mik\*

No discussion of “Law and Technology” would be complete without at least one essay centred on the Internet. While the Internet no longer captures our imagination with the same force as it did 20 years ago, we cannot assume that it no longer creates (or *perpetuates*?) multiple legal problems. When we talk about the Internet we must, however, refrain from the popular “Internet meta-narrative” that often leads to superficial arguments and unhelpful generalisations.<sup>1</sup> We must always remain aware of the multiplicity of the Internet’s *technical* applications and the wide range of *legal* contexts in which the term gains significance. Discussing the Internet in the context of freedom of speech or cybercrime raises different legal issues than in the context of commerce or contract. In most instances, we should avoid mentioning the Internet altogether and refer to specific Internet-enabled technologies or services, such as the web or video streaming. This brief essay addresses one specific issue: the regulation of online activity by means of private agreement. I have, however, chosen yet another term to provide the backdrop for the discussion: “cyberspace.” Although we know that cyberspace only exists at some esoteric, conceptual level,<sup>2</sup> I have chosen the term to pay homage to early cyberspace scholarship, to invoke the reader’s memories of its idealistic values and its promotion of separatist, self-regulatory thinking. Consequently, embellishing cyberspace with the adjective “commercial” seems highly inappropriate, if not heretical. After all, cyberspace is supposed to be free, permeated with community spirit and libertarian values. How can it be *commercial*?

We must, however, acknowledge the changed character of the Internet and therefore, unavoidably, cyberspace. Neither the Internet nor the web can still be referred to as novel or revolutionary. Internet-based technologies, ranging from email to mobile apps, have become permanently integrated into our everyday lives. The Internet is used for professional and personal communications, for entertainment, for public services, politics and religion. More importantly, the Internet has become commercial. To explain: the first phase of commercialisation of the Internet was associated with the development of network infrastructure, the sale of networking products, and basic connectivity. This phase related to the *privatisation* of the Internet, to the

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<sup>1</sup> Evgeny Morozov, *To Save Everything Click Here* (Allen Lane, 2013) 18.

<sup>2</sup> Julie E Cohen, ‘Cyberspace as/and Space’ (2007) 107 *Columbia Law Review* 210, 213.

move from the state-funded NSFNET backbone to the long-distance, high-capacity networks provided by commercial operators. The second phase of commercialisation can be associated with technological developments aimed at providing new services that use the Internet as a transmission infrastructure, such as the distribution of digital content (e.g. Amazon, Netflix) or the provision of cloud-based services (e.g. Gmail, Facebook, Dropbox). More specifically, the web is used to access mass media (television, radio, newspapers) as well as many forms of digitised entertainment (films, music, books). Consequently, although we associate the web with freedom of expression and political activism, its practical role is often reduced to that of an access interface to online resources.

In sum, contrary to popular beliefs, the Internet economy is a capitalist economy.<sup>3</sup> And the main tool of regulating commercial exchanges in capitalist economies is contract. While we need not debate whether contract law continues to apply online, we may need to be more alert to its role in regulating online activity and of the increased range of online activities regulated by contract. The point made in this brief essay is simple: the commercialisation of cyberspace correlates with an unprecedented proliferation of contractual relationships, some of which govern access to the Internet in the sense of connectivity (e.g. contracts with ISPs), while others regulate access to the content and services made available on websites (e.g. contracts with Amazon, Google etc). Both types of contracts can be regarded as a form of bottom-up regulation or private lawmaking. The latter term seems more apposite than “self-regulation.” To explain: regulation can be imposed or self-adopted, top-down or bottom-up.<sup>4</sup> The latter implies a degree of voluntariness and self-determination; the former is associated with state authority and legislation. Bottom-up regulation can be synonymous with self-regulation or private lawmaking. Although “self-regulation” usually refers to rules developed by those participating in an activity, it often assumes the delegation of state authority.<sup>5</sup> Such delegation is, however, absent if bottom-up regulation takes the form of private agreement. It is also difficult to speak of *self*-regulation if the terms of such agreements are unilaterally imposed and if consent to them is largely fictional. There is no perfect term to describe the type of regulation encountered in commercial cyberspace. We can only observe that it takes the form of contracts governing a wide range of relationships, some of which may have no offline equivalent. If we recognise contract as a form of private lawmaking, we must examine its basic building block: consent.

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<sup>3</sup> Manuel Castells, *The Rise of the Network Society* (Wiley & Sons, 2<sup>nd</sup> ed, 2010) 160.

<sup>4</sup> Julia Black, ‘What is Regulatory Innovation?’ in Julia Black, Martin Lodge and Mark Thatcher (eds), *Regulatory Innovation: A Comparative Analysis* (Edward Elgar, 2005) 11.

<sup>5</sup> Jeanne Pia Mifsud Bonnici, *Information Technology & Law Series: Self-Regulation in Cyberspace* (TCM Asser Press, 2008) vol 16, 6, 23.

Two problems arise. One concerns the form of consent, the other – the potential normative consequences of consent. To better understand these problems and to evaluate the very adequacy of contract-based private lawmaking we must revisit some early cyberspace scholarship.

## I LESSONS FROM CYBERSPACE

In their famous 1996 article ‘Law and Borders – The Rise of Law in Cyberspace,’ Johnson and Post discussed the legitimacy of rule-setting “in” cyberspace and advocated a self-regulatory model as naturally deriving from the decentralised character of the Internet.<sup>6</sup> While many of their theories can be criticised as somewhat unrealistic, we must concede that some observations made by Johnson and Post retain their currency or, at the least, provide interesting points of departure for discussions concerning the regulation of online commerce. Three of them are pertinent for our purposes.

*First*, although it is frequently assumed that the said authors advocated that cyberspace remain lawless – a possible conflation with Barlow’s declaration of *independence* of cyberspace<sup>7</sup> - Johnson and Post emphasised the need for *some* laws. They stated however, that such laws should be separate and different from traditional laws because only cyberspace-specific laws could accommodate the idiosyncrasies of the new environment. Existing laws were enacted with the physical world in mind and thus inherently unsuitable for cyberspace because they did not consider its characteristics. Recognising cyberspace as a separate regulatory sphere would simplify legal analysis by creating doctrines tailored to these characteristics.<sup>8</sup> The cyberspace-separatism advocated by Johnson & Post associated the lack of legitimacy of external regulators with their presumed lack of competence. After all, you cannot regulate something you don't understand.

*Second*, Johnson and Post asserted not only that every regulation had to allow for the characteristics of the place being regulated but also that these characteristics determined *who* should regulate - and cyberspace was inherently more amenable to bottom-up, self-regulatory efforts. Consequently, they emphasised the importance of private agreement in regulating cyberspace and promoted norms designed by “self-governing virtual communities” as reflecting the decentralised architecture of the Internet and the spirit of selfless

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<sup>6</sup> David R Johnson and David Post, ‘Law and Borders – The Raise of Law in Cyberspace’ (1996) 48 *Stanford Law Review* 1367, 1388.

<sup>7</sup> See John Perry Barlow, *A Declaration of the Independence of Cyberspace* (8 February 1996) Electronic Frontier Foundation <<https://www.eff.org/cyberspace-independence>>.

<sup>8</sup> Johnson and Post, above n 6, 1401.

co-operation.<sup>9</sup> Rules developed in virtual communities were better than state-imposed laws, because they were tailored *for and by* the participants themselves, reflecting their autonomy and competence. The legitimacy of the rules derived from the participation of those who were subject to those rules and who understood the environment they acted in.

*Third*, an important theme in Johnson & Post's article was the absence of physical borders. Borders were a precondition of enforceability within specific jurisdictions but also, on a broader level, served to delineate "spaces" and to establish which set of rules applied. In particular, borders had a signaling function. They provided notice that once the boundaries were crossed, the rules may change.<sup>10</sup> In cyberspace, borders would not serve to distinguish between jurisdictions but between commercial and non-commercial spaces or between different communities governed by discrete rules.<sup>11</sup> Borders also created context and, most importantly, shaped the expectations users had of their surroundings.

## II 20 YEARS LATER

20 years later we can agree with most of the observations highlighted above, albeit with some qualifications. First, we can observe that the failure to understand the characteristics of the environment being regulated may have disastrous consequences. Examples abound. We can recall the overzealous top-down regulatory output of the late 90's and early 2000's, which is characterised by a general misunderstanding of most Internet-related technologies and business models.<sup>12</sup> Consequently, many of the Internet-specific top-down instruments enacted in that period were outdated on arrival, unnecessary or premature. Most of these instruments exhibit a certain "disconnect" between what they prescribe and what is technically possible or commercially necessary.<sup>13</sup> Second, as recommended *or anticipated* by Johnson & Post, the regulation of cyberspace has in fact evolved into a complex system of

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<sup>9</sup> Lee Bygrave, 'Contract vs. Statute in Internet Governance' in Ian Brown (ed), *Research Handbook on Governance of the Internet* (Edgar Elgar, 2013) 178.

<sup>10</sup> Johnson and Post, above n 6, 1370.

<sup>11</sup> Johnson and Post, above n 6, 1380.

<sup>12</sup> See generally: Chris Reed, 'How to make bad law: lessons from Cyberspace' (2010) 73 *Modern Law Review* 6; Susan P Crawford, 'The Internet and the Project of Communications Law' (2007) 55 *UCLA Law Review* 359, who observes that regulators seem to be "stumbling forward, tinkering blindly with the greatest value-creation system we have ever seen": at 381.

<sup>13</sup> Eliza Mik, 'E-commerce Regulation: Necessity, Futility, Disconnect' (Paper presented at First International Conference on Technologies and Law, Portugal, 8 November 2013) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2372559](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372559)>.



predominantly private, bottom-up solutions.<sup>14</sup> There is no single cyberspace, but a myriad of self-regulated spaces where rules are imposed within localised areas of authority.<sup>15</sup> Some problems have, however, arisen that taint the optimistic roadmap painted by the authors. Johnson and Post did not anticipate the commercialisation of cyberspace and the difficulties of any meaningful *self*-regulation in a space governed by technological giants, such as Google or Amazon. Once businesses realised the potential of the Internet as a platform for content and service distribution, as a separate but equally viable sales and marketing channel - cyberspace became *commercial* cyberspace. And commercial cyberspace required more than community norms to recoup the investments in content and infrastructure. Once profits were to be made, cyberspace needed clear rules and the protection of the state in the form of enforceability. Enforceability, however, could only be granted to those relationships that carried the indicia of a contract.<sup>16</sup> Contract has thus naturally emerged as the dominant form of bottom-up regulation in commercial cyberspace. Although contract has always been regarded as a form of delegated legislative authority,<sup>17</sup> cyberspace has leveraged its role to an unprecedented level. Interestingly, despite the recognition that online commercial activity had to be anchored in a traditional legal framework, cyber-scholars have insisted that any external interference, be it legislative or judicial, be kept at a minimum as it could impede the development of “real legitimate internal governance.”<sup>18</sup> Cyberspace should be regulated by means of contracts but such contracts should be left to market forces.<sup>19</sup> The assumption was (and maybe still is?) that market forces alone would produce contracts with the best possible terms. Users who disagreed with the norms of a given community could always exit and find a community with more suitable norms. This ease of exit would create a market for rules and naturally produce fairer terms. Of course, as it has

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<sup>14</sup> Egbert Dommering, ‘Regulating Technology: Code is not Law’ in Egbert Dommering and Lodewijk F Asscher (eds), *Information Technology & Law Series: Coding Regulation, Essays on the Normative Role of Information Technology* (TCM Asser Press, 2006) vol 12, 10.

<sup>15</sup> Pierre Mounier, ‘Internet Governance and the Question of Legitimacy’ in Cécile Méadel, Eric Brousseau and Meryem Marzouki (eds), *Governance, Regulations and Powers on the Internet* (Cambridge University Press, 2012) 170.

<sup>16</sup> Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a borderless world* (Oxford University Press, 2006) 138; Margaret Jane Radin and R. Polk Wagner, ‘The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace’ (1998) 73 *Chicago-Kent Law Review* 1295, 1296.

<sup>17</sup> Brian Coote, *Contract as Assumption, Essays on a Theme* (Hart Publishing, 2010) Ch 2 (Note: Chapter Two is a republication of Brian Coote, ‘The Essence of Contract (Parts I and II)’ (1988-89) 1 *Journal of Contract Law* 91; 183.

<sup>18</sup> David G Post, ‘Governing Cyberspace’ (2008) 24 *Santa Clara High Technology Law Journal* 883; Frank H Easterbrook, ‘Cyberspace and the Law of the Horse’ (1996) *University of Chicago Legal Forum* 207, 215-216.

<sup>19</sup> Nicholas Suzor, ‘The Role of the Rule of Law in Virtual Communities’ (2010) 25 *Berkeley Technology Law Journal* 1817, 1823.

turned out, most “online communities” are not communities but commercial relationships between those who provide online content or services (operators) and those who use such (users). These commercial relationships are governed by sets of standardised terms imposed by individual operators. It must be conceded that operators understand the characteristics of the environment better than external regulators. After all, they created (i.e. coded) the website or platform through which they conduct their business. The terms of these contracts are therefore perfectly tailored to the environment, the business model and, most importantly, the interests of the respective operators. As observed by Marsden, the “flood of private law” on the Internet reflects corporate interests not community values.<sup>20</sup> The problem does not, however, lie in the unilateral imposition of standard terms but in the fact that market forces have failed to produce the diversity of terms that were supposed to guarantee contractual fairness. Proponents of market determinism have ignored the difficulties of exit accompanying the network effects of the services provided by such companies as Facebook, Google, Amazon or eBay. They have also overlooked the fact that terms are routinely ignored. If, however, market participants do not review the terms – the market will not produce the best terms.<sup>21</sup>

I must pause to elaborate on the wide range of online relationships regulated by contract. Contracts govern not only traditional e-commerce transactions, such as purchases from Amazon or auctions on eBay but also the very access and use of many websites. We must consent to a set of terms either expressly, by e.g. establishing an account with a particular website, or impliedly, by continuing its use. We must do so even if we “only” want to read the news, “google something” or watch a cat video. As indicated, websites must often be regarded as access interfaces to online resources. As a consequence, contracts govern a broad spectrum of relationships, many of which do not appear *prima facie* commercial in nature. In many instances, online contracts are encountered in unfamiliar contexts. It may be unclear that the continued use of a website, or other online service, requires the formation of a contract. We must recall the third lesson from cyberspace: the importance of borders. While it is impossible to recreate *physical* borders online, there is a persistent trend in legal scholarship to demarcate various cyber-spaces: those that are open to everyone and those that require prior agreement. Madison speaks of the signaling function of borders in the context of notice of access restrictions to websites. As online experiences differ from offline experiences legal concepts “borrowed” from the physical world should be repackaged to match the online

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<sup>20</sup> Christopher T Marsden, *Internet Co-Regulation* (Cambridge University Press, 2011) 6.

<sup>21</sup> Michael I Meyerson, ‘The Efficient Consumer Form Contract: Law and Economics Meets the Real World’ (1990) 24 *Georgia Law Review* 583, 601.

environment<sup>22</sup> Consequently, a party wishing to enforce any type of access conditions, such as those exemplified by website terms of use, should establish a “feature of the information environment that creates... a salient or visible boundary between open, public information and information subject to access constraints.”<sup>23</sup> Translated into the present discussion, contract-based private lawmaking must allow for the characteristics of environment, particularly for the changed context in which online contracts are encountered. This dictates some form of enhanced notice, or “boundary,” clearly signaling the very presence of terms. It is one thing, after all, not to expect contractual terms, it is yet another to deny their existence when they are conspicuously presented.

### III THE PROBLEM WITH CONSENT

It is beyond doubt that the *legitimacy* of any rules appears questionable if they are unilaterally imposed. After all, the core justification for state non-interference is the “consent of the governed.”<sup>24</sup> Private lawmaking, or “legitimate internal governance,” can only be supported on the assumption that users consent to the contracts governing their relationships with online operators.<sup>25</sup> There are, however, multiple problems with contract-based private lawmaking most of which, quite surprisingly, derive from the very principles of contract law. The latter is inherently informal, permissive and content neutral. Formalities, such as writing or signatures, may be required by statute in the context of specific transactions, e.g. those relating to land. Otherwise, contractual intention – taking the form of acceptance, agreement or consent – can be manifested in any manner. Consequently, consent need not be express but can be inferred from any conduct, excluding silence but including the continued use of a website. Contract law is permissive in the sense that, assuming the absence of vitiating factors and illegality, the parties can agree on virtually anything. Substantive fairness is not required. Courts do not examine the adequacy of consideration or the equivalence of exchange. If one party agrees to relinquish her privacy in return for the “right” to watch cat videos – so be it. Contract law is content neutral in the sense that the same principles apply irrespective of the substance of the contractual provisions. One exception concerns enhanced notice requirements with regards to the incorporation of particularly onerous or unusual terms, popularly referred to as the “red hand rule.”<sup>26</sup>

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<sup>22</sup> Michael J Madison, ‘Rights of Access and the Shape of the Internet’ (2003) 44 *Boston College Law Review* 433, 489.

<sup>23</sup> *Ibid* 491.

<sup>24</sup> Johnson and Post, above n 6, 1370.

<sup>25</sup> Suzor, above n 19, 548.

<sup>26</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1987] EWCA Civ 6.

Contrary to the foregoing, we intuitively expect consent to be express, deliberate and informed, not implied, accidental and uninformed. When faced with any form of contractual unfairness or when more significant rights are at stake, we recall that textbooks on contract law speak of the meeting of minds and of the voluntary assumption of obligations. We forget that theory differs from practice and that due to the principle of objectivity, the “meeting of minds” is not an actual requirement. We also tend to imply, somewhat irrationally, that “everything was perfect until commerce moved online.” We forget that consent has been becoming increasingly less expressive and “easy to obtain” for more than a century. The “degradation of consent” accompanied the mass-market production of goods spawned by the industrial revolution. The latter has, in turn, led to the standardisation of terms. Assumedly, the proliferation of standard terms was made possible by the simplicity and informality of contract formation. Moreover, contrary to popular assumptions, contractual terms need not be negotiated and can be unilaterally imposed. This has always been the case, long before the emergence of the Internet. Unsurprisingly, many academics question whether relationships based on standardised, unilaterally imposed terms can be referred to as contractual.<sup>27</sup> The accompanying problems have been described by Professor Radin in *Boilerplate*, a tirade on the aberrations of standard terms and the fictional character of consent. Radin recalls the traditional picture of contract as the time-honoured meeting of minds: two autonomous wills coming together to express their autonomy. She then describes the decay of consent, the progressive shift from voluntary willingness to fictional assent and, ultimately, to a “mere efficient rearrangement of entitlements without any consent or assent.”<sup>28</sup> In her words:

Consent seems obviously fictional in a great many transactions, however, and that is one reason I say that consent is vestigial. Consent is fictional when the terms are filed somewhere we cannot access, as in airline tariffs. Consent is fictional when almost all of us click on-screen boxes affirming that we have read and understood things we have not read and would not understand if we did. Consent is fictional on websites whose terms of service state that just by browsing the site, whether or

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<sup>27</sup> See: Randy E Barnett, ‘Consenting to Form Contracts’ (2002) 71 *Fordham Law Review* 627, 627 (who observes the dissonance between contract theory and practice on the subject of form contracts); Omri Ben-Shahar, ‘Foreword to Boilerplate: Foundation of Market Contracts Symposium’ (2006) 104 *Michigan Law Review* 821, 826 (“On a theoretical level, boilerplate is shown to be a legal phenomenon different from contract. Is it a statute? Is it property? Is it a product?”).

<sup>28</sup> Margaret Jane Radin, ‘Boilerplate Today: The Rise Of Modularity And The Waning Of Consent’ (2006) 104 *Michigan Law Review* 1223.

not one ever clicks on the terms, one has agreed to whatever the terms say, now or as they may be changed in the future. Consent is fictional when the contract ends, as one I saw recently did, with “By reading the above you have agreed to it.”<sup>29</sup>

The degradation of consent, next to the imposition of one-sided standardised terms, can be regarded as the main weakness of contract-based private lawmaking. We must, however, re-emphasise that this weakness is not attributable to the Internet or to the commercialisation of cyberspace. The degradation of consent is best explained with the concept of “shifting baseline syndrome.” Dan Pauly presents the term in the context of the ecology of fisheries: each generation of fisheries scientists accept as a baseline the stock size that occurred at the beginning of their careers and uses it to evaluate changes. Years later, when the next generation starts its career, the stocks have declined further, but it is these stocks at that time that serve as a new baseline.<sup>30</sup> The result is a gradual shift of the baseline, a slow barely perceptible accumulation of negative changes. At some stage, someone asks: *where are all the fish gone?* But at that stage - it is probably too late. In the context of contract law we might ask *why is consent so easy to obtain?* Or: how can it be implied from so many behaviours that do not carry the same gravity or solemnity as signatures or handshakes? How can *billions* of contractual relationships be created with something as informal as a click? Clicks, or other forms of interacting with artificial interfaces, are always used as illustrations of a problem that is, strictly speaking, unrelated to the web or the Internet. Before blaming the Internet we must ask: what should be regarded as the baseline for evaluating contractual consent? Is it the informed and deliberate consent encountered in face-to-face negotiations between peers or the semi-accidental cursory consent encountered in mass-market, standardised transactions that characterise *everyday* commerce? Should we compare consent in online contracts to the former or the latter? It becomes apparent that the degradation of consent cannot be attributed to the web or to the Internet. The latter may have *slightly* contributed to the shift in the baseline in the sense that it simplified the contracting process even further. After all, web-based interactions are streamlined to the point of making consent so simple as to render it virtually imperceptible and thus meaningless. It may, however, also be claimed that online commerce did not contribute but simply took advantage of a pre-existing problem. Operators exploit a *status quo* that is the result of a long-term trend. The baseline shifted long before the Internet became mainstream. If we regard everyday commercial practice, including consumer

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<sup>29</sup> Ibid 1223, 1231.

<sup>30</sup> Dan Pauly, ‘Anecdotes and the Shifting Baseline Syndrome of Fisheries’ (1995) 10 *Trends in Ecology and Evolution* 430.

transactions, as the baseline for contractual consent it becomes apparent that online transactions do not significantly depart from that baseline. The progressive degradation of consent can be blamed on prior generations of commercially minded judges that resigned themselves to the demands of the market – not on the Internet.

Despite its degradation, consent has become more significant in terms of its potential normative consequences. Users impliedly (or *inadvertently*?) “consent” to increasingly important matters, such as the alienation of rights or the assumption of obligations that may prove detrimental to their long-term interests. For example, millions of users “consent” to what is best described as pervasive commercial surveillance on a daily basis. To explain: the web consists of a complex ecosystem of vendors, advertisers, content and service providers, to name a few. The predominant business models rely on advertising. Money is made (directly or indirectly) not only when consumers purchase books on Amazon or subscriptions to Netflix, but also when they click on advertisements or otherwise interact with content.<sup>31</sup> Despite popular references to “free” online services, the online environment abounds in transactions conditioning access to online resources on “payment” with personal information. In the latter instance, the transactional context may be barely perceptible because there is no price indication and no provision of payment data. Consequently, users who want to read the news or listen to music consent to the operators’ collecting, analysing and subsequently utilising their personal information. Aside from the simplicity of implied consent, another problem concerns the fact that users need not understand what they are consenting to. Contractual consent need not be informed. It is therefore irrelevant that the terms (provided via hyperlink on the bottom of websites or “popping-up” during account creation) are never read.<sup>32</sup> It suffices that the user has the opportunity to review them. This is where the differences between the online and the offline environments become apparent. Unlike in traditional offline transactions, users have a realistic chance to read online terms without time constraints and pressures from over-zealous sales assistants.<sup>33</sup> At the same time, however, they do not expect terms and often do not understand the relevance of the “terms of use” hyperlink at the bottom of the webpage. More importantly, websites are meticulously designed to encourage or

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<sup>31</sup> For a succinct explanation see Richard Warner and Robert H Sloan, ‘Behavioral Advertising: From One-Sided Chicken to Informational Norms’ (2012) 15 *Vanderbilt Journal Entertainment & Technology Law* 49, 57-60.

<sup>32</sup> David R Trossen, ‘Florenca Marotta-Wurgler and Yannis Bakos ‘Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts’ (2014) 43 *Journal of Legal Studies* 1.

<sup>33</sup> Robert A Hillman, ‘Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?’ (2006) 104 *Michigan Law Review* 837.

discourage certain actions, *including* the reading of terms.<sup>34</sup> We must not forget that operators not only impose the terms but also control the entire transacting environment, which results in an unprecedented degree of “technological management” of users, including novel ways of manipulating their behavior.<sup>35</sup>

#### IV FINAL OBSERVATIONS

An interesting picture emerges. On one hand, top-down regulators rarely have the expertise to efficiently regulate the online environment. In some instances, it could even be questioned whether such top-down regulation is necessary to begin with. The dangers of bad regulation are exemplified by the failed EU directives aimed at ‘facilitating’ e-commerce and digital signatures. On the other, bottom-up regulations in the form of private agreements carry their own disadvantages, predominantly related to the permissive and informal character of contract law and the increasingly fictional character of consent. If consent can be obtained too easily while, at the same time, it carries significant normative consequences, some external assistance may be necessary. An indiscriminate reliance on market forces overlooks the necessity to control private power – in our case, that of Internet giants like Google or Amazon. As early as 1944, Kessler emphasised that unlimited freedom of contract enables enterprisers to legislate by contract, often “in a substantially authoritarian manner without using the appearance of authoritarian forms.”<sup>36</sup> Similarly, Coote admitted that unless the parties are of equal bargaining power or if the stronger party is prepared to exercise self-restraint, freedom of contract could be an instrument of oppression.<sup>37</sup> More recently, Suzor suggests that we should see many online contracts as “mini-constitutions” and recognise their role in unilaterally shaping billions of relationships and their potential for subverting values.<sup>38</sup> The fact that contract has become a tool of shaping rights in billions of relationships does not, however, change the principles of contract law. At the same time, we may require a more discerning approach in how these principles are applied. The boundaries of contract-based private lawmaking must be influenced not only by the strict application of contractual principles but also by certain substantive values. It is one thing to say that contract law continues to apply online, it is yet another to realise how contract is used in the online economy. It could be argued that if contracts effectively

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<sup>34</sup> Ryan Calo, ‘Digital Market Manipulation’ (2014) 82 *George Washington Law Review* 995, 1034.

<sup>35</sup> Roger Brownsword, ‘The Shaping Of Our On-Line Worlds: Getting The Regulatory Environment Right’ (2012) 20 *International Journal of Law and Technology* 249, 253.

<sup>36</sup> Friedrich Kessler, ‘Contracts of Adhesion – Some Thoughts about Freedom of Contract’ (1943) 43 *Columbia Law Review* 629, 640.

<sup>37</sup> Coote, above n 17, 33.

<sup>38</sup> Nicols Suzor, ‘Order Supported by Law: The Enforcement of Rules in Online Communities’ (2012) 63 *Mercer Law Review* 523, 523.

become constitutions, then both the substance of these contracts and the process of their formation should be influenced by principles of public governance.<sup>39</sup> The “easiest” solution seems to be the creation of rules dictating that consent that produces normative effects, such as the assumption of obligations or the relinquishment of important rights, should be express or more expressive. This “solution” creates a cascade of difficult questions: *who* should introduce such rule and *how*? Should such “enhanced consent” be imposed by judges or by the legislature? What form should it take? Would it resemble cookie notification bars in the EU or the “click-wrap” agreements encountered in the US? In what circumstances would it be necessary? How would such requirement affect legal certainty? It must not be forgotten that contract law itself does not recognise the concept of “enhanced consent” – any external additions to its principles should be approached with caution. At the same time, leaving aside doctrinal purity, it cannot be doubted that some form of ‘adjustment’ is indispensable. The present state of affairs can be regarded as a mockery of both contract and of self-regulation.

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<sup>39</sup> Ibid; Anupam Chander, ‘Facebookistan’ (2012) 90 *North Carolina Law Review* 1808.