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A Question of Consent in Cybernorms Governance

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**ABSTRACT**

Although access to the internet is increasingly recognised as a critical right, the increasing criminalisation of copyright infringements and its consequent constitutional concerns reflects not only an ever widening gap between the legislative prescriptions and the broader societal expectations but may also raise constitutional concerns that may undermine that right of access. Drawing on the premise of consent from a public choice perspective this thesis examines some aspects of these complex debates such as in advocating for government intervention.

The research finds that the recent pluralistic legislative developments such as ACTA and DRD are forum shifted with the ascending IPRs rights in the on-going bilateral forum (such as the CETA) matched by increased surveillance that can be understood as issues of voter ignorance/rationalities and the rent seeking lobbying interest groups that erodes the premise of consent and ultimately the democratic legitimacy of the State. It is argued that the paradoxical neoliberal outcomes are product of lobbying and the malaise underlying political consensus. It argues for the return of 'bottom-up' spontaneous ordering of 'cybernorm' law-making as a product of human action to address these developments instead of the social construct and human design of central government institutions in understanding and addressing the normative gap.

**KEY TERMS: Consent, Cybernorms, Spontaneous Order, Public Choice Analysis**

**ABBREVIATIONS**

ACTA	Anti-Counterfeiting Trade Agreement
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
DRD	Data Retention Directive
FTA	Free Trade Agreement
HADOPI	Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet
ICANN	Internet Corporation for Assigned Names and Numbers
IPR	Intellectual Property Rights
PIPA	Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act
SOPA	Stop Online Piracy Act
TIPP	Stop Online Piracy Act
TPP	Trans-pacific Partnership Agreement
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UN	United Nations
WTO	World Trade Organization

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*'Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.'*

John Perry Barlow<sup>1</sup>

## INTRODUCTION

The normative ascent of internet access as a fundamental human right<sup>2</sup> is increasingly becoming eroded by the criminalisation of copyright infringements<sup>3</sup>, of surveillance and the three-strike schemes (such as France's HADOPI and the UK Digital Economy Act) but this also reflects a widening gap between legislative prescriptions and societal expectations.<sup>4</sup> In the same vein, there have been suggestions to the porous 'bottom-up'<sup>5</sup> self-governance and spontaneous origins of cybernorms<sup>6</sup> and calls to recognise the premise of consent in the trans-national nature of cyber-space as pointed out by John Barlow. Indeed central to the arguments for cyber space self-governance and that claim of legitimacy in modern democracies is consent, the '*consent of the governed*' for instance.<sup>7</sup> That one argument is the focus of this investigation.<sup>8</sup>

<sup>1</sup> John Perry Barlow, A Declaration of the Independence of Cyberspace <<http://www.eff.org/~barlow/Declaration-Final.html>>. All websites visited as of 15 May 2013. Also cited in Netanel, N. (2000) Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory, 88 Calif. L. Rev. 395.

<sup>2</sup> See e.g., UNGA (2011) Human Rights Council, Report of the Special Rapporteur on Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development A/HRC/17/27 Report

<sup>3</sup> See e.g., Svensson, M and Larsson, S. (2012) Intellectual property law compliance in Europe: Illegal file sharing and the role of social norms, *New Media & Society*, vol. 14 no. 7 1147-1163

<sup>4</sup> See e.g., Larsson, S. (2011) Metaphors and Norms. Understanding Copyright Law in a Digital Society, *Studies in Sociology of Law*. Lund: Lund University

<sup>5</sup> Macaulay, S. (1963) Non-Contractual Relations in Business. *American Sociological Review* 28: 55-67.

<sup>6</sup> See e.g., Barry, N. P., (1982) *The Tradition of Spontaneous Order, Literature of Liberty: A Review of Contemporary Liberal Thought*, Library of Economics and Liberty; Post, D. (1996) Governing Cyberspace, 43 *Wayne L Rev* 155; Gibbons, L. J. (1997) No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace, 6 *Cornell J. L. & Pub. Pol'y* 475 at 502; Goldsmith, J. (1998) Against cyberanarchy, 65 *University of Chicago Law Review*, 1199, 2; Lessig, L. (1999) *Code and Other Laws of Cyberspace*, New York: Basic Books; Post, D. (2002) Against 'Against Cyberanarchy', *Berkeley Technology Law Journal*, 17, p. 1365; Post, D (2009) *In Search of Jefferson's Moose: Notes on the State of Cyberspace: Notes on the State of Cyberspace*, Oxford University Press. For avoidance of doubt, the terms 'cybern timerms' and 'cyber norms' are not distinguished here.

<sup>7</sup> 'Consent' as defined as one that shapes the constitutional consequences, that '...constitutional choice normative implications only insofar as the underlying basis of individual consent is accepted' See notably in, Buchanan, J. and Tullock, G. (1962) *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, University of Michigan Press, p.7.

In particular, the thesis draws on the political-economic public choice analysis framework pioneered by James Buchanan to draw novel and original insights to a selected analysis of recent trans-national legislative instruments that shape what can be called cybernorms, within the EU. In examining the question of consent, the thesis draws from the seminal work of Buchanan and Gordon Tullock's work.<sup>9</sup> The thesis here is thus briefly divided into three parts; first, an introduction; second, a brief literature review; and finally, a selected analysis of recent EU-related legislative instruments that impact cybernorms.

### **Research Question**

Consent is without doubt critical in any claims of modern legitimacy and accordingly, the thesis seeks to answer the question of '*Why is consent critical to the governance of cybernorms?*' In order to approach an answer to this research questions, the following section briefly examines the sociology of cybernorms, as well as elaborate on the notion of consent and the research premise.

### **The Sociology of Cybernorms**

The broad interdisciplinary analytic prism of 'sociology of law' (SL) examines pragmatic sociological concerns of authority and rationality<sup>10</sup>, but more fundamentally perhaps, a reflection of society itself.<sup>11</sup> In this sub-section, what I call the 'sociology of cybernorms' is briefly reviewed in light of the positivistic assertion of the State legislative exclusivity premise on that knowledge as well as its claims of legitimacy based on consent in cyberspace. A critical aspect of SL long lies in recognising the issue of the 'normative gap'<sup>12</sup> as David Nelken and Reza Banakar<sup>13</sup> have recently pointed out for instance. The 'gap' is also demonstrated in a survey on cybernorm practices for instance that tellingly observed that some '*...stop [file sharing] as a result of a fear of getting caught and being punished and not because*

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<sup>8</sup> See also Netanel, op cit; Post, Against 'Against Cyberanarchy', op cit; Goldsmith, Against cyberanarchy, op cit.

<sup>9</sup> Buchanan and Tullock, op cit.

<sup>10</sup> Weber, M. (1978) *Economy and Society: An Outline of Interpretive Sociology* edited by Guenther Roth and Claus Wittich, Berkeley: University of California Press

<sup>11</sup> Weber, op cit.

<sup>12</sup> Pound, R. (1910) *Law in Books and Law in Action*, Am. Law Rev, p.12-36; Ehrlich, E. (1913) *Fundamental Sociology of Law*, Cambridge: Harvard University Press

<sup>13</sup> Nelken, D. (1981) "The 'Gap Problem' in the Sociology of Law: A Theoretical Review" (1981) *Windsor Yearbook of Access to Justice* 35-62; Banakar, R. (2011) *The Sociology of Law: From Industrialisation to Globalisation*, U. of Westminster School of Law Research Paper No. 11-03

*the social landscape has altered. Young people do not subscribe to the arguments on which the law rests and neither do those people close to them.*<sup>14</sup>

It is a ‘gap’ in which regularity of law as Lawrence Lessig also observed for instance<sup>15</sup> but not just societal expectations but interestingly, that of the changing music industry business interests and technological advances. In the latter, most notably perhaps, with the increasing popularity of cloud storage and multiple media device use saw the need to legally permit ‘format’ changing in the UK where legally bought materials such as CDs can be converted into MP3 format for other forms of portable media players for instance. Indeed, following the Hargreaves Review<sup>16</sup>, the British copyrights laws now allow copying and transferring into different formats but as the BBC observed ‘...Millions of people have been doing this for years, with the music industry turning a blind eye to copying for personal use. It's always been against the law but now the government wants to change that. That's after it commissioned a report to recommend changes to old UK copyright laws which hadn't kept up with new technology trends.’<sup>17</sup>

This normative gap between societal norms/expectations of the Hayekian *Nomos* and the statutory prescription or *Thesis*<sup>18</sup> for instance, thus refers to ‘law’ here as a broader notion of rules, codes, protocols and other normative expressions as it *ought* to be, legislation being only one such form of the law. Indeed, it is critical to note that social norms and the Lockean (and followed by the latter Hayekian perspective) notion of consent pre-dates and precedes any edifices of the State. This implicitly questions the underlying necessity, let alone the monopolistic exclusivity of the State’s legislative apparatus.<sup>19</sup> Indeed, many will recall the decentralized origins of the Internet and that organic premise of cybernorms.<sup>20</sup> These norms formation can be

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<sup>14</sup> Svensson and Larsson, op cit

<sup>15</sup> Lessig, Remix, op cit

<sup>16</sup> Hargreaves, I. (2011). Digital opportunity: A review of intellectual property and growth. London, Intellectual Property Office.

<sup>17</sup> BBC News (2011) Laws relaxed on copying music and film content, 11 August.

<sup>18</sup> Hayek, F. A. (1973) Law, Legislation, and Liberty, Volume I: Rules and Order, Chicago: University of Chicago Press

<sup>19</sup> Macaulay, op cit

<sup>20</sup> Johnson, D.R. and D.G. Post (1997) “And How Shall The Net Be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law,” in *Coordinating the Internet* (MIT Press); Radin, M. and R.P. Wagner: 1999, “The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace,” *Chicago-Kent Law Review*, vol. 73 no. 4 (1998): 1295-317

understood from the sociological perspectives of scientists as a community as Jonathan Zittrain and Lessig observed for instance.<sup>21</sup> The normative origins of cybernorms are thus not centralised by a State but emerged spontaneously, unplanned and without the State.<sup>22</sup> Thus in addressing the normative gap between the legislative prescriptions and societal expectations, a necessary realignment towards a '*society-centred*' premise on the democratic notion premised on consent must not only be the key but also that the notion of consent is implicit and embedded in the spontaneous ordering of law emerged through collective usage.<sup>23</sup>

Cybernorms thus refers to a wide body of normative expressions within cyber space that may also include a range of informal, persuasive social standards or netiquette<sup>24</sup>, such as HyperText Markup Language (HTML) protocols where there is no legislative mandate sustained by the coercive authority of law.<sup>25</sup> In cyber-squatting disputes for instance, the US law seeking to assert even *in rem* jurisdiction<sup>26</sup> but nonetheless offers limited use, since the Uniform Domain Name Dispute Resolution Policy administered by the private ICANN is often quicker and cheaper in practice.<sup>27</sup> Cybernorms thus include aspects of intellectual property rights (IPRs), a subject of much recent controversy<sup>28</sup> and central to this investigation.

The black letter legal positivism claim premised on a State-centric fetish of coercive threats over the persuasive norms on the other hand for instance, sought to promote a Hobbesian state of nature ultimately governed by an unfettered 'divine right to rule' or the Austinian 'command of the sovereign' demanding obedience. The latter clings on to the figment of territorial integrity however it is increasingly straining against the realism of globalisation, inter-dependency and the permutations of threats, new and old, that effortlessly transcend porous national borders. The global financial crisis, terrorism, bird flu viruses and computer viruses are examples that come to mind. The

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<sup>21</sup> Zittrain, J. (2008) *The Future of the Internet and how to stop it.*, Yale University Press and Penguin UK; Lessig, L. (1999) *Code and other laws of cyberspace*; - (2006) *Code version 2.0*, op cit.

<sup>22</sup> Notably see Ellickson, op cit

<sup>23</sup> Buchanan, J. (1982) "Order Defined in the Process of its Emergence - A note stimulated by reading Norman Barry, "The Tradition of Spontaneous Order," *Literature of Liberty*, Vol. V, 7-58; Barry, op cit.

<sup>24</sup> Shea, V. (1994) *The Core Rules of Netiquette*, Albion Books

<sup>25</sup> Johnson and Post 1997, op cit

<sup>26</sup> Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d)

<sup>27</sup> Netanel, p. 395-499

<sup>28</sup> See e.g., Svensson and Larsson, op cit.

intrinsic borderless cyber-context thus crystallises the question of ‘consent’ founded only on territorial claims further when there is no automatic right to assert jurisdiction, *nemo dat quod non habet*. Hence the simple squaring of incidents of geography onto the claims of cyberspace legitimacy cannot be right.<sup>29</sup>

But the question of consent and that monopolistic positivist assertion of exclusive knowledge by a social construct such as the State also raise both the question of legitimacy and that necessary knowledge in addressing the normative gap. The exclusive claims of ‘knowledge’, not least Polanyi’s ‘tacit’ knowledge of each individual preference for instance is underlined in the critic of legal positivism which demonstrates that knowledge is irreducible to simple binary prescriptive norms as Hayek pointed out for instance.<sup>30</sup> Legislative prescriptions alone cannot therefore be reconciled with the complex, pluralistic, multi-tiered/forum pervasiveness of cybernorms/laws that now encompasses a burgeoning complex range of legal issues beyond cyber contract to cyber-crime but one central to the very fabric of modern lives. Hence that ‘pretence’<sup>31</sup> of exclusive knowledge that is extended into property rights (notably intellectual property law) that is shaped and sustained only by the coercive function of the State over genuine market demand raises profound constitutional concerns of that consent to be governed as to the function of the State and its role.

The almost universal incantation of a 70 years of copyright protection under TRIPS for instance is extended without due regard of the different nature of the material (whether as a song or a drawing) or how different people (whether in their roles as the author, the owner or a consumer for instance) with different cultural values in different times perceive – all of which are accentuated further in the complex, global cyberspace communities. Defining the universal parameters for copyright protection (such as its criteria and extent of protection) must be futile not only because of the forgoing permutations but also more fundamentally, it undermines the autonomy of property rights without seeking the authors/owners consent. Instead, legislative prescriptions are universally presupposed premised on that claims of exclusive

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<sup>29</sup> Post, Against 'Against Cyberanarchy', op cit

<sup>30</sup> Hayek, The Pretence of Knowledge, op cit

<sup>31</sup> Hayek, Pretence of Knowledge op cit.

‘knowledge’ or even ignorance. The economic construct of the law thus not only become the ‘deadweight’ where private contractual arrangements must often circumvent; it also result in a normative gap when normal social expectations of the ‘governed’ is different and that civil wrongs becomes criminalised.<sup>32</sup>

There is thus no reason why private, flexible contractual self-ordering agreements cannot also address these issues of regulation. Instead, efficient and equitable solutions are simply ‘crowded out’ by the State intervention and can never emerge.<sup>33</sup> This is also not to say that the private alternative does not have any mandatory or default rules per se; *lex mercatoria*, the trans-national old merchant law for instance, long operated on a number of de-nationalised and de-localised principles, rather than the alleged Hobbesian ‘free for all’ anarchy.<sup>34</sup> Imposition of a pre-supposed consent is thus not only fundamentally wrong but also economically inefficient since the social construct of the State and its legislative apparatus is not often recognised as a product of human design rather than human action as both Hayek and Buchanan have observed.<sup>35</sup>

### **The Premise of Consent**

Consent (as opposed to consensus) is a central tenet whether in the modern State claims of legislative legitimacy over the private ordering of the law or indeed assertions of cyber space self-governance. Yet, consent premised on methodological individualism as Buchanan and Gordon Tullock (or the Virginia School) as followed on in this work, would allude that consent is only legitimate when there is unanimity in decision-making rule because the premise of public interest is simply the sum of private beneficiaries when all actors (voters, politicians and bureaucrats) are fundamentally self-interested in the political process. Politicians thus seek re-elections and bureaucrats on promotions for instance.

A key premise of consent in the methodological individualism is thus questioned when taking account of the Pareto efficiency, where in the state allocation of finite

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<sup>32</sup> See e.g., Larsson, *Metaphors*, op cit.

<sup>33</sup> Barry, op cit

<sup>34</sup> Radin and Wagner, *op cit*

<sup>35</sup> Buchanan, *Order Defined* op cit; Hayek, *The Pretence of Knowledge*, op cit

resources, one person cannot benefit without the expense of another.<sup>36</sup> Rent seeking and voter ignorance are also embedded in that political process<sup>37</sup> and shape the legislative impact and feed the growing normative gap. In rent seeking, social and political outcomes are manipulated to achieve desirable economic outcomes, notably efforts to influence monopolistic privileges through patronages and regulatory functions to subvert the efficiency of the free market competition.<sup>38</sup> In the case of voter ignorance (or sometimes voter's apathy), meaningful representation is eroded by both the voter rational ignorance because the potential costs of securing that knowledge often out-weights their concerns over the issues at hand as well as their heuristics in shaping political choices.<sup>39</sup>

Self-interested actors such as lobbyists thus seek to influence the legislative outcomes in their favour – such as Federation Against Copyright Theft's agenda on criminalising private civil intellectual property rights infringements into a public sphere of criminal 'theft' in cyberspace for instance. Voters on the other hand are unable to assess the complex changes IPR legislative prescriptions because of informational costs as well as the political process (such as closed-door negotiations) while rent seekers seek to manipulate the institutions and processes to their economic favour, such as extending their intellectual property rights/monopolies. The result, as pointed out, is not only a skewering towards their 'expressive interest'<sup>40</sup> but also suggests a tragedy of the commons that often follows since private inefficiencies are socialised while social benefits are being privatised – such as through dated business models and the criminal sanctions of copyright infringements respectively.<sup>41</sup>

The controversy in surrounding the secrecy of legislative process on a number of instruments that notably shape the governance on cybernorms illustrates the case well for increasing informational costs to promote voter ignorance and the rent seeking in political lobbying. TRIPS for instance was, as highlighted by Susan Sell, first negotiated in secret amongst twelve influential US-based multinationals corporations

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<sup>36</sup> Buchanan and Tullock, op cit.

<sup>37</sup> Tullock, G. (1987) "Rent seeking". The New Palgrave: A Dictionary of Economics. Palgrave Macmillan. vol. 4, pp.147–149

<sup>38</sup> Tullock, op cit

<sup>39</sup> Downs, A. (1957) An Economic Theory of Democracy, Harper & Brothers

<sup>40</sup> Buchanan and Tullock, op cit.

<sup>41</sup> Buchanan and Tullock, op cit.

such as IBM and the pharma giants before being imposed onto the WTO forum through the lobbying of the US and the other developed economies.<sup>42</sup> More recently, in the case of ACTA for instance, preserving the same secrecy and controversies which included the exclusion of civil societies that led to the resignation of the EU Parliament Rapporteur Kader Arif in protest, highlights these issues of constitutional consent and concerns over issues of transparency and accountability on governance - especially given the re-incorporation of ACTA provisions at bi-lateral negotiations when it had already been rejected by the EU Parliament. The premise of consent in light of these developments is indeed a central consideration to the future of the governance of cybernorms.

### **Justifications**

The normative implications of cybernorms are thus vast and complex. The *raison d'être* of the paper is to examine why is consent critical to the governance of cybernorms. In framing the conceptual premise of the organic normative nature of law, Boaventura de Sousa Santos wrote citing Hayek for instance, '*...In our century, no one has expressed this idea better than Hayek: 'Societies formed but states are made. (Hayek 1979 p. 140)'.*<sup>43</sup> The social construct of the State and its exclusive claims of knowledge are thus diametrically opposed to the organic spontaneous origins of the law and profound constitutional questions emerge when the earlier unilaterally asserts its unwanted jurisdiction without relevant and effective consent. In asserting the claims of legitimacy for governance whether real-world or cyberspace, there are also fundamental questions of consent notably when asked from a methodological individualism of public choice analysis. This issue is thus timely and critical, permeates the very fabric of modern lives and is central to the claims of democratic governance. As Nicholas Negroponte wrote for instance,

*'...We're discussing a fundamental cultural change: Computing is not about computers, it's about life; being digital is not just being a geek or Internet surfer or mathematically savvy child, it's actually a way of living and is going to impact absolutely everything.'*<sup>44</sup>

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<sup>42</sup> Sell, S. (2010) The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play, PIJIP.

<sup>43</sup> de Sousa Santos, B. (2002) Toward a New Legal Common Sense: Law, Globalization, and Emancipation, p.363

<sup>44</sup> Negroponte, N. (1995) Being Digital, Random House

## Limitations

There are no doubt a number of critiques to the theories that are used here. First, there are a number of critics to an economic analysis of the law and the reasons are varied. These concerns however do not necessarily pose serious methodological considerations to this research. Indeed, even though Buchanan and Hayek's works for instance represents distinct critical methodologies, they nonetheless draw from specific tenets of methodological individualism central to this thesis. Opponents to liberalism are noted and these philosophical debates are paralleled in a range of sociological, economic and legal studies that the fundamental liberal/neo-liberal philosophical tradition presents as the private consent 'bottom-up' phenomena on one hand and the alternative construct of consensus as appeared to be manifested in a centralised organisation on the other. Indeed, in the latter, one notes that critics of Buchanan *et al* questioned the methodology rather than 'consent' even though consensus is advocated.

Secondly, the Eurocentricity/ Westphalian assumption in the legal analysis or indeed philosophy is another limitation but these aspects have nevertheless been crystallised into the corpus of modern international law and the claims of State sovereignty today. Another criticism is the assumptions underlying a future outcome of ascending IPRs following from a series of on-going negotiations (e.g., CETA, US-EU BIT). In reviewing both the past patterns of FTA/BITs jurisprudence as well as the economic interests of the States concerned however, these issues nonetheless formed much of the premise of these treaties and the economic constitutionalizing.<sup>45</sup> Finally, central to this thesis is the importance of consent and its varied nature. Nonetheless, consent is without doubt important, premised on modern liberal governance and its claims of legitimacy.

## Methodology

The paper draws from a critical Webberian socio-economic analysis of aspects of international law making process, a range of socio-legal literature, legal instruments and case law in its comparative and framing analysis of the recent significant developments in the EU-cyber law/IPR regime, notably on the DRD, ACTA and the

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<sup>45</sup> Schneiderman, *op cit*

on-going bilateral negotiations. The latter are interesting because the normative ripples flowing from these instruments also shape the jurisprudential trajectory of cybernorms despite the legal prescriptions in other regimes such as intellectual rights, trade and investment and perhaps because of inter-disciplinary boundaries are thus not often studied or understood. The characteristics of selecting these instruments are therefore recent EU and of an on-going legislative significance.

In doing so, the textual analysis follows on from Harold Lasswell's work for instance, notably in seeking to investigate the premise of the law as 'Who says what, to whom, why, to what extent and with what effect?'<sup>46</sup> in analysing the content of the instruments and their underlying *raison d'etre*.<sup>47</sup> The approach is thus one that examines what the law *ought* to be and follows from a critical approach based on methodological individualism in public choice theory in the argument for and against cyber-space self-governance. It is with this in mind that one now examines the academic debate central to the issues of consent.

## LITERATURE REVIEW

The Hayekian notion of spontaneous origins of norms has been critical in advancing the organic nature of cybernorms but also implicit in the latter, that consent embedded in persuasive norms over the coercive State-sanctioned threats to 'expressive interest' as underlined in the public choice analysis. These concerns raise fundamental constitutional concerns as well as a normative gap. The analysis here thus first examines briefly Hayek's theory on spontaneous orders and the debate on cyber space self-governance. The premise of consent from a public choice analysis is then briefly reviewed.

### Hayek's Spontaneous Orders

The literature on Hayek's work and on spontaneous orders' is not surprisingly extensive.<sup>48</sup> The term 'spontaneous orders' refers to the self-organisation that emerges in nature and has also been used to describe a catalysis for a number of processes in

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<sup>46</sup> Lasswell, H. (1948) *Power and Personality*, New York: Vintage Books

<sup>47</sup> Holsti, O. (1969) *Content Analysis for the Social Sciences and Humanities*, MA: Addison-Wesley

<sup>48</sup> Ellickson, *op cit*; Hayek, *Law, Legislation and Liberty*, *op cit*; -The Fatal Conceit, *op cit*.

human organisations and is not novel to Hayek as such.<sup>49</sup> Hayek's contribution however can be distinguished in his extended economic analysis of the Kantian notion of knowledge and information, the earlier as a complex, synthesised body of knowledge and the latter as discreet pieces of facts.<sup>50</sup> According to Hayek, the spontaneous order is unplanned, self-generating, endogenous, a result of human action that is '*superior to any order a human mind can design*'.<sup>51</sup> Hayek's contribution on the constant dynamic fluid cross-market forces thus eludes that in the market economy, it is the 'price' as the aggregation of information (in contrast to the Hayekian notion of a systemic body of knowledge) that cannot centralise individual preferences. The economy or the 'catallaxy' thus emerged as a spontaneous order to facilitate that exchange and draws that parallel to the incremental case-law approach in common law as opposed to a blanket statutory law in the process of norm formation.<sup>52</sup>

Hayek's spontaneous order however has been criticised by a number of writers; some arguing that the distinction between spontaneous and constructed order cannot be delineated clearly<sup>53</sup>, that legal systems are 'complex' systems<sup>54</sup> and the theory is premised as understood by these critics only limited to economic aspects.<sup>55</sup> Spontaneous orders are argued as a naturalistic fallacy (i.e., what evolves is good) and that economic analysis alone cannot therefore become a '*...general basis of legal decision*'.<sup>56</sup> Indeed to redress an alleged 'market failure' (as opposed to a State failure from human design) critics argued that some central authority must thereby mediate or mitigate that risk and ameliorate that uncertainty.

Supporters of the theory on the other hand argue that a human construct of blunt central 'planning' cannot predict all the constant and subtle aspects of societal change

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<sup>49</sup> Rothbard, M. (1990) Concepts of the Role of Intellectuals in Social Change Toward Laissez Faire, *The Journal of Libertarian Studies*, Vol IX No. 2.

<sup>50</sup> Hayek, *The Fatal Conceit*, *op cit*

<sup>51</sup> *Ibid*, p.6

<sup>52</sup> Hayek, *Constitution of Liberty*, *op cit*.

<sup>53</sup> Sandefur, T. (2009) Some Problems with Spontaneous Order, *The Independent Review*, Vol. 14, No.1.

<sup>54</sup> Vilaça, G.V. (2010) From Hayek's Spontaneous Orders to Luhmann's Autopoietic Systems, *Studies in Emergent Order*, Vol. 3 Vol. 3, pp. 50-81

<sup>55</sup> Kukathas, A. (1989) Hayek and Modern Liberalism, Clarendon Press; Ogus, A. (1989) Law and Spontaneous Order: Hayek's Contribution to Legal Theory, 16 *J.L. & Soc'y* 393

<sup>56</sup> Engle, E. (2009) Theoretical Puffery, Exaggerated Claims and Counterfactual Models, *Journal Jurisprudence*, Vol. 2, p. 29; Ogus, *op cit*

and thus spontaneous ordering must thus evolve through a process akin to the Darwinian natural selection. The critics arguing that the legal systems as too 'complex' are thus not only self-contradicting by proposing a blunt 'central planning' of human design but also suffer from a logical fallacy and selective amnesia since social norms/law long pre-dates and precedes the founding of States. The liberal premise of personal choice exercised through 'economic' preferences is thus spontaneously expressed even though it is only one such facet albeit an important one.<sup>57</sup> Rather, it is more fundamental question as to the constitutional legitimacy of the State as an inexplicable figment of social construct created by an oxymoronic 'rational constructivism' that in its claims of exclusive omniscience and its expanding *raison d'être* that is ultimately the threat to the individual's liberty.

Given the historical trajectory of cyber space development, it is not surprising that Hayek's theory on spontaneous orders have often been developed in relation to cybernorms generation unanimity and indeed the premise for self-governing. Bruce Benson for instance, argued that cyber law has evolved spontaneously without State intervention<sup>58</sup> while David Johnston and Post questioned the premise of territorial notion to cyber space.<sup>59</sup> Some however argued that cybernorms can neither evolve spontaneously nor be sustained without intervention from the State, arguing that it is a 'myth' and leading to a 'free for all'.<sup>60</sup> These arguments in part draw many parallels to the case of cyber space self-governance because of the advocacy of either the State or the market in the form of self/private regulation.

More fundamentally, the conceptual premise of spontaneous ordering in law making is also highlighted in the context of Buchanan's notion of consent addressing the challenges of coordination in a Hayekian enquiry.<sup>61</sup> Buchanan further questioned the discourse of 'social' (and by the extension to a 'sociology of law' perspective) pointing out when the term 'social' is ascribed, it is often perceived as only the government can stake that claim of legitimacy. It thus belies its human design and its fallibility as a social construct rather than as an outcome of human action that self-

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<sup>57</sup> Hayek, *Constitution of Liberty*, *op cit*.

<sup>58</sup> Benson, *The Spontaneous Evolution*, *op cit*; Netanel *Cyberspace Self-Governance*, *op cit*.

<sup>59</sup> Johnston and Post *law and Borders*, *op cit*

<sup>60</sup> Radin and Wagner, *op cit*

<sup>61</sup> Buchanan, J. M. (1986) "Order Defined in the Process of Its Emergence

governance in spontaneous ordering illustrate. It is with this critical consideration that one turns to the debate on self-governance.

### **Arguments for and against Cyberspace Self-Governance**

The spontaneous origins of cybernorms as a premise for self-governance have been suggested by a number of writers although equally a number of writers are also critical.<sup>62</sup> The debate for cyberspace self-governance and those against briefly are thus reviewed. Jack Goldsmith's canonical arguments against cyber-anarchy for instance have been widely cited<sup>63</sup> but are not complete without Post's response to the 'exceptionalism'<sup>64</sup> of cyberspace. The three main of criticisms of self-governance are made broadly on the premise of firstly, a private ordering dominating over the liberal democracy; secondly, the anarchical arrangements and; finally, the absence of recourse to redress a 'market failure'.<sup>65</sup> Some writers such as Netanel for instance delineate the premise of these arguments as 'cyberpopulist', which argue for the actualisation of a liberal democracy, the 'cybersyndicalists' who strive to attain consensual self-governance with social norms reflecting the relevant communities, the 'cyberanarchists' offer a 'market of alternative rule regimes' free from state interventions<sup>66</sup> while others broadly divide the positivist advocating for the State from the liberals occasionally delineated as 'liberal'/ 'mini-anarchist' and 'anarchist' camps<sup>67</sup>. Nonetheless, the debate and criticisms overlaps are considerable.

The first argument against self-governance questions the efficiency and efficacy of 'private ordering',<sup>68</sup> arguing that the decentralised aspects of digital network communication would create regulatory arbitrage and evasion without State regulation.<sup>69</sup> It is also argued that the democratic premise is comprised by a private order; some even suggesting a regime of a 'tyranny of the majority',<sup>70</sup> as a necessary evil. This argument however fails to convincingly explain *why* precisely only States

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<sup>62</sup> Posner, E.A. (1996) Law, Economics, and Inefficient Norms, 144 U. PA. L. REv. 1697; Lessig, (1996) *op cit*

<sup>63</sup> Goldsmith, *Against cyberanarchy*, p.2

<sup>64</sup> Post, *Against 'Against Cyberanarchy'* *op cit*; Post, *Jefferson's Moose*, *op cit*

<sup>65</sup> On the efficiency claim, see Radin & Wagner, *op cit.*. Lessig, *Social meaning*, at 34-42, 49-60; Goldsmith, *Against Cyberanarchy*, *op cit*

<sup>66</sup> Post and Johnson, *Civic Virtue*, *op cit*, at 49-50. Contra. Netanel *op cit*, at p.403

<sup>67</sup> See e.g., Radin & Wagner, *op cit*

<sup>68</sup> See Gibbons, *op cit*, p. 502; Johnson and Post, *Law and Borders*, *op cit*.

<sup>69</sup> Gibbons, *op cit* at p. 502

<sup>70</sup> See e.g., Netanel, *op cit*. p.421

are superior organisation to address this defect since if Buchanan and Tullock are correct, the latter is merely a aggregation of private interest in the first place. The discourse of framing criminal 'regulatory arbitrage and evasion' may also well reflect that normative gap between legislative prescription and social expectations but more fundamentally however suffers from the logical fallacy of 'principle of equivalence' as suggested by Post - that the uncritical 'democratic' panacea of legitimacy claims based territorial governance that not only ignores that liberal choice of consent but activity seeking to unilaterally remove that choice to choose is therefore paradoxically undemocratic. Imposing that façade of consensus into the individual's consent derided as 'private ordering' is cannot be efficient and efficacy since it is premised on human design of an oxymoronic 'rational constructivism' such as the universal incarnation of TRIPS provisions for instance as stated earlier.

The second argument is the anarchical arrangements and the alleged fluidity/ freedom of movement undermines cyber-social norms generation.<sup>71</sup> Yet critics of self-governance on the other hand argued that the anarchical arrangements of entry and exit in cyberspace are costly or cheaply whether for 'dissenters' or 'the enforcement of metanorms' but on the other, they are quick to dismiss that fluidity and hence instability cannot create norms hence, only State intervention is the solution. This is another logical fallacy, as stability is overstated (especially since 'instant' customary international law is possible), nor does stability simply equate with norms generation. The public choice analysis work would further question that political process and interests in resolving these 'deficiencies' by deferring to the expressive special interest groups in the façade of democracy by maintaining the monopolistic status-quo.<sup>72</sup> Rather, it is argued that cyber-democracy and self-governance would mitigate rather than accentuate special interest groups because of the virtually unlimited reach and diversity that cyberspace is premised upon.

The final 'market failure' argument (by that extension 'e-markets') that is embedded in the Keynesian and latter aspects of the Stockholm Economic School are also a similar argument against the spontaneous ordering implicit in the Hayekian view of the market. Yet, those advocating for central government intervention sought to

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<sup>71</sup> See e.g., Radin & Wagner, op cit; Netanel, op cit

<sup>72</sup> Buchanan and Tullock, op cit

impose that claim of body of superior 'knowledge'/ignorance onto cyberspace much like a pharmaceutical company pathologising normalcy. The assumptions in the claims of 'market failure' premised on a market 'irrationality' plagued by the Keynesian 'animal spirits' often falls apart once the premise of information/knowledge is discerned. Rather central organisations lacking in a systemic knowledge distorts market information through interest rates manipulations, taxes and other rent seeking measures emanating from central control. Regulatory inflation by adopting coercive rather than persuasive measures, manifested by interventions that beget further interventions that is ultimately responsible for the proverbial 'market failure'<sup>73</sup> but also the normative gap.

Arguments for self-governance on the other hand, are often premised on the welfare maximisation and resources efficiency arising from the decentralized, fragmented, but also the incremental networked norm creation process rather than a centralized, state regulation premised on political bureaucracy and blunt interventions.<sup>74</sup> The oft-made arguments thus are framed as a question of efficiency and of legitimacy (by whom, for what, why and how for instance) is a road well worn. Arguments for self-governance can thus be crystallised into three premises, a 'liberal' advantage, community autonomy and its regularity. These arguments are thus central to the premise of consent.

The first argument for self-governance is the liberal advantage, or the 'liberal perfection' by critics,<sup>75</sup> premised that self-governance that is consistent with liberal democratic ideals. Self-governance advocates for the organic promulgation of the primacy of 'local' norms in the global, diverse, cyberspace communities and most critically perhaps, one that is premised upon individual choice and consent,<sup>76</sup> eschewing a 'top-down' control.<sup>77</sup> Hence, self-governance not only meets the idealised notion of democracy based on consent, it is further pointed out that the

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<sup>73</sup> Hayek, *The Fatal Conceit*, *op cit*

<sup>74</sup> Gibbons, *No Regulation*, *op cit*; Post, D. and Johnson, D. (1998) *Chaos Prevailing on Every Continent: A New Theory of Decentralized Decision-Making in Complex Systems*, 73 *Cm.-Kent L. Rev.* 1055.

<sup>75</sup> Netanel, *op cit*

<sup>76</sup> Post & Johnson, *Civic Virtue*, at 170-71.

<sup>77</sup> See Post & Johnson, *Civic Virtue*, at 46-5 1; Post, D. (1998) *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 *Ind. J. Global Legal Studies*, 521, 535-42

claims of legitimacy, premised on incidents of territorial representative that lies on the government, are not appropriate nor relevant in a fundamentally different environment of the 'real space' that transcends national borders with its emphasis on communication and knowledge exchange.<sup>78</sup> Indeed, unilateral assertion of jurisdiction is fundamentally undemocratic because it ignores the complex infinite permutation of virtual communities as with one's identities and roles. Rather, consent implied by human action is ultimately the only outcome capable of representing that choice and the claims of democracy.

The second argument for self-governance is community autonomy, one that is not only confined within the cyberspace community and its own norm generations whether in the 'convergence'<sup>79</sup> or 'values' but also a fundamental right to belong. Notably, Hayek pointed out that 'values' as a matter of individual subjective preferences is expressed through the price system for instance on the premise of consent.<sup>80</sup> It is also a key facet of the individual's choice/ value in the cyberspace context that the potential is fully expressed. As Negroponte argued '*...values of a nation-state will give way to those of... electronic communities...socialize in digital neighborhoods in which physical space will be irrelevant*'.<sup>81</sup> State regulation is argued thus as a 'colonial'<sup>82</sup> usurpation of norms in the cyberspace as a self-defining community and that right to community autonomy.<sup>83</sup>

This leads to the third argument for self-governance of regularity in that self-governance produces a more systematic reflection of the norms relevant to its community. The persuasive rather than coercive 'bottom-up' approach emerged from the culmination of consensus is thus intrinsically and more appropriate to the governance of the cyber-community not only it is premised on consent (since one is freer to choose without coercion) but also it is a product of human action. The premised of human action that premised on self-governance consent, notably in the context of cyber-space, is therefore preferred in view of the concerns emerged in that claim of central organisation of consensus.

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<sup>78</sup> Post & Johnson, *Civic Virtue*, op cit.

<sup>79</sup> Johnson and Post, *Law and Borders*, op cit , at 1393

<sup>80</sup> Hayek, *Rules and Order*, op cit

<sup>81</sup> Negroponte, op cit

<sup>82</sup> See Gibbons, op cit at 503.

<sup>83</sup> Johnson and Post, *Law and Borders*, op cit at 1393; Perritt, op cit at 425-32

## Consent and Criticisms

Without doubt, consent must be the founding cornerstone of modern claims of legitimacy for States and it must not be eroded in the promises of protection and welfare. It would be ironic that in the quest for consensus that the rights of individual is subjected to the tyranny of the commons as critics for cyberspace self-governance such as Netanel for instance would describe as

*‘...ultimately prove inimical to the ideals of liberal democracy. It would free majorities to trample upon minorities and serve as a breeding ground for invidious status discrimination, narrowcasting and mainstreaming content selection, systematic invasions of privacy, and gross inequalities in the distribution of basic requisites for citizenship in the information age.’*<sup>84</sup>

Critics of self-governance thus first argued that the anarchical arrangements premised on the individual consent is must be superseded by the rights of the majority; in the latter not only paradoxically subverting the premise of consent as its basis but also, secondly; presents a fallacy of ‘governance’ is solely limited to the remit of governments, even though it is not clear how and only why governments are the exclusive guardians of ‘*liberal democracy*’ because government actors/measures can be as illiberal and are as capable of committing atrocities. In prescribing an act of unilateral assertion of territorial sovereignty which is ‘*inimical to the ideals of liberal democracy*’ to the claims of protecting democracy is itself ultimately *inimical* and contradicting. Epithets such as ‘anarchist’<sup>85</sup> like thus often sought to skew the discourse and silent a critical and constructive debate in questioning that claims of legitimacy.<sup>86</sup>

The criticisms of public choice thus parallel cyber-anarchism. Critics such as Amartya Sen, whilst already recognising the unanimity criterion for collective choice nonetheless notably questioned that Pareto-principle premise.<sup>87</sup> Others such Netanel argued that Buchanan and Tullock as fundamentally undemocratic.<sup>88</sup> The latter was derided as liberal heretics that do not subscribe to a particular panacea of a ‘tyranny of

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<sup>84</sup> Netanel, *op cit*.

<sup>85</sup> Netanel, *op cit* ; Radin and Wagner *op cit*

<sup>86</sup> Trotter, *op cit*

<sup>87</sup> Sen, A. (1970) "The Impossibility of a Paretian Liberal," *Journal of Political Economy*, 78(1), pp. 152-7

<sup>88</sup> Netanel, *op cit*; Radin and Wagner, *op cit*

majority<sup>89</sup> argued that the heuristic of consensus over consent that must be applied in all circumstances, even if in the context of the borderless cyberspace. The latter premise of a 'social contract' is thus imposed, contrary to its premise of 'consent' as with the claims of cyberspace sovereignty. More fundamentally, those advocating government interventions subverted that awkward question of legitimacy and its justification of territorial assertions as *if* cyber space is simply another physical territory (as indeed, it is possible for one to be a citizen of more than one country for instance) not just the exceptional nature of cyberspace as Post pointed out.<sup>90</sup>

Critics of public choice have also sought to link the conceptual premise of unanimity premised on the Stockholm School. The latter is premised on the seminal works of Knut Wicksell and latter, of Erik Lindhal on the central welfare provisions to its efficiencies and effectiveness. It is also further argued that in practice unanimous consent is difficult, vulnerable to hold outs and opportunistic bargaining for instance. Hence although cyberspace is argued to facilitate collective bargaining and negotiations by the ease of its communicative functions – it is also argued that online regimes, nevertheless suffer from the same inefficiencies in the real world.<sup>91</sup> Consequently, it is argued that unanimous consent is unable workable in the context of cyberspace practice rather than only the theoretical premise of unanimity itself as Sen for instance have concluded. Indeed, as if in anticipating to Sen's criticism on the Pareto principle, Buchanan and Tullock wrote in a Hayekian tradition that

*'...so long as some part of all individual behavior is, ...in fact motivated by utility maximization, and so long as the identification of the individual with the group does not extend to the point of making all individuals utility functions identical, an economic-individualist model of political activity should be of some positive worth.'*<sup>92</sup>

The arguments for government interventions are thus selective, self-serving and contradictory. Critics of cyber-space self-governance have similar criticisms of the Hayekian theory of spontaneous ordering of 'bottom-up' cyber-norms; advocating the

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<sup>89</sup> Netanel, *op cit*

<sup>90</sup> Post, *Against 'Against Cyberanarchy'* *op cit*; Post, *Jefferson's Moose*, *op cit*  
Johnson and Post, *Law and Borders*, *op cit*

<sup>91</sup> Netanel, *op cit*; Radin and Wagner, *op cit*

<sup>92</sup> Buchanan and Tullock, *op cit*, p.30

individual's liberal choice and consent to be submitted uncritically to a central authority of human design and a social construct that is somehow inexplicably imbued with special 'knowledge', authority and legitimacy. Drawing from the analytic prism of Buchanan and Tullock's work for instance, these arguments of cannot be right; rather that premise of 'consent' and legitimacy is tainted by expressive self-interest and criminal coercion that not only subvert the individual fundamental rights but widen the normative gap between the legislative prescription and social expectation. In the following section, these developments are briefly examined.

## **ANALYSIS**

Drawing from a methodological individualism premised on consent to address some of the perspectives to the recent aspects of developments, it can be seen that aspects of principal-agent problems (of the citizen and political agents) are inherent to the notion of consent in Buchanan and Tullock work. In this analysis, drawing notably on the on-going bilateral developments (US-EU and EU-Canada) as well as the DRD and ACTA, three aspects can be discerned that raised constitutional concerns in examining the issue of consent in cyber-norm governance namely; the lobbying in law making, the consequent forum/regime shifting; and the emerging neoliberal paradox.

### **Lobbying for Law**

The public choice analysis demonstrate the concerns over the particular skew in favour 'expressive interests' of specific individuals in specific industries rather than the boarder economic interest of the population the premise of consent in a democracy.<sup>93</sup> The British Digital Economy Act for instance, incorporating many aspects of ACTA has been a subject of intense media controversy and political opposition, a legislative creature product of industry lobbying and political malfeasance now recognised by a number of media articles and the London School of Economics Report in 2011 for instance.<sup>94</sup>

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<sup>93</sup> Buchanan and Tullock, op cit

<sup>94</sup> Cammaerts, B and Meng, B. (2011) Creative Destruction and Copyright Protection, Media Policy Brief 1, LSE

Allegations of ministers taking a sudden interest following lobbying elements manipulating political rules and processes belied that human design in political institutions is reflected across the EU. Like in France, the lobbying interest cumulating into the HADOPI law (or the French ACTA) and its disproportionate criminal sanctions for copyright infringements was recently revoked in July 2013, one ostensibly seeking to promote creativity rather than the interests of the 40 or so companies was championed no less by the past French President Nicolas Sarkozy himself. The lobbying for ACTA, has thus repeatedly raised many different and fundamental concerns of the democratic process at many levels of governance, of accountability and of transparency. It is thus argued rather innovating to suit changing consumer tastes, rent seeking legislations such as ACTA seeks to precisely safeguard 'expressive' corporate interest of the few with their dated model of business by riding roughshod over the consent of the individual.<sup>95</sup>

The Buchanan example of a construction company spending its time lobbying for government contracts rather than seeking innovation is thus telling in the context of cyber-norm governance.<sup>96</sup> The premise of consent that highlights the perennial principal-agent problem of conflicting knowledge and interest within institutions of human design thus underlies much of Buchanan and Tullock's work. The revolving door policies of industry and government institutions for instance, raise potential conflict of interests as a key IFPI lobbyist heads the ACTA and IPRED at the EU Commission.<sup>97</sup> But the lobbying for ACTA and DRD is old news and indeed lobbying itself is as old as the world's second oldest profession. The ACTA and DRD for instance, even though each was ultimately recognised as 'illegal' by the European Commission, are being reinstated in other forums (such as the EU-US FTA) despite their controversial nature and numerous objections in both national and European parliamentary institutions.

### **Forum/Regime Shifting**

The 'pretence' of knowledge thus not only distorts the normative discourse but also subverts that 'general public interest' in favour of the self-interest of political agents, notably in the complex multi-forum, voter ignorance and the permutations and

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<sup>95</sup> Ibid.

<sup>96</sup> Buchanan and Tullock, op cit

<sup>97</sup> Von Kirsten (2011) Lobbyist der Musikindustrie vor Wechsel zur EU-Kommission, 30th March, Netzpolitik.org.

opportunities for rent seeking.<sup>98</sup> The notion of 'consent' within the constitutional order is eroded by the forum/regime shifting in treaties because not only do the instruments and institutions are not confined (nor can be) within the strict remit it is claimed, but external relations ripples across domestic constitutional structures to the economic interest of the few.<sup>99</sup> The growing popularity of investment treaties for instance often include IPR protection as with trade agreements - and the forum shifting, as seen in the TRIPS Plus regime '*...means that some negotiations are never really over*'<sup>100</sup>, one which is as demonstrated in on-going negotiation in the EU TIPPAs and FTAs.<sup>101</sup> Hence not only within TRIPS, ACTA, SOPA, PIPA, the TPP, BITS and FTAs<sup>102</sup> have all sought to raise IPR protection even if these instruments are apparently addressing fundamentally different issues. The normative assertion into cyberspace premised on these territorial claims is thus profoundly complex and raises many complex questions and concerns (such as human rights) in these largely uncharted waters.

Indeed, the effect of voter ignorance in regime shifting and rent seeking is further exemplified by the on-going Canada-EU negotiations for instance which demonstrated that '*... CETA adopts ACTA's wording exactly*'<sup>103</sup> with the '*...worst aspects of the ACTA*'<sup>104</sup> as a 'backdoor'.<sup>105</sup> But IPRs and the cyber law/norms therein is regime shifted to investment (as IPRs are often defined as 'investments'<sup>106</sup>) and into trade - especially since the US FTA signatories are already compelled to the TRIPS Plus standards, standards above TRIPS prescriptions. The conflicting political process is also often illustrated within EU institutional power dispute (between the Parliament, Commission and Council) as well as Member States over precedence of EU law over national interest.<sup>107</sup> These considerations rose in the perennial debate over democratic

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<sup>98</sup> Hayek, *Errors of Constructivism*, *op cit.*; Buchanan and Tullock, *op cit.*

<sup>99</sup> Schneiderman, *op cit.*

<sup>100</sup> Drahos, P. (2007) Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines, *Liverpool Law Review*, Vol.28, 11-39.

<sup>101</sup> Yu, P. (2012) The Alphabet Soup of Transborder Intellectual Property Enforcement, Drake University Law School Research Paper No. 12-13; Drahos, *op cit.*

<sup>102</sup> Yu, *op cit.*; Drahos, *op cit.*

<sup>103</sup> Moody, G. (2012). "ACTA's Back: European Commission Trying To Sneak In Worst Parts Using Canada-EU Trade Agreement As A Trojan Horse", *Techdirt*, July 9.

<sup>104</sup> Moody, ACTA's Back, *op cit.*

<sup>105</sup> See e.g., Geist, M. (2012) ACTA Lives: How the EU & Canada Are Using CETA as Backdoor Mechanism To Revive ACTA, July 09, <http://www.michaelgeist.ca/content/view/6580/135/>

<sup>106</sup> U.S. Model Bilateral Investment Treaty, 2012, Article 1(f)

<sup>107</sup> Austria (case C 205/06), Sweden (case C-249/06) and Finland (case C-118/07)

deficit in the legislative process and the concern over the loss of consent of the governed.<sup>108</sup> The Hayekian notion of knowledge (or the lack of in this context) reflects the necessity of constant tweaking of the blunt legislative apparatus inevitably leads to regulatory inflation and with that, a trajectory towards an inflation of the IPRs and of surveillance in these instances. It is also a trajectory to preserve monopolistic interest of the few as often ascribed as ‘neoliberal’.

### **The Neoliberal Paradox**

The forum/regime shifting in IPR has also led to mass surveillance of the citizenry, raises fundamental constitutional concerns, such as the perennial principal-agent problems in the political process.<sup>109</sup> More fundamentally perhaps, the democratic deficit is often reflected in the legislative process within the EU discourse.<sup>110</sup> In this sense, that neoliberal paradox is that only certain rights are enhanced, notably selected property rights while other rights such as privacy rights are eroded. These developments also reflect the distortive ‘expressive interest’ that emerged from the defective consent in the political process underlined by the premise of human design.

That neoliberal paradox is further extended in the sense that the privacy/anonymity is also available for a price as demonstrated with various measures such as VPN services which is increasingly popular as surveillance is ratcheted up.<sup>111</sup> Like a fee for delisting one’s telephone number, the neoliberal paradox must ultimately lie in the most illiberal premise of securing private property rights only through the State apparatus of coercive criminal sanctions rather than a genuine market need is – as fundamentally perverse as asserting unilateral claims of territorial sovereignty to cyberspace in the name of democracy but reveal the monopolistic premise of systematically excluding consent thereby raises constitutional concerns.

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<sup>108</sup> Crombez, C. (2003) The Democratic Deficit in the European Union Much Ado about Nothing? *European Union Politics*, Volume 4 (1): 101–120

<sup>109</sup> Buchanan and Tullock op cit.

<sup>110</sup> Crombez, op cit.

<sup>111</sup> See e.g., Larsson, S., Svensson, M., de Kaminski, M., Rönkkö, K. (2012) Law, Norms, Piracy and Online Anonymity – Practices of de-identification in the global file sharing community. *Journal of Research in Interactive Marketing: Special Issue on Digital Piracy*, 6(4):260 - 280

### Constitutional Premise of Consent

The constitutional premise of surveillance and selected enforcement of property rights undoubtedly raises profound concerns over many issues including voter ignorance and that premise of consent. The on-going bilateral negotiations of re-introducing ACTA<sup>112</sup> for instance when already rejected by some national as well as the European Parliament circumvent the scrutiny process but also become binding to member states demonstrate both the constitutionalization effect as well as a democratic deficit.<sup>113</sup> These instruments of surveillance framed as ‘proportionate’ and ‘legitimate’ means to protect ‘serious crime’ over aspects of privacy raising complex issues of democracy. More fundamentally these means have also sought to achieve the ends of ill-defined ‘*other purposes*’ raising the prospect of an incompatibility with the Charter of Fundamental Rights. Indeed, the legislative prescription of ACTA is not premised on evidence based policy nor legitimate grounds of national security raises fundamental constitutional concerns and like ACTA, the DRD promise of crime prevention. To justify an intrusion, lip service to privacy is often paid while both ‘protective’ functions of the state and the alleged threats are highlighted. Section 4 of the DRD for instance notes that

*‘Any such restrictions must be necessary, appropriate and proportionate within a democratic society for specific public order purposes, i.e. to safeguard national security (i.e. State security), defence, public security or the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications systems.’*<sup>114</sup>

Yet, a number of internal EU reports conducted to review the premise of DRD for instance have argued that these instruments are legitimate and consistent with data retention legislations even in the face of public outcry.<sup>115</sup> As Marieke de Goede observed for instance, in spite of the

*‘...strong criticism by civil society organisations on the grounds that data retention violates fundamental rights, the evaluation report concludes that*

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<sup>112</sup> See e.g., Geist, M. (2012) op cit

<sup>113</sup> Schneiderman, op cit; Crombez op cit.

<sup>114</sup> Section 4 Data Retention Directive

<sup>115</sup> EC (2010) Article 29 Working Party Report 01/2010; Opinion of the European Data Protection Supervisor on the Evaluation report from the Commission to the Council and the European Parliament on the Data Retention Directive (Directive 2006/24/EC), 31 May 2011.

*data retention is valuable for the important role it plays in combating serious crime in Europe*'.<sup>116</sup>

The privacy concerns by fundamentally shifting the onus of guilt to all European data communication are neither proportionate nor appropriate as Rens Van Munster concluded for instance, '*...In a sense everybody is a suspect.*'<sup>117</sup> The politicised knee-jerk respond to terrorism showed both limited public discussion and legal uncertainties such as not delineating business from 'serious crime' purposes as well as that the notion of '*serious crime*'. That voter ignorance saw the latter to be as '*...defined by each Member State in its national law, cannot be sufficiently achieved by the Member States*' (s.21), as evident that the criminalisation at Community level was already the default in the absence of any agreed standards. Tellingly, a Commission Services consultation for instance latter found that there is no

*'...logical separation between data stored and then accessed for a) business purposes, b) for purposes of combating 'serious crime' and c) for purposes other than combating serious crime" and the lack of a monitoring system showing "data (that) would not have been available to law enforcement without mandatory retention.*'<sup>118</sup>

The limited delineation of '*serious crime*' from ordinary 'crime' as well as the lack of a broader debate in framing the discourse resulted in fishing expeditions for copyright infringements as 'hacking' or 'urgent cases'<sup>119</sup> without establishing the usual necessity nor proportionality thus raises concerns such as representations and due process.<sup>120</sup> Without a coherent procedure for data breaches in evaluating access or costs of implementation, it is observed that only countries with these economic interests will implement these instruments. The problem of voter ignorance has thus

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<sup>116</sup> De Goede, op cit.

<sup>117</sup> Van Munster, R. (2004) 'The War on Terrorism: When the Exception Becomes the Rule', International Journal for the Semiotics of Law 17(2): 141–153 at p.151; De Goede, M. (2008) The Politics of Pre-emption and the War on Terror in Europe, European Journal of International Relations, 14, p. 161.

<sup>118</sup> See Commission Services, Consultation on reform of Data Retention Directive: emerging themes and next, Brussels, 15 December 2011, 9324/11 DAPIX 38 TELECOM 47 COPEN 85

<sup>119</sup> EDRI (2012), Commission confirms illegality of Data Retention Directive, Jan 18, Available <http://www.edri.org/edriagram/number10.1/commission-confirms-illegality-data-retention>

<sup>120</sup> Report from the Commission to the Council and the European Parliament, Brussels, Evaluation report on the Data Retention Directive (Directive 2006/24/EC) 18.4.2011, COM(2011) 225 final, Available <http://www.statewatch.org/news/2011/apr/eu-com-data-retention-report-225-11.pdf>

led to the skewing of 'expressive interest' in the legislative process. The question of consent is extended further when the constitutional premise of applying the principle of proportionality by not going beyond what is necessary to combat serious crime and terrorism such as national security leaves the latter to be a judge in his own cause. Thus even with a 'proportionality' to privacy<sup>121</sup>, new developments such as a 'right to be forgotten and to erasure' and its premise remains uncertain.<sup>122</sup> Indeed lip service to 'necessity' and 'proportionality' in the façade of democratic consensus belies the constitutionalising economic effects.<sup>123</sup> The controversial UK 'rnbxclusive' case for instance saw the Serious Organised Crime Agency (SOCA) closing the website down, raising profound IPR, surveillance as well as constitutional concerns that the SOCA may have becomes a 'personal enforcer to the recording industry',<sup>124</sup> seeking to impose custodial sentence of 10 years for illegal downloading.

## CONCLUSION

Drawing on the rational self-interest actors in the political process and using Pareto optimality, Buchanan and Tullock demonstrated that the problem of voter ignorance and rent seeking erodes that premise of consent. In this instance, it is observed that the special interest groups lobbying widens that normative divide with legislative trajectories of ratcheting up of IPRs and of surveillance, raising fundamental constitutional questions, the claims of legislative legitimacy but also fundamental rights. In part, the intellectual property law and its related cyber law/norms, like the State institutions are premised on human design manifested in the social construct and relying on the coercive apparatus of sovereign privileges and patronage as opposed to the spontaneous human action of private 'bottom up' norms cumulated by the individual's consent that has widened this normative gap.

The normative gap is widened by central authority claims of knowledge but the normative trajectory premised on societal normative expectations is diverted by *both* voter ignorance and rent seeking as seen in the *ACTA, DRD and also in the bilateral*

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<sup>121</sup> See e.g., e-Privacy Directive 2002/58/EC

<sup>122</sup> Feiler, L. (2010) "The Legality of the Data Retention Directive in Light of the Fundamental Rights to Privacy and Data Protection", *European Journal of Law and Technology*, Vol. 1, Issue 3.

<sup>123</sup> Schneiderman, op cit

<sup>124</sup> RT (2012) ACTA in UK: 10 years in jail for 'illegal downloads', March 03, Available at <http://rt.com/news/acta-uk-illegal-downloading-jail-753/>

*forum where forum-shifting and lobbying are rife. Voter ignorance emerged from informational costs and internal decision heuristics, such as a full debate post-terrorism on 'proportionality' for surveillance and indeed, the framing discourse on crime. More critically, the rent seeking elements from a public choice perspective demonstrate that lobbying distorts the legal outcomes distorts the legal prescriptions. This is notably underlined by the ascending criminal sanctions of a civil wrong. The public choice analytic perspective of consent is thus interesting because it demonstrates the inherent problems of the political process in the first instance but also in defining lives only through incidents of geography, normative ripples not only erode the fundamental rights in squaring territorial claims to the cyber space but those claims are unilaterally imposed without consent. These concerns have already been raised by John Perry Barlow and many others but are central to the right of the individual against the unfettered powers of the State.*

When examined further on a number of cyber law related legislation however, the normative ripples in ACTA and the DRD demonstrate that the developments in the intended forums have impacts, whether foreseen or unintended belies the excessive statism pushed these 'outcomes' to transcend the national constitutional premise/promise and that private governance through spontaneous ordering will eschew. Criminalisation of normal social expectations to the rent seeking special interests groups is one such outcome. The mass illegal surveillance of the State is another. These outcomes would not materialise if there is genuine consent, premised on human action rather than human design. This is why consent is so critical to the governance of cybernorms.

The potential for future research is thus vast, timely and critical. There is already conclusive evidence that the legislative prescriptions do not reflect the normative societal expectations on file-sharing in the Cybernorms Project at University of Lund and that social norms emerged differently across different net cultures.<sup>125</sup> Normative ripples from the rational construct of the State and its *raison d'être* thus shape complex human rights issues of privacy and of access that erode rather than augment democracy as claimed. This raises fundamental questions that have vast constitutional

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<sup>125</sup> See e.g., Cybernorms research group, About Cybernorms. Available at <http://cybernormer.se/>

implications that shape our way of life. In a widely cited article, one critic wrote ‘*There is the urgent question of sovereignty: who will do the shaping and patrolling?*’<sup>126</sup> But even in alluding to the ‘night-watch man state’ with its already very flawed premise, who watch the watchers? Consent as opposed to consensus must therefore be that premise of legitimacy and in addressing the normative gap.

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<sup>126</sup> See Radin and Wagner, op cit

## **Bibliography**

Banakar, R. (2011) *The Sociology of Law: From Industrialisation to Globalisation*, U. of Westminster School of Law Research Paper No. 11-03

*Barry, N. P.*, (1982) *The Tradition of Spontaneous Order, Literature of Liberty: A Review of Contemporary Liberal Thought*, Library of Economics and Liberty

BBC News (2011) *Laws relaxed on copying music and film content*, 11 August.

Buchanan, J. (1982) "Order Defined in the Process of its Emergence - A note stimulated by reading Norman Barry, "The Tradition of Spontaneous Order," *Literature of Liberty*, Vol. V, 7-58.

Buchanan, J. and Tullock, G. (1962) *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, University of Michigan Press

Cammaerts, B and Meng, B. (2011) *Creative Destruction and Copyright Protection*, Media Policy Brief 1, LSE

Coase, R. (1960) *The Problem of Social Cost*, *Journal of Law and Economics*, Vol. 3 (Oct., 1960), pp. 1-44

Crombez, C. (2003) *The Democratic Deficit in the European Union Much Ado about Nothing?* *European Union Politics*, Volume 4 (1): 101–120

De Goede, M. (2008) *The Politics of Pre-emption and the War on Terror in Europe*, *European Journal of International Relations*, 14, p. 161.

de Sousa Santos, B. (2002) *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, p.363

Downs, A. (1957) *An Economic Theory of Democracy*, Harper & Brothers

Drahos, P. (2007) Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines, *Liverpool Law Review*, Vol.28, 11-39.

EC (2010) Article 29 Working Party Report 01/2010; Opinion of the European Data Protection Supervisor on the Evaluation report from the Commission to the Council and the European Parliament on the Data Retention Directive (Directive 2006/24/EC), 31 May 2011.

EDRI (2012), Commission confirms illegality of Data Retention Directive, Jan 18, Available <http://www.edri.org/edriagram/number10.1/commission-confirms-illegality-data-retention>

Ehrlich, E. (1913) *Fundamental Sociology of Law*, Cambridge: Harvard University Press

Engle, E. (2009) Theoretical Puffery, Exaggerated Claims and Counterfactual Models, *Journal Jurisprudence*, Vol. 2, p. 29

Feiler, L. (2010) "The Legality of the Data Retention Directive in Light of the Fundamental Rights to Privacy and Data Protection", *European Journal of Law and Technology*, Vol. 1, Issue 3.

Geist, M. (2012) ACTA Lives: How the EU & Canada Are Using CETA as Backdoor Mechanism To Revive ACTA, July 09, <http://www.michaelgeist.ca/content/view/6580/135/>

Gibbons, L. J. (1997) No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace, 6 *Cornell J. L. & Pub. Pol'y* 475 at 502

Goldsmith, J. (1998) Against cyberanarchy, 65 *University of Chicago Law Review*, 1199, 2

- Hargreaves, I. (2011). *Digital opportunity: A review of intellectual property and growth*. London, Intellectual Property Office
- Hayek, F. A. (1973) *Law, Legislation, and Liberty, Volume I: Rules and Order*, Chicago: University of Chicago Press
- Hayek, F. A (1989) *The Pretence Of Knowledge*, *The American Economic Review*, 79, 6
- Holsti, O. (1969). *Content Analysis for the Social Sciences and Humanities*, MA: Addison-Wesley
- Johnson, D.R. and D.G. Post (1997) “And How Shall The Net Be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law,” in *Coordinating the Internet* (MIT Press)
- Kukathas, A. (1989) *Hayek and Modern Liberalism*, Clarendon Press
- Larsson, S. (2009) *Metaphors and Norms Lund Understanding Copyright Law in a Digital Society Studies in Sociology of Law*. Lund: Lund University
- Larsson, S., Svensson, M., de Kaminski, M., Rönkkö, K. (2012) *Law, Norms, Piracy and Online Anonymity – Practices of de-identification in the global file sharing community*. *Journal of Research in Interactive Marketing: Special Issue on Digital Piracy*, 6(4):260 - 280
- Lasswell, H. (1948) *Power and Personality*, New York: Vintage Books
- Lessig, L. (1999) *Code and Other Laws of Cyberspace*, New York: Basic Books
- Macaulay, S. (1963) *Non-Contractual Relations in Business*. *American Sociological Review* 28: 55-67.

Moody, G. (2012). "ACTA's Back: European Commission Trying To Sneak In Worst Parts Using Canada-EU Trade Agreement As A Trojan Horse", Techdirt, July 9.

Negroponte, N. (1995) *Being Digital*, Random House

Nelken, D. (1981) "The 'Gap Problem' in the Sociology of Law: A Theoretical Review" (1981) *Windsor Yearbook of Access to Justice* 35–62

Netanel, N. (2000) *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 *Calif. L. Rev.* 395.

Ogus, A. (1989) *Law and Spontaneous Order: Hayek's Contribution to Legal Theory*, 16 *J.L. & Soc'y* 393

Posner, E.A. (1996) *Law, Economics, and Inefficient Norms*, 144 *U. PA. L. Rev.* 1697

Post, D (2009) *In Search of Jefferson's Moose: Notes on the State of Cyberspace: Notes on the State of Cyberspace*, Oxford University Press

Post, D. (1996) *Governing Cyberspace*, 43 *Wayne L Rev* 155

Post, D. (1998) *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 *Ind. J. Global Legal Studies*, 521, 535-42

Post, D. (2002) *Against 'Against Cyberanarchy'*, *Berkeley Technology Law Journal*, 17, p. 1365

Post, D. and Johnson, D. (1998) *Chaos Prevailing on Every Continent: A New Theory of Decentralized Decision-Making in Complex Systems*, 73 *Cm.-Kent L. Rev.* 1055.

Pound, R. (1910) *Law in Books and Law in Action*, *Am. Law Rev*, p.12-36

Radin, M. and R.P. Wagner (1999) The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace,” Chicago-Kent Law Review, vol. 73 no. 4 (1998): 1295-317

RT (2012) ACTA in UK: 10 years in jail for 'illegal downloads', March 03, Available at <http://rt.com/news/acta-uk-illegal-downloading-jail-753/>

Sandefur, T. (2009) Some Problems with Spontaneous Order, The Independent Review, Vol. 14, No.1.

Sell, S. (2010) The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play, PIJIP.

Sen, A. (1970) "The Impossibility of a Paretian Liberal," Journal of Political Economy, 78(1), pp. 152-7

Shea, V. (1994) The Core Rules of Netiquette, Albion Books

Svensson, M and Larsson, S. (2012) Intellectual property law compliance in Europe: Illegal file sharing and the role of social norms, New Media & Society, vol. 14 no. 7 1147-1163

Tullock, G. (1987) "Rent seeking". The New Palgrave: A Dictionary of Economics. Palgrave Macmillan. vol. 4, pp.147–149

UNGA (2011) Human Rights Council, Report of the Special Rapporteur on Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development A/HRC/17/27 Report

Van Munster, R. (2004) 'The War on Terrorism: When the Exception Becomes the Rule', International Journal for the Semiotics of Law 17(2): 141–153 at p.151

Vilaça, G.V. (2010) From Hayek's Spontaneous Orders to Luhmann's Autopoietic Systems, Studies in Emergent Order, Vol. 3 Vol. 3, pp. 50-81

Von Kirsten (2011) Lobbyist der Musikindustrie vor Wechsel zur EU-Kommission, 30th March, Netzpolitik.org.

Weber, M. (1978) *Economy and Society: An Outline of Interpretive Sociology* edited by Guenther Roth and Claus Wittich, Berkeley: University of California Press

Yu, P. (2012) *The Alphabet Soup of Transborder Intellectual Property Enforcement*, Drake University Law School Research Paper No. 12-13

Zittrain, J. (2008) *The Future of the Internet and how to stop it.*, Yale University Press and Penguin UK