Who Governs the Internet?
The Emerging Regime of E-Commerce

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Abstract

The expansion of commercial activities on the Internet has determined the emergence of a set of norms and institutions regulating (or abstaining to regulate) the cyberspace and e-commerce. A number of risks threatening the expansion of electronic markets prompted the emergence of a particular combination of sources and instruments of control over the internet. Some of these sources were private (self-regulation) and some others were public (regulation). Private and public actors/authorities cooperated and competed in order to establish the normative frameworks and the technical configurations governing e-markets. All these activities of control responded predominantly to preferences and interests of private business, and the emerging international regime of e-commerce illustrates a specific set of power relations and structures. The paper presents a comparative model of international regimes’ analysis based on several criteria –degree of development, structure complexity, density of norms, degree of legalization and kind of authority–. According to this model, the international regime of e-commerce is characterised as a regime with a low degree of development, high complexity, high density, low legalization and a mix of private-public control. The role played in the process by the private sector has made an important contribution to the governance of the internet, but it has not always been consistent with public interests and preferences. Thus, huge problems of accountability arise with the emergence of the international regime of e-commerce.
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The aim of this paper is to analyze patterns of power and order on the internet, and more particularly in e-commerce. This analysis will show how important the role played by private authorities has been in the control of electronic markets. Sometimes the power of private actors in this domain has clearly exceeded the power of public authorities, and very often such power has been backed by some legitimacy, by some acknowledgement that those private actors were authorized to exercise it. When power is vested with authority and when it is exercised by private authorities, then it is an act of private authority (Strange, 1996; Cutler, 1999). In the electronic markets private authorities have been decisive in the emergence of the e-commerce regime.

The paper will first briefly describe the structural nature of power on the internet and in the electronic markets. Since the beginning of the commercial activities in the cyberspace, some American corporations have been in a privileged position to control the structures of power and to determine what users and consumers can and cannot do. Such control has been exercised through a combination of sources and instruments shaping the emerging e-commerce regime. Thus, order has been increasingly established and assured in the electronic markets, but very often according to the preferences of the private sector, in the interest of business, and at the expense of public interests. In order to balance this situation, public authorities have a fundamental role to play and should be expected to fulfill their responsibilities for the sake of social justice.
**Structural power in electronic markets**

The nature of power on the internet and in e-commerce, as in any other area of activity in international relations, is both relational and structural. Power in the electronic markets is the ability of actors both to influence other actors and to create the framework of relations taking place on the internet. In international relations, powerful actors are highly interested in the existence of order, and they provide for such order. In the cyberspace there is also order—a pattern of behaviour among the stakeholders oriented to the maintenance and expansion of profits arising from e-commerce. The sources and instruments of control assuring such order have reached a high stage of development and they constitute an emerging regime of e-commerce. This regime, as any other regime, benefits mainly those actors involved in its creation and maintenance—the most powerful actors.

While bearing in mind the dual dimension of power in electronic markets, it is important to note that the structural dimension is particularly decisive to determine the conditions of markets in the cyberspace. Following Susan Strange, we could affirm that the structure of power in e-commerce is formed by the mix of institutions, norms, values and beliefs governing the electronic markets. It is the result of stakeholders’ preferences, but likewise it shapes the framework of relationships where these preferences are defined and it constraints the action of governments, companies, and international organizations, both governmental and non-governmental.

As Strange would have put it, several power structures converge in the electronic markets (Strange, 1988). First, there is the trade structure determining what goods and services are exchanged in the cyberspace, how, in which conditions, and by whom. Secondly, the production structure determines what is produced in the ICT sector, with what technology, in which conditions and by what companies. Finally, there is the knowledge structure, which determines what technology and knowledge are acquired, how are they kept, who diffuse it, through what means, to whom, and in what conditions. Closely related to the knowledge structure would be the culture structure, although the borders between these two power domains are rather fuzzy and difficult to discern. The political economy of e-commerce shows how interlinked the trade structure, the production structure and the knowledge structure are, and how changes in
any of these structures are transferred to the others. Knowledge is the critical resource in any of these changes. The historical importance of the information revolution lies in the transformation of the traditional ways of producing and transmitting knowledge, and e-commerce is an outcome of such historic transformation.

The power structure governing the electronic markets determines the conditions of exchanges of goods and services in the cyberspace. The business sector has been mostly interested in the development of those markets and has pushed private interests so that they prevail over public interests in negotiations affecting the shape of electronic markets. Inter-firm cooperation has made possible for the private sector to influence governments more effectively in order to assume their demands, and the US government has been particularly receptive to them. Generally speaking, the most important demand put forward by companies has been (private) self-regulation of electronic markets, and this principle has been broadly acknowledged by the US government, by the EU institutions and by all the OECD member states. Big companies with some interest in e-commerce have led the self-regulation processes establishing normative frameworks and technical configurations allowing them to expand their businesses with a wide margin of manoeuvre.

American and European public authorities promoted the self-regulatory approach and helped it in at least three ways. Firstly, they monitored the effective implementation of private instruments of control and used public means for the sake of such implementation – economic resources, governmental bodies, courts, etc. Secondly, they adopted public instruments of control when private authorities exceptionally requested them, as the intellectual property regime clearly shows. Thirdly, they cooperated through intergovernmental organizations in order to assure at a transnational level the harmonization of electronic markets.

The power structure of e-commerce is inevitably interlinked with the production structure of all the necessary infrastructure, software and contents required by e-commerce. Telecommunication operators, hardware companies, software firms and big content producers (mainly entertainment content) establish the conditions for the production of the material and digital basis of electronic markets. The activities of some of these industries have historically been tightly controlled by public authorities, but the
processes of economic globalization, the ICT revolution and the widespread adoption of neoliberal policies have tended to alleviate such control.

**American corporations control the internet**

During the nineties, the liberalization of telecommunications put many state monopolies in a difficult situation; these public companies lost the state protection, but at the same time they were helped to enter broader international markets in extremely favorable conditions of competition. Some of the new players in the liberalized international markets were remarkably benefited, whereas other players went through mergers or acquisitions which transformed the markets and industries in fundamental ways. In any case, the liberalization processes reduced the power of public authorities in the telecommunication markets.

In the computer industry, since the creation of the first PCs public control has been almost inexistent. A few hardware companies have controlled the world production of computers in the best suitable conditions that they established for themselves. The antitrust case against IBM, closed down by the US government in 1982, did not prevent this company to keep its leading role in the computer industry, although the environment was certainly more competitive with the participation of other giants like HP-Compaq, Sun Microsystems or Dell. Since the mid-nineties, the patterns of business concentration have intensified and a very reduced number of manufacturers control every single segment of the industry, while the restructuring or diversification of internet activities has helped these big manufacturers to enter now the internet service business. As regards computer chips, the oligopoly is even more acute, with Intel prevailing over the rest of players, in spite of the fierce competition arising during the last decade from Asian manufacturers –initially Japanese companies, later Korean and Taiwanese firms. Combined with Microsoft’s power in the software industry, this prevalence gave rise to *Wintelism*, a huge reflection of power in the production structure of the computer sector (Borrus & Zysman, 1997; Hart & Kim, 2002. With the spreading of internet and the WWW at the beginning of the nineties, software production patterns shifted in a significant manner. Nevertheless, if there is a company with structural power in the digital economy, this company still is Microsoft.
Companies producing contents for electronic markets not only have eluded the control of public authorities, but also they have received their help in the liberalization of information flows through copyright protection laws. The production structure of internet contents is greatly determined by the big American corporations controlling the mass media –Time-Warner, Disney, Bertelsmann, Viacom, News Corporation, Universal, NBC, TCI, Philips, Polygram, Sony, etc.–. During the last decade, in order to deliver their services and products on the internet they have intensified their cooperation with big telecommunication companies, hardware manufacturers and software producers.

Precisely in the domain of internet contents the production structure of global political economy meets the knowledge structure and feeds “cultural power” –the ability to shape the knowledge processes in a society, the ability to directly or indirectly shape concept systems (Comor, 1999: 118-119). As two US government advisors bluntly stated (Nye & Owens, 1996: 29):

This new political and technological landscape is ready-made for the United States to capitalize on its formidable tools of soft power, to project the appeal of its ideals, ideology, culture, economic model, and social and political institutions, and to take advantage of its international business and telecommunications networks. American popular culture, with its libertarian and egalitarian currents, dominates films, television, and electronic communications. American higher education draw. [...] Not all aspects of American culture are attractive, of course, particularly to conservative Muslims. Nonetheless, American leadership in the information revolution has generally increased global awareness of and openness to American ideas and values.

In a more elegant style, other scholars have underlined the connection between the growing role of soft power in the information age and some soft legalized forms of intergovernmental cooperation. According to Anne-Marie Slaughter, one of the more subtle exercises of soft power appears through informal networks of intergovernmental cooperation, sometimes in the shape of poorly legalized institutions, for instance soft law norms. Thus, interestingly enough, soft power is often exercised through soft law, a suitable instrument for less coercive power relations (Slaughter, 2002: 296). For Slaughter, the correlation between soft power and soft legalization demonstrates that the US government has not exercised the possibilities of (coercive) power offered by a higher degree of legalization of international relations. This view differs completely
from the idea that the US government has used international law in its own interest to increase American power, and that the international legal system has been an instrument of the American foreign policy. However, leaving aside the debate on the relation between the legalization of international relations and the nature of power, presently few analysts cast many doubts about the American hegemony.

The nature of the US hegemony has been nicely described from the Gramscian perspective of some critical theorists of international political economy, and not only by underlining its ideological and cultural features, but also by stressing that it is a social hegemony, a hegemony of social groups operating and identifying each other at a transnational level (Cox, 1983; Gill, 1993; Gill & Law, 1993). The public authorities of the US have a very limited control over the knowledge structure, whose power patterns are established by the big American ICT companies. It is not necessarily accurate to identify US business’ interests and US national interest, and not only because of the imprecise and doubtful content of the “national interest”, but also because the welfare of American citizens is not improved more by profits of the companies’ affiliates abroad than by profits from foreign companies’ affiliates in the United States (Reich, 1991).

Big ICT companies, most of them American companies, control the power structures of world e-commerce. The international (or transnational) regime of e-commerce is the result of such control and has been brought about by cooperation and bargaining between firms, as well as between public and private authorities. Actors with any these two kinds of authority have provided the necessary conditions for the establishment and maintenance of order on the internet.

Sources and instruments of control in e-commerce

A number of sources and instruments of control are the basis of the e-commerce regime. A simple model would allow us to analyse and integrate these two sets of means for the control of electronic markets. On the one hand, the two fundamental sources of control are public regulation and private self-regulation. The former refers to legal norms and soft law (in any degree of legalization), as well as to the public acknowledgement of standards being used by market operators and users. The latter refers to private norms and standards effectively regulating how businesses operate on the internet –codes of
conduct, formal and informal adoption of technical standards, rating mechanisms, etc. On the other hand, two fundamental instruments of control are the normative or regulatory frameworks, and the technical configurations of electronic markets—the technology necessary for the functioning of electronic markets. The combination of sources and instruments of control is represented in the following figure:

**Figure 1. Sources and instruments of control in e-commerce**

One of the main questions being addressed here is whether the normative frameworks regulating e-commerce constitute a regime or not. From a formal perspective, in line with the generally accepted definition of international regime, it is not difficult to acknowledge the existence of an e-commerce regime. In effect, the activities developing in the electronic markets are governed by “principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of
international relations” (Krasner, 1982: 2). A decade after the beginning of commercial activities on the web, the institutions governing e-commerce appear to have reached a certain level of development: the domain names system, the protection of intellectual property, the legal security of digital contracts and signatures, the acknowledgement of secure means of payment, or the tax regime for electronic transactions on the net, are some of the core issues of e-commerce already addressed by a developed international regime.

But are we really considering one international regime or a series of international regimes? From a theoretical perspective Friedrich Kratochwil tackled some of the difficulties arising from the imprecise limits of international regimes –or the connections between some of them (Kratochwil, 1993). According to his view, the material specificity of a regime is a necessary condition for its existence, though an insufficient one, since the specific issue should also be highly consensual. Thus, some goods like steel, coffee or textiles were governed by international regimes, whereas goods or areas like sardines, shoes, the outer space or the oceans were not. Certainly, institutions controlling e-commerce refer not to a specific issue area, but to a number of different and sometimes connected areas. These are not always precisely bounded, and their consensual character is sometimes strong, sometimes weak.

*The e-commerce regime*

When considering the existence of an e-commerce regime in electronic markets, as in any issue area, these difficulties might be sorted out by distinguishing between dimensions or categories. In turn, this would allow the creation of a basic typology of regimes partly based on Kratochwil’s work. He distinguished between explicit and implicit regimes, public and secret regimes, and formal and informal regimes (Kratochvil, 1993: 84-92). Here we would use some other categories and distinctions regarding:

1. Development. Institutions forming a regime may be at a low or embryonic stage of development, or they may be well established, at a higher stage. The degree of development depends on the density, soundness and consistency of norms, and not on
how long they have been developing, although older regimes tend to include a higher number and more consistent norms.

2. Structure. Institutions forming a regime may be specific to an issue area or they may belong to connected but different issue areas. In the former case, the regime would be simple, while in the latter the regime would have a complex structure.

3. Density. The number of norms and the degree of connection between them will determine whether the regime is very dense or not. There is a correlation between the degree of density and the stage of development because the former is a function of the latter, although they refer to different features of a regime.

4. Legalization. Depending on how institutionalised the norms of a regime are, an important distinction can be made between “hard” legalization and “soft” legalization (Abbott, Keohane, Moravcsik, Slaughter & Snidal, 2000).

5. Authority. When considering the source of authority from which the regime emerges, there is a basic distinction between public regimes, private regimes and, if both forms combine, hybrid or mixed regimes – in any such hybrid regime there will always be a predominance of either public regulation or private self-regulation.

According to these categories, a characterization of the e-commerce regime easily emerges. Firstly, in order to evaluate the degree of development, it is necessary to bear in mind the fundamental feature distinguishing electronic markets from traditional markets, i.e. e-commerce activities take place (at least partly) on the internet, not in the “real” world. Thus, whether an e-commerce regime exists or not will to some extent depend on the existence of an internet regime. Marcus Franda has extensively dealt with this question and, in his view, the internet regime is embryonic and incomplete (Franda: 2001: 213). In the same vein, Milton Mueller considers that the ICANN and other important technical non-governmental bodies are part of a nascent international regime (Mueller, 2002: 212). Although the e-commerce regime is fed with norms from other well established regimes, internet governance is still at an embryonic and less developed stage, and the regime of electronic markets is still in formation.

Secondly, e-commerce is not really a specific issue area, but a combination of diverse issue areas from traditional and electronic markets. The e-commerce regime is formed by the mix of norms from different regimes regulating commercial activities on the Net:
international trade, intellectual property, foreign investment, international contracts, personal data protection, to name but a few. Each of these regimes has its own features of development, structure, density, legalization and authority. Thus, the convergence in the e-commerce regime of norms from other very diverse regimes makes its structure particularly complex. And such complexity stresses the difficulty to articulate norms from international regimes having operated rather autonomously in the traditional markets, but which are inextricably linked with each other in the electronic markets. This is the case of the relationship between privacy protection and the GATS, between the TRIPS and the WIPO treaties, or between GATS and computer systems protection.

Thirdly, the e-commerce regime is very dense because its high number of norms and the connections between them. Obviously, the complex structure of the regime adds to its density and difficulty of articulation: norms against harmful contents obstruct freedom of expression; privacy protection norms may conflict with those trying to maximize security; or norms assuring freedom of expression may interfere with those protecting intellectual property. Therefore, a choice of values and priorities will be critical to determine which norms or which regime will prevail in each of these conflicts (Ibáñez, 2003).

Fourthly, in the normative frameworks of e-commerce soft law clearly prevails over other legal forms. Thus, electronic markets are characterized by soft legalization. Although binding and non-binding norms coexist, the e-commerce regime is not hardly legalized.

Fifthly, as regards sources of authority, private authorities play a leading role in some core issues of the e-commerce regime. However, this is not a private regime, since public authorities have also highly contributed to its creation and coordination. After all, states have fulfilled some critical functions: they have endorsed and promoted private self-regulation; they have guaranteed the implementation of private norms through public means; and they have legalized soft law norms (public and private) when such norms were insufficient for the protection of business interests –intellectual property rights– or public interests –consumer rights. This combination of public regulation and private self-regulation confers the e-commerce regime its hybrid character, much more stressed than in other international regimes.
To sum up, the regime of e-commerce is a regime at an embryonic stage, structurally complex, with high density of norms, with a low degree of legalization, and hybrid as for its sources of authority. Graphically, such characterization can be represented with a combination of development, structure, density, legalization and authority that would be very different from any other international regime. The following figure represents such characterization of the e-commerce regime:

**Figure 2. A graphic characterization of the e-commerce regime**

Note: The figure assigns numerical values in a one-to-ten scale for every dimension, excepting the one referred to authority, where the scale is applied separately to both public and private authority. In the resulting combination of values for the e-commerce regime the assigned values have been: structure, 8; public authority, 4; legalization, 3; development, 2; density, 6; private authority, 7. The combination of values for the internet regime the assigned values have been: structure, 5; public authority, 3; legalization, 2.5; development, 1.5; density, 3.5; private authority, 7. Such values have been determined after the examination of the most important activities of control by both public authorities –US government, European Union institutions, international governmental organizations– and private authorities –ICT companies, technical bodies, non-governmental organizations, hacker groups– (Ibáñez, 2003).
The graph and figures are not intended to offer a mathematical model at all, but only a graphic representation of differences between international regimes in a comparative way. Thus, the graphic characterization of each international regime will result in polygons with different surfaces and locations. The assignment of numerical values to each dimension might slightly vary according to the subjective evaluation of the observer, but such variation should not be fundamental and would not alter the basic patterns of surface and location for each polygon.

**Public interests in the cyberspace**

As stated above, the resulting order of power structures in electronic markets benefits mainly those with most power in e-commerce. Big ICT companies have been the main beneficiaries of these commercial activities and of the control exercised over the risks threatening them. Public authorities have undoubtedly affected the power structures of electronic markets, but the preferences of private actors and authorities have prevailed over preferences of less powerful players. Thus, private preferences have determined the agenda of e-commerce and the management of its issues. On the one hand, the agenda of e-commerce has been filled with a selection of issues and risks, which have been managed according to the priorities of big companies in the electronic markets. On the other hand, the management of issues and risks in the agenda has been addressed mainly through private self-regulation, which has prevailed over public regulation.

One of the main problems of self-regulation is the democratic deficit generated by the lack of accountability mechanisms. Private authorities are not subject to such mechanisms before those being subject to their instruments of control (Price & Verhulst, 2000: 60). The authority of some companies, business associations, and other private bodies, derives from the acknowledgement of a rather small number of individuals, companies and organizations. In democratic political systems, the legitimacy of private authorities is not comparable to the legitimacy of public authorities. Any of the forms adopted by the representative democracy has enough problems to seriously consider something like a re-delegation of the citizens’ sovereignty from public authorities representing a community to private authorities
representing nobody but themselves, and their own business interests. If this is already a problem at a local or state level, it becomes much more serious at an international or global scale. And this is what has happened with e-commerce on the internet; big transnational companies have taken advantage of the lack of coordination amongst state policies in order to impose their interests and preferences in the e-commerce regime. Yochai Benkler clearly stated this trend (Benkler, 2000: 184-185): private actors with most structural power in electronic markets are interested in the lack of interference by public authorities. The less public authorities intervene, the best private actors and authorities will control how these markets will function. Only in the protection of intellectual property rights private authorities demand protection by public authorities, since they cannot guarantee by themselves the implementation of these rights, nor any punishment for violations.

Until the end of the nineties both internet users and hackers defended total freedom in cyberspace. The evolution of internet since the mid-nineties demonstrated how harmful the retreat or lack of public regulation can be. And this for a very simple reason: private self-regulation allows norms to be imposed by the most powerful actors, whose values and interests will prevail over the majority if there is any conflict. As Debora L. Spar puts it, on the internet “power lies with those who make the rules” (Spar, 1999: 48), as in any other area of social relations. If norms are made by big companies through self-regulation, power will lie with big companies. Actually, this is where it already is. It can even be worse if the internet is commercialised on a larger scale and if new public goods brought about by the Net become privatised. Scholars like Saskia Sassen have pointed out the former danger (Sassen, 1999), while Lawrence Lessig has brilliantly shown the loss of free spaces in the face of growing control by business (Lessig, 1999 and 2001). Both ideas emerge from the same evidence: internet is being transformed, it is ceasing to be a public, open, free and cheap space and it is becoming a private, closed, controlled and expensive space.

In our view, it is absolutely necessary to reconsider the role of public authorities in the cyberspace. This means neither regulation for the sake of regulation, nor total control of the net by the state, nor unrestricted state intervention in electronic markets. However, public authorities have a critical role to play in three directions. First, the internet should be maintained as a public good, since its sociopolitical benefits for societies are much
more valuable than the economic benefits generated by e-commerce. Secondly, socioeconomic inequalities should be avoided in the cyberspace; they are sufficiently deep in the real world and the digital divide should not add to the socioeconomic divides already existing. Thirdly, the internet offers huge possibilities of social, political and economic benefits, but these should be widely spread and effectively used to improve human development all over the world –not only in some sectors of some societies, whether rich or poor.

The internet has opened up the door for the development of new forms of political participation and organization, but their real value will depend on their ability to improve the existing conditions of political activity. New forms of legitimacy and representation are still to appear in the cyberspace, but in the meantime it would be a huge mistake to undermine the role that public authorities could play as depositories of the citizens’ will. For the moment, only these authorities have some kind of obligation to guarantee order and justice in a postinternational society characterized by the coexistence of overlapping authorities cooperating and competing for the imposition of their own values and interests (Ibáñez, 2004). In the cyberspace, only public authorities are expected to adopt and impose measures of distributive justice assuring the protection of human dignity in any society. Private authorities are only expected to expand markets and to favour business activities. Being things so, for those in need of protection and help, the state is not a panacea, but its retreat is much worse.
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