INTRODUCTION

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This issue of the Stanford Law and Policy Review contains five insightful articles about proposed government regulation of different new technologies. Individually, each article describes how regulation of a particular new development, whether digital or medical, comports with the values and desires of the public and proposes a way that individual interests could be better enshrined in public policy.

As a set, the five articles reveal an underlying consensus: what the public wants is what the public should have, with only narrow exceptions in the case of medical safety and the rare market failure. The market is the morality.

In the opening article of this issue, Congressman Rick Boucher details an onslaught of legislative proposals from a media industry intent on strengthening its bargaining position vis-à-vis consumer electronics manufacturers.1 In short, Big Content wants to control the features Big Devices build into their products, and customer fair use rights are collateral damage. As a thirteen term U.S. Representative for Southern Virginia and member of the House Judiciary Committee’s Internet and Intellectual Property Subcommittee, Boucher has a front row seat for this battle of the titans.

Luckily for consumers, the consumer electronics trade groups are a powerful opposition to the copyright industries, and the manufacturers want to give culture lovers gadgets with all the bells and whistles. This power player is standing up for customer freedom, for fair use, and for a certain kind of innovation, though they do so out of self-interest, rather than out of a sense of the inherent public value in fair use and freedom to create. There is a choice here, between security and control for the copyright owners and freedom, risk, and innovation for the consumer. Congressman Boucher shows that in the balance between copyright, creativity, and public access, the technological future that the public imagines is brighter than the one that the copyright owners would grant.

Steven Goldberg's article looks at innovation in a different field—biotechnology—and asks whether unregulated public access to untested...

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medical procedures is appropriate. Against a background of regulation in which new medical risks are subject to detailed study and heavy regulation, Goldberg points to several signs of a more libertarian approach to policy. The public craves the benefits of scientific and medical innovation and often is willing to incur new health risks in the hopes of curing current medical problems.

Unlike Congressman Boucher, Goldberg sees consumer self-interest as far more dangerous, at least in the medical sector. He concludes that there will inevitably be unintended consequences to new medical procedures, which will result in lawsuits, high profile failures, calls for regulation, and the usual policy limitations. Goldberg argues that prudent regulation may actually promote progress by bringing it into accord with social expectations for safety. Is there something unique about the promise and risk of biotech/medical innovations that suggest they should be more—or less—regulated than other new technologies?

Stacy Baird's article defines a narrow set of circumstances under which the government should get into the business of regulating digital technology standards. Restraint is better, Baird argues, because the technology industries are extremely “sophisticated”—and the government is decidedly not—when it comes to establishing a common language for internet transmissions, or for software interoperability. Baird likes that industries can be highly responsive to market demands, and the people's choice as determined by the market, should be the prevailing standard. Yet, Baird's view disfavors even those regulations which would support customer choice. For example, both Baird and Congressman Boucher agree that regulation in favor of copyright business models is unwise. Baird provides an interesting counterpoint; the French Parliament's consideration of digital rights management interoperability legislation, which would have been a victory for consumers, but would have created problems for content companies reliant on DRM Government intervention. Intervention in favor of the consumer interests is perhaps as unwise as regulation in favor of strong copyright interests. Baird favors flexibility over assurances of consumer protection. What normative guidelines, other than faith in the marketplace, can aid us in these complicated policy choices?

David W. Opderbeck's game theory analysis of the battle for supremacy between “open” and “closed” intellectual property rights systems is also a call

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for policy that values public access over industry growth and prosperity. 5 Opderbeck adds to our understanding of the intellectual property policy dynamic by using game theory to account for price elasticity, network effects, and the influence of open access and distribution of products. His article provides a playbook for the open source and open access communities, whether in software or science. Specifically, game theory suggests that those who want more openness would do better to try to influence public policy through bottom-up ethical and cultural changes that influence public norms, than through advocating for openness in the forums where public policy is more directly made. Open source and access advocates may not be happy with this conclusion, but Opderbeck's intentions are clearly to promote more open IP regimes.

The final article by Russell Korobkin looks at the ethical challenges posed by human cloning. 6 Korobkin shows that there is a strong relationship between research that enables cloning and research that produces valuable new medical therapies, belying the public's distaste for the former and desire for the latter. In the ethical choice between banning cloning and inhibiting research, or allowing the practice and opening opportunities for innovation, Korobkin comes down solidly on the side of letting the researchers work without impediments or restrictions. He concludes that there is a public right to access the fruits of scientific advancement and medical knowledge, and that whatever moral disgust or futuristic fears one holds about cloning, the public good from potential medical breakthroughs outweigh those values and concerns. Korobkin recognizes, as Goldberg does, that there are risks. But he comes to a different conclusion about the acceptability of unintended consequences and the role of the government in protecting the public from itself.

People extol the revolutionary nature of modern innovation. New technologies will transform our work, our minds, our bodies, and, especially in Silicon Valley, we believe that these transformations will be inherently liberating. Internet businesses are going to infect China with democratic ideals. Cybernetic implants will make us stronger and longer-lived. San Francisco will lead the world in medical cures from stem cell research. New fangled internet gismos will make working fun again.

The internet has its own manifesto—John Perry Barlow’s 1996 paper A Declaration of the Independence of Cyberspace—which lauds freedom and autonomy of thought, unsullied by terrestrial powers or nations, governed by enlightened self-interest and the Golden Rule. 7 Merely ten years later, we know

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that technol Libertarianism was empirically wrong. The internet is profoundly regulated at every layer.

But the values that animate Barlow’s proclamation prevail today, especially in Silicon Valley. What individuals want, they should get, and the results will be not just transformative, but fantastically empowering. People want to hear music anytime, anywhere, and we want to be able to create our own songs by reworking the tunes we know, love, and listen to on the radio. People want to be able to live longer, healthier lives. Like Barlow, our writers also mostly presume that enlightened self-interest is the way to go. Goldberg raises a flag of caution where the issue is medical safety, and Baird suggests that free standards which allow rapid market innovation will benefit us more in the long term than legislating rights protections at a particular point in time. Still, a liberal view of ethics in technology policy has firm hold. Regulation should be directed towards giving the people what they want, rather than protecting us from the unknown or controlling disruptive technology to minimize its unsettling effects.

Public access or private incentives? Cures or safety? Privacy or free speech? Individual preferences may be as good a guideline as any for making tough policy choices, and I am in no better position than anyone else to guess whether this is right. Yet, the subtlety of the ethical tradeoffs these scholars portray suggest that policy makers would benefit from a more systematic normative theory of technology policy.

Would-be tech regulators face the same ethical questions that arise with any policy choices; when does the market fail to produce socially optimal results, and what do we do about it? How do we protect individual interests under majoritarian rule? Which choices promote transparency, accountability, and legitimacy?

Technology policy inevitably raises other questions, too. When faced with new and unknown risks, individual choice is more problematic because we do not know enough to effectively pursue our interests. How do we handle unanticipated future victims? In a system or network economy, individual choices and policy changes can have proportionately too much or too little effect. If one part of freedom is the right to make your own mistakes, what should we do when the system—computers, environment, public health—is only as strong as the weakest link in the chain?

Perhaps paternalism deserves a better place in technology policy, where the outcomes are unknown and new, and where there are external costs that we cannot anticipate and do not fully bear the brunt of as individuals. The copyright industry certainly believes this is the case with IP policy, and privacy advocates agree when the issue is control over our personal information. How much weight should we give to public fear, uncertainty, and doubt, to the
feeling that some technological advances are just plain “creepy”? Or must we embrace technology and all the ramifications that it might bring?

In 1964, philosopher Jacques Ellul wrote about the relationship of technology to spirituality and ethics. He argued that modern society holds technology sacred, believes that it is a necessity, and that the love of efficiency and rationality leaves a moral and spiritual vacuum in its place. The thoughtful articles in this issue show that perhaps Ellul worried too much, for these writers are grappling with ethical questions in some very difficult technological policy realms. Ellul was right, however, that mere rationality does not resolve our ethical dilemmas, nor can it guide our policy choices.

9. Id. at 134 (“Since [technique] has put itself beyond good and evil it need fear no limitation whatever.”); id. at 141 (“[Man] therefore transfers his sense of the sacred to the very thing which has destroyed its former object: to technique itself.”).
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