
THE PRINCIPLES FOR USER GENERATED CONTENT SERVICES: A MIDDLE-GROUND APPROACH TO CYBER-GOVERNANCE

The debate over how, whether, and by whom the Internet should be regulated has occurred mostly at the extremes: some have argued that formal regulation of the Internet is impossible and undesirable, advocating for self-governance and heavy reliance on private arrangements,¹ while others have argued that formal, traditional regulation is possible, inevitable, and ideal.² The recently announced Principles for User Generated Content Services³ (Principles), a set of guidelines negotiated among various industry stakeholders that takes existing formal copyright law as its starting point and background assumption, illustrate that self-governance and traditional regulation can complement one another. The Principles therefore suggest the possibility and promise of a middle-ground approach to online governance. Their strengths and weaknesses shed light on what an ideal middle-ground approach might look like. In this approach, self-governance and private arrangements would operate *within* a generalized legal framework instead of replacing official regulation altogether. In addition to providing clear background rules, that legal framework would ensure that private arrangements adequately take into account the interests of all constituencies.

In October 2007, leading commercial copyright owners, including CBS and Disney, and YouTube-like user-generated content (UGC) services that display and distribute user-uploaded and user-generated audio and video content⁴ announced that they had agreed on the Principles.⁵ So long as UGC services followed the Principles — by, for example, using state-of-the-art filtering software and displaying information about the importance of intellectual property rights — copyright owners would not sue them for copyright violations committed

¹ See, e.g., John Perry Barlow, A Declaration of the Independence of Cyberspace (Feb. 8, 1996), <http://homes.eff.org/~barlow/Declaration-Final.html>.

² See, e.g., Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475 (1998).

³ Principles for User Generated Content Services, <http://www.ugcprinciples.com> (last visited Feb. 9, 2008).

⁴ A UGC service's website allows visitors to upload their own material onto the site. Subsequent visitors to the website can then access the video, audio, and written material so uploaded. Some criticize the term UGC as too sterile to encompass the creativity involved in producing art that is uploaded onto sites like YouTube. See, e.g., Just a Thought, <http://www.powazek.com/2006/04/000576.html> (Apr. 4, 2006).

⁵ Press Release, Internet and Media Industry Leaders Unveil Principles To Foster Online Innovation While Protecting Copyrights (Oct. 18, 2007), available at http://www.ugcprinciples.com/press_release.html. Interestingly, YouTube itself is not a signatory.

by the services' users.⁶ Because the agreement is not legally enforceable, it is most accurately described as an informal understanding among the participating parties and not as a binding contract.⁷ Although the Principles took the existing U.S. copyright regime and associated enforcement mechanisms as their starting point, the parties came up with their own rules about what private entities would do to further the competing interests underlying copyright law: encouraging the production of creative works while ensuring that people are able to access, enjoy, and build upon them. Thus, the Principles represent self-governance at the secondary level: the privately drafted and privately agreed-upon Principles indicate *how* the law will be followed and *when* violations will give rise to civil lawsuits.⁸

The Principles show that cyberspace is evolving toward a model of negotiated self-governance against a background of legally enforceable rules. The very need for the Principles illustrates the failure of traditional law as a sole, sufficient solution to the problem of online copyright infringement, but the Principles nevertheless build upon traditional law. To be sure, the negotiated settlement occurred in the shadow of litigation, but it also illustrates the continued vitality of cooperation and self-regulation as drivers of online behavior.

The Principles' reliance on traditional legal rules illuminates the crucial need for courts and legislatures to develop and enforce clear, sensible rules that are sufficiently general so as not to mandate the use of particular technologies or methods, which could stymie development and innovation. At the same time, the absence of certain parties at the negotiating table shows that there may be room for traditional regulators to step in and at least ensure fair representation at the time bargains are being struck.

This Note begins, in Part I, by summarizing the literature on cyber-governance, tracing commentators' evolving attitudes toward self-governance and private arrangements. Part II describes the Principles and their development, focusing on the threads of cooperation and private arrangements underlying the Principles. Part III examines the Principles in light of the various approaches legal scholars have taken to cyber-governance and argues that the Principles represent a promising middle ground that takes advantage of the benefits and minimizes the problems associated with each model. Part III also provides a suggestion for how to deepen and extend the middle-ground approach embodied in the Principles, based upon some of their strengths and weaknesses. Part IV concludes.

⁶ Principles for User Generated Content Services, *supra* note 3, para. 14.

⁷ See Posting of Sherwin Siy to Policy Blog (Public Knowledge), <http://www.publicknowledge.org/node/1230> (Oct. 18, 2007, 16:41 EST).

⁸ Importantly, the Principles do not affect criminal prosecutions brought by the government.

I. THE LITERATURE ON CYBER-GOVERNANCE

Early in the Internet's history, scholars embraced self-regulation and private arrangements both normatively and descriptively, arguing that self-governance should be and would be the exclusive driver of online behavior. Later, scholars questioned both the merits and the feasibility of such an approach.

A. *The Internet Libertarians: The Internet Cannot and Should Not Be Regulated*

At the outset, the Internet seemed destined (and determined) to avoid legal regulation. On February 8, 1996, John Perry Barlow, co-founder of the Electronic Frontier Foundation (EFF), declared the independence of cyberspace. Responding to the Communications Decency Act of 1996⁹ (CDA), which, among other things, prohibited the transmission of certain obscene material online, Barlow asserted that the online world was and always should be free from governmental intervention:

I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

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.¹⁰

Barlow's declaration, like his essay *The Economy of Ideas*,¹¹ expressed a skeptical view of the legitimacy and feasibility of traditional forms of governance within cyberspace. His declaration embraced the axiomatic democratic notion that the consent of the governed is crucial to legitimate government. At the same time, he suggested that because cyberspace is different in kind from the physical, presumably regulable world, the government's intervention attempts would not succeed.¹²

First, he implicitly invoked territoriality, jurisdiction, and citizenship as limits on governmental regulation. Because it is difficult to trace the physical location of users who act online, it is unclear which

⁹ Pub. L. No. 104-104, tit. V, 110 Stat. 133, *invalidated in part by* Reno v. ACLU, 521 U.S. 844 (1997).

¹⁰ Barlow, *supra* note 1.

¹¹ John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84, *available at* <http://www.wired.com/wired/archive/2.03/economy.ideas.html>.

¹² See Barlow, *supra* note 1 ("Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.").

jurisdiction's laws regulate online behavior. Likewise, because traditional jurisdictional principles depend on location, it was unclear early on whether any court (and if so, which court) would have jurisdiction to hear claims premised on online behavior.¹³ Second, he emphasized that since copyright protected the physical expression of ideas and not the ideas themselves, copyright law would be ineffective in cyberspace, where ideas can be exchanged without being physically expressed.¹⁴ Third, and most importantly for the purpose of this Note, he argued that cyberspace grows, develops, and evolves as a result of collective action. Thus, social norms and rules developed online and agreed upon by users and content providers would dictate online behavior; those norms could be codified into law once sufficiently established.¹⁵ Therefore, he explained, private ordering would likely eventually replace official regulation.¹⁶ Similarly, he argued that unwritten understandings govern behavior on the Internet and claimed that this unwritten set of norms and mores was superior to any legal rules that could be imposed on cyberspace — and that it was more likely to give rise to just results, even if those norms and mores were not organized or orderly.¹⁷ In so arguing, Barlow hailed the benefits and inevitability of self-governance and private ordering on the Web, taking possibly the most extreme antiregulation stance of any cyberlaw scholar.¹⁸

Legal scholars echoed, to lesser degrees, Barlow's assertion that cyberspace could not be feasibly regulated. In a now-famous article, Professors David Post and David Johnson argued that because electronic (online) transactions and communications could not be clearly connected to a particular nation-state jurisdiction, the Internet challenged both the legitimacy and the feasibility of a nation-state's regula-

¹³ See Barlow, *supra* note 11, at 86.

¹⁴ *Id.* at 88.

¹⁵ See *id.* In Barlow's words:

In a more perfect world, we'd be wise to declare a moratorium on litigation, legislation, and international treaties in this area until we had a clearer sense of the terms and conditions of enterprise in cyberspace. Ideally, laws ratify already developed social consensus. They are less the Social Contract itself than a series of memoranda expressing a collective intent that has emerged out of many millions of human interactions.

Humans have not inhabited cyberspace long enough or in sufficient diversity to have developed a Social Contract which conforms to the strange new conditions of that world. Laws developed prior to consensus usually favor the already established few who can get them passed and not society as a whole.

Id.

¹⁶ *Id.* at 89.

¹⁷ See *id.* at 128.

¹⁸ Barlow has since somewhat moderated his position. See Brian Doherty, *John Perry Barlow 2.0*, REASON, Aug./Sept. 2004, at 42, 47-49, available at <http://www.reason.com/news/show/29236.html>.

tion of online conduct.¹⁹ Because no particular sovereign could easily be identified with specific online behaviors (and the actors so behaving), the consent of the governed could not be obtained.²⁰ Further, Professors Post and Johnson argued that “efforts to control the flow of electronic information across physical borders — to map local regulation and physical boundaries onto Cyberspace — are likely to prove futile.”²¹ They explained that there is simply too much cross-border electronic communication for government authorities to regulate effectively.²² As a result, they concluded that the Internet had created “entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily, by any current territorially based sovereign.”²³ Therefore, they argued, the online world should be treated as a “distinct ‘place’ for purposes of legal analysis.”²⁴

For Professors Post and Johnson, in the distinct place of cyberspace, special online-only rules should govern. Under such a regime, it would be clear to users what law applied to them, and they would not have to fear that the governments of various jurisdictions would hold them responsible for conduct that they did not even know was prohibited.²⁵ Moreover, knowing what law would apply to them, users could conceivably consent to online-only rules.²⁶ Professors Post and Johnson discussed, by way of example, domain names, which, in the authors’ proposed regime, would be ordered through a global registration system. Not only would the global online system “fully account for the true nature of the Net by treating the use of marks on Web pages as a global phenomena [sic], by assessing the likelihood of confusion and dilution in the online context, and by harmonizing any rules with applicable engineering criteria”; but the system would also help avoid in-

¹⁹ See David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996); see also Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL’Y 475 (1997); I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993 (1994) (arguing that, absent special reasons to the contrary, self-help, custom, and contract should be the predominant modes of cyberspace governance); Edward J. Valauskas, *Lex Networkia: Understanding the Internet Community*, FIRST MONDAY, Oct. 7, 1996, <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/490/411> (arguing that Internet self-governance should be formalized).

²⁰ Johnson & Post, *supra* note 19, at 1375.

²¹ *Id.* at 1372.

²² *Id.*

²³ *Id.* at 1375.

²⁴ *Id.* at 1378.

²⁵ *Id.* at 1380 (“[Y]ou would know to abide by the ‘terms of service’ established by CompuServe or America Online when you are in their online territory, rather than guess whether Germany, or Tennessee, or the SEC will succeed in asserting their right to regulate your activities and those of the ‘placeless’ online personae with whom you communicate.”).

²⁶ See *id.*

consistent assertions of authority from various territorial sovereigns.²⁷ Like Barlow, they concluded that self-governance was the solution to the problem of nonregulability.²⁸

Professors Post and Johnson proclaimed their belief that “the Net can develop its own effective legal institutions.”²⁹ They cited the domain name system and social norms developed online, such as rules against flaming³⁰ and mailbombing,³¹ as examples of online regulatory regimes that were separate from territorial sovereigns and yet effective.³² Like Barlow, the legal scholars who rejected the possibility of traditional regulation of Internet activity emphasized that self-governance and private ordering could stand in the place of formal, externally imposed governance to create an ordered system.

In 1997, the United States Supreme Court implicitly agreed, at least partly, with the Barlow-Post-Johnson position when it decided *Reno v. ACLU*.³³ The *Reno* Court struck down — on First Amendment grounds — significant portions of the CDA, which purported to regulate online content by imposing liability on Internet service providers (ISPs). The CDA prohibited transmission and display of patently offensive sexually explicit material,³⁴ but it provided affirmative defenses to ISPs that used “reasonable” means to prevent minors from viewing the restricted material.³⁵ Rather than applying the more deferential approach that the government had advocated,³⁶ the Court employed a strict scrutiny analysis. The Court reasoned that although the law’s aims were legitimate, its means were not narrowly tailored, because the goal could have been less restrictively achieved by regulating the end user.³⁷

²⁷ *Id.*

²⁸ *Id.* at 1387.

²⁹ *Id.*

³⁰ According to Wikipedia, a seemingly appropriate source for definitions of online behavior: *Flaming* is the hostile and insulting interaction between Internet users. Flaming usually occurs in the social context of a discussion board, Internet Relay Chat (IRC) or even through e-mail. An Internet user typically generates a flame response to other posts or users posting on a site, and such a response is usually not constructive, does not clarify a discussion, and does not persuade others.

Wikipedia, *Flaming (Internet)*, [http://en.wikipedia.org/wiki/Flaming_\(Internet\)](http://en.wikipedia.org/wiki/Flaming_(Internet)) (last visited Feb. 9, 2008).

³¹ According to Wikipedia, an e-mail bomb “is a form of net abuse consisting of sending huge volumes of e-mail to an address in an attempt to overflow the mailbox *or* overwhelm the server where the email address is hosted in a denial-of-service attack.” Wikipedia, *E-mail Bomb*, http://en.wikipedia.org/wiki/Email_bomb (last visited Feb. 9, 2008).

³² See Johnson & Post, *supra* note 19, at 1388.

³³ 521 U.S. 844 (1997).

³⁴ Pub. L. No. 104-104, tit. V, § 502(2)(d), 110 Stat. 133, 133–34 (codified as amended at 47 U.S.C.A. § 223(d) (West 2001 & Supp. 2007)).

³⁵ *Id.* § 502(2)(e)(5), 110 Stat. at 134 (codified at 47 U.S.C. § 223(e)(5) (2000)).

³⁶ See Brief for the Appellants at 19–23, *Reno*, 521 U.S. 844 (No. 96-511), 1997 WL 32931.

³⁷ *Reno*, 521 U.S. at 875–82.

Because most online activity is speech, and because it may not be possible to regulate speech online in a way that satisfies strict scrutiny, *Reno* casts doubt on the possibility of valid governmental regulation of cyberspace. Regulation of this area is therefore likely to take place, if at all, through self-governance. For example, websites or ISPs may adopt their own speech-related guidelines for users. Moreover, relative to other contexts, the Internet may provide more tools for users and service providers to collaborate in developing those guidelines.

*B. The Real-World Parity Advocates:
The Internet Can and Should Be Regulated*

In a series of articles, Professor Jack Goldsmith took issue with the claim that the Internet could not be regulated (and hence that any order had to be enforced through social norms and self-governance).³⁸ He argued that cyberspace was not inherently different from other territorial spaces and that, as a result, the rules and jurisprudential doctrines applicable to other transnational transactions could be marshaled to facilitate regulation of the Internet.³⁹ Rejecting Professors Post and Johnson's assertion that the Internet was a separate place, Professor Goldsmith explained that "[l]ike the telephone, the telegraph, and the smoke signal, the Internet is a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction."⁴⁰ In his view, territorial sovereignty supported the regulation of communication taking place within a territory and of the local effects of conduct taking place outside the territory.⁴¹

Professor Goldsmith argued that the three basic assumptions underlying the nonfeasibility claim were flawed. First, he asserted that even though Internet information flow might have an "extraterritorial" source, such communication could still be regulated based on its local impact.⁴² Conceding that governments might not be able protect their borders — whether electronic or geographic — from all harmful effects of foreign activity, Professor Goldsmith noted that such effects could be "regulated *ex post* through legal sanctions."⁴³ However, he recognized that the Internet's architecture made it possible that actors inflicting local harm would lack a local presence, a fact which complicated enforcement of such *ex post* sanctions. To deal with this

³⁸ See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); Goldsmith, *supra* note 2; Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119 (1998).

³⁹ Goldsmith, *supra* note 2, at 475.

⁴⁰ *Id.* at 476.

⁴¹ *Id.*

⁴² *Id.* at 479.

⁴³ *Id.*

problem, Professor Goldsmith argued, governments could resort to indirect regulation: intervening at the end-user stage by penalizing local website visitors who “use illegal content or who otherwise participate in an illegal cyberspace transaction.”⁴⁴ Recent, high-profile examples of such end-user regulation include the recording industry’s suits against Napster and Limewire users who had downloaded music illegally.⁴⁵ Many filesharing services like Napster have been shut down,⁴⁶ and many music downloaders have shifted to services like iTunes that provide legal, relatively inexpensive music for downloading.⁴⁷

In response to the argument that Internet regulation cannot be effective because different jurisdictions may impose different regulations on the same conduct, Professor Goldsmith asserted that “[a] government’s regulation of the harmful local effects of an Internet transaction does not become less legitimate because the effects of the same transaction are regulated differently in other jurisdictions where these effects appear.”⁴⁸ The complications resulting from inconsistent regulations could be addressed by the harmonization of standards and rules across jurisdictions, or by requiring content providers to solicit information about users’ geographic locations and thus clarify from the outset whose law applies to a particular transaction.⁴⁹ This approach would also help address concerns about the consent of the governed.⁵⁰

Professors Joel Reidenberg and Lawrence Lessig mounted a more technical argument that regulation of the Internet was possible. According to Professor Reidenberg, if a sovereign regulated the people who wrote the technical code that drove online content and access, it could control how people behaved on the Internet.⁵¹ For example, a

⁴⁴ *Id.* at 481; *cf.* *Reno v. ACLU*, 521 U.S. 844, 874–79 (1997) (noting that end-user regulation is possible); Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653 (2003) (discussing the efficacy of online regulation focusing on ISPs).

⁴⁵ See Reuters, *Record Labels Sue LimeWire for Enabling Music File-Sharing*, FOXNEWS.COM, Aug. 6, 2007, <http://www.foxnews.com/story/0,2933,207287,00.html>.

⁴⁶ See, e.g., John Borland, *Supercharged College P2P Network Closes*, CNET NEWS.COM, Nov. 14, 2005, http://www.news.com/2100-1027_3-5952060.html; Christopher Jones, *Open-Source ‘Napster’ Shut Down*, WIRED, Mar. 15, 2000, <http://www.wired.com/science/discoveries/news/2000/03/34978>.

⁴⁷ See, e.g., Press Release, NPD Group, *iTunes More Popular than Most Peer-to-Peer File Sharing Services* (June 7, 2005), available at http://www.npd.com/press/releases/press_050607.html.

⁴⁸ Goldsmith, *supra* note 2, at 484.

⁴⁹ See *id.*

⁵⁰ Indeed, as Professor Goldsmith predicted, courts have crafted solutions for answering questions about territoriality in cyberspace. See, e.g., *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). See generally Jonathan Zittrain, Berkman Ctr. for Internet & Soc’y, *Jurisdiction in Cyberspace*, http://cyber.law.harvard.edu/ilaw/mexico_2006_module_9_jurisdiction (last visited Feb. 9, 2008).

⁵¹ See Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 580–81 (1998).

government could sanction developers within its jurisdiction who wrote code that facilitated the distribution of child pornography on the Web, thereby limiting access to the objectionable content. Similarly, a government could provide tax benefits to ISPs who filtered out content that included words like “Nazi” in an effort to regulate hate speech.⁵²

Building on this notion of feasibility but adding normative concerns, Professor Lessig argued that computer code could be law and regulate people’s behavior only so long as the code was closed and proprietary, thus preventing users from adapting it to circumvent any regulation.⁵³ Yet with open code subject to revision by subsequent users, even if a game developer were forced to write code in such a way that players could not name their characters “Hitler,” for example, gamers could simply rewrite the code to allow for such expression. Thus, code developers could frustrate governments’ attempts at regulation by using open code.⁵⁴ By encouraging the use of open code, Professor Lessig promoted the notion that self-governance was the most appropriate approach to cyberspace governance, although not necessarily the only possible one.

Professor Neil Netanel took the argument for traditional regulation one step further, contending that governmental regulation was not only possible, but also normatively superior to self-regulation of the Internet.⁵⁵ He argued that self-regulatory bodies on the Internet were doomed to struggle with the same problems that afflict other direct democracies:

An untrammelled cyberspace would ultimately be inimical to liberal democratic principles. It would free majorities to trample upon minorities and would 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 netizenship and citizenship in the information age.⁵⁶

⁵² Of course, such a filtering system might be overinclusive and ban users condemning Nazism. One amusing example of such overinclusiveness occurred when the U.S. government installed a filter on a service it provided to assist Iranian citizens in circumventing their own government’s filtering. The U.S. filter prohibited any domain names containing “ass”; this ultimately barred access to the U.S. embassies’ own portal at usembassy.state.gov. See JONATHAN L. ZITTRAIN, *THE FUTURE OF THE INTERNET — AND HOW TO STOP IT* 115 (2008); OpenNet Initiative, *Unintended Risks and Consequences of Circumvention Technologies: The IBB’s Anonymizer Service in Iran* (May 5, 2004), <http://www.opennetinitiative.org/advisories/001/>.

⁵³ See Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 *BERKELEY TECH. L.J.* 759 (1999).

⁵⁴ See Lawrence Lessig, *CODE: VERSION 2.0*, at 152 (2006), available at <http://pdf.codev2.cc/Lessig-Codev2.pdf>.

⁵⁵ See Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 *CAL. L. REV.* 395 (2000).

⁵⁶ *Id.* at 498.

He was similarly concerned that nonterritorial, voluntarily governing associations would not fulfill the promise of fostering fair, participatory democracy online. For example, at the time of Professor Netanel's writing, the Internet Corporation for Assigned Names and Numbers (ICANN), the nonterritorial association for domain-name registration and regulation, was hailed as a paradigm of online self-governance: it had adopted a board structure that gave five of nineteen seats to members of the Internet-using public.⁵⁷ Professor Netanel aptly predicted that the ICANN paradigm would not live up to most people's optimistic expectations, but rather would become subject to special interest politics and the imposition of power-wielders' views on minorities.⁵⁸ By 2002, his prediction had come true: ICANN's board structure had been revised and representatives of various government agencies had replaced the members of the public on the board of directors.⁵⁹ Citizen participation had become a thing of the past.

*C. Hints at a Middle Ground: Private Arrangements
Against the Background of Traditional Legal Frameworks*

Coming closest to espousing a middle-ground approach, though perhaps unwittingly, Judge Easterbrook thought it impossible to "regulate the whole process of information exchange"⁶⁰ and so rejected a *sui generis* approach to the Internet. He compared the law of cyberspace to "the law of the horse," which he believed could be much better learned (and developed) by studying the general rules governing torts, contracts, and commercial transactions.⁶¹ He emphasized that this preference for general rules over specialized ones was especially appropriate in cyberspace, where the pace of change was so great that any specialized legal rules that could be developed would likely become outdated shortly thereafter.⁶² Therefore, a "sound law of intellectual property" should be developed and then applied to cyberspace and other developing technologies.⁶³ Judge Easterbrook suggested that absent a sound legal framework, private efforts to apply existing intellectual property law might be problematic. He further emphasized that even the legal problems posed by preexisting technology had not yet been addressed when Internet-related complications began to

⁵⁷ See John Palfrey, *The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed*, 17 HARV. J.L. & TECH. 409, 446-49 (2004).

⁵⁸ Netanel, *supra* note 55, at 486.

⁵⁹ See Palfrey, *supra* note 57, at 412.

⁶⁰ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 213.

⁶¹ See *id.* at 208.

⁶² See *id.* at 215 ("Let us not struggle to match an imperfect legal system to an evolving world that we understand poorly.")

⁶³ See *id.* at 208.

arise: fair use questions about, for example, whether photocopying journal articles amounted to a copyright violation had not yet been answered. The courts, including the Supreme Court, that had grappled with that question were deeply divided.⁶⁴ As a result, Judge Easterbrook could not believe that the law was ready to be tailored to cyberspace: “If you don’t know what is best, let people make their own arrangements.”⁶⁵ Judge Easterbrook’s approach hinted at the importance of both self-governance and private arrangements on the Internet, but within a framework of clearly established legal rules.

In a new book that builds on arguments concerning the importance of private arrangements set against the background of traditional legal regimes, Professor Jonathan Zittrain emphasizes the role of cooperation and self-governance in the Internet’s development. He describes the Internet’s founding architecture as “built on neighborliness and cooperation among strangers occupying disparate network nodes.”⁶⁶ Moreover, he stresses that innovative and successful websites like Wikipedia reflect both cooperation and self-governance: “Wikipedia — with the cooperation of many Wikipedians — has developed a system of self-governance that has many indicia of the rule of law without heavy reliance on outside authority or boundary.”⁶⁷ Working within the framework of existing American copyright law, for example, Wikipedia developed its own standards for how that law should be followed and enforced on the site.⁶⁸ To Professor Zittrain, the governing principles of Wikipedia represent “the essence of law: something larger than an arbitrary exercise of force, and something with meaning apart from a pretext for that force, one couched in neutral terms only for the purpose of social acceptability.”⁶⁹ Not surprisingly, Professor Zittrain sees in Wikipedia’s virtues — a “light regulatory touch,” consensus, and cooperation — the seeds of solutions for other problems on the Internet.⁷⁰ This spirit of cooperation and collaboration is consistent with the idea that some self-governance should be maintained in cyberspace even when traditional law also applies, and that a need for self-governance may be inherent in the Internet’s fabric.

⁶⁴ *See id.* at 208–09.

⁶⁵ *Id.* at 210.

⁶⁶ ZITTRAIN, *supra* note 52, at 130.

⁶⁷ *Id.* at 143.

⁶⁸ *See id.* Similarly, encyclopedia-like entries on the site are the products of cooperation and division of responsibilities agreed upon by collaborators dispersed throughout the world. *See id.*

⁶⁹ *Id.* at 144.

⁷⁰ *Id.* at 146.

II. THE PRINCIPLES FOR USER GENERATED CONTENT SERVICES

Online copyright infringement became a high-profile issue in the late 1990s when peer-to-peer service Napster rose in popularity. Napster was a filesharing service that created a central index of songs and other files made available by its users, and allowed other users to download those files free of charge. Such free and quick downloading of copyrighted works began to worry copyright owners when Napster became popular enough to affect the market for music.⁷¹ Several recording companies successfully sued Napster in 2000 for vicarious and contributory copyright violations.⁷² After the district court opinion was affirmed on appeal, the district court ordered Napster to monitor activities taking place on its network and to block access to infringing materials once it became aware of those materials' whereabouts.⁷³ Unable to comply with this order, Napster shut down in 2001 and declared bankruptcy in 2002.⁷⁴ Since then, new peer-to-peer services have circumvented legal rules in various creative ways, managing to facilitate filesharing for significant periods of time before being shut down.⁷⁵ Other sites have managed to escape fatal legal challenge altogether. As UGC services like YouTube, which enable users to upload material that may include copyrighted works, have become more popular, copyright owners have become increasingly concerned that their intellectual property rights are not being sufficiently protected.

Congress and the courts have attempted to address such online copyright issues in a variety of ways, but many of these efforts — including the Digital Millennium Copyright Act⁷⁶ (DMCA) — have been criticized as ineffective and overly rigid given the fast pace of technological change. Because the Internet has enabled such widespread copyright infringement, near-perfect enforcement is virtually impossible. The Principles aim to limit the harms associated with underenforcement of copyright law by conditioning nonenforcement on con-

⁷¹ See Brad King, *Napster: Music's Friend or Foe?*, WIREd, June 14, 2000, <http://www.wired.com/techbiz/media/news/2000/06/36961>.

⁷² See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

⁷³ See *id.*

⁷⁴ See Laura Rohde, *Napster's Bankruptcy Draws to a Close*, PC WORLD, Aug. 29, 2002, <http://www.pcworld.com/article/id,104576-page,1/article.html>.

⁷⁵ See Joel Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073, 1085 (2007); Paul Festa, *Court: Anonymous P2P No Defense*, CNET NEWS.COM, June 30, 2003, http://www.news.com/2100-1025_3-1022462.html; cf. Fred von Lohmann, Electronic Frontier Foundation, IAAL: What Peer-to-Peer Developers Need To Know About Copyright Law (Jan. 2006), http://www.eff.org/files/p2p_copyright_wp_v5_0.pdf (describing steps peer-to-peer developers can take to reduce their risk of facing copyright infringement liability).

⁷⁶ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

duct consistent with the spirit of the law. In so doing, they ultimately aim to leverage self-governance and cooperation to fill in the gaps left by political failures.

A. The History of Copyright on the Internet

The DMCA was Congress's attempt to combat online copyright infringement without overly hampering UGC activities. One goal underlying the legislation was to balance the needs of content owners, whose works had become cheaper to copy and distribute, and the interests of ISPs, who often hosted content uploaded by users and who would have faced enormous costs had they been required to evaluate whether each uploaded work represented a copyright violation.⁷⁷ Under the DMCA, ISPs need not actively monitor their sites for infringing works. Instead, so long as they take down infringing material when a copyright owner complains about it, they will qualify for the DMCA safe harbor and will not be liable for monetary damages.⁷⁸ To benefit from the safe harbor, ISPs must adopt a copyright policy under which repeat copyright infringers are barred from using the ISP under certain circumstances, must implement that policy in a reasonable manner, and must make subscribers aware of the policy.⁷⁹

The DMCA has been criticized as ineffective and inflexible.⁸⁰ Because it does not require ISPs to monitor the traffic on their networks to ensure that none of the transmitted material infringes copyrights, there are now many sites that enable users to download copyrighted material, even though such downloading violates copyright law.⁸¹ Critics argue that the DMCA "avoids any characterization of how effective a content protection technology must be to qualify for protection under the law, thereby weakening vendors' incentives to build strong protection technologies."⁸² Another criticism, from the opposite side of the debate, is that the DMCA regime encourages ISPs to remove material blindly once they receive a takedown notice, without sufficiently incentivizing them to consider fair use.⁸³ Despite some agi-

⁷⁷ See JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 607–09 (2d ed. 2006).

⁷⁸ See 17 U.S.C. § 512 (2000).

⁷⁹ *Id.* § 512(i)(1). The European Union Copyright Directive, which governs European digital copyright law, is similar to the DMCA. See Deana Sobel, *A Bite Out of Apple? iTunes, Interoperability, and France's DADVSI Law*, 22 *BERKELEY TECH. L.J.* 267, 267 (2007).

⁸⁰ See, e.g., Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 *N.Y.U. J. LEGIS. & PUB. POL'Y* 99, 100 (2005).

⁸¹ See Reidenberg, *supra* note 75, at 1086.

⁸² Bill Rosenblatt, *Video Content Owners and User Generated Content Sites Agree on Filtering Principles*, *DRM WATCH*, Oct. 25, 2007, <http://www.drmwatch.com/legal/article.php/3707261>.

⁸³ See Scott, *supra* note 80, at 100.

tation in favor of reforming the DMCA or passing new legislation,⁸⁴ many commentators have given up on formal statutory regulation in favor of private enforcement and best practices standards developed by industry participants.⁸⁵

B. *The Principles*

On October 18, 2007, several leading Internet and media companies announced their adoption of guidelines that would govern user-generated content on the Web.⁸⁶ Copyright owners CBS, Fox, NBC Universal, and Viacom were among the signatories, as were UGC services MySpace and DailyMotion (a site similar to YouTube). Internet giants Facebook and Google, the latter of which owns leading UGC service YouTube, did not adopt the Principles.

The Principles reflect a quid pro quo between copyright owners and content providers: so long as content providers make their best effort to block infringing materials, copyright owners will not sue them. The Principles purportedly strike a balance with respect to four “important objectives”: eliminating infringing material on UGC services; encouraging users to upload original, authorized content; accommodating fair use principles; and protecting users’ privacy interests.⁸⁷ At bottom, “the guidelines call for sites hosting UGC to automatically block content that matches copyrighted material submitted by copyright owners to a back-end database.”⁸⁸ Unlike the DMCA, the Principles require UGC services to filter content actively and to ensure that their filtering technology is up-to-date.⁸⁹ Interestingly, the Principles set a deadline: UGC services were to have filtering technology in place by the end of 2007. Thus, unlike the DMCA, the Principles provide an incentive to develop and implement filtering technology that is effective but that also accommodates fair use.

⁸⁴ See, e.g., Digital Media Consumers’ Rights Act of 2005, H.R. 1201, 109th Cong. (2005), available at <http://www.gpoaccess.gov/bills/browse.html> (follow “HR” hyperlink under “109th Congress”; then follow “PDF” hyperlink under “H.R. 1201”).

⁸⁵ See, e.g., Justin D. Fitzdam, Note, *Private Enforcement of the Digital Millennium Copyright Act: Effective Without Government Intervention*, 90 CORNELL L. REV. 1085, 1087 (2005).

⁸⁶ See Press Release, *supra* note 5.

⁸⁷ Principles for User Generated Content Services, *supra* note 3. The drafting parties agreed upon fifteen Principles that serve those objectives. The Principles require, for example, that UGC services explicitly encourage respect for intellectual property, use up-to-date filtering systems, punish repeat infringers, and respect fair use. The Principles end with a commitment to cooperating to “create content-rich, infringement-free services” and to develop and test new filtering technologies as they become available. *Id.* para. 15.

⁸⁸ See Posting of Sherwin Siy, *supra* note 7.

⁸⁹ Principles for User Generated Content Services, *supra* note 3, para. 3. This is one advantage the Principles enjoy over the DMCA, which does not provide a standard that technology must meet. See Rosenblatt, *supra* note 82.

The Principles will likely have two important economic effects. First, they will minimize litigation risk by describing what UGC services can do to prevent other signatories from suing them.⁹⁰ Because the DMCA safe harbor does not protect UGC services when they are aware of “facts or circumstances from which infringing activity is apparent,”⁹¹ the DMCA sets the stage for high-stakes litigation with potentially catastrophic results for a UGC service. Second, the Principles will shift much of the burden of policing copyright infringement from the copyright owners to the UGC services.⁹² Existing laws, including the DMCA, appeared to place much of this burden on copyright owners.⁹³ The Principles will therefore significantly shape the enforcement of copyright laws online.

C. *Self-Governance in the Principles*

Several features of the guidelines demonstrate self-governance. First, the development of the Principles in itself reflects a recognition that some self-imposed regulation was necessary to fill in the gaps left by the suboptimal existing legal regime. Had the DMCA adequately minimized the number of copyright violations taking place online, the Principles would have been entirely unnecessary. Had it clearly spelled out the situations constituting violations, many of the provisions in the Principles clarifying when legal enforcement action is called for would have been left out. Had the DMCA sufficiently incentivized the use of state-of-the-art filtering mechanisms, the parties would not have needed to agree amongst themselves to support the development and implementation of such systems. And had it provided an even more categorical safe harbor, providing more security for UGC services, the services would have had little incentive to come to the negotiating table.

Moreover, the Principles represent an effort by affected parties to exercise some self-imposed control over the current phenomenon of underenforcement in the copyright context. The Principles embody an agreement that even though the law bans certain infringing uses, copyright owners will not bring suits to punish those uses if specified prerequisites are met. Thus, the Principles still tolerate some lawbreaking, but only if UGC services use their best efforts to avoid breaking the law. Because the regulated parties are choosing when and how to enforce the law, they are essentially determining for themselves what the law will mean in practice. Such self-governance, similar to that

⁹⁰ See Bill Rosenblatt, *2007 Year In Review, Part 2*, DRM WATCH, Dec. 27, 2007, <http://www.drmwatch.com/watermarking/article.php/3718651>.

⁹¹ 17 U.S.C. § 512(c)(1)(A)(ii) (2000).

⁹² See Rosenblatt, *supra* note 90.

⁹³ See *id.*

which a regulatory agency might impose, is more likely to be necessary in a situation of underenforcement in which private arrangements must fill in the gaps left by political actors.

The press release announcing the Principles hailed this self-governance theme as well: “The companies backing these principles believe that they can collectively find a path that fosters creativity while respecting the rights of copyright owners.”⁹⁴ Although the legislature (or an agency exercising delegated authority on its behalf) is typically the institution that weighs competing interests and creates an optimal scheme for balancing them, here the industry players themselves took on that role by engaging in a “cross-industry dialogue.”⁹⁵

The upgrading requirements demonstrate a benefit of self-governance: the ability to adapt quickly and sensibly.⁹⁶ By requiring UGC services to enhance existing technologies, work to develop new technologies, and adapt as new technologies evolve and become reasonably affordable, the Principles incentivize industry members to respond to developments without requiring them to retain a particular mechanism.

D. Private Arrangements in the Principles

The Principles’ development reflects the reality that private arrangements can and do shape online behavior in at least some respects. Moreover, the Principles demonstrate that parties with competing interests can collaborate and negotiate to develop private arrangements, in this case generating a seemingly sensible, workable set of guidelines.

Additionally, the Principles create mechanisms for sharing information and technology among private parties, thus creating meta-institutions that facilitate smoother private arrangements. For example, UGC services have to report URLs for offending content elsewhere on the Internet when they become aware of those URLs. This type of back-and-forth between parties who have historically been on opposite sides of the table represents a commitment to cooperation that the law likely would not mandate. The idea that these copyright holders and UGC services will work together to create effective and affordable technologies shows similar promise. For example, under the Principles, the parties are to collaborate in testing new filtering technologies, thereby ensuring that such technologies reflect an appropriate

⁹⁴ Press Release, *supra* note 5.

⁹⁵ *Id.*

⁹⁶ Responding to a similar concern about the law meeting the pace of innovation in the environmental arena, treaties governing the use of potentially dangerous substances sometimes use adjustment procedures, allowing an international body of scientists to make changes to the requirements based on new discoveries without requiring formal treaty and statutory amendments. *See, e.g.,* Natural Res. Def. Council v. EPA, 464 F.3d 1, 3 & n.2 (D.C. Cir. 2006).

balance of preventing infringing uploads, allowing noninfringing uploads, and accommodating fair use.⁹⁷ In addition, the Principles call for collaboration in the implementation of manual, human review of potentially infringing uploaded works, and in developing procedures for addressing claims that materials have been blocked in error.⁹⁸ The repeated emphasis on cooperation within the text of the Principles shows that the drafting parties had faith that cooperation and collaboration were possible and a conviction that they were important mechanisms for achieving an online environment in which copyright violations are neither under- nor overpunished.

III. THE PRINCIPLES AS A GUIDE TO DEVELOPING A MIDDLE-GROUND APPROACH TO CYBER-GOVERNANCE

The Principles show that a middle-ground approach to Internet regulation is possible: self-governance and private arrangements can shape online conduct without eliminating formal governmental regulation altogether. Such an approach is optimal because it can take advantage of the benefits of each model while addressing some of the problems associated with relying too heavily or exclusively on self-governance or on traditional, public regulation. In an optimal middle-ground approach — one suggested, but not fully embodied, by the Principles — the benefits of private actors' flexibility and expertise regarding Internet technologies would be combined with the government's ability to ensure full representation in the policymaking process, both at the government level and when private parties set up self-governance systems like the Principles, to facilitate a fair, effective, and nonstifling system for regulation of online behavior. Ideally, this approach would feature clear, general legislative rules, complemented by private arrangements developed through an inclusive negotiation process fostered by the government itself.

A. *Legitimacy and Consent*

The Principles, and through them the background copyright law regime, enjoy the consent of the governed. The Principles take existing copyright law and the fair use doctrine as background law, thus impliedly consenting to their application. The Principles, therefore, at least partially solve the problem of the illegitimacy of formal regulation, which so concerned self-governance advocates.

As a result, the Principles show that Barlow's conception of entirely self-ordered anarchy is not the only way that the consent of the

⁹⁷ Principles for User Generated Content Services, *supra* note 3, para. 15.

⁹⁸ *Id.* para. 3(f), (i). The word "cooperate" appears seven times within the text of the Principles.

governed, and the legitimacy of regulation, can be achieved in cyberspace. Barlow objected to the CDA, which inspired his Declaration, mostly because external forces placed specific limits on online actors and directly regulated certain behaviors, dictating which actions online actors would have to take to comply with copyright and indecency laws.⁹⁹ Through the Principles, by contrast, online actors impose limits on themselves and determine on their own what content they will filter and how.¹⁰⁰

At the same time, however, there is a risk that the Principles will become more than a set of guidelines for implementing current law, thereby realizing Professor Lessig's admonition that code can be (or become) law. Although the Principles ostensibly work within the established framework of U.S. copyright law, that they mandate filtering by their signatories may give rise to a (possibly slowly evolving) new legally enforceable norm. Some commentators have speculated that the Principles may be a way for copyright owners to force almost all UGC services to implement filtering technologies.¹⁰¹ Once most sites develop and implement such code, filtering will become the norm and courts may disfavor sites that do not follow industry practice in filtering, which would render the DMCA's notice and takedown provisions futile.¹⁰² Thus, a handful of online actors implementing the privately created Principles may actually be developing a legally enforceable rule requiring filtering, which seems undemocratic.

If the government's role is to set forth the general background law, leaving to private online actors the job of hashing out the details of how that law will be followed, the importance of establishing clear, general, fair laws remains at least as great as ever. First, the government must set out rules of its own, preempting private actors' attempts to establish socially suboptimal norms. Accordingly, policymakers should take care to ensure that the government retains some authority over the general background law, heeding Judge Easterbrook's argument that copyright problems on the Internet will best be addressed if, among other things, the government establishes clear property rules. Additionally, to facilitate the effective implementation of the Principles

⁹⁹ See John Perry Barlow, A Cyberspace Independence Declaration (Feb. 8, 1996), <http://www.swiss.ai.mit.edu/6805/articles/cda/barlow-declaration.html>.

¹⁰⁰ These limits in turn shape users' access to content. Very strict limits could drive users to develop their own peer-to-peer versions of YouTube without any intermediaries. Therefore, unless copyright holders wish to work with peer-to-peer services to develop filtering guidelines, copyright holders have an incentive not to impose very strict limitations on content. Cf. Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 254 (2006) (arguing that a shift to peer-to-peer networks entails a decrease in regulability).

¹⁰¹ See David Mirchin, *User-Generated Content Principles: A New Balance*, RED ORBIT, Jan. 11, 2008, <http://www.redorbit.com/news/display/?id=1211648>.

¹⁰² See *id.*

(and other private arrangements), courts and Congress should continue to clarify the bounds of the fair use doctrine so that those complying with the Principles know what it means to respect that doctrine. Likewise, governmental policymakers should help develop norms regarding what information may or may not be censored online, so that private actors do not create a de facto filtering requirement. Copyright law, in its general form, should continue to be tweaked so as to represent a clearly articulated optimal balance between the interests of authors and those of the public.

B. Effectiveness, Fairness, and Representation

The Principles show that the effective informal legal institutions that Professors Post and Johnson believed would and should regulate the Internet can arise. They demonstrate that such private arrangements can give rise to sophisticated and elaborate semi-regulatory systems. However, unlike the nongovernmental enforcement mechanisms in the systems Professors Post and Johnson described, which operated entirely online and without government involvement, the Principles contemplate formal legal action if a UGC service does not follow the guidelines and hosts infringing works. Thus, the Principles demonstrate that even if they are not completely independent of traditional legal regulators, informal institutions can play an important role in shaping and ordering online conduct.

Moreover, the Principles illustrate that private arrangements can be more flexible than official mandates. This flexibility can help address Judge Easterbrook's concern that traditional regulators might inhibit innovation or require suboptimal technologies because those regulators are not familiar with the state of the art and cannot quickly adopt new regulations each time available technology improves. Instead of dictating a particular type of filtering mechanism, the Principles allow for flexibility, encourage experimentation with new technologies, and build in a commercial reasonableness test that allows for case-by-case determinations to be made about the best way to take advantage of existing technologies. This arrangement has the additional value of leveraging the industry leaders' expertise. Accordingly, courts and Congress should keep in mind Judge Easterbrook's lesson about the law of the horse and should use a general approach when making and reviewing rules about online behavior.

Also, as *Reno v. ACLU* indicates, the Constitution imposes significant limitations on legislative regulation of cyberspace. Thus, while traditional legislative regulation will likely play an important role in the middle-ground approach, the regulations themselves will likely be, and should be, generalized and undetailed. They will thereby allow private actors most familiar with the current state of technology to adopt the most appropriate systems and to continue to develop and

experiment with new ones, all the while adhering to copyright norms established by Congress and the courts.

In addition to highlighting some benefits of informality, the Principles show that even if some progress has been made toward addressing concerns about jurisdiction, territoriality, and conflict of laws — as Professor Goldsmith predicted — there remains a need for extragovernmental solutions. If governmental regulation had been effective, and if tolerated lawbreaking were not so prevalent in the peer-to-peer and UGC contexts, the Principles would not have been necessary. Thus, the Principles highlight the importance of encouraging and facilitating unofficial regulatory bodies for the Internet, even when some traditional regulatory scheme is in place.

At the same time, the Principles exemplify a pitfall of such informal institutions: inadequate representation of some significantly affected parties. Major Internet companies, small copyright owners, and Internet users alike were left out of the negotiation process behind the Principles, and some major companies that joined the process, notably Google, ended up not signing on.¹⁰³ Accordingly, the Principles cannot represent self-regulation precisely because “the biggest names in the UGC business aren’t there.”¹⁰⁴ Thus, the Principles do not reflect the consent, or interests, of all affected parties.

Many high-profile parties, including Google (and its subsidiary YouTube), AOL, Facebook, and the four major recording labels, did not sign on to the Principles. Because the Principles may ward off formal regulation, the major entities that did not sign on may end up essentially unregulated. (Although the threat of litigation exists, these major entities have largely avoided lawsuits; Google has customarily settled most claims against it.) Of course, if the norms in the Principles ultimately become legally enforceable, even nonsignatories will have to comply.

Moreover, some less influential parties with significant interests were not represented, including individual copyright owners, blogs and other forums that allow users to post media, and users themselves.¹⁰⁵ The inadequate representation these parties received resonates with Professor Netanel’s concern about majorities trampling minorities through their control over online voluntary associations. Not only does it mean that some affected parties did not consent to the regime, rendering it less legitimate than the frameworks Professors Post and

¹⁰³ *Some Internet and Media Companies Push for Principles on User Content*, EDRI-GRAM, Oct. 24, 2007, <http://www.edri.org/edrigram/number5.20/user-generated-content-principles>.

¹⁰⁴ Posting of Sherwin Siy, *supra* note 7.

¹⁰⁵ *See id.* (“Another big party to the user-generated content revolution is missing from this document — the user. As drawn up by Hollywood and a few cowed tech sites, the principles are all about what is convenient or desirable for those particular parties.”).

Johnson described, but it also suggests that their interests may not have been protected. For example, by virtually immunizing UGC services from copyright suits, the Principles leave users less protected (or at least more likely to face suits for direct infringement, once suits for contributory and vicarious infringement become less frequent) and give UGC services fewer incentives to advocate for their users if suits are brought against them. Blogger Julie Hilden has noted that since users cannot modify sites' boilerplate terms of use, they are bound by the Principles even though they had no seat at the negotiating table.¹⁰⁶ She further notes that had users participated in the negotiations, the Principles "might have tilted much more strongly toward 'fair use.'"¹⁰⁷

Indeed, possibly because users were not involved in the negotiations, critics have argued that the Principles do not adequately spell out how signatories will protect fair use.¹⁰⁸ In response, the Electronic Frontier Foundation and other advocacy groups released the Fair Use Principles for User Generated Video Content, which provide more guidance on how UGC services can fulfill their commitment to respect fair use.¹⁰⁹ The need for these supplementary guidelines, which are meant to work *with* the Principles, shows that some interests are overlooked or not fully fleshed out when not all interested parties participate in the negotiations. At the same time, the EFF's response illustrates the possibility that such interests can be incorporated into previous arrangements fairly smoothly when the original arrangement is private and not the result of bureaucratic governmental proceedings.

This incomplete representation of affected parties suggests a role for government beyond establishing clear, general background rules of law: ensuring that all parties are represented at the bargaining table and that no key parties escape official and unofficial regulation.¹¹⁰ If the government is not itself willing, able, or well-suited to hash out the details concerning online regulation, it nonetheless has an important

¹⁰⁶ Julie Hilden, *The New Guidelines for User-Generated Content Services Such as MySpace: Why Some Will Predictably Inhibit "Fair Use,"* FINDLAW'S WRIT, Nov. 12, 2007, <http://writ.news.findlaw.com/hilden/20071112.html>.

¹⁰⁷ *Id.*

¹⁰⁸ See Posting of David Sohn to PolicyBeta (Ctr. for Democracy & Tech.), *Two Takes on Copyright Principles for UGC Platforms*, <http://blog.cdt.org/2007/10/31/two-takes-on-copyright-principles-for-ugc-platforms/> (Oct. 31, 2007, 17:09 EST) (noting that the Principles do not "provide any guidance on the tricky practical questions concerning" the commitment to respect fair use).

¹⁰⁹ See Fair Use Principles for User Generated Video Content, http://www.eff.org/files/UGC_Fair_Use_Best_Practices_o.pdf; see also Posting of Fred von Lohmann to Deeplinks (Elec. Frontier Found.), *Fair Use Principles for "UGC,"* <http://www.eff.org/deelinks/2007/10/fair-use-principles-ugc> (Oct. 31, 2007).

¹¹⁰ Legislatures and courts have taken similar approaches in other contexts. For example, contracts of adhesion are often held to be legally unenforceable based on the idea that both parties were not at the bargaining table. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 99 (3d Cir. 1991).

role to play in ensuring that online actors' private arrangements reflect the best possible compromise between all affected parties' interests and goals. Had a more diverse set of copyright owners been involved in the Principles' negotiation process, the Principles might have allowed users to opt out of certain provisions, recognized the rights of individual copyright owners whose capacities and goals are different from those of major media companies, and taken into account the special problems faced by bloggers.

Because users and individual artists holding copyrights may be too dispersed to effectively organize and jointly participate in the bargaining process, part of the government's role, especially in a representative democracy, is to mitigate those transaction costs by encouraging fairer, more inclusive bargaining systems. For example, the government could provide grants to consortia of online actors who create semi-enforcement mechanisms of their own, but only if certain conditions are met, including a requirement that either nonrepresented parties are brought into the process or their interests and needs are clearly considered and addressed. One way to do this might be to require some sort of town hall meeting, either in person, by mail, or online, before a group may adopt a set of guidelines like the Principles, if the group is to receive government funding. If this system proves unworkable, other options aiming to address the problem of lack of representation and underinclusiveness of online voluntary associations should be considered, experimented with, and implemented.

IV. CONCLUSION

The Internet has been celebrated by some as a haven for self-governance and private arrangements. The Principles show that self-governance and traditional regulation may be able to coexist, allowing for an optimal compromise between self-governance and governmental oversight. Government has an important role to play, online as much as elsewhere, in developing clear rules and ensuring that even informal regulation of online conduct reflects the interests of all those affected, not just of large corporations. At the same time, private parties can help smooth the workings of the regulatory regime by developing online self-governance mechanisms that allow for flexibility, cooperation, and the leveraging of new technologies.