

Give it Up: Why Self-Regulation Won't Work

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In the five years since the Telecommunications Act was signed into law, we have heard a lot of talk about Internet policy issues such as taxation and privacy – issues that were not even on lawmakers' minds when they debated the Act. Why? Because the Internet itself was barely on their minds at that time. Further, as the Internet developed, the Clinton-Gore Administration heeded industry's requests that it be allowed to develop self-regulatory means to protect consumers and the Bush-Cheney administration is likely to follow that track. Federal Communication Commission Chairman Michael Powell will surely take a more hands-off approach than his predecessors did in recent years – he has publicly stated that "the burden of proof is always against regulatory intervention."

There have been two particularly notable attempts at self-regulation: **online taxes** – led by the Advisory Commission on Electronic Commerce, a mixture of lawmakers and industry executives – and **online privacy** – led by the Online Privacy Alliance, a group of industry leaders. Both groups attempted to solve major Internet policy problems; however, both problems remain because **pure** self-regulation in these areas has proven an unworkable solution.

The Advisory Commission on Electronic Commerce sounded like a great idea. The group of 19 Congressionally-appointed state and local lawmakers and industry leaders would take on the difficult issue of tax collection for the goods and services sold over the Internet. Unfortunately, the group was fraught with trouble. There were disputes over who would be appointed to the commission and then more than a quarter of the participants skipped the first meeting. In the end, the group degenerated into

squabbling and was unable make useful recommendations to Congress. Two-thirds of the nation's governors denounced the commission, calling it a forum for special interests.

Policy makers and industry leaders should proceed with caution in pursuing a self-regulatory model in areas like Internet tax and online privacy, as successful self-regulation requires four elements, none of which are present in either the tax or privacy arenas.

Better Understanding of the Self-Regulatory Process

Economists, government officials, and industry representatives do not have much practical experience with self-regulation. For example, there are no criteria by which policymakers can assess its effectiveness. There is no established mechanism for limiting dominant firms' attempts to manipulate policy outcomes in their favor. The self-regulatory process needs to be much better understood if it is to be implemented effectively and justify heavy reliance on industry self-regulation of the Internet. Consumers, firms and government would all benefit from more study of this neglected topic. Unfortunately, self-regulation's popularity is not hampered by our need for more understanding of it.

A Single Jurisdictional Body "In Charge"

The United States and other national governments do not have a single jurisdictional body to regulate the Internet. Self-regulation can preempt, complement, or replace public regulation; but the most effective outcomes occur when government retains some co-regulatory role. In a successful self-regulatory model, which

government entity would be the co-regulator? The regulation of the Internet does not rest neatly within the White House, Congress, the Federal Communication Commission (FCC), the Department of Justice, or the Federal Trade Commission (FTC), all of which have already played major roles in regulating the Internet. In contrast, plain old telecommunications is mainly in the domain of the FCC with oversight by Congress. To further complicate questions over jurisdiction, several international groups and quasi-governmental bodies have weighed in on Internet regulatory issues. There is no clear governmental "backstop" to act as co-regulator and ensure companies work to resolve problems and issues.

A Compelling Reason for Industry to Participate

In neither of these cases is there a compelling impetus for firms to participate in the self-regulation process. Companies are profit maximizers, so they are motivated to participate in the self-regulatory process only when it appears to be in their financial best interest. Every firm's resources are in high demand, and they are likely to rank participation in a self-regulatory process behind short-term priorities. To busy CEOs and presidents, abstract issues like online consumer privacy do not clearly affect the bottom line. The impetus for industry to self-regulate on Internet policy can come from two sources: the threat of government action or the loss of revenue due to consumer reluctance to use a service because of privacy or other concerns. So far, neither has proven enough to compel firms into action. Until they see the real threat of costs to their business, executives will

continue to call for self-regulation while failing to make genuine self-regulatory progress.

Industry Cohesion

The "Internet industry" does not have a strong self-concept or a ubiquitous industry organization. Proponents of self-regulation cite the successful example of the catalog sales industry. In that industry, self-regulation works because the Direct Marketing Association can bring all the major players to the table. It can even sanction members for misbehavior because membership is highly valuable to member companies. Internet-related alliances and membership organizations abound, but none of them speak for all the interested parties. None of them can punish their industry members by exclusion from the "in club." So, when government regulators turn to industry, there is no single group to tap. We've come a long way since a sanctioned monopoly (Ma Bell) was the only corporation regulators had to be concerned with – for better or for worse, the companies now doing business on the Internet are too heterogeneous to be assimilated.

The past five years have demonstrated that self-regulation is not a method for good decision-making in the Internet industry, yet there are a lot of complicated decisions to be made. No one wants to "wreck" Internet policy with burdensome regulation, but self-regulation will continue to result in useless deadlocks such as the Advisory Commission on Electronic Commerce's non-recommendations. For the good of the public they serve, regulators must pass appropriate regulations to guide industry instead of leaning on self-regulation.