Towards a Prosumer Law

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VERY DRAFT – FOR COMMENT NOT ATTRIBUTION

Prosumers (a term coined by Toffler, 1980) are active users who are sharing and producing content, rather than passively consuming it, notably 'hacking' content using techniques famously described as "rip, mix, burn". Any Internet user who has posted content, from Facebook to Twitter to blog posts to podcasts, has become a prosumer – though there are very broad categories, ranging from the occasional tweeter to the fully developed hacker. Over two billion people now use Google to search for content, Facebook, Instagram and WhatsApp to share news, gossip and photos, YouTube to watch and upload videos, and Twitter/Snap and other sites to say just about anything. We are all becoming 'prosumers' sharing intimate details of our personal lives[1]. But this 'prosumer environment' is currently either grossly unregulated[2], leaving users' data and content at the mercy of the multinationals who host it and sometimes claim to own it, or subject to knee-jerk over-regulation as with the current 'fake news' law ("Netzwerkdurchsetzungsgesetz") in Germany[3]. It is a new regulatory policy cycle in network regulation[4]. Platform regulation has become the *cause celebre* of technology regulation: a call to regulate the intermediaries who provide platforms for networked digital services[5]. These include the GAFA giants: Google, Amazon, Facebook and Apple.

Regulatory responses are finally emerging, driven by both data protection and competition concerns[6], yet the over-arching need to ensure greater neutrality of intermediaries has largely been limited to last

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[1] The basic insight of nudging consumers towards 'free' platforms and their biases builds on Tversky, A. and D. Kahneman (1974) Judgment under Uncertainty: Heuristics and Biases, Science, Vol. 185, No. 4157 p.1124.

[2] Recent UK investigations include Competition and Markets Authority (2015) Online reviews and endorsements, Opened: 26 February 2015; Competition and Markets Authority (2015) Commercial use of consumer data, Opened: 27 January 2015; Currie, David (2015) Homo economicus and Homo sapiens: The CMA experience of behavioural economics, Speech given by CMA Chairman, David Currie, at a New Zealand Commerce Commission public lecture, 21 April, at https://www.gov.uk/government/speeches/david-currie-speaks-about-the-cma-experience-of-behavioural-economics

[3] See Fiedler, Kirsten (2017) Reckless social media law threatens freedom of expression in Germany, EDRI-gram, 05 April at https://edri.org/reckless-social-media-law-threatens-freedom-expression-germany/. Splittgerber, Andreas and Friederike Detmering (2017) Germany's new hate speech act in force: what social network providers need to do now, Technology Law Dispatch, 2 October at https://www.technologylawdispatch.com/2017/10/social-mobile-analytics-cloud-smac/germanys-new-hate-speech-act-in-force-what-social-network-providers-need-to-do-now/

[4] McNamee, Joe (2018) Fake news about fake news being news, ENDitorial: 8 February at https://edri.org/enditorial-fake-news-about-fake-news-being-news/ Generally see Balkin, Jack M. (2017) Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation, UC Davis Law Review, (2018 Forthcoming); Yale Law School, Public Law Research Paper No. 615. Available at http://dx.doi.org/10.2139/ssrn.3038939

[5] This was recognised early in the commercial roll-out of the Internet and the growth of electronic commerce. See Katz, M. and Shapiro, C. (1986) Technology Adoption in the Presence of Network Externalities, Journal of Political Economy 94(4): 822–41; Shapiro, Carl and Hal R. Varian (1999). Information Rules. Harvard Business School Press ISBN 0-87584-863-X; Evans, Philip & Thomas Wuerster (1999) Blown to Bits, Harvard Business School Press; Lemley, M.A. & David McGowan (1998) Legal Implications of Network Economic Effects, 86 Calif. L. Rev. 479; Benkler, Y. (1998) Communications infrastructure regulation and the distribution of control over content, Telecommunications Policy vol.22, no. 3, pp. 183-196; Evans, David S. (2003) Some Empirical Aspects of Multi-Sided Platform Industries. Review of Network Economics (RNE), Vol. 2, No. 3, September, at http://dx.doi.org/10.2139/ssrn.447981; Gawer, Annabelle and Cowen, Tim (2012) Competition in the Cloud: Unleashing Investment and Innovation within and across Platforms Communications & Strategies, No. 85, 1st Quarter 2012, pp. 45-62 at SSRN: https://ssrn.com/abstract=2199401

[6] Competition law has shown concern for Internet platform dominance for twenty years: see Pitofsky, Robert (1998) Self Regulation and Antitrust, Prepared Remarks of Chairman, Federal Trade Commission, D. C. Bar Association Symposium, February 18, Washington, D.C.; Ungerer, Herbert (1998) Ensuring Efficient Access to Bottleneck Essential Facilities: The Case of Telecommunications in the European Union - Competition Workshop, Florence 13/11/98, EC: Brussels, at http://ec.europa.eu/competition/speeches/text/sp1998_056_en.html; European Commission Press Release IP/98/639 (1998) Commission clears WorldCom and MCI merger subject to conditions 8.7.1998, EC: Brussels; Case T-310/00 MCI, Inc. v

mile monopolists and mobile oligopolists: the legacy telecommunications companies who provide Internet access.

These solutions depend on regulatory alignment between national regulatory authorities (NRAs) in antitrust, data protection, consumer protection, communications regulation and other fields[7]. That is far from guaranteed in a fragmented, technologically challenged and budgetary constrained agency field. Whereas many US scholars describe a 'Brussels effect' whereby consumer, data proteciton and even competition law is aligning globally to a de facto European standard, that neglects the regulatory fragmentation of the European Union[8]. Observers are aware that one of the 28 Member States (MS) is about to 'Brexit', subject to successful negotiation of its retreat from European law's 'acquis communitaire'. However, there is a major regulatory alignment problem that is not cited in either Brussels or London[9]. That is what I term the 'Portarlington effect'.

Portarlington Effect

US companies constantly complain that the proposed new European Regulation on Data Protection will raise costs of doing business via platforms. But separate the rhetoric from reality: it is the US federal and state authorities - and litigants in court - which have far more vigorously pursued Facebook, Google and others for their failures to guarantee users' privacy. In 2012, Google settled for $22.5million a case brought by the FTC in the case of tracking cookies for Safari browser users,[10] on top of a 2011 $8.5million settlement for privacy breaches involving Google Buzz. Two months later, Facebook settled a class action with a $20million payment into a compensation fund that – as with the Google Buzz settlement – culminated in privacy advocacy and education groups receiving a substantial part of the settlement.[11] In 2012, both companies agreed to settle privacy complaints by agreeing to FTC privacy audit of their products for a twenty-year period.[12]

It is noteworthy that the Irish Data Protection Commissioner fined neither company a single Euro in either of the cases highlighted above, examined at length in the two famous Schrems European Court of Justice cases of 2015 and 2017[13]. Sector-specific regulation of social networking already exists *de facto* in

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Commission: Judgment of the CFI of 28 September 2004, EC: Brussels; Margarethe Vestager (2017) 'Algorithms and competition', Speech at the Bundeskartellamt 18th Conference on Competition, Berlin, 16 March, at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en

[7] Kennedy, Rónán (2016) Rethinking Reflexive Law for the Information Age: Hybrid and Flexible Regulation by Disclosure 7(2) George Washington University Energy and Environmental Law Review 124: https://ssrn.com/abstract=2762528

[8] Koops, Bertjaap (2014) The Trouble with European Data Protection Law – ISACA www.isaca.org/Groups/Professional-English/privacy-data-protection.pdf stating: "The trouble with European data protection law, as with Hitchcock's Harry, is that it's dead."

[9] Erdos, David (2016) European Data Protection Regulation and Online New Media: Mind the Enforcement Gap Journal of Law and Society, Vol. 43, Issue 4, pp. 534-564: http://dx.doi.org/10.1111/jols.12002

[10] *U.S. v. Google Inc.*, 3:12-cv-04177, U.S. District Court, Northern District of California (San Francisco). See Devine, Lauren-Kelly (2012) *Court Approves Google's Privacy Settlement*, RegBlog, 27 November, at https://www.law.upenn.edu/blogs/regblog/2012/11/27-devine-ftc-google.html

[11] *Fraley, et al. v. Facebook, Inc., et al.*, Case No. CV-11-01726 RS. See Marsden, C. (2013) *Fraley v. Facebook, Inc. - $20m settlement for private education/research of social media users*, Regulating Code Blog at http://regulatingcode.blogspot.co.uk/2013/01/fraley-v-facebook-inc-20m-settlement.html

[12] See Brown and Marsden (2013) *Regulating Code*, at pp134, 188 for analysis.

[13] Case C-362/14 (Schrems I), Grand Chamber ruling of 6 October 2015, Maximillian Schrems v. Data Protection Commissioner, joined party: Digital Rights Ireland Ltd, Request for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 17 July 2014, received at the Court on 25 July 2014.

Case C-498/16 Maximilian Schrems v Facebook Ireland Limited (Schrems II), Grand Chamber ruling of 25 January 2018, Request for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by

the United States, while European member states wring their hands on the sidelines as 'flag of convenience' national regulators in Luxembourg and Ireland provide derisory oversight[14].

For European data protection law purposes, US multinationals are required to establish a legal presence in the European Union if they choose to process European citizens' data (in practice that means any Internet company of significant size)[15]. Many have chosen to make that decision by establishing in the Republic of Ireland, a small economy in the remote far northwest of Europe with strong socio-economic and cultural links to the United States. The Republic achived 'Celtic Tiger' fast economic growth based on a low regulation, low tax economy that attracted US inward investment from the 1980s onwards, becoming known as the 'mouse capital of Europe' due to low cost manufacturing based around Knock Airport tax/duty free zone. It became the European base for data protection purposes of Google, Apple, Facebook and many other US multinationals[16].

Portarlington is a small town built on a railway and canal junction in the middle of the Republic of Ireland. It is an inconsequential place of pebble-dashed houses, with 28 public houses to sell aocohol and not a single cinema or cultural space. It was voted the least desirable town in Ireland for the national broadcaster's 'Brighten up your Town' poll[17]. As this poll took place, the entire Irish Data Protection Commissioner (IDPC) office was uprooted from Dublin to the town in 2010[18]. This followed a proposal of the Irish Justice Minister, under whose control the IDPC lay, as part of the wider government effort to move regulation to the provinces to control in some measure the overheating Irish capital property and labour market.The 30 or so staff were to move as one, but unfortunately the desirability difference between their established Dublin location and Portarlington's pebbledash meant many senior employees chose not to move, instead taking jobs with those US banks and tech companies arriving in large number in Dublin's harbour zone. As a result, the IDPC staff of 30 was made up largely by trainees and new employees in the period to 2014, a critical period for those companies' data policies. The IDPC, Billy Hawkes from 2005-14, was perceived to be 'asleep on the job' when many data breaches took place[19], culminating in the Edward Snowden revelations that US multinationals had been engaged in widespread illegal activity in passing European citizens' personal data to the US

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decision of 20 July 2016, received at the Court on 19 September 2016http://curia.europa.eu/juris/document/document.jsf?text=&docid=198764&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=189241

[14] Erdos, David (2016) European Data Protection Regulation and Online New Media: Mind the Enforcement Gap Journal of Law and Society, Vol. 43, Issue 4, pp. 534-564, http://dx.doi.org/10.1111/jols.12002

[15] Ryngaert Cedric (2015) Symposium issue on extraterritoriality and EU data protection, International Data Privacy Law, Volume 5, Issue 4, 1 November, Pages 221–225, https://doi.org/10.1093/idpl/ipv025

[16] Brown and Marsden (2013): 134-5.

[17] Levine, Robert (2015) Behind the European Privacy Ruling That's Confounding Silicon Valley, New York Times, OCT. 9, at https://www.nytimes.com/2015/10/11/business/international/behind-the-european-privacy-ruling-thats-confounding-silicon-valley.html "a Centra minimart in the Irish countryside. "This is the Irish Data Protection Commissioner who is in charge of Facebook, Dropbox, LinkedIn, Google — all the big names," he [Schrems] says. "It's in a cool place called Portarlington with about 5,000 people." The Irish Data Protection Commissioner has its office — pause — "there," Schrems said, pointing to the floor above the market. (The organization moved some of its operations to Dublin this year.) Imagine if the Federal Trade Commission had its headquarters above a 7-Eleven in a Virginia exurb and you'll get the idea."

[18] Carson, Angelique (2014) Billy Hawkes: Blue Eyes and a Global Sway, Sep 10, 2014, IAPP Blog, at https://iapp.org/news/a/billy-hawkes-blue-eyes-and-a-global-sway/

[19] Carson supra n.18: Hawkes "had a "soft touch" approach on companies that took some liberties with data use policies and practices."

National Security Agency and its close British ally GCHQ. The IDPC had two devastating European Court of Justice defeats in 2014-15[20].

The perception of the 'Portarlington Effect' was so great by 2014 that the major technology companies requested the Irish government to reopen a satellite office in Dublin for their convenience[21], and to make some effort to apply the relevant European laws, notably the ePrivacy (2009), Data Retention (2006) and Data Protection (1995) Directives[22]. The new IDPC since September 2014, Helen Dixon, has proved a much more effective regulator.

The regulatory culture in Europe remains deeply divided between those 'Club Med' less regulatory cultures and 'Club Nord' of established liberal democracies (roughly speaking those many NRAs on the fringes of Europe versus Nordic nations, UK, Netherlands, France, Austria and Germany). It is this 'Portarlington effect' which is the greater influence on European regulation generally, and the data protection regime in particular. The claims that Europe has a generally more privacy protective culture would be greeted with gales of laughter in Portarlington or Limassol, Cyprus, whatever the opinion in Hamburg or Berlin.

Prosumer Law

Co-regulation may be the answer adopted in Europe[23]. Co-regulation encompasses a range of different regulatory phenomena, which have in common that the regulatory regime is made up of a complex interaction of general legislation and self-regulatory bodies[24]. Varying interests of actors result in different incentives to cooperate or attempt unilateral actions. Without regulation responsive to both market and constitutional protection of fundamental human rights such as privacy and free speech, Internet co-regulatory measures cannot be responsive to information ecologies and thus self-sustaining[25]. It has enriched conceptions of 'soft law' or 'governance' in the literature, but like those umbrella terms, refers to forms of hybrid regulation that do not meet the administrative and statute-based legitimacy of regulation, yet perform some elements of public policy that cannot be justified as self-regulation, in the

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[20] C-293/12 and C-594/12, Digital Rights Ireland and Others, Judgment of the Court (Grand Chamber), 8 April 2014 (EU:C:2014:238); C-362/14, Maximillian Schrems v Data Protection Commissioner, Judgment of the Court (Grand Chamber) of 6 October 2015, at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0362

[21] O'Connell, Hugh (2014) The Data Protection Commissioner is getting a new office, but keeping the one beside a convenience store in Laois, The Journal, May 31st at http://www.thejournal.ie/data-protection-commissioner-new-office-1488473-May2014/

[22] Data Protection Directive 95/46/EC http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm; Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications); Directive 2006/24/EC on Data Retention (15 March 2006); General Data Protection Regulation 2016: http://statewatch.org/news/2015/dec/eu-council-dp-reg-draft-final-compromise-15039-15.pdf

[23] See Finck, Michèle, (2018)Digital Co-Regulation: Designing a Supranational Legal Framework for the Platform Economy European Law Review; LSE Legal Studies Working Paper No. 15/2017. Available at SSRN: https://ssrn.com/abstract=2990043. A historical view is provided in the classic Frydman , Benoît & Isabelle Rorive, 2002,Regulating Internet Content through Intermediaries in Europe and the USA, Zeitschrift für Rechtssoziologie, vol. 23 (1), pp. 41-59. See also Mayer-Schonberger, Viktor, and Crowley, John (2006) Napster's SecondLife?: The Regulatory Challenges of Virtual Worlds, Northwestern University Law Review Vol. 100, No. 4, http://www.vmsweb.net/attachments/pdf/NWLR100n4.pdf. An ahistoric but relevant perspective analyzing recent European policy is Frosio, Giancarlo (2017) Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy 112 Northwestern University Law Review 19, at SSRN: https://ssrn.com/abstract=2912272.

[24] Lennon, YC Chang and Peter Grabosky (2017) Chapter 31: Governance of cyberspace pp533-553 in Drahos, Peter (2017 Ed.) Regulatory Theory: Foundations and Applications, ANU Press.

[25] See Cohen, Julie E. (2017) Affording Fundamental Rights 4:1 Critical Analysis of Law; Frischmann Brett M. & Mark A. Lemley (2007) Spillovers, 107 COLUM. L. REV. 257, 299-300.

absence of law[26]. Co-regulation constitutes multiple stakeholders, with the state and stakeholder groups including prosumers stated to explicitly form part of the institutional setting for regulation[27].

The intersection of consumer law with privacy law is driving scholars and policymakers towards the conclusion that prosumer law is emerging[28]. Prosumerism should be a declared policy of the European Commission alongside the European interoperability framework (EIF). The Commission in 2012 launched its *Code of European Union Online Rights* for European citizens using the Internet.[29] European e-commerce and audiovisual law is a marked departure from freedom of contract in European law. Implementation requires all member states to commit to such a step in practice as well as theory.[30] Prosumer law must do more than proposed solutions to permit data deletion, or algorithmic transparency[31], because that only covers users' tracks and ex post remedy[32]. Prosumer law needs the ability for exiting prosumers to cover their traces, transfer their content and metadata, and suggests interoperability to permit exit to more prosumer-friendly products than Google and Facebook, should prosumers wish to switch. It requires a combination of interconnection and interoperability more than transparency and the theoretical possibility to switch[33]. Only then will information platforms become more competitive, and prosumers have the luxury of real choice between very different standards offered by their hosts.

I argue in conclusion that what is needed is a comprehensive 'Prosumer Law' solution that draws on fundamental human rights to privacy and free expression, competition, and technology regulation to ensure a fair and neutral deal for prosumers and citizens.

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[26] See Kohler-Koch, B. and Eising, R. eds. (1999) The Transformation of Governance in the European Union, London: Routledge

[27] European Commission (2015) Better regulation: guidelines and toolbox - General principles, at https://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en

[28] Helberger, Natali and Zuiderveen Borgesius, Frederik J. and Reyna, Agustin (2017)The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law. Common Market Law Review, Vol. 54, No. 5, at SSRN: https://ssrn.com/abstract=3048844

[29] European Commission (2012) *Code of EU online rights published*, at http://ec.europa.eu/digital-agenda/en/blog/code-eu-online-rights-published

[30] See further Brown and Marsden (2013) Regulating Code, at pp.180-192.

[31] See Edwards, Lilian and Veale, Michael, (2017) Slave to the Algorithm? Why a 'Right to Explanation' is Probably Not the Remedy You are Looking for: https://ssrn.com/abstract=2972855.

[32] See Hildebrandt Mireille (2016) Law as Information in the Era of Data-Driven Agency, MLR 79(1) pp.1–30; Calo, R. (2015) Robotics and the Lessons of Cyberlaw, 103 Cal. L. Rev. 513; Brogden, Peter (2017) Smart Contracts and Web 3.0: The Evolution of Law? Computers and Law, at https://www.scl.org/articles/3907-smart-contracts-and-web-3-0-the-evolution-of-law; Lee, Peter and Sabrina Richards (2017) Res Robotica! Liability and Driverless Vehicles, Computers and Law, at https://www.scl.org/articles/3167-res-robotica-liability-and-driverless-vehicles; Katz, Andrew (2008) Intelligent Agents and Internet Commerce in Ancient Rome, Computers and Law, at https://www.scl.org/articles/1095-intelligent-agents-and-internet-commerce-in-ancient-rome; Floridi, L. (2007) 'A Look into the Future Impact of ICT on Our Lives' 23 The Information Society 1, p.62; Floridi L. (ed 2014) The Onlife Manifesto - Being Human in a Hyperconnected Era, Dordrecht: Springer; Surden, H. (2014) 'Machine Learning and Law' 89 Washington Law Review 87; Kerr, I. (2013) 'Prediction, Preemption, Presumption: The Path of Law After the Computational Turn' in M. Hildebrandt and K. de Vries (2013 eds), Privacy, Due Process and the Computational Turn: The Philosophy of Law Meets the Philosophy of Technology (Abingdon: Routledge) at p.91.

[33] See Lynskey, Orla (2017) Regulating 'Platform Power' LSE Law, Society and Economy Working Papers 1/2017; Grimmelmann James (2014) What to Do About Google? Communications of the ACM, Vol. 56 No. 9, Pages 28-30 DOI 10.1145/2500129; Zingales, Nicolo (2015) Of Coffee Pods, Videogames, and Missed Interoperability: Reflections for EU Governance of the Internet of Things, TILEC Discussion Paper No. 2015-026: https://ssrn.com/abstract=2707570