THE ALLENS HUB
FOR TECHNOLOGY, LAW & INNOVATION

“Regulating Technology” as a category error and the real work of the Allens Hub for Technology, Law and Innovation (@UNSWAllensHub)

Lyria Bennett Moses, @lyria1
The Metaphor

- “Law, marching with medicine but in the rear and limping a little”
- “The hare of science and technology lurches ahead. The tortoise of law ambles slowly behind”
- “Rapid technological change unsettles the law quite as much as it unsettles people”
- “I have seen the fields of law and technology thrown against each other, necessarily but often antagonistically”
- “The law, however, generally develops at a much slower pace than technology”
Orientation: Broad and narrow questions

• Some specific law applied to some specific technology
• “Technological law” (the law of technical standards)
• Law applied to a category of technology (“cyberlaw”, “nanolaw”)
• Technology as “law” (Lessig’s proposition that code is law)
• Understanding law’s impact on innovation and technology diffusion

• Technology regulation (What? How? When?)
• Legal dilemmas resulting from technological change
Is there a “cyberlaw” – Lessig vs Easterbrook
What is “technology” and technological change?

- Donald Schön, Technology and Change (1967)
  - “any tool or technique, any product or process, any physical equipment or method of doing or making, by which human capability is extended.”
“Regulation” by Julia Black

• The sustained and focused attempt to alter the behaviour of others according to standards or goals with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.
Thinking about technology regulation

- Brownsword: legitimacy, diversity of values systems, effectiveness, cosmopolitanism, connection, style, mode, pitch, phasing, range
- Koops: Dimensions of analysis being technology type, innovation, place, time, type of regulation, normative outlook, knowledge, discipline, problem, frame
- Murray: Understanding as dynamic system
But what does “technology regulation” mean?
Changes in conduct

Social / cultural change

Legal change

Technological change

Legislation/regulation/judicial activity

Law reform

TA

R & D

Compliance

Catching up

Resistance/tech adaptation

Use/social adaptation/impact

Social engineering

Regulation

Catching up

R & D
Types of legal problems resulting from technological change

• The need for special rules
• Uncertainty
• Over-inclusiveness and under-inclusiveness
• Obsolescence
How is this helpful?

• In what sense can legislation be “technology neutral” and what is the optimum balance between specificity and generality? Optimising legislative design for evolving technologies.
  - Do we need laws or regulations that deal specifically with certain technologies or technological categories (nanotechnology, AI, robots)?

• When should law reform “wait”?

• How should lawyers and law reformers approach law in an evolving technological context?

• How should judges approach interpretation where terms used were chosen in an earlier socio-technical context?
Categorising scholarship

• There is no FOR category that covers scholarship into these questions, although some will cover parts of it.
  ▪ Proliferation of conferences, journals, scholarship

• Law and technology (and innovation) as an example of a cross-cutting category

• Category should be
  ▪ Broad so as to include those looking broadly within one category of technology (eg cyberlaw) or at technology as regulation.
  ▪ open to new (and different) ideas and

• Broader rethink of categories to cover other cross-cutting themes in research?
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