Technology and Trust: The Challenge of Regulating Digital Platforms

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Digital Platforms and Societal Issues

It has seemed like we are confronted by a new issue relating to digital platforms on an almost daily basis. One day it could be neo-Nazis using Facebook or Twitter as organizing platforms, or YouTube celebrities behaving in a morally abhorrent manner, or murders being committed in real time on Facebook Live. The next day it could be the spread of so-called fake news through social media, or concerns about Instagram use among teenagers and its impact upon body image, or the conditions of work facing content moderators in different parts of the world.
Just as we have concerns about the content of social media, we also have concerns about the censoring of the internet. One of the last pieces of legislation passed by former Malaysian Prime minister Najib Razak, before he lost the 2018 election and was subsequently arrested on charges of large scale embezzlement of public moneys, was an Anti-Fake News Law, aimed at cracking down on bloggers and others on the internet who circulated malicious rumors about the ruling UMNO government – many of which subsequently turned out to be true. When the platforms themselves choose to act, there are questions about their impact on dissident opinions or marginalized communities. When Google moves in April 2017 to change its algorithm to promote ‘authoritative’ content over ‘fake news’, conspiracy theories and ‘low-quality information’, it faced the allegation that it was also restricting access to a broad range of left-wing, progressive, anti-war and democratic rights organizations (MR online, 2017). Community standards measures introduced by Facebook to restrict hate speech saw a number of sites developed by and for lesbians blocked, as they made use of the word ‘dyke’ (Trigger, 2017). At the same time, inaction creates its own concerns. The recent statement by Facebook CEO Mark Zuckerberg that he could not censor statements by Holocaust deniers on the platform if he ‘didn’t think that they’re intentionally getting it wrong’ (quoted in Levin & Solon, 2018) was met with widespread outrage, and led to a partial retraction by Zuckerberg two days later, saying that he ‘personally found Holocaust denial deeply offensive’ (Nieva & al-Heeti, 2018).

One of the challenges faced with this range of issues is the manner in which they appear as episodic public shocks. Ananny and Gillespie (2017, pp. 2-3) define these public shocks as ‘public moments that interrupt the functioning and governance of these ostensibly private platforms, by suddenly highlighting a platform’s infrastructural qualities and call it to account for its public implications. These shocks sometimes give rise to a cycle of public indignation
and regulatory pushback that produces critical—but often unsatisfying and insufficient—exceptions made by the platform.’ As Napoli (2017, p. 23) has observed, these public shocks ‘produce moments of attention to the issue of the governance of social and algorithmic media platforms.’ At the same time, they typically produce a ‘targeted’ response on the part of the platforms themselves, that produces specific responses to particular instances of public controversy – more content moderators, greater internal fact checking, new tools for users to block objectionable content etc. These are characteristically ‘issue management’ responses, that foreclose on larger questions about the publicness of communications on digital platforms, and potential issues arising about the governance of such online communication.

Getting beyond the episodic nature of responses to public shocks, and aligning questions around digital technologies in general, and digital platforms as our object of discussion here, to questions of the public good and the public interest, requires consideration of where the platforms now sit within a wider media and communications ecology. In particular, the looming question is whether digital platform companies are increasingly taking the form of media companies, and thus potentially subject to the laws, policies and regulations that are associated with media and communications policy? Napoli and Caplan (2017) have argued that digital platform companies are major distributors of media content, facilitators of content creation by third parties (e.g. YouTubers who have their own channels on YouTube), and that they make editorial-like decisions about what content is to be distributed, promoted, or restricted, through a mix of human and algorithmic processes, moving them closer to the conventional understanding of a publisher. Picard and Pickard make the point that ‘our contemporary digital environment, which includes internet and related activities, raises the question of what, exactly, is a media company’, and that companies such as Google and Facebook are ‘increasingly monitoring, regulating, and deleting content, and restricting and blocking some users, functions that are very akin to editorial choices’ (Picard & Pickard, 2017, p. 6).
The economic context for debates about whether digital platforms are increasingly taking the form of media companies is the growing *platformisation of the Internet* (Bauer, 2014; Antonelli & Patrucco, 2016; Mosco, 2017; Gillespie, 2018). As the internet and social media have increasingly come to be accessed through search engines, platforms and apps, and as media content generally migrates to these platforms in search of new audiences, the digital platform companies variously known as the FAANG (Facebook, Apple, Amazon, Netflix, Google) or the FAMGA (Facebook, Apple, Microsoft, Google, Amazon) have increasingly constituted the gatekeepers of access to digital content. It has been estimated that 70 per cent of web traffic is now directed by Google and Facebook, that Google now controls nearly ninety per cent of search advertising, Facebook accounts for eighty per cent of mobile social traffic, and Amazon accounts for seventy-five per cent of e-book sales (Flew *et al.*, 2019). Timothy Wu’s (2011) prediction that the digital world of 2020 may come to resemble the Hollywood film industry of the 1940s, with a small number of oligopolistic firms dominating market distribution, appears to have come to pass. In light of such transformations in the political economy of platform capitalism (Srnicek, 2016, 2017; Pasquale, 2016; Langley & Leyshon, 2017), the question of public interest regulation of digital platforms is now clearly on the agenda of policymakers worldwide.

**Digital Platforms and the Wider Question of Trust**

Trust is an integral element of modern, complex societies with high levels of interdependency, albeit something that is also hard to understand or to quantify. The German sociologist Niklas Luhmann has observed that ‘a complete absence of trust would prevent one even getting up in the morning’ (Luhmann, 1979, p. 4), and we can recognize the symptoms of societies where
trust has broken down. Revolutionary China during the Cultural Revolution is a case in point, as there was no longer simply state action against people in the society, but also purges, civil wars and retribution at the highest levels of the Communist Party, generating a degree of mutual distrust that inhibited independent thought and action, generated constant suspicion towards others, and produced endemic uncertainty about the nature, scope and limits of authority, or indeed who had it, beyond unquestioning belief in the leadership of Mao Zedong (Dikötter, 2016).

Pierre Rosunvallon (2008, pp. 3-4) emphasises that trust differs from legitimacy in that it has a far deeper reach in society than political institutions. It is what Kenneth Arrow (1974, p. 26) termed an invisible institution, and what Douglass North (1990, p. 4) terms an informal institution, or a ‘form of constraint that human beings devise to shape human interaction’. Rosunvallon argued that trust expands the realm of legitimacy, by giving a moral dimension of integrity to agreements to act according to established procedures with regard to the common good. It is also a ‘hypothesis about future behavior’, and provides ‘an intermediate state between knowledge and ignorance of others’ (Rosunvallon, 2008, p. 4). If we had perfect knowledge about the future, trust would be irrelevant, but trust is also something that is earned and maintained over time through social action: it is not synonymous with belief. Finally, trust is an institutional economizer, as it ‘eliminates the need for various procedures of verification and proof’ (Rosunvallon, 2008, p. 4). It constitutes a feeling of safety or security, that we can act in both the present and the future with a reduced sense of uncertainty, suspicion, foreboding or fear, as well as an attitude that we have to people and institutions. Importantly, it is also a relationship, between oneself and others, be they people, collectives of people, or institutions, that is ‘based on the well-founded but not certain expectation that he/she/they will act for my good’ (Hosking, 2014, p. 28), both in the present and into the future.
It has been widely observed that there is a crisis of trust in the Western liberal democracies. The Edelman Trust Barometer (2018) has identified declining levels of trust in business, government, non-government organizations (NGOs) and the media over a 15 year period, with lower levels of trust correlating with lower levels of income and education, or non-elite status. The Gallup polling group has observed declines in trust of Congress, banks, big business, organized religion and the media in the United States that have been relatively consistent since they commenced polling on this question in 1973. Trust in newspapers fell from 39 per cent to 27 per cent during this period in the U.S., and trust in TV news from 36 per cent in 1996 to 24 per cent in 2017 (Gallup, 2018). In Australia, a 2018 Roy Morgan survey found that net trust for television was -16 percent (i.e. 16 per cent more people distrusted television as a source of information than trusted it), and was -13 per cent for newspapers (Roy Morgan Surveys, 2018). A 2017 Essential Media poll found a decline in trust in all mainstream Australian media outlets, with only 42 per cent of those surveyed trusting daily newspapers, as compared to 63 per cent in 2010 (Dawson, 2017). In such environments, alternative news sources of varying degrees of reliability can thrive, and the claims that mainstream media are ‘fake news’ get a ready hearing when delivered by populist politicians (Allcott & Gentzkow, 2017).

A crisis of trust in news media and in politics and society can be mutually constitutive forces. Coleman (2012) identifies trust as being at the core of citizenship, since:

To be a citizen means that one is compelled to interact with others (strangers) with whom one shares common space and rules, but whom one cannot hope to know or understand personally. Because citizenship only works on the basis of common knowledge and shared agreement about ways to live, citizens not only need to become
informed themselves, but to trust that others around them are similarly civically informed. Unless we can trust the news media to deliver common knowledge, the idea of the public – a collective entity possessing shared concerns – starts to fall apart (Coleman, 2012, p. 36).

For Coleman, trust in the news operates at two levels. At the first-order level, it involves trust in journalists and news producers, to provide us with stories that are truthful and accurate, and that they will behave ethically and without bias or prejudice in getting these stories. Crises of journalistic ethics, therefore, have a societal impact that goes beyond those associated with most other professions. The second-order level of trust is more complex, as it involves ‘news producers and news audiences agreeing about what the news is supposed to do … [and] shared expectations and values that constitute an ethically coherent and culturally convincing foundation for evaluating news performance’ (Coleman, 2012, p. 36). From this perspective, disagreement about what constitutes news, and what is truthful, accurate, and appropriate is both socially necessary, yet very difficult to achieve. It requires ‘joint investment in the values of a commonly experienced world .. [so that] at the most basic level of recognition and respect, they are capable of talking to as well as about one another’ (Coleman, 2012, p. 37).

Critiques of news media, and journalistic practice, are of course a staple of media and communication studies, and have existed for as long as the mass media itself. They also seem to identify comparable issues in both liberal democratic and authoritarian political systems. I have noted, for instance, that students from China, when challenged about the propaganda function of Chinese state media, will make the point that Chomsky and Herman (1989) similarly identified The New York Times as a propaganda outlet, albeit primarily for the dominant corporate interests. We could cite many similar studies around the political economy.
of news media in other places, including critiques of public broadcasters such as the BBC (Freedman, 2018). What has changed in the last decade is the degree of confidence that the internet may be a vehicle for addressing such structural biases by opening up the channels of communication to new voices and alternative perspectives. The platformisation of the internet has seen digital platforms themselves increasingly become the gatekeepers of access to news, with the rise of social news (Flew, 2019 (forthcoming)), but their ambivalent status between simply being platforms yet functioning as quasi-publishers may be producing the worst of both worlds. It may be generating a funnel of fake news coexisting with established news brands, and algorithmic distribution on non-transparent criteria, but with little accountability or acknowledged responsibility for the accuracy, veracity or truth of the information being made available, and malicious agents deliberately seeking to spread falsehoods and misinformation online (Anderson & Rennie, 2017; Faris et. al., 2017). The 2018 Edelman Trust Barometer saw a significant improvement in trust in journalism (from 51 per cent in 2015 to 59 per cent in 2018), in parallel with a decline in trust for digital platforms. In Australia, the Roy Morgan survey found that Facebook was Australia’s least trusted news source in 2018, with a -42 per cent net score, as compared to a +5 per cent net score for the publicly-funded Australian Broadcasting Corporation.

**Return of the Regulatory Question**

The current phase of development around the internet and digital platforms may be described as a third stage, commencing in the mid-2010s. The first stage, from the mid-1990s to the mid-2000s, saw the mass popularisation of the internet, but within a context where web content was largely read-only content developed by various media professionals, with the more interactive and interpersonal dimensions of online engagement happening on mailing lists, bulletin boards,
blogs etc. The second stage, from the mid-2000s and sometimes referred to as the ‘Web 2.0’ era, promises mass democratisation of media, through easy-to-use web tools enabling multitudes worldwide to become producers and distributors as well as consumers of digital media content. This is also the environment in which social media flourishes, as easy-to-use digital platforms such as Facebook and Twitter enable large-scale real-time online interaction on a transnational scale, while almost all media outlets, from YouTube to mainstream newspapers, embrace online comments as a core function of the platform in building community and bringing content professionals closer to their user communities.

**Options for Platform Regulation**

There have been many proposals flagged recently about how to get improved governance of digital platforms that better aligns their operations with the broader public interest. Historically, digital platforms have defended their role as neutral intermediaries, and IT companies rather than publishers, with this position enshrined legislatively in Section 230 of the *Communication Act* 1996 in the United States. The Section 230 ‘safe harbor’ provisions gave what were then referred to as online service providers ‘broad immunity’ from legal liability for content, since they both treated intermediaries as unable to police what their users say or do on their services, yet at the same time enabled them to moderate and police online content without thus becoming publishers, and losing ‘safe harbor’ provisions or being redefined as media companies (Mueller, 2015; Gillespie, 2018).

The European Union *Electronic Commerce Directive*, passed in 2000 by the European Parliament, similarly identified online service providers as conduits or ‘hosts’ of information, establishing that legal liability associated with the information itself does not reside with the digital platforms themselves.
However, it is increasingly apparent that policy makers, politicians, activists and NGOs in several countries (e.g. House of Commons, 2017; House of Lords, 2018; Marwick & Lewis, 2017; *The Economist*, 2018) view those rationales as inadequate in light of growing political, economic and social concerns. Reasons can vary between countries. In the U.S., the question of whether agents directly or indirectly ‘weaponised’ Facebook and other digital platforms to influence the outcome of the U.S. Presidential election has been the catalyst for Congressional inquiries, as it went to the heart of national security issues in a digital age, as well as having self-evident importance to Democrats in both Houses. In the U.K., the murder of MP Jo Cox by far-right activist Thomas Mair, who had flagged his intent on social media in advance of the killings, generated considerable debate about whether digital platforms as well as governments had responsibilities towards online ‘hate speech’. The European Commission has been particularly concerned with the impact of global digital platforms on the scope to develop a single European digital market (EC, 2015, 2016). In Australia, the ACCC Digital Platforms Inquiry came about as a condition of support by a minor Senate party then-led by Nick Xenophon for the Liberal-National Party’s media reform legislation, passed in the latter part of 2016 (ACCC, 2018).

Proposals for digital platform regulation can be understood as operating across four dimensions:

1. Focus on state or non-state actors;
2. Focus on *exit* (enabling greater competition and choice) or *voice* (enabling greater participation and transparency);
3. Formal regulation or ‘soft law’;
4. National or supranational domain of application.

The likelihood of a particular path being pursued is contingent to some degree on the institutional culture and regulatory histories of nation-states (Flew & Waisbord, 2015). In the United States, it
is difficult to extend the remit of the Federal Communications Commission (FCC) beyond broadcasting to digital content in the absence of a strong Congressional will to do so, which is patently not in existence at present, so there tends to be a stronger focus upon legal remedies and the role on non-state actors and grassroots campaigning for change. By contrast, the European Union has tended to take a more interventionist approach towards digital platforms, particularly in recent years. In announcing the €2.4 billion fine for Google around anti-competitive practices,

**Roads already travelled: Self-regulation and selective stakeholder engagement**

The first option is *corporate self-regulation*. This is essentially the status quo for the last decade, where digital platform companies respond to periodic ‘public shocks’, with profuse apologies, promises to do better, and minor changes to the user experience of their platforms. This approach has become synonymous with the Facebook CEO Mark Zuckerberg, who Tufecki (2018) observes has made an astonishing 14 public apologies for privacy breaches in the company’s 15-year history, leading Sen. Richard Blumenthal (D- NY) to refer to the appearance before the U.S. Congress as part of an ‘apology tour’. His appearance before the U.S. Senate on 10 April 2018 marked yet another public apology from Zuckerberg, as he said with regards to alleged Russian use of Facebook to spread misinformation during the 2016 U.S. Presidential election:

> We didn't take a broad enough view of our responsibility, and that was a big mistake. And it was my mistake. And I'm sorry. I started Facebook, I run it, and I'm responsible for what happens here (Washington Post, 2018).

The issue is not simply one of negligence on the part of the CEO. The question of whether the business model of digital platforms that provide ‘free’ services, where access is exchanged for
personal data, remains a critical one. The ACCC (2018, pp. 20-21) has posed the question of ‘whether consumers understand the value of the data they provide, the extent to which platforms collect and use their personal data for commercial purposes, and how to assess the value or quality of the service they receive from the digital platforms?’.

Freiberg (2010, pp. 28-29) has identified three circumstances where self-regulation may be an appropriate policy response:

1. Where there are no strong public interest concerns;
2. Where the problems are low-risk, or of low significance;
3. The problem can be fixed by the market itself.

None of these conditions apply for digital platforms. The concerns that have been raised have significant public interest dimensions (loss of privacy, future of news, misuse of personal data by third parties), the risks associated with misuse of the platforms are potentially highly significant given their pervasiveness in the lives of so many people, and there are strong network effects associated with access to large amounts of data. In that light, the risks of self-regulation associated with conflicts of interest, inadequate sanctions for violations, lack of accountability and transparency, and the scope for anti-competitive practices, clearly outweigh any potential benefits form a public interest perspective (Freiberg, 2010, pp. 30-31).

A second model is that of selective stakeholder engagement. This is a stronger version of corporate self-regulation, and typically involves either a platform providing more options to users in terms of managing their data and/or privacy settings based on advice from third parties, or – in a more expansive arrangement – involving selected non-government organisations (NGOs) that represent stakeholders to have a role in particular governance processes within the organisation. In the
immediate aftermath of the Cambridge Analytica revelations, Facebook announced its participation in a joint program with the Social Science Research Council, Harvard and Stanford Universities, and seven philanthropic foundations to support industry-academic collaborations, and will make data available to social science researchers via an independent, transparent, peer-review process to research the responsible use of social data. This would be an example of selective stakeholder engagement around who can access Facebook data for research purposes, and it has been criticised by other scholars in the field.

The best known example of a more formal arrangement is the Trust and Safety Council established by Twitter in 2016, which brought together 40 NGOs to advise on issues relating to online abuse, harassment, mental health, bullying, media literacy and digital citizenship. Not a lot is known about how the Trust and Safety Council interacts with Twitter about decisions that involve suspending accounts, tackling online abuse, and balancing its strongly held commitment to free speech with its reputation as a platform with a disproportionately high amount of abusive behaviour among its user base. One of the major criticisms of Twitter has been its inability to maintain a clear line as to what constitutes unacceptable behaviour on its platform, which in turn points to the limitations of a corporate self-regulatory approach that selectively includes stakeholders from the NGO sector (Kosoff, 2018b).

**Exit and voice options**

It is useful to understand the calls for greater regulation of digital platforms in terms of the framework of exit, voice and loyalty first proposed by Alfred Hirschman (1970) and adapted by Nick Couldry (2011). Arguments for exit look to market-based solutions to the power of digital platforms, such as anti-trust measures or the promotion of alternative digital platforms. The Economist (2018) has flagged the issue of anti-trust actions being pursued against Facebook and
Google, that could lead to the structural separation of Instagram and WhatsApp from Facebook, and YouTube from Google. Others have advocated for the development of alternative platforms.

Timothy Wu (2018) has argued that the challenge is not to ‘fix’ Facebook, as data harvesting is too deeply embedded in its business model, but rather to promote alternatives. This could be an alternative social media platform that trades a modest subscription for guaranteed data protection – the example of Lyft being a competition to Uber comes to mind – or some form of non-profit entity, with Wikipedia perhaps providing one model for a potentially more cost-effective and civically-minded social media platform. The issue is not simply one of an alternative platform, but an alternative business model, that is less reliant on providing personal data as the condition for accessing free services. Ello has had some success in this regard in the U.S., although its user base is a small fraction of that of Facebook.

One challenge is that alternative platforms could turn out to be worse than the established platforms: leaving Twitter for Gab (the ad-free social network for ‘those who cherish liberty’) would seem an odd move if one wants to get away from abusive behaviour and poorly argued conspiracy theories. There is also no guarantee that alternative digital platforms will be more accountable or transparent than the established ones. Companies such as Apple and Google, for instance, were once poster children for a more ethical and responsive corporate culture than those whom they challenged.

Much of the concern about digital platforms stems from the wish for something more akin to a partnership, where the inevitable trade-off of various forms of freely available access (to search, community, news, opinion, entertainment etc.) for personal data comes with some form of accountability, transparency and capacity to control one’s own digital rights. Writing in pre-internet times, Alfred Hirschmann referred to this as the demand for *voice*, which he defined as ‘any attempt
at all to change, rather than to escape from, an objectionable state of affairs’ (Hirschman 1970, p. 30). Hirschmann viewed the capacity to exercise voice as essential to meaningful citizenship in democratic societies, where ‘it has long been an article of faith … that the proper functioning of democracy requires a maximally alert, active, and vocal public’ (Hirschmann 1970: 31-32).

Whereas debates about social media in the late 2000s and early 2010s tended to be about the capacity of social media to enable new voices to be heard in the public sphere, the contemporary debate is about the capacity to exercise voice over the digital platforms themselves, particularly around their uses of personal data. Nick Couldry (2011) saw this as the difference between the capacity to speak, and the right to have one’s voice meaningfully responded to by powerful social institutions, with the associated need for ‘new ways of valuing voice, of putting voice to work within processes of social cooperation’ (Couldry 2011, p 144). While there is an extensive literature on how social media has been used to make demands for voice and participation in politics, there is now a growing demand for greater transparency and accountability of digital platforms themselves (Gillespie, 2018).

**Media Policy Regulation**

The key question in this regard is whether digital platforms should be subject to *media policy regulation* similar to that for established publishers and broadcasters. Historically, digital platforms have benefited from the provisions of legislation such as Section 230 of the U.S. *Communications Act* 1996, which identified ‘safe harbor’ provisions for Internet Service Providers, has provided legal indemnity for digital platforms in two respects (Mueller, 2015). The distinction between carriage and content, which was a feature of communications policy debates in the 1990s, has meant that digital platforms have been able to evade classification as publishers or broadcasters, while still having the capacity to regulate, monitor or delete user content without losing their safe
harbor protections. This draws upon the distinction made in U.S. law between those who provide information and content, and hence can be held liable for it, and those who distribute or carry the content of others.

Several scholars have been challenging this distinction. Gillespie (2018, p. 255) has noted that interventions to manage and curate digital platforms have continued to grow, as ‘social media platforms have increasingly taken on the responsibility of curating the content and policing the activity of their users: not simply to meet legal requirements, or to avoid having additional policies imposed, but also to avoid losing offended or harassed users, to placate advertisers eager to associate their brands with a healthy online community, to protect their corporate image, and to honour their own personal and institutional ethics.’ Picard and Pickard (2017, p. 6) make the point that ‘these firms are increasingly monitoring, regulating, and deleting content, and restricting and blocking some users, functions that are very akin to editorial choices’ (Picard & Pickard, 2017, p. 6). They acknowledge that the issue is a difficult one, as ‘platform responsibilities might differ from those of traditional publishers’ (Picard & Pickard, 2017, p. 6). For example, they are expected to be open to the distribution of user-generated content to a degree that would never be expected of traditional publishers or media broadcasters.

Napoli and Caplan (2017) have observed that ‘the framing of social media platforms and digital content curators purely as technology companies marginalizes the increasingly prominent political and cultural dimensions of their operation, which grow more pronounced as these platforms become central gatekeepers of news and information in the contemporary media ecosystem’. It is also increasingly at odds with how they are operating in practice, as they are not only strongly engaged in the curation of content on their own sites, but also increasingly commissioning original content for their digital platforms. Napoli and Caplan note that the discourse of companies such as Google and Facebook has been shifting over time, from insisting that they are not media companies
at all – they are simply technology companies – to one where they argue that they are not traditional media companies.

If digital platforms are to be subject to media policy regulations, there are clearly implications for how those regulations are themselves constructed. Traditional forms of content regulation would be impossible to apply to a platform such as YouTube, which generates over 300 hours of original video content per second. Similarly, regulations to support particular forms of content production would work differently for subscriber-driven platforms such as Netflix and Amazon prime to how they have worked for traditional broadcasters. Given the expectation that platforms such as Facebook, Twitter and other should remain open to their users to be the primary generators of content, and the difficulties in construction a consensus around what constituted ‘inappropriate content’, Picard and Pickard make the point that ‘accountability and attendant punitive actions need to be exercised in measured ways to ensure that free expression is not unduly restricted … The most serious breaches of laws and norms should typically be handled through legal and regulatory mechanisms and less serious breaches through self-regulatory private mechanisms’ (Picard & Pickard, 2017, pp. 30-31).

Co-regulation and ‘soft law’

It is in this context that the concepts of soft law and co-regulation become relevant. Co-regulation has been a feature of regulatory theory for some time, and is premised upon the notion that regulators can set the general rules and laws, and industry can oversee the operational dimensions of their application, subject to oversight from the government regulators and the parliament. It typically requires the existence of a third party between government and the regulated firms to set and enforce rules and standards, and can be advantageous when there is both a public interest in regulation but a need for government to have some distance from the process, whether due to the
costs of regulation or the need for proximity in order to have ready access to relevant information (Freiberg, 2010, pp. 32-33).

The concept of soft law is originally derived from international law, and refers to the use of quasi-legal processes, typically applied at an industry level, to enforce appropriate corporate behaviour, including rules, norms, guidelines, codes of practice, recommendations and codes of conduct. Van der Sluijs (2013) has made the point that effective applications of soft law requires:

1. An institutional framework to be in place that creates a compulsion to cooperate among regulated entities;
2. Clearly identifiable entities that are subject to the regulatory processes;
3. A'n apparatus to address non-compliance and to ensure that sanctions are enforced when rules are broken; and
4. Clear channels of communication of the rules, breaches, responses and evidence of compliance or redress.

For soft law to have teeth, it requires the oversight of independent public agencies that are nonetheless trusted by the parties who are subject to such provisions. It also needs clear backing by state regulation and civil and criminal law (‘hard law’) if required. The potential of ‘soft law’ is that recognises the difficulties of simply existing laws and regulations designed for publishers or broadcasters to Google or Facebook, as they do not identify with these traditional media industry models. It would enable digital platform companies to have a role in shaping the regulatory requirements they are subject to. It is also conceivable in principle that provisions could be developed by relevant government agencies working with the relevant digital platform industry stakeholders.
Conclusion

The days of unregulated or self-regulated digital platforms appear to be coming to an end, at least for the largest platforms. While the calls of various politicians, public interest groups, activists and others may at times appear poorly informed or self-interested, they are now continuous and arising at a scale and volume, and are being articulated to public interest issues that necessitates some form of policy action. The generalised crisis of trust in public institutions identified by Edelman and others has taken a particularly sharp form for the leading digital platforms, and the platformisation of the internet has thrown into doubt claims that some form of regulation would be an unreasonable inhibition upon freedom of public expression. Simply going from public shock to public shock, with a retrospective promise to ‘do something’, is no longer sufficient.

It is the contention of this paper that some form of co-regulatory arrangement, bound up with ‘soft law’ approaches to enactment and enforcement, is the most likely direction that such regulation will take. In order for such arrangements to be effective, there will be a need to clarify what are those matters of concern that are most open to codification of rules, laws, elements of good practice, and areas of regulatory breach. Rules around about consumer and data protection, anti-competitive practices and the exercise of market power, political advertising, ‘fake news’ and online hate speech are among the areas around which rules can be developed (although, in reality, there will be contention in all of these areas). Issues such as whether social media generates online filter bubbles, job losses in the traditional media industries, or whether users become addicted to digital platforms, are not so readily addressable through co-regulatory codes.

Independent third-party oversight is critical. Digital platforms have good reason to be suspicious of direct regulation by governments of online content, as do their user communities. There are too many examples internationally of governments reacting to social and political unrest by cracking
down on social media and online content. At the same time, there needs to be a regulatory authority with credibility and teeth. It is apparent from the failures of self-regulation and co-regulation in fields identified in fields such as finance that the application of rules and principles will be ineffective in the absence of both ethical change on the part of regulated entities, and ‘a fundamental cultural change in the way business values are seen in government, by regulators, in the courts, in the community and in business itself’ (Braithwaite, 2013, p. 270). While an independent regulator cannot themselves engineer such a change, they can use the enforcement of sanctions that response to breaches of such codes as occasions in which to broadcast the requirements of ethical practice in online spaces.

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