

# **The Limits of Regulation**

## **A Case Study of Virtual and Intangible Harm**

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## **Abstract**

This dissertation deals with the limits of regulation through the analysis of virtual and intangible harm and the capacity of regulation to prevent or at least reduce such harm. The case study at hand is the potential harm to children's imaginative development in virtual worlds. A comparison is drawn from the regulation of online advertising to children in Canada and the US. Based on a review of the literature in chapter 1, it is suggested that there are serious and long-term consequences to an underdeveloped imagination, including pathological phenomenon and lack of imaginative ability. As with other harms to children, the situation seems to call for regulation. However, the harm posed to children's imagination by virtual worlds use is challenging in two ways: it is virtual and intangible. Chapter 2 deals with regulation as a field to provide the framework to deal with the said harm. Due to its virtual character, regulation in its traditional form, reviewed in chapter 3, is unsuitable to address this harm. Technology regulation reviewed in chapter 4 is unsuitable to address this harm as it is intangible. As this harm involves speech thus dealing with constitutional implications, the 5 chapter reviews this aspect in Canada and the USA. The 6 chapter then argues that there are similar characteristics between the presumed harm to children's imagination and the harm resulting from marketing to children online. In fact, the literature argues that they are two sides of the same coin. Chapter 6 examines the regulation of online marketing to children in Canada and United States and concludes that the experience of regulating advertising to children is mainly unhelpful because it does not address virtual and intangible risks in an efficient manner. Chapter 7 summarizes the findings of the previous chapters and analyzes the limits of regulation in light of the case study at hand. The dissertation concludes with a discussion of parental regulation, followed by a suggested future research.

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## **Introduction**

This dissertation deals with the limits of regulation through the analysis of virtual and intangible harm and the capacity of regulation to prevent or at least reduce such harm. The case study at hand is the potential harm to children's imagination development in virtual worlds. A comparison is drawn from the regulation of online advertising to children in Canada and the US.

The thesis makes two contributions: The first concerns the limitations of all the variants of regulation applied to the types of harm discussed in this study. The second is more practical and addresses what might be done about the potential harms of interest.

In chapter 1, I begin by outlining in brief the potential harm investigated in this dissertation. Here I argue that, while there is much disagreement in the literature, there is sufficient evidence to suggest that potential harm does exist. I identify the harm as being connected to the development of imagination. The goal is to establish the reason that control might be necessary.

The next section of the dissertation comprises three chapters and develops my contribution concerning the limits of various approaches to regulation. I begin my discussion in chapter 2 by clarifying that "regulation" has many definitions, and I conclude that the concept of regulation is highly elastic. In theory at least, regulation would be able to address the types of potential harm of interest. I then make the point that regulation is not a single phenomenon; the term refers to different practices involving different policy instruments, all of which aim to exercise control over private-sector behaviour, with the goal of supporting a public good.

In chapter 3, I review the different instruments of regulation and suggest that they exist on a spectrum, between stiff "command and control" at one end and soft control, or information regulation, at the other. Even so, and notwithstanding the potential benefits of the many different regulatory instruments, I conclude chapter 3 by arguing that no form of regulation is suitable for a virtual and intangible harm, in this case, the harm to children in virtual worlds. In chapter 4, I conclude that, compared with the traditional types of regulation discussed in the previous two chapters, "code regulation" is likely to be much more effective in regulating virtual space, but it, too, is not sufficiently equipped to address intangible harm. Code regulation may account for the

virtual aspect of the potential harm in virtual worlds, but the intangible nature of this harm does not allow code regulation to prevent the harm. In the absence of identifiable and measurable factors associated with the harm, code regulation cannot prevent it. The only factor directly associated with the harm is usage time, and this factor is problematic for several reasons discussed in chapters 5 and 7.

Any form of control over media content raises freedom-of-speech issues. In chapter 5, I look at the interplay of media control and freedom of speech and, more specifically, the interplay between law and regulation. Here the analysis is doctrinal, and the countries discussed are Canada and the United States. The chapter concludes that the softer the regulatory instrument, the more compatible it is with freedom of speech. Finally, in this section on regulation, I examine in chapter 6 an instance of regulation where the potential harm involves speech and is virtual and intangible. My case study involves the regulation of advertising and online marketing to children in Canada and the USA. My goal is to assess the potential for the regulation of virtual and intangible practices, taking into account the elasticity of regulation and law concerning the freedom of speech. I conclude that the practice of regulating harm to children from media use is limited.

Chapter 7 summarizes the discussion in the previous chapters on the limits of regulation in general and more specifically, the limits of regulation when dealing with a virtual and intangible harm, as the harm described in chapter 1. The theoretical discussion in chapter 2, 3 and 4 is compared and contrasted with the review of the regulation of online marketing to children in chapter 6.

Finally, the dissertation concludes with my recommendation that, given the limits of regulation, education in the children home environment is the most suitable regulatory tool for this realm.

In appendix A, future research is suggested in order to further explore this field and apply a regulatory regime that would help protecting children from the said harm.

It should be noted that chapter 1 dealing with the harm to children imaginative development and chapter 7 on the regulation at home includes two methodological issues that

requires explanation. The first issue is the use of dated literature. In light of the scarce research on this topics (especially in chapter 1) and as long as the dated literature is not contradicted by newer one, it is assumed that this literature is valid and relevant. Furthermore, the theory behind the argument in chapter 1 assumes that all media has the same deleterious affects but the level of these affects increase as the medium is more powerful and advance (e.g., radio is weaker than the TV as it have only sound compared to sound and picture in TV).

This explanation is also relevant to the second methodological issue apparent mainly in chapter 7. While most of the research reviewed in this chapter is based on TV and the Internet but not on virtual worlds use, the reader may question the validity of the conclusions towards virtual worlds. As explained above, the assumption guiding the media part of this dissertation considers all media on the same spectrum. While this is a bold and general assumption, dealing with it in more details is beyond the scope of this dissertation. For the sake of this dissertation and within the scope of these chapters' discussion, it is assumed that findings with respect to TV would be relevant to the Internet much the same that findings with respect to the internet would be relevant to virtual worlds. After all, virtual worlds are merely an Internet based application.

Throughout the dissertation I refer to harm that is both virtual and intangible. "Virtual Harm" means that the harm originates from digital media, rather than that the harm is not somehow 'real' (a discussion regarding the difference between digital and non-digital media in this context is beyond the scope of this dissertation). "Intangible Harm" refers, in the context of this dissertation, to harm which is either very difficult or impossible to identify and quantify. For example, cyberbullying (bullying which takes place via social media) produces tangible harms. A trained psychologist could identify with some precision the level of psychological damage caused to the person who experienced cyberbullying. However, the harm to children's imagination resulting from their engagement with virtual worlds that I posit in this dissertation is either extremely difficult or impossible at the present time to identify with precision and therefore, impossible to measure. Similarly, scholars continue to argue over whether or not advertising to children via various media produces harms, but it is possible to say that any such harms remain very difficult or impossible to identify with any precision. These harms are therefore both virtual and intangible.

## **Chapter 1 - Potential Virtual and Intangible Harm**

This chapter outlines one potential virtual and intangible harm, as a starting point for the discussion in this dissertation regarding the limits of regulation in the context of a harm that is both virtual and intangible. The harm identified here is the potential damage to children's creative imagination that arises from virtual-world play. The thesis focuses on the harm to children's creative imagination from specific types of virtual reality play games, but it also makes reference in a lengthy chapter to the debates concerning potential harms arising from advertising directed to children. It could be contested whether the harm that I describe as being to children's creative imagination is as serious as I suggest, but the problem that this thesis deals with is not confined to my assessment. Other potential harms to children from media involvement have been identified before, specifically the harm that might arise from exposure to a steady diet of violence, or the harm that might arise from the promotion of unhealthy habits or foods or the harm that might arise from exposure to obscenities. These harms have each caught the attention of regulators either or both in Canada or the United States at some point in time. Like the potential harm of primary interest here, all these harms are intangible, difficult to establish scientifically and nonetheless significant in terms of both the public interest and public opinion. The growth of the virtual world adds a further dimension to harms that have been suggested as arising from media involvement. Here I am not alone in suggesting that the virtual realities created by the new, seemingly social media, might have a negative impact that seems, in some minds, to call for regulation. My task is therefore to examine the potential and limits of regulation to deal with harms to children that are intangible and virtual.

The theoretical basis of the said harm is found in the Artificial Medium Laws theory forth postulate. The chapter begins with a short explanation of the Artificial Medium Laws Theory, its notion of perceived psychological dimensions and the five postulates that the theory suggests. This explanation is followed by a discussion of the literature on imagination and how it is best developed, especially the role played by creative imagination. Having established the importance of creative imagination and how thoroughly it is grounded in children's experience, I turn my attention to the effects of media on children's creative imagination. Furthermore, I describe three virtual worlds marketed to children. Finally, I discuss why children's play in virtual worlds might not serve their interests with respect to the development of their creative

imagination. I suggest that the harm is so severe that some form of response is called for. In subsequent chapters, I discuss the limits of regulation in the context of this case study.

## 1. The Artificial Medium Laws Theory

The theory of artificial media Laws<sup>1</sup> includes two components: the perceived psychological dimensions and the five Artificial Medium postulates. The theory should be treated as a whole, working as a framework for understanding artificial media and as a method to draw insights regarding the future of artificial media and their influence on humans and our societies. The postulates and the perceived dimensions they refer to are intertwined: each artificial medium poses one or more perceived psychological dimensions. For example, print encompasses the visual dimension plus imagination; picture includes the visual dimension only; radio includes the audio dimension only; television includes audio and moving picture; and Virtual Worlds, which include audio, moving picture, time and social interaction. The psychological dimensions are not equivalent, but are ordered based upon the tendency of information gained through a stronger psychological dimension to affect that gained through a weaker one.

The postulates of the artificial medium builds on the perceived psychological dimensions. The first postulate, ‘The Truth in the Medium is Context Dependent’, argues that it is the context that defines our perceptions of the credibility of the message; the more psychological dimensions the medium engages, the more difficult it becomes for the user to define the context and thus assess the credibility of the message.

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<sup>1</sup> Nachshon Goltz, *The Artificial Medium Law Theory - Technopoly in Practice*, Osgoode Legal Studies Research Paper No. 47, Vol. 10/Issue 11 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2429899](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2429899); Nachshon Goltz, *The Artificial Medium Laws – Technopoly in Practice*, The Sixteenth Annual Convention of the Media Ecology Association, Metropolitan State University of Denver, Denver, Colorado, June 11–14, 2015; Nachshon Goltz, *The Artificial Medium Laws Theory – The Foundations*, Future Communications Symposium, York-Ryerson Joint Program in Communication & Culture, York University, Toronto, Canada, November 14, 2014; Nachshon Goltz, *The Artificial Medium Laws Theory – iPhone as an Accomplice to Murder*, the Alfred Korzybski Memorial lecture/conference, Institute of General Semantics, New York City, October 24-26, 2014; Nachshon Goltz, *The Artificial Medium Laws Theory – KONY2012 as a Case Study*, Media Ecology Association Convention, Ryerson University, Toronto, Canada, June 19-21, 2014; Nachshon Goltz & Tracey Dowdeswell, *Virtual Worlds Use and the Harm to Children’s Imagination Development*, in Matteo Stocchetti (ed.), *Storytelling in the Digital Age, Media and Education in the Digital Age* [Forthcoming]; The SORT, patent application before the United States Patent and Trademark Office, application number 14/074,715, filed on November 08, 2013; see also an in-depth discussion held at the Media Ecology online list-serve 2014 [on file].

The second postulate, ‘The Stronger Dimension Prevails’, argues that given the hierarchy of the perceived psychological dimensions, a combination of low-level dimension (*e.g.* sound) with a cognitively higher-level dimension (*e.g.* social interaction) will result in supremacy of the higher dimension in its influence on the user. Complex forms of media, ones that cause us to engage using a variety of psychological dimensions (*e.g.*, virtual worlds), can be especially effective at manipulating users.

The third postulate, ‘A Medium with Time Dimension Determines its Usage Length’, states that the more dimensions a medium possess, the more control over time usage shifts from the user to the medium. This law can be illustrated through the correlation between Internet addiction, usage time, and high-dimensional media such as Virtual World video games.

The fourth postulate, ‘The More Dimensions the Medium Possesses the Weaker the User’s Imagination’, is discussed in length in this chapter.

Finally, the fifth postulate, ‘The User is Bound to All the Laws’, argues that the user of the artificial medium is inherently bound to all the rules outlined above. This is simply because we are responding to the media in ways that are psychologically typical and predicable. It is precisely this predictability that is used so effectively by those who would manipulate us through artificial media. When the user is involved in creating the content, the influence of the medium may be even stronger. Virtual Worlds engender more addiction because of their interactivity (see the Interaction Dimension *supra*), while the high rate of suicide among reality TV participants suggests that the urge to bridge the gap between the real and the virtual is taking its toll.<sup>2</sup> Finally, recent evidence suggests that *knowing* about a medium’s ability to distort our perceptions has no effect on our ability to resist that manipulation, and may even increase it.<sup>3</sup>

## 2. The Imagination

This section lays the foundations for the argument regarding the harm resulting from virtual worlds to the development of children’s imagination, as predicted by the Artificial

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<sup>2</sup> Seth Kaufman, Suicide Rate for Reality Contestants Three Times the National Average. *TheKingofPain* (2013, April 1). Retrieved from <http://www.thekingofpainbook.com/2013/04/01/tkop-exclusive-suicide-rate-for-reality-contestants-three-times-the-national-average/>.

<sup>3</sup> R. Epstein & R. E. Robertson The search engine manipulation effect (SEME) and its possible impact on the outcome of elections. 33:112 *Proceedings of the National Academy of Sciences*, 33(112), E4512-E4521 (2015).

Medium Laws Theory's fourth postulate. The section begins with a review of the literature on the definition of imagination, especially the creative imagination, and then discusses children's development and play in this context in terms of the theory and the research.

The essence of imagination lies in its generativity, in the fact that through our imagination we can conjure up experiences and representations that are wholly novel to our lived experiences. Imagination is critical to children's mental development and abilities to learn, as discussed further below. Despite its importance, it remains intangible and difficult to define. Cohen & MacKeith<sup>4</sup> described psychologists' ambivalence towards it, stating that,

[o]n the one hand, it fascinates. Just as no other species can speak, no other species can imagine or invent. On the other hand, it is extremely hard to study imagination – especially experimentally.<sup>5</sup>

Despite this ambivalence, there have been numerous attempts to define and classify the imagination, none of which has yet received widespread consensus. Vygotsky<sup>6</sup> defined imagination as,

[a] new formation which is not present in the consciousness of the very young child, is totally absent in animals and represents a specifically human form of conscious activity. Like all functions of consciousness, it originally arises from action.<sup>7</sup>

One can imagine, for example, a bird turning into a snake while flying over a lake without ever seeing such a transformation actually taking place. One can produce novel representations in the mind by generatively combining past perceived representations. An underlying assumption of the Artificial Medium Laws Theory's fourth postulate is that only unmediated perceived dimensions can nourish the creative imagination. Therefore, in the example of the bird and the snake, it is assumed that a child who has only experienced the notion

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<sup>4</sup> David Cohen & Sephen Mackeith A., *The Development of Imagination*, London: Routledge 11-14 (1991).

<sup>5</sup> *Id.*, at 11-14.

<sup>6</sup> L. S. Vygotsky, *Mind in society: The development of higher psychological processes*, Cambridge, MA: Harvard University Press 79-91 (1978).

<sup>7</sup> *Id.*, at 537.

of a snake through the media, will not be able to imagine the transformation. Supporting this underlying assumption is beyond the scope of this chapter.

Elaborating on Vygotsky's definition, Singer and Singer<sup>8</sup> define imagination as,

[a] form of human thought characterized by the ability of the individual to reproduce images or concepts originally derived from the basic senses, but now reflected in one's consciousness as memories, fantasies, or future plans. These sensory-derived images, 'pictures in the mind's eye', mental conversations, or remembered or anticipated smells, touches, tastes, or movements can be reshaped and recombined into new images or possible future dialogues.<sup>9</sup>

The emphasize is on the, "images or concepts originally derived from the basic senses," that are then, "reshaped and recombined."<sup>10</sup> But this raises the question of whether "images or concepts" that are artificially mediated – and which are usually the product of the imaginary process of a TV show or video game creator – will function in the same way as basic building blocks for the user's imagination. When perceived via a medium, these images and concepts are already mediated and transformed to some extent, often drastically.

Other authors have defined the imagination in the context of the human spirit. For Watkins,<sup>11</sup> the imagination is, "the intermediate universe—the universe between pure spirit and the physical, sensible world—which is the world of the symbol and of imagining."<sup>12</sup> According to Latham,<sup>13</sup>

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<sup>8</sup> Dorothy G. Singer, & Jerome L. Singer, *Imagination and play in the Electronic Age*, Cambridge, Mass. Harvard University Press (2005).

<sup>9</sup> *Id.*, at 16.

<sup>10</sup> *Id.*

<sup>11</sup> M. Watkins, *Invisible Guests: The Development of Imaginal Dialogues*, Boston, Mass.: Sigo Press (1990).

<sup>12</sup> *Id.*, at 75.

<sup>13</sup> Christopher Lawrence Latham, *High Tech Image Influences On Development Of Young Children's Imaginative World Making* (2003) Dissertation Abstracts International: Section B: The Sciences and Engineering Vol. 63(7-B), pp. 3495 [ProQuest].

[i]maginative capacity thus underpins our species' ability to make sense and guide us beyond ego-directed aims and conditions that life brings our way. Creative fantasy freely expressed is our key to balance and wholeness.<sup>14</sup>

Dubos<sup>15</sup> argued that,

[m]an's propensity to imagine what does not yet exist, including what will never come to pass...most clearly differentiates him from animals. The more human he is, the more intensely do his anticipations of the future affect the character of his responses to the forces of the present.<sup>16</sup>

The imagination bridges the time from the present to the future.

Ulanov and Ulanov<sup>17</sup> point out that there is no life of the spirit without imagination,

Properly understood and pursued, the imagination is perhaps our most reliable way of bringing the world of the unconscious into some degree of consciousness and our best means of corresponding with the graces offered us in the life of the spirit.<sup>18</sup>

In our spiritual lives, the imagination enables paths that cannot be travelled in any other way, and its absence detaches us from the unconscious and the spirit. This is in stark contrast to the superficial and artificial representations of children's virtual worlds, with their flat and fleeting images, a world in which everything is offered, but nothing can truly be experienced. The child user is confined and constrained by the keyboard, mouse and screen on one hand, and the game rules on the other hand. The complete opposite of unmediated, free and sensual experience that the real world provides to the children and their imagination.

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<sup>14</sup> *Id.*, at 91.

<sup>15</sup> Rene Dubos, *Man Adapting*, New Haven: Yale University Press (1965).

<sup>16</sup> *Id.*, at 7.

<sup>17</sup> B. Ulanov & A. Ulanov, *The Healing Imagination*, New Jersey: Paulist Press (1991).

<sup>18</sup> *Id.*, at 3.

A more prosaic definition of the imagination claims that imagination is an activity of the human brain, operating much like memory or logic or any other cognitive process.<sup>19</sup> In this view, there is nothing mystical about the imagination, it is simply working on the material present in the brain.<sup>20</sup> The critical character of the imagination lies in its generative and transformative abilities, to take existing ingredients and bring them together to generate something novel. It is perhaps for this reason that imagination is critical to learning. As Egan<sup>21</sup> states,

[a]ll learning that is to be of educational value seems necessarily to involve an imaginative-finite creative component. The imagination is the making, composing, vivifying power that is required if the student is to reconstitute codes into living knowledge.<sup>22</sup>

Central to consideration of the relationship among reality, imagination, and play is Vygotsky's<sup>23</sup> suggestion that rich experiences create rich materials for the imagination. The richer children's experiences are, the more material they have to draw on to feed their imagination and, in turn, to channel into their play,

If we want to build a relatively strong foundation for a child's creativity, what we must do is broaden the experiences we provide him with. All else being equal, the more a child sees, hears, and experiences, the more he knows and assimilates, the more elements of reality he will have in his experience, and the more productive will be the operation of his imagination.<sup>24</sup>

Vygotsky<sup>25</sup> suggests that it is critical that a "rich" reality support a powerful imagination,

The creative activity of the imagination depends directly on the richness and

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<sup>19</sup> Ray Misson, *Imagination, The Individual And The Global Media*, In *Cross-Roads of the new millennium, Proceedings of the technological education and national development (TEND) Conference 2<sup>nd</sup>*, Abu Dhabi, United Arab Emirates, April 8-10, 2000.

<sup>20</sup> D. Feldman, M. Csikszentmihalyi & H. Gardner, *Changing the World: A Framework for the Study of Creativity*, Westport, CT: Greenwood Publishing (1994).

<sup>21</sup> Kieran Egan, *Romantic Understanding*, London: Routledge (1990).

<sup>22</sup> *Id.*, at 166.

<sup>23</sup> L. Vygotsky, *Imagination and creativity in childhood*, 42(1) *Journal of Russian and East European Psychology* 7-97 (2004).

<sup>24</sup> *Id.*, at 14.

<sup>25</sup> *Id.*

variety of a person's previous experience because this experience provides the material from which the products of fantasy are constructed. The richer a person's experience, the richer is the material his imagination has access to. This is why a child has a less rich imagination than an adult, because his experience has not been as rich.<sup>26</sup>

Generally, imagination has not been studied as a single concept. Valkenburg et al.,<sup>27</sup> in a review of the research on the influence of TV on daydreaming and creative imagination, found three closely related but distinguishable imaginal processes, which they define as follows: imaginative play – play in which children transcend the constraints of reality by acting ‘as if’; daydreaming – a state of consciousness characterized by a shift of attention from external stimuli to internal thoughts and images; and creative imagination, which is defined as the capacity to generate many different novel or unusual ideas.<sup>28</sup> This chapter will not deal with daydreaming, being outside the scope of this discussion, but it will discuss below imaginative play, the creative imagination, and the negative effects of media on the imagination as expressed in dreams. Within this discussion, the experience of virtual worlds is pivotal as the harm discussed in this chapter is the harm to imaginative development as a result of virtual worlds use.<sup>29</sup> It is important to note that some authorities<sup>30</sup> see potential benefits in the use of virtual worlds in certain types of educational projects.

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<sup>26</sup> *Id.*, at 14-15.

<sup>27</sup> Patti M. Valkenburg, and Tom H. A., van der Voort, *Influence of TV on Daydreaming and Creative Imagination: A Review of Research*, 116(2) *Psychological Bulletin* 316-339 (1994).

<sup>28</sup> J. L. Singer, *The Inner World of Daydreaming*, New York: Harper & Row (1975); J. L. Singer, Navigating the stream of consciousness: Research in daydreaming and related inner experience. *American Psychologist*, 30, 727-738 (1975).

<sup>29</sup> The harm from virtual worlds is contested. Some authorities suggest that the harm-causing problem might be screen time rather than virtual worlds (see the American Academy of Pediatrics, *Media Use in School-Aged Children and Adolescents*, Policy Statement, October 2016, <http://pediatrics.aappublications.org/content/early/2016/10/19/peds.2016-2592> (last visited Nov 25, 2016) (“children [should] have 2 hours or less of sedentary screen time daily”); Lipnowski, S., LeBlanc, CMA, Canadian Pediatric Society, *Healthy Active Living and Sports Medicine Committee*, 17(4) *Pediatric Child Health* 209 (2012) (“Children (5-11 yrs) and youth (12-17 yrs) should minimize the time they spend being sedentary each day by”)).

<sup>30</sup> See, e.g., Eschenbrenner, Brenda, Fui-Hoon Nah, Fiona & Siau Keng, *3-D Virtual Worlds in Education: Applications, Benefits, Issues, and Opportunities*, 19(4) *Journal of Database Management* 20 (2008); Baker, Suzanne C., Wentz, Ryan K. & Woods, Madison M., *Using Virtual Worlds in Education: Second Life® as an Educational Tool* (14 Jan 2009), <http://www.tandfonline.com/doi/abs/10.1080/00986280802529079> (last visited Nov 25, 2016); Nussli, Natalie & Oh, Kevin, *Teachers' perceptions of the benefits and challenges of three-dimensional virtual worlds for social skills practice*, 53(3) *Educational Media International* 198 (2016).

Virtual worlds differ in many ways from authentic imaginary experiences, and these differences may actually impede the development of imagination in young children. According to Cobb,<sup>31</sup> the psychological distance between the self and the object of desire “is the locus in which the ecology of imagination in childhood has its origin”.<sup>32</sup> In virtual worlds, the distance between ‘the self and the object of desire’ is vague since the self is portrayed as a virtual avatar; the object of desire is always at hand in the virtual environment but cannot be reached in the real one.

Scholars have defined four key characteristics of children’s imaginary worlds: first, the child must be able to distinguish between what they have imagined and what is real; second, the child’s interest in the fantasy world persists for months or years; third, the child will be proud of the world and consistent about it; lastly, the child will feel that the world matters to him or her (these worlds usually disappear by the age of ten).<sup>33</sup> As with the tale of the child whose *Webkinz* pet fell ill from his disuse of the game,<sup>34</sup> virtual worlds can mimic the last three characteristics. However, it is on the first characteristic that virtual worlds fall short: the child has not imagined the world, and is not in control. The child may, therefore, have significant difficulties distinguishing the virtual world from the real one.

Others contend that the development of the imagination is critical not only to our individual development but also to our collective development. Jung,<sup>35</sup> already cognizant of the pressures of our modern life, warns us not to abandon our species’ hard-fought accomplishments in developing our spiritual life. “The wheel of history,” he states, “must not be turned back, and man’s advance toward a spiritual life, which began with the primitive rites of initiation, must not

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<sup>31</sup> E. Cobb, *The Ecology of Imagination*. New York: Columbia University Press (1977).

<sup>32</sup> *Id.*, at 56.

<sup>33</sup> D. Cohen & S. A. MacKeith *The Development of Imagination: The Private Worlds of Childhood*. London: Routledge (1991); R. Silvey & S. MacKeith *The paracosm: A special form of fantasy*. In Morrison, D. C. (Ed.), *Organizing Early Experience: Imagination and Cognition in Childhood*. Amityville, NY: Baywood, 173-197 (1988).

<sup>34</sup> The author’s colleague and her family were traveling for Christmas and unable to get to a computer easily when her son wanted to play on *Webkinz*. When her son was finally able to log on he became instantly panicked and cried uncontrollably over the fear that his pet was dying. He saw that his beloved avatar was very ill and in the hospital due to malnutrition. The mother knew the pet was, indeed, not going to die; the website makes that clear to parents in its introduction. Yet her son was distraught over having neglected his poor pet during the Christmas season. He vowed never to let that many days go by without caring for the animal’s needs. (C. Dellinger-Pate & R. J. Conforti, *Webkinz as Consumerist Discourse: A Critical Ideological Analysis*, In I. R. Berson & M. J., Berson (Eds.), *High Tech Tots: Childhood in a Digital World*. Charlotte, NC: Information Age Publishing, 249-270, 267 (2010).

<sup>35</sup> C. G. Jung, *Modern Man in Search of a Soul*, London: Harvest Books (1933).

be denied”.<sup>36</sup> The consequences of losing or not developing our imaginative capacities can have serious and as yet unforeseen repercussions and, as Jung warns us, our collective accomplishments can be turned back.

In summary, the imagination is unique to humans, and it is critical for our learning and for children’s proper intellectual development. It is also a key part of what makes us *human*. In addition, the imagination is a learned ability, one which is not yet present in young children. It is originally derived from the basic senses, works on the material that is present in the brain and bridges the gap between the self and the object of desire, as well as the time from the present to the future. The development of the imagination also appears necessary in order to be able to distinguish between the imagined and the real.

In children, the imagination develops and expresses in imaginative play and creative imagination. The emphasis is on the novel reshaping of already-familiar images and experiences. These skills are all essential for both understanding and creating stories. But the question that I wish to raise in this chapter is whether the images and concepts that children receive from playing in virtual worlds function as building blocks for the development of the child’s imagination in the same way as images and concepts derived from less artificial media. To take a simple example, the images a child gets from having a book read to them come from his or her own mind’s eye, but the images they get from watching a show on TV come from the creator and are imposed upon the child, crowding out the images in the mind’s eye the child would otherwise create. Because a virtual world is an even more fully-immersive experience for the child than a television show, even more of the images and concepts that child users receive are imposed upon them, thus increasing the ill effects of the medium.

### **3. The Development of the Imagination**

Imagination is critical to children’s learning and development. Vygotsky<sup>37</sup> states that,

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<sup>36</sup> *Id.*, at 125.

<sup>37</sup> L. S. Vygotsky, Imagination and creativity in childhood. *Journal of Russian and East European Psychology*, 42(1), 7-97 (2004) (English translation 2004, M.E. Sharpe, Inc., from the Russian text *Voobrazhenie i tvorchestvo v detskom vozraste* (Moscow: Prosveshchenie, 1967)).

[c]hild's play is not simply a reproduction of what he has experienced, but a creative reworking of the impressions he has acquired. He combines them and uses them to construct a new reality, one that conforms to his own needs and desires.<sup>38</sup>

When the child is rehearsing a situation from his life with toys, he/she is not only duplicating the situation in reality but is creating a scenario that exceeds that reality and portrays what will or may happen, according to the child's fears, hopes and other internal drives. Winnicott<sup>39</sup> further states that, "[i]t is in playing and only in playing that the individual child or adult is able to be creative and to use the whole personality, and it is only in being creative that the individual discovers the self".<sup>40</sup> These two steps are essential. First, imaginative playing will enable creativity, and in creativity will we discover ourselves.

While many animals engage in play, it lacks the generativity of children's play. Cobb<sup>41</sup> contends that, "while other animals do play, the human child's play includes the effort to be something other than what he actually is, to 'act out' and to dramatize speculation". Wittgenstein<sup>42</sup> pondered, "Could one imagine a world in which there could be no pretend?". Play is essential for the imagination, but it is pretend play that most deeply express and develops our creativity and imagination.

According to Piaget's influential developmental theory,<sup>43</sup> there are three main types of children's play that direct and foster a child's mental development: practice games, symbolic games and games with rules. When a child jumps over a stream for the fun of jumping, she is engaging in a practice game. Games with rules are,

[g]ames with sensory-motor combinations (races, marbles, ball games, etc.) or intellectual combinations (cards, chess, etc.), in which there is competition between individuals (otherwise rules would be useless) and which are regulated

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<sup>38</sup> *Id.*, at 11-12.

<sup>39</sup> D. W. Winnicott, *Playing and Reality*. Tavistock Publication (1971).

<sup>40</sup> *Id.*, at 72-3.

<sup>41</sup> Cobb, *supra* note 31, at 22.

<sup>42</sup> L. Wittgenstein, *Last Writings on the Philosophy of Psychology. The Inner and the Outer*, Vol. 2. Oxford: Blackwell, 1949/199, 37e (1992).

<sup>43</sup> J. Piaget *Play, Dreams and Imitation in Childhood*, Gattegno, C., & Hodgson, F. M. trans. New York: W. W. Norton (1962).

either by a code handed down from earlier generations, or by temporary agreement.<sup>44</sup>

Symbolic games imply representation of an absent object, since there is a comparison between a given and an imagined element. For example, a child pushing a box and imagining it is a car. It is the symbolic, or pretend, games that are most important in the context of the development of imagination.

Piaget argues that,

[w]hile mere practice play begins with the first months of life and symbolic play during the second year, games with rules rarely occur before stage II (age 4-7) and belong mainly to the third period (from 7-11).<sup>45</sup>

Piaget theorizes that from ages 4 to 7, symbolic games begin to lose their frequency, but continue to appear in the same intensity. From the age of 7 to 11 or 12, symbolic play declines and games with rules (social games) emerge. According to Piaget, symbolic play takes place mainly from about age 2 to 7. Singer and Singer<sup>46</sup> agree that,

[i]maginative play emerges toward the end of the child's second post-partum year, struggles fitfully toward a flowering well into the third year, and in the fourth, fifth, and sixth years is a significant factor in the child's behavioral repertory.<sup>47</sup>

However, they claim that while,

Piaget seemed to suggest that imaginative play fades by the early school years as 'operational' thought takes over, we shall suggest that it is merely submerged in the interest of the changing demands of school decorum and other social pressures.<sup>48</sup>

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<sup>44</sup> *Id.*, at 142.

<sup>45</sup> *Id.*

<sup>46</sup> D. G. Singer & J. L. Singer, *The House of Make-Believe*. Cambridge, Mass.: Harvard University Press (1990).

<sup>47</sup> *Id.*, at 32.

<sup>48</sup> *Id.*

In their view, it is not an internal psychological force that propels the shift, but external ones. I posit that the use of virtual worlds may spur on this shift, making the symbolic play period shorter and thus impairing the process of imagination development.

Recognizing the developmental importance of the imagination, Singer & Singer propose that, “our human stream of consciousness emerges gradually in childhood from children’s play and from their pretend games”.<sup>49</sup> As explained by Grossman & Degaetano,<sup>50</sup>

The brain of the child is not a miniature version of the adult brain...the young brain is an organ that will change considerably as it matures over the course of childhood and adolescence. As it builds neural structures for optimal development, the young brain is very vulnerable to stimulus from its environment.<sup>51</sup>

Without pretend play, the imagination will not develop properly in young children, and the literature suggests that some of the deficits created thereby may be life-long. I posit that another mechanism whereby virtual worlds may be harming this development by misleading the child’s brain to think he is engaged in pretend play, while he is actually engaged in a combination of practice and rule games.

Cobb’s findings seem to support this proposition. She writes,<sup>52</sup>

The sense of wonder is spontaneous, a prerogative of childhood. When it is maintained as an attitude, or a point of view, in later life, wonder permits a response of the nervous system to the universe that incites the mind to organize novelty of pattern and form out of incoming information. The ability of the adult to look upon the world with wonder is thus a technique and an essential instrument in the work of the poet, the artist or the creative thinker.

The artificial medium and the mediated stimulus it sends to the senses curtail this sense of wonder. Instead of experiencing the world in wonder, the child is experiencing the virtual

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<sup>49</sup> *Id.*

<sup>50</sup> D. Grossman & G. Degaetano, *Stop Teaching Our Kids to Kill*. New York: Crown Publishers (1999).

<sup>51</sup> *Id.*, at 58.

<sup>52</sup> Cobb, *supra* note 31, at 27.

world where the alleged wonder is mediated and masks the ‘true’ imaginary universe with the ready-made and mediated one.

#### 4. The Role of Play

The chief value of play in child development lies in the child’s total control over his/her imaginary universe, free from external constraints – an accomplishment that is simply not possible in the mediated virtual world. Piaget argued that,

[u]nlike objective thought, which seeks to adapt itself to the requirements of external reality, imaginative play is a symbolic transposition which subjects things to the child’s activity, without rules or limitations.<sup>53</sup>

Although Piaget and Vygotsky experienced a theoretical controversy about the nature of imagination,<sup>54</sup> there was a mutual understanding between them that,

[t]he symbolic game as a whole is again a practice game, but a practice game which exercises (and more particularly ‘pre-exercises’) the specific form of thought which is imagination.<sup>55</sup>

Symbolic games develop the imagination free from any external constraints, a freedom which is not possible in virtual worlds that are inherently bound to some rules.

Mitchell<sup>56</sup> explains that, “[p]retense or make-believe is a mantle activity involving imagination that is intentionally projected onto something”. More elaborately, make-believe is “the use of...props in imaginative activities,” where props are “objects of imagining”.<sup>57</sup> Props include the pretenders themselves and the objects. Pretence in play is called ‘symbolic play’, but

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<sup>53</sup> Piaget, *supra* note 43, at 87.

<sup>54</sup> N. Gajdamaschko, Vygotsky on imagination: Why an understanding of the imagination is an important issue for school teachers. *Teaching Education*, 16(1), 13-22 (2005).

<sup>55</sup> Piaget, *supra* note 43, at 118.

<sup>56</sup> W. R. Mitchell, Imaginative animals, pretending children, In Mitchell, R. W. (Ed.). *Pretending and Imagination in Animals and Children*. Cambridge: Cambridge University Press, 3-22, 4 (2002).

<sup>57</sup> K. L. Walton, *Mimesis as Make-Believe*. Cambridge, Mass.: Harvard University Press 25 (1990).

pretending also occurs outside play, and need not be ‘playful’.<sup>58</sup> Pretence is essential for the imagination development either in play or outside it. But it is only possible when there are no external constraints forced on the child.

Adults and other children might force external constraints, the same as do virtual worlds. The difference is that external constraints in the real world are obvious and apparent, while virtual worlds actually enforce external constraints, while pretending to provide props for imaginative play. For example, a child can dress its penguin in *Club Penguin*, which is allegedly imaginative play, but *cannot use the penguin as a chair*, i.e., the child cannot stand the penguin as a symbol for some other object or idea, which constitutes true imaginative play.

Singer & Singer<sup>59</sup> support the developmental value of symbolic games, stating that when, children engage in symbolic games they are practicing mental skills that will later stand them in good stead, just as practice in walking, balancing, or swimming aids the development of motor skills.

In a follow-up study of children from age eight to twelve, twenty years later, Shiner, Masten, and Roberts<sup>60</sup> found that those children who scored high in social skills, academic attainment, and work competence maintained these patterns as adults. These kinds of skills are the same as those found to emerge from imaginative play in the earlier years.<sup>61</sup> Therefore, deficits in imagination in early years are correlated with long-term deficits in other pro-social skills. Thus, the importance of the imagination for the development of the child and her achievement, success and well being as an adult.

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<sup>58</sup> L. R. Goldman, *Child's Play*. Oxford: Berg (1998); A. Lillard, Just through the looking glass: children's understanding of pretense. In Mitchell, R. W. (Ed.). *Pretending and Imagination in Animals and Children*. Cambridge: Cambridge University Press, 102-114 (2002).

<sup>59</sup> Singer & Singer, *supra* note 8, at 22.

<sup>60</sup> R. L. Shiner, A. S. Masten & J. M. Roberts, Childhood Personality Foreshadows Adult Personality and Life Outcomes Two Decades Later. *Journal of Personality*, 71(6), 1145-1170 (2003).

<sup>61</sup> D. G. Singer & J. L. Singer, *Make-Believe: Games and Activities for Imaginative Play*. Washington, DC: American Psychological Association Books, Imagination Press (2001); S. Smilansky, *The Effects of Sociodramatic Play on Disadvantaged Preschool Children*. New York: Wiley (1986).

Symbolic play enables children to have a clear sense of what is real and what is fantasy.<sup>62</sup> Russ conducted a study with 121 first and second graders, and then a follow up study with 31 of them in fifth and sixth grade. She found that,

[c]hildren who play imaginatively in their early years are more likely to think creatively...good early play skills predicted the ability to be creative and generate alternative solutions to everyday problems.<sup>63</sup>

Therefore, children who substitute their imaginative play with the rule-bound play in virtual worlds may not fully develop these skills.

Make-believe play produces other important outcomes. Spiegel<sup>64</sup> argues that it develops the ability to self-regulate; Singer & Singer<sup>65</sup> posit that imaginative play is associated with more positive emotions in children. Other studies have shown how children engaging together in make-believe play demonstrate advances in recognizing others' thoughts, or in differentiating fantasy representations from reality.<sup>66</sup> Children engaged together in play in virtual worlds are not involved in make-believe play; rather, they are playing games with rules, but these are the rules set by the creators of the virtual world.

An illustration of the negative effects of the lack of pretend play was made by Wulff,<sup>67</sup> who finds that autistic children have severe early deprivations in symbolic play. Harris states

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<sup>62</sup> J. N. Aronson & C. Golomb, Preschoolers' understanding of pretense and presumption of congruity between action and representation. *Developmental Psychology*, 35(6), 1414-1425 (1999); C. Golomb & R. Kuersten, On the Transition From Pretense Play To Reality: What Are The Rules Of The Game? *British Journal of Developmental Psychology*, 14(2), 203-217 (1996).

<sup>63</sup> Cited in, J. Adams, B. Sutherland, C. Kalb & J. Raymond, The end of make believe. *Newsweek* 3 (2003, August 25). Retrieved from <http://www.newsweek.com/end-make-believe-135693>.

<sup>64</sup> A. Spiegel, Old Fashioned Play Builds Serious Skills. *National Public Radio* (2008, February 21). Retrieved from <http://www.npr.org/templates/story.php?storyId=19212514>

<sup>65</sup> Singer & Singer, *supra* note 8.

<sup>66</sup> C. Rosen, D. Schwebel, & J. L. Singer, Preschoolers' Attributions of Mental States in Pretense. *Child Development*, 66, 1133-1142 (1997); D. Schwebel, C. Rosen, & J. L. Singer, Preschooler' Pretend Play and Theory of Mind: The Role of Jointly-Conducted Pretense, *British Journal of Developmental Psychology*, 17, 333-348 (1999).

<sup>67</sup> S. B. Wulff, The symbolic and object play of children with autism: A review, *Journal of Autism and Developmental Disorder*, 15, 139-48 (1985).

that, “the study of early pathology shows that it is the absence of early imagination, and not its presence, that is pathological”.<sup>68</sup> He continues, stating that,

[o]ne of the major characteristics of the syndrome of early childhood autism is an absence or impoverishment of pretend play...The long term social and cognitive restriction of people with autism suggest that the capacity for pretence is an important foundation for lifelong normality.<sup>69</sup>

The imagination, the ability to think symbolically, and therefore the development of normal cognition are all closely linked. This can clearly be seen in children who have serious deficits in symbolic thinking and cannot engage in symbolic or pretend play, as occurs in children who are on the severe end of the autism spectrum.

Children playing in virtual worlds might, therefore, interact with the virtual world as though they are engaged in make-believe play, while they are really engaged in rule-bound play. I argue that this interaction with the game removes the benefits children would otherwise receive from their play. First, children are not receiving the benefits from symbolic play when they play in virtual worlds, and second, because they may acquire a learned deficit in the ability to distinguish the real world from the fantasy.

## 5. The Creative Imagination

It should be noted that this chapter deals with the *creative imagination* rather than *creativity* itself. The commonalities and differences between the two are beyond the scope of this chapter. Singer & Singer<sup>70</sup> have noted some of the differences between the two concepts, stating that,

[i]magination seems freer and broader, since our thoughts may remain as private and as fanciful as we may want them to be, with no constraints.

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<sup>68</sup> L. P. Harris, *The Work of the Imagination*. Oxford: Blackwell 6 (2000).

<sup>69</sup> *Id.*

<sup>70</sup> Singer & Singer, *supra* note 8.

Imagination may take the form of visual imagery with no obvious outcome other than the pleasure it affords us.<sup>71</sup>

It is the creative imagination in this sense that I discuss below.

Vygotsky<sup>72</sup> saw creativity as a way of adapting to the challenges posed by our environment. “A creature that is perfectly adapted to its environment,” he states, “would not want anything, would not have anything to strive for, and, of course, would not be able to create anything”.<sup>73</sup> Rogers<sup>74</sup> points out that, with the kaleidoscope of changes that are occurring at a geometric rate, the development of genuine, creative adaptation may represent the only way forward to build a constructive continuity. As Rogers states,

[u]nless man can make new and original adaptations to his environment as rapidly as his science can change the environment, our culture will perish. Not only individual maladjustment and group tensions but international annihilation will be the price we pay for a lack of creativity.<sup>75</sup>

There may be a heavy price to pay, therefore, if genuine creative adaptation cannot be fostered. At the same time as our real environment is changing rapidly, our virtual environment is changing in the opposite direction, becoming more and more convenient for us and adapting to our whims, rather than posing challenges to our creativity.

In this context, Winnicott argues that, “everything that happens is creative except in so far as the individual is ill, or is hampered by ongoing environmental factors which stifle his creative processes”.<sup>76</sup> When the child is spending time in the pre-designed environment of the virtual world, his creativity is stifled in this manner. Cobb<sup>77</sup> states that,

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<sup>71</sup> *Id.*, 268-9.

<sup>72</sup> Vygotsky, *supra* note 23.

<sup>73</sup> *Id.*, at 29.

<sup>74</sup> C. R. Rogers, Toward a Theory of Creativity, In Anderson, H. H. (Ed.). *Creativity and its Cultivation*. New York: Harper (1959).

<sup>75</sup> *Id.*, at 70.

<sup>76</sup> D. W. Winnicott, *Playing and Reality*. Tavistock Publication 91 (1971).

<sup>77</sup> Cobb, *supra* note 31, at 15.

[a] major clue to mental and psychosocial health lies in the spontaneous and innately creative imagination of childhood, both as form of learning and as a function of the organizing powers of the perceiving nervous system.

As can be seen in children with severe autism, the lack of symbolic thinking and the creative imagination presents itself as a severe cognitive pathology.

Winnicott<sup>78</sup> further states that,

[m]any individuals have experienced just enough of creative living to recognize that for most of their time they are living uncreatively, as if caught up in the creativity of someone else, or of a machine.

However, children have not yet experienced enough creative imagining of their own to realize they are, ‘caught up in the creativity of someone else, or of a machine’. Vygotsky<sup>79</sup> concludes that,

[t]he entire future of humanity will be attained through the creative imagination... The development of a creative individual, one who strives for the future, is enabled by creative imagination embodied in the present.

But what if there is no ‘creative imagination embodied in the present’ because of the influence of an all-encompassing virtual environment?

## 6. The Senses

The argument that technology alters our sensory perception is not new. McLuhan<sup>80</sup> remarked on the changes in the senses as a result of the introduction of technology, stating that,

[i]f technology is introduced from within or from without a culture, and if it gives new stress or ascendancy to one or another of our senses, the ratio among

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<sup>78</sup> Winnicott, *supra* note 76, at 87.

<sup>79</sup> Vygotsky, *supra* note 23, at 88.

<sup>80</sup> M. McLuhan, *Understanding Media: The Extensions of Man*. Toronto: Toronto University Press (1964).

all our senses is altered. We no longer feel the same, nor do our eyes and ears and other senses remain the same.<sup>81</sup>

Advanced technologies, such as virtual worlds, provide more powerful sensory input, like time and interaction, all of which were not present at the time of McLuhan's writing. We ought, therefore, to think carefully about how our sensory perceptions are being altered by these developing virtual cultures.

In an interview with Rudolf Arnheim,<sup>82</sup> he discusses a generation that had lost touch with its senses. Arnheim states,

If you look at television for hours every day, you must grow up with the ghostly feeling that you live in a world of wraiths...the mind finds it hard to grasp images that do not have significant form, and in grasping an object the mind finds meaning in that object....The visual sense in most men and women has been reduced to an economic minimum – the effort it takes to tell that the piece of paper is not a piece of bread<sup>83</sup>... We have lost the human ability to taste the feast of meaning that each event and object offers to our senses.<sup>84</sup>

The mind cannot fully develop its imagination based on sensory input coming from an artificial medium, and this is more so for virtual worlds than it was in Arnheim's time.

Pearce<sup>85</sup> states that,

[a]bstract imagery is not present to the senses; it must be created from within. We must then process that imagery, transfer it into images available to the senses out there. If we cannot, we have no imagination, and if we have no imagination we are automatically grounded in sensory-motor imagery.<sup>86</sup>

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<sup>81</sup> *Id.*, at 24.

<sup>82</sup> R. J. Peterson, Eyes Have They, But They See Not, A Conversation With Rudolf Arnheim About a Generation That Has Lost Touch With Its Senses. *Psychology Today*, June 1972, 55-58 (1972); R. Arnheim, *Visual Thinking*, California: University of California Press (1969).

<sup>83</sup> *Id.*, at 92.

<sup>84</sup> *Id.*, at 55.

<sup>85</sup> J. Pearce, *Magical Child Matures*, New York: E. P. Dutton (1985).

<sup>86</sup> *Id.*, at 63.

When the mind is bombarded with sensory input from an artificial medium, there is no place for acquiring and manipulating abstract imagery. There is no creation of images from within, and therefore no imagination.

In his warning to us about the dangerous aspects of children's exposure to artificial media, Latham<sup>87</sup> concludes that,

[y]oung children's spontaneous imaginative capabilities may be neurologically foreclosed and become increasingly impoverished as exposure to screen-based electronic entertainment rises.<sup>88</sup>

The internal process of imagination is replaced by the outside exposure to the artificial media. Kline<sup>89</sup> summarizes this shift as one in which,

[m]arketing, rather than entertainment, considerations dominate the design of children's characters, the fictions in which they appear, and hence the way children play.<sup>90</sup>

At the same time,

[p]lay, the most important modality of childhood learning is thus colonized by marketing objectives making the imagination the organ of corporate desire. *The consumption ethos has become the vortex of children's culture.*<sup>91</sup>

## **7. Empirical Research on Children and the Media: The Visualization Hypothesis**

One would have expected to find extensive literature on media and the users' imagination, but a diligent and thorough search yielded little results. From the outset of my

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<sup>87</sup> C. L. Latham, *High Tech Image Influences On Development Of Young Children's Imaginative World Making*. Dissertation Abstracts International: Section B: The Sciences and Engineering Vol. 63(7-B), 3495 (2003). [ProQuest].

<sup>88</sup> *Id.*, at iv.

<sup>89</sup> S. Kline, Limits to the Imagination: Marketing and Children's Culture, In Angus, I. & Jhally, S. (Eds.). *Cultural Politics in Contemporary America*. New York: Routledge, 299-316 (1989).

<sup>90</sup> *Id.*, at 311; D. E. Levin & B. Rosenquest, The Increasing Role of Electronic Toys in the Lives of Infants and Toddlers: Should we be Concerned? *Contemporary Issues in Early Childhood*, 2(2), 242-247 (2001).

<sup>91</sup> *Id.* (emphasis added).

research, I was searching for relevant literature including approaching leading scholars in this field; my arguments were presented in the media ecology list serve, at international conferences and were reviewed by experts in the field for publication, however, no literature to the contrary (or in support) was provided. Possible explanation to the scarce literature could be that without a theory that makes a claim (i.e., media harm imagination development), there will be little relevant literature. It is usually when a theory is presented that relevant research is done. Many influential theories have been accepted with skepticism, at best, and was later proven accurate and groundbreaking.

Most of the empirical research regarding media and the imagination was conducted during the 1980s and therefore focused on television. For several reasons – undoubtedly the problem of quantifying imagination being one of them – this line of research has been rarely pursued further to other, more advanced artificial mediums. Therefore, I will review the existing research in this field, and the implications for the effects of more advanced artificial mediums will be drawn based on the scarce current literature and by analogy.

Two competing theories have been introduced regarding the effects of TV use on creative imagination: stimulation theory posits that TV stimulates creative imagination through its content; reduction theory, on the other hand, posits that TV hinders the development of creative imagination.<sup>92</sup> While five types of reduction hypotheses have been proposed in the literature,<sup>93</sup> only the visualization hypothesis is relevant and will be discussed here. The visualization hypothesis posits, in essence, that the visual nature of TV is responsible for the reductive effect that TV has on creative imagination. Unlike verbal media, such as radio and print, TV presents the viewer with ready-made visual images and thus leaves little room for forming one's own. When engaged in creative thinking, it is hard to dissociate oneself from the

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<sup>92</sup> P. M. Valkenburg & T. H. van der Voort, Influence of TV on Daydreaming and Creative Imagination: A Review of Research. *Psychological Bulletin*, 116(2), 316-339, 324-5 (1994).

<sup>93</sup> G. Salomon, Television is "Easy" and Print is "Tough": The Differential Investment of Mental Effort as a Function of Perceptions and Attributions. *Journal of Educational Psychology*, 76, 647-658 (1984); J. L. Singer, D. G. Singer & W. Rapaczynski, Children's imagination as predicted by family patterns and television viewing: A longitudinal study. *Genetic Psychology Monographs*, 110, 43-69 (1984).

images supplied by TV, with the result that one has greater difficulty generating novel ideas and images from TV.<sup>94</sup>

Valkenberg & Van der Voort have found some support for the visualization hypothesis.<sup>95</sup> They reviewed a number of studies which indicated that children who watched a TV story more often used visual content as a basis for drawing story related inferences, whereas children who had heard the same story on a radio more often based their inferences on the verbal content, as well as information from outside of the story, such as personal experience.<sup>96</sup> Goldberg,<sup>97</sup> too, found that, “[TV] supplies the same image to millions of people at the same time. We process those images rather than create them”.

Further support for the visualization hypothesis was provided by Lang et al.,<sup>98</sup> as well as Conway & Siegelman,<sup>99</sup> who found that,

[h]eavy viewing destroys the natural ability of children to form mental images from what they hear or read. With too much TV, the young child’s basic capacity of imagination, like an unused muscle, never reaches a level adequate for performing even the most elementary of creative acts.<sup>100</sup>

Mander,<sup>101</sup> discussing the visualization hypothesis, wrote that,

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<sup>94</sup> P. M. Greenfield & J. Beagles-Ross, Radio vs. Television: Their Cognitive Impact on Children of Different Socioeconomic and Ethnic Groups, *Journal of Communication*, 38(2), 71-92 (1988); C. W. Meline, Does The Medium Matter? *Journal of Communication*, 26(3), 81-89 (1976); E. Webb, Images of Television: Some Reflections. *Use of English*, 32(1), 10-17 (1980).

<sup>95</sup> Valkenberg & Van der Voort, *supra* note 92.

<sup>96</sup> J. Beagles-Ross, & I. Gat, Specific Impact of Radio and Television on Children’s Story Comprehension, *Journal of Educational Psychology*, 75, 128-137 (1983); P. M. Greenfield & J. Beagles-Ross, Radio vs. Television: Their Cognitive Impact on Children of Different Socioeconomic and Ethnic Groups, *Journal of Communication*, 38(2), 71-92 (1988); L. K. Meringoff, Influence of the Medium on Children’s Story Apprehension, *Journal of Educational Psychology*, 72, 240-249 (1980); M. M. Vibbert & L. K. Meringoff, Children’s Production and Application of Story Imagery: A Cross-medium Investigation (Tech. Rep. No. 23). *Project Zero*. Cambridge, MA: Harvard University. (ERIC Document Reproduction Service No. ED 210 682) (1981).

<sup>97</sup> D. A. Goldberg, Television From Jungian Perspective, *Psychological Perspectives*, 29(2), 10-20 16 (1994).

<sup>98</sup> A. Lang, K. Dhillon & Q. Dong The effects of emotional arousal and valence on television viewers’ cognitive capacity and memory. *Journal of Broadcasting and Electronic Media*, 39(3), 313-327 (1995).

<sup>99</sup> F. Conway & J. Siegelman, *Snapping*. Philadelphia: J. B. Lippincott (1978).

<sup>100</sup> *Id.*, at 191.

<sup>101</sup> J. Mander, *Four Arguments for the Elimination of Television*. New York: Perennial (1978).

[m]ore than any other single effect, television places images in our brain. It is a melancholy fact that most of us give little importance to this implantation, perhaps because we have lost touch with our own image-creating abilities, how we use them and the critical functions they serve in our lives.<sup>102</sup>

This can have a negative effect on the development of creative imagination in children. Pearce argues,<sup>103</sup>

Television feeds both stimulus and response into that infant-child brain, as a single paired-effect, and therein lays the danger. *Television floods the brain with a counterfeit of the response the brain is supposed to learn to make to the stimuli of words or music.* As a result, much structural coupling between mind and environment is eliminated; few metaphoric images develop; few higher cortical areas of the brain are called into play; few, if any, symbolic structures develop.<sup>104</sup>

Pearce concludes that, “failing to develop imagery means having no imagination”.<sup>105</sup>

In their research on video game users and dreams, Gackenbach et al.<sup>106</sup> found that high-end users were associated with the lucid dream type, had more dead and imaginary characters in their dreams,<sup>107</sup> and were coded as containing more incongruent and vague elements than were those of low-end gamers. Gackenbach et al.<sup>108</sup> assume that dream bizarreness in high-end video game users is a result of a more developed creative imagination.

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<sup>102</sup> *Id.*, at 216.

<sup>103</sup> J. Pearce, *Evolution's End: Claiming the Potential of Our Intelligence*. San Francisco: Harper Collins (1992).

<sup>104</sup> *Id.*, at 166.

<sup>105</sup> *Id.*, at 167.

<sup>106</sup> J. I. Gackenbach, B. Kuruvilla, R. Dopko & H. Le, Dreams and Video Game Play, In Columbus, F. (Ed.). *Computer Games: Learning Objectives, Cognitive Performance and Effects on Development*. Hauppauge, NY: Nova Science, 127-136 (2010).

<sup>107</sup> J. I. Gackenbach, Video game play and lucid dreams: Implications for the development of consciousness. *Dreaming*, 16, 96-110 (2006); J. I. Gackenbach, Electronic media and lucid-control dreams: Morning after reports, *Dreaming*, 19, 1-6 (2009); J. I. Gackenbach, I. Matty, B. Kuruvilla, A. N. Samaha, A. Zederayko, J. Olishefski & H. Von Stackelberg, Video Game Play: Waking and Dreaming Consciousness. In Krippner, S. (Ed.). *Perchance to Dream*. Hauppauge, NY: Nova Science, 239-253 (2009).

<sup>108</sup> J. Gackenbach, B. Kuruvilla, & R. Dopko, Video Game Play and Dream Bizarreness, *Dreaming*, 4, 218-231 (2009).

Similarly, a study conducted among users of the virtual world *Everquest* found that 80.6% of the female and 58.4% of the male players reported dreaming of the virtual world or having a dream taking place in the virtual world environment.<sup>109</sup> However, these findings may rather indicate the deep influence of video games (and consequently, virtual worlds) on the user. It might be said that the most ‘sacred’ space of the imagination – dreams – has been ‘invaded’ by the artificial medium, and that this is a warning sign as to its deep and embracing influence.

I argue that virtual worlds and virtual realities call upon us to extend the visualization hypothesis further – from the senses of vision and sound to higher psychological dimensions of perception, including of time, interaction and associated aspects as a narrative construction, and judgments concerning reality versus fantasy. I posit that these are weak and almost irrelevant in TV, stronger in video games and predominant in virtual worlds, as the user becomes more and more immersed in the medium, and more and more of the material is supplied for the user by the medium. This is the key theoretical advance that I propose in this chapter. Accordingly, I propose to rename this phenomenon the ‘displacement hypothesis’ in order to capture these new cognitive and sensory dimensions that are being displaced by the immersive virtual environment, and to emphasize that, when manufactured content is supplied ready-made to the individual, it displaces the creative imaginative processes that the individual would otherwise supply for him or herself. In children whose creative imagination is still developing, such continuous displacement could have permanent effects on the creative imagination. It is no longer the visual only that is displacing the images that could have been created by the imagination; time, space, interaction and narrative, even presence and being, are now being projected onto us and consumed from the artificial medium, where they are replacing the natural pace and creation of these mental processes within the person. This has much more significant effects on the individual than when only the visual sense is being displaced. The most internal object, the mind, is becoming externalized, nourishing itself falsely from the artificial medium dimensions, and leaving little space for the flourishing of the imagination.

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<sup>109</sup> David Smahel, *et al.*, *MMORPG Playing of Youths and Adolescents: Addiction and its Factors*. Vancouver: Association of Internet Researchers, *Internet Research 8.0: Let's Play* (2007) Retrieved from <http://www.muni.cz/research/publications/726643>.

In a more recent research, Calvert and Valkenburg,<sup>110</sup> support this argument by stating that, “Overall the data support a reductive effect of media exposure.”<sup>111</sup> According to Edwards,<sup>112</sup> the first way of understanding the connection between reality and imagination draws on elements, “taken from reality, from a person’s previous experience.”<sup>113</sup> This is where a child might take an old sheet and use it to represent a cave or a pond, for playing a game about woolly mammoths.

But what happens when that sheet is a toy manufactured by a large company with the intention that it be “consumed” to create profit? Children can take a small, wooden Thomas the Tank Engine train produced by HIT Entertainment, and they can locate it within their experience of existing Thomas the Tank Engine movies, television shows, DVDs, online games, magazines, books, toys, clothing, and accessories. Yet, the train’s potential to be anything other than a “Thomas the Tank Engine” is greatly limited, when compared to an old sheet’s potential to become a cave or pond.

According to Edwards,<sup>114</sup>

...‘reality’ experienced by children operating in digital–consumerist orientated worlds is lacking in the richness necessary for fostering a productive imagination as a means of supporting play as a leading activity. This interpretation of the role of play as a leading activity in contemporary contexts echoes those arguments regarding the ill effects of digital technologies and consumerism on children’s development by positioning the social context children inhabit as destructive to a particular view of ‘normal’ development.<sup>115</sup>

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<sup>110</sup> Sandra L. Calvert & Patti M. Valkenburg, *The Influence of Television, Video Games, and the Internet on Children’s Creativity* In Marjorie Taylor (ed.), *The Oxford Handbook of the Development of the Imagination*, London: Oxford University Press 438 (2013).

<sup>111</sup> *Id.*, at 448.

<sup>112</sup> Susan Edwards, *Lessons from ‘a really useful engine’™: using Thomas the Tank Engine™ to examine the relationship between play as a leading activity, imagination and reality in children’s contemporary play worlds* 41(2) *Cambridge Journal of Education* (2011).

<sup>113</sup> Vygotsky, *supra* note 6, at 13.

<sup>114</sup> Edwards, *supra* note 112.

<sup>115</sup> K. Brooks, *Consuming innocence: Popular culture and our children*, Melbourne: Melbourne University Press (2008); S. Linn, *Consuming kids: The hostile takeover of children*, New York: The New Press (2004).

Finally, Calvert and Valkenburg<sup>116</sup> conclude that while only a few studies have been conducted in the field of creative imagination and interactive media, “[T]here is reason to expect that even exposure to newer media can disrupt creative behaviours.”<sup>117</sup>

## 8. Virtual worlds for children

According to industry report, there are over 400 virtual worlds designed and targeted specifically to children.<sup>118</sup> Some of the most popular virtual worlds claim tens of millions of registered users, most of which consist of users under 13 years of age.<sup>119</sup> There is no standard definition or description of virtual worlds for children, but most of the major brands in the market are based on a mix of social interaction and casual game-play. The classic example is Club Penguin, launched by Canadian entrepreneur Lane Merrifield and acquired by Disney in 2007.<sup>120</sup> In this case, children sign up as registered users and take on the form of penguin avatars. They then go to a fantasy world called Penguin Island, where they can play games, customize their characters, and talk to other children. Chat is moderated to ensure that there is no antisocial behavior.

Registered users of Club Penguin, typically aged six to 12, with a slight skew towards girls, can have a basic entertainment experience for free. But if they want the complete experience, they have to pay a subscription fee of \$6-8 per month. The difference is that members can customize their world much more comprehensively: They can use virtual coins they earn by playing games to change their penguin’s look or decorate their igloos more than non-members can. There are also special events that only members can attend. An example is the Halloween Party, when the look of the site changes completely.<sup>121</sup>

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<sup>116</sup> Calvert and Valkenburg, *supra* note 110, at 448.

<sup>117</sup> See M. Götz, et al. *Media and the make-believe worlds of children: When Harry Potter meets Pokémon in Disneyland*, Mahwah, NJ: Lawrence Erlbaum (2005).

<sup>118</sup> W. Smolen, *Making it to the top: Tweens rule the virtual world space*, Kidscreen (2012). <http://kidscreen.com/2012/12/05/making-it-to-the-top-tweens-rule-the-virtual-world-space/> (last visited April 25, 2016).

<sup>119</sup> KZero Worldwide, *VW age profiles 2011* (2011), <http://www.slideshare.net/nicmitham/vw-age-profiles-2011> (last visited April 25, 2016).

<sup>120</sup> Peter White, *Kids Virtual Worlds*, TBIVision (October 29, 2012), <http://tbivision.com/highlight/2012/10/kids-virtual-worlds/19038/> (last visited April 25, 2016).

<sup>121</sup> *Id.*

In 2012 Club Penguin's headline statistics suggested that the site had 175 million registered users in 190 countries, up from around 12 million at the time of the purchase by Disney. Analysts estimate that around 5 to 10% of the total are paying members. If these estimates are correct, Disney generated approximately \$122.5 million per month from Club Penguin's subscription fees.<sup>122</sup> Nonetheless, according to other sources, in 2014 Club Penguin's daily revenue was estimated to be around \$700 USD,<sup>123</sup> but according to Disney, Club Penguin has currently over 150 million registered users and a revenue of over \$50 million.<sup>124</sup>

When users go to the Club Penguin website, the first thing they need to do is create a new account. This usually takes a few minutes since all they have to do is enter their email address and the password they wish to use. Then they activate their account via email. The email must belong to the user's parent.

In the game, there are four main things users can do. They can visit places, play games, buy items at different shops, and play with their pet. Each different place they visit consists of mini games and different items they can buy, depending on the style of the location. Users have their own penguin, for which they can buy clothes and other items. Users can also buy clothes for their pets. They have an igloo with a backyard, for which they can buy furniture. All the things that users can buy cost coins, which they gain by playing games. Most of the items in the shop cannot be bought unless the user has a membership. Users without a membership can only buy simple and small items with the coins they earn from playing the games. Users can buy a membership for one, six, or 12 months. Of course, the longer they buy the membership for, the cheaper it is. The membership not only allows users to buy better things at the shop, but it also allows them to buy more pets, play more mini games, and more.

The games are fairly simple to play and are clearly targeted to young children. They are fun, and there are many different mini games<sup>125</sup> even if you do not have a membership. Some of

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<sup>122</sup> *Id.*

<sup>123</sup> Mach Investigates, *The Falling of Club Penguin* (April 7, 2014), <http://cparmycentral.com/2014/04/07/mach-investigates-the-falling-of-club-penguin/> (last visited April 25, 2016).

<sup>124</sup> *Disney Club Penguin Memories page*, <http://clubpenguinmemories.com/club-penguin-help-and-guides/club-penguin-lists/club-penguin-facts/> (last visited April 25, 2016).

<sup>125</sup> One example is a sled race in which the user controls its penguin avatar sledding down an icy hill. The goal is to avoid obstacles by navigating the sled with the keyboard arrows. At the end of the race you receive virtual coins with which you can adopt a virtual pet, decorate your virtual igloo or by virtual cloths for your penguin avatar.

the games are for solo play, and some involve competing against others to win coins. In addition to competing against other users in games, users can interact with them. Users can chat with others who are in the same location, throw snowballs, and make other silly gestures towards them. They can add people as friends, message them, and look at their igloo.

As stated before and well apparent in Club Penguin, the virtual environment and the activities offered in it seems to foster the imaginative development of the children users. However, and this is the locus of the harm described in this chapter, the combination of the game environment coupled with the said activities merely pretend to foster the imagination, encourage play and create interactions; in practice, all play offered at the website is both restricted heavily with rules set by the code (ironically the virtual environment, inherently, does not even require abiding to the rules of nature like gravity etc.) and geared towards consumption. The user's choices, activities and eventually status, is determined by the amount of coins purchased with real money (or earned). There is no pretend play or even free play beyond the heavily moderated environment set by the virtual world. Consumption, rather than imagination, is the vortex of this world.

Another virtual world for children is Fantage,<sup>126</sup> which was made available to the general public in April 2008<sup>127</sup> and has since expanded into a large online community. By January 2012, Fantage had over 16 million registered users.<sup>128</sup> On December 18, 2014, Fantage announced that they had gained over 30 million registered users.<sup>129</sup>

In Fantage, the user can create either a female or a male character. Users can interact with other users by adding them as friends, talking to them in the main chat area, sending messages, playing games, and exploring the virtual world. Users can customize their characters with different hairstyles, clothing, and more. Fantage is mostly for small children to have fun and develop new social skills. The game is very safe, and parents can determine how much

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<sup>126</sup> <http://fantage.com> (last visited April 25, 2016).

<sup>127</sup> Dean Takahashi, *With 0 million fans, Fantage formally launches virtual world for kids*, VentureBeat (2009-10-19), <http://venturebeat.com/2009/10/19/fantage-formally-launches-virtual-world-for-kids/> (last visited April 25, 2016).

<sup>128</sup> Dean Takahashi, *Fantage Recruits Schools One by One for Kids Online Virtual Learning World* (2012-01-23), <http://venturebeat.com/2012/01/23/fantage-recruits-schools-one-by-one-for-kids-online-virtual-learning-world/> (last visited April 25, 2016).

<sup>129</sup> The Fantage 099, *30 MILLION USERS + Holiday Event*, <https://thefantage099.wordpress.com/2014/12/20/30-million-users-holiday-event/> (last visited April 25, 2016).

interaction their children have with others (by mistake I cursed during chat and was banned for a full hour from the game).

There are many different places in this virtual world. Users can play games to earn coins and use those coins to buy things for their avatar: virtual pet, virtual house, and more. Users can also join virtual parties and hold their own party where other users can join and play games.

Users can purchase a premium membership for one, six, or 12 months. The membership provides double coins and gold in the game, which allows users to buy different items. Some activities and purchases require payment in virtual gold, which can be obtained by buying either a membership or an amount of gold from the virtual shop. Users can also buy coins at the shop. The membership provides more benefits as well as the option to dye one's avatar hair, acquire more items, collect all the 65 types of virtual pets that are in the game, and more. One special feature of Fantage is that members can get free items every month, and the longer the subscription lasts, the more items members can choose.

While the imagination is 'in the minds eye', reflecting on internal representations and dealing with transformation, the virtual world focuses (as part of the media inherent tendency) on the external, the look and the appearance, rather on the internal nature of objects, interactions and play. It is a superficial portrayal of a world driven by consumption in which the only things that matter are the user's achievements, using money, competition or both.

The last example is Animal Jam,<sup>130</sup> launched in 2010 by WildWorks in partnership with the National Geographic Society. The game, which has experienced 500% year-over-year growth, has more than 30 million registered players,<sup>131</sup> and it is one of the fastest-growing online kids' games worldwide.<sup>132</sup>

When creating a new account in Animal Jam, users need to choose an animal and a name. Users are also required to provide personal information such as birth date, gender, and a

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<sup>130</sup> <http://www.animaljam.com/welcome> (last visited April 25, 2016).

<sup>131</sup> Dan Crawley, *Animal Jam Teams with Free the Children to Encourage Global Citizenship in Kids*, VentureBeat (March 2015), <http://venturebeat.com/2015/03/10/animal-jam-teams-with-free-the-children-to-encourage-global-citizenship-in-kids/> (last visited April 25, 2016).

<sup>132</sup> Smart Bomb Interactive, *National Geographic Animal Jam surpasses 6 million young players*, PRNewswire (August 6, 2012), <http://www.prnewswire.com/news-releases/national-geographic-animal-jam-surpasses-6-million-young-players-165124896.html> (last visited April 25, 2016).

parent's email address. Animal Jam takes place in the world of Jamaa, where players can travel through various ecological environments. Each environment has different facts, games, shops, and more.

In the game, users can interact with other users in many different ways: correspond via chat, send a message, and add friends. Users can join virtual parties, play games to gain gems, and buy virtual items for their virtual den. There are also virtual places in this world where the user is provided with fun facts about animals and can watch educational videos.

Users can purchase a membership for one, six, or 12 months, which provides more perks. The perks allow users to buy everything in games using gems and provide extra gems when users purchase a membership. They also allow users to have more virtual animals and houses and to join premium virtual parties. Without a membership, users are limited in terms of what they can do in the game.

Membership is also required if users wish to adopt virtual pets. The game has an online shop where users can purchase virtual items, such as diamonds and gems, which can be used to purchase virtual game items. Users can even purchase real clothing and merchandise based on the game, such as binders, mouse pads, tote bags, and wrist bands.

By allowing the purchase of real items through the game, Animal Jam proceed even further than the two other virtual worlds reviewed above by creating a direct connection between in-game consumption and real world merchandise. While providing educational content which is not present in the other games described above, Animal Jam is still a profit driven consumption based game with rules, another example of seemingly pretend play which is in practice a game with rules based on consumption.

## **9. The Harm**

This chapter has reviewed some of the extant literature on virtual worlds, particularly those aimed at children, as well as the imagination and its development. I have noted that there is a great potential for the use of virtual worlds to harm the development of the creative imagination in the child's developing mind. Furthermore, I posit that the likely pathway of this harm is that

virtual worlds, like television, displace the imagination with ready-made images and narratives. Unlike television, however, virtual worlds further displace the child's imaginary universe, their sense of reality versus fantasy, and their creative and symbolic play. They do this while mimicking the imaginary world that children need to create on their own terms, displacing this experience as well. For this reason, children experience the virtual world not as a construct of their imagination, over which they have control, but as an external reality like any other. This can give rise to serious distortions of normal developing cognitive processes.

I am aware that there is little empirical research to date on the effects of virtual worlds on children's cognitive development, let alone the development of the creative imagination. With this review of the extant literature, and the proposed mechanisms for how virtual worlds disrupt children's normal development, it is my hope to suggest a testable hypothesis, and generate interest in further research. The displacement hypothesis that I herein propose has a long provenance in the literature and is an extension to new media theories for which there is already much empirical support. Healy<sup>133</sup> reminds us that,

[t]echnology shapes the growing mind. The younger the mind, the more malleable it is. The younger the technology, the more unproven it is.<sup>134</sup>

The rapid development of new and untested technologies operating on younger and younger minds for longer and longer periods of time is in many ways itself a great experiment, and there seem to be good reasons to believe that it is an ill-conceived one, with potentially serious consequences.

## 10. Conclusion

The harm to children's creative imagination from virtual-world play identified in this chapter is alarming and relatively new. It represents several "digital-age" harms that are inherently virtual and intangible and, thus, pose a challenge not only to traditional regulation but even to modern regulations of virtual space. The following chapters attempt to answer the

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<sup>133</sup> J. Healy, *Failure to Connect: How Computers Affect Our Children's Minds – For Better and Worse*. New York: Simon & Shuster (1998).

<sup>134</sup> *Id.*, at 17.

dissertation's main question: How should we regulate a harm that is both virtual and intangible, such as the harm to children's creative imagination?

## Chapter 2 – Regulation: Foundations

Assuming one takes the harm described in chapter 1, *supra*, seriously, and that it affects children, the first response might be to regulate one or more of the players and/or factors involved in this realm, however difficult that might be. But even if the reader does not find this harm convincing, there are other virtual and intangible harms (e.g., violent media) regarding which there is a wide agreement that regulation is required. This chapter looks closely at the literature on regulation to see if, how and where it speaks to the problem of virtual and intangible harm in general and more specifically to the harm described in chapter 1. To the extent that it does, how could one conceive of regulation in terms of a harm of this sort. I am not concerned with practicalities, such as whether there would be any hope that regulation would be instituted (the political question), or with how, technologically speaking, it could be done. Simply I want to look for how the particular problem could or would be addressed by a better understanding of regulation, and thus by regulation itself.

The first chapter established that there are reasons for concern regarding the harm that virtual worlds use may cause to children’s imaginative development, harm that is both intangible and virtual. This chapter addresses the foundations of regulation in the context of the said harm. The first part of this chapter reviews the theoretical definitions of regulation with the goal to identify a definition that will be broad enough to include virtual and intangible harm. The second part reviews the goals of regulation to set the path in which the regulatory course of preventing the said harm should take.

### 1. Definition of regulation

The term ‘Regulation’ has been defined in several ways.<sup>1</sup> Baldwin et al. argue that regulation refers to the enactment of an authoritative set of rules. These rules are accompanied

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<sup>1</sup> See B. M. Mitnick, *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms*, New York: Columbia University Press (1980); A. Ogus, *Regulation: Legal Form and Economic Theory*, New York: Oxford University Press (1994); G. Majone (ed.), *De-Regulation of Re-Regulation? Regulatory Reform in Europe and the United States*, London: Pinter (1989).

by a mechanism that will monitor and promote compliance.<sup>2</sup> The rules, according to Baldwin et al., refer to any social control mechanisms, including unintentional and non-state processes.<sup>3</sup> This broad definition is suitable for regulating the harm to children's imagination in virtual worlds as it allows more flexible approach's than just laws. When dealing with intangible and virtual harm, flexibility and non-legal regulation (e.g., code, market, social norms) is important in light of the unique nature of the harm.

Selznick narrows down the definition of Regulation offered by Baldwin et al. to, "a sustained and focused control exercised by a public agency over activities that are valued by a community."<sup>4</sup> In contradiction to Baldwin et al., Selznick argues that non-state and unintentional 'control mechanisms' are not considered regulation. Selznick's narrow definition may bring to a rigid perceptions of regulation and creates a situation in which one needs to search for a solution to an intangible and virtual harm outside the realm of regulation. This is not a warranted situation since remaining within the boundaries of the regulatory definition has its positive theoretical and practical implications (e.g., compliance, reliability and more).

Examples from the OECD, Canada, Australia and the UK resonate with Selznick's narrow definition according to which only government actions are considered regulation. The OECD defines regulation as,

The full range of legal instruments by which governing institutions, at all levels of government, impose obligations or constraints on private sector (regulation is often aimed at the public sector) behavior. Constitutions, parliamentary laws, subordinate legislation, decrees, orders, norms, licenses, plans, codes and even some forms of administrative guidance can all be considered as 'regulation.'<sup>5</sup>

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<sup>2</sup> R. Baldwin, C Scott & C Hood, *A Reader on Regulation*, New York: Oxford University Press 3 (1998).

<sup>3</sup> *Id.*, at 4.

<sup>4</sup> P. Selznick, *Focusing Organizational Research on Regulation*, In R. Noll (ed.), *Regulatory Policy and the Social Science*, Berkeley: University of California Press 363 (1985).

<sup>5</sup> OECD, *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*, OCDE/GD(95)95, Note 1; OECD, *The OECD Report on Regulatory Reform: Synthesis*, Paris, (1997).

The Canadian and Australian governments adopted a similar definition.<sup>6</sup> According to their approach, it is not regulation if it is not enacted through legislation or delegated legislation. The UK government's Better Regulation Task Force, in contrast, takes the broad approach according to which regulation extends beyond government actions, defining regulation as,

[a]ny government measure or intervention that seeks to change the behavior of individuals or groups, so including taxes, subsidies and other financial measures.<sup>7</sup>

However, government is a very fragmented creature. While the Better Regulation Task Force regards only government actions as regulation, the UK Office of Telecommunications defines regulation as the operation of market forces.<sup>8</sup> The definitions mentioned above, by governments, indicate that there is an inherent and definitional obstacle in the way of dealing with an intangible and virtual harm through flexible, non-state and varied regulatory instruments. The reason for the state-centered, rigid and restricted definitions of regulation may be stemming from the state desire to be the only regulator, its lack of flexibility or its tendency to act slow. Nonetheless, as long as the definition of regulation is narrow, it would be challenging to promote any meaningful, flexible and non state based regulation backed by the government. This in turn implies that an effective regulation of intangible and virtual harm requires a high level change in the regulatory thought.

Regulation's definition was also discussed in the context of policy. Levi-Faur defines regulation as a policy instrument,<sup>9</sup> while Hartle<sup>10</sup> sees it as, "[T]he most general policy

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<sup>6</sup> Canada: Regulatory Affairs Guide, *Assessing Regulatory Alternatives*, Ontario 63 (1994); Australia: Productivity Commission, Office of Regulatory Review, *A Guide to Regulation*, Canberra (2nd ed. 1999).

<sup>7</sup> Better Regulation Taskforce, *Principles of Better Regulation* Cabinet Office, London 1 (undated).

<sup>8</sup> Office of Telecommunications, *Encouraging Self- and Co-Regulation in Telecoms to Benefit Consumers 2* London (June 2000).

<sup>9</sup> David Levi-Faur, *Regulatory Governance*, In Paolo Graziano & Maarten Vink (eds.), *Europeanization: New Research Agendas*, Basingstoke: Palgrave Macmillan (2006).

<sup>10</sup> Douglas G. Hartle, *Public Policy Decision Making and Regulation*, Toronto: University of Toronto xii (1979).

instrument,” and Scott<sup>11</sup> argues that in North America, “there is a long tradition of the deliberate use of regulation as an instrument of public policy.”<sup>12</sup> Scott further contends that,

[t]he image of independent regulatory agencies, capable of making technically expert and correct decisions, isolated from politics and from the courts, is illusory.<sup>13</sup>

Contemporary governance, according to Scott,<sup>14</sup> “is characterized by fragmentation of power, rather than its concentration in independent agencies.”<sup>15</sup> This observation, Scott argues, “substantially undermines many of the claimed virtues of regulation as a public policy instrument.”<sup>16</sup> This discussion is relevant to the choice of regulatory tool to deal with the harm to children’s imaginative development in virtual worlds that is discussed in the next chapter. Once the harm is assumed and identified, it is a question of great importance whether the regulatory measures used to deal with the harm are based on empirical evidence, projected efficiency or, as Scott suggests, political perceptions and influence. In general, the political aspect is beyond the scope of this dissertation and assumed to be separate from the regulatory sphere.

Sarre and Johnstone<sup>17</sup> recognize that regulation in its broader sense can be carried out by non-state entities, including professional firms (auditors, accountants, and lawyers), corporations, international interest holders, non-profit organizations,<sup>18</sup> citizens, and community groups. In these concepts of regulation, the state no longer dominates the regulatory processes, regulation is thus “decentered,” and the state shares the regulatory control with other sub-

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<sup>11</sup> Colin Scott, *Regulatory Fragmentation*, In Patrice A. Dutil & Michael McConkey (eds.), *Dreaming of the Regulatory Village, Speaking of the Regulatory State*, EBRARY CEL - York University, Institute of Public Administration of Canada 149 (2006).

<sup>12</sup> M. A. Eisner, *Regulatory Politics in Transition*, Baltimore: Johns Hopkins University Press (2000).

<sup>13</sup> Scott, *supra* note 11, at 149.

<sup>14</sup> *Id.*

<sup>15</sup> Julia Black, *Decentering Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World* Current Legal Problems 103-146 (2001); C. Scott, *Analyzing Regulatory Space: Fragmented Resources and Institutional Design*, Public Law 329-353 (2001).

<sup>16</sup> Scott, *supra* note 11, at 149.

<sup>17</sup> R. Sarre & R. Johnstone (eds.), *Regulation: Enforcement and Compliance* 57 Research and Public Policy Series, Australian Institute of Criminology 4 (2004) available at <http://www.aic.gov.au/documents/B/A/0/%7BBBA0FC2D0-B43E-4CB6-A5AD-95ACE70542AA%7DRPP57.pdf> (last visited Apr 26, 2016).

<sup>18</sup> See D. Brereton, *Emerging Forms of Corporate and Industry Governance in the Australian Mining Industry*, In Sarre & Johnstone, *supra* note 17.

centers.<sup>19</sup> This flexible perception of regulation is more suitable for dealing with complex and new harm which is both intangible and virtual (as the harm to children’s imaginative development in virtual worlds).

Parker et al<sup>20</sup> further contend that for scholars of regulation, the core area of study is “regulation” in the sense of, “the intentional activity of attempting to control, order or influence the behavior of others.”<sup>21</sup> This definition of regulation is broad, as it is not limited to targeted rules that are enforced and monitored. This definition is also not limited to the intervention of the state in the economy and/or civil society. Regulation is usually considered an activity that restricts behavior and prevents certain undesirable activities from happening (a “red light” concept<sup>22</sup>). But the influence of regulation may also be enabling or facilitative (“green light”). An example is the regulation of the airwaves that allows broadcasting operations to be conducted in an ordered fashion and not left to the potential chaos of an uncontrolled market.<sup>23</sup>

Ellickson<sup>24</sup> illustrates this distinction by stating that, “systems of social control typically employ both rewards and punishments – both carrots and sticks – to influence behavior.”<sup>25</sup> In managing these negative and positive measures, enforcers usually apply rules dividing human behavior into three categories: (1) good behavior deserving rewards, (2) bad behavior that needs to be altered, and (3) ordinary behavior that requires no response.<sup>26</sup> The case of harm to

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<sup>19</sup> See L. Mazerolle & J. Ransley, *Third Party Policing: Prospects, Challenges and Implications for Regulators*, In Sarre & Johnstone, *supra* note 17.

<sup>20</sup> C. Parker et al. (eds.), *Regulating Law*, Oxford: Oxford University Press 1 (2004).

<sup>21</sup> J. Black, *Critical Reflections on Regulation* 27 Australian J of Legal Philosophy 1 (2002).

<sup>22</sup> On 'red light' and 'green light' rules and regulation see C. Harlow & R. Rawlings, *Law and Administration*, London: Pergamon Press (2<sup>nd</sup> ed. 1997); A. Ogus, *supra* note 1, at ch. 2.

<sup>23</sup> See for example, David A. Moss & Michael R. Fein, *Radio Regulation revisited: Coase, the FCC, and the Public Interest*, 15(4) Journal of Policy History (2003).

<sup>24</sup> R. C. Ellickson, *Order Without Law: How Neighbors Settle Disputes*, Cambridge: Harvard University Press, 124 (1991).

<sup>25</sup> Rewards are goods, services, or obligations to which a person would assign a positive monetary value; punishments are goods, services, or obligations that a person would pay to be rid of. The distinction between punishments and rewards is well developed in behavioral psychology, where the two are sometimes referred to as positive and negative reinforcement. Sociologists, since Durkheim, have distinguished between penal and compensatory (restitutive) modes of social control. These are two different forms of punishment. What sociologists sometimes call therapeutic social control is a reward system; the person who seeks help from others is rewarded for recognizing and trying to remedy his plight. On these and other sociological distinctions, see Donald Black, *The Behavior of Law*, New York: Academic Press 4-6 (1976).

<sup>26</sup> For a fuller inquiry into the function of these three categories, see R. C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls* 40 U. Chi. L. Rev. 681, 728-733 (1973); See also Saul X. Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of Affirmative Obligations* 72 Va. L. Rev. 879 (1986); Donald Wittman, *Liability for Harm or Restitution for Benefit* 13 J. Legal Stud. 57 (1984).

children's imagination in virtual worlds and intangible and virtual harm in general is more complex and does not fall within one of these definitions. Although the theory contends that any use of virtual worlds (and media in general) could be harmful to children's imaginative development, it would be challenging to argue that using virtual worlds is a bad behaviour that needs to be altered. The harm discussed in this dissertation falls into a fourth category of behaviour which is neither good or bad but that requires intervention as it can cause harm.

To achieve the desired ends, according to Ogus,<sup>27</sup> two kinds of tools are employed: (1) legal regulation that details the implications of legal rules; individuals are either compelled or receive incentives by an authority – the state – to behave in certain ways, with sanctions as a threat if they do not comply or the incentive of rewards if they comply; (2) other kinds of regulation that are not directly related to rules, such as, among others, code, information, and education. In general, three basic requirements are incorporated into the regulatory regime: standards setting, monitoring compliance with the standards, and mechanisms for enforcing the standards. It is important to note that most standards have no mechanisms for compliance enforcement.

In this context, Ogus<sup>28</sup> recognizes two general types of regulation: social regulation and economic regulation. Social regulation is the interest of the public to justify regulation, which addresses such matters as environmental protection, health and safety, and consumer protection. Social regulation focuses on two types of market failure. First, individuals contracting or about to contract with firms that supply goods or services often lack adequate information regarding the quality offered by suppliers; as a result, a market that is not regulated may fail to meet their preferences. Second, even if the issue of inadequate information does not arise, market transactions may have externalities (spill-over effects) that can drastically and negatively affect individuals who are not part of the transactions.

A third type of market failure, not mentioned by Ogus, that lies at the heart of this dissertation is the inability of individuals to avoid the harm embedded in the service they consume. The market-failure approach assumes that the market is able to address every problem but sometimes fails to do so. As markets evolve, we need to understand that this assumption

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<sup>27</sup> Ogus, *supra* note 1, at 2.

<sup>28</sup> Ogus, *supra* note 1, at 4.

does not apply to failures that are constructed in the market and can hardly be referred to as market failures. This is especially true with regard to intangible and virtual harm relating to children.

The more intangible the harm, the harder it is to prove it and identify its characteristics. In addition, there is an inherent inclination to treat virtual harms as less dangerous than non-virtual or tangible harms. This inclination is not only wrong but dangerous and could be proved wrong for intangible and virtual harms and their consequences. The danger is in the nature of these harms and their consequences since they tend to be hidden from view (as in the current case study of the under-developed imagination); hence, it is harder to prevent and these damages that may be detected only when the harm has already been done. Moreover, even the damage is so embedded and fundamental, that it is very hard to detect, it reveals only over time and even then in ways that are hard to refer to the original cause.

For example, if we assume that the use of virtual worlds by children cause harm to their imagination development, how will we detect in the future that their imagination is underdeveloped? And even if we will be able to detect that this is the case, how can we prove that this is a result of virtual worlds use and not a consequence of other intervening factors? These challenges place the regulation of intangible and virtual harm at the center of a chicken and egg scenario thus requiring a different approach than the traditional approach to regulation.

In this respect, Bogart<sup>29</sup> argues that modern market economies are predicated on consumption. A multitude of interventions have attempted to control excessive consumption in its many forms. According to Bogart, consumption is permitted, but harmful effects are discouraged through various legal interventions. Society judges that, whatever benefits would accrue from banning a particular form of consumption, such advantages are outweighed by the costs that would be incurred.

Prohibition is an exception to this tendency and is used only sparingly, for example, banning children from the use of alcohol, tobacco, marijuana,<sup>30</sup> gambling and the criminalization

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<sup>29</sup> W. A. Bogart, *Permit but Discourage: Regulating Excessive Consumption*, New York: Oxford University Press, xxiii-xxiv (2011).

<sup>30</sup> See, for example, the new legislation in Colorado: Colorado Department of Revenue, Marijuana Enforcement Division, 1 CCR 212-2, *Permanent Rules Related to the Colorado Retail Marijuana Code* (September 9, 2013);

of impaired driving (but how effective these prohibitions actually are is another question that is entertained). Instead, regulatory efforts aim not to forbid consumption but to suppress excessive use.

For example, in the case of tobacco, safe consumption means zero consumption since there is no safe level of smoking. This does not mean that smoking is sanctioned, but it is strongly discouraged through the use of deterring images on the package that graphically illustrate the damages. The sale of cigarettes to children is obviously forbidden and strictly sanctioned, as is the use of alcohol. With regard to alcohol, regulation means encouraging consumption of moderate amounts for enjoyment and to bolster health but discouraging use while driving. In the case of marijuana, regulation means limiting the purchase amount and taxing the sales to support education,<sup>31</sup> while keeping it away from children and schools.

In her work to find a conclusive definition of regulation, Black,<sup>32</sup> summarizes three definitions that are mentioned in the literature:

- (1) regulation is the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement, usually assumed to be performed through a specialist public agency;
- (2) regulation is any form of direct state intervention in the economy, whatever form that intervention might take;
- (3) regulation is all mechanisms of social control or influence affecting all aspects of behavior from whatever source, whether they are intentional or not.

According to Black, scholars adopt different definitions, implicitly or explicitly, in different writings. For example, in the introduction to their *Reader on Regulation*, Baldwin, Scott, and Hood adopt all three definitions;<sup>33</sup> in their book *Understanding Regulation*, Baldwin and Cave adopt the first two. They add “decentered,” thus potentially arguing that regulation is

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Stuart Hunter, *5 Reasons Denver Is Now More Weed-Friendly Than Amsterdam*, HuffingtonPost.com, (January 23, 2014), available at <http://www.huffingtonpost.com/news/colorado-marijuana-laws> (last visited April 26, 2016).

<sup>31</sup> *Id.*

<sup>32</sup> Black, *supra* note 21, at 12-13.

<sup>33</sup> Baldwin et al., *supra* note 2.

also the making, monitoring, and enforcing of rules by non-governmental actors.<sup>34</sup> In *Regulation Inside Government*, Hood et al. adopt only the first definition, adding that the “regulator” has an official mandate to moderate the behavior of the “regulatee” and seek to change it.<sup>35</sup> In their book on telecommunications regulation, Hall, Hood, and Scott adopt the third definition when they write of regulators being “regulated” by culture.<sup>36</sup>

Finally, Black<sup>37</sup> defines regulation as,

[t]he sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behavior-modification.

I adopt Black’s definition of regulation as a starting point for the regulatory framework to be developed in this dissertation. The main reason for doing so is the broad scope of Black’s definition and its inclusion of non-governmental forms of regulation. Regulation in its broad scope provides more and diverse instruments of regulation and enables a more creative approach than does the formal definition of governmental formal instruments mentioned above.

Nonetheless, a problematic aspect of this definition in the stated context emerges in the words, “... alter the behavior of others...” As will be explained at the end of the following section, some of the problematic characteristics of virtual worlds are inherent in those worlds, and therefore, dealing with them lies outside the relationship between the operators of virtual worlds and the child users. Traditional regulation usually applies to a binary and simple world: regulatees and protected subjects. The regulator regulates the regulatees’ behavior to protect the subjects. However, it is challenging when the problematic characteristics are inherent in the regulatees’ product and the harm cannot be prevented or reduced directly through the product.

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<sup>34</sup> C. Hood, et al., *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*, Oxford: Oxford University Press (2000).

<sup>35</sup> *Id.*, at 8.

<sup>36</sup> C. Hall, C. Scott & C. Hood, *Telecommunications Regulation: Culture, Chaos and Interdependency Inside the Regulatory Process*, London: Routledge 5-7 (2000).

<sup>37</sup> Black, *supra* note 21, at 26.

Aside from the challenging text mentioned above, Black's definition as adopted situates the harm to the development of children's imaginations on solid ground as a situation that can be regulated.

## 2. Goals of regulation

The theoretical framework of the goals of regulation is important in order to set the end goal of regulating an intangible and virtual harm as the one discussed in chapter 1, *supra*, harm to the imaginative development of children using virtual worlds. Identifying a theoretical end goal is important in order to determine the actual practical goals of regulation to prevent the said harm. While this dissertation attempts to determine the most efficient regulation to prevent the said harm – identifying an end goal, both theoretical and practical, is a crucial step in the process of outlining the solution.

According to Haines and Gurney,<sup>38</sup> “good regulatory practice focuses on the outcomes of regulatory aims, not with obsessive concern about compliance with prescriptive rules”.<sup>39</sup> Parker emphasizes the importance of flexibility in the regulatory process in order to achieve superior results.<sup>40</sup> The nature of a virtual and intangible harm calls for flexibility and focus on the outcome of the prescribed regulation. Prescriptive rules may miss the prevention of the harm altogether by employing a rigid regulatory regime that is hard to implement and measures where the factors relevant to the harm are hard to measure and quantify. The virtual and intangible character of the harm to children's imaginative development in virtual worlds requires an holistic approach that focuses on the outcome rather than the means to achieve the goal.

Yet another aspect of regulatory goals and achieving these goals is compliance. Gunningham and Johnstone talk about, ‘culture of compliance’ in which the regulatees are committed to the regulatory goals.<sup>41</sup> Hopkins argues that strong leadership is an important factor

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<sup>38</sup> Fiona Haines & David Gurney, *Regulatory Conflict and Regulatory Compliance: The Problems and Possibilities in Generic Models of Regulation*, In R. Sarre, & R. Johnstone (eds.), *Regulation: Enforcement and Compliance*, 57 Research and Public Policy Series 10 (2004).

<sup>39</sup> P. May, *Making Sense Out of Regulatory Enforcement* 20(2) Law and Policy 157-182 (1998); J. Black, *Rules and Regulators*, Oxford: Clarendon Press (1997).

<sup>40</sup> C. Parker, *Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime* 26(2) J. of Law and Society 215–239 (1999).

<sup>41</sup> N. Gunningham & R. Johnstone, *Regulating Workplace Safety: Systems and Sanctions*, Oxford: Oxford University Press (1999); Parker, *supra* note 40.

to bring to compliance with the regulatory goals,<sup>42</sup> while Sitkin and Beis recommend avoiding strategic use of regulations as it fails to achieve the regulatory goals.<sup>43</sup> Even if the approach is flexible and holistic in trying to address the harm to children's imaginative development, lack of compliance may yield poor results. Nonetheless, it is the 'culture of compliance' and not compliance per se that is required in order to render the regulation efficient. An understanding and acknowledgment that there is a harm and its consequences by all the actors in this regulatory sphere is the first and most essential step in creating a 'culture of compliance'. The second step is the realization of the parties involved that the suggested regulation is appropriate, proportional, efficient and warranted in light of the potential harmful consequences of the harm. The challenge is to convince the involved parties that there is a harm, that this harm can be severe and that the regulation can relax it if compliance is practiced by all the players involved.

Parker argues that linking regulatory aims with business goals enhances compliance.<sup>44</sup> A rational enforcement strategy underpins this ideal. According to Sitkin and Beis, this means adopting a stepwise progression of penalties for non-compliance.<sup>45</sup> Such a framework not only promotes the benefits of compliance but also reduces the costs of non-compliance. When dealing with complex regulatory challenges such as the challenge with virtual and intangible harm, sophisticated systems of compliance as the stepwise progression penalty mentioned by Sitkin and Beis may be helpful in maximizing the benefits of a chosen regulatory regime. Rather than employing a 'one size fit all' solution that would be rigid, non-responsive and thus inefficient, employing a gradual solution with business goals in mind would be helpful to decrease the harm to children's imaginative development in virtual worlds.

Nonetheless, even if these ideas seem attractive, approaches that assume a single regulatory goal have limits. In regulation, multiple goals often exist, and some of these goals may conflict. When conflict between regulatory goals arises, focusing on results, employing a singular "compliance culture," or following a specific enforcement strategy may miss the

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<sup>42</sup> A. Hopkins, *Making Safety Work: Getting Management Commitment to Occupational Health and Safety*, Sydney: Allen & Unwin (1995).

<sup>43</sup> S., Sitkin & R., Beis, *The Legalisation of Organisations: A Multi-Theoretical Perspective*, Sage: Thousand Oaks (1994); Black, *supra* note 39; Parker, *supra* note 40.

<sup>44</sup> Parker, *supra* note 40.

<sup>45</sup> I. Ayres & J., Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: Social Legal Studies (1995).

regulatory task altogether and over-emphasize its simplicity. For example, in the case at hand we want to protect children's imagination while maintaining the children's good relationship with their parents, and protect the virtual worlds' companies freedom of speech. Only a 'compliance culture' will enable a solution that on one hand protects the interests of the parties involved, and on the other hand, leads to a solution to prevent the harm or at least, decrease it.

An example of other, more general conflicts within regulatory goals include conflicts between worker safety and worker pregnancy,<sup>46</sup> worker safety and disabled workers' rights,<sup>47</sup> laws on competition and the protection of the environment,<sup>48</sup> health and anti-trust,<sup>49</sup> indigenous rights and environmental protection,<sup>50</sup> as well as equity of access, environmental goals, and utilities privatization.<sup>51</sup> Haines and Gurney<sup>52</sup> contend that these conflicts between regulatory goals illustrate that regulation is a political activity, "Political exigencies that underlie regulation shape both what is identified as a risk and the nature of any trade off".<sup>53</sup> Hood's work<sup>54</sup> supports the notion that there is an ideological conflict between different regulatory regimes. Hood argues that there are fundamental paradigm differences between the many justifications for regulation and notions of an ideal regulatory framework. Further conflict related to the case of children's imaginative development in virtual worlds can be found in the tension between the government desire to encourage business enterprises, especially technology oriented ones, to further their capacity and success (i.e. virtual worlds companies), against the general social desire to protect

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<sup>46</sup> D. M. Randall, & D. D. Baker, *The Threat of Legal Liability and Managerial Decision Making: Regulation of Reproductive Health in the Workplace*, In S. Sitkin & R. Beis, *The Legalization of Organization: A Multi-Theoretical Perspective*, Sage: Thousand Oaks 169-189 (1994).

<sup>47</sup> N. Daniels, *Chevron v Echazabal: Protection, Opportunity and Paternalism* 93(4) American J. Public Health 545-8 (2003).

<sup>48</sup> P. Bennett, *Anti-trust? European Competition Law and Mutual Environmental Insurance* 76(1) Economic Geography 50-67 (2000).

<sup>49</sup> G. Geis, *White Collar Crime: What Is It?* 3 Current Issues in Criminal Justice 9-24 (1991).

<sup>50</sup> C. Cocklin & M. Wall, *Contested Rural Futures: New Zealand's East Coast Forestry Project* 13(2) J of Rural Studies 149-162 (1997).

<sup>51</sup> W. A. Maloney, *Regulation In An Episodic Policy-Making Environment: The Water Industry In England And Wales* 79(3) Public Administration 625-642 (2001); F. Watters, *The Devil Is The Details: The Deregulation Of An Essential Service*, Unpublished PhD thesis, University of Melbourne (2003).

<sup>52</sup> F. Haines & D. Gurney, *Regulatory Compliance: The Problem and Possibilities in Generic Models of Regulation*, In R. Sarre & R. Johnstone (eds.), *Regulation: Enforcement and Compliance*, 57 Research and Public Policy Series, Australian Institute of Criminology 12 (2004).

<sup>53</sup> L. Hancher & M. Moran, *Organizing Regulatory Space*, In Baldwin et al., *supra* note 2; F. Haines & A. Sutton, *The Engineer's Dilemma: A Sociological Perspective On The Juridification Of Regulation* 39(1) Crime, Law and Social Change 1-22 (2003).

<sup>54</sup> C. Hood, *The Art of the State: Culture, Rhetoric and Public Management*, Oxford: Clarendon Press (1998).

children. This tension between technological advancement and children's well being and the question of how to reconcile this tension lies at the heart of this dissertation.

In this context, Sarre and Johnstone<sup>55</sup> mention that regulatory theorists frequently talk of seeking out the optimal "regulatory mix" and not relying on one form of regulatory technique.<sup>56</sup> One concern is how various regulatory tools impact (or fail to impact) daily life in an attempt to order it according to some set of norms.<sup>57</sup> This concern also relates to the extent to which the regulation values and techniques fit with pre-existing social ordering and norms in the target population.<sup>58</sup> There is strong evidence that apparently effective regulation that is not responsive to non-legal norms will ultimately fail to accomplish its goals.<sup>59</sup> In the case of the harm to children's imagination in virtual worlds, many non-legal norms are set in the background, such as: children's need to play, parents and children's relationship and the virtual worlds companies right to sell. Therefore, creating a regulatory mix that will be responsive to these norms is challenging. The more the suggested regulation will rest in harmony with these factors, the more it will be efficient and less disruptive.

Selznick argues that the common-law tradition embodies a distinctively communitarian ideal: the integration of law and society. Therefore, Selznick argues that this integration is a key to social justice.<sup>60</sup> Justice requires a responsive legal order.<sup>61</sup> Considerations such as these seem to demand a different view of law and its appropriate relationship to government from that of

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<sup>55</sup> Sarre & Johnstone, *supra* note 17, at 6.

<sup>56</sup> R. Sarre, *The Future of Policing in a Broader Regulatory Framework*, In R. Sarre, & R. Johnstone (eds.), *Regulation: Enforcement and Compliance*, 57 Research and Public Policy Series, Australian Institute of Criminology 77 (2004); Lorraine Mazerolle & Janet Ransley, *Third Party Policing: Prospects, Challenges And Implications For Regulators*, *Id.*

<sup>57</sup> The choice of norms is often separate question, though norm-form and tool-form are sometimes subjects of simultaneous construction of normative and explanatory theory.

<sup>58</sup> E.g., Ayres & Braitwaite, *supra* note 45; R. Baldwin, *Regulation: After Command and Control*, In K. Hawkins (ed.), *The Human Face of Law: Essays in Honor of Donald Harris*, Oxford: Clarendon (1997); E. Bardach & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, Philadelphia: Temple University Press (1982); J. Black, *Talking About Regulation* 77 Public Law (1998); N. Gunningham & P. Grabosky, *Smart Regulation: Designing Environmental Policy*, Oxford: Clarendon Press (1998); Gunningham & Johnstone, *supra* note 41.

<sup>59</sup> See P. Selznick, *The Moral Commonwealth*, Berkeley: University of California Press 463 (1992).

<sup>60</sup> *Id.*

<sup>61</sup> See Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, New York: Harper/Colophon (1978).

simple legal instrumentalism. For example, Habermas<sup>62</sup> insists that law be considered primarily not as a policy instrument but as an institution, an expression, or framework, in some sense, of existing structures of social life, while Lange<sup>63</sup> argues that, “space is becoming an increasingly important concept in the analysis of legal regulation.” We want to create a system of regulatory instruments to approach the said harm. This is a close system where every aspect affects another or many other aspects and unless there is harmony in the system, the outcome may not be efficient. Only by considering all the factors and parties involved will we be able to present an efficient solution that will decrease the harm without causing new challenges.

Another aspect that has been marked as fundamental for effective regulation is the mix of regulatory entities. Ayres and Braithwaite<sup>64</sup> argue that good policy analysis is not about choosing between the free market and government regulation, or deciding what the law should prescribe. They suggest that an understanding of private regulation, and its interdependence with state regulation is required to achieve the mix of private and public regulation. We can conclude that the principle of ‘one size fits all’ is a complete stranger to the efficient regulation of virtual and intangible harm to children’s imagination in virtual worlds and therefore a regulatory mix – both of the regulatory instruments and of the regulatory entities involved, is the right approach to be taken to address the said harm. Only flexibility in the regulatory space will allow relevant and efficient response to this challenging harm.

In this context, Gunningham and Sinclair<sup>65</sup> propose two necessary components of a successful regulatory design: regulatory design principles<sup>66</sup> and instrument mixes.<sup>67</sup> These components will be used in the following chapters as a theoretical framework that drives the search for an answer to this dissertation question: how should we regulate a harm which is both intangible and virtual. The first component, regulatory design principles, will be discussed below while the second component, instrument mixes, will be discussed at the end of the next chapter.

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<sup>62</sup> J. Habermas, *Law as Medium and Law as Institution*, In G. Teubner (ed.), *Dilemmas of Law in the welfare state*, Berlin: De Gruyter 203-20 (1986).

<sup>63</sup> Bettina, Lange, *Regulatory Spaces and Interactions: An Introduction*, 12(4) *Social & Legal Studies* 411, 414 (2003).

<sup>64</sup> Ayres & Braithwaite, *supra note 45*.

<sup>65</sup> See N. Gunningham & D. Sinclair, *Designing Environmental Policy*, In N. Gunningham & P. Grabosky, *Smart Regulation: Designing Environmental Policy*, Oxford: Clarendon Press 42 (1998).

<sup>66</sup> *Id.*, at 387-419.

<sup>67</sup> *Id.*, at 422-448.

Regulatory design principles are classified into four types:<sup>68</sup>

(1) *identification of the desired policy goal(s) and trade-offs necessary to achieve it* – in the case of the harm to imagination in children’s virtual worlds, as much as in the case of advertising to children (see chapter 6, *infra*) the policy goal is to reduce the said harm while maintaining both the children and the virtual worlds companies’ freedom of speech (see chapter 5, *infra*). Another aspect of the trade offs is balancing the interests of the players in the regulatory sphere, i.e. the children, the parents, and the virtual worlds companies (see chapter 7, *infra*).

(2) *identification of the unique characteristics of the problem being addressed* – the harm is hard to prove and measure (see chapter 1, *supra*); the harm is new and stems from new technologies (see chapter 4, *infra*); while it is a public interest to encourage use of new technologies, it should be done in moderation to prevent deleterious effects; complex social interactions are involved as children-parents relationships (see chapter 7, *infra*).

(3) *identification of the range of potential regulatory participants and policy instruments* – as said above, there are multiple and diverse participants in the regulatory realm of the harm discussed, mainly: the user children, their parents, virtual worlds companies, the state, school, children’s friends, and society in general. The policy or regulatory instruments will be discussed in details in the next chapter.

(4) *identification of opportunities for consultation and public participation* – there are many opportunities for consultation and public participation in this regulatory realm. Issues to be discussed include the fragile and complex relationship between parents and children, including the school environment; the regulation of the internet from a public point of view (see chapter 4, *infra*); and aspects of freedom of speech in the view of the participants and the public (see chapter 5, *infra*).

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<sup>68</sup> *Id.*, at 378-385.

### **3. Conclusion**

Given Black's broad definition of regulation, the harm described in chapter 1 comes within this definition and is considered a regulatory realm to be considered within regulation's theoretical framework. With the goals of regulation in mind, Gunningham and Sinclair's regulatory design principles sets the framework to move to the second step of the regulatory discussion brought in the next chapter – regulatory instruments. The next chapter will detail the regulatory instruments and their suitability for the harm discussed in chapter 1.

## Chapter 3 - Regulatory Instruments

In the previous chapter the working definition of regulation was established and the goals of regulation were determined in order to set the theoretical framework for a discussion of the regulation of a virtual and intangible harm as the harm described in chapter 1, *supra*. This chapter will discuss the regulatory instruments available and their suitability to deal with the said harm in an efficient way.

According to Ogus,<sup>1</sup> policymakers can choose from a range of regulatory instruments classifiable according to the degree of state intervention required. Bronwen et al<sup>2</sup> classify regulatory instruments by the underlying “modality” through which the control of behavior is sought. They identify five classes:

1. *Command and Control* – the government commands and the regulatee needs to obey otherwise he/she will be sanctioned;
2. *Competition* - regulation instruments that facilitate competition among regulated entities using incentives (‘green light’ regulation). It should be mentioned that often industry players are interested in enforced regulation in order to prevent competition and maintain other competitors from entering the market.
3. *Consensus* - can come in different forms (i.e. enforced self-regulation, performance based regulation, etc.) and relates to the process of the regulatee’s regulating itself.
4. *Communication* - less intrusive forms of regulation like forcing industry to provide information to consumer or education measures taken by the state or industry in order to enhance knowledge and prevent harm.
5. *Code* (or architecture) - the use of technology (or other practical means) to prevent unwanted behavior. This last modality will be discussed in detail in the context of the internet in the next chapter.

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<sup>1</sup> A. Ogus, *Regulation – Legal Form and Economic Theory*, Oxford: Clarendon Press 5 (1994).

<sup>2</sup> M. Bronwen, K. Yeung & W. Twining, *Introduction to Law and Regulation: Text and Materials*, Cambridge: Cambridge University Press 80 (2007).

These four modalities (Code will be discussed in detail in the next chapter) and the regulatory instruments they entail will be discussed below in the context of their suitability to regulate a virtual and intangible harm as the one discussed in chapter 1, *supra*. Further, a short discussion of paternalism and compliance will follow as these two components are crucial aspects of any kind of regulation. The underlying assumption of this chapter is that the most efficient regulatory regime would be a mix of regulatory instruments with an emphasis on the fourth modality of information. This assumption will be subject to the consequences of dealing with a virtual harm as discussed in chapter 4 *infra*, the constraints of the freedom of speech as discussed in chapter 5 *infra*, the lessons drawn from the regulation of advertising online detailed in chapter 6 *infra* and finally, the aspects of regulation at home as discussed in chapter 7 *infra*.

The goal of this chapter is to set the theoretical framework, based on the grounds set in chapter 2, *supra*, for a mix of regulatory instruments that would be efficient in dealing with a virtual and intangible harm as the harm described in chapter 1, *supra*. While the discussion is theoretical and doctrinal, the implication to the case at hand are specific and illustrative.

## **1. Command and control**

The literature discusses the pros and cons of command and control as a regulatory regime and instrument, and the principles of command-and-control design. The studies conclude that it is an inherently unsuitable regulatory instrument for successfully and efficiently regulating a virtual and intangible harm such as the one discussed in this dissertation, mainly because the rigid nature of command and control regulation and the need to have a well defined and tangible factor or factors to be controlled.

The typical starting point for understanding regulatory instruments is an examination of command-based mechanisms for regulating behavior. This is also the instrument with which lawyers are most familiar. Command and control involves legal rules promulgated by the state in

order to prohibit specified conduct. These rules are underpinned by coercive sanctions (either civil or criminal in nature). Ojo<sup>3</sup> argues that,

The ability to define the expected behavior of regulatees with immense clarity constitutes the major strength of command and control regulation.<sup>4</sup> Not only does this enable breaches of the legal standard and legal enforcement to be identified in a relatively simple manner, it defines limits of regulators' operations which enables individuals and firms to have a clearer understanding of their regulatory obligations.<sup>5</sup>

Latin<sup>6</sup> suggests that command-and-control regulation has advantages that extend beyond the advantages identified with more tailored and flexible instruments. Nonetheless, command-and-control is criticized for its rigidity, which contributes to economic inefficiency.

Black<sup>7</sup> argues that many people's core understanding of "regulation" as a form of "command and control" is based on the notion of regulation administered by the state using legal rules enforced by (often criminal) sanctions. In many cases, "command and control" has also become shorthand to denote all that can be bad about regulation, including rigidity, poorly targeted rules, under- or over-enforcement, ossification, and unintended consequences.

Sinclair<sup>8</sup> contends that command-and-control regulation is accused of stifling innovation, being costly and inefficient, inviting enforcement difficulties,<sup>9</sup> and focusing on "end-of-pipe"<sup>10</sup>

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<sup>3</sup> Marianne Ojo, *Responsive Regulation: Achieving the Right Balance Between Persuasion and Penalisation*, 14170 MPRA Paper 5 (March 19, 2009), available at <http://mpa.ub.uni-muenchen.de/14170/> (last visited April 26, 2016).

<sup>4</sup> N. Gunningham, & P. Grabosky, *Smart Regulation: Designing Environmental Policy*, Oxford: Clarendon Press 42 (1998).

<sup>5</sup> *Id.*, at 41.

<sup>6</sup> Latin, H., *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine Tuning" Reforms*, 37 *Stanford Law Rev.* 1271 (1985).

<sup>7</sup> Julia Black, *Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World*, *Current Legal Problems* 2-3 (2001).

<sup>8</sup> Darren Sinclair, *Self-Regulation versus Command and Control – Beyond False Dichotomies* 19 *Law & Pol'y* 530 (1997).

<sup>9</sup> A perceived lack of enforcement has led third parties to point to the "regulatory capture" of authorities. Even if regulatory officials remain objective, funding shortfalls often leave them under-tagged and at disadvantage when confronting in-house technical expertise of firms.

<sup>10</sup> "End-of-Pipe" refers to ameliorating pollution just before the point at which it enters the environment rather than seeking to prevent its generation in the first place.

solutions.<sup>11</sup> Whether command and control lives up to this criteria is an empirical question.<sup>12</sup> It is more relevant for this discussion to assert that command-and-control regulation posits a particular role for the state against which the “decentering” analysis is counterpoised. Command and control is “centered” in that it assumes the state’s capacity to command and control, to be autonomous of the regulatees, to be the only regulator, and to be potentially effective in this role.

Command and control is assumed to be based on relations of simple cause-effect, to be unilateral in its approach (state telling, regulatees doing), and to envisage a linear progression from policy formation to implementation.

Within the so-called command-and-control approach to agency regulation, major tasks are perceived to be rule-making, enforcement, and application of sanctions. The design of appropriate regulatory rules has been the subject of a substantial and growing literature.<sup>13</sup> A wide variety of parameters to describe legal rules have been identified: generality and clarity,<sup>14</sup> comprehensibility,<sup>15</sup> accuracy of prediction,<sup>16</sup> determinacy,<sup>17</sup> weight,<sup>18</sup> value,<sup>19</sup> and consistency with social purpose.<sup>20</sup> Rules have been treated by some analysts as having four dimensions: (1) substance (what the rule says), (2) character (whether it is permissive or mandatory: may or

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<sup>11</sup> A. Moran, *Tools of Environmental policy: Market Instruments Versus Command-and-Control*, In R. Eckersley (ed.), *Markets, the State and the Environment: Towards Integration*, South Melbourne: Macmillan Education Australia (1995); Janis D. Bernstein, *Alternative Approaches to Pollution Control and Waste Management: Regulatory and Economic Instruments*, Washington, D.C.: The World Bank for Urban management programme (1993); Richard B. Stewart, *Models for Environmental Regulation: Central Planning Versus Market-Based Approaches* 19 *Boston College Environmental Affairs Law Review* 547-62 (1992); Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?* 18(1) *Ecology Law Quarterly* 1-42 (1991); Arnold W. Reitze, Jr., *A Century of Pollution Control Law: What’s Worked; What’s Failed; What Might Work* 21 *Environmental Law* 1549-1646 (1991); Cass R. Sunstein, *The Paradoxes of the Regulatory State*, *University of Chicago Law Review* 407-41 (1990); Robert A. Leone, *Who Profits?: Winners, Losers, and Government Regulation*, New York: Basic Books (1986).

<sup>12</sup> See R. Baldwin, C. Scott & C. Hood, *A Reader on Regulation*, New York: Oxford University Press, (1998); N. Gunningham & P. Grabosky, *Smart Regulation: Designing Environmental Policy*, Oxford: Clarendon Press 38-50 (1998).

<sup>13</sup> Baldwin, *supra* note 12.

<sup>14</sup> Lon L. Fuller, *The Morality of Law*, New Haven: Yale University Press 46-49, 63-65 (Revised ed. 1969).

<sup>15</sup> H. L. A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 121 (1961).

<sup>16</sup> J. Frank, *Law and the modern Mind*, New York: Brentano’s 118-19 (1930).

<sup>17</sup> R. Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press 24-26 (1977).

<sup>18</sup> *Id.*, at 26-28; J. Raz, *Legal Principles and the Limits of Law* 81 *Yale L. J.* 832-33 (1972).

<sup>19</sup> See, e.g., R. Posner, *Economic Analysis of Law*, Aspen 419-21 (2<sup>nd</sup> ed. 1977); M. Landes & R. A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis* 19 *J. L. & Econ.* 263-64 (1976).

<sup>20</sup> See L. M. Friedman, *Legal Rules and the Process of Social Change* 19 *Stan. L. Rev.* 822-24 (1967).

shall), (3) status (its legal force and the sanction attached to it), and (4) structure. Rule type is a function of only three of the dimensions: character, status/sanction, and structure.<sup>21</sup>

For regulators and regulatees, one of the key issues is a particular rule's ideal degree of precision. Diver<sup>22</sup> defines the concept of rule precision and distinguishes three qualities of regulatory rules: transparency, accessibility, and congruence. Transparency is defined by Diver as the rule-maker's will to use, "words with well-defined and universally accepted meanings within the relevant community."<sup>23</sup> Accessibility is the rule-maker's will to make the rule "accessible" to its intended audience, "[t]hat is, applicable to concrete situations without excessive difficulty or effort."<sup>24</sup> Finally, a policymaker will care about whether the content of his communicated message will produce the desired behavior.<sup>25</sup>

Although criticized as mentioned above, command-and-control regulation is still the major regulatory instrument in use. Nonetheless, as virtual worlds redefine compliance, enforcement, and efficiency, command and control becomes unsuitable for addressing harm to children's imaginations.

In a geographically borderless virtual world, enforcement becomes contested as an issue of jurisdiction. Moreover, the application of command-and-control standards to intangible harm-prevention faces compatibility challenges because the nature of the harm is hard to prove empirically and to quantify. While an element of command-and-control may be part of a mix of regulatory instruments as will be discussed in the end of this chapter, employing a strict regime

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<sup>21</sup> Baldwin et al., *supra* note 12.

<sup>22</sup> Colin S. Diver, *The Optimal Precision of Administrative Rules* 93 Yale L. J. 66. (1983-1984)

<sup>23</sup> *Id.*, at 67. Jerry Mashaw uses the term "transparency" to describe a similar idea (J. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory* 61 B. U. L. Rev. 901(1981). It is presumably this same notion that Hart has in mind when speaking of rules "which multitudes of individuals could understand," (Hart, *supra* note 15, at 121), that Fuller has in mind when speaking of a rule's "clarity," (Fuller, *supra* note 14, at 63-65), and that Kennedy describes as "formal realizability," (D. Kennedy, *Form and Substance in Private Law Adjudication* 89 Harv. L. Rev. 1687-88 (1976).

<sup>24</sup> Diver, *supra* note 22, at 67; See G. Tullock, *Trials on Trial: A Pure Theory of Legal Procedure*, New York: Columbia University Press 180 (1980); J. F. Brodley, *In Defence of Presumptive Rules: An Approach to Legal Rulemaking for Conglomerate Mergers*, In R. Blair & R. Lanzilloti (eds.), *The Conglomerate Corporation: An Antitrust Law and Economics Symposium*, Greenwood Press, 255-60 (1981).

<sup>25</sup> For a graphic representation of this point, see J. Tussman & J. tenBroek, *The Equal Protection of the Laws* 37 Calif. L. Rev. 346-49 (1949) (discussing passage of a hypothetical law for sterilization of suspected hereditary criminals); see also *Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982) (defining "specificity" of a classification as its degree of "over or underinclusive[ness]" in serving legitimate political ends).

of command-and-control to deal with an intangible and virtual harm would be unsuitable, rigid and inefficient. The new and innovative regulatory sphere of virtual and intangible harm requires an innovative approach which usually runs contrary to command-and-control regime.

## 2. Competition

There are many disadvantages associated with using command-and-control regulation. The extent of these disadvantages seem to convince regulators to refrain from using such regulation. These disadvantages are part of the reason for the shift toward regulatory instruments that take advantage of the competitive forces that exist among competing actors. There are various such instruments available, often referred to as economic instruments, including taxes, charges, subsidies, changes in liability rules, and tradable emissions.

The OECD<sup>26</sup> defines economic instruments as,

Instruments that affect costs and benefits of alternative actions open to economic agents, with the effect of influencing behavior in a way favourable to the environment.

In this regard, it is important to note that sometimes the target industry wants to be regulated in order to prevent competition with other actors that the regulation will prevent from entering the market. Ogus<sup>27</sup> argues that,

The general disenchantment with traditional regulatory forms which has emerged in the last two decades has led to pressure not only to deregulate but also to experiment with other regulatory forms which encourage the desired behavior by financial incentives rather than by legal compulsion. Such incentives can be either negative (conduct is legally unconstrained but if a firm chooses to act in an undesired way it must pay a charge) or positive (if a firm chooses to act in a desired way it is awarded a subsidy).

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<sup>26</sup> OECD, *Environmental Policy: How to Apply Economic Instruments* 10 OECD (1991).

<sup>27</sup> A. Ogus, *Costs and Cautionary Tales – Economic Insights for the Law*, Portland: Hart (2006).

Supporters of economic instruments claim that these instruments are able to deal successfully with command-and-control regulation many challenges. Command-and-control often requires centrally formulated complex and detailed set of standards; whereas broad target goals can be the basis for the functionality of economic instruments, while reducing the costs of administrative handling and information providing, for both the firms and the regulators.<sup>28</sup> Further, the freedom level enabled by economic instruments creates development incentives for firms. For example, tax credit awarded for reduced toxic waste production may encourage more efficient production process. Third, while there is considerable uncertainty in the enforcement of command-and-control with respect to prosecution, apprehension, and the level of sanctions, economic instruments ensure payment of specific sums. Fourth, the funds generated by negative economic instruments (i.e., charges) can be used to compensate the victims of externalities; this compensation is rarely possible in command-and-control regimes.

Typically, arguments for the use of economic instruments, have been presented in terms of their advantages over command-and-control regulation.<sup>29</sup> Command instruments of environmental regulation have been criticized for being administratively complex and costly, rigid, and failing to produce sufficient incentives for business to reach beyond the regulatory floor.<sup>30</sup> Although some command-and-control regimes have incentive effects, such as administrative pricing, they are not market-based, as governments effectively control resource allocation. Nonetheless, the strongest argument in favor of economic instruments is their cost effectiveness.<sup>31</sup>

Markets are a powerful player on the regulatory board. Competition aligns with market perceptions, it is easy to enforce, provides certainty and can generate income to the government. Yet, when the harm is embedded at the heart of the product, as in the case at hand, the markets

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<sup>28</sup> Cf. Benjamin J. Richardson, *Economic instruments in UK Environmental Law Reform: Is the UK Government Sending the Right Signals* 3 Eur. J. L. Reform 432 (2001) ('Economic instruments magnify the costs of environmental policy whereas costs under command regulation are less transparent and hence less readily objectionable').

<sup>29</sup> See R. B. Stewart, *Economic Incentives for Environmental protection: Opportunities and Obstacles, Environmental Law, the Economy and Sustainable Development*, Cambridge: Cambridge University Press, 171 (2000).

<sup>30</sup> M. B. Hopper, *Trust But Verify: Innovation in Compliance Monitoring as a Response to Privatization of Utilities in Developed Nations* 48 Administrative Law Review 610-611 (1996).

<sup>31</sup> See N. O. Keohane, R. L. Revesz & R. N. Stavins, *The Choice of Regulatory Instruments in Environmental Policy* 22(2) Harvard Environmental L. Rev 313 (1998); J. van Dunne (ed.), *New Instruments for a Realistic Environmental Policy*, Erasmus University (1993).

may fail to prevent the harm. On the contrary, it can fiercen the competition and create potentially more harm. Nonetheless, incentives can be associated with encouraging the virtual worlds companies to engage in communication based regulation. As will be discussed below, this communication may increase the knowledge and awareness of the harm’s existence, its potential danger, the long term implications and the potential protection measures.

### 3. Consensus

The notion of regulatee’s regulating themselves is appealing at first impression. Regulatees should have the knowledge, expertise and ability to identify the harm, regulate themselves to prevent it and make sure they comply with the regulation. Nonetheless, beside its flexibility and alleged cost effectiveness, self regulation has encountered criticism for creating a flexible regulatory regime that seek first and foremost to satisfy the regulatee’s interests and only then look at the harm and the ways to decrease or prevent it.

According to Ojo,<sup>32</sup> the term “decentering regulation” is intended to emphasize the idea that there is no monopoly on regulation by governments and that such a monopoly should not exist. Regulation is conducted by other actors as well: collective associations, large organizations, professions, technical committees, and so forth. This occurs without the government's involvement or even formal approval.<sup>33</sup> Decentered regulation also refers to changes taking place within government and administration. These changes manifest in the internal fragmentation of policy formation and implementation.<sup>34</sup> Black<sup>35</sup> contends that,

Since we are familiar with the notion of the 'regulatory state',<sup>36</sup> and even with that of a 'new regulatory state',<sup>37</sup> we should also begin to take seriously the notion of a 'regulatory society' in which we recognize that regulation is not 'centered' on the state, but instead is 'decentered', diffused throughout society.

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<sup>32</sup> Marianne Ojo, *Responsive Regulation: Achieving the Right Balance Between Persuasion and Penalisation*, 14170 MPRA 2 (March 19, 2009).

<sup>33</sup> J. Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World* 54 *Current Legal Problems* 103-146 (2002).

<sup>34</sup> *Id.*, at 104.

<sup>35</sup> J. Black, *Rules and Regulators*, Oxford: Clarendon Press 1-2 (1997).

<sup>36</sup> G. Majone, *The Rise of the Regulatory State in Western Europe* 17 *West European Politics* 77 (1994).

<sup>37</sup> J. Braithwaite, *The New Regulatory State and the Transformation of Criminology* 40 *British J of Criminology* 222 (2000).

Streeck and Schmitter<sup>38</sup> argue that associations, the “private interest governments,” should be added to the governing alternatives of bureaucracies (hierarchies) and markets.

Regulation is often perceived as the outcome of the interactions of networks or, alternatively, “webs of influence” that operate in the absence of formal governmental or legal sanctions.<sup>39</sup> Therefore, in an understanding of decentered regulation, the role of formal authority is ambiguous, and regulation is a product of activity. Teubner<sup>40</sup> argues that,

Any regulatory intervention that attempts to change social institutions will face the possibility that it is either:

- (1) 'irrelevant'; that is, it is ineffective because people fail to comply;
- (2) 'produces disintegrating effects on the social area or social life'; that is, it is non-responsive to existing norms, values, and social orderings;
- (3) produces 'disintegrating effects on regulatory law itself'; that is it is incoherent.

These regulatory flow's: being ineffective, non-responsive and incoherent, will be further discussed in chapter 4, *infra*, regarding the regulation of the internet and in chapter 7, *infra*, regarding regulation at home as both of these institutions, the virtual space and the family, are social institutions with defined rules, players and interactions.

### 3.1 Self-regulation

According to Baldwin and Cave,<sup>41</sup> self-regulation is,

The exercise of control by a group of firms or individuals, over its membership and their behavior. Variables of self-regulation consist of the governmental

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<sup>38</sup> P. Streeck & P. Schmitter, *Community, Market, State and Associations? The Prospective Contribution of Interest Governance to Social Order*, In P. Streeck & P. Schmitter (eds.), *Private Interest Government: Beyond Market and State*, London: Sage 20 (1985).

<sup>39</sup> Rhodes R, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Buckingham: Open University Press (1997); J. Braithwaite & P. Drahos, *Global Business Regulation*, Cambridge: Cambridge University Press (2000).

<sup>40</sup> G. Teubner, *Law as an Autopoietic System*, Oxford: Blackwell (1993).

<sup>41</sup> See R. Baldwin & M. Cave, *Understanding Regulation – Theory, Strategy and Practice*, Oxford: Oxford University Press (1999).

nature of self-regulation, the level of involvement of self-regulators and the extent of the binding legal force which is connected to self-regulatory rules.<sup>42</sup> Claims in favor of self-regulation or the incorporation of components of self-regulation into governmental regulation are based on arguments related to expertise and efficiency.<sup>43</sup>

The case of Coase Theorem, theorizing that legal measures will not force compliance and Ellickson's field experiment with cattle growers, illustrates the advantages of self-regulation.

In the most cited law article "The Problem of Social Cost," Coase suggested as a fundamental example a conflict between a farmer raising crops and a neighboring rancher running cattle.<sup>44</sup> Coase used this parable to illustrate what has come to be known as the Coase Theorem.<sup>45</sup> In its strongest form, this counterintuitive proposition states that when transaction costs<sup>46</sup> are zero, a change in the rule of liability will have no effect on the allocation of resources. For example, assuming these assumptions are met, Coase's theorem predicts that holding a rancher liable for damage done by his trespassing cattle would not cause the rancher to take precautionary measures such as reducing his herd's size, erecting more fencing, or keeping a closer watch on his livestock. In theory, a rancher who is liable for trespass damage has a legal incentive to implement all cost-justified measures to control his cattle. But Coase argues that

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<sup>42</sup> *Id.*, at 125-126.

<sup>43</sup> *Id.*, at 126; In relation to expertise, it is usually advanced that self-regulatory bodies possess greater expertise than is the case with independent regulation. Efficiency is also a ground put forward by proponents of self-regulation in that self-regulation emphasizes the ability of self-regulation to generate controls in an efficient manner – since there is greater accessibility to those being controlled. Furthermore, self-regulators are able to acquire information at lower costs, incur low monitoring and enforcement costs and can easily adapt their regimes to changing industrial conditions; *Id.*, at 127.

<sup>44</sup> 3 J. L. & Econ. 1 (1960). During the 1957-1985 period the most cited article published in a conventional law review was Gerald Gunther, *The Supreme Court, 1971 Term – Foreword* 86 Harv. L. Rev. 1 (1972). See Fred R. Shapiro, *The Most-Cited Law Review Articles* 73 Cal. L. Rev. 1549 (1985). The Social Science Citation Index, which counts citations to articles appearing in law, economics, and other social science journals, provides a basis for comparing citations to the Coase and Gunther articles. This index indicates that during 1981-1988 the Coase article was cited in the surveyed journals almost twice as often as the Gunther article was.

<sup>45</sup> Coase didn't, and no doubt wouldn't, use the label parable. This noun is nevertheless a useful shorthand way to refer to his example.

<sup>46</sup> Coase, *supra* note 44, at 114 ("In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up a contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on"); Carl J. Dahlman, *The Problem of Externality* 22(1) J. of Law and Economics 148 (April 1979) ("Search and information costs, bargaining and decision costs, policing and enforcement costs").

even if the law were to decline to make the rancher liable, the potential trespass-control victims would pay the rancher to implement identical trespass-control measures to the ones that the corn grower has implemented. In short, the parties involved internalize market forces and, thus, all costs in the transaction, regardless of the rule of liability. This theorem has undoubtedly been the most fruitful and the most controversial proposition to arise out of the law-and-economics movement.<sup>47</sup>

Coase was fully aware that negotiating agreements, obtaining information, and litigating disputes are all potentially costly. Therefore, his Farmer-Rancher Parable might not portray accurately how landowners in rural areas would respond to a change in trespass law.<sup>48</sup> Nonetheless, law-and-economics scholars believe that when only two parties are in conflict, transaction costs are indeed often trivial.<sup>49</sup> These scholars therefore might assume, as Coase likely would not, that the parable accurately predicts how rural landowners would resolve cattle-trespass disputes.

In an account of how residents of rural Shasta County, California resolve various disputes that arise from wayward cattle, Ellickson's<sup>50</sup> principle finding is that Shasta County neighbors

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<sup>47</sup> Some landmark in the Coase Theorem literature are Robert Cooter, *The Cost of Coase* 11 J. Legal Stud. 1 (1982); John J. Donohue III, *Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells* 99 Yale L.J. 549 (1989); Donald H. Regan, *The Problem of Social Cost Revisited* 15 J. L. & Econ. 427 (1972).

<sup>48</sup> Coase developed the parable not to describe behavior but rather to illustrate a purely theoretical point about the fanciful world of zero transaction cost. He himself has always been a militant in the cause of empiricism. See R. Coase, *The Firm, the Market, and the Law*, Chicago: University of Chicago Press 174-179 (1988).

<sup>49</sup> Several of Coase's colleagues at the University of Chicago wedded themselves to this assumption in the 1960s. See, e.g., Walter J. Blum & Harry Jr. Kalven, *Public Law Perspectives on a Private Law Problem: Auto Compensation Plan*, Boston: Little, Brown and Company 58-59 (1965); Harold Demsetz, *When Does the Rule of liability Matter* 1 J. Legal Stud. 13, 16 (1972) (transaction costs "would seem to be negligible" when a baseball player negotiates with his club). The current consensus, even among Chicagoans, is that negotiations in bilateral-monopoly situations can be costly because the parties may act strategically. See, e.g., William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other rescuers: An Economic Study of Altruism* 7 J Legal Stud. 83, 91 (1978) ("transaction costs under bilateral monopoly are high"); Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior* 11 J. Legal Stud. 225, 242-244 (1982). Other reasons why transaction costs might be high in simple two-party situations are explored in R.C. Ellickson, *The Case for Coase and against Coaseanism* 99 Yale L. J. 611 (1989).

<sup>50</sup> R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes*, Cambridge: Harvard University Press 1 (1991).

apply informal norms, rather than legal rules, to resolve most of the issues. According to Ellickson,<sup>51</sup>

Shasta County neighbors, it turns out, do not behave as Coase portrays them as behaving in the Farmer-Rancher Parable.<sup>52</sup> Neighbors in fact are strongly inclined to cooperate, but they achieve cooperative outcomes not by bargaining from legally established entitlements, as the parable supposes, but rather by developing and enforcing adaptive norms of neighborliness that trump formal legal entitlements. Although the route chosen is not the one that the parable anticipates, the end reached is exactly the one that Coase predicted: coordination to mutual advantage without supervision by the state.

Ellickson further contends that order often arises out of mutual understanding. Although many other writers have recognized this point,<sup>53</sup> it remains counterintuitive and cannot be repeated too often. It is not surprising that those who favor expanding the role of government in regulation do not appreciate non-hierarchical systems of social control such as those pointed out by Ellickson.

Although Coase's writing tends to support decentered regulation, in "The Problem of Social Cost" he adopts the "legal centralist" view, arguing that the state functions as the sole creator of operative rules of entitlement among individuals. In so doing, Coase repeats an approach dating back to Thomas Hobbes.<sup>54</sup> According to Hobbes, all would be endless civil strife without a Leviathan (government) to issue and enforce commands. The Shasta County evidence shows that Hobbes was much too quick to equate anarchy with chaos.

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<sup>51</sup> *Id.*, at 3-4.

<sup>52</sup> Besides exaggerating the reach of law, Coase's parable misidentifies the main risks associated with straying cattle. In Shasta County, the principle risks are not those posed to neighboring vegetation but those posed to motorists and to the animals themselves.

<sup>53</sup> Two classic sources are Charles Lindblom, *The Intelligence of Democracy*, Free Press 3-6 (1965) (lucid explanation of the possibility of coordination without hierarchy), and Friedrich Hayek, *The Road to Serfdom*, London: George Routledge & Sons 35-37 (1944) (reasons why planned economies can be expected to perform less well than unplanned ones).

<sup>54</sup> See Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (1691).

Ellickson<sup>55</sup> argues that many entitlements, especially workday entitlements, can arise out of mutual understanding. People may supplement, and indeed pre-empt, rules of their own with the state's rules.<sup>56</sup> Ellickson concludes that,

A centerpiece of the theory is the hypothesis that, to govern their workaday interactions, members of a close-knit group tend to develop informal norms whose content serves to maximize the objective welfare of group members. This hypothesis suggests that the choice of informal custom over law is done not only because custom tends to be administratively cheaper but also because the substantive content of customary rules is more likely to be welfare maximizing.<sup>57</sup>

Because the potential harm caused by virtual worlds to the development of children's imaginations is a consequence of an interaction between unequal forces, the operators of virtual worlds and child users, Ellickson's norms-based regulation might be irrelevant. Moreover, placing liability on the virtual worlds companies for damages caused to children as the Coase Theorem suggests, may not encourage the virtual worlds companies to 'erect virtual fences' in order to prevent the damages to the children.

Both in Coase Theorem and in Ellickson's experience, the advantage to the party causing the harm is marginal as the cattle grower is not relying on the corn field to feed his cattle. In contradiction, in the case of children's virtual worlds, the profits of these entities is based on children users, thus any measure to prevent or monitor entrance to these worlds will be directly negative to the virtual worlds companies.

When the self-regulation objective is in direct contradiction to the business model of the entities maintaining this regime, as in the case of children users and virtual worlds, this regulatory instrument is bound to fail. A different aspect of self-regulation to be discussed in details in chapter 7, *infra*, is the regulation of children usage employed by parents at home.

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<sup>55</sup> Ellickson, *supra* note 50, at 5.

<sup>56</sup> See, e.g., Robert Axelrod, *The Evolution of Cooperation*, New York: Basic Books 4 (1984); Peter Singer, *The Expanding Circle: Ethics and Sociobiology*, Oxford: Clarendon Press 23-24 (1981); Michael Taylor, *Anarchy and Cooperation*, London: Wiley 3, 7, 98-118 (1976).

<sup>57</sup> Ellickson, *supra* note 50, at 283.

## 3.2 Co-regulation

Co-regulation refers to industry-association self-regulation with some oversight and/or ratification by government.<sup>58</sup> Enforced self-regulation is different from co-regulation since in enforced self-regulation, negotiations take place between the state and individual firms to establish regulations that are tailor-made to each firm.<sup>59</sup> In co-regulation, these negotiations are conducted between the government and the industry association combined with the individual firms. This “centralization” of self-regulation enhances standardization and can make it more efficient for the government to enforce compliance. Nonetheless, this kind of generic approach might be a less distinctive approach than the individual approach that can be employed in enforced self-regulation.

As we assume that the harm is similar in all virtual worlds, since the harm causes, as discussed in chapter 1, *supra*, are inherent and embedded in the media itself, enforced self-regulation is not relevant. In addition, similar to self-regulation discussed above, co-regulation may not be effective in preventing the harm as it is a result of the virtual worlds use which lies at the heart of the virtual world product and its operator source of income. Nonetheless, as will be discussed at the end of this chapter and in chapter 7, *infra*, co-regulation could be part of a mix of regulatory instruments. For example, the government overseeing a regulatory measure to be implemented by the virtual worlds to educate children and their parents about the potential harm and ways to avoid or decrease it. Moreover, the government can force the virtual worlds companies to create regulation in which these worlds dedicate part of their revenue to rehabilitate those who are suffering from the harm.

Though the notion of causing the harm on one hand and curing its effects on the other by the same entity may seem absurd, it could be a valid and efficient partial solution that reconciles some of the interests and factors involved in this regulatory realm, namely, the complexity of virtual regulation (see chapter 4, *infra*), virtual worlds companies and children’s freedom of speech (see chapter 5, *infra*), the challenge of regulating an intangible harm (see chapter 6,

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<sup>58</sup> P. Grabosky & J. Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies*, Melbourne: Oxford University Press 83 (1986).

<sup>59</sup> See also I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: Social Legal Studies 101 (1995); Baldwin & Cave, *supra* note 41, at 125-127.

*infra*), children autonomy and a solution for the resources needed for education based approach (see chapter 7, *infra*).

### 3.3 Responsive regulation

Ayres and Braithwaite<sup>60</sup> proposed a responsive approach to regulation. This approach involves a process in which regulators use compliance-based strategies, and when the desired level of compliance is not achieved, they resort to more punitive “deterrents.” According to Ayres and Braithwaite, this option is preferable to the positions supported by those who believe that, “gentle persuasion works in securing business compliance with the law.”<sup>61</sup> It is also preferable to those who believe that corporations will comply with the law only when tough sanctions are applied. They contend that greater regulatory challenges are found at the intermediate levels of the pyramid of regulatory strategies.<sup>62</sup> Nonetheless, such intermediate levels are in greatest need of regulatory innovation.

According to Ojo,<sup>63</sup> the responsive approach assumes that the commencement of regulation would always be at the base of the pyramid. A form of responsive regulation can be found in the enforced self-regulation model. Under this model, negotiations are held between the state and individual firms to establish regulations that are particular to each firm.<sup>64</sup> In this model, each firm is required to propose its own regulatory standards in order to avoid harder (and less tailored) standards imposed by the state.<sup>65</sup>

According to Ayres and Braithwaite,

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<sup>60</sup> *Id.*, at 101.

<sup>61</sup> *Id.*, at 20.

<sup>62</sup> *Id.*, at 101. A range of certified punitive strategies exist at the apex of the pyramid whilst experience of the successes and failures of the free market and of self regulation (aimed at protecting consumers) can be found at the base of the pyramid, *Id.*

<sup>63</sup> Ojo, *supra* note 32, at 3.

<sup>64</sup> *Id.*, at 101.

<sup>65</sup> *Id.*

This individual firm is “enforced” in two senses:<sup>66</sup> first, the firm is required by the state to do the self-regulation; second, the privately written rules can be publicly enforced.

According to Baldwin and Black,<sup>67</sup>

Ayres and Braithwaite acknowledge the possible difficulties of moving down the regulatory pyramid since relationships between regulators and regulatees, which are foundations for less punitive strategies, could be influenced through the application of punitive sanctions.

Facing an intangible harm such as the harm to children’s imaginative development in virtual worlds, responsive regulation might be impossible to use. In the absence of a defined and measurable parameter to be measured, there is no meaning to the sanctions pyramid as there is no way to bring it into action.

### **3.4 Risk-based regulation**

Regulation may be regarded as a response to risk,<sup>68</sup> and the main concern of regulation can be considered as controlling these risks.<sup>69</sup> According to Power, “The regulatory state is becoming a risk management state.”<sup>70</sup> Beck argues that,

Whilst the standard way of risk regulation in modern societies was well suited for such societies, it is not responsive enough to our “postmodern” societies.<sup>71</sup> Risk is, as a result, inefficiently controlled at too high a cost.<sup>72</sup>

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<sup>66</sup> Ayres & Braithwaite, *supra* note 59, at 101.

<sup>67</sup> R. Baldwin & J. Black, *Really Responsive Regulation*, 15/2007 Society and Economy Working Papers, LSE law 6 (2007).

<sup>68</sup> U. Beck, *Risk Society: Towards a New Modernity*, London: Sage Publications (1992); also see C. Hood et al, *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*, Oxford: Oxford University Press (2000).

<sup>69</sup> Baldwin & Cave, *supra* note 41, at 138.

<sup>70</sup> M. Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty*, London: Demos 23 (2004); also see B. Fischhoff, S. Watson & C. Hope, *Defining Risk* 17 Policy Science 123-139 (1984).

<sup>71</sup> See Beck, *supra* note 68; and also M. Lassagne & B. Munier, *The Move Towards Risk-Based Regulation and Its Impact on Operational and Strategic Management*, available at [http://www.gregoriae.com/index.php?option=com\\_content&view=article&id=4215%3Apubli&catid=40%3Apublications&Itemid=93&lang=fr&type=1](http://www.gregoriae.com/index.php?option=com_content&view=article&id=4215%3Apubli&catid=40%3Apublications&Itemid=93&lang=fr&type=1) (last visited April 27, 2016); According to Beck and other

Power further states that there is growing acceptance in recent years of the fact that regulation efficiency will be enhanced where collaboration with private control systems exists,<sup>73</sup>

By utilizing activities which relate to private internal control systems for purposes which are of public regulatory nature, regulators are not only able to relieve themselves of the cumbersome work which derives from rule making, but are also able to concentrate on the oversight of the functioning and design of local systems.<sup>74</sup>

In comparison to responsive regulation,<sup>75</sup> risk-based regulation is relatively new.<sup>76</sup> In March, 2005, The Hampton Review<sup>77</sup> recommended a risk-based approach to regulation, particularly enforcement. According to Baldwin and Black,<sup>78</sup>

In the aftermath of the Hampton Review, ‘risk based’ regulation has been implemented primarily through inspection and enforcement procedures which are derived through an examination of risks posed by a regulated person or firm to a regulatory agency’s objectives.<sup>79</sup>

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sociologists’ considerations of the “risk society”, nature does not play a role in generating risks in the sense that risks are no longer the consequence of external or uncontrollable factors such as “force majeure” but are generated through man made decisions. Cultural theorists however, argue that attitudes to risk differ according to cultural preferences. See R. Baldwin & M. Cave, *supra* note 41, at 141; Also see M. Douglas, *Risk and Blame: Essays in Cultural Theory*, London: Routledge (1992).

<sup>72</sup> It can be observed from daily occurrence that more attention should be devoted to recent evolution toward risk based regulation, examples of which can be found in recent European and partly Western-rule setting as illustrated by the Basel II agreement on the regulation of risks in banking and the European Commission White Paper on how to regulate risk in the chemical industry. For more information on this, see Lassagne & Munier, *supra* note 71.

<sup>73</sup> Power, *supra* note 70, at 21.

<sup>74</sup> *Id.*

<sup>75</sup> Ojo, *supra* note 32, at 10.

<sup>76</sup> See H. Rothstein, M. Huber & G. Gaskell, *A Theory of Risk Colonisation* 35 (1) *Economy and Society* 91 (2006).

<sup>77</sup> In 2004, the Chancellor of the Exchequer asked Philip Hampton, a leading businessman, to lead a review of regulatory inspection and enforcement. Philip Hampton’s 2005 report set out an ambitious programme to reduce the burdens on business created by regulatory systems, together with principles to guide effective inspection and enforcement, putting risk assessment at the heart of regulatory assessment, and intending to encourage a regulatory system which properly balances protection and prosperity. (Philip Hampton, *The Hampton Review – Final Report*, UK National Audit Office (March 2005), available at [http://news.bbc.co.uk/1/1/shared/bsp/hi/pdfs/bud05hampton\\_150305\\_640.pdf](http://news.bbc.co.uk/1/1/shared/bsp/hi/pdfs/bud05hampton_150305_640.pdf) (last visited April 27, 2016)).

<sup>78</sup> Baldwin & Black, *supra* note 67, at 12.

<sup>79</sup> *Id.*

Furthermore, according to Power, in contrast to the concept of zero tolerance, risk-based regulation is an expression of the notion that regulatory failures are possible,<sup>80</sup>

Whilst some events can be classified as being of “zero-tolerance” nature, such an event as that of the fall of Equitable Life, which could be considered as ‘tolerable’ from the perspective of a systemic financial risk, in fact, generated life changing catastrophic consequences for many.<sup>81</sup>

According to Baldwin and Black, other problems associated with risk-based regulation derive from the fact that “drivers of action” are short-term, random, and irrational considerations. In addition, the most important risks are not necessarily receiving attention, and lower levels of risk will likely be neglected. These lower-level risks, in turn, may aggregate to risks of immense and dangerous proportions.<sup>82</sup>

According to Baldwin and Cave,

The first regulatory challenge faced by regulators consists in the identification of risks that need to be reduced – not only on the basis of priority, but also in a way which would be approved by the public.<sup>83</sup>

In the current case study of harm caused by virtual worlds to the development of children’s imaginations, it seems, perhaps unsurprisingly, that the public is the one to acknowledge the risk, while the regulator still needs solid proof that this harm actually exists and poses harm to a degree requiring regulation.

Second, managing and regulating risks effectively and in an acceptable way is the challenge for regulators.<sup>84</sup> Furthermore, additional challenges arise from aspects such as the design of institutions and techniques for managing risk, choosing the appropriate regulatory

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<sup>80</sup> See Power, *supra* note 70, at 22.

<sup>81</sup> *Id.*

<sup>82</sup> Baldwin & Black, *supra* note 67, at 13-14.

<sup>83</sup> Baldwin & Cave, *supra* note 41, at 142-143.

<sup>84</sup> *Id.*, at 143.

technique, whether risk management or regulation should be “blame oriented,” and the reliance on qualitative risk evaluations in contrast to more quantitative assessment methods.<sup>85</sup>

Anthony Giddens<sup>86</sup> argues that,

A risk society, is a society that increasingly lives on a high tech frontier, with consequences which no one completely understands, and which generates a diversity of possible futures and outcomes. At a certain point, sometime in the past 50 years or so we stopped worrying so much about what nature can do to us and started worrying much more about what we have done to nature.<sup>87</sup>

In light of Giddens’s warning and in the context of the case study at hand, we should be concerned about what technology is doing to our human nature and, more important, how it shapes our children’s natures.

Baldwin identifies risk as, “the probability that a particular adverse event will occur during a stated period of time, or result from a particular challenge.”<sup>88</sup> Hence, risk regulation seeks to reduce the risk for personal and environmental injuries.<sup>89</sup> According to Beck, risk regulation represents a, “systematic way of dealing with hazards and insecurities induced and introduced by modernization itself.”<sup>90</sup>

According to Ogus,

[r]isk assessment should be followed by risk management and risk communication. There are three types of risks allowing for three main assessment categories:<sup>91</sup> 1) risks that society will not be willing to tolerate, 2) risks that society will tolerate due to the small-scale danger they pose, and 3) risks between these two extremes that need to be controlled and managed.

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<sup>85</sup> *Id.*, at 144 [my underline].

<sup>86</sup> A. Giddens, *The Third Way*, Cambridge: Polity 25 (1998).

<sup>87</sup> *Id.*

<sup>88</sup> R. Baldwin, *Law and Uncertainty – Risks and the Legal Process*, UK: Kluwer Law International 2 (1997).

<sup>89</sup> S. Shapiro & R. Glicksman, *Risk Regulation at Risk*, California: Stanford University Press 1 (2003).

<sup>90</sup> U. Beck, *World Risk Society*, UK: Polity 21 (1992).

<sup>91</sup> A. Ogus, *Risk Management and “Rational” Social Regulation*, In R. Baldwin (ed.), *Law and Uncertainty – Risks and the Legal Process*, UK: Kluwer Law International 142 (1997).

The risk presented in this case study falls within the third category, if not the first. It is argued that an adverse event will occur with high probability – the development of children’s imaginations will be harmed by the use of virtual worlds, during a stated period of time – within one generation that was born to this reality of the use of virtual worlds (i.e., the Millennials). Therefore, according to risk-regulation perception, there is a need to create a “systematic way” to address the said harm.

This is especially important in our case given that the harm is new, virtual and intangible and, thus, hard to prove and measure. Relaxing or even making the need for solid evidence regarding the potential harm unnecessary, will be an important step in making regulatory measures acceptable. Since in risk-based regulation it is the potential of the harm that matters, and not the actual harm (being impossible to assess and measure at present). Therefore, within the regulatory mix to approach the said harm, risk regulation is one of the instruments to be employed along with co-regulation identified above.

### **3.5 Meta-regulation**

Parker defines meta-regulation as the regulation of self-regulation.<sup>92</sup> Parker et al<sup>93</sup> argue that,

It is useful to think about the relationship of law and society or law and economy in terms of various layers of regulation each doing their own regulating. At the same time, each layer regulates the regulation of each other in various combinations of horizontal and vertical influence.<sup>94</sup>

The label “meta-regulation” has been applied to this concept.<sup>95</sup> An example of meta-regulation can be found in the trend toward the greater regulation of business-management

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<sup>92</sup> See the penultimate chapter of Christine Parker’s book, C. Parker, *The Open Corporation: Effective Self-Regulation and Democracy*, Cambridge: Cambridge University Press (2002).

<sup>93</sup> C. Parker, et al. (eds.), *Regulating Law*, Oxford: Oxford University Press 6 (2004).

<sup>94</sup> See C. Shearing & J. Wood, *Nodal Governance, Democracy and the New "Denizens": Challenging the Westphalian Ideal* 30 *J. of Law and Society* 400 (2003); C. Scott, *Accountability in the Regulatory State* 27 *J. of Law and Society* 38 (2000).

<sup>95</sup> Parker, *supra* note 92, at Ch. 9; C. Parker & J. Braithwaite, *Regulation*, In Peter Cane & Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies*, Oxford: Oxford University Press 119-145 (2003); C. Scott, *Speaking Softly Without Big Sticks: Meta Regulation and the Public Audit* 25 *Law and Policy* 203 (2003); See also P. Grabosky, *Using Non-governmental Resources to Foster Regulatory Compliance* 8

processes and strategies of firms, through regulatory tools that address the role of senior management in firms and directly regulate individuals within firms.<sup>96</sup> According to Haines,<sup>97</sup> meta-regulation is capable of managing “self-regulatory capacity” while exercising governmental discretion regarding the goals and levels of risk reduction to be achieved in regulation.<sup>98</sup> Not only key stakeholders but also personnel within these organizations are developing processes and procedures for risk management.<sup>99</sup> This development can occur while ensuring that “pro-compliance motivational postures” are maintained within the regulated site in a way that the regulator’s goal, that is, risk reduction, is achieved.<sup>100</sup> Common understanding of risk priorities by the regulator and regulated organizations will determine the success of the implementation of meta-regulation.<sup>101</sup> Haines concludes that,

[m]eta-regulation is advantageous particularly where there are complex causes of harm, which also require constant monitoring.<sup>102</sup>

Braithwaite<sup>103</sup> illustrates successful meta-risk management by describing the Transfer Pricing Record Review and Improvement Project of the Australian Taxation Office, setting out the “arm's length” principle to prevent multinational corporations from using fake transaction prices between subsidiaries in different countries in a way that will shift the taxation jurisdiction preference to the one that charges less tax,

The arm's length principle uses the behaviour of independent parties as a guide or benchmark to determine the allocation of income and expenses in international dealings between associated enterprises.<sup>104</sup>

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Governance: An Int. J of Policy and Administration 527 (1995); B. Morgan, *Regulating the Regulators: Meta Regulation as a Strategy for Reinventing Government in Australia* 49 Public Management: An Int. J of Research and Theory 1 (1999); Rhodes, *supra* note 39.

<sup>96</sup> J. Gray & J. Hamilton, *Implementing Financial Regulation: Theory and Practice*, Chichester: John Wiley and Sons 2 (2006).

<sup>97</sup> F. Haines, *Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster* 39 Law and Social Inquiry 3 (2009).

<sup>98</sup> *Id.*, at 1.

<sup>99</sup> *Id.*, at 3; Also see Parker, *supra* note 92.

<sup>100</sup> *Id.*

<sup>101</sup> Haines, *supra* note 97, at 17.

<sup>102</sup> *Id.*, at 1.

<sup>103</sup> J. Braithwaite, *Markets in Vice, Markets in Virtue*, New York: Oxford University Press 89-97 (2005).

<sup>104</sup> *Id.*

As stated above, in the absence of a scientific way to measure associated harm or other factors that are measurable and/or standardized, meta-regulation would be difficult to employ in this case study and with respect to any harm that is intangible. Nonetheless, as said regarding co-regulation, meta regulation can be employed in association with other regulatory instruments as part of a regulatory instrument mix. In this respect there is not much difference between co-regulation and meta regulation, since both of these regulatory instruments involve some degree of government oversee and self-regulation by the virtual worlds companies.

Identifying the virtual and intangible harm as a challenge by the virtual worlds companies' management would be the first step towards a desirable shift. Forcing these managements to think of creative, innovative and educational ways to try and decrease this harm through resource allocation and modifications to the product (the virtual world) would be a second desirable step. Finally, asking these companies to reconsider their business model, could lead to a desirable shift with respect to the said harm. There are good reasons to suspect that these changes will not happen without governmental intervention. Nonetheless, virtual worlds companies should be given credit for having an advantage over the regulator in knowing their product and being able to meet some standards that may make it less harmful.

While the Artificial Medium Laws Theory discussed in chapter 1, *supra*, assumes that any use of virtual worlds (and the media in general) may harm children's imaginative development, steps taken by these companies in order to try and encourage children's imaginative development may be a step in the right direction. This approach will require research, awareness, acknowledgment that there might be a harm and ethical reconciliation within the virtual worlds companies between their inherent desire to increase their revenue – and their responsibility to the generation to come.

#### **4. Communication**

Communication-based regulation attempt to educate and convince the regulatees to behave in a way that will help achieve the regulatory goals. Communication-based instruments regulate behaviour by providing more information to the regulatees, thereby helping them to reach more informed decisions and choices, hence foster and achieve regulatory goals.

The aim of communication-based regulatory instruments, according to Bronwen et al.<sup>105</sup> is to, “bring some kind of indirect social pressure to bear on individual decision-making in the hope that it will lead to behavioural change”.<sup>106</sup> The most familiar form of communication-based instrument is government-backed public education campaigns.

According to Yeung,<sup>107</sup> the state may compel manufacturers, for example, to disclose information regarding the ingredients of a product, any potential side-effects and/or the way it was produced. The goal is to foster more informed choices and decision-making by the consumers in their consumption and purchasing decisions. In addition, the obligation to disclose information can deter manufacturers against fraud or misrepresentation, reflecting the well-known claim by Louis Brandeis that, “sunlight is the best disinfectant”.

Mandatory disclosure regimes combine both command and control (the government makes disclosure mandatory, with the enforcement of some form of criminal or civil sanction for non-compliance) with market-based mechanisms (relying on consumers to make the decision whether to purchase the product in question).

Challenges that are associated with communicated-based regulatory instruments include: issues of privacy and confidentiality, the costs associated with generating, collecting and reporting the information, and the costs to the authority responsible for administering and enforcing a disclosure regime. Finally, disclosure-based schemes see consumers not only as rational decision-makers, but also as capable of accurately understanding and evaluating the information provided.

According to Bronwen et al.<sup>108</sup> there is empirical evidence that the effect of information on individual behaviour is highly context sensitive. For example, in the regulation of financial and investment products, there is evidence to suggest that the information disclosed may have very little effect on consumer investment decisions.

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<sup>105</sup> Morgan Bronwen, Karen Yeung, & William Twining, *An Introduction to Law and Regulation: Text and Materials*, Cambridge University Press (2007).

<sup>106</sup> *Id.*, at 96.

<sup>107</sup> K. Yeung, *Government by publicity management: Sunlight or spin?*, Public Law 360-383 (2005).

<sup>108</sup> Bronwen et al., *supra* note 105 at 98.

Disclosure regimes may also be initiated voluntarily by the regulated companies. In a competitive economy, there are powerful incentives to provide consumers with information regarding the product, the way it was produced and other relevant facts.

Information can be disclosed by the regulated entities, as a requirement of the regulator or voluntarily, and can rely on the communication of specific messages or information, by the regulatory authority. This latter communication will be done where it is considered impractical, inefficient or ineffective to compel the regulatees to disclose the presence or magnitude of the hazard associated with their activity.

There are different ways in which communication can be conveyed by the government to implement government policy. The most common way is campaigns ('exhortation') in which the state communicates for the purposes of influencing social behavior, trying to encourage the public to behave in a way that is pro-social and consistent with the regulator policy goals.

Communication regulatory instruments assumes that individuals will be willing to accept, learn, and behave upon the information provided. Nonetheless, it is demonstrated by the literature on 'risk communication', that in response to risk information, individuals behave in contingent, complex, and sometime unpredictable ways.

Viscusi and Margat<sup>109</sup> draw a distinction between information that is provided in order to cause the public to behave in desired ways, from information that seek to help the public in making informed decisions.

Finally, in her study on music education and the law, Heimonen<sup>110</sup> refers to Aristotle's thought on the law as a means in moral education. In Aristotle's view,

[t]he state has to educate its individual citizens in the exercise of virtue, since living according to virtue means living in harmony with one's own nature, this being the proper end of the individual. Aristotle referred to virtue as a disposition that demands long and careful exercise. Thus, for him and his

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<sup>109</sup> W. A. Magat & W. K. Viscusi, *Informational Approaches to Regulation*, Cambridge, MA: MIT Press (1992).

<sup>110</sup> Marja Heimonen, *Music Education & Law - Regulation as an Instrument*, 17 *Studia Musica* 19 (2002).

followers, the law is an instrument in moral education.<sup>111</sup>

## 5. Conclusion

While the Artificial Medium Laws Theory assumes that any use of virtual worlds may harm children's imaginative development, the recognition that the harm cannot be completely prevented but only reduced is an important notion that should be adopted as part of the stepping away from the 'black and white' rigidity of command-and-control regime. A constant and carefully design movement on the regulatory instrument's scale away from intrusive and rigid command-and-control towards soft and innovative communication regulation aligns with the general scheme of dealing with intangible and virtual harm and fit swell with the theoretical framework identified in chapter 2, *supra*, while resonating with the requirements of the freedom of speech as will be discussed in chapter 5, *infra*.

As mentioned in the previous chapter, Gunningham and Sinclair<sup>112</sup> propose two necessary components of a successful regulatory design: regulatory design principles<sup>113</sup> and instrument mixes.<sup>114</sup> The regulatory design principles were discussed in chapter 2, *supra*, and the instrument mixes will be discussed below in light of the discussion regarding regulatory instruments and in the context of the harm in question.

(1) preferring policy mixes incorporating a broader range of instruments and institutions

The discussion above identifies regulatory instruments that can be employed as a mix in order to deal with the intangible and virtual harm discussed in this dissertation. The scheme to be considered in the following chapters is a combination of command-and-control measures incorporated into a communication-based co-regulation regime. This regulatory mix will enable the government to oversee a self-regulatory regime by the virtual worlds companies that will act to reduce the harm, inform the users and their parents about the potential harm and educate the users and their parents in order to prevent more harm and face future harm. To the said mix we should add risk regulation that should be efficient in cases where the harm is hard to measure. It

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<sup>111</sup> *Id.*

<sup>112</sup> See N. Gunningham & D. Sinclair, *Designing Environmental Policy*, In N. Gunningham & P. Grabosky, *Smart Regulation: Designing Environmental Policy*, Oxford: Clarendon Press 42 (1998).

<sup>113</sup> *Id.*, at 387-419.

<sup>114</sup> *Id.*, at 422-448.

should be emphasized that this is only a general layout to be considered in light of the factors and constraints discussed in the following chapters.

- (2) preferring less interventionist measures which include the principle of low interventionism

Co-regulation and communication-based instruments as discussed above are measures of low intervention and align well with the recommended regulatory mix. Moreover, as will be discussed in the coming chapters, when dealing with a multi-factorial, sensitive and complex regulatory sphere, soft and less interventionist measures are preferable. In addition, flexible and non-interventionist instruments align with the freedom of speech constraints discussed in detail in chapter 5, *infra*.

- (3) ascending a dynamic instrument pyramid to the level required to achieve policy goals – including building in regulatory responsiveness

The structure of communication-based co-regulation instrument, can create a dynamic instrument pyramid and regulatory responsiveness. The notion of decreasing the harm, rather than eliminating it altogether, enables a pyramid approach to regulation. For example, a co-regulation regime that will cause the virtual worlds companies to create educational programs for users and their parents about the harm to the imagination and how to prevent it. In cases where the virtual world company fails to comply with this requirement, the government can force more stringent measures as forcing the virtual world company to incorporate mandatory online course in order to start using its services.

- (4) empowering participants which are best placed to act as quasi regulators – including the application of the principle of empowerment and maximizing opportunities for win-win outcomes

As said above, requiring the virtual worlds companies to educate children users and their parents will empower participants as quasi regulators. This trend can be further extended to consulting with the children and their parents on the desired educational measures, ways to foster imagination in virtual worlds and programs for education at home and in school.

(5) including the consideration of whether firms will voluntarily go beyond compliance

The option of firms going beyond compliance is remote. However, if the harm is acknowledged and widely accepted in the users and their parent's awareness, the virtual worlds companies can go beyond compliance. This can be done by employing exceptional educational measures as well as features that suppose to enhance the user's imagination, hence, creating for these companies' a competitive advantage in the market.

The next chapter will deal with the virtual aspect of the harm to children's imagination in virtual worlds through the discussion of the regulation of the internet and the regulatory instruments of 'Code'.

## Chapter 4 - Can the Internet be Regulated?

The previous chapter discussed the use of regulatory instruments to attempt to regulate virtual and intangible harm as the harm identified in chapter 1. This chapter continues this discussion by focusing on code regulation in the context of the Internet. The goal of this chapter is to address the virtual aspect of the harm, in this case caused by virtual worlds, to the development of children's imagination and the unique aspect of virtual and intangible harm in general. The first part will address the debate over the regulation of the Internet. The second part will address code regulation in the context of the Internet.

### 1. The Regulation of the Internet

From the inception of the Internet, whether and how it should be regulated have become contested issues. Arguments reflect a wide continuum, from those who argue that there is nothing unique about the Internet and therefore it should be treated as anything else that is regulated by law, to those on the other extreme who argue that the Internet is so unique that it should not be regulated at all. This debate is ongoing and rests on the tension between the claimed benefits of the Internet (e.g., free market of ideas, information source, and more) and its alarming consequences (e.g., pornography, surveillance, spam etc.). I argue that the answer lies somewhere in the middle of these opposing arguments: There is a real need for regulation of the Internet in the context of virtual and intangible harm, but this regulation should be within the limits of freedom of speech discussed in chapter 5, *infra*, and taking into account the lessons and inferences drawn from chapter 6 and 7, *infra*.

In an article published in 1980, Chalfant et al.<sup>1</sup> wrote,

The time when developments in science and technology were automatically welcomed as progressive and beneficial has passed. Public confidence in the scientific community has given way to skepticism, if not distrust. This attitude is due in part to the recent development of highly complex and sophisticated

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<sup>1</sup> James C. Chalfant, Michael E. Hartmann, & Alan Blakeboro, *Recombinant DNA: A Case in Regulation of Scientific Research* 8 Ecology L. Q. 55 (1979-1980).

technologies which, from their inception, have been recognized as entailing substantial risks as well as benefits. The public now expects the government to evaluate independently the risks of new technologies before they are introduced and, moreover, demands input into the decision making processes that sanction their use.

Although the timing of this comment matches the commercial birth of the Internet, the general attitude of the public towards the internet was different from the described attitude towards DNA-related scientific developments. Livingstone and Bober<sup>2</sup> argued, regarding the Internet, that,

In terms of media regulation, therefore, it may be that the stakes have never been higher, as society seeks to strike a balance between the failure to minimize the dangers and the failure to maximize the opportunities.

In this context of striking the balance between dangers and opportunities as well as the tension between technology and regulation, Kirby<sup>3</sup> notes that Napoleon never responded to letters for at least a year. The logic of this principle was that if the problem still existed after a year, there would be enough time for the Emperor to give it his attention. Either intentionally or not, Kirby argues, many of the issues currently presented to law by the advance of technology appear to receive the same treatment. Nonetheless, in contradiction to Napoleon's approach, it seems that the cause of the delay is not intentional but rather a result of the complexity and sensitivity of the issues.

Dickerson<sup>4</sup> argues that, given the Internet's potential to enhance democracy and promote the exchange of ideas, it is not clear why anyone is permitted to regulate it at all. Nonetheless,

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<sup>2</sup> Sonia Livingstone & Magdalena Bober, *Regulating the Internet at Home: Contrasting the Perspectives of Children and Parents*, In D. Buckingham & R. Willett, *Digital generations: children, young people and new media*, Mahwah, N.J.: Lawrence Erlbaum 94 (2006).

<sup>3</sup> Michael Kirby, *The Fundamental Problem of Regulating Technology*, 5 *Indian J. L. & Tech.* 9 (2009).

<sup>4</sup> Nicholas Dickerson, *What Makes the Internet so Special? And Why, Where, How, and by Whom should its content be Regulated?*, 46:1 *Houston Law Review* 67-68 (2009).

there is great potential for abuse via the Internet. Therefore, in some areas, regulation is very much needed.<sup>5</sup> In this context, four main reasons have been identified as requiring regulation.<sup>6</sup>

First, the protection of moral values:<sup>7</sup> The protection of children from harmful information is the most prominent example.<sup>8</sup> Second, the security of the state and additional political interests enforce regulation.<sup>9</sup> Third, the Internet is often regulated in the name of protecting the intellectual property of copyright holders from those wishing to copy, modify, or redistribute copyrighted materials.<sup>10</sup> Finally, computer security and commercial concerns about unwanted messages (in various forms of spam) or viruses comprise a fourth category of Internet activity necessitating regulation.<sup>11</sup> Although the first category requiring regulation – moral values – seems to be the most relevant to harm to the development of children’s imagination in virtual worlds and virtual and intangible harm in general, this harm goes beyond moral values.

Failure to prevent children from watching pornography (online explicit websites), for example, may result in distorted perceptions of sex, wrong perceptions of intimate interpersonal relationships, and other negative consequences. Nonetheless, harm to the development of children’s imaginations as a case of virtual and intangible harm seems to go further in its implications by causing damage that is permanent and incurable. Therefore, we should redefine the first category of Internet regulation from, “moral value protection” to, “the prevention of virtual and intangible harm.”

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<sup>5</sup> John G. Palfrey Jr. & Robert Rogoyski, *The Move to the Middle: The Enduring Threat of “Harmful” Speech to the End-to-End Principle*, 21 Wash. U. J. L. & Pol’y 37-38 (2006) (discussing problems associated with “harmful” online speech).

<sup>6</sup> Kevin O’Keefe, John Palfrey & Wendy Seltzer, *Internet Filtering in the United States and Canada*, In R. Deibert, et al. (eds.), *Access Denied: The Practice and Policy of Global Internet Filtering*, Mas: MIT Press 226 (2008).

<sup>7</sup> See Palfrey & Rogoyski, *supra* note 5, at 38-39 (noting the original problems that gave rise to a need to regulate the Internet dealt primarily with “offensive images, such as pornography, or text, such as hate speech”).

<sup>8</sup> See O’Keefe *supra* note 6, at 227-30 (identifying congressional attempts to protect minors from explicit content on the Internet).

<sup>9</sup> See *Id.*, at 232; see also Palfrey & Rogoyski, *supra* note 5, at 41-42 (detailing how political activists can use the Internet and attract the attention of governments). See generally Ulrich Sieber & Phillip W. Brunst, *Cyberterrorism – The Use of the Internet for Terrorist Purposes*, The European Council (2007).

<sup>10</sup> See Palfrey & Rogoyski, *supra* note 5, at 40; See also Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N. Y. U. L. Rev. 13-18 (2004) (assessing the Internet’s value as a means of facilitating access to and innovation based upon copyrighted material).

<sup>11</sup> See O’Keefe, Palfrey & Seltzer, *supra* note 6, at 232 (discussing congressional attempts to remedy security concerns); Palfrey & Rogoyski, *supra* note 5, at 40 (“[T]he security threats to the network often borne by spam and other means of dissemination [] increase the potential damage of these activities.”).

Berman<sup>12</sup> reports that from the outset of the Internet, judges and academics have considered whether it creates a new area of law. Justice Easterbrook<sup>13</sup> argued that treating Internet law as a new field of law would be no different from studying the “Law of the Horse” in the nineteenth century. Easterbrook's position and the responses to it divided the field into two camps. One camp, the “unexceptionalists,” argued that Internet law can and should be dealt with by using the existing legal system;<sup>14</sup> the other camp, the “exceptionalists,” argued that there is a need for a new legal system to deal with the Internet.<sup>15</sup>

According to Berman,<sup>16</sup>

While the unexceptionalists have relied too much on the application of 'mythical well-settled principles', the exceptionalists have, at times, tended to the opposite extreme, assuming that the rise of cyberspace changed nearly all extant ideas about law and the role of the state. Indeed, many of these exceptionalists rejected the idea that Internet 'communities' could or should be governed by territorially based sovereigns at all. John Perry Barlow much-quoted Declaration of Independence of Cyberspace,<sup>17</sup> Issued in 1996, illustrate this approach.

Echoing Barlow's declaration, Johnson and Post argue that there is no way to regulate the Internet in a legitimate and effective way by using a jurisdiction based on geographical boundaries. They further argue that the Internet should create its own legal jurisdiction (or

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<sup>12</sup> Paul Schiff Berman (ed.), *Law and Society Approaches to Cyberspace*, UK: Ashgate xiii-xiv (2007).

<sup>13</sup> Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, University of Chicago Legal Forum 207-216 (1996).

<sup>14</sup> For example, Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, Indiana Journal of Global Legal Studies 485-86 (1998); Jack L. Goldsmith, *Against Cyberanarchy*, University of Chicago Law Review 422-30 (1998); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 35 International Lawyer 1167-191 (1998).

<sup>15</sup> For example, Dan L. Burk, *Federalism in Cyberspace*, 28 Connecticut Law Review 1095-136 (1996); David G. Post, *Against "Against Cyberanarchy"*, 17 Berkeley Technology Law Journals 1-23 (2002).

<sup>16</sup> Berman, *supra* note 12, at xv-xvii.

<sup>17</sup> John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Electronic Frontier Foundation (1996), available at <https://www.eff.org/cyberspace-independence> (last visited April 28, 2016).

multiple jurisdictions).<sup>18</sup> In response, others pointed to online harms and states' and non-state entities' need and desire to control those harms.<sup>19</sup>

In this background, the second generation of Internet-regulation scholars emerged. This generation was less optimistic regarding online regulation and more aware of individual empowerment.<sup>20</sup> The most important aspect of this generation's attitude is the way in which code can regulate behavior on the Internet. If one would like to prevent trucks from entering a parking lot, he can place a sign stating that it is forbidden and then hire guards to make sure that drivers comply. Another option would be to build a barrier at the parking entrance that prevents trucks from driving inside, based on their height. In both cases, the guards and the barrier are used as regulatory tools.

On the Internet, argued the second generation of Internet-regulation scholars, architectural (or code) regulation would be much more effective than guards because the Internet is made of code and is thus inherent to the technology itself. Koops<sup>21</sup> argues that, "Code as law' is viewed sometimes from an optimistic and sometimes from a pessimistic point of view."

Now, we have reached a third generation of regulatory thought about the Internet, which combines some of the perspectives of the previous two.<sup>22</sup> Much like the exceptionalists, third-generation scholars believe that there is a fundamental difference between the Internet and other regulatory spheres and that this difference creates new opportunities and alters existing conventions. Nonetheless, much like the second generation, the third generation is concerned

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<sup>18</sup> David R. Johnson & David G. Post, *Law and Borders – the Rise of Law in Cyberspace* 48 *Stanford Law Review* 1367-1402 (1996).

<sup>19</sup> For example, Goldsmith, *supra* note 14, at 485-86; Jack L. Goldsmith, *Against Cyberanarchy* 65 *University of Chicago Law Review* 422-30 (1998); Stein, *supra* note 14.

<sup>20</sup> For example, Paul Boyle, *Law and Society Approaches to Cyberspace*, Burlington, VT, Ashgate Publishing Limited, Ch. 7 (2007); Julie E. Cohen, *Intellectual Privacy and Censorship of the Internet* 8 *Seton Hall Constitutional Law Journal* 693-701 (1998); Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York: Basic Books (1999); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules through Technology* 76 *Texas Law Review* 553-85 (1998).

<sup>21</sup> Koops Bert-Jaap, *Criteria for Normative Technology*, In R. Brownsword & E. Yeung (eds.), *Regulating Technology*, Oxford: Hart Publishing 158 (1998).

<sup>22</sup> for example, Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, New Haven, CT: Yale University Press (2006); David R. Johnson, Susan P. Crawford & John G. Palfrey Jr., *The Accountable Internet: Peer Production of Internet Governance* 9 *Virginia Journal of Law and Technology* 1-33 (2004); Jonathan Zittrain, *The Generative Internet*, 119 *Harvard Law Review* 1975-2040 (2006).

about code regulation and its implications. This perception focuses on maintaining the balance between the advantages and disadvantages of the Internet.

Before we discuss code regulation as a regulatory instrument to prevent or decrease the harm to the development of children's imaginations in virtual worlds as well as the suitability and efficiency of this regulation regarding virtual and intangible harm in general, it is important to review the infrastructure and control of the Internet.

## **1.1 Infrastructure**

Understanding the Internet's technical aspects is necessary in order to conduct adequate legal analysis of many online legal issues. According to Smith,<sup>23</sup> a technical definition of the Internet would focus not on physical devices but on the Internet's networks transmission and on addressing protocols that glue the networks together. These protocols allow the networks and the attached computers to communicate and, using a common address system, to find other computers attached to the Internet. The collection of protocols is known as TCP/IP, after the two most important protocols: TCP (Transmission Control Protocol) and IP (Internet Protocol).

While an underlying collection of networks makes up the Internet, various applications designed to work with Internet protocols provide facilities to Internet users. The most significant applications are the World Wide Web, electronic mail, file downloading (using file transfer protocol (ftp)), Usenet newsgroups, instant messaging, streaming audio and video, and voice telephony (Voice Over IP, or VoIP).<sup>24</sup>

The core infrastructure of the Internet consists largely of routers or switches (computers designed to receive and forward packets of data), hosts (which store programs and data), and pipes (telecommunications connections that link the hosts and routers). Network providers have both physical links to and contractual relations with other networks and their providers. The physical connection (which may be a bilateral link to the other networks or at a special-purpose multilateral traffic-exchange center, such as MAE-East in Washington DC or LINX in London)

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<sup>23</sup> Graham J. H. Smith, *Internet Law and Regulation*, Sweet & Maxwell: London 1 (2007 4<sup>th</sup> ed.).

<sup>24</sup> Graham, *supra* note 23, at 4.

enables traffic to flow directly from one network to the next. The contractual arrangement (often known as a “peering agreement”) governs the exchange of traffic among the networks.<sup>25</sup>

The Internet is based on two main providers. Content providers provide the Internet’s content, which comes in many forms but divides generally into real-time and downloadable content. Real-time content can be viewed or heard as the user accesses it, either delivered in batches or by maintaining a continuous stream of data. Downloadable content takes the form of a file that can be copied from the Internet site to the user’s own computer.<sup>26</sup> In contrast to most media forms, Internet users play a central role as content providers. The second type of providers is access providers. The typical access provider is now a commercial organization selling Internet access to home and commercial users. Commercial-access providers are commonly known as Internet service providers, or ISPs.<sup>27</sup>

In the case at hand, virtual-world companies are content providers, and access providers enable users’ access to websites. In the context of code regulation, ISPs are relevant for employing filtering and blocking, whereas content providers, virtual-world companies in this case, can mainly employ age verification and other similar screening techniques. As will be discussed below, these measures are problematic from a freedom-of-speech point of view and are not relevant to this particular harm. Nonetheless, to complete the picture I will review the control structure of the Internet.

## 1.2 Control

According to Cukier,<sup>28</sup> every network’s functionality depends on a centralized control. The International Telecommunication Union (now part of the United Nations), for example, controls the global phone system. The Internet is coordinated by the Internet Corporation for Assigned Names and Numbers (ICANN), a private-sector non-profit organization set up in 1998 by the United States.

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<sup>25</sup> *Id.*, at 5.

<sup>26</sup> *Id.*, at 6.

<sup>27</sup> *Id.*, at 12.

<sup>28</sup> Kenneth Neil Cukier, *Who Will Control the Internet? Washington Battles the World* 84 Foreign Affairs 7-8 (2005).

One of the myths of the Internet is that it is uncontrollable. Like all myths, part of this is true, and part is wishful thinking. Compared with the telephone system, the Internet is free of regulation. Nonetheless, there are four areas that require control and coordination to operate smoothly. The “domain name system” of addresses is the general name of these areas of control.

First, there is a need to determine who will operate the database of generic names ending with suffixes such as .com, .net, .info, and others. This includes the two-letter country-code suffixes (such as .ca, for Canada). Second, up-to-12-digit codes, referred to as Internet Protocol numbers, are required for the computers in the network to identify other computers. Third, there are “root servers.” When Internet users surf the Web or send email, these servers match domain names with corresponding Internet Protocol numbers in a matter of milliseconds. The root servers are located in NASA, a Dutch non-profit organization, universities, the US military, and private companies. Today, ten root servers are operated from the United States and one each from Amsterdam, Stockholm, and Tokyo. Fourth, there is a need to establish technical standards to allow the Internet's interoperability.

Many countries argue that the Internet should be operating under a multilateral treaty. They consider ICANN an instrument of American hegemony over the Internet. The latest session of this ongoing debate took place in Dubai, when the United Nations summit broke down after the US, Canada, and other democracies refused to sign a treaty that would grant a UN agency more authority over how the Internet is managed.<sup>29</sup>

This debate ties in well to the difference in regulatory approach between the US (and Canada) and the European Union and other countries. While the North American approach prefers more flexible forms of regulation (i.e., self-regulation among others) due to pressure from Internet giants and constitutional constraints of freedom of speech, the European approach is more concerned with the potential deleterious implications of the harm (mainly for children) and takes a stricter approach to regulation. The different approaches parallel the general debate over the question of whether the Internet should be regulated (discussed above) and are illustrated by the regulation of data transfer from the EU, in which the European Union's commissioner

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<sup>29</sup> Declan McCullagh, *U.N. summit implodes as U.S., others spurn Internet treaty*, Cnet (December 13, 2012), available at [http://news.cnet.com/8301-13578\\_3-57559034-38/u.n-summit-implodes-as-u.s-others-spurn-internet-treaty/](http://news.cnet.com/8301-13578_3-57559034-38/u.n-summit-implodes-as-u.s-others-spurn-internet-treaty/) (last visited April 28, 2016).

surrendered to US demands for self-regulation<sup>30</sup> but eventually, 15 years later, faced a refusal by the European Union high court.<sup>31</sup>

## 2. Code of conduct

Reidenberg<sup>32</sup> was one of the first scholars to point out that in the digital age, software and hardware tend to regulate themselves, or, rather, Internet users and developers tend to regulate themselves through technology. He coined the term “Lex Informatica” to refer to this development, thus comparing the newly emerging technology-embedded “law” with the largely bottom-up-developed “Lex Mercatoria” of the Middle Ages.<sup>33</sup> Initially he viewed this as positive, since traditional legislatures are not fit, for many reasons, to regulate the Internet by law and hence invite public authorities to embrace the emerging “Lex Informatica” to fill the gap of Internet regulation.<sup>34</sup> Reidenberg later turned more pessimistic, noticing the downside of self-regulatory norms built into technology that bypass democratic control.<sup>35</sup>

Lessig<sup>36</sup> has made a major contribution to the discussion of regulatory instruments in the context of code regulation for the Internet, arguing that the Internet is a unique regulatory sphere that should be treated differently from other, non-virtual regulatory spheres. In many aspects, code is used in Internet applications to create restrictions on unacceptable conduct through technology. Such control creates a risk to our moral judgment in other, less restricted domains; or, as Spinello argues, “code should not be a surrogate for conscience.”<sup>37</sup>

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<sup>30</sup> See Nachshon Goltz, *Is there anybody out there? Analyzing the Regulation of Children’s Privacy Online in the US and the EU According to Eberlein et al. (2014) TBGI analytical Framework*, Journal of International Media and Entertainment Law [forthcoming] (2016).

<sup>31</sup> Ian Traynor & Owen Bowcott, *Facebook row: US data storage leaves users open to surveillance, court rules*, The Guardian (6 October 2015), available at <http://www.theguardian.com/world/2015/oct/06/us-digital-data-storage-systems-enable-state-interference-eu-court-rules> (last visited April 28, 2016)

<sup>32</sup> Joel R. Reidenberg, *Rules of the Road for Global Electronic Highways: Merging the Trade and Technical Paradigms* 6 Harvard Journal of Law & Technology 287 (1993).

<sup>33</sup> ‘Lex Mercatoria’ - the body of commercial law used by merchants throughout Europe during the medieval period. It evolved similar to English common law as a system of custom and best practice, which was enforced through a system of merchant courts along the main trade routes. It functioned as the international law of commerce (Wikipedia, [http://en.wikipedia.org/wiki/Lex\\_mercatoria](http://en.wikipedia.org/wiki/Lex_mercatoria) (last visited April 28, 2016)).

<sup>34</sup> *Id.*

<sup>35</sup> Cf. Joel R. Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy* 44(4) Houston Law Review 1073-95 (2007).

<sup>36</sup> L. Lessig, *The New Chicago School* 27 The Journal of Legal Studies 660 (1998); Lessig, *supra* note 13; Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York: Basic Books, (1999).

<sup>37</sup> R. Spinello, *Code and Moral Values in Cyberspace* 3 Ethics and Information Technology 137 (2001).

While techniques based on communication seek to bring behavioral change by turning to the human rationale, techniques based on code operate by eliminating the possibility of undesired behavior. Lessig<sup>38</sup> argues that regulating the Internet may be achieved through code, since, “Law as code is the start to the perfect technology of justice.”

According to Koops,<sup>39</sup> the main systematic attempt to offer a set of criteria for judging normative technology has been made by Asscher,<sup>40</sup> in the Institute for Information Law’s “code as law” project. Asscher puts forward a fairly rough and tentative set of criteria, presented in the form of questions, using “code” to indicate “normative technology.”<sup>41</sup>

- 1) Can code rules be understood? If so, are they transparent and accessible to the general public?
- 2) Can the rules be trusted? Are they reliable in the sense of predictability?
- 3) Is there an authority that makes the code rules?
- 4) Is there a choice?

This set reflects transparency, reliability, accountability, and choice. All of these are procedural criteria.

Brownsword,<sup>42</sup> in his discussion of “techno-regulation” (his term for normative technology that secures compliance, i.e., norm-enforcing technology), presents two criteria for regulatory intervention: effectiveness and legitimacy; legitimacy comes down to respect for human rights and human dignity. Brownsword’s key criterion for assessing compliance-proof normative technology is the existence of choice.<sup>43</sup>

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<sup>38</sup> Lessig, *supra* note 36, at 85-99.

<sup>39</sup> Koops, *supra* note 21, at 164.

<sup>40</sup> E.J. Dommering & L.F. Asscher (eds.) *Coding Regulation. Essays on the Normative Role of Information Technology*, IT & Law Series, The Hague, TMC Asser Press 12 (2006).

<sup>41</sup> L.F. Asscher, “Code” as Law. *Using Fuller to Assess Code Rules*, In Dommering and Asscher, *Id.*, at 85.

<sup>42</sup> R. Brownsword, *What the World Needs Now: Techno-Regulation, Human Rights and Human Dignity*, In R. Brownsword (ed.), *Global Governance and the Quest for Justice*, Oxford: Hart Publishing 210 (2004).

<sup>43</sup> *Id.*, at 230-32.

In subsequent work, Brownsword<sup>44</sup> has outlined as additional criteria the principles of good governance: transparency and accountability. Particularly interesting is the remark that, even if techno-regulation is implemented in a fully transparent and accountable way, in due time transparency is lost because the rule built into the techno-object simply becomes, for later generations, part of the object's features and is no longer recognized for what it once was: a normative rule that purposefully influences people's behavior. Then, "it is only outsiders and historians who can trace the invisible hand of regulation."<sup>45</sup> Whether there are disadvantages to this suggested process is not clear.

Zittrain<sup>46</sup> argues that,

Generative networks like the Internet can be partially controlled, and there is important work to be done to enumerate the ways in which governments try to censor the Net.<sup>47</sup> But the key move to watch is a sea change in control over the endpoint: lock down the device, and network censorship and control can be extraordinarily reinforced.<sup>48</sup>

Kesan and Shah<sup>49</sup> have highlighted three characteristics of code that regulators should pay attention to: transparency of rules, open standards (which can be seen as transparency of the rule-making process), and default settings. The latter are important, because users tend not to change default settings, partly because they have a legitimating effect: Apparently, the default is "normal." This means that default settings ought to be made optimal for users, in light of the values that are at stake.<sup>50</sup>

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<sup>44</sup> *Id.*, at section III.

<sup>45</sup> *Id.*, at section III(i).

<sup>46</sup> Jonathan Zittrain, *Perfect Enforcement*, In Brownsword & Yeung, *supra* note 21, at 155.

<sup>47</sup> See generally Deibert, *supra* note 6.

<sup>48</sup> See Joseph C. Rodriguez, *A comparative Study of Internet Content Regulations in the United States and Singapore: The Invincibility of Cyberporn*, 1 Asian-Pacific L. & Pol'y J. 9 (February 2000); Yee Fen Lim, *Cyberspace Law-Commentaries and Materials*, Victoria, Australia: Oxford University Press, 396 (2007 2<sup>nd</sup> ed.) (discussing the inefficiency of the Singaporean ISP license regime in preventing access to explicit porn websites. Specifically interesting is the discussion of the Australian legislator approach through the Broadcasting Services Act (*Id.*, at 406).

<sup>49</sup> Jay P. Kesan, & C. Shah Rajiv, *Deconstructing Code 6* Yale Journal of Law & Technology 277-389 (2003-4).

<sup>50</sup> Rajiv C. Shah & Jay P. Kesan, *Manipulating the Governance Characteristics of Code 5(4)* info 5-8 (2003).

Zittrain<sup>51</sup> argues that in cases of pornography and intellectual property, for example, even a click of a mouse can force extreme sanctions on the user. Users of offline media are usually aware of illegal content by the fact that it is not offered for sale. If it is for sale, the user assumes the content is legal. The situation is different online. Although the user is accustomed, based on offline media, to assume that if it is accessible then it is legal, this is not always the case. This situation places the user in a vulnerable position. One solution would be for Internet service providers to implement filtering and, in turn, to offer users' immunity for most categories. A negative consequence of filtering and blocking could be that both users and the law might judge content as acceptable that is not blocked or filtered. An example of this approach exists in laws that criminalize unauthorized access to computer systems only if the user has broken the technical security protecting that system.<sup>52</sup>

Advocating technology regulation via code to the case of harm to the development of imagination caused by virtual worlds is problematic. The intangible nature of the harm leaves only one identifiable indicator to regulate: usage time. This indicator is problematic for practical reasons and for issues of freedom of speech, as discussed in chapter 5.

In a technology-created creature that operates automatically, code regulation is not a precise instrument. As will be discussed below, filtering, blocking, and age verification are the more common variations within code regulation. These tools are employed in cases similar to the harm at hand but are not suitable for intangible harm. Code regulation is based on identifiable characteristics, factors, and variables that the machine (the computer) can understand and comply with. Nonetheless, when the harm is intangible, these factors and variables are hard to define, let alone transform into language that the machine can understand and implement.

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<sup>51</sup> J. Zittrain, *Internet Points of Control* 43 Boston College Law Review 36 (2003).

<sup>52</sup> See the discussion in S.M. Kierkegaard, *Here Comes the 'Cybernators'!* 22(5) Computer Law & Security Report 381 (2006); O. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes* 78 New York University Law Review 1596 (2003) (suggests that this approach should apply to unauthorized access offences generally).

## 2.1 Filtering and blocking

According to McIntyre and Scott,<sup>53</sup> Internet filtering and blocking are technologies that prevent access to or restrict the distribution of information. Jurisdictions such as Saudi Arabia and China widely use filtering to prevent access to political or pornographic material, thus creating, “borders in cyberspace.”<sup>54</sup> One example is the censorship of the phrase “Tiananmen Square” in Google Chinese, following the demands of the Chinese government.<sup>55</sup>

British Telecom, a UK telecommunications operator (in consultation with the Home Office), has employed the Cleanfeed system, which blocks requests for Internet websites suspected of displaying child pornography.<sup>56</sup> The British government has asserted that all Internet service providers should adopt a similar system.<sup>57</sup> A court in Belgium ordered the implementation of measures by an Internet service provider to prevent users from accessing file-sharing websites and from distributing certain music files.<sup>58</sup> In Canada, the Internet service provider Telus blocked users from visiting a website that supported the strike of Telus’ employees, while also blocking many unrelated sites.<sup>59</sup>

Blocking and filtering share common features: They are automatic, self-enforcing, and often opaque. These features are common to code regulation in general. Lessig argued that code regulation is automatic and often opaque.<sup>60</sup> Boyle<sup>61</sup> and Swire<sup>62</sup> asserted that the nature of the

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<sup>53</sup> T. J. McIntyre & Colin Scott, *Internet Filtering: Rhetoric, Legitimacy, Accountability and Responsibility*, In Brownsword & Yeung, *supra* note 21, at 109.

<sup>54</sup> N. Villeneuve, *The Filtering Matrix: Integrated Mechanisms of Information Control and the Demarcation of Borders in Cyberspace* 11(1) First Monday (2006) available at <http://firstmonday.org/ojs/index.php/fm/article/view/1307/1227> (last visited April 28, 2016).

<sup>55</sup> H. Bray, *Google China Censorship Fuels Calls for US Boycott*, The Boston Globe (28 January 2006), available at [http://www.boston.com/news/world/articles/2006/01/28/google\\_china\\_censorship\\_fuels\\_calls\\_for\\_us\\_boycott/](http://www.boston.com/news/world/articles/2006/01/28/google_china_censorship_fuels_calls_for_us_boycott/) (last visited April 28, 2016).

<sup>56</sup> M. Bright, *BT Puts Block on Child Porn Sites*, The Observer (6 June 2004), available at <https://www.theguardian.com/technology/2004/jun/06/childrenservices.childprotection> (last visited April 28, 2016).

<sup>57</sup> W. Grossman, *The Great Firewall of Britain*, net.wars (24 November 2006), quoting Vernon Coaker, Parliamentary Under-Secretary for the Home Department to Parliament: ‘We believe that working with the industry offers us the best way forward, but we will keep that under review if it looks likely that the targets will not be met’. available at [http://www.pelicancrossing.net/netwars/2006/11/the\\_great\\_firewall\\_of\\_britain.html](http://www.pelicancrossing.net/netwars/2006/11/the_great_firewall_of_britain.html) (last visited April 28, 2016).

<sup>58</sup> V. Scarlet Sabam, *Decision of the Court of First Instance in Brussels of 29 June 2007*, OUT-LAW News (6 July 2007), available at <http://www.out-law.com/default.aspx?page=8239> (last visited April 28, 2016).

<sup>59</sup> Tom Barrett, *To Censor Pro-Union Web Site, Telus Blocked 766 Others*, TheTyee.ca, (4 Aug 2005), available at <http://thetyee.ca/News/2005/08/04/TelusCensor/> (last visited April 28, 2016).

<sup>60</sup> Lessig, *supra* note 38.

Internet will cause regulators to focus on indirect enforcement, targeting providers rather than users, “elephants” rather than “mice.”

A user may not be aware of filtering<sup>63</sup> or that access to a particular site has been blocked. The website owner might also not be aware of it. Moreover, sometimes when websites are considered unacceptable by governments,<sup>64</sup> they are routinely blocked and deliver a message to users suggesting that the website is not available (“file not found”), or users encounter technical problems (e.g., “connection timeout”).<sup>65</sup> Villeneuve described the use of error pages as “an attempt to deflect criticism, allowing the authorities to claim that they are not censoring Internet content.”<sup>66</sup>

In other cases, governments can employ practices that mislead end users. For example, in Uzbekistan there is a practice of informing users that pornographic content is the reason for blocking websites that are actually blocked for political reasons.<sup>67</sup> Villeneuve observed that governments, “[u]nable to justify the reason for blocking political content...choose to obscure or deny the fact that such content is in fact targeted.”<sup>68</sup> Lessig argued that, “even if the users are aware of the filtering, they may not know who is responsible for it: it may be any entity upstream of the user.”<sup>69</sup>

Commercial forces are also involved. Filtering-software companies protect their lists of blocking sites, considering these lists as trade secrets. As these lists are generally encrypted, filtering-software companies have filed claims or threatened to do so against those who would make the lists public.<sup>70</sup> According to McIntyre and Scott,<sup>71</sup> in some cases, such as the Australian

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<sup>61</sup> J. Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors* 66 University of Cincinnati Law Review 177 (1997).

<sup>62</sup> P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, SSRN.com (August 1998), available at <http://ssrn.com/abstract=121277> (last visited April 28, 2016).

<sup>63</sup> A point made by Lessig, *supra* note 38, where he refers to ‘truth in blocking’ as a desirable characteristic.

<sup>64</sup> For example, those of opposition political groupings, media and human rights organizations.

<sup>65</sup> R. Deibert & N. Villeneuve, *Firewalls and Power: An Overview of Global State Censorship of the Internet*, In Mathias Klang & Andrew Murray, *Human Rights in the Digital Age*, Portland, Or.: GlassHouse 119 (2005).

<sup>66</sup> Villeneuve, *supra* note 54.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Lessig, *supra* note 38, at 257.

<sup>70</sup> For an example see B. Fitzgerald, *Note: Edelman v. N2H2 – At the Crossroads of Copyright and Filtering Technology* 69 Brooklyn Law Review 1471 (2004).

<sup>71</sup> McIntyre & Scott, *supra* note 53, at 121

Interactive Gambling Act of 2001, specific legal authority exists for a public body to investigate particular content, make determinations, and issue notices requiring ISPs to block access to that content.<sup>72</sup>

From a regulatory perspective, a more troubling situation occurs when governments use their capacity, without legislation, to encourage Internet service providers to engage in content filtering. This is what the UK government has done as part of self-regulation. According to Bright, consultation and cooperation were used to push Internet service providers such as British Telecom to automatically block customer access to URLs alleged to host child pornography, while the Internet Watch Foundation maintained the list of blocked URLs.<sup>73</sup> Now, Grossman argues, UK authorities have indicated their intention to ensure that all UK Internet service providers adopt either Cleanfeed or a similar system, with the threat of legislation should ISPs fail to do so “voluntarily.”<sup>74</sup>

Furthermore, McIntyre and Scott raise the concern that requiring Internet service providers to filter content might allow them to externalize the costs associated with monitoring and blocking, thus causing high levels of censorship.<sup>75</sup> Even more troubling are the incentives that filtering creates for Internet service providers. Kreimer argues that regulators can recruit “proxy censors” by targeting Internet service providers whose “dominant incentive is to protect themselves from sanctions, rather than to protect the target from censorship.”<sup>76</sup>

As the harm in virtual worlds is inherent to their use, filtering techniques have little to do with preventing such harm. Monitoring can allow better supervision by parents, although regulation at home presents other challenges (see chapter 7, *infra*). Furthermore, as stated above, blocking and filtering may violate virtual-world companies’ freedom of speech rights and the rights of children as users (see chapter 5, *infra*).

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<sup>72</sup> *Interactive Gambling Act* (Cwlth) 2001, s 24.

<sup>73</sup> Bright, *supra* note 56; P. Hunter, *BT Siteblock* 9 *Computer Fraud and Security* 4 (2004).

<sup>74</sup> Grossman, *supra* note 57.

<sup>75</sup> S. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries and the Problem of the Weakest Link* 11 *University of Pennsylvania Law Review* 27 (2006).

<sup>76</sup> *Id.*, at 28.

## 2.2 Age verification and identity authentication

The purpose of age-verification technologies is to prevent minors from engaging harmful material (e.g., pornography, gambling), and to ensure that adults do not use websites for children. Methods to determine a user's age include trusted third parties for verification (e.g., schools, banks, or government agencies), user self-identification, and credit-card requirements, for example. Technologies designed to authenticate a user's identity work in the same manner. The Internet Safety Technical Task Force<sup>77</sup> reported that available technologies make it challenging for children to pretend to be adults or for adults to pretend to be children, but that usually more than one technology is used to perform both functions. Willard<sup>78</sup> questioned the utility of such technologies.

Problems with age-verification and identity-authentication technologies were identified by the ISTTF Technology Advisory Board.<sup>79</sup> For example, duress can cause victims to provide their verification credentials received as part of the process, thus enabling unauthorized persons pretending to be someone else to enter restricted sites; children can use fake birth date and make use of their parents credit card for false identification. The ISTTF concluded that “age verification and identity authentication technologies are appealing in concept but challenged in terms of effectiveness.”<sup>80</sup>

An underlying assumption of the harm described in chapter 1, *supra*, is a correlation between the length of virtual worlds use and the harm to the imaginative development. Therefore, one way that these technologies can be used to address the harm discussed here is to prevent children from lengthy use of virtual worlds. This is a “mechanical” solution that might miss the subtle issues involved with intangible and virtual harm. First, users may find ways to overcome this regulatory instrument by logging in with different user names. Second, although usage time is correlated with Internet addiction (see chapter 1, *supra*), it does not necessarily

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<sup>77</sup> IDology Inc., *IDology Expands on Its Member Statement to Internet Safety Technical Task Force's Final Report* (2009), Available at <https://www.idology.com/blog/idology-expands-on-its-member-statement-to-internet-safety-technical-task-forces-final-report/> (last visited April 16, 2016).

<sup>78</sup> N. Willard, *Research that is “outdated and inadequate?”: An analysis of the Pennsylvania Child Predator Unit arrests in response to Attorney General criticism of the Berkman Task Force Report* (2009), Available at <http://www.embracecivility.org/wp-content/uploadsnew/2011/10/papredator.pdf> (last visited April 28, 2016).

<sup>79</sup> IDology Inc., *supra* note 77.

<sup>80</sup> *Id.*, Appendix D, at 10.

correlate with harm to the development of imagination. Third, this solution may raise freedom-of-speech concerns (see chapter 5, *infra*) by forcing virtual-world companies to limit their customers' usage time, which is the central element of their business model. Finally, this solution faces all the concerns related to code regulation (transparency, moral values, and accountability), in which users are not informed of the challenges they face but, rather, are forced to cease usage after a specific amount of time.

### **3. Conclusion**

Internet regulation may account for the virtual aspect of the potential harm discussed in this case study, but the intangible nature of this harm does not allow code regulation to prevent such harm. In the absence of identifiable and measurable factors associated with the harm, code regulation is not a suitable solution for prevention. The only factor directly associated with the harm is usage time, and this factor is problematic for several reasons discussed in chapters 5 and 7, *infra*.

## Chapter 5 – Freedom of Speech and Online Harm to Children

Any discussion of regulation or control of virtual and intangible harms resulting from media exposure, in this case, virtual worlds harm to imagination development, must take into account issues concerning legal aspects of freedom of speech. Such comprehensive discussion is beyond the scope of this dissertation. Instead, this chapter will focus on the general approach taken in two countries, Canada and USA.

The Canadian approach will be illustrated and analyzed using the Canadian Supreme Court decision in *Irwin Toy v. Quebec*,<sup>1</sup> ruling that prohibition of marketing to children in Quebec does not infringe the right set in section 2(b) of the Charter of Rights and Freedoms. The US approach will be illustrated and analyzed using the US Supreme Court decision in *Brown v. Entertainment*,<sup>2</sup> quashing a California law intending to protect children from violent video games on the basis that it abridges the Freedom of Speech.

For each jurisdiction, the approach taken in the Supreme Court decision (i.e., *Irwin Toy* and *Brown*) will be used to draw an analogy towards the harm at hand. More specifically, an attempt will be made to predict what would be the decision of each Supreme Court, in case of a freedom of speech challenge, with respect to the regulation of children's use of virtual worlds in light of the potential harm to children's imaginative development.

### 1. Canada – *Irwin Toy v. Quebec*

The text of the Canadian Charter of Rights and Freedoms leaves much open to interpretation.<sup>3</sup> Section 2(b) protects the, "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."<sup>4</sup> The language, on its face, is broad and without apparent definitional limitations. As a result, picketing outside a business,<sup>5</sup>

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<sup>1</sup> *Irwin Toy v Québec (AG)*, [1989] 1 S.C.R 927 at para 41.

<sup>2</sup> *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011).

<sup>3</sup> Chanakya, Sethi, *Beyond Irwin Toy: A New Approach to Freedom of Expression Under the Charter* 17 Appeal 21-45 (2012).

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, ("The Charter") 2(b), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 1.

<sup>5</sup> *RWDSU v Dolphin Delivery*, [1986] 2 S.C.R 573, [1986] S.C.J No. 75 (QL), at para 20.

advertising to children,<sup>6</sup> publishing details of a divorce proceeding,<sup>7</sup> describing Jews to school children as “sadistic,” “power hungry,” “child killers,”<sup>8</sup> soliciting one's services as a prostitute,<sup>9</sup> denying the Holocaust in a pamphlet,<sup>10</sup> financing election advertisements,<sup>11</sup> creating child pornography,<sup>12</sup> comparing a public personality to Hitler, the Ku Klux Klan and skinheads,<sup>13</sup> and advertising on the side of a transit bus,<sup>14</sup> among other things, have all been held to be protected means of expression under section 2(b).

The state can, however, seek to limit expression. Section 1 of the Charter permits “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>15</sup> Similar to the language used in section 2(b), the constitutional dictate in section 1 is broad, leaving much to be filled by the court. The result, for example, is that certain limits on advertising to children are constitutionally acceptable,<sup>16</sup> but others on the sides of transit buses are not;<sup>17</sup> denying the Holocaust is permissible,<sup>18</sup> but calling all Jewish people “child killers” is not.<sup>19</sup>

These examples demonstrate that the Court has opted for a structure that defines expression very broadly, with almost every conceivable form of human expression *prima facie* protected under section 2(b).<sup>20</sup> The result is that section 2(b) is “little more than a formal step,”<sup>21</sup>

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<sup>6</sup> *Irwin Toy v Québec (AG)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36 (QL), at para 41. (“Activity is expressive if it attempts to convey meaning”). The single exception to this general rule, for reasons that are less than clear, is violence.

<sup>7</sup> *Edmonton Journal v Alberta (AG)*, [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124 (QL), at para 50, Wilson J.

<sup>8</sup> *R v Keegstra*, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131 (QL), at para 83.

<sup>9</sup> Reference re ss. 193 and 195.1(1)(c) of the *Criminal Code*, [1990] 1 S.C.R. 1123.

<sup>10</sup> *R v Zundel*, [1992] 2 S.C.R. 731, [1992] S.C.J. No. 70 (QL).

<sup>11</sup> *Libman v Québec (AG)*, [1997] 3 S.C.R. 569, [1997] S.C.J. No. 85 (QL); *Harper v Canada (AG)*, [2004] 1 S.C.R. 827, [2004] S.C.J. No. 28 (QL).

<sup>12</sup> *R v Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3 (QL).

<sup>13</sup> *WIC Radio v Simpson*, [2008] 2 S.C.R. 420, [2008] S.C.J. No. 41 (QL).

<sup>14</sup> *Greater Vancouver Transportation Authority v Canadian Federation of Students*, [2009] 2 S.C.R. 295, [2009] S.C.J. No. 31 (QL).

<sup>15</sup> The Charter, *supra* note 4.

<sup>16</sup> *Irwin Toy*, *supra* note 6.

<sup>17</sup> *Greater Vancouver Transportation Authority*, *supra* note 14.

<sup>18</sup> *R v Zundel*, *supra* note 10.

<sup>19</sup> *R v Keegstra*, *supra* note 8.

<sup>20</sup> See *Irwin Toy* *supra* note 6, at paragraph 41 (“Activity is expressive if it attempts to convey meaning”). The single exception to this general rule, for reasons that are less than clear, is violence. See *RWDSU*, *supra* note 5, at paragraph 20; There was one aspect of the decision that was definitional in nature: It was “clear” to the Court that “a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen.” *Id.*, at paragraph 42. As authority, the majority cited the opinion of McIntyre J in *Dolphin Delivery*, which merely repeated the same assertion, resulting in a tautology. McIntyre J had said in *Dolphin Delivery* that “freedom [of

leaving effectively all analysis to section 1. But at the same time, the Court has imposed a single, high bar for justification under section 1. As a result, illegally parking a car in order to make a point<sup>22</sup> and distributing pornography depicting real children<sup>22</sup> are each considered forms of expression that -- in theory -- require a "pressing and substantial purpose" if they are to be constitutionally limited.<sup>23</sup> Unsurprisingly, the Court has thus struggled mightily in the two decades since its early section 2(b) cases to find meaningful ways to assess limits under section 1. Its solutions to this dilemma include the adoption of a "contextual approach" and "deference" to the legislative branch. However, these solutions have often served to further muddy the jurisprudential waters of section 2(b).

The overall result is a jurisprudence that, according to Cameron, is replete with "contradictions and double standards,"<sup>24</sup> and is "capricious, and [is] a captive of instincts which shift from judge to judge, case to case, and issue to issue."<sup>25</sup> In this view, the myth of a monolithic *Oakes* test under section 1 is belied by, "case-by-case manipulation"<sup>26</sup> where the Court has, "transformed section 1 review into an ad hoc exercise that exalts flexibility at the expense of principle."<sup>27</sup>

Others express frustration with a highly deferential section 1 analysis that is according to Hogg, "unprincipled and unpredictable,"<sup>28</sup> according to Macklem and John, "inherently

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expression], of course, would not extend to protect threats of violence or acts of violence." The majority in *Irwin Toy* confirmed this by adding that "freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure." Though one can easily infer why a purposive analysis of section 2(b) would result in the exclusion of violence from the right's ambit, neither statement offers a thorough explanation of the exclusion.

<sup>21</sup> Richard Moon, *Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights* 40 Osgoode Hall L. J. 339 (2002).

<sup>22</sup> *Irwin Toy*, *supra* note 6, at paragraph 41. As Peter Hogg has cheekily observed, "Fortunately, most drivers are unaware of their constitutional right to disregard parking restrictions of which they disapprove." (Peter W. Hogg, *Constitutional Law of Canada*, Toronto: Carswell 987 n 55 (2009 student ed.).

<sup>23</sup> See *R v Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7 (QL), at 138-9, 26 DLR (4th) 200 ["Oakes"] ("It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important").

<sup>24</sup> Jamie Cameron, *Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on Vancouver Sun and Harper v. Canada* 17 NJCL 103 (2005).

<sup>25</sup> *Id.*, at 71.

<sup>26</sup> Jamie Cameron, *Abstract Principle v. Contextual Conceptions of Harm: A Comment on R. v. Butler* 37 McGill L. J. 1147 (1992). See also *Oakes*, *supra* note 23.

<sup>27</sup> Jamie Cameron, *The Past, Present, and Future of Expressive Freedom under the Charter* 35 Osgoode Hall L. J. 5 (1997).

<sup>28</sup> Hogg, *supra* note 22, at 990.

indeterminate and, consequently, open to manipulation,"<sup>29</sup> and according to Bredt and Dodek, "a highly subjective exercise with little predictability."<sup>30</sup> Dodek further argued that the Court's struggle in crafting its jurisprudence, "has resulted in a lack of transparency and a general state of confusion among lawyers, scholars and Charter litigants."<sup>31</sup>

Most troublingly, however, the purported stringency of a single Oakes test is contradicted by precedents that confirm the "dominant narrative" of recent scholarship that the Court's section 1 analysis has been weakened over the last two decades.<sup>32</sup> In the expression context, the adoption of the contextual approach and a more deferential posture in applying section 1 has eroded the foundations of expressive freedom, especially in core areas such as political speech.

The Supreme Court decision in *Irwin Toy* is relevant to the harm discussed in this dissertation and is illustrative of the manner in which the Supreme Court of Canada approaches freedom of expression issues. Sections 248 and 249 of Quebec's *Consumer Protection Act*<sup>33</sup> prohibits commercial advertising directed at persons under thirteen years of age. *Irwin Toy* challenged this legislation, arguing that it was ultra vires of the province and that it infringed the Canadian and the Quebec *Charters*. As in *Ford*,<sup>34</sup> the Supreme Court of Canada treated the Canadian and Quebec *Charters* as being largely synonymous in their guarantees of freedom of expression.

The starting point for the majority (Dickson C.J., Lamer and Wilson J.J.) was to elaborate on the scope of the protection found in s. 2 (b) of the *Charter*. This scope is very broad indeed. "Activity," the majority stated, "is expressive if it attempts to convey meaning."<sup>35</sup> Any human activity that conveys or attempts to convey a meaning falls within the scope of the guarantee.<sup>36</sup>

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<sup>29</sup> Terry Macklem & John Terry, *Making the Justification Fit the Breach* 11 Sup Ct L Rev (2d) 593 (2000).

<sup>30</sup> Christopher D. Bredt & Adam Dodek, *The Increasing Irrelevance of Section 1 of the Charter* 14 Sup Ct L Rev (2d) 185 (2001).

<sup>31</sup> Christopher D. Bredt, *Revisiting the s. 1 Oakes Test: Time for a Change?* 27 NJCL 66 (2010).

<sup>32</sup> Sujit Choudhry, *So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1* 34 Sup Ct L Rev (2d) 515-521 (2006) ("Our precedents, including for example those concerning hate speech, campaign financing, and defamation, belie the notion that free speech in Canada is more strongly protected as a result of the Oakes"). On hate speech, c.f. Keegstra, *supra* note 8, with *RAV v St Paul (City)*, 505 US 377 (1992) (a unanimous court struck down a municipal ordinance and in doing so overturned the conviction of the teenaged accused for burning a cross on the lawn of an African-American family).

<sup>33</sup> *R.S.Q.*, c. P-40.i.

<sup>34</sup> *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, [1988] S.C.J No. 88 (QL).

<sup>35</sup> *Irwin Toy*, at 606.

<sup>36</sup> *Id.*, at 607.

Even the mundane physical activity of parking a car, the majority stated, can fall within the s. 2 (b) guarantee if it is performed to convey a meaning. For example, in a case of parking space reserved to spouses of government employees, an unmarried person might protest against this method of allocating a limited resource, by parking in these spots.<sup>37</sup>

Once the Supreme Court had determined that commercial advertising aimed at children was *prima facie* expression, the majority turned to the issue of the purpose and effect of the impugned legislation. Following the position taken in *R. v. Big M Drug Mart Ltd.*<sup>38</sup>, the majority concluded that legislation will infringe s. 2 (b) of the *Charter* if its purpose, "is to restrict the content of expression by singling out particular meanings that are not to be conveyed...".<sup>39</sup>

This is to be contrasted with time, place and manner restrictions that simply aim at controlling the, "physical consequences of certain human activity, regardless of the meaning being conveyed...".<sup>40</sup> This latter category of governmental regulation may still infringe s. 2 (b) if it can be established that the *effect* of the regulation is to restrict the plaintiff's free expression. If the plaintiff is to fall within this latter category, the onus is on the plaintiff to establish that his or her activity is consonant with one or more of the functions of the freedom of expression guarantee.

Applying this test, the majority had no difficulty in finding that the legislation under attack violated s. 2 (b). The whole purpose of the Quebec legislation was to ban certain types of advertising. This was not simply a manner or form restriction; it was a total prohibition, in certain media, against advertising aimed at children under the age of thirteen. As such, the purpose of the legislation was to limit the free expression of advertisers.

The majority then turned to the *Oakes* criteria to determine that the impugned sections of the *Consumer Protection Act* were justified under s. 1 of the *Charter*. The evidence before the Court indicated a high degree of consensus among the experts that children are particularly vulnerable to, "the techniques of seduction and manipulation abundant in advertising".<sup>41</sup> The

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<sup>37</sup> *Id.*

<sup>38</sup> [1985] 1 S.C.R. 295.

<sup>39</sup> *Irwin Toy*, at 610.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, at 620.

scientific evidence differed on precisely what group was vulnerable. The impugned legislation protected a group that was somewhat broader than the group that some studies found particularly at risk (children six or younger). The Court, however, was not willing to pick and choose among the social scientists' reports. The government is, the majority stated, "afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence".<sup>42</sup>

Turning to the proportionality requirement of the *Oakes* test, the majority concluded that unlike the legislation in *Ford*, the impugned legislation in *Irwin Toy* was rationally connected to its goal. The government's goal was to prevent advertisers from exploiting the vulnerability of children; while a complete ban on advertising of children's products would not have been rationally connected to this end, the majority concluded that a prohibition of advertisements *directed* at young children was.

Did Quebec's advertising ban restrict the freedom of expression as little as possible? In answering this question the majority once again emphasized the purposive approach to *Charter* interpretation. When legislation is directed towards the, "protection of vulnerable groups, [the courts] ... must be mindful of the legislature's representative function".<sup>43</sup> Thus, the majority stated, the courts will be more vigilant in enforcing the minimal impairment requirement when the government is, "the singular antagonist"<sup>44</sup> of the individual whose right has been infringed (for example, in the context of criminal prosecution) than they will when the government is balancing competing claims between groups in society.

This is especially so, the majority stated, when the *Charter* is being used as, "an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons".<sup>45</sup> Given this somewhat relaxed standard, the Court was willing to conclude that the route chosen by Quebec impaired freedom of expression as little as possible.

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<sup>42</sup> *Id.*, at 623.

<sup>43</sup> *Id.*, at 625.

<sup>44</sup> *Id.*, at 626.

<sup>45</sup> *Id.*, at 625, quoting from *R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713, [1986] S.C.J No. 70 (QL), at 779.

Finally the majority noted that there was no suggestion that, "the...effects of the ban are so severe as to outweigh the government's pressing and substantial objective."<sup>46</sup> Significantly, the majority concluded that the challenge to the legislation was based simply on a concern that corporate revenue would be affected.<sup>47</sup> This concern over corporate profits was not seen as a factor that weighed heavily in the s. 1 scales. This is especially so when it was contrasted with the legislative objective of protecting a vulnerable group in society. Of some interest is the short dissenting judgment by McIntyre J. (Beetz J. concurring), emphasizing the fundamental importance of freedom of expression, and concluding that the legislation could not be justified in a free and democratic society.<sup>48</sup>

McIntyre J. further suggests that this freedom should only be suppressed for the most, "urgent and compelling reasons and then only to the extent and for the time necessary to protect the community".<sup>49</sup>

As to the particular legislation, the dissenting judges declined to accept the government's view that any real harm existed. While children may be unduly influenced by advertising and while this may be, "a source of irritation to parents...no evidence had been led that suggested that children would be permanently harmed by being subjected to advertising".<sup>50</sup> Given this conclusion, McIntyre J. rejected the notion that the legislation was in fact directed towards an objective of pressing and substantial importance. McIntyre J. went on to note that, "a total prohibition of advertising aimed at children below an arbitrarily fixed age makes no attempt at the achievement of proportionality."<sup>51</sup>

In *Irwin Toy*, the Supreme Court constructed a special analytical framework for the resolution of freedom-of-expression cases under s 2(b) of the *Charter*.<sup>52</sup> That analytical framework both identified the questions that courts are required to answer when called upon to determine whether governmental action challenged on the basis of s 2(b) violates the right to

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<sup>46</sup> *Id.*, at 630.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, at 636.

<sup>49</sup> *Id.*, at 637.

<sup>50</sup> *Id.*, at 636.

<sup>51</sup> *Id.*

<sup>52</sup> Robin Elliot, *Back To Basics: A Critical Look at the Irwin Toy Framework for Freedom of Expression* 15 Rev. Const. Stud. 205 (2010-2011).

freedom of expression, and prescribed the principles that are to be applied when each of these questions is being answered.

In setting out that framework, the Supreme Court provided us with its understanding of two of the building blocks of any coherent theory of freedom of expression as a constitutional right: (1) the meaning to be given to freedom of expression, and (2) the manner in which one determines whether governmental action infringes upon freedom of expression as defined in (1). Of these two building blocks, the first is clearly the more important, since it determines the range of interests that s 2(b) protects. However, the second is a necessary and far from unimportant component of any such theory, for without it one has no legal basis upon which to decide in a given case whether or not the impugned governmental action adversely affects one of the protected interests in a manner, or to a degree, that should engage the concern of the courts.

The *Irwin Toy* framework was harshly criticized by a number of scholars and counsel in the years immediately following its adoption, and for a broad range of reasons.<sup>53</sup> To this point, however, that criticism has fallen on deaf ears; in fact, the Court appears to have ignored it entirely.<sup>54</sup> The Court has used the framework consistently in resolving s. 2(b) cases since it was first articulated and, as the judgment in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*<sup>55</sup> makes clear, continues to invoke it today.

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<sup>53</sup> See e.g. J. Cameron, *The Original Conception of Section 1 and Its Demise: A Comment on Irwin Toy Ltd. v Attorney-General of Quebec*, 35 McGill LJ 253 (1989); D. Gibson, *Constitutional Law-Freedom of Commercial Expression under the Charter-Legislative Jurisdiction over Advertising-A Representative Ruling-Irwin Toy Ltd. v Attorney-General of Quebec* 69 Can Bar Rev 339 (1990); T. Macklem, *Toying with Expression: Irwin Toy Ltd. v Quebec (Attorney-General)* 1 Sup Ct L Rev (2d) 547 (1990); L. Weinrib, *Does Money Talk? Commercial Expression in the Canadian Constitutional Context*, In D. Schneiderman (ed.), *Freedom of Expression and the Charter*, Toronto: Carswell 341 (1991); D. Lepofsky, *The Supreme Court's Approach to Freedom of Expression: Irwin Toy Ltd. v Quebec (Attorney General) and the Illusion of Section 2(b) Liberalism* 3 NJCL 37 (1993); R. Moon, *The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication* 45 UTLJ 419 (1995). It should be acknowledged that not everyone who has written about the approach taken to freedom of expression in *Irwin Toy* has been critical of it. For a sampling of some of the positive assessments, see J. Ross, *The Protection of Freedom of Expression by the Supreme Court of Canada* 19 Sup Ct L Rev (2d) 81 (2003); S. Anand, *Beyond Keegstra: The Constitutionality of the Willful Promotion of Hatred Revisited* 9 NJCL 117 (1998); M. Tilliard, *Commercial Expression Comes of Age: The Path to Constitutional Recognition Under the Charter of Rights* 28 Alb L Rev 604. (1990)

<sup>54</sup> Elliot, *supra* note 52.

<sup>55</sup> 2010 S.C.C 23, [2010] 1 S.C.R 815.

Cameron<sup>56</sup> submits that from the outset the Charter purpose was, “that the substantive rights be given a broad and literal interpretation”. These rights should be limited, according to Cameron, exclusively under section one. Therefore, the distinction between breach and justification under the charter, “must be maintained to preserve the *Charter's* integrity”.

Cameron further suggests that the Supreme Court of Canada's decision in *Irwin Toy* will only perpetuate the confusion surrounding *Charter* interpretation.

Drawing an analogy from the Supreme Court decision in *Irwin Toy* to the harm discussed in this dissertation may yield similar results. If the evidence brought before the court will be convincing as to the damage to imagination development caused to children from the use of virtual worlds, the court may reach a similar conclusion and uphold a theoretical law that will limit the use to children over the age of 14, for example. Nonetheless, there is a fundamental difference between the restriction imposed in *Irwin Toy* – advertising to children, and the one discussed here. In the case of virtual worlds use the restriction is on the product itself and not its promotion.

Therefore, if a law banning the use of virtual worlds by children under the age of 14 would be challenged on the grounds of breaching the freedom of expression, it is assumed that the Supreme Court would not be protecting this law as it was done in *Irwin Toy*, as this would not be the least restrictive measure the government could take in this respect. This is not an advertising of a toy to use *Irwin Toy* analogy, but rather a ban on the use of the toy itself which means going a long way from the justifications brought forward in the *Irwin Toy* decision.

Having said that, if the government will enact a regulatory regime in which a self regulatory or a co-regulatory scheme is employed to prevent a virtual and intangible harm, the Supreme Court of Canada, based on its approach as was articulated in *Irwin Toy*, will tend to approve such a scheme as it will protect children from an intangible harm on one hand and will comply with the tests set out in *Oaks* on the other hand.

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<sup>56</sup> Jamie Cameron, *The Original Conception of Section 1 and its Demise: A Comment on Irwin Toy Ltd v. Attorney-General of Quebec*, 35 McGill L. J. 253 (1989-1990).

## 2. USA - Brown v. Entertainment

In this case, The United States Supreme Court struck down a California law prohibiting the sale of violent video-games to minors<sup>57</sup> as it offended the First Amendment.<sup>58</sup> *Brown v. Entertainment* is the first video game case to be heard by the United States Supreme Court.<sup>59</sup>

The California statute at issue “Prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” The Act covers games, where the options available to the player includes, “[k]illing, maiming, dismembering, or sexually assaulting an image of a human being,” as long as these acts are presented in a way that a reasonable person would find, “appeals to a deviant or morbid interest of minors”. Violation of the Act is punishable by a civil fine of up to \$1,000.<sup>60</sup>

Since the opinions of the Court were strongly divided, I will discuss the decision according to the Judge who wrote it, from the majority to the dissent.

### (a) Justice Scalia

Justice Scalia delivering the majority opinion, relied heavily on an earlier case – *United States v. Stevens*.<sup>61</sup> In *Stevens*, the majority held that new categories of speech which is not protected by the first amendment, may not be added, by a legislature that concludes certain speech is too harmful to be tolerated. In *Stevens* it was the depiction of animal cruelty that the Supreme Court decided not to add to the list of speech which is not protected by the first amendment.<sup>62</sup>

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<sup>57</sup> See *CAL. CIV. CODE* §§1746-1746.5 (West 2005).

<sup>58</sup> *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011). See David G. Post, *Sex, Lies, and Videogames: Brown v. Entertainment Marchants Association* 27 *Cato Sup. Ct. Rev.* 38-39 (2010-2011) on the question why the Supreme Court granted the appeal in the first place.

<sup>59</sup> See Stephen Totilo, *All You Need to Know About This Week's Violent Video Game Case in the U.S. Supreme Court*, Gizmodo (Nov. 1, 2010), available at <http://www.kotaku.com/5678354/all-you-need-to-know-about-this-weeks-violent-video-game-case-in-the-us-supreme-court> (last visited April 29, 2016).

<sup>60</sup> *Brown*, 131 S. Ct. at 2732-33.

<sup>61</sup> *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577 (2010)

<sup>62</sup> *Id.*, at 3 (Justice Scalia).

According to Justice Scalia the decision in *Ginsberg v. New York*<sup>63</sup> cannot be used as a protection from First Amendment scrutiny every time a legislature decides that speech is harmful to minors. The decision in *Ginsberg* applies only to speech that is obscene and therefore harmful to minors.

Justice Scalia further concludes that an exception for the protection of speech when it comes to violent video game aimed at minors can only be created, “if there were a long-standing tradition in this country of specially restricting children’s access to depictions of violence.”<sup>64</sup> Nonetheless, since there is no such tradition, the statute is, “a restriction on the content of protected speech,” and therefore offends the first amendment.<sup>65</sup> It is not enough to show that declaring violent video games harmful to minors is rational the legislator must show that the statute, “is justified by a compelling government interest and is narrowly drawn to serve that interest.”<sup>66</sup>

According to Justice Scalia neither prong of the strict scrutiny doctrine is met: (i) there is no evidence of “compelling interest,” because California, “cannot show a direct causal link between violent video games and harm to minors,”<sup>67</sup> at the, “degree of certitude that strict scrutiny requires”;<sup>68</sup> and (ii) if this causal link between violent speech and harm to minors was established, the statute is not narrowly tailored to achieve its asserted goal. It is “wildly underinclusive” because it covers only violent video games, and does not cover the wide range of other violent speech (e.g., fairy tales, movies and cartoons) to which children are exposed, and

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<sup>63</sup> In *Ginsberg v. New York*, 390 U.S. 629 (1968) the owner of a Bellmore, Long Island, luncheonette had been convicted of selling “girlie magazines” – concededly not obscene – to a 16-year-old boy in violation of a New York statute that made it unlawful to sell “any picture...which depicts nudity...and which is harmful to minors...” (*Ginsberg*, 390 U.S. at 631-32).

<sup>64</sup> *Id.*, at 2736.

<sup>65</sup> *Id.*, at 2738. “[T]he government[‘s] power to restrict expression because of its message, its ideas, its subject matter, or its content” (Brown, 131 S. Ct. at 2733 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)), is severely limited by the “strict scrutiny” such efforts will receive in the courts. The government’s burden of justification in such cases – to demonstrate that it has “a compelling interest” in achieving the goal it is pursuing, and that there are no “less speech-restrictive alternatives” available to accomplish that purpose as effectively – is not only substantial, it is well-nigh insurmountable. (See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000) (“It is rare that a regulation restricting speech because of its content will ever be permissible”).

<sup>66</sup> *Id.*

<sup>67</sup> Brown, 131 S. Ct. at 2738.

<sup>68</sup> *Id.*, at 2739 n.8

because the statute is content to “leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK.”<sup>69</sup>

Moreover, the statutory coverage is also “vastly over inclusive”:<sup>70</sup> though the state asserted that the statute was designed to “aid parental authority,” the Court is reluctant to accept this notion asserting that parents don’t always care if their children will purchase a violent video game. Therefore, the state limits on the purchase of violent video game may effect these children which their parents do not object to the purchase of violent video games and hence, this legislation is broadly tailored and therefore breach the first amendment.<sup>71</sup>

Justice Scalia’s most notable evaluation is that future technologies will be subject to the same protections of the First Amendment.<sup>72</sup> Specifically, the Court stated that the First Amendment, “do not vary when a new and different medium for communication appears”.<sup>73</sup>

Justice Scalia addressed California’s argument that video games are distinguishable from other forms of media because they are interactive in that the player participates in the violence and determines its outcome.<sup>74</sup> The Court, however, found this distinction unconvincing for two reasons.<sup>75</sup> First, with respect to controlling the outcome of the game, this is a common feature akin to, “choose-your-own-adventure stories,” which have been around since 1969.<sup>76</sup> Second, as for the player’s participation, the Court viewed this as, “more a matter of degree than kind.”<sup>77</sup> This increased interactivity, however, is not a strike against video games, and is in fact, a testament to their success at drawing the player into the experience.<sup>78</sup>

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<sup>69</sup> *Id.*, at 2740.

<sup>70</sup> *Id.*, at 2741.

<sup>71</sup> *Id.*

<sup>72</sup> *Brown*, 131 S. Ct. at 2733

<sup>73</sup> *Id.* See Laura Black, *Violence is Never the Answer, Or Is It? Constitutionality of California's Violent Video Game Regulation*, 5(1) *Journal of Business, Entrepreneurship & the Law*, at 122 n351 (2011) (“It appears that the Court is trying to preempt future litigation that attempts to restrict emerging technologies because of its increased interactivity, such as the motion sensory technology of Xbox’s Kinect and PlayStation’s Move system”).

<sup>74</sup> *Id.*, at 2737-38.

<sup>75</sup> *Id.*, at 2738.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, at 2738. The Court quotes Judge Posner, who commented on the interactivity of literature by stating, “the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and suffering as the readers’ own.” *Id.* (quoting *Am. Amusement Mach. Ass’n v. Kendrick*, 224 F.3d 572, 577 (7<sup>th</sup> 2001)).

The opinion expressed the Court's doubts that punishing the video games vendors for selling violent video games to children, in case their parents do not agree with the sale of these video games, is a, "proper governmental means of aiding parental authority".<sup>79</sup>

However, this type of government regulation of children's access to speech is exactly what the Court upheld in *Ginsberg* and many other cases.<sup>80</sup> In fact, the Court has upheld numerous broadcasting restrictions, which affect adults and children alike, all in the name of protecting children from speech of which their parents may disapprove.<sup>81</sup>

Scalia's opinion pointed out that California regulation does not take into account the fact that some children who will be prohibited from purchasing video games under the law have parents who do not care whether their child is buying violent video games.<sup>82</sup> As a result, the law's purported aim to assist parental authority actually supports only what, "the State thinks parents ought to want."<sup>83</sup>

#### (b) Justice Alito

Justice Alito, joining the majority opinion conclusion, would have held the statute unconstitutional on the, "narrower ground that the law's definition of 'violent video games' is impermissibly vague."<sup>84</sup> The California statute does not meet the vital threshold requirement; it does not define "violent video games" with the "'narrow specificity' that the Constitution demands."<sup>85</sup>

Justice Alito rejects the majority assumption that video games are the same as books and movies,<sup>86</sup> saying that the experience of playing video games, "may be very different from anything that we have seen before". According to Justice Alito, testifying in his decision that he

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<sup>79</sup> *Id.*

<sup>80</sup> See *Ginsberg*, 390 U.S. at 639; See also, e.g., *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003); *AShcroft v. ACLU*, 535 U.S. 564 (2002); *Denver Area Educ. Telecomms. Consortium, Inc., v. FCC*, 518 U.S. 727; *Sable Comme'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

<sup>81</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. 727; *Info. Providers Coal. for Def. of the First Amendment v. FCC*, 928 F.2d 866 (9<sup>th</sup> Cir. 1991).

<sup>82</sup> *Id.*, at 2741. *Shcroft v. ACLU*, 535 U.S. 564 (2002).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*, at 2742.

<sup>85</sup> *Id.*, at 2741.

<sup>86</sup> *Brown*, 131 S. Ct. at 2746 (Alito, J., concurring).

had played violent video games to learn about this topic, the experience is very different from reading books or watching movies.<sup>87</sup>

Justice Alito's concurrence expressed the concern that the majority decision will be interpreted as indicating that no regulation of a minor's access to violent video games (and new technologies in general) is ever allowed.<sup>88</sup> Justice Alito argues that the law should progress with technology and proceed with caution when considering the principles of the constitution and the rapidly evolving technology. Especially relevant to the harm discussed in this dissertation is Justice Alito statement that, "*We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time*". Justice Alito further states that the legislator may be in a better position than the court to assess the implications of new technologies. The majority, according to Justice Alito, exhibit none of this caution.<sup>89</sup>

Clearly, Justice Alito is taking the side that the internet is a unique regulatory sphere. In addition, I argue that he is the only voice within the majority that recognizes, 'the simulacra bias',<sup>90</sup> "the signs of the real when there is no real," according to Baudrillard.<sup>91</sup>

#### (e) Justice Breyer

Justice Breyer argues that the majority decision creates a, "serious anomaly in First Amendment law."<sup>92</sup> While the state can prohibit the sale of magazines with nude pictures to minors, according to Justice Breyer, the decision in *Brown* prohibit the state from preventing the sale of violent interactive games to minors. This could lead to an absurd situation in which nude

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<sup>87</sup> *Id.*, at 2748, 2749, 2751.

<sup>88</sup> *Id.*, at 2747.

<sup>89</sup> *Id.*, at 2742.

<sup>90</sup> Nachshon Goltz, *Simulacra's Day in the U.S. Supreme Court: Brown Versus Entertainment Merchants Association and United States Versus Stevens*, Osgoode Hall Law School Research Report No. 36/2013, Comparative Research in Law & Political Economy, Available at <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1308&context=clpe> (last visited April 29, 2016).

<sup>91</sup> J. Baudrillard, *Simulacra and Simulation*, University of Michigan Press 20 (trans. Sheila Faria Glasner, 1994).

<sup>92</sup> *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting)

pictures are prohibited but interactive video game allowing the minor to torture, rape and kill a virtual naked women is allowed.<sup>93</sup>

Justice Breyer stated that the applicable standards of review in determining the constitutionality of California's video game regulation are the vagueness precedents and the strict scrutiny test. The relevant category of speech for this type of review is not depictions of violence, but rather is the category of, "protection of children."<sup>94</sup> Under the vagueness analysis, Breyer found the California statute provided sufficient notice of what is prohibited under the law, and therefore was not impermissibly vague.<sup>95</sup> Additionally, California's law was no more vague than New York's statute in *Ginsberg*.<sup>96</sup> Accordingly, any issues of remaining confusion could be cured through the state courts' interpretation.<sup>97</sup>

By applying the same standard of strict scrutiny to California's video game regulation, Breyer reach the opposite result of the majority.<sup>98</sup> Breyer determined that both California's interest in addressing a social problem and in aiding parental authority are legitimate, and indeed, are furthered by the California legislation.<sup>99</sup> According to Breyer, the California law achieved these aims since it only prevents a minor from buying a violent video game without a parent's permission.<sup>100</sup> Furthermore, video games are accepted teaching tools, and therefore, properly regulating the distribution of video games deemed exceedingly violent will further California's aim of protecting the physical and psychological well-being of minors.<sup>101</sup>

Justice Breyer imparted that the present case is more about education than censorship.<sup>102</sup> As such, the First Amendment does not prevent the government from assisting parents with their children's education about matters of violence.<sup>103</sup> As Breyer pointed out, the Court has previously stated that an immature and developing child may be less able than an adult to

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*, at 2762 (Breyer, J., dissenting).

<sup>95</sup> *Id.*, at 2763.

<sup>96</sup> *Id.*, at 2763-65.

<sup>97</sup> *Id.*, at 2765.

<sup>98</sup> *Id.*, at 2765-66.

<sup>99</sup> *Id.*, at 2766-67.

<sup>100</sup> *Id.*, at 2766.

<sup>101</sup> *Id.*, at 2767.

<sup>102</sup> *Id.*, at 2771.

<sup>103</sup> *Id.*

determine for him or herself what material is appropriate or not, and as such is vulnerable to “negative influences.”<sup>104</sup>

(f) Justice Thomas

Justice Thomas’s dissent took the view that the majority improperly extended the protections of the First Amendment.<sup>105</sup> Instead, Justice Thomas believed the present case encompasses a new category of speech, “speech to minor children bypassing their parents.”<sup>106</sup> Justice Thomas reasoned that the law does not prevent a minor from buying a violent video game if his parent’s agrees to it. But if the parents disagree to this purchase, than the freedom of speech provides a bypass to parents consent, and this was not the original purpose of the first amendment.<sup>107</sup>

The Brown decision was hailed by many commentators as a big victory for free speech and the First Amendment.<sup>108</sup> Post argues that the Brown decision, read along with the Stevens decision, prevents the government from suppressing speech by defining it as ‘obscene’ (Stevens) or ‘obscene to minors’ (Brown).<sup>109</sup>

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<sup>104</sup> *Id.*, at 2767 (citing *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)).

<sup>105</sup> *Id.*, at 2751 (Thomas, J., dissenting).

<sup>106</sup> *Id.*, at 2752.

<sup>107</sup> *Id.*, at 2761.

<sup>108</sup> See, e.g., Catherine J. Ross, *The Supreme Court Was Right to Strike Down California’s Video Game Law*, Wash. Post (June 27, 2011), Available at [https://www.washingtonpost.com/opinions/the-supreme-court-was-right-to-strike-down-californias-video-game-law/2011/06/27/AG6jYDoH\\_story.html](https://www.washingtonpost.com/opinions/the-supreme-court-was-right-to-strike-down-californias-video-game-law/2011/06/27/AG6jYDoH_story.html) (last visited April 29, 2016) (“The justices rejected a radical challenge to free speech – in the process protecting all of us, not just children.”); David G. Savage, *Supreme Court Strikes Down California Video Game Law*, L.A. Times (June 28, 2011), Available at <http://www.latimes.com/entertainment/news/la-na-0628-court-violent-video-20110628,0,5099090.story> (last visited April 29, 2016) (noting that the decision “highlights a consistent theme of the high court under Chief Justice John G. Roberts Jr.: Freedom of speech is almost always a winner, even if the context is unusual”); Brent Jones, *Our View: Even Violent Video Games Are Protected*, USA Today (Jun. 27, 2011), Available at [http://usatoday30.usatoday.com/news/opinion/editorials/2011-06-27-Even-violent-video-games-are-protected\\_n.htm](http://usatoday30.usatoday.com/news/opinion/editorials/2011-06-27-Even-violent-video-games-are-protected_n.htm) (last visited April 29, 2016) (describing “why the Supreme Court was right Monday in giving the makers of violent video games the same protection as the pamphleteers, printers and orators of the 18<sup>th</sup> century”); Tony Mauro, *Roberts Court Extends Line of Permissive First Amendment Ruling in Video Game Case*, The AmLaw Daily (June 28, 2011), Available at <http://amlawdaily.typepad.com/amlawdaily/2011/06/scotusfirstamendmentvideo.html> (last visited April 29, 2016) (Brown decision continues an “undeniable trend line” in favor of “classic First Amendment protection for even the most objectionable speech”).

<sup>109</sup> *Supra* note 58, at 51.

Post<sup>110</sup> further indicates that on the legal question at the heart of the case, as he sees it, “will a legislature’s decision to prohibit and distribution of purportedly harmful but non-obscene speech receive the highest level of First Amendment scrutiny?”, the Court appears to be split into a somewhat more fragile 5-4 alignment.

According to Black, if the California law would have been affirmed, it would have created a ‘chilling effect’ on the video game industry.<sup>111</sup> Black further argues that the “wolf” has taken the form of violent video games; however, “the Supreme Court has held that California’s cry is nothing more than a false alarm”.<sup>112</sup>

Nonetheless, Goltz<sup>113</sup> argues that the Court’s decision was a result of lack of understanding of new technology and the ‘Simulacra Bias’ influencing the majority.

Using the analogy of the Brown decision to analyse a potential court decision regarding the harm presented in this dissertation and the validity of regulation to take measure against it leads to a different conclusion than the case with the Canadian jurisprudence. Even when it comes to a law that engages the parents in the regulation of their children engagement with new media, as the California law in the Brown case, the US Supreme Court was reluctant to approve the law and strike it down on the basis that it is offending to the freedom of speech.

Therefore, in order to pass muster and satisfy first amendment requirements, a much more lenient approach should be taken. According to the US Supreme Court, any governmental supervision may offend the freedom of speech of both the virtual worlds operators and the children users. Therefore, even a ‘weak’ instrument as co-regulation may be considered offensive in this respect. Self-regulation nonetheless may be treated differently as it is not set by law and the government is not enforcing it in legal means but merely suggesting that the industry will self regulate itself.

Both in the Brown and Stevens decisions the US Supreme Court made it clear that it would not allow any regulation of content which does not fall into the few categories already

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<sup>110</sup> *Id.*

<sup>111</sup> Black, *supra* note 73, at 130-2.

<sup>112</sup> *Id.*, at 133.

<sup>113</sup> Goltz, *supra* note 90.

identified in the past as exceptions to the freedom of speech protection. Whether the Court analysis was right is a different matter that exceeds the scope of the discussion here.

### 3. Conclusions

Two aspects of freedom of speech and harm to children are important and illustrated in the two cases presented: *Irwin Toy v. Quebec* and *Brown v. Entertainment*. The first aspect demanding consideration in the context of this case study is the notion that freedom of speech restrictions are a crucial and imperative element of any regulatory attempt to regulate content.

The second aspect is what seems to be a different approach to the freedom of speech interpretation between the Canadian and the American Supreme Court. In light of the decisions in *Irwin Toy* and *Brown* it is suggested that in similar cases the Canadian Supreme Court will tend towards a more flexible approach when considering content regulation, especially as it relates to the interpretation of section one of the Charter.<sup>114</sup> The US Supreme Court is bound to continue the line set in *Brown*. Unless a surprise occurs and future American courts adopt Justice Alito's side of the majority opinion in *Brown* – Justice Scalia's rigid framework will reign and with it the tendency not to allow regulatory interference with any content.

It should be mentioned that the US Supreme Court conclusion runs to the heart of 'The Law of the Horse' debate of whether the internet requires special regulation as discussed in chapter 4, *supra*.<sup>115</sup> One may argue, depending on those who favor the Internet's special regulation, that the 'special' attitude towards internet new regulation should be also applied to constitutional aspects.

Finally, and most important to the case study at hand, the cases analyzed in this chapter and the legal tradition demonstrate the correlation between softer regulatory instrument and the ability to pass the constitutional master of freedom of speech. Moreover, there may be a need to

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<sup>114</sup> *R. v. Oakes* [1986] 1 S.C.R. 103

<sup>115</sup> See discussion in Chapter 1 *Supra*.

take different approach when it comes to Canada and the USA. While the Canadian Supreme Court may approve co-regulation as not offending freedom of expression in order to protect children's imaginative development in virtual worlds and virtual and intangible harm in general, the US Supreme Court may reject such a solution regardless of the evidence to support the existence of the harm.

It is also important to distinguish the two cases on the basis that while *Irwin Toy* deals with the advertisement of the product, *Brown* deals with the actual access to the product. To draw an analogy to the harm to children's imaginative development in virtual worlds, it would be permissible from a freedom of speech perspective to educate the children users and their parents about the potential deleterious effects of virtual worlds but it would be extremely challenging to restrict the access to these worlds. Nonetheless, while in *Irwin Toy* the potential harm is in the advertisement itself and children's poor ability to deal with it, in *Brown* it is the actual product that poses the harm.

The most important aspect of this comparison in the context of the regulation of virtual and intangible harm in general and more specifically with respect to the harm identified in chapter 1, *supra*, is the constitutional concept of harm and how it is doctrinalized differently under Canadian and US free speech protections. The bottom line is that Canada is prepared to assume the causal link and presume the presence of harm on little or no evidence, while the US is not. Canada is more likely as well to allow generous regulation where a vulnerable group (children) is the target of expression.

## Chapter 6 – Lessons Learned from Comparable Regulation

[w]hat we are experiencing is the absorption of all virtual modes of expression into that of advertising...The lowest form of energy of the sign.<sup>1</sup>

Many characteristics of the potential harm in advertising to children, especially online, resemble the characters of the harm to children’s imaginative development as detailed in chapter 1, *supra*. The virtual and intangible nature of the harm, the importance of the development stage in children’s understanding as well as the evolving technologies and frequently changing terrain – all make the regulation of advertising to children online a suitable case for comparison and lesson drawing when it comes to understanding the challenge in regulating a virtual and intangible harm in general and the harm to children’s imaginative development in virtual worlds in specific.

This chapter provides a background on advertising to children, especially online, followed by an analysis of the legislative and regulatory framework concerning advertising to children in two countries, Canada and United States. The chapter concludes that the pressure to move to soft forms of regulation, codes and voluntary standards in dealing with harms to children is great. The situation is hardly reassuring that the harms resulting from new forms of participation in media can or will be dealt with. I will argue that the existing regulation can perhaps deal with ‘old’ non-virtual advertisement, but it is not equipped to deal with ‘new’ virtual advertisement. The case of virtual advertisement regulation as reviewed in this chapter and its suitability to address virtual and intangible harm to children will be used to draw an analogy to virtual and intangible harm regulation in general, and specifically to the harm to children’s imaginative development in virtual worlds as described in chapter 1, *supra*.

It is important to note that a major part of the discussion on advertising directed to children has focused on the effects of unhealthy food and drink choices and obesity among children. This discussion, although central and highly important, is not part of this chapter. In

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<sup>1</sup> J. Boudrillard, *Simulacra and Simulation*, Ann Arbor: University of Michigan Press 87 (1994) (translated by Sheila Faria Glaser).

addition, although privacy and advertisement are two sides of the same coin, apart from behavioural advertisement, privacy regulation exceeds this chapter's scope.

## 1. Online Advertising to Children

Advertising to children is a big and growing business. In 2007, companies paid \$17 billion on advertising to children,<sup>2</sup> while in 2011, it was estimated that American teens hold almost \$200 billion of the American market buying power.<sup>3</sup> Moreover, it is estimated that children under the age of twelve influence (e.g., asking, nudging etc.) family purchases of \$130–670 billion annually.<sup>4</sup>

Screen media is a big part of this campaign with the average American child above age 8 spending more than seven hours a day watching TV, using the computer, playing video games, and using hand-held devices.<sup>5</sup> Children younger than 8 are spending two hours a day with screen media.<sup>6</sup> On average, American children between the ages of 8 and 18 are spending an hour and a half per day on the computer,<sup>7</sup> while 30% of their Canadian peers are (grades 6 to 12) are spending more than two hours per day using their computers.<sup>8</sup>

According to Cai & Zhao, most of the popular websites for children (87%) include some type of advertising.<sup>9</sup> This online advertising represents a radical shift from the traditional advertising to children in TV and print,<sup>10</sup> for several reasons: its interactivity allows children to

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<sup>2</sup> C. Lagorio, *Resources: Marketing to Kids*, CBS News (May 14, 2007), Available at <http://www.cbsnews.com/stories/2007/05/14/fyi/main2798401.shtml> (last visited April 30, 2016).

<sup>3</sup> EPM Communications, *Teen Spending & Behaviour* (2011), Available at [http://www.researchandmarkets.com/research/a1c416/teen\\_spending\\_be](http://www.researchandmarkets.com/research/a1c416/teen_spending_be) (last visited April 30, 2016).

<sup>4</sup> Juliet B. Schor, *When Childhood Gets Commercialized, Can Children Be Protected?*, In Ulla Carlsson (ed.), *Regulation, Awareness, Empowerment, Young People and Harmful Media Content in the Digital Age* 101 (2006); Kim Campbell & Kent Davis-Packard, *How Ads Get Kids to Say I Want It!*, Christian Sci. Monitor (Sept. 18, 2000), Available at <http://www.csmonitor.com/2000/0918/p1s1.html> (last visited April 30, 2016).

<sup>5</sup> V. J. Rideout, U. G. Foehr & D. F. Roberts, *Generation m2: Media in the Lives of 8- to 18-year-olds*, Menlo Park: Kaiser Family Foundation (2010).

<sup>6</sup> Common Sense Media, *Zero to Eight: Children's Media use in America 2013*, San Francisco: Common Sense Media (2013).

<sup>7</sup> Rideout & Foehr, *supra* note 5.

<sup>8</sup> S. T. Leatherdale & R. Ahmed, *Screen-based Sedentary Behaviours among a Nationally Representative Sample of Youth: are Canadian Kids Couch Potatoes?* 31 *Chronic Dis Inj Can* 141–146 (2011).

<sup>9</sup> Cited in D. Kunkel & J. Castonguay, *Children and Advertising: Content, Comprehension, and Consequences*, In D. G. Singer & J. L. Singer (Eds.), *Handbook of Children and the Media*, Los Angeles: Sage 395-418 (2012).

<sup>10</sup> E. S. Moore & V. Rideout, *The Online Marketing of Food to Children: Is it Just Fun and Games?* 26(2) *Journal of Public Policy & Marketing* 202-220 (2007); K. C. Montgomery, *Safeguards for Youth in the Digital Marketing ecosystem*, In Singer & Singer *Id.*

engage in an active manner with the brand; its immersive nature brings and keeps the child in a fully branded virtual environment, thus blurring the lines between advertising and other content (as well as blurring the lines between reality and the virtual world<sup>11</sup>); and the advertisers can build the advertisement based on the data they have on the specific child (e.g., location, preferences, web history etc.).<sup>12</sup>

These factors have implications not only on the children and the influence of advertisement on them, but also on the research of these effects. As Montgomery noted, “[D]igital entertainment and advertising are now thoroughly intertwined,” and this makes it “difficult to isolate advertising as a separate form of communication.” This is true for the child as well as for the researcher.<sup>13</sup>

According to Calvert,<sup>14</sup> new techniques of advertisement are being used due to the advances in technology. One example is stealth advertising<sup>15</sup> (or embedded advertising<sup>16</sup>), where the intent of the advertisement is being concealed.<sup>17</sup> The reason for this strategy is the notion that the effectiveness of advertising increases if it is not being recognized by the consumers as an

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<sup>11</sup> See Nachshon Goltz, ‘ESRB Warning: Use of Virtual Worlds by Children May Result in Addiction and Blurring of Borders’ – *The Advisable Regulations in Light of Foreseeable Damages*, 11(2) PGH. J. TECH. L. & POL’Y 1 (Fall 2010), Available at <http://lawlib.wlu.edu/CLJC/index.aspx?mainid=599&issuedate=2011-02-16> (last visited April 30, 2016).

<sup>12</sup> Common Sense Media, *Advertising to Children and Teens: Current Practices* (Spring 2014), Available at <https://www.common sense media.org/research/advertising-to-children-and-teens-current-practices> (last visited Nov 25, 2016).

<sup>13</sup> Valerie Steeves & Jane Tallim, *Kids for Sale: Online Marketing to Kids and Privacy Issues*, Ottawa: Media Awareness Network (2003).

<sup>14</sup> Sandra L. Calvert, *Children as Consumers: Advertising and Marketing*, 18(1) *The Future of Children* 208 (Spring 2008).

<sup>15</sup> On the distinction between Stealth Advertising and Embedded Advertising see Zahr Said, *Embedded Advertising and the Venture Consumer* 89 N.C. L. Rev. 109 (2010-2011) (“the word “stealth” has rhetorical and historical connotations that stack the deck against these marketing practices. The term “embedded,” by contrast, is neutral; it merely indicates that the advertisements have been placed into content (or developed with it), thus removing the stigma associated with the fear of deceiving consumers”).

<sup>16</sup> *Sponsorship Identification Rules & Embedded Advertising* 73 Fed. Reg. 43,194, 43,195 (proposed July 24, 2008); see, e.g., Ellen P. Goodman, *Stealth Marketing and Editorial Integrity* 85 TEX. L. REV. 86 (2006); Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit* 47 AM. Bus. L.J. 415-16 (2010); Eric Goldman, *Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman’s Stealth Marketing and Editorial Integrity* (2007), Available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1630&context=facpubs> (last visited April 30, 2016); *Letter from Gary Ruskin, Exec. Dir., Commercial Alert, to Marlene H. Dortch, Sec’y, FCC* (Sept. 30, 2003), Available at <http://www.commercialalert.org/fcc.pdf> (last visited April 30, 2016).

<sup>17</sup> E. Gardner, *Understanding the Net’s Toughest Customer*, 3 *Internet World* 6 (2000).

advertisement.<sup>18</sup> This technique tries to capture the consumers when their “guards” are down, so that they will be more open to persuasive arguments about the product. This way the border between the advertisement and the content is blurred. See in this context Goltz’s<sup>19</sup> first law: “The Truth in the Medium is Context Dependent” as explained in chapter 1 *supra*.

Examples of stealth advertising include ‘planting’ products in movie scenes, the use of word-of-mouth (viral) advertising, creating interactions between children and online characters promoting specific brands, creating advertisements that appear to be video news releases, and employ behavioral advertisement in which information is being collected from children online and is being used to advance targeted advertisement to them.<sup>20</sup> These examples of stealth advertising are designed to create or enhance a branded environment that fosters loyalty.<sup>21</sup> One example of stealth advertising is adver-games, “online video games with a subtle or overt commercial message where the use of product placement is common”.<sup>22</sup> This technique provides information about the user’s engagement with the brand and ensures that the user is in constant interaction with it.<sup>23</sup> Since 64% of American children between the ages of 5 to 14 are using the internet in order to play games, adver-games are a very popular and powerful tool.<sup>24</sup>

In many cases adver-games keep the user immersed with the brand for a growing period of time,<sup>25</sup> hence blurring the line between advertising and entertainment with little understanding of the user children about the advertisement being presented to them while playing these games.<sup>26</sup> Therefore, it is not surprising that only 25% of four and five grade students succeeded

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<sup>18</sup> D. Eisenberg et al., *It's an Ad, Ad, Ad, Ad World*, Time 160:38–42 (2002).

<sup>19</sup> *The User is Bound to All the Rules: Media Manipulation and the Laws of Artificial Media*, with T. Dowdeswell, Journal of Communications Media Studies [forthcoming].

<sup>20</sup> A. Cohen, *Spies among Us*, 3 Time Digital 5; Gardner, *supra* note 17; Mazur L., *Marketing Madness*, 7(3) E Magazine: The Environmental Magazine (1996).

<sup>21</sup> S. L. Calvert, *Future Faces of Selling to Children*, In E. L. Palmer & B. M. Young (eds.), *The Faces of Televisual Media*, Mahwah, N.J.: Erlbaum (2003); K. Montgomery, *Digital Kids: The New On-Line Children's Consumer Culture*, In D. Singer & J. Singer, *Handbook of Children and Media*, Thousand Oaks, Calif.: Sage (2001).

<sup>22</sup> Eisenberg et al, *supra* note 18.

<sup>23</sup> For a thorough discussion of gaming advertisement see Ralf Terlutter & Michael L. Capella, *The Gamification of Advertising: Analysis and Research Directions of In-Game Advertising, Advergames, and Advertising in Social Network Games*, 42(2–3) Journal of Advertising 95–112 (2013).

<sup>24</sup> E. S. Moore & V. J. Rideout, *The Online Marketing of Food to Children: is it just Fun and Games?* 2 J Public Policy Marketing 202–220 (2007).

<sup>25</sup> E. S. Moore, *It's Child's Play: Advergaming and the Online Marketing of Food to Children*, Menlo Park, California: Kaiser Family Foundation (2006).

<sup>26</sup> K. Weber, M. Story & L. Harnack, *Internet Food Marketing Strategies Aimed at Children and Adolescents: a Content Analysis of Food and Beverage Brand Websites*, 9 J. Am Diet Assoc. 1463–1466 (2006).

in recognizing that advertising was, in fact, the purpose of the adver-game.<sup>27</sup>

Other online advertisement techniques includes spokes-characters that promote the brand;<sup>28</sup> social-media marketing;<sup>29</sup> the traditional Banner ads;<sup>30</sup> and mobile advertisement.<sup>31</sup>

## 1.1 Children's Vulnerability

According to Kunkel, children's ability to understand the intention of advertising is developing based on their age.<sup>32</sup> Robertson and Rossiter argue that children younger than eight understand advertising as a tool used to help them in their purchasing decisions; at this age, they are not aware of advertisers' intention to convince them to purchase the product.<sup>33</sup> Piaget's theory of cognitive development is often used in order to explain children's development in understanding advertisements.<sup>34</sup>

Valkenburg and Cantor argue that at a younger age (2-7), children focus their attention on properties such as how a product looks. The children believe that, just like in the advertisement, Santa will bring them the presents portrayed during the Christmas season,

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<sup>27</sup> M. E. Wollslager, *Children's Awareness of Online Advertising on Neopets: the Effect of Media Literacy Training on Recall*, 2 *Studies Media Information Literacy Education* 31–53 (2009).

<sup>28</sup> R. Mizerski, *The Relationship Between Cartoon Trade Character Recognition and Attitude Toward Product Category in Young Children* 4 *J. Marketing* 58–70 (1995); S. M. Neeley & D. W. Sherman, *Using Animated Spokes-characters in Advertising to Young Children* 3 *J. Advertising* 7–23 (2004).

<sup>29</sup> Common Sense Media, *Social Media, Social Life: How Teens View their Digital Lives*, San Francisco: Common Sense Media (2012).

<sup>30</sup> A. E. Ustjanauskas, J. L. Harris & M. B. Schwartz, *Food and Beverage Advertising on Children's Web Sites* 9(5) *Pediatric Obesity* 362-372 (October 2014), Available at <http://onlinelibrary.wiley.com/doi/10.1111/j.2047-6310.2013.00185.x/full> (last visited April 30, 2016).

<sup>31</sup> K. C. Montgomery, S. A. Grier, J. Chester & L. Dorfman, *The Digital Food Marketing Landscape: Challenges for Researchers*, In J. D. Williams et al. (eds.), *Advances in Communication Research to Reduce Childhood Obesity*, New York: Springer 221-242 (2013).

<sup>32</sup> D. Kunkel, et al., *Report of the APA Task Force on Advertising and Children: Psychological Issues in the Increasing Commercialization of Childhood*, Washington, D.C.: American Psychological Association (2004).

<sup>33</sup> D. Robertson & J. Rossiter, *Children and Commercial Persuasion: An Attribution Theory Analysis*, 1 *Journal of Consumer Research* 13-20 (1974).

<sup>34</sup> J. H. Flavell, *The Developmental Psychology of Jean Piaget*, Princeton, N.J.: Van Nostrand (1963).

Preoperational modes of thought put young children at a distinct disadvantage in understanding commercial intent and, thus, in being able to make informed decisions about requests and purchases of products.<sup>35</sup>

A more realistic understanding of the world begins at ages seven to eleven. At this stage, children go beyond the information provided by the advertisement and realize that the intent of the advertisement is to sell them products. Finally, at age twelve, “adolescents can reason abstractly and understand the motives of advertisers even to the point of growing cynical about advertising”.<sup>36</sup>

In a research conducted in the 70s, Robertson and Rossiter questioned 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> grade students about their understanding of advertisements. While only 50% of the 1<sup>st</sup> grade students understood the commercials’ persuasive intent, 87% of 3<sup>rd</sup> graders and 99% of 5<sup>th</sup> graders understood the persuasive intent of the advertisement.<sup>37</sup> While children understanding of advertisement has developed in the last 40 years, so does the sophistication and manipulative nature of advertisers and advertisements.

Education can improve children’s ability to understand the intent of advertisement. Roberts et al presented to children in grades four, six and eight a movie teaching advertisement techniques or a control film. Children who viewed the advertisement techniques film demonstrated a more sceptical approach to advertisements after viewing the film. One week later, these children showed a sophisticated understanding and applied advertising techniques. Second, third, and fifth graders demonstrated weaker but similar effects.<sup>38</sup>

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<sup>35</sup> P. Valkenburg & J. Cantor, *The Development of a Child into a Consumer*, In S. L. Calvert, A. B. Jordan & R. R. Cocking, *Children in the Digital Age: Influences of Electronic Media on Development*, Westport, Conn.: Praeger 201-14 (2002).

<sup>36</sup> *Id.*

<sup>37</sup> D. Robertson & J. Rossiter, *Children and Commercial Persuasion: An Attribution Theory Analysis*, 1 *Journal of Consumer Research* 13-20 (1974).

<sup>38</sup> D. F. Roberts, et al, *Developing Discriminating Consumers*, 30 *Journal of Communication* 229-31 (1980).

The research on children’s learning from interactive media made use of Piaget<sup>39</sup> and Vygotsky’s<sup>40</sup> notion that, “knowledge is constructed through interactions between the knower and the known”. According to Wartella et al.,

Interactive technologies are based on dialogue and turn-taking – a child takes a turn, then a computer responds and takes a turn, then the child takes a turn again. In essence, a conversation is taking place in which each response made by a child leads to potentially different content being shared.<sup>41</sup>

Nonetheless, the nature of the virtual interaction is based on the development level of the child. For example, children younger than eight believe they are really interacting with branded characters. Older children have a better understanding of the differences between what is real and what is imaginary. Advertisers can target the children’s level of understanding therefore achieving a much more effective tool of advertisement than what could be done in traditional TV advertisement, for example. Reber argues that repeated presentation of commercial messages online, “can also tap into children’s implicit memory, which involves learning without conscious awareness”.<sup>42</sup> Auty and Lweis argue that embedded products into entertaining content creates a positive attitude towards that product while the user is not aware of it.<sup>43</sup> In order to help children cope with embedded advertisement, Reid<sup>44</sup> suggests to create online games in which the goal is to identify embedded products.

Another aspect that makes children more vulnerable to online marketing is the immediacy and ease of the purchase. While in television advertisement there is the actual need to go to the store and purchase the product or call the ‘hot line’, on the Internet the purchase can be

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<sup>39</sup> J. Piaget, *Play, Dreams and Imitation in Childhood*, New York: W. W. Norton (1962) (C. Gattegno & F. M. Hodgson – trans.).

<sup>40</sup> Lev Vygotsky, *Imagination and Creativity in Childhood*, 42(1) *J. of Russian and East European Psychology* 7-97 (January–February 2004) (M.E. Sharpe transl.).

<sup>41</sup> E. Wartella, B. O’Keefe & R. Scantlin, *Children and Interactive Media: A Compendium of Current Research and Directions for the Future*, New York: Markle Foundation (2000).

<sup>42</sup> A. S. Reber, *Implicit Learning and Tacit Knowledge: An Essay on the Cognitive Unconscious*, New York: Oxford University Press (1993).

<sup>43</sup> S. Auty & C. Lweis, *The ‘Delicious Paradox’: Preconscious Processing of Product Placements by Children*, In L. J. Shrum, *The Psychology of Entertainment Media: Blurring the Lines between Entertainment and Persuasion* 117-33 Mahwah, N.J.: Lawrence Erlbaum Associates (2004).

<sup>44</sup> Rita-Marie, Reid, *Embedded Advertising to Children: A Tactic that Requires a New Regulatory Approach*, 51(4) *American Business Law Journal* 721, 774-5 (2014).

done with the click of the mouse. There is no delay between the moment where the product is presented in the advertisement and the next moment when the child can purchase it online.<sup>45</sup>

## 1.2 Criticism

An example of the cynical way used by advertisers to convince children to buy products without any moral constrain can be found in Schor's book, 'Born to Buy'.<sup>46</sup> Schor observe that while in the 1920's the purpose of marketers was to convince mothers (the "gatekeepers") that the product being advertised is beneficial for the child,<sup>47</sup> in the 1980s, marketing strategies aim to undermine parental authority in the name of "kid power",

Parents are now presented as neglectful, incompetent, abusive, invisible, or embarrassing. These ads represent authority figures as laughable, and convey the message that the only one capable of understanding children is the corporate sponsor.<sup>48</sup>

According to the case of Thomas Cook and advertising standard Canada,<sup>49</sup> the 'kid power' approach remains intact today.

Fleras<sup>50</sup> emphasise the shift from advertisements that provide information about the product to "creating an emotional connection between the product or brand and the consumer".<sup>51</sup> This emotional connection is achieved by using images, sound and narrative that are either not connected or remotely connected to the product. Fleras further argue that,

By not making verifiable (and therefore, falsifiable) claims that are clearly subject to regulatory scrutiny, this shift in approach could allow advertisers to

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<sup>45</sup> T. Tarpley, *Children, the Internet, and other New technologies*, In Singer & Singer, *supra* note 21.

<sup>46</sup> Juliet Schor, *Born to Buy: The Commercialized Child and the New Consumer Culture*, New York: Scribner (2004).

<sup>47</sup> *Id.*, at 16.

<sup>48</sup> *Id.*, at 54-55, 180.

<sup>49</sup> Nachshon Goltz & Peter Neufeld, *Undermining Parental Authority, Unethical Advertising and the Accountability of self-regulation: ThomasCook.ca as a Fable*, Osgoode Hall Law School, Comparative Research in Law & Political Economy (CLPE) (2013), Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2347345](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347345) (last visited May 1, 2016).

<sup>50</sup> Augie Fleras, *Mass Media Communication in Canada* 186 Toronto: Thomson Nelson (2003); Heather Morton, *Television Food Advertising* 14 *Community Health Stud.* 153 (1990) (observing that few food advertisements in Australia make any nutritional claims whatsoever).

<sup>51</sup> *Id.*, at 210.

partially or completely remove advertising from the oversight of traditional statutory controls on misleading advertising if those controls are narrowly interpreted.

In the virtual worlds, interactivity and the appeal to emotions reveal new dimensions. An example can be found in The Media Awareness Network report in which a fourteen-year old girl took the “Ultimate Personality Test” on Tickle’s predecessor, emode.com.<sup>52</sup> After taking the test, the girl was told that “she values her image”, so the website recommended that she visit e-diets, one of their advertisers, to “prep her body for success”.<sup>53</sup>

Another example of the deep ‘relationship’ artificially created by advertisers between the children and the online content is provided by Steeves,<sup>54</sup>

[t]he site [Barbie.com] incorporates more than a sales pitch – it reinforces the ‘friendship’ between the child and the brand itself. After taking a car trip into the city to help Cali (a doll) get ready for a party, the screen tells her, ‘We’re totally glad your’e chillin’ with our Cali girl crew!’ For US\$1.99, Barbie can also step out of the website and call the child directly on the phone. The site tells girls, ‘Wow! You could get a call from your best friend – Barbie!’.

In this context Lawford<sup>55</sup> and others<sup>56</sup> found that the online world is perceived by children as an extension of the offline world, rather than as a separate space with different rules.

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<sup>52</sup> See *The Death of Emode.com*, The Truth (January 14, 2006), Available at <http://venjanztruth.blogspot.ca/2006/01/death-of-emodecom.html> (last visited April 30, 2016) (The site offered an IM service and contact with people that they “matched” with your test answers).

<sup>53</sup> Valerie Steeves & Jane Tallim, *Kids for Sale: Online Marketing to Kids and Privacy Issues*, Ottawa: Media Awareness Network (2003).

<sup>54</sup> Valerie Steeves, *It’s Not Child’s Play: The Online Invasion of Children’s Privacy* 3:1 UOLTJ 169 (2006).

<sup>55</sup> John Lawford, *All in the Data Family: Children’s Privacy Online*, Ottawa, Canada: Public Interest Advocacy Centre 13 (2008).

<sup>56</sup> See Valerie Steeves, *The Watched Child: Surveillance in Three Online Playgrounds*, Proceedings of the International Conference on the Rights of the Child, Montreal: Wilson Lafleur (2007); Sonia Livingstone, *Children’s Privacy Online: Experimenting with Boundaries Within and Beyond the Family*, In R. E. Kraut, M. Brynin & S. Kiesler (eds.), *Computers, Phones, and the Internet: Domesticating Information Technology*, New York: Oxford University Press (2006) (“Although children see it as a useful tool for learning, the Internet is primarily a social space to them, and the boundaries between it and the real worlds are fluid”); Valerie Steeves, *Young Canadians in a Wired World, Phase II: Trends and Recommendations*, Ottawa: Media Awareness Network (2005); Leslie Regan Shade, Nikki Porter & Wendy Sanchez, *You Can See Anything on the Internet, You Can Do Anything on the Internet!': Young Canadians Talk About the Internet* 30(4) Canadian Journal of Communication,

This led to the development of the “immersive advertising” model mentioned above in which advertisers use adver-games and stealth advertisement. In her book ‘Consuming Kids: The Hostile Takeover of Childhood’ Lin, argues, that,

[s]uch immersive advertising environments are detrimental to the child’s own development by invading the child’s sense of how to play – potentially emotionally and mentally impoverishing the child.<sup>57</sup>

The criticism of advertising to children is so severe that it is now coming from the heart of the advertising industry. Bogusky, widely credited with having invented viral marketing,<sup>58</sup> called the practice of marketing to children a “destructive” practice that has no “redeeming value”. Children are, “incapable of protecting and defending themselves from a message that probably doesn’t have their very best interest at heart,” Bogusky stated, and because it is,

[t]he duty of adults in society...to protect...children, they should demand that corporations and marketers stop spending billions to influence our innocent and defenseless offspring.<sup>59</sup>

Lindstrom, a leading kids marketer, is similarly concerned,

Kids are being led to expect everything to be customized around them, including parents and schools, and if it's not, they lose patience and move on to something else...One of the biggest scares in the future is going to be lack of creative people...We're forcing the brain in the wrong direction, killing all creativity and fantasy.<sup>60</sup>

In light of the said above, advertising to children online poses a real risk to many aspects of the children’s well being. Nonetheless, as stated in earlier chapters, the regulation tends to

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503-526 (2006); Sonia Livingstone & Magdalena Bober, *UK Children Go Online: Listening to Young People’s Experiences*, London: Economic and Social Research Council (2003).

<sup>57</sup> Susan Linn, *Consuming Kids: The Hostile Takeover of Childhood*, New York: The New Press, ch. 4 (2004).

<sup>58</sup> See Susan Krashinsky, *Advertising Whiz Bogusky Takes His Leave*, *Globe and Mail* (July 2, 2010), Available at <http://www.theglobeandmail.com/report-on-business/industry-news/marketing/advertising-whiz-bogusky-takes-his-leave/article4329421/> (last visited April 30, 2016).

<sup>59</sup> From Bogusky blog, cited in J. Bakan, *Childhood under Siege: How Big Business Callously Targets Children*, Toronto: Allen Lane Canada 51 (2011).

<sup>60</sup> Interview with Martin Lindstrom, *Id.*

react slowly and late to new technological and market developments. One of the indications that this is the case with the regulation of advertising to children's online is the fact that there is no real distinction between traditional advertising regulation and the new advertising online.

## **2. The Regulation of Advertising to Children Online**

This section details and analyses the regulation of advertising in Canada and the US, especially regarding advertising to children online. Each part of the section will include the legislation, code of practice, industry codes, recent legal developments and finally the research evaluating the regulation in each of the two jurisdictions. With the exception of Quebec, the focus of the discussion is federal.

### **2.1 Canada**

The general regulatory framework regarding advertising to children in the media is set by the Canadian Radio-television and Telecommunication Commission (CRTC),<sup>61</sup> according to which, children's advertising includes:

- (1) any paid commercial message carried during children's program, and (2)
- any commercial message that is directed to children (defined as those under 12 years of age), whether it's during children's programming or not.<sup>62</sup>

Broadcasters must adhere to the Broadcast Code for Advertising to Children.<sup>63</sup> This Code was created to complement the Canadian Code of Advertising Standards,<sup>64</sup> containing general principles for ethical advertising. The Canadian Code of Advertising Standards is published by

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<sup>61</sup> CRTC Website, Available at <http://www.crtc.gc.ca/eng/acrtc.htm> (last visited April 30, 2016) ("The Canadian Radio-television and Telecommunications Commission (CRTC) is an independent public organization that regulates and supervises the Canadian broadcasting and telecommunications systems. The CRTC does not regulate newspapers, magazines, cell phone rates, the quality of service and business practices of cell phone companies, or the quality and content of TV and radio programs. As an independent organization, the CRTC works to serve the needs and interests of citizens, industries, interest groups and the government. The CRTC reports to Parliament through the Minister of Canadian Heritage").

<sup>62</sup> CRTC Website, *Broadcast Advertising Basics: Revenue, Limits and Content, Children's advertising* Available at <http://www.crtc.gc.ca/eng/television/publicit/publicit.htm> (last visited April 30, 2016).

<sup>63</sup> <http://www.adstandards.com/en/clearance/childrens/broadcastcodeforadvertisingtochildren.aspx> (last visited April 30, 2016).

<sup>64</sup> <http://www.adstandards.com/en/standards/canCodeOfAdStandards.aspx> (last visited April 30, 2016).

the Canadian Association of Broadcasters<sup>65</sup> and Advertising Standards Canada.<sup>66</sup> In Quebec, as will be detailed below, commercial advertising aimed at persons younger than 13 is generally prohibited.<sup>67</sup>

### **(a) Legislation**

Online advertisement directed at children is not directly regulated by legislation in Canada.<sup>68</sup> The federal legislation that is relevant to this field consists of the Competition Act,<sup>69</sup> and recently the Canada Anti Spam Legislation (CASL). In Quebec, The Quebec Consumer Protection Act<sup>70</sup> and related regulations oversee this field. Other provincial legislation is beyond the scope of this discussion and deals mainly with misleading advertisement of specific professionals and products.<sup>71</sup>

#### **(i) Federal Competition Act**

Engaging in false or misleading advertising is a criminal and/or civil offence according to The Competition Act. When advertising to children, fair disclosure will be measured from the

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<sup>65</sup> <http://www.cab-acr.ca/english/about/default.shtm> (last visited April 30, 2016) (“The Canadian Association of Broadcasters (CAB) is the national voice of Canada’s private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. We are the voice and choice of Canadians. Private radio and television services enjoy by far the largest share of the market, and Canadian programming broadcast by those services attracts the predominant share of the total audience for Canadian content”).

<sup>66</sup> <http://www.adstandards.com/en/AboutASC/aboutASC.aspx> (last visited April 30, 2016) (“Advertising Standards Canada is the national not-for-profit advertising self-regulatory body. We are committed to fostering community confidence in advertising and to ensuring the integrity and viability of advertising in Canada through responsible industry self-regulation. Created by the advertising industry in 1957, Advertising Standards Canada was founded on the belief that advertising self-regulation best serves the interests of the industry and the public. This principle has guided our work and our activities on behalf of our members, the public and the industry for over 50 years”).

<sup>67</sup> *Quebec Consumer Protection Act*, Prohibits commercial advertising aimed at children under 13, 40.1, 1978, c. 9, a. 248-249.

<sup>68</sup> Bill Hearn, *Under Age & The Digital Age: The Law and Best Practices When Marketing to Minors Online in Canada*, The Canadian Institute’s, 17th Annual Advertising & Marketing Law Conference (January 20, 2011), Toronto, Ontario, [http://www.mcmillan.ca/Files/119153\\_PRESENTATION\\_AdvMktg\\_UnderAge\\_TheDigitalAge\\_0111.pdf](http://www.mcmillan.ca/Files/119153_PRESENTATION_AdvMktg_UnderAge_TheDigitalAge_0111.pdf) (last visited April 30, 2016).

<sup>69</sup> *R.S.C.* 1985, c. C-34

<sup>70</sup> *R.S.Q.* c. P-40.1

<sup>71</sup> See for example, *British Columbia - Business Practices and Consumer Protection Act*, SBC 2004, c 2, Part 2 — Unfair Practices; *Nova Scotia - Mortgage Brokers and Lenders Registration Act*, RSNS 1989, c 291; *New Brunswick - Dressed Poultry and Eviscerated Poultry Regulation*, NB Reg 88-265; *Manitoba - The Trade Practices Inquiry Act*, CCSM c T110; *Saskatchewan - Private Investigators and Security Guards Act*, RSS 1978, c P-26; *Alberta - Private Vocational Training Act*, RSA 2000, c P-24.

standard of the target audience.<sup>72</sup> To determine liability in online advertisement, a case by case analysis is conducted.<sup>73</sup> Nonetheless, when targeting children, a special standard will be applied.

Section 52 of the Act Makes a criminal offence to make false or misleading representation to the public in any material respect, if done knowingly or recklessly.<sup>74</sup> Non-compliance may result in a fine of up to \$200,000 and/or imprisonment of up to one year on summary conviction. Upon indictment the court has discretion regarding the fine amount and/or imprisonment of up to 14 years.<sup>75</sup>

The civil provision set in Section 74.01(1)(a) of the Act prohibits a person to make or permit the making of a representation to the public, if this representation is false or misleading in a material respect. Intention is not required. In the first instance, for such an offence administrative monetary penalties (“AMPs”) of up to \$750,000 for individuals and up to \$10,000,000 for corporations may be imposed. The AMP can be increased in subsequent offences up to \$1,000,000 in the case of individuals and \$15,000,000 in the case of corporations.<sup>76</sup> Under both provisions, the literal meaning and “general impression” are considered in the determination of whether a representation has been false or misleading.

The case of Popsicle Industries Inc. (Canada) shows that it is the duty of the advertiser to meet the demand of its target audience, especially in the case of children. In the case of Popsicle, the charge was that Popsicle violated the Competition Act in a promotion targeted at minors.<sup>77</sup> Participants in Popsicle promotion were allowed to exchange “points” for prizes. These prizes included games by Nintendo. Nonetheless, due to unexpected demand for the Nintendo prize, Popsicle awarded substitute rewards. These substitute prizes were at a lower quality and less

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<sup>72</sup> Competition Bureau, *Misleading Advertising Guidelines* (2001), Available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02776.html> (last visited April 30, 2016).

<sup>73</sup> Competition Bureau, *Enforcement Guidelines re: Application of the Competition Act to Representations on the Internet* (October 16, 2009), Available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03134.html> (last visited April 30, 2016).

<sup>74</sup> Note that section 75 of FISA: C-28 amends the *Competition Act* by specifically providing in a new section 52.01 for the following new criminal offences: for the purpose of promoting a business interest, knowingly or recklessly making a false or misleading representation in (1) the sender information or subject matter information of an electronic message, (2) an electronic message and (3) a locator.

<sup>75</sup> *Competition Act*, R.S.C. 1985, c. C-34, at s 52(5).

<sup>76</sup> *Id.*, s. 74.1.

<sup>77</sup> The company was charged under s.59 of the *Competition Act*, the predecessor to s. 74.06.

desirable. Eventually, Popsicle gave Nintendo prizes to all of the participants and paid a fine of \$200,000 for the delay in awarding these prizes.<sup>78</sup>

In 2012 the Supreme Court in *Richard v. Time*<sup>79</sup> held that misleading advertising claims ought to be determined from the point of view of the, “credulous and inexperienced consumer”. The first general impression that the advertisement made on the viewer substitute the misleading element. The “credulous and inexperienced consumer” does not have experience in detecting the falsehoods in advertisements, his intelligence is less than average, and he is not particularly well-informed, prudent, nor diligent.

The Commissioner of Competition expressed the view that the decision in *Richard v. Time* is directly relevant to the application of the Competition Act. This approach aligns with the Competition Bureau’s aggressive enforcement of the Competition Act. For example, in the *Yellow Pages Marketing* case, the Competition Bureau was successful in obtaining \$9 million. This is the highest AMP that was awarded to date in a proceeding dealing with misleading advertising.<sup>80</sup>

A relatively new addition to the Competition Act is the Canada’s anti-spam legislation (CASL). This legislation requires that in the case of sending “commercial electronic messages”, there will be strict consent by the receiver, and unsubscribe option available. Under this new legislation express consent is required in the case of installing a computer program on any other person’s computer system. Cookies are considered computer programs and therefore there is a need for consent to install cookies where, “the person’s conduct is such that it is reasonable to believe that they consent to the program’s installation”.

The regulator under CASL can impose AMP’s of up to \$1,000,000 for an individual per violation and \$10,000,000 for businesses. Coming into force in July 1, 2017, CASL allows a

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<sup>78</sup> This case is discussed at more length in Bill Hearn, *From Windfalls to Catastrophes: Canadian Contest Law and Practice*, Paper delivered at the Canadian Institute’s Advertising and Marketing Law Conference (25 January 2007), Available at [http://www.mcmillan.ca/Files/BHearn\\_Windfalls\\_to\\_Catastrophes\\_0107.pdf](http://www.mcmillan.ca/Files/BHearn_Windfalls_to_Catastrophes_0107.pdf) (last visited April 30, 2016).

<sup>79</sup> *Richard v. Time Inc.*, [2012] 1 SCR 265, 2012 SCC 8 (CanLII).

<sup>80</sup> *Commissioner of Competition v. Yellow Page Marketing*, 2012 ONSC 927 (Sup. Ct.) (faxes that were sent by a group of companies and individuals, meant to lead recipients to believe they were confirming online directory information for the Yellow Pages Group (“YPG”). These companies, using names and logos resembling YPG, were unrelated to YPG and used fine print disclaimers to sign-up recipients to new two-year online directory contracts with significant fees.

private right of civil action with the award of damages of up to \$200 per violation (i.e. for every email sent), but not more than \$1 million per day.

The purpose of CASL is to prevent unsolicited or misleading commercial electronic messages (“CEMs”) and deter individuals and companies from engaging in other forms of online fraud. CASL comes into force when commercial electronic messages are sent by a computer system in Canada to a recipient. The location of the sender or recipient are not important. The provisions of CASL relating to CEMs came into force on July 1, 2014.

(ii) Quebec Consumer Protection Act

The Quebec Act banning advertising to children was the first such law in the twentieth century.<sup>81</sup> At its inception, the concerns related to consumption of heavily-promoted sugary foods and the accompanying risks of tooth decay were part of the justification for the ban.<sup>82</sup> But, the primary rationale was related to the unique vulnerability of children to deception.<sup>83</sup> The Quebec Act and its Regulations<sup>84</sup> are the only legislation in Canada prohibiting advertising directed at children. The Act does not consider specifically the issue of online advertising to children.<sup>85</sup> However, it has been applied by the government and provincial courts to marketing directed at children on the Internet.<sup>86</sup>

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<sup>81</sup> Corrina Hawkes, *Marketing Food to Children: The Global Regulatory Environment* 20 World Health Organization (2004), Available at <http://whqlibdoc.who.int/publications/2004/9241591579.pdf> (last visited April 30, 2016).

<sup>82</sup> e.g., Fed.-Provincial Comm. On Adver. Intended for Children, Quebec Dep’t of Commc’n, *The effects of Quebec’s legislation prohibiting advertising intended for children* 35 (1985) (citing the possible long-term implications of advertising to children for health and dental costs); John P. Murray, *Quebec Law Leads the way Out of “Kidvid” Wasteland*, Toronto Star A15 (June 19, 1989), Available at <http://www.thestar.com> (available for purchase in archives).

<sup>83</sup> See *Att’y Gen. of Quebec v. Irwin Toy, Ltd.*, [1989] 1 S.C.R. 927 (Can.). The Supreme Court accepted the following explanation of the objective of the legislation: “The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising. In the words of the Attorney General of Quebec, [Trans.] ‘Children experience most manifestly the kind of inequality and imbalance between producers and consumers which the legislature wanted to correct.’ (*Id.*, at 987).

<sup>84</sup> *R.Q.C.* P-40.1, r.1.

<sup>85</sup> Not surprising given that the relevant provision was drafted over 30 years ago.

<sup>86</sup> Office de la protection du consommateur, *General Mills plaide coupable d’avoir fait de la publicit\_e commerciale destin\_ee aux enfants*. Quebec: Office de la protection du consommateur (2009), Available at <http://www.newswire.ca/news-releases/general-mills-plaide-coupable-davoir-fait-de-la-publicite-commerciale-destinee-aux-enfants-sur-le-web-537252151.html> (last visited April 30, 2016).

Commercial advertising directed at persons under 13 years of age is prohibited by the Act.<sup>87</sup> Whether the advertisement is directed at children is determined by the following contextual factors, “a) the nature and intended purpose of the goods advertised, b) the manner that the advertisement is presented and c) the time and place that it is shown”.<sup>88</sup> According to the Regulations, advertisers may not portray goods, persons or services in such way that may be potentially harmful or misleading. The use of professionals or animated cartoons for endorsements is prohibited.

In general, the Act and Regulations are enforced. In 2009, Saputo Inc. manufacturer of Vachon snack cakes was ordered to pay a fine of \$44,000 as a result of a 2007 campaign in which the company distributed Igor cakes and merchandise in daycare centers.<sup>89</sup> Charges under the Act were also made against Burger King, McDonald’s, and General Mills, for sponsoring Tele-Quebec children’s movies as well as distributing toys with meals intended to children. Nonetheless, eventually although charged and pled guilty, General Mills was subject to an insignificant fine of \$2,000.<sup>90</sup> The problem with enforcing the Quebec Act relates to the complaint process according to Kent et al.,<sup>91</sup>

[s]ome food and beverage companies are not respecting Quebec’s Consumer Protection Act on the Internet. The key to strengthening this Act is systematic surveillance, as currently the Quebec government relies on consumer complaints.

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<sup>87</sup> See Bill Jeffery, *The Supreme Court of Canada’s Appraisal of the 1980 Ban on Advertising to Children in Quebec: Implications for “Misleading” Advertising Elsewhere* 39 *Loyola of Los Angeles Law Review* 242 (2006) for a table summarizing Office de la protection du consommateur, Regulation Respecting the Application of the *Consumer Protection Act* (2004) (Can.), which is an English version of a guide that discusses sections 248-9 of the consumer Protection Act.

<sup>88</sup> *Quebec Consumer Protection Act*, R.S.Q. c. P-40.1, at s. 249

<sup>89</sup> Graeme Hamilton, *The Junk Food Wars*, *National Post* (27 January 2009), Available at <https://www.sott.net/article/175852-The-Junk-Food-Wars> (last visited April 30, 2016).

<sup>90</sup> Canadian Press, *Watchdog Bites General Mills over Lucky Charms ad Campaign*, *The Western Star* (26 February 2009), <http://www.cbc.ca/news/canada/montreal/quebec-watchdog-bites-general-mills-over-lucky-charms-ad-campaign-1.837472> (last visited April 30, 2016).

<sup>91</sup> M. Potvin Kent, L. Dubois, E. A. Kent & A. J., *Wanless, Internet Marketing Directed at Children on Food and Restaurant Websites in Two Policy Environments* 21(4) *Obesity* 805 (April 2013).

## (b) The Federal Commission

Section 5(1) of the of the Broadcasting Act<sup>92</sup> sets the Objects and Powers of the Canadian Radio-television and Communication Commission in Relation to Broadcasting, “the Commission shall regulate and supervise all aspects of the Canadian broadcasting system”. The Canadian Radio-television and Telecommunications Commission Act<sup>93</sup> oversee the establishment of the commission.

In 1974, both the Federal Communication Commission (FCC - US) and Canadian Radio-Television and Communication Commission (CRTC - Canada) became more engaged in the realm of children’s media, with the establishment of new policy guidelines regarding children's programmers and advertisers.<sup>94</sup> Both the US and the Canadian government began applying pressure on the industry to, "adopt codes regulating some of the worst excesses of children's advertising" and "violence," and include more programming with educational content.<sup>95</sup> Nonetheless, by the 1980s, the tendency towards self-regulation led to relaxing the requirements and leaving the regulation at the hands of the industry.<sup>96</sup>

Advertising limitations encountered compliance and enforcement challenges in both countries. According to Shanahan & Hyman, in the US,

Despite clear prohibitions on host selling (since 1974) and program-length commercials (since 1992) targeted at children<sup>97</sup> television stations continue to violate children's television rules with very little repercussion.<sup>98</sup>

In Canada, Jeffery argues,

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<sup>92</sup> S.C. 1991, c. 11

<sup>93</sup> RSC 1985, c C-22

<sup>94</sup> T. Engelhardt, *The Strawberry Shortcake Strategy*, In T. Gitlin (ed.), *Watching television: A Pantheon guide to popular culture*, New York: Pantheon Books 68-100 (1986).

<sup>95</sup> *Id.*, at 75. In the US, for example, this included new restrictions on "host selling" or "the use of program talent to deliver commercials" aired during or adjacent to the program. See K. J. Shanahan & M. R. Hyman, *Program-length commercials and host selling by the WWF* 106(4) *Business and Society Review* 381 (2001).

<sup>96</sup> Sara M. Grimes, *Kid's' Ad Play: Regulating Children's Advergemes in the Converging Media Context* 12 *Int'l J. Comm. L. & Pol'y* 161 (Winter 2008); for the history of the CRTC decisions see Paul Horwitz, *Regulating TV Violence: An Analysis of the Voluntary Code Regarding Violence in Television Programming* 52 *U. Toronto Fac. L. Rev.* 345 (1993-1994).

<sup>97</sup> Engelhardt, *supra* note 94, at 379.

<sup>98</sup> *Id.*, Shanahan and Hyman report 37 violations of the program-length commercial and host selling rules between 1998 and 2001 alone.

[t]here is no evidence on record that the CRTC has ever considered violations of the Children's Code to determine whether a license should be renewed, revoked, or subjected to additional terms.<sup>99</sup>

In June 2015, the Standing Senate Committee on Social Affairs, Science and Technology chaired by Senator Kelvin Kenneth Ogilvie met to continue its study on the increasing incidence of obesity in Canada: causes, consequences and the way forward.<sup>100</sup> The committee met with the CRTC Executive Director, Broadcasting, Scott Hutton, and the Director, Social and Consumer Policy, Nanao Kachi to discuss the regulation of advertising to children in Canada. The CRTC representative's presentation to the committee is telling and encapsulate most of what is wrong in the regulation of advertising to children in Canada.

At the outset of his presentation, Mr. Hutton states that,

[a]lthough the CRTC does not directly regulate advertising content, we do intervene when it comes to basic standards for advertising aimed at Canadians aged 12 years and younger.

This intervention includes, according to Mr. Hutton, requirement from broadcasters to adhere to the *Broadcast Code for Advertising to Children*, the Canadian Children's Food and Beverage Advertising Initiative administered by ASC, and advertising pre-clearance, a service performed by Advertising Standards Canada. According to Mr. Hutton,

Such measures are working. the CRTC collects and addresses complaints made by Canadians about the appropriateness of content aired by broadcasters. In 2014–15, we received over 2,800 complaints related to television programming. Of those, only 30—or less than 1% of the complaints—concerned advertising directed at children.

Following Mr. Hutton statement that there are no complaints to the CRTC about

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<sup>99</sup> B. Jeffery, *The Supreme Court of Canada's appraisal of the 1980 ban on advertising to children in Quebec: Implications for "misleading" Advertising Elsewhere* 39 *Loyola of Los Angeles Law Review* 249 (2006).

<sup>100</sup> Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, Issue 37 - Evidence - June 11, 2015, <http://www.parl.gc.ca/content/sen/committee/412/SOCI/37EV-52229-E.HTM>

advertising to children, Senator Stewart Olsen was skeptical saying that, “with the industry setting its own standards, they are after advertising money” and asked how often does the CRTC review and redo the advertising to children standards, “Apparently the code was put in place in 1978, so I would be interested in hearing about your reviews of it”. Nanao Kachi, Director, Social and Consumer Policy, at the CRTC answers with no hesitation, “We base our determination as to whether or not the code needs to be reviewed on input from Canadians...we basically have no complaints.”.

A brief look at the CRTC website solves the mystery and provides a different reason as to why the CRTC is not receiving any complaints about advertising to children – the option to make a complaint to the CRTC about advertising to children does not exist. When choosing the ‘Make a complaint -> TV/Radio (for the Internet the option of ‘Advertising’ does not exist) -> Advertising’ option in the CRTC website, there are three options: inappropriate content/false or misleading content/sound levels.<sup>101</sup> When choosing ‘inappropriate content’, the following message appears,

For concerns related to **inappropriate content in advertising**, you should try to resolve the issue with the broadcaster. Many questions or complaints are resolved at this stage.

If your issue remains unresolved, please contact Advertising Standards Canada (ASC). As Canada’s advertising self-regulatory body, they administer the *Canadian Code of Advertising Standards*, the principal instrument of advertising self-regulation in Canada. The *Code* sets the criteria for acceptable advertising and forms the basis for the review and adjudication of consumer and advertising disputes.

In the case of ‘false or misleading content’, the CRTC website refers the complainant to the Competition Bureau. It is only with regard to complaints about ‘sound level’ that the CRTC will deal with the complaint, after the complainant will contact the broadcaster and the complaint will not be settled.

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<sup>101</sup> CRTC website, <http://www.crtc.gc.ca/eng/question.htm#asc>

Given this structure, it is not surprising that the CRTC top area of complaints, according to Mr. Hutton, is, “the loudness of advertising [which] comes front and centre”.

The same pattern of reply by the CRTC representatives demonstrated above with regard to complaints, arise with respect to the regulatory mechanism that oversees advertising to children. The regulatory regime is described by Mr. Hutton as a, “co-regulation form”,

We trust the industry to co-regulate itself and to work out best situations. If there are issues that arise, they always come back to the commission. The commission has final say and can impose further conditions or restrictions, or require improvements to those conditions through its own motions.

However, in a further explanation about ASC pre-clearance system cast doubt as to the trustworthiness of the industry in overseeing itself,

When an advertiser comes to Advertising Standards Canada to have their advertisements reviewed, there is a fee associated with that.

It is unlikely that ASC will reject an advertisement when its source of revenue relies on the fee paid by the advertisers for the preclearance process. Therefore, it seems that in theory the CRTC is maintaining a co-regulation regime where the government is overseeing the self regulatory body (i.e., ASC), however, when this oversight is focused mainly on enforcing compliance and given that the self regulatory body is biased towards approving the advertisements and rejecting code based complaints, the government involvement is theoretical and the alleged co-regulatory regime is actually plain self regulation.

As to the regulation of the Internet, the CRTC position is clear, “We don't regulate other forms of digital social media”. When asked if there is any regulation, the CRTC representatives answer that there is not and this is the reason for their approach of empowering the users,

[t]hat's why we're making the point that we need to work collectively on engaging citizens, teaching them about advertising, teaching them about being digital savvy and that is our message, even as we are looking at other forms of

our interventions. Restrictions don't seem to work as well as in the past. We need to educate and get the proper messages out.

Nonetheless, intentions and performance do not walk together when it comes to the CRTC as they refer the committee to the work of MediaSmarts, a not for profit independent organization which is supported by the CRTC. A review of the relevant parts of MediaSmarts website,<sup>102</sup> reveals material which is dated, is not intended for children, not interactive and raises questions as to whether anyone is using it. In addition, the CRTC latest imitative, '*Let's Talk TV*',<sup>103</sup> is silent about media literacy, advertising to children or any topic relevant to this discussion.

In 2009, the CRTC decided to maintain the exemption status of new media broadcasting undertakings.<sup>104</sup> The Broadcasting Act would not apply to Internet content, as the new technology was still changing in a way that continued to justify various exemptions. Then, in February 2011, the Supreme Court of Canada stated that Internet providers do not fall under the laws that apply to broadcasters since they have no control over the content they distribute. This decision settled the ongoing debate to determine whether or not Internet service providers were broadcasters.<sup>105</sup>

A related field in which the CRTC was much more active, is the regulation of violence in children television programs. The following discussion purpose is to demonstrate the CRTC dealing, across time, with a harm which is both virtual and intangible, thus similar to the harm caused by advertising to children and the harm identified in chapter 1 supra. A discussion on the affects of violent television on children or the fine differences between the nature of the harm from violent television and the nature of the harm from advertising and the potential harm to imaginative development from virtual worlds use as well as the rich literature on the regulation of violent video game, is beyond the scope of this discussion.

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<sup>102</sup> MediaSmarts website, <http://mediasmarts.ca/digital-media-literacy/media-issues/marketing-consumerism> - provide resources for parents and teachers; <http://mediasmarts.ca/digital-media-literacy/digital-issues/online-marketing> - for online.

<sup>103</sup> CRTC website, *Let's Talk TV: A Conversation with Canadians* <http://www.crtc.gc.ca/eng/talktv-parlonstele.htm>

<sup>104</sup> CRTC Broadcasting Regulatory Policy 2009-329, *Review of Broadcasting in New Media*, 4 June 2009.

<sup>105</sup> Reference re Broadcasting Act, [2012] 1 S.C.R. 142.

According to the CRTC website,<sup>106</sup>

Canadian policies prevent children from being exposed to inappropriate violence on TV. Work on these policies began in the early 1990s, and continues.

According to the CRTC public notice,

The CRTC policy focuses on three areas: broadcasters' responsibilities, which include the industry codes of conduct', parents' responsibilities, including tools parents can use to make informed viewing choices, and media literacy.<sup>107</sup>

In February 1993, the National Action Group, later renamed Action Group on Violence on Television ("AGVOT"), was formed to further examine the issue of violence in Canadian children programming. AGVOT was comprised of representatives of the broadcasting industry. In September 1993 a General Statement of Principles was adopted by AGVOT concerning the depiction of violence in children television programming. These principles prohibited depiction of gratuitous violence; pose responsibility on broadcasters to be sensitive to the concerns for children; and a commitment by licensees to provide viewers with adequate information about the subject matter of programs offered. The principles expressed the commitment of the Canadian broadcasting industry to adopt a code dealing with violence in television programming, based on the General Statement of Principles.<sup>108</sup>

In October 1993, the revised Voluntary Code Regarding Violence in Television Programming was submitted by the Canadian Association of Broadcasters<sup>109</sup> (CAB). This

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<sup>106</sup> [http://www.crtc.gc.ca/eng/info\\_sht/b317.htm](http://www.crtc.gc.ca/eng/info_sht/b317.htm) (last visited April 30, 2016).

<sup>107</sup> Public Notice CRTC 1996-36; Industry Code Regarding Violence in Television Programming (Public Notice CRTC 1993-149); Pay Television and Pay-per-View Programming Code Regarding Violence (Public Notice CRTC 1994-155).

<sup>108</sup> See Report to the Canadian Radio-television and Telecommunications Commission from the Action Group on Violence on Television, *Report on a Classification System for Violence in Television Programming to be used in conjunction with V-chip Technology* (April 30, 1997), Available at [http://www.cab-acr.ca/french/societal/antiviolence/agvot\\_vchip.shtm](http://www.cab-acr.ca/french/societal/antiviolence/agvot_vchip.shtm) (last visited April 30, 2016).

<sup>109</sup> <http://www.cab-acr.ca/english/about/default.shtm> (last visited April 30, 2016) ("The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. We are the voice and choice of Canadians. Private radio and television services enjoy by far the

revised Code embraced the principles set out by AGVOT. The CRTC accepted the code in its Public Notice announcement.<sup>110</sup>

The Violence Code, administered by the Canadian Broadcasting Standards Council,<sup>111</sup> was used for the first time on 24 October 1994, as a response to complaints about violence in what was then the most commercially successful children's television program of all time: *Mighty Morphin Power Rangers*.<sup>112</sup> The adjudicators found that all of the episodes violated several of the standards of the Violence Code. Following this decision, the broadcaster stopped airing the series a few months later. Nonetheless, despite the decision, the show was still available via broadcasters not subject to the authority of the CBSC. This issue pressured the CRTC to establish a regulatory system to apply to all channels available in Canada.

In the fall of 1995 the CRTC held regional consultations on television violence, followed by a national public hearing in October. In the resulting Policy, the CRTC stated its intention to develop program rating classification systems and announced an acceptable blocking technology that would function in tandem with that system.<sup>113</sup> In March 1996, the CRTC outlined its policy in a report entitled 'Respecting Children: A Canadian Approach to Helping Families Deal with Television Violence'. The report stated that the solution to the problem of violence on television will be a combination of adoption of industry codes and a rating system – accounting for 10%, Vchip technology accounting for another 10% and finally, public awareness and media literacy programs that would account for 80% of the solution.

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largest share of the market, and Canadian programming broadcast by those services attracts the predominant share of the total audience for Canadian content").

<sup>110</sup> Public Notice CRTC 1993-149 (28 October 1993), Available at <http://www.crtc.gc.ca/eng/archive/1993/PB93-149.htm> (last visited April 30, 2016).

<sup>111</sup> CBSC website, <http://www.cbsc.ca/about-us/> ("The CBSC is a national voluntary self-regulatory organization created by Canada's private broadcasters to deal with complaints made by viewers or listeners about programs they have seen or heard broadcast on a participating station. The CBSC administers seven industry codes covering various issues relating to ethics, violence on television, equitable portrayal, journalistic ethics, cross-media ownership, and pay television which set out the guidelines for television and radio programming. Our Associates include almost all private sector radio and television stations, specialty services and pay television services from across Canada, programming in English, French and third languages. The CBSC was first incorporated on August 15, 1990 and was recognized by the Canadian Radio-Television and Telecommunications Commission (CRTC) on August 30, 1991 in its Public Notice 1991-90").

<sup>112</sup> Andreh Caron & Ronaldi Cohen, *Regulating Screens Issues in Broadcasting and Internet Governance for Children*, McGill-Queen's University Press, London, 2013

<sup>113</sup> CRTC, Broadcasting Public Notice CRTC 1996-36, Policy on Violence in Television Programming, 14 March 1996.

Following this statement, AGVOT presented its planned rating classification system on 30 April 1997, and the CRTC approved it on 18 June. The classification system came into effect in September 1997, when Canadian broadcasters began to air the ratings icons. By 2001, most analog television sets larger than thirteen inches on the Canadian market had V-chips. By March 2001, all Canadian broadcasters coded rating information in accordance with the V-chip, and by 2005 the chip and the ratings classification system were well established. Full responsibilities for the administrative duties concerning these two mechanisms were transferred to the CBSC on 1 March 2007. The CBSC became the self-regulatory organization that administers the codes concerning violence and equitable portrayal in broadcasting. It is now responsible for everything related to the rating classification system and V-chip, and it has reported that between 2000 and February 2008 the number of complaints concerning television violence dropped by around 22 per cent.<sup>114</sup>

In 2002, a complaint similar to those from 1994 was made concerning a new Power Rangers series, Power Rangers Wild Force, broadcast by CTV. The CBSC disagreed. No program targeting children has been the subject of complaints to the CBSC since that time.<sup>115</sup>

A review of children channels licensing decisions illustrates the CRTC's vague implementation of the violence in children's programs discussion. For example, Broadcasting Decision CRTC 2006-381,<sup>116</sup> dated 18 August 2006, dealing with the renewal of the license for YTV states:

In accordance with its usual practice for specialty television services, the Commission is imposing **conditions of licence** requiring the licensee to adhere to industry codes related to sex-role portrayal, advertising to children and the depiction of violence in television programming.

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<sup>114</sup> Submission of the Canadian Broadcast Standards Council to the Standing 144 Notes to pages 61–5 Committee on Canadian Heritage regarding Bill C-327, 6 March 2008, 3.

<sup>115</sup> Caron & Cohen, *supra* note 112.

<sup>116</sup> CRTC Website, <http://www.crtc.gc.ca/eng/archive/2006/db2006-381.htm>; see also Broadcasting Decision CRTC 2004-12, 21 January 2004, <http://www.crtc.gc.ca/eng/archive/2004/db2004-12.htm> (in the matter of Teletoon).

The decision further states that YTV, “shall adhere to the guidelines on the depiction of violence in television programming set out in the CAB's *Voluntary code regarding violence in television programming*”.<sup>117</sup>

### **(c) Code of Practice**

#### **(i) The Canadian Code of Practice for Consumer Protection in Electronic Commerce**

In January 16, 2004 the federal, provincial and territorial ministers of consumer affairs first endorsed the Canadian Code of Practice for Consumer Protection in Electronic Commerce<sup>118</sup> created by The Consumer Measures Committee.<sup>119</sup> The Code establishes benchmarks for good business practices for merchants who are engaged in e-commerce, and is now open to private-sector and consumer organizations to endorse. Communications with children is set in Principle 8 of the Code.<sup>120</sup> Section 8.1 states that,

[v]endors have a social responsibility to determine whether the person with whom they are communicating or transacting is a child. When communicating with children, or when the content is likely to be of interest to children, the language must be age-appropriate, must not exploit the credulity, lack of experience or sense of loyalty of children, and must not exert any pressure on children to urge their parents or guardians to purchase goods or services.

Vendors are required to take all reasonable steps to prevent monetary transactions with children,<sup>121</sup> and are forbidden from collecting, using or disclosing personal information of children without the express, verifiable consent of their parents or guardians.<sup>122</sup> When seeking

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<sup>117</sup> *Id.*

<sup>118</sup> <http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/fe00064.html> (last visited May 1, 2016).

<sup>119</sup> See Consumer Measures Committee Website, Available at [http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h\\_fe00013.html](http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h_fe00013.html) (last visited May 1, 2016) (“[T]he Consumer Measures Committee (CMC) was created under Chapter Eight of the Agreement on Internal Trade (AIT). The Consumer Measures Committee has a representative from the federal government as well as every province and territory. The CMC provides a federal-provincial-territorial (FPT) forum for national cooperation to improve the marketplace for Canadian consumers, through harmonization of laws, regulations and practices and through actions to raise public awareness.”).

<sup>120</sup> <http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/fe00073.html> (last visited May 1, 2016).

<sup>121</sup> *Id.*, section 8.2

<sup>122</sup> *Id.*, section 8.3 (except as provided for in sections 8.5 and 8.6 - 8.5 When contests or clubs are directed at children, vendors may collect children's personal information without parental consent and communicate directly with those children, when vendors: a) collect the minimum amount of information required to provide the club

parental consent, vendors shall clearly specify the nature of the proposed communications, the personal information being collected and all potential uses of the information. Vendors are not allowed to send marketing e-mail to children.<sup>123</sup> These principles are voluntary.<sup>124</sup>

#### **(d) Industry Codes**

The compliance with industry codes of advertising is voluntary. Nonetheless, organizations as the Canadian Marketing Association (CMA)<sup>125</sup> and Advertising Standards Canada (ASC), employ enforcement and disciplinary measures against their members in cases where the members does not follow the standards set out in their respective codes. Although the legal consequences of breaching these codes are minor, the negative publicity resulting from such breaches can be a major deterrent to make sure that members comply with the code.

##### **(i) CMA Code of Ethics and Standards of Practice**

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membership or to determine the winner of a contest; b) limit communications only to those required to provide the club membership; c) in the case of contests, only deal with the parents or guardians of the winner(s) and do not contact the winner(s); d) retain the information only as long as the children remain members of the club or until the conclusion of the contest; and e) make no use of the information other than to provide the club membership or to determine a contest winner. 8.6 When vendors contract with third parties to provide a club membership or to determine the winner of a contest, vendors shall disclose only the personal information necessary for this, and shall ensure that the third parties agree to comply with principles 4 and 8.).

<sup>123</sup> *Id.*, section 8.4.

<sup>124</sup> CIPPIC, *Submission to the House of Commons Standing Committee on Access to Information, Privacy and Ethics on the Personal Information Protection and Electronic Documents Act* (“PIPEDA”) 15 (November 28, 2006), Available at <https://www.yumpu.com/en/document/view/22500202/written-submission-on-the-identity-trail> (last visited May 1, 2016).

<sup>125</sup> CMA, “About CMA”, <http://www.the-cma.org/about> (last visited May 1, 2016) (“The Canadian Marketing Association (CMA) is the only marketing association in Canada that embraces Canada’s major business sectors and all marketing disciplines, channels and technologies. Its programs help shape the future of marketing in Canada by building talented marketers and exceptional business leaders and by demonstrating marketing’s strategic role as a key driver of business success.”).

The CMA Code is a measure of self-regulation by the marketing community.<sup>126</sup> The CMA's Code is compulsory for members.<sup>127</sup> Section K of the code deals with, "Special Considerations in Marketing to Children". The Code considers children to be under the age of 13.<sup>128</sup> According to the Code, it should be recognized by marketers that children are not adults and that not all marketing techniques are appropriate for children.<sup>129</sup> Opt-in consent of the child's parent or guardian is required for any marketing interactions directed to children that include the collection, transfer and requests for personal information.<sup>130</sup> Children's information should be immediately deleted if the child, parent or guardian withdraws or declines permission to collect, use or disclose a child's information.<sup>131</sup>

According to the Code, it is not allowed to exploit children's credulity, lack of experience or sense of loyalty,<sup>132</sup> and marketing communications must be age appropriate and presented in simple language, easily understood by children.<sup>133</sup> Finally, a parent or guardian's opt-in consent must be obtained in order to accept an order from a child and the marketers are not allowed to pressure a child to urge their parents or guardians to purchase a product or service.<sup>134</sup>

Section N4.11 of the Code deals with Online Interest-based Advertising,<sup>135</sup> and determines three principles when using internet and app interest-based advertising,

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<sup>126</sup> CMA, *Code of Ethics and Standards of Practice*, <http://www.the-cma.org/regulatory/code-of-ethics> (last visited May 1, 2016).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*, section k1.

<sup>129</sup> *Id.*, section k2.

<sup>130</sup> section k3.1 with the exception of K4 Contests Directed to Children, Subject to applicable laws, marketers may collect personal information from children for the purposes of contests without obtaining the parent or guardian's opt-in consent, only if the marketer: (a) collects a minimal amount of personal information, sufficient only to determine the winner(s); (b) deals only with the winner(s)' parent or guardian and does not contact the winner(s); (c) does not retain the personal information following the conclusion of the contest or sweepstakes; (d) makes no use of the personal information other than to determine the contest or sweepstakes winner(s); and (e) does not transfer or make available the personal information to any other individual or organization.

<sup>131</sup> *Id.*, section K3.2.

<sup>132</sup> *Id.*, section K5.

<sup>133</sup> *Id.*, section K6.

<sup>134</sup> *Id.*, section K7.

<sup>135</sup> *Id.*, section N4.11 ("Online interest-based advertising, sometimes referred to as online behavioral advertising, refers to tracking consumers' online activities over time in order to deliver advertisements that are relevant to individuals' inferred interests. In advertising their goods or services through online interest-based advertising, marketers may directly or indirectly make use of service providers that include communications agencies, ad networks and website publishers.").

- a. *Transparency*: Marketers should be transparent when collecting, using, disclosing and retaining information regarding their consumers.
- b. *Consent*: Marketers must take the appropriate steps to allow consumers to opt-out from tracking and behavioral advertisement.
- c. *Children*: Unless an opt-in consent was obtained from a parent or a guardian, marketers must not advertise to children under the age of 13.

Following a complaint made by a consumer, a member that does not comply with the CMA Code, will be summoned to an inquiry by the CMA. Failing to respond to the CMA or to satisfy the CMA that best efforts to comply with the CMA Code was done by the member organization, will bring to the referral of the complaint to mediation. If the mediation does not succeed, a hearing by an independent panel is conducted. CMA's board of directors will hold a meeting with the member organization upon receipt of the panel's report. The meeting will determine, a) whether the member organization is willing to follow the panels' recommendations, b) make an order for corrective action or c) make a public announcement that the member is expelled.<sup>136</sup>

(ii) Canadian Code of Advertising Standards

Being a national advertising self-regulatory organization, Advertising Standards Canada ("ASC") administers the Canadian Code of Advertising Standards and the Broadcast Code for Advertising to Children. Clauses 12 and 13 of the Canadian Code of Advertising Standards are directed at children and determine that,

Advertising that is directed to children must not exploit their credulity, lack of experience or their sense of loyalty, and must not present information or illustrations that might result in their physical, emotional or moral harm<sup>137</sup>

In addition, the code defines that,

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<sup>136</sup> *Id.*, at Section Q.

<sup>137</sup> *Id.*, section 12.

Products prohibited from sale to minors must not be advertised in such a way as to appeal particularly to persons under legal age, and people featured in advertisements for such products must be, and clearly seen to be, adults under the law.<sup>138</sup>

Under the Broadcast Code ASC regulates advertisements in the broadcast media that is specifically directed to children.<sup>139</sup> Several of ASC's policies provide the framework for advertisement to children's online.<sup>140</sup> To comply with the Children's Code, advertisers must obtain preclearance from ASC prior to airing any paid commercial messages.<sup>141</sup>

Children (persons under 12 years of age)<sup>142</sup> advertising is defined as,

[a]ny paid commercial message that is carried in or immediately adjacent to a children's program. Children's advertising also includes any commercial message that is determined by the broadcaster as being directed to children and is carried in or immediately adjacent to any other program.<sup>143</sup>

The Code provides interesting directions regarding factual presentation,

(a) No children's advertising may employ any device or technique that attempts to transmit messages below the threshold of normal awareness;

(b) Written, sound, photographic and other visual presentations must not exaggerate service, product or premium characteristics, such as performance, speed, size, color, durability, etc.;

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<sup>138</sup> *Id.*, section 13.

<sup>139</sup> In March 2010, the ASC published a new *Children's Broadcast Advertising Clearance Guide*, which is designed to clarify standards and assist advertisers develop and present commercials that comply with the Children's Code. <http://www.adstandards.com/en/Clearance/Childrens/kidsGuide.pdf> (last visited May 1, 2016).

<sup>140</sup> ASC Clearance Services reviews children's advertising in non-broadcast media (which includes children's advertising appearing on the internet and in magazines).

<sup>141</sup> Preclearance is given by the Children's Advertising Section, made up of a board of nine members, including at least: a chairperson, three public members, and a member nominated respectively by each of the Canadian Radio-television Telecommunication Commission (the "CRTC"), private broadcasters, the Canadian Broadcasting Corporation (the "CBC"), and advertiser and advertising agency associations.

<sup>142</sup> Advertising Standards Canada, *Broadcast Code for Advertising to Children*, section 1(b), Available at <http://www.adstandards.com/en/clearance/childrens/broadcastcodeforadvertisingtochildren.aspx> (last visited May 1, 2016).

<sup>143</sup> *Id.*, section 1(a).

(c) The relative size of the product must be clearly established;

(d) When children's advertising shows results from a drawing, construction, craft or modeling toy or kit, the results should be reasonably attainable by an average child<sup>144</sup>

According to the Code, it is prohibit to advertise to children products not intended for use by children<sup>145</sup> as drugs, proprietary medicines and vitamins in any pharmaceutical form, with the exception of children's fluoride toothpastes,<sup>146</sup> and to make undue pressure on children to purchase or ask their parents to make inquiries or purchases of the advertised item.<sup>147</sup> In addition, the code give instructions regarding advertising Scheduling<sup>148</sup> and prohibit the promotion by Program Characters, Advertiser-Generated Characters, and Personal Endorsements,<sup>149</sup> with few exceptions.<sup>150</sup>

The code details the way price and purchase terms should be presented, the fact that cost must not be minimized, and that the statement in audio, "it has to be put together" or a similar phrase must be included when the viewer may assume that the product is delivered assembled. In addition, it should be clear which toys are being sold separately, when more than one toy is featured in a commercial message (this includes accessories).<sup>151</sup>

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<sup>144</sup> *Id.*, section 3.

<sup>145</sup> *Id.*, section 4(a).

<sup>146</sup> *Id.*, section 4(b).

<sup>147</sup> *Id.*, section 5(a).

<sup>148</sup> *Id.*, section 6(a)(b)(c)(d).

<sup>149</sup> *Id.*, section 7. (“(a) Puppets, persons and characters (including cartoon characters) well-known to children and/or featured on children's programs must not be used to endorse or personally promote products, premiums or services. The mere presence of such well-known puppets, persons or characters in a commercial message does not necessarily constitute endorsement or personal promotion. For example, film clips or animation are acceptable as a mood or theme-setting short introduction to commercial messages before presenting the subject of the commercial message itself. These puppets, persons and characters may not handle, consume, mention or endorse in any other way the product being advertised).

<sup>150</sup> this prohibition does not apply to puppets, persons and characters created by an advertiser which may be used by advertisers to sell the products they were designed to sell as well as other products produced by the same advertiser or by other advertisers licensed to use these characters for promotional purposes (section 7(b)) Professional actors, actresses or announcers who are not identified with characters in programs appealing to children may be used as spokespersons in advertising directed to children (section 7(c)), and Puppets, persons and characters well-known to children may present factual and relevant generic statements about nutrition, safety, education, etc. in children's advertising (section 7(d)).

<sup>151</sup> *Id.*, section 8(a)(b)(c)(d)

It is forbidden to make comparisons with competitor's product or previous year's model,<sup>152</sup> or to portray adults or children in clearly unsafe acts or situations or to show products being used in an unsafe or dangerous manner.<sup>153</sup> Of special interest is the social values clause determining that,

(a) Children's advertising must not encourage or portray a range of values that are inconsistent with the moral, ethical or legal standards of contemporary Canadian society.

(b) Children's advertising must not imply that possession or use of a product makes the owner superior or that without it the child will be open to ridicule or contempt. This prohibition does not apply to true statements regarding educational or health benefits.<sup>154</sup>

ASC and its Consumer Response Councils reviews complaints made by the public. The Council determines whether there was a violation of the Code. In case of violation, the advertisers will be required to amend the advertisement or withdraw it. If the advertiser is not complying with the Council's decision, ASC may request the media to stop airing the advertisement or publicly declare the advertiser to be found in breach of the Children's Code.

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<sup>152</sup> *Id.*, section 9(a)(b).

<sup>153</sup> *Id.*, section 10(a)(b).

<sup>154</sup> *Id.*, section 11; see *Interpretation Guidelines for Clause 11 – (i)* Child-directed messages for food products in broadcast advertising that are inconsistent with the pertinent provisions of the *Food and Drugs Act and Regulations*, or the Canadian Food Inspection Agency's *Guide to Food Labelling and Advertising* shall be deemed to violate Clause 11 (Social Values) of the *Children's Code*. This Interpretation Guideline is intended, among other purposes, to ensure that advertisements representing mealtime clearly and adequately depict the role of the product within the framework of a balanced diet, and snack foods are clearly presented as such, not as substitutes for meals. (ii) Every "child-directed message" for a product or service should encourage responsible use of the advertised product or service with a view toward the healthy development of the child. (iii) Advertising of food products should not discourage or disparage healthy lifestyle choices or the consumption of fruits or vegetables, or other foods recommended for increased consumption in *Canada's Food Guide*, and Health Canada's nutrition policies and recommendations applicable to children under 12. (v) The amount of food product featured in a "child-directed message" should not be excessive or more than would be reasonable to acquire, use or, where applicable, consume, by a person in the situation depicted. (vi) If an advertisement depicts food being consumed by a person in the advertisement, or suggests that the food will be consumed, the quantity of food shown should not exceed the labelled serving size on the Nutrition Facts Panel (where no such serving size is applicable, the quantity of food shown should not exceed a single serving size that would be appropriate for consumption by a person of the age depicted).

According to section two of ASC Code it is not allowed to use a format or style in a way that disguises the commercial intention of the advertisement.<sup>155</sup> However, although it is more relevant to children's undeveloped ability to understand advertisements intent, such provision is not included in the Children's Code.<sup>156</sup> According to section twelve of the ASC Code, advertising directed at young children should not,

[e]xploit their credulity, lack of experience or their sense of loyalty, and must not present information or illustration that might result in their physical, emotional or moral harm.<sup>157</sup>

Since ASC publishes its decisions only in cases that a violation of the Code was found, it is impossible to determine how the code provisions are applied.<sup>158</sup> In addition, ASC dismisses most complaints,<sup>159</sup> and claims to receive “virtually no” complaints about advertising directed at children.<sup>160</sup> It would be prudent to assume that a very narrow interpretation of section twelve is being applied by ASC,<sup>161</sup> especially due to the large volume of unchallenged advertisements to which children are exposed (many of which are pre-cleared by ASC).<sup>162</sup>

According to Janet Feasby, Vice President, Standards at ASC,

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<sup>155</sup> Advertising Standards Canada, *Canadian Code of Advertising*, Standards § 2 (2004).

<sup>156</sup> See ASC, *supra* note 142.

<sup>157</sup> ASC, *supra* note 155, at ¶ 12.

<sup>158</sup> *Id.*, *The Consumer Complaint Procedure*, Advertising Complaints Report.

<sup>159</sup> See Advertising Standards Canada, *2004 Ad Complaints Report 2* (2005), Available at <http://www.adstandards.com/en/consumerComplaints/2004AdComplaintsReport.pdf> (last visited May 1, 2016) (indicating that nearly 94% of challenged ads were absolved in 2004. Of all 860 ads challenged that year, complaints were upheld against only 55 ads.).

<sup>160</sup> ASC reported only ten complaints alleging violations of Article twelve (“Advertising to Children”) of the ASC Code during the period 1997 until the first quarter of 2004 (Advertising Standards Canada, *Previous Complaints Reports*, <http://www.adstandards.com/en/standards/report.asp> (last visited May 1, 2016)).

<sup>161</sup> In 2011 only 12 television related complaints regarding clause 12 were pursued by ASC. Among which 1 was upheld. For comparison, 604 complaints were pursued regarding clause 1 and 3 among which 98 was upheld (ASC, *AD Complaints Report 4* (2011), Available at <http://adstandards.com/en/ConsumerComplaints/2011AdComplaintsReport.pdf> (last visited May 1, 2016)).

<sup>162</sup> For example, ASC pre-clearance does not apply to print ads or commercials broadcast in purely local markets. See Advertising Standards Canada, *Broadcasting Code For Advertising To Children* § II(7) (2004).

ASC receives very few complaints about advertising directed to children. Between 2009 and 2012, two complaints under Clause 12 (Advertising to Children) were upheld about two radio commercials.<sup>163</sup>

In a recent case study,<sup>164</sup> Goltz and Neufield detailed ASC's response to a claim made by the authors arguing that a television advertisement for Thomas Cook's family vacation featuring a child telling his mother that booking a family vacation through Thomas Cook's website is "a no brainer" – was undermining parental authority and therefore violating the Code. Rather than dealing with the substance of the complaint or the advertisement, ASC insisted that the advertisement does not fall under the Children's Code. ASC strongly rejected the notion that ThomasCook.ca ad is children advertising. According to ASC Family vacations are,

[n]ot a child directed message because it does not promote a product for which children form a substantial part of the market as users.

The evidence, however, differs from the view expressed by ASC. Research asking parents and children about children's consumption choices concluded that the percentage influence that children have is 36% in holiday destination<sup>165</sup>. Moreover, the fact that the advertisement is aired during children's shows indicates the importance of children as

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<sup>163</sup> Email to the author dated Jan 29, 2013 [on file]. Upheld Complaints - Q2 2011, Clause 1: Accuracy and Clarity, Clause 12: Advertising to Children: A radio commercial invited children between the ages of 6 and 17 to call the advertiser if they wanted to be on the Disney Channel or in a television program. If they were one of the first 200 callers, they could become the next superstar. The complainant alleged that the commercial was misleading. The clear impression conveyed to Council by the commercial was that children ages 6-17 were invited to audition for a chance to appear on the Disney Channel or in a television program. In reality, the advertised event was an information session about the John Robert Powers acting school and not an audition at all. Council, therefore, found that the commercial was misleading and also exploited children's credulity and lack of experience.

Upheld Complaints - Q2 2010, Clause 12: Advertising to Children, In a radio commercial directed to children between the ages of 6 and 17 the advertiser claimed the first 100 children who texted "star at 2121" on their mobile phones could be become the next superstar. The complainant alleged that the commercial was inappropriate for children. The overall impression conveyed by this commercial was that children could become stars on a children's television channel if they were one of the first 100 to send mobile text messages to a certain telephone number. To Council, this exploited a child's credulity and lack of experience, contrary to the Code.

<sup>164</sup> Goltz & Neufield, *supra* note 49.

<sup>165</sup> John Hall et al., *Influence of Children on Family Consumer Decision Making*, 2 European Advances in Consumer Research 45-53 (1995); See also Kuo-Ching Wang et al, *Who is the decision-maker: the parents or the child in group package tours?*, 25(2) Tourism Management 183-194 (April 2004) ("Results indicated that family has a tendency to make a joint decision in problem recognition and the final decision stages").

consumers, at least in the eyes of the advertiser. Nonetheless, ASC was not convinced and responded as follows,<sup>166</sup>

Even if it can be argued that children form a substantial part of the market as users of travel services, in ASC's evaluation, the message was not presented in a manner that was directed primarily to children...In addition, we contacted the broadcaster, CORUS Entertainment, and learned that the commercial was not aired during or immediately adjacent to a children's program...The holiday program, *It's a Spongebob Christmas*, during which you saw the commercial, was rated G by the broadcaster...ASC understands from the broadcaster that this program was geared for family viewing – not exclusively children".<sup>167</sup>

(iii) Other Industry Codes & Policies

Industry Codes and policies have been presented by several major networks and companies with respect to children's advertising. The CBC Policy 1.3.8 Advertising Directed to Children Under 12 Years of Age<sup>168</sup> and the Canadian Children's Food and Beverage Advertising Initiative (CAI),<sup>169</sup> are two examples.

The Canadian Children's Food and Beverage Advertising Initiative core principles require organization members to devote all of their advertising (including video and computer

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<sup>166</sup> Email to the Author dated January 31, 2013 from Janet Feasby, Vice President, Standards at ASC [on file].

<sup>167</sup> *Id.*

<sup>168</sup> CBC Radio Canada, *Policy 1.3.8: Advertising Directed to Children Under 12 Years of Age* (June 20, 2006), Available at <http://cbc.radio-canada.ca/en/reporting-to-canadians/acts-and-policies/programming/advertising-standards/1-3-8/> (last visited May 1, 2016) ("The CBC/Radio-Canada does not accept advertising of any kind in programming and websites designated by the CBC/Radio-Canada as directed to children under 12 years of age. Products that appeal to children and in their normal use require adult supervision may not be advertised in station breaks adjacent to children's programs. The CBC/Radio-Canada may accept advertising directed to children under 12 years of age in other CBC/Radio-Canada programming and websites subject to restrictions.").

<sup>169</sup> Canadian Children's Food and Beverage Advertising Initiative, <http://www.adstandards.com/en/childrensinitiative/default.htm> (last visited May 1, 2016) ("The Canadian Children's Food and Beverage Advertising Initiative (Children's Advertising Initiative) is a voluntary initiative by 19 of Canada's leading food and beverage companies (Participants). In April 2007, Participants announced their collaborative commitment to use their creativity and marketing activities to promote and support healthy dietary choices and healthy lifestyles to children under 12 years of age."). The organization participants are: Burger King Restaurants of Canada, Inc., Campbell Company of Canada, Coca-Cola Ltd., Danone Inc., Ferrero Canada Ltd., General Mills Canada Corporation, Hershey Canada Inc., Janes Family Foods Ltd., Kellogg Canada Inc., Kraft Canada Inc., Mars Canada Inc., McCain Foods (Canada), McDonald's Restaurants of Canada Ltd., Nestlé Canada Inc., Parmalat Canada, PepsiCo Canada ULC, Post Foods Canada Corp., Unilever Canada Inc., Weston Bakeries Limited.

games rated "Early Childhood" or "EC", for example) directed primarily to children under 12 years of age, to promote products that represent healthy dietary choices; reduce the use of third party licensed characters in advertising unhealthy products; and avoid advertising food or beverage products in elementary schools - pre-kindergarten through Grade 6.

The Canadian Broadcasting Standards Council (CBSC) was established by Canada's private broadcasters in August 15, 1990, and recognized by the Canadian Radio-Television and Telecommunications Commission (CRTC) on August 30, 1991 in its Public Notice 1991-90. The CBSC is a national voluntary self-regulatory organization that was created to deal with complaints about programs made by viewers or listeners. There are seven industry codes administered by the CBSC, covering various issues relating to ethics, violence on television, equitable portrayal, journalistic ethics, cross-media ownership.<sup>170</sup>

### **(e) Recent Legal Developments**

In December 6, 2011, Jennifer Stoddart, the Privacy Commissioner of Canada, announced<sup>171</sup> the publication of a new set of guidelines on Privacy and Online Behavioral Advertising.<sup>172</sup> Commissioner Stoddart said,

[t]o best address these complexities, all stakeholders in the advertising community, including website operators and browser developers, have a role to play to ensure that the issues of transparency and meaningful consent are addressed.<sup>173</sup>

In June of 2012, the Office of the Privacy Commissioner published more specific expectations in its Policy Position on Online Behavioural Advertising.<sup>174</sup> In September 2013, the

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<sup>170</sup> Canadian Broadcasting Standards Council, *About Us*, Available at <http://www.cbsc.ca/about-us/> (last visited May 1, 2016).

<sup>171</sup> Jennifer Stoddart, Privacy Commissioner of Canada, *Respecting Privacy Rights in the World of Online Behavioural Advertising*, Remarks at the Marketing and the Law Conference (December 6, 2011), Available at [http://www.priv.gc.ca/media/sp-d/2011/sp-d\\_20111206\\_e.asp](http://www.priv.gc.ca/media/sp-d/2011/sp-d_20111206_e.asp) (last visited May 1, 2016).

<sup>172</sup> Office of the Privacy Commissioner of Canada, *Guidelines on Privacy and Online Behavioural Advertising* (December 2015), Available at [http://www.priv.gc.ca/information/guide/2011/gl\\_ba\\_1112\\_e.pdf](http://www.priv.gc.ca/information/guide/2011/gl_ba_1112_e.pdf) (last visited May 1, 2016).

<sup>173</sup> Stoddart, *supra* note 171.

<sup>174</sup> Office of the Privacy Commissioner of Canada, *Policy Position on Online Behavioural Advertising* (December 2015), Available at [http://www.priv.gc.ca/information/guide/2012/bg\\_ba\\_1206\\_e.asp](http://www.priv.gc.ca/information/guide/2012/bg_ba_1206_e.asp) (last visited May 1, 2016).

Canadian Self-regulatory Program for Online Behavioural Advertising website was launched by the advertising industry led by the Digital Advertising Alliance of Canada (DAAC). The website is geared to consumers and companies alike.<sup>175</sup> This Program is based on the U.S. Digital Advertising Alliance (DAA) Online Behavioural Advertising Ad Choices program and principles.<sup>176</sup> Some common principles are also shared with the European Advertising Standards Alliance (EASA) Online Behavioral Advertising Framework.<sup>177</sup> This “Ad Choices” program uses the identifying icon consisting of a lower case letter i within a blue triangle.

The DAAC Program was structured to follow the Personal Information Protection and Electronic Documents Act (PIPEDA)<sup>178</sup> and the OPC guidelines. Advertising Standards Canada (ASC) has the role of monitoring compliance, dealing with complaints, initiating investigations, and publishing reports. The Program set the following Principles: Education; Transparency; Consumer Control (over its data collection); Data Security; Sensitive Data (children and sensitive personal information); and Accountability.<sup>179</sup> However, not all types of activities are covered by the Program. For example, online advertising of entities within a web site they own or control and contextual advertising, including ads “based on the content of the Web page being visited, a consumer’s current visit to a Web page, or a search query.”<sup>180</sup>

## **(f) Evaluation**

Kent et al.<sup>181</sup> assessed and compared the influence of the ban on advertising to children in Quebec and the self-regulatory Children’s Food and Beverage Advertising Initiative (CAI) on food manufacturer and restaurant websites in Canada. The presence of child-directed content in 147 French and English language food and restaurant websites was assessed. The research

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<sup>175</sup> Digital Advertising Alliance of Canada, *AdChoices*, Available at <http://youradchoices.ca/> (last visited May 1, 2016).

<sup>176</sup> *Id.*

<sup>177</sup> European Advertising Standards Alliance, *Comprehensive standards for Online Behavioural Advertising* (14 April 2011), <http://www.easa-alliance.org/page.aspx/386> (last visited May 1, 2016).

<sup>178</sup> S.C. 2000, c. 5.

<sup>179</sup> Digital Advertising Alliance of Canada, Canadian Self-Regulatory Principles for Online Behavioural Advertising, Available at <http://youradchoices.ca/files/DAAC-ThePrinciples.pdf> (last visited May 1, 2016).

<sup>180</sup> *Id.*, at 1.

<sup>181</sup> Kent, et. al., *Internet Marketing Directed at Children on Food and Restaurant Websites in Two Policy Environments* 21(4) *Obesity* 800-807 (April 2013).

analyzed marketing features, games and activities, child protection features, and the promotion of healthy lifestyle messages on those sites.

The research found equal child-directed content in the French and English language websites, including marketing features indicating that the Quebec ban was not necessarily more effective in preventing commercial content directed to children in those websites than the CAI. In addition, equal child directed content was found in CAI websites compared to non-CAI websites. However, The CAI sites included more healthy lifestyle messages and child protection features compared to the non-CAI sites.

Kent et. al. conclude,

Systematic surveillance of the Consumer Protection Act in Quebec is recommended. In the rest of Canada, the CAI needs to be significantly expanded or replaced by regulatory measures to adequately protect children from the marketing of foods/beverages high in fat, sugar, and sodium on the Internet.<sup>182</sup>

Dhar and Baylis assessed the effect of the Quebec ban on advertising to children by household consumption of fast food.<sup>183</sup> They found that the advertising ban had a "statistically significant effect on fast food consumption at the household level. The ban decreased the probability of fast food purchase incidence by thirteen percent per week".<sup>184</sup>

## 2.2 USA

Online advertising in the US is governed mainly by the Federal Trade Commission (FTC) and the Federal Communication Commission (FCC), as well as by self-regulatory entities like the National Advertising Division and enforcement by individual states.<sup>185</sup>

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<sup>182</sup> *Id.*, at 803.

<sup>183</sup> Tirtha Dhar & Kathy Baylis, *Fast-Food Consumption and the Ban on Advertising Targeting Children: The Quebec Experience* 48 J. MKTG. RESEARCH 801 (2011).

<sup>184</sup> *Id.*, at 810.

<sup>185</sup> See Better Business Bureau, National Advertising Division (2013), Available at <http://www.bbb.org/us/nationaladvertisingdivision> (last visited May 1, 2016); Columbia University National

## (a) Legislation

Formed under the Federal Trade Commission Act,<sup>186</sup> the FTC has created a regulatory scheme that determines what is misleading advertisement. Overseeing the FTC decisions, the federal courts<sup>187</sup> also contributed to the legal framework used by the FTC to determine deceptive advertising.<sup>188</sup> The FTC has rulemaking authority to declare children’s advertising (embedded or traditional) to be deceptive. An act is considered deceptive, “if it includes a representation or omission that is likely to mislead reasonable consumers, and the representation or omission is material”<sup>189</sup>.

As part of applying the Act to online advertisement, FTC staff ruled in a petition by Commercial Alert,<sup>190</sup> determining that product placement that was not disclosed is not deceptive practice. According to the FTC, the complaint, “does not suggest that product placement results in consumers giving more credence to objective claims about the product’s attributes.”<sup>191</sup> The FTC further argued that the complainant failed to demonstrate sufficiently that the product placement involved, “false or misleading objective, material claims about the product’s attributes.”<sup>192</sup> Referring to product placement from the eyes of the “ordinary child,” the FTC staff argued that,<sup>193</sup>

[i]f no objective claims are made for the product, then there is no claim as to which greater credence could be given; therefore, even from an ordinary child’s standpoint, consumer injury from an undisclosed paid product

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Attorneys General Program, Deceptive Advertising (2013), Available at <http://web.law.columbia.edu/attorneys-general/policy-areas/health-law-initiative/resources-publications/deceptive-advertising> (last visited May 1, 2016).

<sup>186</sup> *Federal Trade Commission Act* of 1914, 15 U.S.C. §§ 41-58 (2012).

<sup>187</sup> *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (“[I]n the last analysis the words ‘deceptive practices’ set forth a legal standard and they must get their final meaning from judicial construction.”).

<sup>188</sup> 15 U.S.C. § 45(a)(1) (2012).

<sup>189</sup> Federal Trade Commission, *FTC Policy Statement on Deception* (Oct. 14, 1983), Available at <http://www.ftc.gov/ftc-policy-statement-on-deception>.

<sup>190</sup> Letter from Gary Ruskin, Exec. Dir., Commercial Alert, to Marlene H. Dortch, Sec’y, Fed. Trade Comm’n 4 (Sept. 30, 2003), available at <http://www.commercialalert.org/fcc.pdf> (last visited May 1, 2016).

<sup>191</sup> Letter from Mary Engle, Assoc. Dir. for Advertising Practices, Fed. Trade Comm’n, to Gary Ruskin, Exec. Dir., Commercial Alert, 3 (Feb. 10, 2005), Available at <http://www.commercialalert.org/FTCletter2.10.05.pdf> (last visited May 1, 2016).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

placement seems unlikely.<sup>194</sup>

This decision does not align with other past decisions of the FTC in which the deception was related to the advertisement method and not to the product. One example is *re Encyclopaedia Britannica, Inc.*,<sup>195</sup> in which a sales representative claimed to be conducting an advertising research, while trying to sell his products. In practice, the main goal of the sales representative with the clients going from door to door was to sell them encyclopaedias. Although the sales representative did conduct the research survey, the FTC concluded that it was only, “a ploy to serve as an introduction to a sales presentation.”<sup>196</sup> The FTC declared this conduct deceptive because, “sales representatives misrepresented and failed to disclose the purpose of the initial contact with prospects.”<sup>197</sup>

In 2009 the FTC expended sponsorship disclosure requirements by revising its Endorsement Guidelines based on the principle that lack of disclosure, without any other product claims, is deceptive.<sup>198</sup> The FTC 2009 Endorsement Guidelines consider non-disclosure of an advertising method as material, and therefore, misleading and deceptive. Finally, the scholarly opinion in law reviews and marketing literature conclude that undisclosed sponsorship is inherently deceptive.<sup>199</sup> Additional legislation that is relevant, especially to embedded

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<sup>194</sup> *Id.*

<sup>195</sup> 87 F.T.C. 421 (1976), *aff'd sub nom. Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964 (7<sup>th</sup> Cir. 1979), cert. denied, 445 U.S. 934 (1980).

<sup>196</sup> *Id.* at 66–67. In an earlier FTC case, door-to-door salesmen obtained entry to a house by falsely stating that they were conducting a survey, which the FTC deemed a deceptive trade practice. In *re Crowell-Collier Publishing Co.*, 70 F.T.C. 977, 978 (1966).

<sup>197</sup> In *re Encyclopaedia Britannica*, 87 F.T.C. at 169. Earlier, the FTC challenged furnace repair services that offered homeowners a free furnace inspection. The agent would disassemble the homeowner's furnace and refuse to put it back together unless the consumer purchased a service contract. See *In re Holland Furnace Co.*, 55 F.T.C. 55 (1958), *aff'd*, 295 F.2d 302 (7<sup>th</sup> Cir. 1961); *In re Davis Furnace Co.*, 59 F.T.C. 583 (1961). One author characterizes these advertising tactics as “fully masked” marketing, as opposed to “partially masked” marketing, which is obvious advertising that has testimonials or endorsements that seem objective but actually are compensated. See Ross D. Petty, *From Puffery to Penalties: A Historical Analysis of US Masked Marketing Public Policy Concerns* 5 *J. Hist. Res. Marketing* 10, 12–13, 15 (2013).

<sup>198</sup> Federal Trade Commission, *Guides Concerning the Use of Endorsements and Testimonials in Advertising* 74 Fed. Reg. 53124 (Oct. 15, 2009) (codified at 16 C.F.R. §§ 255–255.5 (2014)).

<sup>199</sup> See Petty, *supra* note 197, at 23; Ross D. Petty & J. Craig Andrews, *Covert Marketing Unmasked: A Legal and Regulatory Guide for Practices that Mask Marketing Messages* 27 *J. Pub. Pol'y & Marketing* 8-11 (2008); Kelly D. Martin & N. Craig Smith, *Commercializing Social Interaction: The Ethics of Stealth Marketing* 27 *J. Pub. Pol. & Marketing* 6 (2008); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity* 85 *Tex. L. Rev.* 108 (2006); Brooke E. Crescenti, *Notes and Comments, Undercover Marketing: If Omission Is the Mission, Where Is the Federal Trade Commission?* 13 *J. L. & Pol'y* 699, 707, 728 (2005); Buzz Marketing, *Pub. Citizen's Commercial Alert*, Available at <http://www.commercialalert.org/issues/culture/buzz-marketing> (last visited May 1, 2016). But see Herbert Jack Rotfeld, *The Stealth Influence of Covert Marketing and Much Ado About What May Be Nothing* 27

advertising, is the sponsorship disclosure obligations set in the Communication Act of 1934. Nonetheless, this legislation is out dated and vague.<sup>200</sup>

Additional legislation dealing with deceptive advertising is the Lanham Trademark Act,<sup>201</sup> creating a private cause of action. The Lanham Act enable businesses to make a claim in federal courts against their competitors in case of deceptive advertisement. Similarly to the FTC Act, the Lanham Act prohibits "false or misleading representation of fact" in advertising.<sup>202</sup> When hearing cases under the Lanham Act, federal courts have adopted the same principle applied in FTC deciding appeals of FTC cases.<sup>203</sup> The FTC principle declares advertising claims deceptive if they are "likely to mislead consumers acting reasonably under the circumstances" and are "material".<sup>204</sup>

In 1990 Congress passed the Children's Television Act (CTA).<sup>205</sup> The Federal Communication Commission (FCC), set to enforce the Act was of the opinion that the market should regulate itself.<sup>206</sup> The CTA introduced two main requirements: (1) standards regarding the amount of television programs aired to children should be established by the FCC;<sup>207</sup> and (2) the amount of commercial time aired during children's television programs should be limited by broadcasters to 10.5 minutes per hour or less on weekends and 12 minutes per hour or less on weekdays.<sup>208</sup> These limits apply to over-the-air commercial television broadcasters, cable<sup>209</sup> and

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J. Pub. Pol'y & Marketing 67 (2008); See also Zahr Said, *Embedded Advertising and the Venture Consumer* 89 N. C. L. Rev. 107-17 (2010).

<sup>200</sup> *Id.*

<sup>201</sup> 15 U.S.C. § 1125(a) (2012).

<sup>202</sup> 15 U.S.C. § 1125(a) (2012).

<sup>203</sup> See, e.g., *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-11 (1st Cir. 2002); *Johnson & Johnson \* Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297-98 (2d. Cir. 1992); *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971-72 (7th Cir. 1999). As this Part will discuss, the courts have modified the FTC principles to better suit them to private actions, but these changes are relatively minor.

<sup>204</sup> FTC, *supra* note 189.

<sup>205</sup> *Children's Television Act of 1990*, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified at scattered sections of 47 U.S.C.).

<sup>206</sup> 8 *H.R. REP. No. 101-385*, at 4 (1991).

<sup>207</sup> The FCC requires broadcasters to air three hours of "core" children's programming per week. Policies and Rules Concerning Children's Television Programming, *Report and Order*, 11 F.C.C.R. 10660, paragraph. 4 (1996).

<sup>208</sup> 47 U.S.C. § 303a(b).

<sup>209</sup> FCC, *Consumer Facts*, Available at <http://www.fcc.gov/cgb/consumerfacts/childtv.html> (last visited May 1, 2016).

digital television suppliers.<sup>210</sup> In 1991 the FCC adopted its rules to enforce the CTA<sup>211</sup> and revised these rules in 1996.<sup>212</sup>

Since the CTA requires separation between content and commercials in children's programs, advocates argued that embedded advertising violates the Act. They further argued that programs with embedded advertising should be considered as program-length commercials and adhere to the time limits for commercials in the CTA.<sup>213</sup> The FCC refused to make a decision in this matter and deferred it to the sponsorship disclosure docket, which remains open.<sup>214</sup>

In 2007 Congress passed the Child Safe Viewing Act (CSVA).<sup>215</sup> The CSVA aim was to instruct the FCC to encourage implementation of technologies that would allow parents to control their children's media use. To date, the FCC under the CSVA imposed no new rules, concluding that all media have parental control technologies available, although no single technology works across all media.<sup>216</sup> Although stating that it would continue studying technology solutions for parents<sup>217</sup> the FCC has taken no action since issuing its mandatory congressional report in 2009.

## **(b) The Federal Commission**

The Federal Communication Commission (FCC) regulates communications media according to the Communications Act.<sup>218</sup> The FCC is granted general jurisdiction over certain

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<sup>210</sup> Children's Television Obligations of Digital Television Broadcasters, *Notice of Proposed Rule Making*, 15 F.C.C.R. 22946, paragraph 12 (2000), Available at <https://www.fcc.gov/general/childrens-educational-television-rules-and-orders> (last visited May 1, 2016).

<sup>211</sup> Policies and Rules Concerning Children's Television Programming, *Memorandum Opinion and Order*, 6 F.C.C.R. 5093 (1991).

<sup>212</sup> *Id.*, paragraph 1.

<sup>213</sup> See, e.g., Comments of Children's Media Policy Coalition Before the Federal Communications Commission, In re Sponsorship Identification Rules & Embedded Advert., MB No. 08-90, 7-9 (Sept. 22, 2008), Available at <http://apps.fcc.gov/ecfs/document/view?id=7521071206> (last visited May 1, 2016).

<sup>214</sup> See *In re Sponsorship Identification Rules & Embedded Advert.*, 73 Fed. Reg. 43195 (proposed July 23, 2008) (to be codified at 47 C.F.R. pts. 73, 76), Available at <http://www.gpo.gov/fdsys/pkg/FR-2008-07-24/pdf/E8-16998.pdf> (last visited May 1, 2016).

<sup>215</sup> *Child Safe Viewing Act of 2007*, Pub. L. No. 110-452, 122 Stat. 5025 (Dec. 2, 2008).

<sup>216</sup> Implementation of the Child Safe Viewing Act, *Examination of Parental Control Technologies for Video or Audio Programming, Report*, 24 F.C.C. Rcd. 11413, 11415 (Aug. 31, 2009).

<sup>217</sup> *Id.*, at 11429.

<sup>218</sup> *Communications Act of 1934*, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–620 (2012 & Supp. 2013)).

media in title I of the Act, however the Act does not provide specific jurisdictional guidance.<sup>219</sup> The FCC authority is further detailed in the other titles of the Act, based on the different media method of transmission. Not surprisingly, the Communications Act of 1934 does not include instructions regarding the Internet.<sup>220</sup>

In 2007, the FCC was authorized by the Congress to address risks to children in all electronic media.<sup>221</sup> Nonetheless, a year later the FCC refused to use this new authority over embedded advertising to children online.<sup>222</sup>

### **(c) Code of Practice**

The advertising industry in the United States has established an extensive system of self-regulation. According to Edelstein, the main goals of this system are to make sure that,

- (1) advertising is truthful, accurate, and not misleading or deceptive, (2) all claims are adequately substantiated, and (3) there is compliance with federal, state, and local laws and regulations.<sup>223</sup>

The major components of the advertising industry self-regulation are: the National Advertising Division (NAD) of the Council of Better Business Bureaus, Inc., its appellate body, the National Advertising Review Board (NARB), and its children's division, the Children's Advertising Review Unit (CARU); the national television networks; and trade associations in many industries. Advertising is also regulated by some magazines and newspapers, some station and cable television groups, and local Better Business Bureaus. There are also controls by advertisers and advertising agencies.

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<sup>219</sup> *Communications Act of 1934* tit. I, §§ 1–12 (codified as amended at 47 U.S.C. §§ 151–162).

<sup>220</sup> The most significant revision to the Communications Act, the Telecommunications Act of 1996, included some provisions related to broadband and Internet services, but clearly did not anticipate the dominance of the Internet platform nor foresee how it would make obsolete the siloed approach. *See generally Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 15 and 47 U.S.C.).

<sup>221</sup> *See Child Safe Viewing Act of 2007*, Pub. L. No. 110-452, 122 Stat. 5025 (Dec. 2, 2008).

<sup>222</sup> Implementation of the Child Safe Viewing Act, *Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd. 11413, 11429 (2009).

<sup>223</sup> Jeffrey S. Edelstein, *Self-Regulation of Advertising: An Alternative to Litigation and Government Action*, *Idea* 509 (2003).

The National Advertising Division (NAD) and the National Advertising Review Board (NARB) were established in 1971 to serve as a self-regulatory mechanism for the advertising industry. The NAD and the NARB were established by four major associations: the Council of Better Business Bureaus, the American Association of Advertising Agencies, the American Advertising Federation, and the Association of National Advertisers. The Children's Advertising Review Unit (CARU) was created in 1974 as a division of NAD. The NAD/CARU/NARB mechanism has gained widespread acceptance in the advertising industry. This voluntary self-regulatory process has handled over 4000 cases.<sup>224</sup>

NAD investigates complaints about the truth and accuracy of national advertising. As stated in the NAD/NARB/CARU Procedures, NAD is,

[r]esponsible for receiving or initiating, evaluating, investigating, analyzing...and holding negotiations with an advertiser, and resolving complaints or questions from any source involving the truth or accuracy of national advertising.<sup>225</sup>

The Children's Advertising Review Unit (CARU), a division of the NAD, is responsible for monitoring and reviewing national advertising directed to children under 12 for consistency with CARU's Self-Regulatory Guidelines for Children's Advertising.<sup>226</sup> CARU publishes in the monthly NAD Case Reports a summary of its actions, other than formal cases, during the preceding month. These reports include summaries of informal inquiries, summaries of proposed advertising submitted to it for pre-screening, and commentaries, consisting of news or policy that CARU believes is appropriate to disseminate to its readership.<sup>227</sup> Formal cases are also published in the NAD Case Reports.

CARU first published its Self-Regulatory Guidelines for Children's Advertising in 1974. Since then, the Guidelines have been revised a number of times, most recently in December of

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<sup>224</sup> See CBBB-NAD, *Case Reports Online*, Available at <https://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/national-advertising-division/nad-case-reports/> (last visited May 1, 2016).

<sup>225</sup> National Advertising Division/National Advertising Review Board/Children's Advertising Review Unit Procedures § 2.1(A) (May 1, 2002).

<sup>226</sup> *Id.*, § 2.1 (B).

<sup>227</sup> *Id.*, § 2.1(C)(i)-(iii).

2001. The guidelines cover such subjects as: sales pressure, comparative advertising, required disclosures and disclaimers, endorsements, sweepstakes and premium offers, host-selling, and product safety. Guidelines covering the use of telemarketing and pay-per-call 900/976 telephone number marketing directed to children were adopted by CARU in 1989 and were incorporated in the guidelines in 1991. In 1996, CARU added Guidelines for Interactive Electronic Media.

CARU follows the same procedures for formal cases as the NAD and also has a provision for expedited procedures. If the advertiser responds within five business days to a letter of inquiry from CARU and the advertising is substantiated, or if the advertising is modified to comply with CARU's guidelines within an additional five business days, no formal case will be opened, and the results will be published in the CARU Activity Report.<sup>228</sup> Most CARU investigations are informal inquiries. However, about one-third is published in the NAD Case Reports. Currently, the vast majority of investigations involve web sites.<sup>229</sup>

Self-regulation, as defined by CARU, results in the, "review and evaluation of child-directed advertising in all media, and online privacy practices as they affect children."<sup>230</sup> When these practices,

[a]re found to be misleading, inaccurate, or inconsistent with CARU's Self-Regulatory Guidelines for Children's Advertising or relevant laws, CARU seeks change through the voluntary cooperation of advertisers.<sup>231</sup>

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<sup>228</sup> *Id.*, Procedures at § 2.12.

<sup>229</sup> In 2001, CARU initiated 89 informal inquiries and commenced 43 formal cases. Of the 43 formal cases, 38 advertisers agreed to either modify or discontinue the activity in question and three cases were referred to the government. By and large, CARU focused on web sites targeted to children under 13 or web sites whose operators had a reasonable expectation that children under 13 accessed the site. Of the 43 formal cases, 39 focused on web sites: five involved food/beverage; 12 involved entertainment (*i.e.*, editorials or movies, celebrities, etc.); five involved general interest web sites (*i.e.*, www.yahoo.com); eight involved consumer products (*i.e.*, make-up); two involved sports (*i.e.*, www.sportsline.com); and six involved music/musicians (*i.e.*, www.lilromeo.com). Many of the web sites contained a noncompliant privacy policy, ineffective age screening, no tracking mechanisms to deter age falsification, and non-compliant parental consent forms. Of the four non-web site cases, one involved packaging (product presentation and claims) and the other three involved television commercials (product presentation and claims). NAD Case Reports (Jan.-Dec. 2001).

<sup>230</sup> National Advertising Review Council, *Guidance for Food Advertising Self-Regulation: An Historical Overview of the Investigations of Food, Nutrition and Weight-Loss Advertising of the Children's Advertising Rev. Unit (CARU) and the National Advertising Division (NAD)* 10 (2004).

<sup>231</sup> *Id.*, 10-11.

CARU revises its Guidelines in its attempt to, "ensure that they accurately reflect changes in the children's media landscape and current industry 'best practices.'"<sup>232</sup> Therefore in 1996 CARU expended its guidelines to include provisions that, "highlight issues, including children's privacy, that are unique to the Internet and online sites directed at children age 12 and under."<sup>233</sup>

Elizabeth Lascoutx, CARU's director, has described CARU's purpose as, "ensur[ing] that advertising directed to children is truthful, accurate and appropriate for its intended audience."<sup>234</sup> Lascoutx emphasized that,

[i]t was never intended that CARU be the arbiter of what products should or should not be manufactured or sold, or to decide what foods are 'healthy,' to tell parents or children what they should or shouldn't buy.<sup>235</sup>

In its guidelines, CARU emphasize the promotion of, "responsible children's advertising,"<sup>236</sup> and the cognitive development of children as a factor in children's ability to grasp and understand basic methods and mechanisms of advertising including sales pressure, program character endorsements, and product claims.<sup>237</sup> While the nutritional content of advertised foods is not part of CARU guidelines, there are specific food-related guidelines.<sup>238</sup>

CARU guidelines have resulted in some common practices in the advertising industry. Examples include presenting breakfast cereals as part of a "balanced breakfast" (i.e., a meal that includes milk, toast, and fruit); and the statement "No purchase necessary," (although usually appearing in "mice type,"<sup>239</sup> which is challenging, if not impossible, to read).<sup>240</sup> The concern that

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<sup>232</sup> Children's Adver. Review Unit, *Latest Revisions to the Self-Regulatory Guidelines for Children's Advertising*, Available at <http://www.caru.org/guidelines/guidelines.pdf> (last visited May 1, 2016).

<sup>233</sup> CARU, About Us, Available at <http://www.asrcreviews.org/about-caru/> (last visited May 1, 2016).

<sup>234</sup> Caroline E. Mayer, *Minding Nemo: Pitches to Kids Feed Debate About a Watchdog*, Washington Post F01 (Feb. 27, 2005).

<sup>235</sup> *Id.*

<sup>236</sup> Children's Adver. Rev. Unit, *Self Regulatory Program for Children's Advertising*, Available at <http://www.caru.org/guidelines/guidelines.pdf> (last visited May 1, 2016).

<sup>237</sup> *Id.*, at 3.

<sup>238</sup> *See id.*, at 1-5.

<sup>239</sup> *See generally* Roger P. Furey, of "Mice Type" And Men, *Advantage* 4, 7 (Winter 2005) (defining "mice type" as a fine print advertisement disclaimer, and giving general information about regulation and usage of such fine print).

<sup>240</sup> Children's Advertising Review Unit, *Sweepstakes Directed to Children*, Available at <http://www.asrcreviews.org/wp-content/uploads/2012/04/Guidelines-FINAL-FINAL-REVISED-20142.pdf> (last visited May 1, 2016) (noting that a child will not understand the phrase "no purchase is necessary" if the text is not clearly displayed and easy to read).

advertisers might mislead children using deceptive methods brought CARU to publish a commentary in 2003 that stress the importance of adherence to CARU guidelines.<sup>241</sup> In this publication, CARU reminded the advertising industry that children "are more credulous" than adults.<sup>242</sup> Therefore, when targeting children advertisers need to be particularly careful about the winning chances disclosure, as well as the fact that no purchase is necessary to enter a sweepstakes,<sup>243</sup> "The necessity of having clear disclosure that no purchase is necessary cannot be overstated."<sup>244</sup>

One of the cases dealt by CARU, illustrating the process and shading light on the conduct of the regular players in this regulatory framework, is CSPI's complaint to National Geographic Society that,

[a]t a time when obesity, diabetes, and other nutrition-related health crises plague our nation and especially our youth, it is unconscionable that the National Geographic Society... has chosen to cram *National Geographic Kids Magazine (NGK)* with ads for sugary cereals, candy, and snack foods.<sup>245</sup>

Following its procedure, CARU determined that CSPI had raised reviewable issues. Therefore, NGS would be notified of the complaint and given an opportunity to reply. The reply would then forwarded to CASPI for their reply. The finding of CARU would be then issued as a case report. The case report will be released to the public as a press release. According to the press release, the advertisers argued that their advertisements complied with CARU guidelines;<sup>246</sup> the advertiser not accept the claims raised both by the complainant and in CARU's

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*; see Lynnea Mallalieu, et al., *Understanding Children's Knowledge and Beliefs About Advertising: A Global Issue That Spans Generations* 27 J. Current Issues & Res. Adver. 62-63 (2005) ("Contests may not be an effective strategy with older children; however, younger children exhibited greater susceptibility to this strategy. Even though younger children expressed skepticism about winning competitions, they were still quite eager to try as evidenced by the 6 and 7 year olds who had repeatedly bought Bagel Bites in an attempt to win a competition.").

<sup>243</sup> *Id.*, 63.

<sup>244</sup> *Id.*

<sup>245</sup> Letter from Jacobson, Michael F., Executive Dir., Ctr. for Sci. in the Pub. Interest, & Fried, Ellen J., Legal Consultant, Ctr. for Sci. in the Pub. Interest, to John M. Fahey, Jr., President and CEO, Nat'l Geographic Soc'y, app. at 7 (July 19, 2004) (detailing the fifty-one violations), Cited in Ellen J. Fried, *Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit*, 39 Loy. L.A. L. Rev. 93 (2006), Available at: <http://digitalcommons.lmu.edu/llr/vol39/iss1/5> (last visited May 1, 2016).

<sup>246</sup> See, e.g., Arby's LLC, *Arby's Adventure Meal*, *Children's Adver. Review Unit Case No. 4268*, at 4-5 (December 10, 2004), Cited in Fried, *Id.*

findings;<sup>247</sup> the advertiser claimed that the advertisement had run its course or had only a few more appearances;<sup>248</sup> and finally stated that it would take into consideration CARU's advice for its next advertisements.<sup>249</sup>

NGK publisher stated,

We do accept advertising from these companies because, from a pure economic standpoint, they're the ones with the advertising budgets and the marketing dollars to reach kids this way. If this helps us to fulfill our mission to get information out to young people in a respectful way, and in a way that adheres to advertising and editorial guidelines, we will continue to do that.<sup>250</sup>

#### **(d) Industry Codes**

The Council of Better Business Bureaus has issued a Code of Advertising, outlining the standards of basic advertisement in order to guide advertising media, advertisers and advertising agencies. The Code covers a variety of topics as comparative price, credit, warranties and guarantees, use or condition disclosures, company name or trade style, and unassembled merchandise, among others.<sup>251</sup> The Council also publishes a publication entitled, "Do's and Don'ts in Advertising", which is a comprehensive loose-leaf volume covering many advertising topics, which is updated periodically.

Many industries have established advertising codes for their members through their industry or trade associations. These codes generally contain moral or ethical proscriptions instead of legal restrictions. For example, the Consumer Healthcare Products Association (CHPA), a trade association which represents U.S. manufacturers and distributors of non-prescription, over-the-counter drugs and dietary supplements, has a Code of Advertising Practices for Non-prescription Medicines. The Preamble to the CHPA Code states that,

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<sup>247</sup> See, e.g., Press Release, Children's Adver. Review Unit, *Kraft and SPI Participate in CARU Process* (Nov. 23, 2004), Cited in Fried, *Id.*

<sup>248</sup> See, e.g., *Id.*

<sup>249</sup> See also Press Release, Children's Adver. Review Unit, *CARU Launches New Program to Monitor Advertising to Children in Spanish-Language Media* (Sept. 9, 2004), Cited in Fried, *supra* note 245.

<sup>250</sup> *Id.*

<sup>251</sup> Council of Better Business Bureaus, Inc., *Code of Advertising* (2003), Available at <http://www.bbb.org/mbc/get-to-know-us/about-us/bbb-code-of-advertising/> (last visited May 1, 2016).

[a]dvertising should truthfully reflect the goals of self-medication and the safety and efficacy of nonprescription medicines. Untruthful or misleading claims or comparisons, which are inconsistent with the role of self-medication or with the safety and effectiveness of nonprescription medicines, are to be avoided. They do not serve the interests of consumers and cast doubt on both the appropriateness of self-medication and the industry's willingness to live up to its public trust.<sup>252</sup>

The Code requires compliance with the Federal Drugs Association and the Federal Trade Commission labeling and advertising requirements, and contains many other requirements and prohibitions. The CHPA reviews complaints regarding alleged violations, and takes appropriate action to resolve them.

Other prominent industry codes are the "Code of Responsible Practice" of the Distilled Spirits Council of the United States, Inc.<sup>253</sup> and the Direct Marketing Association Guidelines for Ethical Business Practice.<sup>254</sup> These codes generally are effective self-regulatory mechanisms. Voluntary compliance by members of each trade association tends to be high due to the force placed upon the codes by the industry's imprimatur.

Launched in November 2006 and fully operational in July 2007, the Children's Food and Beverage Advertising Initiative (CFBAI)<sup>255</sup> was designed to specifically address 'concerns about food advertising and childhood obesity'<sup>256</sup>, and to 'foster trust in the marketplace by promoting balance in food and beverage marketing and truthful, responsible advertising to children under 12 years old'.<sup>257</sup> CFBAI is a voluntary programme comprising food and beverage marketers who pledge to re-craft their advertising and marketing tactics to encourage healthier dietary and lifestyle choices for children under 12.

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<sup>252</sup> The full text of the CHPA Code is available online at <http://www.chpa.org/VolCodesGuidelines.aspx> (last visited May 3, 2016).

<sup>253</sup> See <http://www.discus.org/responsibility/code/> (last visited May 3, 2016).

<sup>254</sup> See <http://www.the-dma.org/guidelines/ethicalguidelines.shtml> (last visited May 3, 2016).

<sup>255</sup> <https://www.bbb.org/council/the-national-partner-program/discover/> (last visited May 3, 2016).

<sup>256</sup> C. Peeler, *CBBB statement to Congress on advertising trends and consumer protection* 1 (2009), Available at <http://www.bbb.org/atlanta/migration/bbb-news-releases/2009/07/cbbb-statement-to-congress-on-advertising-trends-and-consumer-protection/> (last visited May 3, 2016).

<sup>257</sup> Council of Better Business Bureaus (CBBB) (2008b) Fact sheet on CFBAI and CARU. Available online at: <http://www.bbb.org/us/storage/16/documents/Fact%20Sheet%20on%20CFBAI%20and%20CARU%20Dec%202008.pdf>, at 1.

Ten companies, representing two-thirds of children's food and beverage television advertising expenditures, signed on as charter Initiative members.<sup>258</sup> Each participating company chooses how to best implement changes to marketing strategies by crafting its own unique Pledge, which then must be approved by CARU.

Regardless of the Pledge, all CFBAI members agree to follow five core principles:<sup>259</sup> 1. directing at least half of their advertising to the promotion of healthy dietary choices and lifestyles; 2. reducing or eliminating the use of product placement in marketing unhealthy food and beverages to kids; 3. decreasing the use of licensed characters in advertisements when not endorsing healthy eating and behaviours; 4. controlling the representation of food and beverage products, and promoting healthy eating and lifestyle behaviours in interactive gaming; 5. eliminate all food and beverage advertising in elementary schools.

In addition, these core principles were enhanced in January 2010 to require that all advertising directed to children under 12 be for healthier dietary choices and 'better-for-you' foods. Media/marketing techniques targeting this age group were expanded to include video and computer games, cell phone marketing and word-of-mouth advertising.<sup>260</sup>

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<sup>258</sup> Council of Better Business Bureaus (CBBB), *New food, beverage initiative to focus kids' ads on healthy choices; revised guidelines strengthen CARU's guidance to advertisers* (press release) (14 November 2006), Available at <http://www.bbb.org/alerts/article.asp?ID=728> (last visited May 3, 2016). (The companies were: Cadbury Schweppes, USA; Campbell Soup Company; The Coca-Cola Company; General Mills, Inc.; The Hershey Company; Kellogg Company; Kraft Foods, Inc; McDonald's; PepsiCo, Inc. and Unilever. Since November 2006, seven additional marketers have joined: Mars, Inc., Burger King (September 2007), ConAgra (October 2007), Nestl. USA (July 2008), Danone (September 2008), Post Foods LLC (October 2009) and Sara Lee (September 2010).)

<sup>259</sup> Council of Better Business Bureaus (CBBB), *Better Business Bureau announces food and beverage advertising commitments from 11 industry leaders* (press release) (July 18, 2007), Available at: [https://www.google.co.nz/url?sa=t&ret=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwj6xbXIh73MAhVRtJQKHa2xAIMQFggtMAM&url=http%3A%2F%2Fwww.hamawi.org%2Finitiative%2Fpr\\_070718.pdf&usg=AFQjCNErFyqrJ7EaCv-yeD5qdpGm-Q1K9g](https://www.google.co.nz/url?sa=t&ret=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwj6xbXIh73MAhVRtJQKHa2xAIMQFggtMAM&url=http%3A%2F%2Fwww.hamawi.org%2Finitiative%2Fpr_070718.pdf&usg=AFQjCNErFyqrJ7EaCv-yeD5qdpGm-Q1K9g) (last visited May 3, 2016); Council of Better Business Bureaus (CBBB), *New year brings new changes to children's food and beverage advertising landscape* (press release), (January 21, 2009), Available at <http://www.bbb.org/new-jersey/migration/other-news/2009/01/new-year-brings-new-changes-to-childrens-food-and-beverage-advertising-landscape/> (last visited May 3, 2016); Federal Trade Commission (FTC), *Marketing food to children and adolescents: a review of industry expenditures, activities, and self-regulation, a Federal Trade Commission Report to Congress* (July 2008), Available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf> (last visited May 3, 2016).

<sup>260</sup> Council of Better Business Bureaus (CBBB), *BBB reports on progress of Children's Food and Beverage Advertising Initiative at FTC Forum* (press release) (15 December 2009). Available at <http://www.bbb.org/snakeriver/migration/bbb-news-releases/2009/12/bbb-reports-on-progress-of-childrens-food-and-beverage-advertising-initiative-at-ftc-forum/> (last visited May 3, 2016).

## (e) Recent Legal Developments

A series of attempts have been done by the online advertising industry to self-regulate behavioral tracking.<sup>261</sup> The Digital Advertising Alliance (DAA), the main professional association for the online advertisement industry, is a consortium of the leading national advertising and marketing companies. The DAA was founded in 2009 and became the leader of self-regulation efforts replacing the Network Advertising Initiative (NAI). NAI created a program that enables users to block ads that are sent based on tracking data. These ads are labeled by a label known as the AdChoices label.

Further regulatory efforts were initiated in 2007, when a campaign for a ‘Do Not Track law’ was initiated by the World Privacy Forum. The campaign called the FTC to assemble a list of third-party advertisers from which users will be able to opt out. Nonetheless, no progress was achieved until 2010,<sup>262</sup> when the FTC published a report entitled ‘Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policy makers’. The report recommended a Do Not Track (DNT) mechanism.<sup>263</sup>

Another effort was initiated in 2011, when a Tracking Protection Working Group was formed by the World Wide Web Consortium (W3C). This working group included academic experts, industry members and privacy advocates and its goal was set to form standards for a universal Do Not Track request tool. Unfortunately, since the W3C does not have any enforcement power, even if these efforts are successful, the standards could end up as only symbolic.<sup>264</sup> Today, in most browsers, users can subscribe to a ‘Do Not Track list’ of third-party advertisers, as well as a Do Not Track feature that allows users to request that Web sites do not track them. However, Web sites were not required to comply-that is until the DAA announced in February 2012 that all DAA members (about 80 in total) would begin honoring Do Not Track

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<sup>261</sup> Meredith Whipple, *Regulating Consumer Profiling: Going Beyond Behavioral Advertising*, 21 LBJ J. Pub. Aff. 89 (2013).

<sup>262</sup> David P. Baron, *Business and its Environment*, Upper Saddle River, NJ: Pearson Education 25 (2010 6th ed.).

<sup>263</sup> Federal Trade Commission, *FTC Staff Issues Privacy Report, Offers Framework for Consumers, Businesses, and Policymakers* (1 December 2010), Available at <http://www.ftc.gov/opa/2010/12/privacyreport.shtm> (last visited May 3, 2016).

<sup>264</sup> World Wide Web Consortium, *Tracking Protection Working Group*, Available at <http://www.w3.org/2011/tracking-protection/> (last visited May 3, 2016).

requests from users.<sup>265</sup> Now any DAA member that does not comply will be subject to FTC penalties.

## (f) Evaluation

In 2004 the National Advertising Review Council (NARC) held an assessment of CARU's thirty-year involvement in food advertising.<sup>266</sup> The result of NARC assessment was published as a White Paper detailing CARU's self-regulatory approach to food advertising directed at children.<sup>267</sup> NARC's conclusion indicates that neither the interpretation nor implementation of guidelines has been robust. Following the publication of the White Paper, NARC have announced proposed changes to CARU guidelines.<sup>268</sup>

Fried<sup>269</sup> assessed whether the Children's Advertising Review Unit of the Council of Better Business Bureaus (CARU)<sup>270</sup> actions had an impact on advertisers' behavior, through subsequent advertisements compliance with the guideline violations raised by the Centre for Science in the Public Interest (CSPI)<sup>271</sup> and conclude that "The success rate claimed by CARU, and therefore the effectiveness of the process itself, cannot be substantiated".

The main limitations of advertising self-regulation are the limited number of cases addressed compared to the total number of advertisements, decisions coming too late to be truly useful, and the mildness of penalties, which results in easily ignored guidance.<sup>272</sup> Critics of

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<sup>265</sup> Karan Chopra, *Google and the Digital Advertising Alliance Will Support 'Do Not Track,' Agreed On Not To Collect Data About Users*, i2mag (February 23, 2012), Available at <http://i2mag.com/google-and-the-digital-advertising-alliance-will-support-do-not-track-agreed-on-not-to-collect-data-about-users/> (last visited May 3, 2016).

<sup>266</sup> Letter from Manly C. Molpus, President & CEO, Grocery Mfr. Assoc. to James Guthrie, President, Nat'l Adver. Review Council, and Elizabeth Lascoux, Dir., Children's Adver. Review Unit (October 23, 2003), Cited in Fried, *supra* note 245.

<sup>267</sup> See National Advertising Review Council, *supra* note 230. The White Paper also reviewed National Advertising Division's (NAD) history with regard to adult food advertising. See *Id.*, 45-67.

<sup>268</sup> National Advertising Review Council, NARC Announces Key Initiatives to Strengthen Self-Regulation of Advertising to Children (press Release) (Sept. 15, 2005), Cited in H. Dele Davies, Hiram E. Fitzgerald & Vasiliki Mousouli, *Obesity in Childhood and Adolescence: Understanding development and prevention*, NY: Praeger (2008).

<sup>269</sup> Fried, *supra* note 245.

<sup>270</sup> [http://www.ascreviews.org/category/caru/about\\_caru/](http://www.ascreviews.org/category/caru/about_caru/) (last visited May 3, 2016) ("CARU is the children's arm of the advertising industry's self-regulation program and evaluates child-directed advertising and promotional material in all media to advance truthfulness, accuracy and consistency with its Self-Regulatory Program for Children's Advertising and relevant laws").

<sup>271</sup> <http://cspinet.org/about/index.html> (last visited May 3, 2016) ("The Center for Science in the Public Interest (CSPI) is a consumer advocacy organization whose twin missions are to conduct innovative research and advocacy programs in health and nutrition, and to provide consumers with current, useful information about their health and well-being").

<sup>272</sup> J. Boddewyn, *Advertising Self-regulation: True Purpose and Limits* 18(2) *Journal of Advertising* 19-27 (1989).

advertising self-regulation in general, and CARU in particular, view such efforts as ‘toothless’ in that compliance is totally voluntary. Armstrong<sup>273</sup> concluded that CARU was ‘little more than a token effort by the advertising industry’, which was seriously understaffed and underfunded to accomplish its mandate.<sup>274</sup>

Prior research falls primarily into two categories: assessing compliance with guidance in television commercials or analysis of case reports. Kunkel and Gantz<sup>275</sup> found in their 1990 data that 96% of all commercials complied. Ji and Laczniak<sup>276</sup> analysed 297 children’s commercials to examine the extent to which advertisers adhered to the 2003 core principles. They found that advertisers followed some principles but still needed to pay attention to other aspects such as violence or portrayals of aggression. Zwarun’s<sup>277</sup> content analysis of a week’s worth of children’s programming reported 18.7% of the ads were for food-related products, mainly cereals, breakfast foods and fast-food restaurants. In keeping with CARU guidelines, the amount of food/portion sizes portrayed were reasonable and predominantly portrayed responsible eating habits. Zwarun concluded that the advertisements were generally in line with the guidelines.

Internal assessments of the CFBAI have been positive. In its six-month evaluation report, the CBBB<sup>278</sup> stated that pledge compliance was ‘excellent’. This evaluation was based on the members’ submitted reports, as well as independent monitoring of company-owned child-directed websites and advertising that primarily targeted children under 12. The CBBB<sup>279</sup> also noted that advertisers, “diligently provided information to respond to issues that we flagged through our monitoring.”<sup>280</sup> Similarly, the second report<sup>281</sup> found high compliance and that some

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<sup>273</sup> G. Armstrong, *An Evaluation of the Children’s Advertising Review Unit* 3 *Journal of Public Policy & Marketing* 38–55 (1984).

<sup>274</sup> *Id.*, at 53.

<sup>275</sup> D. Kunkel & W. Gantz, *Assessing Compliance with Industry Self-regulation of Television Advertising to Children* 21(2) *Journal of Applied Communication* 148–162 (1993).

<sup>276</sup> M. Ji & R. Laczniak, *Advertisers’ implementation of CARU guidelines for advertising targeted at children* 29(2) *Journal of Current Issues and Research in Advertising* 27–38 (2007).

<sup>277</sup> L. Zwarun, *Policy Worth Perpetuating? An Analysis of How Well Food Commercials Marketed to Kids Comply with CARU Self-regulatory Guidelines* 23(2) *Southwestern Mass Communication Journal* 1–9 (2008).

<sup>278</sup> Council of Better Business Bureaus (CBBB), *Changing the Landscape of Food and Beverage Advertising: the Children’s Food and Beverage Advertising Initiative in Action, a Progress Report on the First Six Months of Implementation* i (July–December 2007), Available at [http://www.bbb.org/us/storage/16/documents/CFBAI/ChildrenF&BInit\\_Sept21.pdf](http://www.bbb.org/us/storage/16/documents/CFBAI/ChildrenF&BInit_Sept21.pdf) (last visited May 3, 2016).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*, at 13.

<sup>281</sup> Council of Better Business Bureaus (CBBB), *The Children’s Food & Beverage Advertising Initiative in Action, a Report on Compliance and Implementation During 2008* (October 2009), Available at <http://www.bbb.org/us/storage/0/Shared%20Documents/finalbbbs.pdf> (Last visited May 3, 2016).

companies had strengthened their pledges. The report notes that all of the members had either pledged that, “100% of their child-directed advertising will be for better-for-you products or not to engage in child-directed advertising at all.”<sup>282</sup>

External academic research has shown mixed results. Two studies assessed change in the television advertising landscape. In their content analysis of data from 2005, 2007 and 2009, Kunkel et al.<sup>283</sup> assessed several aspects of the CFBAI core principles. On a positive note, the number of food ads per hour declined significantly from 2005 to 2007 and, while not significantly so, 2009 saw fewer ads. With respect to time devoted to food ads, there was a significant decline for each of the three years as 2005 saw 4:22 minutes per hour (2005) to 3:29 (2007) to 2:44 (2009). Given that Initiative members account for approximately two-thirds of the television advertising spending,<sup>284</sup> this decline represents the impact of members easing their television advertising to children under 12. Kunkel et al.<sup>285</sup> specifically note they found no advertising from the four members that pledged not to advertise food to children (Cadbury Adams, Coca-Cola, Hershey’s and Mars).

Using the DHHS food rating system, instead of the USDA Dietary Guidelines and My Pyramid referenced in the CARU 2006 and 2009 guidelines, Kunkel et al.<sup>286</sup> found 68.5% of the members’ advertising was for food of the lowest nutritional value.

In contrast to one of the core principles, use of licensed characters nearly doubled from 2005 to 2009. Further, nearly half of the members’ ads that used a licensed character were for nutritionally poor foods. While the authors noted that the members had, “fulfilled the ‘letter of the law’ based on their individual pledges”,<sup>287</sup> they concluded that, “the marketplace of televised food advertising of children remains dominated by products of the poorest nutritional quality.”<sup>288</sup>

Powell et al.<sup>289</sup> took a different approach to assess trends in televised food advertising

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<sup>282</sup> *Id.*, at i.

<sup>283</sup> D. Kunkel, C. McKinley & P. Wright, *The Impact of Industry Self-regulation on the Nutritional Quality of Food Advertised on Television to Children* (2009), Available at [http://lahealthaction.org/library/adstudy09\\_report.pdf](http://lahealthaction.org/library/adstudy09_report.pdf) (last visited May 3, 2016).

<sup>284</sup> Council of Better Business Bureaus (CBBB), *supra* note 258.

<sup>285</sup> Kunkel et al., *supra* note 283.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*, at 32.

<sup>288</sup> *Id.*, at 34.

<sup>289</sup> L. Powell, G. Szczypka, & F. Chaloupka, *Trends in Exposure to Television Food Advertisements Among Children and Adolescents in the United States* 164(9) *Archives of Pediatric & Adolescent Medicine* 794–802

targeting children and the impact of the CFBAI. Rather than creating ‘composite days’,<sup>290</sup> the authors used TV advertising expenditure data from Nielsen to examine changes across 2003, 2005 and 2007. Similar to Kunkel et al.,<sup>291</sup> they found a decrease in the number of food ads for children under 12. Powell et al.<sup>292</sup> note that,

[i]n line with the ‘better-for-you’ pledges ... overall exposure to sweets fell ... with the largest decreases in exposure to candy bar and cookie ads [and] ... substantial decreases ... for the most heavily advertised sugar-sweetened beverages ... Additional ‘better-for-you’ changes occurred with substantial increases in exposure to ads for bottled water.<sup>293</sup>

In their assessment of CFBAI members versus non-members, Powell et al.<sup>294</sup> comment that the members showed what could be considered positive changes. However, like Kunkel et al.,<sup>295</sup> they were critical that self-regulation allowed individual companies to define what constituted ‘better for you’ foods. Powell et al.<sup>296</sup> also criticised the lack of standards in what defined children’s programming. They noted that some companies appeared to be shifting their advertising budgets from 2–5 year olds to 6–11 year olds. Both studies called for expansion such that all food and beverage advertisers who market to children participate in the CFBAI.

Quilliam<sup>297</sup> reported a content analysis of advergimes on food and beverage websites. The analysis compared the extent to which CFBAI members versus non-members adhered to CARU guidance and the CFBAI core principles for advergimes. More members included an ad break disclosure (63%) than non-members (33%). Thirty-seven per cent of the games incorporated a healthy lifestyle message. However, there were no differences between members’ and non members’ games. Surprisingly, the non-members’ games had more healthy foods (33.3%) versus the members (11.9%).<sup>298</sup> These results are consistent with reports from other

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(2010).

<sup>290</sup> Kunkel et al., *supra* note 283.

<sup>291</sup> *Id.*

<sup>292</sup> Powell, *supra* note 289.

<sup>293</sup> *Id.*, at 799.

<sup>294</sup> *Id.*

<sup>295</sup> Kunkel et al., *supra* note 283.

<sup>296</sup> Powell, *supra* note 289.

<sup>297</sup> E. Quilliam, *MSU Preliminary Report on Food Marketers’ Advergame Self-regulation* (2009), Cited in Amanda E. Staiano & Sandra L. Calvert, *Digital Gaming and Pediatric Obesity: At the Intersection of Science and Social Policy* 6(1) Social Issues Policy Review 54-81 (2012).

<sup>298</sup> *Id.*; see also Elizabeth Taylor Quilliam et al., *The Impetus for (and Limited Power of) Business Self-Regulation:*

domains of food marketing, such as licensed character promotions on food packages<sup>299</sup> and television advertising on children's programs.<sup>300</sup>

In the review of this study of CARU's cases from 2000-2010, in nearly all of the 94 cases (91.5%), CARU was the challenger as it monitored the marketplace. Five cases came to CARU's attention from consumers and only three cases were brought from an advocacy group (the Center for Science in the Public Interest).

Hoy et al.<sup>301</sup> examined CARU cases from 2000 to 2010 involving US food and beverage marketers. They conclude that,

The obvious question at this juncture is 'Does self-regulation work with regards to addressing the role food and beverage advertising may play in influencing childhood obesity or is government regulation necessary?' There is no denying the impact of federal regulation<sup>302</sup>...has promotion self-regulation improved? Has CARU been responsive to the emergence of childhood obesity as a prominent public policy and societal concern? Based on this study's results, a qualifying answer is 'yes'.

Stanford's Computer Science Security Lab examined the Ad Choices label program. Analyzing the 500 most popular Web sites,<sup>303</sup> the researchers found only 9 percent of the ads examined (62 out of 627 ads) to contain the label.<sup>304</sup> Another study by researchers from Carnegie Mellon University examined the level of compliance by Web sites to the DAA principles document, "Self-Regulatory Principles for Online Behavioral Advertising". The research examined 66 NAI Web sites and the results indicated that only 35 percent of ads included the

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*The Example of Advergaming* 45(2) *The Journal of Consumer Affairs* 224-247 (Summer 2011).

<sup>299</sup> Jennifer Harris, Marlene B. Schwartz & Kelly D. Brownell, *Marketing Foods to Children and Adolescents: Licensed Characters and Other Promotions on Packaged Foods in the Supermarket* 13 *Public Health Nutrition* 409-417 (February 2010).

<sup>300</sup> Ameena Batada & Margo G. Wootan, *Better-for-Who? Revisiting Company Promises on Food Marketing to Children*, Washington, DC: Center for Science in the Public Interest (2009).

<sup>301</sup> Mariea Grubbs Hoy, Courtney Carpenter Childers & Margaret Morrison, *The Evolution of Self-regulation in Food Advertising: An Analysis of CARU Cases From 2000-2010* 31(2) *International Journal of Advertising* 257-290 (2012).

<sup>302</sup> *Id.*, at 281.

<sup>303</sup> as ranked by Alexa.com on August 4, 2011.

<sup>304</sup> Jonathan Mayer, *Tracking the Trackers: The AdChoices Icon*, The Center for Internet and Society (18 August 2011), Available at <http://cyberlaw.stanford.edu/node/6714>.

label, whereas industry estimates indicated that 80 percent were targeted ads.<sup>305</sup>

Further evaluation was voiced by Demaine<sup>306</sup> with respect to the regulatory focus on language whereas the advertisement industry have long ago shifted its focus to the visual,

Despite the nearly universal paradigm shift from language to visual imagery in advertising, the FTC continues to focus its efforts on linguistic claims and leaves visual imagery almost entirely unregulated.<sup>307</sup>

### 3. Conclusions

Advertising to children commercialize and commodify the children's world and is an intangible harm, often done virtually, hence a virtual and intangible harm similar to the harm to the imagination development from virtual worlds use discussed throughout this dissertation. As shown above, the realm of the harm from advertising to children is one that the regulators in Canada and US looked at and tried to deal with it (e.g., the ban in Quebec). This is an ongoing concern that involve the public opinion and public interest.

The analysis of the regulation of advertising to children online in Canada and USA as detailed above, results in four main objects of referral: the regulatory regime (legislation, self-regulation and a ban), the overall structure of the regulatory framework (i.e., fragmentation), the comparison between the approach in Canada and the USA, and finally the struggle to cope with new and constantly evolving new technologies.

In both Canada and the USA legislation and self-regulation are the structure of the regulatory regime in the regulation of advertising to children online. The main exception is the ban on advertising in Quebec, a Canadian province. This variety of regulatory instruments and

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<sup>305</sup> Saranga Komanduri et al., *AdChoices? Compliance with Online Behavioral Advertising Notice and Choice Requirements*, Carnegie Mellon University CyLab (March 2011), <http://repository.cmu.edu/cylab/82/> (last visited May 4, 2016).

<sup>306</sup> Linda J. Demaine, *Seeing Is Deceiving: The Tacit Deregulation Of Deceptive Advertising* 54 *Ariz. L. Rev.* 722 (2012).

<sup>307</sup> State consumer protection statutes are also ineffective mechanisms for regulating deceptive visual imagery insofar as they adopt the FTC's approach to deceptive advertising. For example, Arizona's statute suggests that the state's courts use FTC and federal court decisions interpreting the Federal Trade Commission Act's deceptive advertising provisions when enforcing the state statute. Arizona Review Statistic Anniversary § 44-1522(C) (2012). See *Generally Deceptive Trade Practices*, In 50 State Statutory Surveys: Business Organizations: Consumer Protection 0015 Surveys 6 (Westlaw) (2007).

their failure to yield reasonable results, as demonstrated in the evaluation section, demonstrate the challenging nature of the harm at hand and the need to find new and innovative ways to address this harm since traditional means have proven to be ineffective.

Moreover, the question of whether more is better with regards to regulatory instruments seems to be answered in the negative when it comes to the mix of federal and state/provincial legislation, self-regulation and industry codes that are employed in the regulatory framework in both Canada and the USA. While it seems that many regulatory instruments cover the subject matter more closely, in fact, it appears that the opposite occurs and the regulatory over load just complicates things, leaves dark corners and unattended matters and results in massive fragmentation that has a negative effect on the regulatory effort.

With the exception of Quebec, the regulatory structure in Canada and the USA is very similar and comprises three main elements: federal legislation, state/provincial legislation, and self-regulation by national organizations and industry codes. Furthermore, despite the differences in the nature and scope of their relevant legislations, the two federal agencies, the CRTC and the FCC, have tended to follow a similar path with respect to intangible harms. Moreover, the two jurisdictions are influenced by each other (mainly Canada influenced by the USA) and the main industry actors are dominant in both jurisdictions (and usually worldwide).

With the privilege of observing the evaluation of the effectiveness of three regulatory regimes (i.e., legislation, self-regulation and a ban) covering most of the regulatory spectrum and the way they are dealing with a virtual and intangible harm as advertising to children online, the conclusion echoes the previous conclusion set in chapter 3, *supra* – that traditional regulation is not equipped to deal with this kind of harm. Emphasising the challenging nature of this harm is the effect of the ever evolving technologies involved and the difficulty of regulators to keep pace with these developments.

My conclusion from this examination is that the pressure to move to soft forms of regulation codes and voluntary standards in dealing with harms to children is great. The situation is hardly reassuring that the harms resulting from new forms of media can or would be dealt with. Moreover, as concluded in chapters 1-3, *supra*, the most suitable regulation is in education, mainly at home. Nonetheless, the entire regulatory structure in Canada and the US does not

include any such regulatory initiative. The next and last chapter discuss the limits of regulation and review the realm of regulation at home as a potential solution.

## Chapter 7 – The Limits of Regulation

There are many limits to regulation's ability to steer human behavior. These limits may be specific to a certain field<sup>1</sup> or general<sup>2</sup> in its nature. When dealing with the virtual world, a relatively new sphere for regulation, these limits can be inherent and structural.<sup>3</sup> Moreover, when the regulated field is virtual and the actual harm is intangible<sup>4</sup> – the limits of regulation may reach a point that requires reconsideration.

Mayer-Schönberger is using physics to illustrate the limits of regulation in virtual worlds.<sup>5</sup> In 1927, physicist Werner Heisenberg explained how the position and the momentum of a particle cannot both be measured with certainty.<sup>6</sup> The more one pushes for precision of measuring one variable, the less exactly one will know the value of the other. Therefore, Mayer-Schönberger argues,

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<sup>1</sup> See, e.g., June Ross, *Professional Advertising and the Limits of Regulation* 2 Const. F. 7 (1990-1991); Kenneth S. Abraham, *Risk Aversion, Insurance Insurance, and the Limits of Regulation* 5 UC Irvine L. Rev. 513 (2015); Mark Stallworthy, *Carbon sequestration and the limits of regulation: a UK perspective* 64 N. Ir. Legal Q. 165 (2013); James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation* 86 J. Crim. L. & Criminology 93 (1995-1996); Linda C. Dalton, *The Limits of Regulation, Evidence from Local Plan Implementation in California*, APA Journal 151 (Spring 1989); Nicole Bolleyer & Anika Gauja, *The Limits of Regulation: Indirect Party Access to State Resources in Australia and the United Kingdom* 28(3) Governance: An International Journal of Policy, Administration, and Institutions 321-340 (July 2015); Richard A. Wall, *Financial Markets and the Limits of Regulation* 9(1) Managerial and Decision Economics 65-73 (Mar., 1988); Peyton L. Wynns, *The Limits of Economic Regulation: The U.S. Experience*, Federal Communications Commission, International Bureau Working Paper Series, Working Paper No. 2 (June 2004); Fernando Casal Bértoa, Kevin Deegan-Krause & Peter Ucen, *Limits of regulation: party law and finance in Slovakia 1990–2012* 30(3) East European Politics 351-371 (2014); Peter Cleary Yeager, *The Limits of Law, The public regulation of private pollution*, Cambridge University Press, Cambridge: Mass (1991); Ken Cruikshank, *The Limits of Regulation: Railway Freight Rate Regulation and the Board of Railway Commissioners, 1851-1933*, Thesis, York University (Oct 1988).

<sup>2</sup> Stavros Mavroudeas, *The Limits of Regulation, a critical analysis of capitalist Development*, Cheltenham, UK: Edward Elgar (2012); James F. Gatti (ed.), *The Limits of Government Regulation*, NY: Academic Press (1981).

<sup>3</sup> See Viktor Mayer-Schönberger and David Lazer (eds.), *Governance and Information Technology, from Electronic Government to Information Government*, London, UK: MIT Press (2007).

<sup>4</sup> See, e.g., David Nelmark, *Virtual Property: The Challenges of Regulating Intangible, Exclusionary Property Interests such as Domain Names* 3 Nw. J. Tech. & Intell. Prop. 1 (2004), Available at <http://scholarlycommons.law.northwestern.edu/njtip/vol3/iss1/1> (last visited May 5, 2016); Pratin Vallabhaneni & James Kim, *A Primer On Prudential Regulation for Virtual Currency Businesses* 18(5) FinTech Law Report (Sep/Oct 2015).

<sup>5</sup> Viktor Mayer-Schönberger, *Virtual Heisenberg: The Limits of Virtual World Regulability* 66 Wash. & Lee L. Rev. 1245 (2009).

<sup>6</sup> See Werner Heisenberg, *Über den anschaulichen Inhalt der quantentheoretischen Kinematik und Mechanik* 43 Zeitschrift Fur Physik 172–98 (1927) cited in Viktor Mayer-Schönberger, *Id.* (articulating his uncertainty principle of quantum physics); Roger Penrose, *The Road To Reality*, NY: Alfred A. Knopf 521– 24 (2004).

even using the inclusive mechanism of co-regulation to regulate virtual worlds, we encounter a somewhat similar barrier: Real-world regulators cannot co-regulate for public values the way they have without eventually triggering market-choice regulation that in turn triggers public-values regulation and so forth. The more a regulator aims for market concentration to co-regulate effectively for public values, the more this triggers market-choice concerns—and thus regulatory action, and vice versa.

O’Laughlin<sup>7</sup> refers to the boundary between the market and society in the context of regulation by stating that this boundary is blurred, “because both are part of the same moral order”. As Elam and Arrow put it,

[a]ll markets are liable to fail without some measure of moral regulation and . . . all goods, therefore, are to some extent public goods.<sup>8</sup>

In this context, Rumbles<sup>9</sup> demonstrates the thin and blurry border between the virtual and the real in the a case of the Chinese Qui Chengwei (41), a player in the virtual world of Legend of Mir II. Chengwei won a particularly rare weapon, a Dragon Sabre, in an online quest, and subsequently loaned it to another man Zhu Caoyuan (26), who without permission sold the weapon for approximately the equivalent of \$1000.<sup>10</sup> When Chengwei initially sought the assistance of the police, he was told that the theft was not a crime, since virtual property is not covered as a protected asset under the then current law.<sup>11</sup> Tragically, Chengwei attacked Caoyuan, stabbing him to death.<sup>12</sup>

Similarly, Abramovitch & Cummings<sup>13</sup> argue that the Chinese case of Li Hongchen v.

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<sup>7</sup> Bridget O’Laughlin, *Governing Capital? Corporate Social Responsibility and the Limits of Regulation*, 39(6) *Development and Change* 945–957 (2008).

<sup>8</sup> M. Elam & K.J. Arrow, *Markets, Morals and Powers of Innovation* 22(1) *Economy and Society* 34 (1993).

<sup>9</sup> Wayne Rumbles, *Theft in the Digital: Can You Steal Virtual Property?* 17(2) *Canterbury Law Review* 354-374 (2011).

<sup>10</sup> Allen Chein, *A Practical Look at Virtual Property* 80 *St John’s L Rev.* 1059-1060 (2006).

<sup>11</sup> BBC News, *Game theft led to fatal Attack* (31 March 2005), Available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/4397159.stm> (last visited May 5, 2016).

<sup>12</sup> Cao Li, *Death Sentence for Online Gamer*, *China Daily* 3 (6 August 2005), Available at [http://www.chinadaily.com.cn/english/doc/2005-06/08/content\\_449600.htm](http://www.chinadaily.com.cn/english/doc/2005-06/08/content_449600.htm) (last visited May 5, 2016).

<sup>13</sup> Susan H. Abramovitch & David L. Cummings, *Virtual Property, Real Law: The Regulation of Property in Video Games* 6(2) *Canadian Journal of Law and Technology* 73 (July 2007).

Beijing Arctic Ice Technology Development Co.<sup>14</sup> exemplifies the recognition that intangible goods have real world value and thus deserve protection by law. In this case, a third-party hacked into Li's account in the game Red Moon and stole his virtual property. Li consequently sued Beijing Arctic, the developer of the game, for not protecting his virtual goods from theft by a third party. The court of first instance held in favour of Li and ordered Beijing Arctic to, "pay damages equal to the amount of money Li had spent on game subscription fees."<sup>15</sup>

Another case demonstrating the spill over of virtual world legal issues into the real world and the court's approach towards intangible and virtual items is the American case of *Blacksnow Interactive v. Mythic Entertainment, Inc.*<sup>16</sup> Mythic was the developer of the MMORPG Dark Age of Camelot. Blacksnow was a virtual-property farming company ("the activity of playing a game to get valuable items to sell offline")<sup>17</sup> that 'farmed' for virtual property in the virtual world Dark Age of Camelot. When Mythic prompted eBay to stop the auctioning of Dark Age of Camelot items, Blacksnow sued Mythic for unfair business practices and interference with, 'prospective economic advantage'. Blacksnow sought damages and a, "[c]ourt order declaring that the sale of items and accounts outside the game [did] not infringe on Mythic's copyrights."<sup>18</sup>

According to Abramovitch & Cummings, although the case was settled in Mythic's favour before judgment,

[i]t is notable because the facts demonstrate that at least one party has attempted to challenge the general legal position held by developers that real-world trading of virtual objects is not sanctioned.

Although the court cases mentioned above are dealing with theft of virtual and intangible property, they provide an illustration of the struggle, on one hand, to deal with this new legal field within the scope of regulation in general, and on the other hand, demonstrate the

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<sup>14</sup> Joshua Fairfield, *Virtual Property* 85 B.U.L. Rev. 1049, 1084 (2005).

<sup>15</sup> Theodore J. Westbrook, *Owned: Finding A Place for Virtual World Property Rights* 3 Mich. St. L. Rev. 805 (2006).

<sup>16</sup> See Abramovitch & Cummings, *supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> David Becker, *Game Exchange Dispute Goes to Court*, CNET News. com (7 February 2007), Available at <http://www.cnet.com/news/game-exchange-dispute-goes-to-court/> (last visited May 5, 2016).

willingness of the regulatory system, namely the courts, to recognize and acknowledge rights that used to be considered absurd, at best.

Surprisingly, the literature on the limits of regulation, in general, is not comprehensive. It seems that scholars in the field prefer to deal with the capacity of regulation rather than with its incapacity. When they do discuss the incapacity of regulation, it is usually done with respect to a specific field and describes the failure of regulation to deal with a specific harm.

In this sense, the limits of regulation in the case of virtual and intangible harm, as discussed in this dissertation, are unique mainly because of the structural and inherent nature of the limits of regulation to deal with such harm. Not only is this a new field, different from everything that regulation used to deal with before, but also the nature of the harm forces a new approach. This new approach requires new tools and places traditional regulation in general and traditional regulatory instruments in specific, as inferior and unsuitable to deal with these harms in this new environment.

Nonetheless, the virtual is here to stay and the new and alarming regulatory issues it raises will only be amplified with time, especially with the advances of virtual reality, a field that will pose even more challenging regulatory challenges than the ones posed by virtual worlds (being a more immersive and all encompassing technology). This is a twofold regulatory challenge, virtual and intangible. In order to provide a suitable and efficient answer, we need to approach the two heads of this challenge. Only one would not be sufficient.

The following section discusses and summarizes the previous chapters in this dissertation in the context of the limits of regulation in the context of a virtual and intangible harm in general and the virtual and intangible harm to children's imaginative development in virtual worlds as discussed in chapter 1, *supra*. The chapter ends with the suggested regulation.

## **1. Discussion and Conclusions**

The harm identified here is the potential damage to children's creative imagination that arises from virtual-world play. The thesis focuses on the harm to children's creative imagination from specific types of virtual reality play games, but it also makes reference in chapter 6, *supra*,

to the debates concerning potential harms arising from advertising directed to children. It could be contested whether the harm that I describe as being to children's creative imagination is as serious as I suggest, but the problem that this thesis deals with is not confined to my assessment. Other potential harms to children from media involvement have been identified before, specifically the harm that might arise from exposure to a steady diet of violence, or the harm that might arise from the promotion of unhealthy habits or foods or the harm that might arise from exposure to obscenities. These harms have each caught the attention of regulators either or both in Canada or the United States at some point in time. Like the potential harm of primary interest here, all these harms are intangible, difficult to establish scientifically and nonetheless significant in terms of both the public interest and public opinion. The growth of the virtual world adds a further dimension to harms that have been suggested as arising from media involvement. Here I am not alone in suggesting that the virtual realities created by the new, seemingly social media, might have a negative impact that seems, in some minds, to call for regulation. My task is therefore to examine the potential and limits of regulation to deal with harms to children that are intangible and virtual.

New technologies pose new harms that makes their regulation evermore challenging. The Internet has created harms that are virtual and intangible. This dissertation goal was to answer the following question: how do we regulate a harm that is both virtual and intangible, more specifically, the harm to children's imaginative development in virtual worlds. This case study presents the harm caused by virtual worlds, the most advanced technology (not including virtual reality which is still in development and beyond the scope of this dissertation), to children, the most vulnerable users.

Chapter 1, *supra* described the said harm to children's imaginative development in virtual worlds. The Artificial Medium Laws Theory's fourth postulate predicts that the more dimensions a medium possesses, the weaker a user's imagination will be. As a medium, virtual worlds currently have the most dimensions and children's are the most vulnerable users.

The development of creative imagination in children has long-standing implications and is nourished from unmediated sensory input. Play in general and pretend play in particular are fundamental to children's mental development, particularly creative imagination.

The research on media effects on the creative imagination supports the Reduction Theory in general and, especially relevant to the argument in chapter 1, *supra*, the Visualization Theory. Sensory input from the media is replacing internal and external unmediated sensory input, thus curtailing the development and functioning of creative imagination.

In addition, the Displacement Hypothesis occurs in children's play in virtual worlds, not only because virtual play displaces real, unmediated play, but because virtual-world play pretends to be pretend play, while it is merely play with rules.

The harm to children's creative imagination from virtual-world play identified in chapter 1, *supra* is alarming and relatively new. It represents several "digital-age" harms that are inherently virtual and intangible and, thus, pose a challenge not only to traditional regulation but even to modern regulations of virtual space.

Chapters 2-4, *supra* attempted to answer the dissertation's main question: How should we regulate a harm that is both virtual and intangible, such as the harm to children's creative imagination?

Assuming one takes the harm described in chapter 1 *supra* seriously, and that it affects children, the first response might be to regulate one or more of the players and/or factors involved in this realm, however difficult that might be. Chapter 2 *supra* looked closely at the literature on regulation to see if, how and where it speaks to the problem described in chapter 1 *supra*.

Chapter 2, *supra*, concluded that given Black's broad definition of regulation, the harm described in chapter 1, *supra*, comes within this definition and is considered a realm to be considered within regulation's theoretical framework. With the goals of regulation in mind, Gunningham and Sinclair's regulatory design principles sets the framework to move to the second step of the discussion brought in the next chapter – regulatory instruments.

Chapter 3, *supra*, detailed the regulatory instruments and their suitability for the harm discussed in chapter 1, *supra*. As mentioned in the previous chapter, Gunningham and Sinclair<sup>19</sup>

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<sup>19</sup> See Gunningham & Sinclair, *Designing Environmental Policy*, In Gunningham & Grabosky, *Smart Regulation: Designing Environmental Policy*, Oxford: Clarendon Press 42 (1998).

propose two necessary components of a successful regulatory design: regulatory design principles<sup>20</sup> and instrument mixes.<sup>21</sup> The regulatory design principles were discussed in chapter 2 *supra* and the instrument mixes will be discussed below in light of the discussion regarding regulatory instruments and in the context of the harm in question.

(1) preferring policy mixes incorporating a broader range of instruments and institutions,

The discussion above identified some regulatory instruments that can be employed as a mix in order to deal with the intangible and virtual harm discussed. The scheme to be considered in the following chapters is a combination of command-and-control measures incorporated into a co-regulation regime that will enable the government to oversee a self regulatory regime by the virtual-world companies that will act to reduce the harm, inform the users and their parents about the potential harm, and educate the users and their parents in order to prevent more harm and face future harm. To the said mix we should add risk regulation that should be efficient in cases where the harm is hard to measure. It should be emphasized that this is only a general layout to be considered in light of the factors and constraints discussed in the following chapters.

(2) preferring less interventionist measures which include the principle of low interventionism,

Co-regulation and communication-based instruments as discussed above are measures of low intervention and align well with the recommended regulatory mix. Moreover, as will be discussed below, when dealing with a multi-factor, sensitive and complex regulatory sphere, soft and less interventionist measures are always preferable. In addition, flexible and non-interventionist instruments align's with the freedom of speech constraints discussed in details in chapter 5, *supra*.

(3) ascending a dynamic instrument pyramid to the level required to achieve policy goals – including building in regulatory responsiveness,

The structure of co-regulation decoupled with communication based regulatory instruments can create a dynamic instrument pyramid and regulatory responsiveness. The notion

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<sup>20</sup> *Id.*, at 387-419.

<sup>21</sup> *Id.*, at 422-448.

of decreasing the harm, rather than eliminating it all together, enables a pyramid approach to regulation. For example, Co-regulation regime that will cause the virtual worlds companies to create educational programs for users and their parents about the harm to the imagination and how to prevent it. In case where the virtual world company fail to comply with this requirement, the government can force more stringent measure as forcing the virtual world company to incorporate mandatory online course in order to start using its services.

- (4) empowering participants which are best placed to act as quasi regulators – including the application of the principle of empowerment and maximizing opportunities for win-win outcomes,

As said above, assigning the virtual worlds companies to educate children users and their parents will empower participants as quasi regulators. This trend can be further extended to consulting with the children and their parents on the desired educational measures, ways to foster imagination in virtual worlds and programs for education at home and in school.

- (5) including the consideration of whether firms will voluntarily go beyond compliance.

The option of firms going beyond compliance is remote. However, if the harm will be acknowledged and widely accepted in the users and their parent's awareness, the virtual worlds companies can go beyond compliance. This can be done by employing exceptional educational measures as well as features that suppose to enhance the user's imagination, hence, creating these companies competitive advantage in the market.

Chapter 4, *supra*, dealt with the virtual aspect of the harm to children's imagination in virtual worlds through the discussion of the regulation of the internet and the regulatory instruments of 'Code' in the context of the Internet. The goal of this chapter was to address the virtual aspect of the harm caused by virtual worlds to the development of children's imagination and the unique aspect of virtual and intangible harm in general. The first part addressed the debate over the regulation of the Internet. The second part addressed code regulation in the context of the Internet.

The chapter concludes that Internet regulation may account for the virtual aspect of the potential harm discussed in this case study, but the intangible nature of this harm does not allow

code regulation to prevent such harm. In the absence of identifiable and measurable factors associated with the harm, code regulation is not a suitable solution for prevention. The only factor directly associated with the harm is usage time, and this factor is problematic for several reasons discussed in chapters 5 and 7, *supra*.

Chapter 5, *supra*, considered the regulation of the virtual and intangible harm in the context of the freedom of speech. The chapter focused on the general approach taken in two countries, Canada and USA.

Two aspects of freedom of speech and harm to children are important and illustrated in the two cases presented: *Irwin Toy v. Quebec* and *Brown v. Entertainment*. The first aspect demanding consideration in the context of this case study is the notion that freedom of speech restrictions are crucial and imperative element of any regulator attempt to regulate content, especially in the field of harm to children imagination development in virtual worlds.

The second aspect is what seem to be a different approach to the Freedom of Speech interpretation between the Canadian and the American Supreme Court. In light of the decisions in *Irwin Toy* and *Brown* it is suggested that in similar cases the Canadian Supreme Court will tend towards flexibility with freedom of speech claims, especially as it relates to the interpretation of section 1 of the Charter in the dawn of the *Oaks* test.<sup>22</sup> Thus, tending towards protecting the children.

The US Supreme Court, at the wake of *Brown*, is bound to continue in what seems to be its ‘race to the crash’. Unless a surprise will occur and future American courts will adopt Justice Alito’s side of the majority opinion in *Brown* – Justice Scalia’s rigid framework will rein and with it the tendency not to allow regulatory interference with any content.

It should be mentioned that the US Supreme Court conclusions runs to the heart of ‘The Law of the Horse’ debate of whether the internet require special regulation as discussed in chapter 4, *supra*.<sup>23</sup> One may argue, depending on those who favor the Internet’s special

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<sup>22</sup> *R. v. Oakes* [1986] 1 S.C.R. 103.

<sup>23</sup> See discussion in Chapter 1 *supra*.

regulation, that the ‘special’ attitude towards internet new regulation should be also applied to constitutional aspects.

Finally, and most important to the case study at hand, the cases analyzed in chapter 5, *supra*, and the legal tradition demonstrates that the softer the regulation instrument, it is easier to pass the constitutional master of freedom of speech. Moreover, there may be a need to take different approach when it comes to Canada and the USA. While the Canadian Supreme Court may approve co-regulation as not offending the freedom of expression in order to protect children’s imaginative development in virtual worlds and virtual and intangible harm in general, the US Supreme Court may reject such a solution regardless of the evidence to support the existence of the harm.

It is also important to distinguish the two cases on the basis that while Irwin Toy deals with the advertisement of the product, Brown deals with the actual access to the product. To draw an analogy to the harm to children’s imaginative development in virtual worlds, it would be permissible from a freedom of speech perspective to educate the children users and their parents about the potential deleterious effects of virtual worlds but it would be extremely challenging to restrict the access to these worlds. Nonetheless, while in Irwin Toy the potential harm is in the advertisement itself and children’s poor ability to deal with it, in Brown it is the actual product that poses the harm.

In this sense both cases deal with alarming consequences on children’s developing minds and therefore are analogues to the case of the harm to imagination development in virtual worlds.

Chapter 6, *supra*, provides a background on advertising to children, especially online, followed by an analysis of the legislative and regulatory framework concerning advertising to children in two countries, Canada and United States. The chapter concludes that the pressure to move to soft forms of regulation, codes and voluntary standards in dealing with harms to children is great. The situation is hardly reassuring that the harms resulting from new forms of participation in media can or would be dealt with. It is argued that the existing regulation can perhaps deal with ‘old’ non-virtual advertisement, but it is not equipped to deal with ‘new’ virtual advertisement. The case of virtual advertisement regulation as reviewed in chapter 6 and its suitability to address virtual and intangible harm to children is used to draw an analogy to

virtual and intangible harm regulation in general and specifically to the harm to children's imaginative development in virtual worlds as described in chapter 1 *supra*.

Many characters of the potential harm in advertising to children, especially online, resemble the characters of the harm to children's imaginative development as detailed in chapter 1, *supra*. The virtual and intangible nature of the harm, the importance of the development stage in children's understanding as well as the evolving technologies and frequently changing terrain – all makes the regulation of advertising to children online a suitable case for comparison and lesson drawing when it comes to understanding the challenge in regulating a virtual and intangible harm in general and the harm to children's imaginative development in virtual worlds in specific.

The analysis of the regulation of advertising to children online in Canada and USA as detailed above results in four main objects of referral: the regulatory regime (legislation, self-regulation and a ban), the overall structure of the regulatory framework (i.e., fragmentation), the comparison between the approach in Canada and the USA, and finally the struggle to cope with new and constantly evolving new technologies.

In both Canada and the USA legislation and self-regulation compose the regulatory regime in the regulation of advertising to children online. The main exception is the ban on advertising in Quebec, a Canadian province. This variety of regulatory instruments and their failure to yield reasonable results as demonstrated in the evaluation section, demonstrate the challenging nature of the harm at hand and the need to find new and innovative ways to address this harm since traditional means has proven to be ineffective.

Moreover, the question of whether more is better with regards to regulatory instruments seems to be answered in the negative when it comes to the mix of federal and state/provincial legislation, self-regulation and industry codes that are employed in the regulatory framework in both Canada and the USA. While it seems that many regulatory instruments cover the subject matter more closely, in fact, it appears that the opposite occurs and the regulatory over load just complicates things, leaves dark corners and unattended matters and results in massive fragmentation that have a negative effect on the regulatory effort.

With the exception of Quebec, the regulatory structure in Canada and the USA is very similar and comprised of three main elements: federal legislation, state/provincial legislation, self-regulation by national organizations and industry codes. Furthermore, despite the differences in the nature and scope of their relevant legislations, the two federal agencies, the CRTC and the FCC, have tended to follow a similar path with respect to intangible harms. Moreover, the two jurisdictions are influenced by each other (mainly Canada influenced by the USA) and the main industry actors are dominant in both jurisdictions (and usually worldwide).

With the privilege of observing the evaluation of the effectiveness of three regulatory regimes (i.e., legislation, self-regulation and a ban) covering most of the regulatory spectrum and the way they are dealing with a virtual and intangible harm as advertising to children online, the conclusion echoes the previous conclusion set in chapter 3, *supra* – that traditional regulation is not equipped this kind of harm. Emphasizing the challenging nature of this harm is the effect of the ever evolving technologies involved and the difficulty of regulators to keep pace with these developments.

My conclusion from this examination is that the pressure to move to soft forms of regulation codes and voluntary standards in dealing with harms to children, is great. The situation is hardly reassuring that the harms resulting from new forms of participation in media can or will be dealt with. Moreover, as concluded in chapters 2-4, *supra*, the most suitable regulation is in education, mainly at home. Nonetheless, the entire regulatory structure in Canada and the US does not include any such regulatory initiative. The next and last chapter explores the realm of regulation at home.

Considering the conclusion of the previous chapters, children's Internet use regulation at home by their parents seems to be the most appropriate solution for a virtual and intangible harm in general and especially to the harm to children's imaginative development in virtual worlds as discussed in chapter 1, *supra*. Parents regulation at home as a 'light' educational regulatory instrument is the most suitable measure for a virtual and intangible harm as discussed in chapters 2-4, *supra*; there are no significant implications in the context of the freedom of speech as discussed in chapter 5, *supra*; and, parent's regulation at home seems to align with the

conclusions of the analysis of the regulation of advertisement online as discussed in chapter 6, *supra*.

There are many intangible harms that are impossible to prove and regulators have a history of thinking and dealing with them. This thesis takes the harm that I am concerned about and check whether regulators can deal with it – my conclusion is that they cannot but this is not the only intangible harm that regulators were asked to deal with in the Canada and US; other examples includes the harm from obscenity – there is an extensive discussion about this intangible harm; or the intangible harm in children exposure to sexually explicit material.

There are all kinds of intangible harm arising from media involvement of children and they are especially dominant in virtual worlds. Regulators demanded that there will be regulation. In this thesis I have taken one harm and explored whether regulation can deal with it. My conclusions are generalizable to the issues of intangible harm from media involvement by children especially in the virtual worlds where regulators have historically been concerned and where there is a public interest and public pressure for regulation.

The discussion below deals with the regulation of children’s Internet use at home by their parents in the context of harm in general and in specific in the context of virtual and intangible harm. This discussion details the research findings on parental regulation of children Internet use at home and drew conclusions regarding the regulation at home in the context of virtual and intangible harm and more specifically with respect to the harm presented in chapter 1, *supra* – the harm posed to children’s imaginative development in virtual worlds.

In general, the regulation of children’s Internet use at home reflects the regulatory framework discussed in chapters’ 2-4, *supra*. The relationships in the modern family, the regulatory instruments and code regulation are prevalent in the regulation field in general, as much as they are dominant in the relationship between parents and children over the regulation of the use of the Internet at home.

Therefore, there is no surprise in the findings that traditional forms of regulation are not effective when dealing with virtual and intangible harm, both by regulators and by parents at home. It is the the regulatory measures at the other end of the regulatory spectrum, namely ‘soft regulation’ involving understanding the terrain, discussing it with the children and offering

advice and guidance which seems to be the most efficient in reducing the risk of the virtual and intangible harm posed by the Internet.

Although parents are positioned in the best spot to regulate their children's Internet use, few obstacles make this task challenging: the knowledge gap, children's privacy, parent-child relationship in general and more. To this end, guiding the parents and exposing them to the research results in this field as well as training them to engage authoritative mediation is warranted.

While parents stand at the forefront of the regulation of children's Internet use being best positioned to deal with the prevention of the virtual and intangible harm, they should not be left alone in this crucial battle. As will be discussed in the conclusions of this dissertation and suggested in the future research in Appendix A, *infra*, parents should receive every assistance possible, from all relevant stakeholders, in order to perform their task in the best way possible.

Finally, one may ponder: if the potential harm is so severe, why am I proposing such a 'soft' measure as parental regulation? The answer is not a simple one. Even if we set aside the constraints of freedom of speech, the inefficiency of traditional regulation and the incapacity of virtual regulation – the question remains: can we do more? I argue that we can, but first we need to change the regulatory paradigm as stated in the prolog of this chapter. Once changed, we can employ the technology itself to help with its regulation (see the suggested future research in Appendix A, *infra*). This paradigm shift takes us back to the question posed in the outset of this paragraph to teach us that in the realm of virtual and intangible harm there is no 'soft' or 'hard' regulation, but a different and new spectrum of regulatory instruments – the regulatory spectrum of new technologies.

## **2. Parental Regulation**

Considering the conclusion of the previous chapters, children's Internet use regulation at home by their parents seems to be the most appropriate solution for a virtual and intangible harm in general, and especially to the harm to children's imaginative development in virtual worlds as discussed in chapter 1 *supra*. Parental regulation at home as a 'light' educational regulatory instrument is the most suitable measure for a virtual and intangible harm as discussed in chapters

2-4, *supra*; there are no significant implications in the context of the freedom of speech as discussed in chapter 5, *supra*; and, parents regulation at home seems to align with the conclusions of the analysis of the regulation of advertisement online as discussed in chapter 6, *supra*. As Harden<sup>24</sup> observes, ‘while anxieties about risk may be shaped by public discussion, it is as individuals that we cope with these uncertainties’.

Therefore, the following chapter will discuss the regulation of children’s Internet use at home by their parents in the context of harm in general and in specific in the context of virtual and intangible harm. The chapter will detail the research findings on parental regulation of children’s Internet use at home and will draw conclusions regarding regulation at home in the context of virtual and intangible harm, and more specifically with respect to the harm presented in chapter 1 *supra* – the harm posed to children’s imaginative development in virtual worlds.

The research findings regarding the parental regulation of children’s Internet use at home should be evaluated carefully. Cultural differences between countries, children’s age, and the date of the research compared with the development level of the Internet are some influential factors in assessing these research findings. Therefore, as much as possible, this chapter attempts to distinguish the findings according to these factors and draw conclusions accordingly.

## 2.1 Parents and Children

According to Giddens<sup>25</sup> and Beck,<sup>26</sup> in the modern family, there is a shift from the model of authority and hierarchy to a relationship of democracy and ‘friendship’. Instead of rules and rewards as a mean of control exercised by parents over their children, a relationship based on trust and negotiation are formed. In this context, the regulation of children’s media use at home is a way of ‘working’ the family relationship, rather than responding to an external threat. As Buckingham observed,

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<sup>24</sup> J. Harden, *There's No Place Like Home: The Public Private Distinction in Children's Theorizing of Risk and Safety* 7(1) *Childhood* 46 (2000).

<sup>25</sup> A. Giddens, *Modernity and Self-identity: Self and Society in the Late Modern Age.*, Cambridge: Polity Press (1991).

<sup>26</sup> U. Beck, *Risk Society: Towards a new modernity*, London: Sage (1992).

Since it is the new media that mark the key transition for parents from the norms of their own childhood to those of their children's childhood, these discussions center on new media and have a strongly nostalgic flavor.<sup>27</sup>

Some of the concerns parents have with respect to their children's Internet use includes: becoming isolated from others, exposure to sexual and/or violent images, the displacement of more important activities, and risk to privacy.<sup>28</sup> Nonetheless, most parents believe that the Internet can assist their child do better at school and help them learn worthwhile things. Indeed, this is why the parents acquire access to the Internet in the first place<sup>29</sup>.

Ho and Zaccheus<sup>30</sup> argue that parents are encouraged to monitor and supervise their children's Internet use. However, as Tripp notes, since children often have much more knowledge about technology than their parents, effective monitoring is challenging.<sup>31</sup> Moreover, as children are using the Internet through their mobile phones, parents find it harder to supervise their children's Internet use.<sup>32</sup>

Paus-Hasebrink et al.<sup>33</sup> have identified four main patterns of relationship between parents and children in the context of the Internet use: the "digital native vs. digital immigrant family"—

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<sup>27</sup> D. Buckingham, *After the Death of Childhood: Growing Up in the Age of Electronic Media*, Cambridge: Polity Press (2000).

<sup>28</sup> See Ofcom, *The Evidence Base – The views of Children, Young People and Parents*, Ofcom's Submission to the Byron Review 72 (2007), Available at <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/annex5.pdf> (last visited May 5, 2016) (children who expressed concerns about content on the Internet were asked "What sort of things are you worried about?". Parents who expressed concerns about content on the Internet were asked "what sort of things are you worried about for your children?". The top three concerns of parents were 'sexual content' (54%), 'Violent content' (35%) and 'Paedophiles/perverts masquerading as younger people' (29%). The top three concerns of children were identical but in much lower degree 'sexual content' (13%), 'Violent content' (11%) and 'Paedophiles/perverts masquerading as younger people' (6%). It should be noted that both parents and children were not asked in general about concern with regard to Internet use, but rather about concern about internet content. This distinction is important when considering internet addiction, blurring of borders and imagination decline, which are not content concerns.

<sup>29</sup> D. Buckingham, The Electronic Generation? Children and New Media, In Lievrouw & Livingstone (eds.), *The Handbook of New Media: Social shaping and consequences of ICTs*, London: Sage 77-89 (2002); Livingstone & Bovill, *Families and the Internet: An Observational Study of Children and Young people's Internet Use* (2001), Available at [http://www.infoamerica.org/documentos\\_pdf/livingstone08.pdf](http://www.infoamerica.org/documentos_pdf/livingstone08.pdf) (last visited May 5, 2016).

<sup>30</sup> D. Ho & M. Zaccheus, *Alarm Over popular Facebook Group*, The Straits Times B1-B2 (23 October 2012).

<sup>31</sup> L. M. Tripp, *The Computer is Not for You to be Looking Around, It Is for Schoolwork: Challenges for Digital Inclusion as Latino Immigrant Families Negotiate Children's Access to the Internet*, 13(4) *New Media & Society* 552–567 (2011).

<sup>32</sup> L. S. Clark, *Parental Mediation Theory for the Digital Age* 21 *Communication Theory* 323–343 (2011).

<sup>33</sup> I. Paus-Hasebrink, Bauwens, J. Durager & C. Ponte, *Exploring Types of Parent–Child Relationship and Internet Use Across Europe* 7(1) *Journal of Children and Media* 114–132 (2013).

children have better understanding of the Internet than their parents; the “unskilled family”— the children and the parents are lacking basic Internet skills; the “triple C family”— Confident, Caring and Communicative parenting style; and the “protective family”— parents’ employ active and restrictive mediation beyond the average. It is the ‘triple C Family’ that is best able to regulate the Internet use of children.

Parents of children aged 7–12, according to Shin,<sup>34</sup> were confident regarding their ability to manage their children’s Internet use. However, this confidence led parents to be less engaged in purposeful and communication-based parental mediation and to fail to keep up with their knowledge of the Internet.

The breadth of opportunities to use the Internet almost everywhere and anytime using a variety of device, makes the regulation of children’s Internet use at home even more challenging. According to a study conducted by the Keiser Family Foundation, 84% of the children in the United States<sup>35</sup> use the Internet at home. Similar results (67%) were found among Australian children<sup>36</sup> and children in the European Union, (65%).<sup>37</sup> Livingstone and Bober’s<sup>38</sup> UK study further indicates that regardless of the computer location – in a public or private room – children are looking to use the internet in privacy, with 79% mostly using the Internet alone.

Livingstone and Bober,<sup>39</sup> conclude that,

In terms of media regulation, therefore, it may be that the stakes have never been higher, as society seeks to strike a balance between the failure to minimize the dangers and the failure to maximize the opportunities.<sup>40</sup>

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<sup>34</sup> Wonsun Shin, *Parental Socialization of Children’s Internet Use: A Qualitative Approach* 17(5) *New Media & Society* 649– 665 (2015).

<sup>35</sup> Kaiser Family Foundation, *Generation M2, Media in the Lives of 8-Year-Olds* 3 (1 January 2010), Available at [www.kff.org/entmedia/upload/8010.pdf](http://www.kff.org/entmedia/upload/8010.pdf) (last visited May 5, 2016).

<sup>36</sup> Dooley et al., *Review of Existing Australian and International Cyber-Safety Research*, Child Health Promotion Research Centre, Edith Cowan University (2009), Available at [https://www.ecu.edu.au/\\_\\_data/assets/pdf\\_file/0007/32965/ECU\\_Review\\_of\\_existing\\_Australian\\_and\\_international\\_cyber-safety\\_research.pdf](https://www.ecu.edu.au/__data/assets/pdf_file/0007/32965/ECU_Review_of_existing_Australian_and_international_cyber-safety_research.pdf) (last visited May 5, 2016).

<sup>37</sup> European Commission Flash Eurobarometer (EU27), *Towards a Safer Use of the Internet for Children in the EU – a Parents’ Perspective, Analytical Report* 14 (2008), Available at [http://ec.europa.eu/public\\_opinion/flash/fl\\_248\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_248_en.pdf) (last visited May 5, 2016).

<sup>38</sup> S. Livingstone, & M. Bober, *UK Children Go Online: Surveying the Experiences of Young People and their Parents*, London: London School of Economics and Political Science 101 (2004).

<sup>39</sup> *Id.*, at 94.

The following section reviews the research findings regarding the regulation of children's Internet use at home. This section is comparative in order to account for cultural differences and will serve as the ground for the next section that will summarize and analyze the findings in the multiple countries. The parents and children's positions will first be presented followed by the research findings on the use of technology as a tool of regulation at home. Further, the research results regarding parent's practice of setting rules of Internet use by their children will be discussed and finally the research results regarding the outcome of different parental Internet mediation types will be detailed.

## 2.2 Parent's Position

In a study conducted in Canada at the beginning of the millennium, most surveyed parents (94%) considered educating children about safe, responsible Internet use as a top priority. 91% of these parents indicated the importance of educating parents about strategies for managing the Internet. 55% of the parents believe in taking responsibility for family Internet use, and 44% said that the content of the Internet should be controlled.<sup>41</sup> Many of the parents supported a collaborative approach that would involve public libraries, schools, Internet service providers (ISPs), community institutions, government and police.<sup>42</sup>

In a similar study conducted in the European Union,<sup>43</sup> most parents suggested the following to enhance their children's safety online: "more/better teaching and guidance on the Internet use in schools" (88%), "more awareness raising campaigns on online risks" (87%), "more/better information and advice for parents on website children use" (87%), "stricter regulation for businesses that produce online content and services" (86%), "contact points where parents and children can receive individual advice about how to stay safe online" (84%), "improved availability/performance of monitoring software" (80%) and finally, "training sessions organized for parents by NGO's, government, local authorities" (70%). Livingstone and

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<sup>40</sup> *Id.*, at 95.

<sup>41</sup> Media Smart, *Canada's Children in a Wired World: The Parents' View* 3 (1 Mar 2003), Available at <http://mediasmarts.ca/publicationreport/canadas-children-wired-world-parents-view> (last visited May 5, 2016).

<sup>42</sup> *Id.*

<sup>43</sup> European Commission, *supra* note 37, at 55.

Bober<sup>44</sup> further found that only 41% of EU parents to 9-17 year-olds, were confident that their child has learned how to judge the reliability of online information.

In a more recent study, Cassidy et al.,<sup>45</sup> found that there is a gap between Canadian children and their parents' experience of Internet use. While 6% of the parents say that their child spends 5 hours or more on the Internet per day, 11% of the children reported this length of time. It was further reported that 31% of parents do not supervise their child's Internet use at all. Moreover, those 69% of parents who report supervising their child's Internet use are using some of the methods similar to what Turow<sup>46</sup> found, and which were labeled as, "fleeting at best".<sup>47</sup>

According to Cassidy et al.,

Although these parents were familiar with older types of technology (e-mail and cellular phones), they were less knowledgeable about newer forms of technology such as Facebook, Blogs, and YouTube. The parents were even less familiar with these forms of technology than the participating educators, whose knowledge was also limited.<sup>48</sup>

Livingston et al.<sup>49</sup> found that 87% of parents in Spain report the use of active mediation of their child's Internet safety. When it comes to the mediation of Internet use, 91% of the parents use active mediation. In addition, 93% of the parents reported using restrictive mediation of their child's Internet use, and 67% reported using monitoring of their child's Internet use.

These findings align with the Eurobarometer 248<sup>50</sup> for Spain, in which 85% of parents

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<sup>44</sup> *Id.*, at 104.

<sup>45</sup> Cassidy et al., *Making Kind Cool: Parents' Suggestions for Preventing Cyber Bullying and Fostering Cyber Kindness* 46(4) *J. Educational Computing Research* 415-436 (2012).

<sup>46</sup> J. Turow, *Family Boundaries, Commercialism, and the Internet: A Framework for Research* 22(1) *Journal of Applied Developmental Psychology* 73-86 (2001)

<sup>47</sup> *Id.*, at 218. ("parent-child conversations about Web privacy issues are fleeting at best, perhaps in the form of "don't give out your name" or "don't talk to strangers" that parents have traditionally urged upon their children").

<sup>48</sup> W. Cassidy, K. Brown & M. Jackson, *'Under the Radar': Educators and Cyberbullying in Schools* 33(5), *School Psychology International* 520-532 (2012).

<sup>49</sup> S. Livingstone, L. Haddon, A. Görzig & K. Ólafsson, *Risks and Safety on the Internet: The Perspective of European Children*, LSE, London: EU Kids Online (2011), Available at [http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20\(2009-11\)/National%20reports/UKReport.pdf](http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20(2009-11)/National%20reports/UKReport.pdf) (last visited May 5, 2016).

<sup>50</sup> European Commission, *supra* note 37.

reported talking to their children about the Internet (compared with 74% for all 27 EU member states); 74% of the parents further reported that they always or frequently remained close to their children while they were online (compared with 61% for all 27 EU member states). Interestingly, only 48% of parents reported imposing no restrictions on online access (compared to a much lower percentage of 25% for the Europe-wide average).

According to Garitaonandia and Garmendia,<sup>51</sup>

[t]he main concern of Spanish parents was the amount of time children spent online, not the content of the pages their children were visiting or any online relationships they may be maintaining.

Yet, in another Spanish study,<sup>52</sup> surveying families with children (10-16), it was found that 27.6% of parents asked always or almost always what their children were doing online. Similarly, a study done in Argentina found that there is a very low level of parental supervision, with parents underestimating the risks of Internet access.<sup>53</sup>

The results of parental mediation of Internet use amongst fifth and sixth grade in Belgium show a predominance of the restrictive mediation style (59.4%). Mediation differs in accordance with parents' gender, educational level and age. Mediation styles are also linked to how much parents themselves use the Internet, their attitude to it and their experiences on the net.<sup>54</sup>

Ihmeideh and Shawareb<sup>55</sup> interviewed parents of age 7-8 children in Jordan about their mediation style. Authoritative mediation was most commonly used, followed by the permissive and authoritarian parenting styles, and the neglectful parenting style being used the least.

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<sup>51</sup> C. Garitaonandia & M. Garmendia, *Cómo usan Internet los jóvenes: Hábitos, riesgos y control parental* [How Youngster Use Internet: Habits, Risks and Parental control] (2007), cited in M. Álvarez, A. Torres, E. Rodríguez, S. Padilla & M.J. Rodrigo, *Attitudes and Parenting Dimensions in Parents' Regulation of Internet use by Primary and Secondary School Children* 67 *Computers & Education* 69–78 (September 2013).

<sup>52</sup> INTECO, *Estudio sobre hábitos seguros en el uso de las TIC por niños y adolescentes y e-confianza de sus padres* [Survey on Safety Habits in the Use of TICs by Children and Adolescents and e-trust of their Parents]. Madrid: Instituto Nacional de Tecnologías de la Comunicación. (2009), *Id.*

<sup>53</sup> A. Melamud et al., *Internet Usage in Households with Children Between 4 and 18 Years old. Parent's Supervision*, Results of a national survey 107(1) *Archivos Argentinos de Pediatría* 30–36 (2009).

<sup>54</sup> M. Valecke et al., *Internet Parenting Styles and the Impact on Internet use of Primary School Children* 55(2) *Computers & Education* 454-464 (2010).

<sup>55</sup> Fathi Mahmoud Ihmeideh & Aseel Akram Shawareb, *The Association Between Internet Parenting Styles and Children's Use of the Internet at Home* 28 *Journal of Research in Childhood Education* 411–425 (2014).

As evident from the research findings parents are confused with regard to many factors involved in the regulation of their children's Internet use. What is the best mediation approach? Who should regulate their children's Internet use? And how to bridge the knowledge gap between the generations are only some of the questions posed. These challenges combined with the rapidly evolution of the Internet (and technology in general) as well as cultural differences and traditional versus modern parental approaches, make this regulatory sphere highly contested.

### 2.3 Children's Position

The research indicates that the patterns, places and regulation of Internet use vary as children age and develop.<sup>56</sup> Before they reach the age of 12, children are more likely to access the Internet at home using a computer located in a communal area and have their access supervised. In contrast, a more specialized and diverse Internet practices are developed by adolescents, with more places and devices they use to access the Internet, more time spent online, less supervision, and greater variety in their online activities. Younger children tend to visit few sites and often return to familiar sites; and they are more likely to use the Internet for doing homework or to play online games rather than communicate or seek out information.<sup>57</sup>

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<sup>56</sup> Australian Communications and Media Authority (ACMA), *Media and Communications in Australian Families 2007*, Report for the Media and Society Research Project, Melbourne: ACMA (2007), Available at [http://www.acma.gov.au/webwr/\\_assets/main/lib101058/media\\_and\\_society\\_report\\_2007.pdf](http://www.acma.gov.au/webwr/_assets/main/lib101058/media_and_society_report_2007.pdf) (last visited May 5, 2016); Australian Communications and Media Authority (ACMA), *Use of Electronic Media and Communications: Early Childhood to Years, Findings from Growing Up in Australia* (2009), Available at [http://www.acma.gov.au/webwr/\\_assets/main/lib310665/use\\_of\\_electronic\\_media\\_and\\_comms-early\\_childhood\\_to\\_teenage\\_years.pdf](http://www.acma.gov.au/webwr/_assets/main/lib310665/use_of_electronic_media_and_comms-early_childhood_to_teenage_years.pdf) (last visited May 5); *The Longitudinal Study of Australian Children (3 to 4 and 7 to 8-year-olds), and Media and Communications in Australian Families (8 to 17-year-olds)*, Melbourne: ACMA (2007), Available at <http://www.growingupinaustralia.gov.au/pubs/newsletter/participants/studyupdate201002.pdf> (last visited May 5, 2016); S. Livingstone et al., *Risks and Safety on the Internet: The Perspective of European Children*, Initial findings, LSE, London: EU Kids Online (2010), Available at [http://www.lse.ac.uk/media%40lse/research/EUKidsOnline/EU%20Kids%20II%20\(2009-11\)/EUKidsOnlineIIRReports/D4FullFindings.pdf](http://www.lse.ac.uk/media%40lse/research/EUKidsOnline/EU%20Kids%20II%20(2009-11)/EUKidsOnlineIIRReports/D4FullFindings.pdf) (last visited May 5, 2016).

<sup>57</sup> Australian Bureau of Statistics (ABS), *Children's Participation in Cultural and Leisure Activities Survey 2009*, Canberra: ABS (2009), Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4901.0> (last visited May 5, 2016); ACMA (2007), *Id.*; ACMA (2009), *Id.*; S. Fox & S. Jones, *Generations Online in 2009*, Washington: Pew Internet and American Life Project (2009), Available at <http://www.pewinternet.org/2009/01/28/generations-online-in-2009/> (last visited May 5, 2016); S. Livingstone, *Children and the Internet: Great Expectations, Challenging Realities*, Cambridge: Polity (2009), Available at [http://www.gla.ac.uk/media/media\\_230790\\_en.pdf](http://www.gla.ac.uk/media/media_230790_en.pdf) (last visited May 5, 2016); S. Livingstone & M. Bober, *UK Children Go Online*, London: Economic and Social Research Council (2005), Available at <http://eprints.lse.ac.uk/395/> (last visited May 5, 2016); Livingstone, S. et al., *supra* note 49; Kaiser Family Foundation, *supra* note 35.

According to Livingstone and Bober,<sup>58</sup> many children in the EU do not have the basic skills needed to evaluate online content. Among children age 9-19, 40% said that they trust most of the information on the Internet, while 50% trust some of it. Only 10% of the research participants said that they are skeptical about much information online and only one third of the participants said that they have been told how to judge the reliability of online information.

Mascheroni,<sup>59</sup> studying the interaction of Italian children and parents in parental mediation of smartphones use, found that children are active recipients of parental mediation: they negotiate, resist or ignore parental attempts to regulate their relationship with their smartphone,

What parents perceive positively, as a way of engaging in their children's everyday lives and guiding them towards safer Internet uses, is rather understood by children as a clear infringement of their privacy. For example, the practice of friending children on Facebook is acknowledged as a form of parental surveillance, to which children, especially young girls, resist by selecting privacy settings that exclude parents from their online conversations.

According to Duerager and Livingstone,<sup>60</sup> EU children underestimate their parents' use of monitoring and filtering. 27% said that their parent's involvement in Internet mediation was very active and 43% thought it was 'a bit' positive. 32% of the children said that their parents knew a lot about their activities online and 36% said their parents knew 'quite a lot'. Nonetheless, 11% said that their parent's mediation limits their online activities 'a lot' and 33% said it limits their activities 'a little'. 29% of the children said that they ignore their parents a little and 8% said they ignore a lot what their parents say about using the Internet.<sup>61</sup> 5% would like their parents to take more interest in their online activity, and 10% would like a little more interest.

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<sup>58</sup> *Id.*, at 104.

<sup>59</sup> Giovanna Mascheroni, *Parenting the Mobile Internet in Italian Households: Parents' and Children's Discourses* 8(4) *Journal of Children and Media* 440–456 (2014).

<sup>60</sup> A. Duerager & S. Livingstone, *How Can Parents Support Children's Internet Safety?*, London, UK: EU Kids Online Network (2012), Available at [http://eprints.lse.ac.uk/42872/1/How%20can%20parents%20support%20children's%20internet%20safety\(lsero\).pdf](http://eprints.lse.ac.uk/42872/1/How%20can%20parents%20support%20children's%20internet%20safety(lsero).pdf) (last visited May 5, 2016).

<sup>61</sup> *Id.*

These research results show that children are an active and not always negative part of the regulation at home interaction. While the children perceive part of their parent's mediation as invading their privacy, they also appreciate this mediation as long as it takes a more educational approach rather than an arbitrarily controlling the amount of time children spend online. Moreover, children's underdeveloped ability to determine the reliability of online content makes parental mediation an important component.

## 2.4 Technology Measures

In Spain, 28% of parents report use of parental controls or other means of blocking or filtering websites.<sup>62</sup> Most U.S. parents with children using the Internet would be willing to pay for online protection measures, such as filtering software.<sup>63</sup> 33% of parents report using some type of filtering or blocking software.<sup>64</sup> According to Mitchell et al.<sup>65</sup> parents to younger children (10-15) were more likely to use Internet filters.

According to a survey done in the European Union,<sup>66</sup> half of the parents say that they install filtering software on the computer that their child uses at home. 37% of the parents used monitoring software. 27% said they used both filtering and monitoring software. According to Kirwil,<sup>67</sup> 28% of EU parents use technical safety tools to moderate their children Internet use. Overall, parents prefer social mediation over technical restrictions and monitoring.

According to Dooley et al.,<sup>68</sup> Australian parents use of filtering software is moderate. Similar results were found in a report prepared for the Australian Broadcasting Authority (now ACMA). More than third (35%) of parents reported using software filters to help mediate their children's Internet use. Almost one third of these parents (29%) use filtering software on a

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<sup>62</sup> Livingstone, S., *supra* note 49.

<sup>63</sup> See OECD, *The Protection of Children Online, Recommendation of the OECD Council Report on Risks Faced by Children Online and Policies to Protect Them* (2012), Available at [https://www.oecd.org/sti/ieconomy/childrenonline\\_with\\_cover.pdf](https://www.oecd.org/sti/ieconomy/childrenonline_with_cover.pdf) (last visited May 6, 2016).

<sup>64</sup> K. J. Mitchell et al., *Protecting Youth Online: Family Use of Filtering and Blocking Software* 29(7) *Child Abuse & Neglect* 753-765 (2005).

<sup>65</sup> *Id.*

<sup>66</sup> European Commission, *supra* note 37, at 48.

<sup>67</sup> L. Kirwil, *Parental Mediation of Children's Internet Use in Different European Countries* 3(4) *Journal of Children and Media* 394-409 (2009); Livingstone & Helsper, *supra* note 88.

<sup>68</sup> J. J. Dooley et al., *supra* note 36, at 175.

regular basis and 6% on an occasional basis.<sup>69</sup> Fleming et al.,<sup>70</sup> in a more recent Australian research, found Internet filter usage levels considerably lower at approximately 20%.

Inherently, technology measures are not fine or focused tools to regulate children's Internet's use. By their nature, these measures may work well in protecting children from sexual content but would work poorly when dealing with an intangible and virtual harm as the harm described in chapter 1 *supra*, the harm to children's imaginative development in virtual worlds. These are quantity tools rather than qualitative tools and as such are inefficient in protecting children and thus unpopular among parents.

## 2.5 Setting Rules

Mitchell et al.<sup>71</sup> studying US parents of 10-17 years old, found that parents of preadolescent children (10–12) tend to control and supervise their online behavior more (by restricting online time and using filters) than parents of teenagers (aged 12–17). Rosen et al.,<sup>72</sup> surveying parents and children online found that parents of teenagers tend to adopt the permissive and negligent styles more than parents of preadolescent children.

According to a study done by the Kaiser Family Foundation,<sup>73</sup> the majority of 8 to 18 year olds living in the US, report that their parents do not set any rules regarding the type of media content they can use or the amount of time they can spend with the medium. However, 52% reported that their parents set rules regarding what they are allowed to do on the Internet. 26% of the children report some media rules and say their parents generally enforce those rules most of the time. 39% of the children report having some rules, but say those rules aren't always enforced.<sup>74</sup>

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<sup>69</sup> NetRatings Australia, *Kidsonline@home: Internet Use in Australian Homes*, Sydney: Australian Broadcasting Authority and NetAlert Limited (2005), Available at <http://trove.nla.gov.au/work/12156089> (last visited May 6, 2016).

<sup>70</sup> M. J. Fleming et al., *Safety in Cyberspace: Adolescents' Safety and Exposure Online* 38(2) *Youth and Society* 135-154 (2006).

<sup>71</sup> Mitchell et al., *supra* note 64.

<sup>72</sup> L. Rosen, N. Cheever & L. M. Carrier, *The Association of Parenting Style and Child Age with Parental Limit Setting and Adolescent MySpace Behavior* 29(6) *Journal of Applied Developmental Psychology* 459–471 (2008).

<sup>73</sup> Kaiser Family Foundation, *supra* note 35.

<sup>74</sup> *Id.*, at 35.

According to Wang et al.<sup>75</sup> American parents report more monitoring of their teen children (61%) than the teens report (38%). Rideout et al.<sup>76</sup> found that 60% of American parents have set rules regarding what their children (8-14) can watch on television and do on computer.

A European Commission survey<sup>77</sup> found that in the EU, 25% of the parents reported to talk with their children always or very frequently talked with their son or daughter about their online activities. 25% of the parents said that there were no rules or restrictions about their child's use of the Internet. Approximately 80% of the parents listed online shopping (84%), talking to strangers (83%) and spending a lot of time online (79%) as activities that were not allowed for their child.<sup>78</sup>

Duerager and Livingstone<sup>79</sup> found that 89% of EU parents impose rules about whether their child can give out personal information online; 82% of parents discuss their children online activities with the children and 58% stay nearby when the child is online. Parents also restrict children's disclosure of personal information (85%), uploading (63%) and downloading (57%).

In the UK, parents prefer to use restrictive forms of guidance than evaluative or conversational forms.<sup>80</sup> 42% of children say that they have to follow rules about for how long they can use the Internet and 35% of the children say they have to follow rules about when they can go online. Parents provided the same answers. However, parents claim a greater degree of domestic control than their children recognize.

Livingston and Helsper<sup>81</sup> found that 53% of parents in the UK reported rules concerning the amount of time their children are allowed to spend online. Parents talk to their child about Internet use (64%), watch their child online (46%), stay nearby when their child is online (34%),

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<sup>75</sup> R. Wang, S. Bianchi & S. Raley, *Teenagers' Internet Use and Family Rules: a Research Note* 67 *Journal of Marriage and Family* 1249-1258 (2005).

<sup>76</sup> Kaiser Family Foundation, *supra* note 35.

<sup>77</sup> European Commission, *supra* note 37.

<sup>78</sup> *Id.*, at 40.

<sup>79</sup> Duerager & Livingstone, *supra* note 60.

<sup>80</sup> Sonia Livingstone & Magdalena Bober, *Regulating the Internet at Home: Contrasting the Perspectives of Children and Parents*, In D. Buckingham & R. Willett, *Digital Generations: Children, Young People and New Media*, Mahwah, N.J.: Lawrence Erlbaum 99 (2006).

<sup>81</sup> S. Livingstone & E. J. Helsper, *Parental Mediation of Children's Internet Use* 52(4) *Journal of Broadcasting & Electronic Media* 581-599 (2008).

check which sites their child visited (30%), check the child's e-mail accounts (17%) and sit with their child while online (16%). They conclude that:

Parents have a preference for social over technical forms of mediation, preferring active co-use over technical restrictions, interaction restrictions, and monitoring practices.<sup>82</sup>

In Spain, the importance of rules regarding Internet use by children is recognized by 70.4% of parents, and 67.4% of children. However, parents' emphasis is placed on controlling the time of day and amount of time spent online (64.1% and 59.6%, respectively), whereas the control on inappropriate content was less frequently used (11.9%).

According to Sureda et al.,<sup>83</sup> 53% of Spanish children (6 – 14) and 62% of teenagers (15 – 16) reported to use the Internet with no restrictions by their parents. When the parents use rules, it is mainly regarding to the amount of time spent online. Alvarez et al.<sup>84</sup> found that many parents used Internet access as a form of reward or punishment for their children's good or bad behavior, reflecting little concern of effective regulation of their children's Internet use.

While the literature shows that rules are made and enforced in many cases, these rules seem to be technical in nature covering mainly issues as the amount of time the children are allowed to use the Internet, disclosing personal information and shopping online, to name a few. These rules are not effective when considering an intangible and virtual harm as the harm to children's imaginative development in virtual worlds. In fact, these rules are a less technical reflection of the technology measures mentioned in the previous section. To use the terms discussed in chapter 3 *supra*, these rules are generally a way to employ a command and control regime at home.

## 2.6 Parental Mediation

The research on parental mediation shows that parents regulate their children's media use in a variety of ways. These studies were initially aimed at exploring television viewing, assessing

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<sup>82</sup> *Id.*, at 596.

<sup>83</sup> J. Sureda, R. Comas & M. Morey, *Menores y acceso a Internet en el hogar: las normas familiares* [Minors and Internet access at home: family norms] 34 *Comunicar* 135–143 (2010), cited in Álvarez et al., *supra* note 84.

<sup>84</sup> Álvarez et al., *supra* note 84.

its consequences on media use in general, media literacy and, more specifically, media effects.<sup>85</sup>

As discussed in chapter 3 *supra*, two aspects of regulation are positive regulation (encouraging, facilitating or requiring certain activities – ‘green light’) and negative regulation (discouraging, impeding or prohibiting certain activities). The research on parental mediation of children’s use of media, shows that parents combine positive and negative strategies, from the flexible strategy of parent-child co-viewing, on one end of the spectrum, to a more restrictive or controlling strategies at the other end of this spectrum.<sup>86</sup>

Three types of parental mediation styles were defined in the literature:<sup>87</sup> factual mediation (parents explaining to their children how Internet content is created), evaluative mediation (assessing the content while engaging with it together with the child and discussing the possible effects of the content on children) and restrictive mediation (promoting parental rules governing the use of the Internet by the children).

Livingstone and Helsper<sup>88</sup> suggest four main types of parental mediation: social mediation (combining active mediation and co-use); interaction restrictions (restricting children’s interactions online); technical restrictions, (parental controls limiting online activities and time spent online); and active monitoring of children’s online practices.

More recently, the EU Kids Online survey<sup>89</sup> offered the distinction between active mediation (the parent is present or nearby, discussing or sharing internet activities) and safety

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<sup>85</sup> E. Austin, *Exploring the Effects of Active Parental Mediation of Television Content* 37 *Journal of Broadcasting & Electronic Media* 147–158 (1993); E. Austin et al, *How and Why Parents Take on the Tube* 43 *Journal of Broadcasting & Electronic Media* 175–192 (1999); R. Desmond et al., *Family Mediation Patterns and Television Viewing: Young Children’s Use and Grasp of the Medium* 11 *Human Communication Research* 461–480 (1985); A. Dorr, P. Kovaric & C. Doubleday, *Parent-child Co-viewing of Television* 33(1) *Journal of Broadcasting & Electronic Media* 35–51 (1989).

<sup>86</sup> J. Van Der Bulck & B Van Den Bergh, *Parental Guidance of Children’s Media use and Conflict in the Family*, In B. Van Den Bergh & J. Van Der Bulck (eds.), *Children and Media: Interdisciplinary Approaches* 131-150 Leuven-Apeldoorn: Garant. (2000); A. Dorr, P. Kovaric & C. Doubleday, *Parent-Child Co-viewing of Television* 33(1) *Journal of Broadcasting and Electronic Media* 35-51 (1989); C. A. Lin & D. J. Atkin, *Parental Mediation and Rulemaking for Adolescent use of Television and VCRs* 33(1) *Journal of Broadcasting and Electronic Media* 53-67 (1989).

<sup>87</sup> A. Nathanson, *Identifying and Explaining the Relationship Between Parental Mediation and Children’s Aggression* 26(6) *Communication Research* 124–143 (1999); P. Valkenburg, M. Krccmar, A. Peeters & N. Marseille, *Developing a Scale to Assess Three Styles of Television Mediation: Instructive Mediation, Restrictive Mediation, and Social Co-viewing* 43(1) *Journal of Broadcasting & Electronic Media* 52–67 (1999).

<sup>88</sup> S. Livingstone & E. Helsper, *Parental Mediation and Children’s Internet use* 52(4) *Journal of Broadcasting & Electronic Media* 581–599 (2008).

<sup>89</sup> Livingstone et. al., *supra* note 49.

guidance (the parent actively promotes safer and responsible uses of the internet). This distinction led to the identification of five practices of parental mediation: active mediation of internet use; active mediation of internet safety; restrictive mediation; monitoring; and technical mediation.

Types of mediation are influenced by parents' gender, education and socio-economic background, as well as by children's characteristics.<sup>90</sup> Liao et al.<sup>91</sup> found that the supervision techniques employed by parents regarding their children's Internet use were unrelated to youth engaging in risky online behavior. However, when parents set limits, children spend less time with media.<sup>92</sup>

Eastin et al.<sup>93</sup> studying single and married mothers of teenagers in large Midwestern US states, found correlation between parenting styles and Internet mediation strategies. Authoritative style parents were more likely to use the evaluative strategies of watching and discussing Internet content with their children, while authoritarian and negligent parents were more likely to use restrictive techniques, such as blocking access.

Lwin et al.<sup>94</sup> distinguished between strategies of restrictive mediation and active mediation of US parents<sup>95</sup> overseeing their 10-12 years old children Internet use. Findings indicate that the simple act of a parent talking to the child about not providing personal information online greatly reduces the likelihood that children will disclose personal information. In addition, it was found that setting rules for Internet use was not as effective as talking to children about the dangers of giving out such information.

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<sup>90</sup> M. Eastin, B. Greenberg & L. Hofschire, *Parenting the Internet* 56 *Journal of Communication* 486–504 (2006); M. Garmendia et al., *The Effectiveness of Parental Mediation*, In S. Livingstone, L. Haddon & A. Gourzig (eds.), *Children, Risk and Safety on the Internet: Kids Online in Comparative Perspective*, Bristol: Policy Press 231–244 (2012); Livingstone & Helsper, *supra* note 88; M. Nelson, *Parenting out of Control: Anxious Parents in Uncertain Times*, New York: NY University Press (2010).

<sup>91</sup> A. Liao, A. Khoo & P. Ang, *Parental Awareness and Monitoring of Adolescent Internet Use* 27(4) *Current Psychology* 217-233 (2008).

<sup>92</sup> *Id.*, at 36.

<sup>93</sup> M. Eastin, B. Greenberg & L. Hofschire, *Parenting the Internet* 56(3) *Journal of Communication* 486–504 (2006).

<sup>94</sup> M. O. Lwin, A. Stanaland & A. Miyazaki, *Protecting Children's Privacy Online: How Parental Mediation Strategies Affect Website Safeguard Effectiveness* 84 *Journal of Retailing* 205–217 (2008).

<sup>95</sup> Similar to the distinction between reactive and proactive parenting in other socialization domains - See L. M. Padilla-Walker, A. M. Fraser & J. M. Harper, *Walking the Walk: the Moderating Role of Proactive Parenting on Adolescents' Value-Congruent Behaviors* 35 *Journal of Adolescence* 1141–1152 (2012).

According to Duerager and Livingstone<sup>96</sup> active mediation of Internet use (where parents talk with the child about the internet, stay nearby or sit with the child while they go online), reduces EU children's exposure to online risks without reducing online opportunities. These activities also reduce young children's (9-12 years) reports of being upset when they encounter online risks. Interestingly, parental technical mediation such as using a filter is not shown to reduce online risk encounters among children.

According to Valcke et al.<sup>97</sup> the highest level of Internet use among adolescents in Belgium is observed when parents adopt a permissive mediation style, and the lowest level is observed when they adopt a restrictive mediation style. Parents' behavior and cultural level significantly predict Internet use among adolescents in the home. In another study Valcke et al.<sup>98</sup> found that Belgium adolescents unsafe Internet use is not tempered by increased parental control. These results contradict those obtained by Padilla-Walker and Coyne,<sup>99</sup> who found that parents do influence Internet regulation.

A research conducted in Australia<sup>100</sup> concluded that, "as children become teenagers direct supervision and rules become less effective and education and trust play greater roles".<sup>101</sup> According to Fleming et al.,<sup>102</sup> the fact that parents of teenagers age 13-16 in Australia were aware of the risks of the Internet was not associated with the use of more controlling styles, such as the authoritarian or authoritative styles. However, the authoritative style was linked to lower levels of online risk behavior by children.

In their research on the affect of parental mediation on private information disclosure online by Korean Tweens, Shin et al.<sup>103</sup> found no significant impact of parental mediation on

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<sup>96</sup> Andrea Duerager & Sonia Livingstone, *How can parents support children's internet safety? EU Kids Online*, London, UK (2012), <http://eprints.lse.ac.uk/42872/> (last visited May 6, 2016).

<sup>97</sup> M. Valcke et al., *Internet Parenting Styles and the Impact on Internet use of Primary School Children* 55(2) *Computers & Education* 454-464 (2010).

<sup>98</sup> M., Valcke et al., *Long-term Study of Safe Internet use of Young Children* 57(1) *Computers & Education* 1292-1305 (2011).

<sup>99</sup> L. M. Padilla-Walker & S. M. Coyne, "Turn that thing off!" *Parent and Adolescent Predictors of Proactive Media Monitoring* 34(4) *Journal of Adolescence* 705-715 (2011).

<sup>100</sup> NetRatings Australia, *supra* note 69.

<sup>101</sup> *Id.*, at 68.

<sup>102</sup> J. Fleming et al., *Safety in Cyberspace* 38(2) *Youth and Society* 135-154 (2006).

<sup>103</sup> Shin Wonsun, Huh Jisu & Ronald J. Faber, *Tweens' Online Privacy Risks and the Role of Parental Mediation* 56(4) *Journal of Broadcasting & Electronic Media* 632-649 (2012).

tweens' personal information disclosure behaviors. This is contrary to previous findings in the parental mediation research on children's television use<sup>104</sup> and on teenagers' perceptions of online safety.<sup>105</sup>

A significant relationship was found between parent-tween disagreement on restrictive mediation and tweens' information disclosure. Buijzen et al.<sup>106</sup> argued that parent-child agreement on parental mediation reflects the child's accurate perception of parental mediation. Shin et al.<sup>107</sup> finding seems to suggest that tweens' inaccurate perception of what parents do to limit their access to commercial Web sites can account for tweens' information disclosure online.

Lee and Chae<sup>108</sup> surveying 566 Korean children between the ages of 10 and 15 found that association with online risks was moderated by Internet skills and parental restrictive mediation. Finally, according to Ihmeideh & Shawareb<sup>109</sup> found that children whose parents adopt the authoritative parenting style, in which they define the rules, discuss them with their children, and encourage their children to talk about their Internet use, have higher exposure to the Internet at home than those with parents who adopt other parenting styles.

## 2.7 Conclusions

In general, the regulation of children's Internet use at home reflects the regulatory framework discussed in chapters' 2-4 *supra*. The relationships in the modern family, the regulatory instruments and code regulation are prevalent in the regulation field in general, as much as they are dominant in the relationship between parents and children over the regulation of the use of the Internet at home.

Therefore, there is no surprise in the findings that traditional forms of regulation are not effective when dealing with virtual and intangible harm, both by regulators and by parents at

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<sup>104</sup> M. Buijzen & P. M. Valkenburg, *Parental Mediation of Undesired Advertising Effects* 49(2) *Journal of Broadcasting & Electronic Media* 153–165 (2005).

<sup>105</sup> Lwin et al., *supra* note 94; S. Youn, *Parental Influence and Teens' Attitude Toward Online Privacy Protection* 42(3) *The Journal of Consumer Affairs* 362–388 (2008).

<sup>106</sup> M. Buijzen et al., *Parent Versus Child: Reports of Parental Advertising Mediation: Exploring the Meaning of Agreement* 52(4) *Journal of Broadcasting & Electronic Media* 509–525. (2008).

<sup>107</sup> Wonsun et al., *supra* note 103.

<sup>108</sup> Lee Sook-Jung & Chae Young-Gil, *Balancing Participation and Risks in Children's Internet Use: The Role of Internet Literacy and Parental Mediation* 15(5) *Cberpsychology, Behavior, and Social Networking* (2012).

<sup>109</sup> Ihmeideh & Shawareb, *supra* note 55.

home. It is the the regulatory measures at the other end of the regulatory spectrum, namely ‘soft regulation’ involving understanding the terrain, discussing it with the children and offering advice and guidance which seems to be the most efficient in reducing the risk of the virtual and intangible harm posed by the Internet.

Although parents are positioned in the best spot to regulate their children’s Internet use, few obstacles make this task challenging: the knowledge gap, children’s privacy, parent-child relationship in general and more. To this end, guiding the parents and exposing them to the research results in this field as well as training them to engage authoritative mediation is warranted.

While parents stand at the forefront of the regulation of children’s Internet use being best positioned to deal with the prevention of the virtual and intangible harm, they should not be left alone in this crucial battle. As discussed in the conclusions of this dissertation and suggested in the future research in Appendix A, parents should receive every assistance possible, from all relevant stakeholders, in order to perform their task in the best way possible.

### **3. Prolog**

For me, this dissertation is a landmark milestone of a journey initiated 20 years ago. I first became aware of the potential harm of virtual worlds to children imaginative development through the Artificial Medium Laws Theory; Secondly, I explored the regulatory framework of children’s virtual worlds in my Masters thesis, and now I was able to embrace the four relevant fields: law, technology, psychology and communication, in order to reconcile the inherent tension between the need to protect children and the limits of regulation, its suitability and efficiency, and the constitutional requirements.

This circular journey from the virtual and intangible harm posed by new technology, through regulation in its many forms, and back to the starting point, regulation at home, underlines the depth of the change that new technology brings to these fundamental systems: childhood, home, regulation and law and the interaction between them. Identifying the limits of regulation in the case of virtual and intangible harm not only touches on the foundations of every democratic society, but also challenges and redefines the basic notions of control.

It is time to change our perceptions about regulation. As in many other fields, new technology is forcing us to think different, look deep into the conventions adopted in the field of regulation since the establishment of the new state and change the way we think about regulation. It is not a question of choice, but one of necessity. Failing to adapt and employ creativity and innovation in the creation of new regulation for new technologies will, and already has unprecedented implications. As detailed in chapter 1, *supra*, it is our children's imagination, among other, that is at stake. Losing this battle will leave little to fight for, if any.

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## **Appendix**

### **Creative Regulation for Creative Industry**

Innovating the Regulation of New Media: Towards Education-Based Co-Regulatory Model to Reduce Virtual-Intangible Harm to Children

#### **Summary description**

This project goal is to explore and innovate the regulation of new media, especially regarding the virtual-intangible potential harm to children, by developing, implementing and measuring the effectiveness of an education based Co-regulatory model. In light of its scale, importance and innovative nature, the project is divided into two parts: (1) Infrastructure, and (2) Implementation. The goal of part one (24 months) – infrastructure, is to prepare the grounds for the second part – implementation, by creating a master plan, drafting an initial report on the legal landscape of new media regulation, and exploring stakeholder positions and education-based, Co-regulatory models. The goal of the second part (24 months) is to develop an education-based Co-regulatory model that will innovate and improve the regulation of new media as it relates to virtual-intangible harm to children. The project will last 48 months. The main activities of the first part consist on the mapping of the legal landscape, identifying the potential virtual-intangible harms to children, reviewing the literature on the theoretical framework of education based Co-regulation, networking and obtaining funding for the second part. Expected results include the formulation of the second part implementation plan, research questions based on accessible data, expert network from the countries involved, funding accessibility, and theoretical framework towards development of the education-based Co-regulatory model. The project will involve a variety of stakeholders from the industry, the public, education system and regulatory agencies. Deliverables of the first part include: a) a master plan for the second part, b) Initial report on the legal landscape of the industry, stakeholder positions and education-based, Co-regulatory models. Deliverables for the second part include: a) detailed report on the legal landscape of the industry, stakeholder positions and education-based, Co-regulatory models, b) innovative, specifically designed education based Co-regulatory model, c) a dedicated website with resources for the implementation of the model, d) publications on scientific journals; e) at least one international conference. In addition, depending on resources: databank, network and monitoring program to measure the effectiveness of the model.

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## 1. Rationale for the project

Regulatory systems are influential and complex ‘objects’ of analysis.<sup>1</sup> Regulatory systems for new media (digital and creative media) are particularly influential and complex by virtue of the growing presence and fundamental impact of digital communication in our contemporary societies,<sup>2</sup> especially among the younger generations.<sup>3</sup>

The speed of technological innovation, and the pervasiveness and intensity of the effects associated with the use of digital media among youths unite in creating a serious need of reliable knowledge about the optimal features of regulatory systems in this field. Moreover, in a virtual and intangible terrine, regulation becomes evermore challenging.<sup>4</sup>

This project goal is to conduct an empirical research that will effectively analyse the regulation of new media in order to develop an innovative education-based Co-regulatory model to efficiently address the potential harm of virtual-intangible harm to children. The complexity and the importance of this objects recommends, in our view, an exploratory study capable of providing the material and immaterial background conditions for the effective implementation of the project.

More precisely these conditions include – for the first part - infrastructure:

- Mapping the nature of available data and prepare for the construction of additional data;

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<sup>1</sup> Nachshon Goltz & Aleksander Nikolic, *Global-Regulation – Drawing Future Regulatory Tools from the Experience of the Past* 3 *The European Journal of Risk Regulation* (2013).

<sup>2</sup> Nachshon Goltz, *Simulacra’s Day in the U.S. Supreme Court: Brown v. Entertainment Merchants Association and United States v. Stevens Ent’*, *Comparative Research in Law & Political Economy*, Research Paper No. 36 (2013).

<sup>3</sup> Tracey Dowdeswell & Nachshon Goltz, *Virtual Worlds Use and the Harm to Children’s Imagination Development*, In Matteo Stocchetti (ed.), *Storytelling in the Digital Age, Media and Education in the Digital Age* [Forthcoming]; Nachshon Goltz, *Protecting Children’s Privacy in Virtual World Games: The Threats of Smart Advertising*, In Lesley Jacobs, *Privacy Rights in the Global Digital Economy: Everyday Legal Problems and Canadian Paths to Justice*, Toronto: Irwin Law (2014); Nachshon Goltz, *Is there anybody out there? Analyzing the Regulation of Children’s Privacy Online in the US and the EU According to Eberlein et al. (2014) TBGI analytical Framework*, *Journal of International Media and Entertainment Law*, Vol. 6(1) 21-42 (2016); Nachshon Goltz & Peter Neufeld, *Undermining Parental Authority, Unethical Advertising and the Accountability of self-regulation: ThomasCook.ca as a Fable*, Osgoode Hall Law School, *Comparative Research in Law & Political Economy* (CLPE) (2013); Nachshon Goltz, *‘ESRB Warning: Use of Virtual Worlds by Children May Result in Addiction and Blurring of Borders’ – The Advisable Regulations in Light of Foreseeable Damages* 11(2) *PGH. J. Tech. L. & Pol’y* (Fall 2010).

<sup>4</sup> Nachshon Goltz, *The Limits of Regulation*, PhD Dissertation, Osgoode Hall Law School, York University (2015) [forthcoming].

- Establishing a network of agencies and individuals capable of supporting the comparative analysis of the regulatory landscape of new media;
- Performing preparatory theoretical overview (e.g. identifying the relevant dimensions of the phenomenon, mapping current research, evaluate the nature and value of competing traditions, formulating a preliminary set of research questions and working hypothesis, etc.)

This project seek to shift the paradigm in new media regulation as the current situation begs for a new model to better protect children which are becoming evermore vulnerable to the new media. The potential virtual-intangible harm posed by new media, especially to children, as identified by the Artificial Medium Laws Theory,<sup>5</sup> cannot be overstated. Thus the urgent and crucial need to address this virtual-intangible potential harm.

## **2. Research Questions and Working Hypotheses**

The goal of this first part is to design and establish the preparatory grounds or ‘infrastructure’ for a second part of the project. The research should therefore distinguish the research questions addressed by the first part from those that will inspire the research activities of the second part. The latter will result from the activities of the former and cannot be anticipated in detail at this stage. The main research questions inspiring the first part are summarised as follows:

- Who are the stakeholders, what are their needs, interests and resources in the debates and processes concerning regulatory models of the activities of digital and creative media industry, especially with respect to potential virtual-intangible harm to children?
- What is the nature and quality of the available data in the relevant dimensions of the phenomenon in question?
- What is the scope and depth of a research initiative aiming at the comparative analysis of different regulatory systems?
- What are the conditions of sustainability for a research network capable of performing a comparative research with these ambitions?

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<sup>5</sup> Goltz & Dowdeswell, *supra* note 2.

- What are the key research questions that the second part should address?

Although the working hypotheses of the second part cannot be anticipated here, one can anticipate that some of the questions addressed will include the following:

- What is the nature of the arguments deployed in support of alternative regulatory models for the activities of digital and creative media industry regarding children?
- What are the legal instruments, problems and solutions affecting the evolution of these systems?
- What is the relative efficacy of alternative regulatory models for the activities of digital media & creative industries?
- What is the role of education in alternative models of Co-regulation?
- Can education-based Co-regulation substitute other, more formal and centred regulatory instruments?

### **3. Expected Results and Their Utilization**

The main expected result of the first part is the facilitation of the second part on regulatory systems, virtual-intangible harm and practice in the domain of digital media. In concrete terms the first part will be a preparatory exercise to identify a) the stakeholders involved in the regulatory realm, their needs, interests and the potential benefits of education-based Co-regulatory models emerging from the empirical research and the nature and deleterious potential of virtual-intangible harm; b) nature and accessibility of relevant data as an empirical grounds for construction of these models; c) suitable research partners to establish the international network for the comparative research and d) extension of the research partnership and obtaining funds for the second part of the research.

### **4. Publication and Dissemination of the Results**

The first part will generate two main texts: a) a master plan for the second part, b) Initial report on the legal landscape of the industry, stakeholder positions, education-based, Co-regulatory models and virtual-intangible harm. The first text will be circulated among stakeholders and research partners and will be used to perform coordination functions in the implementation of the second part. The second text will be used primarily in the

communication with potential partners while its content will be a resource in the design and implementation of the second part.

## 5. Conceptual framework

The conceptual framework of the first part includes several aspects of regulation deeply rooted in the rich literature developed in this field. In this short overview I will first discuss the definition of regulation, secondly, notions of Co-regulation, thirdly, media regulation, fourthly creative regulation and finally the virtual-intangible harm to children.

### (i) Regulation

At its simplest, regulation refers to the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules.<sup>6</sup> The term regulation has been defined in a number of ways,<sup>7</sup> and might go as far as to consider, “all mechanisms of social control – including unintentional and non-state processes – to be forms of regulation.”<sup>8</sup>

Selznick defines regulation as sustained and focused control exercised by a public agency over activities that are valued by a community. This definition is considered to express the core meaning of the concept,<sup>9</sup> albeit other notions are also commonly used.<sup>10</sup> Levi-Faur defines regulation as a policy instrument,<sup>11</sup> while Hartle<sup>12</sup> sees it as, “[t]he most general

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<sup>6</sup> R Baldwin, C Scott & C Hood, *A Reader on Regulation* 3 New York: Oxford University Press (1998).

<sup>7</sup> See B. M. Mitnick, *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms*, New York: Columbia University Press, ch. 1 (1980); A. Ogus, *Regulation: Legal Form and Economic Theory*, New York: Oxford University Press, ch. 1 (1994); G. Majone (ed.), *De-Regulation of Re-Regulation? Regulatory Reform in Europe and the United States*, London: Pinter (1989).

<sup>8</sup> Baldwin et al., *supra* note 6, at 4.

<sup>9</sup> P. Selznick, *Focusing Organizational Research on Regulation*, In R. Noll (ed.), *Regulatory Policy and the Social Science*, Berkeley: University of California Press 363 (1985).

<sup>10</sup> M. Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty*, London: Demos 23 (2004); R. Baldwin & M. Cave, *Understanding Regulation – Theory, Strategy and Practice*, Oxford: Oxford University Press 2 (1999).

<sup>11</sup> David Levi-Faur, *Regulatory Governance*, In Paolo Graziano & Maarten Vink (eds.), *Europeanization: New Research Agendas*, Basingstoke: Palgrave Macmillan, (2006).

<sup>12</sup> Douglas G. Hartle, *Public Policy Decision Making and Regulation*, Toronto: University of Toronto xii (1979).

policy instrument,” and Scott<sup>13</sup> argues that in North America there is a long tradition of the deliberate use of regulation as an instrument of public policy.<sup>14</sup> Scott further contends that, “[t]he image of independent regulatory agencies, capable of making technically expert and correct decisions, isolated from politics and from the courts, is illusory.”<sup>15</sup> Contemporary governance, according to Scott<sup>16</sup>, is characterized by fragmentation of power, rather than its concentration in independent agencies.<sup>17</sup> This observation, Scott argues, substantially undermines many of the claimed virtues of regulation as a public policy instrument.<sup>18</sup>

Sarre and Johnstone<sup>19</sup> argue that these broader definitions of regulation recognize that regulation can be carried out by non-government actors — including corporations, professional firms (auditors, accountants and lawyers), international interest holders, non-profit organizations,<sup>20</sup> other community groups, and citizens. In these broader conceptions of regulation, the state is ‘decentred’, so that it is no longer necessarily dominates regulatory processes, but shares regulatory control with other sub-centers.<sup>21</sup>

From the standpoint of the industry and market-regulated activities, regulation is often thought of as an activity that restricts behavior and prevents the occurrence of certain undesirable activities (a ‘red light’ concept<sup>22</sup>) but the influence of regulation may also be enabling or facilitative (‘green light’) as, for example, where the airwaves are regulated so as

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<sup>13</sup> Colin Scott, *Regulatory Fragmentation*, In Patrice A. Dutil & Michael McConkey (eds.), *Dreaming of the Regulatory Village, Speaking of the Regulatory State*, EBRARY CEL - York University, Institute of Public Administration of Canada 149 (2006).

<sup>14</sup> M.A. Eisner, *Regulatory Politics in Transition*, Baltimore: Johns Hopkins University Press (2000).

<sup>15</sup> Scott, *supra* note 13, at 149.

<sup>16</sup> *Id.*

<sup>17</sup> Julia Black, *Decentring Regulation: The Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World* 54(1) *Current Legal Problems* 103-146 (2001); C. Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, *Public Law* 329-353 (Summer 2001).

<sup>18</sup> Scott, *supra* note 13, at 149.

<sup>19</sup> R. Sarre & R. Johnstone (eds.), *Regulation: Enforcement and Compliance* 57 *Research and Public Policy Series*, Australian Institute of Criminology 4 (2004), Available at <http://www.aic.gov.au/documents/B/A/0/%7BBA0FC2D0-B43E-4CB6-A5AD-95ACE70542AA%7DRPP57.pdf> (last visited May 6, 2016).

<sup>20</sup> See D. Brereton, *Emerging Forms of Corporate and Industry Governance in the Australian Mining Industry*, In Sarre & Johnstone, *supra* note 19.

<sup>21</sup> See L. Mazerolle & J. Ransley, *Third Party Policing: Prospects, Challenges and Implications for Regulators*, In Sarre & Johnstone, *supra* note 19.

<sup>22</sup> On ‘red light’ and ‘green light’ rules and regulation see C. Harlow & R., Rawlings, *Law and Administration*, London: Pergamon Press, ch. 2, 3 (2<sup>nd</sup> ed. 1997) ; A. Ogus, *supra* note 7, at ch. 2.

to allow broadcasting operations to be conducted in an ordered fashion rather than left to the potential chaos of an uncontrolled market.<sup>23</sup>

Anthony Ogus<sup>24</sup> argues that one of the aims of regulation is to correct perceived deficiencies in the market system in meeting collective or public interest goal. In the analysis of Ogus, under the market model, the law has a primarily facilitative function: it offers a set of formalized arrangements with which individuals can 'clothe' their welfare-seeking activities and relationship. The arrangements carry with them mutual rights and obligations which, if necessary, a court will enforce. Although the law may be said to control conduct, private law is distinct from regulation in two fundamental respects: it is left to individuals and not the state to enforce rights; and obligations are incurred voluntarily in the sense that they can always be displaced by agreements between the affected parties, if they are found to be inappropriate. For the same reasons, Ogus argues that the private law is largely decentralized. It is important to note that by definition, public law is centralized.

Ogus further contends that regulation is not always directive, public, and centralized. In some areas it is formulated and enforced by self-regulatory agencies, rather than by a public body. Occasionally, collective goals are pursued by means of instruments, such as franchise contracts, which resemble private legal obligations. Finally, regulation can take the form of an 'economic instrument' which is not directive: individuals or firms are legally free to undertake certain activities which, from a public interest perspective, are regarded as undesirable, but if they do so, they must pay a tax or charge.

Parker et al<sup>25</sup> contends that for scholars of regulation, the core area of study is 'regulation' in the sense of, "the intentional activity of attempting to control, order or influence the behavior of others."<sup>26</sup> This definition is broad in the sense that 'regulation' is not limited to targeted rules that are enforced and monitored, nor is it limited to state intervention in the economy and/or civil society. It incorporates three basic requirements for a regulatory regime: the setting of standards; processes for monitoring compliance with the standards; and mechanisms for enforcing the standards. It is important to note that most standards have no mechanisms for compliance enforcement.

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<sup>23</sup> See for example, David A. Moss, & Michael R. Fein, *Radio Regulation revisited: Coase, the FCC, and the Public Interest* 15(4) *Journal of Policy History* 389-416 (2003).

<sup>24</sup> Ogus, *supra* note 7, at 2.

<sup>25</sup> C. Parker, et al. (eds.), *Regulating Law*, Oxford: Oxford University Press 1 (2004).

<sup>26</sup> J. Black, *Critical Reflections on Regulation* 27 *Australian J of Legal Philosophy* 1 (2002).

According to Ellickson,<sup>27</sup> systems of social control typically employ both rewards and punishments – both carrots and sticks – to influence behavior.<sup>28</sup> In administering these positive and negative measures, enforcers usually apply rules that divide the universe of human behavior into three categories: (1) good behavior that is to be rewarded, (2) bad behavior that is to be altered, and (3) ordinary behavior that warrants no response.<sup>29</sup>

Ogus<sup>30</sup> recognizes two general types of regulation: social regulation and economic regulation. Social regulation is the public interest justification for regulation, which deals with such matters as health and safety, environmental protection, and consumer protection. Social regulation tends to centre on two types of market failure. First, individuals in an existing, or potential, contractual relationship with firms supplying goods or services often have inadequate information concerning the quality offered by suppliers; in consequence, the unregulated market may fail to meet their preferences. Secondly, even if this information problem does not exist, market transactions may have spillover effects (or externalities) which adversely affect individuals who are not involved in the transactions.

A third type of market failure, not mentioned by Ogus, is the inability of individuals to refrain from the harm embedded in the service they are consuming. The market failure approach assumes that the market is able to address every problem – but sometimes fail to do so. As markets evolve, this assumption needs further observation for failures that are constructed in the market and can hardly be referred as market failures. According to Goltz,<sup>31</sup> this is especially true when dealing with intangible and virtual harm relating to children. The more the harm is intangible, the harder it is to prove it and identify its characteristics. In addition, there is an inherent inclination to treat virtual harms as less dangerous than non-

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<sup>27</sup> R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes*, Cambridge: Harvard University Press, 124 (1991).

<sup>28</sup> Rewards are goods, services, or obligations to which a person would assign a positive monetary value; punishments are goods, services, or obligations that a person would pay to be rid of. The distinction between punishments and rewards is well developed in behavioral psychology, where the two are sometimes referred to as positive and negative reinforcement. Sociologists, since Durkheim, have distinguished between penal and compensatory (restitutive) modes of social control. These are two different forms of punishment. What sociologists sometimes call therapeutic social control is a reward system; the person who seeks help from others is rewarded for recognizing and trying to remedy his plight. On these and other sociological distinctions, see Donald Black, *The Behavior of Law*, New York: Academic Press 4-6 (1976).

<sup>29</sup> For a fuller inquiry into the function of these three categories, see R. C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls* 40 U. Chi. L. Rev. 728-733 (1973); See also Saul X. Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of Affirmative Obligations* 72 Va. L. Rev. 879 (1986); Donald Wittman, *Liability for Harm or Restitution for Benefit* 13 J Legal Stud. 57 (1984).

<sup>30</sup> Ogus, *supra* note 7, at 4.

<sup>31</sup> Goltz, *Supra* note 4.

virtual or non-intangible harms. This inclination is not only wrong, but dangerous and could be proved to the contrary for intangible and virtual harms and its consequences especially since these harms and their consequences tend to be hidden from the eye; hence harder to prevent or protect from and cause damages that will be detected only when the harm is already done.

The OECD defines regulation as 'the full range of legal instruments by which governing institutions, at all levels of government, impose obligations or constraints on private sector (regulation is often aimed at the public sector) behavior. Constitutions, parliamentary laws, subordinate legislation, decrees, orders, norms, licenses, plans, codes and even some forms of administrative guidance can all be considered as 'regulation'.<sup>32</sup>

The governments of Canada and Australia adopt a similar definition.<sup>33</sup> Everything that government does that is not done through legislation or delegated legislation is thus not 'regulation'. In contrast, the UK government's Better Regulation Task force defines regulation as 'any government measure or intervention that seeks to change the behavior of individuals or groups, so including taxes, subsidies and other financial measures.<sup>34</sup> Government is, however, a notoriously fragmented thing. Whilst the Better Regulation Task force sees only government actions to be regulation, the UK office of telecommunication includes in its definition of regulation the operation of market forces.<sup>35</sup>

According to Black,<sup>36</sup> academics are even less disciplined in defining regulation. They (including Black) vary as to which of the definitions to adopt: (1) regulation is the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement, usually assumed to be performed through a specialist public agency; (2) regulation is any form of direct state intervention in the economy, whatever form that intervention might take; (3) regulation is all mechanisms of social control or influence affecting all aspects of behavior from whatever source, whether they are intentional or not.

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<sup>32</sup> OECD, *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*, OCDE/GD(95)95, Note 1; OECD, *The OECD Report on Regulatory Reform: Synthesis* (Paris, 1997).

<sup>33</sup> Canada: *Regulatory Affairs Guide, Assessing Regulatory Alternatives* 63 (Ontario, 1994); Australia: *Productivity Commission, Office of Regulatory Review, A Guide to Regulation* (Canberra, 2nd ed. 1999).

<sup>34</sup> Better Regulation Taskforce, *Principles of Better Regulation* 1 Cabinet Office, London, undated.

<sup>35</sup> Office of Telecommunications, *Encouraging Self- and Co-Regulation in Telecoms to Benefit Consumers* 2 London (June 2000).

<sup>36</sup> Black, *supra* note 26, at 12-13.

Baldwin, Scott and Hood adopt all three definitions in the introduction to their 'Reader on Regulation';<sup>37</sup> Baldwin and Cave adopt the first two in their book 'Understanding Regulation,' although add 'decentered' potential with the variation that regulation is also the making, monitoring and enforcing of rules by non-governmental actors.<sup>38</sup> Hood et al adopt only the first definition in their book, 'Regulation inside Government', with the additional twist that the 'regulator' has some kind of official mandate to scrutinize the behavior of the 'regulatee' and seek to change it.<sup>39</sup> Hall, Hood and Scott however implicitly adopt the third definition in their book on telecommunications regulation when they talk of regulators being 'regulated' by culture.<sup>40</sup> Finally, Black<sup>41</sup> defines regulation as, “[t]he sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behavior-modification.”

(ii) Co-Regulation

Co-regulation refers to industry-association self-regulation with some oversight and/or ratification by government.<sup>42</sup> Enforced self-regulation is different from co-regulation since in enforced self-regulation, negotiations take place between the state and individual firms to establish regulations that are tailor-made to each firm.<sup>43</sup> In co-regulation, these negotiations are conducted between the government and the industry association combined with the individual firms. This “centralization” of self-regulation enhances standardization and can make it more efficient for the government to enforce compliance. Nonetheless, this kind of generic approach might be a less distinctive approach than the individual approach that can be employed in enforced self-regulation.

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<sup>37</sup> Baldwin et al., *supra* note 6.

<sup>38</sup> C. Hood et al., *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*, Oxford: Oxford University Press (2000).

<sup>39</sup> *Id.*, at 8.

<sup>40</sup> C. Hall, C. Scott & C. Hood, *Telecommunications Regulation: Culture, Chaos and Interdependency Inside the Regulatory Process* 5-7 London: Routledge (2000).

<sup>41</sup> Black, *supra* note 26, at 26.

<sup>42</sup> P. Grabosky & J. Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies*, Melbourne: Oxford University Press 83 (1986).

<sup>43</sup> See also I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: Social Legal Studies 101 (1995); Baldwin & Cave, *supra* note 44, at 125-127.

According to Baldwin and Cave,<sup>44</sup> self-regulation is, “The exercise of control by a group of firms or individuals, over its membership and their behaviour. Variables of self-regulation consist of the governmental nature of self-regulation, the level of involvement of self-regulators and the extent of the binding legal force which is connected to self-regulatory rules”.<sup>45</sup> Claims in favour of self-regulation or the incorporation of components of self-regulation into governmental regulation are based on arguments related to expertise and efficiency.<sup>46</sup>

In his seminal work, "The Problem of Social Cost" – the most cited law article – the economist Ronald Coase suggested as a fundamental example a conflict between a rancher running cattle and neighbouring farmer raising crops.<sup>47</sup> This Parable was used by Coase to illustrate what has come to be known as the Coase Theorem.<sup>48</sup> In its strongest form, this counterintuitive proposition states, that when transaction costs<sup>49</sup> are zero a change in the rule of liability will have no effect on the allocation of resources. For example, assuming these assumptions are met, it is Coase’s theorem prediction that holding a rancher liable for damage done by his trespassing cattle would not cause the rancher to take precautionary measures as reducing his herds size, erecting more fencing, or keeping a closer watch on his livestock. In theory, a rancher who is liable for trespass damage has a legal incentive to implement all cost-justified measures to control his cattle. But Coase argues that even if the law were to decline to make the rancher liable, the potential trespass-control victims would pay the rancher to implement the identical trespass-control measures. In short, market forces internalize to the

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<sup>44</sup> See R. Baldwin & M. Cave, *Understanding Regulation – Theory, Strategy and Practice*, Oxford: Oxford University Press, (1999).

<sup>45</sup> *Id.*, at 125-126.

<sup>46</sup> *Id.*, at 126; In relation to expertise, it is usually advanced that self-regulatory bodies possess greater expertise than is the case with independent regulation. Efficiency is also a ground put forward by proponents of self-regulation in that self-regulation emphasizes the ability of self-regulation to generate controls in an efficient manner – since there is greater accessibility to those being controlled. Furthermore, self-regulators are able to acquire information at lower costs, incur low monitoring and enforcement costs and can easily adapt their regimes to changing industrial conditions; *Id.*, at 127.

<sup>47</sup> (1960) 3 J.L. & Econ. 1. During the 1957-1985 period the most cited article published in a conventional law review was Gunther, Gerald, *The Supreme Court, 1971 Term – Foreword* 86 Harv. L. Rev. 1 (1972). See Fred R. Shapiro, *The Most-Cited Law Review Articles* 73 Cal. L. Rev. 1549 (1985). The Social Science Citation Index, which counts citations to articles appearing in law, economics, and other social science journals, provides a basis for comparing citations to the Coase and Gunther articles. This index indicates that during 1981-1988 the Coase article was cited in the surveyed journals almost twice as often as the Gunther article was.

<sup>48</sup> Coase didn't, and no doubt wouldn't, use the label parable. This noun is nevertheless a useful shorthand way to refer to his example.

<sup>49</sup> R. Coase, *supra* note 47, at 114 ("In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up a contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on"); Carl J. Dahlman, *The Problem of Externality* 22(1) J of Law and Economics 148 (April 1979) ("Search and information costs, bargaining and decision costs, policing and enforcement costs").

parties involved in the transaction all costs regardless of the rule of liability. This theorem has undoubtedly been both the most fruitful, and the most controversial proposition to arise out of the law-and-economics movement.<sup>50</sup>

Coase was fully aware that negotiating agreements, obtaining information, and litigating disputes are all potentially costly. Therefore his Farmer-Rancher Parable might not portray accurately how landowners in rural areas would respond to trespass law change.<sup>51</sup> Nonetheless, law-and-economics scholars believe that when only two parties are in conflict, transaction costs are indeed often trivial.<sup>52</sup> These scholars therefore might assume, as Coase likely would not, that the Parable accurately predicts how rural landowners would resolve cattle-trespass disputes.

In an account of how residents of rural Shasta County, California, resolve a variety of disputes that arise from wayward cattle, Ellickson's<sup>53</sup> principle finding is that Shasta County neighbours apply informal norms, rather than legal rules, to resolve most of the issues that arise among them.

According to Ellickson,<sup>54</sup> “Shasta County neighbours, it turns out, do not behave as Coase portrays them as behaving in the Farmer-Rancher Parable.<sup>55</sup> Neighbours in fact are strongly inclined to cooperate, but they achieve cooperative outcomes not by bargaining from legally established entitlements, as the parable supposes, but rather by developing and enforcing

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<sup>50</sup> Some landmark in the Coase Theorem literature are Robert Cooter, *The Cost of Coase* 11 J. Legal Stud. 1 (1982); John J. Donohue, III, *Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells* 99 Yale L.J. 549 (1989); Donald H. Regan, *The Problem of Social Cost Revisited* 15 J.L. & Econ. 427 (1972).

<sup>51</sup> Coase developed the parable not to describe behavior but rather to illustrate a purely theoretical point about the fanciful world of zero transaction cost. He himself has always been a militant in the cause of empiricism. See R. Coase, *The Firm, the Market, and the Law*, Chicago: University of Chicago Press 174-179 (1988).

<sup>52</sup> Several of Coase's colleagues at the University of Chicago wedded themselves to this assumption in the 1960s. See, e.g., Walter J. Blum & Harry Kalven Jr., *Public Law Perspectives on a Private Law Problem: Auto Compensation Plan*, Boston: Little, Brown and Company 58-59 (1965); Harold Demsetz, *When Does the Rule of liability Matter* 1 J. Legal Stud. 16 (1972) (transaction costs "would seem to be negligible" when a baseball player negotiates with his club). The current consensus, even among Chicagoans, is that negotiations in bilateral-monopoly situations can be costly because the parties may act strategically. See, e.g., William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other rescuers: An Economic Study of Altruism* (1978) 7 J Legal Stud. 91 ("transaction costs under bilateral monopoly are high"); Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior* 11 J Legal Stud. 242-244 (1982). Other reasons why transaction costs might be high in simple two-party situations are explored in R.C. Ellickson, *The Case for Coase and against Coaseanism* 99 Yale LJ 611 (1989).

<sup>53</sup> R. C. Ellickson, *Order Without Law: How Neighbors Settle Disputes*, Cambridge: Harvard University Press, 1 (1991).

<sup>54</sup> *Id.*, at 3-4.

<sup>55</sup> Besides exaggerating the reach of law, Coase's parable misidentifies the main risks associated with straying cattle. In Shasta County, the principle risks are not those posed to neighboring vegetation but those posed to motorists and to the animals themselves.

adaptive norms of neighbourliness that trump formal legal entitlements. Although the route chosen is not the one that the parable anticipates, the end reached is exactly the one that Coase predicted: coordination to mutual advantage without supervision by the state”.

Ellickson further contends that order often arises out of mutual understanding. Although many other writers have recognized this point,<sup>56</sup> it remains counterintuitive and cannot be repeated too often. It is not surprising that those who favor expanding the role of government in regulation do not appreciate non-hierarchical systems of social control, as these pointed out by Ellickson.

Although Coase's writing tends towards decentered regulation, in "The Problem of Social Cost", he adopts the "legal centralist" view arguing that the state functions as the sole creator of operative rules of entitlement among individuals. In so doing Coase repeated an approach dating back to Thomas Hobbes.<sup>57</sup> According to Hobbes, all would be endless civil strife without a Leviathan (government) to issue and enforce commands. The Shasta County evidence shows that Hobbes was much too quick to equate anarchy with chaos.

Ellickson<sup>58</sup> argues that many entitlements, especially workday entitlements, can arise out of mutual understanding. People may supplement, and indeed preempt, rules of their own with the state's rules.<sup>59</sup>

Ellickson concludes that, “A centerpiece of the theory is the hypothesis that, to govern their workaday interactions, members of a close-knit group tend to develop informal norms whose content serves to maximize the objective welfare of group members. This hypothesis suggests that the choice of informal custom over law is done not only because custom tends to be administratively cheaper but also because the substantive content of customary rules is more likely to be welfare maximizing”.<sup>60</sup>

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<sup>56</sup> Two classic sources are Charles Lindblom, *The Intelligence of Democracy*, Free Press 3-6 (1965) (lucid explanation of the possibility of coordination without hierarchy), and Friedrich Hayek, *The Road to Serfdom*, London: George Routledge & Sons 35-37 (1944) (reasons why planned economies can be expected to perform less well than unplanned ones).

<sup>57</sup> See Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (1691).

<sup>58</sup> Ellickson, *supra* note 53, at 5.

<sup>59</sup> See, e.g., Robert Axelrod, *The Evolution of Cooperation*, New York: Basic Books 4 (1984); Peter Singer, *The Expanding Circle: Ethics and Sociobiology*, Oxford: Clarendon Press 23-24 (1981); Michael Taylor, *Anarchy and Cooperation*, London: Wiley 3, 7, 98-118 (1976).

<sup>60</sup> Ellickson, *supra* note 53, at 283.

As the potential harm to children's imaginative development in virtual worlds is a consequence of an interaction between unequal forces – virtual worlds operators and children users – Ellickson's norms based regulation might be irrelevant.

(iii) Media Regulation

Livingstone and Bober<sup>61</sup> argued regarding the internet that, "In terms of media regulation, therefore, it may be that the stakes have never been higher, as society seeks to strike a balance between the failure to minimize the dangers and the failure to maximize the opportunities." In this context, Kirby<sup>62</sup> notes that, Napoleon reportedly observed a principle of never responding to letters for at least a year. He adopted this principle on the footing that, if the problem still existed a year later, it would be time enough for it to receive the Emperor's attention. Whether by default or by design, many issues presented to the law by contemporary technology appear to receive the same treatment. One suspects that, in many instances, it is because of the complexity and sensitivity of the issues rather than a strategic policy of lawmakers to postpone lawmaking or clarification of regulation until the contours of the necessary law have become clear.

An attempt to employ individual actors in the regulation of their children's Internet use was done by the European Commission in its 'Green Paper on the Convergence of Telecommunications, Media and Information Technology Sectors'.<sup>63</sup> The Commission sought to instigate a shift from direct control by government to governance through 'action at a distance' by regulating parents, for example through discursively-established norms of 'good parenting' and 'appropriate children's conduct'.<sup>64</sup>

The goal was an expectation that individual actors – parents, teachers and even children – will become informed through the dissemination of appropriate expertise and so empowered

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<sup>61</sup> Sonia Livingstone & Magdalena Bober, *Regulating the Internet at Home: Contrasting the Perspectives of Children and Parents*, In D. Buckingham & R. Willett, *Digital generations: children, young people and new media*, Mahwah, N.J.: Lawrence Erlbaum 94 (2006).

<sup>62</sup> Michael Kirby, *The Fundamental Problem of Regulating Technology* 5 Indian J. L. & Tech. 9 (2009).

<sup>63</sup> European-Commission, *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation Towards an Information Society Approach* (Green Paper No. COM(97)623), Brussels (1997).

<sup>64</sup> D. Oswell, *The Dark Side of Cyberspace: Internet Content Regulation and Child Protection* 5(4) *Convergence: The Journal of Research into New Media Technologies* 52 (1999).

to regulate themselves and each other in their internet use. Harden<sup>65</sup> observes, “while anxieties about risk may be shaped by public discussion, it is as individuals that we cope with these uncertainties.”

When asked what would contribute to safer and more effective use of the Internet for your child, most of the surveyed parents in the European Union<sup>66</sup> said ‘more/better teaching and guidance on the Internet use in schools’ (88%).

A great majority of surveyed Canadian parents<sup>67</sup> (94%) said educating children about safe, responsible Internet use is a top priority. Another 91% mentioned the importance of educating parents about strategies for managing the Internet while 55% of parents believe that users have to take responsibility for family Internet use, and 44% think that Internet content needs to be controlled.

According to Livingstone and Bober,<sup>68</sup> many children, it seems, lack key skills in evaluating online content: four in ten 9-19 years old say that they trust most of the information on the internet, half trust some of it, and only one in ten are skeptical about much information online. Only 33% of 9-19 year-olds who go online at least once a week say that they have been told how to judge the reliability of online information, and among parents of 9-17 year-olds, only 41% are confident that their child has learned how to judge the reliability of online information.

When asked what would contribute to safer and more effective use of the Internet for your child, most of the surveyed parents in the European Union<sup>69</sup> said ‘more/better teaching and guidance on the Internet use in schools’ (88%), ‘more awareness raising campaigns on online risks’ (87%), ‘more/better information and advice for parents on website children use’ (87%), ‘stricter regulation for businesses that produce online content and services’ (86%), ‘contact points where parents and children can receive individual advice about how to stay safe online’ (84%), ‘improved availability/performance of monitoring software’ (80%) and finally, ‘training sessions organized for parents by NGO’s, government, local authorities’ (70%).

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<sup>65</sup> J. Harden, *There's No Place Like Home: The Public Private Distinction in Children's Theorizing of Risk and Safety* 7(1) *Childhood* 46 (2000).

<sup>66</sup> European Commission, *supra* note 63, at 55.

<sup>67</sup> Canada's Children in a Wired World: The Parents' View 3 (2000).

<sup>68</sup> *Id.*, at 104.

<sup>69</sup> European Commission, *supra* note 63, at 55.

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(iv) Creative Regulation

The word governance comes from the Latin *gubernare* which means ‘to steer’. So we can think of the purpose of governance and regulation as steering us into conformity with the principles which will keep the planet and the earth community healthy.<sup>71</sup>

Rivers argues that, “We need to replace our current mechanistic view of regulation with a biological model. Biological systems have innate ways of regulating themselves.<sup>72</sup> For example, through the process of homeostasis, biological organisms regulate their processes eg temperature control. James Lovelock’s *gaia* theory, whereby the planet is seen as an entity with its own self-regulating mechanisms, can provide an important source of inspiration for framing our governance systems.”<sup>73</sup>

Rivers<sup>74</sup> provides an example of good design from the field of social entrepreneurship describing the ‘Good Earth’ project in Italy. Mafia land that has been confiscated is handed over to a social justice programme. Recovering drug addicts (drug addiction is a problem fuelled by Mafia organized crime) farm the land, and the food produced is then sold throughout Italy under the ‘Good Earth’ brand. People who buy this brand know that they are making a stand against the Mafia. The addicts often have little education and would struggle to find other work, but ordinary farm work is seen as low status and does not fit with the self-image of an addict. However, withstanding a degree of intimidation and harassment from the Mafia, who want to undermine the project, makes the addicts feel heroic and builds their self

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<sup>70</sup> Canada’s Children in a Wired World: The Parents’ View 3 (2000).

<sup>71</sup> Elizabeth, Rivers, *Creative Regulation: How Wild Law Can Rehabilitate Governance and Regulation* (2007), available at <http://www.lizrivers.com/wp-content/uploads/2011/01/ELM-article-July-07-Rivers1.pdf> (last visited Nov. 25, 2016).

<sup>72</sup> *Id.*, at 85.

<sup>73</sup> For a succinct overview of *gaia* theory see J Lovelock, *The Revenge of Gaia*, Penguin, ch. 2 (2006).

<sup>74</sup> Rivers, *supra* note 71.

esteem, thus aiding recovery. Before this programme was started, Mafia land that was confiscated was sold at auction but usually found its way back into Mafia hands.<sup>75</sup>

Walter Morton define Creative Regulation as,<sup>76</sup> “...the art of guiding human affairs toward constructive ends... There is indeed no substitute in human affairs for experienced and enlightened judgment based on available facts and knowledge. It is only the inexperienced who would trust the fate of any company, nation or institution to a mechanical formula based upon an abstraction. Human judgment, of course, is not infallible but it is all that we have and has brought us as far as we have come.”<sup>77</sup>

Bronwen et al.<sup>78</sup> argues that continuity and change in the practice and debates surrounding regulation may be illustrated by comparing Marie Antoinette’s indignant response to complaints about rising bread prices in pre-revolutionary France, to France Telecom’s contemporary response to complaints about fears of rising local telephone call charges in rural France as a consequence of telecommunications privatization. Like the latter’s protestations that international calls would be so much cheaper,<sup>79</sup> Marie Antoinette similarly claimed, “But then let them eat cake.” In other words, both justified the potentially negative distributional impact of a refusal to regulate the price of important goods by invoking the expansion of choice available to citizens. Yet both failed to give credence to the incapacity of particular sectors of the community to avail themselves of essential commodities, be they bread or local phone calls. Such a failure demonstrates that insensitivity to the political and moral dimensions of regulatory policy and practice has endured, despite the long sweep of time separating the two events.

#### (v) Virtual-Intangible Harm to Children

The theoretical basis for the identification and exploration of the virtual-intangible harm to children is based on the Artificial Medium Laws Theory,<sup>80</sup> grounded in the literature of

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<sup>75</sup> T. Jones, *Utopian Dreams*, Faber & Faber (2007).

<sup>76</sup> Walter A. Morton, *Creative Regulation* 39(4) *Land Economics* 374 (Nov., 1963).

<sup>77</sup> *Id.*, 368

<sup>78</sup> M. Bronwen, K. Yeung & W. Twining, *Introduction to Law and Regulation: Text and Materials*, Cambridge: Cambridge University Press 1-2 (2007).

<sup>79</sup> S. Silbey, 'Let them eat cake': *Globalization, Postmodern Colonialism, and the Possibilities of Justice* 31 *Law and Society Rev* 207-208 (1997).

<sup>80</sup> Nachshon Goltz & Tracey Dowdeswell, *Virtual Worlds Use and the Harm to Children’s Imagination Development*, In Stocchetti, Matteo (ed.), *Storytelling in the Digital Age, Media and Education in the Digital*

“medium theorists,” to use Meyrowitz’s term.<sup>81</sup> This term is a variant of the more common and widespread term “media ecology,” which Meyrowitz studied but renamed in his writing. Media ecologists do not suggest that means of communication wholly shape culture and personality but that changes in communication patterns are one very important contribution to social change, a contribution that has generally been overlooked.<sup>82</sup> Medium theorists argue that the form in which people communicate has an impact that goes beyond the choice of specific messages. Marshall McLuhan described media as extensions of the senses and claimed that the introduction of a new medium to a culture, therefore, changes the “sensory balance” of the people in that culture and alters their consciousness.<sup>83</sup>

However, according to Meyrowitz,<sup>84</sup> “the greatest problem with medium ecologists is that they ultimately provide more of a perspective for studying the effects of media on behavior rather than a detailed theory. The insights, observations, and evidence they collect point to the need to study media environments in addition to studying media messages, but they do not form a clear set of propositions to explain the means through which media reshape specific behaviors”.

An example of this criticism is McLuhan’s laws of the media.<sup>85</sup> The discussion among scholars on the Media Ecology Association Listserve on this topic is illuminating. While some argue that the laws are nothing but a joke, others claim that they help structure a medium’s influence and even that these laws create a “new science.” Moreover, it has been argued that McLuhan’s laws apply to any object that conveys meaning.

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*Age* [Forthcoming]; Nachshon Goltz & Tracey Dowdeswell, *The User is Bound to All the Rules: Media Manipulation and the Laws of Artificial Media*, *Journal of Communications Media Studies* [forthcoming]; Nachshon Goltz, *The Artificial Medium Laws – Technopoly in Practice*, The Sixteenth Annual Convention of the Media Ecology Association, Metropolitan State University of Denver, Denver, Colorado, June 11–14, 2015; Nachshon Goltz, *The Artificial Medium Laws Theory – The Foundations*, Future Communications Symposium, York-Ryerson Joint Program in Communication & Culture, York University, Toronto, Canada, November 14, 2014; Nachshon Goltz, *The Artificial Medium Laws Theory – iPhone as an Accomplice to Murder*, the Alfred Korzybski Memorial lecture/conference, Institute of General Semantics, New York City, October 24-26, 2014; Nachshon Goltz, *The Artificial Medium Laws Theory – KONY2012 as a Case Study*, Media Ecology Association Convention, Ryerson University, Toronto, Canada, June 19-21, 2014; The SORT, patent application before the United States Patent and Trademark Office, application number 14/074,715, filed on November 08, 2013; See also an in-depth discussion held at the Media Ecology online list-serve 2014 [on file].

<sup>81</sup> Joshua Meyrowitz, *No Sense of Place, The Impact of Electronic Media on Social Behavior*, New York, NY: Oxford Uni. Press. (1985).

<sup>82</sup> *Id.*, at 18.

<sup>83</sup> Eric McLuhan & Frank Zingrone (ed.), *Essential McLuhan*, Concord, On: Basic Books 234 (1995).

<sup>84</sup> Meyrowitz, *supra* note 81, at 22.

<sup>85</sup> Marshall McLuhan & Eric McLuhan, *Laws of Media: the New Science*, Toronto: University of Toronto Press. (1988).

The Artificial Medium Laws Theory concurs with medium ecologists who, like Postman,<sup>86</sup> recognize the hazards of new media, and the theory argues that the advancement of artificial media poses hazards to humans. Nonetheless, the theory tries to avoid the criticism mentioned above regarding the lack of empiricism in medium theory, by presenting linear, logical, and empirically supported laws that are easily applicable and produce clear insights and understanding of artificial media and their effects.

For the purpose of this theory, an artificial medium is defined as a man-made mechanical or electronic object of communication that transfers information using one or more of the following perceived psychological dimensions: photos, sounds, moving photos, time, and interaction. Television, radio, newspaper, films, the Internet, cell phones, virtual reality, and similar objects are a few examples. These artificial media are also referred to as advanced technologies, electronic media, and other names. Users assume that these dimensions reflect reality, but as will be illustrated below, the dimensions perceived from the media are often distorted and deceptive.

The theory includes two components: the perceived psychological dimensions and five artificial medium laws. The theory is treated as a whole and works as a framework for understanding artificial media and as a method for drawing insights on the future of artificial media's influence on humans and society. The theory's laws and the perceived dimensions they refer to are intertwined: Each artificial medium poses one or more perceived psychological dimension: picture (newspaper); sound (radio); sound and moving picture (TV); sound, moving picture, and time (Internet); and sound, moving pictures, time, and interaction (virtual worlds). These dimensions have a hierarchical order, from the weakest (picture) to the strongest (interaction). For example, a user's exposure to a low-level dimension (the sound of the radio) is considered less influential than a user's exposure to a silent movie (moving picture as a higher-level dimension).

The first law, The Truth in a Medium is Context Dependent, argues that the context (news, comedy, website, etc.) defines the credibility of a message and that the more dimensions a medium possesses, the more difficult it becomes for the user to define the context. Postman argued, "Philosophers may agonize over the questions 'What is truth?' 'What is intelligence?' 'What is the good life?' But in Technopoly there is no need for such

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<sup>86</sup> Neil Postman, *Amusing Ourselves to Death*, New York, NY: Penguin Books (1986); Neil Postman, *Technopoly: The Surrender of Culture to Technology*, New York: Vintage Books (1993).

intellectual struggle. Machines eliminate complexity, doubt, and ambiguity.”<sup>87</sup> Thus, the only indicator a user has to discover whether the information he or she perceives via a medium is true or false is whether the information comes, for example, from a comedy website (the information is most likely false) or from a news website (assumed to be credible).

In his book *Amusing Ourselves to Death*, Postman argues that, “The concept of truth is intimately linked to the biases of forms of expression. Truth does not, and never has, come unadorned. It must appear in its proper clothing or it is not acknowledged, which is a way of saying that the ‘truth’ is a kind of cultural prejudice.”<sup>88</sup>

Furthermore, according to Postman, “Truth, like time itself, is a product of a conversation man has with himself about and through the techniques of communication he has invented.”<sup>89</sup>

Wartella et al.<sup>90</sup> argue that the frame of a message includes knowledge of its point, topic, and relevant background information; it provides the context for interpreting communication. As Goffman<sup>91</sup> and others have pointed out, the impact of experience is a function of how that experience is interpreted, or framed. Bransford and McCarrell<sup>92</sup> provided a classic demonstration, showing that what people learned from narratives depended on the frame they were given. Wartella et al.<sup>93</sup> concludes that, “The general rule for communication theory, then, is that the effects of communication content are mediated by the frames people use in processing that content.”

Moreover, as described by McAllister in “Selling Survivor, The Use of TV News to Promote Commercial Entertainment,”<sup>94</sup> identifying and determining the context become increasingly problematic. In his article, “What is the difference between *The Hobbit* and the news? Not as much as there should be,” Brooker wonders, “News reports are looking more

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<sup>87</sup> *Id.*, at 93.

<sup>88</sup> Postman, *supra* note 86, at 22.

<sup>89</sup> *Id.*, at 24.

<sup>90</sup> Wartella et al., *The Role of Interactive Media in Children’s Cognitive Development*, In Angharad Valdivia (ed.), *A Companion to Media Studies*, Oxford, UK: Blackwell 461-479(2003).

<sup>91</sup> E. Goffman, *Frame Analysis: An Essay on the Organization of Experience*, New York, NY: Harper & Row (1974).

<sup>92</sup> J. D. Bransfordand & N. S. McCarrell, *A Sketch of Cognitive Approach to comprehension*, In W. B. Weimer & D. S. Palermo (eds.), *Cognition and the Symbolic Processes*, Hillsdale, NJ: Lawrence Erlbaum 299-303 (1974).

<sup>93</sup> Wartella et al., *supra* note 90, at 472.

<sup>94</sup> M. McAllister, *Selling Survivor, The Use of TV News to Promote Commercial Entertainment*, In Angharad Valdivia (ed.), *A Companion to Media Studies*, Oxford, UK: Blackwell 209-226 (2003).

like movies – and movies are looking more like news reports. How are we supposed to tell them apart?”<sup>95</sup>

Brooker gives the example of reports that an audience of cult movie buffs reacted negatively to test footage from Peter Jackson’s forthcoming *Hobbit* movie, “The Hobbit is shot at 48 frames per second – twice as many frames as standard films. The studio claims this gives it an unparalleled fluidity. The viewers complained it was *too* smooth – like raw video. Some said it looked like daytime TV. What they meant, I guess, is that it seemed too ‘real,’ and therefore inherently underwhelming”.<sup>96</sup>

Two examples of this confusion between fact and fiction are the story of North Korea’s Kim Jong-un having his uncle eaten by 120 wild dogs, which may have started in a satirical tweet and ended up on NBC news, Fox news, and other news networks and websites,<sup>97</sup> and Sweden’s justice minister posting a spoof article on her Facebook page about marijuana-linked deaths, along with comments about her zero-tolerance policy on drugs.<sup>98</sup>

Two other recent examples include an activist group’s fictional blog showing a blond-haired, 12-year-old, Norwegian girl planning her wedding to a 30-something-year-old man. The blog was created to promote awareness of the very real phenomenon of child marriages around the world.<sup>99</sup> Another example is the “hero boy” video created by Norwegian activists portraying a Syrian boy saving a girl from a shooting.<sup>100</sup> The video generated five million views before it was discovered that it was staged and filmed in another country to increase awareness about children’s suffering in the Syrian civil war.

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<sup>95</sup> Charlie Brooker, *What is the Difference Between The Hobbit and the News? Not as Much as there Should be*, guardian.co.uk, (29 April 2012), Available at <http://www.guardian.co.uk/commentisfree/2012/apr/29/difference-hobbit-news-not-much> (last visited May 6, 2016).

<sup>96</sup> Ben Child, *The Hobbit: First Glimpse Gets Mixed Response*, guardian.co.uk, (25 April 2012), Available at <http://www.guardian.co.uk/film/2012/apr/25/the-hobbit-first-screening-cinemacon?newsfeed=true> (last visited May 6, 2016).

<sup>97</sup> Adam Taylor, *The Story About Kim Jong-Un Having His Uncle Eaten by 120 Wild Dogs May Have Started with a Satirical Tweet*, BusinessInsider.com, (Jan 5, 2014), Available at <http://www.businessinsider.com/jang-song-taeks-execution-rumors-2014-1> (last visited May 6, 2016).

<sup>98</sup> Associated Press, *Sweden's Justice Chief Left High and Dry over Spoof Marijuana Deaths Story*, theguardian.com, (7 January 2014), Available at <http://www.theguardian.com/world/2014/jan/07/sweden-justice-minister-spoof-marijuana-deaths-story> (last visited May 6, 2016).

<sup>99</sup> Cate Matthews, *This Norwegian Preteen Is ‘Marrying’ A 37-Year-Old For One Important Reason*, The Huffington Post, (9 October 2014), Available at [http://www.huffingtonpost.com/2014/10/09/thea-norway-child-bride-plan-international\\_n\\_5954802.html](http://www.huffingtonpost.com/2014/10/09/thea-norway-child-bride-plan-international_n_5954802.html) (last visited May 6, 2016).

<sup>100</sup> Anne-Marie Tomchak & Charlotte McDonald, *#BBCTrending: Syrian 'hero boy' Video Faked by Norwegian Director*, BBC.com, Available at <http://www.bbc.com/news/blogs-trending-30057401>, 14/11/2014 (last visited May 6, 2016).

The second law of the Artificial Medium Laws Theory is The Stronger Dimension Prevails, which argues that given the hierarchy of the perceived psychological dimensions, a combination of a low-level dimension (voice) with a high-level dimension (interaction) will result in the higher dimension's greater influence on a user. It is further argued that there is a complex system of interaction among the dimensions that can bring powerful results. This law will be illustrated through the YouTube video KONY 2012, to argue that while the sound dimension describes Joseph Kony's war crimes in Uganda, the moving picture tells a different story about the power of social media. I suggest that this combination of dimensions made this video the most-watched moving picture ever, with an amazing 99 million views within a week.<sup>101</sup>

The third law, Medium with Time Dimension Determines its Usage Length, argues that a medium that possess the basic dimensions, including the time dimension, will determine the user's usage time. Moreover, the more dimensions a medium possesses, the more the determination of the length of the usage time will shift from the user to the medium. It is the medium that determine how long the user is using it – not the user. This law is illustrated through the correlation between Internet addiction and usage time. Moreover, it will be demonstrated that this correlation is even more alarming when measured in a stronger medium: virtual worlds.<sup>102</sup>

Internet addiction illustrates the third law. Like other forms of addiction, Internet addiction consumes an addict's time and energy, harms his personal relationships, restricts his academic, professional, and social potential,<sup>103</sup> and may result in physical problems stemming from self-negligence (lack of sleep, little exercise, malnutrition, and more).<sup>104</sup> Researchers have found that 90-95% of self-defined Internet addicts reported mild to severe distress at work, in school, and in financial matters.<sup>105</sup>

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<sup>101</sup> See Goltz, The Artificial Medium Laws Theory – KONY2012 as a Case Study, *supra* note 80.

<sup>102</sup> See Nachshon Goltz, 'ESRB Warning: Use of Virtual Worlds by Children May Result in Addiction and Blurring of Borders' – *The Advisable Regulations in Light of Foreseeable Damages* 11(2) PGH. J. TECH. L. & POL'Y (Fall 2010).

<sup>103</sup> J. J. Kandell, *Internet Addiction on Campus: The Vulnerability of College Students* 1 *Cyberpsychology & Behavior* 11 (1998); T. Eppright et al., *Internet Addiction: A New Type of Addiction* 96 *Missouri Medicine* 133 (1999).

<sup>104</sup> Kimberly Young, *What Makes the Internet Addictive: Potential Explanations for Internet Use*, Paper presented at the 105th Annual Conference of the American Psychological Association, Chicago, IL. (1997).

<sup>105</sup> Kimberly Young, *Internet Addiction: The Emergence of a New Clinical Disorder* 1 *Cyberpsychology & Behavior* 237 (1996).

Internet addiction is a cross-cultural syndrome, and the amount of time the user spends online is its best predictor. Several studies indicate a significant correlation between the amount of time spent surfing the Internet and the risk of developing Internet addiction, among American college students, Chinese and Taiwanese people, Internet users from Pakistan, and Australian students.<sup>106</sup> The results found in a study of Italian Internet users, however, did not support this correlation.<sup>107</sup>

Numerous studies have tracked the frequency of Internet addiction. In a study of 1,078 college students, it was found that 9.8% of the subjects possessed characteristics consistent with Internet addiction diagnoses.<sup>108</sup> Similar results were found in a study of 576 students, revealing a 9.26% addiction rate.<sup>109</sup> Nonetheless, a conservative research study using two diagnostic tools (Diagnostic Questionnaire – DQ and Internet Related Addictive Behavior Inventory – IARBI) found a 6% addiction rate.<sup>110</sup> These results were supported by the result of a US nationwide survey of 17,251 Internet users visiting abcnews.com, which indicated a 6% addiction rate.<sup>111</sup>

While many negative side effects result from Internet addiction, it seems that addiction to virtual worlds, a stronger artificial medium, is a far more serious problem. Research conducted with 3,989 users of the virtual world Everquest.com indicated that 15.4% of the subjects reported experiencing symptoms of withdrawal when not able to use the virtual world, 23.8% experienced mood modification while using the virtual world, 28.8% used the virtual world even when they did not enjoy the experience, and 18.4% reported problems with academics, health, finances, or relationships.<sup>112</sup> A follow-up survey of 2,237 Massively

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<sup>106</sup> V. Brenner, *Psychology of Computer Use: Parameters of Internet Use, Abuse, and Addiction: The First 90 Days of the Internet Usage Survey* 80 *Psychology Rep.* 879 (1997); Guo Liang, *Surveying Internet Usage and Impact in Twelve Chinese Cities* (2005), Available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10\\_02\\_06\\_china.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10_02_06_china.pdf) (last visited May 6, 2016); Sunny S.J. Lin & Chin-Chung Tsai, *Sensation Seeking and Internet Dependence of Taiwanese High School Adolescents* 18 *Computers In Human Behavior* 411 (2002); Kausar Suhail & Zobia Bargees, *Effects of Excessive Internet Use on Undergraduate Students in Pakistan* 9 *Cyberpsychology & Behavior* 297 (2006); Wei Wang, *Internet Dependency and Psychosocial Maturity Among College Students* 55 *Int'l Journal of Human-Computer Studies* 919 (2001).

<sup>107</sup> Ferraro Giovanni, *Internet Addiction Disorder: An Italian Study* 10 *Cyberpsychology & Behavior* 170 (2007).

<sup>108</sup> Lynette Armstrong et al., *Potential Determinants of Heavier Internet Usage* 53 *Int'l Journal of Human-Computer Studies* 537 (2000).

<sup>109</sup> Robert W. Kubey et al., *Internet Use and Collegiate Academic Performance Decrements: Early Findings* 51 *Journal of Communication* 366 (2001).

<sup>110</sup> V. Brenner, *supra* note 106.

<sup>111</sup> P. M. Greenfield, *Psychological Characteristics of Compulsive Internet Use: A Preliminary Analysis* 2 *Cyberpsychology & Behavior* 403 (1999).

<sup>112</sup> Nick Yee, *Ariadne – Understanding MMORPG Addiction*, NickYee.com (Oct. 2002), Available at <http://www.nickyee.com/hub/addiction/home.html> (last visited May 6, 2016).

Multiplayer Online Role Playing Game users concluded that 40.7% of the subjects considered themselves addicted to the game experience.<sup>113</sup>

There are numerous documented deaths resulting from fatigue due to extended, continuous use of virtual worlds. Li Syong Saup of South Korea died after using the virtual world Starcraft.com for more than 50 hours continuously.<sup>114</sup> Kso Yan of China died after using virtual worlds for more than 15 days continuously, during the New Year holiday.<sup>115</sup> Another Chinese individual died after using virtual worlds for three days straight.<sup>116</sup>

Hu Bin, a 16-year-old Chinese teenager from the province Anhuvi in Lujiang County, died two days after he swallowed an insecticide he brought with him to an Internet bar.<sup>117</sup> Before Hu committed suicide, he had used virtual worlds at the Internet bar for 11 days straight. According to reports, the words “even the gods cannot save me” were written on the family door. Hu’s father said that when Hu was about to die, he said, “I drank it [the pesticide] because I wanted to make sure that you could not save me. I have played enough.”

Three-month-old Sa-rand (“love” in Korean) died as a result of her parents neglecting her in order to raise a virtual baby in a virtual world;<sup>118</sup> a 22-year-old was arrested for clubbing his 53-year-old mother to death after she criticized his online gaming habit;<sup>119</sup> twenty-three-year-old Taiwanese Chen Rong-yu lay dead in an Internet café for nine hours before anyone noticed. He had been playing a virtual game continuously for 23 hours;<sup>120</sup> and finally, a Chinese teenager was rushed to the hospital after chopping off his hand in a desperate attempt to cure his addiction to the Internet.<sup>121</sup>

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<sup>113</sup> Nick Yee, *The Daedalus Project: Addiction*, NickYee.com (Jul. 9, 2004), Available at <http://www.nickyee.com/daedalus/archives/000818.php> (last visited May 6, 2016).

<sup>114</sup> Philippe Naughton, *Korean Drops Dead After 50-hour Gaming Marathon*, London Times (Aug. 10, 2005), Available at <http://www.timesonline.co.uk/tol/news/world/article553840.ece> (last visited May 6, 2016).

<sup>115</sup> Ian Williams, *Chinese Gamer Dies After 15-Day Session*, VNUNet.com (Mar. 1, 2007) Available at <http://www.vnunet.com/vnunet/news/2184523/online-addict-games-himself> (last visited May 6, 2016).

<sup>116</sup> Ian Thomson, *Chinese Gamer Dies After Three-Day Session*, VNUNet.com (Sep. 17, 2007), Available at <http://www.vnunet.com/vnunet/news/2198850/chinese-man-dies-three-days> (last visited May 6, 2016).

<sup>117</sup> Shen Ying et al., *The Death of a Young Online Game Player*, EastSouthWestNorth.com (Mar. 4, 2006), Available at [http://www.zonaeuropa.com/20060304\\_1.htm](http://www.zonaeuropa.com/20060304_1.htm) (last visited May 6, 2016).

<sup>118</sup> Choe Sang-Hun, *South Korea Expends Aid for Internet Addiction*, N.Y. Times A4 (May 28, 2010), Available at <http://www.nytimes.com/2010/05/29/world/asia/29game.html> (last visited May 6, 2016).

<sup>119</sup> AFP, *S. Korean Jailed for Killing mother Over Gaming Addiction* (July 2, 2010), Available at [http://www.google.com/hostednews/afp/article/ALeqM5iSGEyDod6Z\\_YdAeX5n3bu7BKO47Q](http://www.google.com/hostednews/afp/article/ALeqM5iSGEyDod6Z_YdAeX5n3bu7BKO47Q) (last visited May 6, 2016).

<sup>120</sup> Rob Copper, *Gamer lies dead in internet café for 9 hours before anyone notices*, dailymail.co.uk (Feb 3, 2012), Available at <http://www.dailymail.co.uk/news/article-2096128/Gamer-lies-dead-Taiwan-internet-cafe-9-HOURS-notices.html> (last visited May 6, 2016).

<sup>121</sup> Tom Phillips, *Chinese teen chops hand off to ‘cure’ internet addiction*, The Telegraph (03 Feb 2015),

The fourth law, The More Dimensions a Medium Possesses, the Weaker the User's Imagination, suggests that Virtual worlds brings to the extension of the visualization Hypothesis further, from the senses – vision and sound – to the other perceived psychological dimensions (i.e., time and interaction), weak and almost irrelevant in TV, stronger in video games and dominant and supreme in virtual worlds. It is no longer about the photo's and sound that replaces the images that could have been created by the imagination as in TV, but in these powerful mediums it is time and interaction from the artificial medium that replace the natural time and interaction within the person's mind. The most internal object, the mind, becomes external, nourishing falsely from the artificial medium perceived psychological dimensions, leaving little space, if any, for the imagination. For this law implication and harm to children's imaginative development in virtual worlds see Goltz & Dowdeswell<sup>122</sup> and Goltz.<sup>123</sup>

The fifth and last law, The User is Bound to All the Laws, argues that the user of an artificial medium is inherently bound to all of the other laws. Furthermore, when a user is involved in creating content, the laws' influence is even stronger. This law applies to those who are using a medium actively. For example, an actor in a movie is using the medium, while the viewer is passive. An example of a user-actor's subordination to the medium laws would be male and female actors playing a loving couple in a movie and then becoming a couple in reality. Another example is the meltdown of the KONY 2012 director as a result of abusing the medium laws (albeit unintentionally), as described above.<sup>124</sup>

The same phenomenon occurs on the Internet and virtual worlds when most of the users are active. The law predicts that under these circumstances, the law's impact will be more intense, and the line between the virtual and real will be completely blurred. Veteran New York journalist Seth Kaufman's<sup>125</sup> findings illustrate this point. Kaufman has explored the suicide rate of US reality show contestants and compared it to the national average suicide

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Available at <http://www.telegraph.co.uk/news/worldnews/asia/china/11386325/Chinese-teen-chops-hand-off-to-cure-internet-addiction.html> (last visited May 6, 2016).

<sup>122</sup> Goltz & Dowdeswell, Virtual Worlds Use and the Harm to Children's Imagination Development, *supra note 2*.

<sup>123</sup> Goltz, Nachshon, The Limits of Regulation, A Case Study of Virtual and Intangible Harm, PhD Dissertation, Osgoode Hall Law School, York University 2015 [forthcoming].

<sup>124</sup> Daily Mail, 'You're the devil, you're the devil': New footage of Kony video director emerges 'ranting at traffic while naked on busy street' (19 March 2012), Available at <http://www.dailymail.co.uk/news/article-2116981/Jason-Russell-arrested-New-footage-Kony-2012-video-director-ranting-naked-emerges.html> (last visited May 6, 2016).

<sup>125</sup> Seth Kaufman, *Suicide Rate for Reality Contestants Three Times the National Average*, TheKingofPain.com, (April 1, 2013), Available at <http://www.thekingofpainbook.com/2013/04/01/tkop-exclusive-suicide-rate-for-reality-contestants-three-times-the-national-average/> (last visited May 6, 2016).

rate. Kaufman determined that the number of contestants on US reality shows since 2005 is 34,080, 14 of whom have committed suicide. The national average rate for suicides is 12.4 per 100,000 people, according to the American Foundation for Suicide Prevention. Therefore, the suicide rate among US reality show participants is more than three times the national average.

The theory suggests that the gap between the real and the virtual and the natural urge to bridge it are causing these dramatic results.

## **6. Research methods**

The first part is a preparatory initiative whose main goal is to set the grounds for the second part. The main research method of the second part will be a qualitative comparison of the regulatory systems applied to the activities of digital and creative media industry, especially in the context of virtual-intangible harm aiming at children and using this data in order to develop an education-based Co-regulatory model. This qualitative comparison will be based on a theoretical framework, surveys and interviews with the relevant stakeholders and an analysis of the dimensions involved.

## **7. Implementation schedule**

The first part will start in September 2016 and should be concluded by August 2018. The second part will start in September 2018 and should be concluded by August 2020. At least in principle, the activities described in the working packages will be performed simultaneously or through successive rounds of approximation.

## **8. Work Packages**

The main activities of the first part can be described in terms of at least four work packages (WP)

- WP1 - Mapping stakeholders. The first step is to identify the nature of the actors directly or indirectly affected by the regulatory process in the field of digital media

and to assess the nature of their interests in the process as well as the virtual-intangible harm to children.

- WP2 - Data procurement. The preparation for the second part and the research questions that this can credibly and reliably assess should also include a review of accessible data. The use of a comparative method, for example, pose question of data comparability or, put simply, the idea that the data and indicators available from different systems actually measure the same properties.
- WP3 – Networking. This activity consists in establishing contact with researchers and institutions in the countries included in the comparison. During the first step I will identify the most suitable partners and whenever possible establish research partnerships to support the implementation of the second part e.g. in the access to national data, in the application for international funding, etc.
- WP4 – Funding. During the first part I will also identify suitable sources of funding for the second part and, whenever possible, apply for research appropriations.