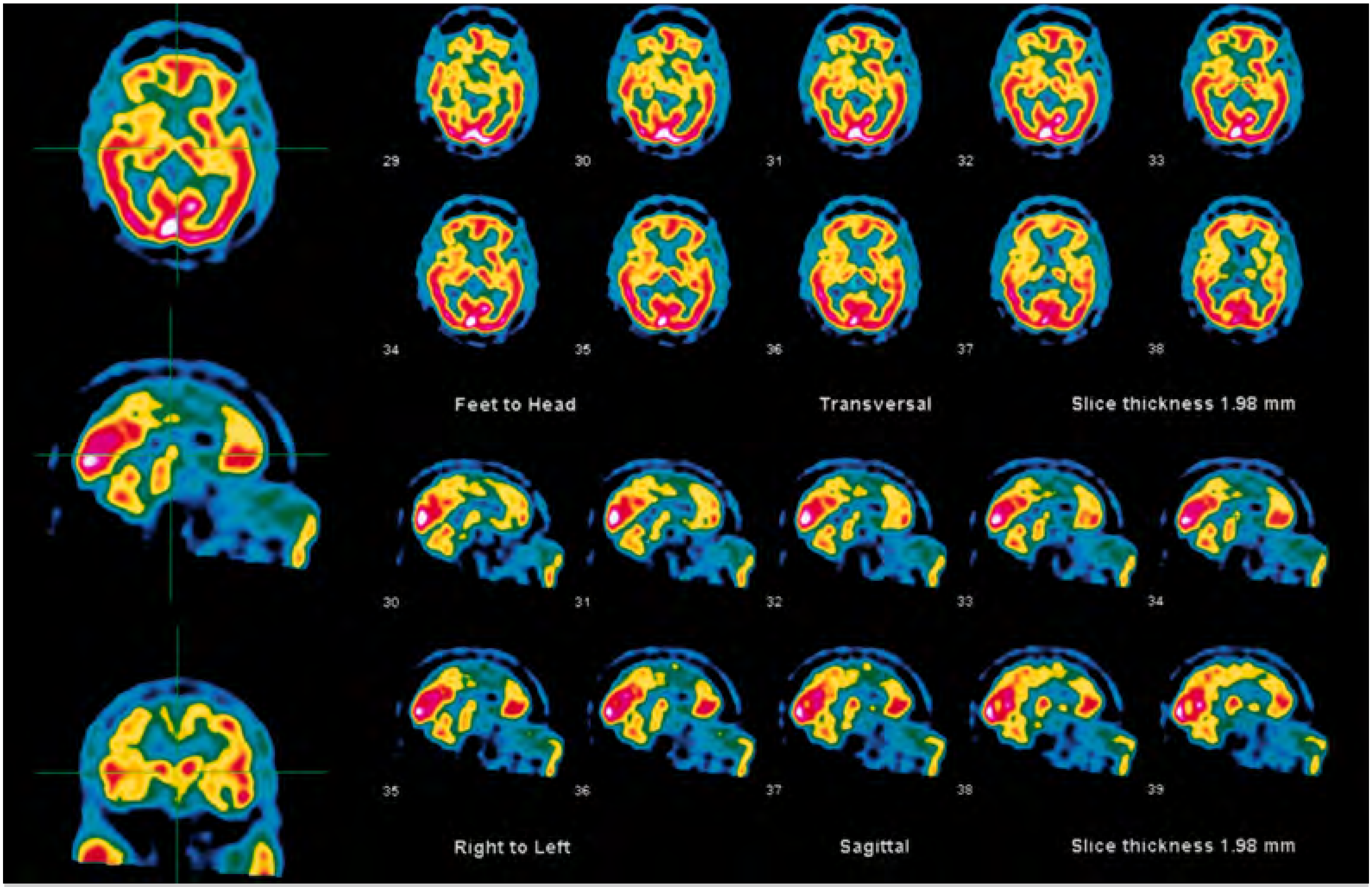


WHY TECH REGULATORS **NEED TO THINK LIKE GOOGLE**

BY
TERRY FLEW

Professor of Digital Communications and Culture, Faculty of Arts and Social Sciences, The University of Sydney.

TechREG CHRONICLE
JUNE 2022

WHY TECH REGULATORS NEED TO THINK LIKE GOOGLE

By Terry Flew

As many of the world's largest companies are platform-based technology companies, there has been a growing push worldwide to regulate these companies to address issues arising from economic, political and communications power. At the same time, their distinctive platform business models raise new challenges to regulators, such as what industries they are in, what problems connect to which regulatory authority, and who has jurisdictional authority and regulatory capacity. The paper argues that regulators increasingly need to "think like Google": they need to be able to adopt holistic strategies that can apply across industry silos and different regulatory responsibilities. There is also a need to empower the notion of regulation in the public interest, to challenge the ideational power of tech companies that they are superior stewards of public good to government agencies.

01

THE CHALLENGE OF PLATFORM BUSINESS MODELS

The 2020s have been a period where the policy spotlight has been thrown upon the power of Big Tech. The reasons are not surprising. Platform-based technology companies experienced phenomenal growth during the 2010s and early 2020s, to become the world's largest companies and most valuable brands.

According to Kantar BrandZ, the seven most valuable brands in 2021 were platform-based technology companies (in order): Amazon, Apple, Google, Microsoft, Tencent, Facebook, and Alibaba.[2] They sit alongside a slew of other tech-based companies, including those in media and entertainment (Netflix, Disney, TikTok), business-based technology solutions (IBM, Adobe, Intel, Cisco, SAP, Oracle and Zoom), telecommunications (AT&T, Verizon, T-Mobile, Vodafone) and technology hardware (Huawei, Xiaomi). Even traditional industries have been disrupted by the digital platform challengers, as seen with Amazon and Alibaba in retail, Tesla and Uber in cars and transportation, and PayPal in the financial sector.

The majority of these companies did not exist prior to 2000, and many have risen to their dominant position on the basis of a platform-based business model. The general features of the platform-based business model are well known, and include the brokering of interactions between buyers, sellers and third parties (e.g. advertisers) across multiple markets, the accumulation of data from multiple sources through online transactions, and the use of algorithms and machine learning for behavioral targeting of consumers based upon prior revealed preferences in order to better match them to products and advertising content. [3]

Critics of this model point to the rise of "platform capitalism" and "surveillance capitalism" whereby these companies access the innermost thoughts and preferences of people and harvest them as data to generate what Shoshana Zuboff termed a "behavioral surplus" for profit. [4] Even those who see the impact of digital platforms as broadly positive for society would nonetheless concede that it has opened up substantial risks for the abuse of power, through privacy loss and data breaches, the capacity to algorithmically amplify misinformation and unchecked hate speech, and the generation of filter bubbles and the distortion of public speech in the face of polarization and incivility in online discourse.

There are also the economic challenges presented by the rise of digital platform companies. Most prominent among these is the "winner-takes-most" nature of many digital markets, which make it difficult to challenge an incumbent in key fields such as search and social media. Once a single provider reaches a certain scale, it becomes very difficult to challenge their market dominance, as direct and indirect network effects become mutually reinforcing, the superior quantity of data generates a superior quality of service (e.g. Google knows your pre-existing search habits better than any new provider can), and consumers find it increasingly costly to switch from one service to another (e.g. losing messaging histories if you leave Facebook).[5] As the U.S. House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law concluded, "companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons."[6]

02

WHAT INDUSTRY ARE THEY IN?

While the digital platform giants may have the monopoly power of the oil barons and rail tycoons of yore, one important difference is about what industry they are in. Industries such as rail, food, transportation, even media, were once clearly delineated by the products or services

2 Carmen Ang, "The World's 100 Most Valuable Brands in 2021," *Visual Capitalist*, 6 October 2021.

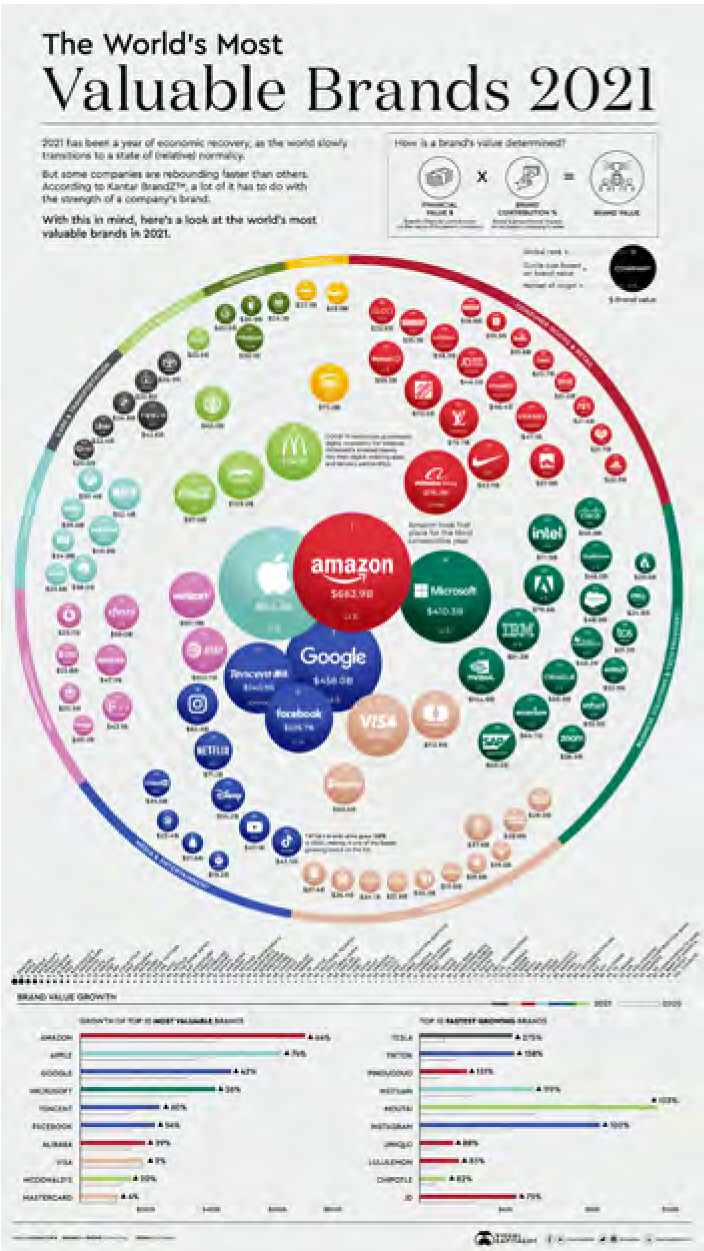
3 Geoffrey Parker, Marshall van Alstyne & Sangeet Paul Choudary, *Platform Revolution*, New York, W. W. Norton & Co, 2016. See also Hal Varian, "Computer-Enabled Transactions," *American Economic Review* 100(1), 1-10, 2010.

4 Shoshana Zuboff, *The Rise of Surveillance Capitalism*, New York, Public Affairs, 2019.

5 Patrick Barwise and Leo Watkins, "The Evolution of Digital Dominance: How and Why we Got to GAFA," in Martin Moore and Damian Tambini (eds.), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple*, Oxford, Oxford University Press, 2018, pp. 21-49.

6 US House of Representatives, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, Washington, DC, 2020, p. 7.

they provided, and the production processes that went into making those products or providing those services. The legacy of these linear value chains – or what are now referred to as pipeline business models – is seen in the ways in which an industry is constructed for purposes as various as Standard Industry Classifications ("SIC") data, industry support and industry lobby groups, and what constitutes a market for purposes of antitrust and competition policies.



By contrast, digital platform companies can operate in multiple industries simultaneously. Amazon is the paradigmatic example of this. The company started in online bookselling, less because its founder Jeff Bezos had a passion for books, which is the usual reason for getting into bookselling. Rather, the publishing industry had long developed detailed taxonomies for the types of books that were in its catalogues – romance novels, military histories, cookbooks, adult fiction, academic textbooks etc. – and this lent itself very well to a data-driven business model where recommendations to users based upon past purchases would be critical to repeat business. And of course the Internet had mitigated the need to invest heavily in physical retail infrastructure, which was an error made by Borders, which was Amazon's principal competitor at the time.

Having pioneered core platform business innovations such as recommendation engines, the use of algorithms to direct consumers to products based in revealed preferences is now core to all platform-based businesses. But the other major innovation of Amazon has been to operate in disparate industries, generating large quantities of diverse sources of data that can be mutually reinforcing in the company's overall business model. Amazon is in the video streaming business through Amazon Prime, but, unlike other streaming services such as Netflix, can run it as a "loss leader" as Amazon Prime is also a highly lucrative premium shipping service for its retail customers. When Amazon acquired the upmarket U.S. grocer Whole Foods in 2017 its value lay les in the markup that can be put on the price of an organic avocado, than in the additional data sources it provided on the shopping preferences of middle-class consumers, as well as the capacity to acquire physical distribution sites to complement Amazon's wider e-commerce business.

Other examples can be given. Google's free provision of search and email to users is cross-subsidized by its highly profitable cloud computing services; Amazon can also cross-subsidies other activities (e.g. cost of delivering products to homes) by its cloud computing activities. This is different to a multi-divisional corporate structure, or even to the conglomerate business model that emerged in the 19970s, and which has been a feature of giant media companies. Conglomerates are typically loosely interconnected by their engagement with a particular line of business, and the aim is to generate synergies between one line of business and another – think about the relationship that Disney theme parks have to Disney films and TV shows, or the capacity to franchise a myriad array of products from the characters in *Frozen*. While platform businesses can have integrated product lines with a common look and feel – think of Apple – the integration is actually hidden from view, and arises out of the capacity to share and repurpose data across multiple, and often disparate, online activities.

> ***By contrast, digital platform companies can operate in multiple industries simultaneously. Amazon is the paradigmatic example of this***

Among the many challenges that this inversion of conventional industry and market structures presents, one is the difficulty in identifying economic power. In conventional industry economics, and the competition policy and antitrust initiatives that stem from it, economic power is measured in terms of market dominance, and conduct which can follow from it, such as the ability to set prices above what would be the norm in more competitive markets, with limited risk of new competitors emerging due to economies of scale and scope.[7] Think for instance about the power to set prices for parking at or near an airport. But market power in digital markets dominated by platform businesses operates differently.

As Lina Khan observed "equating competition with 'consumer welfare', typically measured through short-term effects on price and output – failed to capture the architecture of market power in the 21st century marketplace."[8] Instead of focusing on price, Khan proposed that we needed to instead focus on questions such as whether a company's structure enables anticompetitive practices and generates conflicts of interest, whether it can cross-leverage market advantage across distinct lines of business, and whether the structure of the market incentivizes and permits predatory conduct towards potential competitors. A further measure, noted by the Stigler Center for the Study of Economy and the State at the University of Chicago, is whether such market structures increasingly constitute a barrier to innovation, promoting a mindset that seeks to buy out potential competitors rather than responding to competition by investing in new digital products, services, and processes.[9]

> *Among the many challenges that this inversion of conventional industry and market structures presents, one is the difficulty in identifying economic power*

03
WHAT ARE THE PROBLEMS?

The challenges presented by digital platform power are thus a mix of traditional and new concerns. Traditional concerns include the capacity to engage in dominant conduct in digital markets and the use of their substantial wealth to lobby politicians for favorable legislative outcomes.[10] But these forms of economic and political power co-exist with newer challenges, which make the regulatory task more complex. Three in particular stand out:

1. Economic power that manifests itself, not in higher prices to consumers, but in the capacity to squeeze other stakeholders in digital platform markets through unequal *bargaining power*. This of course includes workers (campaigns to unionize tech workers have been a major feature of the last decade, particularly in the U.S.), but also includes those who provide the content that is distributed through digital platforms. A major flashpoint in a number of countries has proven to be news. News publishers have a "frenemy" relationship to digital platforms, in that they have been reliant upon them as distribution channels, yet lose advertising revenue to the platforms, who contribute very little to the costs of producing news.[11] This has led governments in countries such as Australia and Canada to establish "mandatory news bargaining codes," whereby major platforms such as Google and Facebook contribute to the costs of producing news through contracts with news publishers.

2. In addition to political power associated with corporate lobbying of politicians, donations to political parties etc., digital platform companies have come to have considerable *ideational power*, in that they ideas that they generate about how to do things come to shape public policy. One example is former Google CEO Eric Schmidt's observation that tech companies are better placed to address policy issues because they are more agile, and employ brighter people, than government bureaucracies. During the COVID-19 global

7 Economic power of this sort may indeed exist in digital markets. The Australian Competition and Consumer Commission (ACCC) identified this as being an issue with Google's dominant position in online advertising. See ACCC, *Digital Advertising Services Inquiry: Final Report*, 2021.

8 Lina Khan, "Amazon-An Infrastructure Service and its Challenge to Current Antitrust Law," in Martin Moore and Damian Tambini (eds.), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple*, Oxford, Oxford University Press, 2018, pp. 100.

9 Stigler Center for the Study of Economy and the State, *Stigler Committee on Digital Platforms: Final Report*, 2019.

10 Zephyr Teachout, *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money*, New York, All Points Books, 2020.

11 ACCC, *Digital Platforms Inquiry: Final Report*, Commonwealth of Australia, Canberra, 2019.

pandemic, Microsoft CEO Satya Nadella called for a "partnership" between tech companies and governments, on the basis that tech companies are better at "doing thing" than governments are, and that the role of governments is to set overarching policy goals.[12] A particularly striking recent example has been Elon Musk's use of the Twitter platform to generate support for his proposed takeover of the company, pointing to faults with current Twitter management on Twitter, and conducting plebiscites of his followers about how to "fix" the platform.

3. The rise of digital platforms as distributors, moderators, amplifiers, and arbiters of public speech has placed *communications power* issues on the political agenda in new ways. Whereas the classic debates about free speech and censorship was around the relationship between governments and individual citizens, authors such as the legal theorist Jack Balkin now refer to a "free speech triangle," where private companies increasingly mediate the flows of public discourse in direct and largely unaccountable ways. [13] How to establish accountability and transparency in the decisions being made by digital platform companies about speech rights and content moderation has proven to be a lively political question, from across the political spectrum.

In noting these issues, it becomes apparent that the agencies which could or should have regulatory oversight vary depending upon the nature of the concern. If the primary concern is content rules and speech rights, the focus is on communications agencies, and the capacity to extend existing media and communications laws and policies into the digital realm. If the primary concern is lack of market competition, then the locus of responsibility shifts to economic agencies. Some argue that the new nature of the problems requires the creation of new mega-regulators purpose built for the platform environment, while others foresee the rise of "neo-regulation," whereby existing laws and regulations are stitched together through cooperation among existing government agencies across Ministerial portfolios. [14]

04

WHO HAS RESPONSIBILITY, AND WHO SHOULD HAVE IT?

Overarching questions around what should be regulated, and how, is the issue of who is best placed to undertake such regulation. In an age of the global Internet, it is apparent that this issue emerges differently in some jurisdictions compared to others. In China, to take an obvious example, discourses of cyber-sovereignty dictate that it is the nation-state that remains the primary locus of regulatory oversight, and there are limits to the capacity of digital platform companies to self-regulate their activities.

In the liberal democracies, by contrast, the Internet arose at a time when there was a strongly "hands off" view of the role of government. While the platformization of the Internet has clearly challenged the idealism of the early Internet, concerns that nation-state governments may act to restrict or suppress speech, or that they lack the regulatory capacity or competence to oversee digital environments, remains significant. [15]

Others feel that civil society groups and NGOs need to take a more active role in platform governance, so as to safeguard against nation-state overreach. In *Speech Police: The Global Struggle to Govern the Internet*, David Kaye argues that, while it is important to have mechanisms to keep in check unaccountable corporate power over digital technologies, regulatory measures "risk capture by ill-intentioned governments," and favors a stronger role for civil society organizations, operating in some instances in direct collaboration with the digital platform companies.[16] Tim Berners-Lee's "Contract for the Web" prioritizes civil society in a similar way, favoring a largely hands-off role for governments beyond commitments to invest in digital infrastructure and promote digital literacy. [17]

The problem with these civil society-led initiatives, and associated measures such as promoting corporate social responsibility, shareholder activism or "social media coun-

12 The Eric Schmidt and Satya Nadella statements are cited in Terry Flew, *Regulating Platforms*, Cambridge, Polity, pp. 123, 131.

13 Jack Balkin, "Free Speech is a Triangle," *Columbia Law Review*, 117(8), pp. 2011-56, 2018.

14 Philip Schlesinger, *The Neo-Regulation of Internet Platforms in the UK*, CREATe Working Paper 2021/11, 2021.

15 See e.g. Jeff Jarvis, "Statement to the Judiciary subcommittee on antitrust," *Medium*, February 13, 2021.

16 David Kaye, *Speech Police: The Global Struggle to Govern the Internet*, New York, Columbia University Press, 2019, p. 88.

17 Tim Berners-Lee, 30 years on, what's next #for the web? *Web Foundation*, March 12, 2019.

cils," is that they do not adequately address the issues of legitimacy and accountability. The desire to develop binding global standards fails to take account of the diverse preferences and circumstances that exist within and between nations, while it is far from clear than NGOs possess more legitimacy than democratically elected nation-state governments.

In the absence of some form of transnational government, democratic elections continue to provide the "least worst" means of addressing questions of legitimacy and accountability, in a context where nation-state remain the primary rule-makers in geographically defined territories. As the late British democratic socialist Tony Benn put it, a question that we always have to ask about power is "How do we get rid of you?" Models for third party quasi-self-governance, such as the Facebook Oversight Board and NGO-led initiatives, cannot adequately address the need for nation-states to underpin forms of counterpower to digital platform power that have legitimacy, accountability, and legal effectiveness.

05

REGULATORS LEARNING FROM GOOGLE

Effective regulation of digital platforms requires the articulation of a new public interest vision for the Internet. As the legal theorist Julie Cohen has observed, it requires a preparedness to see regulatory institutions as sites of policy innovation, rather than as slow-moving bureaucracies from the pre-digital era, a vision long promoted by thought leaders in the tech sector. [18] This does mean learning lessons from the tech sector about how to act effectively, without ceding responsibility for regulation to the tech sector.

Notably, it requires a preparedness to think laterally. Just as Google, Amazon and other digital platform giants can operate in multiple businesses and markets simultaneously and apply lessons from one area of operations to others. In this respect, a key challenge for nation-state policy agencies is the capacity for coordinated action based on shared information. What was described as neo-regulation is likely to become the new normal in addressing the multifaceted challenges associated with digital platform power.

This is not a call for a new "super-regulator" or even necessarily for new laws: it is a call for adapting well-established principles to the changed environment for content, competition and markets associated with the rise of digital platforms.

It also requires a new idealism on behalf of the public interest. For much of the last 30 years, idealism has been associated with the open Internet, and those seeking greater regulation in the public interest are too often assumed to have base cynical motivations. There is no shortage of statements of what ethically sound and socially just principles are with regards to media and communications policy.[19] What is needed are advocacy skills for the kinds of practical measures that can move digital societies closer to such ideals.

Finally, regulators can learn from Google the capacity to be clear about what they are seeking. If the primary public interest concern is the lack of market competition, then measures can be put in place around that question. If the primary concerns are around hate speech and potentially objectionable content in the public sphere, then that requires its own mechanisms for addressing. The need will be for advocates who can speak with clarity about such issues, and who can identify realistic and achievable pathways to addressing these concerns that draw upon the legitimacy provided by nation-state governments. ■

"Effective regulation of digital platforms requires the articulation of a new public interest vision for the Internet

18 Julie Cohen, *Between Truth and Power: The Legal Constructions of informational Capitalism*, Oxford, Oxford University Press.

19 See e.g. Robert Picard and Victor Pickard, *Essential Principles for Contemporary Media and Communications Policymaking*, Reuters Institute for the Study of Journalism, Oxford, 2017.

CPI
SUBSCRIPTIONS