

# WHAT BLOGGING MIGHT TEACH ABOUT CYBERNORMS

*Jacqueline D Lipton*\*

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## I. INTRODUCTION

Since the dawn of the information age, scholars have argued about whether and how cyberspace might be regulated.<sup>1</sup> While the notion that cyberspace is incapable of regulation has now more or less fallen by the

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\* Professor of Law; Associate Dean for Faculty Development and Research; Co-Director, Center for Law, Technology, and the Arts, Case Western Reserve University School of Law, 11075 East Boulevard, Cleveland, Ohio, 44106. Email: jacqueline.lipton@case.edu. The author would like to thank participants at the 3rd Annual Akron Intellectual Property Forum, University of Akron School of Law, October 30, 2009 for helpful comments on an earlier draft of this paper. The author would also like to thank Professor David Hoffman for providing useful sources and information for this article. All mistakes or omissions are of course my own.

1. See, e.g., John P. Barlow, A Declaration of the Independence of Cyberspace (Feb. 8, 1996), <http://homes.eff.org/~barlow/Declaration-Final.html> (arguing that cyberspace cannot be meaningfully regulated); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003) (discussing concerns over-regulation of cyberspace); LAWRENCE LESSIG, CODE 2.0 (2006) [hereinafter LESSIG, CODE] (discussing software code as a cyberspace regulator); JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2006) (noting that it is appropriate and inevitable that cyberspace is regulated).

wayside,<sup>2</sup> the question remains as to how it might most appropriately be regulated. Inherent in this question are the associated issues as to which entities are the most appropriate regulators, and on what basis. Cyberspace theorists in the 1990s accepted the fact that legal rules would not be the only, nor even necessarily the predominant, form of online regulation.<sup>3</sup> Professor Lessig prophetically proclaimed that “code is law,”<sup>4</sup> while Professor Reidenberg wrote of a *lex informatica* based on system architecture design decisions.<sup>5</sup> These scholars and others identified additional forms of cyberspace regulation, including market forces, public education, and private institutions.<sup>6</sup>

There is no doubt that all of these forms of regulation have a role to play. However, as we move into a world of interactive Web 2.0 technologies, social norms take on particular significance.<sup>7</sup> Web 2.0

2. GOLDSMITH & WU, *supra* note 1, at vii.

[I]n the 1990s, activists were saying that it was impossible for the government to control the Internet. Now in the 2000s, many (including one of us) have demanded that the government act to protect the Internet from perceived threats—whether from telecom firms or foreign governments. That attitude toward government confirms the difference a decade has made.

*Id.* See also LESSIG, CODE, *supra* note 1, at ix (“The idea—and even the desire—that the Internet would remain unregulated is gone.”).

3. See, e.g., Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) [hereinafter Lessig, *The Law of the Horse*].

4. LESSIG, CODE, *supra* note 1, at 5.

In real space, we recognize how laws regulate—through constitutions, statutes, and other legal codes. In cyberspace, we must understand how a different ‘code’ regulates—how the software and hardware (i.e., the “code” of cyberspace) that make cyberspace what it is also regulate cyberspace as it is . . . “code is law.”

*Id.*

5. Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules through Technology*, 76 TEX. L. REV. 553 (1998).

6. Lessig, *The Law of the Horse*, *supra* note 3 (identifying legal rules, norms, system architecture, and market forces as modes of regulation online); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 420 (2008) (giving an example of the American Library Association as an institutional regulator in a real world context); Jacqueline D. Lipton, “We, the Paparazzi”: *Developing a Privacy Paradigm for Digital Video*, 95 Iowa L. Rev. (forthcoming, 2009), available at <http://ssrn.com/abstract=1367314> (identifying public education as a mode of regulation along with norms, market forces, system architecture, legal rules, and non-profit institutions).

7. Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 212-13 (2006).

[B]loggers can be constrained by informal conduct norms enforced by social disapprobation and psychological sanctions of shame or guilt and the desire for esteem. Norms have been described as social ordering arising outside the legal system. Because bloggers generally derive little direct financial reward from their activity, the reputational effects of norm violations can be significant.

*Id.*

technologies are characterized by global interactive online conversations between individuals. Blogs,<sup>8</sup> wikis,<sup>9</sup> online social networks,<sup>10</sup> and even massively multiplayer online games,<sup>11</sup> involve casual online conversations on a scope and scale never before possible. These interactions are often beyond the scope of any one national law and may well be outside of the ambit of traditional market forces in terms of regulation.<sup>12</sup> While code may have some impact on the ways in which people interact in these contexts, social norms are likely to have much more immediate and subtle impacts on the content of communications.<sup>13</sup> For example, code may enable a blog reader to comment on another's post,<sup>14</sup> but social norms and personal preferences will dictate the extent to which a blog poster allows and monitors comments. Norms will also impact on the way in which people comment on blog entries, including whether they comment anonymously.

While the literature on social norms as online regulators has achieved some prominence in the cyberlaw area,<sup>15</sup> there is still scant examination of particular online norms and of the ways in which norms interact with other forms of regulation. The aim of this article is to reverse that trend by providing a detailed examination of one apparently emerging norm in the blogosphere—the norm against “hijacking” a blog post by hyperlinking to another blog in the comment feed for the original blog post. For example, consider a situation where Blogger A posts her

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8. JANET LOWE, *GOOGLE SPEAKS: SECRETS OF THE WORLD'S GREATEST BILLIONAIRE ENTREPRENEURS, SERGEY BRIN AND LARRY PAGE* 288 (2009) (defining a blog as “a string of journal entries posted on a web page”); Ribstein, *supra* note 7, at 195 (identifying at least three different species of blogs: personal blogs, political blogs and amateur journalism).

9. LOWE, *supra* note 8, at 294 (defining “wikis” as “[a] collection of Web pages that enables anyone who accesses them to contribute or modify content, using a simplified computer language.”).

10. *Id.* at 292 (defining “social networking” in the online context as “[w]ebsites that allow people to share ideas, information, and images and to form networks with friends, family, or other like-minded individuals.”).

11. See LESSIG, *CODE*, *supra* note 1, at 10-15 (discussing the operation of massive multi-player online games); DON TAPSCOTT & ANTHONY WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 307-08 (2008) (discussing the application of principles from multi-player online role playing games, like Second Life and World of Warcraft, to business paradigms).

12. Of course, this is not to say that laws and market forces will never have an impact—simply that they will probably take a back seat to norms in practice.

13. Ribstein, *supra* note 7, at 212-13 (noting the importance of norms as potential regulators in the blogosphere).

14. *Id.* at 191 (noting the commenting capability of most blogging software).

15. See, e.g., April M. Major, *Norm Origin and Development in Cyberspace: Models of Cybernorm Evolution*, 78 WASH. U. L.Q. 59, 59-60 (2000) (noting the importance of cybernorms as a cyberspace regulator).

advice for cooking a soufflé and allows readers to comment on their own soufflé-cooking experiences in the comment feed for the blog. In the comment section, Blogger B not only posts about his own experiences, but also hyperlinks<sup>16</sup> to a post in his own blog that contains more information for readers interested in the topic. Under the norm, Blogger B's conduct is regarded as "hijacking" the comment thread from Blogger A's post in order to attract Blogger A's readers to Blogger B's own blog.

This norm has been selected for discussion because of its somewhat opaque nature. It is a norm enforced largely through editorial censorship: that is, through the original blog poster deleting comments that infringe the rule. Thus, this norm raises interesting comparative issues relating to identification of the rule and its contents—when compared with, say, a legal rule. Legal rules are of course generally easy to identify and read in statute books and judicial interpretations. The norm discussed here also raises issues about identifying the underlying policy basis for these kinds of rules. Part II provides an introductory comparison between norms and other forms of regulation. Part III analyzes the anti-hijacking norm with respect to: norm identification, norm contents, underlying policies, and enforcement issues. It contrasts these aspects of norm-based regulation with other forms of regulation, particularly emphasizing the comparison with legal rules. Part IV raises more general conclusions from the case study. It weighs the pros and cons of norm-based regulation and concludes that too much faith may currently be placed on norms as regulators of peer-based online conduct. Future norm development might do well to focus on attempting to achieve some degree of consensus about norm content and policy, and on reducing norms to writing.

## II. COMPARISON OF REGULATORY MODALITIES

Scholars have identified a number of regulatory modalities both for the real world and for cyberspace.<sup>17</sup> They include legal rules, market forces, architecture (both physical and virtual), social norms, public

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16. SCOTT ROSENBERG, *SAY EVERYTHING: HOW BLOGGING BEGAN, WHAT IT'S BECOMING, AND WHY IT MATTERS* 24-25 (2009) (describing the development and early use of hypertext markup language which enables hyperlinks from one website to another).

17. Lessig, *The Law of the Horse*, *supra* note 3 (identifying legal rules, norms, system architecture, and market forces as modes of regulation online); Richards, *supra* note 6, at 420 (2008) (giving an example of the American Library Association as an institutional regulator in a real world context); Lipton, *supra* note 6 (identifying public education as a mode of regulation along with norms, market forces, system architecture, legal rules, and non profit institutions).

education, and private institutions.<sup>18</sup> While all are important for governing cyberspace, this article focuses on legal rules and social norms because of the similarities between them in operation and effect. Laws are rules created generally by domestic legislatures.<sup>19</sup> They are enforced by governments.<sup>20</sup> Legal rules constrain behavior in at least two ways: They serve both an *ex post* punishment function in terms of sanctions being imposed for infringement<sup>21</sup> as well as an *ex ante* expressive or communicative function.<sup>22</sup> In other words, we do not actually have to infringe a law to be affected by it. Many people will comply with the speed limit because the rule communicates to them how fast they should drive. In the absence of the rule, they may well drive faster. The speed limit both communicates the government's mandate about acceptable driving speeds and provides *ex post* punishments for those who contravene the limit and are caught doing so.

When we think about regulation in general, we usually think immediately about laws as the paradigmatic example—the government tells us what to do and how to do it. The government imposes sanctions in the form of fines or other forms of punishment, or compensation for a wronged party. However, there are a number of other regulatory modalities that equally constrain our behaviors, albeit in different ways. Norms can constrain our behavior in ways that are quite like laws in several respects. Like laws, norms serve both an expressive and a sanctioning function. If they are sufficiently well understood, norms can express a community's attitude to particular conduct in terms of what will or will not be tolerated.<sup>23</sup> Communities can also enforce norms through social sanctions, such as shunning an individual who refuses to conform.<sup>24</sup>

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18. Lipton, *supra* note 6 (identifying public education as a mode of regulation along with norms, market forces, system architecture, legal rules, and non-profit institutions).

19. Lessig, *The Law of the Horse*, *supra* note 3, at 508 (“Legislatures enact, prosecutors threaten, courts convict.”).

20. *Id.*

21. *Id.* (noting that laws threaten *ex post* punishment for infringement online).

22. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2030 (1996) (“But the most effective use of norms is *ex ante*. The expectation of shame—a kind of social ‘tax,’ sometimes a very high one—is usually enough to produce compliance”); Danielle K. Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

23. Sunstein, *supra* note 22, at 2030 (“[S]uppose that a community is pervaded by a strong norm against littering. If the norm is truly pervasive, an important problem of environmental degradation can be solved without any need for legal intervention.”).

24. Major, *supra* note 15, at 62.

Noncompliance with social norms will typically invoke penalties or sanctions. For instance, co-workers may think less of a colleague who chooses not to recycle white office paper; the person who did not say “excuse

There are also some distinct differences between laws and norms. In the online context in particular, norms do not suffer from the territorial limits of laws. While laws can only apply to the group of people that a lawmaker has constitutional power to govern, norms can operate across state and national borders online and hence can be more meaningful in terms of their application to a given community. However, norms suffer the disadvantage that they are often difficult to identify. While a law is generally written in a statute book and interpreted by courts—all reduced to publicly available writing—norms might not be written down anywhere.<sup>25</sup> Thus, it may be hard for the governed to work out the exact content of a given norm or even to identify the existence of the norm.

Another important difference between laws and norms is the way in which they come into being. While laws tend to be debated and redrafted in light of comments made in the course of relatively open debate, norms derive over time from community usages and expectations.<sup>26</sup> Thus, it may be easier to discern the policy basis behind a given law than it is for a norm. This may assist in compliance with the spirit of the law. It may be difficult for members of a community to comply with the spirit of a norm with an unclear policy basis. The example discussed in Part III of the norm against hijacking a comment thread on a blog is a good example. Of course, the informal development of norms has advantages over laws as well. For example, norms can develop quickly with few formalities, unlike laws which require a combination of political will and congressional effort to come into being. By the same token, norms can evolve relatively rapidly to meet the changing needs of relevant communities, whereas laws generally require formal legislative amendment or judicial interpretation to meet the needs of new situations.

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me” when bumping into another may receive a dirty look; the lack of a ring may engender negative assumptions; nasty comments may deluge the person who rudely cuts in the front of the line; and neighbors may gossip about the lackadaisical neighbor who has not mowed his lawn for three weeks.

*Id.*

25. There are some exceptions to this. In 1995, for example, Intel promulgated a set of guidelines in the form of a generally available memo for the Internet community. Sally Hambridge, *Netiquette Guidelines* (Oct. 1995), available at <http://www.albury.net.au/new-users/rfc1855.txt>. These “Netiquette Guidelines” contained suggestions about appropriate use of e-mail services for the then new generation of Internet users who had not “grown up with the Internet.” *Id.*

26. Major, *supra* note 15, at 63 (“Norms therefore are malleable rather than static, and capable of growth and decay.”).

The similarities and differences between legal and norm-based regulations are the subject of the following discussion. However, for completeness, it is worth noting some other forms of regulation, along with ways in which they interact with laws and norms online. Architecture, for example, can be a powerful form of behavioral constraint. In the physical world, architecture largely determines where one can go and what one can do. Physical borders and walls can prevent individual movement in the real world in much the same way that software code can restrict virtual movement and communication online. In the online world, system architecture is a major determinant of what individuals can or cannot do in any given corner of the Internet. If a particular website is encrypted so as not to allow access without a password or payment of a fee, that is an impediment to use of the site in the same way that a physical barrier constrains movement in the real world. System architecture—or code—as a regulator works differently to laws and norms in the sense that it is an *ex ante* restriction on behavior.<sup>27</sup> It does not punish conduct after the fact, but it rather may well prevent conduct before it occurs.<sup>28</sup>

Further, its *ex ante* effect is not purely expressive, in contrast to laws and norms. Rather, it is prohibitive. If the architecture does not allow an Internet user to do something, that person is effectively unable to do it, unless she has the skill to hack the code.<sup>29</sup> In many cases, architecture may not be expressive at all. Code does not necessarily tell anyone anything about the expected or appropriate conduct in a particular forum. In many cases, individuals will not even be aware of how the architecture is operating—or that it is operating at all. For example, where search engines or other online service providers block access to particular websites, it is not always evident to the Internet user that anything is being blocked.<sup>30</sup> Even if it is evident, the basis for the blocking is not always obvious.<sup>31</sup>

Market forces are another form of regulation that can impact individual behavior by determining what capabilities are available in given online markets. For example, if there is a market demand for

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27. Lessig, *The Law of the Horse*, *supra* note 3, at 509 (noting that code-based constraints “are experienced as conditions on one’s access to areas of cyberspace.”).

28. *Id.* (“In some places, one must enter a password before one gains access; in other places, one can enter whether identified or not.”).

29. *Id.*

30. JOHN BATTELLE, *THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE* 204-06 (2005) (discussing Google omitting certain sites from its web results in China at the request of the Chinese government).

31. *See id.*

greater parental controls in online services, players in the market may compete to provide services with greater and greater controls to prevent minors from accessing unsuitable material. Another area in which market forces may increasingly have some impact, particularly in peer-to-peer interactions, is with respect to privacy. Increasingly, market players in online social networking, for example, are implementing stronger privacy policies as a reaction to concerns about protection of online privacy.<sup>32</sup>

There are often gaps between what market players say they do to protect online privacy and what they actually do in practice.<sup>33</sup> Market forces tend to involve a dance between market players and consumers. To some extent, consumer demand will dictate what the market provides. However, at the same time, what the market is prepared or able to provide will often limit the choices available to consumers. Additionally, network effects must be taken into account in online markets. Sometimes, consumers end up effectively tied in to services that do not satisfy their needs because so many other people are using the same services, thus increasing the value of being on the service.<sup>34</sup> As with architecture, markets constrain behavior in a different way compared to laws and norms. Markets do not necessarily express rules and do not punish individuals for infringing rules. They simply constrain behavior by limiting a consumer's options.

Other forms of regulation, such as public education, can also be important online.<sup>35</sup> Education, in particular, has an expressive function like laws and norms and may interoperate with laws and norms in practice. Education can be used as a means of making Internet users familiar with laws and norms that relate to online conduct. It might also help users to implement technological controls effectively to protect their interests online. For example, education about effective use of technological privacy controls can assist in helping Internet users to

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32. See Lipton, *supra* note 6 (manuscript at 42-44).

33. See *id.*

34. William J. Kolasky, *Network Effects: A Contrarian View*, 7 GEO. MASON L. REV. 577, 579 (1999).

As defined in the economics literature, network effects exist when “the utility that a user derives from consumption of a good increases with the number of other agents consuming the good”—in other words, when a product becomes more valuable as greater numbers of customers use it. The most obvious examples are communications networks, where the value to each customer increases exponentially the more “friends and family” are on the same network.

*Id.*

35. See Lipton, *supra* note 6 (manuscript at 47-48).

protect their privacy online. Public and private institutions, such as universities, think tanks, and pro bono organizations,<sup>36</sup> can also help develop rules by encouraging education and debate about acceptable practices online. These debates may facilitate the development of laws, norms, architecture, and market practices.

Online regulation is never a question of one regulatory modality versus another. All regulatory modalities interact with each other in a complex pattern.<sup>37</sup> This article considers only a small, but important, slice of this equation—an examination of the relative merits and disadvantages of norms within the regulatory matrix for Web 2.0 technologies. The reason for this choice of focus is a concern that too much faith might ultimately be placed on norms as online regulators without sufficient consideration of how norms develop and how clearly they are expressed to participants in online communities. While norms are no doubt an important source of behavioral constraint, they cannot in their present form necessarily be regarded as the final word on online regulation. In the future, it may be appropriate to develop a more precise approach to online norms that encourages communities more openly to debate and express norms in writing, and in a manner more easily accessible to those utilizing the community's forums.

### III. CASE STUDY: THE BLOGOSPHERE'S "ANTI-HIJACKING" NORM

#### A. *The Anti-Hijacking Norm*

This article utilizes a case study focusing on what might be described as the blogosphere's "anti-hijacking" norm. In general, this norm applies to blogs that invite comments from readers.<sup>38</sup> In simple terms, the rule is that the opportunity to comment should not be used to "hijack" the blog by diverting readers to the commenter's own blog. Suppose, for example, that Professor A has posted a blog entry on a hypothetical law teachers' blog—<http://www.lawteachers.org>—about

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36. *Id.* (manuscript 48-49).

37. Lessig, *The Law of the Horse*, *supra* note 3, at 510.

These four constraints [laws, norms, code, and market forces]—both in real space and in cyberspace—operate together. For any given policy, their interaction may be cooperative, or competitive. Thus, to understand how a regulation might succeed, we must view these four modalities as acting on the same field, and understand how they interact.

*Id.*

38. Ribstein, *supra* note 7, at 191, 204 (discussing use of comment feeds below a blog post to enable readers to interact with the poster by responding to the posted material).

methods for enhancing the classroom experience. Professor B then posts a comment in response to Professor A, agreeing with much of what Professor A has said, and hyperlinking to another blog thread initiated by Professor B on his own blog—[www.teachlaw.net](http://www.teachlaw.net). Thus, readers of the comments on Professor A’s posts can click on the link and be taken directly to Professor B’s. This example provides a good study of the pros and cons of norms as regulators of online conduct because it is less contentious than some of the questions currently arising about norms against flaming,<sup>39</sup> trolling,<sup>40</sup> and cyberbullying.<sup>41</sup> A norm that opposes drawing readers from Professor A’s blog to Professor B’s blog raises less emotive issues than some of these other areas of online practice, while at the same time raising similar questions about free speech online.

### B. Norm Identification

The anti-hijacking norm may be examined under four headings: (a) norm identification; (b) norm content or substance; (c) identification and interpretation of underlying policies; and (d) enforcement. Norm identification refers to the ability of members of a community—including aspiring and new members of the community—to identify the very existence of the norm. While a legal rule is usually expressed in writing somewhere accessible to the public—even if not often *accessed* by the public—norms are not always written down. It is not always immediately clear to participants in online communities that a particular norm exists. The anti-hijacking norm, for example, may be difficult to observe unless it is written down somewhere in the rules of conduct related to one or more blogs. Simply reading a blog, even for a long

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39. Lessig, *The Law of the Horse*, *supra* note 3, at 508 (defining “flaming” as an “angry, text-based response”).

40. Wikipedia currently defines “trolling” as follows:

In Internet slang, a troll is someone who posts controversial, inflammatory, irrelevant or off-topic messages in an online community, such as an online discussion forum, chat room or blog, with the primary intent of provoking other users into an emotional or disciplinary response or of otherwise disrupting normal on-topic discussion.

Wikipedia, Troll(Internet), available at [http://en.wikipedia.org/wiki/Troll\\_\(Internet\)](http://en.wikipedia.org/wiki/Troll_(Internet)) (last visited Sep. 7, 2009); Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503, 548 n.237 (2009).

41. Danielle K. Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63-64 (2009) (commenting on the destructive nature of “online mobs that attack women, people of color, religious minorities, gays and lesbians”); Sarah Jameson, Comment, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPECTUS 231, 236-37 (2008) (defining the difference between cyberharassing, cyberstalking, and cyberbullying).

time, may not sufficiently alert Internet users to the existence of the rule, depending on how—and how publicly—it is enforced.

A rule like the anti-hijacking norm, in particular, is likely to apply *across* different blogs. Thus, even reading the terms of use of one or two blogs—assuming relevant blogs to have clearly expressed terms of use, which is often not the case—an Internet user would have to read the terms of use of *many* blogs to become aware of the anti-hijacking norm. Many bloggers do not include a detailed “terms of use” section in their blogs, but occasionally they refer to particular rules as they arise and are enforced. Thus, a reader new to the blog would not necessarily become immediately aware of the rules and norms applying on the blog. Additionally, different bloggers sharing the same group blog may take different attitudes to monitoring, editing, and censoring comments on the same blog.<sup>42</sup> Thus, readers would have to keep track of each different blogger’s attitude to things like anti-hijacking of comment feeds to be aware that the norm was at least occasionally enforced on the blog. Sometimes, the same blogger on the same blog will change rules for different posts. For example, a blogger may in some cases enable comments and in other cases disable comments depending on the topic of the post. Again, the reader would have to watch each post very carefully to ascertain the applicable norms.

One problem with online norms is that they are not necessarily written down anywhere on particular blogs and there is no general “blogger code of conduct” to which Internet users can refer.<sup>43</sup> Norms may also differ between different blogs, between different bloggers on the same blog, and even the same blogger may vary her norms from time to time depending on the nature of a given blog post. This makes norm identification a tricky proposition for anyone reading a blog. People

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42. Ribstein, *supra* note 7, at 213.

Developing norms that control amateur journalists’ behavior may not be easy. These journalists by definition comprise a vast group of millions of diverse people rather than a well-defined profession. It may be difficult to find a set of principles that amateur journalists generally can agree on and internalize as norms. Moreover, the self-expression motives of amateur journalists suggest that they will tend to have libertarian views, or at least views incompatible with externally imposed order.

*Id.*

43. *Id.* at 214 (noting that the suggestion by a *New York Times* writer that there should be a blogger code of ethics was widely rebuked in the blogosphere); ROSENBERG, *supra* note 16, at 255 (describing Tim O’Reilly’s call for a blogger code of conduct in the wake of a cyber-bullying incident involving blogger Kathy Sierra. Rosenberg notes that “[t]his was all eminently good advice, but it seemed highly likely that those bloggers who were most in need of it would be those least likely to take it.” *Id.*

who have been blogging and reading blogs for a while may begin to gain a sense of relevant norms. However, it may be difficult for new participants to quickly pick up the norms if they are not clearly expressed anywhere. This problem can be exacerbated if a norm is not enforced very publicly. While some norms are enforced through, say, public shaming, others may be enforced through censorship. Public shaming may involve a written comment by the original blogger saying that she has deleted a particular comment and giving the reasons why. Censorship-style enforcement on the other hand would involve the original blogger simply removing the comment without any observable trace. Censorship-based enforcement is difficult to observe in practice unless a particular reader is watching a blog very closely. Thus, in these cases, the norms themselves are difficult to identify.

### C. Norm Content

Another difficulty inherent in relying on norms as online regulators arises in identifying their content or substance. In other words, how might one go about ascertaining the precise contours of the norm in terms of what conduct it specifically proscribes? Where norms are not expressed in writing, it can be difficult to identify their boundaries. For example, in the anti-hijacking example, in the absence of a written policy on a blog explaining the rule, it may not be clear to a potential commenter on the blog what precisely she is entitled to do by way of comment. For example, does the existence of an unwritten anti-hijacking rule contemplate that a commenter should not post a comment that merely *refers* to her own blog, as opposed to *hyperlinking* to it? Is she entitled to post a comment that refers to or hyperlinks to somebody else's blog, where the commenter has no particular connection with the referenced blog other than having read it? These permutations of conduct may be expressed as set out in Table 1, *infra*.

**Table 1: Potential Coverage of Anti-Hijacking Norm**

	<b>Referencing Commenter's Blog</b>	<b>Referencing Unrelated Blog</b>
<b>Hyperlink</b>	✓ Definitely covered by anti-hijacking norm	?
<b>Non-Hyperlinked Reference</b>	?	?

Under the vague and unexpressed norm, it is not clear whether either of the situations contemplated in Column 2, or the situation

contemplated in Row 2 of Column 1, are covered by the norm. Legal rules, on the other hand, even if drafted poorly, are expressed in writing. They can thus be more readily interpreted by citizens and by courts. For example, a hypothetical legal rule may state that: “A person may not, in the comment thread of another person’s blog, create a hyperlink to another blog.” Applying this hypothetical law to the scenarios set out in Table 1, we would obtain results that look something like those set out in Table 2.

**Table 2: Apparent Coverage of Hypothetical Law**

	<b>Referencing Commenter’s Blog</b>	<b>Referencing Unrelated Blog</b>
<b>Hyperlink</b>	✓ Definitely covered by hypothetical law	✓ Definitely covered by hypothetical law
<b>Non-Hyperlinked Reference</b>	✗ Not covered by hypothetical law	✗ Not covered by hypothetical law

Because it is expressed in writing, it is clear to anyone who reads the law exactly when and how it is to apply. It is, of course, possible that a court interpreting the rule may later hold that Congress had drafted the rule poorly with respect to the goals that Congress intended to achieve. For example, if congressional intent was really only to prevent hyperlinking to the commenter’s own blog and not to prevent linking to other unassociated blogs, a court may add a judicial gloss to the rule. For example, a court interpreting the rule might say:

The definition of the term “another blog” in the law was clearly intended to apply to the commenter’s own blog and not to any other blog she thought might be of interest to the readers of the original blog. Congress intended to prevent a second-comer from using the original blog to attract custom for her own blog, but not from alerting readers of the original blog to other sources of information they might find generally useful.

Even though this reading of the rule is not a literal reading, we nevertheless end up with a clear interpretation of the rule. The court’s understanding of the rule could be diagrammed as set out in Table 3.

**Table 3: Coverage of Hypothetical Law After Judicial Interpretation**

	<b>Referencing Commenter's Blog</b>	<b>Referencing Unrelated Blog</b>
<b>Hyperlink</b>	✓ Definitely covered by hypothetical law	✗ Definitely not covered by hypothetical law
<b>Non-Hyperlinked Reference</b>	✗ Not covered by hypothetical law	✗ Not covered by hypothetical law

One may argue that the interplay between judges and legislatures in a common law system leads to its own brand of uncertainty. This is a valid criticism. It may be that laws and norms are not as different as they at first appear in this respect. However, the writing requirements of legislation, and of judicial interpretations of legislation, do provide some certainty as to the contours of a rule at least as compared with an unwritten norm. Congressional debates and judicial interpretations of laws—also reduced to writing—can also give important guidance as to the underlying policy justifications for a given law. This in turn may assist with ascertaining the intended scope of the rule.

#### *D. Underlying Policies*

The question of underlying policies is inextricably linked with the substance of a norm—or any kind of rule for that matter. Clearly all rules—whether legal or normative, and whether written or not—are founded on some underlying policy considerations. For written laws, the policies are usually relatively obvious. Legislation is usually debated publicly. It is also routinely interpreted by judges who often rely on what they perceive to be the underlying policy rationale for the law. Norms, on the other hand, may often mean different things to different people, deriving, as they do, from a community.<sup>44</sup> There might be a general consensus that using someone else's comment thread to advertise your own blog is a breach of protocol. Yet, reasonable minds could differ on the policy basis for this. Some might assume that this conduct is akin to trademark infringement and that it takes unfair advantage of a blog post, potentially drawing valuable custom from one blog to another unaffiliated blog by utilizing the goodwill of the first blog to draw away custom.

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44. Ribstein, *supra* note 7, at 213 (noting the difficulty inherent in finding norms that suit a diverse group of amateur journalists interacting in the blogosphere).

Others might feel that using someone else's blog to plug your own blog is like big-noting yourself and belittling the original blog poster. Particularly in areas where people are blogging for rewards related to reputation and self-worth, rather than money, this may be a more likely explanation for the norm.<sup>45</sup> In some situations, there may be an argument that Blogger B (the commenter) should give some deference to Blogger A for being the first or most notable blogger on a particular topic. In contexts in which Blogger A habitually blogs on a particular topic, and Blogger B has only recently started posting about it, it may be regarded as unseemly for Blogger B to link from Blogger A's comment feed to Blogger B's own blog post where Blogger A is regarded as the original and most respected source on the topic.

Another alternative policy rationale for the anti-hijacking norm could be derived from a quasi-property rights theory. The original blogger—Blogger A—could regard her blog and her posts on the blog as quasi-property. If she has allowed a comment feed on the blog, she could see this as akin to giving others an invitation or license to come on to the property for authorized purposes, but not for other purposes. Breaching the terms of the license on this analogy would be grounds for removal from the property, somewhat akin to trespass.<sup>46</sup>

One common problem with all of these analogies is that they run up against concerns about free speech. While many in the blogosphere may recognize Blogger A as having a special place online with respect to a particular topic, is this necessarily enough to support a norm that effectively chills speech in an important global communications medium? One might take the view that the norm itself does not chill speech if, say, it is interpreted as allowing Blogger B to *refer to* his own, or another, relevant blog post while commenting on Blogger A's original post, provided that he does not use hyperlinks to those other sources. Some courts have, in non-blogging contexts, distinguished between hyperlinking to, as opposed to merely referencing, another website in

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45. *Id.* at 212 (noting the reputational incentives inherent in blogging).

46. Analogous arguments have historically been made with real property law in the context of computer trespass actions. *See, e.g.,* *Compuserve, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) (successful computer trespass action involving unauthorized sending of unsolicited commercial e-mail messages on plaintiff's servers); *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (unsuccessful computer trespass action involving e-mail service); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (successful computer trespass action involving unauthorized use of 'bots to collect data from plaintiff's website). For an analysis of the policy implications of applying chattel trespass law in these contexts, see Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000).

attempting to balance free speech concerns against prohibiting undesirable conduct in cyberspace.<sup>47</sup>

Online norms are often derived from either very little reasoned policy debate or lots of policy debate that never particularly comes to any agreed conclusions within members of a community.<sup>48</sup> The lack of clear policy basis, coupled with the fact that a norm may never be clearly expressed in writing, may thus lead to great uncertainty as to the scope and indeed the very existence of a given norm. Confusion associated with identifying the norm, its substance, and its underlying policy justification may lead to unwitting infringements of the norm by those interacting online. Such innocent infringers may find themselves subject to online enforcement by those allegedly aggrieved by their transgressions.

This may not be a problem in practice if it is regarded as part of the way in which norms develop. In other words, the punishment, or at least chastisement of innocent infringers, may simply be part of the way in which norms are identified and their boundaries clarified. Nevertheless, as compared to some other forms of regulation, unwritten norms with an unclear policy basis have the potential to create disharmony between good faith participants in online networks. They may also ultimately discourage new voices from entering online discussion forums. If new speakers fear punishment for breaking rules they cannot identify or do not understand, this may chill speech by limiting the number of voices in a given online forum.

#### *E. Norm Enforcement*

Issues relating to the fear of online punishment raise the important question of how norms are actually enforced in practice and the impacts of such enforcement on the operation and cohesion of online communities. In terms of enforcement, norms raise a number of issues

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47. *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd* 273 F. 3d 429 (2d Cir. 2001) (injunction granted against hyperlinking, but not referring to decryption code that infringed anti-circumvention provisions of the Digital Millennium Copyright Act).

48. For example, in the context of an alleged norm about the need to cite prior literature in blog posts, there has been a heated debate in the blogosphere with little consensus as to a conclusion on whether the norm exists or what its contours may be. *See, e.g.*, Ideoblog, [http://busmovie.typepad.com/ideoblog/2005/07/blogging\\_and\\_th.html](http://busmovie.typepad.com/ideoblog/2005/07/blogging_and_th.html) (July 21, 2005, 08:41); Posting of Will Baude to The Conglomerate, [http://www.theconglomerate.org/2005/07/ethics\\_and\\_pree.html](http://www.theconglomerate.org/2005/07/ethics_and_pree.html) (July 21, 2005); The Great Change: Turning Cathy into a Lawyer, <http://www.cathygellis.com/mt/archives/000448.html> (July 21, 2005, 17:44); Ideoblog, [http://busmovie.typepad.com/ideoblog/2005/07/more\\_on\\_bloggin.html](http://busmovie.typepad.com/ideoblog/2005/07/more_on_bloggin.html) (July 22, 2005, 10:47).

that are different to those raised by traditional law enforcement. Difficult questions arise as to who gets to enforce norms and on what basis. In the case of the anti-hijacking norm, the initial blog poster—Blogger A—has both the interest in enforcement of the rule and, generally, the ability to enforce the rule. In fact, Blogger A has a number of choices as to how to enforce the rule. She may decide to incorporate rules of practice on her blog that tell readers clearly that comments will be allowed, but that comments should not refer to or link to the commenter's (or anyone else's) blog. Alternatively, she can use technology to disable comments altogether if she is concerned about hijacking of comment threads. If she wishes to be less draconian and to foster discourse in her comment threads, she might enable comments, but monitor and edit them. In this context, she may delete any comment that she feels has contravened the anti-hijacking norm. When deleting a comment, she may include a public notice in the comment thread as to why the comment was deleted or she may send a private message to the commenter, assuming the commenter has provided a valid email address, explaining why she deleted the comment. Alternatively, she may temporarily leave the comment on the blog, but send an e-mail to the commenter asking whether he knew that he had breached a rule and inquiring whether he would mind if the comment was deleted. Most of these methods of enforcement are not mutually exclusive.

One obvious advantage of norms for the aggrieved party is, in fact, the way in which they are enforced. They give the enforcing party many self-help options.<sup>49</sup> Within these options are various nuances of behavior—the enforcer can take a more conciliatory tone by simply opening up a dialogue with the apparent infringer to find out whether or not that person was acting in bad faith. At the other end of the spectrum, the enforcer can resort to public shaming by openly criticizing the conduct of the commenter on the blog itself. Of course, the downside to the ease of enforcement of a norm is that it puts the alleged norm infringer into a potentially more difficult position, particularly if he was acting in good faith and the norm enforcer has resorted to public shaming. Then again, public shaming on a blog may not be as serious as having a court judgment issued and enforced against you, depending on the circumstances. Additionally, where Blogger B has acted pseudonymously or anonymously in the comment feed, the public shaming may not have much impact because Blogger B can simply pack

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49. Ribstein, *supra* note 7, at 229-30 (describing advantages and disadvantages of bloggers relying on self-help remedies in the defamation context).

up his pseudonym and create another one or continue to blog anonymously with no damage to his reputation.

In sum, enforcement of norms is relatively easy and can be relatively immediate by way of self-help.<sup>50</sup> However, enforcement may be more or less effective in practice depending on the mode of enforcement chosen. A decision to delete a comment that infringes a norm is likely to be very effective, assuming that the commenter does not attempt to keep reposting the comment. Even if he does attempt to repost, the blog-owner may be able to block the particular commenter from commenting on the blog or, if all else fails, may remove the comment feed from that blog post altogether. Public shaming, on the other hand, may not be particularly effective in a largely anonymous or pseudonymous environment.

The problem of anonymous and pseudonymous posting on blogs has been particularly pronounced in cases of cyber-harassment and cyber-bullying.<sup>51</sup> People who seek to attack others—often along gender or race lines<sup>52</sup>—have been very successful in hiding their identities and making ongoing online attacks.<sup>53</sup> Victims have had little practical recourse, particularly against those who are determined to continue the attacks. Some victims of cyber-harassment and bullying have been effectively forced to shut down their blogs altogether.<sup>54</sup> While this is a kind of self-help in the sense that the victim has managed to turn off the attacks by closing down the forum for the attacks, it is not a particularly effective form of enforcement. It cuts off the victim's own online presence in order to preserve her from attack. It also does not do much to ease the victim's state of mind.<sup>55</sup> Some victims have used legal rules to turn the tables on their cyber-attackers—usually by launching

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50. *Id.* (citing from *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), where the court comments that the Internet provides the means to immediately respond to defamatory statements).

51. Citron, *supra* note 41, at 64-65 (describing online mob attacks by anonymous attackers).

52. *Id.* (noting the prevalence of online attacks directed at women); *id.* at 85 (“[O]nline mobs typically focus on women, people of color, and other traditionally subjugated groups”); *id.* at 118 (“[H]olding accountable the operators of websites which facilitate anonymous attacks may hold the key to protecting the civil rights of the women, people of color, and others set upon by online mobs.”).

53. *See id.* at 65; Jameson, *supra* note 41, at 235-36 (noting the ease of anonymous cyberharassment).

54. Citron, *supra* note 41, at 64 (“Some victims respond by shutting down their blogs and going offline . . . Victims who stop blogging or writing under their own names lose the chance to build robust online reputations that could generate online and offline career opportunities.”).

55. *Id.* at 65 (describing the case involving Kathy Sierra who felt that she could not participate in public life in the same way after being threatened on her blog); ROSENBERG, *supra* note 16, at 251-57 (describing Kathy Sierra case in more detail).

defamation or privacy actions against them.<sup>56</sup> Legal rules may here be more powerful than online self-help because they can be used to unmask anonymous attackers.<sup>57</sup>

The kinds of rules being infringed in these cyber-attack cases are a little different in nature from the kinds of norms discussed so far in this article. In particular, many cyber-attacks involve infringements of laws as well as norms—including defamation, privacy, and also copyright laws.<sup>58</sup> In these cases, the victims may have a choice between online self-help or legal action, or both. However, in cases where a norm does not overlap with a law—such as the anti-hijacking norm—a legal action is not a possibility. The universe of norms is much larger than the universe of laws. While some conduct will infringe norms and laws at the same time, other conduct will only infringe norms. It is not always a choice between enforcing a law and enforcing a norm. This is another reason why being able to clearly establish the existence, substance, and policy justifications for norms is extremely important in practice. Where a norm does not conform to a legal rule, it is impossible to gain any guidance from written laws as to the appropriate boundaries of the norm. This is likely the case for a vast majority of online norms.

The wide range of self-help enforcement mechanisms for norms can also create problems in identifying their existence and scope. Where, for example, a blog poster quietly removes any comments that she perceives to contravene blogging norms, her readers may never know of the existence of those norms. The commenter may post a follow up querying the deletion, and this might lead to a useful discussion of the norm, but in the absence of such action by the commenter—or anyone else who saw the comment before it was removed—the very existence of the norm may go largely unobserved. Thus, norm enforcement also interacts with issues of norm

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56. Citron, *supra* note 41, at 85-88 (describing traditional tort remedies that may be utilized by victims of cyber-attacks in court); *id.* at 105 (noting the risks inherent in victims turning the tables on attackers in this way).

57. However, courts will not always order the unmasking of an anonymous online actor. *See, e.g.,* In Re Subpoena Duces Tecum to Am. Online, 52 Va. Cir. 26 (2000) (court ordered America Online to disclose identities of Internet users in the context of a defamation action); Doe v. 2TheMart.com, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (court did not order disclosure of identities of anonymous online witnesses in the context of an insider trading proceeding); In re Verizon Internet Servs., Inc., 257 F. Supp. 2d 244 (D.D.C. 2003) (court interpreted copyright legislation on the requirement for an Internet Service Provider to disclose identities of anonymous online copyright infringers); Ribstein, *supra* note 7, at 229 (noting that courts do not always require Internet Service Providers to disclose the identities of bloggers in a defamation context).

58. Citron, *supra* note 41, at 86-88 (describing traditional tort remedies that may be utilized by victims of cyber-attacks in court).

identification, content, and policy questions. Where norms can be enforced without many people being aware of the enforcement, it becomes even more difficult for participants in the blogosphere to identify the existence, content, and underlying policies that pertain to the norm.

#### IV. CONCLUSION

The above examination of the anti-hijacking norm tells us something about the relationship between online norms and other forms of regulation, notably laws which have similar *ex ante* and *ex post* dynamics to norms as described in Part II. As compared with legal rules, norms—particularly unwritten norms—can exhibit disadvantages in terms of identification of their existence, scope, and underlying policy justifications. Norms can be very difficult to observe in practice, particularly norms that are enforced by means of censorship where the censorship may not be brought to the attention of blog readers. However, norms do exhibit some advantages over laws. They can better reflect the needs of a community at any given time if they are sufficiently clearly agreed and expressed. They can adapt to changed circumstances more quickly than laws which require legislative or judicial action to meet evolving circumstances. Norms might additionally be useful in encompassing rules for global communities while laws are territorially based. Online, the need for global reach creates significant challenges for laws.

Where the comparison between laws and norms becomes particularly interesting is in the context of enforcement. In some ways, norms are much more effective than laws because they are generally enforced by inexpensive and immediate self-help remedies. The downside of this kind of enforcement is that it is not always particularly effective in practice. While self-help in the anti-hijacking context is generally very effective, self-help in the cyber-harassment and cyber-bullying context often leads to greater attacks and ultimately to silencing the victim's online presence altogether.<sup>59</sup> Even self-help in the anti-hijacking context has its limits depending on the aims of the person doing the enforcing. Someone who simply wants to remove an infringing comment from her comment feed can easily avail herself of the delete comment function. However, a person who wants to more publicly shame the infringer may have a more difficult time, given the

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59. Citron, *supra* note 41, at 105 (noting the risks inherent in victims turning the tables on attackers in this way).

anonymous and pseudonymous nature of communications in the blogosphere. Self-help enforcement of norms purely by deletion of online comments without more is also problematic in that it can obscure the very existence and substance of a norm. Where readers of a blog or other online forum are not effectively able to observe the enforcement, this may incidentally cloud their ability to see that the norm exists at all. This, in turn, may lead to increased instances of unwitting infringement of the norm.

Web 2.0 technologies are very good at enabling wide scale global communications between members of various communities. They provide mechanisms both for communicating substance within online forums and for developing norms for acceptable use of those forums. The problem is that the underlying technologies enable norms to develop and to be enforced in a very scattershot manner.<sup>60</sup> Participants in these forums must be diligent to ensure that there is some clarity about the existence of, nature of, underlying policies for, and enforcement policies that will be attached to online norms. Additionally, those involved in norm development within Web 2.0 interactive forums should be careful to think about difficult questions involving free speech.

Free speech should never be adopted as a cover for unacceptable cyber-attacks based on hatred of a particular race, class, gender, or ideology.<sup>61</sup> However, free speech should likewise not be used to justify norms that chill speech. For example, the anti-hijacking norm discussed above should not be enforced so as to chill speech. Participants in online communities should remain vigilant to ensure that rules they adopt to govern their conduct do not discourage speech. This is not to say that participants in online communities do not have the right to decide the bases upon which they will communicate with each other. Rather, it is intended to suggest that in developing an approach to a particular new form of interaction, and in seeking to protect one's own online turf and reputation, it can be easy to omit any thought for the broader picture.

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60. One example is the online debate about the alleged norm with respect to citing prior blog posts. See, e.g., Ideoblog, [http://busmovie.typepad.com/ideoblog/2005/07/bloggng\\_and\\_th.html](http://busmovie.typepad.com/ideoblog/2005/07/bloggng_and_th.html) (July 21, 2005, 08:41); Posting of Will Baude to The Conglomerate, [http://www.theconglomerate.org/2005/07/ethics\\_and\\_pree.html](http://www.theconglomerate.org/2005/07/ethics_and_pree.html) (July 21, 2005); The Great Change: Turning Cathy into a Lawyer, <http://www.cathygellis.com/mt/archives/000448.html> (July 21, 2005, 17:44); Ideoblog, [http://busmovie.typepad.com/ideoblog/2005/07/more\\_on\\_bloggin.html](http://busmovie.typepad.com/ideoblog/2005/07/more_on_bloggin.html) (July 22, 2005, 10:47). While the technology enables robust debate, there is no apparent resolution to the conflict.

61. Citron, *supra* note 41, at 106 ("Protecting the civil rights of online mobs' victims comes at an extremely small cost to legitimate expression.").

Norms undoubtedly play a very powerful role in the ongoing development of online communities. Although software code and market forces can shape the things that people physically can and cannot do online, norms in many instances take the place of laws in both expressing what a society will tolerate and providing sanctions for infringement of the rules. While norms sometimes overlap with laws, they are often the first and sometimes the only port of call for disputing parties. Parties may resort to norms either because the law is not a good fit for a particular complaint or because resort to the law is too costly and raises jurisdictional problems. Legal actions also necessitate identifying a defendant, which is not always necessary for the enforcement of a norm online. Because of the important place of norms as regulators of online behavior, it is necessary that norms be relatively easily identifiable, that their underlying policies and substance are understood, and that sanctions for their infringement are relatively clear. This may necessitate greater thought in reducing norms to writing within online communities and in making sure that a majority of participants in a relevant online community agrees to a single version of a given rule, even if that rule is later subject to revision. In communities that routinely welcome new entrants—such as the blogosphere, many online social networks, and even massively multi-player online games—it is important that these new players have clear access to at least the most important community norms. This enables new entrants a much smoother transition into the existing community and decreases instances of unintentional infringements of accepted norms. This, in turn, has the potential to facilitate the cohesion of rapidly expanding online communities.