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Who Regulates the Robots?

Author : Margot Kaminski

Date : September 29, 2015

Woodrow Hartzog, [Unfair and Deceptive Robots](#), 74 *Maryland L. Rev.* 785 (2015).

When the law faces a new technology, a basic question is who governs it and with what rules? Technological development disrupts regulatory schemes. Take, for example, the challenges the Federal Aviation Administration (FAA) now faces with drones. The FAA usually regulates aircraft safety. Drones force the FAA to consider—and in some cases reject as outside the agency’s mandate—issues of privacy, spectrum policy, data security, autonomous decision-making, and more. The pace and complexity of recent technological change has led some to call for the creation of [new agencies](#), including a [Federal Robotics Commission](#). But given the significant hurdles involved in agency creation, it is valuable in the short run to assess what tools we already have.

In [Unfair and Deceptive Robots](#), [Woodrow Hartzog](#) takes up the question of who will govern consumer robots. Hartzog proposes that the Federal Trade Commission (FTC) is best equipped to govern most issues that consumer robots will soon raise. He reasons that the FTC is well prepared both as a matter of subject-matter expertise and as a matter of institutional practice.

This article was a hit at the [2015 We Robot](#) conference. It blends practical guidance, expert knowledge of the FTC, and a range of thoughtful and often amusing examples. It also provides a window onto a number of framing questions recurring in the field: to what extent are robots new? How does that answer vary, depending on what aspect of robots you focus on? And how do you best choose or design institutions to adapt to fast-changing technology?

Hartzog points out a number of ways in which robots, or really robotics companies, might take advantage of vulnerable consumers. A company might falsely represent a robot’s capabilities, touting effectiveness in sped-up videos that make a robot look more capable than it is. Or a company might use a “Wizard-of-Oz” setup to operate a robot from behind the scenes, causing it to appear autonomous when it is not. A company might use a robot to spy on people, or to nudge their behavior. Autonomous robots and robotic implantables raise their own classes of consumer protection concerns. If you were not already worried about robots, you will be after reading this. From the robot vacuum that ate its owner’s hair, to flirtatious Twitter bots, to a dying Roomba pleading for a software upgrade, to the “Internet of Things Inside Our Body,” Hartzog’s examples are visceral and compelling.

The FTC, Hartzog claims, is thankfully well positioned to address many of the consumer protection issues raised by this pending host of scambots, decepticons, autobots, and cyborgs. The FTC has a broad grant of authority to regulate “unfair and deceptive” trade practices. It has used that Section 5 authority in recent years to regulate online privacy and data security. While the FTC started by addressing classic truth-in-advertising problems, and enforcing company promises, it has developed more complex theories of unfairness that it now extends to data security and user interface design. His recent [authoritative work](#) with Dan Solove on the FTC’s Section 5 “jurisprudence” makes Hartzog uniquely qualified to discuss FTC coverage of robotics. There is no doubt that this paper will have practical applicability.

Hartzog also contributes to ongoing conversations about technological change and regulatory design. He touts the FTC’s institutional ability to adapt to changes through productive co-regulation, including its tendency to defer to industry standards and avoid “drastic regulatory lurches.” Hartzog thus identifies not just substantive but structural reasons why the FTC is a good fit for governing consumer robots.

But the view Hartzog presents is a little too rosy. The FTC has vocal and litigious [critics](#) whom Hartzog mainly ignores.

Not everyone is happy with its settlement agreement process, which some regard as arbitrary and lacking notice. While Hartzog mentions in passing that the FTC's authority to regulate data security has been challenged, the pending [Wyndham](#) decision in the Third Circuit could seriously rock the Section 5 boat. Moreover, the FTC's focus on notice and design is in tension with developing First Amendment jurisprudence on commercial and [compelled speech](#). And there are plenty of other [good reasons](#) why we might want to be careful about focusing governance on technological design as Hartzog proposes.

If I have one larger criticism, it is that the "which agency is best" framing is a little disingenuous. Hartzog frames his question in a way that drives his answer. He asks which agency is best positioned for governing consumer protection issues raised by robots; unsurprisingly, his answer is the FTC, a consumer protection agency. If he had asked which regime is best for governing robotic torts, or which is best for governing robotic IP issues, the answer would have differed. In other words, the article provides solid guidance for how the FTC might approach robots. It does not answer, or really justify asking, the question of who governs them best.

Which brings us to the larger conversation this piece briefly engages in, on just how new and disruptive robots will be. I am increasingly convinced that the answer to this question is dependent on the asker's perspective. Asking how robots disrupt a particular area of law will highlight the features of the technology and its social uses that are disruptive *to that particular area of law*. A new technology will be disruptive to different regulatory regimes in different ways. And because Hartzog picks the FTC as his lens, he is bound to solutions the FTC provides, and somewhat blinded to the problems it can not solve. Robots fit within the FTC's consumer protection regime, but they also fundamentally disrupt it. As with the Internet of Things, the owner of the robot is often not the only person facing harm. The FTC protects the consumer, not the visitor to a consumer's house. As Meg Jones has recently pointed out, the FTC is not particularly well equipped to handle problems raised by this "[Internet of Other People's Things](#)."

Unfair and Deceptive Robots is clever and extremely useful: it tells us what the FTC is equipped to handle, and argues for the FTC's competence in this area. As a robot's road map to FTC jurisprudence, the piece shines. But regulating robots will take many regulatory players. While we are trying to spot the gaps and encourage them to cooperate, it might be counterproductive to name one as the "best."

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