Essay question: Ad block plus

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Presented by

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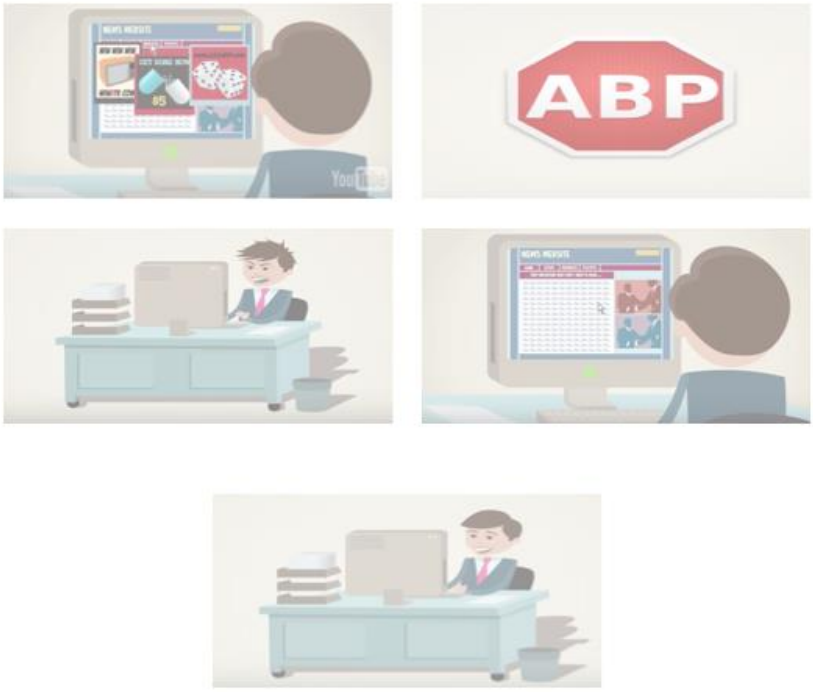


Words: **2'750 with footnotes**

Glossary

ABP	Ad Block Plus;
art.	Article;
AI	Artificial intelligence;
B2B	Business to Business;
CC	Swiss civil code, of the 10th of December 1907, SR 210;
Cst.	Swiss Constitution, SR 101;
DRM	Digital right management;
e.g.	for example;
eds.	editor(s);
etc	et caetera;
f. / ff.	and following page(s);
GC	General conditions;
GURT	Genetic use restriction technology;
Idem	same citation;
ISP	Internet Service Provider;
LCD	Loi fédérale contre la concurrence déloyale, SR 241;
let.	Letter;
n.b.	nota bene;
n°	number;
p.	page;
par.	paragraph;
SR	Swiss Classified Compilation;
supra	above.

Introduction

Ads are advertising boards 2.0. The market concerned is expansive, 520 million CHF in Switzerland[1], and represents the majority of revenue for Internet websites. The introduction of ads revisits an ancient legal question with a different angle: "*How do we regulate advertising into public space and avoid issues in domains of copyright*[2]*, antitrust, and competition law?*"

1 Is ABP legally relevant?

ABP appeared as a reaction to widespread complaints against annoying ads. Ad blockers and Ads have the effects of what is usually considered as a **regulation** in the sense that it *« alter(s) the behaviour of others via standards »*[3] and functionally encompass social control. For instance, ABP helps unwanted advertising to appear, forces the adaptation of ads and also change ISP's business model.

The source of this regulation is "*decentralised*" [4] to private entities, and it is fragmented among different ad blocking systems (and other actors), which they themselves are interdependent and able to adapt to shocks with one another.

Eyeo, ABP's Community and end-user design together ABP's architecture. This plurality of normativity is transcribed via coding, which represent the "***law*** *of the system*"[5] among the Internet environment (*umwelt*); code functions then as a medium to reach regulation via the stabilisation of expectation. Furthermore, ABP seems self-legitimate (unlike positivism) and seeks its own "*truth*" (*autopoïese*). Those kinds of self-regulatory standard behaviour can appear as law when it is democratic and relies on a large community[6].

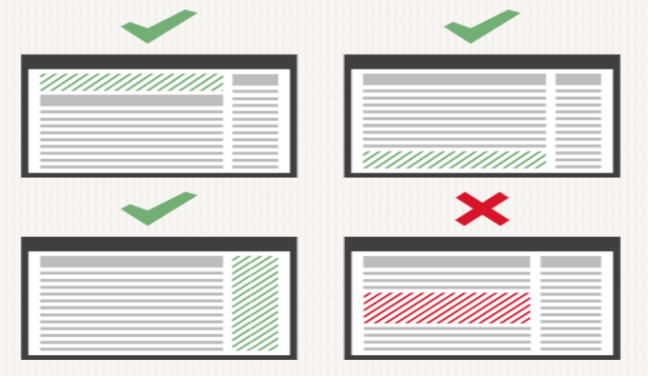
An element of differentiation between code and law is that code acts *ex ante* and is self-executing, which overcomes eventual cost of monitoring or difficulties of enforcement (e.g. DRM/GURT)[7]. In this sense, ABP substitutes and enforces perfectly the effects of the law by enabling a defensive right of users against predatory designs.

However, reliance on technology to apply law can be problematic since the two systems (technological/legal) follow their own internal logic (e.g. Ponce Pilate). Further, ABP's code

[1] MEDIA FOCUS, *Online-Werbemarkt*, Semester Report 2014/02, Zurich, 2015, p.3.
[2] e.g. Betamax case.
[3] BLACK Julia, *Critical Reflections on Regulation*, in: Australian Journal of Legal Philosophy n°27, 2002, p.26.
[4] BLACK, *supra* note 3, p.7.
[5] BURK Dan L., *Legal and Technical Standards in Digital Rights Management Technology*, in : Fordham Law review n°74, 2005, p.548
[6] HART HLA, *The Concept of Law*, in: Oxford University Press, 1961, p.82 ff.
[7] BURK, *Legal and Technical Standards in Digital Rights Management Technology*, *supra* note 5, p.538, p.548.

as a tool to enforce law is imperfect since it does not guarantee minimal protections for the "*quality and* ***integrity***" [8] of the legal process, as would state law (e.g. judicial review, proportionality[9], legitimacy, control[10]), Then, as a consequence, "(State) *Law may be needed in cases where regulation by technology contradicts societal values*"[11].

Finally, as a condition, the notion of regulation presupposes the designers' "***intention*** *of producing a broadly identified outcome"*[12]. The flexibilities of choice made in the designs reflects the possibility for insertion of the designers' cultural and political background (subjectivity/"*design constituency*") and its desire to alter behaviour in a conscious way.



As pictured above, ABP contains acceptable criteria per defaults designed subjectively by Eyeo (or users via blacklists). Those designs pre-empt certain ads and permit others (e.g. useful cookies) and hence support the idea of an intentional will to act, which is automated by the codes (no AI).

[8] JASANOFF, *Just Evidence : the Limits of Science in the Legal Process*, in : Journal of Law, Medicine & Ethics n°34, 2006, p.331.
[9] GRABER Christopher B., *Internet Creativity, Communicative Freedom and a Constitutional Rights Theory response to "Code is Law",* in :Sean A. Pager and Adam Candeub (ed.), Transnational Culture in the Internet Age, 2012, p.144.
[10] JASANOFF Sheila, *supra* note 8, p.329.
[11] NISSENBAUM *From Preemption to Cicumvention : If Technology Regulates, Why do We Need Regulation (and Vive Versa)?*, in : Berkeley Technology Law journal n°26, 2011, p.1374.
[12] BLACK, *supra* note 3, p.26.

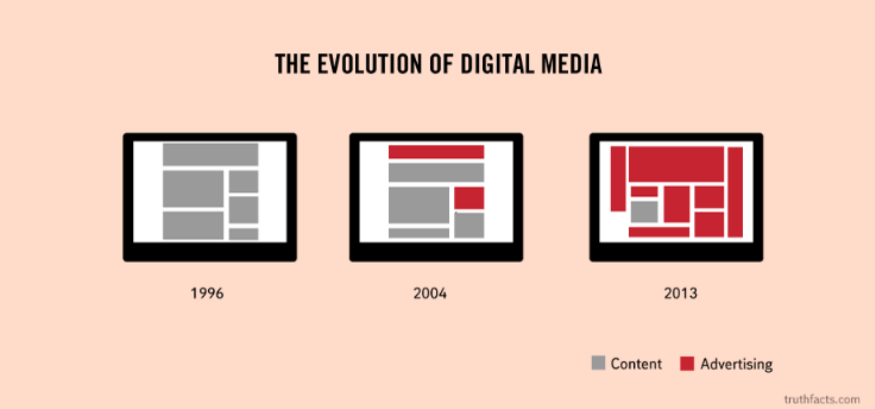
2 Politic, Interpretation and Type of rules

2.1 Politics and interpretation

According to PFAFFENBERGER'S **"technological drama"**, the "*design constituency*" determines the political and cultural interpretation aims of technologies. After an adaptation with the specific cultural mythologies, the *logos* becomes permanent and "*irresistible*"[13]. Conversely, POTTAGE [14] believes that *materiality is sociality* and what matters is the "*paradoxical ecology of emergent sociality*"[15]; materiality and instrumentality are effects of schematisation, which refers to the specific observer.

Regarding ABP, we can observe a **discursive process** occurring between the introduction of ads (statement, emerging economy) and the apparition of ABP/Shine (counter-statement, emerging sociality) followed by the subsequent adaptation of both to reach a level "*normality*" (fewer/different ads). One of the most important questions of this process is: "*How do users want to pay for free services from the Internet*?"

Ad blocking technologies mix socio-economical aims[16] in its discourse. The first type is user protection and better Internet experience (loading time, fluidity, right to access, etc). The second is economic interest (covering cost, profit, etc.).



In our view, ABP is an *emerging sociality* altering the ads' design up to a social acceptable level. The parallel discursive phenomenon in mobile industry, where white-labelled program (Shine) are erected, converse with this view. Then, ads' first design cannot bypass sociality and there is a prior societal need over a business opportunity.

[13] NISSENBAUM *supra* note 11, p.1376 f.
[14] POTTAGE Alain, *Biotechnology as Environmental Regulation*, in : Law and Ecology: New Environmental Foundations, Andreas Philippopoulos-Mihalopoulos (ed.), 2011,p.107.
[15] POTTAGE *supra* note 14, p.121.
[16] NISSENBAUM Helen, *supra* note 11, p.1371.

Further, we believe that ABP's technology materiality contains **politics** since it is inherently free (1) and its aims at the diminution of annoying ads for user's welfare purposes (2). Indeed, the alteration towards a non-free model allowing annoying ads in the whitelist would transform ABP in another program, giving the opportunity for another ABP to exist once again under the current form.

Nevertheless, POTTAGE is correct in arguing that technologies are subject to a permanent **interpretation** and shape sociality (e.g. Transcontainer). For instance, one could argue that ABP/Shine represents a new business model shifting the gain expectations from users to Business. Further, ABP's collection of 30% (tax?) on advertising revenue for big company and the promotion of ABP's service may reveals a preponderant economical interest (business). In our opinion, even though computer's protection programs are usually not free, ABP would still exist without profit since annoying ads are socially too detrimental to user's rights not to be hacked and state law is not adapted to this defence (social welfare).

Those interpretations are part of the discursive phase leading to "*normality*", which is (e.g.) interpreted and enforced by Courts, as of the German Court regarding ABP's legality. The difficulty lies in the heterogeneity of interprets (observers) with opinions differing according to their "*cultural relativism*"[17]. In the end, all ABP's *logos* are not irresistible and leading jurisprudence could interpret differently the aims of ABP (e.g. only 10% collection is correct or ABP endanger the Internet).

2.2 Hart's concept of rules

In our **first opinion**, **ads** constitute primary rules in the sense that users are *obliged* to watch all ads when they surf the web. In case of a total non-compliance, the users can expect a direct sanction (Gunman) because ISP could: ban the access of their website, indirectly create a cyber war or lower the incentive to create new content.

Furthermore, some user can *feel obliged* (morally) and be sensitised (e.g. underneath) to watch ads in order to support the legitimate costs and rights of benefits of the website visited (internal aspect)[18]. It can be explained by the fact that Internet is a public space but websites are not a public good (e.g. comparison with seed and GURT)[19]. Then, even without sanctions, users are tempted not to block all ads.

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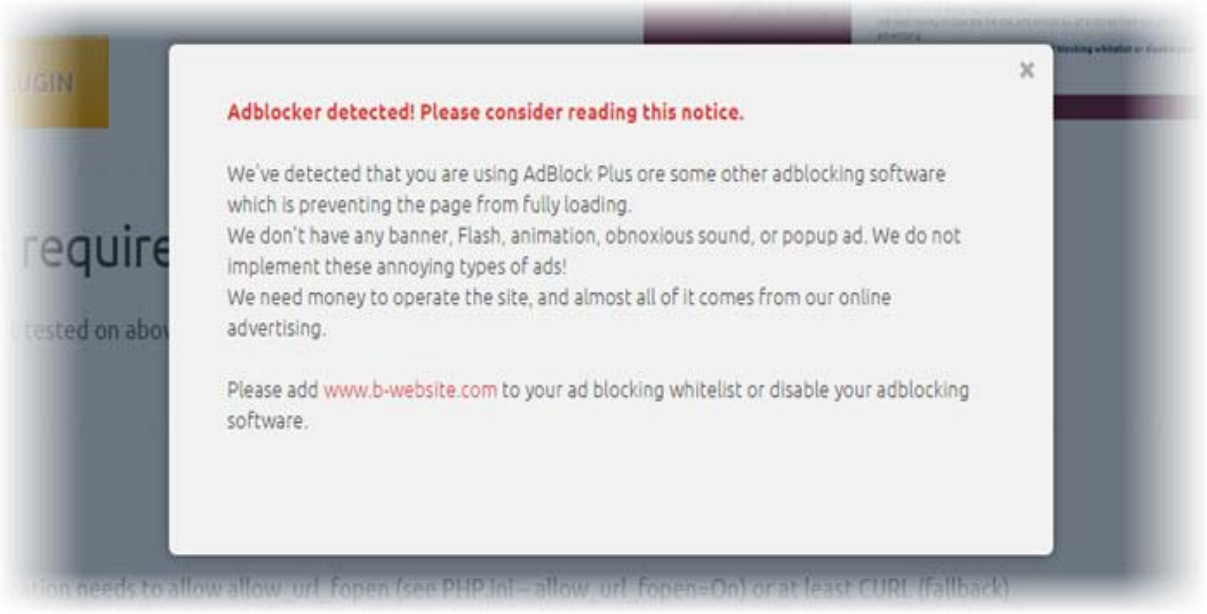
[17] MONTAINGNE's concept.
[18] HART, *supra* note 6, p.82 ff.
[19] BURK Dan L., *DNA Rules Legal and Conceptual Implications of Biological "Lock.Out" Systems*, in California Law Review, n°92(6), 2004, p.1556.



In this optic, **ABP** can also be seen as a primary rule, which *obliges* ads Company or ISP: not to disproportionally constrain access of websites, forbidding annoying ads and imposing an adaptation. Then ABP replaces the above-mentioned ads primary rule thanks to a rule of change (serious social pressure/jurisprudence). In this regard, the legal decision to use ABP on mobile as an optional application is interesting because it highlights that ads are legitimate since it helps maintaining the Internet the way it is today, but its *obligation* stay in the proportion wanted by the users, therefore a strict obligation to watch ads is a "*barrier to overcome*"[20].

Further, ABP could be completed by secondary rules, such as: rules of adjudication (criteria of unwanted ads design), rule of recognition (detection of annoying ads automatically or manually), and rule of change (e.g. social pressure, state law).

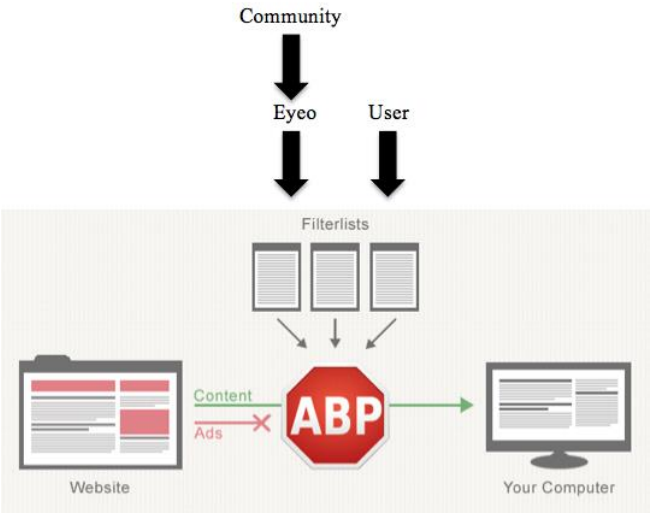
In our **second opinion**, **ABP** can be seen as a secondary rule modifying and moderating the first obligation created by Ads Companies to watch.

[20] NISSENBAUM *supra* note 11, p.1375.

3 Generativity, Integrity and Protection

3.1 Generativity and Integrity

ABP is partially **generative** since users have the freedom and the possibility to tailor new code, which places them in a powerful position. ABP's code is open source and users can choose to use a stable version or not, updated or not, without prejudice. In practice, ABP's development is often made between technocrats.



The generative process of ABP's code presents similarity with the democratic elaboration of state law. First, a Community (including users and ads company) proposes (communicative freedom) democratically criteria for filtering. Then, Eyeo chooses (arbitrarily) and creates the default architecture (e.g. whitelist) (legislative). This development is necessary due to the inherent risk of failure with pure generative system and its inefficiency to keep updated harmonized programs. Finally, users can (arbitrarily) personalized all the default's settings (legislative).

Secondly, the code is self-executed by ABP (executive/judiciary). The subsequent modification and amelioration of its is constantly proposed by the designers (legislative/judiciary (jurisprudence)) with a preponderant decision choice of the specific user.

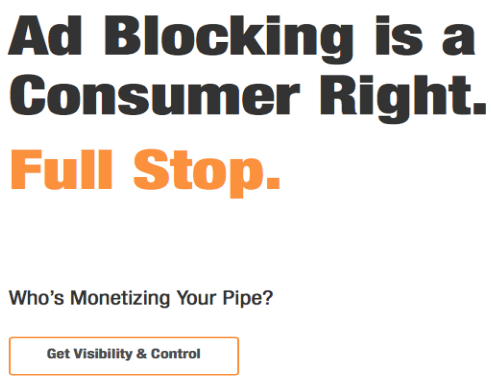
The risk of generativity and ABP is for the system to overblock content (lock-in mistakes). Note, in those cases Eyeo excludes its liability. This danger comes first from users themselves since a general tendency to ban all ads could destroy both ABP and ads business model. In addition, it would lower the quality of website content by favouring some content providers over others, hence creating discrepancies in the diversity of the accessible content

(information rights). Today, without State intervention, we believe ABP system is a fair solution against ads excess; users overblocking tendency constitute a necessary cost for protection.

As seen, the "***integrity*** *of the digital system*"[21], is partially guarantee because ABP's pipes (meta-rules of the architecture) are democratic, transparent and in control of the end-user. Nevertheless, the quality of the content is anyway "*shaped*", which contradicts the principle of net neutrality[22]. There is a risk for ABP to use its monopolistic position to advantage ISP among others and users by the practice do endanger biodiversity of content. Further, ABP can enhance the apparition of subtler ads that users could not remark. Finally, ABP could have for effects to multiply ads in a way that forces all users to use ad blockers. As a consequence, as most users only require *feeling* that ABP works, users could participate in the destruction of the Internet neutrality.

3.2 Protection

ABP's success comes from the **constitutional** state regulation failure to provide a mean to protect individual rights; without protection persons are like commodity goods[23]. It forces us to observe constitutional right among privates (art.35 Cst.) and as a notion encompassing legal and social aspects. Thus, ABP reveals an underground process resulting from a "*social constitution*"[24]. Furthermore, ABP's constitutional values protected refers to a worldwide Community or a "*subconstitution of the world society*"[25].



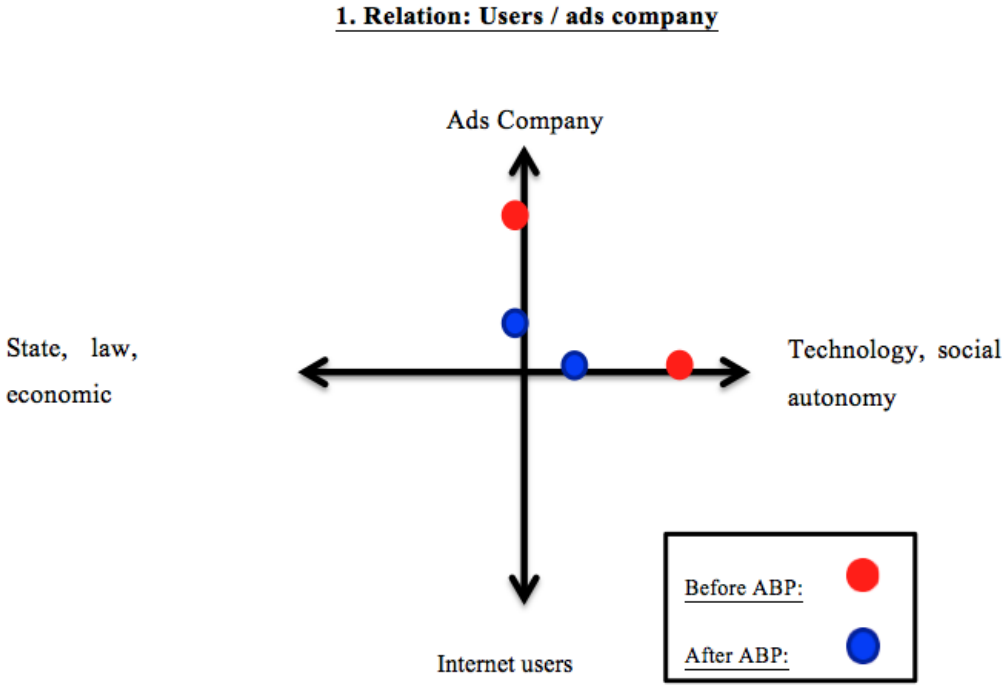
[21] GRABER, *supra* note 9, p.152 f.
[22] ZITTERAIN Jonathan, *The Future of the Internet and how to Stop it*, in: Yale University Press, 2008, p.8.
[23] SUNSTEIN Cass R., *Republic.com 2.0*, in: Princeton University Press, 2007, p15.
[24] TEUBNER Gunther, *Societal Constitutionalism : Alternatives to State-Centered Constitutional Theory*, in: Christian Jorges et al. (eds), Constitutionalism and Transnational Governance, OR Hart Publishing, 2004, p.18.
[25] TEUBNER, *supra* note 24, p.15.

ABP's rises highlights the necessity for "*coupling between digital structures and legal norms*"[26]. Indeed, many concepts present in the legal architecture are transposed by ABP. For instance: right for ads (art. 27 Cst.), protection against mass advertising (art.3 par.1 let.o LCD), neutrality of pipes (8 Cst.), personality rights (28 ff. CC), access to a diversity of information, etc.

[26] TEUBNER, *supra* note 24, p.22.

4 The dispositive(s)

In this section we study Foucault's dispositive and strategically analyse the actual mechanism of powers amongst the actors in presence. Propositions:



Vertical:

Before ABP, users suffered a very strong asymmetry of power and knowledge. The possibilities to hack the system were reserved to sophisticated users[27]. The user was *under the obligation* (Gunman) to watch all ads where "*Only tyrannies force people to watch*"[28]. The "*right to hack*"[29] enabled by ABP seemed justified since the effects created by the ads affect social rights of users, leaving them without defences. Under contract law, this situation could constitue an abusive clause as in GC (Cohen theorem). However, the Swiss doctrine only qualifies the free services provided by ISP as "*courtesy*".

After ABP, hacking is possible within "*a few clicks*" and power shifts towards users. Furthermore, sanctions of ISP against users (e.g. prohibition access) are counter-productive and not cost-efficient. Nevertheless, the language of the code and the possible creation of subtler ads still slightly disadvantage users.

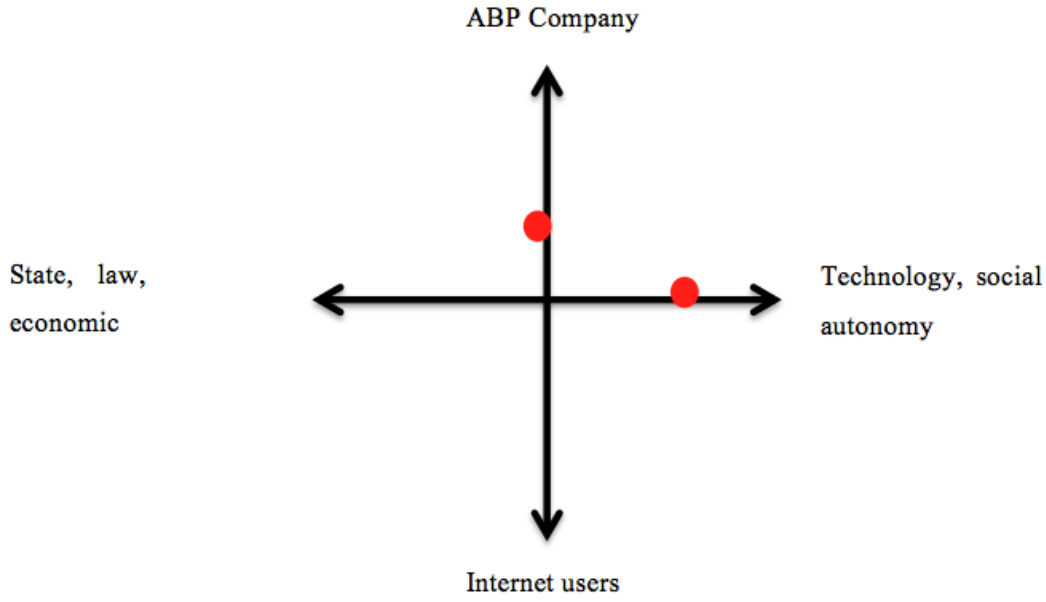
[27] BURK, *Legal and Technical Standards in Digital Rights Management Technology*, *supra* note 5, p.548.
[28] SUNSTEIN, *supra* note 23, p.8.
[29] BURK, DNA Rules Legal and Conceptual Implications of Biological "Lock.Out" Systems, p.1569.

Horizontal:

The code is preponderant against state law. Legally speaking, a general "*social damage*" for annoying advertising could be recognized [30]. However, users have no incentive (e.g. procedure/economic) to sue for abusive ads, notably because the damage is immaterial (moral) and one user has not a more preponderant concern among others.

After ABP, socio-legal notions are coupled in ABP's structure, which forces a discursive phase. Moreover, in a B2B relation, an economical incentive exists to go to court and ask for legal solutions and eventually secure user's protection or ABP's actions, as did the German court regarding ABP's legality.

2. Relation ABP / Users



Vertical:

ABP's architecture is pro-users (participation, disabling possibilities, etc). Indeed, unfriendly users' decisions could potentially reinforce competitors' and will not serve Eyeo since they need users approval to earn money over ads company.

Nevertheless: users are dependent of ABP, lack knowledge in its functioning or existence and have few effective controls as in a democracy. The dependency could also be assimilated with

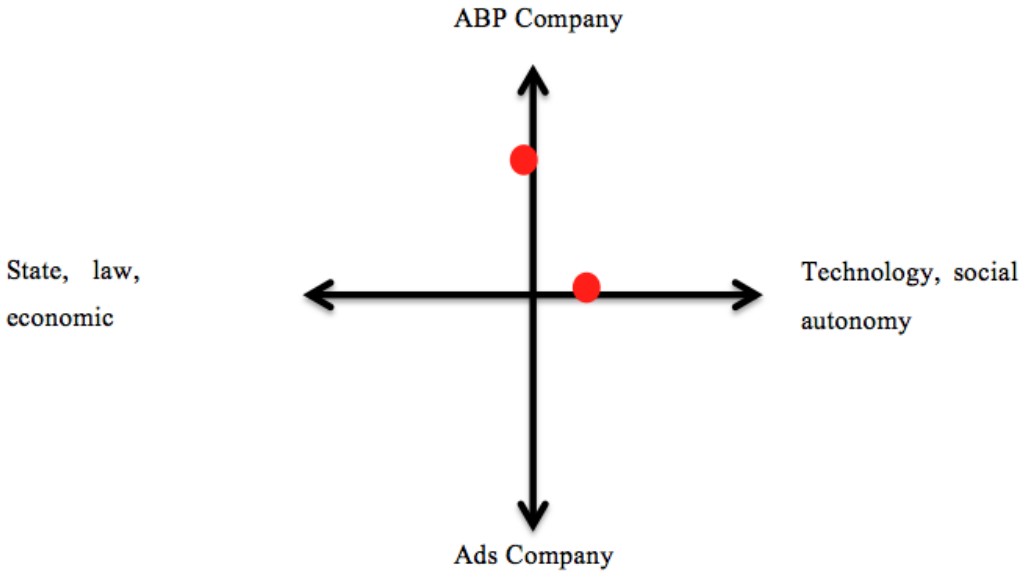
[30] SUNSTEIN, *supra* note 23, p200.

an abusive clause of GC. Finally, users have no rights (to be defended, consulted, to access deal-making's content, contractual/ethical claim) against ABP.

Horizontal:

The power of the code is preponderant against the state law. ABP replaces the state law in its protective role but it is not regulated (except via jurisprudence).

3. Relation ABP / Ads Company



Vertical:

Eyeo holds a powerful position over ad Companies, even considering that some ISP (e.g. Google) have a huge market power. Further, ABP puts pressure on them because: it is easily replaceable, their costs are minimal, they can potentially cost them a lot, their business model is user friendly.

We see four options for ad Companies: (1) technological war, which would be detrimental for every actors and ABP could win; (2) legislation/jurisprudence, which is costly, uncertain and not time-efficient; (3) compromise with ABP, (4) Adaptation of self-regulation. We believe in option 3) and 4), especially for actors with little market strength.

Horizontal:

The code is the law between the present actors. The law only plays a secondary role in case of conflicts e.g. jurisprudence/ bargaining contract. However, the risk of conflict between actors

gives the possibility to use the law (e.g. make ABP optional) and allow the use of the legal solutions (e.g. consumer protection, net neutrality). However, this use isolated and not international.

Conclusion

In conclusion, State law is needed to guarantee fully user's rights and integrity of content on the Internet. The ineffectiveness of state is appalling and inaction could result to be dramatically harmful for the social welfare.

Then, practically, users should accept some ads, as they already do freely for advertising boards when they walk in the street. Users should be sensitized and accept to pay in some ways for the many services an upright Internet can give; like anywhere else: "*nothing is free*".