

2003

## Commentary: Time to Hug a Bureaucrat

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### Recommended Citation

A. M. Froomkin, *Commentary: Time to Hug a Bureaucrat*, 35 Loy. U. Chi. L. J. 139 (2003).  
Available at: <http://lawcommons.luc.edu/lucj/vol35/iss1/6>

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# Commentary: Time To Hug a Bureaucrat

A. Michael Froomkin\*

## I. INTRODUCTION

This panel, “Regulatory Aspects of Internet Governance,” unites three of the most serious, detail-oriented scholars of the regulation of information technology. Indeed, the three papers in this session share a commitment to detailed descriptions of regulatory regimes. Professor Weiser’s<sup>1</sup> and Professor Speta’s<sup>2</sup> papers concentrate on the Federal Communication Commission’s (“FCC”) authority to regulate the Internet, or at least some of the infrastructure on which the U.S. portion of the Internet depends. Professor Kesan’s<sup>3</sup> paper examines two regulatory regimes, one self-regulatory (BBBOnline) and the other perhaps unique (the Internet Corporation for Assigned Names and Numbers’ (“ICANN”) Uniform Domain-Name Dispute-Resolution Policy (“UDRP”)). The papers differ somewhat in their motivations. The Weiser and Speta papers treat the issue of the correct scope of the FCC’s authority as an end in itself; the Kesan paper examines its cases in hopes of making more general observations about e-commerce regulation.

## II. THE FCC AND THE INTERNET

Professors Speta and Weiser both understand that the FCC’s current strategy of regulation by platform will need to change in the face of

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\* Professor of Law, University of Miami. This Article expands on remarks presented at the March 2003 Loyola University Chicago Law Journal Conference, *Technology and Governance: How the Internet Has Shaped Our Conceptions of Governance and Institutions*. Copyright 2003 A. Michael Froomkin, all rights reserved.

1. Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41 (2003).

2. James B. Speta, *FCC Authority To Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15 (2003).

3. Jay P. Kesan, *Private Internet Governance*, 35 LOY. U. CHI. L.J. 87 (2003). Professor Kesan’s paper was something of a moving target. There was one version at the conference, a completely different version some months later, and then a materially revised version in the proofs. Comments in the text of this Commentary refer to the final version.

digital convergence,<sup>4</sup> and they propose ways to optimize it, with particular attention to the FCC's regulation of broadband (cable modems and DSL). Professor Speta notes that the FCC's mission relates primarily to the Internet's physical or hardware layer, not its logical or content layers. But sensible regulation of hardware cannot be achieved without some thought about how people plan to use it.

Broadband regulation raises special problems because the broadband provider enjoys a potential stranglehold over the consumer and perhaps over part of the applications layer. Currently, there is at most only one DSL line to a home, and perhaps also one cable connection; this is the "last mile" problem.<sup>5</sup> Worse, there may be upstream bottlenecks as well. Economic theory suggests that a market with two or fewer providers is not likely to achieve a competitive result. Professor Speta believes that the FCC abdicated its responsibilities by refusing to regulate Internet service provider access to cable in the 1990s, and he argues that it should not repeat this error for "interconnection." Professor Weiser agrees that the interconnection problem is an area in which regulation is appropriate.

If Professors Speta and Weiser broadly agree that the FCC should take action, they disagree sharply as to where the FCC would get the needed authority and more gently about the optimal regulatory style. Professor Weiser argues that the FCC has authority under its Title I "ancillary jurisdiction,"<sup>6</sup> which he sees as a broad delegation from Congress akin to the open-ended grant in the Sherman Act.<sup>7</sup> That the FCC has rarely used this authority, has yet to develop a coherent theory of it,<sup>8</sup> and indeed tends to treat it as a mostly minor power,<sup>9</sup> are, in his view, all surmountable obstacles.

This is certainly an argument with attractive features, not least that it would not require going to Congress to amend the FCC's authority. Professor Weiser is fair, however, and also notes the counterarguments, two of which appear particularly formidable. First, as Professor Weiser notes, broadband simply is not "ancillary" to the FCC's regulation of "information platforms" in the usual sense of the word "ancillary."

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4. Weiser, *supra* note 1, at 41; Speta, *supra* note 2, at 102.

5. For a discussion of "last mile" issues, see, for example, James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39 (2000), and Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819 (2000).

6. Weiser, *supra* note 1, at 54-64.

7. *Id.* at 51.

8. *Id.* at 52.

9. *Id.* at 53.

Indeed, his reading is, as he admits, “untested and quite novel,”<sup>10</sup> and for all that it is also quite elegant. The core of his argument is that we can contort the word “ancillary” to make it fit, a reading Professor Weiser almost makes seem reasonable. Second, were one to adopt Professor Weiser’s interpretative strategy, there would be no obvious stopping point. A key part of his argument thus lies in the construction of a limiting principle. For if “ancillary” in Title I were to mean, in practice, “anything remotely connected to telecommunications,” it is pretty clear that this construction of the statute would be flawed; for whatever Title I is supposed to do, on no reading could it be a limitless grant to the FCC of regulatory authority over all telecommunications. Professor Weiser suggests that we read “ancillary” not to mean only relatively minor things that come along with Title II jurisdiction, but also relatively major things—like voice over IP—that threaten to replace technologies over which the FCC currently has regulatory jurisdiction.<sup>11</sup> The proposed “reasonably likely to substitute” test<sup>12</sup> would keep the FCC from reading Title I as a charter to regulate anything with electrons and would keep it out of content regulation and similar functions that the FCC should not attempt to perform. Nevertheless, despite the excellence of the advocacy, it is hard to accept that this is what Congress intended when it enacted Title I, or that the language is sufficiently capacious for us to find it in there anyway. And regardless of what we may think, it seems more likely than not that the D.C. Circuit would take the narrow view of Title I—a point developed convincingly in the Speta paper.<sup>13</sup>

Professor Speta advances a number of reasons for why granting the FCC new jurisdiction under “a statutory default rule that would require Internet carriers to interconnect amongst themselves and with retail customers”<sup>14</sup> makes sense as a policy matter. In addition to preferring a statutory basis for common carrier regulation, Professor Speta suggests that having the FCC proceed in the common-law-like manner that would follow from a series of adjudications under Professor Weiser’s suggested Title I authority is unlikely to produce the best rules. He also suggests that it is nearly guaranteed to create a period of substantial uncertainty. Instead, he advocates a new statute and some limited rulemaking.

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10. *Id.* at 60.

11. *Id.* at 60–62.

12. *Id.* at 63.

13. See Speta, *supra* note 2, pt. II (characterizing the FCC’s Title I authority as uncertain and detailing the D.C. Circuit’s narrow reading of the FCC’s Title I authority in recent cases).

14. *Id.* at 30.

The case for an interconnection regulation is indeed strong, and if one cannot shoehorn it into Title I, then Title II sounds like a reasonable approach. Professor Speta argues that this new authority should be quite limited, but it seems fair to ask whether the natural jurisdictional creep of bureaucracies would not tend to extend this authority further than he might like—and indeed whether that would really be so bad.

Indeed, Professor Speta's proposal is surprisingly modest. He advocates only that an Internet carrier be required "to transport or transit IP-compliant traffic on an equal footing with the IP access service sold to its retail customers."<sup>15</sup> Not only does he specifically disclaim regulation of unbundling and wholesaling of service,<sup>16</sup> but he is "unwilling to endorse a rule that requires carriers to be neutral among the applications carried over their networks," a refusal qualified by the prediction that "such a rule may well prevail in practice."<sup>17</sup> This is cautious indeed, and risks opening up a world of gamesmanship for the carriers, a result more easily avoided by taking this next step through legislation. Current battles over instant messaging suggest that the incentive to discriminate is somewhat stronger than Professor Speta would like to believe.<sup>18</sup>

### III. PRIVATE INTERNET GOVERNANCE

At the Conference on Technology and Governance in Chicago, Professor Kesan presented a 200-plus-page paper that outlined an initial model of e-commerce regulation influenced by the institutional economics school, fleshed out by two case studies. It was an incredibly ambitious paper—maybe overly ambitious—and I suggested in my comments at the conference that it operated at too-high a level of generality. There are, I argued in Chicago, important differences between at least five different types of e-commerce markets. The

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15. *Id.* at 32.

16. *Id.* at 35.

17. *Id.* at 37.

18. *See, e.g.,* Joris Evers, *Microsoft To Lock Down MSN Messenger Network: Move Will Exclude Users of Third-party Software*, INFOWORLD, at [http://www.infoworld.com/article/03/08/19/HNmsnlockdown\\_1.html](http://www.infoworld.com/article/03/08/19/HNmsnlockdown_1.html) (Aug. 19, 2003) (reporting Microsoft's decision to lock out, by October 2003, both users of third-party software who also use MSN messaging and users of older versions of the MSN software); *see also* Frederick E. Ellrod III & Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 SEATTLE U. L. REV. 475, 481–82 & n.18 (2003) (stating that "[a] provider that wields market power may believe that it benefits from keeping its users in a 'walled garden' and making it difficult for them to communicate with, or through, its competitors," and noting, "[I]t was only [after] a federal antitrust inquiry into its instant messaging technology that America Online submitted a proposal allowing open access to its Instant Messenger system.").

differences among these markets, I suggested, are all the more important in the context of an analysis of the optimal level of regulation, since these markets tend to fail in different ways, with different consequences for both efficiency and distributional justice. The market for commodity goods is likely to be dominated by price competition (and strategies to avoid it) in a way that will be foreign to the market for non-commodity goods. Similarly, the services market will differ from both types of goods, though it may have more in common with the non-commodity goods market since issues of information, quality, and guarantee will predominate. A fourth market is that for markets and institutions—the competition among market makers such as online stock exchanges and auction sites. And of course, the market for digitized data will be dominated by the struggle between its inherent non-excludability and those who seek artificial excludability.<sup>19</sup>

Perhaps in response to that critique, in a revised (and slimmer) version of his paper, Professor Kesan narrowed his focus to the two case studies that I had suggested were insufficient to carry the freight of his ambitious general theory. For that reason, my written remarks diverge more than is customary from my comments on Professor Kesan's paper delivered in Chicago.<sup>20</sup>

Case studies are important work, and we need more of them. A detailed examination of a particular set of facts can tell us much about the specific situations they encompass. A study of the widget market might, we hope, tell us whether or how the widget market should be regulated. In order to generalize, however, we need some reason to think that the widget market is broadly representative of the market for other goods. We might be justly suspicious if a case study of the market for hand-drawn miniatures was cited as evidence in a debate over regulation of securities markets. Thus, in weighing the conclusions that could be drawn from the examples of *BBBOnline* and ICANN's UDRP, one has to ask how representative the two institutions featured in *Private Internet Governance* are of other institutions or, even if unrepresentative, whether either is a model that is likely to be replicated elsewhere. I will suggest below that the answers to these questions are, first, that the most representative features of *BBBOnline* as a form of

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19. See J. Bradford DeLong & A. Michael Froomkin, *Speculative Microeconomics for Tomorrow's Economy*, in *INTERNET PUBLISHING AND BEYOND: THE ECONOMICS OF DIGITAL INFORMATION AND INTELLECTUAL PROPERTY* 10–13 (Brian Kahin & Hal R. Varian eds., 2000), available at <http://www.law.miami.edu/~froomkin/articles/spec.htm> (last visited Oct. 9, 2003).

20. And, as noted above, there is now a third version of Professor Kesan's paper that responds to my comments in its text. I will confine to footnotes my comments to Professor Kesan's responses.

self-regulation are not fully appreciated in Professor Kesan's account, and that (fortunately) ICANN's UDRP is not a representative public-private partnership.

Furthermore, for a case study to be really useful, it needs to be more than an amalgamation of publicly available information<sup>21</sup>—the information needs to be digested, and that process of digestion necessarily involves the application of academic skepticism. Professor Kesan has tended to take official documents at their word, when, in fact, the official reports are often demonstrably rose-tinted.<sup>22</sup>

Before getting to the details, it seems appropriate to note another fundamental difference that divides us, and which remains in this version of the paper: Professor Kesan and I do not see the "Internet" in the same way. Professor Kesan sees it as a thing apart, a space of its own. I think that at least in the context of e-commerce regulation, this is an unhelpful reification. For most e-commerce, there really isn't an "Internet" in any useful sense any more than there is "telephone space"; rather, the Internet is just another quicker, better way of passing information between machines and people. Professor Kesan, however, sees it as something more. Noting "the growing importance" of e-commerce, Professor Kesan seeks to evaluate the claims of those whom he says "see the Internet as an environment that needs some regulation to improve its performance,"<sup>23</sup> although he notes that "[s]ome authors note that particular Internet practices are already illegal."<sup>24</sup>

Professor Kesan writes—and in this he is far from alone—that "[s]ince its origin, the main characteristic of the Internet has been its relatively unregulated character."<sup>25</sup> Whatever the truth of that claim as regards governance of the Internet itself through technical standard-setting,<sup>26</sup> the claim's applicability to a discussion of commercial activities conducted over the Internet is debatable. In theory, and to a

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21. See Kesan, *supra* note 3, at 90.

22. For example, during its first years, ICANN constantly referred to its very controversial decisions as consensus-based. Whether this was wishful thinking or active disinformation is debatable, but it was surely nonsense. See, e.g., Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 250–57 (2000); David Post, *ICANN and the Consensus of the Internet Community*, at [http://www.icannwatch.org/archive/icann\\_and\\_the\\_consensus\\_of\\_the\\_community.htm](http://www.icannwatch.org/archive/icann_and_the_consensus_of_the_community.htm) (Aug. 20, 1999) (disagreeing with ICANN's consensus statements and questioning how ICANN arrived at such conclusions).

23. Kesan, *supra* note 3, at 89.

24. *Id.* at 89 n.8.

25. *Id.* at 88.

26. Cf. A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 739, 782–96 (2003) (providing a short social and institutional history of Internet standard-setting).

great extent in practice, e-commerce has always been exactly as highly regulated as ordinary commerce. Indeed, I know of no rule of terrestrial commerce other than sales tax<sup>27</sup> that does not, in theory, apply to equivalent electronic transactions. E-commerce may *appear* to be less regulated than mundane commerce, but that is only because it allows consumers in some markets, primarily those for services and information goods, to choose among existing regulatory structures more easily, to conduct regulatory arbitrage.<sup>28</sup> Even there, the choice is *among* terrestrial regulatory systems rather than whether or not to have one.

This difference is fundamentally important. On it turns the question of whether one should consider e-commerce as *sui generis*, and be grateful for any example of an e-institution in action, or whether one feels more comfortable analogizing from other long-familiar phenomena. The Speta and Weiser papers treat the interconnection problem as something familiar. *Private Internet Governance*, unlike Professor Kesan's previous work,<sup>29</sup> tends toward the *sui generis* view.

#### A. Case Study: BBBOnline

BBBOnline is a propaganda triumph but a market and social failure. It has garnered academic attention far in excess of its actual importance—a Westlaw search found 145 academic articles and PLI presentations mentioning it. In fact, however, as Professor Kesan notes, BBBOnline is of almost no relevance in the real world, especially as regards privacy policies. There are fewer than 800 firms in its privacy seal program and less than 10,000 in its reliability seal program. The

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27. The United States seems poised to renew the existing moratorium on sales tax collection for Internet sales. See Grant Gross, *Internet Tax Moratorium Bill Gains Support*, INFOWORLD, at [http://www.infoworld.com/article/03/03/31/HNmoratorium\\_1.html](http://www.infoworld.com/article/03/03/31/HNmoratorium_1.html) (Mar. 31, 2003) (reporting that in March 2003, more than 100 members of Congress sponsored a bill to make the five-year moratorium permanent). In contrast, the European Union requires that a value-added tax be collected by online sellers in business-to-business transactions of digital products and services. Paul Meller, *EU To Move on Taxing Online Sales*, COMPUTERWORLD, at <http://www.computerworld.com/industrytopics/retail/story/0,10801,68264,00.html> (Feb. 13, 2002).

28. See generally A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE (Brian Kahin & Charles R. Nesson eds., 1997), available at <http://www.law.miami.edu/~froomkin/articles/arbitr.htm> (last visited Oct. 19, 2003).

29. See, e.g., Jay P. Kesan, *Cyber-Working or Cyber-Shirking? A First Principles Examination of Electronic Privacy in the Workplace*, 54 FLA. L. REV. 289 (2002); Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You—Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 WASH. U. L.Q. 89 (2001).



large majority of heavily-trafficked sites do not use either program.<sup>30</sup> Even for the websites that do participate, the rules are weak and enforcement toothless. As for consumer participation, there is not much of it going on.<sup>31</sup> Professor Kesan concludes from this that all would be well if the government would “cooperat[e] in the design and enforcement”<sup>32</sup> of privacy rules. Doing so will enhance the mythic “consumer confidence” that governments like to say they are fostering<sup>33</sup>—as if online commerce were not increasing at a rapid pace.

In fact, the failure of *BBBOnline* is its most interesting and representative feature. To begin with, as Professor Kesan notes, when it comes to privacy rules, the strictures of *BBBOnline* do not bind tightly. Even so, almost no one bothers with the fig leaf it offers. Perhaps firms believe they do not in fact face much threat of regulation—a logical supposition in the George W. Bush era—and hence lack much motivation to expend resources to head off a low risk.

Assume that there is a market in which consumers believe the market clearing level of consumer protection provided by the  $N$  identical firms in the market is inadequate. If worried consumers are sufficiently numerous, they may be able to persuade politically entrepreneurial politicians to regulate the market. Assume that participants in the market expect these regulations to have a cost  $C^*$  per firm, discounted by the probability of regulation to become  $C$ . In this world each firm faces the following choices:

1. It can accept the expected cost  $C$ .

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30. Kesan, *supra* note 3, at 103 & n.48 (citing Stephen R. Bergerson, *E-commerce Privacy and the Black Hole of Cyberspace*, 27 WM. MITCHELL L. REV. 1527, 1543 (2001)).

31. *Id.* at 104 (“Consumers are not participating widely in the private regulatory process.”).

32. *Id.* at 105.

33. The FTC is a leading offender here. See, e.g., FED. TRADE COMM’N, SUMMARY OF PUBLIC WORKSHOP: ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER TRANSACTIONS IN THE BORDERLESS ONLINE MARKETPLACE *passim* (Nov. 2000) (detailing discussions regarding development of ADR programs that consumers can understand and appreciate), available at <http://www.ftc.gov/bcp/altdisresolution/summary.pdf> (last visited Nov. 11, 2003); Mary Hillebrand, *FTC: E-Commerce Mediations Should Replace Lawsuits*, E-COMMERCE TIMES, at <http://www.ecommercetimes.com/perl/story/2473.html> (Feb. 8, 2000) (discussing the FTC’s planned spring 2003 ADR workshop aimed at building consumer confidence through development of ADR programs that give consumers access to fair and effective resolutions of online marketplace problems); Press Release, Fed. Trade Comm’n, FTC Releases 2002 Statistics on Cross-border Consumer Fraud (Feb. 20, 2003), available at <http://www.ftc.gov/opa/2003/02/cbfrpt.htm> (last visited Oct. 12, 2003) (describing Econsumer.gov “as a joint effort involving 13 countries to gather and share cross-border e-commerce complaints in order to respond to the challenges of multinational Internet fraud, and enhance consumer confidence in e-commerce”).

2. It can counter-lobby the consumers, hoping to spend some sum less than *C*. Since each firm has an interest in free riding on others' expenditures, this may not be effective. It is also risky: politics is not yet demonstrably a simple input-output model in which a given level of investment guarantees a given result.
3. It can engage in some sort of signaling tactics to reassure consumers that their concerns are being addressed, with ostentatious self-regulation being one such strategy. Ignoring, for the moment, collective action problems, each firm seeks to spend the minimum amount (or, if you prefer, provide the minimum necessary consumer protection) to pacify enough consumers to break up what would otherwise risk becoming a winning coalition in favor of regulation.<sup>34</sup>

Frequently, firms choose option three. Often this self-regulation is little more than window-dressing. The window-dressing serves two purposes. It allows firms to persuade the least well-informed consumers, and those whose taste for regulation is the weakest, that their needs are being addressed. And it gives government officials who might otherwise feel pressured to act—whether or not regulation is in fact justified—something to hide behind.

In this context, consider Professor Kesan's suggestion that "[g]overnments and consumer groups view some of these private initiatives as indications that self-regulation can be effective on the Internet."<sup>35</sup> There is no question that is what the U.S. government says when rejecting calls for increased regulation. I am not, however, familiar with any reputable consumer group that agrees that self-regulation has been effective for online privacy issues, and none is cited. More to the point, however, there's no reason in the abstract to think it is likely to be true, if only for the very reasons Professor Kesan summarizes in his paper.<sup>36</sup>

34. See Kesan, *supra* note 3, at 101 (noting that the goal of private firms is to "generate a minimum set of rules that will avoid government intervention").

35. *Id.* at 94.

36. Professor Kesan says he agrees that the third option above is likely, but states:

I warn off against excessive government regulation that could harm private investment and create incentives for private firms to defect by trying to avoid government regulation through the use of their superior technological knowledge. This is the essence of the private-public cooperation that this Article leads to. In short, we appear to be saying the same thing, but I hope to offer a better solution by enhancing government participation without creating incentives for the private sector to defect.

*Id.* at 105–06. Well, we are all against "excessive government regulation" and for motherhood too. But while motherhood may be easy to identify, there is considerable debate about what sort of government regulation is "excessive." By joining the cheerleading for the sham of *BBBOnline*

Professor Kesan approaches the problem dialectically, by outlining what he says are the claimed advantages and disadvantages of self-regulation of “online privacy.”<sup>37</sup> Proceeding in this manner allows him to give reasons proffered by others without having to vouch for them himself. Indeed, we see thesis and antithesis, but not much of a synthesis other than that there’s something to both sides.

The same dialectic approach guides the discussion of whether regulation should be “top-down” or “bottom-up.” No one could disagree that “cooperation between the government and the private sector, exploiting the advantages that each system offers”<sup>38</sup> is the way to go. The problem is figuring out what that means in practice. What’s more, it turns out that regulation should not be national; rather, “it is important to cooperate with other governments in order to converge to a unique set of rules for the Internet.”<sup>39</sup> Why the Internet needs a “unique set of rules,” why a bonsai tree bought online should be regulated differently from one bought by phoning in an order from a catalog, are not explained.<sup>40</sup> Nor are the implications for national democracy

and the industry-designed injustice of the UDRP, Professor Kesan gives aid and comfort to those who wish to argue that these deeply flawed models somehow demonstrate how we could do without government intervention in the area of privacy or justice. To my eye, to the limited extent these case studies prove anything, it is exactly the reverse: these are areas that currently suffer from a sub-optimal level of regulation.

This government-private partnership talk is wonderful stuff, and if it leads to something meaningful, I would be all for it, but the point of the third option above is that there is a very substantial chance that *industry is going to bail out before the self-regulation has teeth*. If there are practical strategies described in Professor Kesan’s paper that would produce a substantial reduction in the probability of this unfortunate outcome, I missed them.

37. Kesan, *supra* note 3, at 95–98. As noted above, I have some doubts about the utility of trying to treat these questions across multiple markets. See *supra* note 19 and accompanying and preceding text (describing the need to consider important differences in at least five types of e-commerce markets when optimizing regulation within those markets).

38. Kesan, *supra* note 3, at 100.

39. *Id.* at 100–01. I strenuously disagree with the claim that “[m]ost of the attempts to converge to a common set of rules on the Internet have come from government initiatives.” *Id.* at 98–99. This leaves out the essential work of voluntary-standards bodies such as the Internet Engineering Task Force (“IETF”), W3C (World Wide Web Consortium), and many others. See generally Froomkin, *supra* note 26, at 786–820 (discussing the emergence of IETF and other voluntary bodies, as well as their regulatory strengths and weaknesses).

40. Professor Kesan objects to my example as being true “only if one thinks of just the U.S. market and not international markets.” Kesan, *supra* note 3, at 92. Since international telephone calls are increasingly cheap, this cannot be a denial that international phone sales are possible. Ultimately, it seems to be a claim that what makes the Internet different is the difficulty of *transnational* enforcement. See *id.* at 92–93. (“[I]f you buy the bonsai tree from a firm in a foreign country, you may have problems getting similar redress for any loss from that transaction. In addition, jurisdictions are not well-established and the transaction costs involved are uncertain.”) We could, I suppose, spend a long time trying to find data about domestic rates of customer dispute resolution to see if Professor Kesan’s intuitions about domestic recourse are correct. But fortunately we do not need to. Instead, one need only observe that, at least in the

explained, even though an almost inevitable consequence of supra-national regulation is the substantial diminution of voter control over the regulations that control national markets.

### B. Case Study: ICANN's UDRP

The best case for the UDRP was that a few cybersquatters were getting undeserved windfalls by registering for domain names for free, then selling them to trademark holders for thousands, due to the high settlement value of even a meritless trademark case.<sup>41</sup> The second-best case was that national legal systems had not figured out how to treat domain names.<sup>42</sup> To some extent both of these justifications have been overrun by events.<sup>43</sup>

Cybersquatting is down,<sup>44</sup> both because of the end of the dot.com bubble, and because domain-name registrations now cost money up front. At the time the UDRP was designed, there was no specific domain-name legislation in the United States or elsewhere, although by the time ICANN enacted the UDRP, Congress had passed the Anti-Cybersquatting Consumer Protection Act ("ACPA"),<sup>45</sup> which created powerful legal remedies against cybersquatters, including up to \$100,000 in statutory damages.<sup>46</sup> It is important to understand, however, that the "need"<sup>47</sup> for the UDRP was felt by trademark rights holders, not the public, and that the system was designed by and for those rights holders, with the cooperation of the World Intellectual

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United States, a substantial amount of e-commerce is conducted with the use of credit cards, which effectively act as insurers to the transaction and will refund the charge if the consumer has a dispute with the seller. (Similar protections do not necessarily exist for debit cards and do not exist at all for Paypal-type intermediation schemes even if the consumer pays Paypal with a credit card.) Thus, at least for international purchases from the United States via credit card, the customer's recourse is substantially similar wherever the seller happens to be located.

41. *E.g.*, WORLD INTELLECTUAL PROP. ORG., THE MANAGEMENT OF INTERNET NAMES AND ADDRESSES: INTELLECTUAL PROPERTY ISSUES—FINAL REPORT OF THE WIPO INTERNET DOMAIN NAME PROCESS paras. 314–18 (Apr. 30, 1999), available at <http://wipo2.wipo.int/process1/report/finalreport.html> (last visited Nov. 11, 2003).

42. *See id.* paras. 131–32 (stating that the global presence of domain names and the sheer volume of violations created multijurisdictional issues).

43. *See generally* A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 621–22 (2002) (describing justifications for ICANN's UDRP).

44. *See* Tamara Loomis, *Domain Name Disputes Decline as Internet Matures*, N.Y. LAW., at <http://www.nylawyer.com/news/03/02/020603c.html> (Feb. 6, 2003) (stating that "the number of UDRP proceedings has dropped by almost half in the last two years," in part because cybersquatting has declined as a result of the slowing Internet economy).

45. 15 U.S.C. § 1125(d) (2000).

46. *Id.* § 1117(d).

47. Kesan, *supra* note 3, at 106.

Property Organization (“WIPO”). It is simply as one-sided a system as those constituencies could get away with.<sup>48</sup>

Cybersquatting may be down, but it is not dead, so the first justification—reduction of settlement costs of meritless cases—still has some power. In the UDRP, the trains run on time, and enforcement is swift and sure. If the plaintiff trademark holders do not get what they want the first time, they can always try again.<sup>49</sup> While respondents do have some ability to choose a panel member in a three-person panel, they may have to pay for the privilege.<sup>50</sup> (Plus their choice is limited to the arbitrators selected by the dispute resolution service providers, who have been culling their lists of anyone who might be considered unsound from a rights-holder’s point of view.<sup>51</sup> Thus, for the defendant, the choice of panelists verges on a Hobson’s choice rather than a real one.) I have argued elsewhere that the UDRP lacks basic due process.<sup>52</sup> Professor Kesan states repeatedly that his Article does not address due process concerns posed by the two regimes he describes. Nevertheless, he persists in saying that the UDRP example “showed that cooperation between the private sector and public sector is the best outcome from the social welfare standpoint”<sup>53</sup> Neither the UDRP’s value as a model, nor its effect “from the social welfare

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48. See Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 159–68 (2000) (describing due process concerns associated with ICANN’s UDRP); Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP 10–17*, at <http://aix1.uottawa.ca/~geist/geistudrp.pdf> (Aug. 2001) (providing a brief overview of the UDRP’s development while analyzing alleged problems of bias, particularly regarding panel formation); Milton Mueller, *Rough Justice: An Analysis of ICANN’s Uniform Dispute Resolution Policy 4–5*, at <http://dcc.syr.edu/miscarticles/roughjustice.pdf> (Nov. 2000) (detailing the development of the UDRP). See generally Froomkin, *supra* note 43, at 613–49 (discussing the history prior to the UDRP).

49. See, e.g., *Citigroup, Inc. v. Parvin*, WIPO Case No. D2002-0969 (2003) (Perritt, Presiding Panelist, concurring in part and dissenting in part) (“I encourage the Complainant to refile . . .”), available at <http://arbiter.wipo.int/domains/decisions/html/2002/d2002-0969.html> (last visited Nov. 11, 2003).

50. See ICANN, RULES FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY para. 5(c), at <http://www.icann.org/dndr/udrp/uniform-rules.htm#5c> (Oct. 24, 1999) (“If Complainant has elected to have the dispute decided by a single-member Panel and Respondent elects a three-member Panel, Respondent shall be required to pay one-half of the applicable fee for a three-member Panel as set forth in the Provider’s Supplemental Rules.”).

51. Milton Mueller, arguably the leading authority on the history of ICANN and the UDRP, was recently dropped from WIPO’s list of arbitrators. WIPO informed parties that he had been dropped but did not notify him. Although a WIPO official told me she faxed me an offer to sit as a panelist when it opened the center, I never received it. When I applied after hearing this story, I was rejected.

52. See Froomkin, *supra* note 43, at 649–51 (discussing procedural flaws of the UDRP).

53. Kesan, *supra* note 3, at 92.

standpoint” can be divorced from its effects on basic rights. If, as I and others have argued, the UDRP is fundamentally unjust, this has more than a little relevance to the suitability of the process that produced the UDRP as a model for the future and also to the value of the UDRP itself. Many academic commentators agree that the UDRP is very, very flawed.<sup>54</sup> Given that view, I cannot agree that the UDRP is “closer to an optimal mixed system”<sup>55</sup> than something fair, such as the courts, at least in any useful sense of “closer.”<sup>56</sup>

In my opinion, Professor Kesan’s account of the UDRP suffers from naive optimism. ICANN’s recent reform entrenched some factions at the expense of the public voice.<sup>57</sup> Tomorrow’s ICANN is not going to “accommodate different views and be open to changes,”<sup>58</sup> as the whole point of the recent exercise was to stifle dissent, not embrace it.<sup>59</sup> Similarly, ICANN’s interest in striking deals with governments is simple: it hopes that the governments will pay it, and it knows that until it makes those deals, the U.S. government will not accept that ICANN has met the preconditions for decreased U.S. supervision of ICANN.<sup>60</sup> Given the very tortured history of the campaign to block the creation of new top-level domains—and especially to block general-purpose ones<sup>61</sup>—it is ivory-tower wishful thinking to set out how ICANN might

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54. *See id.* at 136 & n. 63.

55. *Id.* at 136.

56. Professor Kesan’s new conclusion, though not all his text, retreats to the view that “[t]he UDRP system is somewhat closer to an optimal mixed system, but is nevertheless deeply flawed.” *Id.*

57. *See* Wolfgang Kleinwaechter, *From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet’s Core Resources*, 36 LOY. L.A. L. REV. 1103, 1119–20 (2003) (describing reformed ICANN as a deal between certain industries and certain governments, which sidelines individual Internet users). *See generally* David R. Johnson et al., *A Commentary on the ICANN “Blueprint” for Evolution and Reform*, 36 LOY. L.A. L. REV. 1127 (2003) (arguing that abandoning the “consensus process” to ICANN is not in the best interest of the Internet community).

58. Kesan, *supra* note 3, at 114.

59. *See* Johnson et al., *supra* note 57, at 1127 (“[A]bandoning consensus as the basis for ICANN policy-making is neither in ICANN’s best interests nor in the best interests of the Internet community.”); Kleinwaechter, *supra* note 57, at 1123 (“The losers of the present redistribution of power in cyberspace are the Internet users.”).

60. *See* NAT’L TELECOMMS. AND INFO. ADMIN. & ICANN, AMENDMENT 6 TO MEMORANDUM OF UNDERSTANDING BETWEEN DEPARTMENT OF COMMERCE AND ICANN, at <http://www.icann.org/general/amend6-jpamou-17sep03.htm> (Sept. 16, 2003) (requiring ICANN, inter alia, to “[c]ontinue its efforts to achieve stable agreements with ccTLD operators” and to “conduct outreach to governments and local Internet communities in targeted regions”).

61. *See generally* MILTON MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* (2002) (tracing the history of control and property rights in names and addresses on the Internet, including top-level domains); Milton Mueller & Lee McKnight, *The Post-.COM Internet: Towards Regular and Objective Procedures for Internet Governance*, at <http://intel.si.umich.edu/tprc/papers/2003/175/tprc03-mueller-mcknight.pdf> (Aug. 1, 2003)

create new top-level domains for free speech or any other purpose.<sup>62</sup> It is not going to happen without a push of some sort from outside, and the new structure makes that push even less likely.<sup>63</sup> The new reforms do not, as Professor Kesan would have it, give users “the opportunity to place representatives on ICANN’s Board of Directors”<sup>64</sup>—on the contrary, as he later notes,<sup>65</sup> they remove every vestige of user influence over the Board.<sup>66</sup>

Professor Kesan states that the “legitimacy of [ICANN’s] functions is the basis for effectively enforcing domain-name dispute-resolution rules . . . mak[ing] the UDRP one of the most viable systems for dispute resolution on the Internet.”<sup>67</sup> Even if there were not massive doubts as to ICANN’s fundamental legitimacy,<sup>68</sup> no amount of underlying legitimacy could justify a system that lacks minimum aspects of fairness and due process. It is adding insult to injury to say that “[u]ser participation is much higher in the UDRP than in the previous case study of the privacy rights TPIs.”<sup>69</sup> This “user participation” consists of signing contracts of adhesion, which ICANN forbids registrars from varying, then being subject to UDRP proceedings by covetous third parties. That’s it. There may be—“in theory”<sup>70</sup>—ways that domain-

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(detailing opposition to new top-level domains and proposing an annual ICANN procedure to add top-level domain names).

62. See Kesan, *supra* note 3, at 116–17 (describing the potential creation of new top-level domains for speech purposes only).

63. See *supra* note 57 and accompanying text (discussing ICANN’s recent retrenchment at the expense of the Internet community).

64. Kesan, *supra* note 3, at 117.

65. See *id.* at 134 (noting that “Internet users have lost their prerogative to elect At-large members directly by popular vote”).

66. See, e.g., Kleinwachter, *supra* note 57, at 1123–24 (discussing the reduced role of users).

67. Kesan, *supra* note 3, at 112. ICANN’s ability to enforce UDRP judgments in generic top-level domain (gTLD) space is a result of its contracts with registries, which in turn rest on its relationship with the U.S. government. See generally A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93, 93–119 (2002). Greater or lesser participation by “the international community” has no bearing on enforcement. But see Kesan, *supra* note 3, at 113–14 (noting that increased international cooperation in ICANN “will allow for better enforcement of dispute resolution policies”).

68. On ICANN’s legitimacy, compare generally Weinberg, *supra* note 22 (arguing that ICANN’s uses of administrative law techniques, representation, and consensus have failed to establish its legitimacy), with Dan Hunter, *ICANN and the Concept of Democratic Deficit*, 36 LOY. L.A. L. REV. 1149 (2003) (analyzing ICANN as a democratic institution and arguing that democracy is an empty concept and ICANN should not be blamed for its undemocratic nature).

69. Kesan, *supra* note 3, at 115. Similarly, the claim that the UDRP “has provided good competitive incentives for domain-name dispute-resolution service providers,” *id.* at 110, makes sense only if one considers the matter from the point of view of complainants, not defendants. The dispute-resolution service providers compete to appear plaintiff friendly, which may not be everyone’s idea of “good competition.”

70. *Id.* at 115.

name registrants can influence the UDRP, but there are none in practice. The review of the UDRP promised two years ago was first blocked by the ICANN-appointed chair, then by his resignation.<sup>71</sup> No replacement was named, and the Task Force was quietly shut down.<sup>72</sup> This is not, to coin a phrase, an accident.<sup>73</sup>

As regards the proper way to resolve domain-name disputes, I would assert that ordinary courtroom litigation, with all its costs and delays, is better than the UDRP because at least the parties are on a level playing field and before a neutral decision maker. Of course, that does not prove that we could not do better still. More generally, I take issue with the claim that ICANN has had “successes.”<sup>74</sup> Perhaps from an internal view the “expansion of its influence all over the world”<sup>75</sup> is a good thing, but shouldn’t one ask if this influence is for good or ill before branding it a success? Professor Kesan seems blinded to the ugly realities by the glittering possibilities. Meanwhile, former ICANN enthusiasts have seen the scales fall from their eyes.<sup>76</sup>

I agree with Professor Kesan that the various flaws of *BBBOnline* and ICANN’s UDRP suggest we can do better. I do not think, though, as an abstract matter, that these two examples tell us enough about what that something better would look like, or that they allow much in the way of generalization, except one: Don’t do this. In particular, I do not see how these examples alone allow us to conclude with any confidence that a ‘mixed’ regime would be preferable as a general matter, as

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71. A very restrained account of the problems with the UDRP Task Force appears in Ethan Katsh’s letter to Bruce Tonkin. Letter from Ethan Katsh, Professor and Director, Center for Information Technology and Dispute Resolution, University of Massachusetts, to Bruce Tonkin, Chair of the ICANN Generic Names Supporting Organization (Mar. 2003), available at <http://www.dnso.org/clubpublic/nc-udrp/Arc00/msg00574.html> (last modified Mar. 12, 2003). The resignation letter of the UDRP Task Force Chair, J. Scott Evans, is available at <http://www.dnso.org/clubpublic/nc-udrp/Arc00/msg00575.html>.

72. The UDRP Task Force was quietly shut down at the Generic Name Supporting Organization (“GNSO”) Council meeting held April 17, 2003. See Letter from Glen deSaint Géry, GNSO Secretariat, to GNSO Council Members (Apr. 18, 2003) (providing draft minutes of the GNSO Council teleconference on April 17, 2003), available at <http://www.dnso.org/clubpublic/council/Arc12/msg00250.html> (last visited Nov. 11, 2003); see also *UDRP Review Process Closed, Renewed*, UDRPLAW.NET, at <http://www.udrplaw.net/UDRPReview.htm> (May 1, 2003) (noting with surprise that the shutdown had occurred).

73. Similarly, I disagree that, other than the idea of getting governments to pay for ICANN in exchange for Board seats, the new ICANN structure rejected most of the Lynn plan for reform. See Kesan, *supra* note 3, at 129. The final plan kept the essential ideas of the president’s “reform”: more power for insiders, less for outsiders. See generally sources cited *supra* note 57.

74. Kesan, *supra* note 3, at 122.

75. *Id.*

76. See generally Johnson et al., *supra* note 57 (criticizing the abandonment of the global consensus model).



intuitively plausible as that conclusion may be. The examples do not seem to provide sufficient evidence to rebut the hypothesis that perhaps a regime of required disclosures would suffice to get a market for privacy started. They also fail to rebut the suggestions that perhaps the question of market structure is a sideshow in light of technological<sup>77</sup> and political developments such as Total Information Awareness.<sup>78</sup>

#### IV. PARTIAL CONSENSUS

Although there are many differences, it is worth noting that the three papers exhibit a basic consensus: the Internet can, should, and will be regulated. The issue is not whether, but how. Professor Kesan's project is focused on so-called self-regulatory efforts that might free us, at least partially, from the traditional, somewhat bureaucratic, paradigms in which both the Speta and Weiser papers operate. This is a noble ambition, but if *BBBOnline* and the UDRP are representative examples of either self-regulation or business-government cooperation in action, then it is time to hug a bureaucrat.

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77. Cf. A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1501-38 (2000) (describing legal solutions to data privacy issues in light of technological developments).

78. See generally ELEC. PRIVACY INFO. CTR., "TERRORISM" INFORMATION AWARENESS (TIA), at <http://www.epic.org/privacy/profiling/tia/> (last updated Sept. 10, 2003). The TIA project is part of the Defense Advanced Research Projects Agency's Information Awareness Office. *Id.* The goal is to capture the "information signature" of people through computer algorithms and human analysis so that the government can track possible terrorists and criminals. *Id.*