OF GOVERNMENTS AND GOVERNANCE

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ABSTRACT

The Magaziner Report focuses on achieving short-term goals without giving sufficient consideration to long-term consequences affecting the structure of Internet governance and democracy in general. This overly pragmatic approach creates a paradoxical climate: overly-friendly to government intervention (in e-commerce regulation) while also overly-willing to defer to privatized governance structures (in other areas). As the recent World Intellectual Property Organization ("WIPO") domain name/trademark process demonstrates, certain Internet governance processes raise several questions, not least discerning whether such processes include adequate notice and consultation. More traditional democratic processes, such as legislation and regulation, have routinized means of giving affected parties notice of pending decisions and of soliciting public comment. Other privatized governance processes may be equally or more legitimate, but not inevitably.

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I. INTRODUCTION

The second anniversary of *A Framework for Global Electronic Commerce*[1] ("Magaziner Report") provides an almost overdue occasion to reflect on U.S. government policy towards governance of an increasingly commercial Internet. In the two years since the Magaziner Report, a trickle of e-commerce has turned into a surge, and transactional floods loom. Few, however, foresaw the extent to which this flow of commercialization would create opportunities to erode, and perhaps ultimately overwhelm, the ad hoc governance structures that created and channel the Internet.

When viewed in light of these developments, the Magaziner Report seems so focused on achieving its short-term goals that it is insufficiently concerned with the long-term consequences of its recommendations for both the structure of Internet governance and of democratic government itself. The result of this overly pragmatic approach is to create a climate for too much governance—of the wrong sort.

Before turning to the implicit institutional theory found (or not found) in the Magaziner Report, I must disclose a source of potential bias. Having been appointed as the "public interest representative" to a Panel of Experts convened by the World Intellectual Property Organization ("WIPO") to advise it on conflicts between Internet domain names and trademarks, I am embroiled in a skirmish that forms part of the global war regarding the future of Internet governance. As an international body all too willing to take up the reigns of global governance, WIPO attempted to create global e-commerce friendly rules by a process that, left to itself, seemed likely to consist predominantly of meeting with commercial interest groups and giving little more than lip service to privacy and freedom of expression concerns. While the main theaters in the Internet governance struggle are clustered around the acronym soup of ICANN[2] and DNSOs,[3] I have been

1. WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997), *available at* <http://www.ecommerce.gov/framewrk.htm> (discussing the need for a set of globally recognized commercial law rules) [hereinafter FRAMEWORK].

2. ICANN is the Internet Corporation for Assigned Names and Numbers. ICANN owes much of its authority to an agreement with the U.S. Department of Commerce. *See Memorandum of Understanding Between the U.S. Department of Commerce and ICANN* (visited Mar. 3, 1999) <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>.

3. DNSO is an acronym for "Domain Name Supporting Organization." The Commerce Department's White Paper on Management of Internet Names and Numbers—a Statement of Policy dated June 10, 1998—suggested that ICANN "could rely on separate,

resisting what one might hyperbolically call an attempted "trademark grab."[4] The experience risks turning me into a nationalist. If nothing else, it has reinforced an already strong belief that governance structures matter at least as much as the content of any ephemeral set of rules. As Jean Monnet put it, "nothing is possible without men [sic], nothing is lasting without institutions."[5] Attention to institutional issues, however, is where the Magaziner Report now appears most lacking.

II. WHOSE GOVERNANCE?

It may seem odd to accuse the Magaziner Report of insufficient attention to institutional issues when the document begins with a declaration of principles which on first reading appear to suggest close attention to the institutional design of e-commerce regulation. These five principles are:

- The private sector should lead.
- Governments should avoid undue restrictions on electronic commerce.
- Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce.
- Governments should recognize the unique qualities of the Internet.
- Electronic commerce over the Internet should be facilitated on a global basis.[6]

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diverse and robust name and number councils responsible for developing, reviewing, and recommending for the board's approval policy related to matters within each council's competence. Such councils, if developed, should also abide by rules and decision-making processes that are sound, transparent, protect against capture by a self-interested party and provide an open process for the presentation of petitions for consideration." Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,750 (1998), *available at* <http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm> [hereinafter *White Paper*].

4. For an explanation, see A. Michael Froomkin, *A Critique of RFC 3* (last modified Feb. 21, 1999) <http://www.law.miami.edu/~amf>. *See also* Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134 (for perspective on how intellectual property rights holders seek to manipulate legal rules to their pecuniary advantage).

5. JEAN MONNET, MEMOIRES 360 (1976) ("Rien n'est possible sans les hommes, rein n'est durable sans les institutions.").

6. FRAMEWORK, *supra* note 1, *Principles* 2-3.

Despite these declarations of principle, in hindsight it seems clear that what is missing from the *Framework for Global Electronic Commerce* is ... a framework. There is a vision in the Magaziner Report that might merit the word "strategic"—there is some sense that we are *here* today and we wish to navigate to be *there* tomorrow—so it could be unfair to say that the Magaziner Report is consumed by tactics. It is fair to say, however, that the Magaziner Report is consumed by short-term policies and fails to grasp the consequences of the means proposed to achieve its short-term ends for long-term global governance.

The tensions implicit in the Magaziner Report's approach to governance become evident when one considers the role contemplated for the private sector. The promise of no "undue" restrictions by government, but rather "support" and "minimalist" rules, just sufficient to "facilitate" e-commerce "on a global basis" sounds uncontroversial.[7] On the one hand, the private sector is portrayed in its heroic mode, needing only to have moribund rules removed to allow its unleashed animal spirits to carry the day. In effect, the private sector rules, or should rule. Yet, on the other hand, the private sector needs to be supported, cosseted, and to have rules optimized for it on a global basis. Thus governments have a three-faceted role. First, they duly promulgate restrictions on e-commerce when needed. Second, they facilitate e-commerce by creating simple, predictable rules. Third, they join together to do more of the same. It might be possible to keep both the promise of minimalist rules and the promise of activist intervention to make the world safe for e-commerce, but given the tenor of the Magaziner Report's general recommendations, it seems most likely that the interventionist tendency will win in any conflict between the two.

Indeed, while the rhetoric of the Magaziner Report exalts the private sector and emphasizes its autonomy, the action program in the Magaziner Report reveals a different view. Despite the free-market tone of the first principle, the Magaziner Report is far from a libertarian document. Instead, the Magaziner Report opens up the possibility of a host of new rules emanating from a variety of sources. The Magaziner Report's strategic goal is to further the adoption of what its authors believe to be the right rule set—one that creates an optimal climate for e-business—and the authors are not at all doctrinaire about where those rules should come from. Thus, the Magaziner Report proposes to work with and through whatever institutions look most poised to advance the adoption of the right rules. Sometimes this means private sector autonomy, other times it means

7. *Id.*

local/national rule-making (akin to "subsidiarity"[8]), but most often it turns out to mean some form of globalized rule-making. This is considerably more government action than one might expect from a regime of "minimalist" rules.

A. Private Sector Autonomy?

Despite the general tendency towards globalized rulemaking, there are three areas where the Magaziner Report makes a fairly strong stand for private sector autonomy. First, it gives strong support to private efforts to address basic Internet governance issues such as the problems of allocation of domain names, although in practice it turns out that these efforts are not all that private.[9] Second, the Magaziner Report supports the continued development of voluntary technical standards, which in Internet terms is akin to supporting motherhood. And, third, the Magaziner Report endorses a self-regulation regime for privacy principles in general defiance of the stronger measures suggested by the European Privacy Directive—although it warns that if self-regulation is not forthcoming, the government may find itself politically obligated to regulate. Here, private sector autonomy takes precedence over privacy.

In contrast to this vision of private sector autonomy, consider the role envisaged for the private sector in electronic payments. The Magaziner Report admits that in the short term the private sector must lead in electronic payment systems because the technology is changing too quickly for the government to regulate effectively. "In the near term," therefore, the government role is limited to "case-by-case monitoring of electronic payment experiments."[10] This is only temporary, however, for, "[f]rom a longer term perspective, ... the marketplace and industry self-regulation alone may not fully address all issues. For example, government action may be necessary to ensure the safety and soundness of electronic payment systems, to protect consumers, or to respond to important law enforcement objectives."[11] Of course, the private sector will be consulted to "ensure that governmental activities flexibly accommodate the needs of the emerging marketplace."[12] Consider also the role foreseen for con-

8. Subsidiarity is the devolution of responsibility to smaller political units in the context of a federal system.

9. *Compare* FRAMEWORK, *supra* note 1, § 4, at 11 (discussing domain name issues), *with White Paper*, *supra* note 3 (calling on a public body, WIPO, to make recommendations on domain name management).

10. FRAMEWORK, *supra* note 1, § 1, at 6.

11. *Id.*

12. *Id.*

tracting parties on the Internet. The Magaziner Report envisions a world where freedom of contract is king, and parties will be masters of their contract, right down to choice of law and forum. Nevertheless, parties should expect to bargain in the shadow of a single, world-wide, agreed U.C.C.-like set of rules to be developed at the international level.

Ultimately, in the Magaziner Report vision, the private sector will not lead; it will instead hold sway within the confines defined for it, its traditional role in a mixed capitalist economy. Strangely, it may turn out that in the Magaziner Report vision of the near future, certain private parties will find their greatest empowerment and autonomy not in the marketplace, but in the bargaining process by which the new global rules shaping that marketplace will formed.

B. Local/National Government Rulemaking

The Magaziner Report seems to find almost no role for state/local governments in the regulation of e-commerce. They do not appear often in the document, except when they are to be discouraged from levying Internet taxes. One might say that this absence follows from the international nature of the Internet. The Magaziner Report implicitly argues that if e-commerce rules are to be consistent, then policies need to be made at least at the national level, and perhaps at the global level.[13] Given that in the U.S. the primary regulatory authority for the law of sales has tended to rest with the states (with harmonization enhanced by coordinated law projects such as the U.C.C.), this would represent a larger shift towards federal or international rulemaking than perhaps the Magaziner Report lets on.

In contrast, national rulemaking figures in the Magaziner Report in two ways. First, there are a few areas which are identified as suited for straightforward national legislation. Examples include legislation on server/provider liability,[14] fraud prevention in general,[15] and the regulation of cryptography.[16] We must accept cryptography control as *sui generis*, though headed for the footnotes of history.[17] But how exactly Internet fraud became primarily a matter of federal, and even international, jurisdiction is more asserted than explained. Securities regulation excepted, most law relating to commercial fraud, like most contract law, has traditionally been a state responsibility. Perhaps the Magaziner Report's tilt

13. *See id.* § 3.
14. *See id.* § 4, at 9.
15. *See id.* § 8, at 19-20.
16. *See id.* § 6, at 15.
17. *See infra* text accompanying notes 33-35.

towards federal/international jurisdiction reflects the current U.S. reality that the majority of law enforcement and prosecutors with experience in Internet-related crime work for the larger, usually federal, departments. Some matters, such as the issuance of rules to combat online securities fraud, are properly national (although there is some concurrent regulatory jurisdiction at the state level).

Garden-variety fraud that moves off-shore presents jurisdictional problems, and new opportunities for international cooperation among law enforcement bodies, but it is less evident that it requires new substantive rules. Nevertheless, an argument might be made to justify this tilt: arguably because the Internet makes every consumer transaction feel equally local, and because absent a robust digital signature infrastructure consumers are not able to verify the nationality of a merchant,[18] potentially fraudulent consumer transactions are now more similar to potentially fraudulent securities transactions. Consumer protection law therefore must make provisions at the national and international levels for cross-border fraud, just as the securities regulation regime has done. However, no such argument is found in the Magaziner Report, and it is vulnerable to the counter-argument that the best cure is the provision of technical means such as a robust digital signature infrastructure[19] (sometimes called a "public key infrastructure" or PKI) rather than national or supra-national rulemaking.

It is easier to understand how a concern with the preservation of values of free expression leads the Magaziner Report to the assertion of national primacy when it comes to content controls and the regulation of both political and commercial speech. Indeed, the Magaziner Report states that not only will the U.S. retain full autonomy on matters of free expression, but that the U.S. will try to spread the gospel of the First Amendment throughout the world.[20] This deserves great praise because freedom of expression is far too important to be risked to the doubtful processes proposed for electronic commerce rulemaking.

C. Harmonization

Second, and perhaps even more important, nations figure as both participants and subjects in the harmonization of international law. Through-

18. *See generally* A. Michael Froomkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 OR. L. REV. 49 (1996), *available at* <http://www.law.miami.edu/~froomkin/articles/trusted.htm>.

19. *See id.* (explaining function and uses of a public key infrastructure).

20. *See* FRAMEWORK, *supra* note 1, § 8, at 18.

out the Magaziner Report one finds calls for international cooperation of various sorts, for action by international organizations, and for legal standardization generally.

International legal harmonization happens in a variety of ways, ranging from highly decentralized to top-down rulemaking. A few examples illustrate the spectrum of means that might be available.

- The most decentralized form of harmonization occurs when norms, usages of trade, *lex mercatoria*, or the like spontaneously develops within a (usually specialized) transnational (usually commercial) community.

- The second most decentralized form of harmonization happens when one jurisdiction's law becomes the de facto rule for another place, perhaps due to regulatory arbitrage. For example, if a country with excellent Internet connectivity has a policy of allowing full freedom of expression and anonymous Internet access, this policy will have effects on every other nation that chooses to allow a full Internet feed.[21]

- A third form of harmonization occurs in the context of regulatory competition, when one jurisdiction chooses to copy another's rules, whether as part of a race to the bottom, or a struggle to the top.

- Governments participate in a fourth type of harmonization when they engage in communal law reform projects, e.g. under the auspices of the United Nations Commission on International Trade Law ("UNCITRAL"), that produce model laws that are then presented to states for their enactment, much as the Commissioners on Uniform Laws in the United States produce model legislation that is presented to the states for their approval.

- Fifth, supra-national bodies are often designed and empowered to harmonize the law of member states, with the European Union and the North American Free Trade Agreement ("NAFTA") being major examples.

- And finally, although sometimes cumbersome to enact, international and especially multilateral treaties potentially are a very powerful source of legal harmonization.

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21. *See generally* A. Michael Froomkin, *The Internet As a Source of Regulatory Arbitrage*, *in* BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE 129 (Brian Kahin & Charles Nesson eds., 1997), *available at* <http://www.law.miami.edu/~froomkin/articles/arbitr.htm>.

There are innumerable differences between each of these modes of harmonization, and of course not every one will be available, much less appropriate, to serve as the solution to any given perceived problem. The key differences, however, are the extent to which these processes are democratic, and the extent to which they are subject to capture. Although a great deal depends on the nature of the issue and the circumstances, on balance it seems that among the options subject to governmental control, the option of presenting model laws to a legislature for adoption is best calculated to produce legal harmonization without sacrificing basic democratic values.

Let me quickly admit that we do not begin from the highest baseline, and that motives are sometimes purer than the word "capture" may suggest. No process of human decision making, and certainly none that involves institutions, can ever be perfectly democratic, or completely immune from capture. And certainly the lawmaking process in the United States shows signs of suffering in this department. Indeed, at a conference organized at the University of California, Berkeley less than a year ago, many joined in an effort to explore the ways in which proposed Article 2B of the UCC would favor certain commercial interests over other participants in the market.[22] That experience also serves to remind us that one person's "capture" is another person's sincere belief that optimalities are found in different places. But that experience also serves to remind us of the salutary effect of bringing one's proposal before a jury of one's professional peers—and then having to try to get it through a real legislature.

D. Law "Reform" in Action

Even in a world of shades of gray there can be better and worse. International standard-making, although not beyond capture, on the whole fits into the "better" category. The Internet Engineering Task Force ("IETF") process of long-winded discussion and peer review retains virtues even as the corporate vice-presidents are crowding into the process. In contrast, most of the processes of international harmonization proposed in the Magaziner Report strike me, on the whole, as likely to produce two kinds of processes that both fall into the "worse" category: (1) the traditional

22. *See* Symposium, *Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce*, 13 BERKELEY TECH. L. J. 809 (1998); Symposium, *Intellectual Property and Contract Law for the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Information and Commerce*, 87 CALIF. L. REV. 1 (1999).

multi-lateral treaty process, and (2) an international version of the process that produced Article 2B, without legitimating ratification by legislatures.

For all their virtues, treaties are not democracy at its finest. At best, treaties are negotiated by unelected delegates of elected officials; they get to negotiate with their counterparts and with the unelected delegates of despots. The ability of elected officials outside the executive branch, and all but the best-informed and well-financed interest groups, to influence the negotiation process is ordinarily attenuated—although in rare cases far from zero as the recent career of Senate Foreign Relations Chairman Jesse Helms demonstrates.[23] Treaties come to legislatures in a form which largely is not amendable.[24] In the U.S., treaties are subject to ratification in only one House; at times they are a means for canny administrations to get Congressional agreement to things that would never have passed both houses if seen to be of U.S. origin. Some will call the practice of using international processes to achieve results unachievable by ordinary legislation, such as the Digital Millennium Copyright Act, a form of high statecraft. Even if true, when it reaches the regulation of the ordinary commercial life of the nation, it is statecraft with significant costs: treaties are costly to break and hard to amend.

Purely private lawmaking is near the other extreme of the continuum of harmonization mechanisms. An international analog of the private lawmaking process that produced Article 2B may be even more discomforting: when the topic is international harmonization the meetings are often farther away, the air tickets and hotels cost more, and even more people are forced to disenfranchise themselves as the process drags on and their time and money become exhausted. Only those with fee-paying clients, or with obsessions, can stay the course, and yet it is only a matter of time before the twin cries of laches and estoppel are heard in the land. The result gains democratic legitimacy when adopted by a legislature, but a flawed process is nonetheless troubling because the proposals may come to the legislature with a patina of legitimacy they may not deserve.

The WIPO domain name system/trademark ("DNS/TM") process in which I have been an "Expert" participant is worse still, because the results will never have to be presented to a legislature. WIPO is a body formally composed of its member states, but blessed with an energetic, intel-

23. *See, e.g.*, Richard L. Berke & Steven Lee Myers, *In Washington, Few Trifle With Jesse Helms*, N. Y. TIMES, Aug. 2, 1997, § 1, at 1 (noting and describing power wielded by current Chairman of Senate Foreign Relations Committee).

24. Nations can ratify a treaty with reservations attached, but there are diplomatic costs to this practice.

ligent, and surprisingly well-financed Secretariat. In part at the request of the U.S. government,[25] WIPO took on the task of crafting recommendations relating to intellectual property concerns caused by the increasing use of domain names as a marketing tool. The recommendations will be passed on to the fledgling Internet Corporation for Assigned Names and Numbers ("ICANN"), a private not-for-profit California corporation charged by the U.S. government with taking over key coordination functions for the technical management of the Internet. ICANN is not formally obligated to accept WIPO's recommendations, but there is likely to be considerable political pressure for it to take some or all of them, and ICANN currently is not formally accountable to anyone.

There is no denying that the DNS/TM problem is complex. It involves conflicts caused by trying to map a trademark system that is both geographic and sectoral onto a domain name space that is world-wide and has only one .com. In addition, there are conflicts between trademark owners and those with other legitimate interests in a domain name—interests that range from nicknames and surnames to criticism and parody. In addition, there are conflicts caused by speculative behavior and hoarding (sometimes termed "cybersquatting" or "cyberpiracy"), or outright attempts to deceive by passing off one site as associated with another's brand.

WIPO responded to this challenge by proposing that ICANN use its (arguable) leverage over the bodies that will control the databases of mappings between Internet domain names and IP numbers to impose a series of contractual duties on all users of those databases.[26] Details aside, the key point is that WIPO proposed a series of contracts of adhesion that would result in every registrant in .com, .net, or .org having to agree to a loser-pays arbitration under substantive rules that likely would differ from the laws applied by a competent court. No treaty or legislation would be required. As the arbitrators would be instructed to supplement applicable national law with certain "principles" identified by WIPO, some results likely would differ from what a court would do. At this writing, the final report has not been written, and there remains at least some hope that it will be much changed from an Interim Report that I believe is biased in favor of intellectual property rights holders.[27]

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25. *See White Paper*, *supra* note 3.

26. *See* World Intellectual Property Organization, *The Management of Internet Names and Addresses: Intellectual Property Issues* (Dec. 23, 1998) <http://wipo2.wipo.int/process/eng/rfc_html> (Interim Report of the WIPO Internet Domain Name Process) [hereinafter *WIPO Interim Report*].

27. *See* Froomkin, *A Critique of RFC 3*, *supra* note 4.

The WIPO process represents an innovative experiment in negotiation between a United Nations body and the private sector. Once having authorized the initial process, the member states have been conspicuous by their absence, at least as a formal matter, except as commentators in response to the various "requests for comments" authored by the Secretariat staff. Regardless of the merits of the WIPO proposals, there can be little debate that the public participation in the process has been dominated by intellectual property rights holders and their lawyers and trade associations.[28] Similarly, the Secretariat staff appear to be very sincerely committed to WIPO's mission of the promotion of intellectual property rights—so much so that to even think about "capture" almost seems besides the point.

The WIPO DNS/TM process has certainly been public in a formal sense, with a series of meetings around the world, and web pages displaying documents and public comments. But public participation has been low for a number of reasons, including poor publicity outside the intellectual property community, and especially the competition for the attention of the relatively small number of people focused on the issue of Internet governance. Most of them understandably have focused on decisions relating to the structure of ICANN rather than on a merely advisory report, even one likely to be influential. Turnout at the public hearings I have attended has been small—usually under 100 and sometimes about 50, and (with the exception of the Washington D.C. event that followed a publicity campaign I organized) comprised almost entirely of trademark lawyers or Internet service providers.[29] There have also been over 150 e-mailed comments.

The dearth of consumer representatives, public interest groups, and citizens groups participating in the WIPO process should serve to remind us all of the many reasons why we entrust major aspects of social policy making to elected officials. Legislatures and national executives are not paragons of rectitude. But when they are elected, the same political proc-

28. Since I delivered this paper in Berkeley the balance has been somewhat redressed, in substantial part due to the written comments to WIPO by several members of the conference audience. *See, e.g.*, Kurt Opsahl, *Law Professors, Academics, Students, Attorneys and Industry* (last modified Mar. 19, 1999) <http://wipo2.wipo.int/dns_comments/rfc3/0164.html> (submitting letter signed by more than 60 opponents of RFC 3).

29. I base this on my attendance at the Toronto, Rio de Janeiro, Brussels and Washington, D.C. second round consultations. Transcripts of these hearings, and the Singapore and Dakar hearings also, will be available at <http://wipo2.wipo.int/process/eng/consult2.html>.

ess that may make them over-solicitous to those bearing campaign contributions imposes some form of accountability to the public at large. Equally important, presentation of a matter to an elected official is a way of putting a question onto the public agenda. WIPO has a very nice set of web pages that lay out the issues at stake in the DNS/TM process and lay out the schedule for its public meetings in various world capitals.[30] There is no particular reason, however, to assume that anyone is necessarily going to know that those web pages are there, or would necessarily visit them. In contrast, a hearing in front of a subcommittee, a vote by a house of Congress, or even a publication of a proposed rule in the federal register by an unelected bureaucrat, would serve to put the public (in one country) on notice in a tolerably effective way—at least in a routine and knowable way—of the rules that someone proposes to lay down upon them.

Indeed, it is not obvious that all the relevant portions of governments understood what was going on. WIPO sent notices of its proposals to every one of its member states, but one suspects from the responses received that these were directed at the patent and trademark offices with which WIPO ordinarily corresponds.[31] Whether these notices were then circulated to other departments is hard to ascertain.[32]

E. Is E-Commerce Harmonization Necessary?

The world envisioned by the Magaziner Report, at least in the parts that use the rhetoric of the leading role of the private sector, is one in which the contractual autonomy of parties extends to making enforceable contracts with choice of law and choice of forum. Competent parties with the ability to pick law and forum may not need as much international legal harmonization. Whether harmonization is necessary becomes doubly important if the processes used for achieving harmonization create or deepen a democratic deficit.

Undoubtedly, there are areas where some harmonization is required. Without basic plumbing such as the recognition and enforcement of electronic contracts, online commerce cannot flow safely. After the basics,

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30. *See, e.g.*, *World Intellectual Property Organization Internet Domain Name Process* (visited Apr. 6, 1999) <http://wipo2.wipo.int/process/eng/processhome.html>.

31. Comments and responses are available at <http://wipo2.wipo.int/dns_comments/rfc3/index.html>.

32. At least within the U.S. government, consultation was imperfect. Eric Menge, Office of Advocacy, U.S. Small Business Administration, Statement at the WIPO consultative meeting (Washington, D.C.) (Mar. 10, 1999) (stating that he had only learned of the proposals a week earlier).

however, clarity will ordinarily suffice if parties have the autonomy to contract around legal impediments. From a government's point of view, the major areas that require additional harmonization are those where risks exist that citizens will engage in undesirable forms of regulatory arbitrage or that consumers will be preyed upon by the unscrupulous. Governments and all those who consider taxes the price of civilization have a common interest in controlling opportunities for tax avoidance and evasion. Similarly, governments concerned about various law enforcement issues, especially the control of money laundering, may have common cause to make inter-jurisdictional agreements for the regulation of electronic cash and transborder deposit-taking. And, considerations of consumer protection (which the private sector tends to lean against rather than lead) may argue for rules requiring transparency or rules regularizing expectations.

Other forms of regulatory arbitrage suit U.S. interests. The Magaziner Report correctly identifies the enhancement of freedom of expression as something too valuable to risk to a multilateral process designed to create some international set of content controls. Given our federal system, however, it seems a little odd to find not only that subsidiarity is mostly absent from the Magaziner Report, but that the contribution of nations as "big labs of democracy" is not recognized.

III. CONCLUSION

Hindsight, of course, is a beautiful thing. Two years ago, when the Magaziner Report first issued, I saw none of this. Instead I was excoriating the Magaziner Report for failing to take a principled stand on reform of cryptography regulation. At the time, I thought that one of the best things the government could do for e-commerce would be to reverse its twin policies of manipulating markets to favor cryptographic "key escrow" and its long-standing ban on the export of meaningful cryptography. Unable to make headway against the Administration consensus in favor of those policies,[33] the Magaziner Report echoed the Janus-like pronouncements that the Administration supported strong cryptographic security measures, so long as one did not have enough to ensure true security and went on to

33. *See generally* A. Michael Froomkin, *The Metaphor is the Key: Cryptography, the Clipper Chip and the Constitution*, 143 U. PENN. L. REV. 709 (1995), *available at* <http://www.law.miami.edu/~froomkin/articles/clipper.htm>; A. Michael Froomkin, *It Came From Planet Clipper*, 1996 U. CHI. L. FORUM 15, *available at* <http://www.law.miami.edu/~froomkin/articles/planet_clipper.htm>.

other things.[34] Today, as strong consumer cryptography spreads around the globe, the Magaziner Report's timidity on this issue almost seems the better part of valor. With even France proposing to liberalize its rules to allow unrestricted use of 128-bit cryptography,[35] it seems increasingly likely that U.S. policies restricting the spread of strong consumer cryptography are becoming irrelevant. Strong cryptography may not be built into Windows 2001, but it will be in the operating system of the near future.

The same social process that is making U.S. cryptography policy increasingly irrelevant internationally suggests that top-down regulations of the type proposed in the Magaziner Report may become irrelevant too. If that scenario is at all real, it may be one more reason to balk at processes that do not have a democratic pedigree. If the private sector is poised to lead from the bottom up, perhaps we should celebrate that, not stomp on it, even (especially) if the redistributive effects of this evolution disadvantage large, established parts of the corporate sector at the expense of small companies arising in the new web-based economy. But it is one thing to celebrate market-driven outcomes (corrected for market failures), and to value market-making technical standardization. It is quite another thing to tolerate private sector leadership when it clothes itself in the guise of "bottom-up rulemaking" but actually seeks to use government or government-like power to lock in advantages enjoyed by established firms, often at the expense of consumers or new competitors.

The real challenge comes in telling legitimate processes apart from the others. True "bottom-up" outcomes are entitled to respect. Not every privatized rulemaking procedure carries the same legitimacy, however. The WIPO process in which I participated involved limited consultation, and opaque decision-making as the reports and recommendations were all written by the Secretariat staff in secret. It featured what appeared from my admittedly partisan perspective to be disproportionate input by trademark holders (as opposed to actual and would-be domain name holders without trademarks), especially in the period before I began to kick up a

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34. True security would make it difficult or impossible for law enforcement and intelligence agencies to intercept communications when they, and a court, believe it necessary.

35. *See Conférence de presse de Monsieur Lionel JOSPIN, Premier ministre, à l'issue du Comité interministériel pour la société de l'information Hôtel de Matignon* (Jan. 19, 1999) <http://www.premier-ministre.gouv.fr/PM/D190199.HTM>; *see also Décret n° 99-199 du 17 mars 1999 définissant les catégories de moyens et de prestations de cryptologie pour lesquelles la procédure de déclaration préalable est substituée à celle d'autorisation* (Mar. 19, 1999) <http://jya.com/decret031799.htm>.

fuss. Rather than be presented to one or more legislatures for ratification, the result will be presented to ICANN, a private non-profit corporation, and if accepted by ICANN will be imposed contractually on all registrants in global top-level domains. This contrasts with the adoption of a technical standard which, at least until the network effects kick in, attracts adherence without the need for any form of external pressure or coercion.

The WIPO process also contrasts with democratic processes. Democratic societies, and especially the U.S., have evolved elaborate techniques for giving notice of upcoming decisions, and making it possible to spot capture in the lawmaking process. Various countervailing advocacy and special interest groups monitor the legislative process seeking to represent the interests of the public or segments of it. Relative to the size of the need, the equivalent public sector is much more attenuated at the international level, and monitoring is in any event much more difficult as institutions are less transparent and much more diverse and spread over the world. As a result, even active citizens and legislators are less able to weigh the results of internationalized rulemaking processes, not least because they cannot have confidence that if the process was seriously deficient someone would blow the whistle. Even the existence of a self-proclaimed whistle-blower is not enough: there is no particular reason to believe that the people claiming a substantive or procedural flaw have a way of getting the attention of relevant auditors, nor for thinking that the auditors have any way of judging the credibility of the source even if they happen to hear the communication.

The difference between the governance procedures endorsed by the Magaziner Report, of which the WIPO process is but one example, and true bottom-up rulemaking can be analogized to the difference between a proprietary standard and Open Source software.[36] Like a manufacturer choosing a proprietary standard, in the WIPO process a single body makes decisions, in relative privacy, after soliciting the degree of input it feels is appropriate. The outcome of the process ought then to be launched on the marketplace of ideas. Instead, the proprietary legal standard threatens to become dominant in its category because ICANN will present consumers with a *fait accompli*. In its Interim Report, WIPO proposes that ICANN impose WIPO's ideas on registries, who would in turn impose them on registrars who would in turn be required to impose them on domain name

36. On Open Source software, see *GNU General Public License* (visited Apr. 6, 1999) <http://www.gnu.org/copyleft/gpl.html> (text of model license); Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 STAN. L. REV. 1487 (1997). I owe the analogy to a conversation with Patrick Gudridge.

registrants.[37] This is more lock-in than is allowed in product markets; even Microsoft's efforts to lock in a large market share by making Windows the required default option on all personal computers sold by a given manufacturer could be reversed by the consumer. It also contrasts with the propagation of open source software, which can freely be copied or modified by anyone so long as the source is open and it is licensed for free. The terms of the open source license are imposed on subsequent designers who choose to incorporate or user of the code, but the decision whether to use the code is left to them.

Undoubtedly it was not the intention of the Magaziner Report to endorse proprietary private lawmaking. We accept proprietary legal solutions when they emanate from a legislature, whatever the source of the original draft. Legal solutions pioneered by judges we often dub "common law"[38] and count on competition between states to produce the best, or a range of acceptable solutions. Other models still must prove themselves.

37. *See WIPO Interim Report*, *supra* note 26, ¶¶ 57, 101, 142, 221.

38. Matters are more complex in the statutory context, where we sometimes dub judicial creativity "common law-like"—and yet more complex in the constitutional context.