

BOOK REVIEW*

The Regulation of Cyberspace: Control in the Online Environment

by ANDREW MURRAY

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Debate over whether the Internet could or should be regulated has swung significantly over the past decade. John Perry Barlow's 1996 'Declaration of the Independence of Cyberspace'¹ ('Declaration') was a revolutionary call for traditional, nation-state regulation to 'leave the Internet alone'. In 1999, in *Code and Other Laws of Cyberspace*,² Lawrence Lessig published a powerful response citing ways in which Internet regulation existed, even within software code itself. Benkler's *The Wealth of Networks*,³ together with Goldsmith and Wu's *Who Controls the Internet: Illusions of a Borderless World*,⁴ arguably represent the high-water mark in the counter-revolution against Barlow's Declaration, each highlighting how nation-states can control large portions of the Internet through the banking system, domain name space and choke-points in the physical network.

If one accepts the claim that the Internet can be regulated, the ensuing questions are whether it *should* be regulated, and *how* this should occur. Governments around the world have swiftly shown their clear intentions (to greater or lesser degrees) that the Internet should and will be regulated. Consequently, various legal mechanisms, from statutes through to self-regulatory codes of conduct, have emerged in numerous jurisdictions as a means of regulating portions of activities involving the Internet over the past ten years.

Mueller's 2002 book *Ruling the Root*⁵ examined many of the challenges posed in trying to meld together legal concepts such as legitimacy, regulatory theory and procedural fairness with technical and policy regulation. In so doing, Mueller exposed many perceived flaws in ICANN's administration of the domain name

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1 John Perry Barlow, 'A Declaration of the Independence of Cyberspace' (1996) <<http://homes.eff.org/~barlow/Declaration-Final.html>> at 11 October 2007.

2 Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999). An updated version of this book is available online <<http://codev2.cc/>> at 11 October 2007.

3 Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006).

4 Jack Goldsmith and Timothy Wu, *Who Controls the Internet? Illusions of a Borderless World* (2006).

5 Milton L Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* (2002).

space. These ideas were also developed by Paré in *Internet Governance in Transition*⁶, particularly in relation to the ‘.uk’ domain.

Over the course of the last decade, academic debate concerning the regulation of the Internet has progressed to incorporate the broader issue of the effectiveness of regulation in general. The very idea of ‘regulating the Internet’ requires that those attempting to do so possess a detailed understanding of the relative strengths and weaknesses of a variety of forms of regulation, together with an understanding of the code, norms, markets, architecture and institutional history of the Internet. A failure to fully comprehend each of these aspects leaves any potential regulator at risk of manipulation by a variety of rationally self-interested stakeholders with agendas aimed squarely at skewing the benefits of the Internet in their own favour.

Andrew Murray’s *The Regulation of Cyberspace: Control in the Online Environment* is a very useful addition to this important debate. In Part A, Murray seeks to map the debate over the cyber-regulatory environment, recounting the famous academic dispute between Barlow / Johnson, Post / Lessig and Easterbrook / Sommer over whether cyberspace law differed from the ‘Law of the Horse’, finding (perhaps unsurprisingly) in favour of the validity of cyber-law as an academic discipline.

Murray identifies four modalities of regulation in cyber-space: hierarchical control; competition-based control; community-based control; and design-based control. He argues that regulatory settlements are only ever temporary equilibria, frequently disturbed by technological change, the entry of powerful new stakeholders, and the flow-on effects of changes to other, vaguely-connected, regulatory settlements (a useful insight from multi-dimensional game-theory).

Murray takes the view that regulators attempt to consciously design regulatory systems. Unfortunately, this analysis understates the influence of stakeholders, some of whom (particularly those with sufficiently concentrated, resourced and organised interests) are rarely passive in their dealings with those regulators. The power of VeriSign in its negotiations with ICANN over the renewal of the ‘.com’ registry agreement bears testament to this.

The book then surveys historical debates over the regulation of radically new technologies such as radio and moving pictures, showing once again that debates over whether to regulate ‘new technologies’ are not in fact new. As an example of the changing nature of regulatory settlements over time, Murray provides an excellent historical analysis of the development of copyright law from 1583 to the modern day, chiding other copyright scholars for starting their analyses with the *Statute of Anne 1710* and, consequently, leaving out the prior agendas of various stakeholders which significantly influenced that seminal piece of legislation. Unfortunately, whilst Murray’s history of the development of the ARPANET into the Internet is detailed, one notable absence is a discussion of the

6 Daniel Paré, *Internet Governance in Transition: Who is the Master of this Domain?* (2003).

important role played by the law firm Jones Day Reavis & Pogue,⁷ legal counsel to Jon Postel and ICANN.

Murray argues that competition, society and hierarchy are the primary forms of regulation and that code as regulation is subservient to the influence of those primary forms. Murray also avoids a failing of many Internet libertarians by recognising that markets are imperfect and that there is a (limited) need for regulation which attempts to correct their failings, particularly in situations where online activity imposes off-line externalities. This is usefully highlighted in two case studies which contrast the influence of feedback from online-community members in case studies of ticket-scalping on eBay and child-pornography on p2p networks.

The book provides a brief overview of different philosophical understandings of the nature of communities (the social contract), how they should be formed and governed and the relationship between the governed and government, focusing on Hobbes, Locke and Rousseau. As one of the goals of this book was to provide a broader (non-US) perspective on Internet governance, the book would have benefited from the inclusion of viewpoints from non-Western scholars.

The Regulation of Cyberspace provides a useful addition to the growing field of internet regulatory theory. It builds upon the groundwork of non-US perspectives set out in Paré's *Internet Governance in Transition* and Wass' edited book *Addressing the World*.⁸ Murray's book usefully links the debate over Internet regulation with a broader, less technologically-driven literature on regulation, highlighting that much of the debate over Internet regulation is not new but in fact merely represents the latest iteration of a complex, contested regulatory bargaining process which has occurred for centuries.

Scholars of the Internet and scholars of regulation have much to learn from each other. Effective Internet regulation requires the development of a common language and a conceptual framework across such diverse scholarly disciplines as computer science, law, economics, sociology and philosophy. This process will take substantial time; however, Murray's book highlights the fact that complex regulatory problems require complex analyses in order to develop useful solutions.

Concluding with the Rumsfeldian (but still accurate) declaration, '[f]or knowing what you do not know is as important as knowing what you do', *The Regulation of Cyberspace* ultimately argues that while some regulation in cyberspace is possible, it is vitally important to recognise the limitations of all

7 Jones Day Reavis & Pogue (now known as Jones Day) is ICANN's external general counsel; see <http://www.jonesday.com/experience/experience_detail.aspx?exID=S4300> at 11 October 2007.

8 Erica Schlesinger Wass (ed), *Addressing the World: National Identity and Internet Country Code Domains* (2003).

types of regulation in achieving both their desired objectives and often unintended consequences.

This is an excellent book for academics, lobbyists and policy-makers and will stimulate further inter-disciplinary research into the role of institutions in regulating the Internet.