

An abstract graphic of a circuit board pattern, featuring black lines and circles of varying sizes, some with white centers, set against a light blue background. The pattern is dense and complex, resembling a network or data flow.

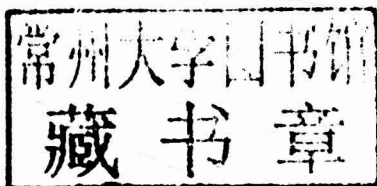
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Lee A. Bygrave

Internet Governance by Contract

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Preface

Contract is extensively used as the principal legal means for governing much of the Internet and its virtual worlds. Coupled with this contractual predilection is widespread reluctance to develop statutory measures in the field. How and why such a situation has arisen, what its extent is, and whether and when it is desirable, are the questions around which this book revolves. They are important questions given the Internet's centrality to many facets of our lives. Their importance is augmented by on-going controversy over purported abuses of contractual power by various providers of Internet-based services.

The book is largely the fruition of a research project titled 'Governance of the Domain Name System and the Future Internet: New Parameters, New Challenges' (Igov2'). The project has been conducted over the last four years under the aegis of the Norwegian Research Center for Computers and Law (NRCCL) attached to the Department of Private Law, University of Oslo. One of the lines of research in the project has been to assess the relative utility of respectively (i) contractual mechanisms and (ii) legislative and treaty-based mechanisms for global governance structures pertaining to the Internet generally, albeit with a focus on the Internet naming and numbering system.

Funding for the research has come mainly from the Norwegian Research Council and UNINETT Norid AS. The research has also been supported by EINS, the Network of Excellence in Internet Science (<www.internet-science.eu>) funded through the European Commission's 7th Framework Programme under Communications Networks, Content and Technologies (Grant Agreement no.288021). The financial support and other assistance from each of these organizations is much appreciated.

Poignant thanks are owed to Jon Bing who died in January 2014. Jon was a close colleague and my most important mentor over the last two decades. It was he who awakened my appreciation for the regulatory significance of the contractual framework for the Internet naming and numbering system. The Igov2 project team was extremely fortunate to have him as one of its members. His keen intelligence and insight have been invaluable for much of the analysis presented in the book, and they will be sorely missed in the future. Jon was one of the pioneers of legal research on computer technology. His death has left a gaping hole in the extended family of legal scholars working in Internet governance and related fields. I dedicate the book to the memory of his unique combination of genius, generosity, empathy, and vision.

I am also grateful to my other colleagues on the Igov2 project—Emily Weitzenboeck, Tobias Mahler, Kevin McGillivray, Francis Augusto Medeiros, Samson Esayas, Larry Solum, and Wolfgang Kleinwächter—along with Graham Greenleaf, Chris Marsden, Dan Svantesson, Matthew Rimmer, and Rolf H. Weber

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At Oxford University Press, thanks go to Ruth Anderson for her whole-hearted support of the book's publication, and to Eleanor Reedy for friendly help in getting it finalized.

References to legal instruments are to their amended form as of 1 September 2014, and all cited websites were last accessed on that date.

Lee A. Bygrave

Oslo

1 September 2014

List of Abbreviations

AOC	Affirmation of Commitments (between ICANN and DOC)
AOL	America Online
B2B	Business-to-Business
B2C	Business-to-Consumer
ccTLD	country-code Top-Level Domain
COE	Council of Europe
DARPA	Defense Advanced Research Projects Agency (USA)
DNRA	Domain Name Registration Agreement
DNS	Domain Name System
DOC	Department of Commerce (USA)
DRMS	Digital Rights Management System
FOSS	Free and Open-Source Software
GAC	Governmental Advisory Committee (ICANN)
GPL	General Public Licence
gTLD	generic Top-Level Domain
IAB	Internet Architecture Board
IANA	Internet Assigned Numbers Authority
ICANN	Internet Corporation for Assigned Names and Numbers
ICT	information and communication technology
IETF	Internet Engineering Task Force
IGO	Intergovernmental Organization
IP	Internet Protocol
IPR	Intellectual Property Rights
ISOC	Internet Society
ISP	Internet Service Provider
ITU	International Telecommunications Union
LEA	Law Enforcement Agency
MOU	Memorandum of Understanding
NGO	Non-Governmental Organization
NSF	National Science Foundation (USA)
NSI	Network Solutions, Incorporated
OECD	Organisation for International Co-operation and Development
OSN	Online Social Network
PDP	Policy Development Process (ICANN)
RA	Registry Agreement
RAA	Registrar Accreditation Agreement
RFC	Request for Comment
RIR	Regional Internet Registry
SRR	Statement of Rights and Responsibilities (Facebook)
TCE	Transaction Cost Economics
TCP	Transmission Control Protocol
TLD	Top-Level Domain

TPR	Transnational Private Regulation
UDRP	Uniform Domain Name Dispute Resolution Policy
W3C	World Wide Web Consortium
WSIS	World Summit on the Information Society

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1

Introduction

A. The Book's Remit

This book elucidates the role of contract in governance of the Internet. In so doing, it examines the reasons for that role and discusses the utility and legitimacy of contractual governance mechanisms. The book also pays some attention to the equivalent role of legislation, charting its interaction with contract. The book's basic premise is that contract plays a key part in Internet governance; accordingly, the latter cannot be properly understood without explaining its attendant contractual frameworks.

A central aim of the book is to make a solid first pass at providing such explanation. Part of that aim is to map the often vague and shifting legal contours of Internet governance, update older maps of the field, and define the field's parameters in a way that is amenable to legal analysis. At the same time, the book is an attempt to contribute to legal-political discussion over the utility and legitimacy of transnational private regulation (explained in section D). In that respect, it is particularly concerned with assessing the power relations that are embedded within contractual schemes and with the balance of power between private and public ordering in Internet governance generally.

On a more abstract level, the book can also be regarded as contributing to policy discourse on 'metagovernance'—that is, the co-ordination of hierarchies, networks, and markets. I use these terms in the same way as Louis Meuleman, who defines 'metagovernance' as 'a means by which to produce some degree of co-ordinated governance, by designing and managing sound combinations of hierarchical, market, and network governance'.¹ The three categories of governance represent ideal types whereof: (i) 'hierarchy' denotes top-down management involving, *inter alia*, imposition of strict accountability procedures and strong preferences for planning and legally binding measures; (ii) 'market' denotes relatively decentralized, competitively based management that stimulates use of contract; while (iii) 'network' refers to more heterarchical, egalitarian, and informal management based on reciprocity and trust.² In practice, elements of these categories often overlap—as the findings of this book testify.

¹ Louis Meuleman, *Public Management and the Metagovernance of Hierarchies, Networks and Markets: The Feasibility of Designing and Managing Governance Style Combinations* (Heidelberg: Physica-Verlag, 2008) 68.

² Meuleman (n 1) 21ff, 329–50.

In keeping with its remit of delineating basic regulatory patterns in Internet governance, the book generally focuses on the function and structure of contracts rather than their content. This does not mean that coverage of the latter is avoided—after all, content impacts upon function and vice versa. Yet, the book tends to forgo extensive, clause-by-clause analysis of contractual terms with a view to determining, say, their proper meaning. To the extent these are analysed, it is usually with a view to explaining matters of function, along with the role played by contract in the broader regulatory landscape.

The book presents a transnational and trans-systemic perspective on the role of contract. In other words, it takes account of legal developments across jurisdictions and within both common law and civil law systems. However, it does not pretend to cover all jurisdictions. There undoubtedly exist contractual or other regulatory practices (particularly in developing countries) which the book does not pick up but which might be noteworthy in light of its aims. Thus, some of the conclusions I advance herein about the role of contract in Internet governance must be treated as simply ‘working hypotheses’ or ‘extrapolations’ in Patton’s terminology.³

Moreover, much of the analysis is slanted towards rules and practices in common law systems. This is due partly to my greater expertise in those systems than those of civil law. Yet, it is due in larger measure to the fact that common law jurisdictions, especially the USA, are home to many of the oldest and most ambitiously conceived contractual regimes in the field of Internet governance.

While much of the book is descriptive, it does advance arguments. The central thesis is that Internet governance by contract has now become, in particular areas, so complex and hierarchical that it suffers from some of the weaknesses typically attributed to legislation. Its putative advantages over statutory schemes in facilitating flexible, light touch, simple governance are thus eroding. I further argue that an important reason for this development is the ease with which contract can be used to govern the minutiae of the digital world—a capability that is often exploited extensively.

It bears emphasis that while the book is essentially a work of legal scholarship, it is written for a generalist academic readership. I have accordingly tried to minimize use of legal jargon and to explain it in simple terms where its use is unavoidable.

B. The Book’s Rationale

As elaborated in the following, the governance structure for the Internet has been formed largely outside a treaty or other legislative framework that is

³ Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (3rd edn, Thousand Oaks, California: Sage Publications, 2002) 584 (‘Extrapolations are modest speculations on the likely applicability of findings to other situations under similar, but not identical, conditions. Extrapolations are logical, thoughtful and problem oriented rather than statistical and probabilistic’).