ICANN and its Responsibilities to the Global Public Interest

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In 1998, the United States government might have taken a different path in asserting its control over the technical administration of the DNS. It might have asserted full U.S. governmental control, or it might have turned over the functions to an international body such as the International Telecommunications Union. Instead, it created a “private-public partnership”, incorporated as a California “nonprofit public benefit corporation”, with a charter giving the company a dual mission of quasi-governmental functions combined with responsibility for operational stability of the Internet.

In all its deliberations, the ICANN Board must maintain a balance in its mission of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet. ICANN has the responsibility to draw the fine line dividing two contrasting areas, one where it should not go, and the other where it risks not doing enough. On the one hand, ICANN cannot become involved in areas such as content control and rule making in areas unrelated to operational stability. On the other hand, ICANN's self image as technical coordinator has at times constrained it from taking action necessary to discharge its public interest obligations, such as, for example, requiring registrars to comply with their contractual obligations.

ICANN's recent attempts to find a way to insert new top level domains in the root zone file illustrate the difficulties of achieving this balance. From a purely technical point of view, there is room for many additional new gTLDs in ASCII and in IDN.IDN versions. There are concerns about stress on the root zone, but it appears that this is a manageable risk, and ICANN is taking responsible steps to deal with it.

On the other hand, the whole question of how new generic top level domains would serve the public interest has never been openly considered by ICANN. The current proposal for an Expression of Interest proceeding illustrates this. Instead of being a straightforward determination of who might want to apply, the proceeding risks becoming an avenue for well-financed commercial applicants who treat the domain name system as a species of investment opportunity comparable to real estate. This is a far cry from the public interest in making names available to people who want to use them.

The proposals for selection of new top level domains present even more serious problems. There will very likely be multiple applicants for some popular strings, and ICANN has the job of selecting from among the competitors. There will also likely be applicants for strings that are obscenities or phrases intended to inflame social or religious conflict. From the standpoint of ICANN's obligation to serve the "global public interest in the operational stability of the Internet", ICANN cannot allow these into the root.

In addition, there is the continuing problem of minimizing trademark infringement opportunities. For better or worse, the United States government demanded in 1998 that ICANN become the enforcer of a global system of trademark rights. This quasi-governmental function, in the form of the UDRP, became part of the otherwise more technical duties assigned to ICANN. The extension of this involvement with trademarks is possibly the most serious test of ICANN's abilities to promote the public interest.

ICANN's Draft Application Guidebook (the "DAG") for new gTLDs attempts to find the appropriate mechanisms for taking into account the sometimes conflicting responsibilities described above. The first and second drafts, issued in October 2008 and February 2009, respectively, were not successful in many respects.

These drafts demonstrate, all too clearly, ICANN's reluctance to face its public interest responsibilities. ICANN proposes to create a system of independent decision makers to decide such questions as likelihood of confusion between different proposed strings for new gTLDs, alleged infringement of legal rights by a proposed string, and objections based on morality, public order and community objections. Of these, the first and second are probably amenable to objective determinations based on internationally recognized principles of trademark law, although there are serious questions as to how far ICANN should go in creating what amounts to international law. As to the questions of morality, public order and community objections to applications for new gTLDs, these can only be tested against conceptions of the public interest. ICANN apparently believes that getting a third party to do this work relieves ICANN of its responsibilities. There are two problems with this approach. First, there is nothing to indicate that any third party has either the expertise or authority to make these judgments better than ICANN, and second, ICANN's mission to serve the public interest does not allow it to delegate its responsibilities to outsiders.

Further, ICANN apparently hopes that its self-serving requirement that all gTLD applicants waive all legal claims against ICANN will insulate it from litigation. ICANN is certainly justified in its fear of litigation. As a creature of California law and subject to US federal law, this risk is always present. However, attempts to pass off to third parties ICANN's obligations to make judgments about the public interest will not lessen this risk, and may in fact increase it. The waiver of legal claims applies only to applicants for new TLDs, not to third parties that may be adversely affected by the process.

As another example of ICANN's failure to face up to its responsibilities, ICANN proposes to create independent evaluation panels to choose from among conflicting applicants for the same new gTLD string. The call for expressions of interest states that evaluators must be capable of exercising *subjective* judgment. ICANN may have a legitimate need to consult with outside experts, but they cannot be allowed to make the final decisions. There are no grounds

for a belief that a third party's subjective judgment would give better results than decisions made by ICANN's Board. The Board clearly must face up to its responsibility to make judgments in the public interest, based on the experience and expertise of the Board members.

To ICANN's credit, it finally realized that there is a connection between the creation of large numbers of new gTLDs and the public interest in preventing a vast increase in cybersquatting and the spread of fraudulent practices. The first two drafts of the DAG neglected to deal this issue in any serious way, but since then ICANN has taken steps "to develop and propose solutions to the over-arching issue of trademark protection..." It is still an open question whether or not ICANN's current proposals will be adequate to serve the public interest in protection of the legitimate rights of trademark owners.

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ICANN has not been so successful in dealing with other overarching issues. In October, 2006, ICANN's Board asked that a comprehensive economic study be completed before the introduction of new gTLDs, but it was never made. Instead, ICANN produced economic studies that purport to justify its proposals for a radical change in the policy of separation of registry and registrar functions. Whether or not this change will serve the public interest will apparently be judged by the results of the experiment, and not by a considered weighing of relevant evidence.

Even when ICANN grasps the concept of its public interest responsibility, it does not always come up with a reasonable approach to a particular problem. For example, the current proposed base agreement for new registries includes a provision allowing ICANN to amend the agreement unilaterally. While there may be a need from time to time to take account of changing circumstances, this brute force approach can hardly be justified as serving the public interest in a stable relationship between ICANN and the new registries.

Despite the concerns outlined here, ICANN has done most of the right things it was created to do and it continues to deserve our support. It is very unlikely that a single government or international organization could better fulfill the obligations undertaken by ICANN. However, a lot of work remains to be done, and ICANN must pay a great deal more attention to its global public interest responsibilities.

APPENDIX

The Legal Framework in which ICANN Operates

ICANN is incorporated as a "nonprofit public benefit corporation"[1] under the laws of the state of California, and is subject to both state and federal law in the United States. ICANN's corporate charter provides that it has two "charitable and public purposes," namely, "lessening the burdens of government and promoting the global public interest in the operational stability of the Internet. . . ."[2] Typically, for a corporation operating in the United States, its charter enumerates specific powers and also contains some broad general language:

> "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."[3]

The language quoted, together with ICANN's bylaws and the series of agreements with the United States Department of Commerce[4], provides the basic legal framework for ICANN's activities. Although the charter appears to give ICANN extremely broad powers, there are significant limitations imposed both externally and internally.

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[1] *Articles of Incorporation of the Internet Corporation for Assigned Names and Numbers* (*"Articles"*), Sec. 3, available at http://icann.org/general/articles.htm, Sec. 3.

[2] id., Sec. 3. These purposes are qualified by a listing of certain specified activities, followed by a conventional catch-all empowerment (subparagraph v):

> "…the Corporation shall . . . pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv). ."

[3] id., Sec. 4

[4] The original agreement between ICANN and the U.S. Department of Commerce is the *Memorandum of Understanding between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers (*"*DoC MoU*"*),* available at: http://icann.org/general/icann-mou-25nov98.htm. The DoC MoU has been amended six times; the seventh amendment is known as the *Joint Project Agreement* (*"JPA"*) and is available at: <http://icann.org/general/JPA-29sep06.pdf>. A separate agreement requires ICANN to operate the Internet Assigned Numbers Authority ("IANA"); the current version is available at: <http://www.icann.org/en/general/iana-contract-14aug06.pdf>

The agreements with the Department of Commerce limit ICANN's powers over the technical management of the domain name system. In a pleading filed by ICANN before a U.S. District Court in 2000, the General Counsel of ICANN said: "ICANN cannot, and has no legal authority to, implement new top level domain names; that authority currently resides in the Department of Commerce, ..."[5]

Internally, ICANN's Bylaws include its "Mission and Core Values" that require ICANN to coordinate "policy development reasonably and appropriately related to [ICANN's] technical functions" and "[t]o the extent feasible and appropriate, [to delegate] coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties." [6] The Core Values further include:

> "Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making" and "While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations." [7]

In a Fact Sheet on ICANN's web site, there is a further explanation of ICANN's policy making procedures:

> "As a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission through bottom-up, consensus-based processes."[8]

This legal framework distinguishes ICANN from governmental regulatory agencies. Although ICANN is charged with lessening certain governmental burdens, that is a basis for exemption from U.S. federal income taxes, not an excuse to engage in regulatory activities. ICANN's Bylaws appropriately link its policy development activities to its technical functions.[9]

For the generic top level domains, the Bylaws provide that ICANN's Generic Names Supporting Organization (GNSO) Council "is responsible for managing the policy development process of the GNSO."[10] The process is governed by Annex A to the Bylaws.[11]

Within this legal framework, ICANN has undertaken policy development for some highly controversial issues, including:

- The creation of new generic top-level domains (gTLDs), including domains that are identified in scripts other than Roman letters (internationalized domain names or IDNs);
- The adoption of the Uniform Domain Name Dispute Resolution Policy (UDRP);
- The consideration of policies, technical and legal, to deal with fraudulent practices that involve the content of Internet messages (e.g., identity theft, or "phishing" and various forms of malware)
- The adoption of a policy to deal with the publication of personal data pursuant to the WHOIS protocol and the ensuing issues of protection of personal privacy.

These activities clearly go beyond purely technical administrative functions relating to the domain name system. For example, consider the creation of new gTLDs and the assignment of registry operators. This is in many ways analogous to the selection of licensees from among multiple applicants for the assignment of frequencies for broadcast and telecommunication purposes. Just as domain names must be unique identifiers in order to achieve

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[5] *Declaration of Louis Touton,* Economic Solutions, Inc v. ICANN, U.S. District Court, E.D. MO, No. 4:00CV1785-DJS, available at: <http://www.icann.org/legal/esi-v-icann/touton-decl-10nov00.htm>

[6] *Bylaws for the Internet Corporation for Assigned Names and Numbers* ("*Bylaws*") , Article I, Section 1, available at: <http://icann.org/general/bylaws.htm>

[7] id. Article I, Section 2

[8] *ICANN Fact Sheet*, available at: <http://www.icann.org/factsheets/fact-sheet.html>

[9] *Bylaws*, supra, n. 5

[10] id., Article X, Section 3(4)

[11] id., Annex A

global interoperability, frequency assignments within a given area must, in general, be unique in order to avoid interference of signals. In the United States, the function of frequency assignment is performed by a federal administrative agency, the Federal Communications Commission.

As another example, the UDRP[12] determines rights that are normally subject to determination by national courts enforcing national law. It is a policy, enforced by ICANN, that has the practical effect of adjudicating the rights of trademark owners vis-à-vis domain name registrants,

In the areas of IDNs, fraudulent practices, registrar compliance and privacy, ICANN is making policy judgments and taking actions that go beyond coordinating Internet identifiers. If ICANN did not exist, these activities would be subject to the active jurisdiction of the agencies or courts of national governments. Alternatively, if national governments could agree, the activities could be put under the jurisdiction of intergovernmental organizations.

There are two aspects of United States law of particular importance to ICANN's mission:

The public interest standard:

The public interest standard has a history relevant to ICANN's activities. In the United States, it first appears in statutory law as the "public interest, convenience or necessity"[13]. The phrase was used in an 1887 Illinois railroad statute[14], and in 1920 became part of United States federal law as part of the Interstate Commerce Act.[15] As early as 1876, the U.S. Supreme Court recognized the standard when it held that state governments may regulate the use of private property when the use was "affected with the public interest."[16] In 1927, it became the standard by which the U.S. Federal Radio Commission (predecessor of the Federal Communications Commission) determined which applicants would receive licenses to operate broadcast stations.[17]

The history of the application of a public interest standard to the regulation of developing technologies is instructive to those dealing with the issues confronting the Internet and ICANN. Frequency spectrum assignments must be coordinated to avoid interference. The domain name system requires technical coordination in order to achieve global interoperability. If there were no global coordination in the assignment of IP addresses and domain names, the result would be as chaotic as the static resulting from unregulated broadcast frequency usage in the 1920's. To use another analogy, just as the telephone system relies on the assignment of unique telephone numbers globally, the Internet relies on its unique assignments. These necessities – global interoperability and unique assignments - arising from the technology of the Internet, justify ICANN's undertaking the promotion of "the global public interest in the operational stability of the Internet."

Lessening the burdens of government:

This concept comes from United States federal tax law, and specifically from Internal Revenue Code Section 501(c)(3), the provision for exemption from payment of federal income taxes by nonprofit organizations in the United States. ICANN has 501(c)(3) status, and has passed the tests imposed by the Internal Revenue Service to determine whether ICANN is lessening the burdens of government. What this means is that ICANN is doing things that government (in this case, the U.S. government) would otherwise be doing.

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[12] *Uniform Domain Name Dispute Resolution Policy ("UDRP"), available at:* <http://www.icann.org/dndr/udrp/policy.htm>

[13] <http://www.ntia.doc.gov/pubintadvcom/octmtg/Krasnow.htm>, fn 16

[14] ibid.

[15] ibid.

[16] Munn v. Illinois, 94 U.S. 113 (1876)

[17] <http://www.ntia.doc.gov/pubintadvcom/octmtg/Krasnow.htm>