

January 27, 2010

Mr. Peter Dengate Thrush,
Chairman, Board of Directors, ICANN

Dear Peter,

We have reached an inflection point in the history of ICANN. By the end of the ICANN meeting in Nairobi in March 2010, we will know if ICANN is really going to introduce new top-level domains, or if the ten years of promises of choice and competition were empty and worthless. Is ICANN able to act in the interest of Internet users, or is it doomed to inaction and a slow decline into irrelevance?

At some point, on some issue, things were going to come to a head. We have reached that point, and (as it happens) the issue that will decide ICANN's credibility is a process called Expressions of Interest (EOI), in which applicants for new TLDs are asked to declare their interest in new applying for a new TLD, and to supply evidence of their seriousness in the form of a hefty submission fee – which, nonetheless, would be applied as a credit toward the application fee.

This EOI process seems at first a minor point, but ICANN, by its previous ambivalence and cryptic ambiguity with regard to new TLDs, has invested in the EOI process the entire credibility of the institution as a venue for Internet governance. It could have been any other question of policy or rules, but it so happens that the course of Internet history has determined that it is on this question that ICANN will be forced to declare itself.

EOIs, minor in themselves, stand for a much larger question: will ICANN proceed with new TLDs or will it not? If it approves the EOI process in some recognizable form, ICANN will have signaled that it is going ahead, that it respects the voice of the Internet community, and that a decision by the community, once reached, has meaning and is to be respected. On the other hand, if it delays making a decision or otherwise vacillates, ICANN will have just as clearly indicated that it is so beholden to incumbent interests, so susceptible to well-financed lobbying, so fearful of criticism from the powerful, that it is willing to throw decisions of the ICANN community overboard to placate those interests, and that it considers its mission not as extending the Internet to those who need it, but as hobbling it on behalf of the economic interests of incumbent insiders. If ICANN once again opts for delay, it will show the world that it is simply window-dressing, and will occupy in history a place on that crowded shelf of insincere political decoration.

At this important juncture, we should be clear: the Internet does not need ICANN, but ICANN needs the Internet. Already issues similar to those ICANN faces today are popping up in other namespaces, for instance names in Twitter, or in Facebook. There the carefully collected Internet interests that make up ICANN have no representation, no voice, no input. And yet

Facebook, with an avowed commercial purpose, is seen to be more responsive to Internet users than ICANN is; it has tested a number of initiatives – concerning privacy, advertising, and more – and changed policies in response to user feedback.

ICANN's value to the Internet has little to do with domain names, which may in the end turn out to be a passing fad; the interest in ICANN turns first and foremost on the question of whether it can be a model for fair and equitable Internet governance. In deciding the EOI question, in deciding whether it is truly going to move ahead to implement the community decision to implement new gTLDs, ICANN is choosing whether it wants to be part of the vital Internet, or a failed and naïve experiment.

The Affirmation of Commitments

At this late date in the process, after years of relying on ICANN's shape-shifting timelines, many potential applicants – especially the smaller, not-for-profit public-interest registries whose names are so often invoked, without their consent, in calling for delay – are close to insolvency. ICANN's inability to manage its processes is about to kill the very thing it claimed to create – choice and competition among gTLDs.

In one of those ironies that abound in any study of institutions built from idealism, these would-be registries who have followed ICANN's vacillating instructions, commented on guidebooks, and have greeted delay after delay with disappointment but also hope, as a hungry job applicant waits for that all-important interview – these applicants have now become the whipping boy of incumbent interests, are being vilified as greedy, unconscionable speculators, and have been given a new code word: "ICANN insiders."

The Affirmation of Commitments ("AoC") states:

"DOC [Department of Commerce] affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS."

This important statement deserves some analysis. Note first of all that ICANN is to be "private sector led" and should enjoy a "bottom-up policy development model." This statement reserves the initiation of policy to the private sector, and reserves to the community the responsibility of developing policy. Non-private-sector actors are given a role of comment and oversight.

Note furthermore that ICANN is committed to publishing analyses of its bottom-up, private-sector led decisions. In other words, it is committed to explaining its decisions in a transparent way. This is quite different from a commitment to submit its tentative decisions to one or more non-community groups for approval before moving ahead. The clear intent is for ICANN to

make decisions first (after community input), then provide justification for them. A review prior to a decision would be impossible, because it would plainly mean that a decision had not yet been reached.

Finally, the AoC explicitly refers to the danger of capture by noting that “there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally.”

With breathtaking disregard for the facts, those who would stop EOIs have identified this “group of participants” as the applicants themselves! This unsupported pretzel of untruth has unfortunately been picked up in a recent communication by the Board from the Government Advisory Committee (“GAC”).

Let’s look at that letter, its assumptions, and who the real insiders are.

The Real Insiders

At the end of a long comment period, leaving little time for discussion or reaction, the GAC has sent a letter to the ICANN Board (<http://forum.icann.org/lists/draft-eoi-model/msg00191.html>). In addition to noting that certain procedural punctilios had not been followed by ICANN in regard to notifying the GAC of EOI process, the GAC goes on to lay out its concerns, which neatly summarize some of the main arguments against EOIs.

The GAC asks ICANN not to vote for EOIs at its next meeting February 2010, because, the letter states, EOIs may:

- ✓ “give an unfair advantage to some ICANN participants¹ who could pre-empt the most valuable strings before the rest of the world is fully aware of the gTLD program;
- ✓ allow a speculative market for ‘Eoi application slots’; and
- ✓ penalize developing country applicants, and small non-profit TLD projects that none-the-less operate in the public interest.”

Let us look at these statements. First, who are the insiders? At their Mexico City meeting in 2009, ICANN asked all those who had been to every single ICANN meeting to date to line up on stage – surely an excellent gauge of “insiderness.” Below is a photo from event.²

¹ The GAC letter here quotes the AoC’s sentence recognizing that “there is a group of participants that engage in ICANN’s processes to a greater extent than Internet users generally.” The GAC clearly thinks that these participants are the applicants. The opposite is true.

² A larger version is available at <http://www.flickr.com/photos/kjd/3331072194/>



Of these ultimate insiders, how many are now involved in applying for new top-level domains? We count three: Amadeu Abril i Abril, Tony Harris, and Sébastien Baccholet. They are all working on the “small non-profit TLD projects that... operate in the public interest.” These are precisely the applicants that the GAC purports to want to protect.

Ranged across the stage, in contrast, are either incumbent TLDs who stand to profit from lack of competition, or those who are counseling delay or outright abandonment of new gTLDs: Michael Palage, Marilyn Cade, Desiree Milosevic (Afilias), Chuck Gomes (VeriSign), Demi Getschko (.br), Oscar Robles Garay (.mx), Calvin Browne (.za). Whatever the actual position of the incumbents (not all are against new TLDs), their short-term economic interest is in either seeing new TLDs stopped, or delayed to such an extent that the applicants are financially exhausted by the time the application period starts.

Very conspicuously absent from the photo are any entrepreneurial faces, those who wish to start for-profit new TLDs. The unfair advantage that the GAC letter refers to goes not to enterprises who want to start new TLDs, but instead to the inside players who want to prevent new TLDs.

As far as a speculative market in new TLD “slots,” the current EOI proposal has given much thought to the matter, and has fixed on a high fee as a deterrent against buying “slots.” There may be other methods, such as a prohibition on transfers. This is not a gating issue: it’s easily solved.

Respecting Bottom-Up Policy Development and Community Decisions

The Generic Supporting Names Organization (GNSO), through a lengthy policy development process, came up with recommendations for the introduction of new gTLDs. Among the many participants in this process were members of the Intellectual Property Constituency and the Business Constituency, who generally oppose new gTLDs. Their voices, among many others, contributed to the GNSO decision. The Board and the CEO have affirmed both the legitimacy of the GNSO decision and the historic mandate of ICANN to introduce new TLDs.

This decision, and the legitimacy of the GNSO policy development process, are not in question. ICANN should therefore pay no attention to those voices who would subvert the process, such as those who counsel that the GAC or the Department of Commerce should “step in” and subvert the bottom-up consensus policy. By the same token, it should not heed those suggestions for infinite delay that will just as surely kill new TLDs, though the death will be slower and more painful.

We recommend to the Board that in order to separate out what is legitimately a matter of community comment (registry-registrar separation for instance, or two-letter IDN TLDs) from what has already been decided by the ICANN community (the fact that we are doing gTLDs), the Board should clearly identify what is a legitimate area of discussion and what is not. This would establish the primacy of the community in developing policy and remove the corrosive effects of endless second-guessing.

Protecting Incumbent Registries at the Expense of Legitimate Applicants

If the ICANN Board wants to get rid of legitimate gTLD applicants, it could follow no better course than the one it has pursued to date. Since the original DAG was published, we have seen the introduction of a host of punitive and expensive restrictions that could not have been better designed to protect the interests of the existing oligopoly of incumbent gTLD registries. These include increased fees, requirements for bonds, background checks, and so on. These and similar measures are justified in the name of security, and yet there is no empirical evidence that they would accomplish this end. What is sure, however, is that they will advantage incumbents, who are under no such obligation.

Incumbent registries are among the real ICANN insiders. From an economic perspective, short of stopping new gTLDs altogether, their advantage is to throw up barriers and to bleed new applicants, whether public-interest registries or entrepreneurial ventures. Second best to no new TLDs are an exhausted and weakened set of competitors.

In the course of human history some people, and even some companies, have risen above their narrow self-interest to embrace the greater good. It has happened. It is also rare – so rare as to excite surprise and exclamations of approval. It is therefore legitimate to examine the interest and position of incumbent registries within ICANN, so that the Board can decide if these companies and individuals are among those exceptional few.

On the Board itself sits Rita Rodin Johnston, who has represented Afilias and Global Name Registry. Also from Afilias is Ram Mohan, an Executive Vice President of Afilias. As Chair of the GNSO is Chuck Gomes, a Vice President of VeriSign. A former Board member and prime agitator against new TLDs and EOLs is Michael Palage, who is rumored to be in the employ of Afilias, a

rumor which Afilias executives do not deny.³ These people are smart, knowledgeable, and have contributed much to the ICANN process. They are also people with an undeniable interest.

Even if these individuals do not recuse themselves from consideration of new gTLDs because of their entirely human propensity to protect their interests, we ask the Board and the GAC to note their positions of influence and “insiderness” when considering their statements, as they should with statements from any party.

On the other side, none of the announced gTLD applicants have any position of power within ICANN. None are on the Board. None of them hold power within ICANN’s constituent organizations. It is certainly possible that there are crypto-gTLD applicants in positions of influence – the EOI process would reveal that.

Even so, the ICANN community, the Board, and the GAC should be under no illusions about who the real insiders are.

The Legitimacy of the EOI Process

As noted in the report of the EOI Working Group, the EOI procedure flows from the GAC Principles enunciated at the ICANN meeting in Lisbon, which distinguishes the phases of application, evaluation, and delegation. The EOI is quite simply a preliminary to the application phases of the new gTLD process. EOIs are not a new policy, but an implementation feature of the community-initiated new gTLD process. Countless implementation details of the GNSO recommendation have been modified, cast aside, or eviscerated; countless other details have been added by ICANN staff, or by “inside” parties with an obvious interest in the outcome (*vide* the Implementation Recommendation Team’s (“IRT”) work on trademarks) without the least comment from the GAC, except for the odd note of congratulation.

We are at pains to understand how a community-inspired suggestion, worked on by a cross-functional working group representing a wide range of motivations and interests, could be seen somehow as an illegitimate policy-making initiative, while on the other hand the IRT process, in which far-reaching policy was fashioned by a closed group of “insider” representatives of trademark holders with very clear agendas, has been hailed in numerous anti-gTLD venues as a piece of valuable work.

Can ICANN Be Relevant?

On its face, the EOI process does little more than provide data to ICANN so that it can plan resources for the process of introducing new gTLDs. But it has assumed a much greater importance.

The opposition to EOIs springs from the fact that it is the first step in actually implementing the new gTLD program. It is in this character that it has assumed its lightning-rod status. Once a hundred, or five hundred, or a thousand applicants spend real money for the chance to apply for a gTLD, the ball will have started rolling, the toothpaste will be out of the tube, and the new gTLD process will have really begun. This has excited the passion of those who, while claiming

³ In a conversation with Ken Stubbs last week at the ICANN Studienkreis in Barcelona, I asked him point blank several times, with others present, if Mr. Palage was being paid by Afilias. Mr. Stubbs on each occasion demurred. If this widespread rumor is false, we would be glad to see it dispelled.

to respect bottom-up policy making, strive ceaselessly to subvert the collective will of the Internet community by killing new gTLDs.

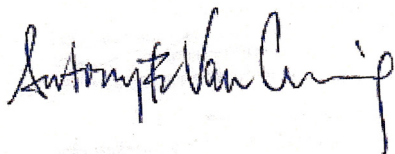
EOIs are being interpreted as a referendum on gTLDs, even though the ICANN stakeholders made their decision long ago. But those who oppose new gTLDs are ever-ready to revisit any decision that does not suit their interests.

The Board of Directors of ICANN are therefore faced, in considering what seems to be a minor implementation detail, with a momentous decision on the future of ICANN and its relevance to the Internet. They can bow before the blandishments and threats of the incumbent special interests and ICANN insiders, or they can respect the policy development process that reflects the will of the Internet community and ICANN stakeholders.

If the ICANN Board decides that its future is to become an instrument of those who put on the mantle of protectors of the community only to subvert its will, if it decides to put itself in thrall to special interests and special pleading, it will have ceased to become a relevant experiment in self-governance, and will become instead the subject of obscure academic research in some future century. By killing the EOI proposal, it will announce to the world that it has become an expert in unearthing rules and points of order designed to avoid the actions it was created to undertake. But by approving the EOI process, the Board can fulfill its historical mandate to create new gTLDs, to respect its own processes, to fulfill the clear wishes of its stakeholders, and to become a venue for where real decisions are made about the Internet, by the people who use it.

We, and many others, will wait and watch, as we have done for so long. Many applicants, however, cannot afford to wait and watch much longer.

Sincerely,

A handwritten signature in black ink, reading "Antony Van Couvering". The signature is written in a cursive style with a large, stylized 'A' and 'V'.

Antony Van Couvering
CEO, Minds + Machines