

Motives and Hidden Agendas

The purpose of this post is to dispell certain rumors and myths that are being circulated in regard to EOIs.

I speak here strictly on my own behalf, as a relative newcommer to the ICANN process, one of many potential applicants originally intrigued by the public interest benefit of new TLDs – specifically for environmental causes. I am also more broadly interested in the registry services business with my partners at Minds and Machines.

As an outsider who has followed the process closely since learning about it in November 2008, at the ICANN Cairo meeting, I resent the treatement that ICANN has put me – and other similar applicants who I have gotten to know (and sometimes compete with) over the last 18 months.

Specifically, ICANN has

- Repeatedly promised applicants such as myself that firm dates would hold, and then move these dates without apology.
- Change the rules on community scoring twice, in opposite directions, again without providing any reason or justification for doing so
- Finally, in November 2009, abandoned timetables altogether
- On Decemeber 18th 2009, promised, in writing that the board would vote on EOIs at the next board meeting in february, and now, apparently is considering delaying this vote another 40 days to the Nairobi meeting on the basis of a single letter by the GAC – filed one day before the final day of comments.

In the letters in this forum from trademark interests and anti-TLD opponents, people such as me are villified as being evil “speculators” who are only interested in creating a market for “EOI slots” , and using our “inside” knowledge of the process to the general detriment of disadvantaged participants and the Internet in general.

Allow me to say – this is outrageous.

I can't think of a single cause that could benefit the planet more than .eco. I can't think of a more deserving and non-commercial cause than the “.zulu” top level for the zulu nation. I am personally involved in both of these initiatives. And yet, as a proponent of EOIs I am now labeled as a “land grabber” and a speculator. And this by the ultimate insiders – trademark lawyers who attend every single ICANN meeting and the entrenched interests of existing registries.

How did this happen? How did the discourse degenerate to such a level?

Let us consider in particular the recent tirade of Michael Palage against EOIs. I have never met Mr Palage, but I feel part of the group targeted by his comments and I would like to respond in kind.

In this tirade, widely published and disseminated in the ICANN community, Michael Palage makes several false arguments that the EOI process is in violation of both ICANN Bylaws and the Affirmation of Commitments. We will get into these erroneous claims further below. But to clarify the debate, its helpful to go back to basics, and ask ourselves, as Palage does, who are the players – and what are the economic motives for their actions.

Let's start with ICANN itself, and since Mr Palage brings the Bylaws into the mix, let us for one minute focus on Core Value 2.6, which is the true reason that ICANN was created in the first place:

“Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.”

Now clearly the abstract goal of increasing choice in new top-level domains is aligned with this goal of “promoting competition”. Is it practicable? This is precisely the goal of the EOI – to determine the scalability of the root, and the practical rollout of new TLDs in a manner, which will not harm the overall stability of the DNS. Is it in the public interest? As Bertrand de la Chappelle of the GAC pointed out in his session at StudienKreiss – this has already been decided. New TLDs are in the public interest. It's a question of how they are rolled out.

But this is not a discussion on the abstract goal of new TLDs. This is a discussion on a specific initiative – the EOI –, which in and of itself does not commit ICANN to moving forward on new Top Level Domains. Because the EOI is not binding from ICANN's perspective – and can only add to the information on the practicality of introducing new TLDs, the EOI is consistent with the guiding core value of ICANN.

In a moment we will examine Mr Palage's claims that the ICANN Bylaws require a face-to-face consultation with the GAC for the specific EOI proposal. But first, let's examine, as Mr Palage asks us to do, the exact motivation of the various parties at the table.

Type I players: certain existing registries

First, and foremost, the people with the most at stake are the existing gTLD registries, and in particular VeriSign and Afilias. This group has the means, the motive and the opportunity to cause endless delays in the TLD process.

Means and Motives

VeriSign has a clear and present monopoly on English language domains. There are at present roughly 80 Million .com registrants and 10 Million .net domains, collectively providing VeriSign with approximately \$700,000,000 in annual revenue. (increasing at 7% per year). This number is simply staggering, and must be carefully considered. Does VeriSign want hundreds of potential competitors to their “.com” and “.net” ? The answer is no.

Afilias, like VeriSign is an incumbent registry that has also has a clear economic interest in no new top level domains. Their second tier domain “.info”, thanks to massive amounts of promotion and price discounting, has now reached 5MM registrants, providing north of \$25,000,000 in annual revenue for the company. Furthermore, Afilias provides the back end for .org, a contract potentially worth over \$30,000,000 in annual revenue. With new registries such as GMO, Key Systems, Minds and Machines and Demand Media on the horizon, that contract could be at risk.

With the vast cash flow and balance sheets afforded to them by their oligopoly positions, both VeriSign and Afilias have the *means* and the *motives* to fight new top level domains.

Opportunity

The latest *opportunity* for these players is the proposed EOI – and the use of paid “third party” organizations and consultants such as Mr. Palage.

While claiming to “count on new TLDs”, VeriSign in fact a registered supporter of the “Progress and Freedom Foundation” – the organization supporting Michael Palage. Afilias, not surprisingly has also a long standing financial history with Palage.

This would not be so troubling if Mr Palage was not in fact a former ICANN board member, who is now providing his insider access for a fee – while at the same time criticizing the “ICANN insiders behind the EOIs”.

By using proxies, as opposed to direct participation in the EOI debate, the existing registries can have the maximum amount of impact, and the least amount of

accountability. But make no mistake – these words and connections are powerful. In a few days after his post, Mr Palage has managed to have the substance of his arguments taken up verbatim in the GAC comment.

This raises the following questions.

- ✓ First: who (if anyone) is paying Mr Palage, and, if so, what is he being paid to do?
- ✓ Second: should Mr Palage, a former ICANN board member, be allowed to sell his vast inside knowledge of the ICANN inner workings?

From an organizational perspective, where are the checks and balances in the ICANN system to make sure this type of insider activity does not occur? If it does occur – as it appears to now be doing with increased force – what are the repercussions? At a minimum, we would want ICANN to formally investigate this situation. In the extreme, existing registries that have been found to inappropriately use board connections to influence the outcome of the new TLD debate should be banned from applying for new TLDs – and in the case of VeriSign – banned from any further increase in the price of dot com domains.

Furthermore, ICANN should consider contacting the Antitrust division of the US Department of Justice to put this issue on their radar.

Type II players: Trademark Attorneys

The second block in the EOI discussion is the IP Trademark attorney block. This block has shown a steadfast refusal to consider any thing that might increase the chance of seeing new TLDs.

Under the guidance of INTA, the International Trademark Association, 5,900 lawyers have been invited in mass to flood the comment forums and voice their discontent with EOIs and new TLDs. By and large they did.

A smaller group of core Trademark Interests representing some of the larger US and European brands are large enough to send their paid watchmen to every ICANN conference. This group constitutes the ultimate insiders: smart, well financed, and with long and deep histories with the ICANN process.

The arguments against EOIs from the trademark group are extremely ingenious. Despite being the very definition of insiders themselves, they have painted a picture of the new TLD applicants as “conniving insiders” who are seeking to unfairly profit from a process that nobody knows about.

Despite the repeated insistence from pro-EOI parties that there should be an extensive comment period – these trademark lawyers are arguing that this process

is “unfair” – particular to “disadvantaged countries” and “brands” who “may not yet know about ICANN and the new TLD process.

The latest characterization of possible EOI “speculators” out to create a market for “slots” is the latest (and surely not the last) of these creative arguments. At \$55,000 its hard to see EOI slots being bought and sold on eBay – but certainly its conceivable, and its hard to see any harm in that. If this was truly an issue, a more constructive approach would be to suggest transfer restrictions.

Type III Players: Potential applicants

The third type of player in this setting are potential applicants. Like the existing registries and trademark interests, they too have economic agendas – and in some cases social agendas as well.

If one were to believe Mr Palage, these applicants are all just frivolous “experimenters” who want to play a game with the root of the Internet – somehow compromising the entire stability of the world information system.

This is not correct.

While it is true that some of the applicants are less savvy and have less financial resources than others, let us not forget that ICANN has now been actively reaching out and communicating to this group for over 18 months now, since the June Paris 2008 ICANN meeting.

Some of these potential applicants, such as Network Solutions and eNom are not any less sophisticated than existing registries – they (unlike NeuStar and Afilias) just had the unfortunate bad luck of being rejected in the first two ICANN rounds.

Other groups such as ourselves (Minds and Machines) and other potential registries have done nothing more than take ICANN at its word , follow the iterations of the DAG, and comment in forums such as this one.

Over the last year and a half we have watched as the entrenched interests have managed to heap more and more restrictions on potential new TLDs: elimination of “community rules”, vertical separation mandates, malicious conduct background checks, bonds. But even more than these new restrictions, we have been forced to endure delay after delay, with serious financial implications.

Based on the original DAG, many projects were formed around the idea of creating support of communities, such as the environmental community for “.eco”, musicians for “.music” or local groups for certain city top level domain projects. Eventually, ICANN informed us that many of these outreach efforts would not count in the final scoring algorithm. However at this point many of these groups now want to see their TLDs go forward – and we are seeing many such support letters in the forum.

Some applicants, it should be said, are not in favor of EOIs – preferring instead to champion a step by step approach where their “deserving” TLDs get chosen ahead of others. But make no mistake, economic motives play a role here as well. No TLD – not a single one – can exist without a profit motive, given the extra-ordinarily high costs and new barriers to operate them.

The example of “.cat” is often given as a top level domain that benefits a specific community (Catalan language speakers) and does not “hurt” the interests of Trademark interests. There are certainly many new TLDs in the wings that fall into this rough category and some of them are not strong participants in the EOI discussion. Be they for-profit or not-for-profit, however, they are all united in one belief: they – and their supporters -- want new TLDs as fast as possible.

The role of the GAC

Although the idea for expressions of Interest was initially circulated to some members of the GAC in Seoul, the GAC has not commented in any formal fashion prior to the Jan 26 letter – less than 24 hours before the final deadline for the *second* comment period.

From a procedural standpoint, it would have been more advisable for the GAC to provide input earlier, if it had reason to do so. As it stands, the letter from the GAC comes almost three months since the original concept was voted – *at the board level*.

If every decision point on the new TLD process (vertical separation, 2 character IDNs, EOIs, comment Period, communications strategy etc..) is subject to this timeline, there will assuredly be no new TLD introduced to the root before 2013.

Legally, it is very debatable whether the adoption of EOIs by the board without a formal face-to-face meeting with the GAC is required by Bylaw 6.3. Contrary to Mr Palage’s assertions, this is not, a priori, an action that effects “public policy concerns” as mandated by 6.3. Certainly the GAC has been aware of this development since it was voted on in Seoul. It had the opportunity to comment in the first phase as did all stakeholders. No separate working group was formed without the GAC’s knowledge.

Be that as it may, we are not opposed to GAC input on this issue. However, given the history here, it is our feeling that the GAC should provide such input in an extremely timely manner – preferably *before* Nairobi.

In general, I do not believe that the GAC’s role is to micromanage every decision such as the exact composition of the EOI rules. Would ICANN please point me to the section of the bylaws or the affirmation of commitments where this is stated?

The Affirmation of Commitments was not violated

As a final point against Mr Palage, we refute his argument that the “erroneous” analysis of the comments by ICANN staff constituted a “violation of the AOC”. This argument is entirely dependent on Mr Palage’s claim that ICANN staff simply counted comments – and made their recommendation accordingly.

While staff should have probably not stated that there were “more positive than negative comments” – least that suggest that the sheer number of comments was the deciding factor – the clear and reasoned analysis of the benefits (and risks) of the EOIs voids Mr Pelages’ central thesis.

As to the idea that the identity and motives of the various participants should be revealed – hopefully this note will help clarify this to all concerned.