Top Three Reasons to Just Say No to
ICANN's Current EOI gTLD Proposal

by Michael D. Palage

On December 9, 2009, the ICANN Board announced its intention to vote during its upcoming February 4, 2010 meeting to approve a plan by which ICANN would solicit "Expressions of Interest" (EOI) from prospective applicants for new Generic Top Level Domains (gTLDs) such as .BLOG.[1] But given a number of significant governance and public policy concerns raised by the current EOI proposal,[2] the ICANN Board should take no action on it before the next in-person ICANN regional meeting—in Nairobi, March 3-7, 2010.

Following the introduction of the Expression of Interest concept in the closing days of the ICANN Seoul meeting (October 2009), I published a detailed survey of ICANN's precedent in this area, warned ICANN to "Proceed with Caution," and suggested how ICANN could move forward while honoring its obligations under its bylaws and the recently executed Affirmation of Commitments.[3] Unfortunately, ICANN staff seem to have largely ignored this advice, as well as cautionary comments on the initial EOI concept filed by several other parties. Instead, ICANN has largely adopted the EOI proposal put forth by a group of gTLD applicants with narrow self-interest in the matter. To prevent irreparable harm to the organization (as set forth below), the ICANN Board's fiduciary duties require that it avoids any hasty decision on the EOI process currently proposed by ICANN staff.

The EOI Raises Major Public Policy Considerations on Which the Government Advisory Committee (GAC) Has Not Been Able to Meaningfully Provide Advice

The concept of an EOI was first raised on Thursday, 29 October 2009 during the ICANN regional meeting in Seoul, the day *after* the ICANN GAC had drafted its communiqué and concluded its in-person session. The next day, the ICANN Board passed a resolution directing staff to "study

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[1] ICANN, *Preliminary Report of Special Board Meeting*, Dec. 9, 2009, http://www.icann.org/en/minutes/prelim-report-09dec09-en.htm.

[2] ICANN, *New gTLD Program: Aspects of an Expressions of Interest and Pre-Registration Model*, http://www.icann.org/en/topics/new-gtlds/eoi-model-18dec09-en.pdf.

[3] Michael Palage, The Progress & Freedom Foundation, *New gTLD Expressions of Interest: Proceed with Caution*, , Progress on Point 16.24, Nov. 2009, http://www.pff.org/issues-pubs/pops/2009/pop16.24-new-gTLD-expressions-of-interest.pdf.

the potential impact of a call for formal 'expressions of interest,' and provide a plan for Board consideration at ICANN's next Board meeting." During its December meeting, the ICANN Board directed staff to "present a proposed EOI process model for approval at the ICANN Board's February 2010 meeting." Because the GAC will not have another in-person meeting until ICANN's Nairobi meeting in March, it has been given no opportunity to provide advice on the EOI proposal.

Since this initiative deviates from existing ICANN precedent and raises major public policy concerns, it is difficult to understand why the ICANN Board would move forward with this proposal without seeking the timely input of the GAC. Among the key public policy concerns raised by the current ICANN staff proposal are the following:

- **The creation of a secondary market for gTLD applicant slots that could be bought and sold prior to the commencement of the actual new gTLD application process**

Many proponents of new gTLD process have repeatedly cited the ICANN bylaws regarding its commitment to "[i]ntroducing and promoting competition in the registration of domain names." However, a full reading of that provision reveals that this is not an absolute statement, but one which contains the following important qualifier: "where practicable and beneficial in the public interest." Unfortunately, many prospective gTLD applicants appear to view the Internet's Root A server as nothing more than a global incubator for entrepreneurs to test new business models for a few hundred thousand dollars in application fees.

The ICANN staff proposal to allow gTLD slots to be transferred will create an artificial market where "insiders" with deep pockets will be able to make a "quick buck"—just as has happened with "domain name tasting" and other anomalies in artificial DNS markets created by ICANN. The ICANN staff has even suggested that "such transfers may be beneficial and in the public interest." ICANN needs to engage the global Internet community and the GAC on the specifics of this important public policy issue to explain its costs and benefits.

- **ICANN requesting financial commitment from prospective gTLD applicants prior to the publication/approval of the final Applicant Guidebook**

There remain a number of unresolved substantive issues that directly impact the ability of some prospective applicants to commit to the investment $185,000 in gTLD application fees, such as: registry/registrar separation; a template registry agreement to adequately address the concerns of public sector applicants (immunity, indemnification, compliance with national laws, *etc*.); and the financial bonding requirements recently incorporated into version 3 of the draft Application Guidebook that will likely far exceed the $185,000 application fee.

The Process Envisioned Violates Article III, Section 6 of the ICANN Bylaws

Article III, Section 6 of the ICANN bylaws provides a number of important safeguards to ensure the transparency of ICANN's operations—specifically:

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and

c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article, prior to any final Board action.[4]

As outlined in the preceding section, there are a number of important public policy considerations that the current ICANN staff EOI proposal raises. Article XI, Section 2(1)(h) of the bylaws requires that

The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN's supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

The Board delegated this authority to ICANN's president in 2003.[5] Yet there is no indication that ICANN's current President, Rod Beckstrom, has formerly solicited the opinion of the GAC on these issues. Therefore it would be a direct violation of the ICANN bylaws and standard operating procedures to approve any EOI proposal at its February 2010 meeting. Furthermore, the ICANN bylaws require that "in-person public forum shall … be held for discussion of any proposed policies… prior to any final Board action" where it is "both practically feasible and consistent with the relevant policy development process" to do so.[6] This standard requires that the ICANN Board or President (i) formally request the input of the GAC on these important

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[4]   ICANN, Bylaws, as amended Sept. 30, 2009, Article III, http://www.icann.org/en/general/bylaws.htm#III-6.1b (emphasis added).

[5]   ICANN Board Resolution [03.43] provides:

     the Board delegates to the President the authority to give notice by the Board to the Chair of the Governmental Advisory Committee under Article XI, Section 2(1)(h) of the bylaws of proposals deemed to raise public-policy issues.

     ICANN, *Regular Meeting of the Board - Rio de Janeiro, March 27, 2003*, Preliminary Report (Posted 28 March 2003), http://www.icann.org/en/minutes/prelim-report-27mar03.htm.

[6]   ICANN, Bylaws, as amended Sept. 30, 2009, Article III, § 6(2), http://www.icann.org/en/general/bylaws.htm#III.

public policy issues, and (ii) stay any final action on the EOI proposal until the Nairobi Kenya meeting.

The Proposal Violates Both the Letter & Spirit of the Affirmation of Commitments

The recently executed Affirmation of Commitments (AOC) represented an important point in ICANN's maturation as an international organization truly accountable to the global Internet community. Yet it is difficult to reconcile the ICANN Board's December 9 decision to approve the EOI proposal with the following three affirmative obligations set forth in the AOC:

> **"ICANN and the 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 interest 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."** (Paragraph 4)[7]

While ICANN staff prepared a paper attempting to publish an analysis of the positive and negative effects associated with an EOI process, it was fundamentally flawed in two key respects. First, ICANN appears to have undertaken a mere numerical count of the comments received and categorized them into "buckets" without providing any contextual analysis to provide a clear understanding of those stakeholders that were submitting comments, and those stakeholders that did not. Had such an analysis been properly conducted by staff—according to both the letter and spirit of the Affirmation of Commitments—it would have revealed that the majority of the comments were from those stakeholders or their supporters with a direct and material interest in applying for gTLDs.

The second major flaw in ICANN staff's "vote-counting" approach to analyzing the public comments is that it appears that all comments were weighed equally. Though I fully support ICANN's multi-stakeholder model, I must protest when the detailed critical comments of a respected governmental representative are cursorily discarded or provided a weight equal to that of far less substantive form support letters from self-interested prospective gTLD applicants and their allies. This shallow "vote-counting" without any further contextual analysis merely transforms the ICANN consensus development process into an exercise in ballot-box-stuffing. The ICANN staff owes the global Internet community a more professional analysis.

> **"DOC Recognizes the important role of the GAC with respect to ICANN decision-making and execution of tasks and of the effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the Internet DNS."** (Paragraph 6)

As explained above, the EOI as currently proposed by ICANN staff raises a number of important public policy considerations and the ICANN Board would therefore violate Article III, Section 6

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[7]   Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, Sept. 30, 2009, http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm.

of its bylaws if it adopted such an EOI model during its February 2010 meeting without any consultation of the GAC.

> **"ICANN commits to provide a through and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied."** (Paragraph 7)

Detailed minutes from the December 9, 2009 meeting at which the ICANN Board directed staff to "present a proposed EOI process model for approval at the ICANN Board's February 2010 meeting" are still not available. But it is important to note that the public forum for comments on the viability of the EOI concept did not close until two days after the December 9, 2009 vote. Perhaps even more disappointing was the request made by ICANN staff that "community members that wish to have their input considered by the Board during its December meeting, should submit comments no later than November 27, 2009." Given that this "expedited" comment period also overlapped with closing of a number of important other public forums and the Thanksgiving Holiday in the United States, it is impossible to reconcile the ICANN Board's hastily-taken actions with the representations set forth in the Affirmation of Commitments.

Next Steps

As a former ICANN Board member, I certainly understand that Board members are constantly bombarded by lobbying. With tens of millions of dollars at stake, would-be applicants and others have a direct interest in influencing the decisions ICANN makes on its gTLD initiative.

But the stakes here are just too high. If the ICANN Board approves an EOI process at its February 4, 2010 Board meeting, it is highly likely that multiple Requests for Reconsideration would be filed under Article IV, Section 2 of the ICANN bylaws, further delaying the gTLD process. For the reasons identified above, it would be difficult—if not impossible—for the Board Governance Committee *not* to find a clear bylaw violation. Notwithstanding the other "real risks" identified by ICANN staff in connection with the EOI proposal, the greatest risk to ICANN's institutional credibility would be a black mark on implementing its core principles just prior to the inaugural Affirmation of Commitment review on Transparency and Accountability.

Thus, the Board should, at its February meeting, formally solicit the advice of the GAC on this important topic and request that proper in-depth discussion of the EOI process by the community take place during the next physical meeting in Nairobi, prior to any final decision by the Board.

Related PFF Publications

- Michael Palage, The Progress & Freedom Foundation, *New gTLD Expressions of Interest: Proceed with Caution*, Progress on Point 16.24, Nov. 2009.

- Michael Palage, The Progress & Freedom Foundation, *New gTLDs: Let the Gaming Begin – Part I: TLD Front Running*, Progress on Point 16.17, Aug. 2009.

- Michael Palage, The Progress & Freedom Foundation, *ICANN & Internet Governance: How Did We Get Here & Where Are We Heading?*, Progress on Point 16.15, July 2009.

- Michael Palage, The Progress & Freedom Foundation, *ICANN's Economic Reports: Finding the Missing Pieces to the Puzzle*, Progress Snapshot 5.4, June 2009.

- Michael Palage, The Progress & Freedom Foundation, *ICANN's Implementation Recommendation Team for New gTLDs: Safeguards Needed*, Progress on Point 16.10, Mar. 25, 2009.

- Michael Palage, The Progress & Freedom Foundation, *ICANN's "Go/ No-Go" Decision Concerning New gTLDs*, Progress on Point 16.3, Feb. 2009.