COMMENTS FOR THE ICANN COMMITTEE ON EVOLUTION AND REFORM

These comments propose three simple mechanisms for defusing the politics around ICANN and allowing it to become the “boring” technical body its directors and staff have often lamented it should be but is not.

• ICANN should request that the U.S. Department of Commerce create a separate MoU for an independent review board. This genuinely independent IRB would be selected by some neutral process without any input from ICANN directors or staff. Ideally, governments would select panelists for limited terms. The sole purpose of the IRB would be to review ICANN decisions and determine if they remained within the scope of ICANN’s purpose and if any procedural rules were violated by ICANN in the formation of the rule.

• ICANN should have a mission statement or other basic document that clearly delineates its areas of responsibility and what actions or policy areas are prohibited to ICANN. The IRB would enforce this document by voiding any decision that ventures into prohibited areas.

• ICANN should create a policy whereby a set number of TLDs is automatically added to the root. Objective criteria should be published in advance, and subjectivity should be eliminated from the process to the greatest possible extent.

INTRODUCTION

ICANN has, regrettably, become the focus of considerable energy and politics. ICANN was designed to be a simple, technical, coordinating body. Sadly, from day one, ICANN has failed to achieve this goal.

The reasons for failure lie in the fact that, since its inception, ICANN has not confined itself to technical coordination. The Department of Commerce White Paper, the foundational document that culminated in the selection of ICANN as the White Paper’s designated “Newco,” required ICANN to address matters of policy: notably trademark issues in domain names.

This “camel’s nose” of policy in the ICANN tent was expanded by the decision to allocate new TLDs in a highly subjective process. ICANN expanded the White Paper’s directive to include new TLDs in a stable fashion to include consideration not merely of technical stability issues, but an array of business considerations.

The matter has grown further complicated by ICANN’s refusal to implement basic accountability mechanisms. ICANN does not permit close inspection of its
finances. It does not have formalized open meeting requirements. It delegates considerable authority to staff and its executive committee.

Most worrisome, ICANN has acted without hesitation to amend its bylaws when those bylaws provide any impediment to the Board’s policy determinations. Because ICANN is not a government agency, no one has appealed a determination of the Board for compliance with due process or to ensure that ICANN’s opinions remain within the supposedly narrow scope of ICANN’s purview. And, indeed, ICANN has continued to expand its jurisdiction.

As a result, many in the Internet community find it difficult to trust ICANN. Whatever pledges or promises ICANN may make today, it may break tomorrow. Whatever carefully tailored restrictions are placed in the bylaws, a future Board may override without warning. And, because ICANN lacks oversight or accountability, no matter how open ICANN claims to be, the public can never be sure if policy is really formulated by some coterie of insiders and special interests.

The addition of new TLDs to the root is another primary locus of politics around ICANN. If a set number of TLDs were created annually, with ICANN playing a ministerial role, much of the politics around ICANN would vanish. Instead, ICANN has restricted the creation of new TLDs and turned it into a “beauty contest” in which applicants compete. This uncertainty, and the prospect that TLDs may remain scarce and therefore drive up the value, and the ability of ICANN to extract concessions from would-be TLD managers again makes ICANN a locus of politics.

These comments therefore propose three methods of defusing the politics around ICANN. First, ICANN should request that DoC create a separate and independent MoU to create an Independent Review Board. Second, ICANN should create a charter that will limit its scope of authority, enforced by the IRB. Third, ICANN should develop a rational system for deploying new TLDs.

Ask DoC to Create a Truly Independent Review Board

The initial Memorandum of Understanding (MoU) required ICANN to create an Independent Review Board (IRB) to act as a “court of appeals” for ICANN. Despite several years of effort, the ICANN Board determined at Accra that it could not actually implement this requirement of the MoU.

The idea behind an IRB remains sound. Indeed, in the absence of any other accountability mechanism, review by a truly independent body is the only way to ensure that ICANN abides by its bylaws. Without such accountability mechanisms, ICANN becomes the tyrant of the DNS. Whether it is a benevolent despot with the wisdom of Voltaire’s philosopher-king or a more traditional despot despoiling the masses for its own gain is irrelevant to the basic question: should the DNS be ruled by a tyrant at all?
What converts a tyrant to a genuine consensus builder with legitimacy is oversight and accountability. Without a genuine accountability mechanism, equitable treatment becomes a matter of grace rather than of right. Worse, the fear of unbridled authority acts to constrain actors and breeds suspicion.

For many years, when the FCC conducted comparative hearings on broadcast licenses, it was accused of “regulating by raised eyebrow.” Because licensees depended utterly on the FCC, any casual suggestion on the part of the agency was taken as an iron command. Nor did broadcasters protest too much, lest they anger the agency and face retaliation and licensing hearings.

ICANN finds itself in the same position. An IRB, while not a complete cure, would go a long way to solving this problem. If the IRB were truly independent, and not itself dependent ion the ICANN Board, it would act to legitimize ICANN and prevent ICANN from exceeding its authority.

Accordingly, ICANN should ask the DoC to create a separate MoU creating an IRB that acts as an independent “Court of Appeals.” These “judges” would ideally be selected by governments, forming a pool of experts. Not technical experts, since technical expertise is not and should not be required. The IRB should NOT second guess ICANN on substantive matters.

Rather, the IRB should be composed of experts in law and policy. Since the role of the IRB is simply to ensure that ICANN complies with its bylaws and any other safeguards (or, as a U.S. administrative lawyer would say, that ICANN does not act either ultra vires or in an arbitrary and capricious manner), it should be composed of experts capable of making such a judgment.

Appointment should be made by governments, rather than any elected system or by ICANN, possibly even the GAC. Each country would select one “judge.” These would form a pool, from which names would be randomly drawn when needed.

Financing such an endeavor should be relatively easy. The volume of work should prove minimal, and judges can be volunteers rather than full-time salaried judges. Expenses could be born by the petitioning party or parties.

The ICANN “Constitution”

Coupled with the creation of an outside reviewing authority, ICANN should adopt a document excluding certain policy areas. The excluded areas should include any regulation of content (including potential copyright violations by name registrants).

A Rational System For Deploying New TLDs
1. Specify, in advance, a fixed number of Top Level Domains that ICANN would add to the root annually, and create a fixed, periodic schedule for proposing names and filing application fees to the root administrator. The fixed number of new TLDs should be small enough to avoid complicating the management of the DNS root, but large enough to accommodate as much of the real demand as possible. Fifty - 100 per year is widely accepted by the technical community as a conservative, safe number that would pose no technical problems.

2. Define objective technical criteria that applicants would have to meet. The technical eligibility requirements would include escrowing requirements in the case of registry failure, minimal requirements for Internet connectivity, and description of allowable or prohibited name server software and configurations.

3. Define objective and minimal financial viability criteria. The criteria could also limit the number of TLDs that any given entity could apply for in a year (or over a longer period).

4. When filing an application, applicants would pay a fee based on the costs of reviewing an application to determine whether it is compliant with the required criteria. The fee should not act as a barrier to entry but simply as a cost recovery mechanism to fund ICANN’s review of compliance with the objective technical standards.

5. Create a dispute procedure whereby intellectual property owners could challenge proposed TLD names on trademark grounds at a certain point in the schedule (after the applications have been received and before they are evaluated); e.g., if someone besides America Online applies for .aol. The first two principles of the UDRP could be adapted for this purpose (confusing similarity and rights and legitimate interest).

6. When the number of applications for TLD names exceeds the annual addition limit, or when two or more applicants apply for an identical string and refuse to modify their applications to avoid conflict, an auction would be held to resolve conflicts. The auction should be designed to ensure that the most highly valued TLDs entered the market first, not to maximize revenue for the root administrator. The auction could also be structured to limit the number of TLDs a bidder could win. Whether this was done simultaneously or sequentially is a technical issue in economics, but there is enough knowledge of auction design to work out an optimal way of solving the problem. Auction design would also have to take into account significant variation in the thickness of the market – for some contested TLD names, there might be ten or twenty bidders, for others only two.

Guaranteeing a fixed number of TLD additions per year has a number of good economic characteristics:

- Consumers would have a wider variety of names from which to choose.
- It avoids a “land rush” in the TLD space by limiting the number of additions to a modest level and making applicants bid for the most popular strings.
It facilitates competition by making new entry the default value. A more competitive market would lead to lower market prices for domain name registration and related services (assuming additional competition materialized). Services could also be made more responsive to demand; e.g., by offering longer-term contracts.

It makes entry into the market more predictable by objectifying and routinizing the process of entry. If applicants know exactly what technical and financial criteria must be met and how many assignments will be made each year, they can assess their chances of getting one more accurately and plan accordingly. Applicants who fail to get an assignment in one cycle know that they will have another opportunity in the next round. This would permit any business with a good idea to enter the market whenever they were ready.

It eliminates the need for extensive investment in unproductive lobbying of the ICANN Board and management. It also makes it difficult if not impossible for applicants to game the system by acquiring a TLD in one round and then lobbying strongly against new additions in future years.

Continuous expansion of the supply of TLDs would greatly reduce the economic incentives for cyber-squatting. The incentive to speculate is predicated almost entirely on the existence of a few exclusive, “guessable” names within a small, restricted, and largely undifferentiated set of gTLDs. If the number of gTLDs increased at a rate of tens per year, the guessability of domain names could be fatally undermined and the speculative value of domain name registrations would deteriorate.

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