

“A Call for ICANN to Embrace its Inner Regulator”

The necessity of a more-regulatory role, to serve the public interest and address increasing challenges

Just a few decades ago, the "phone book" was likely the only way you could find someone with a telephone. Now almost nobody uses printed directories. Just at the time the number of printed directories increased dramatically, people stopped using them; the heightened complexity presented to both telephone users and advertisers hastened their move to alternative sources.

A similar potential presents itself within ICANN; its current gTLD expansion indicates a massive increase in potential domain names, without a corresponding change in the number of actual Internet destinations. This program ignores the failed experience of previous ICANN expansions (.name, .pro, .info), as well as an increase in country-code TLDs acting as global generics (.me, .sx, .co) which already serves to release the pressure of perceived scarcity.

So where does the demand for expansion come from? Did ICANN ever survey a worldwide public demanding that hundreds of new -- potentially confusing -- top level domains were necessary? Did it ask Internet information providers if they wanted a many-hundred-fold increase in the number of potential new sources of cyber-squatting, brand dilution and redundant names?

The conception of this round of gTLD expansion is but the most glaring symptom of a fundamental flaw in ICANN's design. While envisioned by many as the regulator of a key Internet resource, ICANN actively denies that role and correspondingly becomes susceptible to capture by an internal compact.

The founders of DNS could not possibly have perceived the need to protect, let alone assert, the public interest at a time when domain names were identity rather than commodity. The one-size-fits-all model they created was unable to withstand the cut-throat nature of commercial exploitation. So rather than grow to manage and regulate the DNS in the public interest, ICANN instead became dependent on income supplied by the parties it is supposed to oversee. Such dependence has encouraged a steady supply of (amongst other things) speculative and redundant domain name registrations of no benefit outside ICANN's vested interests. Without direct accountability to the public yet with a financial addiction to the growth of the domain industry, ICANN has allowed -- indeed encouraged -- the inmates to run the asylum.

ICANN's refusal to consider that one of its key roles is akin to that of a regulator -- and thus act like one -- essentially means that there is next to zero effective public oversight over the DNS. What is self-assuredly called "multi-stakeholderism" inside the ICANN bubble is, in this view, seen in the wider world as self-regulation by a compact between domain buyers and domain sellers. In this scheme, public interest representation (diversely expressed by governments, security experts and Internet end-users) is relegated to the edge of policy making, holding the consolation prize of outsider advisor status. And when any of these advisors dares assert itself

against the captured direction -- as the GAC has recently done in its Beijing communiqué in relation to the gTLD expansion -- pushback from the compact is predictably outraged.

(Did the GAC overreach in Beijing? Certainly. But given its unique status, the GAC can be forgiven for having taken a very strong stance, consistent with the remit of its members to serve their national public interests.)

That the one regulatory issue which really matters to the outside world -- WHOIS accuracy -- is even controversial, is all the proof needed of ICANN's detachment from basic real-world expectations. Yet other examples are easy to find. Since the compact established an unconstrained approach to gTLD growth as ICANN policy, advocates of the public interest have struggled to contain the excesses. This has resulted in a range of afterthought remedies, which were not devoid of weaknesses. Some examples are worth mentioning:

- the "Public Interest Commitment" filings, whose enforcement status is still unclear;
- the new-gTLD objection process, which was unwieldy and opaque;
- the applicant support program, which was not widely promoted and thus underused;
- and the Trademark Clearinghouse, which may be over-protective of trademarks and does not support internationalized-script variants.

Requests for anything deeper than such superficial fixes elicit a reply that the process is in motion and it is too late for any more meaningful changes.

On the other hand, the needs of the industry compact are designed into the core of ICANN policy; The vested interests have helped craft the expansion rules so as to maximize income, grow ICANN's dependency upon them and inhibit disruptive competition.

As they [rail against](#) attempts to assert the global public interest¹, members of ICANN's domain industry compact repeatedly betray an exceptional sense of entitlement and insulation from global user needs. This inevitably stems from a belief that ICANN, stripped of any regulatory authority, ought to just let the industry determine policy (and implementation) exclusively through its unique form of internal infighting. Such an attitude is unsustainable -- and it is under attack on two very different fronts.

From one side, the WCIT conference showed the scale of multilateral opposition by public authority to "business as usual". ICANN's opening of new offices while maintaining legal status as a California corporation may provide some new global awareness, but will not fix some of its deeply rooted problems. And asking the world to choose between government capture and industry capture is not a gamble ICANN is equipped to make. What WCIT has shown is that the multi stakeholder model is being challenged, and supporters of the model can either demonstrate a willingness and ability to listen and act in the interests of ALL stakeholders - or watch the model be overtaken by others who are prepared to act in their perception of the public interest.

¹ For example, <http://forum.icann.org/lists/comments-base-agreement-29apr13/pdfRSuFNILrUf.pdf>

From the other side, any public demand that ICANN “save the DNS from governments” will itself become less relevant if ICANN succeeds in scaring ordinary end users and information providers away from domain names. The growing success of search engines and corporate portals on social media sites already indicates movement away from the DNS as a primary source of information retrieval. The possibility of massively increasing brand and consumer confusion in domain names, while stifling innovation, has end users and information providers looking for alternatives... and the alternatives are not without their own plans for progress². As consumer and provider trust in ICANN and the DNS diminishes, where the ITU has so far failed, the marketplace may succeed.

Yet ICANN's vested interests appear to prefer ignoring such threats. When asked to develop metrics to gauge the success of the gTLD program, the GNSO sought to measure the relative metrics of the various TLDs to each other rather than to compare the entire DNS against alternatives such as Software Defined Networks and new search technologies. The bubble prefers to remain (publicly) oblivious to outside threats, because such metrics do not point to a successful campaign.

Many in ICANN believe that the organization overcame its most important challenge when it approved the gTLD expansion. In fact we suggest that just the opposite was the case. Succumbing to its captured “community” by proceeding with an expansion that few outside the industry want, ICANN now faces a far bigger challenge to its very legitimacy. The threats are many, and growing; while ICANN has been able to fend off -- for now -- the political and diplomatic threats, it may not be equipped for a widespread consumer abandonment.

In order to overcome these challenges and maintain the relevance of a healthy DNS ecosystem, ICANN's policy initiatives should primarily derive from public interest needs. That is, policy must be initiated with public interest frames as the central reference, while incorporating substantial input from the domain industry compact. The DNS is best served in an environment where the public interest sets the agenda rather than reacts to it, as a superior and more trustworthy form of multi-stakeholderism.

The first step in solving any problem lies in the admission that a problem exists. The next step is the recognition that ICANN must assume the role analogous to that of a regulator, that it is so well positioned to be.

In its aim to achieve international acceptance as a regulatory body, ICANN must be prepared for significant change that more effectively asserts the public interest as the catalyst of, rather than the response to, ICANN policy. In particular, while the multi-stakeholder model needs to be maintained, its current form should be inverted -- that the public interest bodies initiate policy directions and the industry serves in an advisory function.

² <http://www.forbes.com/sites/roberthof/2013/04/29/interview-how-ray-kurzweil-plans-to-revolutionize-search-at-google/>

In summary:

- Denial of regulatory function prevents ICANN from sufficiently serving the public interest;
- In the absence of a regulatory authority, ICANN has been captured by the industry it has the duty to oversee, and has become dependent on its growth regardless of public-interest consequences;
- This situation has isolated ICANN from the public it is supposed to serve, provoking both public authority and the marketplace to actively seek alternatives to an ICANN-managed DNS;
- ICANN must recognize this deficiency and assume a role analogous to that of a regulator -- refocused on the public interest -- if it is to maintain its position of preference amongst the alternatives.
- Such a refocus demands redefining the global public interest as the initiator and driver of ICANN policy rather than its current status of reactive advisor.

Thank you for your attention,

Signed,

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Garth Bruen
Evan Leibovitch
Holly Raiche
Carlton Samuels
Jean-Jacques Subrenat

The above are either members of the ICANN At-Large Advisory Committee (ALAC) or chairs of ICANN At-Large Regional Organizations, signing in personal capacity. No other endorsements are implied.

This is a potential statement for submission to the ATRT2 as well as other channels.

History:

- First version by Evan sent May 5
 - Revisions suggested by Carlton later that day.
 - Posted for collaborative editing May 8, instances of “I” changed to “we”
 - Related message from Jean-Jacques added
 - Evan: some edits to better address the dual issue of the TLD expansion and the “is ICANN a regulator” issue.
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Comments from Jean-Jacques:

Hi All,

having gone through all your interesting (and sometimes profound) observations once again, and then forcing myself to take a telescopic view, I would like to offer a few remarks covering several of the topics discussed.

- In the foreground, trying to attract attention, are a bunch of things for registries and registrars; compliance; document deadlines; the inequality of status between Board, SOs, GAC and other ACs; the number of sub-themes to be had in Atlas-2. And I see AoC, but also ATRT 1 & 2, as attempts to breathe rationality and legitimacy into a system which was simply not designed for that purpose.

- In the distance, but looming larger, I see a fundamental flaw in the way ICANN was launched (it was launched, more than really designed). Because of their cultural complexion, the founders considered that an Internet body would be a known animal, formed of familiar parts all manageable, simply scaled up. They had not foreseen that public authority would, though belatedly, want to be entrusted with upbringing their baby. They had not predicted that business would come to hold sway in ICANN, simply because the business model they envisaged was not designed to attain its present proportions. This is how a one-man system of name attribution, under Postel, has developed into this contraption having to manage a >100 M \$/year operation, and soon perhaps much more.

- What we are stuck with now is a complex dilemma. When this thing was DARPA, the single biggest challenge was making sure the signal got through. As nobody was out to defend a global public interest, or even to formulate such a concept in relation to the Internet, businesses and solicitors were quick to promote corporate interests, as soon as the military experiment turned public. As a result, we now have business demanding T+50 not as a privilege, but as a right; the onus of proof ("show us that there is effective harm") now rests on the shoulders of the lay, not on those of the DNS clergy; and the US DoC is painstakingly trying to socialize the idea that although ICANN operates solely under California law and is cleverly overseen by an Under Secretary, it is in fact an international organization which, at this stage, still

requires an act of faith on your part.

- So, where do we go from here? Of course, at this stage it is necessary to carry on with existing reform, to respond to questions or remarks from the Structural Improvements Committee, to provide data for ATRT-2. But as the "natural home" of the general Internet user, the ALAC should indeed, as proposed by Evan and supported by others, go the full length. Because the Internet has become, almost unwittingly, the first global infrastructure in human history,

- we have the duty to consider principles, not only convenience;*
- to question existing structures, if clearly they no longer serve those principles;*
- to foster a complete Internet eco-system not based on exclusivity (e.g. either ITU or ICANN), but building on the proven advantages of each entity (ICANN has a lot to learn from ISOC in terms of identifying the public interest, the IGF experiment could be taken forward in another shape, etc).*

- Most likely, all suggestions will not be implementable. That's all right, provided that at some point, a group of concerned people did identify the real challenges on which to base their proposals. That may be us.

This was a roundabout way of supporting Evan's suggestion to deal with fundamentals. Taboos are upheld only to the advantage of those who formulated them.

*Best regards,
Jean-Jacques.*

20130509-JJS. Thank you Evan for taking this timely initiative, and for adopting, as its point of departure, such a global overview. I wholeheartedly support you. Here are a few things we should think about in carrying forward your initiative (each analysis is followed by → a suggested path or action item):

Intent. The way this paper is drafted should make clear that we do not perceive, in the formative years of ICANN, the intent to distribute any advantage to this or that segment of the Internet community.

Recognizing the evolutionary nature of ICANN's path would help avoid recrimination.

→ Early in our paper, mention should be made of the initial challenges (technical, legal) in setting up the network of networks. Underline its experimental nature, its utopian value. State what could, at the time, appear to be its business model, its legal framework.

Evolution. This essential part must be drafted in a way to alleviate the fears about some obscure At-Large witch-hunt. Not everything we now see in ICANN -or indeed in the global Internet- was designed from the start. This chapter should follow quite naturally from the previous one about intent.

→ In broad strokes, let's identify the significant changes to the initial model, and why they came about (expressed needs, shift in the balance of power, for instance a gradual emphasis on trademark rights; gradual refinement of a business model led by the domain name business).

Diagnosis: what are the current clinical signs of dysfunction (those identified by Evan, others perhaps)? What are the growing gaps between intent and present reality?

→ Provide a clear view of when, why and how important shifts took place (one example I can think of was when the Trademark Lawyers managed to get a majority on the Board to go their way). The significance of these changes, the way they affect the Internet, the Internet user.

The global public interest: a new challenge. This is a key element: we must recognize that when it was

launched, the Internet and ICANN experiments were not geared to such a lofty, because no one could predict that it would become the first truly global infrastructure in history. What does this realization entail?

→ Charting the future. What do we see as the main challenges (technical, legal, ethical, financial...)? We could separate the challenges for ICANN (structures, process, etc.) from the wider challenges for the Internet. Let's go beyond turf wars (crudely exposed by WCIT), and aim for a truly global Internet ecosystem, building on the recognized strength of each actor (ICANN, ISOC, etc.). Brief review of the seminal paper by Weber and Gunnarson, "A Constitutional Solution for Internet Governance".

→ Recommendations (new gTLDs, compliance, internationalization, outline for an inclusive ecosystem).

Conclusion. *The authors feel that this is not just any phase in the history of the Internet and of ICANN. Potentially, it is a defining moment. Let's rise to the challenge. Résumé of recommendations.*