

TESTIMONY OF BRIAN R. CARTMELL  
CHIEF EXECUTIVE OFFICER  
eNIC CORPORATION  
ON  
THE GOVERNANCE OF THE DOMAIN NAME SYSTEM  
BY THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS  
BEFORE THE  
SUBCOMMITTEE ON TELECOMMUNICATIONS  
OF THE  
UNITED STATES SENATE COMMERCE COMMITTEE  
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Good morning, Mr. Chairman and members of the Committee. My name is Brian R. Cartmell and I am the Chairman and CEO of eNIC Corporation, a privately-held company based in Seattle, Washington. I thank the Committee for its invitation to participate in the hearing this morning and welcome this opportunity to provide the Committee with eNIC's views on the Internet Corporation for Assigned Names and Numbers, generally referred to as ICANN.

I commend the Committee for recognizing the importance of the matters being discussed here today. Indeed, under review is the governance and control of the underlying architecture of the Internet, the super-highway that is quickly emerging as the world's largest marketplace and a primary forum for exchanging information and ideas. Much like the human body which is dependent on the heart for life, the Internet is dependent on a properly functioning, stable, and secure Domain Name System. Without it, the important Internet-related issues being debated in these halls, issues such as Internet privacy, consumer protection and security, literally would become moot. If the Domain Name System fails, an exchange or transmission of information across the Internet would not be possible. Consumers would not be able to access web sites to look up information. Businesses would not be able to transact business with their customers.

**Overview of eNIC Corporation**

My perspective of ICANN and the issues being addressed by this Committee is the result of my extensive experience in and knowledge of the Domain Name System. My involvement began even before the creation of ICANN when, in conjunction with an associate, I submitted an application, on September 25, 1997, to the Internet Assigned Numbers Authority ("IANA"), an agency contracted by the U.S. Department of Commerce, to operate and manage the Dot-CC top level domain. The application was approved on October 13, 1997, and we commenced domain name registration operations a couple of weeks thereafter. The Dot-CC domain is associated with the Cocos Islands, a group of islands in the Indian Ocean that, at the time we submitted our application, were privately owned, but today are a territory of Australia.

Since that time, we have grown to be the second largest domain name registry in the United States, second only to Verisign Global Registry, with approximately 400,000 domain names registered. We employ 40 people and have invested literally millions of dollars to develop a globally diverse and robust infrastructure that we believe rivals any in the industry. Our Dot-CC registrants are located in all parts of the world, including nearly 300,000 in the United States alone, a scenario which is quite different from the widespread perception that correlates “country code top level domain” registrants to a particular geographical area. Dot-CC registrants are a varied cross-section of Internet users, among them individuals, small- and medium-sized businesses, educational organizations, and public interest groups. Our internal monitoring systems indicate that Dot-CC sites are accessed millions of times daily around the world, indicating a widespread use and adoption of the Dot-CC top level domain by both registrants and consumers. Incidentally, my engineers tell me we have 43,893 customers in Florida but, given recent events, I have asked for a recount.

I speak today as an active participant in the process, both prior to and after ICANN’s founding in November of 1998. In that regard, I have attended and participated in almost every quarterly ICANN meeting and have had countless discussions with ICANN executives. I also speak as a representative of a U.S.-based organization that has made tremendous commitments and expended significant resources to promote the long-term viability of the Internet as a whole, while also advancing the interests of eNIC Corporation, its employees, customers and those we serve.

### **A Recipe for Error from its Inception**

In his testimony on February 8, 2001 before the House Energy & Commerce Committee’s Telecommunications Subcommittee, Mr. Vinton Cerf, Chairman of ICANN, likened the process of establishing ICANN to “building a restaurant and starting to serve customers while the kitchen is still under construction; it is possible, but may occasionally produce cold food.” Mr. Cerf further characterized ICANN as a “young, and still maturing organization”, while acknowledging that it has made mistakes and is still a “work in progress”. As a representative of an organization that is vitally interested in the workings of the Domain Name System and which has invested millions of dollars to establish a world-class technological infrastructure and maintains obligations to several hundred thousand consumers in the Dot-CC domain sphere, I consider such admissions both disconcerting and alarming.

Looking back at the genesis of ICANN, it appears that the situation described by Mr. Cerf was inevitable. ICANN launched into uncharted waters without a prior, meaningful, thorough analysis of crucial issues involved, or of the far-reaching ramifications of the ICANN initiative, including how to protect the interests of the U.S. in this critical asset and those of U.S. businesses who would be directly affected by ICANN’s decisions.

Upon reflection, I am amazed. In my relatively short life, I am aware of millions of dollars being spent on governmental commissions studying the construction of single highways connecting two points. I find it ironic that in the case of perhaps the most important “super-highway” of my generation, the “information super-highway” we know as the Internet, the U.S. government has not commissioned even one such study. Rather, much like the development of the Internet itself, the principles for its governance have simply been viewed as a developing, “adapt as we go” experience. Absent is any enabling legislation or other road map other than the general principles stated in the “White Paper”. Please allow me to enumerate some of the critical issues to which I refer and which have yet to be analyzed in any meaningful way.

#### **1. To what extent does the Department of Commerce have authority over the root server system or to delegate powers to ICANN?**

One need only review the findings of the General Accounting Office, set forth in a report dated July 7, 2000, delivered to this Committee and a corresponding committee in the House, as an example of the Department of Commerce’s failure to conduct even the most basic inquiries before it took the ICANN “plunge”. On page 27 of its report, the GAO noted that the Department of Commerce did not even know whether it had the legal authority to delegate the control of the authoritative root server to ICANN as contemplated by the seminal “White Paper”. Indeed, the General Counsel of the Department of Commerce acknowledged to the GAO that in the “absence of such plans [to transfer the “A” root server], we have not devoted the possibly substantial resources that would be necessary to develop a legal opinion as to

whether legislation would be necessary to do so.” Obviously, this issue is a cornerstone of any analysis and must be answered before any decisions should be made on the proper course of action.

2. Is a private, non-profit organization the proper structure to govern such crucial functions of the Internet?

One of the most frequent arguments of ICANN’s defenders is effectively stated by simply asking the question, “can you identify a better alternative? On the surface, such an argument is compelling and makes a great deal of sense, as “privatizing” the Internet functions seems to be preferable to government control thereof. In reality, however, it is premature to ask such a question as no meaningful study has been conducted to discover viable alternatives or, considering critical U.S. interests, even the desirability of such a non-profit entity handling governance responsibilities. For example, even now ICANN is faced with the dilemma of deciding what safeguards it can implement to shield its assets and operations from potential liabilities that will inevitably materialize and which, in the worst case, could threaten ICANN’s very existence. While administrative agencies of government benefit from certain immunities for their rulemaking functions, ICANN cannot claim such immunities without appropriate governmental action.

3. What effect does the transfer to ICANN of the governance of the Domain Name System have on current and future U.S. interests, including those of its consumers and businesses?

Much like the GPS network, the Internet was primarily a U.S.-based initiative, with significant taxpayer funds expended in its development. With the explosion of commercial growth on the Internet, the interests of U.S. based businesses and the global economy are increasingly dependent on the Internet, its stability and robustness. What effect, if any, will such a transfer have on matters of national security or governmental operations in the “.mil” and “.gov” top level domains? Can security be assured on a go-forward basis under the ICANN structure?

In sum, an important question is whether the transfer of those crucial functions to a private, non-profit corporation which is exposed to liability claims, in reality, advances and protects U.S. interests or, to the contrary, exposes them to unnecessary or unwarranted threats. Incidentally, it is my position that it is the role and responsibility of the U.S. Congress, not ICANN or even the Department of Commerce, to decide what U.S. assets should be “gifted” to the world or exposed in some way, and that such a decision should be based on complete information garnered from appropriate inquiry and investigation. Unfortunately, to date, Congress has not been included in, nor been involved with, this important decision.

4. Is ICANN being established exclusively as a technical standards body or should it be delegated policy and rule making powers as well?

Mr. Cerf and other officers of ICANN continually stress that, rather than being a policy-making entity, ICANN’s main role is as a “consensus”-building organization charged with making decisions in accordance with the will of the “international Internet community”. Oddly, no one has yet defined what the term “international Internet community” really means. I would submit that without clear definition, the term has no meaning at all because, as we have seen through history, even illegitimate governments claim to be governed by the “consensus” of the “people”. Without clear standards for measurement, unfettered democratic processes, and uncompromising transparency, a “consensus” can either be manipulated, or a mirage created by, those in power.

In reality, ICANN’s assertions are somewhat simplistic and ignore the tremendous governance function that ICANN has assumed, either rightfully or in excess of its charter. One only needs to review (a) the recent decisions relating to the approval of new “generic” top level domains, or (b) ICANN’s requirements imposing the uniform dispute resolution process (“UDRP”), as evidence that ICANN is exerting tremendous and wide-ranging policy powers over the Domain Name System. Indeed, the power to give and take away rights equates to the power to govern, and extends well beyond the “consensus” building function championed by ICANN.

5. To whom, if anyone, should ICANN be accountable?

A key element of any governing body is the idea of effective accountability, including the question of due process that has been raised by several observers. Yet in the present situation, the question of the accountability of ICANN has not been addressed in any meaningful way. To whom will ICANN be accountable on an on-going basis once the privatization of the Domain Name System is complete? ICANN proponents suggest that it will be accountable to the “international Internet community”. As discussed previously, such a standard has never been defined or evaluated. Consequently, for purposes of governance, it is virtually meaningless and equates to no accountability whatsoever in the real sense of the word. Perhaps a more important question is what mechanism or standard for accountability is in the best interests of the U.S.? Such a question is for Congress to address, not ICANN or other interest groups.

6. What interests should foreign governments or sovereigns have over the Domain Name System and Internet governance?

This issue is of particular importance to eNIC Corporation, and its worldwide customer base because Dot-CC is officially a “country code top level domain”. Our administration of, and interest in, the Dot-CC top level domain arises from a delegation from IANA in October 1997, more than a year before ICANN was established. Since that time we have expended literally millions of dollars establishing a state-of-the-art system of servers worldwide, marketing the Dot-CC top level domain around the world, and serving our customers and others. We have spent nearly \$2 million on projects that benefit the people of the Cocos (Keeling) Islands, something that we have voluntarily undertaken to fulfill our charge to act for the “benefit” of the local Internet community on the Cocos (Keeling) Islands under RFC 1591.

From the beginning, the country code TLDs have not been based on country names and abbreviations but rather on a list known as ISO 3166-1. This listing is a compilation of names and codes developed by the International Organization for Standardization for various statistical purposes and includes country names as well as names of territories, such as Puerto Rico, the Netherlands Antilles and the Cocos Islands. In the paper establishing the Domain Name System, RFC 1591, March 1994, Jonathan Postel, head of IANA (the predecessor to ICANN), stated: “The IANA is not in the business of deciding what is and what is not a country. The selection of the ISO 3166 list as a basis for country code top-level domain names was made with the knowledge that ISO has a procedure for determining which entities should be and should not be on that list.”

Neither IANA nor ICANN has ever deviated from this position. In an affidavit in November 2000, Mr. Louis Touton, ICANN’s general counsel, stated that foreign governments have no ownership interest in or rights to control any country code TLD. Rather, he specified “[c]ountry code TLDs are administered by appointed ccTLD managers, who act as trustees performing a service on behalf of the Internet community, both globally and in the country or territory designated by the country code.” In his February 8, 2001 testimony, ICANN’s chairman, Dr. Vinton Cerf, again confirmed this. “Operation of the registries for these ccTLDs was delegated to a wide variety of people or entities, with the primary consideration being a willingness to agree to operate them for the benefit of the citizens of that geography.” As discussed, eNIC has operated the Dot-CC top level domain both for the benefit of the local Internet Community on the Cocos Islands and for the broader Internet community by registering top level domains on a world wide basis.

Unfortunately, recent statements by some have implied that governments of foreign countries may be given more control over important policy issues, including the operation of country code TLDs. Any such attempted delegation of authority would have significant ramifications, both for the Internet as a whole and for U.S. national interests, those of its consumers and U.S. businesses such as eNIC Corporation. In my view, Congress, rather than ICANN, is the appropriate body to make policy regarding such critical issues.

7. Are additional top level domains necessary?

The issue of the approval of new “generic” top level domains, and ICANN’s process for approving them, has generated heated and rather divisive debate since September of last year. I would suggest that there is no real “shortage” of domain name space using existing top level domains that are already root recognized. In fact, with over 240 existing top level domains, many of which are “open” to worldwide registrations and most of which are dramatically

underutilized (less than 15,000 domain registrations in them), there is plenty of room for literally billions of domain names without the creation of new top level domains. In other words, there is no “shortage” as has been so widely publicized.

8. What is the proper way to fund the governance of the Internet?

Until last fall when it received US\$50,000 from each of the applicants for new top level domains, ICANN was under-funded and “boot-strapping” its operations. The non-refundable application fee has subjected ICANN to widespread criticism and controversy as many have suggested that the fee was nothing more than a funding mechanism. Clearly, any governing body of the Internet needs proper, reliable funding sources in order to fulfill its mission. Unfortunately, this rather critical issue had not been addressed at the time ICANN was launched.

**Call for a Comprehensive Congressionally-Mandated Study**

Looking back, it is abundantly clear that the turmoil surrounding ICANN, the questions regarding its international legitimacy, the growing doubts about its decision making processes and structure, and the lingering skepticism relating to its longevity can be traced directly to the lack of any meaningful analysis or study of material issues prior to its establishment. Such a study would have identified (1) the legality of such an endeavor, and its effect on important U.S. national interests or those of consumers and U.S. businesses, (2) alternatives for Internet governance that might prove to be superior to the establishment of a California non-profit corporation to assume the tasks, (3) the tools and liability protections that such an organization would need to succeed, (4) the specific interests of the nations in the international community, (5) a clear definition of ICANN’s mission, the boundaries of its authority, well-delineated guidelines for the exercise of its powers, and a road map for Congress to enact such legislation as would be necessary to carry out that mission. Instead, ICANN was given only broad statements regarding the objectives of such a governing body.

The good news is that there is still time for Congress to exercise its rightful oversight and legislative roles. If the U.S. is going to give the Internet to the world through privatization, at a minimum it should be the result of a fully informed decision. The bad news is that the failure to act will likely lead only to an escalation of the turmoil, a fracturing and destabilization of the Domain Name System, an increased regulation of the Internet by foreign sovereigns, and the further denigration of U.S. national interests and those of its consumers and U.S. businesses such as eNIC Corporation.

While my instincts tell me that the Internet should move forward with minimal governmental intervention, the questions that have been raised are so important, with ramifications so far-reaching, I am convinced that a comprehensive study should be conducted immediately to avoid long-lasting mistakes. eNIC Corporation respectfully submits that the Senate take the following actions:

(1) In conjunction with the House of Representatives, commission a panel of experts to perform an in-depth study of the issues relating to ICANN, the governance of the Internet and, in particular, the Domain Name System; and

(2) Pending the delivery of the conclusions of the appointed Congressional commission, direct the Department of Commerce to refrain from taking further actions to expand the role of ICANN, including the (a) turn-over of the authoritative root servers, (b) recognition of new generic top level domains, or (c) recognition of rights of foreign sovereigns over top level domains (except to the extent the foreign sovereigns have been delegated a country code top level domain by IANA or the designated country code top level domain manager has already entered into an agreement with the applicable foreign sovereign relative to the operation of a particular country code top level domain).

**Conclusion.**

While ICANN has made mistakes, it should be recognized that it has been undertaking an immensely important and difficult job without any statutory or regulatory guidance, or regularized source of funding. It is time to fully analyze the situation and, if merited, give ICANN the tools and guidance that it needs to succeed. Like a developing child, it cannot be expected to run before it has been instructed on how to walk. At the same time, if it is ultimately decided that

the ICANN form of governance is unsuitable for the task at hand, then steps should be taken as soon as possible to implement a proper governmental form, before it is too late.

In conclusion, I once again express my appreciation for your inviting me to participate in these hearings. I will gladly lend any assistance that this Committee may require to fully and fairly address the important issues presented today. I welcome any questions that you may have.