

Testimony of the Domain Name Rights Coalition and Computer Professionals for Social Responsibility

Introduction:

Thanks to the Committee for providing the opportunity to provide feedback to the Senate regarding the role of ICANN and the Commerce Department in the ongoing battle for Internet governance. Although you have received letters from others who attempt to downplay ICANN's role, make no mistake; it goes far beyond that of technical management and enters the realm of a regulatory body. ICANN's policy will affect commerce, freedom of expression, and likely stifle the very medium it seeks to regulate. ICANN has not provided an accurate picture of the Internet world to the Committee. We felt it was necessary to correct and explain much of what they reported to you in response to your questions.

About DNRC and CPSR:

The Domain Name Rights Coalition has participated in the ongoing debates concerning Internet management as a member of the Boston Working Group, a member of the Open Root Server Confederation, former steering committee member of the IFWP (International Forum on the White Paper.) DNRC submitted comments on the Green Paper, use of the .US domain, testified before Congress, submitted comments to the World Intellectual Property Organization, and has dissented in the formation of ICANN's Uniform Dispute Resolution Policy.

CPSR is a public-interest alliance of computer scientists and others concerned about the impact of computer technology on society. We work to influence decisions regarding the development and use of computers because those decisions have far-reaching consequences and reflect our basic values and priorities.

As technical experts, CPSR members provide the public and policymakers with realistic assessments of the power, promise, and limitations of computer technology. As concerned citizens, we direct public attention to critical choices concerning the applications of computing and how those choices affect society.

Summary:

ICANN continues to execute fundamental Internet policies beyond its mandate as technical coordinator, and without creating the participatory structures that would allow its decisions to be accepted and trusted by a broad spectrum of stakeholders.

The sad fact is that ICANN has been "captured" from the beginning. Special interest groups have dictated the direction of ICANN, and have morphed it into an Internet Governance body with none of the protections afforded by governments.

Governmental safeguards to American ideals such as Free Speech and other civil liberties, must be codified in ICANN, as well as other quasi governmental corporations in the private sector.

There is no technical reason to refuse any applicant for a top level domain. Instead, policy reasons were substituted for technical reasons, resulting in limiting competition, not enhancing it.

By maintaining a false artificial scarcity, ICANN is risking an increasingly fragmented and incoherent Internet system. By their own statements ICANN claims to be concerned with stability above all. However, ICANN has now actively sought to cause domain names already registered by existing businesses (.web, .biz, .museum, .pro, .info and others) to be registered to potentially different parties at another. Rather than taking the opportunity to strengthen the domain name system, ICANN is risking the single predictable factor of the Internet. They are, in effect, ensuring that current domain names maintain their scarcity, and thus value. The Department of Commerce hopefully did not contemplate that ICANN would become the Federal Reserve Board of domain names.

Domain name registrars who have proven technical competence beyond a doubt by registering domain names for years as well as providing their own alternative roots were refused permission, not on technical grounds, but purely on policy grounds. TLD registries should be allowed to set policy independently of ICANN and that no registry be excluded from TLD operator status if its policy differs from that of ICANN.

The burden of proof should be placed on ICANN to refuse to admit competition. Potential competitors should not be prevented from entering the market, and forced to prove to ICANN that they are worthy of an artificially small number of slots.

ICANN further claims to honor intellectual property law. Yet the fundamental basis of a natural right of property is that one earns property by the sweat of the brow. The ICANN uniform dispute resolution protocol (called a protocol to falsely deny that it is clearly a policy document, with negligible technical content) does not acknowledge any sweat of the brow argument. In

multiple cases (for example, etoys and workingwomen) entrepreneurs entered the risky world on on-line commerce and sweat over their domain names to create value. The UDRP policy does not acknowledge that risk-taking or investment even over such generic words and phrases as "toys" and "working women." The UDRP appears to have nothing to do with law. For example the published procedural rules used by one registered UDRP provider are in clear violation of any standard of procedural due process.

As currently constituted ICANN has failed on all charges. It has moved slowly; been unrepresentative; acted to limit competition; and failed to offer useful, fair, coherent policies, or even policies which encourage investment in virtual property. ICANN is a policy experiment that has failed.

History:

The Domain Name Rights Coalition was formed in 1995 directly because of the NSI domain name dispute policy which we thought stifled the rights of individuals and small businesses to choose domain names. The development and growth of the World Wide Web brought with it a significant interest by the business community. It soon became clear that IANA, a US government contractor run by Dr. Jon Postel, would be unable to continue its management of domain names and numbers without significant help. The first attempt to transfer control occurred in 1994 when Dr. Postel attempted to place IANA under the Internet Society (ISOC.) This failed, but something else grew from that union. The IAHC (International Ad Hoc Committee) was created, and tried to take over Internet governance via a document called the gTLD-MOU. Comments were solicited by the IAHC from the Internet community, but the responses were largely ignored. It is not coincidental that many of the members of CORE, POC (the Policy Oversight Committee) , ISOC (an original IAHC advocate), WIPO, and the ITU are now heavily involved with the ICANN process, and have in a sense "captured" that process.

The gTLD-MOU was stopped by the Internet community when it became clear that the process was closed, unaccountable, and non-transparent. Various people appealed to the Department of Commerce and the State Department for help. Through significant work and effort, the IAHC plans were thwarted, and the Commerce Department produced the "Green Paper" as a roadmap for technical management of names and numbers. The Green Paper was truly a pro-competitive solution, one that was hotly contested by many European Governments, and the previous supporters of the MoU. In fact, it was right around this time, that Jon Postel redirected over half of the world-wide root servers to his server in California. While we may never know, this

combination of events apparently derailed the Green Paper, and started the process that resulted in the White Paper.

Thousands of comments were submitted by a large cross section of the Internet community, although many questioned (and still question) under what authority the Department of Commerce was taking control of Internet functions. Many of these comments were incorporated in the "White Paper" which provided a framework for considering these issues. Using the White Paper as a foundation, the IFWP (International Forum on the White Paper) was created in 1998 to discuss these issues and attempt to reach the consensus that was required to move forward with the plans envisioned in the White Paper for an open, transparent and accountable organization, Newco, to manage domain names and numbers. Please note that even with the White Paper, significant numbers of people still ask under what authority Commerce is operating in choosing one company over another, mandating that company's bylaws, mandating that company to be non-profit, and assisting in choosing the unelected board members of that company.

The IFWP steering committee consisted of members of the Internet community who were involved with not-for-profit enterprises. These included CORE, the Commercial Internet Exchange (CIX), Educause, the Domain Name Rights Coalition (DNRC), and various other groups. It was chaired by Tamar Frankel, a respected law professor and expert on corporate structure and process from Boston University. The IFWP held meetings around the world, and worked to come to consensus on various issues. In the midst of this process, Joe Sims, attorney for Dr. Postel, promulgated a set of by-laws for Newco. He did this in closed meetings with no public input. These by-laws were presented to the IFWP, but did not gain consensus, largely because the points on which the IFWP had already garnered agreement were not included. Various further drafts followed, but still none of them achieved consensus.

In late August of 1998 after the final IFWP meetings, the steering committee met telephonically to plan the final or "wrap up" meeting in which the consensus points would be memorialized, and further concessions would be provided by all sides. Although there had been multiple votes already taken that clearly supported a wrap up meeting, yet another vote was called at that time. Mike Roberts vehemently opposed a wrap up meeting, and was supported in this by Barbara Dooley of the CIX. There is speculation that Mr. Roberts had already been contacted at that time regarding serving with the ICANN board in some capacity. Further, around the time of the wrap up meeting, Esther Dyson says that she was approached by Roger Cochetti of IBM and Ira Magaziner in Aspen, Colorado and asked if she would be

interested in joining the ICANN Board. The IFWP wrap up was finally completely derailed by ICANN's refusal to participate in the meeting.

Some of the members of IFWP continued their work to create an open, transparent and accountable Newco. Two major groups, the Open Root Server Confederation (ORSC) and the Boston Working Group (BWG) promulgated by laws for Newco through open process. Three sets of by-laws were provided in a timely manner to the Department of Commerce. Although the Commerce Department had long stated that they would not choose one set of by-laws over any other, they chose the ICANN's bylaws as a starting point

The Commerce Department directed ICANN to consult with the BWG and the ORSC regarding areas of concern to Commerce but there was little reason for them to do so since their bylaws and structure had already been chosen. ICANN did meet telephonically with BWG and ORSC, but failed to make substantive changes in its bylaws to accommodate the diversity of opinions towards fundamental issues such as openness of board meetings, voting on the record, voices for individuals and non-commercial entities, limitations on ICANN's powers to strictly technical issues, etc. Both BWG and ORSC warned that the concept of constituencies would lead to capture by corporate interests at the expense of expression. BWG wanted to do away with constituencies altogether. ORSC wanted constituencies structured so that everyone would have a voice. The ICANN constituency structure has, as predicted, become the catalyst for capture by the old gTLD-MOU crowd, and a large and powerful group of trademark interests. These trademark interests are currently pressing non legislative expansion of rights for trademark holders, at the expense of free speech and expression.

Competition:

It is ironic in that in the midst of all the controversy over competition, ICANN has hesitated to take the single step that would introduce the most competition: creating objective technical guidelines for choosing new TLD registries. Although ICANN has indeed chosen 7 new gTLDs, no guidelines have been established that would allow for future expansion. There are no roadmaps by which prospective registries can turn to structure their technical business plans.

The Process of Consensus Development and Implementation:

ICANN is correct in that its formation was an unprecedented experiment in private sector consensus decision-making. Unfortunately, that experiment is in the process of failure. ICANN's claim of "openness and transparency, based on Internet community consensus, bottom-up in its orientation and globally representative" is far from the reality of the situation.

ICANN is the classic top-down organizational structure without accountability. When its by-laws are inconvenient, they are changed without discussion.

Board of Directors:

Currently, the 9 seats that were to be elected from the Internet stakeholders, the so called "At Large" directors, were whittled down to 5. The other 4 seats have been held by "Board Squatters," those who were appointed and not elected. Despite calls for elections to replace the squatters, and calls for their resignations, no movement has occurred.

Instead, the Board has responded with a "clean sheet" study that could, conceivably, dismantle the entire At Large process altogether. Leaving ICANN controlled solely by special interest groups.

ICANN Staff :

ICANN's staff seems, by all outside examination, to be driving all policy decisions. The non-elected staff, submits reports to the board which are normally accepted verbatim, with no indication to the Internet community of what criteria was used to reach the conclusions contained therein. These policy decisions, often clearly outside the reach of a "technical management" organization, are then presented as a "fait accompli" with no accountability or transparency, and no input from the Internet community that they affect.

Conclusion:

The Internet is the single most significant communications medium ever created. Its power goes well beyond that of shopping malls and e-commerce, and empowers individuals in a way never before imagined. It is thus a national as well as an international resource. The ability to control important aspects of this technology cannot be underestimated. It is up to all of us to remain vigilant when organizations are given special privilege by a branch of the US Government to control this vast means of expression. Safeguards must be put into place whereby individuals, non-profit entities, churches, tribal governments, and other disenfranchised groups may provide unencumbered input and opinion to an open, transparent and accountable entity. This entity is, unfortunately, not ICANN in its current form.

ICANN must be restructured. We suggest the following changes:

must be irrevocably codified in

ICANN's bylaws, and must be enforced by the Commerce Department and/or Congress

documented as to what objective

criteria was used to select them. Any decisions without such objective, clearly stated criteria should be rescinded and revisited after such objective criteria are put in place.

or more inclusion by Internet

stakeholders, including individuals, educational entities, religious entities, consumer protection groups, civil libertarians, and others. The current practice of lumping all of these groups into one constituency, while leaving 6 others who all represent overlapping business interests, must change.

constitutional rights and liberties. An

example is the "takings" clause. Several gTLDs are being operated currently that will essentially be "taken" if ICANN puts the identical strings in their root system. Another example is ICANN's non accountability under the Federal Administrative Procedures Act.

will accept and others that it

will ignore. The most glaring example is its lack of codifying the At Large group into an irrevocable part of the ByLaws. Second to this is ICANN's failure to recognize a place for individuals to participate on an equal footing with business interests. Third, is ICANN's continued failure to constitute a membership in accordance with the White Paper, as well as California public policy under which it is organized.

intellectual property rights of

businesses. ICANN's Uniform Dispute Resolution Policy gives trademark and intellectual property holders a means to limit and silence legitimate speech without recourse. If ICANN is allowed to continue to use this policy, a balance must be struck whereby speech rights are protected and abuses by intellectual property holders are curtailed.