

Dancing the Quango: ICANN and the Privatization of International Governance

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Conference on
New Technologies and International Governance
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Johns Hopkins University
Feb 11 and 12, 2002

The Internet Corporation for Assigned Names and Numbers (ICANN) is the US-based private corporation created in 1998 to manage the root of the Internet's domain name space and the Internet Protocol (IP) address space.¹ This paper characterizes ICANN as an emergent international regulatory regime, analogous in its powers and modes of regulation to the Federal Communications Commission, except that its authority is global rather than national in scope. That characterization would be obvious and uncontroversial were it not for ICANN management's persistent assertions that it is *not* a policy maker and regulatory authority but a "technical coordination body."² In reality, however, ICANN's control of contested and economically valuable technical resources (domain names in particular) links its relatively minor technical coordination activities to a set of highly significant regulatory and policy making functions.

Why does ICANN resist explicit recognition of its true function? The answer lies in its history and in the way the organization has chosen to deal with the tensions inherent in use of a private corporation to provide international governance functions. In a nutshell, the claim that ICANN is engaged in the business of technical management empowers specific stakeholders – notably the Internet technical community and some of the business interests that employ them – and provides a convenient basis for limiting the participation and influence of other stakeholders – notably public interest groups, national governments, and individual domain name holders.

In this paper, I will begin by analyzing the political and legal factors that led the US Government and other key stakeholders to favor private sector governance over other alternatives during the creation of ICANN. The paper then demonstrates that ICANN is in fact an international regulatory regime; the corporation's "technical coordination"

¹ For the sake of readability and economy of expression, this paper avoids describing the technical aspects of the domain name space and the address space. For complete explanations of the domain name space and address space as economic resources, see Chapters 2 and 3 of Milton Mueller, Ruling the Root: Internet Governance and the Taming of Cyberspace (MIT Press, 2002).

² On its web page, ICANN describes itself as a "technical coordination body for the Internet" that "assum[ed] responsibility for a set of technical functions previously performed under U.S. government contract by IANA and other groups." The "IANA" referred to here is the "Internet Assigned Numbers Authority and has been an recognized part of the Internet Engineering Task Force's governing hierarchy since 1988. See also the White Paper and Dyson statement.

tasks provide the leverage for making and implementing policies and regulations governing intellectual property, the domain name supply industry's market structure, end user rights, and privacy. The paper concludes by exploring the conflicts between ICANN's status as a private corporation and its need to function as an accountable, legitimate public institution capable of forming policy in the international arena.

1. Why ICANN was set up as a private sector organization

There are three main reasons why the problem of governing the root of the domain name system and the IP address hierarchy was solved using a private-sector model:

- The influence of a particular epistemic community, namely the technologists organized around the Internet Society, which wanted to retain their historical control of the name and address spaces.
- The need for global rather than national jurisdiction.
- The desire of the US Government to avoid existing international regimes, which it viewed unfavorably.

Epistemic community

The Internet protocols and the domain name system protocols and software were developed by an elite, tightly-knit group of computer science researchers. The group received government research subsidies from the late 1960s but acted with a great deal of autonomy. As the Internet grew this technical cadre, led by Vint Cerf and Jon Postel, developed their own organizations and institutions for developing standards. The two most significant institutional products of that effort were the Internet Engineering Task Force (IETF) and the Internet Society.³ From the standpoint of international theory, the Internet technologists can be characterized as an epistemic community.⁴ Though centered in the United States, the community from the beginning involved computer scientists in Europe and Asia and thus was international in scope. From the origin of the ARPANET in 1969 until about 1996, the community had control of the management of Internet identifiers. When the commercialization of the Internet and the World Wide Web transformed domain names and raised legal and commercial issues, new stakeholders and interests impinged on DNS management and the technologists' control was threatened. They were particularly concerned about political intervention by international organizations such as the ITU, which had historically been hostile to the Internet, and national governments intent on regulating the Internet. This stakeholder group, therefore, resisted traditional forms of international collective action and favored private sector arrangements based on their own, organically developed institutions – IANA and the Internet Society.

³ The Internet Society formally incorporated the Internet Architecture Board (IAB), a small committee that represented the leadership of the technical community. The IAB in turn claimed responsibility for designating an "Internet Assigned Numbers Authority" (IANA) that would manage the top of the name and address space hierarchies. IANA was fundamentally Jon Postel and his staff at the Information Sciences Institute (ISI) of Marina del Rey.

⁴ According to Peter Haas's definition, an epistemic community is a "professional group that believes in the same cause and effect relationships, truth tests to accept them, and shares common values; its members share a common understanding of the problem and its solution." (Peter Haas. 1990. *Saving the Mediterranean. The Politics of International Environmental Co-operation*. New York: Columbia University Press. p.55)

Global vs. National Jurisdiction

In forming its policy toward the Internet and global electronic commerce in the mid- to-late 1990s, the Clinton administration was very concerned about the possibility that the promise of global electronic commerce would be undermined by the assertion of territorial jurisdiction.⁵ It feared that national governments in particular would impose upon the naturally global arena of the Internet a patchwork of inconsistent or conflicting national laws and regulations. A private sector governance authority was perceived as a way around this problem. The Clinton administration's policy called for "private sector leadership" and noted "governments should establish a predictable and simple legal environment based on a decentralized, contractual model of law rather than one based on top-down regulation."⁶ Thus, with respect to domain names the administration proposed in mid-1997 that "It may be possible to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis without the need to litigate."⁷ The request for comments from the US Commerce Department that eventually produced ICANN was issued at the same time as the release of the White House's "Framework for Global Electronic Commerce" report.

Rejection of existing international institutions

US policy was driven not only by its positive assessment of private sector leadership and global contractual approaches, but also by a negative outlook toward the performance of existing international institutions. US telecommunication and information policy makers shared a longstanding antipathy toward the International Telecommunication Union (ITU) in particular. US technology leadership and its often aggressive liberalism were typically blunted within ITU forums. The US was also leery of European-led efforts to create a new international treaty or charter for regulation of the Internet,⁸ fearing that it would open the door to an ITU or UN-like bureaucracy imposed on the Internet. Thus, the US Department of Commerce White Paper that served as the charter and founding document for ICANN avoided direct government action while inviting international participation in governance. It concluded that "the U.S. Government is prepared to recognize, by entering into agreement with, and to seek international support for, a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the Internet name and address system. Under such agreement(s) or understanding(s), the new corporation would undertake various responsibilities for the administration of the domain name system now performed by or on behalf of the U.S. Government or by third parties under arrangements or agreements with the U.S.

⁵ "The Internet is emerging as a global marketplace. The legal framework supporting commercial transactions on the Internet should be governed by consistent principles across state, national, and international borders that lead to predictable results regardless of the jurisdiction in which a particular buyer or seller resides." A Framework for Global Electronic Commerce, The White House, July 1, 1997. Available on line at <http://www.ecommerce.gov/framewrk.htm>.

⁶ Ibid.

⁷ Ibid.

⁸ On September 8, 1997, EU Commissioner Martin Bangemann, in a speech prepared for an ITU conference in Geneva, called for an "international charter" to regulate the Internet. The charter should deal with questions such as technical standards, illegal content, licenses, encryption and data privacy.

Government.”⁹ In this manner the US sidestepped traditional international arenas and moved the governance problem to an entirely new forum where governments and IGOs were not the central players.

2. ICANN as International Regulatory Regime

ICANN must be understood as a new international regime formed around a global shared resource.¹⁰ The resources are of course the domain name and Internet protocol address spaces. ICANN’s purpose is to define property rights in Internet identifiers and to regulate their consumption and supply. Traditional regime theory is centered on the actions of states, and holds that they come into existence to overcome collective goods problems by coordinating the behaviors of individual states. The emerging Internet governance regime is the product of an informal political agreement among national governments, dominated by the United States, which includes a much more extensive role for private sector actors. The reliance on the private sector does make ICANN different from other international regimes, but it does not change its basic nature. It is much more accurate and analytically fruitful to define ICANN as a variant of a standard international regime than it is to think of it as something *sui generis*.

ICANN is not primarily concerned with technical coordination, nor is it a standard-setting organization. Rather, it is an institution that ties the need for technical coordination to regulation of the industry built around the resources it manages. That is why I refer to it as a global regulatory regime. The closest analogue is radio frequency administration at the national level.¹¹ Nominally, the assignment of radio frequencies in a given location must be coordinated to prevent electromagnetic interference among users. As any student of broadcasting and telecommunications policy knows, however, national governments don’t simply *coordinate* frequency use; they *regulate* wireless industries by attaching conditions to and imposing standards upon the assignment of frequencies. Sometimes the regulatory intent of the conditions is overt, as when broadcast licensees are required to fulfill specific public interest obligations or when broadcast content is regulated or censored as a condition of using an assigned channel. The industry can also be regulated in less direct but equally important ways, through the imposition of uniform technical standards, by controlling the number of entrants into the market, or by approving or rejecting corporate mergers.

The common element is that *the regime has exclusive control of a critical input into an industry and uses the leverage it has over access to that resource to regulate the industry*. In radio spectrum management, control is exercised through licenses issued by

⁹ U.S. Commerce Department, National Telecommunications and Information Administration, Management of Internet Names and Addresses, Docket Number: 980212036-8146-02 (“The White Paper”), June 5, 1998. http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm

¹⁰ International regimes are defined by Krasner (1984, 2) as “arrangements that pertain to well-defined activities, resources or geographical areas,” consisting of “principles, rules, norms and decision-making procedures, around which actors’ expectations converge.”

¹¹ Internationally, radio spectrum management through the ITU is mostly confined to technical coordination. Allocation and assignment of frequencies at the international level is not leveraged to exert policy control over national telecommunication regimes, because the ITU is subordinate to national governments and they (or at least, the most powerful ones) would never relinquish such authority.

government regulatory agencies. In ICANN's case, regulation of conduct and market structure is imposed on registries and registrars via contracts with the root administrator. ICANN's control of the root is used to make and enforce policy in three broad areas: defining and enforcing rights to names; regulation of the domain name supply industry; and the linkage of online identity to law enforcement.

Rights to names

ICANN defines and enforces property rights in names. This function involves the recognition and protection of various kinds of intellectual property claims on domain name assignments, and the resolution of disputes based on those claims. Name rights are defined and enforced via the Uniform Dispute Resolution Policy (UDRP). The UDRP is implemented via registrar accreditation contracts that commit consumers to binding arbitration. Other rights to names are enforced via registry contracts that exclude specific names from the DNS database or impose preferential procedures for the initial assignment of names.

Regulation of domain name supply industry

The second policy area is economic regulation of the supply industry for domain names. ICANN uses its control of the root to regulate the supply of top-level domains, and to regulate the price, performance, and market structure of the domain name registration industry. It (along with the U.S. Department of Commerce) imposes price controls on registries and enforces a vertical separation between registry and registrar aspects of the business. In the future, it may be required to take on additional regulatory functions pertaining to the relationship between registrars and registries, consumer complaints against registrars, and the merger of registries. ICANN's position as gateway to the root may also allow it to play an important role in the standardization of internationalized domain names.

Surveillance and law enforcement

The third policy area involves the exploitation of the data generated by Internet identifiers to facilitate surveillance and control of Internet users by law enforcement agencies. This function is now primarily concerned with the exploitation of WHOIS data for intellectual property protection. WHOIS is a protocol that allows users to type in a domain name and see the name and contact information about the person and/or organization that registered it.¹² If the ICANN regime survives, this aspect of policy

¹² See the Geekttools Whois proxy at <http://www.geekttools.com/cgi-bin/proxy.cgi> to use this service. If one types in the domain name sais-jhu.edu, for example, the following information pops up:

Registrant:

The Paul Nitze School for Advanced International Studies
1740 Massachusetts Ave, NW Washington, DC 20036
UNITED STATES

Contacts:

Administrative Contact:
Mark Golding
Johns Hopkins University - SAIS
1740 Massachusetts Avenue, N.W.
Washington, DC 20036

making will probably play a much larger role in the future. One national politician has noted that a “centralized [domain name] registry functioning as a monopoly” was necessary to support “consumer protection,” “the resolution of intellectual property disputes,” and “a capacity for indirect taxation of e-commerce.”¹³ The prospect of linking the surveillance capabilities enabled by the DNS databases to e-commerce taxation makes as much sense as linking it to trademark protection, so the statement cannot be dismissed. The use of a centralized identification mechanism that gives authorities both the ability to identify private actors and some control over their access to cyberspace will probably prove to be too tempting to pass up.

The informal regime

In short, ICANN is not pioneering a radically new and better form of global policy making. It is simply a resource-based international regulatory regime. The only remarkable and unique thing about it is that its creators have succeeded in building a rough facsimile of an international treaty organization without a treaty. The agreements were forged outside the typical international negotiating arenas, and the leading state actor, the United States, disavowed direct participation and instead delegated authority to a private corporation dominant by the technical community. However, ICANN is fundamentally a U.S. government contractor, and the White Paper process that created it was just a less formal mechanism for gaining input from other states (as well as many private sector parties) to produce a policy document that the major parties could agree upon. There is some precedent in the formation of Comsat and Intelsat in the 1960s and 70s, which started as a US corporation and then was broadened to a more formal and political governance structure.

It is the *informality* of the arrangements, and their origins in semi-private initiatives such as the generic top-level domain MoU or the Internet Society’s self-privatization attempts of the mid-1990s that is new.¹⁴ The instruments on which the regime is founded, such as the White Paper, Internet RFCs and the WIPO processes, all share a fuzzy legal status, standing somewhere between formal governmental rulemaking and private sector

UNITED STATES
(202) 663-7702
mgolding@jhu.edu

Technical Contact:
Same as above

Name Servers:
NS1.SHORE.NET
NS2.SHORE.NET

Domain record activated: 23-Sep-1996
Domain record last updated: 22-Oct-2001

¹³ Paul Twomey, National Office for the Information Economy (Australia), Minutes of the .AU Domain Administration Board Meeting, Melbourne, 10 January 1999. Available at <http://www.auda.org.au/minutes/2000-01.html>

¹⁴ For a complete historical account of these initiatives and their role in the creation of ICANN, see M. Mueller, Ruling the Root: Internet Governance and the Taming of Cyberspace, (MIT Press, 2002).

arrangements. More important than the documents themselves are the informal political deals between governmental and private actors that generated them. ICANN is the product of a somewhat precarious bargain between the Internet technical hierarchy, a few major e-commerce and telecommunication firms, the intellectual property interests (including WIPO), the European Union, the US Department of Commerce, and one or two other national governments, notably Australia. Should any one of these major players decide to abandon or actively oppose ICANN, the edifice will crumble, or require major adjustments in policy and structure.

One of the linchpins of the regime, however, is that the US government still holds formal control over the DNS root. The so-called “privatization” of DNS management is not complete. Any changes in the root zone files must be approved by the US Commerce Department. And in 1999, the US announced that it had no plans to transfer ultimate policy authority over the DNS root to anyone else.¹⁵

Aside from the obvious and direct role of the USG, much of ICANN’s agenda has been and is being driven by governments and international treaty organizations. European and Asian governments played an overt role in the selection of ICANN’s initial Board. An international intergovernmental organization (WIPO) was given a leading role in creating ICANN’s approach to trademark protection, and is moving to recognize new rights to names (see next chapter). ICANN’s Governmental Advisory Committee has exerted persistent pressure on the delegation and regulation of the country code top-level domains. The European Union has requested and will receive a special delegation of a .EU top-level domain.

3. Tensions Inherent in ICANN’s status

From the analysis above it should be clear that I do not think that the privatization of Internet governance in the case of ICANN has managed to square what is after all a circle. A public institution that engages in policymaking, regulation and legislation needs to be open and transparent and follow stable, defined procedures designed to protect the procedural and substantive rights of the parties involved. The structures and procedures need to follow established channels and cannot be changed on a case by case basis. The emphasis is on accountability, which in a governmental context trumps efficiency. A private corporation on the other hand is able to act more expeditiously precisely because it does not need to secure the consent of a broad community or laboriously gather a representative sampling of input and commentary from affected stakeholders. It must avoid breaking the law, of course, but it acts in its own interest and trusts its officers and management to determine what that interest is. Privatization of a governance authority does not overcome this dichotomy, nor does it necessarily find the optimal point between the two extremes.

ICANN is wedged uncomfortably somewhere between the two poles. As a policy making and regulatory authority, it needs to develop representative structures and defined procedures for making domain name policies. It needs the capacity to police compliance with its contracts and to adjust the contracts in response to legal and regulatory problems.

¹⁵ Burr statement, Fall 1999

If it is to retain its legitimacy, a stronger consumer protection role will be necessary in the future. Because it is a private sector, self-regulatory agency, however, it is dependent on the industry it regulates for recognition, participation, and financial support. Because it is a US corporation, a large part of the rest of the world does not want it to become powerful or to expand its role. ICANN's management, behaving more like a corporation than a public institution, often tries to set policy unilaterally and views dissent from its desired policies as something that it needs to protect the corporation from, rather than as a healthy expression of divergent views among the affected community. Furthermore, ICANN's behavior at this stage is clearly profoundly affected by the fact that it is not fully privatized – it is still subject to Commerce Dept oversight and indirectly to the U.S. Congress.

The strength of the ICANN model is precisely that it bypassed existing international institutions (although it did rely on WIPO to set policy regarding trademark domain name conflicts), drawing its input and legitimacy directly from a global Internet community with its own organic institutions. The main problems of ICANN stem from its initial management and Board's persistent attempts to avoid or elude the accountability that was supposed to be built into its structure. ICANN's initial Board selections were made by ICANN's management rather than the other way around. The initial Board selections were mostly people with no knowledge of domain name and address policy issues and did not represent a balance of the contending political constituencies affected by ICANN policy decisions.¹⁶ An election of 9 at-large board members by a broad-based membership was delayed for over a year, while the management-selected initial board was allowed to stay on indefinitely. This hand-picked board, unwilling and unable to challenge the small clique in control of management, severely undermined ICANN's legitimacy as a public institution and made it operate more like a corporation than a public institution.

¹⁶ Tamar Frankel critique