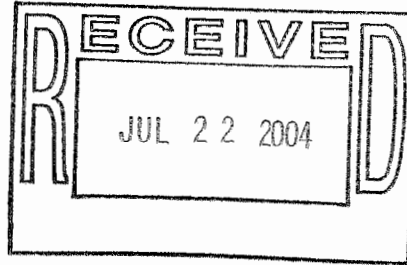Mr. Paul Twomey, President
Mr. Vint Cerf, Chairman
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-660

July 15, 2004

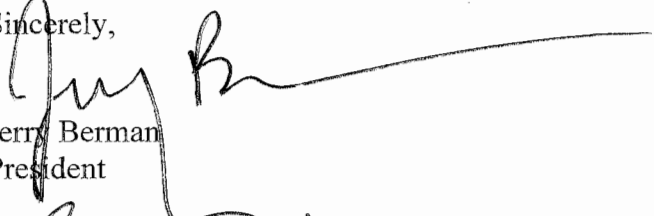RECEIVED
JUL 2 2 2004

Dear Paul and Vint,

We are sending you CDT's CDT's new report, "ICANN and Internet
Governance: Getting Back to Basics." The report is our latest attempt to add
some clarity regarding ICANN's appropriate role in the context of the Internet
governance debate. We remain concerned that great misunderstandings about
ICANN are supporting an international environment where ICANN risks being
altered or supplanted in ways that would threaten the democratic and open
character of the Internet. ICANN's own actions may in some ways have
contributed to these misunderstandings. This paper is intended to offer a
constructive critique of the changes we believe ICANN must continue to
pursue if it is to thrive.

Since 1997, when CDT first cosponsored a workshop to explore global
involvement in domain name and number management, we have been
committed to the private-sector, bottom-up, inclusive coordination of Internet
naming and numbering functions. Today, we remain steadfast believers in the
model on which ICANN was founded. The work of our Global Internet Policy
Initiative (GIPI) in assisting with the redelegation of .uz, among other efforts,
has solidified our belief in both the potentials of this approach and the great
challenges that confront ICANN in the world community.

The success of the ICANN model is now more important than ever given the
attention focused on Internet governance surrounding the World Summit on
the Information Society (WSIS). We believe ICANN must visibly refocus on
its core mission; embrace bottom-up consensus as a cornerstone of its
approach; and continue its efforts to increase inclusiveness. We offer some
specific suggestions that we believe are essential to preserve the private,
bottom-up coordination of core Internet technical functions, which remains the
best means of managing those core functions while protecting the democratic
and decentralized character of the Internet.

We would appreciate meeting with you to discuss our report. We look forward to working with you, the ICANN Board and staff, towards making ICANN a successful and inclusive organization focused on its critical core mission.

Sincerely,

Jerry Berman
President

Alan Davidson
Associate Director
Center for Democracy and Technology

CENTER FOR DEMOCRACY & TECHNOLOGY

Working for Civil Liberties on the Internet

ICANN and Internet Governance:
Getting Back to Basics

July 2004

Abstract

The purpose of this paper is to examine the Internet Corporation for Assigned Names and Numbers (ICANN) and its role in Internet governance. ICANN is arguably straying from its original design as a private-sector, bottom-up, consensus-based technical coordination body. Unless it returns to that model, it is likely to be supplanted or radically altered by efforts to link its management of core Internet functions with broader interests in "Internet governance." Such a result could well threaten the revolutionary decentralized and democratic characteristics that have been the hallmark of the Internet's promise to promote free expression, civic discourse, and economic opportunity around the world.

The success of ICANN has taken on greater importance given the new attention focused on Internet governance surrounding the ongoing World Summit on the Information Society (WSIS). ICANN has naturally become a focal point in the Internet governance debate because of its role in managing key Internet assets, and because it has taken on the appearance of a top-down regulatory body that might serve as precedent for more centralized governance of the Internet. Yet these Internet governance issues, while very important, are much broader than the core technical coordination role that ICANN plays. Involving ICANN in those broader issues would threaten its critical coordination functions. Instead, the vision on which ICANN was founded—private, bottom-up coordination of certain Internet technical functions—remains the best means of managing those core functions while preserving the democratic and decentralized character of the Internet.

As we explain here, ICANN has an important but narrow and largely technical role to play, related to the allocation of Internet names and numbers. We explain why ICANN should not—and cannot—be seen as a locus of broader Internet governance. And we give concrete examples of how ICANN must continue its reform and evolution if it is to survive and achieve its goals. Ultimately, such reform is needed if ICANN is to improve its standing in the eyes of stakeholders, governments, and the Internet community.

1. Introduction

The revolutionary structure of the Internet—a global network of networks built on privately controlled infrastructure and technology that pushes control to the edges—has led to diverse and largely decentralized governance of the functioning of the Internet and of online conduct. But recently, a variety of concerns have led to calls for greater centralization of governance functions, or even for some kind of general purpose, international, Internet governance body. This governance debate, which has been underway in many settings, has become a central focus in the first phase of the World Summit on the Information Society (WSIS) culminating last year.[1]

Many who have called for international centralization of Internet governance have pointed to ICANN as a precedent or justification. Some suggest that ICANN was formed to be the internationalized repository of regulatory powers; some complain that ICANN remains dominated by the U.S., or fails to use its powers appropriately, or has lost legitimacy and that, given the importance of the Internet, ICANN's functions should be undertaken or overseen by an international intergovernmental body.

In CDT's view, many of these arguments are flawed or based on inadequate information. ICANN shares some responsibility for these misperceptions. ICANN has a narrow role focused on largely technical issues associated with management of the domain names system. However, ICANN has sometimes overstepped the bounds of this limited mission, or been miscast by itself or its supporters as a broad regulator with a right to act on behalf of the global Internet community.

Change in ICANN is needed—but not by making it an intergovernmental body or broadening its power. Rather, ICANN must be focused on the design that gave it birth, in order to save that vision of decentralized, bottom up coordination. In this paper, we recount the original, narrow charge given to ICANN, as an organization based on bottom-up consensus-based coordination, and we call for a renewed recognition and return to that goal by the ICANN Board, the ICANN management, and the ICANN community.

In sum, ICANN was founded on three principles:

- It would have a narrow mission focused on the coordination of certain domain name and addressing functions.
- It would adopt policies within that narrow scope by bottom-up consensus among affected parties.

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[1] For example, at a November 2002 preparatory meeting on WSIS, ITU Secretary General Yoshio Utsumi summed up these concerns when he declared that "cyberspace is a new land without frontiers and without a government yet." He said that a "new global governance framework is needed" to deal with issues of cyber-crime, security, taxation, intellectual property protection, and privacy. *See* http://www.itu.int/wsis/docs/rc/bucharest/speech_utsumi.doc.

- Its processes would be transparent, predictable, and open to wide, global participation.

These principles—carefully crafted, embodied in the U.S. Department of Commerce's White Paper, and endorsed in the International Forum on the White Paper—provide a foundation that the Internet community and governments can embrace. Yet many believe that ICANN has strayed from these principles or contributed to misunderstandings about them, and has certainly been challenged in adhering to them. Some WSIS proposals would cast them aside altogether. In order to return to the bottom-up coordination model most likely to succeed, ICANN should:

- reaffirm the extremely limited mission that ICANN was created to accomplish;
- refrain from using ICANN's coordination role as leverage to engage in policymaking in broader areas;
- support the consensus-based approach to decision-making that was core to the original concept under which ICANN created;
- reassess and ensure its contracts with registries provide both the reality and appearance of a limited approach to coordination of registry activities;
- continue its development of mutually-acceptable relationships with the other key entities who manage critical functions: the root server operators, regional addressing registries, and the ccTLD community;
- adopt an approach to coordination that seeks to minimize policy impacts (such as, for example, allocating valuable new generic top-level domains through objective technical criteria rather than subjective policy-based goals); and
- strengthen activities to engage diverse constituencies around the world in ICANN decision-making.

While CDT recognizes the real concerns of many of the participants in the ongoing discussions about Internet governance, including at the WSIS, we have long opposed the view that the Internet should be subject to top-down regulation by a global government-based institution. To the contrary, the Internet arose primarily from cooperation among private parties, and today the development of online order can best stem from such cooperation and local decision-making, supported by national laws. WSIS participants should acknowledge the decentralized nature of the Internet and the crucial role of non-governmental governance in its growth. However, a renewed focus by ICANN on its first principles is essential to proving the continued viability of this approach.

2. WSIS and the "Internet Governance" Debate

The governance debate at WSIS included serious, legitimate concerns. Developing countries believe that they have not had an adequate voice in the development of the policy framework governing information and communications technologies (ICTs). No one can deny that the benefits of the Internet are unevenly available within countries and between the developed and developing parts of the world. Nor can it be denied that online wrongdoing, ranging from fraud to copyright infringement, and from child pornography to spam, need to be addressed

in some meaningful and effective way. None of this, however, is about ICANN. For example, WSIS participants concerned with the digital divide should not focus their efforts on ICANN, but rather on the continuing role of telecommunications monopolies and outdated regulatory barriers in restricting ICT affordability and growth in developing and transitional countries.

Similarly, because the Internet connects across all national boundaries, it is difficult for one local sovereign to enforce its laws against remote wrongdoers. This has led to a number of important efforts to improve harmonization of law and international cooperation to enforce those laws about which there is widespread agreement.

But it is one thing to work for increased international cooperation, and quite a different thing to call for the creation of a new, centralized intergovernmental authority with the right to "govern the Net."

It is important for participants in the "Internet governance" debate to focus on the difference between government and governance. Governance arguably includes any system for developing and enforcing rules to guide behavior and fostering constructive social order. A wide range of bodies is engaged in "Internet governance." These include private corporations through contractual agreements (such as the agreements for peered exchange of traffic), national governments, non-governmental standards bodies such as the Internet Engineering Task Force and the World Wide Web Consortium, and regional and international organizations, ranging from the World Trade Organization to the Council of Europe to the Asia-Pacific Economic Cooperation (APEC) forum. Given the

CDT's Role in the ICANN Debate

The Center for Democracy and Technology is a non-profit, non-governmental organization working to promote free expression, privacy, open access and democracy for the Internet and the other new digital media. CDT has long advocated that ICANN should be based on openness, public representation and other good governance values. We bring to these issues a widely respected expertise in public policy, technology, and law.

CDT was an early and prominent proponent of global representation and participation in ICANN. We urged ICANN to select some of its Board members by elections broadly open to Internet user worldwide. CDT actively encouraged citizens of the world to participate in the ICANN's 2000 elections and operated a website to provide information and facilitate participation. Afterwards, CDT coordinated the NGO and Academic ICANN Study (NAIS), a diverse group of public interest representatives from around the world, which issued in August 2001 a major report, "ICANN, Legitimacy, and the Public Voice: Making Global Participation and Representation Work." (Available at http://www.naisproject.org/report/final/)

More recently, CDT has stressed the need for ICANN to stay confined to its narrow mission. Our 2003 white paper offered concrete benchmarks for assessing ICANN and recommendations for improving representation and responsiveness to the public interest. ("Assessing ICANN: Towards Civil Society Metrics to Evaluate the ICANN Experiment," July 2003. Available at http://www.cdt.org/dns/icann/030731assessingicann.pdf)

CDT is also co-founder, with Internews, of the Global Internet Policy Initiative, a project that works in developing and transitional countries to promote adoption of the legal and regulatory frameworks that will support the growth of an

unique nature of the Internet, even individual users have a role in creating accountability online.[2]

The fatal flaw of proposals to empower an international body to govern the Internet is that the Internet is not a single thing, but rather a multitude of technologies, networks, applications and users subject to many different rules and regulators. The system's complexity is largely a consequence of the fact that the Internet is interwoven with many aspects of commerce and communication, many with pre-existing governance structures.

The Internet consists of vast numbers of participants, most of whom are merely end points that connect with local neighbors. To an extent far greater than any other infrastructure before it (e.g., electricity, air transport, television) the hardware that makes up "the Internet" is owned by millions of different entities, most of which are private parties, scattered among all the countries of the world. Moreover, the Internet was consciously designed to function based on consensus standards developed with the explicit goal of pushing innovation and control to the edges, with little need at the center to distinguish among data packets. This does not mean that the Internet is an anarchic zone. Each participant remains subject to national law. Yet without governmental control at the center, the Internet has grown far faster than any communications medium in history. In fact, there are many reasons to believe that the lack of centralized gatekeepers over Internet applications, services, or content is a major factor in its continued growth and success.

Why then would WSIS delegates believe that a new international government for the Internet might be possible and desirable? The explanations are complex and varied. But to some degree they may lie in misleading impressions created by ICANN itself. Because the U.S. sought at ICANN's founding to establish an organization that would be accountable to all participants affected by its actions worldwide, some may have come to believe that ICANN had somehow received a delegation of governmental power, or that ICANN represents a general "government of the Internet."

In fact, ICANN has extremely limited powers. And while ICANN was created with the agreement of the U.S. government, it did not receive a delegation of governmental power.

open, affordable and user-controlled Internet – an Internet that can drive economic growth and advance human development. Today, GIPI supports local policy coordinators in 15 countries (including India, Vietnam, Indonesia, Russia, and Central Asia). GIPI coordinators in several countries have worked successfully with national governments and civil society to obtain redelegation of country code Top Level Domains (ccTLDs) from offshore companies to local entities chartered to manage the domain names in the interest of the local Internet community. See http://www.internetpolicy.net.

CDT has often critiqued ICANN, and we believe that ICANN needs reform. However, we believe that ICANN, as a non-governmental body, is the best entity to carry out the function of managing the domain name system. We believe ICANN will succeed insofar as it stays within its limited mission and develops policy for domain names in an open and accountable manner consistent with the contractual documents that provide it with its limited powers.

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[2] *See, e.g.,* "Internet Governance: A Discussion Document," George Sadowsky, Raul Zambrano, Pierre Dandjinou (March 2004) http://www.Internetpolicy.net/governance/20040315paper.pdf.

As we noted above, there is a difference between governments and governance. ICANN engages in a limited form of "Internet governance." But it does not do so through the exercise of governmental authority. Understanding ICANN's unique design requires a brief review of why and how ICANN was created.

3. ICANN's Limited Coordination Mission: Background and History

In this section, we review the task ICANN was created to perform, how that role was filled before ICANN, what caused the move to ICANN, and what motivated ICANN's unique design.

A. The Task – Managing the Domain Name System

Every computer connected to the Internet has an address, expressed in the form of a number, such as 206.112.85.10. This address, known as an IP ("Internet protocol") address, is used to route packets of data, allowing email, displays of webpages and other data to get to a desired destination. Some of these addresses are assigned permanently and some are assigned temporarily, but at any given moment each computer connected to the Internet has a unique IP address. Blocks of IP addresses are assigned to the regional IP registries (such as RIPE in Europe and APNIC in the Asia/Pacific region). Larger Internet service providers (ISPs) and other entities apply to the regional IP registries for blocks of IP addresses. The recipients of those address blocks then reassign numbers to smaller ISPs and ultimately to end users.

By the mid-1980's, a system had been designed to translate numeric IP address into human readable names, like cdt.org or itu.int. The system, known as the domain name system (DNS), is hierarchical, meaning that it is divided into top level domains (TLDs), with each TLD then being divided into second level domains. The top level domains historically included three letter generic TLDs (gTLDs), such as .org, .com, .net. The TLDs also include two-letter country code TLDs (ccTLDs), such as .br (Brazil), .nz (New Zealand), or .ca (Canada). More recently, seven new gTLDs have been added, including both "open" gTLDs like .info, .biz., .name, and .pro, and "sponsored" gTLDs like .museum, .aero, and .coop (which are intended to be limited to entities meeting certain criteria set by the sponsors of the TLD). Because the system is hierarchical, cdt.org and cdt.br, for example, are second level domains associated with completely different entities.

Since the earliest days of the Internet, someone has had to keep track of IP addresses, to make sure that a given numeric address is assigned to only one computer connected to the Internet. With the introduction of the DNS, it also became necessary to create and maintain name-to-number lists to translate the domain names used by humans into the numeric IP addresses used by Internet routers. The computers that maintain these translation tables for the top level are known as root name servers. There were originally 13 of them, located in countries throughout the world and operated by various organizations. A server in the U.S., known as the "A root," maintains the authoritative root database and sends changes to the other root servers on a daily basis. Without a set of consistent roots and subsidiary name

servers for each TLD, messages on the Internet addressed to a human readable domain name could not be sent to the intended recipients.

As the DNS has evolved since the creation of ICANN, the assignment and coordination of domain names in the generic space is now handled by two kinds of entities (with confusingly similar names): "Registries" maintain the names-to-numerical address tables for the TLDs. For each TLD, there is one registry. "Registrars" offer second level domain names to end users. In the generic name space, there can be multiple registrars for each TLD, and registrars are "accredited" by ICANN. In essence, the registrars serve the customer service function between the registries and the owners of computers connected to the Internet who want domain names. ICANN requires that registries treat all their registrars equally. This, in effect, forces an internal separation between the registry and registrar sides of any business that wants to operate in both capacities.

The ccTLDs tend to operate in a similar fashion, although their business models vary greatly. Some of the ccTLDs rely on ISPs as registrars; some allow the registry to also offer registrar services. ICANN does not oversee these decisions, which are generally a matter of national policy. It is contemplated that over time global ccTLD policies will be established by a bottom-up policy process within ICANN's new ccNSO, and great attention has been focused on establishing a mutually satisfactory relationship between the ccTLDs and ICANN. Countries of course remain concerned about their national sovereignty as it relates to ccTLD policy, and particularly the allocation of the national ccTLD.

The domain name system also includes a set of technical parameters or protocols—common agreements concerning, for example, what purpose is served by a particular field in a data packet. Someone has to assign these values and maintain a registry of them for developers to refer to when designing new communications programs.

Coordinating this system is the job of ICANN. It is a crucial but quite narrow mission.

B. ICANN's Predecessors

The original need for ICANN arose from the fact that one individual, Jon Postel, a computer scientist at an American university, had accepted responsibility for keeping track of Internet addresses. This was in the early days of the Internet when it consisted of links among U.S. government and university computers, all working on U.S. government-funded research. While the U.S. government funded Postel's work, it exercised no control over Postel's technical decisions—he worked by consensus with the community of academic Internet users, maintaining lists of assigned Internet addresses. Dr. Postel also published a list of technical parameters used by developers to ensure interoperability of their programs when they designed Internet communications applications.

In the early 90's, in large part due to expansion of commercial traffic online, the Internet grew so quickly that it became obvious that the task of keeping track of names and addresses would have to be undertaken by an organization, not one man. Although the U.S. government had paid Postel's salary under a grant to his university, the U.S. did not claim the right to

coordinate the technical aspects of the Internet, much less the right to use leverage over the domain name system to impose a scheme of Internet governance on the rest of the world.

In 1992, the U.S. government solicited competitive proposals to provide domain name registration services. In December 1992, the U.S. government entered into a contract (called the "Cooperative Agreement") with a private company, Network Solutions Inc. (NSI), for the domain name registration and other services. Under the Cooperative Agreement, NSI registered domain names in generic top level domains (e.g. .com, .org, and .net) and maintained a directory linking domain names with IP addresses of domain name servers. NSI also maintained the authoritative database for top level domains, known as the "A root."

As the Internet continued to grow and became more global, the Internet community began to argue that it was inappropriate that major components of the domain name system were performed subject only to agreements with the U.S. government, without broader input. The U.S. government agreed. After an extensive consultative process, in which hundreds of comments were received from around the world, the U.S. government determined that the domain name system should be privatized, opened to competition, and brought under the oversight of a globally representative entity. In a June 1998 "White Paper," the U.S. government called for the creation of a private-sector group to establish policy for the domain name system based on principles of stability, competition, private bottom-up coordination, and representation. [3] By "bottom-up coordination," the White Paper stated that it meant a process that would, "as far as possible, reflect the *bottom-up governance* that has characterized development of the Internet to date"[4] and would be coordinated by *responsible private-sector action.*

The White Paper stressed that the plan it was outlining "applies only to management of Internet names and addresses and does not set out a system of Internet 'governance.'" A guiding principle of the policy was that *"neither national governments acting as sovereigns nor intergovernmental organizations acting as representatives of governments should participate in management of Internet names and addresses."*

The White Paper also stressed that global representativeness was an important priority:

> [T]he Internet is a global medium and…its technical management should fully reflect the global diversity of Internet users. We recognize the need for and fully support mechanisms that would ensure international input into the management of the domain name system. In withdrawing the U.S. Government from DNS management and promoting establishment of a new, non-governmental entity to manage Internet names and addresses, a key U.S. Government objective has been to ensure that the increasingly global Internet user community has a voice in decisions affecting the Internet's technical management.

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[3] http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm.

[4] *Ibid.* Emphasis added.

Representation was made one of the core principles of the new entity (along with stability, competition and private, bottom-up coordination):

> The new corporation should operate…for the benefit of the Internet community as a whole. The development of sound, fair and widely accepted policies for management of the DNS will depend on input from the broad and growing community of Internet users. Management structures should reflect the functional and geographic diversity of the Internet and its users. Mechanisms should be established to ensure international participation in decision-making.

C. The founding of ICANN

ICANN's Charge

In October 1998, Postel and others created ICANN as a non-profit corporation under the laws of the State of California. In November of that year, the U.S. Department of Commerce entered into a Memorandum of Understanding (MOU) with ICANN to recognize that domain name system management responsibilities would remain in the private sector.[5] Following the plan laid out in the White Paper, ICANN's articles of incorporation, its corporate bylaws and its MOU with the U.S. government specify that it would serve four functions:

(1) to set policy for and direct the allocation of IP number blocks;
(2) to oversee the operation of the Internet root server system (the thirteen mirrored computers at the top of the hierarchy of names-to-addresses tables);
(3) to oversee policy for determining the circumstances under which new top level domains would be added to the root system; and
(4) to coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet.[6]

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[5] http://www.icann.org/general/agreements.htm.

[6] *See* ICANN articles of incorporation, Article 3. http://www.icann.org/general/articles.htm. ICANN's corporate bylaws state:

> The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:
>
> 1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
>> a. Domain names (forming a system referred to as "DNS");
>> b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and
>> c. Protocol port and parameter numbers.
>
> 2. Coordinates the operation and evolution of the DNS root name server system.

Also in October 1998, the U.S. government and NSI amended their Cooperative Agreement to provide that NSI would create a shared registry system that would allow other entities to serve as registrars, i.e., to provide domain names to the public. NSI also agreed to recognize ICANN and to enter into a contract with ICANN. In 1999, after further negotiation and public debate, NSI and ICANN signed their contract, under which NSI would continue to perform as the registry for .com, .org and .net for a period of time and have its registrar function accredited by ICANN.

A key provision of NSI's contract with ICANN stated that NSI would be bound by future rules that ICANN might make only if they related to "(1) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability and/or stable operation of the Internet or domain name system, (2) registry policies reasonably necessary to implement Consensus Policies relating to registrars, or (3) resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names)."[7] Equally importantly, as we describe below, policies on these subjects had to be the result of consensus. In addition, policies had to be recommended by at least a two-thirds vote of the council of the ICANN Supporting Organization addressing the issue.[8] Only then could the ICANN Board of Directors adopt the policy.

In 2001-2002, ICANN executed contracts with seven additional registry operators (for .info, .biz, .name, .pro, .aero, .museum, and .coop). Each of these registry agreements includes the limitations on mission and the consensus policy principle, as does ICANN's agreements with registrars accredited to sell name registrations in these TLDs.

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3. Coordinates policy development reasonably and appropriately related to these technical functions.

http://www.icann.org/general/archive-bylaws/bylaws-13oct03.htm. As a matter of corporate law, activities outside the scope of the articles of incorporation and the bylaws are invalid.

[7] November 10, 1999 ICANN-NSI Registry Agreement, Sec. 3(A)(ii)(b). http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm.

[8] Supporting Organizations were created to facilitate and coordinate input from the various affected constituencies. Between 1999 and the end of 2002, the Supporting Organizations were focused on different parts of ICANN's mandate: the Address Supporting Organization; the Domain Name Supporting Organization, and the Protocol Support Organization. Almost all of the energy and controversy in the ICANN context during 1998-2002 took place in the Domain Name Supporting Organization (DNSO). Within the DNSO, there were constituencies established in ICANN's bylaws: registries for generic names, or "gTLDs," registrars, intellectual property groups, business, and registries for ccTLDs. There is also a "Names Council" made up of delegates from these constituencies.

The Role of the U.S. Government

The MOU between the U.S. government and ICANN was intended to be temporary. It was and still is the intent of the U.S. government to withdraw entirely from management of the DNS. The U.S. has determined that it can responsibly *decline* to "regulate the Internet" (at least in respect to the domain name system) as long as private-sector actors, accountable to Internet stakeholders, come forward to take responsible, cooperative, lawful actions that assure continued stable interoperability.

In supporting the formation of ICANN, the U.S. government decided to defer to its decisions in the narrow sphere of domain name system management, where ICANN had the ability to set binding standards, not by making law but by developing policy in compliance with contracts entered into between ICANN and domain name registries and registrars. Neither the U.S. nor any other government granted ICANN any governmental powers.

ICANN is unique: it is a California not-for-profit organization with corporate and contractual obligations to remain accountable in various ways to global Internet stakeholders. But it was not established by means of a delegation to it of any regulatory authority. The continuing MOU between the U.S. government and ICANN gives the U.S. limited power and the U.S. government has in fact not fully exercised the authority it has. The only powers that ICANN has to make and enforce rules come from contracts and other agreements entered into with private parties. In the next section, we go into greater detail about these and other specific limitations on ICANN's power, and how those limitations have been effected in practice.

4. The Limitations on ICANN

If the governmental participants in WSIS understood the constraints on ICANN's powers, they would not want to take it over. Two factors may have misled some to view ICANN as a general purpose regulator of the Net and then to claim that some combination of governments should be playing that role. First, ICANN has not yet done enough to explain to governments that it has no substantial regulatory powers, and how they can participate in its processes. Second, the WSIS participants are understandably impatient to find solutions to pressing problems—including the digital divide, international disputes regarding intellectual property protection, and the control of online wrongdoing—that are not easily solved by means of local regulation. It is difficult to believe that there is not "someone in charge" of something so important as the Internet. So many listen to ICANN's claims to act on behalf of the global Internet community, they observe that problems that bother many members of that community persist, and they conclude that what is needed is a change of regime – either through radical change in ICANN's mission or by moving ICANN's functions to an intergovernmental body. However, ICANN's powers are in fact quite limited and it is not suited to take on broader functions. Moreover, CDT does not agree that it is appropriate or necessary to pursue intergovernmental coordination of the functions that ICANN performs.

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A. Express Limitations

ICANN's only power is to coordinate the identifiers (domain names and Internet protocol numbers) that provide access to the Internet and allow participants to be found. ICANN has no authority to withhold issuance of a domain name (or a block of IP numbers) based on anyone's failure to follow some particular set of policies regarding what content may be posted on a web site or distributed with the aid of a domain name.[9] For all its problems, ICANN has not exceeded its charter in that regard. Appropriately, it has *not* sought to exercise its power over domain names to create regulatory leverage over content.

The MOU between ICANN and the U.S. government also contains many other express limitations on ICANN. These limitations include the duty to promote competition[10] and the obligation to treat all parties equitably.[11] Most important is the requirement that ICANN stick to a very limited mission. Section II.B of the MOU states the "Purpose" of the agreement:

> In the DNS Project, the parties will jointly design, develop, and test the mechanisms, methods, and procedures to carry out the following DNS management functions:

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[9] See the agreement between IANA and the U.S. government at http://www.icann.org/general/iana-contract-17mar03.htm.

[10] Section II.C of the MOU states:

> The Parties will abide by the following principles:
>
> ...
>
> 2. This Agreement promotes the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction.

[11] Section V.A.2 of the MOU provides:

> 2. The Parties agree that ... private-sector technical management of the DNS shall not apply standards, policies, procedures or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause and will ensure sufficient appeal procedures for adversely affected members of the Internet community.

Section V.D of the MOU states:

> 2. Neither Party...shall act unjustifiably or arbitrarily to injure particular persons or entities or particular categories of persons or entities.
> 3. Both Parties shall act in a non-arbitrary and reasonable manner...

a. Establishment of policy for and direction of the allocation of IP number blocks;
b. Oversight of the operation of the authoritative root server system;
c. Oversight of the policy for determining the circumstances under which new top level domains would be added to the root system;
d. Coordination of the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet; and
e. Other activities necessary to coordinate the specified DNS management functions, as agreed by the Parties.

Similarly, the contracts between ICANN and gTLD registries and registrars contain a provision that expressly limits ICANN's powers to certain specified subjects (all of which are germane to the operation of the domain name system).[12]

The limitations on ICANN's power are also illustrated by the manner in which country code Top Level Domain (ccTLD) registries are developing policies on their own, tailoring their approaches to fit local needs (e.g., in developing countries). New policies can be imposed on ccTLD registries only if such policies enjoy very widespread support. Under ICANN's ccNSO structure, a country dissatisfied with an ICANN policy can appeal to the ccNSO group, which will decide whether consensus policies apply to ccTLDs.[13] In part because ccTLDs inherently impact key aspects of national sovereignty, ICANN was not designed at its creation to have direct oversight of ccTLD policy. In addition, ICANN cannot use the leverage associated with creating new TLDs to impose new substantive requirement on

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[12] For example, Section 3 of the 2001 .com Registry says:

A. During the Term of this Agreement:

(i) Registry Operator agrees that it will operate the registry for the Registry TLD in accordance with this Agreement;

(ii) Registry Operator shall comply, in its operation of the registry, with all Consensus Policies insofar as they:

(a) are adopted by ICANN in compliance with Section 4 below,

(b) relate to one or more of the following: (1) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability and/or stable operation of the Internet or DNS, (2) registry policies reasonably necessary to implement Consensus Policies relating to registrars, or (3) resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names), and

(c) do not unreasonably restrain competition.

http://www.icann.org/tlds/agreements/verisign/registry-agmt-com-25may01.htm.

[13] *See* http://www.icann.org/general/bylaws.htm#IX.

ccTLDs. Similarly, the limitations on ICANN's powers are reflected in its inability to impose rules on the Regional IP Address Registries.

In one area, discussed in more detail below, ICANN has expanded its regulatory role. That concerns the approval of new generic Top Level Domains (gTLDs). It has been assumed that ICANN must enter into contracts with new gTLD registries and registrars before they can be approved. In its negotiations with new gTLD registries and registrars, ICANN has insisted on contractual provisions that require ICANN to approve registry business models and any changes in registry operations. While many support the strong enforcement of core contractual provisions directly related to ICANN's coordination and stability mission, concerns remain about the scope and precedent set by ICANN's contracting approach to date.

Also surrounded by rules and limits is ICANN's power to delegate and redelegate management of country code TLDs (ccTLDs). Going back to the early days of the Internet, Jon Postel selected a person, entity or corporation to manage each national ccTLD. Depending on where the necessary technical skills were available, this could have been a government agency, a private corporation, or a university department. Sometimes the manager was located outside the country whose ccTLD it was managing. Recognizing the interests governments have in ensuring that ccTLDs are managed to the benefit of the local Internet community, ICANN has a transparent process for redelegating the ccTLDs, consistent with the interests of the national government.[14] ICANN has never rejected the wishes of a national government regarding ccTLD delegation.

B. Bottom-up Consensus-based Decision-Making

Another major limitation on ICANN's activity has been the consensus-based mechanism for decision-making. The basic agreement that gave rise to ICANN was developed after careful negotiations that led to agreement by the generic Top Level Domain (gTLD) registries (beginning with NSI, the dominant registry for .com, .org and .net) to comply only with policies that reflect an actual consensus among affected parties. Once the registry agreed to this basic principle of consensus, the *future* consensus policies developed in the ICANN forum could become binding on the registry and could be extended down to (and enforced against) registrars and their customers, the domain name registrants.

The consensus policy structure set forth in ICANN's contracts with gTLD registries and registrars requires that an actual consensus be demonstrated by documentary evidence before a policy is adopted. For example, the .com registry agreement provides that the "Registry Operator shall comply, in its operation of the registry, with all Consensus Policies." The agreement defines "Consensus Policies:"

> 'Consensus Policies' are those adopted based on a consensus among Internet stakeholders represented in the ICANN process, as demonstrated by (1) the

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[14] Internet Coordination Policy No. 1 contains a statement of the policies followed in administering delegations of ccTLDs. http://www.icann.org/icp/icp-1.htm. Other materials on ccTLD redelegation are at http://www.icann.org/cctlds/background.html.

adoption of the policy by the ICANN Board of Directors, (2) a recommendation that the policy should be adopted by at least a two-thirds vote of the council of the ICANN Supporting Organization to which the matter is delegated, and (3) a written report and supporting materials (which must include all substantive submissions to the Supporting Organization relating to the proposal) that (i) documents the extent of agreement and disagreement among impacted groups, (ii) documents the outreach process used to seek to achieve adequate representation of the views of groups that are likely to be impacted, and (iii) documents the nature and intensity of reasoned support and opposition to the proposed policy.[15]

The contract goes on to provide that, in the event that a registry disputes the presence of such a consensus, it shall seek review of that issue from an Independent Review Panel established under ICANN's bylaws. If, following a decision by the Independent Review Panel, a registry still disputes the presence of such consensus, it is supposed to be able to seek further review in accordance with the dispute resolution procedures set forth in the contract.

The basic agreement each registry enters into is that it will not irrationally or selfishly resist the imposition of rules that reflect a true consensus among the Internet community (and particularly among those who must comply with or are specially affected by that policy). Correspondingly, ICANN is clearly not given the general power, by the contract or from any other source, to impose rules that its Board might adopt or that its staff might choose to implement without consensus. In the absence of a consensus policy to the contrary, a registry or registrar is supposed to be free to innovate and run its business as it sees fit. Thus, ICANN was designed to be an organization with severely limited institutional powers.

C. Practical Limitations

Finally, it should be noted that, even if ICANN tried to breach the limits on its regulatory authority, and even if the contracting parties might be prepared to go along, Internet stakeholders could themselves effectively defeat any broad ICANN claim to regulatory authority. Major ISPs could on their own create a new authoritative root zone file and a source of IP number block allocations overnight. ICANN has no master switch that can be used to exclude all of those already on the Net who might resist compliance with its rules. While a switchover to a new root zone is an extreme and highly undesirable scenario, it is a useful reminder of the fundamental constraints inherent in ICANN's mission.

Nonetheless, and though it has clearly not approached this extreme, ICANN increasingly threatens to exceed the bounds of its narrow mission. In the final sections, we lay out the ways in which ICANN has overstepped its role, and call for a return to a more limited scope for ICANN.

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[15]http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm

5. ICANN Has Strayed Beyond the Terms of the Original Design

Unfortunately, ICANN has not always stayed within the bounds of its original scope. As noted above, we believe that has led to some of the misunderstandings that underlie the WSIS proposals.

In particular, we remain concerned that ICANN has improperly used its "control" over the creation of new generic Top Level Domains (gTLDs) to force new gTLD registries and registrars to agree to detailed controls on their operations. Because it has been viewed as the only source of effective recommendations to add new Top Level Domains, ICANN has required those who wanted to open a new TLD to sign contracts containing elaborate terms. While a relatively straightforward contractual document could have captured the essence of the agreements, ICANN's contracts with the registries are hundreds of pages long and specify nearly every aspect of a registry's operation.

Even if today's ICANN Board disavows interest in overregulation, the latest version of the contracts proposed by ICANN staff could be read by an overzealous staff—today or in the future—to require explicit ICANN permission for a change in almost any aspect of those operations.[16] Such overly detailed contracts set a bad precedent—and communicate a potentially dangerous misimpression to the world—of ICANN exercising broader authority than many even within ICANN intend.

The contractual provisions have been used to condition approval on ICANN's review of registry business models and to place ICANN in the position of assessing the relationships between TLD registry operators and the communities they seek to serve—with the result of unreasonably delaying the introduction of new registry services, limiting competition, and leading ICANN into areas far beyond its expertise. In narrow instances where the stability of the Internet is implicated, involvement by ICANN is appropriate—but as a general rule ICANN should not be acting as an arbiter of registries' businesses.

To the extent that the top-down imposition of contractual obligations on new TLDs has also replaced the bottom-up consensus approach on which ICANN was founded, ICANN has departed from the core principles that underlay its founding. The Independent Review Panel process to which registries and others were to able to appeal in cases where ICANN oversteps its bounds has not been created, and ICANN has indicated that it *never intends to do so*.

In addition, ICANN has unwisely taken steps that discourage active participation by public interest organizations, individual registrants, and civil society in the process for creation of ICANN policies. After abruptly eliminating the original structure that would have elected half of the ICANN board to represent the Internet community at-large, ICANN has not yet developed adequate alternative mechanisms for broad participation and representation in its decision-making – sending a discouraging message to civil society groups. One of the best ways to encourage such participation and to assure transparent policy-making would be to

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[16]*See* http://www.icann.org/gnso/issue-reports/registry-svcs-report-19nov03.htm.

reaffirm the basic principle of bottom-up consensus, which would guarantee an effective role for reasoned participation. If rational objections must be listened to and accommodated, then it will be worth it for those who represent registrant views to participate. If policies must be shown to be supported by a consensus among affected parties in order to become binding, then a substantial group of rationally objecting registrants would be able to rein in an errant Board of Directors, Names Council or staff.

6. ICANN Needs to Get Back to Basics

ICANN needs to refocus on performing its set of narrow, but critical, tasks with excellence and consistent with bottom-up self-governance. Within the hotbed of gTLD issues, the great virtue of the consensus principle at the core of the ICANN contracts with registries is that it allows ICANN to make globally binding rules only when almost all who would have to abide by those rules agree to accept them. This basic principle keeps Internet decision-making decentralized and preserves diversity and promotes competition among various alternative approaches. It allows local sovereigns to continue to exercise appropriate control over those within their jurisdiction. And it creates an incentive for those who coordinate key Internet infrastructure to come together in constructive deliberation – unafraid that some unresponsive majority or artificially mobilized population might "get the votes" and mandate a rule that does not actually reflect agreement in the affected global community.

Today, ICANN faces a fundamental challenge. If it claims to be a global regulator of the Internet, there will be many who ask where and how it got such powers, why it does not use them more effectively, and why such powers should not instead be wielded by more traditional governmental actors. To resolve its legitimacy crisis, ICANN must get back to basics and acknowledge that –

(1) Its mission is confined to the technical function of coordinating the assigning of names and numbers for the Internet and a few inextricably related policy questions.
(2) Its only real and legitimate power comes from *voluntary* contracts and certain other mutually acceptable relationships and agreements.
(3) Its decision-making must be transparent, predictable and open to broad global participation by stakeholders, including users. ICANN should adhere to the principles of transparency and predictability by, for example, announcing proposals earlier and consistently following the policy processes it has established.
(4) It can make its future policies binding only if they are supported by a demonstrable bottom-up consensus among affected parties.

ICANN is not (and was not originally created as) an entirely "technical" body. From the outset, ICANN's contracts dealt with matters closely associated with the operation of the domain name system but with clear policy implications—such as the resolution of disputes relating to trademarks and domain names, or requirements for registrant data in the Whois database that impact privacy. But those non-technical issues were all understood to be subject to the basic consensus policy regime, and ICANN's policy role was always narrow and focused.

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The consensus policy principle is based on the practice of the Internet Engineering Task Force and other leading standards bodies, of not approving technical standards until a proposal has been published subject to open debate and the commentary on the proposal indicates that any substantive objections have been dealt with to the satisfaction of those raising rational objections.

ICANN has been successful when it has stayed within the bounds of the subject matters on which the contracts allow for the creation of consensus policies. There have already been a number of consensus policies developed within ICANN. It has proven feasible to develop widespread agreement even on such sensitive matters as procedures for transfer of registrations among registrars. Where consensus cannot be reached, the alternative is not chaos or disorder. To the contrary, the absence of a consensus on a uniform policy in some area merely means that all of the industry actors, subject to their own local law, are free to develop their own policies and compete against one another by offering alternatives. However, where ICANN has failed is that it has not fully operationalized and implemented this bottom-up policy approach.

ICANN is not the regulator of the Internet or even of all uses of the domain name system. It is, instead, a contractually-based forum for the coordination of a narrow set of technical systems crucial to the operation of the Internet. ICANN risks drifting far away from the very narrow range of policy matters that the founding parties agreed should be within ICANN's jurisdiction. As a start, it is time to roll back the adventuresome use of ICANN's leverage over new TLD applicants, because this has led to complex new contractual terms that have given the ICANN staff the power to prevent innovation (sometimes at the behest of existing players who oppose additional competition). There is no way to eliminate all non-technical policy matters from ICANN's mission. But there is a way for ICANN to adjust its approach to bring the institution back into an area it might reasonably be competent to address.

7. Conclusion

In many ways, ICANN has been successful. ICANN provides consensus-based, non-governmental management of technical matters crucial to the global Internet. With a high degree of reliability, domain names translate properly into IP addresses, IP addresses are duly assigned to network operators, and stable mechanisms for accrediting registrars have been created. Domain names are being assigned efficiently and at a low cost. Seven new generic Top Level Domains have been introduced, creating further competition. A number of country code Top Level Domains have been redelegated, with the support of national governments, to local entities responsive to the local Internet community. These successes show that ICANN can work better than anything else so long as it sticks to a narrow mission, maintains a decision-making process that is transparent, predictable and inclusive, and makes binding policy only by consensus.

Serious questions exist, however, about ICANN's mission, representativeness and procedures. Those concerns must be resolved. We believe that the central idea of ICANN

remains correct—that the issues associated with management of the domain name system are best handled by non-governmental, non-profit bottom-up coordination. Governments should recall that, to a unique extent, the fundamental character of the Internet, and its success to date, is based on decentralized, private-sector decision-making.

CDT calls on ICANN to get back to basics by continuing its evolution and reforming itself in the ways most likely to succeed:

- ICANN should reaffirm and recommit itself to the extremely limited mission it was created to accomplish. It should expressly disclaim any possession of governmental powers, reaffirm its limited focus in its bylaws and articles, and although some policy issues will be inextricably linked to ICANN's technical coordination role, it should minimize policy activities to the greatest extent possible.
- ICANN should stay true to the original design that gave rise to it in the first place, by creating globally binding policies only by consensus—that is, by adopting rules only when almost all of those affected by such rules agree that a global policy is necessary and are willing to go along.
- ICANN should reassess its contracts and return to the use of a relatively simple contract that contains only the essential elements of the original understanding.
- ICANN should refrain from using its technical role as leverage to engage in broader Internet policymaking. For example, ICANN should avoid using *de facto* control over approval of new gTLDs to impose inappropriate regulatory policies on participants. Rather, gTLD policy should be based on the bottom-up consensus process described and required in its bylaws.
- ICANN should adhere to the principles of transparency and predictability, by announcing proposals earlier and by consistently following the policy processes it has established.
- ICANN should continue its development of mutually acceptable relationships with the other key entities that manage critical functions, including the root server operators, regional addressing registries, and the ccTLD community.
- ICANN should adhere to the principle of subsidiarity—leaving decisions to local control—both corporate and governmental—unless there is a consensus that global policies are needed.
- ICANN should strengthen activities to engage diverse constituencies around the world in its decision-making and coordination activities, reflecting the global diversity of Internet users.

ICANN is a unique and evolving institution. In recent years, we believe many of the changes in ICANN's approach to its mission and its procedures have gone in the wrong direction. On balance, however, we continue to believe the private-sector, bottom-up coordination model that ICANN is based on remains the best approach to management of the domain name system. Both WSIS and ICANN need to allow the Internet to continue to develop as it has in the past, on the basis of global cooperation and bottom up, decentralized decision-making. That is the policy framework most likely to support growth of the Internet as an engine of freedom, economic empowerment and human development, particularly for developing nations.

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