

IN ICANN WE TRUST: ASSURING ACCOUNTABLE INTERNET GOVERNANCE

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It's no surprise to anyone that illegal activity happens online. What may be surprising, however, is that one of the central figures in administering core Internet functions is deeply ambivalent (at best) about its role in preventing illicit online activity.

Since 1998, the Internet Corporation for Assigned Names and Numbers (ICANN) has been the organization tasked by the U.S. government with overseeing the Domain Name System (DNS). The DNS is the system that enables domain names to resolve — meaning that when you type “google.com” in a browser address window you will reliably receive Google’s search engine each time. That reliability is a boon for Internet users, most of the time. But much mischief can be conducted through web sites, as well, and a system that reliably serves up *these* sites imposes costs on its users.

Take one recent example. In July 2015, a Bloomberg News piece from “bloomberg.market” indicated that Twitter was in talks over a \$31B USD buyout. Naturally, the value of Twitter stock shot up before returning to normal. The problem, however, was that it was a totally fabricated event, one that the currently lax accountability regime underlying the DNS only makes easier.¹

One would think that ICANN would have effective procedures in place for removing (or otherwise sanctioning) domain names created or used for illegal purposes. However, even though it possesses contractual control over its registries and registrars (the entities responsible for managing and registering top level domains and domain names), the practical reality is that illegal conduct is rarely ever deterred by ICANN.

The consequences of ICANN’s non-action are evident. ICANN has refused to effectively deter content piracy on the Internet, and pirated content currently constitutes something on the order of 25% of Internet traffic.² It has also overseen an inexorable increase in websites

¹ Matt Egan and Frank Pallotta, *Twitter shares soar on phony Bloomberg story*, CNN (Jul. 14, 2015), available at <http://money.cnn.com/2015/07/14/investing/twitter-fake-story-bloomberg/>.

² Aaron Sankin, *24 percent of Internet traffic is devoted to piracy, study says*, THE DAILY DOT (Sep. 23, 2013), available at <http://www.dailydot.com/business/nbcuniversal-comcast-piracy-study/>.

dedicated to phishing scams. As of December 2014, phishing occurred in 19% of the new gTLDs — and nearly two-thirds of the phishing occurred in just one gTLD (.XYZ).³ To date ICANN has steadfastly refused to take action despite the significant cost that its refusal — ostensibly rooted in its desire not to regulate Internet content — imposes on community members.

ICANN has an accountability problem.

The ICANN community, represented by the IANA Stewardship Transition Coordination Group (ICG), recently submitted its final report⁴ to Congress and the NTIA outlining its proposal for an independent (and accountable) ICANN. This transition period offers an ideal opportunity to assess and to correct the deficiencies in the structure of the organization.

A few central issues emerge:

1. ICANN cannot serve in a purely “technical” capacity because stewardship of the DNS necessarily requires choosing among competing policies.
2. An accountable ICANN can be optimally secured by realigning the organization along a constitutional model that “bakes in” due process procedures and suitably responds to the policy preferences of the multistakeholder community.
3. To the extent that policy choices are selected by the multistakeholder community, those choices should be systematically respected by proper enforcement of contractual obligations.

IF YOU CHOOSE NOT TO DECIDE, YOU STILL HAVE MADE A CHOICE⁵

As legal scholar John Hart Ely has observed, “an insistence on ‘neutral principles’ does not by itself tell us anything useful about the appropriate content of those principles.”⁶ A “neutral” stance that purports not to adopt any particular policy position is not actually neutral; rather it effectively adopts whatever policy predominates by default.

³ Greg Aaron, *Phishing in the New gTLDs*, CIRCLEID (May 27, 2015), available at http://www.circleid.com/posts/20150527_phishing_in_the_new_gtlds/.

⁴ See IANA STEWARDSHIP TRANSITION COORDINATION GROUP (ICG), PROPOSAL TO TRANSITION THE STEWARDSHIP OF THE INTERNET ASSIGNED NUMBERS AUTHORITY (IANA) FUNCTIONS FROM THE U.S. COMMERCE DEPARTMENT’S NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (NTIA) TO THE GLOBAL MULTISTAKEHOLDER COMMUNITY (Mar. 2016), available at <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf>.

⁵ Rush (Neal Peart, Geddy Lee & Alex Lifeson), *Freewill* (Mercury Records 1980).

⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 55 (1980).

ICANN has consistently claimed that its role in Internet governance is merely a technical one, and that it is not the “regulator of Internet content.”⁷ It has made this declaration largely in response to calls from a range of interests for the organization to enforce language in its contracts that prohibits the use of web sites for illicit conduct. But despite its claims, by refusing to enforce this language, ICANN is not staking out a neutral position. Instead, it is very much adhering to a social policy, in this case one that prioritizes avoidance of censorship over the array of other priorities that *could* be incorporated into ICANN’s governance of the DNS. But regulation guided by a default set of priorities is still regulation.

While management of the DNS itself is a technical operation,⁸ the impending transfer of IANA stewardship entails imbuing ICANN with an overtly government-like function that demands more than mere technical acuity:

DNS policy questions... are difficult, because while they all have a “technical” dimension, they do not have *only* a technical dimension; they invoke some important and deeply-held values far removed from the “merely” technical. How they are resolved will have an impact... on trade and commerce and competition, on intellectual property rights, on privacy, and on free expression.⁹

Whatever ICANN’s *historical* role has been, following the transition ICANN will have a dual role — one that includes the obligation to properly “steward” the DNS, as well as to run it.¹⁰ It is clear that the U.S. government expects ICANN to take a more assertive role following the transition, and Congress has made plain that ICANN’s accountability to the parties it regulates is a paramount condition of its approval of the IANA transition.¹¹

⁷ Allen R. Grogan, *ICANN Is Not the Internet Content Police*, ICANN (Jun. 12, 2015), available at <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>

⁸ See, e.g., NATIONAL ACADEMY OF SCIENCES COMMITTEE ON INTERNET NAVIGATION AND THE DOMAIN NAME SYSTEM: TECHNICAL ALTERNATIVES AND POLICY IMPLICATIONS, SIGNPOSTS IN CYBERSPACE: THE DOMAIN NAME SYSTEM AND INTERNET NAVIGATION (2005), available at <http://www.nap.edu/read/11258/chapter/1>.

⁹ DAVID G. POST & DANIELLE KEHL, CONTROLLING INTERNET INFRASTRUCTURE: THE “IANA TRANSITION” AND ICANN ACCOUNTABILITY, PART II, at 20 (Open Technology Institute, Sept. 2015), available at https://static.newamerica.org/attachments/9764-controlling-internet-infrastructure-2/IANA_Paper_2_final.8594b4de27dd4ecf9be46d348f848cf1.pdf.

¹⁰ *NTIA Announces Intent to Transition Key Internet Domain Name Functions*, NTIA (Mar. 14, 2014), available at <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

¹¹ See, e.g., S. Con. Res. 50, 112th Cong. (Dec. 5, 2012), available at <https://www.congress.gov/bill/112th-congress/senate-concurrent-resolution/50/text> (“[I]t is the sense of Congress that the Secretary of State, in consultation with the Secretary of Commerce, should continue working to implement the position of the United States on Internet governance that clearly articulates the consistent and unequivocal policy of the United States to promote a global Internet free from government control *and preserve and advance the successful multistakeholder model that governs the Internet today.*”) (Emphasis added).

An adherence to “social policy neutrality” is thus insufficient for ICANN’s expanded mandate. The DNS is a public good upon which a critical function of the Internet depends, and it is incumbent upon ICANN to administer it justly. To allow ICANN to don a cloak of policy neutrality is, in effect, to allow it to pollute with impunity — and to foist onto society all the costs associated with illicit use of the DNS (or its interdiction).

The multistakeholder community seems to agree. The Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) recently presented its Accountability Final Proposal, intended to govern ICANN following the IANA stewardship transition.¹² Among its suggestions is the creation of an “Empowered Community” to represent the interests of ICANN stakeholders directly, endowed with the authority to appoint and remove directors (or the entire board), and vote on amendments to ICANN’s bylaws.¹³ Notably, among the core values that the CCWG-Accountability group recognizes are respect for internationally recognized “human rights”¹⁴ (presumably including the rights to property and contract¹⁵), as well as the ability to include public interest commitments (PICs) in registry and registrar contracts.¹⁶

It is incumbent upon the architects of the IANA transition, and Congress as the final authority overseeing the transition, to make sure that ICANN’s governance structure is capable of incorporating stakeholder values in a predictable, just and inclusive manner, and ensuring that the multistakeholder community retains the ability to guide the inclusion of these values and their operationalization in ICANN’s activities. ICANN’s legitimacy depends upon reliable process.

¹² See CCWG-ACCOUNTABILITY SUPPLEMENTAL FINAL PROPOSAL ON WORK STREAM 1 RECOMMENDATIONS (Feb. 23, 2016), available at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>.

¹³ *Id.* at Recommendation 13, ¶¶ 46 and 47.

¹⁴ *Id.* at 32, ¶ 170.

¹⁵ Although not all expressions of international human rights have as strongly incorporated a firm commitment to property rights, many have. The Universal Declaration of Human Rights holds that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” *Universal Declaration of Human Rights*, art. 27(b). Among many other examples, the European Court of Human Rights has upheld such a right on numerous occasions and interpreted it to include, among other things, “contractual rights with economic value.” The Inter-American Court on Human Rights has similarly identified a human right to property, including “corporeal and incorporeal elements and any other intangible object capable of having value.” Christophe Golay & Ioana Cismas, *The Right to Property from a Human Rights Perspective*, INTERNATIONAL CENTRE FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT LEGAL OPINION 12-13. The Opinion concludes that “[t]he right to property has been enshrined as a human right in international law — both conventional and customary — through universal and regional treaties and national constitutions.” *Id.* at 28.

¹⁶ CCWG-ACCOUNTABILITY, *supra* note 12, at 29, ¶146.

GUARANTEEING ACCOUNTABILITY THROUGH DUE PROCESS CONSTITUTIONALISM

It is important to note that NTIA is not transitioning its authority *to ICANN*. Rather, in good constitutional fashion, it is transitioning “key Internet domain name functions *to the global multistakeholder community*.”¹⁷ ICANN and its current technical functions are distinct from both the full set of functions that NTIA is now fully privatizing, as well as the intended recipient of the authority: the global multistakeholder community. It is for this reason that accountability — to the global multistakeholder community — is so essential to an acceptable transition.

Some scholars have suggested that ICANN’s new accountability regime be secured through application of constitutional principles¹⁸ — which presents an excellent framing for the issues involved. These scholars tend to echo ICANN’s own preference for neutral governance, however, ostensibly rejecting *any* social policy governance role in order to constrain ICANN’s discretion.

The proper question when considering ICANN’s constitutional order is not which set of interests should be enshrined in the organization (or should be imported through a “neutral” administrative scheme), but how the balance of interests among ICANN’s stakeholders and ICANN itself should be allocated, and how conflicts among those interest should be resolved.¹⁹ As we have noted, it is only through a careful specification of, and dedication to, due process that the substantive values of the multi-stakeholder community can be recognized and upheld.

Get the process “right” and an organization will be equipped to handle (more or less) whatever the world may throw at it. Establishing expectations, clearly allocating decision-making and other powers within the community, and delineating legitimate and unacceptable interests, would empower various constituencies with the incentive and ability to police and constrain ICANN from within. Rather than shunning the messy internal conflicts around the community’s non-technical preferences, an optimal governance structure will embrace them and use them as a bulwark against abuse by ICANN’s

¹⁷ *Id.* at Annex 14, ¶ 1 (Emphasis added).

¹⁸ POST & KEHL, *supra* note 9, at 2 (“We believe that designing effective and trustworthy accountability mechanisms for a post-transition ICANN is a problem of constitutional design, and that the tools of constitutional analysis can be usefully employed in order to come up with an effective accountability structure.”).

¹⁹ “In every society, conflicts of interest among the members of that society must be resolved. The process by which that resolution... occurs is known as competition. Since, by definition, there is no way to eliminate competition, the relevant question is what kind of competition shall be used in the resolution of conflicts of interest.” Armen A. Alchian, *Some Economics of Property Rights*, in ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK 127 (1977).

management, much as the United States government's "system of checks and balances" does.

David Post and Daniel Kehl have identified four salutary principles that should guide the formulation of a constitution for ICANN:

1. A clear and precise delineation between the powers that the corporation may, and those that it may not, exercise.
2. A division of the institution's powers so that they are not concentrated in one set of hands.
3. Internal, institutional mechanism(s) to enforce the constraints of (1); and
4. Transparency and simplicity.²⁰

In order to establish and to preserve limited control over social aspects of the Internet, it is necessary to affirmatively incorporate these into ICANN's mission. But there is nothing contradictory about having a constitution that both enforces structural principles — separation of power, independent judicial review — as well as one that confers power on the global stakeholder community by establishing mechanisms for it to establish and enforce basic legal and moral principles.

Quite the opposite in fact: It is only the board's "unchecked autonomy" that is defective and that leads to procedural unfairness.²¹ Structures like the CCWG-Accountability's "Empowered Community" proposal address this problem.²²

Difficult questions and complex situations will inevitably emerge for any organization, and without suitably accounting for these (as opposed to pretending that a purely technical mandate avoids them), ICANN will be set up for failure. In order to maintain its legitimacy, the organization will need to provide a well-specified mechanism to deal with unanticipated (and anticipated) social and legal challenges.

ENFORCING CONTRACTS: I DO NOT THINK IT MEANS WHAT YOU THINK IT MEANS

In the end, ICANN's governance structure should facilitate the adoption of whatever principles the ICANN stakeholder community deems appropriate as part of the stewardship of the DNS. Very likely, much of this space will be found through voluntary, private arrangements between registries, registrars, and third parties. An overarching commitment to enforcing legitimate contracts, therefore, even ones that espouse particular policy objectives, will be a core attribute of a well-organized ICANN.

²⁰ See *id.* at iv.

²¹ *Id.* (internal citations omitted).

²² See CCWG-ACCOUNTABILITY *supra* note 12.

In fact, far and away ICANN’s most significant failing has been the abdication of its responsibility to enforce the terms of its own contracts, particularly the Registrar Accreditation Agreement (RAA).²³ The effect of this obstinance is that ICANN has failed to exercise its obligation to maintain a “secure, stable, [and] resilient... Internet”²⁴ free of costly “pollutants” like piracy, illegal prescription drugs, and phishing sites that impose significant costs on others with relative impunity.

As a result, Congress has opposed moving forward with the transition of the IANA stewardship functions outside of the U.S. government’s control.²⁵ To an important degree, this resistance is rooted in Congress’ concerns about ICANN’s ability and willingness to enforce the law — including fairly uncontroversial protections of public health and property rights.²⁶

The absence of effective enforcement by ICANN is not for lack of an available remedy. In fact, the RAA provides that domain name cancellation — effectively, banishment from the Internet — is available for errant registered name holders.²⁷ It appears to be the case, rather, that ICANN is simply unwilling to enforce the terms of its own contracts.²⁸

Under the terms of the RAA, domain name registrars have a broad obligation to respond to reports of abuse — defined essentially as illegal conduct²⁹ — on sites within their domains.³⁰ Registrars are also required to use “commercially reasonable efforts” to prevent registered name holders from using a registered name in a way that infringes on the legal rights of

²³ *2013 Registrar Accreditation Agreement*, at § 1.1.13, ICANN (Sept. 17, 2013), *available at* <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en> (hereinafter “RAA”).

²⁴ S. Res. 71, 114th Cong. § 1(3)(B) (Feb. 5, 2015), *available at* <https://www.congress.gov/114/bills/sres/71/BILLS-114sres71ats.pdf>.

²⁵ Philip S. Corwin, *FY16 Appropriations Act Extends IANA Transition Freeze without DOTCOM Act*, CIRCLEID (Dec. 16, 2015), *available at* http://www.circleid.com/posts/20151216_fy16_approp_act_extends_iana_transition_freeze_without_dotcom_act/.

²⁶ *See generally Stakeholder Perspectives On ICANN: The .SUCKS Domain and Essential Steps to Guarantee Trust and Accountability in the Internet’s Operation: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet*, 114th Cong. 7 (May 13, 2015), *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/114-23_94603.pdf. (“ICANN and other stakeholders must abide by their contractual provisions to prohibit the use of domain names for the pirating of copyrighted material and other illegal activity.... It is critical that ICANN help prevent piracy and other unlawful conduct by registrars and registrants.”)

²⁷ RAA § 3.7.7.11.

²⁸ It of course also bears noting that frequently the registrars terms of service *also* provide for suspension of domains used for illicit purposes. *See GoDaddy Domain Name Registration Agreement*, at § 8, *available at* https://www.godaddy.com/agreements/showdoc.aspx?pageid=REG_SA&isc=gofdh026 (last revised Feb. 19, 2016).

²⁹ RAA § 1.1.13.

³⁰ RAA § 3.18.1

third parties.³¹ At the same time registry operators are obligated to require registrars to prohibit name holders “from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law.”³²

Together, these provisions (and others) ostensibly create a backstop that should safeguard against the DNS being co-opted for a variety of illegal activities including fraud, sales of dangerous goods or contraband, and intellectual property infringement. Unfortunately, theory does not always work out in practice.

It was not until public pressure became overwhelming that the illegal sales of pharmaceuticals was addressed by the registrars, and, even to this day, infringement of intellectual property continues on a massive scale.³³ Although it is certainly true that no practical amount of vigilance will ever *completely* deter illicit use of the DNS, the current minimal to non-existent level of enforcement arguably allows far more illegal conduct to proliferate than is necessary or desirable.

Absent direct enforcement by ICANN, the registries, or the registrars, self-help (including through the courts) by injured parties amounts to a frustrating game of whack-a-mole in which offending sites are thwarted, at best, by a particular website hosting service, only to crop up in short order on one of the nearly innumerable other such services. This costly and ineffective dynamic is essentially a repudiation of ICANN’s contractual obligations and an abdication of the organization’s accountability to the Internet community.

It may seem easy to dismiss a LegitScript complaining about illegal pharmaceuticals,³⁴ or the RIAA complaining about piracy, as merely self-interested entities trying to outsource some of their costs of doing business. But, while it’s true that these organizations are the entities engaging in direct enforcement in these cases, it is crucial to remember that they are *not* the sole beneficiaries of such efforts. Behind the actions of these organizations are a web of legal rights and contractual relationships that protect the public health and support the creation of tremendously important industries. Consumers are relieved from the need to

³¹ RAA §§ 3.7.7, 3.7.9.

³² ICANN, *Registry Agreement, Specification 11*, at 90, available at <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf> (last updated Jan. 9, 2014).

³³ See, e.g., DAVID PRICE, NETNAMES POLICY ANALYSIS: SIZING THE PIRACY UNIVERSE (Sept. 2013), available at <https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf>; Alexandra Gibbs, *And 2015’s most pirated TV shows and films are...*, CNBC (Dec. 28, 2015), available at <http://www.cnbc.com/2015/12/28/game-of-thrones-and-interstellar-named-2015s-most-pirated-tv-show-and-film.html>.

³⁴ See *Stakeholder Perspectives On ICANN*, *supra* note 26, at 31-34 (statement of John C. Horton, President and CEO of LegitScript).

worry about the technical details of who infringes what and how those infringements are remedied because, from their rationally ignorant vantage point, “it all takes care of itself.”

Except it doesn't. For the system to work, and for consumers to benefit from the legal and contractual relationships that undergird the Internet economy, there needs to be a party on the other side of industry-led efforts that provides a meaningful enforcement mechanism. When ICANN repudiates its obligation to respect public health concerns and property rights, it is in fact exporting a harm directly onto consumers. And it forces consumers to bear the costs of its own desire to avoid complicated legal questions — despite its commitments to the contrary.

CONCLUSION

Allegedly neutral, purely technical administration is another way of describing an order in which any behavior — no matter how dangerous, costly or patently illegal — is permitted. Although this *may* be a bulwark against censorship, such a regime goes beyond even the United States' relative free speech maximalism and imposes significant costs on the community.

For ICANN to meet its stakeholders' — and Congress' — accountability expectations, it will need to implement a governance structure that establishes and preserves procedural fairness and a “rule of law,” including respect for voluntary ordering of rights by contract. The impetus to equate “procedural fairness” with “policy neutrality” is understandable, but an aspiration for a value-free DNS administration will not make it so in reality. “DNS policy questions... have a “technical” dimension, [but] they do not have *only* a technical dimension; they invoke some important and deeply-held values far removed from the ‘merely’ technical.”³⁵

Instead, it is the establishment and protection of settled expectations through well-defined and responsive organizational structures, facilitation of private ordering, and a system of checks and balances that disciplines abusers of process and abuses of power that will enable ICANN to properly steward the DNS post-transition.

³⁵ POST & KEHL, *supra* note 9, at 20.



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