

Statement for the Record of

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on

The Continued Transition of the Technical Coordination and Management of the
Internet's Domain Name and Addressing System: Midterm Review of the Joint
Project Agreement
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
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Comments

In 2006 when NTIA last inquired about ICANN, I submitted a set of comments. These may be seen on-line at:
<http://www.cavebear.com/archive/public/ntia-july-7-2006-statement.html>

It is now 2008. Those [comments made in 2006](#) remain valid. I include them here by reference.

There are, however, signs of improvement. ICANN's more recent directors are showing signs that they are more than mere rubber stamps. And ICANN's new Chairman has already made the organization far more transparent and appears to be re-establishing the board of directors as the fount of policy and placing ICANN's staff into the proper role as executors of that policy rather than its authors.

Yet, despite these hopeful signs ICANN remains a mixed bag containing many empty promises. And ICANN continues to cost the community of internet users dearly in money and lost innovation.

Below I am going to make some rather harsh assessments. Yet, there is reason for hope that some of these will be cured.

I say *some* because not all of the problems that I mention are problems with ICANN, some are problems with NTIA.

The reason for hope is this: ICANN has instituted a review of the machinery through which the public expresses its interests, values, and concerns into ICANN. If that review results in a significant introduction of the public into ICANN, something that has been lacking, then perhaps ICANN will cure itself.

However, that cure can never be complete; ICANN has, like Gulliver in Lilliput, wound itself with contractual ropes. Some things, like ICANN's perpetual grant of *.com* to Verisign, would be extremely difficult to cure absent an action on the part of NTIA revoking ICANN's own right to delegate *.com*.

I do not think that anyone expects ICANN to become an Athenian Democracy. However, if ICANN can re-introduce a meaningful system for the public benefit to be heard and honored, then the public will have a means to drive ICANN back towards the right track.

But until ICANN gets on that track it would be too early to abandon the slim thread of oversight that exists in the form of the JPA.

Let me begin. And again, I incorporate [my comments of 2006 to NTIA](#) by reference.

1. ICANN has imposed involuntary fees and payments that are the private equivalent of internet taxes. Although these are privately assessed and may not meet a technical legal definition of a "tax" they nevertheless have the same burdensome effect as taxes imposed by governments.

In the interest of plain speech, I will refer to these involuntary fees and payments imposed by ICANN as "taxes".

There is a direct "tax" by ICANN on each and every domain name transaction - this "tax" amounts to roughly \$15,000,000 every year.

It may seem that this tax, a mere \$0.20, is too small to be of concern. Yet we have seen ICANN's Board of Directors recognize that this amount is enough that it can be used as a tool to crush part of the domain name industry (in this case an undesirable part - domain name "tasters") out of existence.

There are also additional "taxes" that are collected indirectly via registrar fees.

But these amounts are minuscule when compared to the "tax" that ICANN imposes onto the internet in the form of domain name registry fees that have no cognizable relationship to the costs that registries incur in providing their monopoly services.

ICANN, for example, without any measure of the actual costs, has declared that every domain name registration in *.com* must be accompanied by a \$7 payment to Verisign.

Estimates have been made of the actual costs of these registrations - these estimates range from \$.03 to \$2.00, i.e. a mark-up of cost to price that ranges from 350% to over 23,000%.

ICANN is thus imposing onto the internet a mandatory tithe that amounts, using those estimates, from a low of \$225,000,000 this year to \$523,000,000 this year. The amount will be higher next year and the year after and the year after that, and so on and so on.

The US Congress has made it clear that it is against United States policy to tax the internet.

Yet the US Department of Commerce and NTIA have enabled ICANN to create a private tax that could soon exceed one billion dollars every year.

ICANN has never once even bothered to inquire how much it actually costs to service a domain registration at the registry level. Is this self-imposed ignorance consistent with ICANN's obligation to serve the public interest? No, it is not. And does ICANN have adequate means for the community of internet users to step into ICANN's decision making processes and change this situation? No, ICANN keeps the community of internet users far away from the places where the decisions are made.

ICANN will argue that domain name prices are lower today than they were in 1997. That is true. But is that a reason to entrench ICANN's massively lucrative boon to Verisign and the other top level domain registrars?

ICANN has created a situation in which each top level domain registrar has a perpetual right to renew its monopoly over its respective top level domains. In exchange for that perpetual right of renewal, ICANN should require these top level domain operators be paid a registration fee that is clearly based on the actual cost of providing that service, plus a reasonable profit. This would make far more sense than the artificially pegged and outrageously inflated registry fees that are in place today.

The JPA represents at least a small barrier against the growth of the fees and charges that ICANN is imposing onto the internet to feed its ever growing budget

- a budget that is already on par with that of NTIA and is on a course to match that of the ITU in a few years.

2. ICANN exists, at least in part, to assure the technical stability of the upper tiers of the internet's domain name system.

The public believes that ICANN is standing watch, guarding against instability, assuring that the domain name machinery is operated with skill, and that should the DNS begin to wobble, whether by human or natural cause, that ICANN will step in and bring a speedy recovery.

The public, however, is misled; ICANN is neither watching nor prepared to assist.

How should we measure the job that needs to be done?

I suggest the following:

The upper tiers of the domain name system are stable when domain name query packets from users (and their ISP's) at the root and top level domain (TLD) level are efficiently, accurately, and promptly transformed into domain name response packets without prejudice against any query source or query subject.

By that measure ICANN has abandoned its post, or more correctly, it has never even shown up to report to duty.

In the absence of any real way for the community of internet users to express their needs on ICANN's Board of Directors, the JPA is the only force that might nudge ICANN to remember that ICANN's primary responsibility is to oversee the DNS to assure that the name resolving service of DNS runs 24x7x365.

3. ICANN was created to promote competition.

Yet the world under ICANN is one in which there is little real competition beyond mild difference in prices. In addition, domain name innovation has stagnated.

Why is this so? The answer is simple: ICANN has been captured by a few incumbent and privileged "stakeholders" that have no interest in changing the status quo or admitting new competitors.

It is safe to say that an aspiring entrepreneur would find it easier to start a new airline - a business in which errors can cause human death - than to start a new top level domain registry under ICANN's rules.

What legal authority exists for ICANN to have the power of life and death over the plans of those who aspire to engage in completely lawful activities on the internet?

ICANN is making some progress in alleviating this problem, but the steps that it is taking are very mild.

By this I mean that ICANN appears to be taking a road that will merely allow minor variations in the ICANN standard business model - ICANN approved registries that sell through ICANN approved registrars who pay an ICANN set registry fee and in which domain name registrants are required to agree to ICANN approved sales terms.

That road will bring some improvement. But in the main it is a short road that leads nowhere very important. On ICANN's map, the roads that lead toward real innovation are absent or marked "closed until further notice."

There are those who have lawful business aspirations that do not fit within ICANN's Procrustean view of the internet domain name marketplace. I am one of these. (See "[The .ewe Business Model - or - It's Just .Ewe and Me, .Kid\(s\)](#)")

Yet we have recognized the futility and waste of going further with our ideas - it is clear to us that ICANN will never allow us to go into lawful business and risk our own assets in the pursuit of the American dream of success. It should not be surprising that time, money, people, and ideas have moved on in search of opportunities not pre-burdened with a nearly automatic rejection from an oversight body.

In addition, ICANN still holds over \$2,000,000 in application fees from those who aspired in year 2000 and who ICANN has held in limbo ever since.

The JPA, as long as it continues to exist, can be used to remind ICANN that the creation of competition in the domain name marketplace is not to be created by closing that marketplace to all but a few incumbent vendors and stodgy business models.

4. As I mentioned above, ICANN wields the power of economic life and death over those who aspire to engage in completely lawful internet enterprises in the domain name marketplace.

J.D. Rockefeller, one of the great monopolists of all time, would have envied ICANN. J.D. Rockefeller's concentration of control over the petroleum industry in the 1870's was never as complete as ICANN's concentration of control over the domain name industry of today. J.D. Rockefeller's Standard Oil Company was

found to be contrary to the public interest and resulted in the Sherman Antitrust act of 1890.

What legal basis is there to distinguish the unlawful concentration of power by Rockefeller from the concentration of power of ICANN?

ICANN may be standing on very thin ice. Even if ICANN might somehow pass muster when measured using the anti-competitive laws of the United States, one would still have to wonder how it would fare against those of the European Union and other nations.

Given that ICANN's authority is based on a pyramid of contracts, a finding anywhere that ICANN's authority or processes are contrary to the laws against combinations in restraint of trade could lead to a collapse and subsequent uncertainty.

This risk has been examined in academic papers and found to be very real. Would it in the interest of internet stability if these academic findings were to be confirmed in a real legal battle?

Yet ICANN's glacial pace and its rejection of anything but the most catholic of business plans have created a field in which those who wish to innovate in the domain name marketplace are beginning to feel that they must first slay the ICANN dragon - or go outside ICANN and split the unitary DNS root.

The JPA, through its mere existence, forms a shield between ICANN and those who might choose to question the lawfulness of ICANN's market-shaping activities. Anyone who seeks to raise that question realizes that even before that question can be faced on its merits it would be necessary to first resolve the question whether ICANN is an instrumentality of the US Government or not.

5. ICANN is a California "public benefit" corporation. ICANN is also a 501(c)(3) organization under the US tax code. In other words, ICANN's legal form makes it clear that ICANN's purpose is to advance the public interest.

Yet ICANN seems rather more a servant of the intellectual property and domain name registry interests than it is a servant of the public interest.

One measure of this imbalance is ICANN's continued exclusion of the public from any meaningful role.

I was elected by the public to ICANN's Board of Directors. ICANN erased my seat. Since that day there has never been a publicly elected director on ICANN's board.

ICANN has created a substitute system - its so called "At Large Advisory Committee" - the "ALAC". This system uses a deep hierarchy of "organizations" to put distance between the public and ICANN. The public has responded to this with an understandable lack of interest.

ICANN is, to its credit, finally going to review the ALAC. I am on the working group for that review. It is my hope that we will be able to take a fresh view of the processes and means of public participation in ICANN.

The JPA is one of the few places where ICANN can be called to account and asked why it has so long denied the community of internet users any real power of decision within ICANN while, at the same time ICANN has been so willing to open doors to a few chosen industrial "stakeholders".

6. ICANN and NTIA have effectively transformed Verisign from a caretaker of the *.com* and *.net* top level domains into a permanent owner.

What authority does NTIA have to engage in that transformation?

Can NTIA cite clear statutory authority through which US Government authority over *.com*, *.net*, *.org*, and *.edu* in 1997 has become private property in 2008?

Is there an Executive Order based on either Article II powers or on powers granted by an identifiable statute that grant such power to privatize what were once US Government assets?

Is there a treaty that might endow that power?

I suggest that NTIA is and has been operating ultra vires, without adequate legal authority.

NTIA should go to Congress and seek a clear statement of its authority.

Without a clear source of legitimacy, the NTIA-ICANN system of a pyramid of contracts, could lose its foundation and crumble. For example, I mentioned ICANN's perpetual grant of *.com* to Verisign. In the absence of clear legal authority for NTIA's conveyance of *.com* to ICANN, that derivative conveyance, or more precisely a license with perpetual right or renewal, to Verisign could begin to look like the celebrated sale of the Brooklyn Bridge.

The JPA represents one of the few "chains of title" that ICANN has for its authority. In the absence of the JPA real questions can be raised about ICANN's legitimacy. It is true that we are not dealing with something that clearly falls into the category of "property rights". But on the other hand, the authority that ICANN exercises is not imaginary. That power did not come from some mythical lady

living in a lake that handed a sword of authority to ICANN; rather that power comes to ICANN via the JPA. If the JPA were to vanish would that authority also vanish? If not, why not?

Summary

ICANN has not been a bright star in the internet constellation. It is unclear that the existence of ICANN has been or ever will be of benefit to the community of internet users. There is no doubt that ICANN is a regulatory body with a heavy and expensive hand. The benefits claimed for ICANN could probably have come about, and could continue to come about, in the absence of any regulatory oversight body. (See [What would the internet be like had there been no ICANN?](http://www.cavebear.com/cbblog-archives/000331.html) at <http://www.cavebear.com/cbblog-archives/000331.html>)

NTIA, through its support and protection of ICANN, has become, albeit with deniable indirection, a very heavy handed governmental regulatory body that stands over the internet domain name space and asserts the kind of excessive governmental regulation so decried by President Ronald Reagan.

NTIA has, through the instrumentality of ICANN, created the first iGuild. ICANN is really little more than a modern incarnation of a [medieval guild](#), with government (NTIA) backing, that stands astride the marketplace of internet domain names, not like a Colossus, but more like Jabba the Hutt.

Those who seek to engage in lawful enterprise in the domain name marketplace may not do so without first paying considerable sums to ICANN and waiting, perhaps years, perhaps forever, to receive ICANN's nod of approval. That is neither fair nor just. And it is contrary to our principles of free enterprise.

ICANN stands in diametric opposition to the modern idea of open and competitive marketplaces.

NTIA's review of the JPA should look back to the original purposes. As measured against those purposes has ICANN been even a partial success. I suggest that the answer is "no".

Can ICANN be reformed? There is a chance that the review of ICANN's ALAC might open a door to reform. However, given the lock-in of existing contracts and the built-in resistance of incumbents who have power within ICANN, it is wise not to overrate the prospects of real reform being implemented.

It would be unwise for NTIA to relinquish its thin reed of oversight until ICANN, at a minimum, creates and puts into operation the mechanisms through which the community of internet users can obtain enough seats on ICANN's Board of Directors to change ICANN's direction. Otherwise ICANN may continue on its

present course and become the very model of the modern captured private regulatory body.

So What Should NTIA Do?

NTIA's choices are not binary - NTIA has more choices than merely retaining or relinquishing the JPA.

Let me make the following suggestions:

A. In the absence of a working mechanism of public accountability it would be premature for NTIA to relinquish its oversight, limited as it may be, over ICANN. NTIA should retain control until ICANN has a working mechanism for the community of internet users to obtain, through representative processes, seats on ICANN's highest decision making body, the Board of Directors.

ICANN was founded on a promise that the public would have representatives chosen through a relatively direct process - the word "elections" was used at the time. The present mechanism, the ALAC, is inadequate.

B. NTIA should consider lifting its tacit approval from ICANN as a body that regulates internet business practices, products, prices, sales terms, and vendors in the domain name marketplace. NTIA should remind ICANN that ICANN's primary purpose is to assure technical stability. To reinforce this point, NTIA should make it clear that neither NTIA nor any other agency of the US Government imbues ICANN with immunity against anti-trust laws and the laws against unfair trade practices.

C. ICANN's relationship with the US Government is of deep concern to other nations. NTIA might help alleviate that concern by pushing for the US government to relinquish those DNS root servers that it operates directly through US agencies or indirectly through contractors.

D. NTIA should clarify what is IANA and what is ICANN. Those two roles have been comingled to a degree that makes it difficult to separate the non-contentious aspects of IANA from the rather more political, economic, and policy driven parts aspects of ICANN. In particular, the status of the L-root server - is it part of IANA or ICANN? - should be clarified.