

Montréal, Canada, June 8, 2009

Office of International Affairs,
National Telecommunications and Information Administration,
U.S. Department of Commerce
email DNSTransition@ntia.doc.gov

Subject: NOI, Assessment of the Transition of the Technical Coordination and Management
of the Internet's Domain Name and Addressing System
Your ref: Docket No. 090420688-9689-01

Dear NTIA staff members:

The opportunity to comment on the ICANN JPA at this point is well appreciated.

Through my involvement in the development and deployment of the DNSSEC protocols as a unique cryptography-based scheme with the same global scope as the plain DNS, I got interested in ICANN-related governance issues. At this turning point after recent public announcements about DNSSEC support at the DNS root zone file, my comments need not be specifically targeted at DNSSEC deployment challenges (those things are essentially being taken care of).

Generally, the USG oversight over ICANN activities are unlikely to be concluded with the JPA contractual term date of September 30, 2009. There are two reasons:

- 1) the JPA is not alone as a mechanism for US government oversight (the IANA contract is the foremost other mechanism, but not alone), and
- 2) the JPA provides US government policy implementation opportunities not present through the other mechanisms.

The main point of this comment is a call for clarifications about the many mechanisms through which the US government is an active player in Internet governance with special status. Because these mechanisms include executive powers outside of the DOC mission, legislative powers, and even judicial powers, my call for clarification is not completely within the NTIA's discretion. But it is perhaps useful in some ways to have questions asked with a different perspective.

Some of the substantive Internet governance issues has received more direct and effective attention from the part of the key players (e.g. ICANN and USG). The price regulation of gTLD registry services, and the protection of trade mark intellectual property are obvious examples and remain an on-going concern. The civil rights, and the very right of access to the public Internet, are not served with equivalent dedication. There are technical coordination issues between these two extremes, such as IDNs at the root and TLD registries, and DNSSEC. My empirical observations of US government influence mechanisms are inevitably influenced by this hierarchy of governance attention.

Thus, here is a quick list of observations on US national powers applied to the governance of the global Internet, with no particular ordering.

- 1) ICANN being a legal body in the United States, US courts assert jurisdiction over its activities, as has been confirmed in many court cases in which it was called as a defendant. This creates a definitive advantage for US corporations, notably with respect to trade mark protection. It also extends to the price regulation of gTLD registrations, as seen from the fact that ICANN was for some time a defendant in the CFIT lawsuit.
- 2) As a counter argument to the preceding paragraph, ICANN governance can be described as an industry self-regulation body. If such is the case, “to keep the legislator at bay” would be an implicit governance agenda item. In practice, I read an untold *threat* of legislation in the letter dated May 6, 2008, from the chairman of the House Subcommittee on Telecommunications and the Internet to the DOC Secretary at <http://markey.house.gov/index.php?option=content&task=view&id=3342&Itemid=125> .
- 3) In the area of gTLD registration price regulation, competition authorities are obvious participants. This involves the judicial power, e.g. in a recent ruling in the abovementioned CFIT lawsuit (see <http://www.ca9.uscourts.gov/datastore/opinions/2009/06/05/07-16151.pdf>). It also involves the US Department of Justice. In this respect, the governance aspects are easily overlooked due to the intrinsic complexity of competition authority powers. The executive branch competition authorities outside of the US should, at least in theory, enjoy equivalent jurisdiction and legitimacy.
- 4) However, the US government has other ways to influence ICANN, not enjoyed by other governments. This is shown in a letter dated December 3, 2008, from the DOJ Antitrust Division to NTIA, included in a letter dated December 18, 2008, from NTIA to ICANN, at <http://www.icann.org/correspondence/baker-to-dengate-thrush-18dec08-en.pdf> . Should ICANN not address the DOJ concerns expressed in this letter, the JPA term negotiations are going to be impacted.
- 5) The mere timing and formulation of ICANN “Affirmation of Responsibilities” cast a doubt about ICANN independence through the previous negotiations that led to the JPA. It is hard *not* to see the influence of US law enforcement agencies in the specific reference to the DNS whois issue.

- 6) The DNS root zone file maintenance procedures are currently spread across ICANN, NTIA, and Verisign. This arrangement makes little sense to those not privy to the motivations of NTIA and Verisign. Nothing more instructive comes from the details of how this arrangement survived up to and including recent announcement of “interim” DNSSEC root signature. (I previously expressed the view that the Verisign role in the DNS root zone management procedure should be transitioned to ICANN at the earliest opportunity, but this is not the point in the present comment.)
- 7) Except maybe in connection to the preceding paragraph, my last item is mainly of symbolic relevance. ICANN is currently subject to a censorship request from NTIA to abstain from public consultations on an ICANN proposition for DNSSEC root signature procedures (see <http://www.icann.org/correspondence/baker-to-twomey-09sep08.pdf> as implicitly acknowledged in item 4 in <http://www.icann.org/correspondence/dengate-thrush-to-gomez-28may09-en.pdf>). This “gag order” is attributed to the IANA contract. If the IANA function was fulfilled by an entity separate from ICANN, the latter would remain free to lead or participate in any public discussions.

Except for the last point which is a shame for the US government, the Internet governance scene is favorably influenced by transparency and public accountability values present in the US federal government executive branch. This being said, there are strong ties between the USG and ICANN, as hinted by the above list of observations. The DOC oversight of ICANN activities remains complex and by all means deserves clarification. This is advocated in order to maintain the legitimacy required as a foundation to the stability of global Internet policy and technical management functions.

Best regards,

- Thierry Moreau

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