

## Comments from Danny Younger

### **Introduction:**

I wish to thank the United States Department of Commerce's National Telecommunications and Information Administration for this opportunity to comment on the continuation of the transition of the technical coordination and management of the Internet's domain name and addressing system to the private sector. As a member of the public that has had the honor of serving as an elected Chair of the General Assembly of the Domain Name Supporting Organization of the Internet Corporation for Assigned Names and Numbers, I sincerely appreciate your posting of a Notice of Inquiry and wish to share with you my thoughts on the transition process as an individual that has tracked ICANN-related matters on a regular basis for the last six years.

It has been said that "ICANN may not be the world's most unpopular organization, but if it had consciously set out to make itself loathed it could hardly have been more successful."<sup>1</sup> I share that assessment. ICANN, the organization selected to embody the principles set forth in the White Paper<sup>2</sup> is almost universally reviled. From my vantage point as a long-time ICANN participant, I have come to conclude that this passionate loathing has a single root cause: we detest ICANN because it has not remained true to the White Paper's noble vision – rather than striving to become an organization committed to private, bottom-up coordination operating for the benefit of the Internet community as a whole, ICANN has chosen instead to focus its attention exclusively upon that select stakeholder community that feeds its coffers – it has become primarily a registry-registrar Guild Manager.

The creation of this de facto DNS Supplier Guild was an unexpected and unwanted development that since coming into fruition has occasioned nothing but rancor. The Internet community wanted a DNS coordinator that would serve both the supply-side interest and the public interest with equal vigor. Instead the public interest has been all but eliminated through an ICANN "Reform Process" – described by the Carter Center's Charles Costello as "a palace coup d'état"<sup>3</sup> – that resulted in the ouster of ICANN's publicly-elected at-Large directors, in the elimination of ICANN's public and very vocal General Assembly, and in the closure of ICANN's multi-purpose Public Comment Forum<sup>4</sup>. ICANN has steadfastly refused to hire a Manager of Public Participation, and frankly no longer has any vested interest in heeding the Public Interest (other than giving lip service to public comments tendered).

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<sup>1</sup> <http://www.telecomasia.net/telecomasia/article/articleDetail.jsp?id=142268>

<sup>2</sup> <http://www.icann.org/general/white-paper-05jun98.htm>

<sup>3</sup> Charles Costello, ICANN Public Forum in Accra, Real-time Captioning, 13 March 2002. <http://www.icann.org/accra/captioning-afternoon-13mar02.htm>

<sup>4</sup> <http://forum.icann.org/offtopic/>

Doubtless a DNS Supplier Guild fulfills a particular need, but in my view it should not be at the complete and total expense of the public interest component. In a nutshell, the problem is this: two competing visions for the future of DNS management have led to nonstop friction between the parties to this dispute (hence the never-ending discussions about Internet “governance”). Consider this public exchange between Bret Fauset and ICANN Chairman of the Board Vint Cerf<sup>5</sup>:

Bret Fauset: I think in an organization like ICANN, public interest is the overriding interest that should be represented.

Vint Cerf: We should talk about that because I have a different model.

At issue then is which model should prevail. Should the White Paper model of a public trust that thoughtfully allocates “user seats” on its board prevail, or should ICANN’s model of a supply-side guild wherein the public interest is given short shrift reign supreme? As the primary concern of the Bush Administration and the global community is the stability and security of the underlying domain name management system, it becomes clear that ultimately the U.S. Department of Commerce must endorse whatever model is best positioned to “respond nimbly to DNS issues in the rapidly evolving Internet space.”<sup>6</sup>

I would argue that the current ICANN Supplier Guild not only fails to respond nimbly to DNS issues, its Vanderbilt-inspired “public be damned” attitude is fully responsible for current DNS issues remaining unaddressed as long as possible. From ICANN’s perspective, nothing is really a problem as long as their suppliers continue to profit. There are no nimble responses unless a registry action threatens registrar interests (i.e. the Sitefinder development<sup>7</sup>).

Examples of DNS issues affecting the public that have not been handled in a nimble fashion:

1. The Deletes Issue – Even though ICANN has adopted an Expired Domain Deletion Policy that calls for domains upon expiry to be returned to the pool of available names, ICANN has overlooked the fact that numerous registrars are circumventing this Consensus Policy by requiring through their Terms of Service Agreements that expiring domains be transferred to auction houses. Consensus Policy arrived at by the overall Internet community is not being enforced because certain registrars are profiting handsomely from domain aftermarket activities. Ignoring this problem to the detriment of the registrant community does not equate with handling the problem in a nimble

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<sup>5</sup> <http://www.icannwatch.org/article.pl?sid=06/03/30/215232&tid=>

<sup>6</sup> [http://www.ntia.doc.gov/ntiahome/domainname/agreements/docstatement\\_09192002.htm](http://www.ntia.doc.gov/ntiahome/domainname/agreements/docstatement_09192002.htm)

<sup>7</sup> <http://www.icann.org/announcements/advisory-03oct03.htm>

manner.

2. The Typosquatting Issue – Cybersquatting has hit epidemic proportions. Business no longer has confidence that its trademarks can be protected in the DNS as typosquatting routinely occurs on every possible variant of a trademark. ICANN's nimble response after watching the explosion of "domain tasting" in the last sixteen months that has facilitated this ignominious and widespread practice has been to schedule a UDRP review for sometime in 2007.
3. The Redemption Grace Period Issue – Registrants continue to pay exorbitant prices to redeem their domain names. As registrars continue to fleece the public, ICANN's nimble response has been to totally ignore the issue (which should have been addressed by a Stage-2 initiative that would have introduced competition into this arena in early 2003).
4. The Five-day Add Grace Period Issue – In the month of May 2006, 32.3 million names were used without being paid for<sup>8</sup> through a domain kiting tactic. Not only does this practice deprive legitimate registrants of meaningful domain names while these names are being "tested", but Security Firm MessageLabs has reported: "Disposable domains are also becoming a larger problem via a tactic known as 'domain kiting' in which cyber criminals acquire domains without paying for them and use them for illegal gains."<sup>9</sup> ICANN's nimble response? As per GoDaddy CEO Bob Parsons: "ICANN is doing what they do best — nothing! It's been two months now since I've written about the gigantic proportions that this scam has assumed, and it is with an extreme sense of sadness that I report to you that, in spite of increasing focus on the domain kiting problem, that ICANN has done literally nothing to even begin to address putting an end to this abuse."<sup>10</sup>
5. The IDN Issue –ICANN's nimbleness on this issue has sarcastically been described as: "another three hour discussion about how *we can't get it to work, and it's more complicated that you think*"<sup>11</sup>. Consider the comments of Andrzej Bartosiewicz, head of DNS at of NASK, which administers Poland's .pl ccTLD: "From my point of view ICANN has no competency to deal with IDNs. I don't plan to discuss IDNs with ICANN any more. It does not have the skills to deal with

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<sup>8</sup> <http://www.bobparsons.com/MayKiting.html>

<sup>9</sup> <http://www.justloadit.com/pr/7876>

<sup>10</sup> <http://www.bobparsons.com/MayKiting.html>

<sup>11</sup> [http://www.theregister.co.uk/2006/06/22/icann\\_marrakesh\\_preview/](http://www.theregister.co.uk/2006/06/22/icann_marrakesh_preview/)

standardization."<sup>12</sup>

6. The WHOIS Issue – Treated by ICANN as the-never-ending-story, this issue has seen committee after committee and task force after task force fumbling around with the topic for the last six years. While ccTLDs such as .ca can readily craft a WHOIS policy<sup>13</sup> after thorough deliberation and public consultation, ICANN can't nimbly even get to the starting gate.
7. The WIPO II Process Issue – This is an embarrassment. ICANN's nimble response to issues brought forth by WIPO (and supported by the GAC) has been to sideline this matter since October 2003 under the pretense of ongoing consultations.
8. The Escrow Issue – Registrars have not been escrowing registrant data (even though required to do so by contract). Millions of domain names are at risk in the event that a calamity besets a large registrar. ICANN's nimble response to this problem? As usual, it has done nothing even though this problem remains a major "stability issue".
9. Registrar Domain Hoarding and Warehousing – Warehousing by major registrars continues unabated<sup>14</sup> with ICANN never once having examined the issue.

The current ICANN model as a Supplier Guild initiative is not nimble. It is the antithesis of nimble. We need an ICANN that is modeled in a way that protects the public interest and responds to DNS issues in a prompt and forthright manner – this present ICANN model is an abomination.

The big question on our plate is this: what can the Department of Commerce now do about this horrible situation while knowing full well that we all remain saddled with ICANN as the organization-that-nobody-wants owing to a decision made by the current U.S. administration:

"ICANN is the appropriate technical manager of the Internet DNS. The United States continues to support the ongoing work of ICANN as the technical manager of the DNS and related technical operations and recognizes the progress it has made to date. The United States will

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<sup>12</sup> [http://www.cbronline.com/article\\_news.asp?guid=E3491C79-AB6C-4F02-A2ED-5948B98276FF](http://www.cbronline.com/article_news.asp?guid=E3491C79-AB6C-4F02-A2ED-5948B98276FF)

<sup>13</sup> [http://www.cira.ca/en/Whois/whois\\_intro.html](http://www.cira.ca/en/Whois/whois_intro.html)

<sup>14</sup> <http://www.cheaphostingdirectory.com/news-tucows-acquires-netidentity-with-extensive-domain-name-portfolio-2157.html>

continue to provide oversight so that ICANN maintains its focus and meets its core technical mission.”<sup>15</sup>

As such, this public comment opportunity presents us with a conundrum: as we have no choice but to acquiesce to a future in which ICANN continues to serve with the blessing of the present U.S. administration, what transition-related comments should we be tendering to the NTIA while knowing full well that ICANN itself is thoroughly predisposed to ignore or dismiss all such public comments? In short, how can we offer any responsible guidance to the NTIA on the privatization process when the subject of its oversight has already received an all-encompassing endorsement, a “Get Out of Jail Free” card, from the current U.S. administration (and thus has no compelling incentive whatsoever to change its modus operandi)?

I believe that the answer to this question lies in a position taken by the Department of Commerce in its 19 September 2002 “*Statement Regarding Extension of Memorandum of Understanding with ICANN*” that noted: “Of course, if ICANN does not make significant progress on the transition tasks, alternatives will be identified and considered.”

The first issue, therefore, is whether ICANN’s progress over the course of the last three years on the transition tasks has been “significant”.

## **The Transition Tasks:**

### **A. ICANN’s Future Shape**

ICANN was given a series of tasks in order to allow it to demonstrate that as an organization it was sufficiently stable, transparent, representative, efficient, and sustainable to the degree that the privatization process could be finalized (with the understanding that the Department of Commerce viewed “finalizing the future shape of ICANN” as “an urgent priority”<sup>16</sup>).

It was further understood by all parties that the “future shape” of ICANN would depend upon the timely outcome of ICANN’s periodic scheduled structural and operational reviews (as required and stipulated in ICANN’s bylaws):

“The Board shall cause a periodic review, if feasible no less frequently than every three years, of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating

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<sup>15</sup> “*Domain Names: U.S. Principles on the Internet’s Domain Name and Addressing System*”  
[http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples\\_06302005.htm](http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm)

<sup>16</sup> [http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement\\_09162003.htm](http://www.ntia.doc.gov/ntiahome/domainname/agreements/sepstatement_09162003.htm)

Committee by an entity or entities independent of the organization under review.”<sup>17</sup>

It should be clear to all observers that what the Department of Commerce viewed as “an urgent priority”, ICANN viewed as just another chore that they could complete at their leisure – there has been no review of every Supporting Organization and their respective Councils; there has been no review of each Advisory Committee (excluding the GAC); neither has there been a review of the Nominating Committee.

That is not “significant progress”; this is moving at a snail’s pace.

## B. Transparency

Neither do we see significant progress with respect to transparency. ICANN Board member Susan Crawford has detailed a slew of ongoing deficiencies<sup>18</sup>:

### 1. Transparency [text in italic font comes from ICANN's bylaws]

*ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.*

1.1 Detailed minutes (example: “SC agreed but listed the following concerns about status of MoU discussion that would need to be addressed publicly: 1, 2, 3 [details]”) to be published of Board conference calls within 5 business days of calls.

1.2 Web site must include “*a docket of all pending policy development matters, including their schedule and current status*”.

1.3 Web site must include “*information on ICANN's budget, annual audit, financial contributors and the amount of their contributions, and related matters*” (information is out of date)

1.4 Manager for Public Participation must be appointed. *There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN, including the Website and various other*

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<sup>17</sup> ARTICLE IV: Section 4. ACCOUNTABILITY AND REVIEW -- PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

<sup>18</sup> [http://scrawford.blogware.com/blog/\\_archives/2006/4/13/1884903.html](http://scrawford.blogware.com/blog/_archives/2006/4/13/1884903.html)

*means of communicating with and receiving input from the general community of Internet users.*

1.5 We need to make better tools available for policy development purposes.

1.6 We need to have all correspondence (not selected correspondence) to and from ICANN posted promptly online.

1.6.1 There should be a single point of contact at ICANN for all ICANN correspondence – a named staff member who is responsible for ensuring that letters get to the right entities/people within ICANN and are promptly posted.

1.6.2 All correspondence from ICANN that is closely related to ICANN's policy development forum role (everything except, e.g., communications with meeting-services vendors) should be posted.

1.7 We need promptly to respond to correspondence. Both ALAC and GNSO have complained that they receive no acknowledgement for communications.

1.8 Bloggers and large-entity journalists should be treated equally when ICANN makes announcements of "press conferences."

1.9 We need to publicly explain why ICANN runs a root server.

1.10 We need to post all reports given at meetings -- preferably before the meeting. In general, the "proceedings" of meetings should be provided online.

Transparency within ICANN is an issue that keeps coming up time and time again. The latest article on this topic "*Another Meeting, Another Bylaw Violation*"<sup>19</sup> was written by Bret Fausett:

"For at least the last year, the ICANN community has complained loudly and frequently about the lack of transparency from the Board. Even the Board has complained about the inability of staff to report on the Board meetings in a timely fashion. ICANN's Chair has publicly promised to be better about reporting ICANN's decisions. ICANN's CEO has publicly promised to be better about reporting ICANN's decisions. Declining to open all of their meetings to the public, they instead adopted a new procedure designed to ensure that timely reports were made to the public. So after all of this, you'd think that ICANN would make it a priority to publish its minutes and preliminary reports in a timely fashion, as it had

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<sup>19</sup> <http://blog.lextext.com/blog/icann//index.html>

promised. *Right?*

You'd be wrong. As of today, Saturday, June 17th, ICANN has not posted any preliminary report from its closed-to-the-public Board meeting held on Friday, June 9th. That's eight regular days -- and more than five business days -- from the date of the meeting. As ever, I'm sure the person(s) responsible for this latest lapse simply need another chance... or at least another administrative assistant."

One can only conclude that progress on transparency has been token at best, certainly not what anyone would characterize as "significant".

### C. Efficiency

Neither has ICANN made significant progress with respect to "efficiency". As but one example, timelines mandated by the ICANN bylaws for use in Policy Development Procedures (PDPs)<sup>20</sup> have blatantly been ignored by the GNSO's constituent "stakeholders" with ICANN's tacit consent, and a commitment to efficiency has been replaced by full-scale disorganization. Consider what has happened to the scheduled timeline for the GNSO's new gTLD Policy Process<sup>21</sup>:

6 December 2005 -- Beginning of public comment period following notification of the initiation of the PDP. Public comment period includes GNSO Public Forum in Vancouver on Friday 2nd December

9 January 2005 -- End of public comment period on launch of PDP

8 December – 9 January 2006 Call for constituency statements

14 January 2006 -- Submission by staff of Preliminary Task Force Report to Task Force.

19 January 2006 -- Task Force vote on Preliminary Task Force Report.

20 January 2006 -- Publication of Preliminary Task Force Report for public comments

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<sup>20</sup> <http://www.icann.org/general/bylaws.htm#AnnexA>

<sup>21</sup> <http://forum.icann.org/lists/alac/msg01408.html>



10 February 2006 -- Conclusion of public comment period

20 February 2006 -- Submission of Final Task Force Report to GNSO Council

2 March 2006 -- GNSO Council meeting to discuss the report and work toward achieving a supermajority vote to present to the Board.

As of a few days ago, we were told<sup>22</sup> that "Between the Marrakech meeting and the December meeting in Brazil, the GNSO Council will complete its Initial Report and release it for a formal Public Comment Period." What should have been an efficient ninety day start-to-finish process has now been extended to well over one year. This is not efficiency; this is a policy council fiddling while ICANN burns, a willful neglect wrapped in the throes of paralysis.

Additional examples of chronic inefficiency abound, but most tend to stem from a failure to generate and post reports. We have no posted Contingency Plan (although a PowerPoint presentation was made to select stakeholders such as CENTR participants); we have no reporting on the thrust of the 14,000+ monthly public comments<sup>23</sup> sent to ICANN's general e-mail box. We have no ongoing analysis of trends in the major TLD zones, nor any reports on the magnitude of typosquatting/cybersquatting or other significant issues that affect the registrant community (such as registrar and institutional warehousing of domain names).

Those reports that we do receive are laboriously read during ICANN's plenary sessions instead of being posted in advance of such sessions with this leading to a steady flow of complaints that ICANN's sessions do not allow sufficient time for the presentation of public comments.

ICANN has not become a more efficient organization; if anything, it has retrogressed.

#### D. Representativeness:

With respect to progress in becoming "representative"... here we continue to have a major problem with absolutely no improvement in sight. The overall registrant community remains unrepresented within ICANN's policy-formulating bodies, and there are still no seats on the ICANN Board set aside for the user community – this in spite of the recommendation of

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<sup>22</sup> <http://forum.icann.org/lists/gtld-council/msg00154.html>

<sup>23</sup> <http://www.icann.org/announcements/proposed-budget-2006-07-rev.pdf>

ICANN's At-Large Study Committee Blue-Ribbon Panel (chaired by the highly respected Carl Bildt) "that the At-Large membership select a third of ICANN's Board"<sup>24</sup>.

The At-Large community has gone from the promise of half of the seats on the ICANN Board to the hope of one third of the seats to the reality of none of the seats. This is not progress. This is a sick and unacceptable perversion of the principle of representation that is so totally reprehensible that I remain shocked and aghast that the Department of Commerce has countenanced this development.

#### E. Stability:

Significant progress with respect to organizational stability would imply that relationships with stakeholder and other community groups had been solidified to a great extent during the course of the last three years. This has not been the case. As writes Bill Manning<sup>25</sup>:

"I see sporadic progress by ICANN in meeting the targets set forth... ICANN has lost much credibility with the technical community in its tenure as the oversight body... In my testimony before Sen. Burns on 30 Sept. 2004 there was an expectation that ICANN would re-initiate discussions with the root operators to establish a formal agreement. No such discussion has occurred to my understanding since then."

If discussions with root operators on formal agreements are at a nil level, and if during the course of the last three years we have seen no new ccTLD sponsorship agreements, only two ccTLD Manager MOUs, two ccTLD Accountability Framework documents and five ccTLD "exchanges of letters", then significant progress on formalizing relationships for the sake of stability is not being made.

Another way of looking at it -- formalized relationships with less than seven percent of the ccTLD community is not "significant progress".

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<sup>24</sup> [http://www.atlargestudy.org/final\\_report.shtml](http://www.atlargestudy.org/final_report.shtml)

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[http://www.ntia.doc.gov/ntiahome/domainname/dnstransition/comments/dnstrans\\_comment0002.htm](http://www.ntia.doc.gov/ntiahome/domainname/dnstransition/comments/dnstrans_comment0002.htm)

## F. Sustainability:

ICANN's task since the last MOU amendment has been "to secure the necessary financial and personnel resources critical to long-term sustainability of the organization".

ICANN has made significant progress in securing financial resources, notably by raising fees in the new .com agreement (which was universally opposed by the entirety of the ICANN community), and by raising the per-domain name fee in other registry contracts to \$2 per name per year (it's only a question of time before all registry contracts will carry the same clause that we see in Section 7.2(c) of the .jobs contract<sup>26</sup>).

Where ICANN has failed to make significant progress is in the area of personnel. We still have no Public Participation Manager (although the need to fill this position was written into the ICANN bylaws over three years ago<sup>27</sup>); we still have no compliance officers<sup>28</sup> (which renders moot ICANN's "compliance program"<sup>29</sup>) and the organization still suffers from a lack of technical expertise (as evinced by [1] a webmaster position that after several years still remains unfilled and [2] the crash of ICANN's servers during the .xxx comment period which resulted in public comments not being publicly posted and available for community review in a timely fashion).

My overall assessment of ICANN's progress in these key transition task areas is that it has not been "significant". If the NTIA concurs with my evaluation, then the next course of action would be to identify and consider "alternatives".

### **The Alternatives:**

As I am convinced that ICANN has not made significant progress on its transition tasks (in spite of its thirteen self-serving accolades (Status Reports) to the contrary<sup>30</sup>), the remainder of these comments will be devoted to an examination of three distinct "alternatives". These alternatives are presented as the starting point for wider discussions by the NTIA and the broader international Internet community; they are alternatives that will still allow for a limited transition of management responsibility for the domain name system functions to the private sector, but will not yet allow for a full transition (as ICANN has not proved itself ready to assume this mantle).

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<sup>26</sup> <http://www.cavebear.com/cbblog-archives/000173.html>

<sup>27</sup> <http://www.icann.org/general/bylaws.htm#III>

<sup>28</sup> <http://www.icann.org/general/jobs.htm>

<sup>29</sup> <http://www.icann.org/compliance/>

<sup>30</sup> <http://www.icann.org/general/mou-status-report-07apr06.pdf>

In the final analysis, we must ask ourselves “who ultimately will be in charge of the DNS”? Will it be a fully privatized ICANN that will manage the DNS, or will it be an ICANN still under current NTIA/DOC oversight, or perhaps a restructured/re-designated ICANN that will perform its functions subject to a different form of supervision?

Some have already expressed their views...

I am aware that participants in the *Internet Governance Project*<sup>31</sup> are urging Internet users everywhere, but especially those outside the United States, to respond to the NTIA Notice of Inquiry with the following statement:

"The Internet's value is created by the participation and cooperation of people all over the world. The Internet is global, not national. Therefore no single Government should have a pre-eminent role in Internet governance. As the US reviews its contract with ICANN, it should work cooperatively with all stakeholders to complete the transition to a Domain Name System independent of US governmental control."

I must state that I disagree with this proposition.

At its most fundamental level, the Internet's domain name system relies upon the principle of “stewardship”. RFC1591 stipulates: “These designated authorities are *trustees* for the delegated domain, and have a duty to serve the community... The major concern in selecting a designated manager for a domain is that it be able to carry out the necessary responsibilities, and have the ability to do a equitable, just, honest, and competent job.”

A trustee or steward, by definition, necessarily must have a “pre-eminent role” with respect to governance and/or administration. I will admit to being pleased that the U.S. government is currently the steward of the DNS as I have a great respect and appreciation for traditional American values and principles.

I, for one, do not seek a Domain Name System independent of US governmental control; I want the U.S. to maintain a pre-eminent role in Internet governance and prefer continued U.S. oversight as I do not place any trust in the private sector's ability to be either equitable, just or honest (especially when the interests of a guild of private sector stakeholders clash with the public interests of the broader community). I equally mistrust the motives of other governmental entities and I have no trust whatsoever in the ability of the United Nations to function as a steward of the DNS.

As I see it, at issue is how to move toward full privatization without actually achieving such privatization so that the public interest may continue to be served by way of ongoing U.S. federal oversight.

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<sup>31</sup> <http://www.internetgovernance.org/comment.asp>

## Alternative Choice #1

One possible path forward might be for the Department of Commerce to recommend having ICANN designated by Congress as a new type of GSE (Government Sponsored Enterprise). Government sponsored enterprises are private corporations chartered by the Federal Government and granted privileges so they can advance specific purposes.

Examples of GSEs include: Federal Home Loan Bank, Federal Home Loan Mortgage Corporation, Federal Farm Credit Bank, Resolution Funding Corporation, and The Student Loan Marketing Association.

Historically, government-sponsored entities have rarely chosen to privatize themselves, preferring to operate with little risk to themselves, in government-chartered safe havens. These entities carry the implicit backing of the U.S. Government (as does ICANN currently), have often been created to fulfill a critical need, are endowed with special exemptions to perform a public mission, and usually have some monopoly control over the goods or services provided within congressionally-mandated parameters. They also enjoy the benefit of having some presidential appointees on their respective Boards.

While ICANN's earlier reform initiative<sup>32</sup> sought to make private-sector self-management work in the context of a public-private partnership that would function to stave off the emergence of a multinational governmental organization as the default alternative, the above-cited approach instead seeks to sideline encroachment by other governmental entities by advancing a decidedly U.S.-centric "partially-privatized" model. (Please note that the USPS was partially privatized by Congress in 1970, and that "GSEs generally do not receive government appropriations"<sup>33</sup>).

A partially-privatized ICANN that enjoys a GSE designation would engender the following benefits:

1. A Charter, rather than an MOU, would establish operational objectives and constraints.
2. The NTIA could remain at arm's length from day-to-day ICANN operations as presidential appointees on the ICANN Board would be able to convey the sentiments of the U.S. administration.
3. When Congress acts to enhance transparency within GSEs generally, ICANN will also need to float on this same tide or risk the consequences attendant with congressional displeasure.

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<sup>32</sup> President's Report: ICANN – The Case for Reform <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>

<sup>33</sup> <http://www.gao.gov/special.pubs/gg97121.htm>

4. As GSEs (like Fannie Mae) can be structured as for-profit enterprises (allowing for the issuance of shares and for the election of board members by shareholder vote), ICANN too could be re-structured with competitive compensation packages for its elected board members and key executives.
5. As special exemptions can apply to GSEs, it remains possible that an exemption may be crafted so that ICANN would not have to face the risk of frivolous shareholder derivative suits, which can be a serious drain on both finances and personnel.

### **Ancillary Considerations:**

To be clear, I sincerely believe that reform is vitally necessary, but at the same time I also believe that ICANN will never ever willingly reform itself to the degree desired by the broader Internet community – a true “reform”, rather than the pretense of reform, must instead be foisted upon ICANN by way of the U.S. Congress acting in its oversight capacity.

The need for ICANN reform has never been greater and has been reiterated most recently by the Canadian Internet Registration Authority (CIRA) with a recommendation “that ICANN engage a non-governmental, independent consultant to conduct a wide-reaching, public review of ICANN's transparency, accountability and the fairness of its processes and to provide a road-map for ICANN's reform”.<sup>34</sup>

Our goal is to attain a stable and secure domain name management system that is well-equipped to nimbly weather any current or future crisis so that the Internet may remain a tool for research, communication and the conduct of business. I would like to stress this latter point because the value of the Internet as an economic engine is of key importance to the Department of Commerce and to the Bush Administration.

Unfortunately, ICANN as currently constituted is not a spry organization. It fails to recognize emerging threats in a timely fashion and it has been exceedingly lax in its duty toward the business community. Typosquatting, for example, has now reached epidemic levels.

In early 2003 researcher Ben Edelman's report “*Large-Scale Registration of Domains with Typographical Errors*”<sup>35</sup> was published. That report documented problems in a mere 8000 domains. More recently, Microsoft Research has released a report entitled “*Strider Typo-Patrol: Discovery and Analysis of Large-*

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<sup>34</sup> CIRA's response to ICANN's letter dated March 23, 2006

<http://www.cira.ca/news-releases/177.html>

<sup>35</sup> <http://cyber.law.harvard.edu/people/edelman/typo-domains/>

*Scale, Systematic Typo-Squatters*” in which typosquatting is described as an “industry” working in conjunction with “questionable domain name registrars”.<sup>36</sup>

Just how big is the scope of this issue? Consider this:

A favorite technique of typo-squatters and phishers is to “drop the dot”; thus if your registered domain name was [www.mastercard.com](http://www.mastercard.com), they would “drop the dot” and register the confusingly similar [wwwmastercard.com](http://wwwmastercard.com). I asked former ICANN director Michael Palage to get me some data on just how many domains had been registered with the [www](http://www) prefix<sup>37</sup>:

.com	282,000
.info	2,900
.net	18,000
.org	8,000

Over 310,000 domains use the “drop-the-dot” typo-squatting/phishing technique. Obviously an even greater number use misspelling techniques which allow for multiple variants on a brand name registered in the DNS. Some would call this problem significant, yet ICANN hasn’t even noticed this issue. Making matters worse is the fact that the registrar community is actively assisting these typo-squatters by willingly providing “domain tasting” services.

Domain tasting is a term that has entered our vocabulary within the last eighteen months. It describes a process whereby players in the “domain monetization industry” register domains for a period of less than five days in order to set up parking pages filled with pay-per-click links that enable them to test the domains’ traffic potential. After the testing is complete, the domains are then deleted during what is called “ICANN’s 5-day add grace period” at no charge. Often, within milliseconds, they are then re-registered for another 5 days, again and again.

Clearly, the domains that can capitalize upon a misspelling of a major brand are those that also have the highest “traffic potential”, and these have been registered in massive quantities during this last year.

Just how many domains are registered, tested, and dropped during any given month? During the month of January 2006, a total of 25,189,496 domain names went through this process<sup>38</sup>. You might want to guess at how many were actually registered that were blatant typo-squats on registered trademarks.

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<sup>36</sup> <http://research.microsoft.com/Typo-Patrol/>

<sup>37</sup> Data reported to me on 14 June 2006

<sup>38</sup> <http://www.icann.org/tlds/monthly-reports/com-net/verisign-200601.pdf>

Unfortunately, a guess is all you will get as ICANN has never commissioned a study or investigation of this issue... and frankly, it's almost impossible to get ICANN to listen even when a problem of this magnitude is sitting right on their doorstep.

In early February, the problem of registrar involvement in typo-squatting efforts was graphically brought to ICANN's attention by way of a submission from Bruce A. McDonald (representing the interests of the Transamerica corporation) to the WHOIS task force<sup>39</sup>. Mr. McDonald, after detailing a pattern of registrar deception, wrote:

"If it is determined that concealment and deception involving the true ownership of Internet domain names is the ordinary course of business of ICANN-accredited registrars who have colluded to misappropriate and counterfeit the names, trademarks and service marks of other parties in their registration and use of Internet domain names, then it is Transamerica's position that such conduct represents the predicate act for a pattern of illegal business activity within the meaning of the Racketeer Influenced and Corrupt Organizations ("RICO") provisions of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968 (1982)."

These were serious charges. Did anyone on either the WHOIS task force, or the Generic Name Supporting Organization even discuss this contribution? As you might expect, the answer is "no". Did the ICANN Board launch any investigation when the issues were brought to their attention? Again, the answer is "no".

As I see it, ICANN is not inclined to do much of anything if such actions would run counter to the economic interests of the primary stakeholders that feed the ICANN coffers – the registrars and registries – and most especially not when these stakeholders are profiting handsomely from an influx of new registrations. ICANN is quite comfortable either just "looking the other way" or at last resort "convening a panel" when forced into such measures by an outraged community.

I'm not alone in holding this viewpoint. Consider the remarks of GoDaddy CEO Bob Parsons<sup>40</sup>:

"I wrote a letter bringing this matter to ICANN's and VeriSign's attention<sup>41</sup> as early as October 8, 2004. So both ICANN and VeriSign have known about this practice for quite sometime — but have looked the other way."

I expect more from the body charged with the management of the DNS. For the Internet to function as an effective commercial market, businesses must have confidence that their trademarks can be protected. ICANN has done very little to

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<sup>39</sup> <http://forum.icann.org/lists/whois-comments/msg00030.html>

<sup>40</sup> <http://www.bobparsons.com/DomainKiting.html>

<sup>41</sup> [http://www.godaddy.com/gdshop/pdf/100804\\_letter\\_ijd.pdf](http://www.godaddy.com/gdshop/pdf/100804_letter_ijd.pdf)



ensure that trademark interests are sufficiently protected from the current cybersquatting plague and has moved at a snail's pace when problems are brought to their attention. We deserve better. We deserve an effective ICANN (which after all was the purported objective of ICANN's last reform initiative).

An effective ICANN is possible, but only if the public interest can share the same table as the special-interest community to prompt necessary action and policy development when required. We need more than platitudes:

“Public Participation. Identifying a mechanism that would enable all of ICANN's constituents to participate in decision-making and ensure the public interest is represented has proven challenging. While there is general agreement concerning the need for such representation, ICANN has not been able to garner consensus regarding the level or best method for achieving it.”<sup>42</sup>

From my point of view, the primary advantage of pursuing GSE status for ICANN is that, at the very least, the public would be assured that civil servants (by way of presidential appointments) would sit on the ICANN Board to defend the public interest (in much the same manner as FCC commissioners, appointed by the President and confirmed by the Senate for 5-year terms, protect the public interest).

Am I expecting an international outcry if ICANN becomes “designated” by the U.S. government as a GSE? Yes I am, but I believe that the current U.S. administration can weather such an international storm as long as it reaffirms that the United States Government intends to preserve the security and stability of the Internet's Domain Name and Addressing System, and that other governments do have legitimate public policy and sovereignty concerns with respect to the management of their own ccTLDs.

I recognize the fact that the mere thought of any governmental representative sitting on the Board of ICANN is anathema to many in the Internet community – I too am an individual that has always preferred the regulatory hand of government to remain at arm's length from the Internet – but I would rather have the public interest represented on the ICANN Board by way of one government's civil service appointees than not to be represented at all (and to have the public interest completely supplanted by the special interest community). An equitable balance must somehow be restored.

The White Paper stated: “On balance, we believe the concerns raised about the representation of specific groups are best addressed by a thoughtful allocation of the “user” seats as determined by the organizers of the new corporation and its Board of Directors”<sup>43</sup> ...but where are the “user” seats on the ICANN Board?

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<sup>42</sup> [http://www.ntia.doc.gov/ntiahome/domainname/agreements/docstatement\\_09192002.htm](http://www.ntia.doc.gov/ntiahome/domainname/agreements/docstatement_09192002.htm)

<sup>43</sup> <http://www.icann.org/general/white-paper-05jun98.htm>

They are gone, a victim of ICANN “reform”. There is not one ICANN Board director that can or will state that he/she represents the user community.

In any event, whatever decision is reached, we all would gain from an open discussion of the options as absolutely no one (other than current ICANN management) appears to be satisfied with the status quo.

### **The Public Interest Factor**

I, for one, remain gravely concerned that ICANN is not structured in a manner that allows for the public interest to be championed. While individual stakeholder communities have their policy advocates (the special interest lobbyists) within ICANN’s Supporting Organizations, the same is not true for the general public.

We continue to have serious issues that fail to be addressed. A few examples:

1. The current version of the ICANN Registrar Accreditation Agreement<sup>44</sup> (“RAA”) obliges registrars to periodically submit a copy of their registration database to ICANN or a mutually-approved third-party escrow agent. The Data Escrow provision is set forth in RAA subsection 3.6, which provides as follows:

"During the Term of this Agreement, on a schedule, under the terms, and in the format specified by ICANN, Registrar shall submit an electronic copy of the database described in Subsection 3.4.1 to ICANN or, at Registrar's election and at its expense, to a reputable escrow agent mutually approved by Registrar and ICANN, such approval also not to be unreasonably withheld by either party. The data shall be held under an agreement among Registrar, ICANN, and the escrow agent (if any) providing that (1) the data shall be received and held in escrow, with no use other than verification that the deposited data is complete, consistent, and in proper format, until released to ICANN; (2) the data shall be released from escrow upon expiration without renewal or termination of this Agreement; and (3) ICANN's rights under the escrow agreement shall be assigned with any assignment of this Agreement. The escrow shall provide that in the event the escrow is released under this Subsection, ICANN (or its assignee) shall have a non-exclusive, irrevocable, royalty-free license to exercise (only for transitional purposes) or have exercised all rights necessary to provide Registrar Services."

In spite of this contractual obligation, registrars across the board have failed to escrow registrant data thereby placing millions of registrations at

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<sup>44</sup> <http://www.icann.org/registrars/ra-agreement-17may01.htm>

risk. This is a serious stability/security threat.

2. Registrants continue to pay extortionate prices for Redemption Grace Period services. It had been proposed<sup>45</sup> that six months after the adoption of Redemption Grace Period Proposal, ICANN's President should re-convene a Technical Steering Group to review the implementation of the Redemption Grace Period, to suggest possible improvements to the Redemption Grace Period, and to develop a specification for Stage 2 of the implementation of the Redemption Grace Period, which would enable registrants to choose the "restoring" registrar. Such choices remain unavailable. There is no competition for these services. Stage 2 has not commenced and registrants remain locked into the registrar that originally deleted their registration (being forced to pay whatever that registrar chooses to charge).
3. Registrants are finding it exceedingly difficult to secure a "good" domain name at a fair price. Part of the problem stems from actions taken by registrars to thwart/circumvent the ICANN Expired Domain Deletion Policy<sup>46</sup> by requiring through their Terms of Service Agreements that expiring domains be transferred either to the registrar or to other third parties<sup>47</sup> (such as domain name auction houses) instead of being returned to the pool of available names.

Coupled with ongoing "domain tasting" (that eliminates millions of domains temporarily from the field of choices available to the average registrant) and domain warehousing on the part of both registrars<sup>48</sup> and institutional speculators, we have the makings of an emerging problem. As one commentator opined:

"You have to wonder about the whole business of domain warehousing. One observer I know calls it a tax on small businesses trying to enter the Web markets, and he has a point."<sup>49</sup>

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<sup>45</sup> <http://www.icann.org/bucharest/redemption-topic.htm>

<sup>46</sup> <http://www.icann.org/registrars/eddp.htm>

<sup>47</sup> "Should you not renew your domain name during any applicable grace period, you agree that unless you notify us to the contrary we may, in our sole discretion, renew and transfer the domain name to a third party on your behalf (such a transaction is hereinafter referred to as a "Direct Transfer"), and your failure to so notify us after the domain name expiration date shall constitute your consent to such a Direct Transfer. In the event we are able to identify such a third party (the "Direct Transfer Customer") and effectuate such a Direct Transfer, we will notify you via email after the transaction is completed ("Direct Transfer Notification")."

<http://www.networksolutions.com/legal/static-service-agreement.jsp#domains>

<sup>48</sup> [http://www.thewhir.com/marketwatch/061606\\_Tucows\\_To\\_Acquire\\_NetIdentity.cfm](http://www.thewhir.com/marketwatch/061606_Tucows_To_Acquire_NetIdentity.cfm)

<sup>49</sup> <http://www.eweek.com/article2/0,1759,1826532,00.asp>