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ICANN’s Constitutional Moment

Essay by Susan Crawford, May 20, 2008

The Internet Corporation for Assigned Names and Numbers, or ICANN, coordinates name and number identifiers for the Internet. In a nutshell, ICANN coordinates actors who make sure that there is only one .com in the list of top level domains (like .com, .net, .org, and .edu) to which most Internet access providers around the world refer. ICANN also makes sure that these top level domains are linked to the “right” Internet Protocol addresses of the machines that have information about second-level domains underneath them (like google.com). It’s also responsible for coordinating the allocation of IP addresses, although the Regional Internet Registries do the work. It has contracts with the registries and registrars who provide, respectively, wholesale and retail services in connection with registering domain names. (It has looser relationships with the country-code top level domains like .de and .fr.) ICANN’s source of contractual authority comes from its status as a provider of services to the U.S. Department of Commerce.

And that’s it. Names and numbers; very simple; and it used to be that just one man with a long white beard named Jon Postel did this work on his own. Now, as of mid-2008, ICANN has a US$61 million budget and more than 100 employees.

As one of very few structures on the landscape of internet governance, ICANN gets both more and less attention than it deserves. At ICANN’s founding, amidst a swirl of rumors and complicated myths (many of which were probably true), many people expressed concern about ICANN’s power to act as a chokepoint. The internet is just a logical architecture, not a network with a manager, but ICANN’s ability to condition registration or use of a domain name or number on compliance with particular content-related (or law-enforcement-related) rules provided a place for policing that seemed risky. Then, after a few years of articles about ICANN, U.S. scholarly interest in ICANN died down; indeed, writing about ICANN became a kind of career-poison. “Who cares about domain names?” became the refrain. “People use search engines to find online sources, so names don’t matter any more.” It is also extremely difficult to follow what ICANN is up to, because much of the work of ICANN happens at week-long meetings (three per year) held in always-different places around the world. Although ICANN’s web site is much better than it used to be, its complicated structure and insider’s jargon can be off-putting.

This year, 2008, is a constitutional moment for ICANN, and I suggest to you that ICANN is now getting less attention than it deserves.

ICANN is often pointed to as a model of private governance for internet resources. First, it adopts “consensus policies” that bind the private actors that provide domain name registration services, and the idea is that these policies are actually formed by consensus of relevant internet stakeholders rather than being crammed down by the Board. Second, it is supposed to open up new top level domains to encourage competition with .com, which gained an enormous advantage in the early years of domain name registrations. And third, it was designed to keep governments at bay. The idea was that the U.S. government would act as a good steward for the rest of the world, so that no government would be able to carry out its content-related desires by using the domain name system as a chokepoint. Kenn Cukier is right that the stated plan of the U.S. government at the time of ICANN’s founding ten years ago was that ICANN would eventually become a fully-private organization; as of mid-2008, it is not clear that this plan will actually be carried out in the near future.

I am personally concerned that ICANN's actual operation is not matching its design in all three of these areas. This prompts a question: was the model unworkable, or has its execution not had adequate oversight? And a second question emerges: Is private governance of things that people think are "critical internet resources" possible?

First, on the "consensus policy" point. Right now, as a condition of registering a domain name individuals have to make public their address and other contact information. This seems like a lure for spammers and an affront to personal privacy, and there is no worldwide consensus in favor of retaining this policy. But because intellectual property interests and law enforcement authorities would like to keep this database public, and because the retention of such a public database is the status quo, it has been extremely difficult to change this policy. The idea behind the consensus policy regime was that ICANN would be a forum for the creation of those very few global rules that were necessary for stability and security of the internet, and everything else would be left to local control. Yet here we are, with a special-interest rule that imposes costs on people around the world and is seemingly impossible to change.

Second, ICANN does not have a very good track record with respect to opening new top level domains, and it is on the verge of adopting a thickly-restrictive, full-of-compromises regime for this process going forward. It is almost as if ICANN would like to perform desired censorship for anyone with an objection to a proposed string – to keep those objecting from being upset with ICANN. I find this difficult to understand; no one is forced to look at the list of top level domains to which network access providers point.

Third, ICANN can no longer be said to be keeping governments at bay. Both the U.S. government and other governments exert a great deal of power within ICANN through the Governmental Advisory Committee, a sort of mini non-treaty organization of governments that must be consulted in detail before ICANN can do much of anything. The most recent step down this path is an apparent agreement to short-circuit ICANN's policy processes in favor of governments who would like a "fast track" for adoption of internationalized (non-ascii) top level domains that they would control. This is a superficial summary of a long story, but the reality remains: governments have a great deal of say over ICANN's processes.

So: was the model unworkable? Should centralized resources of internet names and addresses become subject to government control, because this is the kind of thing for which governments are traditionally responsible? Was the private model subject to such non-democratic pressure by large companies that it could never have worked in the first place? Or has the implementation of the ICANN model been the problem?

Let me try to answer the questions I've posed. Is the theory that rules imposed globally should be rare and supported by almost everyone wrong? No. Is the mechanism of using contracts to ensure enforcement on a global basis wrong? No. Is the theory that non-governmental parties will be better at developing dynamic policies that reflect knowledge of the technology wrong? No. Is the theory that opening up more competition for top level domains would be good wrong? No. So what's the problem?

The creators of the ICANN model may have underestimated both the tendency of people to turn institutions to their own ends and the tendency of governments to ensure that their needs are addressed. ICANN the institution may have had the right theories at its core, but it needed to be peopled with those who cared about preserving the free flow of information online and were willing to put energy behind a private model. Kenn Cukier is right that ICANN is continuing to muddle along; its budget continues to grow, and its meetings are well-attended. But what is it accomplishing, and how are its activities undermining the "avoid chokepoints" model? There are great challenges ahead. At any rate, before the ICANN experiment is pointed to as a model of private internet coordination it should be examined carefully. Its actions this year are likely to be

revelatory.

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