Rights protection in new gTLDs: The multi-stakeholder Internet governance model at work

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Abstract

In June 2008, the Internet Corporation for Assigned Names and Numbers (ICANN) embarked upon an ambitious program of expansion at the top-level of the DNS. The policy underpinning expansion is notable for its adoption of new mechanisms that target the unauthorised use in new gTLDs of names the subject of legal – in particular trademark – rights. These mechanisms are the product of several years of policy development and implementation; they are proof of the functioning of ICANN’s unique multi-stakeholder model of Internet governance. Yet even as new top-level domains near the launch phase, questions remain as to the scope and mechanics of rights protection offered by agreed-upon mechanisms. A “strawman solution” emerged at the end of 2012 to address these questions. This article examines the “strawman solution”, the rights protection mechanisms it seeks to clarify, and the ICANN organisational structure and operational processes into which it does not perfectly fit.

Introduction
In June 2008, the Internet Corporation for Assigned Names and Numbers (ICANN), the body charged with operational and policy authority over the Internet Domain Name System (DNS), embarked upon an ambitious program of expansion at the top level of the DNS. The success of two cautious “proof of concept” expansion programs launched in 2000 and 2003, which together added fifteen new top-level domains to the DNS including .biz and .info, pointed to the technical and operational feasibility of expansion on a larger scale. An increase in generic top-level domains (gTLDs) pushes use of the Internet beyond .com, .net and .org to information being identified by and located within new spaces named specifically after: interests and activities such as .dance; professions such as .accountant; organisations such as .aaa; ethnic, cultural and linguistic groups such as .latino; city names such as .paris, and brand names such as .hermes. While expansion of the DNS is consistent with ICANN’s Bylaws, which set out corporate values of “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest” and “promoting and sustaining a competitive environment”, it creates new issues involving possibly unforeseen factual situations. Chief among these are decisions respecting the allocation of domain names: when conflict arises between two or more claimants of rights in a name, how are those claims prioritised in a system that demands absolute name uniqueness? These issues were sidestepped in the “proof of concept” expansion rounds by ICANN’s limited selection of successful applications, but are unavoidable in the present open and uncapped expansion program.

This question fuels trademark owners’ concerns of an inevitable increase in the already significant burden of policing legal rights in the online environment. Flowing from this is the intellectual property community’s interest and involvement in the domain name policy development process. ICANN policy in respect of the current expansion process has been shaped in particular through new mechanisms that target the unauthorised use in new gTLDs of names which are the subject of legal ? in particular, trademark ? rights. Several mechanisms are made mandatory for all new gTLD operators by force of their inclusion in the contractual framework through which ICANN operates: the New gTLD Applicant Guidebook (the Applicant Guidebook) sets out the terms and conditions of participation in the expansion process and it incorporates a Registry Agreement into which operators of new gTLDs must enter with ICANN (ICANN 2012a [5]).

The Applicant Guidebook raises the bar considerably in terms of rights protection in the DNS. In the time period surrounding launch of a new gTLD, all operators are required to offer a “sunrise period” as well as a “Trademark Claims” service. The former establishes a priority registration period for rights holders, while the latter provides notice of existing trademark rights in an applied-for name to domain name applicants and notice of domain name registrations matching trademarks to mark holders. On an ongoing basis, new gTLD operators are required (consistent with many existing gTLD operators) to adopt the Uniform Domain Name Dispute Resolution Policy (UDRP) as well as a new rapid relief mechanism based upon the UDRP called Uniform Rapid Suspension (URS). These rights protection mechanisms are supported by a Trademark Clearinghouse, which serves as a central repository of trademark data.

These mechanisms are the product of five challenging years of policy-making. Their ultimate agreement and inclusion in the Applicant Guidebook offers proof of the functioning of ICANN’s unique multi-stakeholder model of Internet governance through which DNS policy is created. Yet even as new gTLD applications progress through the evaluation stage and as the addition of the first new gTLDs into the DNS nears, rights protection mechanisms remain contentious. Difficult questions about the apportionment of responsibilities in implementation, the duration of the mechanisms? applicability, and the scope of rights protected are argued by some to be ? as yet ? unresolved.

ICANN’s multi-stakeholder governance model
ICANN, a California non-profit public benefit corporation, was formed during 1998 and 1999 as the United States government’s response to growing global unease with exclusive US government control over the DNS. The United States Department of Commerce (DoC?), the responsible government department, entered into a Memorandum of Understanding with the newly-formed ICANN imposing joint undertakings to support the private sector-led development of the DNS (DoC and ICANN 1999 [6]). The most recent form of this agreement is the Affirmation of Commitments, in which the DoC affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users? (DoC and ICANN 2009 [7]).

These agreements provide the foundation for the so-called ?multi-stakeholder? governance model, which is given effect in ICANN?șs Bylaws (ICANN 2012h [8]) and reflected in the corporation?șs structure. This structure facilitates the involvement of the broad range of domain name industry stakeholders in a ?bottom-up? policy-making process. The Board of Directors is advised by two Supporting Organizations: the Generic Names Supporting Organization (?GNSO?), which is responsible for recommending policy respecting gTLDs; and the Country-Code Names Supporting Organization (?ccNSO?), which is responsible for recommending policy respecting country code Top-Level Domains (?ccTLDs?, for example Australia?șs .au and New Zealand?șs .nz). Advisory Committees provide channels for advice from specific stakeholder groups, including the Governmental Advisory Committee (?GAC?); the Security and Stability Advisory Committee (?SSAC?); the Root Server System Advisory Committee (?RSSAC?); and the At-Large Advisory Committee (?ALAC?).

Specifically relevant to the ?strawman solution? is the placement by Article X Section 1 of ICANN?șs Bylaws of responsibility for ?developing and recommending to the ICANN Board substantive policies relating to generic top-level domains? squarely and singularly on the GNSO. The GNSO is constrained by the Bylaws to develop policy through a formal process constituting no less than eight steps, which are set out at Annex A. These steps involve, inter alia, the ?formal initiation? of a ?Policy Development Process? (or ?PDP?, as it is commonly known) and approval of recommendations arising out of such a PDP by the GNSO Council (ICANN 2012h [8]: Annex A Section 1(b) and (f)). The composition of the GNSO Council is set by Article X Section 3 of ICANN?șs Bylaws, to include representatives from each of the Registries and Registrars Stakeholder Groups (together, the ?contracted parties house?), the Commercial and Non-Commercial Stakeholder Groups (together, the ?non-contracted parties house?) and the ICANN Nominating Committee. The ?strawman solution? was notably created entirely outside of the eight steps mandated by the Bylaws; Annex A has, in other words, unquestionably not been followed.

Origin of and opposition to the ?Strawman Solution? 

As new CEO and Board of Directors member Fadi Chehadé assumed his role at ICANN in October 2012, he made unresolved issues respecting rights protection mechanisms in new gTLDs a top priority. Coming from a corporate background, Chehadé demonstrated an awareness of the concerns expressed by and agreed between two of the three constituency groups within the Commercial Stakeholder Group of ICANN?șs GNSO, the Business Constituency and Intellectual Property Constituency. He publicly expressed a willingness to engage those stakeholders in deeper discussion to more fully understand the issues (Chehadé 2012 [9]). Working behind closed doors with Chehadé in late 2012, representatives from these two constituencies developed and proposed to the broader ICANN community ?a strawman solution to address the concerns of affected stakeholders? (ICANN 2012d [10]).

The closed and unannounced nature of the strawman solution meetings and the level of involvement of senior ICANN staff have generated a formal complaint filed with ICANN?șs ombudsman (ICANN 2012g [11]) as well as a motion put before the GNSO Council at ICANN?șs 46th public meeting in Beijing, China, expressing concerns about deviation from the multi-stakeholder governance model (GNSO 2013 [12]). Some in Beijing expressed fears of circumvention and went so far as to say that the ?strawman solution? represents the beginning of the end of the ?bottom-up? policy-making process.
The "strawman solution" highlights the challenges ahead as the number of stakeholders increases and their interests vary more widely with top-level expansion. This article examines rights holders' and businesses' concerns about rights protection in new gTLDs and the manner and extent to which these have been addressed by ICANN. Specifically, this article examines the rights protection mechanisms which lie at the foundation of the "strawman solution," the way in which concerns about deficiencies in existing rights protection mechanisms are addressed through the "strawman solution," and the challenges of fitting the "strawman solution" into ICANN's structure and processes.

Rights Protection Mechanisms in New gTLDs

The first two drafts of the Applicant Guidebook, developed in 2008 and 2009, placed all responsibility for rights protection on the operators of new gTLDs. Within the draft Registry Agreement to be entered into by each new gTLD registry operator, Specification 7, headed "Minimum Requirements for Rights Protection Mechanisms," required registry operators to adopt some rights protection mechanisms (RPMs) and to describe these in detail in their new gTLD applications, but imposed no specific, substantive requirements. It simply obliged registry operators to "institute measures to deter abuse of the RPMs and clearly false submissions" and to "adopt and implement dispute resolution mechanisms under which third parties may challenge registration of domain names by other parties" (ICANN 2008 [13]). The Intellectual Property Constituency of the GNSO reacted to this lack of clear direction by urging ICANN to "spell out what it is looking for when it calls for rights protection mechanisms to be specified in detail?" (Intellectual Property Interests Constituency 2008 [14]: 5).

In response to the concerns expressed about the lack of specificity and initiative taken by ICANN in the first two drafts of the Applicant Guidebook, the Board of Directors directed the Intellectual Property Constituency to form an ad hoc Implementation Recommendation Team (IRT) to investigate and develop specific recommendations to the Board (ICANN 2009a [15]: item 7). All of the rights protection mechanisms included in the Board-adopted version of the Applicant Guidebook can be traced back, at least in terms of concept, to the IRT's work. Six versions later, the ICANN Board of Directors-approved version of the Applicant Guidebook had evolved to take a significantly less passive stance by requiring new gTLD applicants to implement certain specifically described rights protection mechanisms. At the launch of a new gTLD, these comprise a "sunrise" registration period and a "Trademark Claims" period, both of which must be supported by an information repository called the "Trademark Clearinghouse." Post-launch mandatory rights protection mechanisms comprise adoption of the UDRP as well as the new Uniform Rapid Suspension procedure. An overview of each of these rights protection mechanisms is provided in the sub-sections that follow.

Trademark Clearinghouse

A key recommendation made by the IRT was the development and implementation not of a mechanism for protecting legal rights, but rather a tool to operationally support such mechanisms. The "IP Clearinghouse" (which would later be re-named by ICANN staff the "Trademark Clearinghouse" to better reflect the type of rights eligible for inclusion) is intended to serve as a repository of data on claims to the following types of legal rights:

- Nationally or regionally registered word marks from all jurisdictions;
- Any word mark that has been validated through a court of law or other judicial proceeding;
- Any word mark protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion; and
- Other marks that constitute intellectual property (ICANN 2012a [8]: Trademark Clearinghouse s 3.2).
In most cases, ownership and related data on the types of eligible rights listed above already exists in publicly accessible and searchable form through national or regional trademark registry databases or international treaty databases. The Trademark Clearinghouse’s utility in the DNS is therefore not the novelty of this information’s publication, but rather bringing it together in a single, accessible location for use by the wide range of participants in the domain name space. It is imperative, however, to note the specific declaration within the Applicant Guidebook that “[i]nclusion in the Clearinghouse is not proof of any right, nor does it create any legal rights” (ICANN 2012a [5]: Trademark Clearinghouse s 1.6).

The Trademark Clearinghouse opened on 26 March 2013 (ICANN 2013c [16]) to accept data entries from trademark holders, which are defined as “an owner, licensee or assignee of a mark”, as well as trademark agents “appointed to manage trademark records on behalf of the Trademark Holder” (Clearinghouse 2013 [17]: 3). Validation and centralised dissemination services supplied by the Clearinghouse providers support “and facilitate the rights protection mechanisms mandated by the Applicant Guidebook: a sunrise registration period and the Trademark Claims service.

Sunrise

Sunrise registration periods give priority to specified categories of domain name applicant by enabling them to register domain names before registration is opened to the general public (Lindsay 2007 [18]: 120). Sunrise periods were first used in the launch of new gTLDs created in the proof of concept expansion rounds, so are not new to the DNS. The Applicant Guidebook nevertheless marks a significant turning point in ICANN rights protection policy: it not only mandates that all new gTLDs offer a sunrise registration period supported exclusively by Trademark Clearinghouse data, but additionally mandates the minimum duration of that period (30 days) and minimum eligibility criteria (ICANN 2012a [9]: Trademark Clearinghouse s 6.2). It additionally ensures that all word marks meeting one of the following criteria are eligible to participate in a sunrise:

1. nationally or regionally registered and for which proof of use ? which can be a declaration and a single specimen of current use ? was submitted to, and validated by, the Trademark Clearinghouse;
2. court-validated; or
3. specifically protected by a statute or treaty currently in effect and that was in effect on or before 26 June 2008 (ICANN 2012a [9]: Trademark Clearinghouse s 7.2).

The effect of this policy is that trademark owners satisfying (i), (ii) or (iii) above as well any registration criteria in any given new gTLD are given an opportunity to register domain names in that gTLD before registrations become available to the public. How the criteria listed above will be interpreted and applied in practice is speculative until new gTLDs begin to launch.

Trademark Claims Service

Another principal recommendation made by the IRT and supported by a subsequently appointed cross-community working team, the Special Trademark Issues review team, is the implementation of a claims service to notify prospective domain name registrants of existing legal rights in an applied-for name. Such a service was employed at the launch of the .biz gTLD in 2000 (WIPO 2001 [19]).

Notably, the Applicant Guidebook requires through the Registry Agreement, the ICANN agreement into which all successful new gTLD applicants must enter, the utilisation of both a sunrise and a claims service. The claims service is intended to function as a notification system that utilises data stored in the Trademark Clearinghouse to inform i) domain name registrants of matching records in the Trademark Clearinghouse; and ii) rights holders of registrations matching their trademarks recorded in the Trademark Clearinghouse. The scope of registered marks required to be protected by sunrise is narrower than the scope of registered marks required to be protected by the claims service, encompassing all word marks that have been or are:

1. nationally or regionally registered (note: no proof of use required);
2. court-validated; or
3. specifically protected by a statute or in effect at the time the mark is submitted to the Clearinghouse for inclusion.
The Applicant Guidebook provides at sections 6.1.2 and 6.1.3 that an attempt to register a domain name constituting an ?Identical Match? to a name in the Trademark Clearinghouse will generate and cause transmission to the prospective registrant of an automatic message indicating the existence of a claim to the name in the Trademark Clearinghouse. The prospective registrant can then decide to discontinue or proceed with the domain name registration. If the latter course of action is chosen, the trademark holder (as indicated in the Trademark Clearinghouse) receives a notice indicating that the registration was made.

Given the technical limitations of domain names (for example, the impossibility of depicting spaces or certain symbols where these would otherwise appear in the offline expression of a trademark), an attempt has been made in the Applicant Guidebook (at Trademark Clearinghouse section 6.1.5) to clarify the term ?Identical Match? as meaning ?that the domain name consists of the complete and identical textual elements of the mark?, with the following accommodations:

(a) spaces contained within a mark that are either replaced by hyphens (and vice versa) or omitted; (b) only certain special characters contained within a trademark are spelled out with appropriate words describing it (@ and &); (c) punctuation or special characters contained within a mark that are unable to be used in a second-level domain name may either be (i) omitted or (ii) replaced by spaces, hyphens or underscores and still be considered identical matches; and (d) no plural and no ?marks contained? would qualify for inclusion.

All new gTLD operators are required by the Applicant Guidebook (at Trademark Clearinghouse section 6.1.1) to provide this service for at least the first 60 days of general availability of domain names. To clarify, the Trademark Claims service commences after the end of the sunrise registration period during which domain names are not available to the general public. As a result, the Trademark Claims period adds a layer of protection after registration opens to registrants other than trademark holders.

Uniform Domain Name Dispute Resolution Policy (?UDRP?)

The Uniform Domain Name Dispute Resolution Policy (or ?UDRP? as it is now universally known) was an early (and remains a lasting) achievement of ICANN?s. In the course of discussions during 1998 and 1999 that would ultimately lead to ICANN?s formation, the United States Department of Commerce?s National Telecommunications and Information Administration recommended that the entity proposed to assume operational and policy responsibility for the DNS should adopt a dispute resolution policy and require that all domain name registrants submit to and be bound by it (NTIA 1998[20]). The World Intellectual Property Organization recommended more particularly the establishment of a mandatory administrative procedure for the cancellation or transfer of domain names deemed abusively registered in violation of a third party?s trademark rights by a registrant with no rights or legitimate interests in the domain name (WIPO 1999[21]). This recommendation was adopted by the Board of Directors of the newly formed ICANN at its first public meeting in August, 1999. (ICANN 1999[22])

Today, the UDRP is applicable to all domain name registrations in .com, .net, and .org as well as registrations in all of the new gTLDs created during the ?proof of concept? expansion rounds of 2000 and 2004. This is achieved through the Registry Agreement into which each gTLD registry operator enters with ICANN. That agreement requires operators to sell domain names only through ICANN-accredited registrars, who in turn are bound by ICANN?s Registrar Accreditation Agreement (RAA) to implement the UDRP through the domain name registration agreement into which a registrant enters (ICANN 2009b[23]: clause 3.7.7.11). This obligation remains in the new version of the RAA currently in final stages of negotiation (ICANN 2013e[24]). New gTLD registry operators have similar obligations under Article 2.8 of the base Registry Agreement set out in the Applicant Guidebook.

The UDRP is actionable on proof of all of the following three elements, which equate to a finding that a registration is abusive:

1. the registrant?s domain name is identical or confusingly similar to a trademark or service mark in which
the complainant has rights;
2. the registrant has no rights or legitimate interests in respect of the domain name; and
3. the registrant’s domain name has been registered and is being used in bad faith.

More than a decade after its introduction, the UDRP is still broadly regarded as having a positive impact in terms of reducing cybersquatting behaviour. That impact is lessened, however, by increasingly high domain name registration volumes and high case loads, which lead to inefficiencies in terms of the use of trademark holders’ resources and a reduction in the speed at which disputes are resolved. As capacity to take on new projects grows with new gTLD policy development and implementation requiring less of the community’s attention, focus can slowly turn to how to evolve the UDRP to meet contemporary conditions and demand (ICANN 2011a [25]). Certain concerns about the UDRP are already being addressed in new gTLD policy through a new rights protection mechanism called the ?Uniform Rapid Suspension? procedure.

Uniform Rapid Suspension Procedure

Both the Implementation Recommendation Team (?IRT?) and Special Trademark Issues review team (?STI?) highlighted the need for a mechanism to quickly resolve, in less time and at lower cost than a UDRP proceeding, ?those cases in which there is no genuine contestable issue as to the infringement and abuse that is taking place? (IRT 2009 [26]: 25; STI 2009 [27]: 16). Following the UDRP model, both teams recommended that the procedure be made mandatory for all new gTLDs (IRT 2009 [26]: 25; STI 2009 [27]: 15). The Applicant Guidebook adopts this recommendation through the ?Uniform Rapid Suspension? procedure (or ?URS?, as this new mechanism is frequently called). The procedure is substantively based upon the UDRP, with the modification that a higher evidentiary burden of proof is imposed upon the complainant, who is required to demonstrate to a standard of clear and convincing evidence that there is ?no genuine issue of material fact? (ICANN 2012a [5]: Uniform Rapid Suspension, s 8.3). This modification serves to limit the scope of the URS to the most obvious cases of abusive use of trademarks where there is no genuine contestable issue as to the infringing or abusive use of a mark in a domain name and in connection with a site that represents abusive (i.e., not a fair use or commentary situation nor a situation involving questions of whether the registrant is or is not authorized or selling, for example, legitimate, non-counterfeit goods) (IRT 2009 [26]: 25).

The Applicant Guidebook makes actionable (at section 1.2.6.1, Uniform Rapid Suspension) the registration of a domain name that is identical or confusingly similar to a word mark meeting one of the following criteria:

1. Complainant holds a valid national or regional registration and that is in current use (note: Trademark Clearinghouse data can be used to prove use); or
2. validated through court proceedings; or
3. specifically protected by a statute or treaty in effect at the time the URS complaint is filed.

As with the sunrise eligibility criteria, exactly how these criteria will be interpreted is in question until the launch of new gTLDs. Registrations found abusive under the URS are to be frozen by the registry, and therefore unusable by the registrant, for the remaining term of the domain name registration. Like the UDRP and unlike sunrise and the Trademark Claims service, the URS is not time limited, but rather applies throughout the life of the TLD or until registry and registrar agreements are modified by ICANN.

The Strawman Solution
The approval by ICANN’s Board of Directors of the Applicant Guidebook at its 41st public meeting held in June 2011 in Singapore enabled a shift of attention away from intensive new gTLD policy development towards implementation. A working session was held at that meeting to develop a workable Trademark Clearinghouse implementation model and a methodology for community implementation discussions so that timelines can be met (ICANN 2011b[28]). ICANN issued a Request for Information in late 2011 seeking Trademark Clearinghouse service providers. The new gTLD applications period opened on 12 January 2012; by the 30 May 2012 closing date, 1,930 applications had been lodged (ICANN 2012b[29]). ICANN announced the following day the appointment of Deloitte and IBM to implement and administer the Trademark Clearinghouse (ICANN 2012c[30]).

Concerns still lingered about the adequacy of the agreed rights protection mechanisms set out in the Applicant Guidebook. These concerns are fuelled by debates arising out of the development of the Trademark Clearinghouse and URS implementation models and the apparent stall of progress while new gTLD applications advance through the evaluation stage towards launch. A sign of the deeper significance of these issues came in the form of a letter from the United States Department of Commerce (Strickling 2012[31]). At a critical time in ICANN’s delivery on new gTLDs, that letter stressed the importance of ensuring that stakeholders have a role in evaluating the information and proposals presented in relation to rights protection mechanisms. More significant still, the letter encouraged ICANN to explore additional trademark protections across all TLDs, existing and new, through community dialogues and appropriate policy development processes in the coming year.

The 45th public ICANN meeting held in October 2012 in Toronto opened less than two weeks after ICANN’s receipt of this letter, and rights protection mechanisms dominated the week’s discussions. Two GNSO constituencies, the Business Constituency and the Intellectual Property Constituency, worked closely together to develop a consensus position on improvements and enhancements to the implementation of the rights protection framework contained in the Applicant Guidebook. Presented to the Board on 16 October 2012 were eight proposals, of which the five below relate directly to new gTLD rights protection mechanisms:

1. Extend Sunrise Launch Period from 30 to 60 days with a standardised process.
2. Extend the [Trademark Clearinghouse] and Claims Notices for an indefinite period; ensure the process is easy to use, secure, and stable.
3. Complete the URS as a low cost alternative and improve its usefulness - if necessary, ICANN could underwrite for an initial period.
4. Implement a mechanism for trademark owners to prevent second-level registration of their marks (exact matches, plus character strings previously determined to have been abusively registered or used) across all registries, upon payment of a reasonable fee, with appropriate safeguards for registrants with a legitimate right or interest.
5. Expand [Trademark] Claims service to cover at least strings previously found to have been abusively registered or used (IPC; BC 2012[32]).

Fadi Chehadé, who had then only recently assumed the position of CEO, was an active facilitator of these discussions. It later came to light that unpublicised, closed discussions continued during November between ICANN leadership and representatives of the originating constituencies (Chehadé 2012[9]). Out of these discussions emerged a ‘strawman solution’ incorporating the following proposals:

- 30-day notice period to precede the opening of sunrise in all new gTLDs;
- Trademark Claims service to be extended from the current 60-day duration starting at general availability of domain names to 90-day duration;
- Opportunity for mark holders, at a fee after the Trademark Claims period ends, to receive a ‘lighter-weight version’ of the Trademark Claims service in which a generic notice is issued at domain name registration; and
- Expansion of both Trademark Claims services (?full? and ?light?, so to speak) to cover up to 50 ?
domain name strings previously determined to have been abusively registered or used? (ICANN 2012f [32]).

The ?strawman solution? was published on 30 November 2012 for public comment along with an additional enhancement called the ?Limited Preventative Registration? (or ?LPR?) mechanism. The LPR as proposed by the Business Constituency and Intellectual Property Constituency enables trademark owners to prevent, at a fee, the unauthorised registration as domain names (for example, brandname.shoes or brandname.sport) of exact matches of trademarks and previously abusively registered or used character strings (ICANN 2012f [32]).

The comment period for the ?strawman solution? proposals closed on 15 January 2013 and a subsequent reply period closed on 5 February. Comments received (ICANN 2012e) were then considered by ICANN staff, which less than three weeks before the 46th public ICANN meeting held in Beijing, China published a Memorandum announcing the adoption of three of the ?strawman solution? proposals (ICANN 2013c [16]). The ?lighter-weight version? of Trademark Claims was not adopted, nor was the additional enhancement of the LPR. Staff decision-making on each proposal was explained to have been influenced by distinctions made in the comments received between ?policy? and ?implementation?. This distinction pervaded discussions in Beijing, where the ?strawman solution? was characterised by some as the undoing of the multi-stakeholder model.

The beginning of the end of the multi-stakeholder model?

On the one hand, the development of rights protection mechanisms for new gTLDs can be offered up as proof of the functioning of ICANN?s unique multi-stakeholder governance model. The rights protection mechanisms outlined above are the product of extensive policy development captured in nine increasingly detailed versions of the Applicant Guidebook scrutinised in public comment periods and subjected to questioning in dedicated sessions and public forums at ICANN meetings. The Applicant Guidebook?s existence at the very least indicates that consensus is not impossible, even in the face of difficult questions.

At the same time, the ?strawman solution? and the process of its drafting can be offered up as a specific example of the risks and the challenges in consensus building in the current and expanding ICANN community. At an intersessional meeting of GNSO non-contracted party representatives (including, notably, the Intellectual Property Constituency and Business Constituency) in late January 2013, Fadi Chehad? declined to comment on the ?strawman solution? given that the public comment period was at that time still open. Explicitly linking global concerns about Internet governance to the ?strawman solution?, Chehad? did highlight to representatives his acute awareness of the scrutiny ICANN?s actions currently receive from the international community (ICANN 2013a [33]). With this scrutiny in mind, it is imperative to acknowledge that consensus in substance and consensus in process are two distinct things, but also that the former is extremely difficult if not impossible to achievable without the latter.

The ?strawman solution? likely has less importance in substance than in process; having succeeded in new gTLD policy development, now ICANN and the GNSO in particular must find their way in implementation. A complaint filed with ICANN?s ombudsman on the process by which the ?strawman solution? was developed (ICANN 2012g [11]) points to uncertainty not only as to the role of ICANN leadership but of the GNSO Council and the divergent interests represented within it. It has been claimed that the secretive nature of meetings denied stakeholders outside of the originating GNSO constituencies the opportunity to participate. The ? strawman solution? was opened for public comment but only after its drafting, which took place as a closed exercise, unknown to much of the community. This is not the traditional path to consensus in the ICANN community, which Chehad? has now acknowledged in several public statements (Chehad? 2013 [34]; ICANN 2013b [35]; ICANN 2013d [36]).

If the ?strawman solution? falls within the scope of policy-making, the challenge facing ICANN may be the systemic, retrospective-looking one that complaints allege. If, on the other hand, the ?strawman solution? is characterised not as policy development but rather policy implementation, then the Bylaws are not strictly implicated. This critical distinction is not lost on ICANN staff. Reflecting on recent events, David Olive, ICANN?s Vice President, Policy Development, makes the following remarks:
The rules for formal policy development at ICANN are well-defined in the ICANN Bylaws, but the processes and procedures that surround policy implementation are not so clear. As a result, recent discussions at ICANN (particularly in the context of new gTLD efforts) have focused on a critical question: When is an action part of the implementation of a policy and when does implementation turn into developing policy? (Olive 2013 [37]).

A pervasive topic at ICANN's 46th public meeting in Beijing was the fact that ICANN Bylaws define neither 'policy' nor 'implementation'. In a recently published draft framework, ICANN staff proposes to delineate these by characterising the policy-making responsibility of the GNSO as being limited to 'substantive' policy respecting gTLDs (ICANN 2013a [33]). Yet this emphasis on substance in fleshing out the GNSO policy development mandate is inexplicable given that the Bylaws place no such restriction on the ccNSO or the Advisory Committees.

The definitional deficiency would helpfully be addressed, but there is unavoidable irony in the challenge of doing so through the multi-stakeholder processes through which ICANN operates. There are, as acknowledged by ICANN staff, 'multiple kinds of 'policy' within the ICANN world' that go beyond the matters specifically subject to the policy development process (or 'PDP', as it is commonly referred to) required by the Bylaws (ICANN 2013a [33]). Matters falling within a PDP are traditionally handed, once the PDP is concluded, to ICANN staff for 'implementation'. It is no longer sufficient, however, to rely on tradition or assumption in applying indistinct terms to drive ICANN process. The Affirmation of Commitments requires accountability of ICANN (DoC and ICANN 2009 [7]: clause 3); accountability demands clarity.

Conclusion

The endurance of ICANN's present structure and governance model currently hangs, to an extent, on the meaning of the terms 'policy' and 'implementation'. This is not to suggest that the success of the multi-stakeholder model demands the use of these two terms, but simply that these terms, if used and attributed the importance they currently are, demand at least a degree of precision. This cannot be achieved by the use of equally imprecise terms such as 'substantive' to delineate the policy-making authority of the GNSO with respect to gTLDs, as ICANN proposes to do (ICANN 2013a [33]); such an approach only changes the description of the problem without solving it. Perpetuation of the current view that 'if you like what's going on, it's implementation; if you don't like what's going on, it's policy', is not sustainable. Yet pushing the community for a precise meaning of 'policy' and 'implementation' at this time risks creating division from within the organisation just as it is about to experience enormous growth.

If not the actual terms, the concepts of 'policy' and 'implementation' are critically significant to ICANN's delivery on its core value of '[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making' (ICANN 2012h [8]). The 'strawman solution' serves if not to clarify rights protection mechanisms applying to new gTLDs then to expose the risks of lack of clarity in the meaning of 'policy' and the delegation of policy-making responsibility in an organisation the primary purpose of which is to create policy.

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