The Association for Computing Machinery's Internet Governance Project

Internet Governance: A View from the Trenches

Participation
Needed for Successful Advocacy
in the ICANN Arena

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Executive Summary

The Internet Corporation for Assigned Names and Numbers (ICANN) is a departure from previous technical organizations, and an experiment in how technical policy can be privatized and handed to a corporation. That domain names are the "street signs" of our communication and necessary to post our websites and share our ideas via email and listservs was largely unimportant to the founders of ICANN.

Although the ICANN structure is unbalanced and heavily weighted to commercial participation, it includes a permanent minority seat for the Noncommercial Users Constituency (NCUC). The NCUC can then elect its own representatives, serve on committees with other constituencies, submit comments, write reports, and make presentations to the ICANN Board. It is a good opportunity, but also an awesome challenge with ICANN taking on some of the most difficult technical and policy issues of our time.

Unlike many other constituencies that have a financial interest in the ICANN process (particularly registrars and registries who get their contracts from ICANN), the Noncommercial Constituency has no direct financial stake. We participate solely to make sure that the interests of the most vulnerable, and arguably the most important of domain name holders – those using domain names for personal, political, religious, human rights, scientific and technical -- are protected. After all, the Internet is increasingly the platform of our worldwide dialogue.

ICANN is a political and regulatory process (albeit private) and we must actively and intelligently participate if our voices and concerns are to be included. We must have good people run for the leadership positions that are so important, yet so frustrating. We must be able to call upon experts in intellectual property law, First Amendment rights and due process procedures as we create new policies for speech in cyberspace. We need to have time and resources to lead committees, participate in debates with commercial and noncommercial communities, registries and registrars, and travel to the remote ICANN meetings to present our views.   In short, we need foundation funding.

Recommendations

For effective ICANN participation, the noncommercial and public interest community needs:

> Committed leaders with the time and resources to take on numerous important tasks;
> Access to experts in intellectual property law, free speech rights, administrative law and jurisdictional issues;
> Travel by our most articulate and informed experts and leaders to ICANN meetings (no matter how late ICANN posts its agenda and places issues of concern to us on it);

Meetings and dinners to help the noncommercial strategize, educate and build morale;
Basic administrative services for the Noncommercial Constituency; and
Effective oversight of ICANN.____

Past work show that a variety of noncommercial organizations and individuals have formed a collective and sometimes very effective noncommercial voice in the ICANN process. The work of this collective group should be encouraged and fostered, including:

New noncommercial organizations and new ICANN divisions of older noncommercial and technical organizations;
Traditional noncommercial organizations;
Coalitions;
Judicial watchdog organizations; and
Academics, attorneys, economists, and other individuals.

With appropriate support, these organizations and individuals will continue to add critical and timely voices to the ICANN process. They will also continue to create the reports, studies and resources that provide Noncommercial Constituency leaders with tremendous support.

With foundation funding, the Noncommercial Constituency and our public interest and noncommercial advocates will continue to be a small, but credible voice within the ICANN process – and its conscience.

"Public broadcasting... [is] kind of a Little-Engine-That-Could-Story. The government was persuaded to put aside only a little spectrum, and that a little late, for public uses. ... The embattled history of cable access programming in the United States is another story of the significance of even small public spaces."
>   Patricia Aufderheide, *Telecommunications and the Public Interest,*
>   Conglomerates and the Media, 1997.

"In traditional communications, space is allocated first to commercial uses, and the fight is to create small public spaces. On the Internet, the entire space was originally public and noncommercial. Our fight today is to keep Internet public spaces open and free -- to keep the whole Net from being 'rezoned' commercial."
>   Kathryn Kleiman, Director of ACM's Internet Governance Project, 2003.

I.   Introduction

As spam proliferates and huge companies peddle their wares online, it is hard to remember that for over a decade, commercial speech was banned on the Internet. Originally an experimental technology of the US military, the Internet quickly passed to the National Science Foundation to grow as a technology of communication, science and research, and noncommercial expression.

The 1980s and early 1990s were golden days of the Internet as a purely noncommercial medium. For those lucky enough to have affiliations with a large university, a defense contractor or some parts of the US Government, there was access to an experimental online world of robust personal and political speech.

The environment fostered new ways of collaborating on projects, working across borders, and sharing information and files in new and dynamic ways. The cost of communicating dropped, the speed increased and the Internet community flourished. Scientists modeled molecules from labs on opposite sides of the country; students discussed political issues on campuses thousands of miles away; teachers corresponded with students and answered questions one on one. It was a mass medium and an individual medium, and the period was one of discovery. The National Science Foundation had one basic tenet for the Net: no commercial use, and the Net flourished.

When commercial use developed on the Net, it was small and it was welcome. Its first form was *access*. Entrepreneurs created dial-up networks and pay-as-you-go commercial accounts for those who had left universities and longed to return to the Internet dialogue. Its second form was *new services.* Entrepreneurs experimented and created new services unique to the Internet medium, such as Yahoo! (indexing Internet content to allow people to search) and ClariNet (taking a person's favorite keywords and running them against news feeds for the first email delivery of personalized news). Technologists continued to develop better Internet infrastructure, and easier methods of Internet navigation.

Large companies were late to join the Internet. For McDonald's Corporation the path was paved by a saucy journalist in October 1994 who registered "mcdonalds.com" and wrote an article berating the global giant for failing to realize that the Internet, like McDonalds, was global and "a very big thing." (Quittner 1994, Appendix 1). Large companies quickly came online and became concerned not only with communication, but with control.

Putting pressure on the small minority contractor hired by the National Science Foundation (for the rote work of domain name registrations), corporations succeeded in getting a private policy that allowed domain names of noncommercial speakers, however well-known and well-bookmarked, to be canceled or transferred to trademark owners if they used a trademarked word. Such a trademarked word might also be a common descriptive noun, such as "tide," or a popular name, such as "Wendy," but first priority (for the first time) would go to trademark holders over noncommercial users. The fallout was very rapid and important personal, political and parody speech was lost from the Net as trademark owners sought to push their new-found monopoly powers.

Corporations learned a valuable lesson from the NSI domain name dispute process. They learned that private rules need not have the balance and noncommercial protections of government rules. Private policies can reap huge rewards. Thus, while US trademark law must balance the rights of the trademark holder and all other users of basic words such as "pony," or "windows," or "sun," private rules can be re-engineered to provide superior rights to intellectual property owners. The result has pitted big business against noncommercial organizations and individuals, and led to a sense of noncommercial speech under siege and unprotected.

When the National Science Foundation bowed out of Internet technical management in 1998, its departure raised stark questions about the future of Internet governance:

In whose interest would the Internet be run?
What governance structure would make the future decisions?

II.   **Running the Net: Three Experiments in Governance**

A.   The Internet Engineering Task Force

In the halcyon days of the Net, technologists developed organizations that met their need for informal operation, few strict rules, and easy sharing of ideas and expertise. Chief among them was and is the Internet Engineering Task Force (IETF). Founded in 1986, the IETF is a loosely organized group who work on the engineering and evolution of the Internet infrastructure. IETF's website reflects its open philosophy:

> The IETF is not a membership organization (no cards, no dues, no secret handshakes :-). The IETF is a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet. It is open to any interested individual. www.ietf.org/join.html

While the technologies developed by the IETF sometimes touch on issues of privacy and security (such as personal information that might be entered into databases), IETF in general deals with relatively few public policy issues. When it does, it has a good track record for soliciting and responding to public comment and concern.

B.   The World Wide Web Consortium

The World Wide Web Consortium (W3C) operates at the crossroads of technology and commercial use. Founded in 1994, the developers of the web technology chose not to profit individually from the technology, but to entrust its growth and management to an organization with a few central principles, including universal access, interoperability, evolvability and decentralization.

Despite heavy commercial involvement, the W3C is hosted by three premier research universities: Massachusetts Institute of Technology (USA), the Institut National de Recherche en Informatique et en Automatique (France) and the Keio University (Japan). Many of its management team are academics affiliated with universities. In recognition of the public policy issues implicated by the W3C technologies, the organization created a Technology and Society section and appointed Daniel Weitzner, known from his work at the Electronic Frontier Foundation and the Center for Democracy and Technology, to head it. Public policy is important and seems to be attended to by the W3C.

C.   Internet Corporation for Assigned Names and Numbers

The Internet Corporation for Assigned Names and Numbers (ICANN) could easily have followed the IETF and W3C on a path of technical stewardship. Its powers, from contracts, joint projects and a Memorandum of Understanding with the US

Department of Commerce, are technical in nature and involve management key components of the Internet infrastructure:

1) **Internet protocol (IP) addresses** - a unique numeric identifier which identifies a particular computer to the worldwide network. One IP address is 193.69.116.2.
2) **Domain names** - a mnemonic for the IP address in alphanumeric characters that have meaningful associations to people. Some examples of and including domain names are fordfound.org, acm.org, B.LENTZ@fordfound.org, and KathrynKl@aol.com.
3) **Root servers** - a global set of 13 master tables which translate the domain names (typed by people) into the IP addresses (recognizable by computers).

For years, these important technical assignments were performed diligently and with little fanfare by Jon Postel, a widely respected scientist and technologist. However, Postel's death early in the ICANN process was a huge loss to the technical and noncommercial communities:

"... Postel had been the new corporation's most valuable asset. His death robbed the organization of its moral center, a good part of its institutional memory, and most of what remained of its legitimacy." (Mueller, Ruling the Root, p.181).

His death, and the vacuum it created, allowed a new group to step into power.

Early on, some powerful companies understood that ICANN had a set of broad, private and largely "unchecked" powers in its technical management powers. The companies understood that ICANN could exercise self-restraint and protect the broad range of existing domain name holders, or create policies favoring certain segments of the Internet community and provide a global forum for hearing concerns about domain name use (and the content posted to the Net using that domain name).

With little oversight or limits, ICANN is increasingly opting for a broader interpretation of its policymaking authority. Further, in "ICANN II," the reform movement ended late last year, ICANN's Board of Directors eliminated all democratic voting (nine Board seats formerly allocated for the Internet public to elect), diluted the Noncommercial Constituency vote, and expanded its scope of authority. The calls from the Intellectual Property community for ICANN to police not only trademarks, but also copyright, will be increased in this even more-conducive forum.

III. The Structure of ICANN and Some Structural Problems: An Overview

A. ICANN's Original Structure and Recent Exclusions of the Public Voice

ICANN is a corporation. It has a Board of Directors, officers and staff. It is incorporated under the laws of the State of California as a nonprofit and public benefits corporation. Provided it acts with the laws of the State and does not make a profit, ICANN is pretty much free to conduct its business as it sees fit.

Under its Memorandum of Understanding with the Department of Commerce, ICANN has responsibilities for the policies and regulations of the Internet domain name and IP address infrastructure. Called an "experiment in private governance," ICANN is analogous to a private FCC.

At the outset, noncommercial organizations expressed deep concern over the delegation regulatory authority to a private company with no traditional policy oversight or accountability. We were told that two structures would ensure wide public input and oversight: the Supporting Organizations and the At Large Membership.

<u>The Supporting Organizations</u>

ICANN has three Supporting Organizations, or SOs, which represent certain large communities on the Internet:

> The Address Supporting Organization has as it members the five regional registries which allocate IP addresses (ARIN is the US registry).
>
> The Country-Code Names Supporting Organization has as its members the 200+ two-letter country code registries, e.g., .jp for japan and .de for Germany.
>
> The Generic Names Supporting Organization has as its members six constituencies which represent groups interested in domain name policies such as revocation, challenge and revocation, and expansion. They are:
> 1. Registries (providers of a domain name system, e.g., .COM)
> 2. Registrars (wholesalers for one or more top level domains)
> 3. Internet Service Providers
> 4. Intellectual Property Constituency
> 5. Business Constituency
> 6. Noncommercial Constituency

From the outset, many protested that the GNSO lacks a place for individuals, small businesses and the wide range of noncommercial organizations. Efforts to create

additional constituencies were rejected early in the ICANN process.

<u>The At Large Membership</u>

In its original by-laws, ICANN created a forum for direct participation of individuals called the At Large Membership (ALM). This forum had a single power: the right of individuals worldwide to directly elect half of ICANN's 18 member board. It was widely vaunted as a key feature of "accountability" within ICANN, and promised as a way of inserting new blood and robust ideas into the ICANN process.

In four years, the ALM was allowed to hold only one election for five (of its nine) Board seats. The election was extremely successful, with over 34,000 people worldwide casting ballots (and many more turned away from the ICANN registration website which expected only 5000 to participate).   The ALM Directors have proven generally to be strong and independent voices on the Board. One Director, Karl Auerbach, sued ICANN in California court for access to the documents he felt it was his obligation to review. The judge granted his petition, and expressed clear surprise that other ICANN Directors were not similarly involved in their work.

Professor Mueller wrote that the At Large Membership contains the element which distinguishes ICANN and makes it more than the actions of a self-interested few:

> If ICANN manages to avoid fulfilling its promise to create an at-large membership with direct input into the board, then it would be easier for politicians dissatisfied with its policies to claim that it is little more than a cartel of the domain name supply industry. (Ruling the Root, p. 223).

Yet, despite its popularity and importance, in late 2002 ICANN terminated the At Large Membership and wiped out democratic elections for the Board. The Board replaced the ALM with a Board-chaired and Board-appointed Nominating Committee which will select half of the Directors. No one expects the Nominating Committee to appoint bold or independent voices.

Now a few months after the elimination of the ALM, we find ICANN with its full regulatory and political powers, but without the fundamental checks and balances that provided public accountability. It is a dangerous situation for the public interest, and for the noncommercial voice in ICANN.

B.   Other Errors of ICANN

The majority of this paper is devoted to the future, and the problems that an "unchecked ICANN" is likely to create. But it is worth touching on a few of the deep problems that ICANN has created to date for individuals, noncommercial organizations and all who use domain names for free speech. In particular, ICANN's policies favor commercial over noncommercial speech online.

As its first policy decision in 1999, ICANN adopted the Uniform Dispute Resolution Policy (UDRP) which created mandatory, binding arbitration of domain names when challenged by a trademark owner. The private UDRP rules did not follow the traditional protections and equities of trademark law and did not protect the right of individuals and noncommercial organizations to use basic words in basic ways.

Instead, the rules provide that if the trademark owner can make a basic showing of "bad faith registration" (sometimes as simple as saying "you had to know that my trademark existed) and if the domain name holder cannot show that its use of the domain name falls within a few protected categories, the trademark owner is likely to win the dispute and receive the domain name. No matter how well known the domain or how important its content, the domain name with its associated websites, mail servers and listservs will be taken down in a matter of days.

With over 6000 arbitrations now conducted under the UDRP, studies show that our deep concerns for its unfair rules and procedures were on target.   Professor Michael Geist in his 2001 study found that:

> "While every adjudicative system will have its share of bad decisions, the UDRP has come under heavy criticism for inconsistent decisions, decisions lacking in virtually any reasoning, and decisions that have clearly misinterpreted the UDRP." (Geist, p. 20-21).

There is fairly strong agreement that the UDRP favors commercial use of domain names, and especially big businesses who own many trademarks. Although a domain name holder may be using a trademark in ways considered legal and important under her/his national laws (such as for criticism or parody), national protections for free speech and fair use often are not honored in the international arbitrations of the UDRP.

There are other calls for ICANN to create more policies to protect businesses. Some want to expand the UDRP to protect a broader class of works.   Others want to revoke domain names when the registrant does not publish full and accurate data (despite the problem that ICANN's publication of this data, including home addresses and home phone numbers, may violate many national privacy laws).

Should ICANN continue its trend as a proponent for one class of Internet users, we are likely to find even greater barriers to the robust use of the Internet by individuals,

families, political organizations, grassroots movements and other noncommercial groups.

IV.   Outline of Remaining Sections

To better develop the issues and noncommercial concerns introduced above, this paper is divided into three main sections. Section V sets out in greater detail the fundamental questions whose answers will direct ICANN's future work.

Section VI develops a set of minimum tasks that the Noncommercial Constituency and community must perform to ensure an educated, articulate and politically well-positioned voice in the ICANN proceedings.

Section VII looks at who should advocate for the noncommercial community. It examines the unusual array of organizations and experts who, to date, have positively influenced the ICANN process and advocated for noncommercial concerns. It also sets out the need for some new institutions -- coalitions and watchdog organizations -- to provide additional types of coordination and oversight.

Ultimately, ICANN cannot be monitored by a single organization.   A dedicated network of noncommercial advocates -- working within organizations and as individuals -- will bring the necessary diversity of skills, worldwide presence, and political influence to make noncommercial and free speech voices heard above the fray in the odd world of ICANN politics.

V.   THE FUTURE OF ICANN:
Can the Noncommercial Community Hold Its Own?

A.   Questions ICANN Funders, Participants and Observers Should Ask

A battle now rages in ICANN. It is a private corporation charged with a broad technical and policy mandate. But who does it serve? As a business, does it serve its best customers or does it have an responsibility (with requisite accountability) to the Internet community as a whole?

Second, what is its purpose?   Is ICANN created solely to break up the Verisign monopoly and introduce competition into the domain name market, or is ICANN allowed to use its technical control as an opportunity to create global telecommunications policies impacting free speech (First Amendment), open communication (Universal Declaration of Human Rights) and privacy?

Third, how far can ICANN go? Where are its limits, its oversight, its enforcement?

These questions must be answered by the noncommercial community together with the rest of the ICANN community. Our perspective, concerns and answers are critical to the quality of the debate that will take place and the types of answers that will be created. If ICANN only hears from the commercial community, it will consider itself only answerable to the commercial community.

B.   ICANN's Structure Gives Us A Minority Seat

Sometimes in poker and politics, you are dealt a bad hand. In the back rooms of ICANN's creations, its founders created a double representation for commercial users and a single representation for noncommercial users. Thus, in the Domain Name Supporting Organization, the commercial community was given the Business Constituency and the Intellectual Property Constituency. The noncommercial community received the Noncommercial Domain Name Holders Constituency.

Further, the commercial constituency started with a general clarity of vision internationally. Dominated by large multinational companies, and their attorneys, the commercial constituencies were clear in their desire for ICANN to help them with the chore and cost of policing their trademarks and copyrights worldwide.

The Noncommercial Constituency was unclear in its vision. Its members were scattered and poorly funded. Each participating nonprofit organization had a different view of ICANN and different hope for the services ICANN might render to their developing country, human rights community or digital divide issue. Many joined and quickly left. Yet, a few leaders in the Noncommercial Constituency realized that a small voice is better than no voice, and a permanent place at the discussion table is valuable in and of itself.

My recommendation, developed below, calls upon the foundation community to provide the Noncommercial Constituency with the tools it needs to function as effectively as possible in the ICANN process. These tools are both substantive and administrative; expert and secretarial. They are not extensive.

C.   ICANN's Uncertain Policy Scope Gives Us Pause and Concern

Traditional regulatory agencies are given mandates and asked to operate within them. If they overstep their bounds, their overseeing Congressional committees can call them to account. If private parties feel they have acted beyond their bounds, they can take them to court.

ICANN, asked frequently about the limits of its authority and responsibility, is quick to evade a firm response. Its corporate bylaws, newly revised, did not address the calls of the ACM-IGP, the Center for Democracy and Technology, and others for clear definitions of and limits to ICANN's powers and authority. When similarly questioned, the Department of Commerce is quick to point out that its agreements with

ICANN grant only technical powers, but that as a private company, ICANN can pursue any avenue that is legal under its 501(c)(3) tax status and under the California law as its state of incorporation.

Thus, the scope of ICANN's policymaking authority lies with the choices of the ICANN Board of Directors, and the process of Task Force development that evaluates and reviews the proposals. Each constituency is entitled to appoint one member to the task force, with Board appointees filling remaining chairs.

We need good people, with the leadership skills, substantive expertise and ICANN presence to participate – and if possible lead – the committees, panels and task forces that will work on initial policy proposals. The most important input in ICANN comes at the earliest stages, as the first groups prepare an idea and the proposals for the ICANN Board. This is the time to squelch inappropriate ideas, before they have the chance to gather momentum and support. The resources needed for this type of pro-active involvement in ICANN are outlined below.

D.   ICANN's Need For Enforcement Oversight and Limits Is Clear

The traditional spirit of open process and trust among the technical community has not served noncommercial interests well in ICANN. Good processes can be misused and concepts like "consensus," however useful in a technical setting, can become dangerous in a policy making one. When consensus becomes a way of discounting minority and dissenting opinions, it can be dangerous. When "consensus" is used to allow commercial interests to limit noncommercial rights, it can destroy valuable parts of noncommercial communication.

It is unclear who oversees ICANN. As ICANN changes its own structure to eliminate democratic general elections (widely viewed as the public accountability feature of ICANN), adopts policymaking procedures too fast for organizations without full-time lobbyists and lawyers to follow, and provides inadequate processes for public notice and comment, many are asking where can we appeal ICANN's actions? Neither Congress nor the Department of Commerce claim the right to oversee the decisions of ICANN. Further, ICANN is not accountable to the United Nations or any foreign government either.

Thus, as with any other policymaking organization, it is clear that ICANN needs defined limits to its authority and powers. Further, it needs checks and balances – and an organization to take appeals by effected parties and provide oversight and remedies.

This is the time, in these early years, to ask for such accountability and oversight. The noncommercial community is in an excellent position to share clear and credible concerns about the ramifications for free speech online if ICANN is allowed to proceed unchecked.

VI.   Viewed from the Battlefield: What are the Urgent Funding Priorities?

We do not need battalions of people to represent noncommercial interests in the ICANN arena, but we do need a small committed core of individuals and organizations who will work hard to become expert in the complex technical and legal issues and arcane political process of ICANN.

Below are the key areas necessary to successfully battle for noncommercial and public interest priorities in the ICANN arena. For effective ICANN participation, the noncommercial and public interest community needs:

> ***Committed leaders*** with the time and resources to take on numerous important tasks;
> ***Experts in intellectual property law,*** free speech rights, administrative law and jurisdictional issues;
> ***Travel by our most articulate and informed experts and leaders to ICANN meetings*** (no matter how late ICANN posts its agenda and places issues of concern to us on it);
> ***Meetings and dinners*** to help the noncommercial strategize, educate and build morale;
> ***Basic administrative services for the Noncommercial Constituency*** (a "secretariat" in ICANN parlance), and
> ***Oversight of ICANN.***

A.   Committed Leaders With the Time and Resources to Take on Numerous Important Tasks

The Noncommercial Constituency needs active, articulate and talented leaders. We need constructive participants with the time and interest to pull our members – with the least resources and most diverse interests of any ICANN constituency – together on issues of importance. We need to have the knowledge and skills to express our concerns to the Names Council, the ICANN Board, and the press.

As background, the Noncommercial Constituency elects five representatives, one from each region of the world. All serve together on the Administrative Committee, with the top three vote-getters also serving as our elected representatives to the Names Council (executive committee of the GNSO with representatives of all six

constituencies).

Traditionally, the North American representative plays the main leadership role in the Noncommercial Constituency (perhaps due to our experience with the free speech and privacy issues). Those of us who have performed the position find it to be a fascinating, yet exhausting and overwhelming experience.

There is too much at stake for these noncommercial constituency positions, particularly the North American position, to be performed in a haphazard or amateur manner. To properly perform their tasks as the noncommercial community's leading advocates in the ICANN arena, noncommercial constituency leaders need:

1) <u>time to learn the complex legal, technical and policy issues</u> raised before ICANN during their terms;

2) <u>time to educate other NCUC elected representatives and the NCUC's worldwide membership base</u> about the noncommercial concerns at stake and time to learn about their country's rules and procedures and why issues of import to the US are also of concern internationally.

3) <u>funds to participate in the discussions, including travel to remote ICANN meetings, international telephone calls of the Names Council and conferences</u> where timely issues are being discussed.

4) <u>time to volunteer for committee and task force positions</u>, particularly chairmanships.

As a two-term Noncommercial Constituency representative, this list represents the tasks that I was regularly called upon to perform. Thanks to a Ford Foundation grant at the time, 1999-2000, I was able to perform these functions.

Researching, developing positions and commenting on proposals, educating others on important noncommercial positions and participating in ICANN meetings and Names Council phone calls is a minimum of participation. It is a part-time job which requires regular dedication of 15-20 hours a week, and constant attention to new and emerging questions in the Internet, law and policy arena.

In addition to the minimum participation requirements (points 1-3 above) the Noncommercial Constituency must do a much better of job of leadership on key committees, panels and task forces (committees, for short) of ICANN. These committees are where the vast amount of policy development takes place. Because ICANN pays so little attention to public comments once positions are posted, it is critical to insert noncommercial recommendations, alternatives and concerns at the earliest possible time in the ICANN process.

These leadership positions are extremely time-consuming. For someone who is currently an elected representative of the Noncommercial Constituency and serving also on the Names Council, it changes a part-time job to a full-time job (or more than a full-time job) for the duration of the committee's work and the course of public comment and Board action.

In 2000 I learned firsthand the huge difference that noncommercial leadership can make on an ICANN committee. I volunteered to co-chair ICANN's Working Group B on Famous Marks in Domain Names (WG-B). ICANN had asked WG-B to examine proposals by the World Intellectual Property Organization (WIPO) to give "famous marks" extraordinary protections in new top level domains. WIPO proposed that all new top level domains (such as a future .FAM for family) would automatically prevent any registration of a "famous marks." Thus, McDonald's Corporation would automatically receive mcdonalds.fam in a new family top level domain, irrespective of the fact that thousands of families share the name and use it everyday in noncommercial activities. ICANN was strongly leaning towards adopting these protections.

Being in a leadership position allowed me to push committee discussions towards why WIPO's proposals were inconsistent with national laws. My research showing that no treaties protected famous marks internationally commanded more attention coming from a co-chair.

In addition, as co-chair, I helped present our committee work to ICANN and the public. Before approximately 600 participants and the ICANN Board of Directors (Cairo meeting, 2000) I led an education session on how famous mark protection would endanger noncommercial speech, and how even those few countries with statutes protecting famous marks also carved out huge exceptions for noncommercial use, editorial use and comparative advertising. Finally, I edited the final committee report and highlighted the free speech and fair use concerns. Ultimately, we beat the WIPO proposal.

Overall, in my experience, it is foundation funding that will make the difference between consistent and qualified noncommercial leadership and ad hoc participation. Of course, a few people will always participate on their time, submitting a few comments or issuing a useful statement. But four years of ICANN history teaches that ICANN does not intend to solve a few problems and stop. Rather, it views itself as a global policymaking forum, and we need noncommercial leaders who will participate on a day-in and day-out basis at the many levels of its debates.

B. Experts in Intellectual Property Law, Free Speech Rights, Administrative Law, and Jurisdictional Issues Needed to Navigate the Complex Law and Technology Issues of ICANN.

ICANN's issues are complex. Few are expert in all issues that fall within its scope, including the technical (Internet infrastructure and protocols), regulatory (administrative procedure and due process), content/communication (free speech, intellectual property, and privacy), and international law (national sovereignty, extraterritorial jurisdiction, treaties). This is the cutting edge of law and technology and ICANN's noncommercial leaders need the ability to call in experts.

Experience shows that our leadership and participation is more successful when we work with legal experts. We draw from more solid examples, cite better law and speak with more authority when we have experts who can teach us precedents and principles that exist in other areas.

For example, after ACM's Internet Governance Project (ACM-IGP) led the fight to stop ICANN's adoption of a set of Uniform Dispute Resolution Procedures (UDRP) that gave unprecedented rights to trademark owners (while severely limiting the rights of noncommercial domain name holders), we were appointed to a fast-track elite committee to redraft the procedures in only a few weeks.

With the help of Ford funding, we led the drafting effort by working with a small "brain trust" of senior attorneys who cared deeply about our concerns and specialized in trademark law, telecommunications law, administrative procedure, litigation and free speech issues. In an very short period of time (which is all we were given by ICANN staff), we correct glaring errors in the draft rules.

We also added a new section:

4(c). How to Demonstrate Your Rights to and Legitimate Interests in the Domain Name in Responding to a Complaint.
... Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):
****
(iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue. (UDRP, 1999).

It is the section now relied upon by most defending noncommercial domain name holders, and a basic protection for noncommercial domain name use. While these outstanding attorneys were willing to work at discount rates, they would not work on a

volunteer basis.   Foundation funding allowed us to afford their invaluable services.

It is worth noting that free speech, fair use, and privacy issues -- of great concern to individuals and noncommercial organizations – will arise before ICANN again and again. Because ICANN controls a technical bottleneck (the domain name and IP address systems), certain commercial users will continue to call upon it to become the international governor of content online. In these important early years of ICANN, the noncommercial community must fight to keep ICANN focused on its technical mission.

However, we must also be ready to respond authoritatively and accurately to intellectual property proposals as they arise. For these efforts, we need have legal experts, and be ready to respond quickly.

C.   **Travel Grants to Bring Our Most Articulate and Informed Experts and Leaders to ICANN Meetings (No Matter How Late ICANN Posts its Agenda and Places Issues of Concern to Us on It).**

You cannot fight an issue if you are not on the battlefield. With its commitment to holding successive meetings on different continents, ICANN makes attendance expensive, time-consuming and difficult. But those who attend ICANN meetings can meet with the Noncommercial Constituency and other constituencies, participate in ICANN's Public Forum with presentations to the Board, and meet informally with a range of ICANN leaders. Because of its international base, ICANN's meetings provide the face-to-face opportunity to seek support and build coalitions.

The Salzburg Institute Travel Grants Program for ICANN Meetings had pluses and minuses. It was good because it sent a wide range of participants, prospective newcomers and observers to ICANN meetings. Largely through these grants, there was a noncommercial presence at the ICANN meetings – no matter how distant they were.

It was lacking because it did not provide the flexibility to allow our noncommercial leaders and advocates to attend distant ICANN meetings when ICANN suddenly added their issues to its proposed agenda. Salzburg had a "six-week in advance of meeting" deadline and ICANN posts its agenda only a month before the meeting.   After the posting of the agenda, a noncommercial committee chair or expert would want to attend the ICANN meeting, and need support due to its international location, but Salzburg resources would already be committed.

There is no question that the Salzburg (or some similar process) of travel grant administration is critical to the ongoing participation of the noncommercial community at the ICANN meetings. The process could be slightly tweaked to hold back a few slots until the posting of ICANN's agenda. At that time, the grants administrator -- in consultation with the Noncommercial Constituency leaders – could determine which

noncommercial leaders and experts would be most valuable. These advocates could receive grants to allow them to attend and lead the noncommercial advocacy efforts on their issues.

D.   Forums for Noncommercial Organizations and Leaders to Meet Outside of the Short Session of the Noncommercial Constituency at the ICANN Meeting.

At each ICANN meeting, the first of four days is set aside for constituency meetings. For the Noncommercial Constituency, these meetings are often of limited value for many reasons. Sometimes, many participants are first-time ICANN attendees and are not familiar with ICANN issues or process. Other times, issues require agreement and voting, yet too few members have followed the issue or received permission from their organizations to vote on them. (In contrast, commercial organizations prepare extensively before ICANN meetings.) Like them, we need good preparation and coordination.

Education in meetings before and during the quarterly ICANN meeting process will serve the noncommercial community well. We must create forums to educate each other about our concerns and needs and to discuss how proposed ICANN rules will impact developed and developing countries and communities. I have found that education is never a wasted effort, and note with great satisfaction that young noncommercial leaders, especially from the Asia Pacific regions, have returned to their countries and country code domains to advocate for the same type of free speech and open communication rights and protections they first learned about from my sessions at ICANN.

Coordination and planning is also effort well-spent. In 2000 ACM's Internet Governance Project kicked off the Pre-ICANN Public Interest Meeting. About two weeks before an ICANN meeting, we held a meeting in Washington DC for US-based noncommercial organizations to share ideas, issues and concerns. The face to face contact was critical, and we began (for the first time) to share the positions we were taking and papers we were writing. The advance notice allowed us to return to our own organizations, before the meeting, for support of positions that fellow noncommercial organizations were taking. Old timers offered strategy advice to newcomers. We began to speak more clearly and cohesively at the ICANN meetings.

These US-based meetings should be continued and expanded.   Their success will only be assured with foundation funding. Also, at low cost, the Washington DC meetings could be continued and expanded with a national or international telephone conference bridge. Bringing domestic organizations into the discussion will expand our ability to represent other US groups. Bringing foreign organizations into the discussion will allow us to build foreign support at a critical time.

Building support for our noncommercial positions is important; building networks of trust is even more important. Other constituencies often have a day of pre-ICANN meetings and host a dinner or day during the four day meeting to allow their members to socialize. Our Noncommercial Constituency, with foundation support, could also host pre-ICANN educational sessions and a dinner to build morale and friendships.

E. Basic Administrative Services for the Noncommercial Constituency (a "Secretariat" in ICANN parlance).

The Noncommercial Constituency needs basic administrative functions. Called a Secretariat in ICANN parlance, this administrator function exists in other constituencies. She/he performs no political or substantive work, but is responsible for the day-to-day managing of the constituency's websites, membership lists, and elections.

Some secretariats monitor the disorganized ICANN website to find the sometime obscure places that ICANN posts information about public notice periods, committee formations (and chair selections) and reports. A Secretariat conversant with the ICANN structure would be an invaluable aide to Noncommercial leaders and allow them to focus on their issues, while knowing that ICANN is being monitored for new nominations, new comments and new issues.

Such a function need not be full-time or especially time-consuming. But it does require funding to provide a level of professional service on the continuous basis that the Noncommercial Constituency needs (and to date has lacked).

F. Funding as ICANN and ICANN Issues are Raised in Other Forums.

I regularly receive calls notifying me that ICANN-related issues have been raised in another forum. Congress wants to legislate rules for domain name data; proposed bilateral treaties will require countries to recognize ICANN-created rules; and more. We are finding that, when intellectual property and commercial communities lose a battle before ICANN, they take the fight to other forums.

Yet, the noncommercial groups monitoring these forums are not expert in the legal and technical issues of Internet infrastructures. It would dramatically increase their ability to respond to Internet issues if ICANN noncommercial leaders and experts had the resources to help. Small grants rapidly available (for time and travel) -- either available to international watchdog groups or directly to individual ICANN experts -- would allow international civil liberties groups to quickly get the support they need to respond. A bad idea might be quickly nipped in the bud; otherwise, preparations for a long fight could begin early on.

G. Oversight Calls for ICANN

The parties who established ICANN were not particularly far-sighted. In 1998 they wanted to turn domain name registration from a monopoly service into a competitive market. They also wanted to keep governments and political processes out of the technical management of the Internet. In creating ICANN, as a private corporation, with technical, regulatory and political powers, no one stopped to think about ICANN's limits, and who could enforce them.

Four years later, there are great pressures on ICANN to go beyond its technical management functions into global governance. After all, its technical control of the sole choke point of the Internet - domain names, root servers and Internet protocol addresses -- could be used for many purposes including global content control. Clearly no private corporation should wield such power, but ICANN may be in a position to assert such control if proper checks and balances are not created for it. David Holtzman, former chief technology officer for Verisign, expressed his concerns in his article "If We're Going to Have a World Government, I Want a Revolution First." (Holtzman, 2002, Appendix 2).

Now is the time for individuals and organizations to raise an alarm about ICANN's lack of accountability and oversight with Congressional committees, the Department of Commerce and foreign governments. With good people and support, we could fight for the additional limits, appellate procedures and oversight that will properly limit ICANN going forward.

VI. Funds for Noncommercial Advocacy: Where Should They Go?

In ICANN it is hard to predict what organizations and individuals will be most successful in their advocacy and ICANN is a process of experimentation for academics, attorneys, civil liberties groups, individuals, libraries, and other noncommercial groups – all driven by deep concerns over the impacts of ICANN proposals on noncommercial speech. Supporting both amateurs (with an excellent record of success in ICANN) and senior noncommercial advocates should be a priority for future funders in this area.

While Part V examined tasks to be performed, this Part sets out who might receive the funds to perform such ambitious goals.

Past work shows that the following play an important role in researching, crafting, writing and advocating for noncommercial positions and concerns:

> New noncommercial organizations and new ICANN divisions of older noncommercial and technical organizations;
> Traditional noncommercial organizations;
> Coalitions (noncommercial and cross-constituency);

Judicial watchdog organizations; and

Academics, attorneys, economists, and other individuals.

G.   New noncommercial organizations and New Branches of Existing Organizations.

ICANN is a world unto itself, with arcane procedures, unusual internal politics, and no particular interest in balanced voices, adequate notice and comment, or due process.   It is often referred to as an "experiment in private Internet governance." Given its newness, new organizations can function very effectively within it.

ACM's Internet Governance Project was a part of ACM established to help organize ICANN's Noncommercial Constituency. As its founding director, I found myself in a unique position to respond quickly to ICANN issues. I researched emerging areas of technical and law, drafted resolutions for the Noncommercial Constituency, led training sessions for our members on the fundamentals of trademark law and fair use, submitted comments on ICANN policy proposals and participated actively in ICANN meetings.

New organizations, or new branches of existing organizations, give their leaders an opportunity to devote their energies almost exclusively to ICANN.   These are fully-involved leaders that the Noncommercial Constituency badly needs. Should funding be requested by this type of organization, it may be useful to tie it to commitments to pursue appropriate leadership positions (elected and appointed) within the ICANN arena.

H.   Traditional Noncommercial Organizations

Senior noncommercial organizations are doing a yeoman's job of fighting for noncommercial concerns in traditional arenas. With the issues of homeland security, Patriot II, Digital Rights Management, many noncommercial organizations are task-saturated.   They tend not to have the time to take on the elected positions in the Noncommercial Constituency or accept committee chairs.

Yet, these organizations play an important and necessary role in ICANN. When they speak on an issue, their leaders have name recognition and command attention and respect when they address the ICANN Board. The organizations, by virtue of similar work in other arenas, have a huge base of research and expertise from which to write scholarly papers (often on a rapid schedule). Their reports in the past, including the importance of the democratic "At Large" elections in ICANN (CDT) and privacy in the domain name "WHOIS" database (EPIC), strengthen Noncommercial Constituency positions and provide critical support for the work of the leaders and advocates of the noncommercial community.

The work of traditional noncommercial organizations should be encouraged. However, it might be useful to tie funding of such work to commitments that more senior staff will present the work to the ICANN Board, coordination with Noncommercial Constituency elected leaders will take place, and efforts will be made to tie the work into the political process of ICANN. (Junior people are not nearly as effective against the senior intellectual property lobbyists.)

I.   Coalitions (Noncommercial and Other Groups)

In many political arenas, coalitions play a large role. It is inherent in the political process that different voices must come together to work for change. In ICANN, with its far-flung meetings, members and issues, it is especially important to coordinate and work together.

Clearly, the noncommercial community needs to work within itself to further education and build support for positions. However, our community must also work with others in the ICANN process to ensure proper protection and consideration of free speech, privacy, and due process values. Foundation funding would encourage the ability of noncommercial organizations and leaders to set up coalitions with others in the ICANN process (registries, registrars, ISPs, and others).

One area in which a coalition would currently be useful is on the issue of WHOIS and domain registrant privacy. This is the data required to register a domain name, and for individuals, hobbyists and families seeking personal websites, it includes a request for home address and phone number. The information is put in a publicly available database for all to see. How this data should be treated, whether "opt-out" options should be offered for those seeking to protect personal privacy, and related issues are the subject of strong debate currently in the ICANN world.

The noncommercial community, the registries and the registrars share similar concerns for personal privacy (intellectual property and business oppose any form of opt-out and want to revoke domain names with any inaccuracies). With foundation funding, those concerned about privacy could create a coalition, further a dialogue, and investigate technical and policy options. If started today, their contributions would be timely, relevant and potentially pivotal to the ICANN debate and decision.

D.   Judicial Watchdog Organizations

Legislation from Congress created a dangerous problem in 1998. In the Anticybersquatting Act, Congress said that a domain name holder could be sued where *the domain name exists.* Such a place may be countries or continents away from the home of the domain name registrant, and by virtue of the legislation, often turns out to be the Federal Court for the Eastern District of Virginia in Alexandria, Virginia.

Congress specifically wanted US courts to have jurisdiction over the huge

number of domain names in the "general top level domains" of .COM, .ORG and .NET -- and it turns out they all exist in databases in Northern Virginia. The law has proven to be a coup for trademark owners, many with law firms offices in the Northern Virginia area, who can sue over domain names and their website content quickly and easily. The domain name holder -- individuals, organizations and small businesses located thousands of miles away -- rarely have the notice, time or money to come to court across the world. Accordingly, most domain name holders lose their cases.

We need one new organization (or more) to serve as a watchdog of the federal courts in Northern Virginia.   Attorneys, expert in the domain name and trademark issues, could monitor the "in rem" domain name cases and look for flagrantly unfair filings. On behalf of the domain name holder, or the public interest itself, they could file amicus or "friend of the court," briefs which set out their concerns about the case. Such briefs might help the judge to understand the laws of the nation of the domain name holder, or why the court is being asked to do something beyond the scope of the Anticybersquatting Act.

These briefs would make sure that the courts heard two different sides of an issue, a crucial part of the litigation process. It would help our courts fight the temptation to unduly expand their scope to become the global court of the Internet.

E.   Academics, Attorneys, Economists and Individuals

ICANN's activities trouble many people, some who are ready to devote extraordinary effort. These individuals and experts have written important reports, testified before Congress, published law review articles, run statistical studies of the UDRP database, and started websites for critiques of the ICANN process. See e.g., www.icannwatch.org.

Their energies should be encouraged because their work is highly focused, efficiently done and often very timely and persuasive.   Small foundation grants could play a crucial role in enabling these individuals to perform, complete and distribute their work. One example where this worked well was in 2000. ACM-IGP assisted Professor Milton Mueller with a small grant to hire a summer student to enter data on UDRP decisions for analysis by statistical process. Small but timely, the grant allowed Professor Mueller to begin work immediately -- over that summer and during his student's open time. Few noncommercial organizations have such surplus funding available.

With appropriate support, these individuals and experts will continue to add critical and timely voices to the ICANN process. They will also continue to create the reports, studies and resources that provide Noncommercial Constituency leaders with tremendous support.

VII.   Conclusion

We are in an important time at the formation of a new Internet governance organization and its founding concept of "private Internet governance." It is a time where participation is paramount, and when noncommercial voices should be heard.

With the support of the foundation community, organizations, experts and individuals will continue to advocate for rules that protect free speech and noncommercial activity online.

VIII.　Acknowledgments

This report contains the knowledge and insight of many talented people. I appreciate all of their hard work, and the time they provided me to better understand the resources they need. Should any reader of this report have questions or want to further discuss the history, issues and recommendations discussed above, please feel free to contact me.

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With best wishes,
Kathryn A. Kleiman

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Ruchika Agrawal, Science Policy Analyst, Electronic Privacy Information Center

Martin Apple, President, Council of Scientific Society Presidents

Pat Aufderheide, Professor, School of Communication, American University

Eung Hwi Chun, PeaceNet Korea

David Farber, Professor, School of Engineering and Applied Sciences, University of Pennsylvania.

Tamar Frankel, Professor, Boston University School of Law

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Manon Rees, consumer representative to US delegation for Hague Convention on Jurisdiction and Enforcement of Foreign Judgements, Consumer Project on Technology

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References

Armon, Orion (2003). *Is This As Good As It Gets? An Appraisal of ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) Three Years After Implementation*, 22 REVLITIG 99.

Aufderheide, P., Barnouw, E., Cohen R. (1997). **Conglomerates and the Media**. New York: The New Press.

Frankel, T. (2002). *Accountability and Oversight of the Internet Corporation for Assigned Names and Numbers (ICANN)*, Report to the Markle Foundation. Available: http://www.markle.org/news/_news_pnsp_governance.stm

Frankel, T. (2002). *The Managing Lawmaker in Cyberspace: A Power Model*, 27 Brooklyn Law Review 859.

Froomkin, M. (2000). *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution,* Duke Law Journal, Vol. 50, pp. 17-184. Available: http://personal.law.miami.edu/~froomkin/articles/icann.pdf

Garfinkel, Simson (March 2003). *The Net Effect: The Net's Faltering Democracy,* MIT Technology Review. Available www.newsfactor.com/perl/story/21032.html (Appendix 4).

Holtzman, D. (2002). *If We're Going To Have A World Govt, I Want a Revolution First*, ICB News. Available: http://www.icbtollfree.com/article_free.cfm?articleId=5219 (Appendix 2).

ICANN (1999). Uniform Domain Name Dispute Resolution Policy (UDRP). Available: http://www.icann.org/dndr/udrp/policy.htm

Krause, Jason (2002). *ICANN Can't, Critics Say*, 1 No. 34 A.B.A. J. E-Report 5 (Appendix 3).

Geist, Michael (2001).   *Fair.com? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP.* Available: http://aix1.uottawa.ca/~geist/frameset.html

Markle Foundation (2001). *Toward a Framework for Internet Accountability.* Available: http://www.markle.org/news/_news_pnsp_governance.stm

Mueller, M. (2002). **Ruling the Root: Internet Governance and the Taming of Cyberspace.** Cambridge, MA: MIT Press.

Mueller, M. (2002). *Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP.* Available: http://istweb.syr.edu/~mueller

Quittner, J. (1994). *Billions Registered,* Wired. Available: http://www.wired.com/wired/archive/2.10/mcdonarlds.html (Appendix 1).

Websites Used Frequently in the Preparation of this Paper:

www.icann.org -- ICANN Website

www.ncdnhc.org -- Noncommercial Users Constituency Website

www.gnso.org – Generic Names Supporting Organization Website for posting about all ICANN constituencies and the Names Council executive Committee work.

www.icannwatch.org -- ICANNWatch Website with many postings about ICANN issues and concerns.

| **Appendix 1** |

Issue 2.10 - Oct 1994

Billions Registered

Right now, there are no rules to keep you from owning a bitchin' corporate name as your own Internet address.

By Joshua Quittner

I'm waiting for a call back from McDonald's, the hamburger people. They're trying to find me someone - anyone - within corporate headquarters who knows what the Internet is and can tell me why there are no Golden Arches on the information highway.

It's true: there is no mcdonalds.com on the Internet. No burger_king.com either.

Yet.

"Are you finding that the Internet is a big thing?" asked Jane Hulbert, a helpful McDonald's media-relations person, with whom I spoke a short while ago.

Yes, I told her. In some quarters, the Internet is a very big thing.

I explained a little bit about what the Big Thing is, and how it works, and about the Net Name Gold Rush that's going on. I told her how important domain names are on the Internet ("Kind of like a phone number. It's where you get your e-mail. It's part of your address."), and I explained that savvy business folks are racing out and registering any domain name they can think of: their own company names, obviously, and generic names like drugs.com and sex.com, and silly names that might have some kind of speculative value one day, like roadkill.com.

"Some companies," I told Jane Hulbert, "are even registering the names of their competitors."

"You're kidding," she said.

I am not, I told her, recounting the story of The Princeton Review, the Manhattan-based company that sells SAT prep courses, and how it registered the name of its arch-rival, kaplan.com. Now the lawyers are working it out in court. Very ugly. (We'll get to that later.)

"I could register McDonald's right now," I said, pointing out that the name is still unclaimed.

"You could?" she asked, then quickly answered my silence: "You could."

"So could Burger King," I said, and Jane Hulbert rang off, looking for some MIS person with the answers.

How much do you think mcdonalds.com is worth? What could you sell mtv.com for? Is there gold in them thar domains, as a lot of people seem to think, or is it just fool's gold? No one knows the answers to these questions, though they are being asked, very pointedly, in federal court, as well as in the boardrooms of a number of the nation's biggest companies.

In the meantime, a frenzy of domain-name registration is going on at the InterNIC, or Internet Network Information Center, the agency that assigns domain names and rules on requests. It's easy to find an unused domain name, and so far, there are no rules that would prohibit you from owning a bitchin' corporate name, trademarked or not.

The InterNIC staff has neither the time nor the inclination to scrutinize your application. Not too long ago, I spoke to Scott Williamson, the person who supervises InterNIC registration, to find out what criteria the InterNIC uses to deny registration requests.

There are situations that raise two red flags, according to Williamson: "If the name's already taken. Or if we catch an 'obvious one.'"

An "obvious one," he explained, is a blatant attempt to register a name to which you're not entitled. For in-stance, let's say Sprint Communications wanted to register MCI, a competitor in the long-distance telephone biz. That would be an "obvious one" that even the beleaguered staff of the InterNIC would pick up. But wait a second! In the spring of this year, Sprint *did* register the call letters MCI, albeit briefly. For a while Sprint owned mci.com.

Why did Sprint want to register its rival's name as a domain name? Sprint won't say, exactly: "For the record, Sprint won't discuss its plans for the domain name," said Evette Fulton, a spokesperson, who added, for anyone too dumb to read Sprint's lips, "We're in an extremely competitive business." As soon as the InterNIC got wind of it a week or so later, mci.com was re-registered to MCI.

How did such an obvious one get by InterNIC?

"It was a fluke," Williamson said, noting that three requests for the domain name, mci, came in almost simultaneously. (One request was from MCI itself, one was from Sprint, and one was from another company whose initials were MCI.) "All three came in, and the guy in registration registered the wrong one."

The guy in registration? One person is responsible for assigning domain names on the Internet?

Actually, "We have 2.5 people doing it," Williamson said, meaning that the half person is really a

full person doing it part-time. Or something. Regardless, 2.5 humans is not enough people, or parts of people, to do the job. (Would one person be assigning quit-claims to a gold rush?)

Williamson said that a year ago, his agency received 300 requests a month for domain names; now, more than 1,300 requests stream in each month.

Clearly, the InterNIC can't research every one of those names for trademark violations. "If we had to research every request for a domain name right now, I'd need a staff of 20 people," Williamson said. So the policy is simple: "Trademark problems are the responsibility of the requester."

Which means, I asked, that I could register mcdonalds.com?

"There is nothing that says I can stop you from doing that," he said. "We really need some policy."

"The problem with the Internet is, who's in charge?" he added wryly. "When we figure that out, there will be a meeting."

But even if the InterNIC figures out some mechanism to more effectively weed out bad-faith registrations, it can't go around protecting trademarks. That would be too time consuming and would be beyond the scope of its responsibilities.

The situation is analogous to incorporating a company to do business in a particular state, explained Bruce Keller, one of the country's top trademark attorneys, at the white-shoe Manhattan law firm of Debevoise & Plimpton. While I was waiting for McDonald's Hulbert to call me back, I spoke with Keller on the telephone.

Keller, who is counsel to the International Trademark Association, said that "when you incorporate a company in a state, the state doesn't bother to see if there are other conflicts with trademarks that may be registered in other states -- it just checks with the secretary of state to see if the same name has been registered." This is the same function, in effect, that the InterNIC performs. If a name hasn't been registered, you can take it, he added, but beware: "That in no way entitles you to use the name if in fact there is a conflict with a federally registered trademark."

It's no different in cyberspace. Keller's advice to anyone registering a domain name is to do a careful trademark search, just as you would before incorporating a business. "In my view, it's trademark law pure and simple."

Trademark law, he explained, offers two general kinds of protection. In the first in-stance, protection from infringement, when a customer associates a certain name with a certain product or services, the law prevents others from using that name and creating confusion. You see the name, "McDonald's," and what do you think of? (Quarter Pounder with cheese, medium fries, and medium Coke is what I think of; you can name your own poison.) The question is, Would most people expect to find some connection to fast-food hamburgers in cyberspace when they finger mcdonalds.com? Keller says yes. Trademark protection has to extend from the physical world to the virtual world.

The second kind of protection seeks to prevent trademark "dilution." "Trademarks are valuable corporate assets. You can put a price tag on them," Keller said. "Coca-cola, for instance, has a multibillion-dollar value." If someone else attempted to use that name -- as a joke, for instance, or to be cute -- the value of the trademark would start to dilute. "This protection comes into play when someone takes the word 'McDonald's' and sticks it on a mailbox" - as in a domain name. "McDonald's is among the most aggressive companies in stopping use of its name. It goes after everybody, whether it's a dentist calling himself 'McDental,' or a motel calling itself 'McSleep.'

That, conceivably, might even bar you from using a domain name such as bigmac.com.

Trademark infringement cases are usually settled through a process I've come to think of as Big Footing. The big company with the trademark Big Foots the little one, forcing it to give up the name. Usually, this is achieved with a Big Foot letter from the big company's lawyer, threatening legal action.

McDonald's does it. So does *Wired*. Last year, WIRE, a computer network encouraging women to get on the Net, registered the domain name wire.com. This magazine's lawyers sent them a Big Foot letter: "That sounds too much like *Wired*'s online service, wired.com. Give up the name, or else." WIRE became Women's Wire, and retreated to the domain name wwire.com.

Most trademark infringement cases never get beyond the Big Foot letter. "This is going to cost you a lot of money if you want to fight it -- that's the way the bulk of cases are settled. Who wants to waste time fighting it?" said Keller in an obviously rhetorical question. Keller's firm is local counsel in the Kaplan versus The Princeton Review case, a good example of someone who wants to fight it.

And here's another: Anyone ever hear of Adam Curry? In June 1993, Curry, then an MTV video jockey, registered the domain name mtv.com with the InterNIC, "partly because it was a cool address to have, and it was available," he wrote, in an electronic message that was hard to miss if you were on the Net this past May.

Curry hung his own computer on the Internet and put up a gopher site, which offered, among other things, a daily entertainment "Cybersleaze Report" and "Adam Curry's Brain Waves," providing Curry's own spin on the rock and roll scene. He paid for the site himself and considered it kind of a hobby. He said he told his bosses at MTV what he was doing and encountered no resistance.

Then, in April, Curry resigned from MTV. He was promptly sued for copyright infringement stemming from his ownership and use of mtv.com.

MTV's lawyer asserted that the case would be fought on traditional trademark infringement grounds.

But Curry, who has agreed in the meantime not to use the domain name mtv.com "in a confusing manner," said mtv.com is his property, and he's not relinquishing it. Until the court battle is resolved, Curry is maintaining a site called metaverse.com. In other words, while he might not

use the name, he intends to keep it and not transfer title to MTV.

"I will fight this all the way," he said, adding that the case would be the "*Roe v. Wade* of the Internet and the information superhighway. There is just no way that MTV has the right to my address. It's my address. Mine."

Curry said his site has become exceptionally popular on the Net and has received millions of visits. Indeed, his lawyer, Joe Donley of the Manhattan firm of Shereff, Friedman, Hoffman and Goodman, said that Internet users have come to associate mtv.com with Curry alone.

"We believe that if they were allowed to take Adam's mtv.com address and use it for themselves -- now that Adam has shown what a useful service this could be -- there's a very real danger of reverse confusion," Donley said. "Millions of Internet users have come to associate mtv.com, not with MTV, but with Adam. If they go out and take the domain name, it will leave those millions of people with the potential to be confused."

One way around this problem would be to compensate Curry for his efforts, of course. Would Curry be willing to sell mtv.com to MTV? I asked.

"There are things going on that I cannot comment upon," said Donley. And he didn't.

John Katzman is another guy whose company registered a domain name that is prized by someone else: kaplan.com. Katzman is president of The Princeton Review, a company that provides courses and workbooks to prepare students for standardized tests such as the Scholastic Achievement Test. The Princeton Review's main antagonist is Kaplan Educational Centers, which goes a long way to explaining why Katzman's company might see a strategic advantage in registering and owning kaplan.com.

Katzman said his company decided to launch a site on the World Wide Web "that explains to people the difference between Princeton Review and Kaplan…. We decided to call it kaplan.com."

Doesn't that domain name make it sound as if the site is maintained by Stanley Kaplan? "Our position is that the name of the site is descriptive of what's on the site, which is an analysis of the different courses," he said.

Kaplan's former president, Greg Rorke, doesn't see it that way at all. Around January, Rorke's people met with representatives of The Internet Company Inc., which helps businesses get on the Net, and looked into the possibility of registering a kaplan.com domain name. "We figured there was no hurry," Rorke said, adding that it came as quite a shock when someone in Kaplan's technology department found out a few months later that Princeton Review had registered kaplan.com.

Kaplan fired off a Big Foot letter, and initiated legal action that went to US District Court in Manhattan, the same courthouse-arena, by the way, where the Curry-MTV bout is being fought.

Katzman said he intends to hold onto kaplan.com, unless the court tells him otherwise. In the meantime, he said, Kaplan is more than welcome to find its own, unused name and, "if they want

to link it from our server both ways, we'll do it."

While awaiting McDonald's call back (I called Jane Hulbert and was informed she was on the other line), I started playing the Whois Game. The Whois Game tells you who, if anybody, owns what domain name. For instance, I found out that there is a god, at least on the Internet. (god.com is registered to Guaranteed Online Delivery in Cambridge, Massachusetts.) There's also plenty of sex and rock, if not roll. (Sex.com is registered to Online Classifieds Inc. of San Francisco, and rock.net is registered by Rocknet of Cupertino, California.)

From most Unix Internet shell accounts, you can easily play the Whois Game. From your shell prompt just type, "whois ".

If you type $whois nbc.com, within a few seconds the InterNIC registry will be fingered and you'll see:

National Broadcasting Company Inc.
(NBC-DOM)
30 Rockefeller Plaza
New York, NY 10112

plus some other administrative stuff that meant little to me but would probably help a system administrator, lawyer, or someone who spends far too much time in front of the computer and ought to get out more.

While NBC also has an Internet e-mail address for *Nightly News*, the other three networks haven't even registered their domain names.

But other people have: as I write this, abc.com is registered to ABC Design in Seattle; cbs.com is registered to a consultant in Golden Valley, Minnesota; and fox.com is registered to something called the Flexible Online eXchange, in California. (I couldn't believe that Fox hadn't figured it out. I mean, the Internet was mentioned on an episode of *The Simpsons*, and Rupert Murdoch was smart enough to grab Delphi, the national Internet gateway service. Fox does, in fact, maintain an address at delphi.com, through which viewers can offer feedback.)

The Whois Game is an interesting gauge of who is paying attention to the Big Thing known as the Internet.

In May, I asked a researcher at *Wired* to check the list of Fortune 500 company names against registered domain names and found that only one-third of the Fortune 500 had registered an obvious version of their names. More telling was that 14 percent of America's largest corporations had their net.name snapped up by someone else.

That left more than 50 percent of the Fortune 500 names still available to first-comers. The top 15 companies all had their act together and had registered their domain names. But some other very big companies did not. Those include: Nabisco, Sara Lee, Anheuser-Busch, Kellogg, and Coca-Cola, or even Coke. Ooops. That was just nabbed as I write by one Rajeev Arora in Campbell, California. Way to go, Rajeev! The Pepsi generation, presumably, is more wired, since pepsi.com is registered. A John Sculley legacy?

Of course, some companies were on the Net with nonobvious, unhip addresses at places like America Online and Prodigy.

What will these companies do when they attempt to move onto the Net and reclaim their names? Draft Big Foot letters and lawsuits, I guess.

Which made me think of Jane Hulbert, at McDonald's. I called her again and we finally connected.

She was very apologetic. "I don't have anything for you, and I probably won't have anything for you," she confessed. "I've left a lot of voicemail for people, but no one seems to know anything about it."

Jane Hulbert said she'd keep checking around, but she didn't seem hopeful that we could get to the bottom of this domain-name thing. "You'll probably just have to do your story without it," she said. "It probably won't be the end of the world."

She's probably right. I wondered how long it would take 2.5 InterNIC people to process my application for mcdonalds.com.

Not very, it turns out. About two weeks later, after filling out the Net-available domain-name application form, I got e-mail notification from domreg@internic.net:

"Registration for the domain MCDONALDS .COM has been completed. The InterNIC database has been updated…. The new information will not be visible via WHOIS until the next business day…."

My fingers trembled, as if ripping open a Big Mac. I checked:

$whois mcdonalds.com Domain Name: MCDONALDS.COM Administrative Contact: Quittner, Josh quit@newsday.com

Oh, that's McCool. I feel like McPrometheus. I have stolen McFire.

I need to get comment from someone. But who?

For weeks now, I've been trying to get McJane on the phone, to let her know that I have their name registered if they need it. One week, she's out on vacation. For two others, she's on another line.

Is she avoiding me?

"Can anyone else help you?" someone asks. Yes, I tell her, explaining all over again about the Internet, domain names, the Gold Rush, mcdonalds.com. Still, no one returns my calls. Hamburgers are what makes this country great. Burgers are the backbone of our economy. It's not so far-fetched to think that McDonald's would be out there on the Net; ISDN, after all, was

first used commercially by McDonald's. Also, McD's was expected to perform an online first in August on America Online with a 30-second commercial. I've even heard that the Golden Arches is experimenting with delivery service. What better way to order your Big Mac than over the Net? Over 25 million users served....

This callous indifference to the Internet worries me. Will the Japanese catch on?

Isn't there someone in burgerland who cares?

Hold the pickle, hold the lettuce. You can have it your way, at Burger King!

As I said, there's no burger_king.com either. Still, Burger King seems reasonably wired. The person who answers the phone in communications even has a vague idea about what the Internet is. ("Some kind of information thing, like Prodigy?" she asks. "Yes!" I tell her. "OK, but what does that have to do with Burger King?" she asks. Exactly.) I'm routed to some guy who promises to look into the matter of domain-name registration. A day later, he leaves me voicemail: "I don't have a definitive answer on the Infonet registration," he says. "The closest thing I've got for you is *We are considering it.* But no decision has been made." I'd like to ask him more. Hell, I'd like to see if Burger King is interested in *buying* mcdonalds.com, taking it off my hands, but his message says he will be out for a week or so.

So here's the deal: Let's get interactive. What should I do with mcdonalds.com? You tell me. I could auction it off. I could hold on to it as a trophy, a la Curry and mtv.com. I could set up a Mosaic home page, explaining the difference between McDonald's and Josh "Ronald" Quittner.

Got a suggestion? Send it to ronald@mcdonalds.com.

Joshua Quittner covers cyberspace for Newsday. He's the co-author of Masters of Deception: The Gang that Ruled Cyberspace*, to be published by HarperCollins in January. Andrew Rozmiarek conducted research for this piece.*

Appendix 2

IF WE'RE GOING TO HAVE A WORLD GOVT, I WANT A REVOLUTION FIRST.

David Holtzman, Chairman and CEO of Opion Inc. and former Chief Technology Officer at Network Solutions, Inc., tells ICB, "I've been watching this mess unfold for the last few years. I've probably been in the middle of this more than anyone alive (I designed the SRS, was on the receiving end of most of Postel's calls and pretty much set and negotiated the terms for Amendment 11 to the cooperative agreement with the DOC). It just seems to get worse."

Main Story

ICANN has the potential to turn into the first world regulatory body. By beginning to associate top level domains with content usage, they are putting themselves into the position of being the defacto arbiter of content. This is in addition to what territory that they can grab in the intellectual property world along with WIPO. If all else fails, they can always play games with protocol standards and IP address allocation. I suspect that most people have no clue what this issue is all about, nor care. Remember that Mussolini started with the trains.

I have no problem with authority over critical infrastructure, but there has to be accountability. When I was running the Internic, I was accountable to everyone; investors, my seniors and pretty much anyone who had a domain name and could get through to me. The people involved in this mess by and large seem to have an unhealthily low score on the six-degrees-of-Kevin-Bacon game. There's an old adage about only giving power to those who don't want it. By that standard, many of the ICANN participants should be acting like the cymbal monkey that got the stuffing kicked out of him by the Everready bunny.

If we're going to have a world government, then I want a revolution first. Preferably with some historic event like throwing all the T-1s into Boston harbor. These people are enacting policy, cutting deals with large technology companies and signing things that look suspiciously like treaties with governments and quasi government groups (some of dubious legitimacy).

I'd be a lot more comfortable with some very visible insights into what's going on in ICANN and some good precedent-setting limit making for their "powers". I think that I'd also be happier with some more diverse participation by actual practitioners and a stronger representation by Asian organizations and companies.

I went to school with one of the students killed at Kent State, worked for an military/intelligence agency in my youth and watched as the last administration passed wind while leaving the white house. I never felt paranoia before. I do now.

Appendix 3

Appendix 3 is not easily available in electronic form. If you would like a copy of Jason Krause's article ***ICANN Can't, Critics Say***, I would be happy to fax it to you.   - Kathy

Appendix 4

The Net's Faltering Democracy

By Simson Garfinkel
March 18, 2003

When ICANN's board of directors amended its bylaws last December, it eliminated elections and instituted an advisory committee-at-large whose members -- chosen by other committees -- lack real power.

Complete Story

Critics charge that it is the De Beers of the Internet: an organization that, like the diamond cartel, has created an artificial scarcity to protect a few established players. Worse, they say, whatever claims this body once had to legitimacy were wiped away last year when its board voted to abolish elections.

This faceless power center is the Internet Corporation for Assigned Names and Numbers, or ICANN. And its actions may jeopardize the future of the Internet.

The Internet could evolve into a global commons where people all over the world are free to communicate and interact and to distribute and consume an endless variety of literature and media. Or it could become a tool for enforcing corporate control and governmental censorship. Which direction the Internet takes depends in large part on which policies and technologies ICANN supports.

Many people think the Internet can never be subject to centralized control. Wasn't this global distributed network built to withstand a thermonuclear attack? Doesn't it treat censorship as damage and route around it? So goes popular Net mythology. But in reality, the Internet is a human institution. And like a corporation, nation, or family, it can be led astray.

Global communication requires global standards, and it is here that the ICANN has its grip on the system's choke point. This company sets rules that govern the worldwide assignment of all-important domain names. Its rules are incorporated into contracts and passed on to anybody who gets a dot-com, dot-net, dot-org, or dot-info domain. The best-known of these rules is the Uniform Domain Name Dispute Resolution Policy. If you have a top-level domain name Latest News about domain name, you've agreed to this policy.

ICANN's glacial pace for establishing new top-level domains has been a great help to domain registrars such as VeriSign: they profit from the lack of competition. Because there is a limited number of registrars and a limited number of top-level domains, the worldwide domain name business is directed to the incumbents. The dispute resolution policy creates procedures that can be used to seize a domain name from one organization and hand it to another. This policy has been widely hailed as a boon for trademark holders worldwide.

ICANN's second mode of control is in its ultimate allotment of Internet Protocol addresses -- the Internet's equivalent of phone numbers. Theoretically, control of domain names and Internet addresses could be exploited for purposes that range from stifling competition among Internet service providers to shutting down an entire country's access to the Net. Imagine if instead of having to take Napster to court, the recording industry had been able to bypass the courts and shut down Napster simply by nullifying its domain name and addresses.

None of this would be a big deal if we were talking about an international organization whose policymaking machinery was responsive to the needs of Internet users. But that's not the case: ICANN, a private corporation, is chartered by the state of California and answerable to no one. It is an outgrowth of the Clinton administration's attempts to privatize control of the Internet; ICANN's authority comes from a "memorandum of understanding" with the U.S. Department of Commerce Latest News about U.S. Department of Commerce. Handed a letter of agreement and a board of directors, the corporation was told to go forth and make policy.

The one attribute the U.S. government couldn't confer on this outfit was legitimacy. The Internet is supposed to be a global resource, so ICANN's original plan called for Internet users worldwide to elect nine at-large directors. Those directors, together with nine other directors appointed by important Internet interest groups, would ultimately craft the policy of the global information infrastructure.

ICANN was designed to have the efficiency of private enterprise, but it was somehow supposed to acquire the legitimacy of an elected government. Alas, this proved to be an impossible task. The election was a flop. Voter registration took place in the summer of 2000. ICANN says 158,000 Internet users -- far more than had been expected -- tried to register. Only 75,000 of them completed the elaborate verification process, which entailed getting a personal identification number by e-mail and then typing it into a Web site. And in the end, only 34,000 people voted in October 2000. But those numbers actually overstate the level of user participation: in North America, according to Election.com, the company hired to run the election, a mere 3,449 votes were cast. Karl Auerbach, the candidate elected to represent the United States and Canada, received 1,725 of those votes. Although that's a majority, it's an exceedingly tiny fraction of the Internet's user population.

But ICANN need not worry about more sham elections. When the company's board of directors amended its bylaws last December, it eliminated elections and instituted an advisory committee-at-large whose members -- chosen by other committees -- lack real power. Maybe that's okay. "ICANN is not an experiment in global online democracy," says Stuart Lynn, ICANN's president and CEO. "So the board decided that, at least for now, elections were not to go on."

Perhaps ICANN serves as a model for systematically shutting the public out of messy policy debates and letting the appointed representatives of global business take over.

Perhaps democracy is overrated.