A Prescription To Promote The Progress of Science and Useful Arts

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A Short Trip Into the Near Future

Imagine an evening in the near future. We tune our TV to the evening news. The lights come up on the anchor. He picks up his blue sheet and begins to read:

> Today the United States Department of Commerce announced that it has completed the privatization of the Internet. A department spokesman said that the United States has handed control of the Internet to the Internet Corporation for Assigned Names and Numbers, more popularly known as ICANN.
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> Experts indicate that as a result, ICANN will become the private government of the Internet. And, if ICANN's past is any guide, it can be anticipated that the owners of intellectual property will continue to be ICANN's primary beneficiaries. ICANN is expected to continue to promulgate rules that require that Internet innovation be forbidden if anyone anywhere can conjure up any real or imagined risk to the intellectual property status quo. In addition, ICANN's rules are expected to accelerate the transformation of the Internet into a 1950's style hyper-regulated industry in which change is to be shunned and innovation discouraged.
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> As a result large businesses are expected to reap considerable short-term gains. But the long-term picture is not so rosy.
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> According to analysts, ICANN's emphasis on "today's technology forever" will drive investors into more innovative areas such as biotech or coal mining. Investment in Internet technology will fall to new lows further damaging an already weak segment of the economy. However those same analysts say that in the very long term, ICANN's policies may combine with other forces and cause the Internet to shatter into distinct segments, some of which may declare their independence from ICANN and resume the technological innovation and growth of services that occurred during the 1990's.

Is This Future A Real Possibility?

There are reasons to be fearful that our imaginary look into the future may come to pass.

Let us take a moment to examine some of those reasons:

ICANN – the Internet Corporation for Assigned Names and Numbers – is a private government organization (PGO). ICANN is a predominately non-elected body that is

responsive primarily to those industry groups that stand to gain by ICANN's decisions. ICANN is effectively accountable to no one.

ICANN has created a worldwide system of trademark law that supersedes the laws of individual nations. This Lex-ICANNia accords new rights to trademark owners that are unprecedented not only in practice but unprecedented even as possibilities discussed in academic or popular literature.

ICANN's treatment of trademarks eliminates most of the checks and balances that have allowed peaceful coexistence of trademarks and the human need to name our things, our beliefs, our associations, and our selves. Not being content with being merely a legislature, ICANN has established its own judicial system that is structurally biased in favor of owners of trademarks, lacks internal processes of review, and is daily creating an ad hoc jurisprudence that would appall even Judge Roy Bean.

The Executive branch of the United States government appears to be cheering ICANN along in this endeavor with only the mildest of objection from the Legislative Branch despite some very significant questions concerning the legitimacy of the government's actions.[1]

The near-deification of trademarks at the hands of ICANN is echoed by certain new Federal statutes that extend the term of copyrights to a degree that makes it hard not to laugh when one hears claims that such terms actually comport with the Constitutional requirement that such laws actually "*promote* the Progress of Science and useful Arts, by securing *for limited Times to Authors and Inventors* the exclusive Right to their respective Writings and Discoveries".

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[1] A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 **Duke L.J.** 17 (2000), available online http://personal.law.miami.edu/~froomkin/articles/icann.pdf

Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You – Fool Us Twice Shame on Us: What We Can Learn From the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 **Wash. U.L.Q.** 89 (2001), available online http://papers.ssrn.com/sol3/papers.cfm?abstract_id=260834

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David G. Post, *Governing Cyberspace, or Where is James Madison When We Need Him*?, available online http://www.temple.edu/lawschool/dpost/comment1.html

Mark A.Lemley & A. Michael Froomkin, *ICANN and Antitrust*, draft available online http://personal.law.miami.edu/~froomkin/articles/icann-antitrust.pdf

Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 **U. Colo. L. Rev.** 1263 (2000), available online http://papers.ssrn.com/sol3/papers.cfm?abstract_id=228466

David R. Johnson & Susan P. Crawford, *What's Wrong With ICANN? And How to Fix It*, ICANNWatch, August 13, 2000, available online http://www.icannwatch.org/archive/whats_wrong_with_icann.htm

Why The Intellectual Property Community Should Be Concerned

The present regime of ICANN is a boon to intellectual property – ICANN provides a fast, inexpensive and essentially borderless mechanism for those claiming trademarks to pursue remedies against those who have Internet domain names that are accused of transgressing against the mark.

That seems like a bonanza indeed. But there is a catch. Intellectual property is ultimately grounded on the bedrock of human creativity. As the US Constitution recognizes, such creativity requires protection so that the humans who are being creative will have an incentive to undertake the work and risk that goes into creative efforts.

Whether a right be based on trademark, copyright, or patent there is usually an ongoing need for fresh infusions of creativity – in the absence of innovation these rights may become commercially stale even if they remain legally viable.

Yet, one of our most fruitful sources of innovation during the last half decade, the Internet, is in great danger of becoming stagnant.

One need only witness ICANN's resistance to any evolution of Internet naming systems by anyone outside of ICANN's control to recognize that ICANN has become a very conservative force with a deep commitment to the preservation of the technical status quo and the preservation of ICANN's authority. Just as AT&T and the FCC used technobabble to impede Hush-A-Phone in the early 1950's[2], ICANN is not above creating a miasma of faux techno-noise to create Fear, Uncertainty, and Doubt (FUD) about technologies[3] or entities[4] that could cause ICANN's authority to be diminished.

ICANN has upset the balance that has existed between creativity and ownership of the thing created. ICANN has removed part of the incentive to create. Why should

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[2] *Hush-A-Phone Corporation v. United States*, 99 U.S. App. D.C. 190; 238 F.2d 266; 1956 U.S. App. LEXIS 4023, available online http://www.cavebear.com/ialc/hush-a-phone.htm

The Hush-A-Phone case is particularly relevant to ICANN. At the time of the Hush-A-Phone case, AT&T was the dominant telephone company in the United States. And the FCC was a regulatory body whose job was, in part, to oversee AT&T. It was AT&T's policy to oppose any device that could be attached to the telephone system on the grounds that such devices could damage the telephone network – a claim not unlike ICANN's repeated claim that this or that use of Internet Standards could harm the "stability of the Internet". The Hush-A-Phone company produced a simple Bakelite and aluminum widget that clamped to the mouthpiece of a telephone – much like one uses one's hand – to focus the voice into the microphone and to avoid others from overhearing. This was quite necessary in the days of the old candlestick style telephones and is an etiquette that has been nearly forgotten by present cell-phone users. AT&T, backed by the FCC, tried to suppress the Hush-A-Phone. The Hush-A-Phone was finally vindicated when a Federal appellate court recognized that the Hush-A-Phone device was essentially harmless and that AT&T and the FCC were engaged more in a self-protective charade than in making a legitimate technical argument.

Hush-A-Phone is relevant to ICANN in that it demonstrates how even those who are "technical can become quite reactionary in the defense of technology-that-is against technology-yet-to-be.

[3] ICP-3: *A Unique, Authoritative Root for the DNS*, available online http://www.icann.org/icp/icp-3.htm. Despite the claim that this document represents ICANN policy, it is a document that was simply declared by fiat by ICANN's management.

[4] See Letter from Daniel Scott Schecter, Esq. to ICANN Board (16 July 2001) demanding that ICANN publicly retract alleged defamatory and libelous statements and refrain from other actions, available online http://www.icann.org/correspondence/schecter-letter-to-icann-16jul01.htm

someone with a new idea try to swim against the tide created by ICANN? Many potential Internet innovators are coming to the conclusion that even if they do create something good, it will simply be expropriated as the result of overbroad patents or the ever-expanding scope of copyright and trademark.

Those who measure their worth by their intellectual property portfolios might stop to consider how their net worth might erode if their portfolio ceases to be refreshed by the inflow of new ideas as those who have previously opted to reach for the brass ring provided by the traditional laws of intellectual property decide to forego the creative effort because they perceive that even if they do invent they will lose the benefit of their efforts.

This is the conundrum presented by ICANN to the Intellectual Property Community – Should that community opt for short-term gains by locking down the status quo via PGOs such as ICANN. Or should that community take a longer-term view by accepting some reduction in current valuation as a price to incentivize innovation of those things that will fill the portfolios-yet-to-be?

It is the opinion of this writer that the Internet is still an extremely nascent technology. The Internet could, if it is not transformed into a stunted bonsai, grow and evolve in ways that we cannot guess. We have much to lose from short-term thinking and much to gain by allowing the Internet the time and incentives it needs to mature and to create a much richer body of creative wealth than we had even in the wild days of 1999 and 2000.

Public Control Of Private Governmental Organizations (PGOs)

For the rest of this article I'd like to focus on one question: What steps can and ought to be taken to introduce public control over PGOs such as ICANN?

This question does not directly face the issue raised during the earlier part of this article. Rather than dealing directly with that question, I am making an assumption that better answers to that question will obtain as the indirect result of better public control of PGOs.

Note that I use the word "control" rather than the weaker words "open", "transparent", or "accountable". The reason that I chose the stronger word "control" is that it appears that the weaker words are too easily reduced to meaningless mush by PGO's that chose to dance the semantic samba that has been perfected by ICANN.

When I use the word "control" I mean that there exist unbreakable strings through which the public, and even aggrieved individuals, can call the PGO onto the carpet and make a demand for information or conformance to procedures that is backed by easily invoked and easily affordable legal processes and coercions.

Some readers may react negatively to the strength of these constraints on a PGO. Three years ago I might have agreed; I would have wondered how any entity could operate when always under such a sword of Damocles. However, my experience with ICANN has changed my view – whereas I had previously been somewhat sympathetic to the view that a PGO needs some protection from the public, my view is now the converse. I am now more concerned with how one protects the public from a renegade PGO. PGOs exist to benefit the public not vice versa. Why should the public good be sacrificed simply to make a PGO run more smoothly? PGOs should expect that the costs of public accountability are simply an intrinsic part of being a PGO.

Prescriptions To Control PGOs

The following list of suggestions are derived from the concepts of "open", "transparent", and "accountable" behavior coupled with the idea that even if a PGO were to go to far,

its errors ought not to easily ossify into immovable, permanent institutions. And one more concept is thrown in for good measure – limited finances tend to mean limited behavior.

Before beginning, let's revisit what the words "open", "transparent", and "accountable" mean.

An "open" process is one in which all interested parties can participate in a meaningful way and as equals to all other parties.

A "transparent" process is one in which the entire decision making process, from inception to closure, is revealed and recorded. To be fully transparent, a process must reveal inputs, issues, criteria, biases, misunderstandings, evolution of decision maker positions, compromises, votes taken, etc, etc.

An accountable decision maker is one who is both identifiable and can be held to account for his/her decisions. Board members are typically made accountable by elections and recalls. This assumes, of course, that there actually is an electorate. And it further assumes the electorate can obtain enough information to evaluate how their board members have performed.

The traditional corporate structure, even the non-profit/public-benefit structure, seems inadequate for PGO's. Two changes seem particularly important:

- Most PGO's are probably going to be organized under the non-profit or public-benefit corporation laws of some jurisdiction. And most of those laws provide that the Directors owe a duty of loyalty to the corporation and not necessarily owe a similar duty to the public. This creates a situation in which a Director may feel constrained from taking steps that he or she knows will benefit the public interest that the PGO is intended to serve but which may not necessarily be consistent with a narrow construction of what is the PGO's *corporate* interest.

  To alleviate this situation the organic documents of a PGO must be drafted to clearly indicate that matters that are in the public interest are not adverse to the PGO's corporate interest and that consequently no Director who promotes the public interest may thereby be held to be in violation of that Director's duties to the corporation. The PGO must not be allowed the ability to alter these organic documents except through some sort of extraordinary process in which the public is deeply involved and in which specific public approval is required.

- A new body, a body that is a peer to the Board of Directors, must be created that has a clear responsibility to ask and answer the question of whether the PGO is adhering to its public-benefit purposes. This new body must have the power to act independently from the Board and from PGO management to investigate complaints and to take remedial action, even if that action makes use of corporate assets and conflicts with, or even supersedes, actions of the PGO's Board.

A PGO's public interest obligations as well as its limitations must be very clearly defined in its organic documents. All parties who are effected by the PGO or who are its

beneficiaries must have unambiguous legal standing to invoke those remedies that States have found appropriate.[5]

It should be mandatory that everything a PGO does and every document it creates should be promptly and permanently published on the world-wide-web. The only exceptions would be a very few items specifically defined on an extremely short list.

Except for exigent matters, the PGO must make decisions only through the process of a properly scheduled and properly noticed meeting of the full governing body.

No decision of a PGO ought to last indefinitely. Sunset periods should be automatically imposed on all decisions. And there should be strong barriers to prevent thoughtless or near-automatic renewal. (E.g. renewal of a previously adopted decision ought to require at least the same process as was required for initial adoption.)

It has become fashionable to use the word "stakeholder". Yet that word is a euphemism for institutionalizing preferences for certain selected groups and the disenfranchisement of others. It is necessary that a PGO be denied the ability to categorize the parties who may be interested in the PGO's subject matter into PGO defined voting blocs.

The concept of "consensus" must be discarded. Instead PGO's must make all decisions using clearly defined procedures (such as Roberts Rules of Order or an electronic variant[6]) and use counted voting whenever anyone disagrees with a claim of "consensus".

ICANN's need for operational cash very early forced it into a dependency relationship with the Domain Name System registrars and registries that ICANN oversees. A PGO should have extremely limited powers to obtain revenue from those subject to the PGO's decisions.

Conclusion

PGOs are probably going to be with us for at least the next decade, perhaps longer. They are not the panacea that some claim them to be. To the contrary, they represent a danger of government power without constitutional limitation.

ICANN is one of the first such PGO's. ICANN, while appearing to be a valuable resource for the protection of expansive intellectual property rights, contains poisonous seeds that could drive the innovation of the Internet into stagnation and reduce the value of those intellectual property portfolios that ICANN is trying to protect.

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[5] For example, the State of California accords a significant suite of rights to members of public-benefit/non-profit corporation. These include requirements for meetings of the membership; the right to bring derivative actions against the Board or management in the name of the corporation; the right to obtain annual reports, the right to inspect membership lists, accounting books, records, and minutes; the right to amend the Articles or By-Laws; the right to remove some Directors; and the right to question the validity of elections.

It is interesting to note that ICANN has worked very hard to structure itself so that not even one of those rights applies. Whether ICANN has been successful in this effort to shed the obligations imposed by the State is a question that has not yet been tested.

[6] Mark C. Langston has created an excellent first draft of an adaptation of Roberts Rules for an electronic context. It is available online at http://www.bitshift.org/archives/rror.shtml

We can learn from the ICANN experience what kinds of constraints ought to be laid upon PGOs so that they do easily not turn into the kinds of regulatory bodies that ossify economic and technical progress.

A key to those constraints is the recognition that Private Governmental Organizations, such as ICANN, exist for the public benefit – the public does not exist for the benefit of the PGO. Thus we must begin to recognize that the efficiency and speed of a PGO is not necessarily the paramount concern, quite the contrary – It must be understood that the cost of public accountability is intrinsic to the operation of a PGO and is not something that a PGO should be permitted to easily shed.