
RUNNING AMUCK: USING THE DEBACLE OF RECENT TOP LEVEL DOMAIN EXPANSIONS TO ARGUE FOR GREATER GOVERNMENTAL PARTICIPATION IN DNS MANAGEMENT

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I. INTRODUCTION

In the few decades since the Internet was opened to the public, common website names have become a part of everyday discourse. These web addresses have evolved from their original purpose—directing computers to their proper destination¹—and have assumed branded identities of their own. Amazon, Facebook, and Google are examples that quickly come to mind. It is difficult to imagine that these corporate names likely would not receive the recognition they do today without the useful services their websites provide. However, they would carry even less meaning were it not for the Domain Name System (“DNS”), which translates these names and terms into the technical Internet addresses that underlie each website (or “domain”) name.² Today, these unique domain names offer value to their owners and are easily recognized by everyday Internet users.³

Yet, while a user may associate a corporate name, such as Amazon, with its

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¹ See John Hines, Jr., *Anatomy of a Domain Name: Property, Contract or What?*, SACHNOFF & WEAVER MEDIA (June 2001), <http://commns.org/UTbv7K>.

² See *id.* (The DNS translates easily remembered words—“names”—into the more difficult to remember [Internet Protocol] addresses. Practically everyone uses the shorthand “domain names”).

³ See *id.*

website's services, when seeking to actually access these websites, users must be more formal when directing their computers to the desired website. For example, users are able to access Amazon's website by entering "http://www.amazon.com" into their browsers. Today's Internet browsing software commonly allows users to drop the "www-dot" or the "http://," but they must always include a final suffix: edu.com, .org, .net, and .edu—to name a few. These suffixes represent what are known as "top level domains"⁴ and serve to direct Internet traffic to the proper locations.⁵

As the naming system exists today, there are twenty-two "generic" top level domains ("gTLDs").⁶ Only four of these are open to the general public for the registration of domain names;⁷ one of them, .com, makes up the vast majority of registered domain names.⁸ Recently, the Internet Corporation for Assigned Names and Numbers ("ICANN"), the organization that oversees the policies and technical management of the DNS,⁹ has approved an unprecedented expansion of the number of gTLDs.¹⁰ It was predicted that the new program would create as many as 1,500 top level domains ("TLDs") over the next several years that would compete with the popular .com.¹¹ According to ICANN, "[n]ew gTLDs are being introduced because *the community has asked for*

⁴ See discussion *infra* Part II.A.

⁵ See discussion *infra* Part II.A.

⁶ *Internet domain names: What's in a gTLD?*, ECONOMIST BLOG (Jan. 11, 2012, 9:16 PM), <http://commcns.org/10hA1WE>. Additionally, there are several hundred two-letter, country code top-level domains ("ccTLDs") that are based on the list of country codes designated in ISO-3166-1. ICANN, ICP-1: INTERNET DOMAIN NAME SYSTEM STRUCTURE AND DELEGATION (ccTLD ADMINISTRATION AND DELEGATION) (May 1999), available at <http://commcns.org/102jaCG>.

⁷ *Internet domain names: What's in a gTLD?*, *supra* note 6 (the remaining gTLDs are reserved for specific users or communities, such as .edu for universities in the United States, .gov for the U.S. government, and .xxx for the adult entertainment industry.).

⁸ MICHAEL L. KATZ, GREGORY L. ROSTON & THERESA SULLIVAN, AN ECONOMIC FRAMEWORK FOR THE ANALYSIS OF THE EXPANSION OF GENERIC TOP-LEVEL DOMAIN NAMES, fig.1 (June 2010), available at <http://commcns.org/W9cYqI>.

⁹ *Welcome to ICANN!*, ICANN, <http://commcns.org/XhyrxD> (last visited Nov. 10, 2012) ("[T]he Internet Corporation for Assigned Names and Numbers (ICANN) coordinates the Domain Name System (DNS), Internet Protocol (IP) addresses, space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions.").

¹⁰ See Press Release, Internet Corp. for Assigned Names & Nos., ICANN Approves Historic Change to Internet's Domain Name System (June 20, 2011), available at <http://commcns.org/SQQ37K>.

¹¹ *Internet domain names: What's in a gTLD?*, *supra* note 6; Chris Sherman, *What You Need to Know About the New Top Level Domains*, MARKETING LAND (Jan. 11, 2012, 7:01 PM), <http://commcns.org/WKWBjo> ("ICANN plans to limit the number of new gTLDs to no more than 1,000 per year."); Elisa Cooper, *New Top Level Domains Application Metering—Figure It Out ICANN!*, CIRCLEID (Aug. 2, 2012, 2:53 PM), <http://commcns.org/Va3Ffr> (these estimates were not far off, as ICANN received 1,930 applications, 1,409 of them unique).

them. The launch of the new [gTLD] program will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only [twenty-two] gTLDs."¹²

While ICANN believes that the expansion program will benefit Internet users, the decision to launch the program has been loudly criticized.¹³ In a hearing before a House of Representatives Judiciary Subcommittee, Chairman of the Federal Trade Commission ("FTC") Jon Leibowitz said that the expansion could be a "disaster."¹⁴ Moreover, an international coalition of over 150 trade associations and major corporations petitioned the U.S. Department of Commerce to intervene and "persuade" ICANN to delay the launch of the gTLD program.¹⁵ Trade associations and the FTC argue that the program imposes huge costs on trademark owners, does little to protect consumers from fraud, and will exacerbate existing enforcement problems within ICANN itself.¹⁶

The Department of Commerce has a unique relationship with ICANN. ICANN operates under the auspices of an agreement with the U.S. Department of Commerce, known as the Affirmation of Commitments, whereby ICANN has promised to act in the public interest and make DNS policy decisions in a transparent, bottom-up consensus-driven process.¹⁷ However, the Affirmation is silent as to the Commerce Department's ability to overturn ICANN decisions,¹⁸ leaving some to argue that ICANN is accountable to no one.¹⁹

¹² ICANN, ICANN BOARD RATIONALES FOR THE APPROVAL OF THE LAUNCH OF THE NEW gTLD PROGRAM 4 (2011), available at <http://commcns.org/10CbQn6> (emphasis added).

¹³ See, e.g., David Rowan, *It's Time to Place the Web in Safer Hands*, WIRED UK (Jan. 12, 2012), <http://commcns.org/U4doB8> (discussing high application fees, conflicts of interest within ICANN, and the program's potential to create consumer confusion and vastly increase cybersquatting).

¹⁴ *Oversight of the Antitrust Enforcement Agencies: Hearing Before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 56 (2011) (statement of Chairman Jon Leibowitz, Fed. Trade Comm'n) ("[W]e are very, very concerned that this rollout of the new gTLDs has the potential to be a disaster for consumers and for businesses. . . . We see enormous costs here to consumers and businesses and not a lot of benefit.").

¹⁵ Petition to Secretary John Bryson, U.S. Dep't of Commerce, from Coalition for Responsible Internet Domain Oversight (Nov. 10, 2011), available at <http://commcns.org/XhyYzx>.

¹⁶ See Letter from Chairman Jon Leibowitz, et al., Federal Trade Comm'n, to Stephen D. Crocker, Chairman of the Bd. of Dirs., & Rod Beckstrom, President & CEO, Internet Corp. for Assigned Names & Nos. 3-5 (Dec. 16, 2011), available at <http://commcns.org/YbR107> [hereinafter Leibowitz Letter]; see also Letter from Robert D. Liodice, President & CEO, Ass'n of Nat'l Advertisers, to Rod Beckstrom, President, Internet Corp. for Assigned Names & Nos. (Aug. 4, 2011), available at <http://commcns.org/W9dipw>.

¹⁷ AFFIRMATION OF COMMITMENTS BY THE U.S. DEP'T OF COMMERCE AND THE INTERNET CORP. FOR ASSIGNED NAMES AND NOS. ¶¶ 3-4, 7-9 (2009) [hereinafter AFFIRMATION OF COMMITMENTS], available at <http://commcns.org/XH4AAS>.

¹⁸ See AFFIRMATION OF COMMITMENTS, *supra* note 17 (providing no remedies for either

This Comment argues that greater oversight of ICANN's decision-making is necessary and that that role should be played by either the Department of Commerce or, preferably, by a stronger Governmental Advisory Committee within ICANN. Part II will examine the DNS and the creation of ICANN, both of which helped to shape the controversy over the gTLD expansion program. Part III will contrast the expansion of gTLDs while ICANN was under the Department of Commerce's supervision with expansion since ICANN gained autonomy through the Affirmation of Commitments. This Comment ultimately concludes that, while ICANN was created to give the private sector control of the DNS, the government should assume a stronger role in the multi-stakeholder management of the DNS in order to ensure that management decisions better reflect the public interest and that the DNS' public-facing steward, ICANN, is held accountable for decisions that will impact the Internet's global user base.

II. THE DOMAIN NAME SYSTEM AND HOW IT IS ADMINISTERED

The DNS was developed, in part, to simplify how Internet users navigate the Internet. However, its administration has been mired in controversy and debate since the mid-1990s.

A. Creation of the Domain Name System

The Internet, as we know it today, consists of a network of networks, which allows for the exchange of information by all connected devices, regardless of whether they are laptops, servers, or smart phones.²⁰ This transmission of information between devices is possible because all of the interconnected devices utilize a common protocol and addressing scheme: TCP/IP.²¹ Each computer connected to the Internet is assigned a unique series of numbers and decimal points,²² called an Internet Protocol Address ("IP Address").²³ The

party if the Affirmation is breached); see also A. Michael Froomkin, *Almost Free: An Analysis of ICANN's 'Affirmation of Commitments'*, 9 J. ON TELECOMM. & HIGH TECH. L. 187, 203 (2011) [hereinafter Froomkin, *Almost Free*] ("Symbolism may indeed be the strongest affirmative characteristic of the Affirmation: nothing in the Affirmation, nor anything else ICANN has said on the subject, suggests that any of these promises are enforceable by the U.S. Government, much less by an interested third party.").

¹⁹ See Froomkin, *Almost Free*, *supra* note 18, at 208-9.

²⁰ JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 121 (2007).

²¹ *Id.* (explaining "'Transmission Control Protocol' and 'Internet Protocol'").

²² Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 194 (2000).

²³ Under the most widely used version of Internet Protocol Addressing, a typical IP

TCP/IP protocol ensures that the information packets traveling on the physical layers of the Internet reach their intended destination, contain the information requested, and return that information to the requesting device.²⁴ Thus, under this system, if users want to access information located on another computer, they would, in theory, direct their device to the IP Address of that computer.²⁵ However, having to remember an IP Address poses a difficult issue: remembering a string of seemingly random numbers.²⁶ A system that is easier to remember was needed.

In the early 1980s, local network administrators were able to name a device connected to their network, such as a university's computer network, and link that named device to its unique IP Address.²⁷ However, as networks interconnected (into the Internet's modern network-of-networks) and the number of connected devices grew, this naming system became unworkable.²⁸ To address this problem, leading researchers developed the DNS.²⁹

The DNS functions as a tree-shaped hierarchy.³⁰ The trunk or main branches of the tree are the top-level domains.³¹ The TLDs are then subdivided into second-level domains (forming branches off of the top level),³² which can be further divided into third-level domains and beyond.³³ Under the original plan, the DNS had only seven gTLDs.³⁴ The creators intended for users to select a top level based upon their organizational purpose, such as .com for commercial users or .edu for educational purposes [consider for explanatory purposes].³⁵ In addition to the gTLDs, each country would have its own TLD domain based on its two-letter country code.³⁶ Finally, each TLD (or branch) would connect to an authoritative root server system, which would "list[] the TLDs so that an

address appears as: 98.37.241.30. *See, e.g.*, Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826, 8826 (proposed Feb. 20, 1998) [hereinafter Green Paper].

²⁴ NÜECHTERLEIN & WEISER, *supra* note 20, at 122-23 (discussing the transmission of digital information via "packets").

²⁵ *Id.* at 121-22.

²⁶ *See* Hines, *supra* note 1.

²⁷ Weinberg, *supra* note 22, at 195.

²⁸ *Id.*; PAUL MOCKAPETRIS, RFC 1034, DOMAIN NAMES—CONCEPTS AND FACILITIES § 2.1 (Nov. 1987), available at <http://commens.org/102kRQk>.

²⁹ MOCKAPETRIS, *supra* note 28.

³⁰ *Id.* §3.1 (explaining that within the tree-branch hierarchy, "[e]ach node and leaf on the tree corresponds to a resource set.").

³¹ J. POSTEL & J. REYNOLDS, RFC 920, DOMAIN REQUIREMENTS 1 (Oct. 1984), available at <http://commens.org/U4ecGj>.

³² *Id.* at 8.

³³ *Id.* at 8-9; Weinberg, *supra* note 22, at 196.

³⁴ Weinberg, *supra* note 22, at 196. The original gTLDs were .com, .net, .org, .edu, .gov, .mil and .int. *Id.*

³⁵ *Id.*

³⁶ POSTEL & REYNOLDS, *supra* note 31, at 2.

Internet message [could] be routed to its destination.”³⁷ Under this naming scheme, “the labels that compose a domain name are printed or read left to right, from the most specific (lowest, farthest from the root) to the least specific (highest, closest to the root),” thereby forming the Internet addresses known today.³⁸ The DNS thus created a single system for authoritatively linking IP Addresses to terms consumers can remember and use with ease.³⁹

For the DNS to work properly, all queries or searches to link a particular name to a particular IP Number must be coordinated through a single authoritative system.⁴⁰ If there were multiple root servers, searches for a particular name could lead users to different IP Numbers, and ultimately provide the user with the wrong information.⁴¹ Accordingly, the global Internet relies on a single root server system. Additionally, and of equal importance to a properly functioning system, the operating policies and procedures must be coherent and determined in a responsible manner that serves the interests of the worldwide Internet user base.

B. The Quandary over Management of the Domain Name System

The U.S. government was instrumental in funding much of the research that led to the development of the Internet.⁴² Thus, throughout the 1980s and late 1990s, many of the operational aspects of this new communications tool were performed by entities under contract with federal agencies.⁴³ The initial funding, along with these contracts and agreements, seemingly gave the U.S. government *de facto* control over the DNS.⁴⁴ However, as the number of users and countries accessing the Internet began to grow, this management structure—like the naming system that existed before the DNS—began to show signs of

³⁷ Green Paper, *supra* note 23, at 8826.

³⁸ MOCKAPETRIS, *supra* note 28, §3.1.

³⁹ Green Paper, *supra* note 23, at 8826.

⁴⁰ See ICANN, ICP-3: A UNIQUE, AUTHORITATIVE ROOT FOR THE DNS (July 9, 2001), available at <http://commcns.org/V8rErz>.

⁴¹ See *id.* (“The presence of alternate public DNS roots can result in different answers being given to the same DNS query issued from different computers on the Internet, depending on whether the inquiring computer is programmed to access the authoritative root or a particular one of the alternate roots.”).

⁴² Green Paper, *supra* note 23, at 8826.

⁴³ *Id.* For example, the task of allocating blocks of IP Addresses was performed by the Stanford Research Institute under contract with the Department of Defense, and later by the National Science Foundation. The task of registering second level domains within the TLDs open to the public was done through a cooperative agreement between the National Science Foundation and a company known as Network Solutions, Inc. See Weinberg, *supra* note 22, at 198-99.

⁴⁴ See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 43-45 (2000) [hereinafter Froomkin, *Wrong Turn*].

stress.⁴⁵

Through an agreement with the National Science Foundation (“NSF”), a Virginia company called Network Solutions, Inc. handled the registration of new second-level domains within the .com, .org, .net, and .edu TLDs.⁴⁶ Network Solutions also assumed responsibility for the technical management of the key root server system.⁴⁷ At the time the parties entered into the agreement, the Internet was still a research tool, and, as such, NSF underwrote both the upkeep costs of top-level databases and the expenses of new second-level registrations.⁴⁸ But as use of the Internet became more commercialized and more users registered new domains, the burden of underwriting registrations became prohibitive.⁴⁹ Consequently, NSF amended its agreement with Network Solutions, allowing the company to charge an annual fee of \$50 per domain name.⁵⁰

These new fees, along with Network Solutions’ restrictive domain name authorization practices and its monopolistic hold over domain registration, prompted the technical and legal communities to form the Internet Ad Hoc Committee (“IAHC”).⁵¹ The IAHC proposed a new framework for resolving policy questions, adding new TLDs, and increasing competition in the registration of second-level domains.⁵² But the IAHC proposals were widely criticized.⁵³ Critics saw the proposals as insular, hostile to the open nature of the

⁴⁵ See Weinberg, *supra* note 22, at 199-200; see also Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,742 (June 10, 1998) [hereinafter White Paper] (listing the pressures exerted on the old management structure, which prompted the call for change).

⁴⁶ See White Paper, *supra* note 45, at 31,742; Weinberg, *supra* note 22, at 198-99 (summarizing the terms of the NSF and Network Solutions agreement).

⁴⁷ See Weinberg, *supra* note 22, at 198-99. Note, however, that while Network Solutions managed the technical functioning of the root server, policy decisions over IP address distribution and DNS supervision were made by Dr. Jon Postel of the University of Southern California’s Information Sciences Institute (“ISI”). Together, these functions are known as the Internet Assigned Numbers Authority (“IANA”). *Id.* at 194, 198-99; see also White Paper, *supra* note 45, at 31,741 (providing a short and comprehensive overview of IANA’s background).

⁴⁸ See Weinberg, *supra* note 22, at 198-99.

⁴⁹ Nick Wingfield, *NSF Ends Internet Subsidy; Domain Names to Cost \$50*, INFO-WORLD, Sept. 18, 1995, at 8 (noting that the “explosive growth in Internet domains” could not be covered by NSF’s subsidy); see also Request for Comments on the Registration and Administration of Internet Domain Names, 62 Fed. Reg. 35,896, 35,896 (July 2, 1997) [hereinafter Request for Comments, 1997] (“According to Internet Monthly Report, registration of domain names withincom, .net, [and] .org has increased from approximately 400 per month in 1993 to as many as 70,000 per month in 1996.”); Weinberg, *supra* note 22, at 200 (providing an overview of the pressures stemming from the expanding Internet).

⁵⁰ See Weinberg, *supra* note 22, at 200.

⁵¹ See *id.* at 200-01 (discussing, in more depth, the creation of the IAHC).

⁵² See *id.* at 201-02; see also Request for Comments, 1997, *supra* note 49, at 35,896 (noting the government’s efforts to reach a consensus on the proposals and underlying issues to determine what role, if any, it should play).

⁵³ See Weinberg, *supra* note 22, at 202-204.

Internet, and as an usurpation of control over the DNS.⁵⁴

Reacting to this debate and recognizing the Internet as a “medium for commerce, education and communication,” the U.S. government took steps to settle the debate.⁵⁵ The government assembled a working group comprised of representatives from a range of federal agencies to study and resolve these structural issues.⁵⁶ On July 2, 1997, the working group, through the Department of Commerce, issued a Request for Comments seeking public input on how the DNS should be managed.⁵⁷ In this notice, the federal government endorsed the Internet’s recent expansion through the private sector and the “consensus” building approach to Internet policy development.⁵⁸ The notice sought comment on the creation of new gTLDs and proposed several intellectual property dispute resolution mechanisms,⁵⁹ but chiefly, it requested input on the proper organizational framework for a privatized DNS.⁶⁰ The notice set forth the following principles to guide the new system: (i) encourage competition in the domain name registration system; (ii) develop a “consensus-based self-governing mechanism[]” under private sector leadership, with input from governments; (iii) be flexible and acknowledge the inherently global nature of the Internet; (iv) promote the “prompt, fair, and efficient resolution of conflicts” between domain name registrants; and (v) adopt a new policy framework as quickly as these issues permit.⁶¹

Although the notice promulgated specific and concrete principles to guide the managing body, this surety dissipated when discussion turned towards how the manager should be structured. Without offering clear recommendations, the notice posed vague questions, such as whether there were any existing decision-making processes that could serve as models for the new DNS manager.⁶² The notice also solicited comment on the type and “makeup” of the entity that would administer the DNS.⁶³ And, pertinent to this Comment, the notice que-

⁵⁴ *Id.* at 202-204.

⁵⁵ See White Paper, *supra* note 45, at 31,742-44 (summarizing the proposals recommended by Dr. Postel as well as the reasons for the Department of Commerce’s involvement in the DNS management transition).

⁵⁶ Weinberg, *supra* note 22, at 204. Participants included representatives from the “White House Office of Science and Technology Policy, the National Telecommunications and Information Administration, the Patent and Trademark Office, the [NSF], the Department of Defense, the Department of Justice, the Department of State, [and] the Federal Communications Commission.” *Id.*

⁵⁷ See generally Request for Comments, 1997, *supra* note 49.

⁵⁸ *Id.* at 35,896.

⁵⁹ *Id.* at 35,897.

⁶⁰ *Id.*

⁶¹ *Id.* at 35,896.

⁶² *Id.*

⁶³ *Id.*

ried, “How should the transition to any new systems be accomplished?”⁶⁴

During the notice’s comment period, the Commerce Department received an overwhelming response from the public.⁶⁵ In response, the National Telecommunications and Information Administration (“NTIA”) issued a Notice of Proposed Rule Making that outlined “the process by which the Federal government [planned to] transfer management of the Internet DNS to a private not-for-profit corporation.”⁶⁶ This proposal is more commonly referred to as “the Green Paper.”⁶⁷ The proposed rule suggested four principles for DNS management: stability, competition, private bottom-up coordination, and representation reflecting the diversity of Internet users.⁶⁸ The proposed rule also prescribed specific actions to be taken, such as how the new corporation’s board of directors would be chosen and, notably, recommended adding only five new gTLDs.⁶⁹ The new corporation would assess the impact of new gTLDs on the root system and then decide whether to create more gTLDs.⁷⁰

Not surprisingly, the Green Paper was met with strong resistance.⁷¹ Critics attacked its recommendation to create new domains and proclaimed that the government was extending its control by “dictating the details of the new system” without adequately considering international interests.⁷² Following these politically charged criticisms, NTIA abandoned Green Paper Rulemaking and instead, NTIA issued a “Statement of Policy” known as the White Paper.⁷³

⁶⁴ *Id.* at 35,897.

⁶⁵ White Paper, *supra* note 45 (“During the [RFC] comment period, more than 430 comments were received, amounting to some 1500 pages.”).

⁶⁶ Green Paper, *supra* note 23, at 8826.

⁶⁷ White Paper, *supra* note 45, at 31,741.

⁶⁸ Green Paper, *supra* note 23, at 8826-27.

⁶⁹ *Id.* at 8828-29. The proposal reserved the majority of the seats for technical individuals, such as those representing entities that distribute IP Numbers and representatives of registries (entities that administer TLDs), and registrars (entities that register second-level domains). *Id.* at 8828. Despite competing proposals (ranging from unbridled expansion to extremely restricted), the number of new gTLDs was to be initially limited so that the technical, legal, and competitive effects of expansion could be studied. *Id.* at 8829.

⁷⁰ *Id.* at 8829 (“Some believe that anyone should be allowed to create a [TLD] registry. . . Others believe that such a system would be too chaotic . . . [and] it would be more difficult for trademark holders to protect their trademarks if they had to police a large number of [TLDs].”).

⁷¹ See Weinberg, *supra* note 22, at 207 & n.103 (citing responses from various groups opposing the Green Paper’s proposal); see e.g., Comments of Bell Atlantic Corp., Improvement of Technical Mgmt. of Internet Names & Addresses, Docket No. 980212036-8036-01, at 1 (Mar. 23, 1998), available at <http://commcns.org/U4emgR> (“The creation of up to five new generic Top Level domains (gTLDs) is fundamentally flawed and ought to be reconsidered.”).

⁷² *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1666-67 (1999).

⁷³ Froomkin, *Wrong Turn*, *supra* note 44, at 66; see also Weinberg, *supra* note 22, at 207-08 (noting that the White Paper backed away from its earlier proposal to implement five

In the White Paper, the U.S. government acknowledged its desire to privatize the DNS.⁷⁴ Specifically, the United States would “recognize, by entering into agreement with, and to seek international support for, a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the Internet names and address system.”⁷⁵ The White Paper adopted a more hands-off approach and left much of the decision making up to the new corporation.⁷⁶ Under the White Paper, the new corporation would: “(1) Set policy for and direct allocation of IP Number blocks . . . ; (2) Oversee operation of the authoritative Internet root server system; (3) Oversee policy [for adding] new TLDs to the root system; and (4) Coordinate . . . other Internet technical parameters as needed”⁷⁷ The only actual restriction that the White Paper placed on the new corporation was that it should be headquartered and incorporated in the United States.⁷⁸

C. ICANN and the Department of Commerce’s Legal Relationship

The White Paper laid the foundation for what would become ICANN. However, before further examining ICANN’s creation, it is worth noting the legal circumstances surrounding ICANN’s assumption of power over the DNS. NTIA’s White Paper, as discussed above, was simply a statement of policy.⁷⁹ It had no legally binding effect on the federal government.⁸⁰ As Professor Froomkin notes in his exhaustive history of the DNS and the creation of ICANN:

One aspect of the legal history and pre-history of ICANN deserves special mention before embarking on a detailed contractual history. Like the story of Sherlock Holmes’s dog that did not bark in the night, the ICANN story contains a telling absence. The ICANN story lacks a statute. At no time has Congress ever authorized ICANN or the “privatization” of the DNS. [The Department of Commerce] has relied on its general statutory authority to manage and to seek to “privatize” the DNS. As a result, the critical legal documents are all contracts, memoranda of understanding, or other bilateral agreements either between [the Department of Commerce] and contractors, or among government contractors.⁸¹

Even though the Department of Commerce had no statutory or express legal

new TLDs); *see generally* White Paper, *supra* note 45.

⁷⁴ White Paper, *supra* note 45, at 31,749.

⁷⁵ *Id.*

⁷⁶ *Id.* at 31,749-51.

⁷⁷ *Id.* at 31,749.

⁷⁸ *Id.* at 31,750.

⁷⁹ *Id.* at 31,741.

⁸⁰ *Id.* at 31,748 (“[T]his policy statement is not a substantive rule, does not contain mandatory provisions and does not itself have the force and effect of law.”).

⁸¹ Froomkin, *Wrong Turn*, *supra* note 44, at 50-51 (footnote omitted).

authority to privatize the DNS, the process moved forward.⁸² There are two distinct agreements between the Department of Commerce and ICANN. The first agreement transitioned management control of the DNS to ICANN,⁸³ while the second was for the technical performance of the Internet Assigned Numbers Authority (“IANA”) functions, which include, most importantly, distribution of IP Address numbers and processing administrative requests for changes to the DNS root.⁸⁴ While the goal was to transition much of the DNS to the private sector, in practice these agreements provide for both a check on and means of governmental oversight of ICANN’s decisions.⁸⁵

1. The DNS Management Transmission

Shortly after the release of the White Paper, ICANN was formed in California as a “nonprofit public benefit corporation.”⁸⁶ Following a series of negotiations and several amendments to ICANN’s proposed bylaws,⁸⁷ NTIA selected ICANN as the DNS manager contemplated by the White Paper.⁸⁸

As a result, ICANN and the Department of Commerce entered into a Memorandum of Understanding (“MOU”), whereby ICANN and Commerce would essentially perform a “study” on the transition of DNS management.⁸⁹ “[H]owever, the Commerce Department-ICANN [MOU] conveyed very significant authority, because the means by which ICANN would “study” the future privatization of the DNS was by acting as if the DNS were already privatized.”⁹⁰ Nonetheless, the original MOU made no mention of what might happen to ICANN if the Commerce Department decided to terminate the agree-

⁸² In issuing the White Paper, the Department of Commerce relied on its general statutory authority to promote commerce and its ability to engage in joint projects with nonprofit organizations. See 15 U.S.C. §§ 1512, 1525 (2006). The Department also relied on NTIA’s authority to coordinate executive branch telecommunication policies and standards, as well as issue regulations to carry out its responsibilities. See 47 U.S.C. §§ 902(b)(2)(H), 904(c)(1) (2006); see also White Paper, *supra* note 45, at 31,741. However, as discussed, no actual regulation ever issued.

⁸³ See discussion *infra* Part II.C.1.

⁸⁴ See discussion *infra* Part II.C.2.

⁸⁵ At the present time however, only the IANA Functions Contract arguably fulfills this purpose. See *infra* Part II.C.1 (discussing the shortfalls of the Affirmation of Commitments).

⁸⁶ ICANN, ARTICLES OF INCORPORATION FOR INTERNET CORP. FOR ASSIGNED NAMES AND NOS. (AS REVISED) § 3 (Nov. 21, 1998), available at <http://commcns.org/SQSQOV>.

⁸⁷ See Weinberg, *supra* note 22, at 210-11.

⁸⁸ See generally MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEP’T OF COMMERCE AND INTERNET CORP. FOR ASSIGNED NAMES AND NOS. § II.B (1998) [hereinafter U.S. DEP’T OF COMMERCE & ICANN MOU], available at <http://commcns.org/VMJtyC>; see also Froomkin, *Wrong Turn*, *supra* note 44, at 84.

⁸⁹ U.S. DEP’T OF COMMERCE & ICANN MOU, *supra* note 88, § II.B; see also Froomkin, *Wrong Turn*, *supra* note 44, at 84.

⁹⁰ Froomkin, *Wrong Turn*, *supra* note 44, at 84.

ment for any purpose.⁹¹

It was not until almost a year later that the MOU was amended to specifically highlight that ICANN did not have sole authority over the DNS just yet.⁹² This modification provided that, should the Department of Commerce cease to recognize ICANN, the Department would maintain a reversionary interest in the contracts between ICANN and third parties, namely registries and registrars.⁹³ This provision was extremely important, as ICANN has no regulatory powers and instead uses individual contracts to govern these DNS service providers.⁹⁴ The amendment did not infringe on ICANN's flexibility to manage the DNS, but it created an important constraint on the organization; if it failed to act in the public interest, avenues were in place to ensure that ICANN's responsibilities would be smoothly transitioned to a new DNS manager.⁹⁵

The MOU was continuously amended until 2006⁹⁶ when, at the expiration of Amendment Six,⁹⁷ the agreement between ICANN and the Department of Commerce was rebranded as the "Joint Project Agreement" ("JPA").⁹⁸ Throughout the span of both the MOU and the JPA, the arrangement was characterized as a long-term transition process from public control of the DNS to private control.⁹⁹ Similarly, neither the MOU nor the JPA granted ICANN with

⁹¹ Cf. U.S. DEP'T OF COMMERCE & ICANN MOU, *supra* note 88 (making no mention of reasons why the Department of Commerce might terminate the agreement).

⁹² See MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEP'T OF COMMERCE AND INTERNET CORP. FOR ASSIGNED NAMES AND NOS. AMENDMENT 1 §§ 4-5 (1999), *available at* <http://commcns.org/10CdaX4> [hereinafter MOU AMENDMENT 1].

⁹³ See *id.*; see also MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEP'T OF COMMERCE AND INTERNET CORP. FOR ASSIGNED NAMES AND NOS. AMENDMENT 3 § IV (2001), *available at* <http://commcns.org/XH57CM> ("If the DOC withdraws its recognition of ICANN . . . by terminating this MOU, ICANN agrees that it will assign to the DOC any rights that ICANN has in all existing contracts with the registries and registrars."); Froomkin, *Almost Free*, *supra* note 18, at 188.

⁹⁴ See Froomkin, *Wrong Turn*, *supra* note 44, at 108; see also Froomkin, *Almost Free*, *supra* note 18, at 206.

⁹⁵ Had the Commerce Department ever replaced ICANN, the MOU's reversionary interest provision would have ensured that service providers still honored their agreements and provided continuous oversight of them, either by the Commerce Department or the Department's new DNS management designee. Froomkin, *Wrong Turn*, *supra* note 44, at 108 ("Were the U.S. government to transfer its recognition to another authority, the root servers would be under no more legal obligation to recognize that new authority than they were to recognize ICANN, but the move is all but certain.").

⁹⁶ See *ICANN's Major Agreements and Related Reports*, ICANN, <http://commcns.org/102lrO2> (last visited Nov. 10, 2012) (listing the various amendments between November 1998 and September 2006).

⁹⁷ See U.S. DEP'T OF COMMERCE & ICANN MOU, *supra* note 88, § III.B (providing that the agreement would terminate on September 30, 2006).

⁹⁸ See generally JOINT PROJECT AGREEMENT BETWEEN THE U.S. DEP'T OF COMMERCE AND INTERNET CORP. FOR ASSIGNED NAMES AND NOS. (2006), *available at* <http://commcns.org/U4eH2Y>; see also Froomkin, *Almost Free*, *supra* note 18, at 193.

⁹⁹ See *e.g.*, Press Release, Nat'l Telecomm. & Info. Admin., Statement on the Mid-

complete authority over the DNS. Under the JPA, the Commerce Department retained its ability to replace ICANN and to transfer ICANN's contractual interests to a new DNS manager.¹⁰⁰

On September 30, 2009, the JPA was terminated with the signing of the Affirmation of Commitments by both ICANN and the Department of Commerce.¹⁰¹ In effect, the Affirmation concluded the ten-year transition of the DNS management to ICANN.¹⁰² Under the Affirmation, both parties broadly promised to ensure that decisions are made in the public interest, that the security and stability of the DNS is preserved, that competition, consumer trust, and choice are maintained, and that the international community participates in DNS decision making.¹⁰³ In later provisions, each party individually affirmed its dedication to fulfilling the above "commitments."¹⁰⁴ Importantly, however, the Affirmation lacks a way to ensure that the parties implement their commitments.¹⁰⁵

While the Affirmation may have effectively ceded management to an unaccountable ICANN, the Department of Commerce may still have one bargaining chip left in order to ensure that ICANN keeps its promises.

2. *The IANA Functions Contract*

While ICANN may be in charge of DNS policy and management, it is the IANA that keeps the DNS functioning. Generally, IANA performs three main functions.¹⁰⁶ IANA coordinates the assignment of technical protocol parameters,¹⁰⁷ allocates blocks of IP addresses to Regional Internet Registries,¹⁰⁸ and, most relevantly, performs the administrative functions associated with man-

Term Review of the Joint Project Agreement (JPA) Between NTIA and ICANN (Apr. 2, 2008), available at <http://commcns.org/WKXpF3> ("The JPA is a continuation of a series of agreements between the Department and ICANN to facilitate the transition of the technical coordination of the management functions related to the Internet domain name and addressing system (DNS) to the private sector.").

¹⁰⁰ See Froomkin, *Almost Free*, *supra* note 18, at 193.

¹⁰¹ AFFIRMATION OF COMMITMENTS, *supra* note 17, ¶ 1.

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 3.

¹⁰⁴ See e.g., *id.* ¶¶ 4, 6-9.

¹⁰⁵ Froomkin, *Almost Free*, *supra* note 18, at 203 (discussing a lack of enforceability by the Department of Commerce or any other interested party, as well as the "empty threat" of terminating the Affirmation); cf. AFFIRMATION OF COMMITMENTS, *supra* note 17.

¹⁰⁶ See e.g., IANA FUNCTIONS CONTRACT, ORDER NO. 40SBNT057020 § 12.3 (2000), available at <http://commcns.org/VrHjmM> [hereinafter IANA FUNCTIONS CONTRACT, 2000].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Regional Internet Registries (RIRs) are the non-profit organizations that are responsible for distributing IP Addresses on a regional level to Internet service providers and local registries. There are five RIRs. See *Glossary*, ICANN, <http://commcns.org/WKXubl> (last visited Nov. 10, 2012).

agement of the root name server.¹⁰⁹ These root name server tasks are truly administrative. The IANA Functions contractor can only receive and report on requests to modify the root zone file:¹¹⁰ “This function, however, does not include authorizing modifications, additions, or deletions to the root zone file.”¹¹¹ This limitation persists as the Department of Commerce included it in the most recent award of the IANA Functions contract to ICANN.¹¹²

The Department of Commerce has segregated IANA operations. With administrative functions performed by one contractor, the actual root zone servers are maintained through a separate cooperative agreement between NTIA and VeriSign, Inc.¹¹³ Like the IANA Functions contract, VeriSign’s ability to make changes is contractually limited: “While [VeriSign] continues to operate the primary root server, it shall request written direction from an authorized [U.S. Government] official before making or rejecting any modifications, additions or deletions to the root zone file.”¹¹⁴ This requirement is still in effect.¹¹⁵ Through the two IANA contracts, the Commerce Department maintains an important check on the DNS—no change is actually made without governmental approval.

While VeriSign operates the root servers, it is ICANN who, since 2000, has performed the IANA Functions Contract.¹¹⁶ Recognizing that the latest iteration of the contract was set to expire in late 2011, NTIA issued a Notice of Inquiry seeking public comment on ways to improve the IANA Functions Contract.¹¹⁷ NTIA later issued a Further Notice of Inquiry, but this time sought input on a

¹⁰⁹ IANA FUNCTIONS CONTRACT, 2000, *supra* note 106.

¹¹⁰ *Id.*; IANA FUNCTIONS CONTRACT, CONTRACT NO. SA 1301-12-CN-0035 app. 1 (2012), available at <http://commcns.org/Wj2BBc> [hereinafter IANA FUNCTIONS CONTRACT, 2012] (demonstrating how the IANA Functions Contractor processes change requests, provides them to NTIA for approval, and, once approved, how requests are passed on to the technical Root Zone Maintainer to actually make the requested change).

¹¹¹ IANA FUNCTIONS CONTRACT, 2000, *supra* note 106.

¹¹² IANA FUNCTIONS CONTRACT, 2012, *supra* note 110, § C.8.1.

¹¹³ *Verisign Cooperative Agreement*, NTIA, <http://commcns.org/XhAFgz> (last visited Nov. 10, 2012) (“VeriSign manages the authoritative root zone file under the Cooperative Agreement No. NCR 92-18742 with the United States Government. VeriSign’s responsibilities include editing the file to reflect recommended changes, publishing the file, and then distributing the file to the root server operators.”).

¹¹⁴ SPECIAL AWARD CONDITIONS NCR 92-18742, AMENDMENT 11, at 6 (1998), available at <http://commcns.org/V8sEMe>.

¹¹⁵ See IANA FUNCTIONS CONTRACT, 2012, *supra* note 110, § C.8.1 (“This contract does not alter the root zone file responsibilities as set forth in Amendment 11 of the Cooperative Agreement NCR-9218742 between the U.S. Department of Commerce and VeriSign, Inc. . . .”); see also Froomkin, *Almost Free*, *supra* note 18, at 203-04.

¹¹⁶ See *IANA Functions Contract*, NTIA, <http://commcns.org/W9epWg> (last visited Nov. 10, 2012) (listing every NTIA-ICANN contract and amendment since February 2000).

¹¹⁷ Notice of Inquiry, Request for Comments on the Internet Assigned Numbers Authority (IANA) Functions, 76 Fed. Reg. 10,569 (Feb. 25, 2011).

draft statement of work for the contract.¹¹⁸ NTIA's requests for comments should be seen as a reminder to ICANN that the government is still an important player in the DNS.

III. FREE TO DO WHAT IT WANTS? ICANN AND NEW GENERIC TOP LEVEL DOMAINS

The creation of new TLDs has been a point of discussion since the early days of the DNS privatization movement.¹¹⁹ Furthermore, decisions relating to how new gTLDs should be created have generally been contentious.¹²⁰ This Part of the Comment examines how ICANN has and will continue to expand the number of gTLDs under the MOU/JPA regime, as well as its recent decisions under the Affirmation of Commitments.

A. A Measured and Purposeful Approach: gTLD Expansion under the MOU and JPA

The year 2000 marked the first expansion of the gTLD space, when ICANN initiated a "proof of concept program."¹²¹ This initial program only introduced a select number of new gTLDs.¹²² It was designed to test the flexibility of the DNS and to assist ICANN in determining how future expansions should be managed.¹²³

The decision to implement this proof of concept expansion round closely followed the Commerce Department's earlier recommendations. The White Paper advised that "concern for the stability of the system suggests that expan-

¹¹⁸ Further Notice of Inquiry, The Internet Assigned Numbers Authority (IANA) Functions, 76 Fed. Reg. 34,658 (June 14, 2011) [hereinafter IANA Further NOI].

¹¹⁹ See e.g., Weinberg, *supra* note 22, at 201 (discussing the IAHC's suggestion in 1996 to create 150 new gTLDs); see also Green Paper, *supra* note 23, at 8829 (recommending that five new gTLDs be added while the new private sector DNS manager creates a policy for gTLD creation); *Competition, Consumer Trust and Consumer Choice Review*, ICANN, <http://commcns.org/WKXF71> (last visited Nov. 10, 2012) ("ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved . . . will be adequately addressed prior to implementation.").

¹²⁰ See White Paper, *supra* note 45, at 31,741 (noting that NTIA received more than 650 comments in response to the Green Paper); see also *ICANN Generic Top-Level Domains (gTLD): Hearing before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 1-2 (2011) [hereinafter *ICANN gTLD Hearing*] (statement of Rep. Bob Goodlatte, Chair, Subcomm. on Intellectual Prop.) (discussing potential harms of the program and the motives behind it).

¹²¹ *Background Information Regarding Previous New GTLD Application Rounds*, ICANN (Feb. 13, 2008), <http://commcns.org/V8sOmT> [hereinafter *gTLD Background Information*].

¹²² *Id.*

¹²³ *Id.*

sion of gTLDs [should] proceed at a deliberate and controlled pace to allow for evaluation of the impact of the new gTLDs. . . ."¹²⁴ Additionally, the MOU between ICANN and the Commerce Department stated that the creation process should take into account the impact of new gTLDs on the root server system,¹²⁵ the creation of minimum criteria for new gTLD registries,¹²⁶ the costs and benefits to consumers,¹²⁷ and recommendations for protecting intellectual property rights within new gTLDs.¹²⁸

In 1999, ICANN's Domain Name Supporting Organization ("DNSO")¹²⁹ began the process of formulating recommendations for the creation of new gTLDs.¹³⁰ The DNSO formed a Working Group, which debated whether and how new gTLDs should be created.¹³¹ In October of 1999, the Working Group achieved a rough consensus that, first, new gTLDs should be created and, second, as a compromise position, that ICANN should authorize a limited number of new gTLDs and evaluate their effect.¹³² This consensus came at the expense of competing proposals within the Working Group that called for a much larger expansion. Although these more expansive proposals were the most popular within the Working Group,¹³³ they were opposed by intellectual property

¹²⁴ White Paper, *supra* note 45, at 31,746.

¹²⁵ U.S. DEP'T OF COMMERCE & ICANN MOU, *supra* note 88, § V.C.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ The DNSO was an ICANN-supporting organization created pursuant to ICANN's original bylaws. *See* ICANN, BYLAWS FOR INTERNET CORP. FOR ASSIGNED NAMES AND NOS. Art. VI § 3(a)(ii) (Nov. 6, 1998), *available at* <http://commcns.org/10hEbOo>. ("The [DNSO] shall be composed of representatives from name registries and registrars of [TLDs], businesses and any other entities that are users of the Internet and others with legitimate interests in these issues. . . . The [DNSO] shall . . . make recommendations regarding TLDs, including operation, assignment and management of the [DNS]."). In 2002, ICANN amended its bylaws, eliminating the DNSO and replacing it with the Generic Names Supporting Organization ("GNSO"). *See* ICANN, BYLAWS FOR INTERNET CORP. FOR ASSIGNED NAMES AND NOS. Art. X § 1 (Dec. 15, 2002), *available at* <http://commcns.org/XhAZvR> ("There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.").

¹³⁰ ICANN, REPORT (PART ONE) OF WORKING GROUP C (NEW gTLDs) PRESENTED TO NAMES COUNCIL (2000), *available at* <http://commcns.org/U4fqkC>. *See also* ICANN, MEETING OF THE ICANN BOARD IN YOKOHAMA PRELIMINARY REPORT (July 16, 2000), *available at* <http://commcns.org/10hEuc7> ("Whereas, the Names Council of the DNSO made a set of recommendations to the Board on 18/19 April 2000, including the recommendation that the Board establish a policy for the introduction of new gTLDs in a measured and responsible manner. . . .").

¹³¹ REPORT (PART ONE) OF WORKING GROUP C (NEW gTLDs) PRESENTED TO NAMES COUNCIL, *supra* note 130.

¹³² *Id.*

¹³³ *See* ICANN, INTERIM REPORT OF WORKING GROUP C OF THE DOMAIN NAME SUPPORTING ORG., INTERNET CORP. FOR ASSIGNED NAMES AND NOS. (1999), *available at*

holders.¹³⁴ They were also contrary to the White Paper's recommendation of a "deliberate and controlled pace" for the introduction of new gTLDs.¹³⁵

Shortly after the Working Group's consensus was announced, ICANN and the Commerce Department amended the MOU, adding the provision giving Commerce a reversionary interest in ICANN's contracts with registries and registrars should the Department decide to recognize another non-profit to oversee the DNS.¹³⁶ While it is unlikely that the reversionary language was added to the MOU solely because of the debate over gTLD expansion within the DNSO, it likely served as a reminder that ICANN did not have absolute control over the DNS and that ICANN needed to abide by its MOU obligations. Ultimately, the Working Group stuck to the consensus position of a limited introduction of new gTLDs and recommended it to the DNSO.¹³⁷ The ICANN Board accepted the recommendation and, at its July 2000 meeting, the Board announced that it would begin accepting applications for a limited number of new gTLDs in October 2000.¹³⁸

At the close of the application window, forty-seven entities had applied for the creation of a new TLD.¹³⁹ As part of its evaluation of viable TLDs, ICANN explained, "[a]t this 'proof of concept' stage, the evaluation process was focused on identifying a finite, relatively small number of strong applications that could serve the purpose of this effort," which was to "evaluate the effects on the DNS of additional TLDs [in a way that] would minimize to the extent possible any possible disruption of or instability in the DNS. . . ."¹⁴⁰ This approach was in line with the Commerce Department's recommendation in the White Paper.¹⁴¹

As a result of the proof of concept program, ICANN "selected .info and .biz for general use and .pro for professionals. Also added were .name for personal Web sites, .museum for museums, .aero for airline groups and .coop for busi-

<http://commcns.org/102mH3E> [hereinafter INTERIM REPORT] ("For lack of a better sequence, we have arranged the position papers in this interim report in descending order of their expressed support within the working group. That is, the position paper with the most endorses from within the working group is placed first, and so on.").

¹³⁴ See INTERIM REPORT, *supra* note 133.

¹³⁵ See White Paper, *supra* note 45, at 31,746.

¹³⁶ MOU AMENDMENT 1, *supra* note 92, §§ 4-5.

¹³⁷ INTERIM REPORT, *supra* note 133.

¹³⁸ MEETING OF THE ICANN BOARD IN YOKOHAMA PRELIMINARY REPORT, *supra* note 130 ("Resolved [00.46], that the Board hereby adopts the Names Council's recommendation that a policy be established for the introduction of new TLDs in a measured and responsible manner").

¹³⁹ *gTLD Background Information*, *supra* note 121. The list of applications and suggested TLDs varied widely. See *TLD Applications Lodged*, ICANN (Oct. 10, 2000), <http://commcns.org/VMKeYr>.

¹⁴⁰ *gTLD Background Information*, *supra* note 121.

¹⁴¹ White Paper, *supra* note 45, at 31,746.

ness cooperatives.”¹⁴² With no regulatory or independent legal authority over the DNS, contracts known as Registry Agreements were negotiated and each of these TLDs were added to the root.¹⁴³

In 2004, ICANN initiated a new expansion round, but this time restricted applications to “sponsored TLDs.”¹⁴⁴ These specific TLDs have a sponsor that represents a particular community served by the TLD.¹⁴⁵ The purpose of the sponsor is to carry out “delegated policy formulation responsibilities” over a variety of matters regarding the TLD.¹⁴⁶ Generally, only members of that specific community are allowed to register domains within the sponsored TLD.¹⁴⁷ ICANN received ten applications during the 2004 round,¹⁴⁸ and approved five new TLDs for negotiation: .tel, .post, .mobi, .travel and .jobs.¹⁴⁹

Under the MOU/JPA regime, but outside of any formal application window, ICANN selected two additional sponsored TLDs.¹⁵⁰ The first, .cat, was approved by ICANN in 2005.¹⁵¹ The .cat TLD seeks to promote the continuity of the Catalan language.¹⁵² The second sponsored TLD that was approved by ICANN under the MOU/JPA era, .asia, was approved in late 2006.¹⁵³

As demonstrated by ICANN’s selections, the creation of new TLDs was a measured process while still under the Department of Commerce’s watch. The majority of new TLDs were created to be used by specific businesses or com-

¹⁴² Robert D. Richards & Clay Calvert, *Adult Websites and the Top-Level Domain Debate: ICANN’s Adoption of .XXX Draws Adult-Industry Ire*, 29 CARDOZO ARTS & ENT. L.J. 527, 532 (2011) (discussing the 2000 round of gTLD expansion) (quoting Chris Gaither, *TECHNOLOGY; 7 New Domains Are Chosen To Join the Popular .com*, N.Y. TIMES (Nov. 17, 2000), <http://commcns.org/11ChfH>).

¹⁴³ ICANN maintains an archive of expired Registry Agreements where initial agreements from the proof of concept round can be viewed. *Archived Registry Agreements*, ICANN (Aug. 19, 2012, 3:46 PM), <http://www.icann.org/en/about/agreements/registries/archive>.

¹⁴⁴ *gTLD Background Information*, *supra* note 121.

¹⁴⁵ *Glossary*, GTLD REGISTRIES STAKEHOLDER GROUP (Mar. 9, 2012), <http://commcns.org/102mX21>.

¹⁴⁶ *Id.*

¹⁴⁷ See ICANN, *.CAT REGISTRY AGREEMENT* app. S (Sept. 23, 2005), available at <http://commcns.org/VrJxTi>. Appendix S of the .cat Charter discusses the purpose of the dot-cat TLD as to serve the needs of the Catalan language and restricts registration within the dot-cat TLD to those utilizing the Catalan language or promoting Catalan culture. *Id.* at pt. I & III. Examples of sponsored TLDs from the proof of concept round include .museum and .aero. *Sponsored TLDs*, GTLD REGISTRIES STAKEHOLDER GROUP (Mar. 9, 2012), <http://commcns.org/10hF75l>.

¹⁴⁸ *gTLD Background Information*, *supra* note 121.

¹⁴⁹ In the 2000 sTLD round, .tel and .post were approved for negotiations. *Id.*

¹⁵⁰ See *2005 Board Meetings*, ICANN (Aug. 10, 2012), <http://commcns.org/Xe1oKg>.

¹⁵¹ *Special Meeting of the Board | Preliminary Report*, ICANN (Sept. 15, 2008), <http://commcns.org/13IJ41X>.

¹⁵² See *Sponsored TLDs*, *supra* note 147; see also discussion *supra* note 147.

¹⁵³ Candace Lombardi, *ICANN Approves ‘asia’ as Top-Level Domain*, CNET NEWS (Dec. 8, 2006, 2:08 PM), <http://commcns.org/Wb0H61>.

munities of users, such as speakers of the Catalan language.¹⁵⁴ ICANN chose a variety of different types of TLDs—both truly generic and limited-use TLDs—which allowed it to expand consumer choice, to measure the effects of new TLDs on the root system, and to monitor how the expansion affected intellectual property holders.¹⁵⁵ Unfortunately, once the Commerce Department’s oversight ended, and the possibility that the Department would hand ICANN’s responsibilities to another entity passed, ICANN’s decision-making took a notable shift.

B. Controversy and More Controversy: gTLD Decisions Under the Affirmation of Commitments

Since agreeing to the Affirmation of Commitments in 2009, ICANN has made two major decisions regarding the creation of new TLDs. The first was the 2011 approval of ICM Registry’s application for .xxx, a sponsored TLD for the adult entertainment industry.¹⁵⁶ The second was the approval of the gTLD Program,¹⁵⁷ which could result in over 1100 new TLDs.¹⁵⁸

1. Approving .xxx

Although the Department of Commerce oversaw ICANN during the years of the MOU/JPA, the creation of the .xxx within ICANN languished.¹⁵⁹ ICM Registry had originally applied for the .xxx TLD during the 2000 proof of concept program.¹⁶⁰ Indeed, at the time of the proof of concept expansion, several applicants included either “.xxx” or “dot-sex” among their suggested new domains,¹⁶¹ although neither adult-oriented TLD was accepted by.¹⁶² Critics raised First Amendment arguments for rejecting .xxx, claiming that the domain would make censorship much easier.¹⁶³

In 2004, ICM Registry sought approval of the .xxx TLD during the spon-

¹⁵⁴ See discussion *supra* Part III.A.

¹⁵⁵ See discussion *supra* Part III.A.

¹⁵⁶ Richards & Calvert, *supra* note 142, at 538.

¹⁵⁷ *Approved Board Resolutions Singapore*, ICANN (June 20, 2011), <http://commcns.org/Xe1HEU>.

¹⁵⁸ Kevin Murphy, *It’s Reveal Day and There Are 1,930 New gTLD Bids*, DOMAIN INCITE (June 13, 2012, 2:45 AM), <http://commcns.org/Wb0Syn>.

¹⁵⁹ See Richards & Calvert, *supra* note 142, at 531.

¹⁶⁰ *gTLD Background Information*, *supra* note 121; see also Richards & Calvert, *supra* note 142, at 532-33.

¹⁶¹ See *TLD Applications Lodged*, ICANN, *supra* note 139.

¹⁶² See *id.*

¹⁶³ See Richards & Calvert, *supra* note 142, at 533.

sored TLD application window.¹⁶⁴ ICM Registry defined its sponsored community as “the responsible online adult-entertainment community” and decided that the International Foundation for Online Responsibility (“IFFOR”) would serve as its sponsoring organization.¹⁶⁵ While the application was given tentative approval, it was quickly sidelined after the Department of Commerce received a wave of critical pushback.¹⁶⁶ At the same time, ICANN began receiving more and more complaints from members of its Governmental Advisory Council (“GAC”) who urged ICANN to allow more governments to weigh in on the .xxx decision.¹⁶⁷ In addition to the GAC criticisms, the adult entertainment industry joined critics of .xxx in expressing to ICANN that the ICM Registry application overstated its support from the adult entertainment industry.¹⁶⁸

As a result of the Board of Director’s concern over actual community support for .xxx and GAC’s continued opposition to the TLD, ICM Registry’s application began to languish.¹⁶⁹ In March of 2007, the Board formally rejected the application.¹⁷⁰

ICM Registry appealed this decision through ICANN’s Independent Review Process (“IRP”).¹⁷¹ In a 2010 non-binding arbitral opinion, the IRP panel found that, in rejecting ICM Registry’s application in 2007, the Board had violated its documented policies.¹⁷² Although the decision was non-binding, ICANN explored its options in light of the panel decision.¹⁷³ In reaction to the arbitral decision and despite the increasingly significant public, governmental, and sponsored community opposition to .xxx, the Board decided to move forward in its

¹⁶⁴ *Id.* at 534.

¹⁶⁵ *Id.*; see ICANN, CHRONOLOGICAL HISTORY OF ICM’S INVOLVEMENT WITH ICANN AS OF 31 MARCH 2011, at 1 (Mar. 31, 2011), available at <http://commcns.org/SQWSGv>.

¹⁶⁶ Richards & Calvert, *supra* note 142, at 534-35 (describing letter campaigns from conservative U.S. organizations).

¹⁶⁷ See ICANN, CHRONOLOGICAL HISTORY OF ICM’S INVOLVEMENT WITH ICANN AS OF 31 MARCH 2011, *supra* note 165, at 2.

¹⁶⁸ See *id.* at 2.; see also Richards & Calvert, *supra* note 142, at 536.

¹⁶⁹ ICANN, CHRONOLOGICAL HISTORY OF ICM’S INVOLVEMENT WITH ICANN AS OF 31 MARCH 2011. *supra* note 165, at 2-3.

¹⁷⁰ *Id.* at 2.

¹⁷¹ See ICANN, DRAFT RATIONALE FOR APPROVING REGISTRY AGREEMENT WITH ICM’S FOR .XXX sTLD 4-6 (Mar. 18, 2011), available at <http://commcns.org/XH6WQ8>. It is worth noting that even though the IRP allows an aggrieved party to challenge an ICANN Board decision, ICANN is under no obligation to adhere to the IRP decision; the decision is merely a recommendation. ICANN, BYLAWS FOR INTERNET CORP. FOR ASSIGNED NAMES AND NOS. Art. IV § 3 (Mar. 16, 2012), available at <http://commcns.org/WKYsF2>. The IRP really does not provide much of a remedy.

¹⁷² ICM Registry, LLC v. Internet Corp. for Assigned Names and Nos., ICDR Case No. 50 117 T 00224 08, ¶ 152 (Int’l Ctr. Dispute Resolution Feb. 19 2010), available at <http://commcns.org/11Ci5qn>.

¹⁷³ See ICANN, DRAFT RATIONALE FOR APPROVING REGISTRY AGREEMENT WITH ICM’S FOR .XXX sTLD, *supra* note 171, at 6.

consideration of a registry agreement with ICM Registry for the .xxx TLD.¹⁷⁴

The decision to move forward with .xxx opened a round of public comments on the registry agreement. Notably, a significant number of comments questioned ICM's support within the adult entertainment community.¹⁷⁵ The GAC maintained its refusal to support the .xxx domain, which led to a conflict with the Board.¹⁷⁶ Pursuant to ICANN Bylaws,¹⁷⁷ the Board issued its reasons for rejecting the GAC's advice¹⁷⁸ and approved the new .xxx TLD.¹⁷⁹

The opposition's condemnation was quick. NTIA Administrator Lawrence Strickling said in a statement, "We are disappointed that ICANN ignored the clear advice of governments worldwide, including the U.S. . . . This decision goes against the global public interest, and it will open the door to more Internet blocking by governments and undermine the stability and security of the Internet."¹⁸⁰ In addition, the adult entertainment industry maintains that it does not support the .xxx TLD.¹⁸¹ Governments in Asia indicated that Administrator Strickling's fears were coming to fruition and promised to block the .xxx TLD.¹⁸²

In addition to these issues, another problem arose with the .xxx domain. According to ICANN, more than 100,000 reservations were made for second level domains within .xxx.¹⁸³ While this may sound promising, not all of these registrations were made for productive reasons. Brand owners, universities, and non-profit organizations rushed to protect their images by defensively purchasing .xxx domains that they may never use.¹⁸⁴ By paying between \$200 and

¹⁷⁴ See *id.* at 7. A registry agreement is the contract between ICANN and the TLD operator; in this case, the TLD operator is ICM Registry. ICANN oversees and enforces its policies for the DNS under these agreements.

¹⁷⁵ See *id.* at 8.

¹⁷⁶ See *id.* at 8-9.

¹⁷⁷ In the event of a conflict between GAC advice and a Board decision, "If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee ICANN, BYLAWS FOR INTERNET CORP. FOR ASSIGNED NAMES AND NOS., *supra* note 171, art. XI § 2.1.j-k.

¹⁷⁸ See ICANN, DRAFT RATIONALE FOR APPROVING REGISTRY AGREEMENT WITH ICM'S FOR .XXX sTLD,, *supra* note 171, at 14-18.

¹⁷⁹ See *id.* at 1 ("The Board has determined to approve the ICM Application and enter a Registry Agreement with ICM for the .XXX sTLD . . .").

¹⁸⁰ Ian Shapira, *Coming Soon to a Computer Near you: .xxx*, WASH. POST (Mar. 18, 2011), <http://commcns.org/S9EC9K>.

¹⁸¹ See Richards & Calvert, *supra* note 142, at 537-38.

¹⁸² See *id.* at 539 (discussing how the governments of India and Saudi Arabia have expressed that they will block the .xxx TLD).

¹⁸³ See *id.* at 538-39 (citation omitted).

¹⁸⁴ See Mike Snider, *Universities Block Triple-X Domain Names*, USA TODAY (Dec. 12, 2011, 7:16 AM), <http://commcns.org/10CfGwD>.

\$300 per domain, these organizations sought to block other entities from purchasing one of their trademarks, therefore circumventing any association of their brand with pornography.¹⁸⁵ These defensive registrations serve no productive purpose. ICM Registry has been criticized as abusing .xxx as a means of exhorting protection money from brand owners—brand owners could either pay an expensive fee upfront at the launch of .xxx to reserve their brands or run the risk of a third party purchasing a .xxx domain that associates their brand with pornography.¹⁸⁶

Arguably, the addition of .xxx to the root was not in the public interest. As a sponsored TLD, a large, vocal portion of the community that, in theory, would use .xxx domains does not in fact support the domain.¹⁸⁷ Several nations would use the domain as a censorship tool, which would arguably harm the open nature of the Internet.¹⁸⁸ In addition, as highlighted by the defensive registration land-rush, there is limited productive value in these new .xxx domains. Furthermore, over 400 million adult-oriented websites existed before .xxx was approved.¹⁸⁹ Should these websites be expected to abandon their existing domains in .com and other TLDs and switch to .xxx registrations? This is not economically rational.¹⁹⁰

These harms far outweigh the potential benefits for approving the .xxx domain. Indeed, under both the MOU and JPA, approval of the .xxx domain was denied for many of those reasons.¹⁹¹ However, under the Affirmation of Commitments—with no formal governmental oversight or possible repercussion—ICANN approved the .xxx TLD.¹⁹² The real beneficiaries of .xxx are not the

¹⁸⁵ See Steve Stolfi, Brand Owners Need to Protect Against the .XXX, BUS. INSIDER (Aug. 22, 2011), <http://commcns.org/13IKz04>.

¹⁸⁶ Kevin Murphy, YouPorn Sues ICANN and ICM Over .XXX, DOMAININCITE (Nov. 16, 2011, 11:41 PM), <http://commcns.org/Wj6M08> (Plaintiff Manwin claims that “ICM’s sunrise period amounted to extortion and that ICANN willfully created a monopoly by agreeing to a registry contract with presumptive renewal but no price caps”).

¹⁸⁷ See Richards & Calvert, *supra* note 142, at 536-38 (citations omitted).

¹⁸⁸ Cf. AFFIRMATION OF COMMITMENTS, *supra* note 17 (“The Internet is a transformative technology that will continue to empower people around the globe . . . and enable the free and unfettered flow of information”).

¹⁸⁹ ICANN gTLD Hearing, *supra* note 120, at 73 (statement of Steve DelBianco, Executive Director, NetChoice).

¹⁹⁰ See Grant Gross, Senators, Critics Question ICANN’s Generic TLD Plan, COMPUTERWORLD (Dec. 8, 2011, 5:05 PM), <http://commcns.org/U4gVQ0>. “If Marriott.hotel and Marriott.com were the same site, they would be redundant, and if they are different, ‘it’s simply confusing’ The [gTLD] plan creates ‘a profusion of new things to protect, without creating additional value because there remains only one Marriott.’” *Id.* (discussing testimony of Esther Dyson, founding Chairwoman of ICANN before the Senate Commerce, Science & Transportation Committee).

¹⁹¹ See discussion *supra* Part III.B.

¹⁹² AFFIRMATION OF COMMITMENTS, *supra* note 17.

adult entertainment community, but ICM Registry¹⁹³ and ICANN.¹⁹⁴

As NTIA Administrator Larry Strickling pointed out, the decision to approve the .xxx TLD, “goes against the global public interest.”¹⁹⁵ ICANN’s decision to approve directly violates the Affirmation of Commitments.¹⁹⁶ However, as there are no enforcement mechanisms within the Affirmation, there is little that can be done to remedy such a decision, even if it violates the Affirmation.

2. *The gTLD Program*

If the addition of a single new TLD has the potential to cause substantial harm, an unbridled expansion could have unknown repercussions. While the .xxx decision differs greatly from ICANN’s latest round of expansion of the TLD universe, the struggle between the Board of Directors, the GAC, and intellectual property owners is nothing new to ICANN observers. It is the sheer scope of this latest round of expansion—effectively, its unprecedented lack of scope—that raises concerns and highlights the need for some sort of check on ICANN’s decision-making.¹⁹⁷

a. A Brief History of the Program

In 2005, the Generic Names Supporting Organization (“GNSO”), the ICANN body responsible for the policies related to gTLDs, unanimously approved a policy development process to determine how ICANN should add new gTLDs to the universe of domain names.¹⁹⁸ In September of 2007, the GNSO released 19 recommendations for how new gTLDs should be consid-

¹⁹³ Kevin Murphy, How Much Money Will ICM Make From .XXX Blocks?, DOMAIN INCITE (Sept. 13, 2011, 12:57 PM), <http://commcns.org/W2Xiby> (estimating \$3.24 million in revenue if there are 20,000 defensive registrations during the Sunrise B period).

¹⁹⁴ See ICANN, XXX REGISTRY AGREEMENT art. VII §7.2(c) (Mar. 31, 2011), *available at* <http://commcns.org/UTfssT> (ICANN is to receive \$2.00 for each domain registered or transferred to the .xxx domain). This is a high fee compared to other sponsored TLD registry agreements. See ICANN, .MOBI REGISTRY AGREEMENT art. VII §7.2(b) (amended Mar. 27, 2007), *available at* <http://commcns.org/SQZ2Gf> (ICANN is to receive between \$0.15 and \$0.75 per each domain registered or transferred to the dot-mobi domain, depending on the average price of registration fees); ICANN, .ASIA REGISTRY AGREEMENT amend. 1 (June 22, 2010), *available at* <http://commcns.org/Wj70nP> (ICANN is to receive \$0.50 per each domain registered or transferred to the dot-asia domain).

¹⁹⁵ Shapira, *supra* note 180.

¹⁹⁶ See AFFIRMATION OF COMMITMENTS, *supra* note 17, ¶ 3.

¹⁹⁷ Letter from Daniel L. Jaffe, Grp. Exec. Vice President, Ass’n of Nat’l Advertisers, to Lawrence E. Strickling, Assistant Sec’y for Commc’n and Info., U.S. Dep’t of Commerce (May 7, 2012), *available at* www.ana.net/getfile/17547.

¹⁹⁸ Approved Board Resolutions Singapore, *supra* note 157.

ered and forwarded them to the Board of Directors.¹⁹⁹ ICANN staff began to examine the possibility of implementing the GNSO's recommendations into a program to introduce new gTLDs.²⁰⁰ At a June 2008 Board meeting, the Board adopted the GNSO's recommendations and instructed staff to create an applicant guidebook.²⁰¹

The 2008 approval led to a flurry of studies, reports, drafts of the applicant guidebook, and rounds of public comments on practically every document released for the next three years. This process culminated in June 2011, when the ICANN Board approved (what was believed to be) a final draft of the guidebook and began a public awareness campaign to inform the non-ICANN participating public about the new program.²⁰² ICANN would begin accepting applications for new gTLDs on January 12, 2012.²⁰³

b. The GAC and the Board

Before final approval took place in June 2011, the GAC sought to clarify its role in not only the gTLD program's development process, but also in the ultimate decisions to approve new gTLDs.²⁰⁴ As a result, the GAC created a "scorecard" identifying ICANN's approach to various issues that the GAC required to be addressed before final approval of the gTLD program.²⁰⁵ Relevant issues included the GAC's role in reviewing controversial or "sensitive strings," rights protections for intellectual property owners, and the economic impacts of the program.²⁰⁶ ICANN and the GAC worked to address the GAC's concerns; however, ICANN ultimately approved the gTLD program without addressing all of the GAC's identified issues.²⁰⁷

The ICANN Board ignored the advice of the GAC on several important public policy issues. First, the Board included provisions in the gTLD Applicant Guidebook allowing for the vertical integration of registries and registrars, ef-

¹⁹⁹ *Id.*

²⁰⁰ *See id.*

²⁰¹ See Letter from Heather Dryden, Interim Chair, Governmental Advisory Comm., to Peter Dengate Thrush, Chairman of the Bd., ICANN (Nov. 22, 2010) [hereinafter Dryden Letter], available at <http://commcns.org/Va5EjH>.

²⁰² ICANN GAC, GAC INDICATIVE SCORECARD ON NEW gTLD OUTSTANDING ISSUES LISTED IN THE GAC CARTAGENA COMMUNIQUÉ (Feb. 23, 2011), available at <http://commcns.org/W2XpnD>.

²⁰³ *Id.*

²⁰⁴ *See* Dryden Letter, *supra* note 201.

²⁰⁵ *GAC Indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué*, *supra* note 202.

²⁰⁶ *Id.*

²⁰⁷ *See* ICANN, RATIONALE: REMAINING AREAS OF DIFFERENCE BETWEEN ICANN'S BOARD AND GOVERNMENTAL ADVISORY COMMITTEE REGARDING IMPLEMENTATION OF THE NEW gTLD PROGRAM (June 20, 2011), available at <http://commcns.org/XhCUAs>.

fectively lifting a prior restriction on such activity.²⁰⁸ This raises important anti-trust and competition concerns,²⁰⁹ and will require ICANN to perform antitrust reviews to ensure that these vertically integrated registry-registrars are not harming competition.²¹⁰ Given ICANN's history of poor enforcement of its existing policies against registries and registrars, it is difficult to imagine how ICANN will perform these rigorous antitrust reviews to ensure the competitiveness of the market for domain names.²¹¹ The removal of the vertical integration constraint has the potential to harm competition, which would violate the Affirmation of Commitments²¹² and place a heavy burden on government enforcement agencies to perform ICANN's task.

ICANN also approved the gTLD Program without including important intellectual property rights protection mechanisms that were recommended by the GAC and an ICANN commissioned body called the Implementation Review Team ("IRT").²¹³ One of the strongest protections recommended by the IRT was a Globally Protected Marks List that would protect famous, internationally registered trademarks at both the top and second levels of new gTLDs.²¹⁴ However, ICANN rejected this recommendation and removed it from all future discussions.²¹⁵

The Board did adopt the IRT's recommendation for establishing a Trademark Clearing House where gTLDs can check new registrants against a central database containing owner-registered trademarks.²¹⁶ The GAC recommended that new gTLDs utilize the Trademark Clearing House beyond their initial

²⁰⁸ See ICANN, GTLD APPLICANT GUIDEBOOK § 1.2.1 (Jan. 11, 2012), available at <http://commcns.org/W9fSMe> ("*Registrar Cross-Ownership*—ICANN-accredited registrars are eligible to apply for a gTLD").

²⁰⁹ See Letter from Larry Strickling, Assistant Sec'y of Commerce, to Peter Dengate-Thrush, Chairman of the Bd. of Dirs., ICANN (June 16, 2011), available at <http://commcns.org/10Cg8Lj> (forwarding letter from the U.S. Department of Justice Antitrust Division to ICANN).

²¹⁰ See Letter from Rod Beckstrom, President and CEO, ICANN, to Gerard de Graaf, Dir., European Comm'n Info. Soc'y and Media Directorate and European Comm'n Directorate Gen. for Competition 1 (Mar. 9, 2012), available at <http://commcns.org/WKYPzk>.

²¹¹ See Leibowitz Letter, *supra* note 16, at 1 ("Currently, ICANN is ill-equipped to handle the contract enforcement for the 22 existing gTLDs and several hundred accredited registrars. In particular, ICANN . . . has failed to close contractual loopholes . . . and needs to implement a more rigorous enforcement program").

²¹² AFFIRMATION OF COMMITMENTS, *supra* note 17, ¶ 9.3.

²¹³ ICANN, RATIONALE: REMAINING AREAS OF DIFFERENCE BETWEEN ICANN'S BOARD AND GOVERNMENTAL ADVISORY COMMITTEE REGARDING IMPLEMENTATION OF THE NEW GTLD PROGRAM, *supra* note 207, at 1-4.

²¹⁴ See ICANN, FINAL REPORT ON TRADEMARK PROTECTION IN NEW GTLDs 16 (May 29, 2009), available at <http://commcns.org/XH7SnL>.

²¹⁵ See Paul McGrady, *ICANN Board: You Got It Right. Then You Got It Wrong. Now, Get It Right Again*, CICRLEID (Mar. 1, 2011 11:51 AM), <http://commcns.org/Uxt4f9>.

²¹⁶ ICANN FINAL REPORT ON TRADEMARK PROTECTION IN NEW GTLDs, *supra* note 214, at 12-13.

launch.²¹⁷ The Board also rejected this recommendation, which led to the current requirement that gTLDs are only to use the Trademark Clearing House during their initial launches.²¹⁸ The program was approved, however, without addressing pertinent internal dilemmas. Such issues include additional disagreements between the Board and the GAC regarding the standards for the burden of proof in trademark dispute mechanisms, as well as the special protections for certain intergovernmental organizations.²¹⁹ ICANN's failure to fully address intellectual property protections before implementing the gTLD Program may lead to vocal criticism that would only draw attention to ICANN's disregard for governmental advice.²²⁰

ICANN further disregarded the advice of the GAC in implementing a series of recommendations made by law enforcement designed to assist law enforcement's efforts at policing fraud and illegal activity on the Internet.²²¹ Law enforcement asked ICANN in 2009 to implement several changes to its agreements with its accredited registrars that would make investigating cybercrimes easier.²²² Although some of these recommendations were included in the gTLD Program,²²³ ICANN has slow-walked incorporating these changes into its existing agreements, which has hampered the investigation of today's cybercrime.²²⁴ Almost three years later, the negotiations over these important public policy and safety issues are at a standstill.²²⁵ However, without a means to truly pressure ICANN to bring the registrars to the table to negotiate, the GAC and governments worldwide are seemingly without a means to ensure that ICANN implements these consumer and public safety recommendations.²²⁶

²¹⁷ ICANN GAC, GAC INDICATIVE SCORECARD ON NEW gTLD OUTSTANDING ISSUES LISTED IN THE GAC CARTAGENA COMMUNIQUÉ, *supra* note 202, at 7.

²¹⁸ See gTLD APPLICANT GUIDEBOOK, *supra* note 208, § 5.4.1.

²¹⁹ ICANN, RATIONALE: REMAINING AREAS OF DIFFERENCE BETWEEN ICANN'S BOARD AND GOVERNMENTAL ADVISORY COMMITTEE REGARDING IMPLEMENTATION OF THE NEW gTLD PROGRAM, *supra* note 207, at 1-4.

²²⁰ See *infra* § III.B.2.c.

²²¹ See *Senators Press ICANN on Generic Top-Level Domains*, MASHABLE TECH (Dec. 8, 2011), <http://commcns.org/U4hitP>.

²²² ICANN GAC, GAC COMMUNIQUÉ—DAKAR § III (Oct. 27, 2011), available at <http://commcns.org/11CiUzi>.

²²³ ICANN gTLD Hearing, *supra* note 120, at 3 (statement of Rep. Bob Goodlatte, Chair, Subcomm. on Intellectual Prop.) ("ICANN's new Applicant Guidebook also includes protections that the law enforcement community believes will help take into account some of the cyber security concerns raised by the gTLD proposal").

²²⁴ ICANN GAC, GAC COMMUNIQUÉ, *supra* note 222, § III ("To date, none of the recommendations have been implemented, and the risks remain"); see also Leibowitz Letter, *supra* note 16, at 4-5 (discussing law enforcement's proposed changes and weakness in the current WHOIS system).

²²⁵ Kieren McCarthy, *RAA Talks Collapse: What Now?*, DOT-NXT (Mar. 7, 2012), <http://commcns.org/Wj7zhz>.

²²⁶ Cf. AFFIRMATION OF COMMITMENTS, *supra* note 17 (lacking any enforcement provi-

Had ICANN fully addressed policy concerns over intellectual property protection and public safety before it launched the Program, it would have more likely demonstrated that it was capable of protecting such important issues of public interest. By not fully addressing these issues, ICANN only raises questions about its capability and the need for a stronger governmental role in order to ensure that such issues are fully addressed before new DNS policies are implemented.

c. Negative Reactions to the gTLD Program

Stakeholders have been divided as to whether new gTLDs were warranted or even necessary since 1999, when ICANN first discussed expanding the number of gTLDs.²²⁷ However, as the 2011 decision on the gTLD expansion program came and went, criticism of the program and ICANN itself continued to grow.

Perhaps the first challenge came from NTIA. Mere days before the ICANN Board was to meet and vote on launching the gTLD program, NTIA released a Further Notice of Inquiry related to the IANA Functions Contract, which had been performed by ICANN for almost ten years.²²⁸ NTIA, in discussing comments from its original request for comments on the IANA Functions Contract, noted that some commenters “expressed concerns about transparency and accountability of the current contractor’s decision-making.”²²⁹ More telling of NTIA’s concerns over ICANN came in its response to a question related to the administration of country code TLDs (“ccTLDs”) by IANA.²³⁰ NTIA discussed commenters’ concerns regarding new gTLDs and how they should be introduced “in the interest and for the benefit of the global Internet community.”²³¹ To resolve this, NTIA proposed “a requirement that delegation requests for new gTLDs include documentation demonstrating how the string proposed reflects consensus among relevant stakeholders” that would ensure that new gTLDs were “in the global public interest.”²³²

Many saw this as NTIA reacting to ICANN’s decision to approve .xxx,²³³

sions).

²²⁷ See ICANN INTERIM REPORT, *supra* note 133.

²²⁸ IANA Further NOI, *supra* note 118, at 34,659.

²²⁹ *Id.*

²³⁰ *Id.* at 34,661-62.

²³¹ *Id.* at 34,661.

²³² *Id.* at 34,662.

²³³ Kevin Murphy, *NTIA Says ICANN “Does Not Meet the Requirements” for IANA Renewal*, DOMAIN INCITE (Mar. 10, 2012, 3:21 PM), <http://commcns.org/S9Gxv4> (“This demand is a way to prevent another controversy such as the approval of .xxx a year ago, which the Governmental Advisory Committee objected to on the grounds that it was not the ‘the global public interest.’”).

which NTIA had previously stated was not in the global public interest.²³⁴ With the real possibility of hundreds of new gTLDs, the requirement was seen as a way for governments to prevent new gTLDs that could be as controversial as .xxx.²³⁵ ICANN vehemently opposed this proposed requirement.²³⁶ Yet, despite this threat to ICANN's decision-making authority,²³⁷ and the U.S. government's apparent disapproval of ICANN's decisions, ICANN approved the gTLD program days after NTIA released its proposed changes to the IANA Functions Contract.²³⁸

The ANA's critique of the gTLD Program caught the attention of other organizations and governmental entities that disagreed with ICANN's decisions. A large group of trade associations and businesses formed the Coalition for Responsible Internet Domain Oversight ("CRIDO") to advocate for changes to the gTLD Program.²³⁹ CRIDO petitioned the Department of Commerce to have ICANN postpone the launch of the gTLD Program because "ICANN's decision was not made in the public interest, does not promote consumer trust, and does not benefit the public, as required in the Affirmation of Commitments"²⁴⁰ The coalition further argued that the gTLD program would burden brand holders, confuse consumers, and create greater risks in cyber security and online fraud.²⁴¹

Prominent government stakeholders soon echoed CRIDO's criticisms of the gTLD expansion decisions. One of the first vocal critics was FTC Chairman Jon Leibowitz.²⁴² During a congressional hearing, the Chairman, in response to a question regarding fraud and consumer deception on the Internet, responded that the FTC was "very, very concerned that this roll-out of new gTLDs has the potential to be a disaster for consumers and for businesses."²⁴³ Following up on this statement, the FTC sent a letter to ICANN criticizing ICANN for moving

²³⁴ See Shapira, *supra* note 180.

²³⁵ See Kevin Murphy, *ICANN Fights Government gTLD Power Grab*, DOMAIN INCITE (July 22, 2011, 7:08:32 PM), <http://commcns.org/UxtjXL>.

²³⁶ *Id.* ("Cutting to the very heart of Obama administration internet governance policy, ICANN has told the National Telecommunications and Information Administration that its recent proposals would 'undermine the very principle of the multi-stakeholder model.'").

²³⁷ *Id.* ("ICANN chief Rod Beckstrom says that the NTIA's proposal would "replace" the "intensive multi-stakeholder deliberation" that created the newly approved Applicant Guidebook").

²³⁸ See Approved Board Resolutions Singapore, *supra* note 157.

²³⁹ *Coalition for Responsible Internet Domain Oversight (CRIDO)*, ANA, <http://commcns.org/10hIfOI> (last visited Nov. 10, 2012) (listing coalition members).

²⁴⁰ Letter from CRIDO to Hon. John Bryson, U.S. Sec'y. of Commerce (Nov. 10, 2011), available at <http://commcns.org/XhyYzx>.

²⁴¹ *Id.*

²⁴² Kieren McCarthy, *FTC 'very, very concerned' About New gTLD Program*, DOT-NXT (Dec. 7, 2011), <http://commcns.org/11CjbCt>.

²⁴³ *Id.*

forward with the gTLD Program before it had taken measures to protect consumers online.²⁴⁴ Without improving its policies and enforcement efforts before launching the gTLD Program, the FTC warned that “Fraudsters will be able to register misspellings of businesses, including financial institutions, in each of the new gTLDs, create copycat websites, and obtain sensitive consumer data with relative ease before shutting down the site and launching a new one.”²⁴⁵

The Commission noted that these concerns were not unknown to ICANN and were repeatedly raised during deliberations of the new gTLD Program.²⁴⁶ ICANN had failed to properly respond to all of the issues that were raised. In particular, it failed to implement certain obligations in order to enhance the new gTLD program and did not establish “adequate solutions to widely documented problems in the existing gTLD marketplace.”²⁴⁷ The Commission requested that ICANN implement a pilot program for gTLD expansion in order to improve its enforcement of policies that allow intellectual property owners and law enforcement to police the Internet.²⁴⁸

While much of the criticism of the gTLD program has come from the private sector, the public sector soon realized that the gTLD Program placed its own brands at risk.²⁴⁹ A coalition of intergovernmental organizations (“IGOs”), including the United Nations (“UN”), the International Monetary Fund (“IMF”), and the World Trade Organization (“WTO”), requested that ICANN “make provision for a targeted exclusion of third party registrations of the names and acronyms of IGOs both at the top and second level” during the gTLD Program.²⁵⁰ Their concerns were the same as those of many private sector critics: “the increased potential for the misleading registration and use of IGO names and acronyms in the domain name system under ICANN’s significant expansion plans.”²⁵¹

Just as required of private sector brand holders, these IGOs would be expected to expend resources in order to police the Internet to ensure that their brands were not being misused.²⁵² Such resources would be better spend on

²⁴⁴ Leibowitz Letter, *supra* note 16, at 3-5.

²⁴⁵ *Id.* at 5.

²⁴⁶ *See id.* at 6 (“Stakeholders urged ICANN to address the potential for malicious conduct and implement certain consumer protection safeguards before authorizing the launch of the new gTLD program.”).

²⁴⁷ *Id.* at 7.

²⁴⁸ *See id.* at 6.

²⁴⁹ Diane Bartz, *International Groups Want Off Internet Name Expansion*, REUTERS (Dec. 13, 2011), <http://commcns.org/13ILX2T>.

²⁵⁰ Open Letter from Intergovernmental Orgs. on the Expansion of Generic Top Level Domains to Stephen D. Crocker, Chairman of the Bd. of Dirs., ICANN, and Rod Beckstrom, President and CEO, ICANN 1 (Dec. 13, 2011), *available at* <http://commcns.org/U4hvNA>.

²⁵¹ *Id.*

²⁵² *Id.* (“Abusive registration of IGO names and acronyms harms these causes. It also

productive activities, such as peacekeeping operations, assisting refugees, or disaster relief. Precedent exists for ICANN's protection of IGO names and acronyms. During the gTLD Program policy formulation, ICANN chose to protect only two IGOs—the Red Cross/Red Crescent Movement and the International Olympic Committee.²⁵³ However, ICANN punted on making any decision to protect the rest of the IGO community.²⁵⁴ It simply referred the matter to the GNSO and the GAC in order to provide the Board with “policy advice” regarding protections for IGOs.²⁵⁵

d. The Commerce Department Responds?

Due to the shortcomings of the Affirmation of Commitments, there is little that the U.S. government can do to alter ICANN's decision making. Petitions to the Department of Commerce by organizations and politicians alike have done little to influence any changes to the current gTLD Program.

In early January 2012, shortly before the launch of the gTLD Program, NTIA sent a letter to ICANN, noting the “tremendous concern” of industry regarding the Program.²⁵⁶ NTIA made three requests of ICANN: (1) find a way to minimize the perceived need for defensive gTLD registrations; (2) promptly implement policies to assist law enforcement and protect consumers; and (3) better educate stakeholders about the gTLD program.²⁵⁷

ICANN seemingly responded to NTIA's request. In response to the “perceived need for defensive applications,” ICANN initiated a public comment period on February 6, 2012²⁵⁸ in order to determine the “sources of this perception and how it can be addressed.”²⁵⁹ However, the comment period launched

imposes a serious enforcement burden on IGOs, which . . . divert[s] their public resources. . . [It is] incumbent on ICANN as the mandating agency of the domain name system to implement appropriate policy measures to help mitigate these harms”).

²⁵³ See APPLICANT GUIDEBOOK, *supra* note 208 § 2.2.1.2.3.

²⁵⁴ See Letter from Stephen D. Crocker, Chairman of the Bd. of Dirs., ICANN, and Rod Beckstrom, President and CEO, ICANN, to Heather Dryden, Chair, Gov't Advisory Comm., ICANN, and Stephane van Gelder, Chair, GNSO Council, ICANN 1-2 (Mar. 11, 2012), available at <http://commcns.org/UTfVLI>.

²⁵⁵ See *id.* With new gTLDs potentially coming online in early 2013, as of November 2012, ICANN had yet to decide how, if at all, it will protect IGO names. See Kevin Murphy, *ICANN Sets Deadline to Sort Out Olympic Shambles*, DOMAIN INCITE (Sept. 17, 2012), <http://commcns.org/Va5TLP>; Kevin Murphy, *Secret ICANN Briefing Fuels IGO New gTLDs Debate*, DOMAIN INCITE (Sept. 10, 2012), <http://commcns.org/Va5WXT>.

²⁵⁶ Letter from Lawrence E. Strickling, Adm'r, NTIA, to Dr. Stephen D. Crocker, Chairman, Bd. of Dirs., ICANN 1 (Jan. 3, 2012) [hereinafter Strickling Letter], available at <http://commcns.org/V8vJvK>.

²⁵⁷ *Id.*

²⁵⁸ *Defensive Applications for New gTLDs*, ICANN (Feb. 6, 2012), <http://commcns.org/Va5XLq>.

²⁵⁹ *Id.*

in the middle of the application window.²⁶⁰ Any substantive change to the gTLD program in the middle of the application period would likely give rise to applicants claiming unfairness and inequitable conduct by ICANN. The comment period seemed little more than an empty gesture by ICANN to placate NTIA.²⁶¹

With little ability to persuade ICANN to address its concerns, NTIA's letter, which echoed many of the FTC's concerns,²⁶² may be a fruitless exercise. Because of the Affirmation of Commitments' lack of enforcement power, there is little that NTIA can do to ensure that Internet users are protected from ICANN's actions or its lack of action.²⁶³

NTIA caught ICANN's attention another way: through the IANA Functions Contract. ICANN currently fills the role as the IANA Functions contractor.²⁶⁴ In late 2011, NTIA initiated a Request for Proposals seeking a contractor to fulfill the requirements of the IANA Functions contract.²⁶⁵ The solicitation contained new requirements, previously unknown to the administration of IANA, which NTIA hoped would address international concerns with ICANN and its administration of the DNS.²⁶⁶ Specific to the gTLD Program, under the new

²⁶⁰ See Approved Board Resolutions Singapore, *supra* note 157 (New gTLD application window opened on January 12, 2012, and closed on April 12, 2012); *cf. Defensive Applications for New gTLDs*, *supra* note 258 (Comment period opened Feb. 6, 2012, and closed Feb. 27, 2012).

²⁶¹ Indeed, in an October 2012 letter, NTIA reiterated its concerns with how ICANN would protect trademarks in the new gTLD program. Protection mechanisms within the program, long promised by ICANN, have yet to be finalized and ICANN has not listened to recommendations for additional reasonable and cost-effective protections suggested by the intellectual property community. Strickling Letter, *supra* note 256, at 1-2.

²⁶² Compare *id.* (requesting that ICANN complete negotiations to assist law enforcement, improve WHOIS compliance and policy making, and improve its contractual compliance activities) with Leibowitz Letter, *supra* note 16, at 1-5, 8 (discussing law enforcement's use of and problems with WHOIS and challenges with ICANN's contractual compliance efforts).

²⁶³ See ICANN, PROGRESS REPORT – NEGOTIATIONS ON THE REGISTRAR ACCREDITATION AGREEMENT (Mar. 1, 2012), available at <http://commcns.org/102q3ng>. Only five of law enforcement's recommendations have agreed-upon language for the newest version of ICANN's agreement with its accredited registrars. These recommendations were first issued in 2009 and are designed to improve law enforcement's capability to protect consumers by investigating fraud and other illegal activity.

²⁶⁴ Press Release, Nat'l Telecomm. & Info. Admin, Notice – Extension of the Internet Assigned Numbers Authority (IANA) Functions Contract (Mar. 10, 2012), available at <http://commcns.org/UxtlJx>.

²⁶⁵ IANA SOLICITATION NO. SA1301-12-RP-IANA AMENDMENT 0001 § C.1 (Nov. 17, 2011) [hereinafter IANA AMENDMENT 0001], available at <http://commcns.org/UTg3Lg>.

²⁶⁶ Press Release, Nat'l Telecomm. & Info. Admin, Notice – Cancelled Internet Assigned Numbers Authority (IANA) Functions – Request for Proposal (RFP) SA1301-12-RP-IANA (Mar. 10, 2012) [hereinafter Cancelled IANA Functions], available at <http://commcns.org/W9guRW> (“Based on the input received from stakeholders around the world, NTIA added new requirements . . . including . . . provisions reflecting heightened

statement of work, the IANA Functions contractor would need to ensure that ICANN followed its own processes in delegating the new gTLD to the root, that stakeholders were permitted to weigh in on the gTLD's delegation, and that the delegation was supportive of the global public interest.²⁶⁷ Such requirements appeared to be a response to the .xxx fiasco that left several governments unhappy with ICANN's decision.²⁶⁸

After evaluating the proposals submitted, NTIA canceled the solicitation and announced that none of the submissions had met the solicitation's requirements.²⁶⁹ The rejection of ICANN's bid for the IANA contract left the organization, and its insular community, in a state of shock.²⁷⁰ Although NTIA reissued the solicitation²⁷¹ with some alterations, the new requirements remain.²⁷² NTIA has sent a clear message: the public interest must be fully accounted for when implementing DNS policy. This message aside, NTIA should realize that the Affirmation of Commitments is insufficient and that a greater role for government in DNS policymaking is needed to ensure that the public interest is truly accounted for.

V. CONCLUSION

While private sector coordination of the DNS was always a noble goal, ICANN's handling of gTLDs—perhaps one of the most important aspects of managing the DNS—has demonstrated the organization's inability to operate without some form of governmental oversight. As the gTLD program moves forward, should problems arise that could have been addressed through the ignored advice of governments via the GAC, ICANN may face a serious threat to its role in the DNS. The failure of such a large and public program may be all that is needed for a transfer of ICANN's powers to a wholly government-run DNS management system.²⁷³

respect for local country laws, and a series of consultation and reporting requirements to increase transparency and accountability to the international community.”)

²⁶⁷ IANA AMENDMENT 0001, *supra* note 265, § C.2.9.2d This provision was included in the newest contract. IANA FUNCTIONS CONTRACT, 2012, *supra* note 110, § C.2.9.2d.

²⁶⁸ See Murphy, *supra* note 233.

²⁶⁹ Cancelled IANA Functions, *supra* note 267.

²⁷⁰ See Kieren McCarthy, *ICANN Had No Idea IANA Rejection Was Coming*, DOT-NXT (Mar. 10, 2012), <http://commcns.org/Wj8tuh>; Kevin Murphy, *ICANN to Issue Update on IANA Contract*, DOMAIN INCITE (Mar. 12, 2012), <http://commcns.org/U4hQ2E>.

²⁷¹ Press Release, Nat'l Telecomm. & Info. Admin. Request for Proposal for IANA Functions Contract, (Apr. 17, 2012), available at <http://commcns.org/Va67m6>.

²⁷² See Kevin Murphy, *US Reopens IANA Contract Re-bid*, DOMAIN INCITE (Apr. 17, 2012, 11:04:14 AM), <http://commcns.org/Wj8AGr>; IANA FUNCTIONS CONTRACT, 2012, *supra* note 110, § C.2.9.2d.

²⁷³ See Michael Joseph Gross, *World War 3.0*, VANITY FAIR (May 2012), available at <http://commcns.org/VMM1wI>.

Throughout the history of the DNS, government has always played a role in overseeing the private sector. Indeed, it is hard to imagine such a multi-stakeholder model *without* government involvement. The public-private partnership model should continue. While ICANN promotes itself as an organization dedicated to bottom-up consensus making, the organization seemingly only responds to those who participate—and even then only to certain interests. As a result, the vast majority of consumers, organizations, and businesses who rely on the Internet and the DNS, but have never heard of ICANN, are left out of the process. Such entities could best be represented through stronger government involvement in ICANN.²⁷⁴ If participation truly represented all Internet users, perhaps the many organizations that were adversely affected by the gTLD Program would have voiced their concerns before the gTLD Program was approved. A larger or more formally structured role for government within ICANN would make ICANN more democratic and more responsive to concerns.

Reinstituting some means of governmental oversight could be accomplished in one of two ways. The first, and by far more internationally controversial, involves the Department of Commerce leveraging its contractual control over the physical root server system and IANA to force ICANN to negotiate a new Affirmation of Commitments that contains reasonable means to enforce ICANN's promises. While feasible, this path would only give ammunition to ICANN's critics who claim that the organization is already beholden to the United States. The second way is to strengthen and formally structure the role of the GAC within ICANN in order to give the GAC more power within the ICANN structure. Such power would come from providing the GAC a seat on the ICANN Board of Directors or by reducing the Board's ability to circumvent the GAC's advice. The GAC representative to the Board would thereby represent the GAC, and not his or her individual country's interest; likewise, the interests of the GAC would be kept in check by the other Board members, much like a minority shareholder's board seat in a closely held corporation. Additionally, or even alternatively, the GAC's role could be more structured, such as by providing it a role in the policy making process within the GNSO rather than its current direct path of advising the Board.²⁷⁵ If ICANN were to proactively take such steps, it would send a strong message to its critics that the organization truly is a multi-stakeholder body that responds to the needs of the global community it serves and learns from its previous shortcomings.

²⁷⁴ This position has been argued before from within ICANN, and unfortunately, rejected. Jonathan Weinberg, *Governments, Privatization, and "Privatization": ICANN and the GAC*, 18 MICH. TELECOMM. & TECH. L. REV. 189, 197 (2011).

²⁷⁵ A more structured and participatory role would hopefully lead to less dysfunction. *Contra id.* at 218.

Such action would likewise be a strong counter argument to recent international calls for a purely government-run Internet. A more participatory defined role for government within the management of the DNS could only improve the stability of the Internet's naming system and ensure that all users' interests—and not just those of vested stakeholders—are accounted for.