

ICANN & nice monopoly

From: "John Gilmore"

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Subject: **How global DNS could survive in the frozen lands outside US control**

ICANN has built itself a nice monopoly, with very little outside influence or control. Now it wants to reduce that to "zero" outside influence or control. The community and the US Government should decline to do so. (PS: The community has little or no say over this.)

Back when ICANN was formed in 1998, EFF proposed that ICANN's "nonprofit" corporate charter should include some basic protections for freedom of speech and press, due process, international human rights, transparency, and such.

See:

https://w2.eff.org/Infrastructure/DNS_control/ICANN_IANA_IAHC/19980923_eff_new_iana.bylaws

https://w2.eff.org/Infrastructure/DNS_control/ICANN_IANA_IAHC/19980924_eff_new_iana_pressrel.html

"... any foundation for governance of a communications system, such as the Internet, should stand on the fundamental human right of free expression. ... What was supposed to be an exercise in Internet democracy has become an exercise in Internet oligarchy" - Barry Steinhardt, EFF President

and see generally:

https://w2.eff.org/Infrastructure/DNS_control/ICANN_IANA_IAHC/

ICANN's management and lawyers refused to include any such provisions, on the theory that if they were included, then people could succeed in suing ICANN if it violated freedom of speech or the press, did things to domain holders without due process, or was not transparent about its activities. ICANN management wanted the right to violate those human rights and public oversight provisions -- and they ultimately got it. No court can decide whether ICANN's actions violate international human rights law, because ICANN is not required to follow international human rights law; it isn't a government and it never signed those treaties. It isn't required to follow the US Bill of Rights, because it isn't a government. It isn't required to follow basic transparency policies like Freedom of Information or Open Meetings, except to the extent that the US Government currently requires that under their contract with ICANN. It isn't required to follow anything but California and US nonprofit law (which it deliberately violated anyway, see below). Yes, the sole substantive rules that govern ICANN are the same ones that control the struggling 2-person environmental group or underfunded health clinic doing a bake

sale in a nearby park. The creation of an unaccountable ICANN was all handled by ICANN's "unpaid volunteer" lawyer, Joe Sims of the Los Angeles firm Jones Day, who later, once the gravy train was set up, started charging ICANN a good chunk for his ongoing advice. As of 2014, ICANN pays Jones Day almost \$4 million annually for legal services.

ICANN soon started charging domain registrars a fee of 20c per year per domain, for doing nothing except protecting itself from outsiders and paying itself large wages. ICANN sets the amount of this fee itself, and there is nothing that outsiders, or ICANN's customers, can do to challenge it or change it. It is currently 18c per transaction, and raises about \$80 million dollars per year, all of which ICANN finds some way to spend on itself and its lawyers. By 2014 it had more than 300 employees churning around looking for ways to spend money on themselves and their contractors. More than 30 of these "nonprofit" employees make more than \$250,000 a year or are "paid directors", with the CEO wasting \$900K/year. It also spent about \$575K of your domain fees lobbying the government on its own behalf ("a staff registered lobbyist and two government affairs firms").

See pages 7-9 and 30 and 52-53 of:

<https://www.icann.org/en/system/files/files/fy-2014-form-990-31mar15-en.pdf>

At one point a single outside critic, Karl Auerbach, slipped onto the ICANN Board of Directors. ICANN is (was?) a California nonprofit, and the Directors of a nonprofit have responsibility for the acts of the nonprofit -- and have rights to oversee its acts. They can inspect the physical premises at any time, and can see and copy any documents that the business has. Otherwise the theory that the Board is in control is a hollow mockery, and California law doesn't allow that. ICANN claimed that its Board members could not actually access basic information like the financial statements of the organization (how much money comes in, how much goes out, and for what reasons). Not only did ICANN management refuse. The rest of the ICANN board, including Chairman Vint Cerf, refused, and circled the wagons to protect ICANN from actual transparency. In 2002, EFF helped Karl file a lawsuit under California law to enforce his rights. ICANN contested the lawsuit, and Vint filed a declaration with the court in support of their position. ICANN lost that lawsuit, and Karl got to look at the financial reports -- but did not get to show the finances of this "nonprofit" to the public. ICANN immediately revised the procedures for electing their board, to make sure that no critic would ever get on the board again. However, they did start being more transparent about their finances, since these would have to come out in their publicly available income tax returns anyway.

See:

<https://www.eff.org/cases/auerbach-v-icann>

<https://www.eff.org/press/releases/icann-director-seeks-court-order-review-records>

<https://www.icann.org/resources/pages/fiscal-2014-09-15-en>

Fast forward another few years, and ICANN decided to sell new top-level domains. The bidding process was completely rigged to ICANN's benefit; bidders sent in a non-refundable \$185,000 per proposed domain and were guaranteed exactly nothing in return. Domain speculators sent in a frenzy of money, as expected, and ICANN raked in a one-time profit of \$350 million. Some of those domains have gone live since, and as expected, they have mainly benefited ICANN. Recently in 2015 ICANN auctioned off ".app" for \$25 million, which it says went into a "designated purpose" fund, which ICANN of course has sole control over. As with the about \$80 million in recurring revenue from domain registrars and registries, they have struggled mightily but succeeded in finding ways to waste almost all of these hundreds of millions on themselves and their buddies. As of 2014, they estimate that all but \$100M has been spent, and that is carefully hoarded in a "Risk Reserve" for "future costs that cannot be estimated" (up to now, only \$1M in "risk reserve" has been actually spent). In 2014 they spent or wasted \$17M with Ernst & Young, \$16M with KPMG, \$8M with "JAS Global Advisors", \$4M with Interconnect Communications, \$2.8M with Price Waterhouse, and \$2.6M with Chambre de Commerce Internationale, all for the new top-level domains program.

See:

<https://www.icann.org/en/system/files/files/financial-report-fye-30jun12-en.pdf>

<https://www.icann.org/en/system/files/files/adopted-opplan-budget-fy14-22aug13-en.pdf>

ICANN recently decided that the money it receives for each domain name registered does not obligate it to do anything in particular; or as the lawyers put it on page 75 of:

<https://www.icann.org/en/system/files/files/fy-2014-form-990-31mar15-en.pdf>

ICANN HAS DETERMINED THAT THE REGISTRY AND REGISTRAR AGREEMENTS DO NOT INCLUDE ANY OBLIGATIONS FOR ICANN THAT PERTAIN TO EACH SPECIFIC REGISTRATION OF A DOMAIN NAME. ICANN CONSIDERS THAT ITS CONTRACTUAL OBLIGATIONS ARE UNRELATED TO A SPECIFIC DOMAIN NAME REGISTRATION, WHICH THEREFORE DOES NOT CREATE SPECIFIC PERFORMANCE OBLIGATIONS WHICH WOULD REQUIRE A DEFERRAL OF REVENUE OVER THE DURATION OF THE REGISTRATION. AS A RESULT, ICANN HAS CHANGED ITS REVENUE RECOGNITION METHOD SO THAT THE TRANSACTION-BASED FEES ARE RECOGNIZED AS REVENUE WHEN EACH TRANSACTION OCCURS.

In other words, they specifically state that you are paying them for NOTHING when you pay them every year (via your registrar and registry) to renew your domain name. The reason you have to pay? Because they

control the root and they demand payment, not because they are doing anything for you.

One minor drag on ICANN's ability to do exactly what it wants has been the original US Government contract to run the domain name system. Whenever ICANN got a little too crazy, the government would gently suggest that perhaps it would re-bid that contract to somebody a little less crazy. As far as I can tell from outside, the USG has used a very light touch in this process. Anyway, the USG has never been particularly unhappy about creating monopolies for the private benefit of the monopolies. But nevertheless, the structure galled other countries, especially those who want to use international institutions dominated by governments to impose their own kind of cultural baggage (censorship, wiretapping, etc) on global Internet users. Or kleptocrats who could see how any international institution that managed to wangle control of ICANN could start extracting free money from the Internet; ICANN would just pass the costs down to all of us, in a way that we already have no way to contest. So "Get the US out of domains" became a rallying cry for a kind of misguided leftists in alliance with third world autocrats. That is the current "debate" in the multi-decade debacle of ICANN.

To sum it up? If domain users have zero control over ICANN, if ordinary domain owners have zero control over ICANN, if ISPs have zero control, if domain registrars have zero control, if governments have zero control, if even its sinecure board members have zero control, then who will have any control over what ICANN does with the domain name system that billions of people rely upon? The answer is pretty simple: ICANN management and lawyers will have full control, fat personal salaries, a pot of hundreds of millions that they're sitting on, recurring revenues that are totally set by their fiat, and the rest of us will have zip.

Any questions?

John Gilmore

(speaking for myself, not for the Electronic Frontier Foundation)