Registering the Domain Name System: An Exercise in Global Decision-Making

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Internet domain names have become valuable properties. During the past two years, conflict has grown over the rights to these names and over who has the rights to create them. There is the potential that these conflicts could destabilize the domain name system itself. Efforts to bring the domain name system into alignment with trademark law are complicated by the fact that trademark law is generally national while domain names are inherently global.

One approach to these challenging issues would be to register the domain name system with the appropriate organs of the United Nations. This would build legitimacy for the Internet's naming and registration conventions under the trademark laws of each country and would give the world's governments an "appropriate" role in decision-making regarding the Internet infrastructure. Organizations with a vital stake in the Internet should invest the time and energy to insure that the world's governments acknowledge the domain name system.

The domain name system includes not only the actual Internet domain names, but the administrative and technical infrastructure that makes them possible. The domain name registries impose order on the name application process by preventing duplicate name assignments and by fitting them into a distributed hierarchy. These registries also provide a server from which remote programs may inquire and retrieve authoritative pointers to the domain name servers which contain details about a domain. The Domain Name Service (DNS) is the server program that provides this function and allows the servers to coordinate with each other and

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National Trademarks—Global Domains

The Internet domain name system was set up to create a more "human-friendly" means of accessing Internet hosts than just using a long string of numbers. It also has created a plenitude of marks that are being treated as trademarks or service marks in various countries. There has been a growing number of court cases in the United States over the rights of the holder of a trademark to a domain name that has been registered to someone else. Agmon, Halpern, and Pauker at their Web site "What's in a Name?" provide an excellent overview of recent disputes over the rights to various domain names.[1] Many of these disputes have involved Network Solutions, Inc. (NSI), which is responsible for registering domains under the *.com* Top Level Domain (TLD). NSI has gone through four iterations of a domain dispute policy and has enraged many in the Internet community in the process. At the same time, the U.S. Patent and Trademark Office is developing its rules on registering domain names as trademarks.[2] But, as David Maher of the International Trademark Association points out, the real dilemma is that trademarks are governed by national rules but domain names can—by virtue of the Internet—immediately appear in almost every other country.[3] There is nothing to prevent a second country from judging that a domain name violates the rights of a trademark holder. This has already occurred in Germany, where an American company was sued for using a domain name on the World Wide Web that was registered in the United States but infringed on a trademark claimed by a German company.

Though domain names appear globally, there are no global trademarks. Currently, trademarks need to be registered in each and every country where they are used. The only way to register a mark globally is to register it in every country. The World Intellectual Property Organization (WIPO) does have a process for facilitating multiple registrations, but only for states that have signed the

Madrid Agreement Concerning the International Registration of Marks. The Madrid agreement is limited to 46 states and does not include the United States or Japan.[4] Signatory countries have the right to reject a filing under the Madrid agreement and disputes are settled at the national level.

Though there are no global trademarks, the Internet community does have international Top Level Domains (iTLDs). For the most part, these iTLDs, such as *.com* and *.net*, are currently controlled by the Internic, the registry run by NSI. The rest of the registries are either country or region specific and issue TLDs that are based on International Standards Organization (ISO) 3166 two-letter country codes (i.e., *.fr* for France). Organizations that register a domain name with a national registry will have the country code appended to the right of their second-level domain. However, for historical reasons, the *.us* TLD is rarely used and most U.S. businesses and organizations register under the *.com* or *.org* iTLDs. Businesses outside the United States have been allowed to register under the *.com* TLD regardless of where their host is situated. Thus *.com* is considered an international TLD. The *.com* iTLD has developed a snob appeal that has attracted many non-U.S. companies to register under it, but non-U.S.-based companies have also registered out of fear that someone else might register a domain in the *.com* TLD and dilute the value of their trademark within their own country.

With the incredible explosion of interest in the Internet on the part of the business community, many businesses are finding that when they try to register a second-level domain that the name that they would prefer, a name based on their own trademark, is already taken. U.S. law allows many companies to use the same word in their trademarks (e.g., Acme toys, Acme books, Acme cookies). But because of the way the Internet is currently configured, there can only one *Acme.com.*

There has been considerable discussion in the Internet community on how to restructure the domain name system to meet the needs of the commercial business community and the realities of trademark law. The Kennedy School of Government along with the National Science Foundation hosted a symposium on November 29, 1995, at which leaders from different sectors of the Internet community exchanged ideas on a number of proposals.

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One proposal from the Internet Assigned Number Authority (IANA) and the Internet Society (ISOC) called for the creation of new iTLD registries that would compete against each other and would provide businesses with multiple opportunities to use the same second-layer domain (e.g., *Acme.com, Acme.bus, Acme.ind*). These registries would be chartered by IANA and ISOC.

Tony Rutkowski, former director of the Internet Society, presented a paper noting that the TLD debate touches on a range of international and domestic legal issues. Any TLD solution, he argued, needs to recognize the legal ramifications and include the major stakeholders in the decision-making process. Rutkowski has developed a list of the "parties of interest" in Internet public policy matters which includes both international business associations and international governmental bodies such as the International Telecommunications Union (ITU), the World Trade Organization (WTO), the World Intellectual Property Organization, and the United Nations Educational, Scientific, and Cultural Organization (UNESCO).[5] He sees the need for a new body to oversee the administrative functions of the Internet that would incorporate the key stakeholders and effectively tap their expertise.

While many have debated the question, Eugene Kashpureff has set up a registry called Alternic to issue TLDs for a fee. The TLDs that Alternic registers are not in the Internet root servers, so most users cannot access hosts that have them as TLDs. However, Alternic does offer an alternate root server for those who will point to it which will give users access to the Alternic-registered TLDs along with the IANA-approved TLDs. At the Internet Engineering Task Force (IETF) meeting in Montreal in June 1996, Kashpureff questioned the right of IANA to stifle competition and even threatened to go to court to gain access to the root servers.

Internet Decision-Making?

We reject Kings, Presidents, and Voting:
We believe in rough consensus and working code.
—David Clark, IETF (1992)

Robert Shaw's "Internet Domain Names: Whose Domain Is This?" gives an excellent overview of the organizations that are involved

with Top Level Domains.[6] David Maher in "Trademarks on the Internet: Who's in Charge?" reviews the key proposals for overhauling the system.[7] However, neither Shaw nor Maher fully resolves the questions their titles pose.

Internet Assigned Number Authority

The Internet Assigned Number Authority has historically played the key role in coordinating the domain name system. The IANA states on its home page that it is "chartered by the Internet Society (ISOC) and the Federal Networking Council (FNC)[8] to act as a clearinghouse to assign and coordinate the use of numerous Internet protocols."[9] IANA is not legally incorporated. It is run by John Postel of the Information Sciences Institute (ISI) at the University of Southern California (USC). According to Postel, he is the voice for a "low level of effort" task that is staffed by himself, Joyce Reynolds, Nehel Bhau, and Bill Manning.[10] ISI receives its funding from the U.S. Department of Defense's Advanced Research Projects Agency (ARPA). Though it is not clear how much the U.S. government is involved in, there is some speculation that, in the event that it is ever sued in court, IANA might claim that it is a U.S. government activity to remove the case from the court's jurisdiction.

IANA's authority does not stem from its relationship with the U.S. government but from its historical relationship with the Internet Engineering Task Force and its steering group (the IESG). The Internet protocols that are defined by the IETF contain numerous parameters (Internet addresses, domain names, Management Information Base [MIB] identifiers, etc.) that must be uniquely assigned. John Postel has a long history of making technically sound decisions that have worked for the IETF, Internet Service Providers (ISPs), and users of the Internet. It is this history that has given IANA its authority.

Postel and IANA have not demonstrated parallel skills when forced into the public policy arena. Much to his dismay, Postel has watched as the domain name system has become wrapped up with trademark law. Postel's August 1996 "Memo on New Registries and the Delegation of International Top Level Domains" recognizes

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"trademarks are a complicated problem in their own right."[11] He hopes that there are aspects of his plan that "may ease the problems involved with the interaction of trademarks and domain names by giving more access to domain names for holders of the same trademark in different business areas."

It is very disconcerting that Postel never acknowledges in his memo the reality that, though domain names are used globally, trademark law is national. In his side remarks on "Trademarks and Domain Names," he states that we will have to wait until a "high-level court" makes a decision as to whether domain names are trademarks. In fact, courts all over the world are going to have to make this determination along with their governments and international organizations.

To his credit, Postel requires in section 6.1.1 that new iTLDs must not be trademarks. It is the responsibility of the new registries to research their proposed iTLDs to insure that they have not been trademarked. He states that new iTLDs may be required to not be on the international list of national trademarks maintained by WIPO. In the memo, he is unclear as to whether WIPO's trademark list is readily available and does not seem to be cognizant of the limitations of this list, such as the fact that it does not include trademarks of the United States, Japan, and other nonsignatories.

The Postel memo calls for IANA, ISOC, and the IETF to create a joint committee to oversee the selection of new iTLDs and registries. The contracts used to create new registries will include a "statement indemnifying the IANA and the ISOC for any infringement of trademark which may be created in this process." Processes for arbitrating conflicts are mentioned along with an appeals process that escalates from IANA, to IETF, and finally to ISOC. It seems that IANA and IETF have no intention, however, of becoming involved in trademark disputes though they do allocate legal funds in case they are dragged in to such disputes.

Internet Society and Internet Engineering Task Force

The Internet Society board of trustees voted during its June 1996 meeting to support the Postel TLD proposal. ISOC's mission is to further the Internet, which it tries to do by providing a legal and

financial umbrella for the Internet Engineering Task Force, the Internet Engineering Steering Group (IESG), the Internet Architecture Board (IAB), and IANA. In his memo, Postel acknowledges that ISOC provides IANA with an international legal and financial umbrella. Given the importance of the domain name system to the Internet community and to the businesses that are investing in it, the ability of the umbrella to withstand potential conflicts over the legitimacy of the domain name system must be examined. ISOC's strength comes from its dues-paying members, but also—and more important—from the success and vibrancy of the IETF which it serves. The IETF sets standards for the Internet but has shied away, for good reason, from trying to govern the operational infrastructure of the Internet or to work directly with government to address public policy concerns surrounding the Internet.

ISP Organizations

Internet Service Providers that operate much of the infrastructure have created trade associations such as the Commercial Internet Exchange (CIX)[12] to organize and influence the public policy debate on such key issues as ISP liability for indecent content and copyright violations. Over the past two years, CIX has repeatedly demonstrated an ability to track issues, articulate issues to policymakers, and influence the course of legislation. Though CIX focused primarily on U.S. issues during 1995, in 1996 it began to actively work with a wide range of global and regional bodies that impact ISPs such as the ITU, WIPO, the European Commission, the OECD, and others. CIX has also been active in the debate over the domain name system and jointly hosted with ISOC the well-attended February 1996 conference on the "Internet Administrative Infrastructure—What Is It? Who Should Do It? How Should It Be Paid For?"

In addition to CIX there are a number of national and regional associations of Internet Service Providers. Some of these associations have developed to meet national and regional infrastructure needs for exchange points and registries, but some have also been active in the public policy concerns of their members.

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There is also a wide assortment of associations that have sprung up to represent various interest groups and around specific technologies. The nature of the Internet dramatically lowers the costs of putting together an organization, especially at a national or global level. The ability of these Internet organizations to build consensus and make decisions varies widely, as does their ability to work constructively with other organizations and government. There is certainly no hierarchy into which all these groups fall, nor is there one organization that represents the interests and the expertise of all stakeholders in the Internet. This is not to say that the Internet community cannot focus on common goals such as the creation of an environment where the global domain name system can coexist with various national trademark laws. In working toward this goal there are many potential allies among business associations and businesses themselves which are concerned about the stability of the Internet and their own domain names.

United Nations?

The United Nations and its specialized bodies have a critical role to play in registering the Internet domain name system. Registering the domain name system would help to establish its legitimacy as a global system, even in the absence of global trademark law. Most countries have decided to participate or at least to allow their citizens to participate in the Internet. Though many nations are wrestling with how to set up barriers to illicit content, few have developed policies to deal with foreign domain names that might infringe on local trademarks.

In "Law and Borders," Johnson and Post argue that cyberspace needs and can create new laws and legal institutions of its own.[13] However, they neglect to discuss how to persuade national governments to accept limitations on their own jurisdiction. The Internet community ought to actively engage representatives of the world's governments in dialogue over the domain name system with the goal of registering the system. The goal should not be to make the domain name system a government-mandated convention for all electronic communication or even for the Internet itself. Rather, stakeholders in the Internet should work with those responsible for

maintaining trademark law to insure that the domain name system can coexist with the various national trademark laws.

Part of the dialogue that needs to occur is over how to protect the rights of both domain name holders and trademark holders in this global environment. Postel's new memo seems to suggest that the venue for protecting a trademark is the country in which the iTLD registry is located even if the trademark infringement occurs in another country. Hopefully, IANA will not charter any registries that are not dutifully registered in a particular country or in countries which do not respect the rights of foreign trademark holders. Unfortunately, there is little evidence to suggest that IANA significantly engaged world governments in a discussion as to whether this would be an acceptable solution.

International Telecommunication Union

Such dialogue needs to occur and it would occur much more effectively if the Internet community focused on the goal of United Nations registration. There are a number of UN bodies that ought to be engaged. The International Telecommunication Union (ITU) and particularly its Telecommunications Standardization Sector (the ITU-T) have as their mission the coordination and facilitation of telecommunications between countries. The ITU-T has been active in setting many telecommunications standards, including the Open System Interconnection (OSI) standards such as X.400 and X.500 that attempt to provide some of the same services as the Internet domain name system. There are some in the IETF who are contemptuous of the ITU-T and its standards processes. There are major differences in how the two organizations set standards. The ITU-T votes on standards, while the IETF relies on rough consensus. The IETF requires at least two separate implementations before a draft can become a standard, whereas the ITU-T can draft a standard without an implementation. The IETF is open to all based on their ability to participate, while the ITU-T is controlled by representatives from the government ministries that control telecommunications with input from large telecommunications carriers and manufacturers.

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Despite the differences in organizational cultures, at this point in time the Internet community needs to learn how to work through the ITU to build support for the Internet in general and the domain name system in particular. By attempting to register the domain name system with the appropriate UN bodies, the Internet community would introduce a feedback loop that would be very educational for IANA, ISOC, the IETF, and other members of the Internet community. The experience might even result in IANA growing into, or being supplemented by, the kind of body that Tony Rutkowski envisions in which the key stakeholders in the Internet make the decisions regarding its administration.[14]

If the ITU-T registered the key Requests for Comments (RFCs) associated with the domain name system and how it is administered, the world's governments would take a step toward acknowledging the system's legitimacy. The ITU cannot force any country to do something it does not want to do. However, through its decision-making processes the ITU can create powerful forces for consensus.

The process of registering with the ITU could also be very helpful to the Internet community. Though there are certain Request for Comments such as RFC 1591 that describe domain name system structure and delegation, Postel's memo and the Internet draft that preceded it have not gone through the IETF's RFC processes. IANA needs to update RFC 1591 if it is in fact going to proceed with creating new iTLD registries. The Internet community needs a current set of RFCs dealing with the domain name system for which it can build international support.

Parts of the Internet community are wary of giving the ITU a role in the Internet administrative infrastructure. There are people who fiercely guard the IETF's decision-making processes. In addition, given the potential for competition between ISPs and telephone companies, ISPs may be concerned about the amount of power that national telephone monopolies have in the ITU. Instead of seeing the ITU as a threat, the IETF and the ISPs should recognize the value of utilizing the ITU to build relationships with the world's governments. The ITU can serve as an excellent resource for gathering information and driving debate. The ITU should not define Internet protocols or administrative procedures;

rather it should be challenged to explicate what it would take for a global system, in particular the Internet, to coexist with the world's governments.

The ITU now accepts International Standards Organization standards through a cooperative agreement. It is possible that such an agreement could be arranged with ISOC and the IETF. ISOC and the ITU have become members of each other's organizations. Nevertheless, the mistrust in parts of the Internet community of the ITU in particular and government in general may limit ISOC's ability to build this relationship.

World Intellectual Property Organization

The Internet community should also consider working through other United Nations organizations, such as the World Intellectual Property Organization. WIPO's objective is to promote the protection of intellectual property throughout the world through cooperation among states and, where appropriate, in collaboration with other international organizations. Though there might be a question as to whether IANA is an international organization, there is a potential role for WIPO in harmonizing the domain name system with trademark law.

The WIPO Convention does give the WIPO director general the power to be involved in, subject to the General Assembly's consent, agreements to promote the protection of intellectual property.

Agmon, Halpern, and Pauker suggest that a potential solution to the trademark/domain crisis would be for WIPO to facilitate an international domain name treaty.[15] There is a concern that treaties often take five or more years to write and ratify and no one has any idea where the Internet and its naming conventions will be five years from now. Working through WIPO to register the domain name system is a more realistic short-term goal. WIPO could be very helpful in developing a set of procedures for registries that would minimize the chance that their TLDs or the domains created under them would be contested. WIPO could also be very helpful in setting in place adjudication mechanisms for businesses that countries would not contest and that would minimize litigation. The business community would like the assurance that if a company

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registers a domain name in a registry in one country, it will not be sued for having that domain name appear in another country. Finally and most important, working through WIPO could help to diffuse tensions that might threaten the stability of the domain name system itself.

The Internet community ought to explore with WIPO ways of protecting the rights of domain name and trademark holders in iTLDs on a multilateral basis. For many of the same reasons mentioned with respect to the ITU, it would be a worthwhile exercise to register the domain name system with this different UN specialized agency that has expertise and authority that are relevant to the trademark/domain name dilemma. It is not a matter of choosing WIPO over the ITU or vice versa; they have different expertise and represent different interests (trademark offices vs. telecommunications ministries). It is recommended that the Internet community both engage in a dialogue with and work for registration in both bodies.

The International Ad Hoc Committee

At the September 1996 Harvard Conference on "Coordination and Administration of the Internet," Don Heath, president of ISOC, presented John Postel's proposal for creating new registries and iTLDs.[16] Heath made a major change to Postel's proposal by suggesting that one representative each from the ITU, WIPO, and the International Trademark Association (INTA) should join the International Ad Hoc Committee (IAHC) that would set the rules and select the new registries and iTLDs. Under Postel's proposal the Internet Society, IANA, and the IETF would each choose two members of the committee. Heath's revision includes these six committee members and adds three more from the international organizations.

By including the ITU, WIPO, and INTA on the committee, Don Heath has internationalized the iTLD decision-making process. It is not totally clear whether each of these institutions will agree to serve on the IAHC. More important, just because a representative of the institution is on the IAHC, it is does not mean that the institution and the member-states it serves necessarily accept the

decisions of the IAHC. Building an international consensus might involve not only working with a representative of the ITU and a representative of WIPO, but might also require working through the institutions themselves. The Internet Society under Don Heath's leadership is proposing to take an important first step.

Conclusion

A general "Law of Cyberspace Treaty" or a more specific convention dealing with domain names may eventually come into reality. However, currently the technology and the business are outstripping the ability of stakeholders to organize and make sound decisions. The Internet community should focus on having the world's governments formally recognize the domain name system. Governments and businesses need to be convinced that domain name disputes can be arbitrated or adjudicated even if a domain name is owned by a business in another country and used in a third country. Given the stakes involved, a business or government might out of frustration choose to attack or destabilize the domain name system or the organizations that support it.

The Internet community should work at the national and international level to build consensus behind the domain name system and to minimize the possibility of actions that destabilize the system and the businesses that depend on it.

Notes

1. Jonathan Agmon, Stacey Halpern, and David Pauker, "What's In A Name?" <http://www.law.georgetown.edu/lc/internic/recent/>.

2. Jessie Marshall, "Domain Names and Trademarks: At the Intersection," <http://www.isoc.org/isoc/whatis/conferences/inet/96/proceedings/f4/fr_3.htm>.

3. David Maher, "Trademarks on the Internet: Who's in Charge?" <http://www.aldea.com/cix/maher.html>.

4. *WIPO General Information*, Geneva: 1996.

5. "Parties of Interest in Internet Public Policy Matters," <http://www.wia.org/pub/policy-orgs.html>.

6. Robert Shaw, "Internet Domain Names: Whose Domain Is This?" <http://www.itu.ch/intreg/dns.html>.

7. David Maher, "Trademarks On The
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8. FNC membership consists of repres
whose programs utilize interconnected

9. IANA, <http://www.isi.edu/iana/ov

10. John Postel, e-mail re "issues on th
July 16, 1996.

11. "New Registries and the Delegatio
<ftp://ftp.isi.edu/in-notes/iana/admi

12. See CIX, <http://www.cix.org>.

13. David Johnson and David Post, "
Cyberspace," *First Monday*, <http://w
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14. Tony Rutkowski, "By-laws of the Inter
pub/cnic-charter.html>.

15. Agmon, Halpern, and Pauke
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16. Don M. Heath, "Adding New Regist
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nes: Whose Domain Is This?" <http://

7. David Maher, "Trademarks On The Internet: Who's In Charge?" <http//www.aldea.com/cix/maher.html>.

8. FNC membership consists of representatives from 17 U.S. federal agencies whose programs utilize interconnected Internet networks.

9. IANA, <http://www.isi.edu/iana/overview.html>.

10. John Postel, e-mail re "issues on the table" posted in newdom@iiiia.org on July 16, 1996.

11. "New Registries and the Delegation of International Top Level Domains," <ftp://ftp.isi.edu/in-notes/iana/administration/new-registries>.

12. See CIX, <http://www.cix.org>.

13. David Johnson and David Post, "Law and Borders—The Rise of Law in Cyberspace," *First Monday*, <http://www.firstmonday.dk/issues/issue1/law/top.html#bdtb>.

14. Tony Rutkowski, "By-laws of the Internic Committee," <http://www.agent.org/pub/cnic-charter.html>.

15. Agmon, Halpern, and Pauker, "What's in a Name?" <http://www.law.georgetown.edu/lc/internic/domain1.html>.

16. Don M. Heath, "Adding New Registries and International Top Level Domain Names," <http://www.isoc.org/whatsnew/itlds.html>.