

# **Expert Report of Dr. Milton Mueller**

**Independent Review Process, ICM Registry LLC v. ICANN**

## Table of Contents

1	Objective of Expert Report.....	1
2	My Qualifications and Experience .....	1
3	Overview of the Statement .....	4
4	ICANN as an Institution.....	6
4.1	Why ICANN was set up as a private sector, California nonprofit organization .....	7
4.1.1	The need for global coordination and policy.....	7
4.1.2	Avoidance of existing intergovernmental organizations .....	8
4.1.3	Preserving the special role of the Internet technical community.....	9
4.2	The role of the U.S. government in ICANN.....	10
4.2.1	The Memorandum of Understanding and the Joint Project Agreement.....	11
4.2.2	The IANA contract .....	12
4.2.3	The VeriSign Cooperative Agreement .....	12
4.2.4	“Authority” over the authoritative root zone file.....	13
4.3	The role of other governments in ICANN.....	14
4.3.1	The Governmental Advisory Committee .....	14
4.3.2	Political pressures for a stronger governmental role .....	15
5	How ICANN Operates Under its Bylaws.....	17
5.1	The nexus between policy and technical coordination.....	18
5.2	The creation of new top level domains.....	22
5.3	The ICANN policy-making process .....	23
5.4	Governments under the Bylaws.....	25
6	Narrative of the .xxx Application’s Treatment .....	27
6.1	The design of the RFP process .....	28
6.2	Public comment on the sTLD applications.....	30
6.3	Rejection of .xxx by the Sponsorship Evaluation Team .....	32
6.4	The June 1, 2005 vote of the Board.....	36
6.5	The political reaction to the June 1, 2005 vote.....	38
6.6	The change in the U.S. government’s position.....	41
6.7	The broken process.....	44
7	Assessing the Board Resolution Rejecting .xxx.....	46
7.1	The .xxx application failed to meet sponsorship criteria.....	46
7.2	The .xxx application raised public policy concerns .....	49
7.3	The agreement did not address the GAC’s concern for offensive content and the protection of vulnerable members of the community.....	51
7.4	The application raised law enforcement compliance issues and there are “credible scenarios” in which ICANN would be forced to become involved in content regulation .....	52
8	Conclusion: ICANN and Accountability.....	54

# 1 Objective of Expert Report

I have been asked to describe the history, policies, and practices of the Internet Corporation for Assigned Names and Numbers (ICANN) as they relate to issues of Internet governance and governmental influence. Specifically, I examine the history, policies, and practices of ICANN as they impacted ICM Registry's application for the sponsored top level domain (sTLD) .xxx. As set forth in detail below, ICANN's administration of the 2004 round for new sponsored TLDs and its rejection of ICM Registry's application was inconsistent with ICANN's Bylaws and Articles of Incorporation.

# 2 My Qualifications and Experience

I am a tenured Professor at the Syracuse University School of Information Studies. In January 2008, I was appointed the XS4All Professor at the Technische Universiteit Delft, The Netherlands. This is an endowed Chair on the Faculty of Technology, Policy and Management sponsored by XS4All (the Netherlands' first Internet service provider) and the position is devoted to the "security and privacy of Internet users." It is a part-time position and I continue to hold my professorship at Syracuse University.

I have extensive experience with ICANN, and have conducted academic and applied policy research on Internet governance issues since 1997. My book, Ruling the Root: Internet Governance and the Taming of Cyberspace, published by MIT Press in 2002, is a critically acclaimed and widely cited scholarly account of the history of the domain name system, the development of policy conflicts over control of Internet identifiers, and the formation of ICANN. In the course of researching this book, I comprehensively reviewed the key documents reflecting the technical, administrative, legal, and economic evolution of the domain name system, and interviewed scores of the people involved in making that history. Since 1998, I have published fourteen articles on ICANN and Internet governance-related issues in academic journals or as chapters in scholarly books. In addition, I sit on the editorial boards of four scholarly publications

concerned with information and communication policy issues.

I also participate in a number of groups and associations dedicated to researching Internet governance issues. In 2004, I, along with four other scholars, founded the Internet Governance Project, an alliance of academics who collaboratively research and participate in the international institutions shaping the Internet. I also helped found the Global Internet Governance Academic Network (GigaNet) in 2006. GigaNet is a scholarly association of researchers who hold an annual symposium concurrently with the annual Internet Governance Forum. In 2007, I served as GigaNet's program committee chair and in 2008, I was elected vice-chair of GigaNet. My academic CV with a complete list of publications, positions, and accomplishments is attached.<sup>1</sup>

My research on Internet governance has been funded by the Markle Foundation, the Ford Foundation, the Association for Computing Machinery, the Next Generation Infrastructures Foundation in the Netherlands, the Eastman Kodak Foundation, and Nokia, Inc. I have been invited to speak or to present the results of this research at numerous forums, including the annual meeting of the International Trademark Association (INTA), the New York State Bar Association, the United Nations Internet Governance Forum, the International Telecommunication Union, the U.S. Federal Communications Commission (Office of Strategic Planning), the U.S. Department of Commerce (National Telecommunications and Information Administration), and the United Nations General Assembly. In 2001, I was invited to join a committee formed by the U.S. National Academy of Science to study "Internet Navigation and the Domain Name System." The Academy's National Research Council forms committees of established experts to study and report on important policy problems. The committee reports are then circulated to Congress, federal agencies, and the general public. The project I served on was funded by the National Science Foundation and the U.S. Department of Commerce. Our report, *Signposts in Cyberspace*, was released on March

---

<sup>1</sup> See Exhibit A.

31, 2005.<sup>2</sup>

In addition to my scholarly work, I have extensive practical experience in domain name policy-making and ICANN's processes and procedures. I was an active participant in the U.S. Department of Commerce proceedings that led to the creation of ICANN in 1997-1998, and in the International Forum on the White Paper (IFWP), which followed the U.S. Department of Commerce's release of the White Paper.<sup>3</sup> I was a member of a group (one that included the current Chairman of ICANN's Board, Peter Dengate Thrush) that submitted an alternative proposal to the U.S. Department of Commerce for the creation of an entity to manage the domain name system. In 1999, I co-founded the Noncommercial Users Constituency,<sup>4</sup> a part of ICANN's policy-making apparatus. From 1999 to 2003, I was an arbitrator of domain name trademark disputes under ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) for the World Intellectual Property Organization, serving as a panelist on approximately 20 cases. In 2000, I actively participated in ICANN's Working Group C, which set the policy for the initial addition of seven top level domains (TLDs) in 2001. From February 2001 to February 2002, and again from March 2003 to March 2004, I was an elected representative on an ICANN policy-making organ, the Names Council of the Generic Names Supporting Organization,<sup>5</sup> where I represented the Noncommercial Users Constituency. In that capacity I chaired a Task Force on the divestiture of the .org TLD, leading in the production of a policy document that guided ICANN's subsequent redelegation of the

---

<sup>2</sup> The NRC report does not reflect my views alone, but a consensus of committee members with widely divergent views and areas of expertise. Participation in the NRC Committee is mentioned only to document an important form of peer recognition.

<sup>3</sup> The Department of Commerce's statement on the Management of Internet Names and Addresses, also known as the "White Paper," was a statement by the U.S. government that it intended to transition the responsibilities for Internet management to a private body. U.S. Department of Commerce, National Telecommunications and Information Administration, Management of Internet Names and Addresses, Docket Number: 980212036-8146-02 (The White Paper), June 5, 1998. Available at: [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm). For a more complete discussion, see *infra*, sections 4.1.2.

<sup>4</sup> The Noncommercial Users Constituency was called the Noncommercial Domain Name Holders Constituency before 2003. In 2003 it was renamed in accordance with Bylaw changes recommended by ICANN's "Evolution and Reform" initiative. For simplicity's sake, I use only one name, the current one.

<sup>5</sup> The Generic Names Supporting Organization (GNSO) was called the Domain Name Supporting Organization (DNSO) during my first term as a Names Council representative. Its name was changed in accordance with Bylaw changes recommended by ICANN's "Evolution and Reform" initiative in 2002. For simplicity's sake, I use one name, the current one.

.org domain from VeriSign to the Public Interest Registry. As part of the .org redelegation, in August 2002, I served as a member of a team selected by Stuart Lynn, ICANN's CEO at the time, to evaluate applicants. In March 2003, I was again elected to represent the Noncommercial Constituency on the Names Council. In 2004, 2006, and 2007, I was elected Chair of the Noncommercial Users Constituency. Additionally, I have attended many of ICANN's quarterly meetings and am familiar with its procedures, its corporate structure, and many of the executives and staff who manage the organization.

Because of my research and experience with ICANN, and my knowledge of Internet governance issues generally, I have previously served as an expert witness in matters involving Internet issues. In 1999, I served as an expert witness in Worldsport v. ArtInternet S.A., Cedric Loison and Network Solutions, Inc. 99-CV-616 (BWK) (E.D. Pa.). In November 2002 I served as an expert witness in the case Taubman Company v. Webfeats and Henry Mishkoff, Civil Action No. 01-72987 (E.D. Mich.). Both of the cases mentioned above were done *pro bono* because they involved policy issues concerning freedom of expression. I have also served as a paid expert witness or consultant. In 2002, Professor Lee McKnight of Syracuse University and I produced a report funded by Nokia, Inc. on the policies and methods that could be used for adding new TLDs. From 2002 to 2004 I was an expert witness in a Hong Kong telecommunications industry case, Reach Communications v New World Telephone. In 2005, I served as an expert witness in the case Brian Cartmell v. VeriSign, involving a dispute over the transfer of a country code top level domain (ccTLD).

Although I am participating in the current case on a paid basis, this report is prepared for the Independent Review Panel, and I recognize that my obligation as an expert is to advise and inform the Panel.

### **3 Overview of the Statement**

ICANN is a new and innovative model of global governance that coordinates and

regulates the multi-billion dollar industry of domain name registration.<sup>6</sup> I was a participant in and observer of ICANN throughout the period of ICM Registry's application. Because this expert report is long and complex, I begin by providing a summary of my analysis to serve as a navigation guide for the Panel.

First, I will explain how ICANN works as an institution, focusing in particular on the respective roles of private sector and governmental actors in ICANN, and the ways in which ICANN's decisions implicate matters of public policy.

Next, I will analyze the roller-coaster treatment of the .xxx application and then critically assess the ICANN Board's stated reasons for its ultimate rejection. This analysis hinges on two crucial factual questions:

- (a) What was the meaning of the Board's vote on June 1, 2005 to enter contract negotiations with ICM? Was it, as ICANN asserts, nothing more than a wary, noncommittal nod to ICANN staff to start negotiating with ICM in order to determine whether a questionable application could somehow, through additional negotiations, be adjusted to meet the requirements of the sTLD process? Or was it, as ICM Registry asserts, a formal recognition by the Board that the .xxx application had met the technical, business, community value, and sponsorship requirements outlined in the RFP and all that remained was to negotiate specific contractual conditions within those parameters?
- (b) How should the interventions of the U.S. government and its allies in the GAC in the two and a half months after the Board's vote on June 1, 2005 be characterized? Were these interventions, as ICANN implies in its Response, a legitimate, expected part of a well-defined process in which governments advise ICANN on public policy concerns? Or were they extraordinary and untimely disruptions that essentially destroyed the defined process for reviewing the applications, as well as ICANN's principles, including transparency, nonarbitrariness, fairness and nondiscrimination?

---

<sup>6</sup> In July 2008, there were about 162 million domain name registrations worldwide, with a somewhat arbitrary but plausible estimate that, at US\$ 20 in annual revenue per domain, the registration industry as a whole is worth approximately US\$ 3.25 billion. *VeriSign Domain Report*, Volume 5 Issue 3, June 2008. Domain name registrations are growing at a rate of about 26% per year and the creation of domain names in non-Roman scripts, such as Chinese, Korean, or Cyrillic, may sustain or even accelerate this growth level, though of course no one knows for sure.

In response to the first question, I set out the facts to show that the Board's vote on June 1, 2005, was held to resolve the question of whether ICM Registry met the four sets of evaluation criteria established in the Request for Proposals (RFP), and specifically its fulfillment of the sponsorship criteria. The Board's vote meant that the .xxx application met all four sets of criteria and was ready to enter into contract negotiations. As an expert on ICANN and its processes, I consider the evidence on this point to be overwhelming. The two-step nature of the evaluation process is repeatedly described by Kurt Pritz, the ICANN staff person in charge of introducing the new TLDs. Numerous statements by Board members confirm that the vote meant that the .xxx application met the published criteria. No TLD considered ineligible on any of the three grounds would ever have been passed on to contract negotiations. If the ensuing negotiations were actually intended to clear up specific concerns about the eligibility of the .xxx application, the resolution authorizing negotiations would have specified what those concerns were, just as the Board resolutions authorizing negotiations around other TLDs identified the specific concerns associated with those TLDs which were to be addressed along with the contract negotiations.

In response to the second question, I discuss the facts demonstrating that the U.S. government-led intervention in August 2005 was a surprising and disruptive act. ICANN impermissibly allowed partisan and ideological domestic U.S. political considerations to supersede and overturn its own evaluation process. The intervention not only prompted ICANN's Board to discard its June 2005 decision, but also reflected a sudden change in the U.S. Department of Commerce's own position. This intervention triggered a complete breakdown of the established sTLD process for ICM Registry's application.

In the final section of this report, I explain how accountability and resistance to political interference are major concerns for ICANN and the future of the Internet. I also discuss why independent, impartial review processes such as this IRP are needed to protect ICANN's ability to follow its defined criteria and procedures. The importance of a strong commitment to defined procedures and objective standards goes well beyond the ICM Registry case; it has major implications for the future of the Internet as a whole.

#### **4 ICANN as an Institution**

Many of the points of dispute between ICM Registry and ICANN involve

different interpretations of ICANN's function and of its relationship to governments. For that reason it is useful to explain in detail how and why ICANN ended up taking the particular institutional form it did. In this section I explain why ICANN was organized as a private sector nonprofit corporation, even though it engages in global governance over a global resource. I also explain the changing role of governments in ICANN and the way ICANN operates under its Bylaws.

#### **4.1 Why ICANN was set up as a private sector, California nonprofit organization**

It is unusual for a private organization to hold policy-making and administrative control over resources critical to the functioning of an international public infrastructure. Why then was ICANN organized as a private corporation? This organizational structure occurred for three reasons:

- (a) The need for global rather than national coordination and policy-making;
- (b) The desire of the U.S. government and Internet businesses to avoid the influence of other governments and existing intergovernmental organizations; and
- (c) The preferences of the technologists who developed the Internet and had previously held informal authority over the Internet's administration.

##### **4.1.1 The need for global coordination and policy**

In forming its policy toward the Internet in the mid-to-late 1990s, the Clinton administration was concerned that the Internet's promise of global electronic commerce would be undermined by assertions of territorial jurisdiction.<sup>7</sup> It was feared that national governments, in particular, would impose upon the naturally global arena of the Internet a patchwork of inconsistent or conflicting national laws and regulations. A private sector governance authority was perceived as a way around this problem, and so the U.S. adopted a strategy of internationalization through privatization. In its 1997 policy document, "*A Framework for Global Electronic Commerce*," the Clinton administration

---

<sup>7</sup> "The Internet is emerging as a global marketplace. The legal framework supporting commercial transactions on the Internet should be governed by consistent principles across State, national, and international borders that lead to predictable results regardless of the jurisdiction in which a particular

