

Internet Organization and the Public Interest: The ICANN Experience

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I. Introduction and Executive Summary

The decentralized, global, and open architecture of the Internet has been a source of innovation and individual freedom, but it also presents great challenges to the management and regulation of online activity. As the Internet plays an ever-larger role in commerce, governmental affairs and the lives of individuals worldwide, it cannot operate unmanaged. Important technical decisions and policy issues ultimately need to be resolved. What coordination and “governance” structures will be effective in this new environment? Will they preserve and promote the Internet’s uniquely decentralized and user-controlled architecture and its potential to support human development, or will they undermine these qualities? It is obvious that not only governments and industry should be involved in Internet regulation, but also the public at large. However, this is uncharted territory. How can the “public interest” be defined and how can individuals be given a voice in this global and decentralized but increasingly ubiquitous social space?

Non-governmental organizations (NGOs) can play a crucial role in this context. But that role may not be well understood. Are NGOs mediators of the public voice? Can they facilitate direct user involvement? What can be done to ensure their effective participation in policy making, and especially to strengthen their voice outside the United States?

Although the path to effective management of the Internet is not yet clear, experiments currently underway illuminate the promises and pitfalls of new coordination mechanisms for the Internet, including the role of NGOs. The history of one such

experiment, ICANN -- the Internet Corporation for Assigned Names and Numbers -- offers important lessons about the challenges ahead.

ICANN was created in 1998 at the prompting of the United States government to carry out on an international basis a crucial function for the Internet -- the technical coordination of the Internet's naming and numbering systems. International management of this critical function is essential to the continued stable operation of the Internet, but also could be used to assert authority over broader aspects of online activity, with implications for policy issues ranging from competition to privacy, free expression and other civil liberties. ICANN demonstrates the potential benefits as well as the tremendous challenges in creating a new breed of non-governmental, bottom-up, consensus-based ordering mechanisms that reflect the Internet's unique architecture and give a voice to the public interest.

This paper explores the new environment for online governance from the perspective of Internet users, and focuses in particular on the role of NGOs in contributing to the potential viability of non-governmental, decentralized organizational mechanisms. It catalogs the experience of some NGOs that have participated in ICANN, with attention to the successes achieved and challenges faced in representing the public interest during ICANN's first two years. Finally, it spells out some of the lessons to be learned about Internet governance in general.

-- **The challenge of online governance and the ICANN ideal**

The broad freedoms and ease of interaction presently enjoyed by Internet users stem from fundamental aspects of the network's design. Compared to other communications media, the Internet is uniquely decentralized, global, interactive, open and user-controlled.

These features have enabled a robust and stable network, friendly to innovation, commerce and freedom, in an era of dramatic growth and rapid change.

At the same time, these same desirable technical features create new challenges to traditional governmental mechanisms. They provide fewer opportunities for central control. The network's global nature limits the effectiveness of national regulation. It also tends to resist traditional, slow-moving multi-lateral regulation. And the Internet's technical uniqueness raises concerns about the risks of governmental regulation, as well-intentioned attempts to control the architecture of the Internet could jeopardize its most desirable qualities.

These challenges have led many to question the efficacy of traditional regulatory models. But if the traditional democratic processes of governments are ill suited to management of the Internet, how is it possible to reflect and protect the public interest? The Internet's architecture points to at least two new models of coordination -- the possibility of user-control technologies (such as the ICRA rating system and the diverse blocking and filtering tools organized by GetNetWise.org for protecting children online) and the creation of private self-organizing institutions like ICANN. In both models, NGOs have played a central role.

ICANN was created in 1998 to administer one of the Internet's few essential coordination mechanisms, the naming and addressing system that enables routing of communications among unique resources on the network. Although the US had managed many features of this system, on an increasingly global network it was clear that a system administered by any single nation was likely unsustainable. ICANN is in many ways a bold

experiment to create a private, non-governmental institution that would manage what was once a function performed for the Internet largely by the US government and its agents.

ICANN was founded pursuant to four basic principles: stability of the network, competition within the naming and numbering system, private bottom-up coordination, and international representation from among the diversity of parties affected. Taken together, these principles offer the possibility of a new type of private sector governance mechanism – one largely consistent with the global, decentralized architecture of the Internet; appropriately wary of government regulation; and operating through the consensus-based self-organization that has been part of the tradition of Internet development to date.

In its short lifespan, ICANN has made progress towards some goals. So far, it has taken steps to promote competition, create rules for resolving domain name disputes, and introduce new global Top Level Domains (gTLDs) -- all while maintaining stability in a period of great Internet growth. It has matured into a complex structure with hundreds of active participants. It has taken great pains to promote global inclusion, meeting all over the world and creating rich online mechanisms for participation. And it has just completed an unprecedented global democratic election for five “At-Large” directors.

-- **User interests and the ICANN experience**

At the same time, ICANN’s short history has been characterized by concerns over corporate “capture” and by public disinterest. ICANN’s actions have been buffeted by controversy and debate. It has faced difficulties in achieving some of the very goals that guided its creation:

- **Participation:** Many groups -- particularly individuals, non-commercial groups, small businesses, and many new dot.coms -- have had trouble fully participating in

ICANN's decisions. Being effective at ICANN requires great resources; ironically, this is in part due to ICANN's push for global inclusion. While recently foundations have begun to support the participatory efforts of some non-commercial and consumer groups, many still feel unable to participate effectively.

- **Representation:** In October 2000, ICANN held a global, online election for five seats on its Board of Directors, but deferred indefinitely election of the other four “At-Large” Directors that were originally planned. Moreover, ICANN has recently called into question the entire role of the At-Large membership intended to represent individual Internet users. It has launched a major effort, currently underway, to study the future of ICANN elections and its representative structure in general.
- **Bottom-up decision-making:** Consensus-based processes can mitigate the problems with representation and participation facing ICANN. But while achieving consensus among affected parties remains a foundational principle, in practice consensus has been hard to implement and ICANN has relied on “top-down” decision-making by its Board for most critical decisions to date.
- **Mission:** The problems of broad participation in ICANN would be less of a concern if its decisions were of interest to only a narrow group of stakeholders. While ICANN so far has largely adhered to a narrow technical mission (with the possible exception of issues related to intellectual property and trademarks), it lacks mechanisms to ensure that its technical mandate does not expand into a broader policy role that would demand more representation.

-- **The role of NGOs**

In this environment, non-governmental organizations have played multiple and indispensable roles: As convenors, they brought together stakeholders with disparate interests, in an effort to find the common thread of the public interest. As think tanks, they conducted objective research and laid out the case as to why representation was important to ICANN. As advocates, they pressured ICANN to create more open and representative processes. They mediated between the public and the complex structure ICANN had created. They educated the public about the ways domain names management affects the interests of ordinary users. They mobilized the public to take advantage of the procedures established for public participation. Paradoxically, as outsiders they have been crucial to preserving ICANN's legitimacy.

To carry out these roles, NGOs need resources, depth of experience, access to the media, and credibility that comes with experience. However, while these conditions exist within the US, they so far are undeveloped in many other countries. Thus, as this new type of coordination mechanism confronts the challenge of include the interests of the broader public in its decisions, there is also the challenge of strengthening the NGO sector worldwide.

-- **Lessons from ICANN about the future of Internet governance**

ICANN is an experiment in non-governmental, global, bottom-up, technical coordination for the Internet. And to date, the ICANN experiment is incomplete. The ICANN lesson shows in part how difficult it to achieve the ideals of global inclusion and representation.

- **ICANN itself is not well suited for, nor inclined towards, broad policy making.**

ICANN has neither the legitimacy nor the representational structures in place to be a

quasi-governmental entity for the Internet, and should not be seen by the world community as a mechanism for resolving broad policy disputes.

- **Internet governance mechanisms should reflect the unique features of the global, decentralized Internet.** To be effective, Internet governance must engage the reality of the Internet and the challenges it creates for top-down governance. The guiding principles of ICANN's creation remain valid and efforts must continue to reflect these values in governance mechanisms:
 - International scope: The Internet's global character should inform any self-organization, coordination, and governance online.
 - Broad participation: Governance bodies should be resourced and chartered to promote active outreach and empowerment among affected parties.
 - Bottom-up processes: Decentralized, bottom-up decision-making will often be more responsive and better equipped to deal with rapidly changing technical environments.
 - Appropriate representation: Broad representation mechanisms are necessary if those affected are to acknowledge the legitimacy of broad decisions.
 - Defined mission: In all Internet governance, the corporate charter should carefully define mission parameters and other means to insure appropriate representation and participation.
- **Internet governance mechanisms should preserve, and take advantage of, the valuable technical features of the global, decentralized Internet.** Internet coordination mechanisms should not threaten the key technical features that have been so crucial to the success of the Internet. Efforts to change the decentralized,

open network architecture may make governance easier in the short run, but in the long run put at risk the possibilities for innovation, scalable and stable network performance, and individual liberty currently embodied in the architecture.

- **NGOs have a major role to play as convenors, conceptualizers, mediators, and mobilizers, both representing the public interest and working to create opportunities for direct participation of individual users.** NGOs must be supported with adequate resources. In the US, there is a well-developed network of NGOs with decades of experience asserting and defending the public interest, including a few devoted exclusively to Internet policy issues. There is an urgent need to stimulate development of similar Internet groups and NGO networks outside of the US.

Notwithstanding the shortfalls of ICANN to date, non-governmental, bottom-up models of coordination, organization, and governance seem to have a compelling potential for the global, decentralized Internet. Top-down mechanisms that do not reflect the character and architecture of the Internet are likely to fail, or to jeopardize the very characteristics that have made the Internet so successful. In this light, the ICANN experiment is a useful one. As explained in greater detail below, the ICANN experience is an excellent starting point for understanding the unique challenges and possibilities for governance on the Internet.

II. The Decentralized, Global Internet: Challenges to Regulation and the Promise of Self-Organization

The Internet's unprecedented promise to promote free expression, commerce, economic opportunity, and civic discourse stems from key features fundamental to its architecture, which is uniquely decentralized, global, interactive, user-controlled, open and capable of evolving in an environment of great complexity and rapid change.¹ Together, these features are widely viewed as central to the Internet's success and growth, and they are worth preserving.

-- **Challenges to Internet regulation**

At the same time, these same highly beneficial technical features create new challenges to traditional governmental mechanisms that regulate and organize society in the offline world:

- **Little central control** -- There are few central points of control over Internet activity, making enforcement of regulations difficult. In many cases, policies would have to be enforced against the millions of potential speakers that make up the Internet's user community, rather than against the relatively few publishers active in many other media.
- **Limited effect of national regulation** -- On a global medium, the laws of any given country have limited impact on activity beyond its borders. For example, content restrictions passed by one country may have no impact on publishers abroad whose content -- like all Internet content -- may be accessible in that very country. Moreover, the extraterritorial enforcement of laws is highly problematic. The recent court action in France against Yahoo!, requiring it to keep content hosted in the United States away from French

¹ The unique architectural qualities of the Internet have been widely recognized in official, technical and popular documents, ranging from the decision of the US Supreme court in *Reno v. ACLU* to seminal

users, is viewed by many as an unsustainable precedent that would allow any country to impose its rules on speakers on every Web site worldwide, creating an impossible burden on the free flow of information and impinging on national sovereignty.

- **Difficulties of multi-lateral regulation** -- Traditional international governmental mechanisms encounter particular challenges in this environment. In many areas, there is little global consensus for how to regulate behavior online. For example, while many are concerned about “undesirable” content online, there are widely divergent ideas from region to region about what material to restrict -- some would restrict sexual content, others violent material, and still others would restrict certain religious or political groups. Moreover, many feel that international governance mechanisms are ill suited to regulate with the necessary understanding of complex technical systems, or the necessary speed to keep up with rapidly changing technology.
- **Risks of governmental regulation** -- Using traditional mechanisms to make policy in a complex and quickly changing technical environment risks making bad policy choices and bad technology choices. Well-meaning attempts to influence or control the architecture of the Internet could jeopardize the values that give rise to the Internet’s potential.

These challenges have led many to question the efficacy of traditional regulatory mechanisms, and have raised concern that traditional top-down governmental systems may prove harmful to the key features that have made the Internet such a success.

-- **The self-ordering ideal**

While the Internet's technical features create new challenges for regulation, they also create the potential for new models of organization and new ways to achieve societal objectives.

The interactive nature of the Internet has created new possibilities for *user control* models to protect the individuals and organizations online. New technologies give Internet users unprecedented ability to control what content they see online, to secure their data, or to indicate how their private information might be shared. For example, those concerned about the exposure of children to undesirable content are finding effective protection in new filtering and blocking technologies. Rather than relying on uneven law enforcement mechanisms to protect global communications, encryption is providing Internet users with their own ability to make data highly secure. And new privacy-enhancing technologies such as the Platform for Privacy Preferences (P3P) will soon make it possible for users to exercise greater control over private information independent of regulation.

The consensus-based standards processes through which many Internet technologies were developed has pointed to the possibility of new global *bottom-up consensus-based self-organization* models on the Internet. For example, the Internet Engineering Task Force (IETF) has developed many of the basic network protocols on which the Internet operates through a process that is open to anyone who wants to participate worldwide, and makes decisions based on achieving consensus from among participants. This consensus is then validated by the bottom-up decision of millions to use, or not use, the standards promulgated by IETF. As summarized by one of its prominent participants, Professor David Clark of MIT,

"We reject kings, presidents, and voting. We believe in rough consensus and running code."²

This model of bottom-up self-organization seems well suited to the Internet environment. It allows organization globally, with participation from a wide range of stakeholders, in a self-organizing environment able to respond quickly to complexity and rapid technical change.

Together, the user control mechanisms and bottom-up self-organization models may present meaningful alternatives to traditional government regulation. These models are highly responsive to an environment where technology can have a great impact on policy possibilities and individual behavior. They also respect individual stakeholder needs and adapt to rapid change. As a result, they may be one of the only sustainable structures on developing global decentralized networks.

It is these new models that inform the rationale behind creating and maintaining ICANN.

III. Technical Coordination and ICANN

In the otherwise decentralized network architecture of the Internet, one of the few areas that have required a certain degree of central coordination is the naming and addressing system that provides every resource online with a unique location. The network could not function if names like *cdt.org* or addresses like 207.226.3.1 could not be used reliably to route traffic by users all over the world. Functions that have required some central coordination include: (1) Assignment of numerical addresses to Internet users. (2) Management of the system of registering names for Internet users. (3) Operation of the root server system, a set of file servers that contain authoritative databases of addresses and

² Clark, David. "A Cloudy Crystal Ball/Apocalypse Now." Proceedings of the 24th Annual Conference of the Internet Engineering Task Force. July 1992.

numbers. (4) Protocol assignment, which ensures that particular values (or numbers) in the Internet's protocols are assigned unique meanings. Efficient operation of all these functions is clearly in the interest of all Internet users, and mismanagement would have severe effects worldwide.

Many elements of the central domain name and numbering functions were originally created and administered by the US government and its contractors. By 1997, many factors made it clear that it was increasingly inappropriate for the US government and US-based organizations alone to manage decisions about the Internet; more global input was needed. At the same time, it became clear that decisions about domain names raised issues of trademark policy and issues of competition that the existing administrative structure was not well-equipped to deal with; again broader representation and input was needed. And finally, the US government itself recognized that governmental control might not be the most flexible or appropriate way to manage technical coordination functions for the Internet; a non-governmental body was in keeping with the Clinton Administration's philosophy of non-intervention in global electronic commerce.³

The US government, in consultation with others around the world, laid out the first outlines for a new mechanism for technical coordination in two of ICANN's foundational documents, popularly known as the "Green Paper" and the "White Paper" (1997). These policy statements proposed the creation of a private, non-profit "new corporation," internationally managed, that would engage in technical coordination of Internet naming, numbering, and establishment of certain technical parameters.

³ See US Department of Commerce, *Framework for Electronic Commerce* (1997). This policy statement for the US government, developed by Ira Magaziner and others, set out a broad approach on Internet issues ranging from content controls to taxation, arguing for minimal government action to encourage fast-paced marketplace and technological developments.

The White Paper laid out several principles for the operation of this new corporation itself. These goals included stability and competition, but two were particularly relevant to the issue of governance:

- **Private, Bottom-Up Coordination** – It was determined that responsible, private-sector action would be preferable to government control. Moreover, the private process should, as far as possible, reflect the bottom-up governance that had characterized development of the Internet to date.
- **Representation** - The new corporation should operate as a private entity for the benefit of the Internet community as a whole. The development of sound, fair, and widely accepted policies for the management of DNS would depend on input from the broad and growing community of Internet users. Management structures should reflect the functional and geographic diversity of the Internet and its users and should ensure international participation in decision making.

These principles offered the possibility of a new type of private sector governance mechanism – one that was largely consistent with the global, decentralized architecture of the Internet; appropriately wary of the role of government regulation in this new medium; and based on principles of bottom-up self-organization and self governance that have been part of the best traditions of the Internet.

The Internet Corporation for Assigned Names and Numbers (ICANN) was established in 1998 to take on the role of this “new corporation.” A California non-profit corporation based on international representation, ICANN was created with a nine-member Interim Board of Directors and a complex internal structure for representation and policy formulation. In keeping with the "bottom-up" principle of decision-making, ICANN was

based on a set of Supporting Organizations for each of its three major activity areas: Domain Names, Addressing, and Protocols. In theory, these “SOs” were to be the source of ICANN policies, which were to be approved by the ICANN Board of Directors based on consensus recommendations from the SOs. Each of the SOs were to elect three Directors of the Board, totaling nine, with another nine Directors to be elected “At-Large.”⁴

From its earliest days, ICANN and particularly its domain name activities have attracted attention from a wide range of potentially interested stakeholders:

- **Technical community** - the engineers and technologists who developed and administer the protocols, standards, and systems for DNS operation, address allocation, and parameter setting.
- **Business users** - with many common interests including the stability of the network for commercial purposes and to enable trust in their customers and consumers.
- **Intellectual property holders** - trademark owners have been highly vocal participants, seeking to reconcile trademark conflicts in domain names through ICANN. Other groups, such as copyright holders, viewed the DNS as an important source of information about copyright infringers as well as a potential enforcement mechanism.
- **Registrars and registries** - companies with an interest in competing in the market for selling domain names.
- **Internet Service Providers (ISPs)** - with varying interests focused around the stability of the network and their ability to provide good services.
- **Country-code top level domains (ccTLDs)** - operators of domain registries in particular countries.

⁴ The Board as a whole also selects a nineteenth member, the CEO/President of ICANN.

- **Non-commercial domain name holders** - NGOs and other non-commercial groups who may own domain names or have a particular interest in the operations of the DNS.
- **Individual Internet users** - the most diffuse group, those consumers affected in both direct and indirect ways by the decisions made by ICANN.
- **Governments** –the last but not least important institutions, poised to intervene if they perceived that ICANN was not functioning properly.

The Domain Name SO (DNSO) was intended to accommodate most of these interest groups. A complete representation of the "constituencies" within the DNSO, along with the entire Board Structure, is available online at <http://www.icann.org/general/icann-org-chart.gif>.

In its theoretical creation, ICANN embodied many of the principles of consensus bottom-up decision-making and representation. While ICANN developed an impressively productive track record of activity quickly, in practice it has highlighted many of the challenges in meeting the broad goals of representation and bottom-up decision-making spelled out in ICANN's founding principles.

-- **ICANN's accomplishments to date**

In the first two years of its existence, ICANN has succeeded in taking action -- controversial though it may have been at times -- in a number of directions. It has introduced competition in the registrar space, creating a mechanism and set of contracts whereby over 100 companies now compete to register names in .com, .org, and .net where once there was only one. ICANN has created a uniform dispute resolution policy, which has raised concerns among some consumer groups but has also provided a standardized and relatively inexpensive global mechanism for resolving trademark and ownership issues. And ICANN

has recently concluded a nearly two-year process to introduce new global top-level domains for the first time in over a decade. Throughout, it has acted in a way that has maintained the stability of the Internet.

ICANN has also taken steps towards establishing its own institutional stability. From a fledgling organization, it has “bootstrapped” itself into an organization with hundreds of regular participants. It has a developing -- though contentious -- structure, with supporting organizations, constituency groups, working groups, and emerging secondary structures like the Civil Society Internet Forum. Though plagued by continuing controversy about its representational structure, ICANN held a major global election for five of its nine “At-Large” Directors in October 2000.

ICANN has also taken substantial measures to provide opportunities for global participation. It holds quarterly meetings around the world on every continent. (Recent meetings have been held in such far-flung locales as Berlin, Singapore, Santiago, Los Angeles, Cairo, Yokohama, and Melbourne.) It has developed an impressive mechanism for providing “cybercasting” and archiving of its meetings to allow broader participation. And it has created a broad and comprehensive web site, including public forums that regularly attract hundreds of commentators.

IV. NGOs and the ICANN Experience

NGOs have played a crucial role in both exposing and seeking to overcome the hurdles inherent in ICANN’s operational mode today. NGOs are doing so by undertaking a variety of functions: convening, educating, mobilizing, advocacy, research, mediating. Faced with the tasks of creating a voice for the public interest in the ICANN process and the even

more difficult task of involving individual users, CDT and other NGOs played all these roles. Below, we describe the process in detail.

The good news is that, after a steep learning curve about ICANN politics and dynamics, CDT and its partners have found that ICANN can be receptive to broad input -- if one can develop the expertise and put the time in to fully participate in the organization. The bad news is that NGO involvement requires resources and commitment in ways that at present do not scale well globally and so may not be able to provide adequate input, alone, into the Internet management process.

A threshold, but often-overlooked, element of the public voice is the question of resources. In the case of ICANN, the public interest was aided by a forward-looking commitment in 1999 by the Markle Foundation, a philanthropic, grant-making foundation headquartered in New York City, to support the public's voice in the Internet's governance. While CDT had actively followed the domain name coordination issue – co-hosting a major forum on the DNS in 1997 prior to the creation of ICANN -- it had limited ability to participate in the early international meetings of ICANN without funding. The contentious, intense, and even vicious atmosphere of early ICANN debate online increased costs and concerns about participation. It was only after receiving support from the Markle Foundation that CDT was able to attend the August 1999 ICANN meeting in Santiago and subsequent meetings.

At the Santiago meeting, several salient points were confirmed: numerous public interest issues were coming up in ICANN's deliberations; the ICANN process was very complicated; some commercial interests were well represented and well-resourced; and the

public interest community was totally unrepresented. CDT and Markle began strategic talks on Internet governance.

First, recognizing that even ICANN itself lacked resources to fulfill its mission to involve a global constituency in its deliberations, Markle answered ICANN's own request for funding to support its upcoming elections and conduct public outreach. Markle's initial funding also allowed a group of US-based NGOs, including CDT, Common Cause, the Carter Center and the American Library Association, to pursue the issue of public representation and develop a plan of action.⁵ Shortly afterwards, the Ford Foundation provided additional critical support for broader CDT advocacy work in ICANN. As a result, CDT, Common Cause, and other NGOs undertook a multi-faceted effort to make the public voice heard at ICANN -- focusing first on the key question of public representation through the "At-Large" elections for half of ICANN's Board of Directors.

-- **Convening the Public Interest Community**

NGOs like CDT are most effective when they speak not merely for themselves but for a broader community. The Markle Foundation specifically tasked CDT and Common Cause to convene and consult with other public interest organizations, including many not directly involved in Internet issues.

What made this feasible in the United States is a well-established network of public interest groups created especially to represent the public in governmental decision making. A

⁵ The organizations initially funded by the Markle Foundation represented an effective, if US-centered, mix of organizations with experience in Internet policy and public representation issues. CDT, as noted, is a non-profit group with a respected record of Internet policy work devoted to promoting individual liberty and democratic values online. Common Cause, a Washington-based non-profit, is a leading US advocate of good government and campaign finance reform. The Carter Center, an international group headquartered in Atlanta, Georgia, is a world-renowned supporter and monitor of democratic elections around the globe. And the American Library Association represents US libraries and has a distinguished record of work on Internet policy.

myriad of groups, organized around particular issues, from the environment to child welfare to civil liberties, and of all political persuasions, have grown up over the last several decades to become an influential and respected part of public policy creation process in the US.

Immediately after the Santiago meeting, CDT and Markle began planning how to engage this public interest community in the ICANN debate. One step was to raise awareness of the broad relevance of domain name issues at a time and place where attention was focused on ICANN. In October 1999 in Los Angeles, the day before ICANN's public meeting there, CDT co-sponsored a public workshop on the issues facing ICANN with Harvard's Berkman Center, the Markle Foundation, and Computer Professionals for Social Responsibility. The workshop was intended to generate debate on the larger domain name policy debate. Topics included privacy protections and the "Whois" database of domain name holders, top-level domain (TLD) competition, openness, transparency, and ICANN's At-Large membership.

CDT and Common Cause continued this process by hosting a series of consultations with non-commercial and NGO groups in November and December 1999 and January 2000 to consider and comment on the proposed structure for an At-Large ICANN membership and the procedures for selecting nine At-Large Board Members to represent that membership. Among the many people consulted were Michael Fromkin, a law professor at the University of Miami who specialized in Internet policy issues and who had already been highly critical of the ICANN process; representatives of the Association of Computing Machinery, a well-established and respected association of computer scientists; David Post, another law professor with a long record of incisive writing on Internet issues, representing a small ad-

hoc group called ICANNwatch; and the Consumer Project on Technology, a group affiliated with consumer advocate Ralph Nader.

Several common threads emerged from these consultations: Almost none of the experts and public interest groups supported ICANN's proposal that At-Large elections function as an electoral college system in which At-large members would elect a Council which in turn would select the nine At-Large Board members. Instead, most public interest experts supported direct elections of the At-Larger Board members by the members of a broad At-Large constituency. Most also agreed that any individual Internet user should be allowed to be an At-Large member of ICANN. All agreed that a broad and engaged membership was critical to preventing capture of ICANN's board by a narrow interest, and that making membership meaningful and worthwhile would be key to creating this type of dynamic membership.

This broad consultative process and a series of outreach meetings solicited a wide variety of expert and general opinions on the election process from within the business community, user groups, academics, technologists, and government officials. In February 2000, CDT and Common Cause convened a renowned group of experts in democratic process, elections, and online voting at the Kennedy School of Government for a roundtable discussion on the ICANN At-Large election process.

-- **Research and Analysis**

In the digital world, paper still matters. Or at least, it is necessary for public interest advocates to prepare detailed documents that describe and support their views. Recognizing the need for a coherent critique of the ICANN process, and drawing upon the results of their consultation process with leaders in the nonprofit, business, and technical communities, as

well as experts in online voting, democratic process and international elections, CDT and Common Cause begin to work on a study of the At-Large Election process.

Significantly, the study also provided CDT and Common Cause with the opportunity to contact and gain visibility with other NGOs around the world. Other NGOs from many countries, while far less developed than the US NGO community, were consulted in the research for the election study, and ultimately enlisted to support its recommendations.

In March 2000, CDT and Common Cause concluded their study effort by releasing a report that strongly critiqued ICANN's plan for indirect elections.⁶ In their outreach and consultations, CDT and Common Cause had uncovered uniform skepticism that the election plan would adequately address issues of representation, legitimacy, accountability and due process. The report found that ICANN's plan also inspired strong fears about diversity and capture, and served to magnify confusion and concern about the scope of ICANN's mission. The report included several public interest recommendations for improving accountability and fairness in the election process: ICANN should hold direct elections, clarify the scope of its mission, create a fair nominating process to generate quality candidates, and establish an independent election authority to monitor the election. CDT and Common Cause believed that an election could not proceed in a fair and representative manner until these concerns were resolved.

Leading up to ICANN's next meeting, in Cairo, Egypt, in March 2000, CDT and Common Cause used the report to mobilize a diverse group of nonprofit, business, and international stakeholders.

⁶ For a copy of the CDT and Common Cause final election report, "On the Internet, For the Internet: A Study of ICANN's Global Elections" please see <<http://www.cdt.org/dns/icann/study/>>.

The Bertelsmann Foundation was pursuing a similar course of research and consultation. During its years of investigating Internet content issues (with special attention to the issue of youth protection), the Foundation's attention was frequently drawn to the question of how these solutions could be institutionalized within the Internet community.⁷ This led to the more general questions of how the Internet will be given structure -- whether the Net will be able to autonomously organize in a way that allows it to solve the problems at hand without relying on the intervention of national governments. When ICANN announced its plans to hold elections, the Bertelsmann Foundation decided to analyze this issue, recognizing that ICANN was an interesting experiment in how Internet (self-) regulation can be approached.

To this end, the Bertelsmann Foundation brought together international experts, ICANN representatives, politicians and industry representatives in April 2000 to discuss the ICANN elections and -- on a more general level -- the way in which this democratization of Internet regulation could also be an example for targeting more pressing issues such as privacy, data protection, equal access opportunities, and more. Setting out from the ICANN example, the Foundation's efforts were aimed at developing recommendations and guiding principles for the establishment of self-regulatory Internet structures.⁸

⁷ At the Internet Content Summit in Munich in September 1999, the Bertelsmann Foundation presented the "Memorandum on Self-Regulation", which had been worked out with the support of an international expert network and which contained key recommendations for the Internet industry, policy makers, law enforcement authorities and users. After developing the Memorandum, Bertelsmann's work has concentrated on the development of Internet Hotlines, Codes of Conduct, and the ICRA project. The Foundation participated in the establishment of a European system of Hotlines for the notification and evaluation of problematic Internet content. In a workshop in February 2000, international examples for such hotlines were evaluated and guidelines and principles were developed for such systems. In summer of 2000, the Foundation presented guidelines and principles for ISP codes of conduct and similar self-regulatory documents as well as a draft for a Model Code. Through its participation in the development of the ICRA rating and filtering system, the Foundation is seeking to improve the protection of minors from problematic Internet content.

⁸ Other NGOs also became involved in ICANN. From ICANN's founding in 1998-99, a number of academics and groups such as the US-based Domain Name Rights Coalition had sought to represent individual and small business concerns about domain name usage - including a major debate about ICANN's Uniform Dispute

-- **Advocacy**

CDT, Common Cause, and other NGOs brought their advocacy capabilities to bear at ICANN's March 2000 quarterly meeting in Cairo, Egypt. The Executive Director of CDT and the President of Common Cause both attended, carrying the message of CDT and Common Cause's report on the ICANN elections: that a better articulated mission and election rules, direct elections, and a more open process were necessary for the legitimacy of ICANN. In addition to seeking support for their position among NGOs attending the Cairo meeting, CDT and Common Cause reached out to the technical and corporate attendees for support, briefing constituency meetings on the report and "working the halls" to explain the report's findings. In this case, CDT's track record of creating coalitions with ISPs, registrars, and other parts of the Internet industry on Internet policy issues of common interest - as it had done regarding content regulation or encryption policy in the US - helped build broad support for a direct election alternative.

In response to the report and the advocacy of CDT, Common Cause, and the Carter Center, many attendees – including many representing corporate interests -- voiced their support for reform and the ICANN Board made major changes in the election process, including provision for the direct election of At-Large Directors, allowing individuals to vote directly for 5 out of the total 9 "At-Large" directors. The board also decided to conduct a study to determine whether the final four directors will be elected by similar rules. Another major change included a nomination process to seek highly qualified candidates.

Resolution Policy for resolving trademark disputes. The NCDNHC non-commercial constituency was a forum for NGO input into a range of issues before ICANN. Academic groups, such as the Berkman Center at Harvard Law School, facilitated broad investigation of the policy issues before ICANN. And in July 2000, several US-based NGOs launched the Internet Democracy Project and assisted in the creation of an ICANN Forum on Civil Society; the project developed a statement of guiding values for ICANN and encouraged At-Large election registration. The homepage of the Project is <<http://www.internetdemocracyproject.org/>>. Also, the

However, debate on the issue had by no means ended. In May 2000 ICANN's Board created Election and Nominating Committees for the At-Large election with little or no public input, and the Nominating Committee issued proposed rules for its selection of candidates as well as alternative "member-nomination." Continuing their direct advocacy role, CDT and Common Cause issued letters to the Board, condemning the lack of public input in committee formation and raising serious concerns with the proposed nomination rules. These letters also advocated that the bar for member-nomination -- originally set at 10% of the regional At-Large membership -- be substantially lowered.

In July, the ICANN staff issued proposed changes to the Bylaws that would eliminate the guarantee of nine At-Large Directors and threaten the long-term existence of the At-Large Membership. CDT and Common Cause again moved quickly and issued comments condemning the proposed changes to the bylaws but generally supporting the Election Committee's proposed rules. At the quarterly meeting in Yokohama, Japan, CDT and Common Cause organized NGO and corporate opposition to the proposed bylaws and nomination rules. Consequently, once again the ICANN Board reversed its course, adopting bylaws that preserved nine At-Large Directorships. Also in response to criticism and lobbying from CDT and Common Cause, the Board approved new rules for member-nomination that set the bar for addition to the ballot at 2% of the regional membership, as opposed to the proposed 10%. The Member-nominated process began in August 2000. When it ended in early September, nine candidates had gained enough support to have their names added to the ballot.

Bertelsmann Foundation has supported several conferences of the ICANN Studienkreis for discussion of ICANN, its activities, and its appropriate mission; details are available at <http://www.icann-studienkreis.net/>.

In each of these settings, NGOs played a critical role in identifying issues of public concern, articulating that concern, mobilizing support, and ultimately persuading the ICANN Board and ICANN community to change its approach. In each of these settings, that change most likely could not have come from NGOs alone; ultimately, it only came with the support of a broad cross-section of the ICANN community. But without the work of NGOs - their early identification of issues and subsequent advocacy - these changes would almost certainly not have occurred.

-- **Educating and Mobilizing Voters on A Global Basis**

Having convened and consulted the public interest community, developed a core of expertise and research on the ICANN process, and advocated successfully for an election process that gave voice to individual users, NGOs turned to the task of educating and mobilizing those individual users to take advantage of the participatory procedures created for them. At the end of June 2000, CDT and Common Cause joined with the American Library Association (ALA) to launch a voter registration drive for ICANN's October election of "At-Large" Board members. CDT and the Markle Foundation published "Your Place in Cyberspace: A Guide to Internet Domain Names," a primer on domain-name issues, which was distributed to libraries in the US. To reach a global audience, CDT, ALA, and Common Cause set up Web sites providing comprehensive information for those seeking to learn about ICANN and register to vote.⁹ Visitors could learn more about ICANN and its mission, register to vote, and view online "Your Place in Cyberspace."¹⁰

The registration process was not smooth. To varying degrees around the world, national and regional efforts were conducted to inform potential voters, leading to significant

⁹ These web pages are available at <<http://www.cdt.org/action/icann/>>, <<http://www.commoncause.org/icann/>>, and <<http://www.ala.org/oitp/icann/>>.

disparities in the number of registration among nations. Numerous technical problems and server overloads left thousands frustrated in their attempts to access the election system or deal with the multi-stage registration process. Nonetheless, approximately 158,000 Internet users registered (though only about half that number formally activated their registrations).

The next step was to educate registered voters about the election and the candidates. In September 2000, CDT and Common Cause, in partnership with the Bertelsmann Foundation, prepared and circulated a questionnaire for At-Large Candidates, evaluating their position on eight of the key policy issues facing ICANN. The Bertelsmann Foundation and CDT set up voter education web sites where the candidates' positions were posted.¹¹ The NGOs used their Web sites, email and the traditional media to publicize the information and the upcoming election in general. CDT and Common Cause conducted a "get out the vote" campaign, encouraging At-Large members to visit ICANN's voting site and make their selections.

Ten days of voting began on October 1. The election was far from perfect. Both ICANN and the company it contracted to manage the election, *election.com*, were plagued by technical difficulties that denied some Internet users the ability to register or to vote. Ultimately, approximately 34,000 of 76,000 eligible voters were counted and elected five new members of the ICANN Board: Karl Auerbach (North America), Ivan Moura Campos (Latin America), Masanobu Katoh (Asia/Australia/Pacific), Andy Mueller-Maguhn (Europe), and Nii Quaynor (Africa). The achievement should not be underestimated: an unprecedented

¹⁰ Available at <<http://www.cdt.org/dns/yourplace/>>.

¹¹ The questionnaire is at <<http://www.cdt.org/dns/icann/election/questionnaire.html>>. Candidates' responses were posted at <<http://www.cdt.org/dns/icann/elections/>> and on Bertelsmann's web site <<http://www.democratic-internet.de/>>.

online global election had been held for the members of the Board of a private Internet management body.

-- **Ongoing NGO Activity Surrounding the At-Large Elections**

The election of five At-Large Directors left the broader issue of representation unresolved: the four remaining At-large Directors remain in limbo, pending ICANN's review of its representational structure. The role of NGOs remains vital. In connection with the November 2000 meeting of the ICANN board, CDT and the Berkman Center for Internet & Society again offered a series of panel discussions on the important policy issues facing ICANN, including not only the recent election but also domain-name dispute resolution, privacy protection, and proposals for new Top-Level Domains.

ICANN is now conducting a major study of the At-large election and representation in general.¹² Continuing in their multi-faceted approach of convening, research, education and advocacy, CDT and Common Cause are coordinating the NGO and Academic ICANN Study (NAIS).¹³ The NAIS is an independent response to ICANN's call for a comprehensive study of the concept, structure and processes relating to the At-Large election and selection of ICANN Board of Directors. The study effort is operating in conjunction with ICANN's own study efforts during the first half of 2001, with the goal of producing a final report by June 2001.

With adequate time and resources to conduct a truly global study, wholly absent when CDT and Common Cause undertook its first study, CDT and Common Cause are expanding their international outreach effort. The core group of the NAIS project comprises experienced

¹² December 2000 comments by CDT, Common Cause and the Oxford Programme in Comparative Media Law and Policy are online at <<http://www.cdt.org/dns/icann/001222comments.shtml>>. See also CDT's earlier comments at <<http://www.cdt.org/dns/icann/001109dyson.shtml>>.

¹³ See <<http://www.naisproject.org/010207overview.shtml>>.

researchers from nine organizations worldwide with substantial expertise in ICANN. Group members come from each of ICANN's five geographic regions. The NAIS project will soon release a uniform research template that aims to identify a set of basic At-Large parameters and their interrelationships, review the At Large election process, and compare differences and similarities regionally. Among other initiatives, NAIS sponsored a public forum on issues related to the study in conjunction with ICANN's Melbourne meeting in March 2001.

V. Looking Forward: Key Issues Facing ICANN

The efforts of NGOs at representing public concerns and promoting the public voice at ICANN highlight the ongoing challenges facing ICANN and Internet self-organization in general. Participation and representation remain key, unresolved issues for ICANN. In addition, it faces the related challenges of defining its mission and achieving consensus-based, bottom-up decision processes.

-- The participation challenge

Despite substantial efforts, many NGOs - as well as individual Internet users, consumer groups, and small businesses -- have found themselves unable to fully participate in ICANN's decisions.

ICANN's in-person meetings remain an important part of the ICANN process; major board decisions are made at these meetings, and they provide the best and perhaps only way to present arguments efficiently to the large collection of interested parties in ICANN's proceedings. Yet few organizations have the resources to travel to these meetings. While admirable in their efforts toward globalization, ironically it is these very efforts that in ways have contributed to limitations on those able to fully participate.

Similarly, few organizations have the resources or time to participate on the myriad of mailing lists that permeate ICANN's subgroups. ICANN does perhaps an unprecedented job at using the Web and email lists to facilitate global communication, with dozens of lists and public forum areas generating thousands of comments and messages on issues of note. This mechanism is itself daunting. For example, the Non-commercial Constituency mailing list generated over 800 messages in the first two months of 2001, and it is by no means the most trafficked ICANN list. Open, global list participation by users with a penchant for extensive and intensive online discourse has contributed to conflict and a low "signal-to-noise" ratio on the lists. (The authors have themselves ceased participation in several ICANN lists for this very reason.)

The result has been that many stakeholders that might otherwise be interested have not participated. In the US, for example, many of the major civic groups that have an interest in ICANN's decisions -- such as the major consumer groups representing user interests, or groups engaged in digital divide an access concerns -- have not even begun to participate in ICANN. Small businesses are similarly disadvantaged, and with the notable exception of the US Small Business Administration have not had highly visible representation at ICANN.

The experiences of many individuals and groups are compounded by ICANN's constituency structure, which makes many feel like they are not adequately accounted for. The entire non-commercial sector accounts for only one of seven different constituencies in the DNSO, and many feel constantly outweighed in that forum. Small businesses complain that the "business" constituency cannot alone do justice to their unique concerns. And there is not a single constituency in the DNSO representing individual domain name holders; only organizations can be members of constituency groups.

Further challenges have been faced – and not resolved – in guaranteeing the openness and transparency of ICANN’s decisions. Early on in ICANN’s existence, the Board and staff faced tremendous pressure to act quickly and independently. The broader community had little visibility of what decisions were being made by the board in its closed meetings and little warning about the status of policy issues. This tension between acting autonomously - as corporations do - versus acting only after extensive consultation processes are in place - as many governments tend to - is still being resolved. Even today, ICANN has few of the administrative requirements that are fixtures in many traditional governmental systems, such as procedures for seeking public comment and the right to appeal decisions to a higher authority.

-- **The representation challenge**

ICANN’s original bylaws called for a 19-member body made up of the corporation’s president, three representatives from each of three self-organizing Supporting Organizations representing specific name and number stakeholders, and nine “At-Large Directors.” The original bylaws provided only a very general sense of the At-Large selection process:

At a minimum, such a process shall consist of nominations from Internet users, industry participants, and organizations, and should give consideration to such nominees. Such process shall call for election of At-Large directors by one or more categories of members of the Corporation admitted pursuant to qualifications established by majority vote of the At-Large members of the Initial Board.

However, the bylaws provided neither operational details for the selection of the At-Large directors by the At-Large membership, nor a clear sense of who should be included in that membership. As noted above, ICANN has engaged in a long-term debate about who should

be voting "members of the Corporation" and how the At-Large Directors should be selected.¹⁴

While the 2000 election ultimately selected five elected directors with some sense of institutional legitimacy - more than the appointed board members had in the minds of many in the ICANN community - the election was also haunted by problems that demonstrate the difficulty of the undertaking. There were large regional and national discrepancies in registration. Asia registered over 90,000 voters, Africa less than 1,000. The winner in each region came from the country with the greatest number of registrants, raising concerns about nationalistic "capture." Technical problems plagued the voting system, with many unable to register or vote and thereby disenfranchised. Some complained of a lack of outreach and voter education, and certainly it is clear that the vast majority of those eligible to vote had little idea of what ICANN even was.

Some of these problems are easily remedied in future elections. Others are not – for example, any system where hundreds of millions of people are eligible to vote, and only a few hundred thousand do, will be susceptible to capture by well-organized groups or nations. ICANN is conducting a study of the election, and the entire issue of the existence of its At-

¹⁴ For example, to counsel the ICANN community on these questions, the initial appointed Board set up the Membership Advisory Committee (MAC). In its considerable deliberations, the MAC wrestled with who should be eligible to participate in the selection of directors through the At-Large membership. In one of its early reports to the ICANN community, presented at the March 1999 meeting in Singapore, the MAC laid out the possibilities:

Possibilities include: everyone in the world (regardless of Internet access); all Internet users (individual and corporate); domain name holders; IP address holders; ISPs; entities that use the Internet commercially (such as banks and corporations); educational institutions; public interest organizations; organizations composed of a minimum number of Internet users constituted for the purpose of representing their views to ICANN; and individuals only (excluding corporate and organizational members).

In its report at the May 1999 ICANN meeting in Berlin, the MAC stated that "At-Large membership should primarily represent those individuals and organizations not represented by the Supporting Organizations," and recommended that "At-Large membership shall be open only to individual persons."

Large Directors. As noted above, CDT is engaged in an international research effort that in June 2001 will offer its own analysis and suggestions regarding future selection of Directors.

Resolving concerns about this form of capture, and the related question of who should be eligible to vote, will be difficult but essential for creating a sustainable - and legitimate - representative process. Some within ICANN believe the current mechanism inappropriately includes many uninformed voters in the workings of a narrow technical body, and would reduce the At-Large seats or move away from a broad election. Other believe that the At-Large is essential for representing the interests of those not well-represented in the SOs, and insist on its existence as part of the basic representational structure struck at ICANN's creation and essential to its continuing legitimacy.

Regardless of how these issues are ultimately resolved, they point to the difficulty of providing representation for a global body, particularly if that body is engaged in activity of broad interest, and absent other sufficient mechanisms for representational participation.

-- **The mission challenge**

The problems of broad participation in ICANN would be less of a concern if its decisions were of interest to only a narrow group of stakeholders. A key question is therefore: Should a broader public care about ICANN and its decisions? The answer today is likely yes.

There are two competing visions of ICANN. In one, ICANN is a potential Internet governance body which can use its control over central domain name and IP address functions as a means for addressing a myriad of policy issues (e.g. Creating a .xxx domain or resolving jurisdictional disputes among countries). The second, and predominant view is that ICANN is and should remain a purely technical body, making decisions on straightforward

technical issues of minimal day-to-day interest to the public - like a corporate board or a technical standards group.

In reality, ICANN is somewhere in between. It is therefore going to require public attention for some time to come. There are at least two important reasons why ICANN is of public concern:

- **ICANN has the *potential* for broad policy-making** -- In the decentralized world of the Internet, ICANN oversees a crucial centralized function: the coordination of unique names and addresses. In this role, ICANN has the *potential* to exercise a great deal of control over Internet activities. For example, ICANN has already required that all domain registrars impose a uniform policy for resolving trademark disputes. Without a check on its authority, ICANN could seek to impose other requirements, even content regulations. While the current ICANN Board has shown an admirable lack of interest in such policy-making, the ICANN of the future might not be so restrained, particularly since checks on its authority have not been properly established.
- **Even ICANN's narrow technical decisions have broader policy impacts** -- "Technical" decisions often have broader impact. Expanding the generic Top Level Domain space (by adding new domains to the existing .com, .org, and .net), choosing which registry is recognized for a country code, defining rules for access to domain name registrant data, or even selecting a method for recognizing when new country-code domains get assigned (as .ps was recently assigned to Palestine), for example, all have broader political and social implications.

This potential for making decisions that are not purely technical in nature is exacerbated by ICANN's charter and structure. While the original ICANN Articles of Incorporation do spell out the areas of activity that it is to engage in -- and these areas are largely focused on technical coordination -- there is no requirement in ICANN's Articles or Bylaws that it limit itself to these areas. Non-profits like ICANN have considerable discretion to interpret their charitable mission and there is no satisfactory legal remedy for cabining ICANN. For example, a lawsuit under California law would face issues of standing and other barriers. Moreover, invoking the authority of a US court to define ICANN's mission would revive questions about US control over the Internet's global functions and undermine the goal of internationalizing the domain name management system. For the same reason, appeals to the US Commerce Department (the principal party in all relevant ICANN contracts), or to the US Congress, which could limit the authority of the Commerce Department, are also unsatisfactory.

Thus, CDT, Common Cause, and others have pursued the only viable option at this time: promoting a greater public voice and wider representation in ICANN decision-making. However, this could easily backfire. Broader public representation may actually push ICANN to assume a broader mission. This is the paradox of representation -- if ICANN's elections are open, what is to stop candidates from running and being elected on promises to solve all kinds of problems. Finally, there is no appeal from the Board's choices in this area: should ICANN engage in policy-oriented decisions over time, it is not clear what would stop it other than a vague notion that such action would be intolerable to the world community today. This lack of an effective check on a future ICANN raise doubts about the long-term narrowness of ICANN's mission.

ICANN is likely to face increasing pressure to take on policy-making roles. Governments and stakeholder groups are seeking ways to control a wide range of activity online. Nations seeking to prosecute cyber-crime, protect consumers from fraud, or regulate online content regulation will a tempting target in using ICANN's registrar and registry contracts as a way to enforce rules about access to the domain name and IP numbering space and through it the Internet in general.

Without a clear mechanism for maintaining a limited “technical coordination” mission that minimizes policy-making decisions that demand broad input, ICANN will face continuing pressure to act more as a government and less independent of public scrutiny and participation.

It is time for a creative search for other options. For example, it may be possible to rewrite ICANN’s corporate “constitution” to define its mission more narrowly. A global referendum on this charter would help create ICANN’s “legitimate” mission and scope. If board member elections are possible, a vote on a Mission Statement and a “Charter of Limitations” may be the way to both define and cabin ICANN.

-- **The consensus challenge**

Bottom-up, consensus-based processes provide one possibility for mitigating the representational and participation challenges facing ICANN. While achieving consensus among affected parties remains a foundational principle for ICANN, in practice consensus processes have proven hard to implement.

The Green and White Papers called for "private bottom-up coordination" as the basic decision-making model for ICANN. Policy proposals were to flow from the Supporting Organizations, with a demonstration of consensus among affected stakeholders required

before adoption of any proposal. In fact, ICANN's registrar agreements do not require the registrars to adhere to any new policies that are adopted without a consensus of the affected parties. As explained in a recent set of essays by David Johnson and Susan Crawford entitled "Why Consensus Matters,"¹⁵ a discipline of hewing to the rough consensus bottom-up ideal provides a major legitimizing influence ensuring that those affected can have a say in ICANN's policies without creating rigid and unachievable global representation structures for every potential interest group.

Despite early attempts at consensus-based decision-making, such as the extensive working group efforts undertaken by the DNSO, authority in ICANN increasingly rests at the top, with ICANN's Board. The Supporting Organizations have an increasingly limited role in policy generation. The Board makes major decisions - like the choice of new gTLDs, or the extension of important contracts with key registries - almost exclusively. Such moves are easily understood as a matter of practicality - action by a small Board is hard enough, and far quicker than demonstrating consensus among a sharply divided community. But as a result, ICANN has moved away from the discipline of bottom-up practices that were a critical element of its conception.

VI. Lessons Learned: What ICANN Teaches Us About Internet Governance

ICANN is an experiment in non-governmental, global, bottom-up, technical coordination for the Internet. It is a young organization, and its possibilities and challenges are still not fully realized or understood. Its ultimate success or failure in its mission is not clear. The concepts of global inclusion and representation are good ones. The ICANN lesson shows in part how difficult it to achieve these ideals. Based on these experiences, it is

¹⁵ Available at <http://www.icannwatch.org/archive/why_consensus_matters.htm>.

possible to make some observations and suggestions for ICANN and other Internet coordination mechanisms now and future.

ICANN itself is not well suited for, nor inclined towards, broad policy making. ICANN has neither the legitimacy nor the representational structures in place to be a quasi-governmental entity for the Internet, and should not be seen by the world community as a mechanism for resolving broad policy disputes.

As noted above, ensuring broad representation and participation from among the diverse set of potential stakeholders in ICANN is a daunting task. Widely disparate resources and conceptions of organization among stakeholders exacerbate the problem. At the same time, ICANN finds itself called on to make decisions with somewhat broad impact.

For ICANN, a combination of improvement in its processes and clarification of mission is most likely to ensure future success. It has already undertaken efforts to improve transparency; a study of representation is ongoing; its SO sub-structure may be revisited. But the touchstone is mission. A narrow mission is an essential piece of the communal acceptance of ICANN. If ICANN can confine its mission to the largely technical and objective, or if we can develop a mechanism for seeking a referendum on such a charter, the shortcomings in its other processes are less important. If it is dragged into broader policy debates, the representational problems become critical and ICANN will likely attract a backlash from non-included parties and national governments.

As noted, ICANN has expressed little desire to engage in these broader activities. Steps could be taken to make it harder for future ICANNs to do so - and to warn off those who would expand ICANN's role on notice.

-- **Principles for Internet organization**

Given the problems with ICANN, where do we go from here? Conferences and research efforts such as those being sponsored by Bertelsmann Foundation and others are a key step towards understanding the new face of governance online. The ICANN experience lends itself to several suggested principles for this continued exploration:

- **Internet governance mechanisms should reflect the unique features of the global, decentralized Internet.** To be effective, Internet governance must engage the reality of Internet and the challenges it creates for top-down governance. These mechanisms must therefore provide:
 - **International scope: The Internet's global character should inform any self-organization, coordination, and governance online.** The Internet is global and its coordination mechanisms must be globally inclusive, and operate on a transnational scale while reflecting continued national sovereignty in traditional governmental mechanisms.
 - **Broad participation: Governance bodies should be resourced and chartered to promote active outreach and empowerment among affected parties.** - The decentralized network includes many important users, publishers, and providers - rather than simply a few large players. ICANN's history displays the difficulty of expanding participation in governance beyond the well-resourced few. In the best traditions of the Internet, this diverse community of stakeholders can be engaged in decision-making processes. In the future, outreach to the broad Internet community should be a major priority of would-be governance organizations.
 - **Bottom-up processes: Decentralized, bottom-up decision-making should be used where possible.** These mechanisms will often be more responsive and better

equipped to deal with complex and rapidly changing technical environments.

Bottom-up consensus processes can also do better job ensuring the needs of all affected parties are taking into account.

- **Appropriate representation: Broad representation mechanisms may be required when dictated by the decisions made and the other opportunities for participation** - When participation by affected parties is alone not an option or insufficient, broader representation mechanisms - such as elections - may be appropriate. Ultimately, those affected by decisions will only accept those decisions if they are to acknowledge the legitimacy of such decisions.

- **Defined mission: In all Internet governance, mission parameters should be carefully defined and reconciled with representation and participation.**

Neither ICANN nor other experiments in governance have yet determined, and may never determine, how to achieve the representational legitimacy necessary for broad policy-making. In the absence of that legitimacy, governance bodies should be created only with carefully and narrowly defined missions, so as to minimize potential for abuse of authority that could ultimately compromise the Internet's key values.

- **Internet governance mechanisms should preserve, and take advantage of, the valuable technical features of the global, decentralized Internet.** Internet coordination mechanisms should not threaten the key technical features that have been so crucial to the success of the Internet. Efforts to change the decentralized, open network architecture may make governance easier in the short run, but in the long run put at risk the possibilities for innovation, scalable and stable network

performance, and individual liberty currently embodied in the architecture. These key technical features also create new possibilities for dealing with governance issues.

Technologies of individual control, such as the ICRA initiative, highlight the ways in which policy problems such as the protection of children online can be effectively addressed consistent with the global, diverse network.

- **NGOs have a major role to play as convenors, conceptualizers, mediators, and mobilizers, both representing the public interest and working to create opportunities for direct participation of individual users.** NGOs must be supported with adequate resources, to provide a civil society counterweight to the more organized interests of corporations and governments. CDT is thus working on the Global Internet Policy Initiative (GIPI), one of the purposes of which is to support NGOs around the world seeking to engage in Internet policy debates.

On the global, decentralized Internet, non-governmental, bottom-up models of coordination, organization, and governance online are a possibility that must be pursued. Top-down mechanisms that do not reflect the character and architecture of the Internet are likely to fail, or to jeopardize the very characteristics that have made the Internet so successful. The ICANN experiment is a good one. ICANN has made great progress in its short lifespan, while generating tremendous controversy highlighting the difficulties and challenges of bottom-up governance. Yet it points the way towards principles of self-organization and user control that may be the best hope for coordination and governance that maximizes the Internet's great promise and is consistent with its unique characteristics.