Revised and Final Submission for
Input to ICANN Accountability and Transparency Review Process

June 23, 2010

1. Problem Statement:

ICANN has taken important actions – ranging from significant policy changes to formal reviews – in recent years to improve its accountability, transparency and the "quality" of its decision-making. Despite these efforts and improvements, ICANN arguably continues to have problems making decisions that the global Internet community can support. These perceived issues involve internal factors – how ICANN's decision-making mechanisms have developed in response to its own internal processes and external feedback – and external factors – how stakeholders communicate with ICANN and respond to subsequent decisions, all of which occur within the context of ICANN's unique institutional approach. The proposed exploratory study will develop a framework and methodology to analyze and understand this situation, ideally laying the groundwork for ICANN to address it realistically and effectively.

2. Scope of Proposed Study:

(a) Elements

The proposed study contains interacting elements carried out in three overlapping phases, with emphasis on Phases 1 and 3.

Phase 1 – Problem identification: Case Studies

This component is aimed at identifying key issues, challenges, and areas of disagreement related to recent decisions and actions by ICANN with particular focus on areas in which they are accountability and transparency concerns. The inventory of problems and case study selection will be based on a rapid review of related materials such as public comments submitted to ICANN (e.g. http://brussels38.icann.org/node/12433), media reports, and expert opinions. Instead of engaging in an abstract analysis and theoretical evaluation of ICANN's internal policies and processes, the proposed study starts with a

bottom-up, perception- and problem-oriented analysis of a representative sample of materials in order to identify and map the criticisms voiced by the Internet community.

Among others, the following thematic areas are suggested as representative issues and will be considered for case studies:

- Introduction of new gTLDs
  - o Expression of interest proposal
  - o Implementation Recommendation Team - IRT (ad hoc body set up to deal with IP issues)
  - o Role of the Governmental Advisory Committee – GAC)
  - o Vertical Integration
- .xxx domain application and decision
- DNS-Cert Proposal

Phase 2 – Problem discussion and identification of potential solutions: Supplementary interviews and working meetings

In addition to the review of case studies and other materials mentioned above, we will conduct interviews with select experts, staff members, and stakeholders to discuss the problem areas identified in phase 1 and to explore potential solutions. These interviews will focus primarily on the case studies from phase 1, but may also address other instances where a substantial proportion of ICANN stakeholders were dissatisfied with ICANN policy decisions. Likely areas of discussion will include issues related to:

- the consistency and predictability of ICANN decisions
- the ability to prioritize and focus attention on key issues
- the clarity and transparency of the decision-making process
- the responsiveness of ICANN to stakeholders
- planning

Phase 2 will identify zones of convergence and divergence regarding both the perceived quality of ICANN's decisions along these various dimensions and potential solutions to deal with the underlying challenges.

Acknowledging the special institutional design and hybrid nature of ICANN, we will host a series of informal working meetings with colleagues from the Berkman network with work experience related to a range of institutional settings (including international NGOs). In these sessions, we seek to identify innovative responses to some of the challenges mentioned above, including institutional design, processes, and tools for improving transparency. We will consider not only innovative approaches from the private sector (corporate governance) but also public decision-making processes and governance regimes (e.g. open government initiatives).

Phase 3 – Synthesis and recommendations: Evaluation and reconciliation

Based on a rich body of literature (including corporate governance literature, but also organizational psychology), the study will develop an exploratory model (or "framework") intended to help examine the various factors that shape the perceived legitimacy of ICANN and its decision-making processes and to make visible the interplay among these variables (such as structure, procedures, information flows, etc.) In order to evaluate the influence of these dynamics, the diagnostic model will be constructed using the case studies from phase 1.

The diagnostic model will include a taxonomy of issues and challenges identified in phases 1 and 2. Basic categories of the envisioned taxonomy are 1) foundational – based on the question of legitimacy and the perception that the wrong people are making the decisions; 2) procedural – critiques of the decision-making process itself, including lack of transparency and/or a perception that ICANN procedures were not adequately followed; and 3) substantive – where there is disagreement with ICANN decisions on substantive grounds suggesting a lack of accountability with ICANN's global stakeholders.

In the light of this taxonomy and based on the map that shows the potential intervention points, we will propose a series of concrete, future-oriented recommendations in response to the challenges and problems identified in the earlier phases of the project. We also seek to identify corresponding benchmarks that would allow to measure "success" or "improvement".

(b) Main Areas of Review

Against the backdrop of paragraph 9.1 of the Affirmation of Commitments (AOC) in general and in the light of this RFP in particular,[1] the Berkman Center understands and acknowledges that *Corporate Governance* as a field of research and (best) practice will play a very important role in the context of the proposed review process. Within the proposed study, issues related to corporate governance will be among the core areas of exploration, including the assessment of ICANN Board of Directors' selection process, its performance, and the merits of the mechanisms in place to appeal Board decisions. The review of these areas will directly benefit from the extended team's expertise in corporate governance matters, especially by way of providing an analytical toolset and normative benchmarks – in terms of best practice proxies – for evaluation, factoring in ICANN's unique institutional design.

3. Methods:

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[1] http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm

The study will examine, in a case-study format, a select number of relevant procedural and substantive decisions by ICANN, focusing on the perceived divide between ICANN decision-makers and stakeholders, while seeking to identify specific steps designed to bridge those gaps. The study will map the arguments derived from the content analysis and interviews (phases 1 and 2) onto this taxonomy and identify the key factors that help explain the persistent issues mentioned in the problem statement. This structure will allow us to distinguish between variables that can be influenced (e.g. communication about processes or decisions) from other factors (e.g. the basic organization and U.S. base of the institutions) that are unlikely to be changed.

The main methods for the inquiry above can be summarized as follows:

(1) *Review of documents and other materials*: We consider three types of sources for our review of the critique in the context of the case studies mentioned above: First, public submissions from earlier processes addressing the questions of accountability and transparency, among others. Second, an in-depth literature review of relevant academic articles and scholarly work in the field. Third, a sample of news coverage in foreign online media in several languages (likely including German, French, Spanish). The text analysis is based on standard content analysis methodology.

(2) *Expert interviews*: We will draw upon people from various sectors and settings who operate inside and outside of ICANN and are deeply familiar with ICANN's activities and other relevant institutional models.

(3) *Building the model*: The method for constructing an exploratory model is qualitative in nature and is based on expert knowledge in areas such as law, business studies, new institutional economics, sociology, and psychology. Similar models have been developed and tested by the project team in other areas of research (including online aggression). In particular, the model would borrow from a rich body of scholarship on corporate governance principles and best practices.

4. Output:

The output is a 20-30 pages diagnostic report that summarizes the findings of all three steps of the proposed study and concludes with a series of working hypotheses that explain the persistence of the critiques regarding the transparency, efficacy and accountability of ICANN decision-making processes and provides a series of recommendations.

5. Timeline:

The timeline is aggressive, requiring a substantial, integrated and committed team of experienced researchers. It will also necessarily have implications for difficult decisions regarding the scope and depth of the work. The first phase will begin immediately, along with the preparations and necessary arrangements to implement the second phase; both phases should be completed by the end of August mid-term report. The third phase will move from preliminary foundational work and begin in earnest at this point, iterating with the final elements of the first two phases. The final phase will be our focus during the months of August and September. The report is expected to be delivered on October 10, 2010.

6. Motivation:

The Berkman Center, its faculty members, fellows and extended community have actively observed and contributed to our understanding of ICANN since its inception, and have analyzed its unique role in various context and forums. The team assembled for this project has made a series of important scholarly contributions in the thematic zone of the RFP. Scholarly contributions include Jonathan Zittrains's work on ICANN, John Palfrey's law review article "The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed" and Herbert Burkert's "About a Different Kind of Water: An Attempt at Describing and Understanding Some Elements of the European Union Approach to ICANN", among others. Jack Goldsmith's expert report in one of the more controversial ICANN decisions in recent memory is another illustration of the serious scholarly engagement by the project team with ICANN, its decision-making processes and substantive decisions.

The questions raised here are emblematic of an engaging and pressing suite of larger questions that constitute a core research effort by the Berkman Center, which is focused on exploring new governance regimes in the digitally networked environment, the promise and perils of digital institutions, and new ways of dispute resolution in multi-stakeholder settings. Thus, the proposed project would benefit from individual scholarship focused on ICANN's singular design and characteristics, and would complement this understanding by locating it within ongoing theoretical and practical research on innovative institutions in the context of its Law Lab project (www.lawlab.org).

7. Team:

Herbert Burkert
Herbert Burkert is president of the Research Center for Information Law at the University of St. Gallen. In addition, Professor Burkert is a Senior Research Fellow of the Frauenhofer Institute for Intelligent Information and Analysis Systems (St. Augustin, Germany). Professor Burkert studied Law, Political Science and History at the University of Cologne and at University College Dublin. He had been a Volkswagenwerk Research

Fellow at the University of Regensburg, Germany. He received his PhD from the University of Frankfurt at Main and his residency from University of St. Gallen.

John Coates (Project's Special Advisor on Corporate Governance)
John F. Cogan Jr. Professor of Law and Economics at Harvard Law School
John Coates joined the faculty in 1997 after private practice at the New York law firm of Wachtell, Lipton, Rosen & Katz, where he was a partner specializing in mergers and acquisitions, corporate and securities law, and the regulation of financial institutions. Before coming to HLS, he taught on the adjunct faculties of New York University School of Law and Boston University School of Law. He was promoted to Professor in 2001, and was named the John F. Cogan Jr. Professor of Law and Economics in 2006. His current research at Harvard empirical studies of the purchasing of legal services by S&P 500 companies, the causes and consequences of the completion or failure of M&A transactions, mutual funds and the effects of their regulation, and the causes and consequences of CEO and CLO turnover. He teaches courses on Mergers & Acquisitions, Financial Institutions Regulation, Contracts, Corporations, and the History of Capitalist Institutions. Professor Coates is a principal researcher on the Program's Corporate Purchasing Project, a quantitative and qualitative examination of how corporations purchase legal services. He also instructs at the Program's Executive Education course. Professor Coates is a frequent panelist and speaker on M&A, and a consultant to the SEC, law firms, mutual funds, hedge funds, and other participants in the M&A and capital markets. He also is a member of the Legal Advisory Committee of the New York Stock Exchange and is a director of the American Law and Economics Association. He is the author of numerous articles on corporate, securities, and financial institution law, and for seven years co-authored the leading annual survey of developments in financial institution M&A.

Robert Faris
Research Director, Berkman Center for Internet & Society
Robert Faris is the Research Director of the Berkman Center. His recent research includes Internet content regulation, state censorship and surveillance practices, broadband and infrastructure policy, and the interaction of new media, online speech, government regulation of the Internet and political processes. Rob is a contributor to the OpenNet Initiative, studying Internet censorship activities in over 60 countries around the world. He is currently working on the integration and comparison of analytical tools to better understand the structure of online communities and digital media content. Rob also teaches classes on Internet policy and the impact of the Internet on social and political change. Rob holds a M.A. and PhD. in International Relations from the Fletcher School of Law and Diplomacy at Tufts University and a B.A. in Anthropology from the University of Pennsylvania.

Urs Gasser
Executive Director, Berkman Center for Internet & Society
Urs Gasser is the Executive Director of the Berkman Center. He is the founder of the Research Center for Information Law and was an associate Professor at the University of St. Gallen (Switzerland). His research and teaching focuses on information law and

policy and the interaction between law and innovation. Current research projects –
several of them in collaboration with leading research institutions in the U.S., Europe,
and Asia – explore policy and educational challenges for the future generation of digital
natives, the regulation of digital media and technology (with emphasis on IP law), ICT
interoperability, legal and regulatory issues related to cloud computing, the institutional
settings for fostering entrepreneurship, and the law's impact on innovation and risk in the
ICT space.

Jack Goldsmith
Henry L. Shattuck Professor of Law, Harvard Law School
Faculty Co-Director, Berkman Center for Internet & Society
Jack Goldsmith specializes in international law, foreign affairs law, conflicts of law, and
national security law. He is the author of dozens of articles on these and other subjects.
His most recent publications are *The Terror Presidency: Law and Judgment Inside the
Bush Administration* (Norton, 2007), *Who Controls the Internet? Illusions of a
Borderless World* (Oxford University Press, 2006) (co-authored with Tim Wu) and (with
Eric Posner) *The Limits of International Law* (Oxford University Press, 2005). Before
coming to Harvard, he served as Assistant Attorney General in the Office of Legal
Counsel from October 2003 through July 2004, and Special Counsel to the General
Counsel to the Department of Defense from September 2002 through June 2003.
Professor Goldsmith taught at the University of Chicago Law School from 1997 to 2002,
and at the University of Virginia Law School from 1994 to 1997. His areas of interest at
the Berkman Center lie in Internet governance and regulation, and Internet filtering.

Colin Maclay
Managing Director, Berkman Center for Internet & Society
Colin Maclay is the Managing Director of the Berkman Center, and has led the work of
the Berkman Center on all areas of the Global Network Initiative (GNI), including in
person negotiations, extensive communications with other stakeholders, and substantive
research, in addition to coordination with other Berkman projects and leveraging our
collective knowledge and expertise to inform the process. Colin's research focuses on
effectively and appropriately integrating information and communication technologies
(ICTs) with social and economic development, with attention to the changes Internet
technologies foster in society, policy and institutions.

Laura Miyakawa
Project Manager, Berkman Center for Internet & Society
Laura Miyakawa is the Project Manager at Berkman. In this role, she directs the tactics
and the long term strategy for Herdict.org, among other things. Prior to joining the
Berkman Center, Laura worked with the Boston Consulting Group, developing strategies
for high tech clients up and down the East coast. While at BCG, she had the opportunity
to work in outback Australia on a Welfare Reform pilot. Recently, she worked as a
commercialization associate at the University of Queensland in Brisbane, Australia,
where she handled all patenting and licensing decisions for the School of Information
Technology and Electrical Engineering. Laura holds bachelors and masters degrees in
electrical engineering from Carnegie Mellon University and MIT, respectively.

John Palfrey
Henry N. Ess III Professor of Law
Vice Dean, Library and Information Resources, Harvard Law School
Faculty Co-Director, Berkman Center for Internet & Society
John Palfrey is Henry N. Ess Professor of Law and Vice Dean for Library and Information Resources at Harvard Law School. He is the co-author of *Born Digital: Understanding the First Generation of Digital Natives* (Basic Books, 2008) and *Access Denied: The Practice and Politics of Internet Filtering* (MIT Press, 2008). His research and teaching is focused on Internet law, intellectual property, and international law. He practiced intellectual property and corporate law at the law firm of Ropes & Gray and is currently a faculty co-director of the Berkman Center for Internet & Society at Harvard University. Outside of Harvard Law School, he is a Venture Executive at Highland Capital Partners and serves on the board of several technology companies and non-profits. John served as a special assistant at the US EPA during the Clinton Administration. He is a graduate of Harvard College, the University of Cambridge, and Harvard Law School.

Jonathan Zittrain
Professor of Law, Harvard Law School, Harvard Kennedy School of Government
Professor of Computer Science, Harvard School of Engineering and Applied Sciences
Co-Founder and Faculty Co-Director, Berkman Center for Internet & Society
Jonathan Zittrain is Professor of Law at Harvard Law School and the Kennedy School of Government, co-founder of the Berkman Center for Internet & Society, and Professor of Computer Science in the Harvard School of Engineering and Applied Sciences. He is a member of the Board of Trustees of the Internet Society and is on the board of advisors for Scientific American. Previously, he was Professor of Internet Governance and Regulation at Oxford University. He is a member of the Council on Foreign Relations and a Forum Fellow of the World Economic Forum, which has named him a Young Global Leader. His research interests include battles for control of digital property and content, cryptography, electronic privacy, the roles of intermediaries within Internet architecture, and the useful and unobtrusive deployment of technology in education. His book, The Future of the Internet -- And How to Stop It, focuses on the future of the now-intertwined Internet and PC, and he has co-edited two studies of Internet filtering by national governments, including Access Denied: The Practice and Policy of Global Internet Filtering.

8. Coordinating organization:

The Berkman Center for Internet & Society at Harvard University is devoted to research and teaching on issues at the intersection of emerging technologies, law, public policy, industry, and education and to the development of dynamic approaches and rigorous scholarship that can affect and support the public interest.

The Berkman Center has sought to be an honest broker in conversations about the relationship between the Internet and related technologies and society. Our efforts are concentrated in three zones, united by the question of how the Internet can elicit the best from its users:

- Law, Technology, Innovation, and Knowledge
- The Relationship between Internet and Civic Activity
- Technology, Law, and Development

In the field of intellectual property, we have sought to develop creative ways of resolving, in a rapidly changing technological environment, the tension between the need to stimulate innovation and the importance of providing broad public access to the fruits of that innovation. In our second core area, we see an enormous need to bring clarity to the conversation about the Internet's impact on democracy. As more activists are using the network as an essential toolkit for speaking out in democratic and non-democratic regimes alike, their personal security is increasingly threatened and their self-expression thwarted. In our third area of focus, we envision a growing opportunity to use Internet technologies to enhance economic and educational opportunities in developing countries, to improve the way that we teach and learn, and to make information accessible to citizens around the world who are not physically proximate to our libraries.

9. Budget

See attached file. The Berkman Center is a non-profit institution located at Harvard University, with an annual budget of approximately $5 million dollars. We are funded through a variety of sectors and sponsors. Please review our funding page for additional information: http://cyber.law.harvard.edu/about/support