

Memorandum from Jack Goldsmith

Re: ICANN Independent Review Process

July 29, 2010

This memorandum offers my quick reflections on the ICANN Independent Review Panel (IRP) process. My reflections are informed by my role as an expert for ICM in *ICM v. ICANN*, the only significant instance of an IRP in action. This memorandum reflects my personal views alone and not ICM's or any else's. But it should be considered with proper skepticism in light of my work on the case. Also, I must emphasize the haste with which I wrote this. I have not checked quotations or the accuracy of my claims, which are based on nothing more than my expert report and my unchecked memory of the case. This memorandum, in short, is meant only to offer off-the-cuff ideas and perhaps to spark thought and reflection by others who are more deeply engaged in this project.

I. Background

ICANN is a California non-profit corporation. But it is an unusual one. It is in some sense still under the control of the U.S. government. And it creates and distributes billions of dollars of global property rights on the Internet. These factors – ICANN's ostensible private status, its relationship to the U.S. government, and its plenary governance authority over one of the globe's most important resources – generated significant controversy at ICANN's inception. The nub of the controversy was that ICANN's extraordinary authority over the Internet was untempered by any form of real administrative law or other checks and balances that usually accompany such large exercises of effective governmental power.

Article IV of ICANN's Articles of Incorporation, its Bylaws, and its IRP, were designed in large part to address these concerns. Article IV requires ICANN to “operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.” ICANN's Bylaws impose further duties to act openly, transparently, fairly, and with integrity.

The Bylaws additionally require ICANN to “have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or

Bylaws.” When a party affected by an adverse ICANN Board decision submits a request for “independent review” of the decision, the IRP “shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”

The IRP process emerged from what ICANN's first Chairman of the Board described as the “need for a way to obtain recourse in the event that someone may believe ICANN or its staff has broken our own bylaws or otherwise not followed the rules that we have set up for ourselves and our successors.” The IRP was a response to the demand to “strengthen ... confidence in the fairness of ICANN decision-making,” former ICANN President Stuart Lynn told the U.S. Senate in 2002. The IRP process was apparently included in ICANN's Bylaws at the insistence of the U.S. government as a condition for delegating its control over the Internet's naming and numbering system to ICANN. Paul Twomey, ICANN's former President and CEO, told Congress in 2006 that the IRP “and independent arbitration” are the ultimate guarantors of ICANN’s “accountability in its decision making.”

ICANN determined that the IRP would be governed by the International Arbitration Rules of the American Arbitration Association’s International Centre for Dispute Resolution Procedures (“ICDR Rules”), as modified by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (Supplementary Procedures). The ICDR rules are standard international arbitral rules, with all of the procedural flexibility of such rules. The Supplementary Procedures craft the ICDR rules a bit to fit ICANN’s special circumstances. For example, they direct the IRP “to conduct its proceedings by electronic means to the extent feasible.” But on the whole the ICDR Rules and the Supplementary Procedures give the arbitrators enormous procedural flexibility.

II. *ICM v. ICANN*

ICM v. ICANN is the first and to date only significant experience with the IRP process. The issue before the IRP concerned ICANN's rejection of ICM’s application for a sponsored top-level domain (“sTLD”). ICM argued that ICANN had determined that it qualified for a sTLD under a detailed “request for proposal” but then, under belated pressure from national governments and the Government Advisory Committee (“GAC”), changed its mind and rejected ICM's application in a way that was arbitrary, lacking in transparency, discriminatory, contrary to ICANN's evaluation criteria, and

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outside ICANN's mission, all in violation of ICANN's Articles and Bylaws as well as international law and local law. ICANN denied the charges.

An early (and unpublished) procedural skirmish in the case concerned whether the IRP panel would convene a hearing and would permit live testimony and cross-examination of live witnesses. The rules contemplate the possibility of a quick hearing, electronically or by telephone, to the extent possible; but they also clearly give the arbitrators the discretion to have a live hearing with full documentation, witness testimony, and cross-examination. ICM argued that to make out its complicated factual case, it would need a live hearing and live witnesses. ICANN argued against this request; it wanted a quick and informal process. Without explanation, the arbitrators sided with ICM.

What followed was a full-blown international arbitral process, U.S.-style, with many party memorials and expert opinions, and a week-long hearing with oral testimony and cross-examination. Six months after the hearing, the IRP issued its “Declaration.” It held that (i) the IRP’s holdings were advisory and not binding; (ii) the IRP would appraise the actions and decisions of the ICANN Board “objectively” and with deference under the “business judgment” rule or any other rule; (iii) Article 4 of ICANN’s Articles “requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California”; (iv) the ICANN Board had found that ICM’s application for a .XXX sTLD met the required sponsorship criteria; (v) the ICANN Board’s later reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy; and (vi) ICANN had to pay all IRP-related fees but not ICM’s attorneys’ fees.

Following the Award, ICANN has indicated that it will give ICM a XXX sTLD. But it also indicated that it disagrees with the IRP’s rulings on the deference the IRP owes to ICANN Board decisions and on the applicability of international law. In addition, ICANN had in 2009 (not sure about the date) proposed to amend its Bylaws to create a different (and less demanding) IRP, but it has since dropped that proposal.

III. Reflections

The IRP was set up as an accountability mechanism to ensure that ICANN acts “consistent with” its Articles and Bylaws. In some sense, the IRP worked well. An applicant that was denied a sTLD was able to (i) invoke the process, (ii) argue before independent arbitrators that ICANN acted unfairly, (iii) force ICANN to defend its actions before the independent

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arbitrators, (iv) prevail against ICANN before the arbitrators, and (v) apparently (the decision is not final) convince ICANN thereafter to reverse itself on the merits and award the sTLD.

And yet there are many concerns and questions.

(i)

“Accountability” is a much-banded term. In legal contexts, it is often used in two ways.

In the first sense, “accountability” means that an agent is removable by the people it represents if those people believe agent is acting contrary to their interests. Politicians can be voted out of office or impeached; members of the management team or the Board of Directors can be removed or recalled; etc. In this context removal is a way to ensure that the agent acts in the principal’s interest.

In the second sense, “accountability” means that some entity can demand that a decisionmaker explain or justify its actions in order to determine whether the decisionmaker properly followed rules of some sort. Usually accountability of this sort is accompanied by the scrutinizing entity’s ability to reward or punish the decisionmaker based on its actions or explanations. Examples here are judicial review, inspector general audits, congressional investigations, and the like. This form of accountability can also be seen to ensure that the agent acts in the principal’s interest. But more specifically it can be seen as serving a more direct rule-of-law preservation function.

These two forms of accountability often work in tandem but they can operate separately or as substitutes as well.

Typically an entity like ICANN – which has power over billions of dollars of property rights and over the proper functioning of a hugely important global resource – would have significant accountability constraints of both types to ensure that it served its principals’ interests and followed the law. Both ICANN’s accountability mechanisms are very weak.

As for type 1 accountability: The election process for ICANN’s Board of Directors is well known and widely viewed to be dysfunctional (although it is unclear what would be better). And I believe (but you should check) that Board members can only be removed by a $\frac{3}{4}$ vote of other Board members, and that there is no process for outside removal.

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Type 2 accountability is also weak. It includes government scrutiny and pressure (and ultimately, a refusal by the U.S. Government to honor or renew its contracts), public criticism of its actions (based on what many believe is an inadequately transparent institution), and the IRP. ICANN also faces the possibility of a due process challenge in court, something that has not yet happened and that would in any event be difficult for a plaintiff to win. It also faces the threat that some powerful countries will become dissatisfied with its actions and attempt to create an alternate and competing naming and numbering system, to the detriment of all Internet users.

(ii)

This analysis highlights the relatively important role that the IRP plays. In creating the IRP, ICANN sought to establish a mechanism that (i) ensures that it complies with its Articles and Bylaws, and, just as important if not more so, (ii) credibly conveys to the world that it complies with its Articles and Bylaws and, more generally, that it is a legally limited and rule-governed institution. To achieve these aims, ICANN assumed substantive and procedural obligations. The .XXX controversy shows that both are problematic in practice.

On the substance, ICANN is bedeviled by contradictions in its mission and uncertainties concerning to whom it is accountable. Article IV says it should be accountable to “the Internet community.” But there is no such beast. As the various pressures on ICANN in the .XXX matter show, many different groups with many different and often contradictory interests have a stake in what ICANN does. As the .XXX controversy also revealed, the legitimate influence of the GAC, and of governments generally, remains very unclear. At bottom ICANN screwed up with ICM because it did not have a clear sense of when and how and to what degree to incorporate governmental concerns. It also screwed up because of a fundamental contradiction at the heart of its mission. In many respects ICANN sees itself and presents itself as an entity that performs only technical functions. But as the .XXX controversy demonstrated, these technical functions have huge public policy implications, and public policy considerations inform ICANN’s technical decisions. Much of the disagreement on the Board about the ICM application concerned whether and to what degree and how these public policy implications were relevant to its TLD considerations. Finally, ICANN continues to resist the relevance and applicability of international law even though, as the IRP held, the obligation is clearly stated in its Articles.

ICANN cannot improve its accountability without sorting out these uncertainties and contradictions in its substantive mission. The problem goes back to the founding of ICANN and has never been sorted out. My views

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on how this should be sorted out are too complicated and undeveloped to outline here, except to say that they run in favor of making plainer ICANN's substantive public policy outputs and the legitimate role of government in those outputs. The important point I wish to emphasize, however, is that improving ICANN's functioning and accountability requires getting clearer about its substantive mission and lines of accountability. All the process in the world will not fix this problem.

(iii)

With the caveat that clarity on the substance of ICANN's mission and responsibilities are vital to improving ICANN's accountability, I now turn to consider process alone. The process can be sliced in many ways. I will first consider how elaborate the process should be, and then will consider the standard of review and the bindingness of the IRP Declaration.

Begin with the expense and length of *ICM v. ICANN*. The total of arbitral and lawyers' and related fees certainly ran into the many millions of dollars. And the process, from start to decision, took 20 months. This raises several concerns.

ICM is rich. Few aggrieved ICANN applicants will be able to afford such a lengthy and expensive process. Less wealthy applicants can still invoke the process. But they will not have the resources to hire fancy lawyers and experts to engage in a nearly two-year battle. That said, the resources ICANN is doling out are hugely valuable, and it has assumed serious obligations. Due process in the distribution of such important resources should in theory permit an extensive investigation of the facts to determine whether ICANN satisfied its obligations. I have no doubt that ICM would not have been able to convince the IRP of the unfairness of the ICANN process surrounding .XXX without the ability to cross-examine ICANN witnesses with documents.

I assume that there are many sorts of applicants (and other ICANN-related grievants) – rich and poor – who would wish in theory to contest ICANN decisions before an IRP. How to accommodate them all? Perhaps the current system – which permits the arbitral tribunal to craft the procedures to accord with the demands of the case and the requests and resources of the claimant – is not a bad system. Poor claimants might not be able to afford a full-blown international arbitration. And rich claimants with small claims might not want to spend a lot of money on the IRP. Both groups can still demand a bit of accountability from ICANN, relatively inexpensively, if they wish. But the system also permits more elaborate hearings, as in *ICM v.*

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ICANN, when the facts are complex, the stakes are high, and the claimant is wealthy.

This analysis is very provisional. The amount of due process depends primarily on who the grievants are, what their complaints are about, how important it is to their claims to be able to develop facts in the face of *ICANN*'s inevitably tendentious representations, and what kind of resources are necessary to develop those facts. To do a proper analysis of this slice of the problem, we need to know answers to these and related questions: Why have there been so few IRP arbitrations? Are there many grievants who in theory would like to use the system but find it too opaque or expensive? Who are the potential grievants and what are their complaints? How much factual development in live hearings and witness testimony is necessary to properly develop these claims?

Also, it is important to look to *ICANN*'s side of things. How burdensome and expensive is the IRP process? Why did *ICANN* seem to have so much heartburn about the depth and scope of the *ICM* hearings? (If *ICANN* really wants a full audit of the *ICM* matter it would open its files and permit you to interview the participants. I doubt seriously it will do this, especially since the .XXX matter is not closed. But you should still try to get some serious information about *ICANN*'s side of that case – the good, the bad, and the ugly. You might also interview *ICM* or its lawyers.)

(iv)

The IRP process, as interpreted by the IRP panel, has three important moving parts: (a) the IRP is supposed to determine whether *ICANN* acted “consistent with” its Articles and Bylaws, (b) the standard of review is “objective” and not deferential, and (c) the Declaration is not “binding” on *ICANN*, but rather is advisory and not directly enforceable in court.

ICANN is happy with the non-bindingness of the Declaration, but it argued in the arbitration and continues to insist that the IRP must give deference, akin to the business judgment rule, to its decisions. I think this is dead wrong. First, for the reasons outlined by the arbitrators, the best reading of the Articles and Bylaws is for a non-deferential standard. Second, the combination of a deferential standard and a non-binding declaration would be practically no check at all. I was amazed that *ICANN* argued for both in the arbitration and continues to argue for both now. The argument for both clearly belies its representation that it is and wants to be accountable under its rules.

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Third, the theory of the business judgment rule has no applicability here. That rule is designed to give a firm flexibility in its business decisions when the firm or its officers are sued in court. But that rule assumes two important factors not present with ICANN. First, the judicial decision in court is binding. Of course we don't want courts exercising *de novo* decisionmaking authority over firms' business judgments in ways that are binding on the firms. That would substitute the courts' judgment for the firms' judgment and would obviously be bad. But IRP declarations are not binding. Second, the officers sued in court who receive business judgment deference are subject to an alternate form of accountability that justifies the judicial deference: They can be removed by shareholders. That is not the case with ICANN. For these reasons, and also because of the terms of the Articles and Bylaws, I find ICANN's argument for deference unpersuasive.

What ICANN has set up with the IRP (as interpreted by the arbitrators) is in effect an informed second opinion. Independent arbitrators look at what ICANN did and offer an independent assessment of whether it acted consistent with its rules, but ICANN retains the discretion to abide by or reject the advice. This is useful scrutiny, and in *ICM v. ICANN* it served (in my opinion) a useful role. But it is not terribly demanding scrutiny, and it is surprising that ICANN is arguing for even less scrutiny. One can easily argue that an institution that affects social and economic life as much as ICANN should receive significantly more scrutiny. But less scrutiny is hard to justify.

That said, I do not know if the IRP as currently set up – non-deferential review and a non-binding decision – is optimal. Nor am I sure how these considerations should inform the form of the dispute resolution (in terms of live hearings and cross-examination, etc.). I am sure the issues are related, but I am not sure how. All of which leads to my final, and most firmly held recommendation. ICANN is an entirely novel institution that raises the thorniest questions of accountability, process, and administrative law I have ever seen. I have not begun to do justice to the problem in this memorandum. Our faculty has some of the world's experts in due process theory corporate and administrative law. (Adrian Vermeule, for example, is presenting a paper next week on "second opinions" that is directly relevant to our problem; at least ten others I can think of are qualified to provide real help.) You should get some of them involved in this project.