

Competing for the Internet

ICANN Gate — An Analysis
and Plea for Judicial
Review Through Arbitration

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About the Authors

Flip Petillion is a partner with the law firm Crowell & Moring. Over the past twenty years, he has advised on and resolved disputes concerning regulatory and competition issues in newly liberalized industries including telecommunications, postal, media, energy, transportation and the Internet. He has an impressive background in alternative dispute resolution, having served as chairman, sole arbitrator and party-appointed arbitrator, as well as counsel, in arbitration proceedings conducted by different arbitration institutions.

In particular, Flip advised new carriers on the opening of the EU Telecoms market in the 1990s. He represented a major U.S. telecommunications and media company when it took a majority participation in the newly created first alternative carrier in Belgium. For many years, he advised the new carrier on the preparation and implementation of its operations and services in the liberalized telecommunications market. He negotiated what became the reference interconnection agreement between incumbent operators and new comers all over Europe. He advised and represented alternative carriers and incumbents from many other European countries.

Flip was also closely involved in the liberalization of the African telecommunications market. Working on a project supported by the World Bank, in cooperation with renowned financial advisors in French Congo, Flip rethought and put in place the new regulatory telecommunications framework, and organized the procedure to search for investors and assisted the Office National des Postes et Télécommunication (ONPT) in the selection of its foreign investors.

Flip subsequently obtained postgraduate degrees from the universities of both Leuven and Ghent on legal, technical and strategic aspects affecting the telecommunications industry. He also followed a program on negotiation and mediation lead by Harvard Law School Professor R.H. Mnookin.

Flip was selected to represent the Belgian Institute for Postal services and Telecommunications for many years in procedures brought by alternative operators against the regulatory authority. He co-authored a book on the EU and local regulatory framework.

Flip also advised new entrants on regulatory issues in the media, energy and transportation sectors inside and outside the EU.

Most recently, Flip has represented Internet companies, online services companies and multinationals from other, more traditional, sectors in arbitrations before ICDR, the international division of the American Arbitration Association in New York, and before ICC in Paris and WIPO in Geneva.

Jan Janssen, a senior associate at Crowell & Moring, has worked mainly on national and international disputes with a focus on intellectual property, information technology and the liberalization of sectors like the postal sector and the Internet's naming space. Through his work with Flip Petillion, he has acquired a profound, detailed knowledge of the regulatory framework in these sectors, and has had an excellent opportunity to perfect his arbitration skills.

Foreword

From the creation of hieroglyphics in ancient Egypt, to the invention of the printing press by Gutenberg in the Middle Ages, to the development of computers in the 20th Century, advancing technology has revolutionized the world's ability to record and share information. These developments in information technology have come fast and furious. They all have been disruptive to existing orders, but the disruption is worth it: The result in every case has been an explosive improvement in the human condition.

The Internet - first developed as a military application but now firmly at the center of world commerce - has been just as disruptive as these other leaps in information technology, and just as enriching as well. But, unlike these earlier developments, the Internet's ability to achieve its true potential requires careful management of the technological underpinnings that permit seamless communication. Among the critical components of those underpinnings - at least in today's Internet - is effective and efficient management of the Internet's addressing system and domain name system (DNS).

And that brings us to ICANN. This unusual, non-profit, public-interest entity plays a critical role in ensuring a stable platform for facilitating communications globally across the web. Yet ICANN is no longer accountable to any centralized governmental or regulatory oversight. Instead, it is run through a highly complex, multi-stakeholder system.

In order to ensure that ICANN's management of the DNS is both effective and fair, ICANN has put in place procedural protections, seemingly designed to enhance due process and basic fairness. Navigating the ICANN rules and procedures, though, is extraordinarily difficult. That challenge is made all the more difficult when the ICANN Board sometimes takes steps that seem inconsistent with ICANN's guiding principles, including its promise of ensuring fairness and equality. An entire cottage industry has arisen to help domain name registrants, new gTLD applicants, registrars, registries, and brand owners protect and enforce their sometimes-competing rights and interests.

Given the central importance of the Internet's addressing system and the DNS to global commerce, one would expect there to be many resources available to guide would-be domain name and gTLD owners. Surprisingly, that has not been the case – until now.

With this remarkable volume, Flip Petillion and Jan Janssen have exhaustively canvassed the historical, political and technical processes that made ICANN so central to the administration of the DNS, as well as the administrative, arbitral and other accountability processes that have developed within the ICANN system. If all this book did was catalogue that history and explain the unique and sometimes bizarre processes for dealing with ICANN, this book would be a great success.

But this book does so much more – the authors also have extensively reviewed all of the Independent Review Process (IRP) decisions that have been issued to date, and have provided their own analysis and perspective on the strengths and weaknesses of those decisions.

And then, most helpfully, Messrs. Petillion and Janssen take an even further step: They have thoughtfully developed proposals for improving the way that ICANN works and for the future management of the Internet.

Their recommendations are no doubt colored by their perspectives; after all, the authors have been involved in many of the leading IRP proceedings and have counseled innumerable applicants on their rights in the domain name system and the new gTLD application process. But the authors were able to substantiate their thesis with crystal clear and sound reasoning, and what they have very effectively done is to shine a bright light on ICANN's procedures, and prompt an appropriate debate on how ICANN can improve its model to support the continued growth and fairness of the DNS, and hence the Internet.

This volume is essential reading for anyone who operates in the ICANN and domain name systems. It is so thorough, and its recommendations so thoughtful, that it is sure to have an outsized impact. As a number of IRP panels have noted, the ICANN processes have much room for improvement: This book provides a clear roadmap for how those processes can be improved in the next round of new gTLD applications.

David H. Bernstein

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Preface and Acknowledgments

To look back over the last twenty-five years is to look back over spectacular changes in the IT sector and a huge expansion of the Internet and its capabilities. And this IT growth and innovation has by no means come to an end. It is forecast that within fifteen years there will be some 200 billion connected appliances – *i.e.*, more than twenty-five times as many as there are people on earth. We are moving into the fourth industrial revolution and we need to be prepared.

In the mid-1990s, I had the good fortune to become closely involved in the liberalization of the telecommunications sector in Europe and on the African continent; ten years later, I was working on the liberalization of the postal sector in Europe. This experience proved invaluable as I became more and more involved in the Internet expansion business, and it helped to inform my work and guide my vision of how a competitive market of domains could be assured.

After handling IT disputes for twenty years, my work with the Domain Name System (DNS) began when I was asked by a large number of multinationals and international organizations to give advice on the New generic Top Level Domain (gTLD) Program and, ultimately, to prepare applications for new gTLDs during the 2011 third application round (a round that was meant to allow for full competition). Indeed, with my team I advised more than 100 interested parties and prepared ninety-three unique applications. Given that the Applicant Guidebook had by 2011 evolved to reflect a very technical and challenging application process, my experience was invaluable. During a short period of time, I discovered many different industries, each of which operated according to its own individual cultural approach.

Then, once the applications had been filed, another exciting phase began for me and my team: the dispute resolution phase. I handled objection cases before the World Intellectual Property Organization (WIPO), the International Chamber of Commerce (ICC) and the International Center for Dispute Resolution (ICDR) that covered all the possible grounds that could be invoked (string similarity, legal rights, community interests, public interests).

Finally, there began what was perhaps the most thought-provoking phase of all: resolving disputes with the Internet Corporation for Assigned Names and Numbers (ICANN). I handled many of the Independent Review Process (IRP) cases related to the third application round. To date, we have handled six IRPs, and we have been contacted in relation to two other cases by counsel requiring assistance with regard to procedural issues and in the development of their strategy and arguments. In view of multiparty representations and the consolidation of cases on identical claims, we have in fact represented some 70% of all IRP claimants.

And I truly never expected there to be so many issues, so many obstructions to open competition, so many ‘nos’ to the often elementary requests from my clients who saw no alternative but to initiate an IRP. My experience has allowed me to form my own vision of how the New gTLD Program should operate. Through the cases I have worked on, I have seen a recurrence of particular issues underlining the importance of certain legal principles and their application, and I have been lucky enough to work on cases that have allowed me to support my clients in accordance with my own vision of the best way forward. I am honored to say that some IRP panels have already expressed their gratitude for the contributions we have been able to make to the debate – in the interest of improving the Internet.

While the cataloguing of experience is perhaps already reason enough for a book, it is my belief in a better system for the future that is the driving force behind this publication. I want to share my experience with all applicants and future interested parties, and by doing so give something valuable back to the Internet community.

It was under Bill Clinton’s administration that ICANN was established. The U.S. Government’s aim was to increase competition and that aim is reflected in ICANN’s own description of the New gTLD Program:

The Internet Corporation for Assigned Names and Numbers, founded in 1998, has as its mission to ensure a stable and unified global Internet. One of its key responsibilities is introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system (DNS).¹

Achieving that aim requires ICANN to take some crucial steps. I must acknowledge here that ICANN has already admitted some of its mistakes. Of course, it would have been better had they not occurred in the first place, but in any event, avoiding future mistakes is now the priority. This is primarily what this book is about and I hope it contributes to much-needed, concrete initiatives and promotes change in the interests of the Internet community.

It is perhaps appropriate here to acknowledge that this book is based largely on our personal experiences with the IRP process and our involvement on behalf of claimants.

1. ICANN, *New Generic Top-Level Domains – About the Program*, <https://newgtlds.icann.org/en/about/program>.

Despite this personal involvement, however, every attempt has been made to ensure objectivity and to suggest improvements for the future that are for the general good of the system.

Furthermore, I hope that this book will help to reassure applicants in the fourth application round (which may be an open window). These new applicants may well look at the existing process and its implementation with suspicion in the light of the third, somewhat imperfect, application round; and applicants of the third round who themselves already are (or soon will be) active registries can also expect to be under even more scrutiny when the next round is launched. After all, the number of applicants in the third round was not that great, and as they will all directly or indirectly participate in the preparation and approval of the future regulatory framework, there is a very real possibility that without effective accountability there will be challenges based on perceived or real anticompetitive practices and abusive restriction of competition.

You will notice that the different chapters of this book are easily accessible separately. If you want to know the whole story, it helps to read this book from the beginning to the end. Enjoy it.

Finally, I would like to express my thanks to Jan Janssen, whom I introduced to this world, and who has the potential to become a leading thinker in this field. Together we have advised many international organizations and multinationals, and we have taken part in some of the most fascinating disputes ever launched on subjects related to Internet governance. It has been a joy to share long days and weekends with Jan. I invited Jan to co-author this book as a testimony to the great team we have formed over the years. My thanks also go to Diego Noesen for his unwavering support and to all my other Crowell & Moring colleagues who have made this project possible. I would like to single out Mariet Nelissen, Alexander Heirwegh and especially Penelope Turner for their invaluable help in putting this book together.

Lastly, I want to thank both of our home fronts. Jan and I have missed valuable family time over recent years and we are so grateful to Lisl and Peter for all the support they have given us at times inconvenient to them: at weekends, during the night, while on vacation. This achievement is as much theirs as it is ours and it is to them that we dedicate this book

Flip Petillion
1 November 2016

List of Abbreviations

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
AGB	gTLD Applicant Guidebook
ALAC	At-Large Advisory Committee
AoC	Affirmation of Commitments
AoI	Articles of Incorporation
APDIP	Asia-Pacific Development Information Programme
ARPA	Advanced Research Project Agency
ASEP	ICANN's Accountability Structures Expert Panel
ASO	Address Supporting Organization
AUC	African Union Commission
BGC	Board Governance Committee
BGG	Board Governance Guidelines
BWG	Boston Working Group
CCG	Code of Conduct Guidelines
ccNSO	country code Names Supporting Organization
ccTLD	country code Top Level Domain
CEP	Cooperative Engagement Process
CoIP	Conflicts of Interest Policy
CORE	International Council of Registrars
CPE	Community Priority Evaluation
DCA	DotConnectAfrica Trust
DIDP	Documentary Information Disclosure Policy
DNS	Domain Name System
DNSO	Domain Name Supporting Organization (predecessor of GNSO)

List of Abbreviations

DoC	U.S. Department of Commerce
DR(S)P	Dispute Resolution (Service) Provider
ECJ	European Court of Justice
ERC	Committee on ICANN Evolution and Reform
EIU	Economist Intelligence Unit
EU	European Union
FTP	File Transfer Protocol
GAC	Governmental Advisory Committee
GNP	Geographic Names Panel
GNSO	Generic Names Supporting Organization
GPML	Globally-Protected Marks List
GSO	Generic Supporting Organization
gTLD	generic Top Level Domain
IAB	Internet Advisory Board
IANA	Internet Assigned Numbers Authority
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICDR	International Center for Dispute Resolution
ICDR Rules	International Center for Dispute Resolution's International Arbitration Rules
ICJ	International Court of Justice
ICG	IANA Stewardship Transition Coordination Group
IDN	Internationalized Domain Name
IETF	Internet Engineering Task Force
IGO	Intergovernmental Organization
IMP	Interface Message Processor
INTA	International Trademark Association
IO	Independent Objector
IOC	International Olympic Committee
IPv4	Internet Protocol version 4
IPv6	Internet Protocol version 6
IRP	Independent Review Process
ISI	Information Sciences Institute
ISO	International Standardization Organization
ISOC	The Internet Society
ISP	Internet Service Provider

ITU	International Telecommunications Union
JAS	JAS Global Advisors
JPA	Joint Project Agreement
LRO	Legal Rights Objection
Manwin	Manwin Licensing International
Merck	Merck KGaA
MIT	Massachusetts Institute of Technology
MOU	Memorandum of Understanding
MSD	Merck & Co., Inc.
NCP	Network Control Protocol
NGO	Non-governmental Organization
NGPC	New gTLD Program Committee
NIC	Network Information Center
NOC	Network Operations Center
NSF	National Science Foundation
NSFNET	National Science Foundation NET
NSI	Network Solutions, Inc.
NTIA	National Telecommunications and Information Administration
ORSC	Open Root Server Confederation
PCIJ	Permanent Court of International Justice
PDP	Policy Development Process
PICs	Public Interest Commitments
Procedural rules	The Bylaws, the ICDR Rules, and the Supplementary Procedures
RAA	Registrar Accreditation Agreement
RFP	Request for Proposals
RM	Reference Material
RSSAC	Root Server System Advisory Committee
RySG	Registry Stakeholder Group
SCO	String Confusion Objection
SO	Supporting Organization
SRI	Stanford Research Institute
SRS	Shared Registration System
SSAC	Security and Stability Advisory Committee
SSEP or SSP	String Similarity (Evaluation) Panel
sTLD	Sponsored Top Level Domain

List of Abbreviations

Supplementary Procedures	(ICDR) Supplementary Procedures for ICANN Independent Review Process (or ICDR IRP Supplementary Procedures)
TCP/IP	Transmission Control Protocol/Internet Protocol
TLD	Top Level Domain
Trademark PDDRP	Trademark Post-Delegation Dispute Resolution Procedure
UCLA	University of California, Los Angeles
UDRP	Uniform Domain Name Dispute Resolution Policy
UN	United Nations
URS	Uniform Rapid Suspension procedure
USC	University of Southern California
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WWW	World Wide Web

List of Independent Review Process Cases

RELATED TO THE QUESTIONING OF AN EARLIER DELEGATION

<i>Parties</i>	<i>Extension</i>	<i>Relevant Decision</i>	<i>Case No.</i>	<i>Status</i>
ICM Registry v. Internet Corporation for Assigned names and Numbers	xxx	Questioning the reconsideration of previous ICANN Board 2005 decision in view of a GAC Advice	50 117 T 00224 08	IRP Declaration finding in favor of the Complainant TLD was delegated
Manwin Licensing International v. Internet Corporation for Assigned names and Numbers	xxx	Requestioning the delegation following the IRP Declaration in the <i>ICM Registry</i> case	50 117 T 00812 11	Joint Dismissal of IRP

RELATED TO A STRING SIMILARITY EVALUATION FINDING CONFUSING
SIMILARITY

<i>Parties</i>	<i>Extension</i>	<i>Relevant Decision</i>	<i>Case No.</i>	<i>Status</i>
Booking.com BV v. Internet Corporation for Assigned Names and Numbers	hotels v. .hoteis	Questioning the outcome of the String Similarity Evaluation (SSP held that .hotels is confusingly similar to .hoteis; as a consequence, both applications were put in one contention set)	50-20-1400- 0247	IRP Declaration naming ICANN the prevailing party and finding partially in favor of the Complainant TLD .hotels was delegated following a successful auction

**RELATED TO A STRING CONFUSION OBJECTION DETERMINATION FINDING
CONFUSING SIMILARITY**

<i>Parties</i>	<i>Extension</i>	<i>Relevant Decision</i>	<i>Case No.</i>	<i>Status</i>
Vistaprint Limited v. Internet Corporation for Assigned Names and Numbers	webs v. .web	Questioning the outcome of the String Confusion Objection (ICDR Expert considered Web.com's objection to be successful)	01-14-0000 -6505	IRP Declaration naming ICANN the prevailing party and finding partially in favor of the Complainant TLDs.webs and.web were delegated following a successful auction
