

HARVARD LAW SCHOOL

CAMBRIDGE • MASSACHUSETTS • 02138

LAWRENCE LESSIG
Professor of Law

TELEPHONE: 617.495.8099
FAX: 617.495.4299
E-mail: lessig@pobox.com

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Mr. Ira Magaziner
Senior Advisor to the President for Policy
OEOB, Old Executive Office Building
Room 216
1700 Pennsylvania Avenue
Washington, DC 20502

Dear Mr. Magaziner:

I have reviewed the submission of IANA, proposing the creation of a California Nonprofit Public Benefit Corporation, called "ICANN." In my view, the proposal is a substantial improvement over earlier drafts. And while I still have specific substantive reservations about the Corporation (which I outline in the letter that follows), as well as concerns about the procedure that has produced its design, I do believe that if the government insists upon modifications of this draft consistent with the objectives of the White Paper, it could provide the framework for a workable, and successful, governing body.

My substantive reservations are three. I am concerned first, that the organization is not sufficiently accountable to the diverse interests that its actions will affect; second, that it does not sufficiently separate authority within the organization; and third, that it does not adequately assure openness in the procedures through which decisions of the board are made. I address each of these concerns below.

Accountability

The ICANN draft is careful to assure that the final board remain responsive to the views of the technical community. It does this by establishing that 9 members of the board be appointed by Supporting Organizations, themselves representing, at their core, technical perspectives related to the management of the internet.

This is a sensible structure. The architecture of the net is sensitive; maintaining and extending its design requires technical expertise; and to assure continued stability, the board will require ongoing guidance from technical communities.

But ICANN will be more than a technical organization. Its decisions will affect far more than network engineering. And to assure that, in the long run, it remains responsive to the views of the internet community generally, it needs an outside check similar to the check of Supporting Organizations. Another perspective on the net — a perspective to balance the perspective of the Supporting Organizations — needs to have the same ongoing input into the decisions of the board. The review of the California Attorney General — the only external check on the activities of this board — is not enough.

How that check might be crafted, however, is a hard question. Making ICANN a membership organization is one possible solution, though of course, that alone is no guarantee of its success. Structuring the proper balance of interests is a complicated process; and the board will need time to develop a sensible proposal. Others have suggested different structures to the same end—my colleague, Charles Nesson, for example, has proposed a form of election to add a check to the board. But whether membership or election, we are both aiming at the same end: Some means to provide an on-going external check on the actions of the board, in the same way that technical interests, through the Supporting Organizations, do.

I understand that some are concerned that any membership structure would displace Supporting Organizations, and thereby displace their technical expertise. But a membership organization could be structured to avoid this risk. As our Constitution protected the representational perspective of the Senate from the populist power of the House, so too could a membership organization insulate the Supporting Organizations from any interference by membership bodies. A membership organization — or indeed, a membership Supporting Organization — would be just one way of representing the interests of the net. It would not need to be primary, or foundational to all others, though it should have an equal role in selecting members of the board.

The complexity of designing a membership organization, however, should not weaken the resolve to modify the existing articles to add some form of external accountability. And while the ICANN document has an aspiration that the Corporation move to a membership structure, it still requires that any amendment of the articles of incorporation obtain a 2/3 vote. Thus, the aspiration notwithstanding, the articles significantly entrench the existing structure, and make unlikely any permanent change.

Consistent with the recommendations of the Boston Group, I would recommend that the entrenchment be reversed: That the articles require that the Corporation move to a membership organization within one year, *unless* two-thirds vote against that change. This way, if indeed it proves impossible to craft a membership organization, an escape is available. But by default, the board would be pushed to effect such a change.

Separation

One of the strongest aspects of the ICANN draft is Article V, section 8, which states:

“Directors shall serve as individuals who have the duty to act in what they reasonable believe are the best interests of the Corporation and not as representatives of their Supporting Organizations, employers or any other organization or constituencies.”

This section recognizes that after representative bodies have nominated board members, these board members must be free to act as they, in good faith, believe serves the interest of the Corporation as a whole.

The relationship between Supporting Organizations and the board, however, leaves open an issue that might work against the intention of Article V, section 8. In principle, a Supporting Organization could nominate officers from the Supporting Organization to serve as board members, and those board members would then in effect serve two masters—the Corporation, and their Supporting Organization.

This structural feature weakens the objective that the board stand independent of any “constituency.” It is also easily remedied. To avoid conflicts in loyalty or perspective, I would recommend that the bylaws prohibit board members from simultaneously serving as officers of any Supporting Organization.

Open Procedures

The current draft of the ICANN proposal is strong in its aspiration to openness. Article III is a significant advance over earlier drafts, recognizing, though not as extensively, the important values that others, such as EFF and the Boston Group, have insisted the board embrace.

One element of fair procedure, however, has been left underspecified in the present draft. This is the requirement that a decisionmaker give reasons for a particular resolution of an open question. Article III, section 3, paragraph (b)(iii) states that the board will publish “the reasons for the action.” But this requirement applies only to policies that “substantially affect the operation of the Internet or third parties.”

In my view, the requirement should not be so qualified. While some issues will not be significant, the board should nonetheless be required to give reasons for a decision. This is especially true for a body without any clear political mandate for its actions. Like a court, the board will gain its authority by demonstrating its capacity not just to keep the system running (as IANA has done to date), but also by demonstrating its capacity for fairly considering, and resolving, policy disputes. A clear statement of its decision, and the reasons supporting that decision, is the surest way to earn that respect. It is also a check on the board’s decisions, by requiring they suffer the test of giving reasons.

As I indicated at the start, in my view the document is close to the objectives of the White Paper. Any mistakes in procedure that might have stained

its development can, in my view, be cleared if the government now assures that the values of the White Paper are preserved. We should not forget that our own constitution was erected upon procedures themselves plainly unconstitutional. Madison's counsel then is still valid today: The test is what is produced, for only it can earn forgiveness for how it was produced.

The government has an important role to play here. Its decision to pass-off to a private entity these aspects of internet governance should not interfere with its responsibility to assure that the governing body it sanctions respect and protect values of the White Paper, and of free governments generally. I urge you to bring this extraordinary experiment in "self-government" to a close by guaranteeing that the values of our government not get lost in this hand-off to private interests.

With kind regards,

Lawrence Lessig