



Civil society involvement in ICANN
Strengthening future civil society influence in ICANN
polycymaking

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1. Introduction: civil society, multi-stakeholderism & the ICANN experiment

The Internet Corporation for Assigned Names and Numbers (ICANN) was established in 1998 by the United States Department of Commerce to oversee a number of internet-related tasks including overseeing management of the internet domain name addressing space. One of ICANN's core duties is to manage the Internet Assigned Names Authority (IANA), which allocates IP addresses to various regional assigning bodies.

In some sense, ICANN was and remains a revolutionary experiment in governance. ICANN represents an innovative new form of governance involving a mix of power between business, governments and civil society. As a legal entity, ICANN is a California nonprofit corporation, accountable only loosely to the California Attorney General, state corporation regulations as well as federal rules regarding 501(c)(3) charitable organisations.

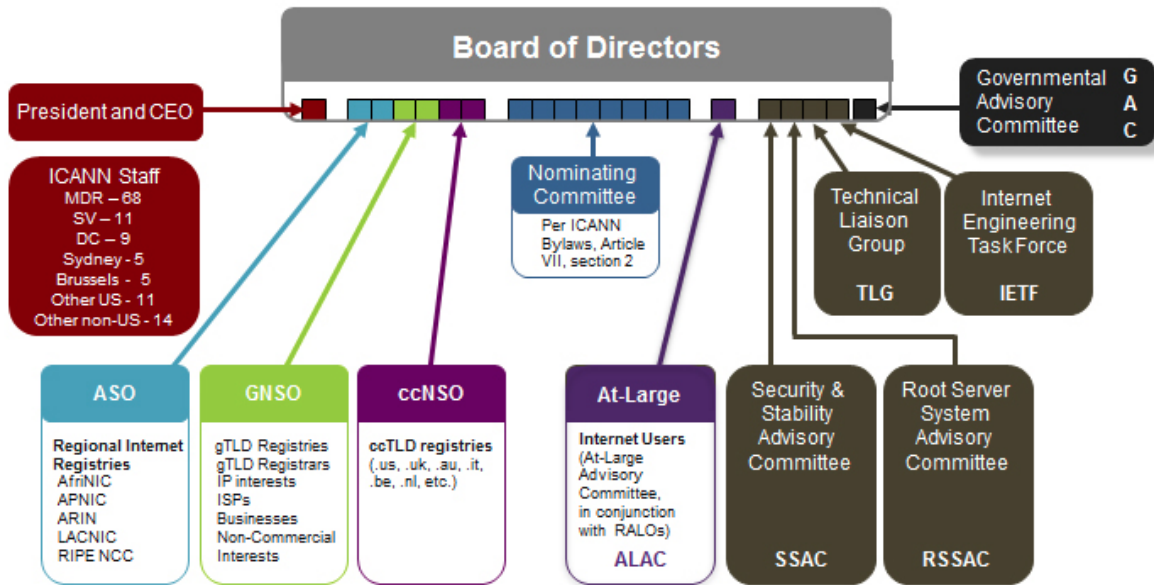
ICANN continues to operate under contract with the US government, despite its initial pledge to completely transition IANA functions to the private sector, although a limited transition has occurred including the 2009 Affirmation of Commitments (AoC) between ICANN and the US government. The AoC affirms key commitments between the US Department of Commerce and ICANN to ensure that ICANN make its decisions in an accountable and transparent manner that promotes the global public interest. The AoC further affirms the US government's commitment to a private sector led, multi-stakeholder driven bottom-up policy development model for the Domain Name System (DNS) coordination.

ICANN occupies a unique role in that it manages a global public resource (the internet's domain name addressing space), but it shares this responsibility between businesses, governments, and civil society participants from many nations. As with any private corporation, ICANN's governance structure is primarily contained in its governing documents such as its article of incorporation and corporate bylaws.

As of August 2011, ICANN is managed by an international board of directors, consisting of sixteen voting members and five non-voting liaisons. Three "supporting organisations" each select two of the voting board members, a "nominating committee" selects eight directors, the At-Large community selects one director, and ICANN's CEO also votes on its board. Governments participate at ICANN in an "advisory" capacity via the Governmental Advisory Committee (GAC) and also via a non-voting liaison on the board of directors. Governments can also play a role via the Country Code Supporting Organization (ccNSO) which manages policy for the country code (or national) domains. Both business interests and civil society can participate in ICANN policy development either through the At-Large community, which advises the board on a wide variety of issues, or through the Generic Names Supporting Organization (GNSO), which makes policy recommendations specifically related to generic top-level domains.

ICANN multi-stakeholder model

ICANN Multi-Stakeholder Model



Thus ICANN represents a unique blend of “multi-stakeholderism” governance wherein the goal is for all of the various impacted parties to participate in the decision-making process that determines the policies based on consensus. From a historical perspective, multi-stakeholderism is a relatively new governance concept and a natural extension of the Enlightenment and Jeffersonian democratic principles, who noted that the exercise of political power without the consent of the governed is illegitimate. Multi-stakeholder governance means that representatives of public interest advocacy groups, business associations, and other interested parties can participate in governmental policy deliberations alongside governments.¹ Thus ICANN arguably attains its legitimacy to govern in direct proportion to which it facilitates the participation of impacted stakeholders.

While financial power and state power have always played a role in setting the rules, the innovative concept of “civil society” participating in policy making is one of ICANN’s greatest strengths and sources of legitimacy. Generally speaking, those interests that can be considered personal, commercial or state power are excluded from definitions of “civil society”, so business and governmental interests are distinct from concepts of “civil society”.

While there is no universally accepted definition of civil society, CIVICUS: World Alliance for Citizen Participation has adopted the following definition: “the arena outside of the family, the state, and the market where people associate to advance common interests.”²

Policy development at ICANN takes place by participation in the consensus process within various “supporting organisations” or “advisory committees”. ICANN divides participants based on various interests and assigns different roles to the actors as part of its policy development process.

¹ Milton Mueller Networks and States: The Global Politics of Internet Governance (Cambridge, MA: The MIT Press, 2010)

² CIVICUS Civil Society Index Methodology, www.civicus.org/new/media/CSI_Methodology_and_conceptual_framework.pdf

ICANN's structure seems complex, arbitrary and overlapping of certain interests (particularly trademark interests), but it does afford a rough basis for including a broad base of participation in more a "bottom-up" fashion than other forms of governance.

With the explosion of popularity of the internet and especially .com and other generic top-level domains over the last decade, the GNSO has become one of the most important places for policy development within ICANN, and given the introduction of new generic top-level domains in coming years, the GNSO should continue to play a preeminent role in ICANN policy development.

The only place within ICANN that is specifically reserved for the advancement of non-state and non-market interests is the Non-Commercial Stakeholder Group (NCSG) of the GNSO. The GNSO, which develops policy recommendations for generic top-level domains, is sub-divided into four broad stakeholder groups for policy development through working groups of interested participants. Besides the NCSG, the four broad stakeholder groups in the GNSO include the Commercial Stakeholder Group (CSG), the Registrars Stakeholder Group, and the Registries Stakeholder Group. Since the other three stakeholder groups all represent various business interests, the NCSG is the only place in the GNSO specifically reserved for non-business interests. The CSG houses three constituencies of specific business interests including the Intellectual Property Constituency, the Business Constituency, and the Internet Service Providers Constituency. The three commercial constituencies have been historically dominated by a small handful of large trademark interests who vote as a block on policy issues.

The constituency within NCSG that promotes noncommercial interests in policy development is the Noncommercial Users Constituency (NCUC). NCUC represents more than 200 nonprofit organisations and individuals who wish to advance noncommercial policy objectives at ICANN such as human rights, education, access to knowledge, freedom of expression, privacy rights and other noncommercial goals. NCUC's members include universities, civil liberties groups, free software groups, religious organisations, artistic groups, ICT development organisations and other noncommercial actors dedicated to the public interest. NCUC has been the home to civil society at ICANN since NCUC was co-founded in 1999 by Syracuse University professor Milton Mueller and Kathy Kleiman, attorney with the Domain Name Rights Coalition.³ NCUC is currently chaired by Dr. Konstantinos Komaitis and maintains a website at ncdnhc.org and an active, open and publicly archived mailing list at listserv.syr.edu/archives/ncsg-discuss.html.

Governments give policy advice via the GAC and make recommendations directly to the ICANN board of directors. Governments also play an increasing role in ICANN's policy development process as GNSO working groups are usually open to anyone to participate and often do include a handful of governmental participants who can play an active role in steering GNSO policy.

Participation from "individual users" is directed through the At-Large structures to provide advice directly to the board. "Individuals" may also participate in various GNSO working groups and play an active role in them. Some individuals participate within At-Large to advocate for their individual business interests, while others participate from a non-commercial perspective. Thus the At-Large communities provide a mix of both commercial and noncommercial individual participants into ICANN.

³ NCUC was called the Non-Commercial Domain Name Holders Constituency (NCDNHC) when originally founded in 1999.

The various stakeholder groups, governments, individuals and others impacted by domain name policy participating together and compromising with each other to develop consensus positions is the heart of the ICANN policy development process. The consensus policies developed from the multi-stakeholder process are then passed to the ICANN board of directors for final decisions (and increasingly reformulations of policy).

2. Struggle for civil society representation in governance of ICANN

Limited civil society involvement at ICANN's founding

The Economist magazine was spot-on in June 2000 when it declared that "ICANN is in many ways a completely new institutional animal." It was not a forgone conclusion at its beginning that this newly established global governance organisation should be private-sector led (as opposed to led by governments). And it was certainly a revolutionary concept that civil society should participate in governance on an "equal" basis with business and governments (even if only in theory). Relative to other global governance organisations such as the World Trade Organization (WTO) or the World Intellectual Property Organization (WIPO), civil society had significantly more opportunity to directly participate in the decision-making processes of the ICANN. Despite this remarkable opportunity to impact the creation of policy regarding a global resource, the vast majority of civil society organisations and individuals did not, in fact, participate in ICANN's governance structure or play a critical role in the influence of its policies in its early years. In ICANN's earliest days, civil society participation came predominantly from academics and educational institutions that recognized the unique governance opportunity or held technical expertise or experience from telecommunication regulation. Academics have continued to play a key role in civil society participation and often provide thought leadership in ICANN community-wide policy discussions.

The reasons for a lack of large participation from civil society in ICANN's early policy development process are varied and broad. ICANN's founders discouraged civil society participation with consistent claims that ICANN would perform a purely technical mission with no policy implications for civil society to concern itself with. A number of civil society actors argued (rather persuasively) that the creation of ICANN itself was an illegal delegation of governmental power by the US Department of Commerce.⁴ Such organisations, including the Electronic Frontier Foundation, are among those who preferred to not lend their own credibility to what they saw as an "illegitimate organisation" by participating in its policy development process.

Other civil society actors viewed ICANN as a waste of time and resources, since civil society's views are often disregarded by the other five commercial constituencies and ICANN staff in the development of policies. While there is (in theory) opportunity for civil society participation, the reality is that without any "muscle" behind a particular policy position, it goes nowhere. And civil society lacks the "muscle" that business (financial power) and governments (state power) wield, and thus civil society plays a less influential role in the policy development process. With ICANN staff and their independent paid consultants holding the drafting pen on most policy matters, noncommercial users must find additional support from a business interest to be effective. When ICANN's direction is challenged by either governments, business, or non-commercial users, the two former more powerful voices are given significant deference in the outcomes of the policy

⁴ Michael Fromkin "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution" Duke Law Journal 50 (2000): 17

development. Obviously, however, the deference afforded to the more powerful actors in regulatory regimes is not a problem that is unique to ICANN.

ICANN's GNSO policy development process is supposed to work by "consensus", meaning what the community participants can agree to via compromise with each other. Unfortunately, no provision is made for ICANN policy to follow existing legal standards and the GNSO community often invents new rules that flatly contradict existing international treaties or the legal standards of most nations. While ICANN claims local law predominates and may provide a basis for disregarding the policy, this "exception" exists more in theory than in practice. Indeed the 2009 AoC recognized the issue of accuracy of its data as one of four broad policy concerns.

Over the last decade, ICANN, the corporation, has grown significantly in size and value and has become an end in and of itself, rather than the means (legal entity) to an end (global management of DNS). ICANN's 1999 annual budget totalled only \$3.4 million in expenses, but the organisation's budget has climbed steadily every year since its founding, with the 2011 operating budget at more than \$60 million. The projected budget for 2011 represents a 9% increase from 2010, which was itself a 5% increase from 2009. Personnel is up 15% in the 2011 budget from 125 to 143. ICANN staff and outside consultants, attorneys and other "professional services" increased 20% over the previous year.⁵ Internal policy staff and their outside consultants are where many of the real policy decisions are made, long before issues are packaged and presented to "the community" for consideration by ICANN staff and their consultants. The pace at which ICANN, the corporation, is growing causes concerns as enormous money and other resources can be steered or restricted at the option of internal policy staff. More often than not, it is an internal ICANN staff member (or one of its outside consultants) that holds the drafting pen on policy recommendations and their implementation details.

Another key factor that discourages civil society participation is that, relative to other stakeholders, non-commercial users are marginalized in the framework of the ICANN's overall governance structure. For example, within the GNSO policy development forum, non-commercial users have been historically under-represented with a 5:1 ratio of commercial: noncommercial interests, with the NCUC the only place for noncommercial interests to become involved in GNSO policy development at ICANN.

Another example of the structural disparity is the composition of voting members on ICANN's Nominating Committee (NC). The NC is important because it selects a number of ICANN board members, GNSO Policy Council representatives, At-Large representatives and other key leadership positions at ICANN. Of the sixteen voting members on the NC, non-commercial users are only provided one representative, to balance out the two representatives from the Business Constituency and representatives from the Intellectual Property, Internet Service Providers, Registrars, and Registries Constituencies. Other voting members of the NC include five At-Large Advisory Committee (ALAC) representatives, but there is no non-commercial requirement in ALAC so those interests cannot be counted on a commercial versus non-commercial basis. Since the structure of the NC favours commercial users above non-commercial users, it should come as no surprise that the selections made by it tend to be candidates supported by the business community

⁵ 2011 ICANN operating budget available online at www.icann.org/en/financials/adopted-opplan-budget-fy11-10jul10-en.pdf; 1999 ICANN budget available online at www.icann.org/en/financials/cairo-fy00-01-budget-issue.htm

over non-commercial interests.

GNSO “reform” & parity between commercial and noncommercial interests

The structural marginalisation of noncommercial users at ICANN has not gone without notice over the years however. In 2006 the London School of Economics (LSE) conducted an in-depth review of the GNSO and determined a dramatic restructuring was in order, in part, to correct imbalances between commercial and noncommercial interests. The LSE report recommended restructuring the GNSO into three larger stakeholder groups to represent registration interests, business, and civil society.⁶

Data from 2006 LSE report

	NCUC	IPR	Business	ISP	Registrars	Registries
Voting members	44	33	39	42	56	13
Estimated annual maximum revenue	\$2,850	\$24,300	\$38,000	Data not available	\$20,500	Registries with < 50,000 registrations pay half fees

Building on the LSE report, ICANN’s Board Governance Committee (BGC) made key recommendations in 2008 to restructure the GNSO with a view toward equal representation between commercial and noncommercial interests among the non-contracted parties side. The BGC explained “the effort to have a balance within ICANN between commercial and noncommercial registrants only reflects a sense of equity.”⁷

The 2008 BGC proposal to restructure the GNSO with the goal of parity between commercial and noncommercial interests came as welcome news to civil society, while large business interests, particularly the trademark industry was outraged by the proposal for parity. Despite the LSE report finding that among GNSO constituencies, the NCUC had the most geographical diverse membership, the most turn-over of representation on the GNSO Policy Council (PC), and one of the largest membership and mailing lists, the trademark industry nonetheless began a series of attacks against NCUC to try to prevent the re-balancing of interests by claiming NCUC should be larger and more diverse in its membership before noncommercial users should be afforded representational parity at ICANN.

In an attempt to expand participation from new and under-represented noncommercial interests, NCUC began a global outreach campaign in 2008 and also opened up its membership to individuals. Previously, NCUC had only been open for membership to nonprofit organisations. As a result of NCUC’s outreach campaign (which it carried out without any support from ICANN), NCUC membership began to steadily grow from 51 organisations in November 2008, to 104 members in July 2009, to 202 members in January 2010.

ICANN’s board had requested that NCUC expand noncommercial participation to justify parity of voting representation between commercial and noncommercial interests among the non-contracted party stakeholders. As a direct result, NCUC increased civil society participation by more than

⁶ 2006 LSE Report Recommendation #19.

⁷ February 2008 Board Governance Committee Report available at www.icann.org/en/topics/gnso-improvements/gnso-improvements-report-03feb08.pdf

300% between 2008 and 2010 in anticipation of the GNSO restructuring. Thus noncommercial users should have increased their representation to six GNSO councillors to match the six Commercial Stakeholder Group (CSG) councillors. Noncommercial users were promised parity from the board with commercial users; but entrenched interests do not relinquish power so easily.

NCUC membership growth 2008-2010

	NCUC members
November 2008	51
February 2009	68
July 2009	104
October 2009	167
January 2010	181
October 2010	202

Community-drafted vs. staff-drafted NCSG charter

Parity of representation between commercial and noncommercial interests was not the only major battle for NCUC in the GNSO restructuring. A struggle between civil society and ICANN staff (with prodding from the trademark industry) was brewing over the fundamental issue of a governance charter for the new Non-Commercial Stakeholder Group (NCSG). In 2009 civil society organisations and individuals participated in a year-long effort of consultations and drafting to develop a charter for governing the NCSG that would ensure a lightweight flexible structure with a stakeholder group wide flat voting structure for GNSO PC representation. Despite the near unanimity among civil society in support of the NCSG charter, ICANN staff drafted a competing charter that would divide civil society into various board-approved "silos" and attach GNSO PC seats and other rights to those sanctioned groups. The result of the ICANN staff-drafted "silo" charter would be to keep noncommercial interests in a constant zero-sum battle with each other over GNSO PC representation and resources. The community-drafted charter encouraged cooperation and consensus building, while the staff-drafted charter fostered divisiveness and competition. Obviously the trademark industry and large commercial interests at ICANN liked the idea of noncommercial users being constantly tied-up with internal battles, rather than cooperating on common policy goals, so they put enormous pressure on the ICANN board to adopt the divisive staff-drafted charter to handicap noncommercial users in the policy development process. The energy of most civil society participants was consumed by this battle over laying a proper foundation for noncommercial participation in ICANN policy development and noncommercial users constantly having to defend their right for equal participation with other stakeholders.⁸

⁸ NCUC letter to ICANN Board of Directors & CEO on NCSG Charter Issue, 29 August 2009 available online at ncdnhc.org/profiles/blogs/ncuc-letter-to-icann-board-of

Disenfranchisement of noncommercial users with board-appointed policy representatives

While the ICANN board did not ultimately accept the “silo” model charter for the NCSG, it did misstep in an equally startling direction. In July 2009, BGC Chair Roberto Gaetano recommended that the board appoint, in the initial term, the three new NCSG GNSO PC representations, rather than allow noncommercial users to elect their own representatives.⁹ Despite the promise of parity, non-commercial users would only be allowed to elect three of its six representatives. Pressure on the board from the Intellectual Property and Business Constituencies turned from fighting the concept of parity with noncommercial users and towards disenfranchisement of noncommercial users and infiltration of the NCSG to ensure continued dominance within the GNSO.

Thus, rather than permit a bottom-up and democratic process that affords accountability to the impacted stakeholders, and achieves parity among interests, the board succumbed to the pressure from the trademark industry and appointed three individuals to “represent” noncommercial interests on the GNSO PC. These appointments came as a slap in the face to noncommercial users, who had increased their participation by over 300% in the previous three years to become the largest and most diverse constituency at ICANN. Despite civil society’s willingness to cooperate with ICANN and dramatically expand its membership, ICANN failed to meet its obligation and live up its promises of accountability and representative democracy. Noncommercial users were still marginalized and disenfranchised within ICANN’s structure of governance as if NCUC’s explosive membership growth had never occurred and the GNSO had never been “reformed”.

In filling those three new NCSG GNSO PC positions, the board further disregarded the recommendations provided by consultation with the noncommercial community and instead appointed two (of the three) representatives whose background and policy positions fell in line with trademark and large business interests. The ICANN staff-board and the Intellectual Property Constituency worked together to fill those new supposedly noncommercial seats on the GNSO PC. So while ICANN could claim “parity” in one sense (that there would be six noncommercial seats and six commercial seats in the Contracted Parties House of the “reformed” GNSO PC), the reality was that two of the six noncommercial representatives were hand-picked by the trademark and business communities and then appointed by the board against the wishes of noncommercial users.

The 2009 board-appointed NCSG GNSO councillors included Debra Hughes, a trademark attorney for the American Red Cross (ARC), an organisation that focuses its ICANN policy work on increasing trademark rights and protecting the interests of large brand owners. Before the ARC, Hughes worked in the legal department of WalMart, Inc., and she remains a vocal advocate within the International Trademark Association (INTA) for expanding the rights of brand owners online.

Appointed by the board and accountable to no one, the representative from the ARC made little effort to communicate with other noncommercial users about policy issues pending before the GNSO PC, seek stakeholder input before a vote, or subsequently explain her divergent votes to those she supposedly represented.

The other board-appointed NCSG GNSO councillor whose background was more closely aligned

⁹ Robin Gross “Is ICANN Accountable to the Global Public Interest? ICANN Ignores Noncommercial Users in Internet Policy Development” 13 July 2009 ipjustice.org/ICANN/NCSG/NCUC-ICANN-Injustices.html

with commercial interests was Rosemary Sinclair from the Australian business users trade group ATUG. Sinclair also supported business interests while serving as a noncommercial representative, although was more absent or simply unengaged than Hughes, who actively coordinated positions with the Commercial Stakeholder Group.

Unlike the aforementioned two NCSG councillors, the final board-appointed councillor Rafik Dammak, a Tunisian graduate student living in Japan, did come from a noncommercial background and regularly worked with members of the NCSG in developing common policy positions in the GNSO.

Board-appointed councillors abandon noncommercial users in crucial board election

The worst fears of NCSG members were realized in June 2011 when noncommercial interests had the opportunity to select an ICANN board member for the first time in ICANN history; all that was needed was for the six NCSG GNSO councillors to vote for the noncommercial candidate in the election for the board seat. The NCSG membership was vocal and unanimous in the support it expressed for the NCSG nominated candidate (who also happened to be the chair of the NCSG executive committee, Avri Doria, and had previously served as chair of the GNSO PC). This first election following GNSO “reform” presented a historic opportunity for noncommercial users to finally be represented on the ICANN board, and it appeared to be a near mathematical certainty – provided the six NCSG representatives cast their votes for the NCSG candidate.

In a shocking turn, when final votes were counted, the candidate nominated by the Commercial Stakeholder Group was elected to the ICANN board, specifically because the two commercially-oriented board-appointed NCSG GNSO councillors – hand-picked by the trademark and business interests – voted for the commercial candidate instead of the noncommercial candidate in the crucial election.

Upon learning of the disappointing election results, NCSG members made several polite requests on the public mailing list and during NCSG policy meetings for the NCSG councillors to explain their divergent votes to the membership. The election’s outcome was especially shocking because Hughes and Sinclair had given earlier assurances that they would support the NCSG board candidate in the election. Sadly, neither Hughes of the ARC nor ATUG’s Sinclair ever responded to the community, on whose behalf they allegedly voted, to explain why they voted for the commercial candidate over the noncommercial candidate for the board seat. It will be at least three years before noncommercial users have another opportunity to influence a seat of the ICANN board of directors.

So while ICANN makes a lot of noise talking about its “bottom-up representation” and “accountability to the community”, digging into the details about how decisions are actually made reveals a different story of top-down manipulation and the lack of any real accountability to noncommercial users or the public interest.

NPOC and the American Red Cross, big brands' Trojan horse

The rapidly growing commercial presence within the NCSG is one of the biggest threats to ICANN's ability to protect the public interest. In addition to the imposed NCSG representatives on the GNSO PC, ICANN has also encouraged the creation of business-oriented constituencies within the NCSG to further dilute true noncommercial representation in the GNSO.

With the support of ICANN staff, the Intellectual Property and Business Constituencies, INTA and other commercial interests, two trademark activists from North America set out in 2010 to create the Not-for-Profit Operational Concerns Constituency (NPOC), a new constituency focused on the expansion of trademark rights in the name of "nonprofit" interests. In close collaboration with the Intellectual Property Constituency, the ARC's trademark attorney Debra Hughes, and another trademark activist, Amber Sterling of the Association of American Medical Colleges, began promoting NPOC and recruiting organisations that share NPOC's commercial perspective, but maintain some claim to a nonprofit status so as to qualify for membership of NCSG.

The ICANN board approved the new "nonprofit" trademark constituency in June 2011 despite NPOC's lack of noncommercial focus, lack of transparency of membership, lack of a public mailing list and other safeguards and means of accountability supposedly required by ICANN. The fact that NPOC's only support during public comments came from major brand owners and large commercial actors failed to inform ICANN's board that NPOC did not, in fact, belong in the NCSG, but back in the Intellectual Property Constituency where it was conceived in the first place.

After the board approved the creation of NPOC in June 2011, its promoters announced several dozen of the new constituency's members, mostly large organisations from North America whose only interest in ICANN policy is to expand trademark rights and eliminate consumer privacy protections. Tellingly, quite a few NPOC members designated their trademark attorney as their voting representative in NCSG, and a couple trademark attorneys appear to have recruited several of their clients for NCSG membership via NPOC.¹⁰ In one bold attempt to capture the NCSG on behalf of large brand owners, the ARC's outside trademark attorney James Bikoff applied for NCSG membership via NPOC for a number of his private clients and designated himself the NCSG voting representative for all of these organisations (National Grange of the Order of Patrons of Husbandry, Pilots & Paws, National Coalition for the Homeless).¹¹

Another of Bikoff's private clients, the multi-million dollar sports licensing business, the US Olympic Committee, is also pushing to join NCSG via NPOC, and faces growing objections due to its primarily commercial focus and quasi-governmental status.¹² And there are other irregularities such as NPOC leaders submitting an organisation (FOCAL) for NCSG membership that claims to have

¹⁰ NCSG-EC mailing list (Milton Mueller's objections to certain proposed NPOC members) available at info.n4c.eu/sympa/arc/ncsg-ec/2011-08/msg00025.html

¹¹ NCSG-EC mailing list info.n4c.eu/sympa/arc/ncsg-ec/2011-07/msg00058.html

¹² NCSG-EC mailing list (Milton Mueller's objections): "I will object to US Olympic Committee (USOC). Although it is a 501(3)(c), USOC was created by an Act of Congress and serves as the exclusive and official Olympic games participant of the USA. It could be considered a governmental organisation, therefore. More important, its status as noncommercial is also questionable. Its website is full of advertisements from corporate sponsors. These are not simply acknowledgements of donors, they are ads. USOC has a \$250 million annual budget. According to its IRS 990 form, only \$66m of that came from donations, the rest came from selling broadcast rights and other 'program services revenue.' Its CEO makes over \$600,000/year in salary and many others in management are making \$250-450k. It seems to me that the trademark constituency in the CSG is the appropriate, suitable and correct home for this organization."

ceased operations on the organisation's website.¹³ The controversial and commercial nature of NPOC's focus and membership remains an open issue of concern for civil society actors concerned with noncommercial public interest objectives. Despite promises of "parity" between commercial and noncommercial interests in policy development, the over-all balance remains firmly tipped in favour of commercial interests.

With the internal organisational support of ICANN and outside financial support and other resources from major brand owners, there is little to prevent the capture of the entire NCSG by NPOC and trademark interests within a couple of years. Either the ICANN board is unaware of NCSG's struggle with capture by commercial interests, or it does not see it as a problem.

3. Historical substantive policy focus for civil society at ICANN

One of the substantive issues of primary concern to civil society participating at ICANN over the last decade has been the appropriate balance between trademark rights and free expression rights or other noncommercial fair uses of domain names.

Uniform Domain Name Dispute Resolution Policy

ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) is one of the most important policies that ICANN has adopted because it impacts the rights of all domain name registrants in the event of a dispute over a domain name. Adopted by the ICANN board in October 1999, the UDRP provides a uniform set of global rules and procedures for the resolution of disputes involving domain names and trademarks. After more than ten years in practice, the UDRP has been widely criticized for policies that favour trademark interests over registrants with other legitimate interests.¹⁴

Numerous studies have shown the UDRP to favour trademark interests because it allows the complainant to select the dispute resolution provider. Other procedural rules that favour trademark complainants are short response time, default rules, selection and composition of panels, and insufficient time to get a case to a court. The UDRP has faced further criticism for its inability to adequately protect freedom of expression, noncommercial use and other legitimate fair uses in the face of trademark claims.¹⁵

Naturally, the values contained within the UDRP mirror the values of those who had the strongest hand in drafting the policy. Much of the policy initially came out of a report from WIPO that had been requested by the US government in 1999 to devise a mechanism for the efficient resolution of domain name disputes. WIPO's final report, which became a foundational document behind the

¹³ NCSG-EC mailing list info.n4c.eu/sympa/arc/ncsg-ec/2011-09/msg00014.html

¹⁴ Laurence R. Helfer and Graeme B. Dinwoodie "Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy" *William & Mary Law Review* 43 (2001): 141; Stanford/Yale Jr. Faculty Forum Paper 01-05 ssrn.com/abstract=275468; A. Michael Froomkin, "ICANN's Uniform Dispute Resolution Policy, Causes and (Partial) Cures" *Brooklyn Law Review* 67, 3 (2002): 605 personal.law.miami.edu/~froomkin/articles/udrp.pdf; Michael Geist "Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP" August 2001 aix1.uottawa.ca/~geist/geistudrp.pdf; Milton Mueller "Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy" *The Information Society* 17, 3 (2001): 151-163; T. Lee, D. Hunter and D. Orr "Cohesion and Coherence in the UDRP" (2008); John Selby "Competitive Justice?: The Role of Dispute Resolution Providers under ICANN's UDRP" *Macquarie Journal of Business Law* 1, 23 (2004); Milton Mueller "Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP" (2002) dcc.syr.edu/PDF/markle-report-final.pdf

¹⁵ Konstantinos Komaitis *The Current State of Domain Name Regulation: Domain Names as Second-Class Citizens in a Mark-Dominated World* (Abingdon: Routledge, 2010)

UDRP, was meant to be of purely advisory nature. WIPO's proposal strongly favoured large trademark holders at the expense of other legitimate interests. Still in its initial founding, ICANN's interim board of directors accepted WIPO's proposal and forwarded it to the GNSO's predecessor, the Domain Name Supporting Organization (DNSO) for final refinement. WIPO's final report was submitted on 30 April 1999 and the ICANN board approved the UDRP on 24 October 1999, less than six months later, with only limited community input.

Early civil society involvement in UDRP development

At the same time that the UDRP was being crafted in 1999, civil society was still in its very earliest days of organized participation and had not formed into the Noncommercial Domain Name Holders Constituency (NCDNHC), subsequently renamed the Noncommercial Users Constituency (NCUC). Indeed the need for an immediate response to the one-sided proposal sent by WIPO and quickly making its way through ICANN was a primary impetus for the creation of NCDNHC in the first place. One of the first and perhaps most important policy contributions civil society has ever made at ICANN was introducing a number of protections for the rights of registrants into the UDRP in these final last minute negotiations in the DNSO before the policy was approved by the ICANN board. In particular NCDNHC co-founders Kathy Kleiman and Milton Mueller were among the few civil society actors who participated in early ICANN policy and worked to provide the few basic protections for the rights of registrants found in the UDRP (incorporating within the policy's text circumstances under which a registrant will be considered a "legitimate" rights holder, by allowing parties to proceed to court litigation to enforce their rights, and by identifying "reverse domain name hi-jacking" as a threat). The few protections that do exist in the UDRP today are a direct result of a small number of civil society participants in ICANN's earliest days. No doubt, had noncommercial views and civil society actors been a part of the UDRP's formulation before its final stage, today's rules would reflect a more balanced view.

UDRP is ripe for review and improvement

Since the adoption of the UDRP in 1999, more than 30,000 domain name complaints have been filed with the dispute resolution providers authorized by ICANN. In the ten years since it was implemented, the UDRP has never been reviewed by ICANN for improvement. ICANN's lack of review of the UDRP is remarkable since nearly every other policy at ICANN must be under constant review and improvements continuously sought. The GNSO requested an issues report on possible review of the UDRP in 2011 and ICANN staff came back in May 2011 with a half-baked preliminary recommendation that no review be undertaken. This preliminary recommendation and a possible review of the UDRP is a matter of pending concern for civil society and the entire GNSO. As part of the pending GNSO proceeding, in July 2011 NCUC submitted a statement disagreeing with the preliminary staff recommendation against UDRP review and calling for its update.¹⁶ Given civil society's recent growth in participation at ICANN since its early days, it is possible that a review of the UDRP by the entire community, including noncommercial users could reform a number of aspects of the UDRP that have been shown to be problematic.

¹⁶ NCUC Statement on Preliminary Staff Report of UDRP Review available at forum.icann.org/lists/prelim-report-udrp/msg00003.html

Trademark rights expanded with New Generic Top-Level Domains (GTLDs)

ICANN's planned introduction of new Generic Top-Level Domains (GTLDs) caused enormous panic throughout the near-sighted and fearful trademark industry. For more than five years leading up to the introduction of new GTLDs, large brand owners devoted enormous energy and wrote much of the specific policies to deal with trademark rights and new GTLDs. Representatives from the Intellectual Property and Business Constituencies drove much of the policy as it worked through GNSO working groups, but given ICANN's consensus process, trademark interests did not get everything they wanted in the GNSO, where registrars and registries have significant sway and somewhat divergent business interests. Compromises were made in the GNSO before a final policy was adopted by the GNSO and sent to the ICANN board in September 2007. Trademark interests continued to lobby the ICANN board to expand the rights granted to brand owners in the GNSO compromise package.

In an unprecedented move seemingly intended to throw out the multi-stakeholder compromise, the board succumbed to the pressure of the trademark industry and created the Implementation Review Team (IRT), in which a single stakeholder (the Intellectual Property Constituency) was allowed to manage the entire process for re-writing the GNSO's rules for trademarks and new GTLDs. The IRT consisted only of representatives of the intellectual property industry and their friends and it operated in a non transparent and explicitly secretive fashion. The IRT delivered its final report to the board in May 2009 and was roundly criticized by the broader ICANN community for both the one-sided substance of the recommendations and the non transparent and non inclusive manner in which it operated.

Seeming to recognize the illegitimacy and grave mistake of the IRT, the ICANN board went back to the broader GNSO community and called for the creation of a new working group in October 2009, the Special Trademark Issues (STI), which included representatives from all GNSO stakeholder groups, Governmental Advisory Committee (GAC), and At-Large Advisory Committee (ALAC). In December 2009, the GNSO PC unanimously approved the STI Recommendations, which had included a number of compromise positions among various competing stakeholders, but still gave the trademark industry additional privileges than what had previously existed.

Special interest lobbying can usurp multi-stakeholder participation

The trademark industry took the additional privileges afforded by the community, but still unsatisfied, it began an intense campaign (in 2010-2011) of lobbying representatives of the GAC to join in the complaint to the ICANN board of directors for additional rights. By the time the ICANN board adopted the final policy in June 2011, the trademark industry had come a remarkably long way in their achievements to write rules in the new GTLD space that favour large brand owners at the expense of innovation and free expression. One ICANN board member remarked at the June 2011 public meeting on how "impressed" he was with "the ability of certain interests to get to the GAC".

Despite ICANN's promise of multi-stakeholder participation and policymaking based on compromise and consensus, well-heeled lobbying of the board and GAC in a sustained fashion by a special interest can have the effect of "un-doing" any compromises achieved in a democratic multi-stakeholder process.

Ironically, even after all of the compromises were reached with the community, and the concessions made by the board to give trademark interests ever-expanding privileges in the final policies, brand owners still call for the complete abandonment of new GTLDs in order to protect the “legitimate rights of trademark holders”. In an August 2011 letter from ICANN CEO Rod Beckstrom to the Association of National Advertisers, ICANN seemed unimpressed by the trademark industry’s latest threats of litigation if new GTLDs are introduced.¹⁷

4. Lessons learned & recommendations for future civil society engagement

Civil society must make ICANN into the organisation it should be

Despite the various above described flaws with ICANN, civil society must work to improve it, not abandon it to commercial interests or nation-state governance models of the past. It is up to us, “the internet community” to force ICANN to be more than it is and to make ICANN into the organisation it should be, one that genuinely pursues the global public interest. ICANN does provide an opportunity to improve policy development and infuse meaningful democratic participation in a key global governance structure, if there can be a means of providing sustained support to civil society.

Multi-stakeholderism is key to ICANN’s governance model

Perhaps ICANN’s truly great contribution to the future is its embracing of the multi-stakeholder model in governance. While it is a long way from perfect, ICANN recognizes that no sector alone should or can manage the global DNS – not governments, not business, and not civil society. Rather, it is the blending of these (oft conflicting) interests and enabling of their effective participation in policy decisions that makes ICANN a truly innovative governance model worthy of contributing to. Given this multi-stakeholder governance model, civil society could play a significant future role in influencing ICANN policy discussion and facilitating ICANN’s stated objective of promoting the global public interest. Even the nature of ICANN’s multi-stakeholder model is constantly under attack. Whether it is governments who are dissatisfied by the loss of dominance of nation-state governance model, or business interests who are frustrated by the engagement of noncommercial interests, ICANN’s governance structure is constantly being renegotiated and lines redrawn to benefit those who are engaged and hold power.

ICANN must leave space for noncommercial interests in policy development

What it means to be a “noncommercial user” at ICANN will play a crucial role in the coming years to determine ICANN’s legitimacy and commitment to the global public interest. If multi-million dollar sports licensing businesses whose only concern in ICANN policy is to expand trademarks can be permitted to advocate for policy matters under the umbrella of the NCSG, there is little that can prevent ICANN from being purely a trade organisation. So it will be up to real noncommercial users to require ICANN to leave space for the promotion of noncommercial interests in policy development. It will be up to the public to force ICANN to be the truly public interest organisation that it should be.

The historical underrepresentation of noncommercial interests in ICANN policy development has

¹⁷ www.icann.org/en/correspondence/beckstrom-to-liodice-09aug11-en.pdf

skewed the organisation's policy outcomes. But given the recent GNSO reform and the increase (if still in theory only) of noncommercial representation on the GNSO PC, there remains opportunity for civil society to fill the space and noncommercial users to become more influential in ICANN policy decision. This will require civil society to become active and engage in the policy development process.

Plenty of opportunity for noncommercial users to engage

There are no shortages of opportunities to get involved, given the various working groups and discussion lists underway to develop ICANN policy. Noncommercial users are badly needed in these groups to provide a different perspective to the various commercial interests who have financial incentive to be there and are frequently paid to participate in these discussions as part of their regular job or as a private consultant.

Unique challenges of noncommercial users vs. commercial users

Not only are noncommercial users outnumbered in these groups, the personal pecuniary interest in the outcome means that commercial interests are far less willing to compromise and will fight to the death in negotiations with noncommercial users who are represented by timid volunteers. And "horse trading" among the commercial interests is very common in ICANN policy development, so human rights concerns get compromised away in the multi-stakeholder model.

Challenge of sustainability for noncommercial interests

The challenge of sustainability in effective participation remains another hurdle for noncommercial users in ICANN policy development. ICANN is complicated – technically, legally, geopolitically complicated. It takes significant time and sustained effort for any individual to become effective in ICANN policy development. And given the sporadic nature and volunteer status of noncommercial participants, this remains a serious challenge for civil society participation and for ICANN's ability to meet its commitment to the public interest. Without the economic interest in the policy, many noncommercial users are only able to engage for a finite period of time and this diminishes the effectiveness of noncommercial users generally at ICANN.

Challenge of protecting human rights in a private corporation governance model

The challenge of protecting human rights in a global governance sector based in the private sector presents one of the greatest hurdles for ICANN's ability to serve the global public interest. Purely private corporations are under no legal obligation to ensure that human rights are respected. However, given ICANN's unique status and quasi-governmental function and connection to the US Department of Commerce, arguably it is not in a position to flout internationally agreed to human rights in its management of the DNS. If ICANN is to have any legitimacy to govern, it must recognize its legal and moral obligation to ensure human rights will be respected in its management of the DNS. If ICANN's legal status as a private corporation can extinguish the public's enjoyment of longstanding and internationally agreed to human rights standards, then a private corporation is a woefully inadequate choice for a global governance model.

Join NCUC to protect human rights and noncommercial interests at ICANN

Despite a decade of explosive growth and its problems, ICANN remains a relatively young institution and still full of promise for the future. 2011 is a crucial time for shaping the future of the DNS and the opportunity is ripe for seizing. Civil society has never been in a better position to influence global DNS policies than now through participation in ICANN's NCUC. Anyone wishing to engage in policy development at ICANN with a view toward protecting human rights and noncommercial interests is welcome to join NCUC and become involved today.