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**WHO GOVERNS THE INTERNET?**

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## Introduction

When the most primitive Internet was designed in 1970's, it was meant to serve needs of American military and to be used for experimental purposes at the education institutions. No one at that time has imagined that in 30 - 40 years time it might account 2 billion users<sup>i</sup>. In the beginning Internet was mainly developed by devoted amateurs and scientist who were fascinated about an idea of creating a new space, immaterial world, which is free of government regulations<sup>ii</sup>. But with the growth of economical interest in Internet, the amount of its users grew up rapidly, causing needs to set up rules how to regulate and govern the Internet.

In 1996 John Perry Barlow stated in "A Declaration of the Independence of Cyberspace" that:

*"Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather"*<sup>iii</sup>.

This statement describes a position between cyber space and a real world. Cyberspace doesn't want to be regulated by current laws and governments. Internet, which is part of cyberspace, progressed beyond a regulatory legal framework and was basically based on self-regulation. At first, only the devoted amateurs and scientists developed it. 4 little blue "people" represent those who developed Internet in 70s- 90s. They were "dodgy nerds" and the beginning of the development of their brilliant ideas usually were in their parents' garages or college labs. Internet was meant to be unregulated space (or self regulatory), but since it plays such an important role in our life, someone is here to regulate it... According to professor Lawrence Lessig, Internet defines itself through code – code is the Law<sup>iv</sup>. Code, if to put simple, is technology that allows its users to act in certain ways. If code itself can be legislator and law enforcer, what is the role of international organizations, which are seeking to unify Internet governance? Since the Internet is crucially important to nowadays reality, it has to benefit and keep bringing the advantage in our life.

The analysis of stakeholders and their influence on the Internet governance will be structured bearing in mind three basic Internet layers, proposed by Yochai Benkler<sup>v</sup>: the physical infrastructure layer, the logical infrastructure layer and the content layer (discussion of this layer's structure and regulation is not part of this article). However there is no agreement regarding a number and names of the layers. Lawrence B. Solum proposes 6 layers that constitute the Internet<sup>vi</sup>:

- The Content Layer—the symbols and images that are communicated.
- The Application Layer—the programs that use the Internet, e.g. the Web.
- The Transport Layer—TCP, which breaks the data into packets.
- The Internet Protocol Layer—IP, handles the flow of data over the network.
- The Link Layer—the interface between users' computers and the physical layer.
- The Physical Layer—the copper wire, optical cable, satellite links, etc.

There are different challenges in each of the layers, as well as different actors influencing each of them. In addition, actions and decisions made in one of the layers can influence the whole Internet community. For example, physical infrastructure

layer is the basic layer and is generally regulated by the state (it makes laws regarding networks, access to them, their management, ect.) and technology producers. In addition, there is a question, how recent Verizon (US telecommunication company) and Google (search engine) joint policy proposal for an open Internet - what means that high-speed Internet providers should not block or slow information or charge websites to pay for a fast lane to reach users more quickly – is going to change Internet use experience?

Logical layer is responsible for domain name system and IP address allocation. Corporation for Assigned Names and Numbers (ICANN) and Internet Assigned Numbers Authority (IANA) carry the most important role governing domain names and IP addresses allocation on the Internet. Issues arising from this layer are regarding ICANN establishment and global role, domain name registration system and dispute of domain name resolution policies.

Internet service providers (ISP) and state law plays the most important role regulating content layer. Cyber crime and privacy infringement is committed in this layer. It is obvious, that what is forbidden and illegal offline, is considered to be the same and online, but should we have a special procedure for online crime regulation and handling? How could self - regulation (code) be useful in this matter?

To sum up, Internet directly influences life of 2 billion users worldwide - therefore it should be governed and ruled for everyone's benefit. The aim of this article is to identify which organizations, companies and persons plays the most important role governing the Internet and to identify in that way the biggest challenges we might face in a future. As Internet Law is very new and doesn't have much of history, case law or codes of unified Internet Law, this thesis might benefit developing this field of law.

## **1. Physical infrastructure layer**

### **1.1. The role of national governments setting Internet connection standards**

There are several options to access the Internet: through phone line connection – integrated services digital network (ISDN); broadband –using digital subscribing line (DSL) or the same ISDN, modem and a cable, WiFi (wireless fidelity), satellite connection. This entire infrastructure is regulated by the local governments, which set speed and connection quality standards. For example, Finland was the first country in the world to implement a rule, that access to the high speed Internet is a legal right. So far the government has set a standard for at least 1 megabit per second speed, however in the near future it is expected to have 100 times faster Internet<sup>vii</sup>. In addition, French court has ruled out a judgment where it claims access to Internet to be a basic human right<sup>viii</sup>. This judgment caused a lot of discussion whether understanding of basic human rights shall be broadened to the access to the Internet, and if yes – how broadly shall it be exercised. Despite that, there are more and more countries declaring access to Internet to be if not the basic human right, so at least a legal right and setting standards how to make it work.

This global development in each state policy regarding Internet access has much to do with the United Nations activities trying to set principles and forecast for the development of information society – “new era of the man kind”.

## **1.2 UN World Summit on Information Society – setting standards for information society**

UN summits are held on variety of issues that are problematic and challenging and their aim is to start discussion and create an “action plan”. World Summit on Information Society first time was called in December 2003 in Geneva. There was a need for a new discussion with a fruitful outcome as “the digital revolution, fired by the engines of Information and Communication Technologies, has fundamentally changed the way people think, behave, communicate, work and earn their livelihood. It has forged new ways to create knowledge, educate people and disseminate information. It has restructured the way the world conducts economic and business practices, runs governments and engages politically. It has provided for the speedy delivery of humanitarian aid and healthcare, and a new vision for environmental protection. It has even created new avenues for entertainment and leisure. As access to information and knowledge is a prerequisite to achieving the Millennium Development Goals – or MDGs -, it has the capacity to improve living standards for millions of people around the world. Moreover, better communication between peoples helps resolve conflicts and attain world peace.”<sup>ix</sup>

The legal background of WSIS is UN Resolution adopted by General Assembly 56/183. Resolution recognized importance of technology seeking goals set in the Millennium Declaration<sup>x</sup> and endorsed the proposal of the Secretary-General of the International Telecommunication Union (ITU) to hold the World Summit on the Information Society at the highest possible level in two phases, the first in Geneva from 10 to 12 December 2003 and the second in Tunis in 2005, pursuant to resolution 73 adopted by the Plenipotentiary Conference of the International Telecommunication Union at its 1998 session, held in Minneapolis, USA<sup>xi</sup> - same year as the White Paper in the USA gave a ground for the ICANN (this is discussed in section 2.2).

The outcome of the first phase of the WSIS in Geneva was a Declaration of Principles “Building the Information Society: a global challenge in the New Millennium”. A key principle of this Declaration is that Information Society shall be for all<sup>xii</sup>:

“ Governments, as well as private sector, civil society and the United Nations and other international organizations have an important role and responsibility in the development of the Information Society and, as appropriate, in decision-making processes. Building a people-centered Information Society is a joint effort which requires cooperation and partnership among all stakeholders.”

WSIS is not setting any requirements, only certain directives where information society, Internet and technology should lead and benefit the modern world. The above mentioned Principles document has been followed by the action plan how these principles should be implemented<sup>xiii</sup>. Based on the internationally agreed development goals, including those in the Millennium Declaration and international cooperation, indicative targets should serve as global references for improving connectivity and access in the use of information and communication technology (ICT) in promoting the objectives of the Plan of Action, should be achieved by 2015. These targets may be taken into account in the establishment of the national targets, considering the different national circumstances:

- a. to connect villages with ICTs and establish community access points;

- b. to connect universities, colleges, secondary schools and primary schools with ICTs;
- c. to connect scientific and research centres with ICTs;
- d. to connect public libraries, cultural centres, museums, post offices and archives with ICTs;
- e. to connect health centres and hospitals with ICTs;
- f. to connect all local and central government departments and establish websites and email addresses;
- g. to adapt all primary and secondary school curricula to meet the challenges of the Information Society, taking into account national circumstances;
- h. to ensure that all of the world's population have access to television and radio services;
- i. to encourage the development of content and to put in place technical conditions in order to facilitate the presence and use of all world languages on the Internet;
- j. to ensure that more than half the world's inhabitants have access to ICTs within their reach.

These principles and the action plan how to embody them have been argued by an international civil liberties organization promoting balanced intellectual property laws and free expression - IP Justice: "Our voices and the general interest we collectively expressed are not adequately reflected in the Summit documents<sup>xiv</sup>". IP Justice members have explained the unanimously adopted declaration by the WSIS Civil Society Plenary on 8 December 2003. The civil society declaration argues that an information and communication society should be based on human rights and human dignity. Civil society warned that no technology is neutral with respect to its social impacts. It is also worried that "information and knowledge are increasingly being transformed into private resources which can be controlled, sold and bought, as if they were simple commodities and not the founding elements of social organization and development." In addition, "the increasing privatization of knowledge production threatens to restrict the availability of research results. Attempts have been made to commercially exploit traditional indigenous knowledge without consulting the communities, who are the owners of that knowledge." Civil society asserted that the defense and extension of the public domain of global knowledge are as essential for an information society, as the diversity of our natural environment. All in all, the position of civil society is that WSIS nor ICANN promote a more equitable distribution of benefits across nations and social groups. According to them, current Internet governance framework needs a better balance between commercial considerations and other legitimate social objectives. Civil society claimed that decision-making processes must be based on values such as inclusive participation, transparency, and democratic accountability.

The second phase of WSIS was held in 2005 in Tunis. This conference outcome was two documents called **Tunis Commitment** and **Tunis Agenda for Information Society**. These documents introduced Working Group on Internet Governance (WGIG), established by UN Secretary General. WGIG was delegated to carry out the mandate from the WSIS with regard to convening a new forum for multi-stakeholder policy dialogue - the Internet Governance Forum (IGF):

Paragraph 72 of the Tunis Agenda:

“72. We ask the UN Secretary-General, in an open and inclusive process, to convene, by the second quarter of 2006, a meeting of the new forum for multi-stakeholder policy dialogue—called the Internet Governance Forum (IGF). The mandate of the Forum is to:

- Discuss public policy issues related to key elements of Internet governance in order to foster the sustainability, robustness, security, stability and development of the Internet;
- Facilitate discourse between bodies dealing with different cross-cutting international public policies regarding the Internet and discuss issues that do not fall within the scope of any existing body;
- Interface with appropriate inter-governmental organizations and other institutions on matters under their purview;
- Facilitate the exchange of information and best practices, and in this regard make full use of the expertise of the academic, scientific and technical communities;
- Advise all stakeholders in proposing ways and means to accelerate the availability and affordability of the Internet in the developing world;
- Strengthen and enhance the engagement of stakeholders in existing and/or future Internet governance mechanisms, particularly those from developing countries;
- Identify emerging issues, bring them to the attention of the relevant bodies and the general public, and, where appropriate, make recommendations;
- Contribute to capacity building for Internet governance in developing countries, drawing fully on local sources of knowledge and expertise;
- Promote and assess, on an ongoing basis, the embodiment of WSIS principles in Internet governance processes;
- Discuss, inter alia, issues relating to critical Internet resources;
- Help to find solutions to the issues arising from the use and misuse of the Internet, of particular concern to everyday users.

From what is cited above we can see that IGF is only an advisory body which role is to collaborate ideas and best practice regarding Internet governance and implementation on WSIS principles. However this dramatic expansion of the interested parties means that true consensus will be difficult to achieve. The acceptance and incorporation of new voices presents a challenge to the existing standard-setting process. A lot of stakeholders may not be the best option for Internet governance as it may make it bureaucratic and taking a lot of time for decision-making. However UN position regarding building an information society is very commendable. Finish government’s policy regarding Internet speed and access to it is way behind WSIS’s action plan – but at least other countries have a good example to follow with the help of UN.

### **1.3 Information Technology**

In the beginning of 2000 the only way to access to the Internet was through computers. But technology has never stopped developing and it allows us today to access the Internet through cell phones, game consoles (Xbox), androids, ect. As

professor Lessig has noticed, Internet has started developing so quickly only because many businesses have foreseen an economic opportunity in it<sup>xv</sup>. He was the pioneer of an idea, that Internet is regulated through code – “code is law”<sup>xvi</sup>. Code is a technology, architecture that allows us to access the web, maintain and modify it. More over, code is regulated through its creator – usually big IT corporations, which are regulated though governments, which are influenced by the lobbyist<sup>xvii</sup>:

“Code design, in other words, can be usefully studied as an alternative to lobbying campaigns, tax avoidance, or any other approach that a group might use to seek legal advantage. The approach aims to separate two different aspects of code’s relationship with law. The first is Lessig’s concept of a regulatory mechanism: that computer code can substitute for law or other forms of regulation. The second aspect is as an anti-regulatory mechanism: a tool to minimize the costs of law that certain groups will use to their advantage. {...} At its greatest extent, the design of code may provide a new option for influencing specific laws. It will be of the greatest importance to individuals or large, disorganized groups poorly equipped to take advantage of existing means of political influence. And as such, the code option may mean some change in the relative power of interest groups, as it makes organization slightly less important.”

Overall it is getting more and more complicated to decide who really regulates and governs the web? In addition to above mentioned direct web connection and infrastructural regulation, governments try to control IT market through competition (antitrust) law. Microsoft Inc. has already marked this race towards domination in IT market with some legal losses. *United States vs. Microsoft Corporation*, Civil Action No. 98-1232 (CKK), December 11, 2002<sup>xviii</sup>, was the first big profile IT case<sup>xix</sup>.

Jonathar Zittrain in his book “*The future of the internet*” has proposed to group communication technology as generative and non-generative. As he gives a simple example, generative would be a knife, non-generative – potatoes peeler, or kettle and coffee maker<sup>xx</sup>. Into generative group of information technology would fall mostly all personal computers and other media tools that can be adopted and changed by its users as this type of technology can “facilitate changes”<sup>xxi</sup>. Non – generative tools and systems can also grow and change, but all changes are monitored and issued through manufacturers of that technology. As non – generative technology could be named cell phones or gaming console, such as Xbox controlled by Microsoft. Internet can be accessed though them and successfully used as long it is within producers’ limits of use. Telecommunication Company (such as Vodafone, O2, Verizon) can decide to allow using its line only for these telephones, which have been purchased from them with a services contract, and devices that have not been prior approved would simply be not able to work on their networks.

## **2. The Logical Infrastructure Layer**

### **2.1. The domain name system**

*Domain names* are used to label a website and it can define administrative authority or control of it in the Internet. It is a simplified (human-friendly) form of the Internet address. The *Domain Name System* (DNS) makes it possible to assign domain names

to groups of Internet resources and users in a meaningful way, independent of each entity's physical location. Internet domain names are easier to remember than its numeric IP address (i.e. "university.com" which IP address is 118.17.146.124). Internet Protocol (IP) addresses are the unique numbers assigned to every computer or device that is connected to the Internet. Among other important functions, they identify every device connected to the Internet, whether it is a web server, smartphone, mail server, or laptop. As the latest researches show, in the third quarter of 2010 there were nearly 202 million domain name registrations across all of the Top Level Domain Names (gTLDs) and 79.2 million names Country Code Top Level Domain Names (ccTLDs). The largest TLDs reported in terms of base size are in order, .com, .de (Germany), .net, .uk (United Kingdom), .org, .info, .cn (China), .nl (Netherlands), .eu (European Union) and .ru (Russian Federation)<sup>xxii</sup>.

Coordination of the Internet's naming system is assigned to the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN was formed in 1998. As it is clear from the documents establishing ICANN, It is a not-for-profit partnership of people from all over the world dedicated to keeping the Internet secure, stable and interoperable. As it is stated in its website, ICANN promotes competition and develops policy on the Internet's unique identifiers that allow computers on the Internet to find one another. The Internet Assigned Numbers Authority (IANA) is another Internet coordination body, which allocates and maintains unique codes and numbering systems that are used in the technical standards (protocols) that drive the Internet (it is operating together with ICANN, even though is an independent body, established in 1970).

The most common *gTLD* are *.com*, *.net*, *.org*. From the 16th of November 2000 additional 7 TLDs were introduced by the ICANN. They are:

- .aero (for the entire aviation community)
- .biz (for business purposes)
- .coop (for cooperatives)
- .info (unrestricted)

A country code top-level domain (ccTLD) is for example *.ie* for Ireland. Nationally designated registration authorities administer these ccTLDs independently. There are currently 252 ccTLDs reflected in the database of the Internet Assigned Numbers Authority (IANA)<sup>xxiii</sup>. Recently (in November 2009) ICANN introduced Internationalized Domain Names (IDNs) system, which allows using national language (I.E. Arabic, Chinese, Russian) to label domain names<sup>xxiv</sup>.

Domain name, not like IP address, can have a lot of modifications and it should never be a problem to associate and IP address to a domain name. However number of IP addresses (IPV4, which looks like i.e. 195.7.12.32.) is running out and in a very near future there will be no new IP addresses. IPv4 has just over four billion unique IP addresses – that number looked reasonable before Internet usage started booming in late 90's. The proposed solution is to start using IPv6 (it looks like this 2001:0db8::53, but if expanded into its full written capacity, it can turn to be 2001:0db8:0000:0000:0000:0000:0053 - this is significantly bigger than IPv4). Compared to IPv4's 32-bit address space of four billion addresses, IPv6 has a 128-bit address space, which is 340 undecillion addresses.

### **Internet Corporation for Assigned Names and Numbers (ICANN)**

For a long time Internet governance has been associated with the ICANN's main role. ICANN sees its mission as „to coordinate, at the overall level, the global Internet's

systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems". In particular, ICANN's role is<sup>xxv</sup>:

Coordinate the allocation and assignment of the three sets of unique identifiers for the Internet, which are

Domain names (forming a system referred to as "DNS");

Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and

Protocol port and parameter numbers.

Coordinate the operation and evolution of the DNS root name server system.

Coordinate policy development reasonably and appropriately related to these technical functions.

The organization itself has been associated with the US government and therefore many Internet users and other states have judged its role in the Internet governance very critically and sometimes even negatively. However these accusations of being partial to US government should be discussed through the analysis of historical development and establishment of ICANN.

The history of ICANN started when the U.S. Department of Commerce (DOC) issued a statement of policy concerning the Domain Name System. Called the "White Paper," the "Management of Internet Names and Addresses"<sup>xxvi</sup>. It was actioned as part of the President Clinton Administration's *Framework for Global Electronic Commerce*, the President directed the Secretary of Commerce to privatize the domain name system (DNS) in a manner that increases competition and facilitates international participation in its management.

Accordingly, on July 2, 1997, the Department of Commerce issued a Request for Comments (RFC) on DNS administration. The RFC solicited public input on issues relating to the overall framework of the DNS administration, the creation of new top-level domains, policies for domain name registrars, and trademark issues. On January 30, 1998, the National Telecommunications and Information Administration (NTIA), an agency of the Department of Commerce, issued for comment, *A Proposal to Improve the Technical Management of Internet Names and Addresses*. The proposed rulemaking, or "Green Paper," was published in the Federal Register on February 20, 1998, providing opportunity for public comment. The Green Paper proposed certain actions designed to privatize the management of Internet names and addresses in a manner that allows for the development of robust competition and facilitates global participation in Internet management. The Green Paper proposed for discussion a variety of issues relating to DNS management including private sector creation of a new not-for-profit corporation managed by a globally and functionally represented by board of directors.

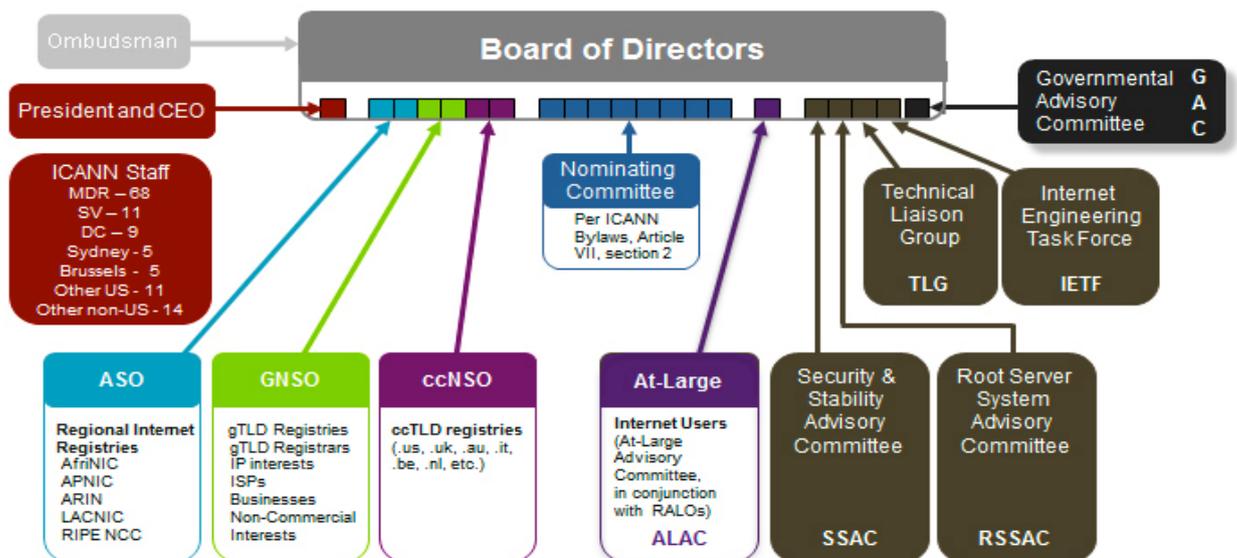
The Green Paper was followed by the White "Statement of Policy, Management of Internet Names and Addresses," 63 Fed. Reg. 31741(1998). The United States Government declared its willingness to recognize a new, not-for-profit corporation formed by private sector where Internet stakeholders should administer policy for the Internet name and address system<sup>xxvii</sup> and which endorsed a process whereby the divergent interests of the Internet community would come together and decide how Internet names and addresses would be managed and administered. The White Paper also signaled DOC's intention to ramp down the government's Cooperative Agreement with Network Solutions, Inc. (NSI), with the objective of introducing competition into the domain name space while maintaining stability and ensuring an orderly transition. As Joseph P. Liu noticed in 1999, "White Paper still drew heavily

from the standard setting model and its underlying assumptions. First, the proposal continued to treat the domain name problem as primarily a technical problem [...], in addition it conceived of the solution to the problem mainly as one of technical standard-setting”.<sup>xxviii</sup>

The law that organizes ICANN is called the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. ICANN has been granted taxexempt status by the United States federal and California state governments.

### ICANN structure

## ICANN Multi-Stakeholder Model



Source: ICANN.com

ICANN has been seeking for transparency and fairness involving as many stakeholders to act in decision making process as possible and to reflect geographic diversity. Existing stakeholders can be grouped, for example, NSI, IANA, domain name owners, and consumers.<sup>xxix</sup> As John Mathiason noticed<sup>xxx</sup>, “ICANN was set up initially to represent the private sector. The supporting organizations are heavily dominated by representatives of private corporations. [...] in that sense, ICANN has been a good venue for that stakeholder, much better than the intergovernmental forums.”

ICANN operates on multi-stakeholder model that is believed to bring together a wide range of relevant parties to develop policy to promote the stability and integrity of the Internet. The President and CEO of ICANN supported this position at the IGF conference in Vilnius, 2010 saying that all Internet stakeholders need to strive to keep Internet governance out of the hands of intergovernmental organizations. And if they fail, he warns, there could be unfortunate consequences<sup>xxxi</sup>:

“Most Internet users – businesses, service providers, non-profits and consumers – would be shut out of the governance debate,” said Rod Beckstrom. “Make no mistake: if we do not address this now – effectively together – the multi-stakeholder model that enabled so many successes will slip from our grasp.”

Being a private corporation (or a private-public as ICANN prefers to call themselves), ICANN is governed by its board of directors. The structure of the board and its role is implemented by Bylaws. Board of directors consist of 16 members. The Nominating Comity selects eight of them. Candidates are selected to aggregate display diversity in geography, culture, skills, experience, and perspective and who have eputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making. The other half of the Board is proposed by the Address Supporting Organization (2), the Country-Code Names Supporting Organization (2), Generic Names Supporting Organization (12), one voting member is selected by the At-Large Community and one by President ex officio. Board is electing a President (CEO). President serves as an ex officio member of the Board, and he has all the same rights and privileges of any Board member.

The board appoints Ombudsman for an initial 2 year term. The role of Ombudsman is to facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community.

The Address Supporting Organization (ASO) advises the Board with respect to ICANN policy issues relating to the operation, assignment, and management of Internet addresses. The Country-Code Names Supporting Organization (ccNSO) is responsible for developing and recommending to the Board global policies relating to country-code top-level domains, nurturing consensus across the ccNSO's community, including the name-related activities of ccTLDs; and coordinating with other ICANN Supporting Organizations, committees, and constituencies under ICANN. Another policy development body is known as the Generic Names Supporting Organization (GNSO), which develops and recommends to the ICANN Board substantive policies relating to generic top-level domains.

Advisory bodied consist of the following comities:

- **Governmental Advisory Committee** - its role is to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues and membership in the Governmental Advisory Committee is open to all national governments;
- **Security and Stability Advisory Committee** - this committee advises the ICANN community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. Its main responsibilities are **to** develop a security framework for Internet naming and address allocation services that defines the key focus areas, and identifies where the responsibilities for each area lie and to communicate on security matters with the Internet technical community and the operators and managers of critical DNS infrastructure services.
- **Root Server System Advisory Committee** - advises the Board about the operation of the root name servers of the domain name system. The RSSAC role is to consider and provide advice on the operational requirements of root name servers, including host hardware capacities, operating systems and name server software versions, network connectivity and physical environment. The RSSAC shall examine and advise on the security aspects of the root name server system.
- **At-Large Advisory Committee** should consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual

Internet users. The ALAC consist of (i) two members selected by each of the Regional At-Large Organizations ("RALOs") and (ii) five members selected by the Nominating Committee.

After this short overview of the basic ICANN governance principles and its board we can make a conclusion that it is very well globally represented and managed private-public body. The core ICANN mission does not include a mandate to innovate new institutions of global democracy, nor to achieve mathematically equal representation of all affected individuals and organizations, nor to regulate content, nor to solve the problems of the digital divide, nor to embody some idealized (and never-before-realized) model of process or procedure. ICANN seeks global representation and satisfaction of its stakeholder expectations – and so far they have succeeding doing this. This organization should not be accused of being biased only because it was established by USA government and is fulfilling commercial aims – Internet works, IP address crises has been handled, domain names are fairly allocated and even though domain name dispute procedure is believed by many to be trademark owner biased – it prevents from cybersquatting (below is more about this problem).

### 2.3 Domain name dispute resolution

The role of a domain name is to label an IP address. The fundamental nature of domain names gives rise to an inevitable conflict between holders of legal rights to particular names<sup>xxxii</sup>. The reason for the conflict is that domain names must be absolutely unique, while names in which legal rights subsist are only reletavely unique<sup>xxxiii</sup>. The other problem is that domain names are granted on the *first come, first served* basis.

ICANN is in a unique position of the administrative right to resolve disputes regarding domain name rgistration. The Uniform Domain-Name Dispute Resolution Policy (UDRP) has been adopted by ICANN-accredited registrars in all gTLDs (.aero, .asia, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, .org, .pro, .tel and .travel) and majority of ccTLDs. Anyone who who registers a new domain nam must agree to „submit to a mandatory administrative proceeding before an independent and impartial panel“. For example Irish domain name registry - IEDR - utilises WIPO arbitration process. Although a few ccTLD Registries use the generic UDRP mechanism offered by WIPO, it is far more common that a ccTLD Registry develops its own local Alternate Dispute Resolution Process (ADRP) that tends to be both quicker and cheaper for the disputing parties. European ccTLD registries, which use an ADRP in preference to the UDRP, include Belgium, the UK, Austria, Sweden, Norway, Finland, Denmark, Italy and the .eu ccTLD.

This dispute resolution procedure may put some constraints on individuals or small businesses that may have the clearest right to a domain name, but the procedure may drive them to consider the cost and effort of pursuing the matter excessively burdensome. This can be so even if the potential loss of good name and risk of other harm are very serious for the party involved. It might be more appropriate for the Registry to have an alternative local, impartial and independent procedure. In addition, it is often heard that WIPO arbitration process is biases in favor of trade mark owners:<sup>xxxiv</sup>

“Simply put, complainants win more frequently with WIPO and the NAF than

with eResolution. The statistical data, which has remained consistent since the introduction of the UDRP, shows that complainants win 82.2% of the time with the WIPO, 82.9% of the time with the NAF, but only 63.4% of the time with eResolution. Since outcome is what matters most to complainants, they have rewarded WIPO and the NAF with an overwhelming share of the UDRP caseload. Despite the highest fees, neutral rules, and low-key marketing, WIPO commands 58% of the UDRP caseload, compared with 34% for the NAF and a paltry 7% for eResolution”

A complainant in a UDRP proceeding must establish three elements to succeed<sup>xxxv</sup>:

- The domain name is identical or confusingly similar to a trademark (service mark) in which the complainant has rights;
- The registrant does not have any rights or legitimate interests in the domain name; and
- The registrant registered the domain name and is using it in *bad faith*.

In a UDRP proceeding, a panel will consider several non-exclusive factors to assess bad faith, such as:

- Whether the registrant registered the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark;
- Whether the registrant registered the domain name to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, if the domain name owner has engaged in a pattern of such conduct; and
- Whether the registrant registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- Whether by using the domain name, the registrant has intentionally attempted to attract, for commercial gain, Internet users to the registrant's website, by creating a likelihood of confusion with the complainant's mark.

The biggest reason for domain name disputes is cybersquatting. This is a widespread problem. In March 2009, WIPO reported an 8 per cent increase in 2008 from 2007 of disputes handled by it under its Uniform Domain Name Dispute Resolution Policy. In the 10 years since the adoption of the UDRP, WIPO has received 14,633 UDRP or UDRP-based cases, covering 26,262 separate domain names. There are many high profile cases of cybersquatters in action. For example, in April 2009, Hollywood actress Jennifer Lopez won an action to remove a cybersquatter from the domain names “jenniferlopez.org” and “jenniferlopez.net”. The problem was also highlighted in Ireland recently when a Dublin City Councilor reported that cybersquatters were asking him to pay \$2,000 to have his name removed from a website selling sex toys<sup>xxxvi</sup>.

## Conclusions

Internet has changed our life! We communicate, study, buy and sell differently. Internet allows us to access information so easily. Each single country realizes what

potential lies in well-educated society. Internet access development is the key challenge for information society. Some countries are way ahead granting this access, the other ones due to political or economical instability falls behind this development plan. United Nations, ICANN and information technology manufacturers – they all have their interests in Internet development and its governance.

USA government has created the Internet, funded its research and initially taken leaders position in its governance. Starting the ICANN project was a reasonable continuances and formal settlement of the achievements in Internet control and development. ICANN role is to allocate IP addresses to domain names - very simple and straightforward. However a lot of interest groups are unsatisfied that this power is solely exercised by the USA. But probably the most important conclusion is that current Internet governance form where ICANN and UN act as main actors - is working fine. UN sets directives regarding Internet development so that it could benefit the whole world equally, ICANN allocates domain names and successfully manages logical Internet layer. Technology producers are the ones who speeded up Internet boom and obviously are not going to stop. Development and improvement of the information technology is the reason why we are have this discussion now.

## List of the information sources used in the article and further explanations

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<sup>i</sup> <http://www.reuters.com/article/2010/10/19/us-telecoms-internet-idUSTRE69I24720101019>, last time viewed on the 20.02.2011

<sup>ii</sup> In 1996 John Perry Barlow stated in *A Declaration of the Independence of Cyberspace*: “Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather”. The full version of the Declaration can be accessed through <https://projects.eff.org/~barlow/Declaration-Final.html>

<sup>iii</sup> John Perry Barlow, "A Declaration of the Independence of Cyberspace", 1996, Davos, Switzerland, accessible on <https://projects.eff.org/~barlow/Declaration-Final.html>

<sup>iv</sup> Lessig, L., *Code Version 2.0*, Basic books, New York, 2006

<sup>v</sup> Benkler, Y., *From Consumers to Users: Shifting the Deeper Structures of Regulation Towards Sustainable Commons and User Access*, Federal Communications Law Journal Vol. 52 pp. 561-579, April 4, 2000

<sup>vi</sup> Solum L.B., *The Layers Principle: Internet Architecture and the Law*, U San Diego Public Law Research Paper No. 55, 2003

<sup>vii</sup> Source: [http://articles.cnn.com/2009-10-15/tech/finland.internet.rights\\_1\\_internet-access-fast-internet-megabit?\\_s=PM:TECH](http://articles.cnn.com/2009-10-15/tech/finland.internet.rights_1_internet-access-fast-internet-megabit?_s=PM:TECH), last time visited on the 03.03.11

<sup>viii</sup> Source: <http://www.dailymail.co.uk/news/worldnews/article-1192359/Internet-access-fundamental-human-right-rules-French-court.html>, last time visited on the 03.03.11

<sup>ix</sup> Source: <http://www.itu.int/wsis/basic/why.html>

<sup>x</sup> Resolution 55/2, September 8, 2000

<sup>xi</sup> Resolution 56/183, December 21, 2001

<sup>xii</sup> First Phase of the WSIS (10-12 December 2003, Geneva) Geneva Declaration of Principles WSIS-03/GENEVA/DOC/0004, Art. 20

<sup>xiii</sup> First Phase of the WSIS (10-12 December 2003, Geneva) Geneva Plan of Action WSIS -03/GENEVA/DOC/0005

<sup>xiv</sup> The whole text of the IP Justice declaration can be accessed on [http://ipjustice.org/WSIS/Civ\\_Soc\\_WSIS\\_Declaration.html](http://ipjustice.org/WSIS/Civ_Soc_WSIS_Declaration.html)

<sup>xv</sup> Lessig, L., *Code Version 2.0*, Basic books, New York, 2006 p. 77

<sup>xvi</sup> Lessig, L., *Code Version 2.0*, Basic books, New York, 2006

<sup>xvii</sup> More on an idea that the computer code can be an instrument to lobbyist to influence government: Wu, T., *When Code isn't Law*, University of Virginia School of Law, Virginia Law Review, vol. 89, pp. 104 - 170 June 2003. T. Wu argues Lessig's idea that „code is the law.“ He brings reasonable arguments, introducing errors of this theory – which is a lack of compliance. He proposes „to study the design of code as an aspect of interest group behavior: as simply one of several mechanisms that groups use to minimize legal costs“.

<sup>xviii</sup> *United States v. Microsoft* antitrust case from first instance to modified Final Judgment can be access through [http://www.justice.gov/atr/cases/ms\\_index.htm](http://www.justice.gov/atr/cases/ms_index.htm)

<sup>xix</sup> The issue central to the case was whether Microsoft was allowed to bundle its flagship **Internet Explorer** (IE) web browser software with its **Microsoft Windows** operating system. Bundling them together is alleged to have been responsible for Microsoft's victory in the **browser wars** as every Windows user had a copy of Internet Explorer.

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Microsoft stated that the merging of Microsoft Windows and Internet Explorer was the result of innovation and **competition**, that the two were now the same product and were inextricably linked together and that consumers were now getting all the benefits of IE for free. Those who opposed Microsoft's position countered that the browser was still a distinct and separate product which did not need to be tied to the operating system, since a separate version of Internet Explorer was available for **Mac OS**. They also asserted that IE was not really free because its development and marketing costs may have kept the price of Windows higher than it might otherwise have been.

<sup>xx</sup> Zittrain, J., *The Future of the Internet*, Penguin Books, London, 2009, p. 76

<sup>xxi</sup> *Ibid*, p. 79

<sup>xxii</sup> [www.verisigninc.com/assets/domain-name-report](http://www.verisigninc.com/assets/domain-name-report) last time viewed 03.03.11

<sup>xxiii</sup> [http://www.wipo.int/amc/en/domains/cctld\\_db/index.html](http://www.wipo.int/amc/en/domains/cctld_db/index.html), last time viewed on 03.03.11

<sup>xxiv</sup> More about IDN can be found on <http://www.icann.org/en/topics/idn/>

<sup>xxv</sup> Source: <http://www.icann.org/en/about/>

<sup>xxvi</sup> [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)

<sup>xxvii</sup> Management of Internet Names and Addresses, 63 Fed. Reg. at 31,741

<sup>xxviii</sup> Joseph P. Liu, *Legitimacy and Authority in Internet Coordination: A Domain Name. Case Study*, 74 Ind. L. J. 587, 618-25 (1999), p. 603

<sup>xxix</sup> ICANN Bylaws, section 5 states as follow: 1. The following Stakeholder Groups are hereby recognized as representative of a specific group of one or more Constituencies or interest groups and subject to the provisions of the Transition Article XX, Section 5 of these Bylaws:

a. Registries Stakeholder Group representing all gTLD registries under contract to ICANN;

b. Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN;

c. Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet; and

d. Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.

2. Each Stakeholder Group is assigned a specific number of Council seats in accordance with Section 3(1) of this Article.

3. Each Stakeholder Group identified in paragraph 1 of this Section and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN Board.

<sup>xxx</sup> Mathiason, J. *“Internet Governance: the new frontier of global institutions”*, Routledge, London, 2009, p. 90

<sup>xxxi</sup> ICANN News Release, September 14, 2010

<sup>xxxii</sup> Reed, C., *Internet Law*, 2<sup>nd</sup> ed., Cambridge, 2005, p. 44.

<sup>xxxiii</sup> *Ibid*

<sup>xxxiv</sup> Geist, M., *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, online at <http://aix1.uottawa.ca/~geist/geistudrp.pdf>

<sup>xxxv</sup> Uniform Domain Name Dispute Resolution Policy, Approved by ICANN on October 24, 1999

<sup>xxxvi</sup> Crean, T., *Cybersquatters: Evicting them from your .IE domain name*, 2009, [http://www.westlaw.ie/westlawie/wisearchframes?edit\\_doctype=all&searchFreeText](http://www.westlaw.ie/westlawie/wisearchframes?edit_doctype=all&searchFreeText)