



ELECTRONIC FRONTIER FOUNDATION eff.org

Content Regulation Using The Domain Name System: Safeguards and Risks

January 27, 2017

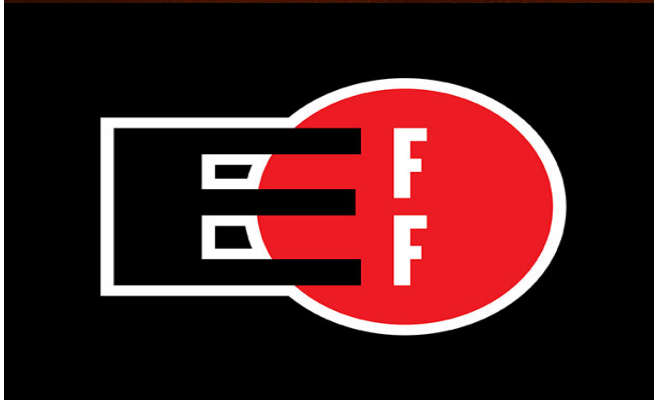
Mitch Stoltz

Jeremy Malcolm

Electronic Frontier Foundation



ELECTRONIC FRONTIER FOUNDATION eff.org



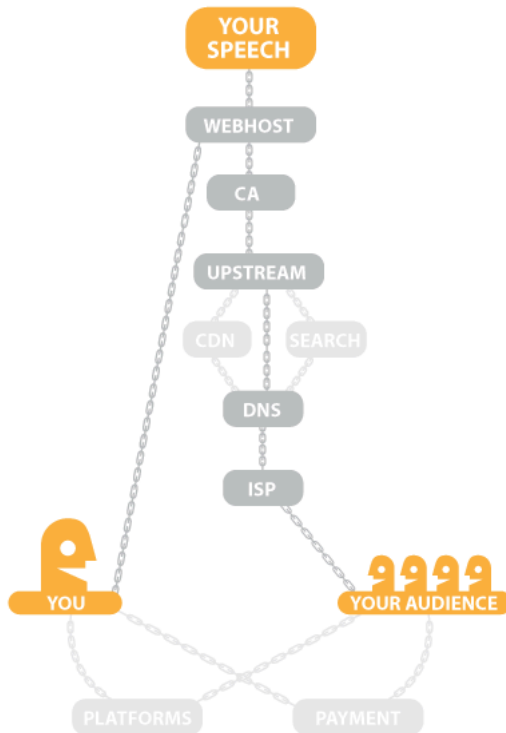


Voluntary Agreements

- Good things about voluntary agreements
 - The Internet is based on voluntary adoption of standards
 - More flexible, cheaper, and faster than regulation
 - Can be cross-jurisdictional and non-governmental
- Bad things about voluntary agreements
 - Used by governments to abdicate responsibility and avoid accountability (Policy Laundering)
 - Industry self-regulation often fails to protect the public
 - Lack of transparency, accountability, participation, and representation



Free Speech Weak Links





Who controls the weak links?

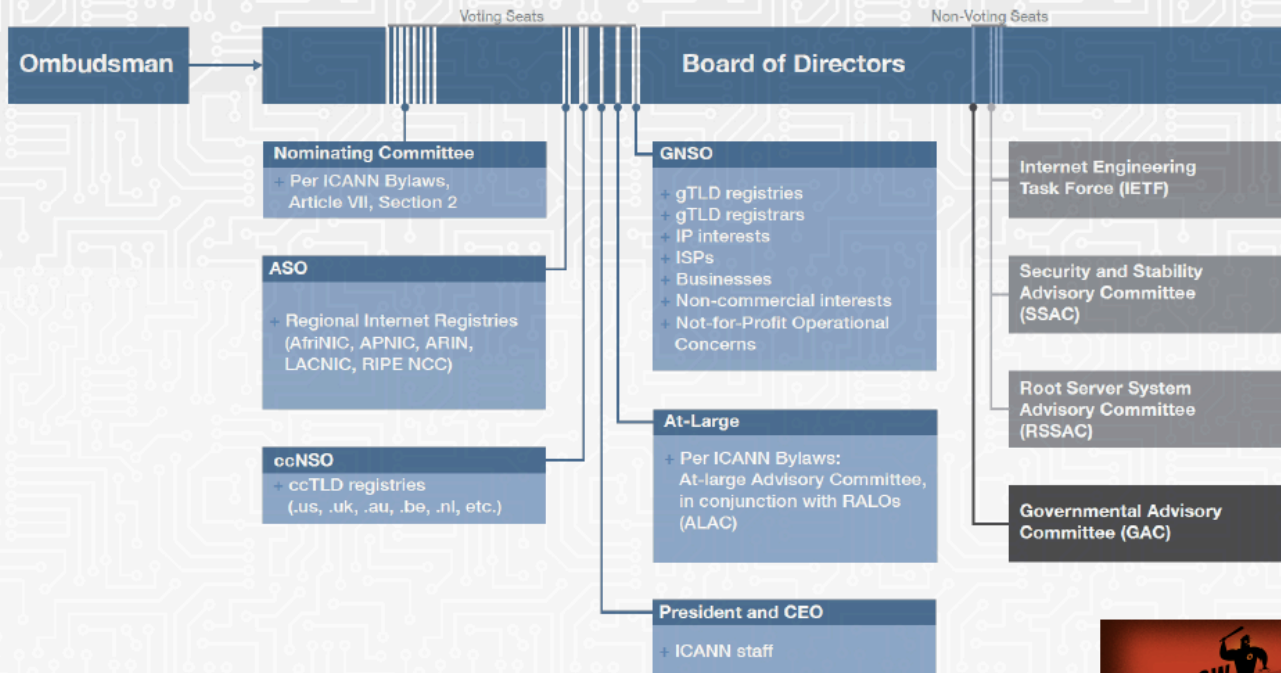


The IANA Functions

An Introduction to the Internet Assigned Numbers Authority (IANA) Functions



ICANN multi-stakeholder model





ICANN's Limited Mission

Allan Grogan, Chief Contractual Compliance Officer, June 12, 2015:

ICANN was never granted, nor was it ever intended that ICANN be granted, the authority to act as a regulator of Internet content. Institutions already exist that have political legitimacy and are charged with interpreting and enforcing laws and regulations around the world. These institutions, including law enforcement ... regulatory agencies and judicial systems, have the expertise, experience and legitimacy to police illegal activity and to address difficult questions such as jurisdiction and conflicts of law. In most countries, these institutions also offer procedural due process and mechanisms for appeal and are experienced in addressing difficult issues such as the proportionality of remedies. If content is to be policed, the burden is on these institutions, and not ICANN...



ICANN Bylaws

1.1 (c) ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide...



ICANN Bylaws

1.1(d)(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN . . . on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers . . .



2013 Registrar Accreditation Agreement

1.13 "Illegal Activity" means conduct involving use of a Registered Name sponsored by Registrar that is prohibited by applicable law and/or exploitation of Registrar's domain name resolution or registration services in furtherance of **conduct involving the use of a Registered Name** sponsored by Registrar that is prohibited by applicable law.

3.18.1 Registrar shall maintain an abuse contact to receive reports of abuse involving Registered ... including reports of Illegal Activity ... Registrar shall take reasonable and prompt steps to **investigate and respond appropriately** to any reports of abuse.



Public Interest Commitments

ICANN Registry Agreement Specification 11:

3.a. Registry Operator will include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.



Closing the Loop

From a letter to ICANN's Contractual Compliance group:

NABP requests that if a domain name is **alleged** to be used for the illegal or unlicensed sale of prescription drugs, at a minimum, an “appropriate response” and “investigation” by the registrar under Section 3.18 must include requesting that the registrant produce a pharmacy license ...

If the seller cannot produce legally required pharmacy licensure ...
the domain name should be suspended ...



Who Wants Content Regulation?

- Media & Entertainment Industries
- Pharmaceutical Interests
- Professional license bodies (.DOCTOR)
- Law enforcement and national security
 - “fraudulent” content
 - “terrorist content”
 - “hate speech”



“self-regulation”

- Healthy Domains Initiative
 - Pre-emptive, private regulation
- Public Interest Registry’s arbitration process for Web content
- MPAA-Donuts “Trusted Notifier” agreement



Strategies

- Efforts within ICANN
- External efforts



Questions?