
ICANN 57: Summary of High Interest Topic Cross-Community Session – The DNS and Content Regulation

To follow is a summary of the High Interest Topic (HIT) session held at ICANN57, Hyderabad (Sunday 6 November, 2016)

This summary has been prepared by the independent ACIG GAC Secretariat for the information of ICANN's Governmental Advisory Committee (GAC).

It is **not** a formal record of the meeting.

Transcript and recordings from the session:

http://scho.w/s/hosted_files/icann572016/58/157%20HYD_Sun06Nov2016-DNS%20and%20Content%20Regulation%20NCUC%20Group-en.pdf

Chair

This session was Chaired by Mr. Raffik Dammak from the Non-Commercial Users Constituency.

Summary of Discussions

Throughout the session, participants shared information and views. No formal position, or possible next steps (action items), were agreed or discussed.

The wide ranging discussions focussed around key questions:

- **Should ICANN and more broadly the Domain Name System and its participants, be used to regulate Internet content?**

Discussion included:

- What is it that ICANN can 'regulate' or 'enforce' versus what the Registrars and Registries can do themselves through voluntary agreements, contractual codes of conduct with their customers or community best practices?
- The ICANN Bylaws contain a strong principle that content on websites and with Internet Service Providers (ISP's) is beyond ICANN's remit. ICANN can only coordinate and allocate IP numbers and names in the DNS and conduct root server operations.
- Despite this, some parties feel that there is pressure from a range of sources (including Governments and law enforcement agencies) to increase the use of domain name suspension (or the threat of suspension) as a 'shadow' means of regulating content. An example of these are the current Public Interest Commitments (PICs)
- Allen Grogan (ICANN Chief Contract Compliance Officer) advised the meeting that if any party wants ICANN to combat "abuse" in terms of content regulation, this abuse must first be deemed to breach one of the contractual provisions in place in the contract between ICANN and the Registry Service Provider (the Registry Accreditation Agreement). If it does not breach the Agreement, there is nothing that ICANN can do.

- Allen also reinforced that the existing Specification 11 PICs are in place under these contracts so they are enforceable under ICANN's existing remit.
- **What is a domain name for? Is it simply a unique identifier for an Internet service? Or is it some kind of certification of good citizenship or legality?**

Discussion included:

- There is no global standard or definition of abusive activities. A single ICANN policy on this would be impossible to create and could never hope to be consistent with the broad range of statutes describing illegal behaviour around the world.
- 'Best Practices' as an industry enforcement standard run the risk of de facto enforcing special interests into some kind of global 'meta law', which is a dangerous concept. They create 'shadow international law'.
- Some service contracts between registries and their clients are established in "ex ante" language – 'a customer can register if they can demonstrate certification or qualification etc etc'. Others are established in "post ante" language – meaning anyone can register and the content only gets taken down if there is subsequently a complaint and the investigation of that complaint identifies abusive or illegal content.
- **Can ICANN and other Domain Name System participants successfully participate in certain forms of content regulation while refusing to participate in others?**

Discussion included:

- It is fundamentally in the interests of Registries to re-register their customers as that is where their revenue lies. It is argued that therefore best practices in terms of taking down 'abusive' content is very unlikely to become inappropriately rampant in terms of application. Therefore the fear of 'shadow international law' is overstated.
- An analogy was offered that running a Registry is like running a restaurant: The owner has the right to enforce their own dress code (ie online content behaviour code) – one that reflects their reputation and values. When a customer wears inappropriate clothing or hosts inappropriate material he/she will be denied service from that restaurant or registry.
- Some types of misuse (as defined in the Specification 11 PIC's) are arguably more equal than others within the ICANN remit. For example the use of malware or a botnet that impacts the stability and security of the DNS is completely within ICANN's remit. Whereas establishing evidence of copyright and fraud is less clear cut.
- Governments can act to regulate content in any way they like. But ICANN cannot enforce these laws for them. It can only enforce its own RAA and terms of service.

- Registries and Registrars can only enforce the contracts and terms of service they have between themselves and their customers. They also cannot enforce laws on behalf of governments.
- Registries and Registrars can also act to investigate and take down websites with abusive or illegal content when requested to by law enforcement agencies. But this is often reactive in terms of consumer protection and timely and costly for the Registries and Registrars themselves.

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