

THE GOOD, THE BAD, AND THE GOOGLY: DOES THE ICANN REGULATIONS ON THE NEW GTLDS LEAVE THE INTERNET AS A SAFE SPACE FOR FREE THOUGHT?

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A*bstract*—The political, economic, and social implications of exclusive and specialised control over the operation of essential and relevant World Wide Web assets are well-established. According to a number of studies, Internet intermediaries, especially those which operate as access providers and search engines or offer web-hosting services seem to be subject to ongoing regulation from a variety of sources. Similarly, intermediaries are increasingly susceptible to the instructions of injunctions to deny access to otherwise illegal information, and in some situations, they may also be held liable for content transmitted, displayed, and posted by third parties. Placing intermediaries in place of content providers assists in overcoming the difficulty of recognising and identifying the source and recipients of particular Internet material. Regardless of how effective this strategy has been in addressing illegal and dishonest acts and misbehaviour online, it has received severe rebuke and criticism. Placing third-party regulators under the crushing weight of content regulation presents the risk of excessive censorship, particularly in the absence of a transparent procedure and clear-cut standards assuring that the rights and interests at stake will be properly considered by the intermediary. The following research seeks to address five fundamental aspects of how the Internet operates. First, how domain name registries and registrars may become tools of misuse and points of control for the online content placed in their domain, with a particular focus on the New-generic top-level domains regime of the Internet Corporation for Assigned Names and Numbers. Second, how objection mechanisms were incorporated with precautionary principles and preventative actions to strengthen the

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anti-abuse policy approach for such New-generic top-level domains. Third, a discussion outlining the origins and evolution of the Domain Name System is also incorporated into the study. Fourth, the research will examine the aspects of the 'procedures of objection' system and the legal duties of domain name registries and registrars, with a particular emphasis on the concerns of scope creep and domain abuse. And finally, it covers the effects of private entities monitoring material on the freedom of speech and expression of domain name holders.

Keywords: ICANN, Domain Names, Freedom of Speech and Expression, DNS, gTLDs, New-gTLDs.

INTRODUCTION

Exclusive and specialised control over the functioning of pertinent and crucial assets of the World Wide Web has well-known political, financial, and social dimensions to them. Under various studies, it has appeared that Internet intermediaries – namely, intermediaries that act as access providers and search engines or that provides for web-hosting services – face the constant ordeal of regulating the Web from many different sources.²⁰¹ Similarly, intermediaries are progressively subjected to the directives of injunctions to repudiate access to otherwise illicit content,²⁰² and in a given number of instances, they may moreover be held accountable with liability for content transferred, displayed, and uploaded by third parties.²⁰³ Placing target intermediaries in place of content providers aids in prevailing over the trouble of recognition and identification of the source and beneficiaries of specific content on the Internet. However, no matter how productive this methodology to handle illicit and mala fide activities and misconduct online has been, it has come under scathing reprimand and criticisms. Placing third-party regulators under the bludgeoning weight of content regulation carries a hazard of over-censorship, especially when there is a stark absence of a transparent process and of clear-cut norms

²⁰¹ Jack M Balkin, 'Old-School/New-School Speech Regulation' (2014) 127 Harvard Law Review 2296; Laura DeNardis, 'Hidden Levers of Internet Control' (2012) 15(5) Information, Communication and Society 720; B Frydman and I Rorive, 'Regulating Internet Content through Intermediaries in Europe and the USA' (2002) 23(1) Zeitschrift für Rechtssoziologie 41.

²⁰² Pekka Savola, 'Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers' (2014) 5(2) JIPITEC 116; Martin Husovec, 'Injunctions against Innocent Third Parties: Case of Website Blocking' (2013) 4(2) JIPITEC 116; Pekka Savola, 'Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers' (2014) 5(2) JIPITEC 116.

²⁰³ Rebecca MacKinnon and others, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO/Internet Society 2014) 39.

ensuring guarantees that the rights and interests at issue will be carefully adjusted by the intermediary.²⁰⁴

Keeping the above in consideration, an endeavour has been undertaken by way of the present study to address the following aspects of the global Internet domain, namely:

- a. Firstly, how domain name registries and registrars might be misused to serve as points of control²⁰⁵ for the online content posted in their administration domain, with special emphasis on the New-generic top-level domains (hereinafter, 'New-gTLD') regime of the Internet Corporation of Assigned Names and Numbers (hereinafter, 'ICANN'). The method proposed by ICANN to evaluate and apportion New-gTLDs offers a regulation mechanism directed at two levels.
- b. concerning the gTLD itself, 'objection procedures' were set up to permit third parties to challenge an 'applied-for gTLD' regarded to be antithetical to 'general standards of customary International law' or against broadly characterised communities. This concern does not target the gTLD itself but the conceivably contentious content that may be distributed under the gTLD regime.
- c. Secondly, the objection procedures were integrated with precautionary principles and preventive measures aimed at fortifying the anti-abuse policy approach towards New gTLDs. Thus, the ICANN revised its standard agreements with domain name registries and registrars to enforce over-the-top protective safeguards, compliance and adherence protocols to all applicable laws, and solutions such as suspension and dissolution of the domain name, which is an authoritative instrument via which access to content on the internet can be denied. However, none of these amending provisions was examined under the 'consensus policy development process' of the ICANN. If enforced, these provisions have the potential of content policing by private enterprises without upholding the basic right of the domain name holders' freedom of expression.
- d. Thirdly, the article will also assess the advancement of the Domain Name System (hereinafter, 'DNS') from its origins in the 1980s, three decades ago. By this, we shall try to understand the strategic policy choices needed to be made to set a standard *modus operandi* to oversee the creation and assignment of New gTLDs.

²⁰⁴ United Nations Commission on Human Rights, 'Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (16 May 2011) HRC Res 16/4.

²⁰⁵ Jonathan L Zittrain, 'Internet Points of Control' (2003) 44(2) Boston College Law Review 653.

- e. Fourthly, the article will also explore the facets of the ‘procedures of objection’ mechanism and the legal obligations of domain name registries and registrars with a specific focus on the issues of scope-creeping and domain abuse.
- f. And, lastly, a sum-up of the discussion by identifying potential recommendations for future developments and the way forward.

REGULATION OF GTLDS BY ICANN

In June 2011, the Board of Directors (hereinafter, ‘Board’) of ICANN gave its seal of approval for the New-gTLD Program, held back then as “one of the greatest changes ever to the Domain Name System regime of the Internet”.²⁰⁶ The DNS acts as the strongest and the most crucial link in the chain of the World Wide Web since it acts as the ‘translator’ of alphanumeric domain names into the corresponding Internet Protocol (hereinafter, ‘IP’) addresses required for the transmission of informational data. The DNS contrasts altogether from the general engineering of the Internet since its operation is centralised to warrant that each and every domain name is distinctive and that a webpage address shall lead to the same location on the Internet, notwithstanding the topographical location of the user.²⁰⁷ In the initial days of the inception of the Internet, the system of naming and addressing depended entirely on a single distributed file, which required continuous and systematic overhaul and updated every time a new system joined the network. However, the issue with this arrangement was that it was unable to cope with the expeditious growth of Internet technology. Thus, the DNS was created in the 1980s to empower the attribute of decentralisation concerning naming and tending capacities while maintaining a certain degree of centralised control to guarantee the consistency and uniqueness of the identifiers. The key was the levelling of the divisions in a hierarchal manner. This tree-shaped chain of command is reflected within the arrangement of the course of action of domain names, from right to left, and isolated by dots:

- (1) a top-level domain (hereinafter, ‘TLD’);
- (2) a second-level domain (hereinafter, ‘SLD’ or ‘2LD’);
- (3) a subsequent third-level domain (hereinafter, ‘3LD’), and so on.

²⁰⁶ ICANN, ‘Approved Board Resolutions: Singapore’ (20 June 2011) <www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-singapore-20-06-2011-en> accessed 27 December 2022.

²⁰⁷ Internet Society, ‘Internet Invariants: What Really Matters’ (3 February 2012) <accessed 27 December 2022.

As an illustration, with ‘xyz.ac.bd’, ‘.bd’ is the TLD, ‘.ac’ is the SLD, and ‘xyz’ is the 3LD.

Primarily, two brackets of TLDs coexist, namely, the generic top-level domains (hereinafter, ‘gTLDs’) (such as ‘.com’, ‘.biz’ and ‘.xxx’) and the two-letter country-code top-level domains (hereinafter, ‘ccTLDs’) (such as ‘.be’ for Belgium, ‘.de’ for Germany, ‘.in’ for India, ‘.cn’ for China, so on and so forth). The pecking order of the DNS empowers the repositioning and storage of data at almost every level at distinctive name servers, which can, in turn discharge the function of the domain name resolution. At the apex of the chain of command lies the ‘root’, a single file that consists of the list of the authoritative servers for each TLD.

The structure of the DNS model is evident from the devolution of powers from the TLDs to the sub-domains. At the top of this pecking order stands the ICANN, which has managed and administered the DNS root since the late 1990s. The DNS was maintained by contractors of the US Federal Government until 1998. However, with the evolution and the rapid expansion of the Internet, private enterprises and foreign governments pushed for an increment of competition and privatisation of control over the DNS. Thus, in June 1998, the National Telecommunications and Information Administration (hereinafter, ‘NTIA’), an agency under the aegis of the US Federal Department of Commerce, formulated a ‘Statement of Policy’, which propounded a private, non-profit, non-governmental corporation to manage the dealings of the DNS²⁰⁸ – forming the ICANN, a multi-stakeholder enterprise with a bottom-up decision-making hierarchy.²⁰⁹

Remarkably, the ICANN’s policies are formulated and developed by members of the international community who have both a commercial and a non-commercial interest in the DNS. The hierarchy of the ICANN has the Board at its apex, which has the final say in all matters with regard to DNS dealings and an Advisory Committee, which provides an opportunity for sovereign governments to participate in the decision-making process of the ICANN.²¹⁰ ICANN’s multi-stakeholder community comprises primarily large and small businesses, technical community members, the civil society,

²⁰⁸ Office of the Federal Register, ‘Management of Internet Names and Addresses’ (*National Archives and Records Administration*, 10 June 1998) <www.govinfo.gov/app/details/FR-1998-06-10> accessed 28 December 2022.

²⁰⁹ Milton L Muller, *Ruling the Root* (The MIT Press 2002); Edgar A Whitley, ‘Ruling the Root: Internet Governance and the Taming of Cyberspace’ (2004) 17 *Information Technology & People* <www.emerald.com/insight/content/doi/10.1108/itp.2004.16117dac.001/full/html> accessed 27 December 2022; Jonathan Weinberg, ‘ICANN and the Problem of Legitimacy’ (2000) 50 *Duke Law Journal* 187 <www.jstor.org/stable/1373114?origin=crossref> accessed 27 December 2022.

²¹⁰ Jonathan Weinberg, ‘Governments, Privatization and ‘Privatization’: ICANN and the GAC’ (2011) 18 *Michigan Telecommunications and Technology Law Review* <<http://dx.doi.org/10.2139/ssrn.1766082>> accessed 27 December 2022.

National Governments, academia and end-users designated as “Supporting Organisations” (like, the Root Server System Advisory Committee, the Government Advisory Committee, the Generic Names Supporting Organisation, the Security and Stability Advisory Committee, the Address Supporting Organisation, the Country Codes Names Supporting Organisation and the Internet Engineering Task Force). Since the Board is tasked with oversight the functioning of the ICANN and taking into consideration the policy recommendations of these Supporting Organisations, hence members of the Board cannot be a part of the multi-stakeholder community. Moreover, along with the Independent Objector, the multi-stakeholder community members can also raise objections against gTLD-Applicants and appeal against decisions of expert panels.

Till 2016, the domain of ICANN over the DNS, under the NTIA, was with regards to the Internet Assigned Numbers Authority (hereinafter, ‘IANA’) related functions. Initially signed in 2000, IANA contract between the ICANN and the US Federal Government has been renewed many times,²¹¹ thereby making ICANN the authority in charge of the coordination and planning of identifiers like domain names, IP addresses, and protocol parameters. In turn, the U.S. Federal Government held superintendence over ICANN, although many have considered this oversight to be highly contentious and controversial.²¹²

Thus, in March 2014, the US Federal Government relinquished its supervisory role and made a notable decision to transition the role of oversight to an international multi-stakeholder Internet community.²¹³ ICANN was assigned as the convener of the transition proposal, taking into consideration all relevant stakeholders of the Internet fraternity from around the globe. Finally, in March 2016, this process of transition fructified, with a transition proposal being submitted to the NTIA²¹⁴ – this proposal essentially advocated for a shift in the Internet policy regulating identifiers, with the transfer of IANA functions to a novel legal entity under the aegis of the ICANN. This entity would take charge as the ‘new’ IANA functions operator, whereas the ICANN shall subsume the role played by the NTIA until then. Yet another remarkable development was

²¹¹ National Telecommunications and Information Administration, ‘An Update on the IANA Transition’ (17 August 2015) <www.ntia.gov/blog/update-iana-transition> accessed 27 December 2022.

²¹² Kevin McGillivray, ‘Give it away now? Renewal of the IANA Functions Contract and its Role in Internet Governance’ (2014) 22 *International Journal of Law and Information Technology* 3 <<http://dx.doi.org/10.1093/ijlit/eat017>> accessed 27 December 2022.

²¹³ CCDCOE, ‘US Announces Intention to Hand Over Control Over DNS’ <www.ccdcoe.org/incyber-articles/u-s-announces-intention-to-hand-over-control-over-dns/> accessed 28 December 2022.

²¹⁴ IANA Stewardship Transition Coordination Group, ‘Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department’s National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community’ (March 2016) <www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf> accessed 28 December 2022.

a highly rigorous accountability mechanism which now the ICANN would be subject to maintain accountability of the ICANN towards the global Internet community and all of its beneficiaries.²¹⁵ In August 2016, the NTIA accepted the proposal of transition²¹⁶ and since then, the IANA functions have been discharged by the Public Technical Identifiers, an affiliate body under the ICANN.²¹⁷

ICANN contracts with Internet registries (ICANN does not have a contract or a legal binding agreement with ccTLDs). These ‘Domain Name Registries’ are, in turn, responsible for the maintenance, coordination and functioning of all SLD databases registered under a TLD – with only one registry that can be registered per TLD, to ensure consistency and transparency of such databases’ functioning. The primary responsibility of such Registrars is to proffer services to the general public (hereinafter, ‘Registrants’) to register their domain name, and to collect the information and payments of clients to create an SLD entry into the database registry.

LACUNAE IN THE EXISTING REGIME OF REGULATION OF THE GTLDS BY THE ICANN

Certain shortcomings of the current TLD regulation-regime under the ICANN pertain to five specific aspects, namely:

- I. Objection Procedures
- II. Limited Public Interest
- III. Community Objections
- IV. Freedom of Speech and Expression, vis-a-vis the ICANN regime
- V. Contractual Obligations of Domain Names Registries and the Registrar

I. Objection Procedures

To ensure consistency of rights, interests and values, a formal procedure of ‘objections’ advanced under the New-gTLDs. In Module 3 of the Applicant

²¹⁵ ICANN, ‘CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations’ (23 February 2016) <www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf> accessed 28 December 2022.

²¹⁶ National Telecommunications and Information Administration, ‘Update on the IANA Transition’ (16 August 2016) <www.ntia.gov/blog/update-iana-transition-0> accessed 28 December 2022.

²¹⁷ ICANN, ‘ICANN Announces Incorporation of Public Technical Identifiers’ (11 August 2016) <www.icann.org/news/announcement-2-2016-08-11-en> accessed 28 December 2022.

Guidebook and in the ‘New gTLD Dispute Resolution Procedure’, the norms and criteria relevant to the objection procedures are outlined in categorical specificity.²¹⁸ There were four grounds on which such ‘objections’ could be filed:

- a. String confusion
- b. Legal rights
- c. Limited public interest
- d. Community grounds²¹⁹

Such objections must be sent to the Dispute Resolution Service Provider (hereinafter, ‘DRSP’), which acts as an independent dispute resolution authority, and which appoints a panel of experts to deliberate and determine issues concerning disputes arising between Registrants and such other entities who object to such registration.

Depending on the terms of the objections raised, the DRSP appointed panels empowered to determine two kinds of reviews:

- a. In cases involving a string or a legal right-related issue, involving questions on whether an applied-for string is deceptively similar to an already existing TLD string or an already applied-for-gTLD string infringes or likely holds the potential to infringe into the trademark of the person who objected?
- b. Whether the terms of the gTLD applied for qualify as ‘highly objectionable’ or not?

To arrive at its determinations, the panel has to derive whether the application is incompatible with the customary principles of morality and public order, following the set international practices in place, or does such an application have the potential to cause harm and detriment to the global Internet community. Therefore, the structure of the ICANN also provides for an “Independent Objector” who shall act “solely in the best interests of the public who use the global internet” and can thus also file objections against “highly objectionable terms.”²²⁰ The presence of an Independent Objector is necessary since neither the staff members of the ICANN, nor members of its Board, could direct or

²¹⁸ ICANN, ‘Gtld Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022.

²¹⁹ Tortsen Bettinger and Allegra Waddell (eds), *Domain Name Law and Practice: An International Handbook* (2nd edn, OUP 2015) 1077.

²²⁰ ICANN, ‘Gtld Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 3.2.5].

compel the filing of a particular objection by themselves. In 2012, Professor Allain Pellet began his tenure as the sole Independent Objector for the New-gTLD Program.²²¹

As is evidenced from the ‘.xxx case’, principally, the Board of the ICANN ought not to adjudicate on issues that arise as a direct ramification of third-party allegations.²²² However, there is a striking absence of a specific appeal process to challenge the decisions and findings of the expert panel – neither have the DRSPs adopted any approach or procedure to assess the findings of the authorised panels, nor have they clarified or provided for a standard of interpretation of the dispute resolution mechanism. The methodology enshrined in the Applicant Guidebook (hereinafter, ‘AGB’) brusquely mentions that the determination and findings of the expert panel would be appraised as “advice that the ICANN will accept with the dispute resolution process.”²²³ This is ambiguous as the implication of the aforementioned wordings is that ICANN “may or may not” follow the decisions of the expert panel – the larger ramifications of which is arbitrary decisions being made.²²⁴ The arbitrariness is also evident from the Fifth Module of the Guidebook (Transition to Delegation) (hereinafter, ‘Guidebook’), which empowers the Board of Directors of the ICANN with the “ultimate responsibility of the New gTLD Program.”²²⁵

The Guidebook also empowers the Board with the final say to determine whether approval of a certain application would lie in the best interests of the global Internet community or not. To add on, the Guidebook also mentions that the “Board may individually consider a gTLD application” under “exceptional circumstances” – while being silent on what encompasses such exceptional circumstances.²²⁶

II. Limited Public Interest

According to the Guidebook, the expert panel has to ascertain, while adjudicating over a Limited Public Interest objection, and consider the question of whether the objected gTLD string stands contrary to the customary principles,

²²¹ ICANN, ‘Independent Objector for New gTLD Program Selected’ (*ICANN*, 14 May 2012) <www.icann.org/news/announcement-2012-05-14-en> accessed 26 December 2022.

²²² Caroline Bricteux, ‘Regulating Online Content through the Internet Architecture: The Case of ICANN’s New gTLDs’ (2017) 7 JIPITEC <www.jipitec.eu/issues/jipitec-7-3-2016/4512> accessed 26 December 2022.

²²³ ICANN, ‘Gtld Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 3.4.6].

²²⁴ Caroline Bricteux, ‘Regulating Online Content through the Internet Architecture: The Case of ICANN’s New gTLDs’ (2017) 7 JIPITEC <www.jipitec.eu/issues/jipitec-7-3-2016/4512> accessed 26 December 2022.

²²⁵ ICANN, ‘Gtld Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 5.1].

²²⁶ *ibid.*

again, of morality and public order, by setting international practices.²²⁷ The Guidebook does carry mention of a non-exhaustive catalogue of international legal instruments which enumerate such general principles of morality and public order. Unless proven otherwise, national laws must be based on the contemporary principles of customary international law to be brought under the ambit of Limited Public Interest objections. Hence, although each and all in the realm of the Internet enjoy the right to freedom of expression, however, such right can only be exercised when certain special duties and responsibilities are observed. The Guidebook thus envisages four case scenarios when the freedom of expression of an Applicant can be curbed:

- a. When the Applicant indulges in the incitement or promotion of a “violent, lawless action”²²⁸;
- b. When the Applicant indulges in the incitement or promotion of discrimination based upon the parameters of race, colour, gender, ethnicity, religion or national origin, or any other kind of discrimination that carry the potential of violating the legal norms enshrined under the principles of International Law;
- c. When the Applicant indulges in the incitement or promotion of “child pornography or other sexual abuse of children”²²⁹;
- d. When the Applicant indulges in the incitement or promotion of transgression of “specific principles of international law as reflected in relevant international instruments of law.”²³⁰

In actual practice, most of the objections pertaining to the aspect of Limited Public Interest are made from the fourth ground.

There are no impositions or restrictions on who can or who cannot file an objection; however, the Limited Public Interest is the least perused mode of the objections procedure, with a mere 23 objections filed as of 2016. A staggering chunk of the Limited Public Interest objections filed was either pulled back before the matter went for a final determination or faced an outright dismissal at the hands of the expert panels. Of these 23 Limited Public Interest

²²⁷ Caroline Bricteux, ‘Regulating Online Content through the Internet Architecture: The Case of ICANN’s New gTLDs’ (2017) 7 JIPITEC <www.jipitec.eu/issues/jipitec-7-3-2016/4512> accessed 26 December 2022.

²²⁸ ICANN, ‘Gtld Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 3.5.3].

²²⁹ *ibid.*

²³⁰ *ibid.*

objections, till 2017, only one objection has been upheld, that too with a dissenting opinion in the *‘hospitalcase’*.²³¹

Over the years, the Independent Objector has filed several objections against the health and medical sector-related-gTLDs, with the contestation being that these strings are in contravention of the tenets enshrined in the Universal Declaration of Human Rights (hereinafter, ‘UDHR’)²³² and the International Covenant on Economic, Social and Cultural Rights (hereinafter, ‘ICESCR’)²³³. This contention becomes far more glaring when considered in the context of the purpose(s) these strings intend to achieve as per their application. The Independent Objector has placed forward the argument that the meaning of the right to access health and medical information should also include the right to access reliable, dependable, and trust-worthy information – hence, an Applicant should have to exhibit that he/she shall continuously, expeditiously and productively use the gTLD string, while respecting the need and necessity of credibility and dependability of the right to health and medicare. The Applicant is supposed to understand the necessity of a higher standard of care for health-related gTLDs, and not put into applying the same rules of operation and protection that they would for a general gTLD.

The expert panel in the *hospital* case espoused an uncanny approach to strike a middle-ground balance between the right to freedom of speech and expression and the right to access health. The majority of the panellists have opined that the freedom of speech and expression is attached to “special duties and responsibilities” including “an application of very specific protection and an awareness of the importance of the role of hospitals in delivering credible healthcare objectives.”²³⁴ In the majority of the panel’s understanding, there was a failure on the end of the Applicant in forestalling a breach of the right to health and thus fell outside the ambit of the freedom of expression – Therefore, this case scenario at hand was an example not only of the mere understanding and application of legal principles but also of a balancing evaluation of values and rules. Thus, the growth and development of services on the Internet, and the understanding of the freedom of expression, need to be balanced not just with the right to health but also with the right to life.²³⁵

However, an important question was raised by the dissenting panellist– “is it the task of an expert panel to rewrite the applicable standards for the gTLD

²³¹ ICANN, ‘Objection Determinations: Application ID 1-1505-15195’ (25 September 2013) <<https://newgtlds.icann.org/en/program-status/odr/determination>> accessed 28 December 2022.

²³² United Nations General Assembly, ‘Universal Declaration of Human Rights’ (10 December 1948) Res 217 A.

²³³ UNGA, ‘International Covenant on Economic, Social and Cultural Rights’ (16 December 1966) Res 2200A (XXI).

²³⁴ *Prof Alain Pellet v Ruby Pike LLC* (Final Expert Determination) [31 August 2016] ICC Case No EXP/600.

²³⁵ *ibid.*

strings and to supplement them with higher standards in the moniker of public interest?”²³⁶

Although the panellist was empathetic to the concern regarding the lack of credibility and reliability of the information provided under the *hospital* gTLD, Nonetheless, the current ICANN registration regime does not mandate such an implied content-wise check as a necessary prerequisite for the registration of a gTLD string.

On the request for a review²³⁷ of the decision of the expert panel, the ICANN Board of Directors instituted a new expert panel to look afresh into the contention of whether the original expert panel had equitably and rationally arrived at a decision, by following the guidelines of the Guidebook.²³⁸

In August 2016, the final expert determination overturned the first expert determination,²³⁹ as the new expert panel deemed that the findings of the first panel relied excessively on the so-called ‘intended plan and purpose’ of the applied-for gTLD and had crossed the limits of reasonableness with such determination, thereby curbing the Applicant’s freedom of expression.

III. Community Objections

To increase inclusivity and diversity and to augment the free flow of opinions, provisions for Community Objections were created.²⁴⁰ Only “established institutions associated with clearly delineated communities”, and the Independent Objector, have the standing to file a Community Objection.²⁴¹ The Applicant Guidebook mentions four prerequisites that need to be satisfied before a Community Objection can be filed. The Objector shall have to prove that:

²³⁶ Prof August Reinisch, ‘Dissenting Opinion on New Generic Top Level Domain Names (gTLDs)’ (*International Chamber of Commerce*, 12 December 2013) <https://iccwbo.org/content/uploads/sites/3/2013/08/EXP_412_ICANN_29_Dissenting-Opinion-Reinisch.pdf> accessed 28 December 2022.

²³⁷ ICANN, ‘Bylaws for Internet Corporation for Assigned Names and Numbers: A California Nonprofit Public-Benefit Corporation’ (2 June 2022) <www.icann.org/resources/pages/governance/bylaws-en/#article4> accessed 28 December 2022 [s 4.2].

²³⁸ ICANN, ‘Approved Board Resolutions: Regular Meeting of the ICANN Board’ (3 February 2016) <www.icann.org/resources/board-material/resolutions-2016-02-03-en> accessed 28 December 2022.

²³⁹ *Alain Pellet (France) v Ruby Pike LLC (USA)* (Expert Determination) [31 August 2016] ICC Case No EXP/412/ICANN/29 [64]–[69].

²⁴⁰ ICANN, ‘Gtld Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 3.2.1].

²⁴¹ ICANN, ‘Gtld Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 3.2.2.4].

- a. The Community to which the said gTLD string pertains is a “clearly delineated Community,”²⁴²
- b. That the Objection to the application is substantial and is of considerable importance,
- c. That there happens to be an existent and actual association between the Community and the applied-for gTLD string, and
- d. The application causes or is likely to cause, harm or detriment to the rights and interests of a sizeable portion of the said Community.

As compared to Limited Public Interest, Community Objections have been the most common kind of objection mechanism in their perusal – till 2017, there have been 104 Community Objections which have been filed, of which a mere 33 were dismissed (mostly because the expert panel found them to be frivolous).²⁴³

For assessing Community Objections, the policy of registration is of paramount credence. The expert panels pay due attention to the eligibility requirements, ex-post anti-abuse measures and a higher involvement and participation of the earmarked community in the management and functioning of the gTLD.

- I. Primarily, most of the expert panels which were involved in the determination of Community Objections have believed that eligibility requirements are of prime importance to maintain, protect and preserve the community reputation and consumer trust. An example of the same would be the case of *.architect*, where the expert panel opined that the said domain name should only be used by a licensed architect as it would be compatible with the public interests aligned with the work of architects and would also keep in sync the legitimate expectations of consumers. Hence, although free speech and expression is a right of a venerable standard, it is not ultimate or absolute and could be altered subject to the public interest.²⁴⁴ The same standard is also accorded to gTLDs targeting regulated sectors, like *medical*²⁴⁵ and *insurance* if the Applicant of the said domain names didn't confine the registration to representatives or members of the said sector.

²⁴² ICANN, 'Gtld Applicant Guidebook: Module 3' (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 3.5.4].

²⁴³ ICANN, 'Objection Determination' <<https://newgtlds.icann.org/en/program-status/odr/determination>> accessed on 28 December 2022.

²⁴⁴ *The International Union of Architects (France) v Spring Frostbite LLC (USA)* (Expert Determination) [3 September 2013] ICC Case No EXP/384/ICANN/1 [129].

²⁴⁵ *Alain Pellet Independent Contractor (France) v Steel Hill LLC (USA)* (Expert Determination) [21 November 2013] ICC Case No EXP/407/ICANN/24 [161]-[166].

- II. Secondly, ex-post anti-abuse policies were effectuated to deal with the obscure and sensitive side of the dealings of domain names. To take the instance of *.islam* and *.halal*, where, owing to the religious sentiment associated with members of the Islamic faith, the expert panel noted that the gTLDs should be operated in a manner that would prevent “radical content or criticism of Islam and the Muslim faith” and to undertake “immediate and severe action against this, should it occur.”²⁴⁶ Thereby, the application was given a clean-chit only when the Applicant proposed not only to bring to implementation uncompromising and strict eligibility requirements but also to put to scrutiny all second-level SLDs to a policy of severe penalisation, in case they violated the end-user policy.²⁴⁷
- III. Thirdly, in the evaluation and assessment of applications, community involvement is yet another crucial element. There have been two contradictory practices concerning community involvement, however:
- i. With regards to TLDs marking regulated sectors²⁴⁸ and sports ventures,²⁴⁹ a sufficient prospect of material damage and detriment existed if it could be proved that there was a lack of community involvement and a dearth of accountability of the registry to a certain community;
 - ii. A contestation that a potential commercial operation can pave the way for misuse of a certain community, as was observed in the cases of *.gay* and *.amazon*;

In the *.gay* case, three out of the four Applicants intended to bring to operation the said domain name for profit and commercial uses, to which the

²⁴⁶ *Telecommunication Regulatory Authority of the United Arab Emirates (UAE) v Asia Green IT System Bilgisayar SAN VE TIC TLD STI (Turkey)* (Expert Determination) [24 October 2013] ICC Case No EXP/430/ICANN/47 [ss 136-145]; *Telecommunication Regulatory Authority of the United Arab Emirates (UAE) v Asia Green IT System Bilgisayar SAN VE TIC TLD STI (Turkey)* (Expert Determination) [24 October 2013] ICC Case No EXP/427/ICANN/44 [143]-[152].

²⁴⁷ *Telecommunication Regulatory Authority of the United Arab Emirates (UAE) v Asia Green IT System Bilgisayar SAN VE TIC TLD STI (Turkey)* (Expert Determination) [24 October 2013] ICC Case No EXP/430/ICANN/47 [142]; *Telecommunication Regulatory Authority of the United Arab Emirates (UAE) v Asia Green IT System Bilgisayar SAN VE TIC TLD STI (Turkey)* (Expert Determination) [24 October 2013] ICC Case No EXP/427/ICANN/44 [149].

²⁴⁸ *Alain Pellet Independent Objector (France) v Charleston Road Registry Inc (USA)* (Expert Determination) [30 December 2013] ICC Case No EXP/404/ICANN/21 [81]; *International Banking Federation (UK) v Dotsecure Inc (UAE)* (Expert Determination) [16 December 2013] ICC Case No EXP/389/ICANN/6 [163]-[166].

²⁴⁹ *Sportaccord (Switzerland) v Dot Sport Limited (Gibraltar)* (Expert Determination) [23 October 2013] ICC Case No EXP/471/ICANN/88 [158]; *Sportaccord (Switzerland) v Steel Edge LLC (USA)* (Expert Determination) [21 January 2014] ICC Case No EXP/486/ICANN/103 [43.4]; *International Rugby Board v Dot Rugby Limited* (Expert Determination) [31 January 2014] ICC Case No EXP/519/ICANN/132 [76] and [90].

International Lesbian, Gay, Bisexual, Trans & Intersex Association (hereinafter, ‘ILGA’), a human rights organisation furthering the cause of the welfare of the queer community, had taken an objection to – in ILGA’s opinion, a profit motive perusal of a movement of the identity of a marginalised community did major damage and detriment to its members, and could also potentially deprive the community of its gTLD string.²⁵⁰ The expert panel, although empathising with the views of the ILGA and acknowledging that there existed a scope of prejudice and detriment to the LGBTQ+ community held that such detriment was not sufficient grounds to let an objection pass. The reasoning that was given by the expert panel was:

- i. One, an allegation that consists only of the Applicant delegating the string, instead of the Objector, is insufficient for finding material detriment.²⁵¹
- ii. Two, it does not fall within the panel’s ambit of responsibility to determine qualitatively which of the two, the Applicant or the Objector, would be the “better” registry for a gTLD string.²⁵²

Similarly, in the *.amazon* case, the panel was not persuaded by the argumentation that the registration policy of the retailer company Amazon entailed a risk of misappropriation, as it would place a complete stoppage on the domains for purposes of public interest regarding the protection, promotion and awareness on issues regarding the Amazon forests and its indigenous communities – if the exclusive rights of the *.amazon* domain are given to a private enterprise. The panel disregarded the said arguments on the following grounds²⁵³:

- i. One, the panel opined that even if we were to argue that the objection was sustained and the reins of the *.amazon* string were not given to the private company, the Amazon communities would still not be entitled to the usage or ownership of the gTLD string. Therefore, the usage of the strings was not directly or indirectly related to the protection of the Forest or its communities.

²⁵⁰ *The International Lesbian Gay Bisexual Trans and Intersex Association (Belgium) v Top Level Design LLC (USA)* (Expert Determination) [16 November 2013] ICC Case No EXP/392/ICANN/9 [22]-[31]; *The International Lesbian Gay Bisexual Trans and Intersex Association (Belgium) v Top Level Domain Holdings Limited (British Virgin Islands)* (Expert Determination) [16 November 2013] ICC Case No EXP/393/ICANN/10 [21]-[30]; *The International Lesbian Gay Bisexual Trans and Intersex (Belgium) v United Tld Holdco Ltd (Cayman Island)* (Expert Determination) [16 November 2013] ICC Case No EXP/394/ICANN/11 [22]-[31].

²⁵¹ ICANN, ‘gTLD Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 3.5.4].

²⁵² ICANN, ‘gTLD Applicant Guidebook: Module 4’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022.

²⁵³ *Alain Pellet Independent Objector v Amazon EU S À R L (Luxembourg)* Case No EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15) [99]-[105].

- ii. Two, the term “amazon” has been used as a trademark, a brand, and above all, a domain name for nearly 20 years – and there lies no evidence to the contrary that it has been of any detriment or harm to the interests of the Amazon Forest or its communities. Thus, “it is unlikely that the loss of the “.com” after “Amazon” will change the matter. Thus, Amazon, the private enterprise, prevailed – but there is a catch to this case.²⁵⁴

Yet another reason why the *amazon* gTLD case study is considered is to understand the ‘red-tapism’ within the ICANN. The ICANN essentially performs a governmental function: it serves as a regulator of the content of the most widely-used medium of free speech and expression, i.e., the Internet.

Going back to the *amazon* case, the Governmental Advisory Committee began to move against the *amazon* applications,²⁵⁵ and subsequently, procured the dismissal of applications by the Board of Directors of the ICANN.²⁵⁶ As per the provisions of the Guidebook, the Board of Directors should have a strong presumption that a certain application should not be approved if the Governmental Advisory Committee has arrived at a consensus for the same.²⁵⁷ The procedural hurdles within the ICANN hierarchy, which is one of the reasons as a consequence of which the *.hospital* domain dispute got prolonged ad nauseam, is also what made the *.amazon* case so very contentious. After over a year of swinging and taking sides, the Board of Directors of the ICANN finally decided in favor of the Governmental Advisory Committee.

IV. A Global Standard For Freedom Of Expression

ICANN has been an organic, developing enterprise, and with the inception of the New gTLDs Program, it orchestrated a global standard for freedom of expression. One of the more pertinent issues plaguing the ICANN hierarchical structure is the technical mandate necessary to harmonise and synchronise the functioning of the identifiers of the Internet. It indeed is a cumbersome task to produce a uniform standard of what is acceptable and what is not when it comes to the online speech and expression, as there is a substantial diversity of existing laws governing speech and expression globally. In Limited Public Interest objection hearings, some panels believed in placing the “intended

²⁵⁴ *Alain Pellet Independent Objector v Amazon EU S À R L (Luxembourg)* Case No EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15) [103].

²⁵⁵ ICANN Governmental Advisory Committee, ‘GAC Communiqué: Durban, South Africa’ (18 July 2013) <<https://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%c3%a9%20-%20Durban,%20South%20Africa.pdf>> accessed 29 December 2022.

²⁵⁶ ICANN, ‘Approved Resolutions: Meeting of the New gTLD Program Committee’ (14 May 2014) <www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-meeting-of-the-new-gtld-program-committee-14-05-2014-en> accessed 29 December 2022.

²⁵⁷ ICANN, ‘gTLD Applicant Guidebook: Module 3’ (4 June 2012) <<https://newgtlds.icann.org/sites/default/files/guidebook-full-04jun12-en.pdf>> accessed 28 December 2022 [s 3.1].

purpose of the said gTLD” at a higher pedestal, while other panels perused a stricter literal interpretation of the regulations of the Guidebook.²⁵⁸

Surprisingly, the objectives and purposes intended to be achieved by the New gTLD Program have been severely undermined and dented by the discretionary powers granted to the expert panel by the Guidebook – in the absence of the principle of binding precedents (i.e., subsequently formed expert panels shall be bound by the decisions given by formerly constituted expert panels on questions concerning similar subject matters), and of an independent review mechanism which shall aid in the harmonisation of the interpretation standards, the Applicant Guidebook legitimises an anarchical disruption of the gTLD mechanism.

To add on, the Board of Directors, in the face of seeming inconsistency, has aided in particularly prolonging dispute resolution proceedings by pushing for ad hoc review mechanisms. Such ad hoc reviews delay the determination process and unnecessarily increases the number of tiers in which a particular matter is heard before a final finding is arrived at – as was seen in the *.hospital* case, which took over three years to rectify the liberal and broadened interpretation of the original expert panel. Sadly, the *.hospital* case had seen the compromise of the independence of the objection proceedings by incessant interventions by the Board of Directors of ICANN itself.

This calls for substantive and authoritative surgical modifications by ICANN to its hierarchy in light of the over-expansive growth of the Internet and the need to safeguard the interests of its stakeholders. It is also necessitous to regulate and ensure proper policing standards for illegal and pirated content on the Internet, by administrating an increment in the obligations and responsibilities of registrars and domain registries with respect to complaints of abuse with the domains.

CONCLUDING REMARKS

Content neutrality is the way to go. Be it ICANN, or any other national authority which regulates the gTLD mechanism for a particular jurisdiction, the Internet framework has to place content neutrality as its prime concern and priority, not just to avoid contention and controversy, but also to bring legitimacy to best and upright practices. Hence, as long as administrators and regulators of the Internet keep content neutrality as the highest priority and avoid getting bogged down by the appeal of value-centric decision-making, Internet governance will always be anodyne.

²⁵⁸ ICANN, ‘Approved Board Resolutions: Regular Meeting of the ICANN Board’ (3 February 2016) <www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-03-02-2016-en> accessed 29 December 2022.

A system of Internet governance universal resolvability should be put in place – a system, where content neutrality is in perfect tandem with the interests of the members of the global Internet community. This approach will also aid in a halt of censorship measures that are often taken up by many authoritative regimes across the globe.

The New gTLD Program works in the furtherance of unbridled freedom of expression online. However, this mechanism carries threats of censorship on a dual level:

- a. Ambiguous grounds on which the freedom of expression of an Applicant could be curtailed: Although the gTLD itself shall not be affected by this policy, however, owing to a lack of pre-defined terms of what can or what can't be deemed as “potentially offensive or contentious” content, the fate of an application lies entirely on the discretion of the expert panel.
- b. Owing to governmental pressure and duress, the portfolios of the registrars and the registries subsequently now have the direct onus of handling alleged misuse in the domain under their jurisdiction. However, there is no mention of a standard protocol in the Applicant Guidebook to be perused by such registrars and registries in taking appropriate measures – thus potentially jeopardising the Applicant's freedom of expression.

Considering the said assertions, it would be notable to see how the Board of Directors, ICANN, formulate rules and regulations to bring to compliance the New gTLD registries with their Public Interest Commitments.²⁵⁹ It would also be of high interest to see in the coming days to see how the ICANN intends to penalise uncooperative and insubordinate registrars and registries. Lastly, attention is needed as to how the hierarchical structure of the ICANN lies with regard to the “old gTLDs” – and how these domains can be incorporated into the new Registry Agreement.

²⁵⁹ Wikipedia, ‘Public Interest Commitments’ (8 April 2022) <https://icannwiki.org/Public_Interest_Commitments> accessed 29 December 2022.