

REMARKS AT THE DIGITAL BROADBAND MIGRATION: THE DYNAMICS OF DISRUPTIVE INNOVATION

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Last year Dale Hatfield and I agreed that I would come here without a prepared text. Instead, I would sit and listen to the conference and then I would stay up all night to prepare remarks to give at the end of the conference. I found it a challenging but stimulating exercise—at least enough so to agree to reprise it again this year.

But before I turn to this year's discussion, I'd like to update everyone on our progress since last year's conference.

Last year I talked about defining the role of the U.S. government in Internet policy to preserve and enhance the trust of actors on the Internet.¹ And that in carrying out that role, the government should act less as a heavy-handed regulator and more as a facilitator or convener to bring all stakeholders together. This is the multi-stakeholder process you've heard discussed here the last two days.

In the past year, we at the National Telecommunications and Information Administration (NTIA) have pursued several actions to implement these concepts in a meaningful way. With the leadership of Secretary Gary Locke and the participation of other Department of Commerce bureaus, we convened an Internet Policy Task Force to take a hard look at four key areas of Internet policy—privacy, cybersecurity, free flow of information, and online copyright protection.

We have made the most progress in the area of privacy. Last December, after convening a workshop and soliciting comments, we released a green paper containing recommendations on establishing stronger privacy protections in the area of online commercial data.² Our

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1. Lawrence Strickling, *Remarks at the Digital Broadband Migration: Examining the Internet's Ecosystem*, 9 J. ON TELECOMM. & HIGH TECH. L. 255 (2011).

2. DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, CYBERSECURITY,

starting point for our recommendations was that strong privacy protection is necessary to preserve and build the trust of users of the Internet and is indispensable to the continued growth and innovation on the Internet.

Our recommendations also rely heavily on the notion of multi-stakeholderism. We propose that baseline privacy protections be adopted—in legislation or otherwise—but that we then convene stakeholders to develop enforceable, codes of conduct to implement the baseline protections. This process allows us the speed to respond quickly to new issues of consumer privacy and the flexibility to have new protections crafted in the most efficient manner.

We received nearly one hundred sets of comments on these recommendations in January and hope to issue a final policy pronouncement on behalf of the Administration by late spring or early summer.

A second major task for us this past year has been our focus on improving multi-stakeholder organizations, in particular the Internet Corporation of Assigned Names and Numbers (ICANN), the organization responsible for coordinating the Internet's domain name system.

I believe strongly that in order for the concept of multi-stakeholderism to be accepted by the global community, the reality has to meet the vision. That has not always been the case with ICANN. For the past year, I have served with representatives from around the world on a team to review the accountability and transparency of ICANN. The team issued a set of recommendations at the end of 2010 identifying what ICANN needed to do to bring its actual accountability and transparency practices up to the level the community expects.³ The ICANN Board must act on these recommendations by June of this year and we will continue to monitor ICANN closely to ensure it operates to develop consensus in an accountable and transparent manner.

That brief summary now sets the stage for my reactions to this year's conference and its theme of the dynamics of disruptive innovation.

I found yesterday morning's discussion of the tension between disruption and stability most interesting. Much of the discussion was about how technological change disrupts the business plans of incumbents—all fine and good for the most part and not obviously

INNOVATION AND THE INTERNET ECONOMY (2011), *available at* http://www.nist.gov/itl/upload/Cybersecurity_Green-Paper_FinalVersion.pdf.

3. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS [hereinafter ICANN], FINAL RECOMMENDATIONS OF THE ACCOUNTABILITY AND TRANSPARENCY REVIEW TEAM (2010), *available at* <http://www.icann.org/en/reviews/affirmation/atrt-final-recommendations-31dec10-en.pdf>.

threatening to the economic sustainability of the Internet overall.

But Michael Powell sounded a more ominous note with implications for the political sustainability of the Internet when he talked of society's need for stability and lack of disruption serving to oppose the impetus for change. That discussion helped crystallize for me some of my own thinking—that one of the greatest challenges facing the Internet in the next five years is political sustainability, which of course forces us to confront the question of what is the collective role of nation-states with respect to Internet governance.

Can governments collectively operate within the paradigm of a multi-stakeholder environment and be satisfied that their interests are being adequately addressed? If not, the alternative is not a happy one in my mind. There are forces at play which would hand over governance of the Internet to a body of governments—perhaps the International Telecommunication Union. But many people believe a governance structure for the Internet managed and controlled by nation-states would jeopardize the growth and innovation we have enjoyed these past years. They fear the imposition of heavy-handed and economically misguided regulation and the loss of flexibility the current system allows today.

Take standards-setting. As Susan Crawford said yesterday, there are no purely technical standards—all standards are political. Do we really want to replace the IETF—which Level 3's Jack Waters just held out as a success story—with committees of government bureaucrats to settle these issues?

As an example of what might happen, look at the World Radio Conference, which will convene next year in Geneva. If you want to get something on the agenda for next year's meeting, it's already too late. In fact, if you want to get something on the agenda for 2016, you need to submit it now. Five years to be heard. How could such a system possibly apply to the Internet without squeezing all the innovation, speed, and flexibility out of the process?

I suggest today a two-pronged approach to respond to the challenge of engaging governments in multi-stakeholder governance institutions.

First, we need to work to convince governments to accept the global Internet as it is and specifically the multi-stakeholder organizations such as ICANN that provide governance today.

Within the U.S. government, the Office of Science Technology Policy (OSTP), the National Economic Council (NEC), NTIA and other agencies have been working on a proposed set of Internet policy-making principles for which we will be seeking buy-in from other governments.⁴

4. See *Statement on the OECD's Announcement of Principles for Internet Policy-Making at its Meeting on the Internet Economy*, U.S. DEP'T OF STATE (June 29, 2011), <http://www.ntia.doc.gov/press-release/2011/statement-oecd-announcement-principles->

This audience would find the proposals supportive of the innovative, global, multi-stakeholder nature of the Internet environment. We seek, among other principles:

- To promote and protect the global free flow of information;
- To promote an open Internet;
- To create multi-stakeholder policy development processes; and
- To foster voluntarily developed codes of conduct.

We are offering these draft principles at a high-level meeting of the OECD on the Internet economy to be held in Paris at the end of June.⁵ We hope to work with OECD countries to develop consensus on a set of principles and from there, to expand the discussion to other nations around the world.

So that's the first prong of the response.

The second prong relates to the responsibility of existing multi-stakeholder institutions to encourage nation-states to participate more fully in their processes. Organizations such as ICANN need to do more to bring governments into the multi-stakeholder tent.

One necessary step, as I already mentioned, is for the organizations to ensure that the accountability and transparency of their day-to-day operations match the expectations of the global Internet community.

But beyond that, these organizations have to focus on the specific concerns of governments and provide them a meaningful opportunity to participate and be heard.

This will not be easy and will force multi-stakeholder institutions to confront issues they have not satisfactorily managed in the past. As I have stated, we want to avoid the complete subjugation of the Internet to national sovereignty, but it is clear that even if we are successful with the first prong of our strategy, we will not totally replace the individual interests of governments with a transnational approach based entirely on a generically-defined "global Internet community."

It is important for organizations such as ICANN to win endorsement of the multi-stakeholder model from governments. To do so, such an organization needs to ask, as a consensus-based organization, how it will deal with issues where the collective consensus view of governments is to take or not take a specific action. This will require a case-by-case

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5. See *OECD High Level Meeting Provides Framework to Guide Internet-related Policy-making*, U.S. DEP'T OF STATE (June 30, 2011), <http://www.state.gov/r/pa/prs/ps/2011/06/167448.htm>. See also *OECD Council Recommendation on Principles for Internet Policy Making*, ORGANISATION FOR ECONOMIC CO-OPERATION (Dec. 13, 2011), <http://www.oecd.org/dataoecd/11/58/49258588.pdf>.

review for which there are no simple answers.

Let me provide a specific example which is very current—the expansion of top-level domains. Top-level domains, as you know, include .com and .org. ICANN has been considering opening up the top-level domain space to all comers.⁶ Financially, this will be very rewarding to ICANN since it plans to charge an application fee of \$185,000 for each proposed top-level domain name.

Governments have raised a number of concerns since 2007 about the proposed expansion through the Governmental Advisory Committee of ICANN. But until a meeting scheduled for later this month, the ICANN Board has not sat down with the GAC, as it is called, to resolve these differences.

It is widely accepted, including by ICANN, that governments, representing the public interest, have legitimate concerns about certain possible strings such as .nazi. But the question is how to handle government objections within the multi-stakeholder model. If we don't, individual governments may start blocking top-level domains based on their parochial objections which in the longer term may provide ammunition to those who would like to replace the multi-stakeholder model with one that puts governments in charge.

The key to a constructive engagement on these difficult questions is for the ICANN Board to take seriously its role of acting in the public interest by assessing consensus of all relevant stakeholders, including governments.

There is a lot at stake.

First, one of the main goals of ICANN is to preserve a single, global interoperable root. If governments do not feel that ICANN offers a meaningful opportunity for their concerns to be addressed, they likely will start blocking domain names they find objectionable. If blocking becomes the norm, the splintering of the single root is probably inevitable which will have impacts on Internet security as well as the free flow of information. We are very concerned that implementing an expansion of top-level domains in a manner that not only expects but forces governments to block domain names in their countries would present an explicit abandonment by ICANN of the vision of the “single Internet” and that, we submit, is not a good outcome.

Second, from the beginning of ICANN, other governments have criticized the unique role of the United States with respect to the root.⁷ Today, ICANN sends root change requests to NTIA. We verify that

6. Universal Acceptance of All Top-Level Domains, ICANN, <http://www.icann.org/en/topics/TLD-acceptance/> (last visited Dec. 14, 2011).

7. See Kathleen E. Fuller, *ICANN: The Debate Over Governing the Internet*, 2001 DUKE L. & TECH. REV. 2 (2001).

ICANN has followed the agreed processes and procedures and pass the request on to VeriSign, which executes the change. Even though we have never yet rejected a change, there are concerns we could act on our own if we decided to do so.

Just as we addressed this perception of U.S. control over the Internet in the Affirmation of Commitments in 2009,⁸ we see the debate over top level domains as another opportunity to internationalize root zone changes and to do so within the four corners of the ICANN structure.

So how can all of this be accomplished?

We have proposed that the ICANN Board use the already-existing GAC process to allow governments collectively to submit objections to individual applications to top-level domains.⁹ The GAC already operates on a consensus basis. If the GAC reaches a consensus view to object to a particular application, that view would be submitted to the Board.

The Board, in its role to determine if there is consensus support for a given application (as it is expected to do for all matters coming before it), would have little choice but to reject the application.

The benefits of this proposal are numerous:

- It affords governments a meaningful opportunity to raise concerns within the multi-stakeholder model of ICANN and reduces some of the pressure to create a new governance model limited to governments.
- It reduces the likelihood of countries taking unilateral action to block individual domain names and fracturing the root. While the proposal does not guarantee there will be no blocking, it avoids legitimizing it and one would hope that, if a government raises an objection that GAC does not agree with, the government, having failed in its effort to secure a consensus objection, would go ahead and not block the new name once it is added to the root.
- It also provides for greater internationalization of the root and provides for collective government action instead of the perceived unilateral U.S. government control.

This is just one example of the types of challenges multi-stakeholder organizations will face from governments. How well these

8. ICANN, AFFIRMATION OF COMMITMENTS BY THE UNITED STATES DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (2009), *available at* <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

9. ICANN, PROCEDURES FOR REVIEW OF SENSITIVE STRINGS (2011), *available at* <http://www.icann.org/en/topics/new-gtlds/gac-scorecard-sorted-14mar11-en.pdf>.

organizations respond to these challenges will have a major impact on the continued growth and development of the Internet. We should all hope they choose wisely.

Thank you.