

**Session Title:** Content Regulation and Private Ordering at Internet Governance Institutions

**Date:** 20 December 2017

**Time:** 15:00

**Session Organizer:** ICANN Non-Commercial Users Constituency

**Chair/Moderator:** Dr Farzaneh Badii

**Rapporteur/Notetaker:** Ayden Férdeline

**List of Speakers and their institutional affiliations:**

- Dr Annemarie Bridy, Professor of Law, University of Idaho (*remote*)
- Becky Burr, Board Member, ICANN
- Brian Cute, CEO, Public Interest Registry
- Dr Milton Mueller, Professor in the School of Public Policy, Georgia Institute of Technology
- Tim Smith, General Manager, Canadian International Pharmacy Association (*remote*)
- Dr Tatiana Tropina, Senior Researcher, Max Planck Institute

**Key Issues raised (1 sentence per issue):**

- Private ordering is used in Internet governance institutions such as the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN implements policies through contractual agreements and develops policies via a multistakeholder process rooted in non-state actors.
- ICANN's control of the root of the Domain Name System (DNS) creates a centralized "choke point" where control over website content and Internet expression can be exerted by regulating domain name registries and registrars (for instance, by taking down domains or withdrawing licenses to register names).
- Most stakeholders believe that ICANN's authority to coordinate and make policy for the DNS should not be leveraged to make ICANN a content regulator on the Internet.
- Some interest groups, however, put pressure on ICANN to use its power over domains to become an Internet regulator. Most notably, this pressure comes from copyright and trademark interests, law enforcement agencies, and some governments.

**If there were presentations during the session, please provide a 1-paragraph summary for each presentation:**

**Dr Annemarie Bridy** explained that ICANN has traditionally not been involved in content regulation. However, 2013 revisions to the Registry Agreement included commitments on the part of registry operators that flow down contractually to registrars and require them to take action in relation to a range of illegal activities, including specifically piracy and counterfeiting. This contractual obligation has placed ICANN into the territory of content regulation. In 2016, the 'Trusted Notifier' arrangement between Donuts and the Motion Picture Association of America was introduced, allowing 'Trusted Notifiers' to bypass registrars who decline to act in response to MPAA notices. In such cases, Donuts may suspend entire domain names at the registry level without there being due process. This is a form of content regulation in the DNS.

**Dr Milton Mueller** outlined the expanding pressure on DNS intermediaries to take on content regulation responsibilities. He said that online, operational concerns dictate rapid action many times, and the way the ICANN regime approaches this is to give private actors a lot of flexibility to act on a

contractual basis with their customers and hopefully there will be enough competition among actors to prevent them from abusing this power. The idea being that if a registry takes content down arbitrarily, their customers will go elsewhere. However, increasingly governments are stepping in and placing pressure on private mediators. As this is external to the market, it is nothing to do with supply and demand, and thus consumers cannot choose to use a different registry. Registries are thus taking on the responsibility of enforcement of government-issued content regulations, and this has negative implications for human rights.

**Becky Burr** said that ICANN has historically refrained from regulating content, and that ICANN is extremely mindful of the fact that its mission statement expressly forbids it from engaging in content regulation. In regards to Section 11 of the Registry Agreement, she stated that these are voluntary commitments taken on by registrars and registry operators via contractual obligations.

**Tim Smith** spoke about the 'Trusted Notifier' programme and other voluntary initiatives which have emerged. He emphasised the importance of healthy practices when dealing with content regulation but noted that the registration criteria used by these 'Trusted Notifiers' and some registries to accredit some marketplaces (for example, online pharmacies) risks fragmenting the Internet and stifling competition. This is because the adopted criteria would eliminate legitimate participants and limit the availability of services to a national border; which constitute a form of content regulation, and is inconsistent with the cross-border nature of the Internet and the established practices of internet users.

**Brian Cute** said that registry operators should not be arbitrators of content on the Internet. However, he said that they do have takedown policies, primarily utilised to protect the DNS from botnets, malware, and phishing. The only form of content regulation the Public Interest Registry engages in is to remove child abuse imagery and hate speech, which is protected speech unless there is a specific and clear call to violence as that is illegal in the U.S.. He stated that there is a clear process for takedowns and said that registry operators should rely on due process and the rule of law when deciding whether or not to take content down. He is concerned about increasing government pressure to take down content, and industry models that don't reflect the requisite level of due process for takedowns. PIR believes that an important question is how services providers engage with stakeholders when considering adopting new policies. PIR considered an approach to systemic copyright violations but has stepped back from this and is reflecting about the stakeholder engagement process issue.

**Dr Tatiana Tropina** commented on initiatives that are going on in the ICANN community, and by the ICANN organisation, which are providing some kind of driving force for the debates on issues to do with content regulation issues. One of these forces, she said, is the idea of DNS abuse. There are different definitions and understandings as to what kinds of DNS abuse should be reported to ICANN and analysed by ICANN staff. There are also differences in opinion over what kinds of actions ICANN registries and registrars should take in relation to this DNS abuse, when it is confirmed. She also said that while reporting on DNS abuse can be beneficial, it can be equally beneficial to report on abuse of the DNS abuse system: i.e. reporting on numbers of unsubstantiated complaints. Such statistics would help understand how 'trusted' a 'Trusted Notifier' is.

#### **Potential next steps / key takeaways (3 paragraphs):**

- A person in the public gallery noted that there is a difference between regulation and providing voluntarily-adopted guidelines, and said that we should discuss in practical terms what are example of cases where it would be in the public interest for certain actions to be taken, and other cases in which it would not be in the public interest.
- It was noted that the danger with voluntarily formulating best practices is that they become quasi-regulations themselves. Rather, it was suggested that service providers should be clear

and consistent about how they handle certain types of abuse so that consumers can decide for themselves which registry and/or registrar to use.

### **Gender Reporting**

*- Estimate the overall number of the participants present at the session:*

60

*- Estimate the overall number of women present at the session:*

12

*- To what extent did the session discuss gender equality and/or women's empowerment?*

N/A

*- If the session addressed issues related to gender equality and/or women's empowerment, please provide a brief summary of the discussion:*

N/A