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Stymieing Controversy Over Generic Top-Level Domains (gTLDs) and Other Internet Governance Decisions with Content Neutrality

Nafees Uddin*

I. INTRODUCTION

On January 28, 2011, Western news sources reported that the Egyptian government had cut off most of its eighty million residents from the Internet.¹ The Egyptian government ordered all four major Internet service providers (ISPs) to come to a dead stop.² Cafes, businesses, schools, protestors, news outlets, and all others who attempted to access the Internet within Egypt awaited the end of this complete Internet blackout.³ Eventually, Internet access was returned to the populace, but not before it cost Egypt's economy roughly \$110 million in immediate losses.⁴

The uprising in Egypt serves as the latest example of revolutions galvanized and supported by new media technologies. In such grassroots revolutions, the Internet has emerged as a “technology of protest.”⁵ No longer is “freedom of the press guaranteed only to those who own one.”⁶ Increasingly, the Internet is being used to promote the “poorly financed

* My heart-felt thanks to my family, friends, and mentors, who have supported, taught, inspired, and tolerated me over the years and throughout the course of this article. Thank you.

¹ Matt Richtel, *Egypt Cuts Off Most Internet and Cell Service*, N.Y. TIMES, Jan. 28, 2011, at A13.

² *Id.*

³ *Id.*

⁴ Parmy Olson, *Egypt's Internet Blackout Cost More Than OECD Estimates*, FORBES, Feb. 3, 2011, <http://www.forbes.com/sites/parmyolson/2011/02/03/how-much-did-five-days-of-no-internet-cost-egypt/>.

⁵ Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119 (2001).

⁶ Abbot Joseph Liebling, *Do You Belong in Journalism*, THE NEW YORKER, May 14, 1960, at 105.

causes of little people”⁷ by enabling (1) resistance movements to coordinate, assemble, and mobilize their efforts; (2) individuals and organizations to monitor and report heretofore obscured atrocities; and (3) international actors to remonstrate injustices in foreign nations.⁸

Unlike the unprecedented⁹ Internet blackout in Egypt,¹⁰ this article is about Internet censorship at yet another, perhaps more insidious, locus—the website-formation phase. Generic Top-Level Domains (gTLDs)¹¹ are part of the technology that govern which websites are allowed to exist in the first place,¹² and they are the latest arena in the battle over control of the Internet’s infrastructure. This article argues that the concept of *content neutrality* can stymie controversy over specific issues like gTLD-management and the broader issue of Internet governance at large.

This article first addresses how the Internet is a tool for organization and mobilization. Second, this article outlines the background of Internet governance and the underlying technology behind the Internet naming system. Third, this article examines the recent regulations regarding the

⁷ Kreimer, *supra* note 5, at 121.

⁸ *Id.* at 122–26.

⁹ See Olson, *supra* note 6; see also HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SEC. POLICY, JOINT COMMUNICATION TO THE EUROPEAN COUNCIL, THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: A PARTNERSHIP FOR DEMOCRACY AND SHARED PROSPERITY WITH THE SOUTHERN MEDITERRANEAN 12 (2011), available at http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/20110308_en.pdf.

¹⁰ Arguably the most infamous example of such everyday censorship remains China’s Golden Field Project, or as the media has dubbed it, the “Great Firewall of China.” The Great Firewall refers to a massive infrastructure through which politically offensive content is either automatically tagged and blocked or manually blocked by one of, at last count, thirty thousand members of the Internet police. John Markoff, *Iranians and Others Outwit Net Censors*, N.Y. TIMES, May 1, 2009, at A1.

¹¹ Generic Top Level Domains are website addresses that end in a generic category.

Unlike the popular website endings like .com, .gov, or .net, gTLDs are generic categories like .shoes, .maps, or .play, which have only recently been permitted. For a more thorough discussion of gTLDs see later sections addressing tech and gTLD expansion.

¹² *Frequently Asked Questions*, ICANN, <http://newgtlds.icann.org/en/applicants/customer-service/faqs/faqs-en> (last visited Oct. 9, 2012) [hereinafter ICANN].

expansion of gTLDs. In discussing gTLDs, this article addresses various groups that amplify the controversy surrounding gTLD expansion. Fourth, this article discusses alternative means of organizing the Internet's governance structure. Lastly, this article sets forth the best alternative model of Internet governance: content neutrality, which mandates equal treatment of all Internet content regardless of values.

II. ORGANIZATION AND MOBILIZATION

The Internet allows the organizers of movements to instantly mobilize members. Some of the simplest recruitment models convert website visitors into active members and supporters.¹³ As a typical example, the Environmental Defense Fund (EDF) encourages visitors to use their website to contact local and national representatives and advocate on the EDF's behalf.¹⁴ The EDF also engages in another pervasive mobilization tactic, the use of "action alerts."¹⁵ Essentially, organizations garner the email addresses of their sympathizers and use mass e-mail lists (listservs) when issues arise to transmit "action alerts," which then generate floods of emails or phone calls from members.¹⁶

Such cyber-advocacy campaigns can be highly successful. For instance, in 1999, the Libertarian Party successfully overturned a Federal Deposit Insurance Corporation rule regarding disclosure of bank records by directing over 250 thousand complaints via its "Know Your Customer" online campaign.¹⁷ Thus, with online services, organizations not only recruit members with their online presence, but also call their members to action

¹³ Kreimer, *supra* note 5, at 133–34.

¹⁴ *Take Action*, ENVTL. DEF. FUND, https://secure2.edf.org/site/Advocacy?cmd=display&page=UserAction&id=1955&s_subsrc=web_action_content_imgList_button_how-you-can-help (last visited Apr. 1, 2011).

¹⁵ *Id.*

¹⁶ See, e.g., *Current Action Alerts*, ACLU, <http://www.aclu.org/action-center> (last visited, Oct. 9, 2012).

¹⁷ *Our History*, LIBERTARIAN PARTY, <http://www.lp.org/our-history> (last visited Apr. 1, 2012).

with unprecedented speed.

A. Using the Internet to Report Atrocities

Scandals that may have been previously difficult to uncover and, once discovered, would have been nearly impossible to report, are now exposed with the help of the Internet. For instance, WikiLeaks has recently attracted an inordinate level of attention for releasing classified documents from various countries.¹⁸ This and other online investigative journalism efforts have generated documents revealing private corporate scandals (such as insider trading at J.P. Morgan) and governmental human-rights atrocities (such as deplorable conditions at US-maintained prisons in Iraq).¹⁹

Even when such scandals are discovered, journalists often risk their lives and livelihoods by attempting to report them to the general public. For instance, in the volatile and mineral-rich province of Balochistan, Pakistan, political killings aimed at silencing opposition are regularly discovered when the mutilated corpses of lawyers, students, farm workers, and advocates surface.²⁰ Naeem Sabir Baloch, a man responsible for compiling a list of these missing and killed persons for the Supreme Court of Pakistan, was gunned down as well in a recent spate of political executions.²¹ These killings are only now coming to light with the help of the Internet, which provides a forum for nonprofit organizations like the Human Rights Watch to publish reports on such atrocities, which are then broadcast by foreign media outlets.²²

¹⁸ Massimo Calabresi, *WikiLeaks' War on Secrecy: Truth's Consequences*, TIME, Dec. 2, 2010, <http://www.time.com/time/magazine/article/0,9171,2034488,00.html>.

¹⁹ See *About*, WIKILEAKS, <http://wikileaks.org/About.html> (last visited Oct. 9, 2012).

²⁰ *Pakistan: A Human Rights Defender Shot Dead in Balochistan by Unknown Persons*, ASIAN HUMAN RIGHTS COMM'N (Mar. 2, 2011), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-035-2011>.

²¹ *Id.*; Declan Walsh, *Pakistan's Secret Dirty War*, GUARDIAN, Mar. 29, 2011, 6:00 PM, <http://www.guardian.co.uk/world/2011/mar/29/balochistan-pakistans-secret-dirty-war>.

²² See *"We Can Torture, Kill, or Keep You for Years,"* HUMAN RIGHTS WATCH, <http://www.hrw.org/reports/2011/07/25/we-can-torture-kill-or-keep-you-years> (last visited Apr. 2, 2012).

B. International Pressure to Actualize Aspirational Rhetoric

Although the efficacy of international pressure in realizing change can be disputed, it is difficult to deny the widespread use of “soft power” in international relations and the Internet’s importance in soft power tactics.²³ Soft power is part of a larger concept that encourages the use of incentives and reputation to garner cooperation, rather than coercive hard power tactics such as economic sanctions.²⁴ Soft power illustrates the importance of maintaining a positive national reputation to leverage cooperation.²⁵ For example, when various nations met in Bangkok to talk about a replacement for the Kyoto Protocol, China’s position as the world’s largest and fastest-growing polluter compromised its soft power to such an extent that other nations viewed China as the “biggest obstacle” to international environmental consensus.²⁶ Additionally, China regularly faces international pressure via the Internet regarding its appalling human rights record,²⁷ further corroding its soft power. Essentially, international actors often use the Internet to not only discover international scandals, but shame transgressors into conscientious actions.

III. BACKGROUND AND HISTORY OF INTERNET GOVERNANCE

To begin with, this section addresses how the governing infrastructure of the Internet was initially laid out and how it currently stands. Next, this section gives a brief overview of the technology relevant to the organization

²³ See Joseph S. Nye, Jr., *The War on Soft Power*, FOREIGN POLICY, Apr. 12, 2011, http://www.foreignpolicy.com/articles/2011/04/12/the_war_on_soft_power.

²⁴ Joseph S. Nye, Jr., *Limits of American Power*, 117 POL. SCI. Q. 545, 552–53 (Winter 2002–2003).

²⁵ Yan Xuetong, Op-Ed. *How China Can Defeat America*, N.Y. TIMES, Nov. 20, 2011, http://www.nytimes.com/2011/11/21/opinion/how-china-can-defeat-america.html?page_wanted=all.

²⁶ MINGJIANG LI, SOFT POWER: CHINA’S EMERGING STRATEGY IN INTERNATIONAL POLITICS 234 (2009).

²⁷ Andrew Jacobs, *China’s Intimidation of Dissidents Said to Persist After Prison*, N.Y. TIMES, Feb. 17, 2011, www.nytimes.com/2011/02/19/world/asia/19china.html?_r=1&ref=freedomandhumanrights.

and possible restructuring of the Internet.

A. The Internet Corporation for Assigned Names and Numbers (ICANN)

As recently as 1998, one man, Jon Postel, almost exclusively controlled the entire infrastructure of the Internet.²⁸ A founder of the Internet and a professor of computer science at the University of Southern California, Postel held this position of power over the Internet for thirty years.²⁹ Inevitably, the US government, wary of this precarious situation, designed a bespoke entity with the sole purpose of regulating the Internet. This private, non-governmental, nonprofit, was named the Internet Corporation for Assigned Names and Numbers (ICANN).³⁰

After prolonged and heated debate, ICANN was incorporated and recognized by the US Department of Commerce (USDC) in 1998.³¹ Initially, ICANN was solely tasked with establishing and implementing a procedure for registrar accreditation, but eventually ICANN also took on the role of ensuring a durable and competitive domain name registration system that would grant the Internet continued stability.³²

Currently, ICANN's key task is to oversee the domain name system (DNS).³³ In this capacity, ICANN has the power to decide what new domain name suffixes may exist, as well as who can sell and administer them.³⁴ The best known of such suffixes are .com, .net, and .org. By effectively taxing the Internet, ICANN enjoys a sixty million dollar

²⁸ Katie Hafner, *Jonathan B. Postel, a Pioneer of the Internet, Is Dead at 55*, N.Y. TIMES, Oct. 19, 1998, <http://www.nytimes.com/1998/10/19/us/jonathan-b-postel-a-pioneer-of-the-internet-is-dead-at-55.html>.

²⁹ *Id.*

³⁰ *ICANN Fact Sheet*, ICANN, <http://archive.icann.org/en/factsheets/fact-sheet.html> (last visited Oct. 9, 2012).

³¹ *About ICANN*, ICANN, <http://www.icann.org/en/about> (last visited Oct. 9, 2012).

³² *Management of Internet Names and Addresses*, U.S. DEP'T OF COMMERCE (June 6, 1998), <http://www.icann.org/en/about/agreements/white-paper>.

³³ *WDRP FAQs for Domain Name Registrants*, ICANN, <http://www.icann.org/en/resources/registrars/consensus-policies/wdrp/faqs> (last visited Oct. 9, 2012).

³⁴ *Id.*

budget.³⁵

However, despite its power, from its very inception ICANN has been marred by problems of legitimacy and accountability.³⁶ When ICANN was first formed, its board of directors was directly accountable to the Attorney General of California, which gave ICANN a national flavor and called into question ICANN's status as an independent and technical administrator of the Internet.³⁷ Essentially, ICANN's founding and continued operation remained contingent on the permission of the US government.

To this day, the global community does not share the privileged position of influence over ICANN that the US government does.³⁸ This is in part because ICANN abides by a "memorandum of understanding" with the USDC.³⁹ This memorandum empowers the USDC with what amounts to a veto power over ICANN's decisions.⁴⁰ Thus, many in the international community consider ICANN to be a puppet of the US government.⁴¹

The Internet's current status as the most democratic medium of communication,⁴² coupled with its troubled history with regards to

³⁵ *Financial Information for ICANN*, ICANN, <http://www.icann.org/en/about/financials> (last visited Oct. 9, 2012); Dan Gillmor, *Can ICANN Really Be Necessary?*, GUARDIAN, June 23, 2011, <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jun/23/icann-internet-domain-names>.

³⁶ See Kim G. von Arx, *ICANN - Now and Then: ICANN's Reform and Its Problems*, 2003 DUKE L. & TECH. REV. 7, 52–55 (2003); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 45–46 (2000); See also Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (2000).

³⁷ See ICANN ACCOUNTABILITY & TRANSPARENCY FRAMEWORKS AND PRINCIPLES, ICANN 17 (2008), available at <http://www.icann.org/en/about/transparency/acct-trans-frameworks-principles-10jan08-en.pdf>.

³⁸ Froomkin, *supra* note 36, at 93–110.

³⁹ *Id.* at 82.

⁴⁰ Associated Press, *Feds Urge Delay for .XXX Domain*, WIRED (Aug. 16, 2005), <http://www.wired.com/techbiz/it/news/2005/08/68545>.

⁴¹ Froomkin, *supra* note 36, at 168–171.

⁴² Steve DelBianco & Braden Cox, *ICANN Internet Governance: Is It Working?*, 21 Pac. McGeorge Global Bus. & Dev. L.J. 27, 39–40 (2008).

governance,⁴³ begs the question, “does the Internet require supervision?” The answer to this question is partly dictated by technology and partly driven by the underlying policy goal of universal resolvability.⁴⁴ Universal resolvability attempts to ensure predictable results on the Internet when accessed from any physical place.⁴⁵ Since the Internet uses domain names, which are unique alpha-numeric strings (much like residential addresses) to access various Internet resources, a measure of consistency is required.⁴⁶ For instance, 221B Baker Street, London, England, is an address that denotes one particular destination in the entire world. Similarly, www.google.com denotes one particular destination on the Internet. Universal resolvability ensures that a particular address will be the same regardless of the physical location from which the user accesses it.⁴⁷ The goal of a predictable Internet is to ensure that when a person sends an e-mail to a friend, parent, or senator, whether they send that e-mail from home or work, it will reach the intended person.⁴⁸

Due to the pyramidal structure⁴⁹ of the Internet and the goal of a universal Internet, a central regulatory body becomes necessary for decisions of technical management, such as when to assign domain names and to whom they should be assigned. ICANN’s efforts to make such administrative decisions demonstrates that technical decisions can easily be

⁴³ *Id.*

⁴⁴ *Keeping the Internet a Reliable Global Public Resource: Response to New.net “Policy Paper,”* ICANN (July 9, 2001), <http://www.icann.org/en/icp/icp-3-background/response-to-new.net-09jul01.htm>.

⁴⁵ *InterNIC FAQs*, INTERNIC, <http://www.internic.net/faqs/authoritative-dns.html> (last visited Oct. 10, 2012).

⁴⁶ S. Jason Whatley, *The Basics of Internet Domain Names and Trademark Infringement*, 21 AM. J. TRIAL ADVOC. 585, 588 n.22 (1998).

⁴⁷ *Id.*

⁴⁸ *InterNIC FAQs*, *supra* note 45.

⁴⁹ The pyramidal structure of the Internet refers to the hierarchy of servers with the apex being the root zone file. This structure is briefly discussed further in the next section explaining the Domain Name System.

construed and often serve as pivotal policy decisions.⁵⁰

B. Relevant Technology: The Domain Name System and the Hierarchy Behind the URL

This section provides a broad, basic overview of the technological concepts that are essential to understanding the structure of the Internet and to analyzing the controversy surrounding governance of the Internet. First, this section addresses the domain name system and how various Internet sources are named. Second, this section examines the autonomy and structure behind a Uniform Resource Locator (URL). Finally, this section introduces gTLDs and their role in the hierarchy of the Internet.

1. The Domain Name System

Generally, each website, or Internet Protocol (IP) resource, on the Internet is represented by a domain name.⁵¹ An IP address normally consists of a number string, such as 173.194.64.100, that is used by computers to communicate with each other.⁵² Fortunately, each IP may also have equivalent domain names, which serve as user-friendly representations of number strings in the form of various permutations of names and phrases recognizable by users, such as google.com.⁵³ Therefore, though users usually type in a domain name such as google.com, users can also access the same website by typing an IP, “173.194.64.100,” into their Internet browsers (e.g., Internet Explorer, Firefox, Chrome, etc.).⁵⁴

The structure of the domain name system remains much the same as Dr. Postel originally designed it—a pyramidal scheme.⁵⁵ Atop the DNS pyramid is the root-zone file, a small file that contains the names and IP

⁵⁰ Froomkin, *supra* note 36, at 94–95.

⁵¹ See Whatley, *supra* note 46.

⁵² *Id.*

⁵³ Neal J. Friedman & Kevin Siebert, *The Name Is Not Always the Same*, 20 SEATTLE U. L. REV. 631, 633–34 (1997).

⁵⁴ *Id.*

⁵⁵ Weinberg, *supra* note 36, at 197.

addresses for the main Top Level Domains (TLDs) and their authoritative servers.⁵⁶ There are thirteen root-name servers geographically interspersed throughout the world that have the primary task of publishing the one file that provides referrals to computers the world over about the location of a particular Internet resource.⁵⁷

2. Anatomy and Hierarchy of a URL

The anatomy of a URL⁵⁸—the address of a World Wide Web page—reflects the hierarchy inherent to domain names.⁵⁹ For the purposes of this article, the two tiers of the domain name hierarchy that must be acknowledged are (1) second-level domain names, and (2) TLD names.

The most recognizable level of the hierarchy is actually the bottom tier—the second-level domain names. For instance, Google and Nike are second-level domain names because they form the middle part of the website address in www.google.com and www.nike.com, respectively.⁶⁰ TLDs, which are the endings to URLs, such as .com, .org, .edu, and so forth, are the next level up.⁶¹ There are two main kinds of TLDs: country code top-level domains (ccTLDs) and gTLDs.⁶²

Generic terms are names that the public utilize to represent entire classes

⁵⁶ *Id.*

⁵⁷ SANS INST. READING ROOM, HOW SECURE ARE THE ROOT DNS SERVERS? 8 (2003), available at http://www.sans.org/reading_room/whitepapers/dns/secure-root-dns-servers_991.

⁵⁸ URL addresses, or “strings,” consist of three parts (substrings): (1) network protocol, (2) host name or address, and (3) file or resource location. These substrings are separated by special characters as follows: protocol :// host / location. An example would be <https://www.google.com>.

⁵⁹ Marshall Brain & Stephanie Crawford, *How Domain Servers Work*, HOWSTUFFWORKS.COM (Apr. 1, 2000), <http://computer.howstuffworks.com/dns.htm>.

⁶⁰ *Id.*

⁶¹ Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 HASTINGS COMM. & ENT. L.J. 359, 365 (2003).

⁶² *Root Zone Database*, INTERNET ASSIGNED NOS. AUTH., <http://www.iana.org/domains/root/db/> (last visited Oct. 10, 2012) (listing the country-code domains).

or categories of goods and services.⁶³ gTLDs are organized by broad function-based domain names, but only few of these domains are actually policed.⁶⁴ For instance, .com is meant for commercial use, .edu is meant to be reserved for educational institutions, and .gov for government sites.⁶⁵ Specifically, this article focuses on the controversy surrounding gTLDs; websites ending in .shoe, .travel, .find, and so forth are garnering increasing attention in legal and technological circles due to the expansion of available gTLDs.⁶⁶

The hierarchy of a URL not only represents the location of a word in a given URL, but also signifies the generality of its function.⁶⁷ The higher up in the hierarchy, the more power the relevant actor exerts over the Internet. For instance, ccTLDs are assigned to sovereign nations.⁶⁸ So in the address, bbc.co.uk, bbc refers to the second-level domain, .uk refers to the ccTLD.⁶⁹

Also, TLD holders have the authority to license second-level names within their domain.⁷⁰ So, for instance, if Google were to purchase the .search gTLD, Google would control every permutation of .search—such as mail.search, shoes.search, maps.search—and could enable, disable, or divert these addresses as it sees fit.⁷¹ Similarly, ICANN has assigned most countries specific two-lettered ccTLDs, which they now manage themselves.⁷² They can choose to reserve the ccTLD for official

⁶³ Ira S. Nathenson, Comment, *Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction over Squatters, Poachers and Other Parasites*, 58 U. PITT. L. REV. 911, 919 (1997).

⁶⁴ *Id.*

⁶⁵ von Arx, *supra* note 36, at 11.

⁶⁶ Whatley, *supra* note 46, at 586.

⁶⁷ Nancy J. Mertz, *Emerging Legal Issues Related to Domain Names*, 1001 PLI/PAT 207, 209 (2010).

⁶⁸ *Id.*

⁶⁹ *See, e.g., Homepage*, BBC, www.bbc.co.uk (last visited Oct. 10, 2012).

⁷⁰ *See* Rodney A. Myer, *Domains Without Borders: Reconciling Domain Name Dispute Resolution Policies and Trademark Rights Between the United States and the Nations of the European Union*, 20 PENN ST. INT'L L. REV. 415, 422 (2002).

⁷¹ Manheim & Solum, *supra* note 61, at 367.

⁷² *Id.* at 381.

governmental purposes, or, as many small or advantageously named countries have already done, commercially lease domain names within their TLD.⁷³ The Colombian government for instance, which owns .co, has opened up the opportunity to a global user base, and is advertising its market potential to businesses.⁷⁴ Likewise, Cameroon has auctioned off use of its ccTLD, .cm, to a prominent typosquatter⁷⁵ that generates revenue off of pay-per-click ads from any visitors that may happen to misspell the common .com TLD.⁷⁶

C. *The Hullabaloo over gTLDs*

A limited number of gTLDs, just over twenty in total, have been in operation for a number of years without generating much attention.⁷⁷ Oddly, gTLDs have existed for a period of time in relative quiet.⁷⁸ The following eight gTLDs predate even the formation of ICANN: .com, .edu, .gov, .int, .mil, .net, .org, and .arpa.⁷⁹ Even recently, ICANN held two previous application rounds for gTLDs—one in 2000 and another in 2003. The gTLDs approved during the 2000 round were .aero, .biz, .coop, .info, .museum, .name, and .pro. In 2004, .asia, .cat, .jobs, .mobi, .tel, and .travel

⁷³ *Id.*

⁷⁴ *General FAQs*, .CO, <http://www.cointernet.co/frequently-asked-questions/general-co-faqs#q3> (last visited Oct. 10, 2012).

⁷⁵ Typosquatting is a method of using misspellings of popular online consumer destinations to mislead and often scam Internet users. For instance, a shopper might accidentally arrive at the address, www.wurbanoutfitters.com, as opposed to the legitimate Urban Outfitters website. The site might resemble the retailer's home page, but the extra "w" makes all the difference. Typosquatters span the spectrum, from the relatively harmless hosts that only attempt to direct traffic towards advertisements to the more malicious scammers that attempt to phish for user information or infect user computers. TYLER MOORE & BENJAMIN EDELMAN, *MEASURING THE PERPETRATORS AND FUNDERS OF TYPOSQUATTING 1* (2010), available at <http://www.benedelman.org/typosquatting/typosquatting.pdf>.

⁷⁶ Paul Sloan, *The Man Who Owns the Internet*, CNNMONEY, May 22, 2007, http://money.cnn.com/magazines/business2/business2_archive/2007/06/01/100050989/.

⁷⁷ Manheim & Solum, *supra* note 61, at 382–84.

⁷⁸ ICANN, *supra* note 12.

⁷⁹ *Id.*

were also approved.

However, ICANN has brought gTLDs into the limelight by promulgating new rules to govern their operation.⁸⁰ In theory, ICANN's new rules opened the door to a potentially unlimited number of gTLDs, alarming everyone⁸¹ from corporate trademark attorneys at large corporations to opportunistic typosquatters. Now, under the new rules, individuals and organizations can formally apply to ICANN for their very own gTLD string (such as .car, .info, or .tour), and for a fee of approximately \$185 thousand, in addition to other technical requirements, enjoy all the rights in the bundle of rights⁸² that a property owner would.⁸³ Consequently, gTLD owners can then allow others' use of second-level domain names on their gTLD.⁸⁴ For instance, if Google buys .search, it can license the use of restaurant.search, to a third party.⁸⁵

Understandably, ICANN has established a detailed application procedure to implement the new gTLDs.⁸⁶ In fact, ICANN was meticulous and extremely reticent when implementing the new gTLD expansion program to avoid upsetting online commerce.⁸⁷ The program is the result of forty-seven comment periods, which included over 2,400 comments, fifty-five explanatory memoranda or independent reports, and seven drafts of the

⁸⁰ See generally *New Generic Top-Level Domains*, ICANN, <http://newgtlds.icann.org/en/> (last visited Oct. 10, 2012).

⁸¹ Mertzél, *supra* note 67, at 212–21; DelBianco & Cox, *supra* note 42, at 35.

⁸² See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (referring to the “bundle of rights that are commonly characterized as property”). First-year property law courses sometimes conceptualize property ownership as a “bundle of rights,” differentiating between the right to: (1) exclude, (2) transfer, (3) possess, and (4) use.

⁸³ See generally ICANN, *supra* note 12.

⁸⁴ *Id.*

⁸⁵ 4 J. THOMAS MCCARTHY, PROPOSALS FOR ADDITIONAL TOP-LEVEL DOMAINS, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:72.50 (4th ed. 2008).

⁸⁶ See ICANN, GTLD APPLICANT GUIDEBOOK (2011), available at <http://archive.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf>.

⁸⁷ *ICANN to Munich: “New gTDs Could Benefit All Internet Users,”* ICANN, <http://newgtlds.icann.org/en/program-status/past-events/reports/new-gtlds-munich-27sep11-en> (last visited Nov. 2, 2012).

Applicant Guidebook.⁸⁸ ICANN first began accepting applications for new gTLDs on January 12, 2012.⁸⁹ Organizations that have chosen to apply to operate a TLD have merely begun a journey that will most likely continue into 2013.⁹⁰

To begin the application process, applicants submit an online application outlining their ability to support a gTLD string.⁹¹ Besides requiring supporting documentation and assurances, ICANN will not begin the evaluation process until it receives the full gTLD evaluation fee of \$185 thousand.⁹²

After the first-round application process closed in mid-April 2012, ICANN publicly announced all the gTLD strings seeking approval on “Reveal Day,” May 1, 2012.⁹³ This was more than just a transparency measure; this public posting signaled the initiation of a comment and objection period.⁹⁴ Anyone who wanted to submit comments or objections⁹⁵ had to do so within seven months of the posting.⁹⁶ An independent panel responsible for overseeing applications for the new gTLDs was appointed to evaluate all comments and objections.⁹⁷ After the comment period ended, the evaluation process began.⁹⁸

⁸⁸ *Id.*

⁸⁹ *New gTLDs: What to Expect in 2012*, ICANN, <http://newgtlds.icann.org/en/announcements-and-media/announcement-23jan12-en> (last visited Oct. 10, 2012).

⁹⁰ *Id.*

⁹¹ ICANN, *supra* note 12, at 6.

⁹² *Id.* at 44.

⁹³ *New gTLDs: What to Expect in 2012*, ICANN, <http://newgtlds.icann.org/en/announcements-and-media/announcement-23jan12-en> (last visited Oct. 16, 2012).

⁹⁴ *See id.*

⁹⁵ As of October 21, 2012, the list of formal objections has not yet been released. *See Pending Cases*, INT’L CHAMBER OF COMMERCE, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/pending-cases/> (last visited Oct. 14, 2012).

⁹⁶ ICANN, *supra* note 12.

⁹⁷ *Id.*; ICANN, NEW GENERIC TOP-LEVEL DOMAINS FACT SHEET 2 (2011), *available at* <http://archive.icann.org/en/topics/new-gtlds/gtld-facts-31jul11-en.pdf>.

⁹⁸ *Id.*

As part of the evaluation process, ICANN first conducts “string reviews,” which focus on whether an applied-for gTLD is confusingly similar to an existing gTLD, whether the gTLD violates a reserved string, whether it contributes to DNS instability, and whether it is an impermissible geographic name.⁹⁹ Second, ICANN conducts “applicant reviews” to ensure that applicants possess the appropriate technical, operational, and financial capabilities to run a gTLD.¹⁰⁰ Depending on the application, the following additional procedures might take place: (1) extended evaluation period (an option that an applicant may invoke if denied at the initial evaluation stage);¹⁰¹ (2) dispute resolution (an option that might be available when processing formal objections);¹⁰² or (3) string contention¹⁰³ (an option that occurs in the event of multiple applications for the same name).¹⁰⁴

ICANN predicts that the earliest of the new gTLDs will be ready for use in early 2013.¹⁰⁵ At that point, maintenance of the gTLD will also require a significant investment by those that choose to purchase a gTLD string.¹⁰⁶ For instance, the purchase of a gTLD is a ten-year commitment,¹⁰⁷ and ICANN charges owners of gTLDs recurring annual fees of \$25 thousand for the continued use of their gTLD strings.¹⁰⁸

The new gTLD program, though not technologically groundbreaking, constitutes a considerable broadening of the naming palette of the Internet. More importantly, the new program is not a hasty measure; ICANN mulled over this expansion for years before methodically implementing it.¹⁰⁹

⁹⁹ *Id.*

¹⁰⁰ ICANN, *supra* note 12, at 1–8.

¹⁰¹ *Id.* at 4–3.

¹⁰² *Id.*

¹⁰³ *Id.* at 4–5.

¹⁰⁴ *Id.*

¹⁰⁵ ICANN, *supra* note 12.

¹⁰⁶ *See id.* at *New GLTD Agreement Appendix*.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at *Preamble*.

Nonetheless, the expansion of available gTLDs is garnering a high level of controversy that is not commensurate with the simple addition of more generic names.¹¹⁰

IV. SOURCES OF CONTROVERSY BEHIND THE EXPANSION OF gTLDs

Some of the potential sources of controversy regarding the expansion of gTLDs include (1) how the change in technology will affect consumers;¹¹¹ (2) how financially incentivized parties, such as trademark owners, could be threatened by the increase of generic domain names;¹¹² and (3) how moral groups¹¹³ often insist that morality be taken into account when permitting new gTLDs.¹¹⁴

A. Do New gTLDs Alter the Consumer Experience?

While others may argue to the contrary, having new gTLDs on the market is unlikely to alter the consumer experience. gTLDs are not new technology; they are simply the ending of website URLs, such as .com, .net,

¹¹⁰ See Mertzel, *supra* note 67, at 209; see also Derek du Preez, *ICANN Now Accepting Applications for Controversial New gTLDs*, COMPUTING.CO.UK (Jan. 12, 2012), <http://www.computing.co.uk/ctg/news/2137100/icann-accepting-applications-controversial-gtlds>.

¹¹¹ Oscar S. Cisneros, *Domain Fights Could Get Nasty*, WIRED NEWS, Nov. 13, 2000, <http://www.wired.com/news/politics/0,1283,40129,00.html>.

¹¹² Pamela Segal, *Attempts to Solve the UDRP's Trademark Holder Bias: A Problem That Remains Unsolved Despite the Introduction of New Top Level Domain Names*, 3 CARDOZO ONLINE J. CONFLICT RESOL. 1, 4 (2001), available at <http://www.cojcr.org/vol3no1/notes02.html>.

¹¹³ This article uses the term “moral groups” to classify values-based advocacy groups that engage in moral censorship, specifically, advocacy groups that promulgate their own particular moral scale or ethical perspective by suppressing and condemning certain online content. For instance, both prolife and prochoice advocates in the abortion debate, groups against pornography, groups against Nazi-speech, and most religious groups, denounce certain content based on their own particular moral sensitivities as opposed to objective economic incentives.

¹¹⁴ Mertzel, *supra* note 67, at 213; Daithi Mac Sthigh, *More Than Words: The Introduction of Internationalised Domain Names and the Reform of Generic Top-Level Domains at ICANN*, 18 INT'L J.L. & INFO. TECH. 274, 294–98 (2010).

or .org, and have been in operation since the existence of domain names.¹¹⁵

Moreover, the use of search engines has diluted, or at least severely palliated, the impact of more available gTLDs.¹¹⁶ As an end-user,¹¹⁷ amid the prevalence of search engines and equipped with the likes of Google, Bing, Yahoo, and others, the new gTLDs pose no marked development because they do not alter the user experience.¹¹⁸ Further numbing the impact of releasing new gTLDs into the market is the fact that many companies use domain names that are not necessarily intuitive to a customer seeking them out for the first time on the World Wide Web.¹¹⁹ Although some in the field maintain that domain names will survive the evolution of the Internet, the utility of domain names has already been sidelined. Proponents of the continued use of URLs equate them to the survival of telephone numbers despite the telecom revolution and the copious advancements therein.¹²⁰ However, few individuals memorize telephone numbers; rather, most individuals simply rely on data entries and contact information stored on

¹¹⁵ See Weinberg, *supra* note 36, at 196.

¹¹⁶ Manheim & Solum, *supra* note 61, at 482–84.

¹¹⁷ According to Merriam-Webster, an end user is the “ultimate consumer of a finished product.” The product in this case is an online business, and the end user is an online consumer. *End User*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/end-user> (last visited Oct. 10, 2012).

¹¹⁸ See Mark Gibbs, *A Site by Any Other Name*, NETWORK WORLD, Apr. 19, 1999, at 82, available at <http://www.networkworld.com/archive/1999b/0419gibbs.html> (suggesting abandoning domain names in favor of Internet Protocol addresses found through search engines). Google gets an estimated 900 million unique visitors each month. See Amir Efrati, *Google Notches One Billion Unique Visitors Per Month*, WALL ST. J., June 21, 2011, <http://blogs.wsj.com/digits/2011/06/21/google-notches-one-billion-unique-visitors-per-month>.

¹¹⁹ Manheim & Solum, *supra* note 61, at 367.

¹²⁰ Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 736, n.105 (2003). Telephone subscribers began to be designated by numbers rather than names in 1879, prompted by a concern that the human operators of telephone switchboards would fall ill in an epidemic of measles and then be replaced by inexperienced operators who did not know everyone’s names. See JOHN BROOKS, TELEPHONE 74 (1976) (noting that “the epidemic quickly passed, but telephone numbers did not”).

cell phones.¹²¹ Unlike telephone numbers, which still retain some utility when transferring contact information between users,¹²² website URLs are difficult to type out fully. Especially in the context of sharing specific content, such as media on YouTube or a particular article on the New York Times webpage, the full URL is typically so lengthy and convoluted that the vast majority of users simply copy and paste hyperlinks so that the intended recipient can simply click on a link.¹²³ Acknowledging this trend, companies such as YouTube and the New York Times have included sharing options on their pages that allow the user to avoid typing out the full URL.¹²⁴

Regrettably, companies do not necessarily own all the various iterations and misspellings of their names, which inevitably leads to frustrating detours and misadventures by those Internet users who try to guess the URL for a company.¹²⁵ For example, General Motors owns gm.com and generalmotors.com but not generalmotor.com.¹²⁶ Similarly, Barnes & Noble owns bn.com and barnesandnoble.com but not barnesandnobles.com or bnn.com.¹²⁷ Amidst this confusion, consumers understandably rely on search engines to visit new websites and rely on pre-arranged bookmarks for commonly visited websites.¹²⁸ According to a 2008 survey conducted by the Pew Center, almost half of all Internet users (49 percent) now use search

¹²¹ Sarah M. Nir, *Dumbed-Down Dialing*, N.Y. TIMES, Aug. 27, 2010, http://www.nytimes.com/2010/08/29/fashion/29Noticed.html?_r=0.

¹²² *Id.*

¹²³ The length of URLs has led to a side-industry in URL shortening, the specifics of which are beyond the scope of this article. Jenna Wortham, *Googl Challenges Bit.ly as King of the Short*, N.Y. TIMES, Dec. 14, 2009, <http://bits.blogs.nytimes.com/2009/12/14/googl-challenges-bitly-as-king-of-the-short/>.

¹²⁴ See YOUTUBE, www.youtube.com (last visited Oct. 10, 2012); N.Y. TIMES, www.nytimes.com (last visited Oct. 10, 2012).

¹²⁵ Moor & Edelman, *supra* note 75.

¹²⁶ Compare GM.COM & GENERALMOTORS.COM, with GENERALMOTOR.COM.

¹²⁷ Compare BN.COM & BARNESANDNOBLE.COM, with BARNESANDNOBLES.COM & BNN.COM.

¹²⁸ Sthigh, *supra* note 114, at 287.

engines on a typical day.¹²⁹

Perhaps one flaw of search engines is that they are sponsored by paid ad placements.¹³⁰ This means that rather than listing links based on relevance to the query, search engines auction off the top spots in the list of results to the highest bidder.¹³¹ This inexorably means that search engine results will never be as efficient as typing a full URL.¹³² However, the convenience of search engines and the corresponding inconvenience of typing out a full URL, make the latter, though not extinct, nevertheless obsolete.

B. Should Financial Stakeholders Worry About New gTLDs?

Parties whose financial interests are at stake because of the new ICANN regulations are the next group associated with the fracas over gTLDs.¹³³ Like any new regulation, the economic interests of various parties are necessarily involved. From trademark owners that fear that gTLDs might land in the hands of their competitors¹³⁴ (for instance, Nike not wanting .shoe to go to Adidas) to those that want to make money off this latest development¹³⁵ (like domain name squatters of the .com age that hope

¹²⁹ Using search engines as an online activity is second only to e-mail; 60 percent of Internet users engage in some sort of e-mailing on a typical day. Deborah Fallows, *Almost Half of All Internet Users Now Use Search Engines on a Typical Day*, PEW INTERNET & AM. LIFE PROJECT (Aug. 6, 2008), http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Search_Aug08.pdf.pdf.

¹³⁰ 4 LOUIS ALTMAN & MALLA POLLACK, ON-LINE PRACTICES—ATTENTION GETTING MECHANISMS—KEYWORD ADVERTISING (INCLUDING THE ISSUE OF “TRADEMARK USE”), CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONONOPOLIES § 22:41 (4th ed. 2011).

¹³¹ *Id.*; See also *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-05340 2005 WL 832398 (N.D. Cal. 2005) (discussing American Blind & Wallpaper Factory’s allegations that the result of Google’s keyword purchase program was to divert consumers seeking American Blind’s products to their competitors’ products).

¹³² *Id.*

¹³³ Mertz, *supra* note 67, at 210.

¹³⁴ Milton Mueller, *ICANN and Internet Governance: Sorting Through the Debris of “Self-Regulation,”* 1 INFO 497, 501–02 (1999).

¹³⁵ See Chris Irvine, *Top Ten Most Expensive Domain Names*, TELEGRAPH, Mar. 10, 2010, <http://www.telegraph.co.uk/technology/news/7412544/Top-10-most-expensive->

companies like Microsoft will pay them off for owning the rights to .window), many parties have a stake.¹³⁶ Theoretically, businesses would prefer to use generic terms for their domain names because it would attract new website traffic and offer an intuitive web address for existing customers.¹³⁷ Trademark attorneys for concerned companies must find a way of protecting the marks registered to these businesses as well as giving them an option to capitalize on the expansion of available generic terms.¹³⁸ This is especially true for online stores since domain names serve as the primary gateway for businesses engaged in the buying and selling of goods and services on the Internet.¹³⁹

There are three primary reasons why groups with financial interests need not be concerned by the new ICANN regulations regarding gTLDs. First, as far as trademark owners are concerned, their rights are protected by the new regulations.¹⁴⁰ Not only can trademark owners contest another party's application for a gTLD bearing trademarks that belong to them, but they can also pursue traditional trademark infringement remedies for gTLDs.¹⁴¹

domain-names.html; *see also* *Cybersquatting Statistics Reflect Concern Over gTLDs*, *Say Lawyers*, WIPR (Sept. 14, 2012), <http://www.worldipreview.com/newsstory.asp?ID=34>.

¹³⁶ *See* Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1129 (2002). "Any person who registers a domain name that consists of the name of another living person, or a name substantially and confusingly similar thereto, without that person's consent, with the specific intent to profit from such name by selling the domain name for financial gain to that person or any third party, shall be liable in a civil action by such person." *Id.*

¹³⁷ *Benefits of a Generic Domain Name*, VERDANT INDUS., <http://www.verdantindustries.com/generic-domain-names.php> (last visited Oct. 10, 2012) (outlining some of the marketing benefits of gTLDs); *see also* MARK MONITOR, EVALUATING NEW TOP-LEVEL DOMAINS: OPPORTUNITY OR THREAT? 1 (2011), *available at* <https://www.markmonitor.com/download/wp/wp-gTLD.pdf>.

¹³⁸ William D. Schultz, *gTLD Expansion: What Your Business Needs to Know*, AM. BUS. J., http://www.abjusa.com/legal/gtld_expansion_what_your_business_needs_to_know.html (last visited Oct. 10, 2012).

¹³⁹ Eric T. Fingerhut & P.L. Skip Singleton, Jr., *The Gtld-Mou: A Yellow Flag for Trademark Owners on the Information Superhighway*, 38 IDEA 281, 290 (1998); Manheim & Solum, *supra* note 61, at 366.

¹⁴⁰ *See* MCCARTHY, *supra* note 85, at § 18:53.

¹⁴¹ David Njarian, *Internet Domains and Trademark Claims: First Amendment Considerations*, 41 IDEA 127, 128 (2001).

Granted, trademark holders must expend resources to police new gTLDs for such violations.

Nonetheless there are incentives for the creation of new gTLDs and TLDs for rightful trademark owners. Under current trademark law, multiple companies with the same name can exist and have valid trademarks as long as this does not create a conflict in the marketplace.¹⁴² For example, United Airlines, United Healthcare, and United Van Lines can all co-exist without such conflict because they are in different markets. However, there can be only one united.com domain name. Thus, businesses that are displaced by large and long-standing competitors can find similar prominence by acquiring their own gTLD or their own mark on another TLD (for example, even though United Airlines owns united.com,¹⁴³ United Van Lines can purchase the .united gTLD or simply the united.net TLD).

Second, typosquatting is unlikely to be as problematic or as prevalent with gTLDs as it was with second-level domain names. Second-level domain names can be purchased relatively inexpensively (often less than ten dollars),¹⁴⁴ thus making it a financially worthy endeavor if they generate advertisement revenue from pay-per-click ads, and a worthy gamble if one of a few hundred names owned were to garner a settlement with a large corporation. However, unlike second-level domain names, gTLDs cost approximately \$185 thousand and require a lengthy approval process to acquire, thus making them unattractive to opportunistic domain name profiteers.¹⁴⁵ Moreover, numerous anti-cybersquatting laws have already

¹⁴² Robert G. Bone, *Taking the Confusion Out of Likelihood of Confusion: Toward a More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307, 1315 (2012), available at <http://www.law.northwestern.edu/lawreview/v106/n3/1307/LR106n3Bone.pdf>.

¹⁴³ See UNITED AIRLINES, www.united.com (last visited Oct. 10, 2012).

¹⁴⁴ See ALLBUSINESS, <http://www.allbusiness.com/technology/internet-domain-names/2629-1.html#axzz27qmFgseU> (last visited Oct. 10, 2012).

¹⁴⁵ ICANN, DEFENSIVE APPLICATIONS FOR NEW GTLDS: SUMMARY AND ANALYSIS OF PUBLIC COMMENT 5 (Mar. 14, 2012), available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CEkQFjAH&url=http%3A%2F%2Fwww>

cropped up for the more malicious forms of typo-squatting that attempt to mimic trademarks or otherwise mislead consumers.

Third, from the limited statistics available at this early stage, many in the industry have already embraced the market-potential of the new gTLDs. As of March 25, 2012, 839 distinct groups had submitted applications for at least one gTLD string.¹⁴⁶ According to research commissioned by Melbourne IT Digital Brand Services (DBS)—a California-based consultancy focused on brand protection—approximately 150 companies have approached the company about applying for gTLDs.¹⁴⁷ According to Melbourne IT DBS, the interest in purchasing a gTLD broken down by industry segment is approximately (1) entertainment, publishing, and media industry (19 percent); (2) financial services (19 percent); (3) information technology and telecommunications (15 percent); (4) travel and tourism (7 percent); and (5) consumer goods industries (7 percent).¹⁴⁸ Of the companies that expressed interest in applying for a gTLD, 92 percent expressed interest in applying for their main brand, a further 9 percent were interested in pursuing a product brand gTLD in addition to their main brand, and 11 percent were interested in applying for a generic term.¹⁴⁹ Notably, the average market capitalization¹⁵⁰ of these interested parties is roughly

w.icann.org%2Fen%2Fnews%2Fpublic-comment%2Freport-comments-new-gtlds-defensive-applications-14mar12-en.pdf&ei=EXV8UJEmgoSLAqLsgZAG&usg=AFQjCNFLuwbla8 2xs3Xs23xQOAmZaeHHAg.

¹⁴⁶ *Program Statistics*, ICANN (June 13, 2012), <http://newgtlds.icann.org/en/program-status/statistics>.

¹⁴⁷ Statistics cited have been compiled by Melbourne IT DBS of information from 150 organizations with headquarters in the United States, Europe, and the Asia-Pacific region. *Reasons Cited for Considering a .brand*, DIGITALBRANDNEWS (Aug. 6, 2011) (on file with author) [hereinafter DIGITALBRANDNEWS].

¹⁴⁸ *Id.*

¹⁴⁹ Anthony O'Donnell, *ICANN's New Top-Level Domain Name Program Forces Insurers to React*, INS. & TECH. (June 20, 2011), <http://www.insurancetech.com/regulation/icanns-new-top-level-domain-name-program/230900040>.

¹⁵⁰ Market capitalization is often used as a proxy for a company's unofficial net worth. *Economics A-Z*, ECONOMIST, <http://www.economist.com/economics-a-to-z/m#node-21529453> (last visited Oct. 10, 2012).

\$36.7 billion.¹⁵¹ When investigating the motive of the applicants, Melbourne IT DBS reports that nearly half the companies, 48 percent, were interested in protecting themselves against brand infringement, while 45 percent were interested in creating a competitive advantage.¹⁵²

As a whole, financially incentivized parties have already leaped at the opportunity to integrate the new gTLD program. Although some of these actors feel coerced into defensive registrations meant to protect their interests rather than embracing new market potential, financial stakeholders do not seem opposed to the new gTLDs in principle.

C. Do gTLDs Raise Questions of Morality?

Another group blamed for drumming up controversy over gTLDs are moral groups.¹⁵³ There are many in the global community who believe that the United States has a monopoly, particularly a moral hegemony that does not respect the differing values of other nations, over the Internet.¹⁵⁴

Groups outside the Western world are jockeying for influence over the values-based decisions that are part of the administrative process of regulating the Internet.¹⁵⁵ For instance, one of the gTLDs that has been applied for is “.gay.”¹⁵⁶ Soon after its application, Saudi Arabia released a statement declaring its opposition to such a domain name.¹⁵⁷ The actual objection made by a representative of the Communications and Information Technology Commission (CITC) of the Kingdom of Saudi Arabia states that “many societies and cultures consider homosexuality to be contrary to

¹⁵¹ O'Donnell, *supra* note 149.

¹⁵² DIGITALBRANDNEWS, *supra* note 147.

¹⁵³ For definition of the term “moral groups,” see *supra* note 113.

¹⁵⁴ *US Must Hand Over Internet Control to the World*, PEOPLE'S DAILY ONLINE, Aug. 18, 2012, <http://english.peopledaily.com.cn/90777/7915248.html>.

¹⁵⁵ See *.sex Considered Dangerous*, THE INTERNET SOC'Y (2004), <http://www.apps.ietf.org/rfc/rfc3675.html>.

¹⁵⁶ *Saudi Arabia Opposes .gay Internet Domain Name*, BBC NEWS, Aug. 14, 2012, <http://www.bbc.co.uk/news/technology-19259422>.

¹⁵⁷ *Id.*

their culture, morality or religion. The creation of a gTLD string which promotes homosexuality will be offensive to these societies and cultures.”¹⁵⁸ Though such an ardent denial of a domain name that may contain inflammatory content smacks of a restriction on free speech, some nations in the world do not harbor the same freedom-of-expression values as the United States does.¹⁵⁹

Further still, even some groups in the United States have not always shied away from imposing their morality on the most democratic of mediums. Some have advocated for stopping internet-based tobacco sales through domain name seizure.¹⁶⁰ A court in the United States has ruled, albeit in a narrow holding, that domain names do not currently constitute speech.¹⁶¹ Specifically, in *Name.Space, Inc. v. Network Solutions, Inc.*, the Second Circuit upheld a government policy that limited the creation of gTLDs because “little if any meaningful expression can be attributed to current gTLDs.”¹⁶² The court concluded that since existing gTLDs lack sufficient expressive content, they do not constitute protected speech under the First Amendment and can be censored.¹⁶³ However, the court did leave open the possibility that certain domain names and new gTLDs could amount to protected speech: “The time may come when new gTLDs could be used for an expressive purpose such as commentary, parody, news reporting, or criticism.”¹⁶⁴ A recent example of the reach of such moral groups,

¹⁵⁸ *Application Comment Details*, ICANN, <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/6154> (last visited Oct. 10, 2012).

¹⁵⁹ See *Obama’s Speech to the United Nations General Assembly*, N.Y. TIMES, Sep. 25, 2012, http://www.nytimes.com/2012/09/26/world/obamas-speech-to-the-united-nations-general-assembly-text.html?pagewanted=all&_r=0; see also *Internet Censorship*, AMENSTY INT’L USA, <http://www.amnestyusa.org/our-work/issues/censorship-and-free-speech/internet-censorship> (last visited Oct. 5, 2012).

¹⁶⁰ Aaron Burstein, *Stopping Internet-Based Tobacco Sales Through Domain Name Seizure*, 16 HEALTH MATRIX: J. L.-MED. 279 (2006).

¹⁶¹ *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2nd Cir. 2000).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 579–80 (internal quotation marks omitted).

especially those inside the United States, is the controversy over the .xxx gTLD. Before the new rules expanding the available gTLDs were implemented, a proposal to permit a .xxx gTLD was suggested to accommodate the adult-entertainment industry.¹⁶⁵

Many supported this development as a way to demarcate and reduce an accidental frolic into adult content, making such adult content easier to filter in corporate, educational, and parental-control environments.¹⁶⁶ Others, including many in the adult-entertainment industry, opposed such a move because they believed it to be an attempt to marginalize the adult entertainment industry by either fencing it in or fencing it out.¹⁶⁷ Curiously enough, some that opposed the .xxx domain believed that it would marginalize the adult entertainment industry, especially if its existence was followed by a requirement to move to such a domain.¹⁶⁸ This notion is not just outlandish paranoia, but has been suggested as a legitimate approach to regulating the Internet by zoning domain name space much like actual real estate.¹⁶⁹

Still others, who also opposed the creation of this new domain, believed that such a demarcation would grant the adult industry new legitimacy and permanency that would only highlight its status in our society.¹⁷⁰ For instance, India has already declared that it will block access to the .xxx

¹⁶⁵ M. Scott Donahey, *ICANN Dispute Resolution Guidelines*, 1 INTERNET L. AND PRAC. § 16:3 (last updated July 2012).

¹⁶⁶ Sthigh, *supra* note 114, at 296–97.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Patty Chan, Comment, *Safer (Cyber)Sex With .XXX: The Case for First Amendment Zoning of the Internet*, 39 Loy. L.A. L. Rev. 1299 (2006).

¹⁷⁰ Sthigh, *supra* note 114, at 296–97; Associated Press, *Approval of '.xxx' Domain Delayed a Month*, MSNBC, Aug. 17, 2005, <http://www.msnbc.msn.com/id/8973683>; Declan McCullagh, *Bush Administration Objects to .xxx Domains*, CNET NEWS (Aug. 15, 2005, 5:25 PM), http://news.com.com/2100-1028_3-5833764.html.

domain.¹⁷¹ The USDC received approximately six thousand letters and emails from individuals expressing concern about the impact of pornography on families and children, and opposing the formation of a new TLD devoted to adult content.¹⁷²

Additionally, Manwin, the company that operates the Playboy website, has sued ICANN and others, alleging that the “creation of the .xxx TLD, forces owners of trademarks and domain names in other Top Level Domains (TLDs), such as .com, to purchase expensive defensive registrations from ICM to prevent cybersquatters or others from exploiting those names in .xxx.”¹⁷³ There may be a legitimate concern here, as ICANN is charging \$60 annually for each .xxx registration, which is ten times the fee of other comparable TLDs.¹⁷⁴ Nevertheless, ICM, the Internet registry in charge of the .xxx domain, boasts that it has already received over eighty thousand applications for .xxx domain names and expects to earn \$200 million in annual profits.¹⁷⁵

In the United States, many politicians moved to quash the nascent domain name to appease their constituents.¹⁷⁶ Nevertheless, to the chagrin of many politicians and countries, .xxx was recently approved and has been

¹⁷¹ Julka Harsimran, *India to Oppose the .XXX Domain for Porn Sites*, ECON. TIMES (Mar. 24, 2011, 6:25 AM), http://articles.economicstimes.indiatimes.com/2011-03-24/news/29181495_1_new-domain-internet-corporation-websites.

¹⁷² Letter from Michael Gallagher, Assistant Sec’y for Comm’n & Info., Dep’t of Commerce, to Dr. Vinton Cerf, Chairman of the Bd., ICANN (Aug. 15, 2005), *available at* <http://www.icann.org/correspondence/gallagher-to-cerf-15aug05.pdf>.

¹⁷³ Press Release, Manwin, *New Allegations of Anti-competitive Practices By ICANN And ICM Disclosed In Manwin Antitrust Suit* (Feb. 17, 2011), *available at* <http://www.manwin.com/pdf/press4.pdf>.

¹⁷⁴ *Id.*

¹⁷⁵ *Porn Sites Sue Internet Regulator over .xxx Web Address*, BBC, Nov. 21, 2011, <http://www.bbc.co.uk/news/technology-15816630>.

¹⁷⁶ Kevin Poulsen, *Worst Tech Moments 2005*, WIRED (Dec. 27, 2005), <http://www.wired.com/news/technology/0,69918-0.html>.

open to subscriptions since late 2011.¹⁷⁷ The passage of this domain has actually provoked a further cry for accountability from ICANN. Moreover, in addition to domain name speculators trying to profit from cybersquatting, even college campuses are snagging up .xxx domain names in order to prevent pornographic websites offering up coeds under the banner of their namesake.¹⁷⁸ For example, University of North Carolina at Chapel Hill has already purchased tarheels.xxx, and intends to purchase UNC.xxx and UniversityofNorthCarolina.xxx.¹⁷⁹ Thus, although moral authorities and the commotion they mobilize have a large impact on what web addresses see the light of day, moral groups oppose particular web addresses for their offensive content, not the advent of new gTLDs generally.

D. Political Stakeholders as Impetus of gTLD Debate

As previously discussed, it is difficult to attribute any one particular group with amplifying the controversy regarding new gTLDs. The new gTLDs are unlikely to rustle the feathers of consumers, who will notice little difference in their day-to-day use. Similarly, though some financial actors oppose the development of new gTLDs, many actually support the gTLD expansion as another potential profit-generating branch. Moral groups do not inherently oppose new gTLDs, simply those they deem to be offensive. Although these groups reflect explicit complaints, beyond the narrative of financial and moral interests lies a battle for control of the Internet itself with powerful international actors at the helm: countries. Therefore, a key, underlying reason behind the controversy over the new gTLDs stems from sovereign nations vying for a voice in the administration

¹⁷⁷ Jacqui Cheng, *ICANN Approves .XXX Red-Light District for the Internet*, WIRED (Mar. 19, 2011), <http://web.archive.org/web/20110322164758/http://www.wired.com/epicenter/2011/03/icann-approves-xxx/>.

¹⁷⁸ Lindsay Goldwert, *Colleges Buying Up XXX Domain Names to Prevent Porn-Site Confusion*, N.Y. DAILY NEWS, Nov. 15, 2011, <http://www.nydailynews.com/life-style/colleges-buying-xxx-domain-names-prevent-porn-site-confusion-article-1.977778>.

¹⁷⁹ *Id.*

of the Internet.¹⁸⁰ The history of Internet governance makes the United States' hegemony over the Internet glaringly apparent, and the United States insists on maintaining such dominance for the foreseeable future.¹⁸¹ Recent letters between USDC officials and ICANN suggest that such exclusive influence is likely to continue.¹⁸²

The effort of language-based equality advocates is another emblematic example of the international community striving to gain more access and control over the Internet. Language-based equality advocates have successfully lobbied ICANN to begin supporting the use of non-Latin scripts in URLs and TLDs.¹⁸³ ICANN has mulled over the possibility of introducing foreign scripts in domain names for over a decade.¹⁸⁴ The first countries to take advantage of this new technology have been Arab nations—Egypt (رص), Saudi Arabia (ةيدوعسلا), and United Arab Emirates (تارام) have opted for fully native script, written from right to left.¹⁸⁵ Cyrillic and Chinese scripts have also already been approved for

¹⁸⁰ Liza Porteus Viana, *US: New Battle Brewing at ITU Will 'Determine the future of the Internet'*, INTELLECTUAL PROP. WATCH (June 1, 2012), <http://www.ip-watch.org/2012/06/01/us-new-battle-brewing-at-itu-will-determine-the-future-of-the-internet/>; Letter from Stuart Lawley, Chairman of the Bd., ICM Registry, to Paul Twomey, Chief Exec. Officer, ICANN (Aug. 15, 2005), available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.icann.org%2Fen%2Fnews%2Fcorrespondence%2Flawley-to-twomey-15aug05-en.pdf&ei=ZIt8UM2LA6XyigKVloEg&usq=AFQjCNFME3ZZIpbJ124CSahoXfEhDHtdRQ>.

¹⁸¹ Kevin Poulsen, *U.S. Maintains Control of Net*, WIRED (Nov. 16, 2005), http://www.wired.com/news/politics/0,1283,69592,00.html?tw=wn_tophead_1.

¹⁸² Letter from Mohamed Sharil Tarmizi, Chairman, Gov't Advisory Comm., to ICANN Bd. of Dirs. (Aug. 12, 2005), available at <http://www.icann.org/correspondence/tarmizi-to-board-12aug05.htm> (discussing the policy reasons underlying the US government's current opposition to the implementation of the .xxx gTLD).

¹⁸³ *'Historic' Day As First Non-Latin Web Addresses Go Live*, BBC, May 6, 2010, <http://www.bbc.co.uk/news/10100108>.

¹⁸⁴ Michael Pattison et al., *New Generic Top-Level Domains And Non-Latin Script*, 10 NO. 8 E-COMMERCE L. REP. 15 (2008).

¹⁸⁵ *Beckstrom Highlights Benefits of New gTLDs for Arabic Speaking*, ICANN (Oct. 10, 2011), <http://newgtlds.icann.org/en/program-status/past-events/reports/beckstrom-newgtlds-highlights-arabic-10oct11-en>.

implementation.¹⁸⁶ This integration of foreign scripts discourages fragmentation of the Internet, as China and Thailand had already provided local workarounds for native support.¹⁸⁷

In addition, various developing countries have already demanded internationalization of the Internet. Some have demanded that an international body, like the United Nations, regulate the Internet.¹⁸⁸ Other nations have gone so far as to threaten the creation of alternative networks that rival the Internet, which would fragment the online landscape.¹⁸⁹ For example, German computer engineers are currently building such an alternative,¹⁹⁰ and China has already created three native script TLDs that create websites inaccessible to those outside of China.¹⁹¹ Many of these alternatives have existed since the beginning of the Internet, but have only recently gained the traction necessary to successfully balkanize the Internet, perhaps due to the development of further technological expertise.¹⁹²

As a result, ICANN has lost legitimacy and the current ICANN means of regulating the Internet have become far too parochial to suit a global audience. While the above listed reasons may contribute to the controversy behind the expansion of gTLDs, the real driving force behind the continued debate over gTLDs is the effort of sovereign nations vying for control over the infrastructure of the Internet.¹⁹³ Thus, gTLDs serve as an opportunity for

¹⁸⁶ Peter Sayer, *Chinese Language Top-Level Domains Win ICANN Approval*, COMPUTERWORLD (June 25, 2010, 11:54 AM), http://www.computerworld.com/s/article/9178525/Chinese_language_top_level_domains_win_ICANN_approval.

¹⁸⁷ *Net Gets Set for Alphabet Changes*, BBC, Nov. 16, 2009, <http://news.bbc.co.uk/2/hi/technology/8362195.stm>.

¹⁸⁸ JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 171 (2006).

¹⁸⁹ *Id.*

¹⁹⁰ Christopher Rhoads, *Endangered Domain: In Threat to Internet's Clout, Some Are Starting Alternatives; Rise of Developing Nations, Anti-U.S. Views Play Role; A Pioneer Raises an Alarm; Off-Limits Sites in China*, WALL ST. J., Jan. 19, 2006, at A1.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See von Arx, *supra* note 36, at 24–28.

countries to gain a foothold in the currently US-monopolized Internet.

V. ALTERNATIVE METHODS OF INTERNET GOVERNANCE

There are those who believe that the Internet can survive devoid of cumbersome regulation.¹⁹⁴ However, most in the technological field, having reviewed the structure of the Internet, accept that some central body is necessary to make daily, commonplace, administrative decisions, such as which web addresses are permitted to exist.¹⁹⁵ Even the simplest of decisions regarding the Internet often become highly politicized, and a call for a body with ironclad legitimacy and global support is heard. ICANN failed to achieve this purpose, and thus needs replacement. There are several alternatives that may succeed it: instituting a governmental veto, moving control to the International Telecommunication Union, zoning the Internet, and introducing content neutrality.

A. Obama's Proposal: Governmental Veto

The Obama administration, via the USDC's National Telecommunications and Information Administration (NTIA), proposed a government veto procedure that it hoped would resolve the global uproar over gTLDs in particular, and Internet governance at large.¹⁹⁶ However, this proposal was rejected by ICANN.¹⁹⁷

The Obama administration had proposed to amend domain approval procedure to include a mandatory review by an ICANN advisory panel

¹⁹⁴ Jean-Pierre Auffret & Jeffrey H. Matsuura, *Technological Change, Telecommunications Deregulation, Telecommunications Economics, and Internet Globalization*, INET CONFERENCES, http://www.isoc.org/inet98/proceedings/5c/5c_3.htm#s14 (last visited Nov. 2, 2012).

¹⁹⁵ Sthigh, *supra* note 114, at 276.

¹⁹⁶ Ian Shapira, *Obama Administration Joins Critics of U.S. Nonprofit Group that Oversee Internet*, WASH. POST, Mar. 1, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/28/AR2011022803719.html>.

¹⁹⁷ Declan McCullagh, *No Support for U.S. Proposal for Domain Name Veto*, CNET (Feb. 28, 2011, 4:00 AM), http://news.cnet.com/8301-31921_3-20037090-281.html.

consisting of representatives from approximately one hundred nations.¹⁹⁸ President Obama's plan would have allowed a nation to raise an objection to a proposed TLD for any reason.¹⁹⁹ In the event of an objection by a member nation, a second nation would have been required to defend the proposed name.²⁰⁰ Without a sponsor to combat such an objection, the proposed domain name would have been summarily rejected.²⁰¹

Currently, governments can provide their input and advice during the TLD approval process, but members of the ICANN board retain final decision-making authority.²⁰² The latest version of ICANN's procedure allows anyone to file an objection to a proposed domain suffix on the grounds of a violation of the "norms of morality and public order," but ICANN retains the final decision.²⁰³ The Obama administration's scheme had hoped to create an explicit governmental veto over all new TLD names, including gTLDs.²⁰⁴

The NTIA hoped this proposed procedure would quell international calls to vest control of the Internet in the hands of the not-so-business-friendly United Nations.²⁰⁵ For instance, last year China and some of its allies demanded that rather than vesting ICANN with "unilateral control of critical Internet resources," a specialized agency within the UN framework

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See id.*

²⁰² Shapira, *supra* note 196.

²⁰³ ICANN, EXPLANATORY MEMORANDUM: "QUICK LOOK" PROCEDURE FOR MORALITY AND PUBLIC ORDER OBJECTIONS, *available at* <http://archive.icann.org/en/topics/new-gtlds/morality-public-order-quick-look-28may10-en.pdf> (last visited Oct. 11, 2012); ICANN, STANDARDS FOR MORALITY AND PUBLIC ORDER RESEARCH 3 (2009), *available at* <http://archive.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>.

²⁰⁴ Shapira, *supra* note 196.

²⁰⁵ Declan McCullagh, *U.S. Seeks Veto Powers Over New Domain Names*, CNET (Feb. 7, 2011, 4:00 AM), http://news.cnet.com/8301-31921_3-20030809-281.html; Declan McCullagh, *No Support for U.S. Proposal for Domain Name Veto*, CNET (Feb. 28, 2011, 4:00 AM), http://news.cnet.com/8301-31921_3-20037090-281.html.

would be a more competent body.²⁰⁶

The problems with the Obama administration's plan of governmental veto were manifold. First, although each government was to be given the power to veto, their vetoes were subject to veto by every other government with a comparable right.²⁰⁷ Thus, in a true controversy, or even in matters of mild disagreement, Internet governance would likely retain the status quo and could remain deadlocked on a majority of issues. It is unlikely that the rapid progress of the Internet thus far would have been possible under such a conservative and overbearing regulatory policy. Second, though the US government proposed a step towards internationalization by providing a voice to foreign nations, its actions rang hollow, primarily because the comparable veto power of an opposing nation rendered any power granted useless. Moreover, this scheme would still have been regulated under the auspices of ICANN, and unlike a truly international body, the United States continues to exert undue influence over it.

B. Other Ways to Internationalize the Internet

Many have called for internationalization of the Internet, such as moving the regulatory powers from ICANN to the International Telecommunication Union, an UN-controlled body.²⁰⁸ Although it may seem like the only legitimate alternative is to vest control over the Internet in the hands of an international body like the United Nations,²⁰⁹ such a course of action gives rise to concerns as well. If repressive countries are granted the opportunity to use their influence or veto powers to restrict free speech and push

²⁰⁶ U.N. ECON. AND SOC. COUNCIL, COUNCIL BRIEFED ON CYBERSECURITY, ALSO DISCUSSES PLANS FOR UPCOMING 2011 FOURTH UNITED NATIONS CONFERENCE ON LEAST DEVELOPED COUNTRIES, ECOSOC/6444 (July 16, 2010), *available at* <http://www.un.org/News/Press/docs/2010/ecosoc6444.doc.htm>.

²⁰⁷ McCullagh, *supra* note 205.

²⁰⁸ GOLDSMITH & WU, *supra* note 188.

²⁰⁹ Press Release, ICANN Internationalization of the Internet Takes Center Stage at ICANN Seoul Meeting, (October 21, 2009), *available at* <http://www.icann.org/en/news/releases/release-25oct09-en.pdf>.

national agendas over liberty interests, the result would be contrary to the very spirit of the Internet.²¹⁰ Many consider such opposition to internationalization to be simply xenophobic rationalizations, especially since the national and cultural sensitivities of the West have been integrated into the Internet since its inception.²¹¹ However, the current status of the Internet as a tool of the masses relies on freedom of speech as a core value; thus, the entire status of the Internet is threatened by censorship.²¹²

C. Creative Approaches to Internet Governance: Zoning the Internet

A creative approach to governance of the Internet that has been suggested by scholars is zoning.²¹³ Under the zoning approach, the Internet would be cordoned off based on a given audience or content, such as a children-friendly zone of the Internet or an all-adult entertainment zone restricted to the .xxx domain. One author juxtaposes the physical and the virtual world in the following manner:

Many similarities exist between the physical world and the virtual world of the Internet. Similar to a sprawling metropolis, the Internet is made up of an organization of networks, consisting of several private organizations, universities, and government agencies. In fact, in 1993, about 40,000 networks and 20 million users comprised the Internet. Recent statistics indicate a significant increase to approximately 972 million users worldwide or a little more than fifteen percent of the 6.4 billion people in the world. Just as smaller cities and towns are access points for individuals to different services, regional networks provide and maintain Internet access within a geographic area.²¹⁴

²¹⁰ Craig Labovitz, *Middle East Internet Scorecard (February 12 – 20)*, ARBOR SERT (Feb. 20, 2011), <http://asert.arbornetworks.com/2011/02/middle-east-internet-scorecard-february-12-%E2%80%93-20/>.

²¹¹ Kenneth Keniston, *Software Localization: Notes on Technology and Culture*, (Program in Sci., Tech., and Soc’y, Massachusetts Inst. of Tech., Working Paper No. 26, 1997), available at <http://stuff.mit.edu/people/kken/PDF/Software%20Localization.pdf>.

²¹² Kreimer, *supra* note 5, at 119.

²¹³ Chan, *supra* note 169.

²¹⁴ *Id.*

The author uses this comparison to argue that just as First Amendment protections have been applied to the Internet and expressions therein, land-zoning laws should also be applied to protect certain demographics on the Internet and to organize online content.²¹⁵

So far, the US Supreme Court has resisted such efforts to apply real-property laws to Internet governance—the Court does not view the online world as a parallel of the physical.²¹⁶ Though the physical world and the online world have undeniable similarities, they are conceptually different. Such carve-outs for the Internet serve as one-dimensional solutions and are inappropriate for the regulation of thought and expression. Moreover, the imputation of such national zoning ordinances or other similar statutory schemes still relay values from a particular society, which, when generalized to the entire world, cause a conflict of national and cultural values.

D. Content Neutrality as a Workable Solution

The best solution to the problems of Internet governance lies not in remedying the lack of a governing authority, or moving towards further internationalization of the Internet, but in the concept of content neutrality. Similar to advocates who seek to promulgate net neutrality,²¹⁷ content neutrality proposes the equalization of all content devoid of values-based attribution. Content neutrality mandates equal treatment of content regardless of values.

1. Net Neutrality

Net neutrality is a principle that stems from the idea that ISPs should treat

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Carol M. Hayes, *Content Discrimination on the Internet: Calls for Regulation of Net Neutrality*, 2009 U. ILL. J. L. TECH. & POL'Y 493 (2009).

all sources of Internet data or traffic equally.²¹⁸ Major ISPs, such as Comcast,²¹⁹ have opposed net neutrality and lobbied for the freedom to create a hierarchy in their rate structure that would allow them to give preferential treatment to those customers who pay for faster transmission.²²⁰ A hierarchical rate structure would also permit ISPs to discriminatorily give preferential treatment based on the source of content or by devoting minimal resources to certain content sources.²²¹

Currently, every website on the Internet is treated identically by service providers whether the website is foreign, corporate, fringe, or otherwise.²²² Proponents of net neutrality argue that this equal plane has been pivotal to the development of the Internet, as it allowed nascent entrepreneurs to compete with large-scale competitors.²²³ Without net neutrality, startup businesses may potentially be unable to afford the same speed and quality of Internet access that their better-established competitors may enjoy.²²⁴

2. Content Neutrality Harmonized with Private Interests

Whereas net neutrality faces severe opposition because it interferes with private interests, commercial interests content neutrality is unlikely to face such hurdles. One of the primary critiques of net neutrality is that it wrested control of resource allocation from ISPs rather than deferring to their expertise. Because of this opposition, net neutrality has never been adopted,

²¹⁸ *Net Neutrality*, N.Y. TIMES, Dec. 22, 2010, http://topics.nytimes.com/topics/reference/timestopics/subjects/n/net_neutrality/index.html.

²¹⁹ *Comcast Corp. v. FCC*, 600 F. 3d 642 (D.C. Cir. 2010).

²²⁰ KATHLEEN ANN RUANE, CONG. RESEARCH SERV., THE FCC'S AUTHORITY TO REGULATE NET NEUTRALITY AFTER *COMCAST V. FCC* 1 (2011), available at <http://www.fas.org/sgp/crs/misc/R40234.pdf>.

²²¹ *Id.* at 26–27.

²²² *See id.*

²²³ *See* Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179, 182 (2008) (answering the arguments made by net neutrality proponents).

²²⁴ *See id.* at 215.

despite multiple Congressional²²⁵ and agency²²⁶ efforts to implement it.²²⁷ Moreover, Comcast recently won a suit against the US Federal Communications Commission (FCC) over regulations that tried to impose net neutrality on bandwidth allocation.²²⁸

Rather than advocating for all sources of data traffic to be treated equally, proponents of content neutrality endorse non-discrimination in the treatment of content from various sources.²²⁹ Essentially, content neutrality is a mandate to filter the political and moral from the technical, and to allow Internet governance decisions to only be based on the latter.²³⁰ This would

²²⁵ Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. (2008). The House version of the bill was perhaps prompted in part by the Comcast-BitTorrent dispute addressed below. The version of the bill introduced in 2008 would have required the FCC to hold hearings about the throttling of Internet traffic by ISPs. See Scott M. Fulton, III, *New Legislation Could Lead to ISP Throttling Ban*, BETANEWS, http://www.betanews.com/article/New_legislation_could_lead_to_ISP_throttling_ban/1202944440 (last visited Oct. 11, 2012); Kim Dixon, *Lawmaker Plans Bill on Web Neutrality*, REUTERS, Nov. 14, 2008, <http://www.reuters.com/article/technology/News/idUSTRE4AC7SU20081114>.

²²⁶ *Madison River Communications*, 20 F.C.C.R. 4295, 4297–98 (2005) (examining the subject matter in the context of a DSL provider that was alleged to discriminate against customers' use of VoIP); *AT&T Inc.*, 22 F.C.C.R. 5662, 5727 (2007) (discussing the potential for blocking Internet content in the context of the dissolution of Adelphia, and the redistribution of Adelphia's assets to Time Warner and Comcast); *AT&T, Inc.*, 22 F.C.C.R. 5662, 5727 (2007) (finding no evidence that the merger will result in the firm engaging in packet discrimination or degradation).

²²⁷ Edward Wyatt, *House Votes Against 'Net Neutrality'*, N.Y. TIMES, Apr. 8, 2011, http://www.nytimes.com/2011/04/09/business/media/09broadband.html?_r=1.

²²⁸ *Comcast Corp. v. FCC*, 600 F. 3d 642, (D.C. Cir. 2010).

²²⁹ Ted Nesi, *R.I. Firms Mull New Net Neutrality*, PROVIDENCE BUS. NEWS (Oct. 7, 2009), <http://www.pbn.com/RI-firms-mull-new-net-neutrality-rules,45291>.

²³⁰ Instances of content-based censorship by Internet Service Providers do occasionally surface in the popular media. See, e.g., Stacey Kramer, *AT&T Silences Pearl Jam; Gives 'Net Neutrality' Proponents Ammunition*, PAIDCONTENT.ORG (Aug. 10, 2007, 4:45 AM), <http://www.paidcontent.org/entry/419-att-silences-pearl-jam-gives-net-neutrality-proponents-ammunition/>; Associated Press, *Censoring of Son Was an Error, AT&T Says*, N.Y. TIMES, Aug. 10, 2007, at C6; David Prince, *Who Else Did AT&T Censor?*, DAILY SWARM (Aug. 12, 2007), <http://www.thedailyswarm.com/swarm/blue-room-who-else-did-t-censor/>; Eliot Van Buskirk, *Crew Member: Previous AT&T Show Had "No Politics" Policy*, WIRED (Aug. 13, 2007, 8:26 AM), <http://blog.wired.com/music/2007/08/crew-member-pre.html>.

be not only at the ISP level²³¹ for bandwidth allocation, but for all governing decisions, including approval of proposed domain names. Thus, private interests are aligned with content neutrality in maximizing available domain names and utility.

Internet governance solutions suggested until now take measures to find a common ground, a means of pluralistically incorporating the moralities of various nations and cultures. Rather than taking fundamental American values and superficially overlaying foreign moralities, which in many cases may restrict free speech, content neutrality proponents suggest abandoning all such values-based decisions in the regulation of the Internet.

Unsurprisingly, such a hands-off approach requires a body capable of administering decisions with unquestionable impartiality. ICANN, since its inception, has never achieved the independent status that it was designed to convey to the wider world, and though it may not have been biased in its rulings, it has always appeared biased. Bodies that respond to sovereign interests, such as the United Nations, are incongruent with the regulatory proposal of content neutrality since such bodies favor national governmental goals and values rather than objectively furthering whatever is technically possible.

The next organization in charge of administering the Internet must also be a non-governmental organization.²³² Even ICANN, which some would consider a non-governmental organization in name alone,²³³ derived

²³¹ Verizon blocked text messages disseminated by an abortion rights group as “controversial or unsavory.” The resultant public outcry forced Verizon to drastically reverse course. Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1; Jessica E. Vascellaro & Dionne Searcey, *Verizon Reversal Highlights Challenges*, WALL. ST. J., Sept. 28, 2007, at B4.

²³² See Pedro Fonseca, *Cerf Sees Government Control of Internet Failing*, REUTERS, Nov. 14, 2007, <http://www.reuters.com/article/2007/11/14/us-internet-cerf-idUSN1420689320071114?sp=>.

²³³ See Weinberg, *supra* note 36, at 244.

substantial benefit from that status.²³⁴ The United States was able to extend the reach of the Internet in controversial ways while shielding itself from international scorn by officially delegating ICANN with such power. For instance, when ICANN granted Taiwan a country code in 2002, China immediately contacted the USDC to inquire whether the United States had officially recognized Taiwan as a sovereign.²³⁵ The United States was able to deflect a foreign relations quagmire by resting blame on ICANN.²³⁶ Such privatization can, and must, shield the leadership of countries from interest groups that advocate for further censorship of domain names.

Some could argue that content neutrality is a thinly veiled attempt to promote the American or Western values of freedom of speech and serves no real-world standard at all. However, even Western moralists who objected to .xxx as granting obscenity an exalted status will be sidelined by content neutrality. Expressions that the majority of the West finds abhorrent will likely also be permissible under a content neutrality test. Under content neutrality, technical possibility is the only threshold to creation; if it is technically possible then it ought to be permitted regardless of the content.

Additionally, for any real world issue, content neutrality serves as a simple enough litmus test: if one has taken the step of divorcing matters of taste from matters of capacity, and if it turns out that a proposed measure is possible, then it passes muster under the content-neutrality test. Thus, under a content neutrality setting, domains such as .xxx and .gay would be approved without compunction unless there are technical or other legal issues, such as a domain name conflict or trademark infringement, that forbid them.

²³⁴ Kenneth Neil Cukier, *Who Will Control the Internet?*, N.Y. TIMES, Nov. 8, 2005, http://www.nytimes.com/cfr/international/20051101facomment_v84n6_cukier.html?_r=1&oref=slogin&pagewanted=print.

²³⁵ *Id.*

²³⁶ *Id.*

VI. CONCLUSION

Ultimately, whichever body controls the infrastructure of the Internet needs to have content neutrality as its highest priority to legitimize controversial decisions. Although ICANN has lost legitimacy by failing to represent international interests, even ICANN can make decisions for the betterment of the Internet. So long as the administrators of the Internet harbor content neutrality as their central tenet and shy away from becoming mired in values-based decisions with national interests or morality in mind, governance of the Internet will become less controversial.

With content neutrality as the focus, domain names like .xxx and .gay would be presumed acceptable, unless contrary technical evidence is presented. Internet governance ought to reflect a unifying model that furthers the underlying goal of universal resolvability, a paramount interest since the inception of the Internet. The crucial aspect that will facilitate the implementation of this program is that such content neutrality aligns perfectly with the interests of financial actors that support market forces in the regulation of the Internet.

Realistically, the immediate and perfect adoption of content neutrality as a tenet will not cease censorship of the Internet overnight. Nations such as Saudi Arabia and China will likely continue to censor the Internet for their local populations. Nor will content neutrality serve as panacea to the human rights atrocities and political upheavals such as those witnessed in Egypt. Content neutrality will, however, levy pressure upon the nations of the world to adopt practices and behaviors that align with their rhetoric of content neutrality. In so doing, an automated content-neutrality process avoids catering to parochial moralities; it transcends sovereign interests and aims to serve humanity at large with a universal and free medium.