Sovereignty and Property Rights: ICANN, ccTLDs and national governments

Milton Mueller, Professor, Georgia Institute of Technology School of Public Policy
Farzaneh Badii, Doctoral candidate, University of Hamburg Law & Economics
Country code Top Level Domains

- ccTLDs as ‘sovereign’ space?
  - Do governments have a sovereign right to decide who the delegee is?
- Property rights claims of litigants
  - Are TLD delegations property rights?
- Both issues raised in recent litigation
  - Ben Haim, et al v. Islamic Republic of Iran et al.
  - Also C. Itoh v. Congo
The delegation of ccTLDs

• Delegation: who is assigned the globally unique TLD?

• A seemingly technical act by the DNS root zone administrator implies:
  • An act of recognition and acceptance by the IANA
  • The ongoing provision of a service (updates and name service) by IANA
  • An exclusive award of a valuable asset

• Policy/political questions raised by delegation:
  • If there are competing applicants, who should get it?
  • Is the recognition/acceptance revocable? If so, on what grounds?
  • Can the asset be attached?
  • Do states have a sovereignty claim over delegation?
Theories of sovereignty & ccTLDs

• Krasner’s 4 types of sovereignty:
  1. International legal sovereignty (mutual recognition by other states)
  2. Westphalian (exclusion of external actors from authority structures)
  3. Domestic sovereignty (effective control of territory)
  4. Interdependence sovereignty

• ccTLD units seem to correspond to type 1, but a ccTLD is not a domestic “authority structure”
  • Sovereignty over ccTLD delegation does not provide a national government with control of all TLDs accessible in its territory
  • States can regulate registries and users in their jurisdiction without controlling delegation
Critique of sovereignty claims

• U.S. control of the root fuels sovereignty claims
  • US control of the DNS root is ending (we hope!)

• DNS is a name space created by private actors
  • A semantic reference to a country does not justify state control over the administration of the semantically related unit of a name space
  • Examples:
    • Library categorization schemes
    • Directory structures on a computer based on country names
Property rights and ccTLD delegations

• Characteristics of a property right in L&E theory:
  • The right to use
  • The right to exclude
  • The right to the benefits or revenues generated by a resource
  • The right to transfer it to others

• All four of these apply to a domain name assignment
  • By definition a domain name assignment is exclusive
  • Domains have value, the registrant can benefit and exclude others from those benefits
  • TLDs can be and often are traded (.TV, .CC, .ME)
Domains as property…or service?

• What is being litigated?
  • Most cases involve TLD registries vs. second-level registrants
  • Registries say SLD domain is a contract for service, registrants say it is a property right

• Courts have ruled both ways, but...
  • Recent cases tend toward property

• TLD registries supply a contracted service to users
  • But the possession of a unique top level domain name is an essential input to the provision of a registry service

• Most rulings that it is a service are focused on whether the economic value of a domain can be seized (garnished)
  • .IR case: ccTLDs are not property subject to attachment under District of Columbia law, but may be property
## Governance scenarios

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<thead>
<tr>
<th>Sovereignty over delegation</th>
<th>Property right</th>
<th>Public Trustee</th>
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</thead>
<tbody>
<tr>
<td>Sovereignty over delegation</td>
<td>A (Mercantilist)</td>
<td>B (PTT)</td>
</tr>
<tr>
<td>No sovereignty over delegation</td>
<td>C (Free trade)</td>
<td>D (RFC 1591)</td>
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What is the best policy choice?

• Sovereignty: Yes or No?
  • Upside: global diversity and distribution of authority
  • Downside: Government overrides all other stakeholders

• Property right or public trustee?
  • Upside: TLDs are in a competitive market and recognizing property rights encourages investment and allows ownership and management to respond more flexibly
  • Downside: Less leverage for public authorities to influence their management
Recommendations

• The Mercantilist option
  • Worst of both worlds

• The PTT (Post, Telephone and Telegraph) model
  • Another step toward the balkanized Internet?

• The Global Public Trustee model
  • Centralizes too much power in ICANN

• The Free Trade model
  • Best for domain name registrants in a competitive, globalized market