



Sovereignty and Property Rights: ICANN, ccTLDs and national governments

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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

	Property right	Public Trustee
Sovereignty over delegation	A (Mercantilist)	B (PTT)
No sovereignty over delegation	C (Free trade)	D (RFC 1591)

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