

**Contribution: on the need to maintain the role of the State over the mission of allocating the Internet resources.**

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Points 1 and 2 of the Request for Comment raise the issue about the model of governance for the allocation of the Internet resources.<sup>1</sup> Our contribution is limited to the address of this issue and aims at demonstrating the need of maintaining the role of the State over the mission of allocating the Internet resources as long as its authority is legally limited by the public values at stake within this field.

We will undertake this demonstration by first developing the theoretical argument that the State is legitimate to play a role over the public policy issues of the Internet resources (I) and second by proposing the possible models governance that this approach is underpinning (II).

#### I. Argument about the legitimacy of the State over the public policy issues of the Internet resources

When reflecting on the issue of the model of governance for the mission allocating the Internet resources first it must be acknowledged that the mission contains public issues which can justify the role of the State as long as finally its authority is legally limited for the protection of those values.

First the mission of allocating the Internet resources involves three kinds of public matters. The mission involves first issues about competition law to ensure an equal access to the internet resources, and also the protection of the freedom of innovation inside the Internet Address System market (IAS). The mission second involves the public issue of the protection of the security and stability of the internet resources to ensure the smooth operation of the IAS. The third and last mission concerns the protection of the freedom of expression to ensure, that the IAS is not used to curb the content circulating over the Internet.

That those three public matters lie at the heart of the mission of allocating the Internet resources, second, is to ground the role of the State over it.

Professor Lawrence Lessig<sup>2</sup> was the first legal scholar to defend the thesis that the State was legitimate to be involved in the public policy issues raised by the Internet. Moreover this thesis, at a political level, has been recently been upheld throughout the *Declaration of Principles of Geneva*

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<sup>1</sup> In our contribution the term “Internet resources”, used as a synonym of the Internet Address System (IAS), refers to the three identifiers needed for the transport of communications over the Internet: first the technical protocol parameter values with for example port numbers, second the Internet protocol address, third and finally the domain names structured in root top level domain names from which second top level domain names can be created such as www.yahoo.com

<sup>2</sup> Lawrence Lessig, *Code and other laws of cyberspace*, United States, Basic Books, 1999

adopted in the course of the World Summit of the Information Society.<sup>3</sup> Indeed, article 49 of the *Declaration of Principles of Geneva* states that:

“The management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations. In this respect it is recognized that: a. Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues”.

We propose to follow up with this jurisprudence and argue that any model of governance for the mission of allocating the Internet resources has to grant and define a role to the State so that it can endorse, in Internet, its traditional role of protecting the public interest. As an illustration of this point we propose to refer to the *Federal Communications Commission* in charge of the regulation of the telecommunication sector inside the United States. We believe that this role has not been clearly defined yet as far as Internet is concerned.

Finally in our approach the State is legitimate to be involved in the protection of the public values raised by the mission of allocating the Internet resources as long as and precisely because its legal authority can be limited for that purpose. In relation to the three core public values mentioned earlier this requirement, on the authority of the State, is to have the following consequences. In relation to competition issues, the State should refrain from being partial when allocating the internet resources and when protecting the freedom of innovation inside the IAS market. In relation to the protection of the security and stability of the internet resources, the State should adopt the necessary measures to ensure the smooth operation of the IAS. In relation to the protection of the freedom of expression, the State should refrain from adopting technical measures to curb the content circulating over the Internet.

We propose now to examine the specific models which can implement the argument according to which the governance of the mission of allocating the internet resources has to involve the State over the public issues raised by this mission.

## II. Specific models of governance implementing the argument of the legitimacy of the State over the public policy issues of the Internet resources

Defending the argument that the State should be involved in the public policy issues of the Internet resources does not mean that the private sector should be excluded of this mission. To the contrary the State should rely on the expertise of the private sector and grant it a role of technical adviser. This point is driving us to conclude that ICANN should remain the private technical adviser for the mission of allocating the Internet resources (A). Then remains the issue of which State should be

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<sup>3</sup> See in *Geneva Declaration of Principles*, Article 49.a, 10-12 December 2003, First Phase of the WSIS, Geneva, available at <http://www.itu.int/wsis/docs/geneva/official/dop.html> ( Last visited on May 7, 2009)

entitled to control ICANN and oversee the mission of allocating the Internet resources. Should the US State continue to unilaterally exercise this policy control? To this issue we are about to propose three answers (B).

- A. Private technical adviser and manager under the policy control of the State: or the maintenance of the ICANN model

Defending the thesis that the State should be in charge of the public issues raised by the mission of allocating the Internet resources does not equate with the exclusion of the private sector over it. Rather the State should rely on the technical expertise of the private sector by granting it a role of adviser and manager. The private sector would advise the State over the policies and decisions to adopt and would also be in charge of the daily administration of this mission.

In that framework the private sector acts as an adviser and manager of the IAS mission, while the State keeps the policy control over the IAS mission: the current model of ICANN appears appropriate and should be maintained.

Indeed the not-for-profit public-benefit corporation has been granted since November 1998, by the U.S Department of Commerce, the mission of managing the IAS mission. However the U.S Department of Commerce has always kept a policy control over this mission and has reiterated its intention to maintain it throughout the *U.S. Principles on the Internet's Domain Name and Addressing System*<sup>4</sup> of July 2005. It results hence that the current model of administration for the IAS mission is shared between a private technical manager who is exercising its management and advising missions under the policy control of the U.S State.

That model of administration should be maintained and ICANN should continue to exercise the mission of technical adviser and manager of the IAS mission because, despite the critics towards ICANN, ICANN is praised for well implementing its mission.

In our approach the model of governance of the Internet resources should involve the private sector, as the technical manager and adviser of this mission, under the control of the State. Currently the U.S Department of Commerce is exercising in monopoly this authority and we propose to examine how to reform it by addressing the question of whom among the States should be in charge of the policy control over ICANN.

- B. State policy control over the Internet resources and reform of the monopoly of the US State

In our approach three reforms can be envisaged to address the issue of the monopoly of the US State over the control of the IAS mission and ICANN.

First the US Department of Commerce keeps this monopoly, inherited from the past involvement in the Internet technology of a couple of US Federal agencies such as the Defense Advanced Research Projects Agency (DARPA) and the National Science Foundation (NSF). However this unilateral model of governance of the IAS mission, in which ICANN, the technical adviser, is under the policy control

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<sup>4</sup> US Department of Commerce, *U.S. Principles on the Internet's Domain Name and Addressing System*, July 2005, [http://www.ntia.doc.gov/ntiahome/domainname/usdnsprinciples\\_06302005.htm](http://www.ntia.doc.gov/ntiahome/domainname/usdnsprinciples_06302005.htm)

of the U.S State, requires that the U.S Department of Commerce authority be legally bound by the three public values at stake within the IAS. Hence there is a need to enshrine a legislative act requiring the US DoC to comply with those values per se our argument according to which the legitimacy of the State over the Internet public issues is tied to the requirement that its authority is legally limited by those public values.

Second, if the U.S Government agrees to share with the State international community its monopoly over the control of the IAS mission, then the inter-governmental model of governance of the IAS mission becomes possible. ICANN would be the technical adviser of the State international community assembled either in the Governmental Advisory Committee (GAC) or the International Telecommunication Union (ITU). However this model requires that the States agree in a Treaty to be bound by the public values raised by the mission of allocating the Internet resources per se our argument according to which the legitimacy of the State over the Internet public issues is tied to the requirement that its authority is legally limited by those public values

Third, if the U.S Government agrees to share with the State international community and the civil society its monopoly over the control of the IAS mission, then the multilateral model of governance of the IAS mission becomes possible. That model of governance would implement the model of governance supported by the World Summit of the Information Society of the United Nations. Indeed in the articles 48 and 49 *Declaration of Principles of Geneva*, it was affirmed that the governance of the Internet should be exercised into a multilateral frame, involving the States, the private sector and the civil society, in which the States retain the decision making power over the public policy issues of the Internet.<sup>5</sup> In this model of governance the private sector would be represented by ICANN and would continue to have a role of adviser and technical manager. The civil society would assemble in the Internet Governance Forum (IGF) of the World Summit of the Information Society, and would have a role of adviser to the States. Finally the States would assemble either in the GAC or the ITU and would have a policy control over the decisions of ICANN. However this model requires that the States agree in a Treaty to be bound by the public values raised by the mission of allocating the Internet resources per se our argument according to which the legitimacy of the State over the Internet public issues is tied to the requirement its authority is legally limited by those public values.

Therefore with our contribution we have emphasized the legitimacy of the role of the State over the mission of allocating the Internet resources as long as its authority is legally limited by the public values at stake within the IAS.

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<sup>5</sup> See in *Geneva Declaration of Principles*, Articles 48 and 49.a , 10-12 December 2003, First Phase of the WSIS, Geneva, *Op cit* footnote 3.

