

ON ICANN GOVERNANCE

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Oral Statement

Of Cameron Powell
Vice President and General Counsel
SnapNames

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I want to thank the Chairman, Senator Allen, and members of the Subcommittee for inviting SnapNames to testify today.

Our company was founded by successful entrepreneurs who saw a critical need to help real individuals and businesses fairly compete to register domain names against domain name professionals. Today, 97.6% of all valuable domain names are registered through means not practically available to the general public.

We expended massive time and resources to come up with a technology to fix part of this broken system. We filed a patent on it. We secured a licensing agreement with VeriSign Registry to distribute our superior service to the public.

In reliance on the principle that the best consumer product, like the best free speech, will triumph in a free market, we hired dozens of new employees in the worst unemployment environment in the country. In any other industry, we would have already launched our technology long ago.

In this industry, our superior technological innovation has been hijacked by the equivalent of a prior restraint on free speech, a technological gag order. ICANN's misguided consensus process has enabled both the uninformed and our competitors to replace the market's and courts' judgment with their own, to censor our superior technology, and to force the lay-off of 20% of our employees.

So there are three issues I want to discuss:

- The shortcomings of a bureaucratic consensus process in a marketplace that requires innovation;
- SnapNames' first-hand experiences with the anti-competitive consequences of that process;
- Some recommendations on ICANN reform

I. Current Structure and Process: ICANN and its Supporting Organizations Collectively are Neither a Meritocracy, a Democracy, or a Marketplace, Nor a Real Deliberative Body

ICANN was a unique experiment in global resource management, but the consensus process of one of its three so-called "supporting organizations" has now paralyzed it. The Domain Name Supporting Organization or DNSO is composed of seven constituencies that are supposed to be, but are not, representative of their respective interest groups (registrars and registries, businesses and IP owners, non-commercial interests and ISPs). In reality most constituencies are neither representative of nor accountable to their intended constituents, some constituencies are actually run by only one or two individuals, and in twists fit for Kafka procedures change unannounced and even retroactively.

II. What are the Unintended Consequences of the DNSO's Consensus "Process"?

First, because the consensus process is not market-driven, it is captive to misinformation and politics unrelated to the public interest, much less the market. All you need in this industry to block an innovation or reform is an opinion. There is no requirement that the opinion have any merit. There is no requirement that any opinion be tested by the most objective normative tests we have in

our society, the law or the market, the courts or consumers.

Those who wish to block reform or innovation in the public interest may do so merely by refusing to give their *consent*. Where every vote is a veto, the result is paralysis.

Consensus also dampens market innovation. It is sometimes appropriate for small groups like town meetings. It is an inappropriate substitute for decisions by the market because it is slow, inefficient, unresponsive, bureaucratic, and of course not driven by customer demand.

III. Case Study: How an Innovative Attempt to Answer Market Demand from Mainstream Consumers is Being Thwarted Not By Superior Competition or Technology but by Special Interests, Petty Politics, and Antitrust Enshrined as Process

To return to our personal experience, since September 9, 2001, our innovative technology has been subjected to endless, only nominally public discussions lacking either basis in law or any procedure or evidence. It has been . . . literally . . . talked . . . to . . . death.

Consensus and its Cousin, Antitrust

Here is my question for those concerned with ICANN reform: Why is a consensus process substituting its judgment for the market's? Why is ICANN even using our competitors' antitrust arguments as a basis for decision on our technology, when doing so is neither ICANN's mandate nor expertise and there are laws and courts in place that should be deferred to? Worse, why have our competitors been handed the power to veto our superior technology?

Some in the industry actually think it's legal to block innovation so long as one of the entities you're opposing is, in their simplistic lay opinion, a monopoly (they mean our licensee, VeriSign). Consensus processes are therefore custom-built for collusion; they are an open invitation to antitrust. Businesses injured by this consensus process should not have to resort to antitrust suits simply because their competitors were inexplicably given the illusion of safe harbor from laws superior to the mere contracts that underpin the industry.

IV. Toward a Model and Some Criteria for the Industry's Oversight Body

Like most complex industries, the domain industry does need oversight of its free market, as well as industry-specific regulations. This is especially true because the domain industry's technology is based on a single root server. Such a singular system is uniquely capable of disabling the market mechanisms that we typically rely on for much consumer-spirited regulation.

In conclusion, any oversight body or law:

- Should stay out market matters, and largely stay out of technical matters, except where the market can't operate freely, and it should act in ways that allow the market to regulate consumer choice;
- It should nevertheless have more of the enforcement powers of a true governmental body than of the undercapitalized business ICANN is;

- Should not be hamstrung by any need to get consensus for market innovation from unrepresentative, non-market-driven interests.

Further elaboration on these ideas is contained in my written testimony. I thank the Subcommittee for its time and attention today.