



**18th BILETA Conference: *Controlling
Information in the Online Environment***

*April, 2003
QMW, London*

Controlling National Top-level Domains -The Question of Legitimacy

Fredrik Roos
University of Göteborg, Sweden

Abstract

National Top-level Domains (TLDs) are controlled in different ways and by different types of organs, including governments, non-profit organizations and stock-listed companies. The only thing the different systems seem to have in common is that they all have been criticized for lacking legitimacy. This paper will describe the different types of systems used to control national TLDs and review whether they meet the traditional demands for legitimacy. It will also evaluate the importance of possible lack of legitimacy in the different systems and try to provide possible solutions.

Different systems used to control a TLD

People working at the universities introduced the Internet as well as the domain name system in most countries. Many national TLDs were for a long time controlled by enthusiasts at national universities and the fundamental principle was that “the net should be free”. In the second half of the 1990s the Internet began to become commercialized and not only enthusiasts but also companies, consumers and individuals began to take an interest in domain names. Today Internet domain names have great value as intellectual property assets. For businesses the commercial importance of domain names can be tremendous.[1] The importance of domain names also led to an interest in the allocation and control over the top-level domains.

The history behind the evolution of the Internet explains that the control of the majority of TLDs now lies with independent non-profit organizations or companies. These were created when the increasing popularity of Internet made the administration require more resources. In other countries the governments are involved and some TLDs have even been sold to commercial companies, sometimes from a foreign country. The most interesting part, however, is not who is in control but how the TLD is controlled.

Regulated system

A “regulated system” is a system with regulations limiting the possibilities to register domain names. The regulated systems attempt to achieve a certain quality of registered domain names and assure that the domain is used in the desired way. The purpose might be to ensure that what is published under a TLD is representative or at least have a connection with the nation related to the TLD.

Examples are the Swedish[2] and French[3] systems that require the applicant to prove a legal right to the desired word before it can be registered as a domain name, and the Canadian where an applicant at least need to have a responsible contact person resident in Canada.

The Swedish regulations have resulted in that a domain name must reflect the exact registered name of an enterprise (which also means that it has been almost impossible to register abbreviations of enterprise names), it has not been possible to register a trademark nor a personal name (except under the sub-level domains “.tm.se” and “.pp.se”). The motivation for these limitations has been that it is an attempt to reserve the TLD for national interests and enterprises. Despite this it has been criticized, by researchers and companies as well as by a government committee assigned to evaluate the Swedish TLD.[4]

The advantage of these systems is that trademark disputes are reduced or even eliminated. Which also means that there is no need for an alternate dispute resolution system. The problems are that the process of registering a domain name may become unnecessary difficult and expensive, the systems may be experienced as bureaucratic by its users. In addition, everyone that was not able to register the name they desired will question the system.

Such criticism raises the issue of legitimacy. Both the Swedish and French TLDs are also controlled by non-profit organizations, with in France mere informal ties to the government and in Sweden without any.

First to file

The “First to File” system is the most common system. It is e.g. applied by ICANN in the control of generic TLDs. The principle means that whoever is first to file an application for a domain name gets the name, as long as it is not already registered. Among many other states Austria, Denmark, Germany, USA and the United Kingdom use the “First to File” system.

Advantages with this system are that it is fast and makes the registration process simple. The easy of registration has to be compared to the fact that the applicant must him or herself take full responsibility for not e.g.

A problem caused by the “First to File” system is legal disputes related to trademarks, that has proved to be both difficult and expensive to solve. In order to prevent these disputes and to provide an alternative to the expensive and slow court processes ICANN and many national TLD has created alternate dispute resolution systems (ADRs).

Applicants for domain names are forced to sign a contract that they will comply with the ADR process. If someone wants to question a registration they apply to one of the assigned arbitration courts and after a brief process, without a hearing, the dispute is decided. Verdicts from the ADRs are in most cases possible to be questioned in a public court.

Controlled by the government

The third form of control of a national TLD is the government controlled. Examples are China, Norway and Singapore. A government controlled TLD could use either regulatory systems, as in China[5] and Norway[6], or more liberal “First to File” systems as in Singapore.[7]

Sold

A form of government controlled TLDs are those where the government initially was in control but then sold or rented the entire TLD to a company in another country. The TLD “.tv” of Tuvalu is controlled by “The .tv corporation” and has no other relationship with the Tuvalu government than paying royalties for the use of the TLD.[8] Another example is the TLD “.nu” of Niue[9]. The

selling of a TLD obviously results in incomes but also loss of regional connection and lack of control.

Legitimacy

Regardless of the form of system applied to control a TLD voices have been raised to criticize the systems and the controlling organizations, both in the international and the national TLDs. The discussions and criticisms have focused on legitimacy and questions related to legitimacy.

Legitimacy can be defined as when norms, institutions and decisions are accepted by the citizens. [10] Such acceptance can be obtained through many different methods. These are used, not only by governments, but also by the organizations controlling TLDs. The traditional sources of legitimacy will now be presented and their application by national TLDs reviewed.

Democracy

Legitimacy is, in democracies, primarily established through public elections. Non-elected administrative agencies and other organizations are legitimised through being appointed by elected politicians.

Support from public opinion

The support from the public opinion transmitted through e.g. the media, public demonstrations or direct contact with the government can provide legitimacy. If the citizens are happy with a decision it can be legitimate despite it does not comply with a public election.

Prescribed form of organization

Administrative agencies also gain legitimacy through being structured in a prescribed way and work under regulation of procedure created by elected organs (the legislator).

Independent judges

An important criterion in many legal systems is that judges are totally independent. They are often not allowed to have other responsibilities aside from their duties in court and in many countries they are appointed for life.

Judicial review

Judicial review is also an important source of legitimacy. It has been argued that it is judicial review that drives the state organs commitment to process and rationality. [11]

Predictability

One of the basic functions of a regulation is to supply predictability in society. One example is that predictability is an important factor when investing in enterprises or new ideas. Predictability is essential for legitimacy in the legal system. The enforcement of powers must be clear and predictable and may not seem arbitrary.

Conclusions

A review of national TLDs show that none has public elections that can provide legitimacy. Different forms of elections do take place to appoint members of the boards and commissions of national TLDs. However the organizations or sometimes individuals allowed voting is a very small

part of the countries populations. Only the TLDs that are government controlled can really claim to gain legitimacy from democracy, that is, those of them that are situated in democratic countries.

Neither can support from the public opinion provide legitimacy. The public generally has to little information and knowledge of the system. Another popular method among to legitimise control of a TLD is to structure as and follow the procedures of similar government organs. However this has proved not too legitimise those organs but to cause confusion among users. If the organs are named as government organs people think that they indeed are connected to the government and therefore find it useless to complain to other state organs if they consider themselves mistreated.

A legitimacy problem in many of the countries that provide alternate dispute resolution systems is that the “judges” often are persons with different backgrounds working in companies, universities and public courts. These judges are not independent and might be influenced by their professional interests.

Judicial review exist in a few of the government controlled TLDs but most national TLD registrars have no, or a non-independent, organ controlling made decisions. The predictability of the systems can also often be questioned, e.g. because they change frequently.

Importance of legitimacy

National TLDs have proven to lack traditional legitimacy, but how important is this? The importance of legitimacy and what needs to be legitimized depend on the form of system used to control the TLD.

In the regulated systems the obstacles to registration are what primarily can be questioned. The stronger regulation the more important is the legitimacy. Regulated systems generally do not have an alternate dispute resolution system, since they rely on their regulations to prevent upcoming disputes. Therefore what have to be legitimized is the obstacles to registration. If an individual or organization is denied to register a desired domain name that decision needs to be legitimized.

The “First to File” systems does not deny anyone registration, as long as the desired domain name is not already registered. What a “First to File” system will need to legitimize is if it has an alternate dispute resolution system. This can be difficult as the authority of the ADR, its procedural regulations as well as the “judges” independence will be questioned.

In a country where the TLD is under control of the national government legitimacy aspects become dependent of the legitimacy of the government itself. Of course the nature of the system is also important for legitimacy. The regulated Chinese TLD is more difficult to legitimize than the “First to File” system in Singapore^[12].

Form of system?	Used by e.g. the TLDs of:	What must be legitimised?
"Regulated registration"	Sweden, France, Canada.	Obstacles to registration.
"First to file"	ICANN Germany, United Kingdom	Alternate dispute resolution.
"Government controlled"	China, Singapore, Norway.	The government.

Conclusions

There is, in many national TLDs, a lack of legitimacy. The consequences of this depend on how the TLD is controlled. The more the control intervenes with individuals and companies use of the TLD, the more important is the legitimacy of the controlling system and organs. In systems with much regulation making it difficult to register a domain name, e.g. in Sweden and France, and in systems with alternate dispute resolution, e.g. in Germany, legitimacy is more important and the lack of it a bigger problem.

To make national TLDs legitimate will require a lot of work and changes. The solutions to the problems we see today could be:

1. Increased predictability and stability in the systems.
2. More democratic influence, perhaps in the form of online elections.
3. Independent "judges" in the alternate dispute resolution systems.
4. More liberal regulations.
5. International harmonization.

Bibliography

-
- [1] T Lindqvist, Domännamn – stöld, strategi och utveckling, Centraltryckeriet, Borås, 1999.
[2] For a detailed review of the Swedish system - F. Roos "å, ä, ö – Trademarks and Domain Names in Sweden", BILETA 2002
[3] www.nic.fr
[4] SOU 2000:30 "se", After criticism from the committee the non-profit organization controlling the Swedish TLD, faced with threats that the government would take control of the TLD, started a process to develop new more liberal regulations. The result is that the Swedish regulations will change as of April 2003 and apply the "First to file" system.
[5] <http://www.cnnic.net.cn/>
[6] <http://www.norid.no/>

[7] <http://www.nic.net.sg/>

[8] <http://www.tv/>

[9] <http://www.nic.nu>

[10] A Peczenik Juridikens teori och metod, pp 11-13, Norstedts Juridik, Göteborg, 1995.

[11] J Weinberg, 'ICANN and the problem of legitimacy', Duke Law Journal Vol 50, p 187, 2000.

[12] <http://www.nic.net.sg/>