

## THE US DISTRICT COURT DECISION ON .IR DOMAIN NAMES

### Gist of the News

According to the *Tower Magazine* on June 29, 2014:

On Tuesday the United States District Court for the District of Columbia issued an order for the Internet Corporation for Assigned Names and Numbers (ICANN) to seize Iran's internet domain (.ir) and IP addresses in order to recover more than \$1 billion in damages that the Islamic Republic owes for its sponsorship of global terror.

The *Legalinsurrection.com* confirms the same information:

Court papers have been served to ICANN and seek ownership of top-level domain names like .ir TLD, the ایران TLD and all Internet Protocol (IP) addresses being utilized by the Iranian government and its agencies. Darshan-Leitner believes these domains are worth the over \$1-billion required to satisfy the outstanding debts owed by the Iranian government to the families participating in the civil suit.

The *lawfareblog.com* adds that:

In this week's Bits and Bytes, Paul ... flagged a request submitted to ICANN by a group of American terror victims and their families in order to seize Iran's domain name. While he sympathized with the victims, Paul maintained that "if U.S. courts were seen as a forum for divesting a sovereign nation of its top-level country code domain that would simply reinforce the ... view ... that the U.S. is not a neutral custodian of the network.

*The-american-interest.com* concludes that:

This ruling comes as Washington moves ahead with its plans to hand over control of the internet in late 2015, when ICANN will be replaced by an as-yet-unestablished international group. The transfer of power is still a year away, however, and ICANN must respond within 10 days. Given the kind of uproar that compliance with the court would likely cause around the world—many countries are already convinced that the U.S. wields disproportionate sway over the Internet in the wake of the Snowden revelations—we can't imagine ICANN quietly complying with this order. But then again, stranger things have happened.

Finally, the prediction came through because ICANN did not comply with the order as reported by *phys.org/news* on July 30, 2014:

ICANN general counsel John Jeffrey said in a statement that these domains are not assets which can be seized but "part of a single, global interoperable Internet which ICANN serves to help maintain." He added that these domains "are not property, and are not 'owned' or 'possessed' by anyone including ICANN, and therefore cannot be seized in a lawsuit." ICANN filed its response Tuesday in federal court after being served with orders to recover assets from those three countries from plaintiffs who won lawsuits against Iran, Syria and North Korea.

## Gist of the Analysis

Four questions need to be answered:

- 1) Is it legally permissible to seize the money paid to a public entity for extending validity of a government domain name?
- 2) If the response is positive, then would it legally be permissible to paralyze a public domain name that serves a huge population? In other words, if we allow an individual or a legal person of private law to 'seize a domain name', then anybody can take a public institution hostage by seizing its domain name. It must not be forgotten that according to the decision of the American court, whenever a payment is going to be made to the ICANN in order to extend validity of the domain names, the judgment creditors shall have the right to seize it. Therefore, through seizure of the money paid by the government of Iran they can keep the domain names in limbo as long as all the compensation is not paid to them.
- 3) Which entity receives the money from the Iranian government for extending validity of a domain name, ICANN, IANA or RIPE NCC?
- 4) Even if the US law allows the execution of the writ of attachment issued by the US District Court, are there legal ways to postpone or to stop the execution?

This News & Analysis tries to put forward brief explanations and responses to the above questions. Although these questions have become somehow hypothetical after the position taken by ICANN on July 30, 2014, mentioned above in the "Gist of the News", but a change of heart on ICANN's side is not beyond expectation.

Before starting our discussions, it is necessary to explain few important terms of the domain name law.

## Definitions

### Domain Name:

- a) It is a unique name that is used for identifying an internet site.
- b) It is comprised of two parts: before the dot and after the dot. The part to the right of the dot is composed of a three-letter element in a Web address or an e-mail address that indicates the type of the organization that owns the domain name; for example .com signifies a commercial organization while .gov signifies a governmental organization. The part to the left of the dot is the domain name that needs to be registered before being used as a website or an email address (Website of the ICANN).
- c) Some websites do not have their own domain names. In that case, they are represented by a domain name like *usersite/hostsite.com* (Internet Glossary, Copyright © 2005 Tom Hua & eBookWholesaler.net).
- d) Different types of domain names exist:
  1. *Top-level domains (TDLs)*: They are either generic or geographic.

2. *Generic TDLs*: They include .com (commercial), .net (network), .edu (educational), .org (organizational, public or non-commercial), .gov (governmental), .mil (military); .biz (business), .info (informational), .name (personal), .pro (professional), .aero (air transport and civil aviation), .coop (business cooperatives such as credit unions) and .museum.
3. *Geographic domains*: They designate countries of origin, such as .us (United States), .fr (France), .uk (United Kingdom), etc. (Glossary of Interactive Advertising Terms v. 2.0)

**Domain name system (DNS)** - The domain name system, or DNS, is a system designed to make the Internet accessible to human beings. The main way computers that make up the Internet find one another is through a series of numbers, with each number (called an "IP address") correlating to a different device. However it is difficult for the human mind to remember long lists of numbers so the DNS uses letters rather than numbers, and then links a precise series of letters with a precise series of numbers (ICANN website).

**Home Page** – It is the web page which your browser shows when you open it to start surfing. Also refers to the main page of a web site which is reached by typing in the site's domain name. (Internet Glossary, Copyright © 2005 Tom Hua & eBookWholesaler.net, "the Internet Glossary")

**ICANN** - According to the Subpoena of the United States District Court for the District of Columbia issued in the Civil Case No. 02-1811(RCL) "ICANN" means the Internet Corporation for Assigned Names and Numbers, the Internet Assigned Numbers Authority (a/k/a/ IANA) and each of the five regional internet registries, as applicable – AfriNIC (serving Africa), APNIC (serving East Asia and the Pacific Region), ARIN (serving the United States and Canada), LACNIC (serving Latin America and much of the Caribbean), and RIPE NCC (serving Europe, the Middle East and much of the former Soviet Union).

**IP addresses** - ICANN plays a similar administrative role with the IP addresses used by computers as it does with the domain names used by humans. In the same way that you cannot have two domain names the same (otherwise you never know where you would end up), for the same reason it is also not possible for there to be two IP addresses the same.

Again, ICANN does not run the system, but it does help co-ordinate how IP addresses are supplied to avoid repetition or clashes. ICANN is also the central repository for IP addresses, from which ranges are supplied to regional registries who in turn distribute them to network providers (ICANN website).

**NIC (Network Information Center)**: Usually refers to an organization which manages information for a network. For instance, InterNIC, which used to register almost all Internet domains before the function was devolved to several private companies. Less commonly used for "Network Interface cards which computer network cables are plugged into (the Internet Glossary).

**TLD (Top Level Domain):** The highest part of a complete Domain Name, such as com, net or org. (the Internet Glossary).

## Facts of the matter

The Writ of Attachment on Judgment other than Wages, Salary and Commissions issued by the United States District Court for the District of Columbia in the civil action No. 01-1655 (RMU) reads as follows:

“You are hereby notified that any money, property or credits other than wages, salary and commissions of the above named defendant(s) are seized by the Writ of Attachment, and you are required to hold it and not to pay or surrender it to the defendant(s) or to anyone else without an order from this court.

The judgment against the defendant was entered on September 10, 2003 in the amount of one hundred and nine million Dollars (\$ 109,000,000) and the costs amounting to \$... with interest at an annual rate of 1.33% from September 10, 2003 less credit of \$500,000.

Within 10 days after this writ is served upon you, you are required to answer the interrogatories, **UNDER PENALTY OF PERJURY**, and to file in this court the original and one copy of the answers, and to serve a copy, by mail or other means upon the plaintiff(s) and upon the defendant(s). If you fail to do so, judgment may be entered against you for the entire amount of the plaintiff's claims with interests and costs.

Witness this Honorable Chief Judge of Said Court, this 24<sup>th</sup> day of June 2014.”

In the above civil action, the plaintiff(s) are Jenny Rubin, et al. In four similar civil actions the plaintiffs are: a) Susan Weinstein, et al; b) Shaul Stern, et al; c) Seth Charles Ben Haim, et al, and; d) Mary Nell Wyatt, et al. The defendant is the Islamic Republic of Iran and the garnishee is the Internet Corporation for Assigned Names and Numbers (ICANN). The total amount of the judgments in the above cases is \$921,248,164.

The Interrogatories in Attachment include two questions as follows:

1) Were you at the time of service of the writ of attachment, or have you been between the time of such service and the filing of your answers to this interrogatory indebted to the defendant(s), and, if so, how, and in what amount?

2) Had you at the time of the service of the writ of attachment, or have you been between the time of such service and the filing of your answers to this interrogatory, any goods, chattels, or credits of the defendant(s) in your possession or charge, and, if so, what?

## Legal basis of the claim

The writ of attachment and the judgment issued against the government of Iran are based on the following premises:

- 1) ICANN is responsible for regulating and managing domain names under a contract with the Department of Commerce (DoC) of the USA.
- 2) ICANN is formally a private non-profit California corporation created that is subject to the US laws.
- 3) The Foreign Sovereign Immunities Act (28 U.S.C. § 1610(g)) that intends to assist terror victims to collect judgments against foreign states enables the claimants to attach property of the Iranian government in aid of execution or in execution of the judgment issues in the year 2003:

**“(g) Property in Certain Actions.—**

(1) In general.— Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

- (A) the level of economic control over the property by the government of the foreign state;
- (B) whether the profits of the property go to that government;
- (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
- (D) whether that government is the sole beneficiary in interest of the property; or
- (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) **United states sovereign immunity inapplicable.**— Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) **Third-party joint property holders.**— Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment” (*emphasis added*).

A. Michael Froomkin in his article titled ‘Wrong Turn in Cyberspace: Using ICANN to route around the APA and the Constitution’ challenges these premises:

- 1) ICANN has been making domain name policy under contract with the Department of Commerce (DoC) of the USA.
- 2) ICANN is formally a private non-profit California corporation created, in response to a summoning by U.S. government officials, to take regulatory actions that the DoC was unable or unwilling to take directly.

3) Despite being famously decentralized and un-hierarchical, the Internet relies on an underlying centralized hierarchy built into the domain name system (DNS).

4) ICANN has chosen to keep in place and step up enforcement of some policies that it inherited, notably NSI's anti-privacy rule requiring that every registrant of a domain name agree to have his name, address, e-mail, and telephone number placed in a database readable by any Internet user in the world.

5) DoC's reliance on ICANN is different from the classic model of privatization, because rather than privatizing a revenue-generating function, the government is "privatizing" a policy-generating function. Furthermore, the "privatization" is subject to sufficient strings to make ICANN's actions fairly chargeable to the government. Although the ICANN-DoC contracts speak of cooperation and research, some of the most significant outputs from ICANN are government regulation in all but name.

6) There is substantial evidence, discussed below, that DoC has directly instructed ICANN on policy matters. Furthermore, as ICANN is utterly dependent on DoC for ICANN's continuing authority, funding, and, indeed, its reason for being, it would be reasonable to conclude that the corporation is currently so captive that all of ICANN's decisions can fairly be charged to the government.

7) DoC's relationship with ICANN is defined by two sets of opposite claims that are hard, perhaps legally impossible, to reconcile. On the one hand, DoC retains ultimate control over the root, and enjoys very substantial sources of leverage over ICANN, so much so that it almost amounts to *de facto* control. On the other hand, DoC committed itself to "privatizing" the governance of the DNS, and its statements and actions since are consistent with a desire to avoid being seen to control the DNS and with allowing ICANN maximum freedom of action.

Briefly put, it would be difficult to establish that ICANN is just a private entity that holds or is entitled to hold the money that it receives from the government of Iran. Therefore, execution of the writ of attachment may be interpreted as seizing property or credit of the government of Iran that is at the disposal of an entity controlled by the US government through a writ of attachment issued by an American court.

### Who will execute the writ of attachment?

#### ICANN

The main question in this case is whether ICANN could be forced to execute the writ of attachment issued by the District Court or not. Two subsidiary questions result from this main question:

1) If ICANN was a governmental entity, would it be acceptable under the US law to argue that a foreign state property could not be attached under the writ of attachment of an American court?

Paragraph (2) of the Foreign Sovereign Immunities Act (28 U.S.C. § 1610(g)) responds to the above question:

“(2) **United states sovereign immunity inapplicable** — Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act” (*emphasis added*).

It may be argued that the above provision indicates a waiver of sovereign immunity because in similar cases it has been argued that:

“In quashing the earlier writ, the Court emphatically held that there was no waiver of sovereign immunity permitting such a writ to operate against the United States” (*Stephen M. Flatow v. The Islamic Republic of Iran et al.*, Civil No. 97-396 (RCL), The United States District Court for the District of Columbia, at 6; Cf. also case of *Joseph J. Cicippio, et al. v. The Islamic Republic of Iran*, Civil No. 96-1805 (TPJ), The United States District Court for the District of Columbia, at 17, footnote 9).

2) If ICANN was an international organization, what would be the position of the US law on this issue?

Under the 22 U.S. Code § 288a - Privileges, exemptions, and immunities of international organizations:

“(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.”

We need to return back to the main question again: Is ICANN a private corporation, or a government entity, or something in between? One way of responding to this question is to look at the fact that ICANN is registered as a company. A more satisfying way, perhaps, is to look at the functions of ICANN as explained on its website:

a) ICANN’s role is to oversee the huge and complex interconnected network of unique identifiers that allow computers on the Internet to find one another. This is commonly termed “universal resolvability” and means that wherever you are on the network – and hence the world – that you receive the same predictable results when you access the network. Without this, you could end up with an Internet that worked entirely differently depending on your location on the globe.

b) ICANN is comprised of four “advisory committees” that provide ICANN with advice and recommendations. These represent:

- Governments and international treaty organisations;

- Root server operators;
- Those concerned with the Internet's security; and
- The “at large” community, meaning average Internet users.

c) Externally, ICANN is an organisation incorporated under the law of the State of California in the United States. That means ICANN must abide by the laws of the United States and can be called to account by the judicial system i.e. ICANN can be taken to court. On the other hand, ICANN is internally accountable to the community through the representative composition of the ICANN Board from across the globe.

Putting together all of the above structural and functional traits of ICANN, it seems difficult to treat ICANN as a private corporation. Arguments of A. Michael Froomkin explained in page 5 of this News & Analysis supports the understanding that ICANN is a *sui generis* entity that carries out public or even international functions in the guise of a private corporation. In dealing with ICANN, its hybrid nature must be kept in mind. For example, it must be noted that under Article II - Section 2 of ICANN Bylaws:

“...Nothing in this Section is intended to prevent ICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency” (*emphasis added*).

Further, according to Article IV - Section 2 of ICANN Bylaws:

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been adversely affected by:
  - a. one or more staff actions or inactions that contradict established ICANN policy(ies); or
  - b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
  - c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.”

It must also be remembered that a Document Request issued in another case requires that ICANN provide the court with the following documents:

“All documents and electronically stored information referencing, listing or describing: any contracts, agreements or understandings pursuant to which ICANN allocates, licenses, assigns or transfers rights of any kind in any top level domain names to Iran” (Subpoena of the United States District Court for the District of Columbia issued in the Civil Case No. 02-1811(RCL)).

## **IANA**

As a department of ICANN, the IANA “allocates and maintains unique codes and numbering systems that are used in the technical standards (‘protocols’) that drive the

Internet.” As part of its work, IANA “coordinates the global pool of IP and AS numbers, providing them to Regional Internet Registries (RIRs).” (IANA Website)

Through RIRs, ICANN/IANA provides the primary means for access to the worldwide web for Internet Service Providers (“ISPs”), telecommunication organizations and end-users within particular regions. Any person or entity within the area covered by the RIPE NCC – including Iran – that has registered for an Internet domain name, utilizes ICANN/IANA services (letter sent by the UANI CEO, Ambassador Mark D. Wallace in September 2012 to ICANN executives).

IANA’s various activities can be broadly grouped into three categories:

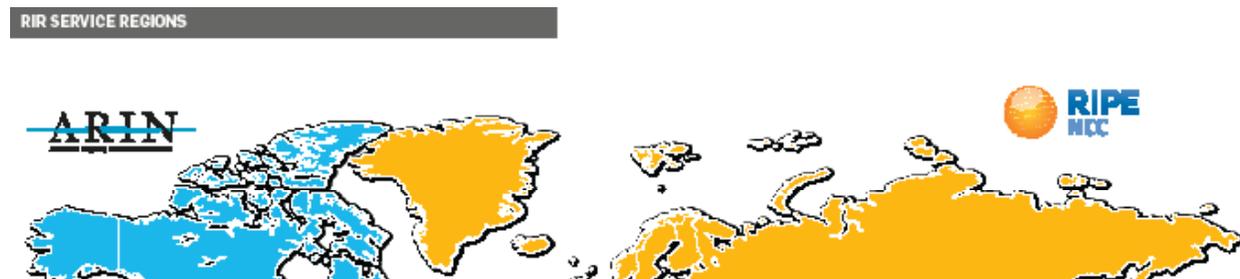
- 1) Domain Names: IANA manages the DNS Root, the .int and .arpa domains, and an IDN practices resource.
- 2) Number Resources: IANA coordinates the global pool of IP and AS numbers, providing them to Regional Internet Registries.
- 3) Protocol Assignments: Internet protocols’ numbering systems are managed by IANA in conjunction with standards bodies.

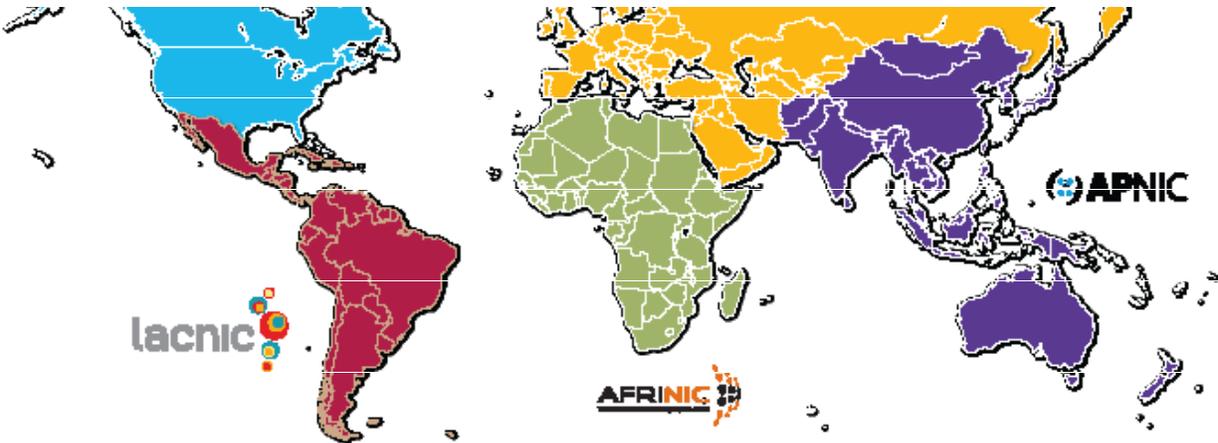
The second activity above is the one that makes a connection between IANA and the Regional Internet Registry (RIR) for Iran, namely the Ripe Ncc.

### Réseaux IP Européens Network Coordination Centre (RIPE NCC)

A Regional Internet Registry (RIR) is a governing body that is responsible for the administration of Internet addresses in a specific geographic region. Typically, an RIR has a mandate to control the allocation and distribution of IP addresses and domain registrations, as explained by *whatismyipaddress.com*.

Five Regional Internet Registries (RIRs) have a mandate to administer information relating to Internet number resources on behalf of the Internet community. They are: a) RIPE NCC that covers Europe, the Middle East (including Iran) and parts of Central Asia; b) ARIN that is serving North America; c) LACNIC that is serving Latin America and the Caribbean; d) AFRINIC that is serving Africa; and e) APNIC that is serving the Asia Pacific region (see the map below taken from the WIKIPEDIA webpage on Regional Internet Registry).





The RIPE NCC has a special procedure for seizure of the RIPE NCC's equipment or property as part of a law enforcement agency's (LEA's) investigation. According to the website of the RIPE NCC:

"LEAs may order the seizure of equipment or property belonging to the RIPE NCC as part of an investigation. In such cases, the RIPE NCC will examine the legitimacy of the investigation and the authorization of the persons conducting the investigation or seizure (examining judge, public prosecutor or investigation officers). The RIPE NCC will strive to ensure that the seizure is conducted in a manner that is the least detrimental to its operations and those of its members. The RIPE NCC will immediately lodge a complaint with the court and will seek to secure an agreement from the authority ordering the seizure that it will await the outcome of the complaint before carrying out the seizure" (*emphasis added*).

The above qualification of "least detrimental to its operations and those of its members" may have a great significance for execution of the writ of attachment. This means that if the court serves the writ of attachment on RIPE NCC, execution of the writ must be carried out in a way to cause minimum level of detriment to the operation of the domain names and the Internet in Iran. Further, the RIPE NCC must immediately lodge a complaint with a competent court and shall seek to secure an agreement from the District Court that it will await the outcome of the complaint before carrying out the seizure.

## CONCLUSION

At least three major players are involved in execution of the writ of attachment issued by the District of Columbia in the civil action No. 01-1655 (RMU): ICANN, IANA, and RIPE NCC. In this News & Analysis we tried to show that the following issues must be studied carefully to determine the possible consequences of execution of the writ of attachment:

- 1) Which entity is responsible for execution of the writ, ICANN, IANA or RIPE NCC?
- 2) If ICANN is the responsible entity, whether it is legally permissible to execute the writ of attachment against an entity that functions as a government/international entity?
- 3) If IANA is responsible, what are the authorities delegated by ICANN to IANA in this respect?

4) If RIPE NCC is the responsible entity, then its special procedure for seizure of the RIPE NCC's equipment or property as part of a law enforcement agency's (LEA's) investigation must be respected.

In considering the above issues, different possible ways of understanding and interpreting the applicable laws of Iran, the US, and the international law must be taken into consideration. In the final analysis, the ICANN is a policy-making entity that has close ties with the US government. Further, it is an entity that functions at global level. As a result, the decision to be taken about execution of the writ of attachment will heavily be influenced by the overall policy of the US government in its dealing with the Iranian regime at international level.

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