

Jurisdiction Hypothetical #1

For discussion at
Jurisdiction Subgroup
Meeting #19
January 30, 2017
19:00 UTC

Jurisdiction Hypothetical #1

Q. In the following hypothetical, what are the influences of ICANN's existing jurisdiction(s) relating to resolution of disputes (i.e., governing law and venue) on (1) the actual operation of ICANN's policies, (2) accountability mechanisms and (3) the resolution of disputes?

A plaintiff initiates litigation, challenging ICANN's actions (or inactions) involving actual operation of its policies – like delegation of a gTLD, and/or acceptance of certain terms of registry operation, on the basis that plaintiff (or a class including plaintiff) would be injured and that ICANN's actions or inactions are in violation of law. The court finds that ICANN's actions or inaction violate the law and issues an order requiring ICANN to change its actions.

Initial “strawman” answers appear on the following pages. These are intended only to spur discussion. Depending on the deliberations of the subgroup, the strawman answers will be freely modified or eliminated. Further proposed answers are expected from the subgroup.

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In Hypothetical #1, what is the influence of governing law and venue on

a. The actual operation of ICANN's policies?

- A positive influence, as ICANN will be aware that any actions that violate such policies can be challenged.
- If the court finds for ICANN, a positive influence, as this will increase confidence that ICANN is properly carrying out its policies (and that its policies do not violate the law).
- If the court finds for plaintiff, this could have a positive influence, if the policy or actions of ICANN violated the law.
- If the court finds for plaintiff, this could have a negative effect, if the ICANN's policies or actions were within ICANN's mission and in the public interest and were nonetheless ruled in violation of law.
 - If the case was correctly decided, this could have a positive effect, as ICANN would need to improve its policies to meet its goals while avoiding a violation of law.
 - If the case was wrongly decided, this could have a negative effect, (a) undermining credibility in the law or venue, and (b) forcing ICANN to change policies that were, in fact, legal.

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In Hypothetical #1, what is the influence of governing law and venue on

b. ICANN's accountability mechanisms?

- This would have a positive influence on ICANN's accountability, as the plaintiff was able to challenge ICANN's actions and seek to hold it accountable.

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In Hypothetical #1, what is the influence of governing law and venue on

c. The resolution of disputes (including this dispute)?

- The **governing law** could influence the case, as the law of another jurisdiction could (a) view ICANN's policies or actions differently, (b) have different burdens of proof, (c) have different standards of review of ICANN's actions, (d) have different remedies, (e) have different causes of action, or (f) have different rules on who pays.
 - These could influence the outcome of the hypothetical case, the type of redress, and the financial burden of bringing (or defending) the case.
 - Assuming US jurisdiction, to the extent ICANN's policies and actions are generally consistent with US law, this would tend to make the outcome would be more predictable. The burden of proof would likely be "preponderance of the evidence," both money damages and equitable relief (changing actions) would be available, and each party would bear their own costs.

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In Hypothetical #1, what is the influence of governing law and venue on

c. The resolution of disputes (including this dispute)? (continued)

- The **venue** could influence the case, as a different venue could (a) choose to apply a different governing law, (b) cost less (or more), (c) have different burdens of proof, (d) have different remedies, (e) have different rules on who pays, (f) have different approaches to transparency, (g) have different approaches to appeals, (h) have different evidentiary standards, (i) be more or less predictable, (j) be quicker (or slower), or (k) take place in a different language.
 - These could influence the outcome of the hypothetical case, the type of redress, the financial burden on the parties.
 - Assuming a U.S. court, US conflict of laws rules would apply, the proceedings would be relatively costly, damages and equitable relief would be available, each party would bear their own costs, the hearings and pleadings would be public, the case would be appealable, preponderance of the evidence would apply, the outcome would be relatively predictable, the case would likely move relatively slowly, and the case would take place in English (though translation may be available).

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In Hypothetical #1, what is the influence of governing law and venue on

c. The resolution of disputes (including this dispute)? (continued)

- In a common law jurisdiction, the outcome of the case would serve as **precedent** in future cases, assuming the case took place in court and not in arbitration.
 - Assuming a U.S. court, the outcome would serve as precedent, both in cases involving ICANN and more generally.

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Variables and Alternative Facts

How would the following influence our analysis, if at all?

Unknown Variables:

- What does “acceptance of certain terms of registry operation” mean?
- Who is the plaintiff?
 - What is their relationship to ICANN’s actions?
- What law(s) are alleged to be violated?
- What harm is alleged?
- What governing law is being applied?
 - Is a choice of law provision involved?
- What venue does this take place in?
- Is a contract involved?
 - Is the plaintiff a party?
- What gTLD is involved?
 - Does it matter?
 - What is the plaintiff’s relationship to the gTLD?

Alternative Facts

- US court applies:
 - US law, including California law.
 - US law, but uses the law of another state.
 - The law of a non-U.S. jurisdiction
- Case takes place in a non-US court.
 - Singapore
 - Istanbul, etc.
- Non-US court applies:
 - US law.
 - non-US law.
- Court finds for plaintiff and awards:
 - only money damages.
 - equitable relief (causing ICANN to change its actions).
 - money damages and equitable relief.
- Court finds for ICANN.
- Parties settle.