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Present At The Creations: ICANN's Birth, Domain Expansion And Jones Day's Role

The Editor interviews Joe Sims and Jeff LeVee, Partners of Jones Day.

Editor: Can you briefly describe your backgrounds for our readers?

Sims: I am Jones Day's senior antitrust lawyer and, beginning in 1997, took primary responsibility for development of its technology practice. In addition to ICANN, I have represented clients such as Apple, Chevron, Dell, Texas Instruments, General Motors, Procter & Gamble, Sirius-XM, Comcast, Hertz and CBS in a full range of antitrust issues. I believe I am the only antitrust lawyer ever recognized (twice, in 2001 and 2009) as "Dealmaker of the Year" by *The American Lawyer*, and in 2010 the *National Law Journal* named me one of "The Decade's Most Influential Lawyers." Many of my most significant transactions have been in the technology/Internet field.

LeVee: I am the coordinator of Jones Day's antitrust practice in California, based in our Los Angeles office. I am primarily an antitrust litigator and counselor, although I also litigate in a variety of other areas including health care. When Joe Sims formed Jones Day's technology practice in 1997, I was one of the members of the practice and have been active in the technology field ever since. From January 2009 to June 2011, I was the partner-in-charge of Jones Day's Silicon Valley office. My clients include Apple, Brocade, CBS, Procter & Gamble, Merz Pharmaceuticals, Sutter Health, Cedars-Sinai Hospital, Banner Health and TMC Healthcare. I have litigated all of ICANN's litigation matters since ICANN was formed in 1998 and took over day-to-day responsibility for Jones Day's relationship with ICANN some years ago.



Joe Sims



Jeff LeVee

Editor: How did ICANN find Jones Day? What were the early challenges?

Sims: Jones Day was originally retained by one of the great founders of the Internet, Jon Postel. Back in the 1970s, Jon was a UCLA graduate student who literally kept all of the Internet's addresses on a notepad. This was not terribly difficult because there were only a handful of Internet addresses, mostly associated with major universities. As the Internet grew, and as the demand for Internet names increased, Jon (and the U.S. government) understood that the technical aspects of the Internet's Domain Name System had to be operated by an entity that had input and support from a wide array of users. Jon was advised to get help, and searched for law firms with expertise in corporate (to create the entity), antitrust (since there would be issues of control over Internet infrastructure), litigation (he anticipated a lot), and of course Washington. Jeff and I went to see John in his office in Marina del Rey, California, and agreed to represent him on a pro bono basis for a few months.

The Internet was created mostly with government grants from the Defense Advanced Research Projects Agency and the National Science Foundation. As the list of addresses proliferated, the Domain Name System was introduced in the mid-1980s to assign strings of letters (easier to

remember) to the numeric addresses then being used to identify specific locations. Jon created the Internet Assigned Numbers Authority to maintain that first database, giving us the now familiar seven Top Level Domains (TLDs) of .com, .org, etc. By 1995, Jon realized that the one-man IANA was not a long-term practical solution and began an effort to establish a nonprofit organization to take over. But Jon was not a policy or business guy, and he underestimated the various tsunamis that were precipitated by this effort. Governments raised questions whether this important technology should be under private control. Large businesses, particularly in the U.S., complained that Jon was trying to "steal" the Internet and move it to Switzerland. By now, the agency within the U.S. government that had the lead on this was the National Telecommunications and Information Administration of the Department of Commerce, but the NSF, the Pentagon, the State Department and the U.S. national security apparatus all remained interested in how this turned out.

Editor: Was the relationship what you expected?

Sims: Not exactly. We thought that the entire project would take a few months and perhaps involve \$50,000 or \$100,000 worth of fees and costs that Jones Day would write off as its contribution to this public enterprise. But Jon's proposal for how the new entity would be structured turned out to be just one of many that wound up being debated on the Internet and in meetings in Washington, Geneva, Berlin and Singapore that Jeff or I attended along with Jon and hundreds of others who were interested in the outcome. I also spent a lot of time with Ira Magaziner, who had the lead on this for the Clinton administra-

Please email the interviewees at jsims@jonesday.com or jleee@jonesday.com with questions about this interview.

tion, in addition to representatives of many other governments. Finally, in October 1998, the U.S. government recognized Jon's new entity – the Internet Corporation for Assigned Names and Numbers – as the provisional body to work with it to try to privatize the management of the Domain Name System.

Editor: I take it that Jones Day must have continued to work with Postel and ICANN?

LeVee: Unfortunately, Jon had a heart attack and passed away that month. He was in the hospital on the day that we filed the organizing papers for ICANN with the California Secretary of State, so I signed ICANN's first Articles of Incorporation, and Jones Day's legal assistants filed all of the necessary paperwork on Jon's behalf. Jon and Joe had, with the help of lots of others including Vint Cerf – one of Jon's close friends and another founding father of the Internet, who eventually became the chairman of ICANN's Board – found a group of people who agreed to serve on a volunteer basis as ICANN's first Board of Directors. They met in November 1998 in New York to commence operations. Because ICANN had no source of funds at that time, Jones Day agreed to continue providing legal advice on a pro bono basis.

Editor: What were the early days of ICANN like?

Sims: Gaining U.S. approval for ICANN was only the beginning. ICANN did not have a penny to pay for operations so it needed loans, all eventually paid back, from various technology companies interested in the subject matter. With no governmental powers to compel compliance, ICANN's management of Internet addressing has to be done by private contract. It took time to persuade the various private entities involved in the Internet to give ICANN oversight authority. In particular, Network Solutions, Inc., which helped operate the first TLDs, had little interest in creating competition or agreeing to ICANN oversight. Today, a consumer can subscribe to a domain name for a dollar or two a year, but in 1998, NSI, the only company offering domain name subscriptions, charged \$35 a year. Eventually, ICANN began collecting fees from NSI and others, which allowed Jones Day to convert ICANN into a paying albeit heavily discounted client. ICANN's first employee, general counsel Louis Touton,

had been a Jones Day IP partner and rejoined after finishing his ICANN service.

Editor: Did ICANN start to create new Top Level Domains immediately?

LeVee: Adding TLDs raised difficult political, technical and economic issues, so ICANN focused initially on creating competition in the retail space, accrediting hundreds of registrars to serve as intermediaries between operators of the TLDs and the companies and individuals that acquire domain names. ICANN then turned to the technical feasibility of adding new TLDs. There were concerns this would hurt the basic security and stability of the Internet. In 2000, ICANN's Board approved seven new TLDs as a "proof of concept," giving us .biz, .info and .name, among others. In 2004-05, the Board approved a handful more, including .mobi and .jobs, to be operated for "sponsored communities" on the Internet. Technically, all went smoothly, but each new TLD had its own logistical issues, and there was litigation or threats of litigation associated with nearly all of them.

Editor: What about the big expansion of the TLD space that just occurred in June?

Sims: Jon Postel first proposed adding new TLDs in the mid-1990s. One of ICANN's constituencies started working hard on this in 2006. It literally took thousands of hours and hundreds of meetings all over the world for people to get comfortable with the concept. Even today there are governments and officials who remain concerned with how the new TLDs might affect their particular constituents. And, of course, businesses throughout the world have been concerned with trademark issues given the problems many have had with cybersquatting.

Editor: What exactly did ICANN approve in June 2011?

Sims: ICANN's Board authorized a potentially unlimited expansion to the Domain Name System that literally will create a new paradigm for the Internet. Under the approved process, as many as 500 new TLDs will be added in the next two years, with no limit on the number that could be added thereafter. Of course, the addition of so many TLDs required the creation of an enormous number of "rules," including an

extensive process by which entities could object to the creation of new TLDs that offend basic rules of morality or civilization. In addition, ICANN had to create a process by which intellectual property interests held all over the world could be protected. The law in these respects varies from country to country, of course, and so creating rules that would work in every country was quite a challenge, given that a word that is benign in one country might literally be a crime to speak in another. Working closely with Jones Day lawyers from our offices in Los Angeles, Paris, Silicon Valley, Irvine, San Diego, Washington, Columbus, Cleveland, Brussels, and Shanghai, ICANN created a process – via a lengthy "Guidebook" that went through multiple drafts that ICANN published over the course of two years – that will allow individuals, governments, organizations, corporations and others to apply for new TLDs that will, we hope, not offend trademark interests across the world and will also conform to "international standards."

Editor: Where does ICANN go from here, and what will be Jones Day's involvement?

LeVee: ICANN's relationships with the world's governments are continuing to evolve; many governments now participate in ICANN's Government Advisory Committee. ICANN itself is undergoing substantial change in understanding how to deal with the technical and policy issues that continue to arise, such as the addition of many different languages to a Domain Name System that was historically accessible only with ASCII characters and the deployment of a new set of unique identifiers (IPv6) that are needed to replace the original IPv4 identifiers because they are literally running out. No doubt unforeseeable new challenges will arise in years to come. This unique public/private entity, with no governmental powers, but what certainly appears to many to be significant regulatory influence if not authority over the most powerful force for communication and commerce ever invented, has already survived longer and accomplished more than almost anyone would have predicted, and it is likely to continue that path for many years to come. Jones Day's involvement will of course be at the pleasure of the client, and we certainly enjoy the cutting edge work. ICANN is a unique entity, and the new issues that constantly arise are the kind of challenging problems that lawyers love to deal with.