There is no shortage of predictions and prognostications these days about the future of the Internet, and, in particular, the way the Internet will shape society. In this paper, I would like to offer a theory that we are embarked on a slippery slope, with an unreasonable emphasis on legal control both of Internet content and the domain name system. I believe there are real dangers in this legalistic approach.

Taking first the issue of control of content, late last year, Eric Schmidt, Chairman of Google, and his colleague, Jared Cohen, published an article in the magazine, *Foreign Affairs*, entitled “The Digital Disruption: Connectivity and the Diffusion of Power”. At that time, Egypt was still in the grip of the Mubarak regime, and the uprisings in other Middle Eastern countries had not started. Schmidt and Cohen must have had a remarkable crystal ball when they wrote:

“Whereas the traditional press is called the fourth estate, this space might be called the ‘interconnected estate’ - a place where any person with access to the Internet, regardless of living standard or nationality, is given a voice and the power to effect change.”

They continue: “States will vie to control the impact of technologies on their political and economic power.”

In the same vein, two recent books take widely different positions on the question of how the Internet will be used to bring about political changes. One book, *The Net Delusion: The Dark Side of Internet Freedom*, by Evgeny Morozov, predicts that the Internet will not be a force for liberation but rather will be abused by governments that will use it for repression or propaganda. The other book, *The Master Switch: The Rise and Fall of Information Empires*, by Tim Wu, takes a longer look at information technology and reaches a different conclusion. Wu surveys the history of the information media in the United States, with an emphasis on the way that radio fell under government and corporate control, then followed by television, thus limiting diversity and encouraging forms of censorship. Wu contrasts the centralization of traditional media with the radical decentralization inherent in the Internet. He writes:

“For many people, the Internet’s structure was - indeed remains - deeply counterintuitive. This is because it defies every expectation one has developed
from experience of other media industries, which are all predicated on control of
the customer”

Wu describes the battle that he sees between the social media and their
business model of an open system and the conflicting model of the companies
defending the traditional concepts of corporate control of spectrum and other media
channels, buttressed by government regulation. Of the latter, he says:

“If this side has its way, the twenty-first-century world of information will look, as
much as possible, like that of the twentieth century, except that the screens that
consumers are glued to will be easier to carry.”

According to Wu, what is required is “the cultivation of a popular ethic concerning
our society’s relation to information, an ethic consistent with the importance of
information in our individual and collective lives” coupled with an “awareness of the
imminent perils of a closed system.”

The kind of corporate control that worries me the most comes from the current
attempts to expand control of intellectual property on the Internet. I see this as a stalking
horse for the proponents of the closed system that would seriously limit and degrade
most of the benefits of the Internet that we enjoy today.

This leads me to the “slippery slope” in the domain name system. In 1994, Jon
Postel had the right idea when he said, “The registration of a domain name does not
have any Trademark status. It is up to the requestor to be sure he is not violating
anyone else’s Trademark.” A couple of years later, he amended the thought: “Domain
names are intended to be an addressing mechanism and are not intended to reflect any
trademark, copyright or other intellectual property rights.” That was a simpler world. In
1998, the US Government’s White Paper, the basis of ICANN, called on the World
Intellectual Property Organization to initiate the process that became the UDRP, the
Uniform Dispute Resolution Policy. The White Paper said this policy should deal with
cyberpiracy (“as opposed to conflicts between trademark holders with legitimate
competing rights”). The White paper further recommended a process for protecting
famous trademarks in the generic top level domains, and called for an evaluation of
these procedures by independent organizations.

At this point, I would like to delve into another bit of Internet history that seems to
have been nearly forgotten. Another great pioneer of the Internet, Paul Baran, died
earlier this year. He is given credit for the development of packet switching, an essential element of the later Internet protocols. In 1997, he collaborated with Dave Farber on a paper entitled “The Convergence of Computing and Telecommunications Systems”. Their observations included these remarkably foresighted comments:

“....

3) The current policy is to determine whether the nation shall or shall not have certain computer communications services, by the adversary process. In this process, often only the voices of the loudest adversary suppliers are heard.

4) Although there can be no certainty that better alternatives cannot be devised, we believe that such a possibility assumes a higher probability if the key actors come from the technical community sectors more representative of the future consumers.

5) If we are to have the new services that are possible, we need an approach that makes better use of the technologists’ dreams and goals rather than have future prospects excessively bound by lawyers paid to preserve the interests of their clients, irrespective of any secondary consequences.

…”

Does this call to mind what is currently going on at ICANN?

There are many examples of the dangers of this client-oriented legal approach. The United States has a law that in many respects parallels the UDRP. Originally it was designed to deal with the serial cybersquatters, the dark side of the domainers who collect domain names based on trademarks and then hope to extort settlements from the trademark owners. The enforcement of this law more recently has degenerated into a mechanistic approach that ignores the White Paper’s warning against getting involved in “conflicts between trademark holders with legitimate competing rights”.

The long drawn out ICANN proceeding to introduce new top level domains offers another example. ICANN made a controversial decision to ask the owners of
trademarks and product brands what they wanted – in many ways a defensible decision. The brand owners responded with a wish list. ICANN then convened a working team with a broad representation of the stakeholders that are supposed to develop policy to consider what to do with the wish list. This team, including representatives of the trademark owners, remarkably, reached rough consensus on the shape of protection for intellectual property in the new domains – in other words, a model of how bottom-up policy should be made.

Unfortunately, that policy is far from being implemented in the proposed final form of ICANN’s Applicant Guidebook for the new domains. ICANN itself has decided to improve on the working group’s consensus. The lawyers paid to preserve the interests of the trademark owners have not ceased to turn their backs on the concessions they made to achieve consensus only a few months previously. Making matters worse, the same lawyers appear to be lobbying the governments that make up the Government Advisory Committee of ICANN, the “GAC”, to induce them to promote even more stringent protections for intellectual property.

Currently the United States Congress is considering a bill that would require Internet service providers to block domain names alleged to be violating intellectual property rights. There is nearly uniform opposition to the bill within the technical community because of its adverse effects on Internet security and stability, but these technical objections may not be sufficient to prevent it from becoming law in the United States.

Fortunately, there are some lawyers who recognize the dangers we face as we slip towards more legal involvement in the Internet. Larry Lessig, a professor at Harvard Law School and trustee of the Internet Society, recently addressed a group of lawyers at a convention in New York. He spoke of the instincts of lawyers and legislators to “invoke the law quite forcefully,” when confronted with piracy. As we have seen, this has been the approach of the record companies – put your best customers in jail. Lessig says, “The right instinct would be to modify the law and the market to reflect the new ways innovation and technology are being used, while also making sure artists are getting paid” and further “The law needs to deregulate a certain area of culture in order to effectively regulate where it should properly be applied.”
As Dave Farber and Paul Baran said, thirty-four years ago, “we need an approach that makes better use of the technologists' dreams and goals...” If we cannot do this, we risk an Internet controlled by private interests whose dreams and goals are more control, the antithesis of the freedom of expression that ought to be the hallmark of the Internet.