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STAKEHOLDER PERSPECTIVES ON ICANN: THE .SUCKS DOMAIN AND ESSENTIAL STEPS TO GUARANTEE TRUST AND ACCOUNTABILITY IN THE INTERNET'S OPERATION

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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STAKEHOLDER PERSPECTIVES ON ICANN: THE .SUCKS DOMAIN AND ESSENTIAL STEPS TO GUARANTEE TRUST AND ACCOUNTABILITY IN THE INTERNET'S OPERATION

WEDNESDAY, MAY 13, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:11 a.m., in room 2141, Rayburn Office Building, the Honorable Darrell E. Issa, (Chairman of the Subcommittee) presiding.

Present: Representatives Issa, Goodlatte, Collins, Smith, Forbes, Jordan, Poe, Marino, Farenthold, Nadler, Conyers, Deutch, Bass, DelBene, Peters, Lofgren, and Johnson.

Staff Present: (Majority) David Whitney, Oversight Counsel; Eric Bagwell, Clerk; and (Minority) Jason Everett, Minority Counsel.

Mr. ISSA. Good morning. I want to welcome you all to this intimate dais gathering here.

The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome today a hearing with the stakeholders of prospective changes on ICANN. In particular, we will be dealing today with a number of new items, including the .SUCKS domain and essential steps to guarantee trust and accountability in Internet operations.

Today's hearing comes approximately 14 months after the National Telecommunications and Information Administration announced its intention to relinquish the existing contract for the oversight of the Internet Assigned Numbers Authority, or IANA, to the global multi-stakeholder group coordinated by ICANN. Now, that is a mouthful. But in a nutshell, we have decided to give up our governance control that has been in place effectively since the beginning of the Internet.

The United States has been a critical backstop against censorship and in promoting openness and free speech in the Internet

once IANA's contract is surrendered. It is impossible to go back once this is done, and we cannot overstate the importance of such a transition. If it is to occur, it is important that it be done correctly and recognizing that the long-term aspirations of these organizations that contribute to the operations of the Internet must take the utmost caution in establishing a process to transition to a new form of control of this critical backbone function.

Clearly, I was troubled by the NTIA's sudden announcement late on a Friday afternoon, which is known by all of us to bury a story. So on September 30, 2014, without first informing or engaging with the appropriate parties for collaboration, including the staff of this Committee—and I want to make it clear, a minor notice that something would be happening the next week, on a Thursday, without recognizing what it was going to be, and then having it stuck in on a Friday, is not collaboration. It is certainly not consultation.

The process that we want to have must be deliberate, conscientious, and, in fact, include a bottom-up evaluation by all the stakeholders. So today's hearing is really about recognizing successes and failures throughout this process.

But we have the largest group of witnesses I personally have ever had in my 15 years in Congress for a reason. Even without ICANN at the table, what we have is we have a small segment of the stakeholders. To have only eight is a disappointment, because there are millions. But to have eight is the bare minimum for us to begin to talk about the breadth of concern that seems to exist in a transition that, although anticipated for a long time, seems to be rushing forward just at a time in which particularly the domain name system has some serious questions and perhaps flaws.

It is particularly important that now that it is about a year later, that we begin to ask the question: Is it appropriate to have the transition as scheduled, or should there be further delay with a short extension in order to ensure that the process that cannot be undone is done right the first time?

An example that particularly concerns this Member is, in fact, that in light of the .AMAZON Web site, one that was not done in consultation with a company of Internet fame, nor necessarily in proper consultation with the countries in which Amazon flows, has been with some chaos and lessons to be learned, and I want to thank our witness for being here today so we can begin discussing what was learned and should be learned before sites such as .SUCKS, .PORN, or .IHATECONGRESS are put on the Internet. I know that .IHATECONGRESS would be well sold, perhaps oversubscribed. The question is, does it serve the responsibility to ensure sufficient naming so that all may have an appropriate name? Or, in fact, have we gotten into a business model that was never envisioned?

There is no question in my mind that since there are billions of possibilities in IPv6, a series of three-digit numbers, there are enough numbers finally to take care of every point. But since names can be assigned by the dozens or even thousands to one number, are we simply exaggerating the number of names that are going to end up at a single point?

In closing, the .SUCKS domain was approved by ICANN and auctioned last November to a company that now has the right to

operate a new generic top-level domain. ICANN should not be the speech police. However, as I have done individual evaluation, and I now place into the record the DarrellIssa.SUCKS opportunity to buy, the process being done by the companies that gain the rights appears to this Member to be nothing more than legalized extortion. The typical price most Americans see if they go to GoDaddy or any other site to buy a name is in the dollars or tens of dollars. In the case of these sites, which can be often and most likely used in a pejorative way, the sites begin at $249 but are effectively being done as an auction. You are given an opportunity to bid, if you are the proper name owner, $2,500, with no guarantee that you won't be over-bid by somebody that hates you more than you love your own name.

So as we begin this process, one of the key elements that we are going to be exploring is whether, in fact, naming and those sales should ever be done to settle past debts that ICANN has, or a bidding process that leads to an unreasonable cost to the legitimate owner of a name only to protect his name from either disparagement or dilution.

And with that, I am pleased to recognize the Ranking Member for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Today we continue our examination of the Internet Corporation for Assigned Names and Numbers, or ICANN. This may not be a glamorous topic, but it is fundamental to the governance and functioning of the Internet.

When we type a simple address into our Web browser, we rarely give a second thought to how our desired Web site loads almost instantly onto our screen. But there is a complicated and unseen architecture that makes this process work, administered in part by ICANN, and we must ensure that it operates smoothly, transparently, and with proper accountability.

Since this Subcommittee last considered issues related to ICANN, there have been many developments that warrant further analysis, and I appreciate the Chairman scheduling this hearing today.

Most prominently since our last hearing, ICANN has continued to expand its new generic top-level domain program, gTLD, which supplements existing top-level domains such as .COM, .NET, and .ORG with new ones consisting of brand names or generic terms like .MUSIC, .NEWS, or .BOOKS. Supporters of this expansion argue that it will increase consumer choice, competition, and innovation. As of last month, there were over 500 new top-level domains added to the Internet, and we expect hundreds more soon.

However, this expansion has also raised a host of issues related to determining which names are allocated, to whom they are allocated, and what it should cost to register a domain. We have seen this most vividly in the controversy surrounding ICANN's approval, as the Chairman has mentioned, of the .SUCKS gTLD. This has been contentious not only because of the term but also because of concerns voiced about the proposed pricing structure associated with the domain.

For obvious reasons, many brand owners have chosen to defensively register their own names in this domain to prevent others

from using it in a negative context. However, the company that administers the .SUCKS domain, Vox Populi, has chosen to charge brand owners $2,500 to register their names instead of the much lower prices, as low as $10 in some cases, that it charges the public to register these names.

According to Vox Populi, the .SUCKS domain "is designed to help consumers find their voices and allow companies to find their value in criticism." Legitimate criticism is fair, of course, and is protected speech. However, this tiered pricing scheme which allows critics to register a name for a nominal charge while brand owners must pay exorbitant prices to protect their brands looks to many people like extortion.

For example, ICANN's intellectual property constituency sent a letter to ICANN suggesting that the roll-out not continue because it "can best be described as predatory, exploitative, and coercive." In response to these concerns, ICANN asked the United States Federal Trade Commission and Canada's Office of Consumer Affairs to consider whether Vox Populi, which is based in Canada, is violating any laws or regulations. According to ICANN, because it is not a law enforcement agency and is only a contractual relationship with Vox Populi, it cannot act unless it receives guidance that the company is acting in some way illegally.

Many stakeholders have expressed concern that ICANN's response is inadequate and simply passes the buck to regulators rather than taking responsibility for administering its own contracts.

Given Vox Populi's scathing letter in response to ICANN, it is clear that this issue will not be resolved quickly. Congress must closely monitor the situation and hope ICANN will provide answers about how it intends to protect intellectual property rights holders and consumers as the rollout of the .SUCKS top-level domain continues.

But this should not be just about one top-level domain expansion. We must consider instead what we can learn from the .SUCKS experience and apply these lessons to future top-level domains. We should also consider whether there are satisfactory safeguards in place to protect trademarks and intellectual property from being misused during this process, and whether ICANN's rights protection mechanism sufficiently addresses concerns raised by active parties.

It is important to recognize that this discussion occurs in the context of oversight responsibility for ICANN's ministerial IANA functions transitioning from the National Telecommunications and Information Administration in the U.S. Commerce Department to an international multi-stakeholder process. This transition is completely separate and apart from ICANN's role in the top-level domain expansion.

However, to the extent that stakeholders have expressed concerns about ICANN's level of transparency and accountability when it comes to managing the gTLD expansion or its other responsibilities, it is fair to ask whether appropriate transparency and accountability will exist once the multi-stakeholder process begins.

Unfortunately, at times the debate over the ICANN transition has veered into a partisan battle based on imagined fears that the

transition will cause the Internet to be dominated by repressive governments overseas. I hope that today's hearing will be free of such overheated rhetoric. In reality, this transition continues a privatization process that started in 1998, which continued through the Bush administration and has been supported by various Congresses. Ensuring effective private-sector management of these networks and transitioning functions served by the United States Government has been a goal shared by Republicans and Democrats alike over the years. I continue to believe that we need to ensure that the transition process and the model developed through the process produces a management structure that supports a secure, open, and truly global Internet.

The NTIA has established criteria to help ensure this occurs, and I am confident that the agency and ICANN will agree to update us periodically.

Before we delve into a discussion of any shortcomings of ICANN, I first want to thank its staff and its leadership for bringing together the multi-stakeholder process and for their hard work in building a strong and effective Internet. I hope that today's hearing will not devolve into a discussion that simply blames ICANN for all of the things that have gone wrong in this transition. Rather, I challenge us to figure out ways we can improve it. I would like our conversation to be more constructive, and I am hopeful that we can work together in a bipartisan fashion to determine how best to improve the current system.

Since we have eight excellent witnesses, I don't want to spend any more time talking than needed. I yield back the balance of my time.

Mr. ISSA. I thank the gentleman. Thank you, Mr. Nadler.

I now recognize the Chairman of the full Committee, Mr. Goodlatte, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Just over a year ago the Obama administration and specifically the NTIA announced plans to transition oversight over the Internet's domain name system to the Internet Corporation for Assigned Names and Numbers, or ICANN. The Administration's decision kicked off high-profile debates involving many far-reaching questions that relate to the future security, stability, resiliency and integrity of the global Internet's continued operation.

At the core of NTIA's decision to entrust ICANN with the responsibility of convening the multi-stakeholder process to transition the IANA functions contract away from the United States is its determination that ICANN has matured as an organization. Presumably, NTIA has concluded that ICANN is not merely likely to conduct itself in a predictable, open, transparent and accountable manner in the future but that it generally exercises sound judgment and conducts itself in this manner already.

Today's hearing before the Courts, Intellectual Property, and the Internet Subcommittee is the second to focus on aspects of the proposed transition of the IANA functions contract to the global multi-stakeholder community. Two overarching concerns that should be tested fully and appropriately validated before concluding any transition are: one, how representative that community is; and two, how effective the community is and will be in the future in compel-

ling ICANN to operate in a manner that benefits not merely a privileged few but the global users of the Internet.

We will direct our attention today to matters that relate to the processes being implemented by ICANN and affected stakeholders to advance the NTIA's proposal and also to the substantive concerns routinely expressed by a wide array of stakeholders about ICANN's trustworthiness, accountability, execution and transparency of its current and existing duties and initiatives.

Regrettably, many of these issues relate to matters presented to successive leaders of ICANN and officials at the Commerce Department for years, and yet there remains substantial room for progress toward responsible outcomes.

Despite these matters being neither novel nor unanticipated, ICANN too often fails to appreciate their seriousness and implement corrective measures in advance or determines that it is unable or unwilling to do so. In at least one instance, the Obama administration actually aided and abetted efforts within ICANN to expand the influence of foreign governments at the expense of American companies.

We will hear what happened when the NTIA and the State Department refused to intervene as the governments of Brazil and Peru pressured ICANN's board to deny Amazon's application for the .AMAZON gTLD even though the application was complete and the word was in no way restricted.

The multi-faceted debate over the .SUCKS gTLD, which has resulted in trademark owners being shaken down for $2,499—I love that $1.00 discount from the round $2,500—or more annually to protect their brands by a registry affiliated with a company in financial default to ICANN raises many troubling questions, including: one, how the registry gained approval in the first instance; and two, whether ICANN itself had a financial motive for allowing this bid to proceed.

Beyond this, ICANN's Chief Contract Compliance Officer's recent public request to consumer protection officials in the United States and Canada to investigate the applicant that ICANN just awarded the new domain to demonstrates the absurdity and futility of ICANN's own enforcement processes.

But frustration over ICANN's enforcement and compliance system is not new. For more than a decade, this Committee has worked to encourage ICANN to take meaningful action to suspend the accreditation of registrars who disregard abuse notifications, and even those who actively solicit criminal activity. Today, we will hear testimony from a witness who has documented ICANN's refusal to deal responsibly with registries that profit from the trafficking of counterfeit drugs and even controlled substances like heroin.

Before concluding, I want to commend the witnesses here today and those who worked to submit statements to the Subcommittee for their extraordinary dedication and ongoing efforts to improve ICANN's responsiveness, accountability and transparency.

As one of our experts who wasn't able to join us today observed, "We think that after more than fifteen years of routinely interacting with each other, ICANN and NTIA may have become a little too close. Only Congress can review what NTIA does and keep

pressure on them to make sure the ICANN/IANA transition is not overly influenced or dominated by the agenda of ICANN. Help us ensure that the transition responds to the needs of the much broader community of Internet users and providers." That is our goal and our obligation.

And with that, Mr. Chairman, I yield back.

Mr. ISSA. I thank the gentleman.

We now recognize the Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Chairman Issa. And to the Members of the Committee, and the gentlelady witness with the seven men that have accompanied her here today. We welcome you and the interested citizens that join us for this discussion here in the Judiciary Committee.

The Internet Corporation for Assigned Names and Numbers, ICANN, is a private-sector, non-profit corporation started in 1998 to promote competition and to develop policy on the Internet's unique identifiers. The pending transition of key domain functions from United States stewardship to the global, multi-stakeholder community presents, of course, several new issues.

Most importantly, ICANN and other stakeholders must abide by their contractual provisions to prohibit the use of domain names for the pirating of copyrighted material and other illegal activity. As many of you know, this Committee is deeply committed to addressing the problems of copyright and trademark infringement.

Thus, from our perspective, it is critical that ICANN help prevent piracy and other unlawful conduct by both registrars and registrants. And to this end, ICANN prohibits registrants from engaging in unlawful conduct. In fact, ICANN released its Register Accreditation Agreement in 2013 which requires registrars to prevent abusive uses of registered domain names.

Yet, there are reports that registrars are ignoring their obligations to deter online theft of copyrighted material, among other concerns. And worse, there are reports that ICANN is not enforcing the registrars' contractual obligations. This raises concerns about ICANN and Internet governance.

Accordingly, I would like the distinguished witnesses to explain how ICANN and stakeholders can better respond to concerns about piracy and other illegal conduct, and how Congress can hold ICANN accountable.

This leads to the next consideration. The National Telecommunications and Information Administration must adhere to its core guiding principles to ensure the security, protection, openness and stability of the network to complete the transition. The United States has long supported transitioning key Internet domain name functions to global multi-stakeholder communities. In fact, the House and Senate, on a bipartisan basis in the last Congress, clearly stated their support for a private, multi-stakeholder model of Internet governance.

Nevertheless, any proposal for transition of the domain name system must meet certain core principles before it can be approved and finalized by the NTIA. These principles ensure that the United States will succeed in maintaining freedom, protections, openness, security and stability of the network. Adhering to these principles

would build much-needed public support for the transition, and it would make it easier to receive our approval.

Finally, we must ensure that NTIA abides by its commitment to facilitate a truly effective transition. The process should continue to be open and transparent and can confirm ICANN's accountability through core values and bylaws, and it should obtain international stakeholder consensus and support.

So the hearing today should be the first of a number of oversight activities that our Committee conducts throughout the remainder of the transition process. Further hearings would allow stakeholders to update us on the transition and provide us with an opportunity to hear concerns. These hearings will also allow us to examine whether further safeguards are necessary.

Accordingly, I thank the Chairman for holding today's hearings, and I look forward to hearing from this rather large number of witnesses. Thank you.

Mr. ISSA. I thank the gentleman. As I said in my opening statement, it is not a large group. It is a sub-segment of millions of people who would like to be sitting here at the witness table.

It is now my pleasure to introduce the distinguished panel of witnesses. The witnesses' written statements will be entered into the record in their entirety. I ask you to please summarize within 5 minutes or less, considering the size of the witnesses. To help us stay within this time limit, you will notice, as my colleague and former Chairman of another Committee, Mr. Towns, would say, you will notice that there is a red, a yellow, and a green light, and every American knows that green means go, yellow means go faster, and red means you have to stop. So if you will obey those, or if you possibly could summarize in less time, it would be appreciated since it will leave more time for the many questions we will have.

Before I introduce the witnesses, I would ask that all the witnesses please rise to take the oath required by the Committee. Please raise your right hand.

Do you all solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Please be seated.

Let the record reflect that all witnesses answered in the affirmative.

It is now my pleasure to introduce our panel of witnesses.

Ms. Mei-lan Stark is the Immediate Past President of the International Trademark Association.

Mr. Paul Misener is Vice President of Global Public Policy at Amazon.com, who has already been mentioned more than most witnesses.

Mr. John Horton is President of LegitScript.

Mr. Steve Metalitz is Counsel for the Coalition for Online Accountability.

Mr. Bill Woodcock is Executive Director of Packet Clearing House.

Mr. Steve DelBianco is Executive Director of NetChoice.

Mr. Phil Corwin is Counsel for the Internet Commerce Association.

And last but not least is Mr. Jonathan Zuck, President of ACT|The App Association.

And with that, Madam, you get to go first.

TESTIMONY OF MEI-LAN STARK, IMMEDIATE PAST PRESIDENT, INTERNATIONAL TRADEMARK ASSOCIATION

Ms. STARK. Good morning, Chairman Issa, Ranking Member Nadler, and Members of the Committee. Thank you for this opportunity to appear before you today. My name is Mei-lan Stark, and I am Senior Vice President of Intellectual Property for the Fox Entertainment Group, and I am appearing today on behalf of the International Trademark Association, otherwise known as INTA, where I am serving on a voluntary basis as their Immediate Past President.

It was my privilege to testify before this Committee in 2011. At that time, I shared with you the trademark community's concerns regarding the launch of ICANN's new generic top-level domain, or gTLD, program. Today, I offer trademark owners' perspectives on ICANN's performance regarding the .SUCKS launch and the concerns it raises for the potential relinquishment of the National Telecommunications Information Administration, or NTIA's, stewardship of the IANA function. We greatly appreciate the Committee's attention to these very important issues.

The new gTLD program was designed to promote competition and innovation. It is a system based upon a participatory multi-stakeholder model, and as is true with any self-regulatory model, trust and accountability are essential. That means the system must have strong mechanisms in place to conduct its operations in a reliable and transparent way.

Intellectual property owners of all sizes, from all industries, both commercial and not-for-profit, must be able to trust that the new gTLD system will operate according to agreed-upon policies and procedures. This is necessary so that business owners can effectively protect their valuable trademarks in this new world. But more than that, trust and predictability are required to satisfy the purported goal of the new system, fostering innovation. After all, no business will invest resources in an unreliable system.

The launch of .SUCKS by Vox Populi is an example of ICANN's operational deficiencies. The new gTLD program followed extensive public comment on how the system would operate and what intellectual property rights mechanisms would be mandatory. In response to grave concerns voiced by trademark owners during the public comment periods, ICANN did convene voluntary experts to address them, and that led to the implementation of new rights protection mechanisms to protect businesses and consumers from confusion, cyber-squatting, fraud, and other abuse.

One such mechanism is the Trademark Clearinghouse, which allows trademark owners to pre-register domains corresponding to their trademarks before such names are made available to the general public. It appears that Vox Populi is using this very mechanism designed to protect trademarks and consumers to charge businesses and non-profits, both large and small, exorbitant fees to register their marks as domain names. Vox Populi co-opts the rights mechanisms developed by the multi-stakeholder community and

uses it as a means to identify who pays 250 times more for a domain name.

ICANN was warned about these bad practices and was asked to resolve these issues before the .SUCKS launch, but ICANN chose to ignore that request, and the launch continues. The current .SUCKS controversy strongly suggests that the critical framework required for a successful transition of the IANA function does not yet exist. ICANN must enforce its own policies and contracts. The trademark community supports the multi-stakeholder model, and we are engaged in the processes that are shaping that framework. We support a transition, but not until we are assured of the necessary accountability and transparency.

As ICANN's management of the .SUCKS launch reveals, we simply are not there yet. Until such accountability mechanisms are implemented, continued U.S. Government and congressional oversight is necessary.

In conclusion, while there are many potential benefits from the new gTLD program, those benefits are unlikely to materialize unless the program is effectively and fairly administered. ICANN's decisions and actions directly impact not only the architecture and control of the Internet but ultimately how consumers experience the Internet. As a trade association dedicated to brands and the consumer protection that trademarks afford, INTA stands ready to help ICANN develop and implement a reliable framework that promotes fair competition, choice and trust.

We very much appreciate the Committee's continued engagement in these matters and thank you again for the opportunity to discuss the challenges facing trademark owners under ICANN's current policies and practices.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Stark follows:]

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TESTIMONY

OF

MEI-LAN STARK

IMMEDIATE PAST PRESIDENT

INTERNATIONAL TRADEMARK ASSOCIATION

STAKEHOLDERS PERSPECTIVES ON THE OPERATION OF THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

MAY 13, 2015

Executive Summary

Mei-lan Stark, Senior Vice President, Intellectual Property, for Fox Entertainment is appearing on behalf of the International Trademark Association (INTA) where she serves as Immediate Past President and Ex-Officio. INTA represents the interests of trademark owners worldwide and is an active participant in ICANN's multistakeholder process. Members of the trademark and business communities support multistakeholderism and actively participate in the development of policies and processes under ICANN's supervision.

Although the new Generic Top Level Domain (new gTLD) program presented intriguing commercial possibilities including creating new online communities and user experiences, trademark owners expressed grave concerns over the potential harms that would likely ensue. Instead of monitoring dozens of extensions for enforcement, trademark owners now have to monitor hundreds and, potentially, thousands of new gTLDs. ICANN addressed these concerns by developing and implementing new rights protection mechanisms (RPMs) in consultation with the multistakeholder community which included trademark experts.

With the RPM's in place, the new gTLD program launched. Hundreds of names have been delegated without controversy, but there is growing concern within the trademark community over the failure of some registries to comply with the terms of the Registry Agreement (RA) and ICANN's failure to enforce the RA. While many registries are following the RA, some are not. There is evidence of rampant abuse of the system. All of these problems were foreseeable and could have been prevented. The launch of the .sucks domain by Vox Populi Registry Ltd. ("Vox Populi") is a glaring example of ICANN's ineffective oversight. The problems with the .sucks launch were documented in a letter to ICANN. The letter urged the suspension of the launch until the issues could be fairly resolved. Unfortunately, ICANN ignored this request. Instead, it looked to the U.S. and Canadian governments for answers rather than its own internal enforcement mechanisms. The launch of .sucks continues to the detriment of trademark owners.

In order for the multistakeholder process to work, there must be strong systems in place to ensure trust, transparency, accountability and predictability. ICANN must implement these mechanisms prior to the IANA transition. This will ensure that the DNS is run fairly and to the benefit of the entire multistakeholder community which includes the end user – the consumer. Trademark protection is based in consumer protection. ICANN needs to learn to engage with its own community in a better way and learn to respond quickly and fairly to legitimate concerns when they are raised. INTA, as a responsible stakeholder, stands ready to help ICANN develop and implement reliable policies and processes to ensure accountability, transparency and fairness in the DNS. INTA is extremely grateful to the committee for its continued engagement in these issues and we greatly appreciate the opportunity to discuss the challenges facing trademark owners under ICANN's current policies and practices.

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Good morning Mr. Chairman and Members of the Subcommittee,

Thank you for this opportunity to offer the perspective of trademark owners on the performance of the Internet Corporation for Assigned Names and Numbers, otherwise known as "ICANN" with regard to the launch of the new generic top-level domain .sucks and its implications regarding the proposed relinquishment of any oversight of the Domain Name System (DNS) by the National Telecommunications and Information Administration (NTIA).

I. Introduction

I am Mei-lan Stark, Senior Vice President, Intellectual Property, for Fox Entertainment Group. I am appearing today on behalf of the International Trademark Association (INTA) where I serve on a voluntary basis as Immediate Past President and Ex-Officio. INTA is a not-for-profit membership association of more than 6,000 corporations, law firms and other trademark-related businesses from more than 190 countries throughout the world. INTA membership crosses all industry lines, including manufacturers, retailers and nonprofit organizations, and it is united in the goal of supporting the essential role trademarks play in promoting effective national and international commerce, protecting the interest of consumers, and encouraging free and fair competition.

I was privileged to testify before this committee in 2011 and shared the concerns of trademark owners with regard to the launch of ICANN's new generic Top-Level Domain (gTLD) program. For the first time, the DNS would be subject to an unlimited amount of top level names for commercial and noncommercial users. Trademark owners could register their brands and any combination of letters could form new names "to the right of the dot." The stated goal of the program was to promote competition, innovation and choice within the DNS. The policies and processes for the new gTLD program were to be developed through ICANN's multistakeholder process.

Members of the trademark and business communities support multistakeholderism and actively participate in the development of policies and processes under ICANN's supervision. However, in order for the multistakeholder process to truly work, there must be trust and predictability. ICANN's record of enforcement, accountability, and transparency with regard to new domain names raises questions as to whether there are the appropriate checks and balances in place for a successful transition of National Telecommunications and Information Administration (NTIA) stewardship of the IANA function.

II. The Trademark Community and the New gTLD Program: Positive Opportunities Bring Foreseeable Bad Practices

Although the new gTLD program presented intriguing commercial possibilities including creating new online communities and user experiences, trademark owners expressed grave concern over the potential harms that would likely ensue. We were concerned about the costs of enforcing our rights while preventing fraud and abuse. Commonly, trademark owners buy domain names that are the same as or similar to their own marks, including plurals or misspellings in order to prevent misuse of those names by others. This practice is referred to

as "defensive registration." Defensive registration either with top or second level domain names could cost tens of thousands of dollars per mark. The risk to a brand's reputation due to the misuse of trademarks under the new program as well as harm to consumers was exponentially higher due to the number of new names to be released. As point of clarification, the top level refers to a new gTLD, like ".brand." The second level is what comes before the dot, for example, "choice.brand." Absent any safeguards, trademark owners would be forced into defensively registering top level domains as well second level domains.

III. Rights Protection Mechanisms (RPMs) and Those Who Would Subvert Them

ICANN recognized our concerns and convened groups of volunteer experts to address them. Thousands of hours were devoted to careful consideration of the balance of rights and remedies for trademark owners in the DNS. This intensive work resulted in recommendations for new rights protection mechanisms (RPMs) including the ability to register our trademarks in a Trademark Clearing House (TMCH) and the mandatory implementation of a Sunrise Period for the launch of each new gTLD. The TMCH is a repository for trademark information that streamlines the validation of trademark ownership for the purpose of registering a domain name with the Sunrise Period. The Sunrise Period is a window in time where trademark owners may register their domains before they are released to the general public. Until now, validation of trademark rights had been left to the individual registrars who sell domain names and trademark owners had to submit proof of their rights with each seller. Creation of the TMCH created a one-stop shop for trademark owners and registrars to verify trademark rights. The intention of the TMCH is to reduce the time and costs of trademark validation and facilitate the sale of domain names to trademark owners. Once our trademark rights are validated, we may avail ourselves of Sunrise Periods within the new gTLD program. The pricing of Sunrise registrations is intended to include the regular fee and recovery of nominal administrative costs. The TMCH and Sunrise Period are tools for trademark owners to avoid costly disputes in the future. They are not intended to create a premium market.

Adherence to RPMs is mandatory under ICANN's Registry Agreement (RA). The effectiveness of the RPM's is still to be determined and ICANN recently closed a comment period on a Draft Report regarding its RPM review.

With RPMs in place and applications submitted under ICANN guidelines, the new gTLD program launched. Hundreds of names have been delegated without controversy, but there is growing concern within the trademark community over the failure of some registries to comply with the terms of the RA and ICANN's failure to enforce the RA. While many registries are following the RA, some are not. There is evidence of rampant abuse of the system including reserving trademarks from sale to trademark owners without apparent reason or redress, use of the TMCH to exploit the trademarks that have been validated for protection, and designating trademarks as premium names subject to higher pricing. All of these problems were foreseeable and could have been prevented.

IV. ".sucks" – The System Fails

The launch of the .sucks domain by Vox Populi Registry Ltd. is a glaring example of ICANN's ineffective oversight of the new gTLD program. The problems with the .sucks launch were documented in a letter submitted to ICANN by the Intellectual Property Constituency or IPC of which INTA is a member. In its letter, the IPC documents what many believe to be unfair practices employed by Vox Populi in order to extract exorbitant fees from trademark owners. Accordingly, the IPC urged the suspension of the launch. Unfortunately, ICANN ignored this request and the launch continues to the detriment of trademark owners. Let me explain.

a. ICANN Allows Exorbitant Pricing of Sunrise and Premium Names

Vox Populi charges trademark owners $2,499 per domain. This is 250 times more than it intends to sell domains to the consumer at $10 per domain. Only trademarks included in the TMCH are subject to the $2,499 pricing. Thus, the Clearinghouse, intended to be a rights protection mechanism is manipulated to set unfair pricing and specifically targets trademark owners who have been diligent in protecting their rights.

Trademark owners thus face the dilemma of leaving their valuable trademarks exposed to unscrupulous actors in cyberspace by forgoing the Sunrise registration and waiting to buy the name during general availability, or paying exorbitant premium fees. Currently, prices for general availability start at $249. The $10 price available for consumers starting in Fall, 2015 and, according to information available on the .sucks website, is not and will not be available to "any corporation or in any way affiliated with the corporation the term is referencing." See https://www.nic.sucks/products. Further, Vox Populi claims that the low $10 price will be subsidized but they are not clear how. Complicating matters, Vox Populi announced a "sunrise premium list" that has nothing to do with the Sunrise Period previously described. The price for a name on the premium list starts at $2,499 a year with a 10 year registration costing nearly $25,000 for trademark owners per domain. To be sure, the overall pricing scheme is clearly aimed at reaping immense profits based on the fame and value of recognized trademarks.

b. Vox Populi is Confusing Consumer Advocacy with Unfair Business Practices

Vox Populi claims it is providing a space for consumer advocacy and information. That is a laudable goal. However, providing consumers a forum for their concerns cannot be predicated on exploiting the legitimate rights of trademark owners. Consumer protection is at the heart of trademark rights. Trademarks signify quality and their value is based on predictability and trust. Trademarks also signal to the consumer consistency and choice. Consumers choose products and services based on these attributes and by their use of trademarked products. The value of the trademark is directly proportional to its resonance with the consumer. INTA believes that businesses that invest in quality products and services to build consumer trust also deserve to enjoy the same level of trust from ICANN and the multistakeholder process. Otherwise, they will be deterred from the investment and innovation that the new gTLD program was designed to foster.

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Choice, fair competition and trust depend on a reliable and level playing field. We submit, Mr. Chairman, that this is not the case today. In the example of .sucks, ICANN had an opportunity to act, but did not. Instead, they chose to seek guidance from U.S. and Canadian regulatory agencies with regard to pricing rather than address the issue from the standpoint of established contract terms and the spirit and intention in which RPMs have evolved. ICANN had the opportunity to preclude the type of behavior described today but, instead, chose to forge ahead with a program that contains too many avenues for abuse and too few mechanisms for redress, which brings me to my next point.

V. The Trademark Community Has Concerns Beyond .sucks

a. Support of Accurate and Accessible Whois Information

In addition to the lack of oversight of registry practices, there are two other major concerns of the trademark community which we would like to bring to the attention of the committee. The first is our concern about the accessibility and accuracy of Whois information. Whois is the directory system whereby domain name holders must register their contact information. There is an ongoing debate whether Whois information should be available at all. An expert working group on Whois produced a report that supports the idea that businesses should have access to reliable and contactable information to fight instances of infringement, counterfeiting, fraud and abuse. We are carefully monitoring the developments around Whois to ensure that trademark owners are afforded effective access to information that is critical to brand enforcement and the conduct of effective electronic commerce.

b. Concern About a Premature Launch of a Second Round of New gTLDs.

Our second concern is the possible launch of a second round of new gTLDs without full consideration of the impact of the first round. Discussion about a second round has already started. We believe that this is premature given the lack of information or analysis of the effectiveness of the program overall including, but not limited to, rights protection mechanisms and registry practices. We understand that many trademark owners who did not apply in the first round of new gTLDs may want apply in the second round. However, until the current issues discussed today are addressed, launching a second round of new gTLDs will only greatly exacerbate the situation for both trademark owners and, most importantly, for consumers.

VI. ICANN Must Implement Strong Accountability and Transparency Mechanisms Prior to the IANA Transition

As I stated earlier, the trademark community supports the multistakeholder model. We are working very hard to assist ICANN in shaping a transition plan with built-in transparency and accountability measures. However, we are not there yet and, I believe, even ICANN acknowledges this reality. ICANN recently released two reports on the IANA transition: the first entitled *The 2nd Draft Proposal of the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions,* released on April 22, 2015, and the second entitled *The Cross Community Working Group on Enhancing ICANN*

Accountability (CCWG-Accountability) – Input Needed on its Proposed Accountability Enhancements (Work Stream 1), released on May 4, 2015. The comment periods close May 20 and June 3 respectively. We are studying the reports to determine whether the proposed structures and reforms would create sufficient safeguards and structures to ensure the accountability, transparency, and oversight required to foster an open, competitive, reliable business environment. We have also requested that the end dates for the two comment periods coincide so that we can prepare a meaningful and comprehensive response. An additional comment period is envisioned for July 2015. Equally important to achieving the right structures and reforms is the continued oversight conducted by this committee and other congressional committees with jurisdiction.

We support a transition but not on an accelerated time frame and not until we are assured of accountability and transparency. Keeping the U.S. government engaged through the Affirmation of Commitments and the IANA contract provides assurances that ICANN will continue to improve its operations and accountability structure until such time as a comprehensive and reliable framework for transition is developed and implemented.

VII. Conclusion – Reliability, Accountability and Transparency Strengthen the DNS and Public Confidence iu the Internet

The launch of the new gTLD program illustrates both the opportunities and the pitfalls emanating from ICANN's current management of the DNS. It is critical that ICANN finally "gets it right" in terms of responding to the concerns of key stakeholders in the multistakeholder model -- trademark owners and the business community at large. The decisions that ICANN makes have a direct impact on consumers of our products and services. INTA members spend thousands of hours volunteering their time to participate on Internet-related committees and working groups in an attempt to develop thoughtful solutions to the vexing problems within the DNS. If the process cannot be trusted or relied upon, then we risk alienation of the very users that the system intends to support. Trademark protection is clearly in the public interest and must be reliably supported throughout ICANN's program development and implementation. ICANN needs to learn to engage with its own community in a better way and learn to respond quickly and fairly to legitimate concerns when they are raised. INTA, as a responsible stakeholder, stands ready to help ICANN develop and implement reliable policies and processes to ensure fairness in the DNS.

INTA is grateful to the committee for its continued engagement in these issues and we appreciate the opportunity to discuss the challenges facing trademark owners under ICANN's current policies and practices.

Thank you Mr. Chairman.

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Mr. ISSA. Thank you.
Mr. Misener?

TESTIMONY OF PAUL MISENER, VICE PRESIDENT OF GLOBAL PUBLIC POLICY, AMAZON.COM, INC.

Mr. MISENER. Thank you, Chairman Issa and Mr. Nadler, for your attention to this important topic, for holding this hearing, and for inviting me to testify.

Amazon strongly supports the U.S. Government's policy goals of maintaining Internet stability, security, and freedom from government control. But NTIA's planned transition of Internet governance functions to ICANN carries the significant risk that, despite NTIA's intentions, ICANN's multi-stakeholder process could be dominated, coopted, or undermined by national governments, ultimately jeopardizing these policy goals.

Amazon's recent experience in ICANN provides a warning that seriously calls into question ICANN's ability and willingness to uphold the multi-stakeholder model. The international community simply has not yet demonstrated its commitment to ICANN's multi-stakeholder process free from government control.

Ideally, this risk would be addressable through a transparent, rules-based, accountable, multi-stakeholder process, so there is a very important question for Congress to ask: Is the current ICANN multi-stakeholder process actually working free from government control? From Amazon's experience, it is not.

To the contrary, Amazon's experience provides a warning about government control of ICANN. Our familiarity with the multi-stakeholder process at ICANN comes from our application for several gTLDs, including .AMAZON. We believe the new gTLD program will provide a great opportunity for innovation and competition on the Internet, and we are thrilled to be a part of it. But our experience in the program raises serious concerns.

In brief, the ICANN multi-stakeholder community worked for more than 3 years to develop rules for gTLD applicants, only to have ICANN ignore these rules under pressure from a handful of national governments, principally Brazil and Peru in the case of .AMAZON and related applications.

Our repeated good-faith attempts to negotiate solutions with these governments, which have no legal rights to the term "amazon," were fruitless. Other national governments also quickly caved to the pressure, and eventually so did the United States. This willingness of ICANN, other governments, and even the U.S., to abandon the rules developed in a multi-stakeholder process because of pressure from a few national governments provides a warning that seriously calls into question the commitment of the international community to ICANN's multi-stakeholder process free from government control.

The implications of this flawed treatment of Amazon stretch well beyond unfairness to a single company. This wasn't just a matter of ICANN and national governments, including the U.S. Government, failing to defend an American company, the treatment of which had no basis under national law or international law. More importantly, these governments also failed to defend the ICANN multi-stakeholder process to which they supposedly were com-

mitted, or to demand ICANN accountability. And if ICANN feels empowered to disregard its rules and procedures, as well as snub the United States, before the NTIA planned transition, one can only imagine what ICANN would feel emboldened to do after a transition were consummated.

From a U.S. perspective, the point is not only that my company's legally protected interests were sacrificed to geopolitics, it is the way they were sacrificed that undermines the whole ICANN multi-stakeholder model and sets a precedent for ICANN and the United States to quickly cave to future pressure from foreign governments.

Perhaps ICANN intended to demonstrate that it would not play favorites with American interests. If so, it went way too far, and instead of treating U.S. interests no differently than those of other countries, it consciously broke its own rules and harmed an American company. Bluntly stated, ICANN's current multi-stakeholder process is not free from government control. The mishandling of Amazon's gTLD applications is a blemish on ICANN's record, and because of how the rules developed in an ICANN multi-stakeholder process were quickly abandoned in the face of modest government pressure, this blemish is disqualifying, at least until cleared.

Favorable resolution of Amazon's lawful applications is a necessary first step, but this incident is only part of a broader question of whether ICANN and the international community are fully committed to the multi-stakeholder model free from government control. If the commitment is only superficial, the United States should recognize it and address it now, and NTIA's planned transition should not occur unless and until independent review and other robust accountability reform mechanisms proposed by the multi-stakeholder community are established for ICANN. The Internet stability, security, and freedom from government control are at stake.

Thank you again for your attention to this topic, and I look forward to your questions.

[The prepared statement of Mr. Misener follows:]

Hearing on

Stakeholder Perspectives on ICANN: The .Sucks Domain and
Essential Steps to Guarantee Trust and Accountability in the Internet's Operation

Before the

Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
United States House of Representatives

May 13, 2015

Testimony of

Paul Misener
Vice President for Global Public Policy
Amazon.com

Thank you, Chairman Issa and Ranking Member Nadler. My name is Paul Misener, and I am Amazon's Vice President for Global Public Policy. Amazon strongly supports the US Government's policy of maintaining Internet stability, security, and freedom from government control. But NTIA's planned transition of core Internet governance functions to an ICANN-led global multistakeholder process carries significant risk. As I will describe today, Amazon's recent experience in ICANN provides a warning that seriously calls into question ICANN's ability or willingness to uphold the multistakeholder model. The international community simply has not yet demonstrated its commitment to ICANN's multistakeholder process, free from government interference, and NTIA's planned transition should not occur unless and until independent review and other robust accountability mechanisms are established for ICANN. Thank you for your attention to this important topic; for calling this hearing; and for inviting me to testify.

I. The Substantive Policy of the United States is Correct.

Concurrent resolutions in 2012 affirmed House and Senate opposition to attempts by foreign governments and intergovernmental organizations to assume control over the Internet and said that, "given the importance of the Internet to the global economy, it is essential that the Internet remain stable, secure, and free from government control." These characteristics have been hallmarks of the Internet throughout its history, and are each crucial for maintaining the Internet's importance, including as a medium for global commerce. The US Government is right to focus on protecting these characteristics of the Internet, including while considering the plans of the US National Telecommunications and Information Administration (NTIA) to transfer key remaining elements of its Internet governance responsibilities to a global multistakeholder process led by the International Corporation for Assigned Names and Numbers (ICANN).

In contrast to the substantive goals of maintaining Internet stability, security, and freedom from government control, the global multistakeholder model of Internet governance itself is primarily a means to these ends, not a similar goal. Citizen-consumers in America and around the world will not know or care *how* the Internet is kept stable, secure, and free from government control – only *whether* it is kept so. Nonetheless, it is widely believed that the multistakeholder model is the best means for maintaining these ends, and we agree it certainly is better than creating an inter-governmental organization or mechanism, such as under the UN's International Telecommunication Union.

II. NTIA's Plans for ICANN are Risky, so is ICANN's Multistakeholder Process Working?

Although the US Government's substantive policy goals are excellent, NTIA's planned transfer of remaining Internet governance functions to ICANN carries significant risk. In particular, there is a serious risk that, despite NTIA's intentions, ICANN's multistakeholder process could be dominated, co-

opted, or undermined by national governments, ultimately jeopardizing the substantive policy goals of Internet stability, security, and freedom from government control. Ideally, this risk would be addressable through a transparent, rules-based, accountable multistakeholder process. But as highlighted by the example of the .SUCKS situation, this process is not fully working. Well over a year ago, members of the multistakeholder community, particularly brand owners, warned ICANN about reports that the .SUCKS operator intended to charge trademark owners $25,000 per domain name to protect their brands. Despite these warnings, ICANN was not appropriately responsive in investigating the community's concerns about violations of policy.

So a very important question for Congress to ask is whether the current ICANN multistakeholder process actually is working, free from government interference. From Amazon's experience, it is not.

III. Amazon's gTLD Experience Provides a Warning about Government Control of ICANN.

Amazon's familiarity with the multistakeholder process at ICANN comes from our application for several so-called "generic Top-Level Domains," or "gTLDs." These are the characters with and following the last "dot" of an Internet address, the most common being ".COM," ".ORG," and ".GOV," and ICANN is issuing new gTLDs to various applicants. Amazon believes the new gTLD program will provide a great opportunity for innovation and competition on the Internet, and we are thrilled to be part of it.

But our experience in the program raises serious concerns. In sum, the ICANN multistakeholder community worked more than three years to develop rules for gTLD applicants, only to have ICANN ignore these rules under pressure from a handful of national governments. Other national governments around the world also quickly caved to the pressure and, eventually, so did the United States. This willingness of ICANN, other governments, and even the United States to abandon the rules developed in a multistakeholder process, after facing but modest pressure from a few national governments, provides

a warning that seriously calls into question the commitment of the international community to ICANN's multistakeholder process, free from government control.

Here's how it happened. From 2007 through 2011, the ICANN multistakeholder community, along with the ICANN Board and Governmental Advisory Committee (GAC), which is open to all national governments, negotiated rules to govern how entities like Amazon could apply for new gTLDs. As with any multistakeholder deliberation, no party got all that it sought, yet all parties accepted the consensus result. On January 11, 2012, these rules were published in an "Applicant Guidebook," which includes a section on Geographic Names Review that forbids approval of gTLDs that appear on any of several lists (*e.g.*, from ISO and UNESCO) referenced in that section. These lists include names such as "Brazil," "South America," and "Americas," but none includes "Amazon." This section of the Applicant Guidebook also specifies that all gTLDs applied for "will be reviewed according to the requirements of this section, regardless of whether the application indicates it is for a geographic name."

Three months later, and pursuant to the Applicant Guidebook rules, Amazon filed 12 gTLD applications covering Amazon brands (*e.g.*, for the gTLDs ".AMAZON" and ".KINDLE"). On November 12, 2012, the GAC first indicated that Brazil and Peru had raised concerns about Amazon's applications for ".AMAZON" and its Chinese and Japanese character translations. This was despite the fact that, again, these were <u>not</u> among the restricted geographic names referenced in the Applicant Guidebook. Moreover, we held registered Amazon trademarks in both Brazil and Peru and, in those countries the term for the river and region is not "Amazon" but, rather, "Amazonas," "Amazonia," or "Amazonica."

Amazon immediately initiated a dialogue with the governments of Brazil and Peru that lasted for months. We engaged in good faith negotiations, including offering to help these governments reserve other domain names, such as ".AMAZONAS," or to provide special access to certain geographic and cultural terms within the .AMAZON space, but our proposals were flatly rejected on multiple occasions.

On April 6, 2013, NTIA confirmed to Amazon that there was nothing in the ICANN Applicant Guidebook that would block our applications, and told us that NTIA would support us in challenges from Brazil and Peru. NTIA did so at ICANN's April 2013 meeting in Beijing, preventing ICANN's Governmental Advisory Committee from issuing advice to block our applications. By July 12, 2013, our applications for .AMAZON and its Chinese and Japanese character translations had passed ICANN's evaluation process, which included findings by ICANN's Geographic Names Panel that the ".AMAZON" gTLD (and its Chinese and Japanese character translations) "does not fall within the criteria for a geographic name."

So it was very disappointing when, only days later, on July 17, 2013, ICANN and participating national governments, facilitated by the abstention of the United States Government, caved to the political pressure and abandoned the rules developed in ICANN's multistakeholder process. At the behest of Brazil and Peru, ICANN's Governmental Advisory Committee reopened discussion of .AMAZON and then advised the ICANN Board to reject our Amazon applications, even though there was absolutely no legal basis for doing so, and even though the GAC objection period had ended three months earlier.

Remarkably, the United States did not take the opportunity to protest this exertion of government control over ICANN's multistakeholder process. And even more disconcerting was ICANN's inability or unwillingness to stand up to national governments who were using ICANN to impose rights that do not exist under their own national laws or through any international treaties. Rather, ICANN decided to violate its rules and capitulate to government interference. Our subsequent appeals to ICANN have to date been denied.

The implications of this flawed treatment of Amazon stretch well beyond unfairness to a single company. This wasn't just a matter of ICANN and national governments, including the US Government, failing to defend an American company, the treatment of which had no basis under national or international law. More importantly, these governments also failed to defend the ICANN

multistakeholder process to which they supposedly were committed, or to demand ICANN accountability. And if ICANN feels empowered to disregard its rules and procedures, as well as snub the United States, *before* the NTIA-planned transition, one can only imagine what ICANN would feel emboldened to do after a transition were consummated.

From a US perspective, the point is not only that my company's legally-protected interests were sacrificed to geopolitics, it's that the *way* they were sacrificed undermines the whole ICANN multistakeholder model and sets a precedent for ICANN – and the United States – to quickly cave to future pressure from foreign governments. We understand, of course, that US relations with South American countries are important economically, politically, and militarily. But this is no reason for the international community, including the US Government, to abandon rules developed in an ICANN multistakeholder process. And it doesn't take much to imagine which countries' relations might someday be considered even more important economically, politically, or militarily. Perhaps ICANN intended to demonstrate that it would not play favorites with American interests. If so, it went way too far and, instead of treating US interests no differently than those of other countries, it consciously broke its own rules and harmed an American company.

IV. ICANN's Current Multistakeholder Process is not free from Government Control.

The mishandling of Amazon's gTLD applications is a blemish on ICANN's record and, because of how the rules developed in an ICANN multistakeholder process were quickly abandoned in the face of modest governmental pressure, this blemish is disqualifying, at least until cleared. Reinstating and granting Amazon's applications would be a first step, but this incident is only part of a broader question of whether ICANN and the international community are truly committed to the multistakeholder model, free from government control. If the commitment is only superficial, the United States should recognize

and address it now, and NTIA's planned transition should not occur unless and until independent review and other robust accountability mechanisms are established for ICANN. The Internet's stability, security, and freedom from government control are at stake.

Thank you again for your attention to this important topic. I look forward to your questions.

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Mr. ISSA. Thank you.
Mr. Horton?

TESTIMONY OF JOHN C. HORTON, PRESIDENT, LEGITSCRIPT

Mr. HORTON. Mr. Chairman, when my company, LegitScript, identifies an illegal, unsafe Internet pharmacy, we notify the domain name registrar. When a registrar is notified that the domain name is being used for illegal activity, ICANN's accreditation scheme requires the registrar to do two things: first, to investigate the claims; and second, to respond appropriately.

The good news is most registrars voluntarily disable domain names used to sell illegal, unsafe medicines that put patients' health and safety at risk. However, cyber criminals are rational economic actors and carefully choose the registrar that they believe will protect them. LegitScript's data indicate that just 12 among about 900 registrars maintain half of all illegal Internet pharmacy registrations. In first place is Rebel, a registrar in the Momentous Group, which operates .SUCKS, which has only 0.05 percent of the total domain name market but over 17 percent of the illegal online pharmacy market.

Now, I'd like to talk about our experience notifying ICANN compliance about the few registrars that are a safe haven for criminal activity. Consider the Web site HealthPlugins.com, selling morphine, Percocet, and other addictive drugs without a prescription. The domain name was registered with Paknic in Pakistan, which refused to take action on this and hundreds of other illegal online pharmacies. ICANN closed our complaint against this registrar, finding that it responded appropriately despite leaving hundreds of illegal Internet pharmacies online.

Now, if you want to buy heroin online, you can do it at smackjunkshot.com. We notified the registrar, Webnic of Malaysia, which had told us in the past that it could not just suspend domain names because it would lose money. We submitted a complaint to ICANN, which closed the complaint, finding that the registrar responded appropriately by leaving a domain name used to sell heroin untouched, as well as hundreds of other illegal online pharmacies.

Finally, let's consider an example from a Momentous registrar, freeworldpharmacy.com, one of hundreds of illegal online pharmacy domain names that we have notified the company about. Mr. Chairman, these are the drugs that were sold to us without a valid prescription being required from freeworldpharmacy.com. And so that Momentous could have no doubt about the domain names used for illegal purposes, we sent a photo of these very drugs just a few weeks ago to Momentous. They took no action, and we have an ICANN complaint pending against Momentous right now. In the past, however, we have notified Momentous about illegal online pharmacies, including this one. They took little or no action, and ICANN has closed our complaints.

I could go on and on. In these folders, these two folders, I have screenshots of another 750 illegal online pharmacies that only continue operating because ICANN closed complaints against the registrar that took no action. We only stopped at 750 in the interest of time.

The point is cyber criminals cluster at a small number of safe-haven registrars who are running circles around ICANN compliance by persuading them that they are responding appropriately by doing nothing about domain names that they know full well are being used for illegal purposes, and those registrars are laughing all the way to the bank.

In all of these cases, when we or law enforcement have asked ICANN what a registrar could possibly have done that constitutes an appropriate response in light of the ongoing use of domain names for illegal activity, ICANN compliance refuses to disclose it, keeping it a secret between ICANN and the registrar.

The fundamental problem with this is a lack of transparency on the part of ICANN's compliance team. No reasonable person would believe that a registrar is responding appropriately to evidence that a domain name is being used to sell heroin by doing nothing. By finding that a registrar is responding appropriately in these cases, ICANN in essence gives a green light to the registrar to continue facilitating and profiting from the illegal activity, thereby putting Internet users at risk. By refusing to explain what the registrar did that supposedly constitutes an appropriate response, ICANN lends the impression that it is participating in a cover-up.

Accordingly, in the spirit of ICANN's longstanding commitment to transparency, I want to publicly challenge ICANN to disclose what steps these registrars took that purportedly constitute an appropriate response despite being notified by LegitScript and in many cases by drug safety regulators and law enforcement that the domain names are being used to put everyday Internet users' health and safety at risk. This lack of transparency and turning a blind eye to ongoing criminal activity, in my view, is emblematic and at the core of ICANN's problems with trust and accountability.

Thank you.

[The prepared statement of Mr. Horton follows:]

LegitScript

EXECUTIVE SUMMARY OF TESTIMONY BY JOHN C. HORTON, LEGITSCRIPT PRESIDENT

BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

STAKEHOLDER PERSPECTIVES ON ICANN: THE .SUCKS DOMAIN AND ESSENTIAL STEPS TO GUARANTEE TRUST AND ACCOUNTABILITY IN THE INTERNET'S OPERATION (May 13, 2015)

My testimony approaches the question of ICANN trust and accountability by looking at ICANN's compliance program, and documenting failures in the compliance process. I argue that until ICANN's compliance processes become more transparent, ICANN will continue to lack the kind of accountability and trust that Internet users as a whole deserve.

My testimony first presents data showing that cybercriminals tend to "cluster" at a relatively small number of domain name registrars. Although the majority of domain name registrars are responsible corporate citizens and voluntarily terminate domain names that are shown to be instrumentalities of crime, just about a dozen of the 800 - 900 accredited registrars provide registration services for over half of all illegal online pharmacies. Moreover, an analysis of the fifteen (15) largest registrars by total domain name market share indicates that most have a tiny percentage of the illegal online pharmacy market due to robust compliance programs. By contrast, the "top 15" registrars by illegal online pharmacy domain name market share mostly have a tiny percentage of the total domain name market.

I next look at how ICANN has applied Section 3.18 of the 2013 Registrar Accreditation Agreement, which requires domain name registrars to conduct a "reasonable and prompt investigation" and "respond appropriately" to complaints that domain names are being used for illegal activity. If a domain name registrar fails in this contractual obligation, it is within ICANN's ambit to penalize or de-accredit the registrar. This structure is supposed to be a safeguard to ensure that domain name registrars do not knowingly harbor or facilitate criminal activity.

However, I cite four examples of instances in which LegitScript and/or drug safety authorities submitted multiple, easily verifiable complaints regarding the use of domain names for illegal online pharmacies activities to an ICANN-accredited registrar. In each case, the registrar failed to take action on most (or any) of the domain names. When LegitScript and/or drug safety authorities submitted complaints to ICANN alleging a violation of Section 3.18, ICANN Compliance closed the complaints, finding that the registrars "responded appropriately" despite continuing to provide registration services to the illegal online pharmacies, which still operate.

Among these four examples is Rebel, a registrar that is part of the Momentous Group, the same company that owns .SUCKS registry Vox Populi. My testimony outlines the relationship between a leading illegal online pharmacy network known as "4rx" and an ICANN-accredited registrar, Crazy8Domains, that appears to exist for the primary purpose of providing registration services for illegal online pharmacies, and appears to employ the illegal online pharmacy owner as its compliance point of contact. I then identify the sole director of Crazy8Domains as Rob Hall, the head of Momentous.

My testimony concludes by focusing on the lack of transparency in ICANN's secret compliance process as a major obstacle to the organization's trust and accountability.

LegitScript

WRITTEN STATEMENT OF JOHN C. HORTON
PRESIDENT AND CEO OF LEGITSCRIPT

BEFORE THE SUBCOMMITTEE ON COURTS,
INTELLECTUAL PROPERTY, AND THE INTERNET

STAKEHOLDER PERSPECTIVES ON ICANN: THE .SUCKS DOMAIN AND ESSENTIAL STEPS TO GUARANTEE TRUST AND ACCOUNTABILITY IN THE INTERNET'S OPERATION (May 13, 2015)

Chairman Issa, Ranking Member Nadler, and Members of the Subcommittee:

I am the President and founder of LegitScript, a company that monitors the online sale of healthcare products and maintains the world's largest database of Internet pharmacies and other healthcare product websites. We help a wide variety of companies, including Google, Microsoft, Visa and others, ensure that their services are not abused by illegal Internet pharmacies and other unscrupulous sellers in the healthcare space. We also work closely with regulators around the world, including the US Food and Drug Administration (FDA) and Japan's Ministry of Health, Labor and Welfare, and with INTERPOL. As part of our mission, we regularly submit complaints to domain name registrars regarding illegal online pharmacy activity.

Thank you for inviting me to testify today about the Internet Corporation for Assigned Names and Numbers (ICANN), the entity that is charged with accrediting domain name registrars and monitoring registrars' compliance with accreditation requirements. To assess any organization's trust and accountability, it is critical to understand how effective and transparent its compliance process is. In my testimony, I will address four issues that evidence the lack of ICANN accountability to enforce its own contracts and operate in the public interest:

1. The operation of a small number of "safe haven" ICANN-accredited domain name registrars that knowingly host illegal online pharmacies;
2. ICANN's contractual authority to stop criminal activity;
3. Specific failures of ICANN's Compliance Department, which has in essence given a green light to certain registrars to provide domain names to criminal networks engaged in illegal online pharmacy operations; and
4. Momentous Corp., the company that owns the .SUCKS registry, and its registrars' lack of responsiveness to complaints about illegal online pharmacies.

My testimony concludes by arguing that until ICANN's compliance processes become more transparent, and do not result in obvious failures such as those described in this testimony, ICANN will continue to lack the kind of accountability and trust that Internet users as a whole deserve.

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ILLEGAL INTERNET PHARMACIES AND DOMAIN NAME REGISTRARS

LegitScript's data suggest that there are roughly 30,000 to 35,000 illegally operating Internet pharmacies active globally at any one point in time. We classify these websites according to the legality of their operations, as well as by the criminal network with which the domain names are associated, where applicable.

Unfortunately, 97% of Internet pharmacies operate illegally and unsafely, by not adhering to drug safety standards, not maintaining appropriate pharmacy licensure, and/or not requiring a prescription for the sale of prescription drugs.[1] These business practices put profits above patients, and put those patients' health and safety at risk.

How do illegal Internet pharmacies survive and thrive? Like any website, Internet pharmacies need a domain name registrar to sell them domain names and keep those domain names online. **But cybercriminals, in order to ensure the stability of their operations, have an additional need: a registrar who will look the other way when confronted with evidence about their customers' criminal activity.**

Most ICANN-accredited registrars voluntarily terminate, and refuse to continue providing, services to customers engaging in illegal activity, such as the sale of prescription medicines without a prescription. In discussing the problem of Internet crime, no discussion is complete without recognizing the outstanding compliance efforts of many upstanding domain name registrars. This includes Rightside *aka* eNom (US), GoDaddy (US), Blacknight (IE), Dynadot (US), Directi (IN), Gandi SAS (FR), Internet.bs (BS), NetOwl (JP) and many others. By working with these registrars, who deserve credit for effective voluntary compliance policies, LegitScript has facilitated the shut down over 65,000 illegal Internet pharmacies since 2008.

But cybercriminals are rational economic actors. Illegal Internet pharmacy operators are careful to choose a domain name registrar that they believe will turn a blind eye to the criminal activity and rebuff abuse complaints. This has resulted in the "clustering" of illegal Internet pharmacies at a relatively small number of ICANN-accredited registrars, with just **12 of the world's 800-900 domain name registrars responsible for providing registration to over half of all illegal online pharmacies.**[2]

For example, first consider data presented in Chart 1 (below) regarding the world's largest domain name registrars, beginning with GoDaddy and Rightside, which have roughly 35% and 9% of the domain name market share, respectively.[3] One might expect that these registrars would also have the same percentage of the illegal Internet pharmacy market — that in the registrar market, illegal Internet pharmacy market share would roughly match total market share. But, in fact, these two registrars, and most other large registrars, have close to zero at

[1] See http://www.nabp.net/programs/consumer-protection/buying-medicine-online

[2] This is based on LegitScript's analysis as of March 2015; charts displaying this data are provided later in this testimony.

[3] These market shares reflect only top-level domains under the ICANN umbrella, and do not account for country-code top-level domains. These market share estimates are derived from ICANN data available at https://features.icann.org/compliance/registrars-list

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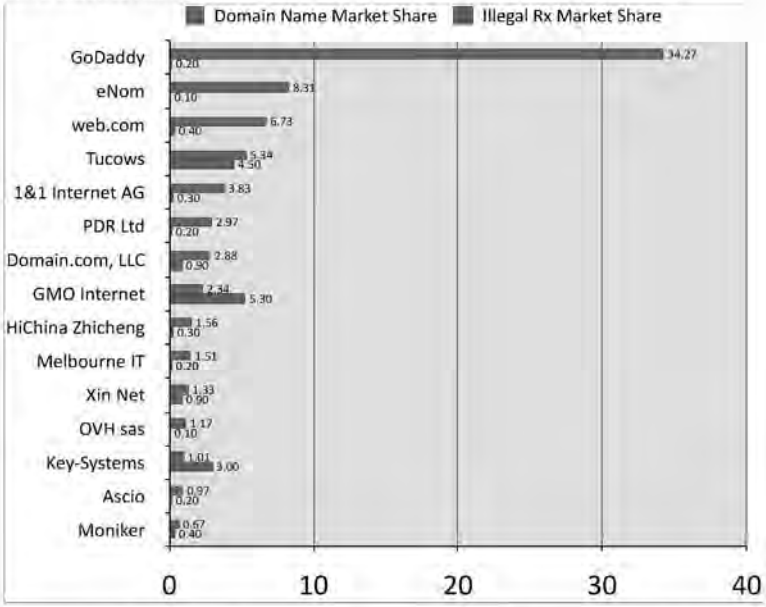
any one time (and those that are identified are quickly disabled). Indeed, illegal Internet pharmacies studiously avoid GoDaddy and Rightside. The reason for this is simple: cybercriminals have learned that these and other registrars have Terms of Service prohibiting the use of a domain name for illegal medicine sales — and they mean it. Of the top 15 registrars by size of market share, only a few have taken steps to shield illegally operating online pharmacies.

Chart 1: Comparison of Top 15 ICANN-Accredited Registrars' Total Market Share and Illegal Internet Pharmacy Market Share (Sources: ICANN (for total domain name market share); LegitScript database, March 2015)



By contrast, the data in Chart 2 (below) illustrate the phenomenon of "clustering," and how a select group of mostly smaller domain name registrars rely — in some cases significantly — on illegal Internet pharmacy-derived revenue. In this sense, the data underscore that it is important not to impute problems with a small number of registrars to the registrar community as a whole.

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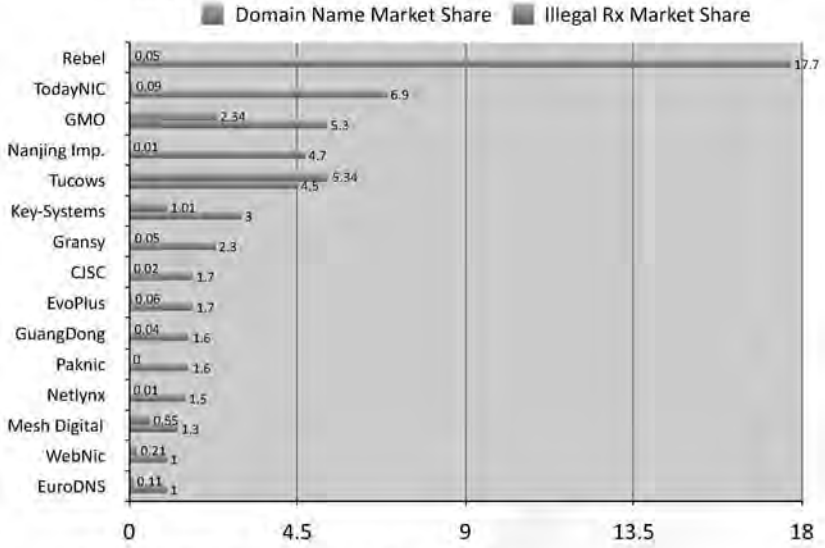
For example, the leading sponsor of domain names registered by illegally operating Internet pharmacies according to LegitScript's data is Rebel, a subsidiary of Momentous Corp., the company that owns Vox Populi (the registrar for .SUCKS). Whereas Rebel claims only about 0.05% of the total domain name market, it has an estimated 17.7% of the entire illegal online pharmacy market. This is no accident: Momentous Corp. routinely ignores or rejects evidence that domain names are used as instrumentalities of crime, and illegal Internet pharmacies have returned the favor by bringing their business to Rebel — a point I return to later in my testimony. Similarly, most of the "top 15" registrars used by illegal online pharmacies for domain name registration have a share of the illegal online pharmacy market that greatly exceeds their share of the domain name market as a whole.

Chart 2: Comparison of Top 15 ICANN-Accredited Registrars Used by Illegal Internet Pharmacies' Total Market Share and Illegal Internet Pharmacy Market Share (Sources: ICANN (for total domain name market share); LegitScript Database, March 2015)



Several other registrars above are similarly problematic:

- Nanjing Imperiosus, a Chinese registrar with Israeli ties that has a scant 0.01% total market share, is increasingly a destination of Russian and Eastern European criminal drug networks, and is one of the fastest-growing safe havens for criminal activity.

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- Tucows, a Canadian registrar, has ignored or failed to act on abuse complaints submitted on behalf of INTERPOL and various countries' drug safety authorities. Although Tucows has shut down some illegal online pharmacies, it has failed to suspend numerous illegal online pharmacies. Examples include cheapscrips.com, anabolics-online.com, and controlledpills.com (along with several others), which sell controlled substances without requiring a valid prescription, and regarding which Tucows was notified about as part of an INTERPOL operation on May 20, 2014 but which remain online to this day.
- In a recent study, LegitScript estimated that nearly one-fourth of the domain name portfolio of NetLynx, an Indian registrar, were (or were related to) illegal online pharmacies.[4]
- WebNic, a small Malaysian registrar, has ignored or failed to act on complaints involving domain names used to sell controlled substances, including black tar heroin, and told LegitScript that it could not "suspend the domains...(because) business wise, it could be millions of dollar losses *[sic]*."

These data logically lead to the question: What is ICANN Compliance doing about the registrars that provide safe haven to illegal Internet pharmacies and other types of criminal activity?

THE ICANN-REGISTRAR CONTRACTUAL STRUCTURE

To answer that question, it is first useful to review the tools that ICANN has at its disposal, and how Internet governance generally works.

Internet governance is largely predicated on two sets of contracts: 1) the Registrar Accreditation Agreement (RAA) between ICANN and the registrar, and 2) the Terms and Conditions agreement between the registrar and the domain name registrant.[5] The first one is what enables registrars to sell domain name registrations; the second one is what enables a registrant to use the domain name.

[4] http://blog.legitscript.com/2015/01/story-behind-icanns-breach-notice-netlynx/.

[5] The current version of the RAA, called the 2013 RAA, went into effect on January 1, 2014 and is accessible at https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en. Most, but not all, ICANN-accredited registrars are subject to the 2013 RAA, with a few still accredited under the 2009 RAA.

Taken together, these contracts prohibit domain name registrants from using domain names for illegal activity, and require the registrar to "investigate" and "respond appropriately" to claims that the domain name is used as an instrumentality of crime (2013 Registrar Accreditation Agreement, Section 3.18.)

If the registrar fails to conduct an investigation into the claims, or fails to "respond appropriately" to the complaint that a domain name is used for illegal activity, it is within ICANN's ambit to penalize or de-accredit the registrar.[6] In considering what an "appropriate response" is to evidence of criminality, it is useful to note the industry standard approach implemented by GoDaddy, Rightside (eNom) and dozens of other registrars: the suspension and locking of the domain name being used for criminal activity. Indeed, it is difficult to envision any other response to credible evidence of illegality that could possibly be considered "appropriate," assuming that one agrees that it is unreasonable for a registrar to knowingly allow its registration services to continue to be used for unlawful purposes.

By contract, it is ICANN's responsibility to ensure that registrars "investigate" and "respond appropriately" to complaints involving illegal activity. This is central to the integrity and effectiveness of Internet governance. Specifically, how ICANN interprets and applies the terms "investigate" and "respond appropriately" dictates whether or not registrars are permitted to provide safe haven to cybercrime networks, or are held to common-sense standards. Unfortunately, LegitScript's experience and data indicate that ICANN has given multiple registrars a free pass to continue providing services to illegal online pharmacies, finding that some registrars "respond appropriately" by doing nothing at all — as illustrated below.

Four Examples of Complaints Closed By ICANN, Allowing Criminal Activity to Continue

Since the 2013 RAA went into effect, LegitScript has submitted multiple complaints to ICANN about accredited registrars that ignored or failed to terminate services to unlicensed, illegal online pharmacies about which we — and in some cases, drug safety officials — notified the registrar.

- In a small handful of cases, ICANN issued breach notices against the registrar, eventually resulting in the domain names being suspended.
- In a few other cases, the domain names were taken offline after the registrar was notified of our complaint to ICANN.
- In many other cases, however, ICANN found that the registrar "responded appropriately" by allowing the illegal Internet pharmacies to continue operating, and closed the complaint, thus giving a green light to the registrar's continued sponsorship of the criminal activity.

This section contains only four examples (for space and brevity reasons) of complaints against registrars that were closed by ICANN, despite the registrar's continued sponsorship of blatant

[6] See, e.g., https://www.icann.org/resources/pages/notices-2012-02-25-en

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and easily verifiable criminal activity. LegitScript is happy to provide additional examples should the Committee desire.

1. Gransy (Czech Republic)

Gransy (*dba* Subreg *dba* Regtons) is an ICANN-accredited domain name registrar in the Czech Republic. The registrar has provided registration services for hundreds of illegal Internet pharmacies.

Summary: During the course of 16 months, from January 2014 to April 2015, LegitScript, US law enforcement and/or other officials contacted Gransy at least 11 times to notify the registrar of the thousands of illegal Internet pharmacies registered with the company. Gransy took no action. These same parties also contacted ICANN Compliance at least six (6) times. ICANN Compliance determined that the registrar responded appropriately and closed the complaint, despite most of the illegal online pharmacies remaining online.

- Jan. 23, 2014. LegitScript notifies Gransy about five related illegal Internet pharmacy domain names, and provides an analysis citing the laws and regulations that were violated by the illegal Internet pharmacy, including the US Food, Drug and Cosmetic Act and US state pharmacy licensure requirements. The illegal Internet pharmacy was confirmed by Canadian authorities as falsely marketing itself as a licensed Canadian pharmacy, and targets mostly US residents. Gransy refuses to act.
- Feb. 7, 2014. LegitScript submits complaint to ICANN regarding Gransy's failure to investigate and "respond appropriately" to evidence of illegal activity.

Fig 1: Illegal online pharmacy globalpharmacyplus.com, part of a network previously verified by Canadian authorities as falsely marketing itself as a Canadian Internet pharmacy. The drugs are not FDA-approved and the seller lacks legally required pharmacy licenses.

- May 8, 2014. LegitScript notifies Gransy about an additional 1,260 illegal Internet pharmacy domain names registered with the company. Our notification was submitted on behalf of, and cc'd, INTERPOL as part of Operation Pangea, a multinational effort to stop illegal online drug sales.[7] The domain names were noted

[7] See http://www.interpol.int/Crime-areas/Pharmaceutical-crime/Operations/Operation-Pangea.

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as selling unapproved/substandard drugs, prescription drugs without a prescription, and in absence of legally required pharmacy licenses.

- May 12, 2014. Gransy responds and refuses to take action on domain names.
- May 15, 2014. US Food and Drug Administration (US FDA) emails Gransy, confirming that the domain names are used for criminal activity and requesting that the company terminate services to illegal Internet pharmacies.
- May 16, 2014. LegitScript, on behalf of INTERPOL, responds with additional legal citations and summary of law.

Fig 2: americanpharm.net, a fake Canadian Internet pharmacy registered with Gransy that is part of a Russian criminal network called IceRx. The drugs are counterfeit and are sold without a prescription, and usually arrive from India or another location.

- May 16, 2014. US FDA again emails Gransy.
- May 17, 2014. INTERPOL emails Gransy directly; confirms domain names are used for illegal purposes on a global scale; requests that Gransy take action.
- May 19, 2014. US FDA emails Gransy a third time, noting that the registrar has refused to respond to the emails.
- May 21, 2014. After no action by registrar, **LegitScript submits second complaint to ICANN about Gransy,** alleging that registrar has refused to investigate and "respond appropriately" to evidence of criminality. All emails from LegitScript, FDA, and INTERPOL to Gransy are forwarded to ICANN Compliance.

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- June 3, 2014. **ICANN closes complaint against Gransy, finding that "(t)he registrar demonstrated that it took reasonable and prompt steps to investigate and respond appropriately to the report of abuse." Yet nearly all of the domain names remain online and are actively illegally selling substandard medicines and prescription drugs without a prescription. When asked to disclose what the registrar did that constituted an "appropriate response," ICANN refuses to disclose any information.**

Fig 3: cialiswithoutprescriptiononlinenow.com, an illegal Internet pharmacy registered with Gransy that is part of a Russian / Indian criminal network called Rx-Partners that sells counterfeit drugs without a prescription. ICANN determined that Gransy "responded appropriately" to our complaint of criminal activity by leaving the website online

- June 10, 2014. US FDA contacts ICANN to express concerns about lack of transparency as to what constitutes an "appropriate response" to evidence that domain names are used for criminal activity, in light of continued criminal activity.
- June 16, 2014. The US Drug Enforcement Administration (DEA), US FDA, National Association of Boards of Pharmacy (NABP) and LegitScript have a conference call with ICANN Compliance staff to discuss Gransy and express concerns that registrars are told by ICANN that they are "responding appropriately" by allowing criminal activity to continue. **The DEA, FDA, NABP and LegitScript ask what Gransy and other registrars have done that constitutes an "appropriate response" in light of the fact that the illegal online pharmacies continue to operate, such as ask for a pharmacy license. ICANN Compliance refuses to disclose the information and says that it is confidential.**
- June 25, 2014. I, John Horton, meet with Gransy President Jan Horak and a member of his staff in London. I outline the reasons that the online pharmacies are illegal and unsafe. They still refuse to take action.

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- Sept. 17, 2014. LegitScript submits a third notification to Gransy regarding another 561 domain names used to illegally sell unapproved prescription drugs without a prescription and valid pharmacy licenses.

Fig 4: steroid-pharmacy.org, an illegal Internet pharmacy registered with Gransy that sells controlled substances and substandard drugs without a prescription. ICANN determined that the registrar "responded appropriately" by permitting the website to remain online and actively sell illegal drugs.

- Sept. 24, 2014. Gransy had not responded to our September 17 letter. We contact them again.
- Oct. 21, 2014. Our analysis indicates that 16 of the 561 websites illegally selling drugs went offline (for unknown reasons); all the rest (545) remain online, illegally selling unsafe medicines.
- Oct. 24, 2014. LegitScript submits a third complaint to ICANN regarding Gransy, alleging that Gransy has not responded appropriately to evidence pertaining to criminal activity.
- **Nov. 26, 2014. ICANN closes complaint against Gransy, again finding that "(t)he registrar demonstrated that it took reasonable and prompt steps to investigate and respond appropriately to the report of abuse." Yet most of the Internet pharmacies remain online, illegally selling prescription drugs without a valid prescription.**
- April 28, 2015. LegitScript files another complaint with Gransy regarding five related domain names (ironcialis.com, zozcialis.com, cialisonlineaerr.com, xoxcialis.com, wowcialis.com) that are part of a multinational criminal network called "Rx-Partners," with an extensive written analysis showing that the domain names are used to sell prescription drugs without requiring a prescription and sell drugs that are unapproved for sale, and that the online pharmacy is unlicensed. The memorandum shows that the activity is not considered lawful in any country, anywhere. As of this writing, the domain names remain online.

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It should be noted that a few of the domain names are by now offline, although it is unclear whether this is due to any action by the registrar or ICANN. Gransy, however, continues to provide paid registration services for hundreds of illegal online pharmacies, including those referenced in the complaints from LegitScript, the FDA and INTERPOL, comforted in the knowledge that ICANN will find that an "appropriate response" to evidence that a domain name is used to sell prescription drugs without a prescription or valid pharmacy license, and/or is selling unapproved/substandard drugs, may include allowing the illegal online pharmacy to continue using the registrar's services.

2. WebNic.cc (Malaysia)

Our second example is WebNic.cc, an ICANN-accredited domain name registrar in Malaysia. The registrar has consistently taken little or no action in response to complaints that domain names are used as illegal online pharmacies, explaining on one occasion that to do so would have too serious of an impact on its business revenue.

Summary: During the course of 15 months, from December 2013 to March 2015, LegitScript, US law enforcement and/or other officials contacted WebNic at least six (6) times to notify the registrar of the thousands of illegal Internet pharmacies registered with the company. WebNic took no action. These same parties also contacted ICANN Compliance at least three (3) times. ICANN Compliance took no action to effectuate the termination of thousands of illegal Internet pharmacies, instead closing the case and refusing to disclose their rationale.

- Dec. 9, 2013. LegitScript sends WebNic.cc a list of 560 illegal online pharmacies, and a summary of applicable laws and regulations, following a US FDA notice to the registrar.

Fig 5: smackjunkshot.com, a website selling heroin online that we notified the registrar about, along with 237 other illegal drug websites. The registrar took no action.

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- **Dec. 10, 2013. Registrar responds that it cannot suspend the domain names because of the potential loss in business revenue.**
- Dec. 17, 2013. LegitScript informs WebNic that an illegal Internet pharmacy, napsgear.net (which maintains several websites with WebNic), is illegally selling drugs and cannot produce a pharmacy license. The website remains online to this day.

Fig 6: This email from WebNic.cc, a "safe haven" ICANN-accredited domain name registrar, highlights the reason that some registrars refuse to terminate services to cybercriminals utilizing their services: the money.

WebNIC Customer Support <support@webr 12/10/13
to me, abuse

====== Please reply above this line ======

Dear John,

There are some point we would like to highlight to you.

Enclosed highlight in red by point form for your reference.

As we mentioned that WebNIC is more than willing to work with you as part of our social responsibility.

However, we could not just suspend the domain like that. From the business wise, it could be millions of dollar losses.

- April 4, 2014. LegitScript notifies WebNic that another 276 domain names are being used as illegal online pharmacies, and provides a summary of how each domain name is used illegally, including the sale of prescription drugs without a prescription requirement.
- April 21, 2014. LegitScript submits complaint to ICANN, alleging that WebNic has not "responded appropriately" to complaints involving illegal activity by leaving illegal Internet pharmacies online.
- April 29, 2014. US FDA submits a complaint to WebNic regarding 24hoursppc.org and pro-heaven.biz, both of which sell controlled substances and prescription medicines illegally. Neither are acted on; both are online and illegally selling drugs as of this writing.

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- July 10, 2014. ICANN closes complaint, finding that WebNic responded appropriately even though nearly all of the websites remain online and active.

Fig 7: ICANN Compliance's email stating that it was closing a complaint against WebNic, finding that the registrar "took reasonable and prompt steps to investigate and respond appropriately to the complaint of illegal activity" despite the registrar leaving all or nearly all of the websites online and engaged in illegal drug sales.

[~LGZ-108-18238]: Abuse complaint re: Web Commerce Communications Limited dba WebNic.cc closed

Compliance Tickets compliance-tickets@icann.org via legitscript.com Mar 3

Dear LegitScript Abuse Team,

Thank you for submitting a Abuse complaint concerning the registrar Web Commerce Communications Limited dba WebNic.cc. ICANN has reviewed and closed your complaint because:

- The registrar demonstrated that it took reasonable and prompt steps to investigate and respond appropriately to the report of abuse.

- Nov. 18, 2014. LegitScript sends another list of 238 illegal online pharmacies to WebNic, including an explanation of how each of the domain names is used as an illegal Internet pharmacy.
- Nov. 26, 2014. After not receiving a response, LegitScript contacts WebNic, which states that it "handled" the case. Yet nearly all domain names continue to illegally sell drugs online.
- Dec. 1, 2014. LegitScript submits a complaint to ICANN regarding WebNic, alleging that the company failed to "respond appropriately" under the RAA.
- March 3, 2015. ICANN closes the complaint, finding that WebNic "responded appropriately" even though it allowed most of the illegal online pharmacies, including the website selling heroin, to remain online.
- March 11, 2015. LegitScript submits a complaint to ICANN regarding WebNic's failure to act on drugpillstore.com, illegally selling medicines without a valid pharmacy license, prescription or FDA drug approval.
- March 20, 2015. ICANN Compliance closes the complaint against WebNic, finding that the registrar "responded appropriately" by requiring the registrant to redirect drugpillstore.com to an equally illegal Internet pharmacy, drugpillstore.net.

3. Mesh Digital (United Kingdom)

Mesh Digital (aka DomainMonster.com and DomainBox.com) is an ICANN-accredited registrar in the United Kingdom. The registrar continues to provide registration services

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to hundreds of illegal Internet pharmacies, including the "Medicina Mexico" network, run by notorious cybercriminal and convicted felon Stephen Michael Cohen.[8]

Summary: During the course of three (3) months, from March 2014 to May 2014, LegitScript, US law enforcement and/or other officials contacted Mesh Digital at least twice to notify the registrar of the thousands of illegal Internet pharmacies registered with the company. Mesh Digital took no action. These same parties also contacted ICANN Compliance at least twice. ICANN Compliance likewise took no action to effectuate the termination of thousands of illegal Internet pharmacies, instead closing the case and refusing to disclose their rationale.

Fig 8: licensedpharmacy.net, an illegal Internet pharmacy operated by notorious con man Stephen Michael Cohen, a convicted felon who regularly impersonates attorneys, and has reportedly gone to prison for it. Other registrars shut down Cohen's fake online pharmacies until he found ICANN-accredited Mesh Digital, which provides safe haven for the criminal network. ICANN found that the registrar responded appropriately even though it took no action, despite complaints from LegitScript and the FDA.

- March 12, 2014. LegitScript notifies Mesh Digital about nearly 200 illegal Internet pharmacies. The company refuses to investigate or take action against any of them.
- March 25, 2014. LegitScript submits complaint to ICANN, alleging that the registrar failed to investigate and respond appropriately to a complaint that domain names are used for illegal purposes.

[8] More information about Cohen is available at http://articles.latimes.com/2001/mar/26/business/fi-42825.

- April 7, 2014. The US FDA submits a complaint to Mesh Digital. The registrar responds and indicates that it will not investigate or take action.
- April 30, 2014. The US FDA submits a complaint to ICANN.
- May 19, 2014. ICANN closes both complaints, finding that the domain name registrar "responded appropriately" even though it had not taken any action. The illegal online pharmacies continue to operate.

4. Momentous Group of Registrars: Rebel, NameScout, DomainsAtCost

The Momentous group of registrars and registries (which includes Vox Populi, the registry for .SUCKS) boasts the world's largest share of illegal online pharmacy domain name registrations. As noted above, the company's flagship domain name registrar, Rebel.com, has only about 0.05% of the ICANN domain name market, but an estimated 17%+ of the illegal online pharmacy market.

- March 12, 2014. LegitScript submits a complaint to Rebel.com about some of the illegal online pharmacies (113 domain names), explaining how they are used to sell prescription drugs without a prescription, sell unapproved drugs, and sell drugs without legally required pharmacy licenses. The registrar writes back the same day, stating that it will not take any action.
- March 25, 2014. LegitScript files a complaint with ICANN.
- June 25, 2014. I, John Horton, meet with Rob Villeneuve, CEO of Momentous Corp.'s Registrar Group, in London. The FDA is present for part of the conversation and voices their concerns about Rebel's business dealings with illegal online pharmacies. We discuss the dangers and problems of illegal online pharmacies.
- July 24, 2014. ICANN closes the complaint, finding that Rebel "responded appropriately" despite the fact that most of the illegal online pharmacies continued to operate.
- Jan. 20, 2015. LegitScript submits a complaint to Rebel regarding another

Fig 9: To eliminate any doubt that an online pharmacy we notified Momentous Corp. about — and that they failed to act on — is operating illegally, we notified them yet again with a photo of the prescription drugs that were sold by one of the online pharmacies without a prescription a few weeks ago. Rebel has still not acted

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328 domain names used as illegal online pharmacies. The CEO of the registrar group responds, stating that he'll look into it. I follow up with a phone call and email. As far as we can tell, no action was taken.

- April 21, 2015. LegitScript submits an additional analysis to Rebel about nine of the illegal online pharmacies, including a photo of the prescription drugs that we were able to purchase without a prescription from one of the illegal online pharmacy networks we had previously notified Rebel about. No action was taken as of this writing.
- May 1, 2015. LegitScript submits another complaint to ICANN about Rebel. The complaint is pending.

To illustrate the degree to which Momentous has become a safe haven for illegal Internet pharmacies, it is instructive to note that several illegal Internet pharmacy networks — groupings of multiple Internet pharmacies under common control — exclusively or primarily use Momentous for domain name registrations. Below are five examples of networks that primarily or exclusively use Momentous Group registrars, each with three sample illegal online pharmacies in the network.

Illegal Online Pharmacy Network:	**MedsIndia**
Sample Illegal Online Pharmacies:	confidencemedicine.com freemarketpharmacy.com freemarketdrugstore.com
Illegal Online Pharmacy Network:	**Gold-Rx**
Sample Illegal Online Pharmacies:	gold-rx.com xcheap-rx.com gold-pharm.com
Illegal Online Pharmacy Network:	**Get Smart Now**
Sample Illegal Online Pharmacies:	propecianow.net getvaltrexnow.net getmodafinilnow.net
Illegal Online Pharmacy Network:	**MedzShop**
Sample Illegal Online Pharmacies:	sleeping-tablets.com costapharmacy.com meds-club.com
Illegal Online Pharmacy Network:	**AllDayChemist**
Sample Illegal Online Pharmacies:	alldaychemist.com reliablerxpharmacy.com premiumrxdrugs.com

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Nexus Between Momentous, Crazy8Domains and Illegal Online Pharmacy "4rx"

The Momentous group is notable for another reason: the nexus of Momentous Corp.'s CEO, Robert Hall, with a registrar that harbors one of the world's leading illegal "rogue" Internet pharmacies, which was online until a few months ago at 4rx.com. Below is relevant background on the 4rx Internet pharmacy network.

Fig 10: A historic screenshot of 4rx.com, one of the world's most prominent illegal online pharmacies. The business is run by a married couple, Ioan Biris and Sabita Limbu, and their associates.

The 4rx network has operated illegally for years, selling prescription drugs without requiring a prescription; dispensing prescription drugs not approved by the US FDA; and operating without valid, legally required pharmacy licenses.

The operators of the 4rx illegal online pharmacy network are a married couple named Ioan Biris (who has several AKAs) and Sabita Limbu. LegitScript has verified this through a variety of sources, including original domain name registration records for key websites, analysis of mail servers and IP address blocks used by the Internet pharmacies, the network's merchant accounts used to process payments, foreign corporate registrations (such as 4rx drug supplier Genpharma International, in which Biris and Limbu have an ownership stake), and other investigative research. Biris and Limbu, along with a small number of key associates, operate the entire scope of the 4rx Internet pharmacy network, from the websites to the payment structure to some of the drug suppliers.

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The network's flagship Internet pharmacy website, 4rx.com, and several others in the network have long been registered with an ICANN-accredited registrar called Crazy8Domains. What is first notable about Crazy8Domains is how small it is, normally having under 100 domain names on its roster. Aside from a few personal or unused domain names, the majority of active domain names are illegal online pharmacies: in late 2014, we found that out of 75 domain names in total registered with Crazy8Domains, over 70% of those that were online pointed to content were illegal online pharmacies (with the remainder being mostly personal websites operated by the Internet pharmacy's employees). At present, our assessment is that out of just 18 domain names registered with Crazy8Domains that are online, 15 are illegal online pharmacies. In other words, Crazy8Domains is a tiny registrar that appears to specialize in illegal online pharmacies.

But that is not all: in fact, **the ICANN-accredited registrar and the illegal online pharmacy network are, in essence, one and the same**. The ICANN-registered point of contact for Crazy8Domains is Sabita Limbu, one of the owners and operators of illegal online pharmacy scheme 4rx. Indeed, if one seeks to submit a complaint to Crazy8Domains, one does not reach a disinterested third-party registrar; rather, complaints to the registrar are answered by Limbu herself — from the email address "legal@crazy8domains.com" — or an associate of the Internet pharmacy network.

Fig 11: According to ICANN records, Sabita Limbu is the point of contact for registrar Crazy8Domains. Limbu and her husband also operate the illegal online pharmacy websites that constitute the bulk of Crazy8Domains' registered domain names.

Yet Limbu, the "legal" and compliance point of contact according to ICANN's own records, is herself the domain name registrant for several illegal online pharmacies, including indianpharmaonline.com, offshorerx1.com, cheapestonlinedrugstore.com and others, all of which are registered with Crazy8Domains under her name. **In short, for all practical purposes, the ICANN-accredited registrar is the illegal online pharmacy, and the illegal online pharmacy is the ICANN-accredited registrar.** As rogue Internet pharmacy network 4rx has found, the best way for a criminal network to ensure a "bulletproof" solution for its domain names is to simply obtain ICANN accreditation for oneself, if under a different corporate record.

So what is the tie-in to Momentous? According to Canadian federal corporate registration records, the sole director of Crazy8Domains, the boutique registrar that exists to provide protection to an illegal online pharmacy network, is Rob Hall, the CEO of Momentous (the company that owns .SUCKS' registry Vox Populi).

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Fig 12: According to Canadian corporate registration records, Momentous CEO Rob Hall is the director of Crazy8Domains, the boutique registrar that provides registrations for an illegal online pharmacy network and employs at least one of the illegal online pharmacy owners.

Corporations Canada

Federal Corporation Information - 6245994

Glossary of Terms used on this page

Return to Search Results
Start New Search

Corporation Number
6245994

Business Number (BN)
860705078RC0001

Governing Legislation
Canada Business Corporations Act - 2004-06-09

Corporate Name
Crazy8Domains.com Inc.

Status
Active

Registered Office Address

26 AURIGA DRIVE
NEPEAN ON K2E 6B7
Canada

Active CBCA corporations are required to update this information within 15 days of any change. A corporation key is required.

Directors

Minimum	Maximum
1	10

Directors

ROBERT HALL
700 SUSSEX DRIVE
SUITE 407
OTTAWA ON K1N 1K4
Canada

IMPLICATIONS: ICANN TRANSPARENCY AND ACCOUNTABILITY

To assess any organization's trust and accountability, it is critical to understand how effective and transparent its compliance process is. To be sure, sometimes complaints to ICANN about registrars that serve as "safe havens" for criminal activity result in the domain names coming offline, or in a breach notice against registrars that do nothing about domain names used for illegal purposes. **But all too often, a registrar is in effect given a green light by ICANN to continue providing registration services to criminal networks, and in the case of Crazy8Domains, ICANN even directly accredited the illegal online pharmacy operator.**

Part of the problem originates with the lack of transparency in ICANN Compliance's process. It is possible to tell *when* the compliance process has obviously failed, but not *why* it has failed.

ICANN Compliance has been clear that the "informal" compliance process is secret: against indisputable evidence that domain names continue to be used for illegal purposes, ICANN Compliance has determined time and time again that a registrar adequately investigated a complaint and responded appropriately when the domain names remain in operation, but will not disclose what steps were taken by the registrar. Yet ICANN cannot point to any law, regulation, or externally imposed reason that requires the details of its informal process to be

confidential. ICANN's compliance staff has argued that secrecy improves disclosure by the registrar, and thus the effectiveness of the compliance process.

This argument is hard to digest, particularly against the evidence of obvious failures in ICANN's compliance process. No reasonable person would believe that if a registrar receives a complaint about hundreds of domain names being used to sell heroin, OxyContin without a prescription, and counterfeit drugs, that continuing to provide registration services to every single one of those domain names — as WebNic.cc did — can possibly be indicative of any response at all, let alone an "appropriate" one.

But when ICANN is confronted with the evidence that the same domain names are still continuing to sell fake, addictive or unapproved drugs, and asked what the registrar did that could have possibly constituted an "appropriate response," the answer is: It's a secret. In response to offers by drug safety regulators, pharmacy regulators or their designees to provide expert help as to what is legal and what is not, the answer is: No thanks.

From the vantage point of trust and accountability, this makes a mockery of ICANN's compliance process, undermines the organization's trustworthiness and credibility, and puts ICANN in the position of giving the registrar a green light to continue facilitating criminal activity. Although most registrars do the right thing, the registrars who want to offer safe haven for illegal online activity are able to do so, and — insofar as we can surmise — have found a way to convince ICANN to say that they are "responding appropriately" to the paid use of their services for illegal activity while continuing to provide the criminals a safe haven.

Enforcing Its Own Contracts Does Not Put ICANN in the Business of Regulating Content or Serving as the "Internet Police"

It is worth addressing two standard talking points that ICANN uses when confronted with these facts: (1) that "ICANN is not a law enforcement agency"; and (2) that "ICANN does not regulate content."

1. The first is simultaneously true and irrelevant: countless other organizations around the world such as Visa, MasterCard, Google, Microsoft and Amazon are also not law enforcement, yet have policies and procedures in place to address high-risk areas of abuse and criminality, either on their own or their affiliates' platforms. These responsible businesses enforce their contracts, appropriately investigating and, if necessary, terminating service to entities that violate their terms of service by engaging in illegal activity. ICANN could do the same with safe haven registrars who violate the RAA by providing safe havens for online crime. Too often, ICANN chooses not to.

2. As to the second, ICANN is responsible for implementing and enforcing accreditation policies ultimately designed to ensure, among other things, that domain names are not "used" for illegal purposes. Because domain names are most commonly used to point to content, it is difficult to envision how a domain name can be "used" illegally in a way that does not require some awareness of the content to which it points.

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Recommended Actions

What can be done about this problem? I respectfully suggest that the Committee and/or ICANN consider the following steps.

1. The Committee should consider inviting ICANN Compliance or ICANN's CEO to testify about the specific actions that registrars such as Gransy, WebNic, Mesh Digital, Rebel.com, and several other registrars took regarding domain names that are still used in furtherance of criminal activity — and why ICANN found that the registrars "responded appropriately," despite evidence about continuing illegal activity from LegitScript, the US FDA, the FDA's counterparts in other countries, and INTERPOL. The Committee's questions of ICANN Compliance should be specific as to the registrar and the domain names in question, and should examine why the ICANN informal compliance process is confidential.

2. The Committee should also consider inviting ICANN to testify about its accreditation of Crazy8Domains, and also invite that company's registered Director, Mr. Robert Hall, to testify about his knowledge of and relationship with Crazy8Domains and the 4rx illegal online pharmacy network, as well as his company's relationships with other Internet pharmacy businesses.

3. ICANN itself should consider establishing best practices for what constitutes an "appropriate response" to specific types of well-known high-risk activity. There is not an epidemic of illegal online activity involving sales of furniture, yoga mats or door knobs. Rather, there are specific types of high-risk activity that are well-known: illegal online pharmacies, child pornography, and counterfeit goods, among a handful of others. ICANN should look to the lead set by Visa and MasterCard, which identify a small number of areas as "high-risk" and have specific guidance to acquiring banks on these areas. ICANN, the registrar community and regulatory authorities can, by working together, come up with best practices in a way that — even if it does not solve every possible instance of illegal activity — establishes what constitutes an "appropriate response" in these high-risk areas.

4. ICANN should also conduct due diligence to learn which registrars are the "safe havens" for these high-risk areas. As our data indicate, most registrars do not tolerate criminal activity, but illegal online pharmacies "cluster" at those registrars who provide safety and stability by ignoring evidence of criminality. This will help make ICANN's processes more focused and efficient, and will focus scarce resources on the small number of registrars that constitute a problem.

Conclusion: ICANN's Duty to the Public Interest

In closing, I would submit that ICANN's position that it owes a duty of secrecy to registrars regarding the informal compliance process is emblematic of its apparent belief that it works primarily for, and on behalf of, the registrars it accredits. ICANN should remember that it does not exist to serve one industry sector, but rather Internet users as a whole. Until its processes become more transparent, and do not result in obvious failures such as those described above,

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ICANN will continue to lack the kind of accountability and trust that Internet users as a whole deserve.

Thank you for the opportunity to submit this testimony. I welcome any questions that the committee may have.

Mr. ISSA. Thank you.
Mr. Metalitz?

TESTIMONY OF STEVEN J. METALITZ, COUNSEL, COALITION FOR ONLINE ACCOUNTABILITY

Mr. METALITZ. Mr. Chairman, Mr. Nadler, Members of the Subcommittee, thanks very much for inviting me to offer once again the perspectives of the Coalition for Online Accountability. Our coalition represents U.S. associations, organizations and companies that depend on the rules set by ICANN to enable us to enforce copyrights and trademarks online.

First I would like to salute the Subcommittee for the crucial role it has played in providing oversight of ICANN issues over the past 15 years. Maintaining that long-established oversight record is critical to U.S. businesses that depend on copyright and trademark protection, and to the millions of American workers that they employ.

My colleagues at the table, and especially on my left, will have a lot to say about the IANA transition process and the accompanying effort to improve ICANN's accountability mechanisms. I think those accountability efforts are basically on the right track. But as a wise man once said, the past is prologue, and so is the present. So rather than speculate about ICANN's future, I would like to focus on the way in which ICANN is now handling the critical domain name system functions over which the U.S. Government ceded its contractual control years ago.

As several Members of the Subcommittee have already noted, what ICANN is doing and not doing today is highly relevant to the terms and conditions of the IANA transition and to what accountability mechanisms are needed in the future. So very briefly, let's look at ICANN's current track record on three key issues: contract compliance, WHOIS, and the new gTLD launch.

We hear a lot about the ICANN multi-stakeholder model. What does that really mean? I think it boils down to this: replacing governmental regulation with private contracts and community oversight in managing the domain name system. For this model to work, the contracts must be strong and clear, and they must be vigorously and transparently enforced.

Now, as John Horton has already mentioned, under the 2013 revision of the Registrar Accreditation Agreement, domain name registrars have new obligations to investigate and respond to complaints that the domain names they sponsor are being used for illegal activities, and that includes specifically copyright or trademark infringement. By now, most registrars have signed the 2013 agreement, but I have to report that registrars are not responding to these complaints even when the facts are clear and the evidence of wrongdoing is overwhelming.

Just as concerning, to date, ICANN is not yet taking action to clarify and enforce these RAA provisions, and as the previous witness said, it is acting with a lack of transparency in its compliance efforts.

Unless and until ICANN shows that it can effectively enforce the agreements that it has signed, its readiness for the completion of the transition will remain in question, and this track record must

be taken into account in fashioning the enhanced accountability mechanisms that must accompany any further transition.

The 2013 RAA also set in motion long-overdue steps toward developing ground rules for the widespread phenomenon of proxy registration services. These have a legitimate role, but today the registered contact data for more than one-fifth of all gTLD registrations, tens of millions, lurks in the shadows rather than in the sunlight of the publicly accessible WHOIS database. Further progress in bringing predictability and consistency to this proxy world is critical. If ICANN cannot do this, then the role of the WHOIS database in letting Internet users know who they are dealing with online, critical for accountability and transparency, will be seriously compromised. The next several months may show whether ICANN is up to the task.

Finally, although ICANN is only about halfway through the current new gTLD launch, it is already starting to review the process. That review needs to be searching and comprehensive. We need to question and reevaluate the ship's heading, not just rearrange the deck chairs for the next voyage.

The review has to address the fundamental issue of whether the rollout of an unlimited number of new top-level domains actually benefitted the general public and brought greater choice to consumers or whether it simply enriched intermediaries and speculators.

In conclusion, thank you again for this Subcommittee's continuing oversight of this fascinating experiment in non-governmental administration of critical Internet resources that we call ICANN. Our coalition urges you to continue that role, especially with regard to contract compliance, WHOIS, and the new gTLD review.

I look forward to your questions. Thank you.

[The prepared statement of Mr. Metalitz follows:]

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Stakeholder Perspectives on ICANN:
The .Sncks Domain and Essential Steps to Gnarantee Trust and Accountability in the Interuet's Operation

Prepared Testimony of

Steven J. Metalitz
Counsel, Coalition for Online Accountability

Before the

Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
United States House of Representatives

Washington, DC

May 13, 2015

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American Society of Composers Authors & Publishers (ASCAP) | Entertainment Software Association (ESA) | Software & Information Industry Association (SIIA)
Broadcast Music Inc. (BMI) | Motion Picture Association of America (MPAA) | Time Warner Inc.
Recording Industry Association of America (RIAA) | The Walt Disney Company
Counsel: Steven J. Metalitz (met@msk.com)

EXECUTIVE SUMMARY

Prepared Testimony of

Steven J. Metalitz
Counsel, Coalition for Online Accountability (COA)

Before the

Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
United States House of Representatives

Washington, DC

May 13, 2015

COA represents associations, organizations and companies that depend upon rules set by ICANN to enable them to enforce their copyright and trademarks online.

COA continues to advocate for meaningful participation by all interested parties in the IANA transition process, and for maximum feasible transparency in how IANA functions are carried out. However, the way in which ICANN has been handling the critical Domain Name System (DNS) functions on which the U.S. government has already ceded contractual oversight is highly relevant to the terms and conditions of the transition. Maintaining the long-established oversight record of this Subcommittee on issues such as new gTLDs, contact compliance and Whois is crucial to U.S. businesses that depend on copyright and trademark protection.

ICANN's multi-stakeholder model boils down to replacement of governmental regulation by private contracts and community oversight in managing the DNS. Strong contracts, vigorously enforced, are essential to this model.

Under the 2013 revision of the Registrar Accreditation Agreement (RAA), domain name registrars took on important new obligations to respond to complaints that domain names they sponsor are being used for copyright or trademark infringement, or other illegal activities. But registrars are not responding, and to date ICANN is not taking action to clarify and enforce these RAA provisions. If ICANN cannot effectively enforce the agreements it has signed, its readiness for the completion of the transition must be questioned.

The 2013 RAA also set in motion long-overdue steps toward developing standards for the widespread phenomenon of proxy registration services. Further progress will be critical if the role of the Whois database in advancing online accountability and transparency is to be saved.

ICANN's upcoming review of the new gTLD launch must address the fundamental issue of whether the roll out of an unlimited number of new Top Level Domains benefited the general public. The Public Interest Commitments undertaken by new gTLD registries have the potential to advance the rule of law in the new gTLD space, and ultimately among legacy gTLDs as well; but it is far too soon to tell whether this potential will be realized.

Written Testimony of Steven J. Metalitz
Counsel, Coalition for Online Accountability

May 13, 2015

Chairman Issa, Ranking Member Nadler, and members of the Subcommittee:

Thank you for convening this timely hearing to collect "Stakeholder Perspectives on ICANN." For the past decade and a half, this subcommittee has provided invaluable oversight of this bold experiment in non-governmental administration of some of the most critical Internet technical functions. We greatly appreciate this opportunity to contribute once again to that unparalleled oversight record, by offering this subcommittee the perspective of associations, organizations, and companies that depend upon the rules set by ICANN to enable them to enforce their copyrights and trademarks online.

I. About COA

The Coalition for Online Accountability (COA), which I serve as counsel, and its predecessor organization, the Copyright Coalition on Domain Names (CCDN), has played an active role within ICANN since 1999. Today, when studies show that streaming audio and audio-visual content consumes far more Internet bandwidth than any other application, it is more important than ever that the voice of the creative community that depends on copyright protection is taken into account.

COA participants include four leading copyright industry trade associations (the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA), and the Software and Information Industry Association (SIIA)); the two largest organizations administering the public

performance right in musical compositions, ASCAP and BMI; and major copyright-owning companies such as Time Warner Inc. and the Walt Disney Company. COA's focus is the Domain Name System (DNS) administered by ICANN. Our main goal is to enhance and strengthen online transparency and accountability, by promoting the continued availability of the data needed for effective enforcement against online infringement of copyrights and trademarks. COA has also been an active participant in ICANN's work to develop the new generic Top Level Domain (gTLD) program, with the objective of implementing clear and enforceable ground rules to reduce the risk that this vast new online space will become a haven for copyright piracy, trademark counterfeiting, or similar abuses.

II. IANA Transition – and Beyond

Over the past year, the focus of public attention has been on the response of the ICANN community to NTIA's announcement that it intends to allow its contractual control over ICANN's exercise of the IANA functions expire. These functions are of critical importance to the operation of the Domain Name System (DNS), so any transition away from U.S. government contractual relations with ICANN regarding the IANA functions must be carefully planned and seamlessly executed. Moreover, it is essential that the transition be accompanied by reforms that make ICANN more accountable to the world of Internet users.

COA continues to advocate for meaningful participation by all interested parties in the IANA transition process, and for maximum feasible transparency in how the IANA function is carried out. We have also stressed the protection of intellectual property rights as a critical ingredient for healthy growth and innovation in the Internet environment, and respect on the

Internet for the rule of law, consistent with international norms and the principles of a free and democratic society. Enhanced accountability mechanisms should advance these goals.

COA's day-to-day focus, however, has been less on the challenges of the IANA transition, and more on the vital aspects of management of the Domain Name System over which the U.S. government relinquished contractual control six years ago. Among the most impactful functions are (1) the biggest and most far-reaching initiative in ICANN's history – the rollout of thousands of new generic Top Level Domains – and (2) management of one of the most important Internet public resources that has been consigned to ICANN's stewardship – the database of contact data on domain name registrants usually referred to as Whois.

As it happens, these two issues — Whois, and new gTLDs — have been at the core of this subcommittee's ICANN-related oversight activities over the past 15 years. This is a reflection of the vital importance of these functions to key national economic interests, including but not limited to the major U.S. industry sector that relies on strong copyright protection, especially in the online environment. That sector now contributes 1.1 trillion dollars annually to the U.S. economy, and provides almost 5.5 million good American jobs. These issues are also critical to the huge U.S. business and consumer interest in preventing trademark infringement and similar fraudulent conduct on the Internet.

In the rest of my testimony, I offer a brief status report on how ICANN is handling these important issues. While these issues are distinct from the technical focus of the IANA functions, ICANN's performance record over the past six years in areas not subject to direct U.S. government oversight is highly relevant to the terms and conditions — especially the

accountability mechanisms — that must be put in place before the United States can safely conclude that the IANA transition will advance our national interests.

III. Contractual Compliance

The best lens through which to view and evaluate ICANN's performance is provided by the web of contracts which ICANN has entered into with private parties to perform critical DNS functions. No phrase is bandied about more often in discussions about ICANN than the "multi-stakeholder model" that the organization embodies for administration of the DNS, and that provides an innovative alternative to control of the Internet by governments. Let's not forget what this boils down to in concrete terms: the essence of the "multi-stakeholder model" of DNS governance is the replacement of governmental regulation of a critical public resource with private contractual constraints and community oversight. This model only works when those contracts are strong and when they are vigorously and transparently enforced. A culture of compliance must be nurtured, fostered and supported by adequate enforcement resources.

The contractual framework that needs the most scrutiny and oversight is the Registrar Accreditation Agreement (RAA). This is the standard contract that ICANN enters into with companies that wish to participate, as registrars, in the retail marketplace for registration of domain names in the generic Top Level Domains (gTLDs). The recurring challenge for ICANN is that the registrars with whom these contracts are negotiated are the very entities that write the checks that fund a significant portion of ICANN's operations; and, once the contracts have been executed, it is ICANN's responsibility to ensure that those registrars comply with those contracts. In other words, ICANN depends for financial support on the same entities with which it must negotiate, and against which it must then enforce, the ground rules for the domain name

registration marketplace. These conflicting roles are inherent in the multi-stakeholder model as ICANN practices it; and, significantly, these conflicts sometimes overwhelm ICANN's ability to negotiate and enforce the provisions of the RAA.

Notably, ICANN held private negotiations with registrars that culminated in 2008 in revisions to the Registrar Accreditation Agreement. These revisions almost completely failed to address well-known community concerns about registrar behavior. Those behaviors included toleration of (or even complicity in) abusive registrations and uses of domain names that infringed trademarks and copyrights. This was virtually a textbook case of "regulatory capture" — the entities dependent on ICANN accreditation for their domain name registration business effectively controlled the ongoing terms of that accreditation.

Fortunately, through concerted efforts of intellectual property interests and law enforcement agencies, with critical support from governments through ICANN's Governmental Advisory Committee, the RAA was re-opened. After years of negotiations, and numerous opportunities for community input into the process, a new version of the RAA was presented in 2013. Its text was subject to an extensive public comment process, which led to some important improvements before final approval by the ICANN Board. ICANN gave registrars a strong incentive to execute the 2013 version of the RAA, by making such execution a prerequisite to accreditation to sell domain names in the new gTLDs that were just then beginning to come on line. By now, registrars that sponsor the vast majority of gTLD domain names have signed, and are obligated to comply with, the 2013 RAA.

Let me highlight two critical aspects of the 2013 RAA. Each of these offers great potential for enhancing transparency, accountability and the rule of law in the Domain Name System – but only if they are clearly, consistently and vigorously enforced by ICANN.

A. 2013 RAA – responding to abuse

First, the 2013 RAA refers more explicitly than ever before to the obligation of accredited domain name registrars to do their part in ridding gTLDs of blatantly abusive uses of registered domain names. The contract requires registrars to maintain an abuse contact to receive reports of illegal activity involving use of a domain name, and to "investigate and respond appropriately" to abuse reports.[1] Another provision of the RAA requires registrars to make "commercially reasonable efforts" to ensure that registrants comply with their promises not to use their domain names "directly or indirectly" to infringe the legal rights of third parties.[2] Taken together, these provisions provide an important avenue of redress against those who abuse gTLD domain name registrations to operate sites for pervasive copyright piracy or trademark counterfeiting, among other abuses. The key, however, is execution.

COA and its participating organizations are deeply engaged with ICANN staff on this issue. Although the 2013 RAA has been in force for many major registrars for more than a year, few if any of them seem to have changed their behavior. Well-documented reports of abuse that are submitted to registrars by right-holders, clearly demonstrating pervasive infringement, are summarily rejected, in contravention of the 2013 RAA, which requires that they be investigated.

[1] See section 3.18.1 of the 2013 RAA, at https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en.

[2] See sections 3.7.7 and 3.7.7.9 of the 2013 RAA.

We have begun bringing these cases to the attention of ICANN's compliance staff, citing the new provisions of the 2013 RAA; but we have had no success in getting ICANN to take action.[3] We have offered to work both with ICANN staff and with representatives of the registrars to help develop guidelines for compliance with these critical RAA provisions. But ultimately, unless registrars comply in good faith, and ICANN undertakes meaningful and substantive action against those who will not, these provisions will simply languish as empty words, and their potential to improve transparency, accountability and the rule of law in the Domain Name System will never be realized.

In recent months, there have been increasing calls from many quarters for domain name registrars to recognize that, like other intermediaries in the e-commerce environment, they must play their part to help address the plague of online copyright theft that continues to blight the digital marketplace. These calls have come from the new U.S. Intellectual Property Enforcement Coordinator; from the Office of the U.S. Trade Representative; and from leaders on Capitol Hill. The provisions of the 2013 RAA offer one clear path for responsible registrars to step up to this responsibility, and for ICANN to press outliers to conform. This is in no sense an issue of "mission creep" for ICANN; it is simply a question of whether it will enforce — fairly, consistently and transparently — the contracts it entered into, contracts that were fully debated within the ICANN community before they were concluded, and that the ICANN Board

[3] For example, the domain name itemvn.com resolves to a pirate music streaming and download site. By August of last year, RIAA had notified the site of over 220,000 infringements of its members' works (and had sent similar notices regarding 26,000 infringements to the site's hosting providers). At that time, RIAA complained to the domain name registrar (a signatory of the 2013 RAA), which took no action, ostensibly because it does not host the site. RIAA complained to ICANN, citing section 3.18.1 of the 2013 RAA. ICANN twice dismissed the complaint, saying that the registrar had acted appropriately. Today, the site continues to engage in clear and widespread infringing activity unabated. Just this Monday, two days prior to this hearing, a pre-release track from a major artist was readily available on itemvn.com, a full day before the track was scheduled to be released through legitimate channels.

unanimously approved. If ICANN cannot effectively enforce the agreements it has signed, then its readiness for the completion of the transition from U.S. government oversight must be questioned. We urge this subcommittee to keep a close eye on this issue, and on the efforts of ICANN's Chief Compliance Officer to make progress in this area.

B. 2013 RAA – Whois

The second 2013 RAA issue involves Whois: the publicly accessible database of identity and contact information on domain name registrants. The new version of the agreement binds domain name registrars to somewhat stronger obligations to improve the accuracy of the Whois data on which intellectual property owners, law enforcement, consumers and members of the public rely to learn who is responsible for particular domain names and the websites and other Internet resources associated with them. Though many registrars have complained loudly about these new obligations, ICANN must stay the course and continue to enforce them, as one key ingredient of a much-needed strategy to improve the accuracy level of Whois.

The 2013 RAA also set in motion a long-overdue effort toward addressing the huge issue of proxy registrations. Tens of millions of gTLD registrations – one-fifth or more of the total – lurk in the shadows of the public Whois, through a completely unregulated proxy registration system that is the antithesis of transparency. These registrations need to be brought into the sunlight. While there is a legitimate role for proxy registrations in limited circumstances, the current system is manipulated to make it impossible to identify or contact those responsible for abusive domain name registrations.

A first step toward greater accountability and transparency for domain name proxy registrations was taken in the 2013 RAA, which requires some proxy registration services to

disclose their terms and conditions.[4] More importantly, it led to the creation of an ICANN working group to draft accreditation standards for such services, nearly all of which are operated by subsidiaries of accredited registrars. The goal is to require registrars to deal only with services that meet accreditation standards on issues such as accuracy of customer data, prompt relay of messages to proxy registrants, and ground rules for when the contact points of a proxy registrant will be revealed to a complainant in order to help address a copyright or trademark infringement. After some sixty meetings over the past 18 months, the accreditation standards working group published a draft report last week, and invited public comment.[5] This is forward progress, but a number of difficult questions remain open. This is another process on which this subcommittee should keep a close eye; and if a satisfactory accreditation system cannot be achieved in the near future within the ICANN structure, it would be timely and appropriate for Congress to consider whether a legislative solution is feasible.

IV. New gTLDs

ICANN is only about halfway through the process of delegating the 1400 or so new generic Top Level Domains that were applied for in the new gTLD launch process it set in motion eight years ago; but it is already starting a review of this new gTLD round, and beginning preparations for the next one. It's essential that this review not be confined to tweaking the particulars of the procedures adopted in this round, but that it also address the more fundamental questions flowing from how the new gTLD launch was carried out.

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[4] See Specification 5 of the 2013 RAA.

[5] See https://www.icann.org/public-comments/ppsai-initial-2015-05-05-en .

ICANN decided to roll out an unlimited number of new generic Top Level Domains, rather than targeting its efforts to those new domains most likely to enhance competition and choice, to broaden participation in the Internet, and to benefit the general public. As COA and others pointed out at the time, this decision is best viewed as the result of capture of the ICANN decision-making process by prospective registry entities seeking to monetize the new domain space through defensive registrations and encouraging speculation. To date, we do not believe that the track record of the new gTLDs refutes or undermines this interpretation of events.

From COA's perspective, one significant feature of the new gTLD launch was that all the new registries were required to take on "public interest commitments" (PICs), that have the potential to sharply reduce the risk that this new space could become a haven for pirates, counterfeiters, and others who register domain names in order to carry out criminal activities. Although ICANN spent significant time and effort on creating a PIC "dispute resolution process," and defending it against criticisms from government representatives and others, we are pleased to see that ICANN is now stressing that the PICs are fully part of the registry agreements between ICANN and the new registry operators, and pledging that the PICs can and will be enforced directly by ICANN. However, it is far too soon to tell whether these innovative provisions will live up to their potential to promote the rule of law in the new gTLD space, and thus to evaluate whether this improvement engineered into the new gTLDs regime can be adapted to apply to the main battlefield against online piracy, counterfeiting, and other infringements: the legacy gTLDs, such as .com, .net and .org.

Finally, with regard to the .sucks new gTLD in particular, one of several concerns is the peculiar provision in the registry agreement between ICANN and the .sucks registry operator, calling for an additional payment of up to $1 million to ICANN. What COA finds most

disturbing is the justification ICANN has furnished for this side payment. If, indeed, an accredited registrar created multiple dummy corporations and sought separate accreditation for each of them, and then defaulted on significant accreditation fees due to ICANN when the registrar chose to close down these subsidiaries, it is hard to understand why an entity controlled by that same registrar was even allowed to apply to operate a new gTLD registry, much less be awarded that franchise. If this accurately describes the scenario, it highlights a fundamental flaw in ICANN's administration and enforcement of the contracts on which its version of the "multi-stakeholder model" directly depends.

V. Thick Whois

An update on one final issue is in order, as it reflects not only on ICANN's approach to contract enforcement, but also on the effectiveness of other aspects of its multi-stakeholder model. For the past several years, almost every gTLD registry has employed a "thick Whois" architecture: consolidating all Whois data at the registry (or wholesale) level, rather than dispersing it across a thousand retail registrar databases around the world. ICANN concluded six years ago that this "thick Whois" structure, which makes this vital data more readily accessible and facilitates enforcement of Whois data accuracy requirements, was in the public interest, and required all the new gTLDs to adopt it. Among legacy gTLDs, there were only three outliers – but two of them were the two largest gTLD registries: .com and .net, both operated by Verisign under contract with ICANN.

ICANN had ample authority under its previous .com and .net registry agreements to require Verisign to migrate to "thick Whois"; but it refused to do so, instead calling on the community to consider whether to adopt a consensus policy on thick Whois. The good news is

that this policy development process reached a successful conclusion in February 2014, when the Board adopted a consensus policy requiring thick Whois for all gTLDs. The bad news is that the implementation process for this policy has inexplicably stalled. Today, 15 months later, .com and .net still maintain their outmoded "thin Whois" architecture, making it harder for business, consumer intellectual property owners, and other users to find out who they are dealing with in the two largest gTLD registries.

VI. Conclusion

Thank you once again for giving COA the opportunity to contribute to your essential oversight role with respect to ICANN. I look forward to responding to any questions you may have.

Mr. ISSA. Thank you.
Mr. Woodcock?

TESTIMONY OF BILL WOODCOCK, EXECUTIVE DIRECTOR, PACKET CLEARING HOUSE

Mr. WOODCOCK. Mr. Chairman, Ranking Member, and Members of the Committee, good morning and thank you for the opportunity to testify. My name is Bill Woodcock. I am the Executive Director of Packet Clearing House, the international organization that builds and supports critical Internet infrastructure, including the core of the domain name system.

I have served on the Board of Trustees of the American Registry for Internet Numbers for the past 14 years, and I have been continuously involved in the IANA process since the mid-1980's. Most relevant to the proceeding at hand, I am one of the two North American representatives to the CRISP team, the process through which the Internet numbers multi-stakeholder community has developed its IANA oversight transition proposal.

I am here today to explain why it is in the interests of both the U.S. Government and other Internet stakeholders to ensure that the IANA oversight transition occurs on schedule and with undiminished strength of accountability.

The IANA function comprises three discrete activities serving three different communities: the domain name community, which is represented by the other seven witnesses at the table here; the Internet protocols community, which sets Internet standards; and the Internet numbers community, which manages the Internet addresses that allow our devices to communicate. These three functions are completely independent of and separable from each other.

Two of the three communities, protocols and numbers, produced the requested transition plans on schedule in January. The names proposal, however, is still a work in progress. The protocols and numbers communities finished promptly because the IANA functions that serve them are very simple. The IANA function that serves names is, as you have been hearing, substantially more complex. The names community will not reach consensus in sufficient time to achieve a September 30 transition, but the numbers and protocols transitions are ready to be implemented now. Moving them forward as planned would show good faith on the part of the U.S. Government and assure the world that the USG is a productive participant in the multi-stakeholder process rather than an obstacle.

At the same time, allowing the names community the further time it needs would show that the U.S. Government is neither throwing caution to the wind nor abandoning its responsibilities before ICANN accountability can be firmly established.

If NTIA delays the protocols and numbers transitions, it will further the interests of those Nations that are already displeased with the exceptional nature of the U.S. Government's role in IANA oversight. A shift in the balance of Internet governance from the multi-stakeholder model of the U.S. Government and the Internet community to the intergovernmental model advocated by China and the ITU would be disastrous. But a timely transition of strong stakeholder oversight of the IANA function would achieve the goals

of both the U.S. Government and the global Internet community, responsible administration of a critical resource with strong contractual responsibility to stakeholders enforced within a jurisdiction that ensures that accountability is guaranteed by the rule of law.

Under pressure from foreign governments to internationalize, ICANN has over the past 5 years gone from being a U.S. operation to one with offices and staff in Beijing, Geneva, Istanbul, Brussels, Montevideo, Seoul, and Singapore. This is clear evidence of other governments' influence on ICANN, influence that will only grow stronger over time.

In my written testimony I cite facts, to demonstrate that the United States is the legal venue of choice of the international Internet community whenever it is an available option, across a sample of more than 142,000 Internet contractual agreements that we analyzed. Strongly accountable contractual oversight of the IANA function allows the Internet community to ensure that performance of the IANA function is never relocated to a jurisdiction with weaker rule of law or lesser protections against organizational capture.

ICANN has performed the IANA function successfully because it has been disciplined by the mechanisms of U.S. Government procurement, the right to remedy uncured defects with mechanisms up to and including contract termination, and the right to seek superior performance in the marketplace through periodic re-competition. We believe retaining these same strong accountability mechanisms after the transition is essential to ensure responsible performance of the IANA function.

No good can come from delaying the transition of the protocols and numbers functions. At the same time, no good can come from hurrying the names community into an incompletely considered compromise. Their issues require carefully crafted solutions involving significant ICANN accountability reforms. But these policy-level reforms are irrelevant to the simple mechanical tasks the IANA performs on behalf of the protocols and numbers communities.

In conclusion, only the U.S. Government can ensure that commitment to a successful IANA transition is realized and act as the guarantor of the success of the multi-stakeholder governance model. The interests of the U.S. Government and of the global Internet stakeholder community are both served by a transition of the IANA protocols and numbers functions on time, on September 30 of this year, as long as the communities are contractually empowered to enforce the accountability of the IANA function operator in the same manner that the U.S. Government has successfully done for the past 16 years. I ask you to use Congress' unique power of oversight over NTIA to ensure that our commitments are met and the transition of the protocols and numbers functions occur as scheduled.

Thank you for your time.

[The prepared statement of Mr. Woodcock follows:]

PCH
Packet Clearing House

Testimony of

Bill Woodcock
Executive Director
Packet Clearing House

before the U.S. House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet

Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation

May 13, 2015

PCH
Packet Clearing House
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Executive Summary
of the Testimony of

Bill Woodcock
Executive Director
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Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential
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May 13, 2015

It is in the interest of both the U.S. Government and US-based Internet stakeholders for the IANA oversight transition to occur on schedule and with undiminished strength of accountability.

The IANA function comprises three independent and separable activities: Protocols, Numbers, and Names. Protocols and Numbers are ready for transition now. Names involves more complex issues, and more time is needed to plan an orderly and responsible transition for it.

Proceeding with the Protocols and Numbers transitions on schedule will show that the US Government is a good-faith participant in the multistakeholder process that it advocates. It will also deny others leverage in their quests to abolish the current multistakeholder system of Internet governance or relocate the site of governance to a jurisdiction with fewer legal protections for stakeholder interests. At the same time, allowing Names the additional time needed to achieve a good result will demonstrate that the US Government is respectful of the expertise and needs of the stakeholder community, not dogmatic in pursuit of a deadline at the expense of a mature and responsible outcome.

ICANN's performance as the IANA function operator is currently incentivized by normal US Government procurement contracting terms. Those include the right to terminate a contract for uncured deficiencies of performance, the right to seek superior offerings through periodic recompetition, and the right to separate the functions. Those contractual protections have successfully ensured good performance on ICANN's part, and diminishing them would raise difficult questions about how to obtain the same incentives.

In addition, the jurisdiction and legal venue of performance of the IANA function are of concern, since rule of law based on an independent judicial system tends to protect the interests of stakeholders. The Internet stakeholder community has shown a very strong preference for US law as the governing law of Internet contracts, and these stakeholders must be given a mechanism to ensure that the IANA function is not moved to a jurisdiction that affords lesser protections. At the same time, any US legal mandate to ensure ICANN always will be domiciled in the US would be resented by others.

Congress can ensure that the IANA transition goes smoothly by holding the NTIA to its announced timeline with respect to Protocols and Numbers and by ensuring that the contractual remedies that currently incentivize good performance by the IANA function operator remain in place after the transition.

Chairman, Ranking Member, and Members of the Committee: Good morning and thank you for the opportunity to testify.

My name is Bill Woodcock.[1] I'm the Executive Director of Packet Clearing House (PCH), the international nongovernmental organization that builds and supports critical Internet infrastructure, including Internet exchange points and the core of the domain name system.[2] I've served on the Board of Trustees of the American Registry for Internet Numbers (ARIN), for the past fourteen years.[3] I have been an active contributor to the the Internet Engineering Task Force (IETF), and in 1998 and 2001 placed protocols into the registry that the Internet Assigned Numbers Authority (IANA) maintains on the IETF's behalf. I have been continuously involved with the IANA processes since the mid-1980s, some fifteen years before the formation of the Internet Corporation for Assigned Names and Numbers (ICANN). Most relevant to the proceeding at hand, I am one of the two North American representatives to the Consolidated RIR IANA Stewardship Proposal Team, the CRISP Team.[4] CRISP is the process through which the Internet Numbers community has developed its IANA oversight transition proposal.[5]

I'm here today to explain why it's in the interest of both the US Government and Internet stakeholders to ensure that the IANA oversight transition occurs on schedule and with undiminished strength of accountability.

The IANA function comprises three discrete activities, serving three different communities: the domain name community, from which you've heard much today; the Internet protocols community, consisting primarily of the IETF, which sets Internet standards; and the Internet numbers community, which manages the Internet addresses that allow our devices to communicate. Although these three functions are similar, inasmuch as they all deal with unique identifiers underpinning the Internet, they're also completely independent of—and separable from—each other. Two of the three communities, Protocols and Numbers, produced the requested transition plans on schedule, in January. These transition plans are a testament to the success of multistakeholder governance. Broad and inclusive participation has produced a qualitatively better result than would have come from a few people hashing out a deal behind closed doors.

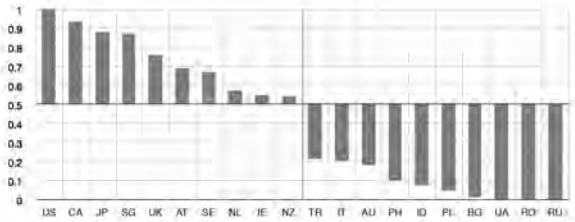
Although the Protocols and Numbers transition proposals are complete, the Names proposal is still a work in progress. The Protocols and Numbers communities have finished because the IANA functions that serve these two communities are very simple. The IANA function that serves Names is, as you've been hearing, substantially more complex and is surrounded by a degree of debate that does not exist in the other two communities.

It seems clear that the Names community will not reach consensus on a proposal in sufficient time to achieve a September 30 transition of the Names function. The Numbers and Protocols transitions are, however, ready to be implemented. Moving these forward on the announced schedule is critical. It would show good faith on the part of the US Government and assure the world that it is a productive participant in the multistakeholder process, rather than an obstacle. At the same time, allowing the Names community the further time it needs would show that the US Government is neither throwing caution to the wind nor abandoning its responsibilities before ICANN accountability can be firmly established.

If NTIA delays the Protocols and Numbers transitions beyond its stated September 30 deadline, when they are already ready to go, it will goad to further action the many nations that are already displeased with the exceptional nature of the US Government's role in IANA oversight. A shift in the balance of Internet governance from the multistakeholder model advocated by the US Government and the Internet community to the intergovernmental model advocated by China and the ITU—in which only national governments have a voice in decisions—would be detrimental to us all. Conversely, a timely transition to strong stakeholder oversight of the IANA function would achieve the goals of both the US Government and the global Internet community: responsible administration of a critical resource with strong contractual accountability to stakeholders, enforced within a jurisdiction that ensures that accountability is guaranteed by the rule of law and does not merely rely on ICANN's whim.

It's worthy of note that, for better or worse, ICANN is under considerable pressure from foreign governments to internationalize and it has, over the past five years, gone from being solely a US operation to one with offices and staff in Beijing, Geneva, Istanbul, Brussels, Montevideo, Seoul, and Singapore. One can take this as evidence of the power of national governments to influence ICANN—influence that will only grow stronger with time. And any US legal mandate to domicile ICANN permanently in the US would further inflame opposition from other governments.

In my written testimony, I have cited the clear and incontrovertable data that demonstrate that the United States is the legal venue of choice of the international Internet community whenever it is an available option—not just some of the time but 100% of the time, across a sample of more than 142,000 Internet contractual agreements.[6] Strongly accountable contractual oversight of the IANA function allows the Internet community to ensure that performance of the IANA function is never relocated to a jurisdiction with weaker rule of law or lesser protections against organizational capture.



Probability of selection as a country of governing law, ten most-likely and ten least-likely countries
Source: https://www-04.pch.net/resources/papers/peering-survey/PCH-Peering-Survey-2011.pdf

To date, ICANN has performed the IANA function well *because* it's been disciplined by the standard mechanisms of US Government procurement: the right to remedy uncured defects with mechanisms up to and including contract termination and the right to seek superior performers in the marketplace through periodic recompetition. The Numbers community believes it essential that we retain these same strong accountability mechanisms after the transition, to ensure responsible performance of the IANA function.[7] These are the safety valves that will protect the Internet in the event that, for example, ICANN becomes a captured organization or reincorporates in a jurisdiction less hospitable to the Internet.

In February, a month after the Protocols and Numbers communities produced their transition plans, Chairmen Goodlatte and Grassley wisely called for an "outcome emanating from a true bottom-up multistakeholder process, neither imposed on nor unduly influenced by ICANN's leaders, staff, or members of its board." It is tremendously encouraging that Congress is embracing and upholding the essential values of multistakeholderism. I cannot emphasize strongly enough the necessity for resolute and steadfast adherence to the principles of transparency and openness in guaranteeing a positive, productive outcome to the transition.

No good can come from delaying the transition of the Protocols and Numbers functions. At the same time, no good can come from hurrying the Names community, with their much more complicated situation, into a hasty or incompletely considered compromise. Their issues are real ones that require thorough consideration and carefully crafted solutions involving significant ICANN accountability reforms. Those policy-level reforms are simply irrelevant and orthogonal to the very simple mechanical tasks the IANA performs on behalf of the Protocols and Numbers communities.

Congress is uniquely able to ensure that the US Government's commitment to a successful IANA transition is realized and to act as the guarantor of the success of the multistakeholder governance model. The interests of the US Government and of the global Internet stakeholder community are both served by a transition of the IANA Protocols and Numbers functions on time, on September 30 of this year, as long as those communities are contractually empowered to enforce the accountability of the IANA function operator in the same manner that the US Government has successfully done for the past sixteen years. I ask you to use Congress' unique power of oversight over NTIA to ensure that our commitments are met and the transition of the Numbers and Names functions occurs as scheduled.

Thank you for your time.

[1] https://www.linkedin.com/profile/view?id=2680

[2] https://pch.net/about/people.php

[3] https://arin.net/about_us/bot.html#Woodcock

[4] https://www.nro.net/nro-and-internet-governance/iana-oversight/consolidated-rir-iana-stewardship-proposal-team-crisp-team

[5] https://www.nro.net/wp-content/uploads/ICG-RFP-Number-Resource-Proposal.html

[6] https://www.pch.net/resources/papers/peering-survey/PCH-Peering-Survey-2011.pdf pp.3 and figure 2

[7] See, for example, point 4 of http://www.afrinic.net/en/library/news/1361-board-statement-on-iana-transition

Mr. ISSA. Thank you.

Mr. Del—I am doing great. And it is a famous name, too.

Mr. DelBianco?

TESTIMONY OF STEVE DelBIANCO, EXECUTIVE DIRECTOR, NETCHOICE

Mr. DELBIANCO. Thank you, Chairman Issa, Ranking Member Nadler, Members of the Committee. You have heard a lot today about operational problems at ICANN, but what would really .SUCK is an unaccountable ICANN after the transition when we have lost the leverage for hearings like this to have much effect on the organization.

Over 17 years, our government has protected ICANN's multi-stakeholder model from government encroachment and helped ICANN to mature, and that is saying something, because the goal for a computer scientist is to build something that can last at least as long as it takes to finish building it, and ICANN is still a work in process.

But it is not sustainable for the U.S. to retain its unique role forever, particularly in a post-Snowden political climate. So NTIA asked the community for proposals to replace the stewardship role for IANA, and Chairman Goodlatte asked in a blog post earlier this year, "What guarantees and capabilities and conditions should first be demanded and stress-tested by the global community?"

Well, the global community has answered with hundreds of meetings in the last several months, tens of thousands of man hours, many of them overnight since we cycle through global time zones, and our community proposals run a very good start. They give the community new powers to challenge board actions via independent review panels and issue binding decisions, to veto bylaws changes proposed by the ICANN board so they can't undo what we have done, to veto strategic plans and budgets proposed by the board, and to remove individual board directors or spill the entire board if we need to.

Stress testing has helped us to assess whether these new powers would let the community challenge an ICANN decision for inaction and to hold the board accountable. As an aside, we saw little need to stress test the technical operations of the core Internet functions that Bill talked about because they are provided by very experienced operators who are actually stress tested every day.

However, stress tests did help us see that ICANN's bylaws have to change in other ways. The first stress test in my April 24 testimony to your Committee was ICANN quitting its affirmation of commitments. So the community has said let's move some of the commitments and reviews from the affirmation into ICANN's bylaws.

Another stress test was the governments changing the way they make their decisions at ICANN by moving to majority voting. That would expand government power over ICANN decisions. So we, the community, have proposed changing ICANN bylaws to seek a mutually acceptable solution with the governments, but only where their decision was reached through true consensus.

Added transparency and powers would also help us to avoid situations like .SUCKS, which I tend to look at as more like a set of

stress tests, of decisions made by ICANN to pass evaluation on an applicant who owed substantial fees, or the decision to negotiate a special million-dollar fee with a single applicant.

So turning back to the community proposals for transition, we need details—I understand that—and we need review by global stakeholders. So this will not be ready by September of 2015. The timeline on the display board in front of you and on some of the paper that I distributed shows that we just can't get there from where we are. But even with an extension in time, we worry that ICANN's board and management will resist the approval of these plans and impede its implementation.

The role of Congress, then, in this historic transition could be critical. What Congress can do while we still have the leverage is to insist that NTIA require ICANN to accept and implement the final community proposals as a condition of the IANA transition they seek. This is, after all, our last chance to use the leverage we are about to relinquish. So let's leave a lasting legacy where the Internet community gets the same kind of accountability from ICANN that shareholders demand today from their corporations, that my members demand from my trade association and, frankly, that voters and citizens demand from you. I don't think the global community deserves anything less than that which we use for the other institutions we count upon to make our lives work better.

I thank you, Mr. Chairman, and look forward to your questions.

[The prepared statement of Mr. DelBianco follows:]

Statement of

Steve DelBianco,
Executive Director

Testimony before the

House Judiciary Committee,

Subcommittee on Courts, Intellectual Property, and the Internet

May 13, 2015

STAKEHOLDER PERSPECTIVES ON ICANN: THE .SUCKS DOMAIN AND ESSENTIAL STEPS TO GUARANTEE TRUST AND ACCOUNTABILITY IN THE INTERNET'S OPERATION

Summary of Statement by Steve DelBianco
Executive Director, NetChoice
Before the House Judiciary Committee,
Subcommittee on Courts, Intellectual Property, and the Internet

NetChoice

May 13, 2015

Stakeholder Perspectives on ICANN: The .SUCKS domain and essential steps to guarantee trust and accountability in the Internet's Operation

1 Over 17 years, the US government has protected ICANN's multistakeholder model from government encroachment and helped ICANN move to independence. But it's not sustainable for the US to retain its unique role forever. At our government's request, the Internet community drafted proposals to transition from the US government's unique contractual relationship with ICANN.

2 NTIA's requirements for this transition are appropriate and the community's proposals are a good start, giving the Internet community new powers to:

- Challenge board actions via Independent Review Panels whose decisions can be binding
- Veto bylaws changes proposed by ICANN board
- Veto strategic plans and budgets proposed by ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*
- Remove individual ICANN board directors, or recall the entire ICANN board as a last resort

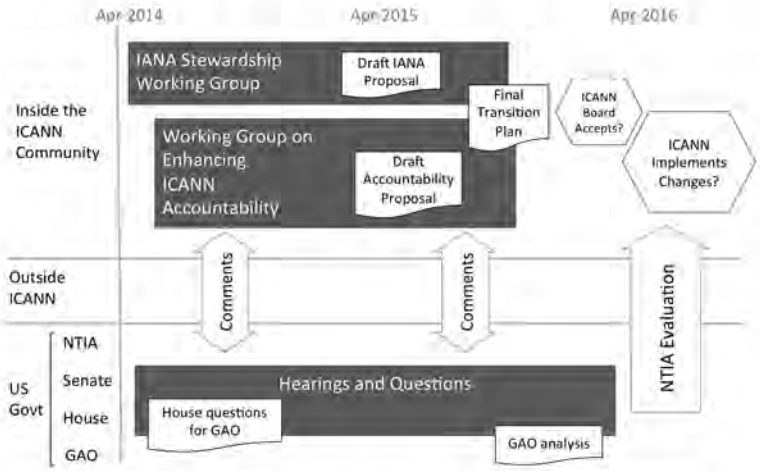
Stress Testing reveals these measures are adequate, but ICANN bylaws must change to:

- Add ICANN's commitments and reviews from the *Affirmation*, in case ICANN quits the *Affirmation*
- Obligate ICANN to find a mutually acceptable solution only when GAC advice has consensus

The unfortunate .SUCKS situation is another Stress Test where new powers would have helped.

We need details and review by global stakeholders, so won't be ready by Sep-2015 IANA expiration.

We worry that ICANN's board and management will resist approval and implementation.



3 The role of Congress in this historic transition goes beyond posing questions and stress tests.

This committee can be more influential and helpful by insisting that NTIA require ICANN to accept and implement the final community proposals *as a condition of the IANA transition*.

This is, after all, our last chance to use the leverage we are about to relinquish.

I serve as Executive Director of NetChoice, an association of leading online and e-commerce businesses.[1] At state, federal, and international levels, NetChoice promotes the integrity and availability of the Internet. We've participated in 30 ICANN meetings and I'm serving my 5th term as policy chair for the ICANN Business Constituency. I've attended eight Internet Governance Forum (IGF) meetings and testified in six Congressional hearings on ICANN and Internet governance, including three in the House Judiciary Committee.

NetChoice members are deeply invested in the topic of today's hearing. Our businesses need a secure Internet address system that's resilient to cyber attacks and online fraud. We need an Internet that works the same around the globe – free from discriminatory regulation and taxation. And we need Internet policies that are predictable and enforceable, allowing innovation while protecting consumers.

My statement will focus on three points relevant to this committee:

1. Over 17 years and through three administrations, the US government has protected the ICANN multistakeholder model from government encroachment and helped ICANN mature towards independence. However, it is not sustainable for the US to retain its unique role forever. At our government's request, the Internet community has drafted proposals to transition from the US government's unique contractual relationship with ICANN, and these drafts are now being reviewed by the broader Internet community.
2. NTIA's principles and requirements for this transition are appropriate to design new mechanisms to oversee core Internet functions, to hold ICANN accountable, and to prevent government capture *after* the transition. However, we do worry about encountering resistance from ICANN's board and management when it comes to approval and implementation of the community's proposals.
3. Congress' role in this transition goes beyond asking questions about proposed accountability mechanisms and potential stress tests, such as the present situation with the .sucks domain. This committee can be extremely helpful by encouraging and supporting the Commerce Department to require that ICANN accept and implement the multistakeholder proposals *as a condition of the transition*.

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[1] See http://www.NetChoice.org. This statement reflects the view of NetChoice and does not necessarily represent the views of any individual member company.

1. How we got here: United States Government Stewardship of ICANN and IANA

America invented the core Internet technologies and promptly gave them to the world. Internet hosts were appearing internationally by the 1980s. The 1990's saw the explosion of commercial uses of the Internet, based on a naming and numbering system also created in the United States. In 1998, the Clinton administration sought to privatize and internationalize the Domain Name System (DNS) with this directive in the *White Paper*:

> "The President directed the Secretary of Commerce to privatize the Domain Name System in a way that increases competition and facilitates international participation in its management."
>
> "The US Government is committed to a transition that will allow the private sector to take leadership for DNS management."[2]

In the 17 years since, it's been a long road from American invention to internationalized private-sector leadership by an entity the US established for the task: the Internet Corporation for Assigned Names and Numbers (ICANN). Three administrations and several Congresses have worked to help ICANN mature and protect the vision of private-sector leadership from growing pressure for control by governments, who saw the growth of the Internet and assumed that its governance required an inter-governmental solution.

The transition to an independent ICANN was expected to take a few years, but the National Telecommunications and Information Administration (NTIA) made several extensions of its oversight arrangements, the latest of which expired in September 2009. At the time, NetChoice was among those calling for another extension so that ICANN could develop permanent accountability mechanisms.

Instead, NTIA and ICANN unveiled a new agreement, the *Affirmation of Commitments*.[3] The *Affirmation* established periodic reviews giving all stakeholders – including governments – a defined oversight role in assessing ICANN's performance. The *Affirmation* gave the global Internet community what was promised: independence for ICANN in a framework where governments were alongside private sector stakeholders.

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[2] The "White Paper" on Management of Internet Names and Addresses, US Department of Commerce, Jun-1998, see http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm

[3] Affirmation of Commitments, 2009, http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm

But concerns about the US role in naming and numbering remained after the execution of the *Affirmation*, because NTIA retained its contracting role for the Internet Assigned Numbers Authority (IANA). The IANA contract is deemed essential to ICANN and therefore provided NTIA leverage to hold ICANN to its *Affirmation* obligations.

However, ICANN can quit the *Affirmation* with just 120 days notice. And within a year of signing, ICANN's then-chairman told a group of European parliamentarians that he saw the *Affirmation* as a temporary arrangement ICANN would like to eventually terminate.[4]

All of this to say that ICANN needs a persistent and powerful reminder that it serves at the pleasure of global stakeholders; that ICANN has no permanent lock on managing the Internet's name and address system. We said at the time that ICANN's role in IANA functions should disappear if it were to walk away from the *Affirmation of Commitments*.

Since the UN created the Internet Governance Forum (IGF) in 2005, IGF meetings have become increasingly productive, yet some governments still want the UN to oversee DNS tasks handled by ICANN and IANA. In its July-2010 statement to the UN, China's government asked the UN and IGF to " solve the issue of unilateral control of the Critical Internet Resources." By 'unilateral control', China means US custody of the IANA contract. And 'Critical Internet Resources' include IP addresses, root servers, and the policymaking for domain names.

China was not alone in its desire for the migration of ICANN and IANA functions to the UN's International Telecommunication Union (ITU). ITU leadership did not like a model where governments share power with industry and civil society, and warned ICANN that sooner or later governments would take greater control of the organization.

In 2011, a group of governments proposed their own replacement for US oversight and ICANN's model of private sector leadership. India, Brazil, and South Africa declared it was time for "establishing a new global body" located "within the UN system" to "oversee the bodies responsible for technical and operational functioning of the Internet". [5] In contrast, both houses of Congress unanimously affirmed a resolution in 2012 stating, "the consistent and unequivocal

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[4] Peter Dengate Thrush, in response to a question from Steve DelBianco, at event hosted by European Internet Foundation in Brussels, June 22, 2010.

[5] Recommendations of IBSA Multistakeholder meeting on Global Internet Governance, September 2011, at http://www.culturalivre.org.br/artigos/IBSA_recommendations_Internet_Governance.pdf

policy of the United States to promote a global Internet free from government control and preserve and advance the successful multistakeholder model that governs the Internet today."[6]

Clearly, the last 17 years of "transition" have seen significant improvements in globalizing ICANN and IANA, although there have certainly been some challenges. Along the way, some governments and intergovernmental organizations have criticized the US role and openly coveted taking over that role. But throughout, the US Congress and multiple administrations have stayed with the vision of multistakeholder, private-sector leadership for Internet addressing and policymaking. And our government has used its contractual tools to improve ICANN's performance and to hold the organization to the accountability measures in the *Affirmation of Commitments*.

Still, the US continued to work towards full privatization of ICANN and IANA, at a deliberate pace and with measurable progress. Then came 2013 and Edward Snowden's revelations of US government surveillance. While not at all related to the Domain Name System or to Internet addressing, the Snowden situation was conflated with US oversight of ICANN and IANA in order to amplify international demands for globalization of these institutions.

2. NTIA's Announced Transition for IANA functions and ICANN Accountability

In March 2014 the Commerce Department announced that it would transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community. The positive global response was immediate, signaling that this move, at this time, might relieve the intense pressure from foreign governments demanding an end to the unique US role in IANA oversight.

NTIA asked ICANN to develop a transition plan to shift stewardship of IANA functions into the hands of "the global multistakeholder community." NTIA said the transition proposal must have broad community support and satisfy four principles in replacing NTIA's role[7]:

- Support and enhance the multistakeholder model

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[6] H.Con.Res.127 and S.Con.Res.50 - Expressing the sense of Congress regarding actions to preserve and advance the multistakeholder governance model under which the Internet has thrived, Aug 20, 2012

[7] Press Release, "NTIA Announces Intent to Transition Key Internet Domain Name Functions", March 14, 2014, at http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions

- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of IANA services
- Maintain the openness of the Internet

NTIA also added a statement that it would not give up IANA control if the plan developed by ICANN would place other governments in the legacy role of the United States.

At the same time, NTIA and most stakeholders recognized that the existing contract between NTIA and ICANN provides a broader accountability framework for ICANN, and that accountability enhancements should be developed and adopted in parallel with the transition.

With the experience of the last 17 years, it's appropriate for the US government to impose these principles and to prevent any government-led organization from replacing the former US role *after* the transition is complete. Since NTIA's 2014 announcement, the Internet community and ICANN have developed two tracks to respond to the challenge:

> **IANA Stewardship track**: Placing the global Internet community in the role historically held by NTIA in the IANA contract with ICANN.
>
> **ICANN Accountability track**: Giving the global Internet community more power to hold the ICANN corporation accountable, since NTIA will lose the leverage associated with the IANA contract.

On each track, the community is comprised of representatives of ICANN's recognized Advisory Committees and Stakeholder Organizations, including business, governments, and civil society.

The IANA Stewardship Track: ICANN structured the IANA track to have a large community group (CWG) for naming functions, plus a smaller working group (ICG) comprised of community representatives and selected outside experts. They began meeting in October 2014 and have published draft proposals for replacing the NTIA's role in all three IANA functions: numbers, protocols, and domain names.

The numbers and protocol proposals were quickly developed by the customer groups concerned with those functions, and published their draft proposals in January 2015. The naming function proposal is more complicated and involves multiple stakeholder groups with existing contractual arrangements with ICANN. In late April, the naming group published its 2nd draft proposal, including these key elements:

- Create a new legal entity to contract with ICANN to operate IANA naming functions
- Establish a customer committee to monitor the performance of IANA functions

- Establish a periodic review of the IANA Functions, embedded in ICANN bylaws
- Empower the community select a new operator for the IANA Functions, if needed

Finally, the IANA naming proposal acknowledged its reliance upon enhanced community powers to hold ICANN to new obligations developed by the ICANN Accountability Track.

The ICANN Accountability track: ICANN stakeholders named representatives to a cross-community working group (CCWG) that began meeting in December 2013. (I serve as the representative of Commercial Stakeholders on the CCWG). After more than a hundred meetings over 5 months, we published a draft proposal giving the community new powers to ensure ICANN the corporation was answerable to more than just itself. New powers for the community include the ability to:

- Challenge board actions via Independent Review Panels whose decisions can be binding
- Veto Bylaw changes proposed by the ICANN board
- Veto strategic plans and budgets proposed by the ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*
- Remove individual ICANN board directors
- Recall the entire ICANN board, as a last-resort measure

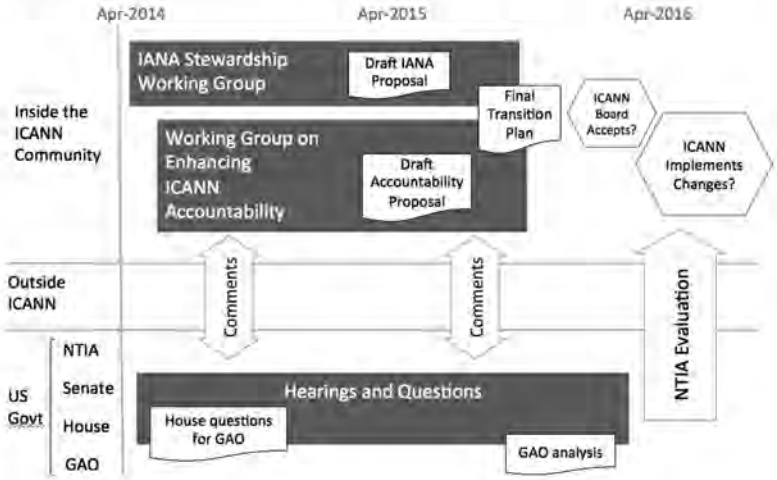
Independent legal counsel is advising the working group on ways to give these powers to the 'community' of Advisory Committees and Stakeholder Organizations and to draft the necessary changes to ICANN bylaws. That includes bringing into the bylaws key commitments and reviews from the NTIA's last remaining bilateral agreement with ICANN – the 2009 *Affirmation of Commitments*. Bylaws amendments also include changes indicated by stress testing. One amendment would restrict ICANN from straying outside its narrow technical mission. Another would limit the power of governments to affect policy, by clarifying that only *consensus* advice from the Government Advisory Committee would obligate ICANN to try and find a mutually acceptable solution.

3. Next Steps in the Transition

The IANA stewardship 2nd draft proposal was published April 22 and the accountability draft proposal was published May 4. The global Internet public can submit comments and questions before and during ICANN's meeting in Buenos Aires in late June. Discussions there will contribute to revised proposals for one or both transition tracks. We will also need to

implement critically important measures (known as Work Stream 1) and plan for implementing additional measures identified for Work Stream 2.

Some ICANN Advisory Committees and Stakeholder Organizations may not be ready to approve the final proposal until after the ICANN meeting in October 2015. That means NTIA will need to extend the IANA contract for several months beyond its September 30, 2015 expiration. Once the community has approved proposals for IANA and ICANN accountability, it's up to NTIA and Congress to assess whether those proposals meet the test, before allowing the IANA contract to expire. Below is a simplified illustration of the timeline and actors:



4. Accountability Enhancements Suggested by Stress Testing

In testimony we submitted to this committee for its April 2014 ICANN hearing, I described 8 stress tests that should be applied to a post-transition ICANN[8]. NTIA leadership and many in Congress embraced stress testing as a prudent means to allow community planning to

[8] See Stress Tests, pages 7-10 at NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – *Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet*, 2-Apr-2014

proceed, while informing and evaluating the proposals against potential threats. Even the Government Accountability office (GAO) is examining stress tests in response to the House Commerce Committee letter last June[9]. As the accountability group noted:

> The purpose of these stress tests is to determine the stability of ICANN in the event of consequences and/or vulnerabilities, and to assess the adequacy of existing and proposed accountability mechanisms available to the ICANN community.
>
> Also, note that the CCWG-Accountability charter does not ask that probability estimates be assigned for contingencies. The purpose of applying tests to proposed accountability measures is to determine if the community has adequate means to challenge ICANN's reactions to the contingency.

Beginning with 8 stress test scenarios that NetChoice presented to your committee last April, the accountability and IANA stewardship groups added 18 more and sorted into 5 categories:

I. Financial Crisis or Insolvency

ICANN becomes fiscally insolvent, and lacks the resources to adequately meet its obligations. This could result from a variety of causes, including financial crisis specific to the domain name industry or the general global economy. It could also result from a legal judgment against ICANN, fraud or theft of funds, or technical evolution that makes DNS obsolete.

II. Failure to Meet Operational Obligations

ICANN fails to process change or delegation requests to the IANA Root Zone, or executes a change or delegation over the objections of stakeholders

III. Legal/Legislative Action

ICANN is the subject of litigation under existing or future policies, legislation, or regulation. ICANN attempts to delegate a new TLD, or re-delegate a non-compliant existing TLD, but is blocked by legal action.

IV. Failure of Accountability

Actions (or expenditure of resources) by one or more ICANN Board Members, CEO, or other Staff, are contrary to ICANN's mission or bylaws. ICANN is "captured" by one stakeholder segment, including governments via the GAC, imposing its agenda on all other stakeholders or abusing accountability mechanisms to block processes.

V. Failure of Accountability to External Stakeholders

ICANN modifies its structure to avoid obligations to external stakeholders, such as terminating the *Affirmation of Commitments*, terminating presence in a jurisdiction where it faces legal action, moving contracts or contracting entities to another jurisdiction. ICANN delegates, subcontracts, or otherwise abdicates its obligations to a third party in a manner that is inconsistent with its bylaws or otherwise not subject to accountability. ICANN merges with or is acquired by an unaccountable third party.

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[9] Letter to GAO from House Commerce Committee and subcommittee chairs, 5-Jun-2014, at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20140605GAO.pdf

The community working groups created a team focused on applying these stress tests using draft proposals for new community powers. For some stresses causes by external events, new accountability measures could help the community challenge the board's preparation and reaction, but could not completely mitigate the impact on ICANN. One stress test regarding country-code domains could not be completed pending policy development by the country-code supporting organization.

Overall, the stress test team determined that proposed new accountability measures were a significant improvement compared to existing measures, and would give the community adequate powers to challenge ICANN's decisions and actions. Two particular stress tests are worth exploring in this hearing, since they identified critical risks of having ICANN quit the *Affirmation of Commitments,* and avoiding expansion of governmental influence over ICANN.

4.1 Proposal to bring *Affirmation* commitments and reviews into ICANN bylaws

In our April 2014 testimony, NetChoice described a stress test scenario where ICANN decides to quit the *Affirmation of Commitments*, which it may do with just 120 days notice.[10] The accountability group was concerned about that stress test and said in its proposal:

> After the IANA agreement is terminated, the *Affirmation of Commitments* will become the next target for elimination since it would be the last remaining aspect of a unique United States oversight role for ICANN.[11]

Once the IANA contract is gone, the *Affirmation* stands out and would be targeted for elimination by governments who resent the US having a unique, bilateral relationship with ICANN. Against this contingency, the accountability group examined *Affirmation* items to determine if they were already part of ICANN bylaws. This resulted in a proposal to add key *Affirmation* commitments to the Core Values in ICANN bylaws:

> Ensure that decisions made related to the global technical coordination of the DNS are made in the global public interest and are accountable, transparent and should respect the bottom-up multistakeholder nature of ICANN.
>
> Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment that enhances consumer trust and choice.

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[10] See Stress Test 1, on page 8 at NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology -- *Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet*, 2-Apr-2014

[11] p.51 at draft report of Cross Community Working Group on Enhancing ICANN Accountability, 4-May-2015

> ICANN shall perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial or non- financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.
>
> ICANN shall adhere to transparent and accountable budgeting processes, providing advance notice to facilitate stakeholder engagement in policy decision-making, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's Bylaws, responsibilities, and strategic and operating plans.
>
> ICANN shall provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.
>
> ICANN shall maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet.
>
> Operate as a multi-stakeholder, bottom-up private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

Affirmation section 8b generated questions during the Senate Commerce Committee hearing in February 2015. 8b commits ICANN to "remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community." The community working group concluded this commitment was reflected in current ICANN articles of incorporation and in bylaws Article XVIII section 1:

> "OFFICES. The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish."

While ICANN's board *could* propose a change to this bylaws provision, the newly-empowered community could block the proposed change. We are also considering whether bylaws Article 18 Section 1 should be listed as a "Fundamental Bylaw," where any change would require approval by 75% of community members.

As part of this stress test analysis, the accountabilty working group also proposed bringing the 4 periodic community reviews from the *Affirmation* into ICANN's bylaws:

> ICANN's accountability & transparency
>
> Preserving security, stability and resiliency
>
> Promoting competition, consumer trust, and consumer choice
>
> The extent to which WHOIS services meet legitimate needs of law enforcement

These reviews are proposed for addition to ICANN bylaws, modified to give the community access to ICANN internal documents and control over review team composition. In addition, the

IANA stewardship group proposed an IANA Functions Review be added to the bylaws. When combined with proposed new powers to challenge ICANN board decisions, these bylaws changes would enable termination of the *Affirmation of Commitments*.

4.2 Proposal to limit ICANN obligations to advice from governments

In our April 2014 testimony, NetChoice described stress tests where global governments could increase their sway over ICANN policies and decisions[12]. In the accountability group this stress test generated much interest since it addresses ICANN's response to government advice in the context of NTIA's statement regarding the transition: "NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution".[13] This stress test was applied to existing and proposed accountability measures:

Stress Test	Existing Accountability Measures	Proposed Accountability Measures
Governments in ICANN's Government Advisory Committee (GAC) could amend their operating procedures to change from consensus decisions to majority voting for advice to ICANN's board. Consequence: Under current bylaws, ICANN must consider and respond to GAC advice, even if that advice were not supported by consensus. A majority of governments could thereby approve GAC advice that restricted free expression, for example.	Current ICANN Bylaws (Section XI) require ICANN to try to find "a mutually acceptable solution" for GAC advice. This is required for any GAC advice, not just for GAC consensus advice. Today, GAC adopts formal advice according to its Operating Principle 47: *"consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection."*[14] But the GAC may at any time change its procedures to use majority voting instead of its present consensus.	One proposed measure is to amend ICANN bylaws (Article XI Section 2, item 1j) to require trying to find a mutually agreeable solution only where GAC advice was supported by GAC consensus. The GAC could change its Operating Principle 47 to use majority voting for formal GAC advice, but ICANN bylaws would require trying to find a mutually agreeable solution only on advice that had GAC consensus. GAC can still give ICANN advice at any time, with or without consensus.

Some government representatives in the working group opposed this change to ICANN bylaws. That is not unexpected, since some government representatives have previously voiced dissatisfaction with the present consensus method of approving Government Advisory

[12] See Stress Tests 6 and 7, on page 9 at NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology – *Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet*, 2-Apr-2014

[13] NTIA Announces Intent to Transition Key Internet Domain Name Functions, 14-Mar-2014, at http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions

[14] ICANN Government Advisory Committee (GAC) - Operating Principles, October, 2011, at https://gac.web.icann.org/display/gacweb/GAC+Operating+Principles

Committee (GAC) advice. It is entirely plausible that the GAC could change its method of approving advice at some point, and it is entirely within their right to do so. On the other hand, several governments supported the change, including a forceful statement from NTIA[15]:

> As a threshold matter, the USG considers the stress test both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA's current stewardship role.
>
> Finally, we interpret the proposed stress test as capturing this important distinction in GAC advice, with an appropriate remedy in the form of a Bylaws amendment to reinforce the ICANN community's expectation that anything less than consensus is not advice that triggers the Bylaw provisions.

This historic transition creates the opportunity for the community to obtain accountability enhancements that the ICANN board would not likely approve if those enhancements were proposed after the leverage of the IANA contract is gone. By the same token, the GAC would not welcome this bylaws change if it were proposed at some point after the IANA transition.

This transition is the best opportunity to pursue difficult and sometimes controversial changes to ensure that ICANN is accountable to the entire community it was created to serve. By the same token, this transition is the last opportunity for the US government to use its leverage to get ICANN to accept and implement the community's proposed accountability enhancements.

5. Ensuring that ICANN accepts and implements the community proposals

In September 2014 all ICANN advisory committees and stakeholder groups wrote a joint letter raising questions about ICANN's proposed accountability process[16]. ICANN responded by asking whether and why the community seemed to lack trust in ICANN's board and management. The Business Constituency's reply is remarkable for its clarity on why the community needs new measures to hold ICANN accountable[17]:

> First, this discussion is not about whether the community 'trusts' the current ICANN board. It's about trusting future boards — after we no longer have the leverage/influence

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[15] Email from Suzanne Radell, Senior Policy Advisor, NTIA, 19-Mar-2015, at http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html

[16] Joint questions, https://www.icann.org/en/system/files/correspondence/cooper-et-al-to-chehade-crocker-03sep14-en.pdf

[17] p. 3, Business Constituency comment on Enhancing ICANN Accountability Process, 27-Sep-2014, at http://www.bizconst.org/wp-content/uploads/2014/09/BC-comment-on-Enhancing-ICANN-Accountability-Process.pdf

of the US Government to rely upon. This IANA transition is the community's chance to establish mechanisms to rein-in a future board that would put ICANN's corporate interests ahead of the community. We are not suggesting that a future board would do so. Rather, we are acknowledging that the board is obliged to protect the corporation's interests first, as required by ICANN bylaws:

> Section 7: Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them.

Should there be any confusion about whether the bylaws refer to 'ICANN' as the corporation or the community, see ICANN's *Management Operating Principles* (2008):

> "The third and perhaps most critical point of tension is between the accountability to the participating community to perform functions in keeping with the expectations of the community and the corporate and legal responsibilities of the Board to meet its fiduciary obligations. The ultimate legal accountability of the organization lies with the Board, not with the individuals and entities that make up the ICANN community."[18]

The Business Constituency had it right: ICANN's present bylaws do not hold the board accountable to the community. Before the US government lets go of the oversight leverage inherent in the IANA contract, it must ensure that ICANN accepts and implements the proposals needed to keep the ICANN corporation accountable to the global multistakeholder community that ICANN was created to serve.

6. Stress Testing the .sucks Situation

Other panelists in today's hearing are better able to describe concerns with practices of the .sucks registry[19]. Given my involvement with stress testing of ICANN accountability measures, I suggest looking at the .sucks situation as a set of stress tests.

To conduct a stress test in this context, we first start with a plausible scenario for an internal or external contingency that could undermine ICANN's operations, finances, credibility,

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[18] ICANN Accountability & Transparency Frameworks and Principles, Jan-2008, p.5, at https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf

[19] See IPC Letter to ICANN, 3-Mar-2015, at https://www.icann.org/en/system/files/correspondence/shatan-to-atallah-27mar15-en.pdf, Business Constituency letter to ICANN, 8-May-2015, at http://www.bizconst.org/wp-content/uploads/2015/05/Letter-to-ICANN-dotSucks.pdf , Business Constituency letter to FTC and Canada consumer protection authority, 8-May-2015, at http://www.bizconst.org/wp-content/uploads/2015/05/Letter-to-FTC-and-OCA-dotSucks.pdf

etc. Second we examine ICANN's existing accountability mechanisms to determine whether they give the Internet community adequate means to challenge board decisions in preventing and reacting to the stress, and to hold the Board accountable for its actions. Third, we assess proposed accountability measures against the same stress test criteria – can the community challenge ICANN decisions and hold it accountable. Finally, we conclude whether the proposed accountability measures are a significant improvement over ICANN's existing mechanisms.

.Sucks Scenario 1: A new gTLD applicant successfully passes initial financial evaluation even though its parent company and affiliates had previously defaulted on substantial payments owed to ICANN. This revelation calls into question ICANN's objectivity and transparency.

> Under existing ICANN accountability mechanisms, potential domain name registrants have no standing to challenge the evaluation panel finding or to force a review of ICANN's decision to accept the evaluation. But under the proposed accountability measures, the community gets standing and affordable access to Reconsideration Request and Independent Review Panel (IRP). Moreover, the new IRP would use objective standards and be able to issue binding decisions. Clearly, these new accountability measures are needed to adequately address this stress test.

.Sucks Scenario 2: ICANN quietly negotiates a registry agreement with the new gTLD applicant described above, adding $1 million in extra fees payable to ICANN. Again, this undermines the promised objectivity and transparency of ICANN processes as well as the judgment of ICANN management.

> Existing ICANN accountability mechanisms would not enable challenges by the domain registrants whose fees would provide the funds going to ICANN. But under proposed accountability measures, the community gets standing and access to Reconsideration Request and IRP to challenge ICANN's decision to sign that contract. Again, the new accountability measures are needed to adequately address this stress test.

.Sucks Scenario 3: ICANN's legal department asks a national government's consumer protection authority to review the practices of a TLD registry to whom ICANN has just given a contract. Aside from questions about the diligence and objectivity of ICANN's contract team, the precedent here is troubling: ICANN is responsible to enforce its registry and registrar agreements – not governments; and will ICANN now do referrals to authorities in every country where users and registrants are located?

> Under existing ICANN accountability mechanisms, the ICANN community has no standing to challenge ICANN's decision to defer to national governments for contract compliance. But under the proposed accountability measures, the community would have standing and access to Reconsideration and IRP measures. Again, the new accountability measures are needed to adequately address this stress test.

These stress tests for .sucks point the way to solving similar situations long after the US government lets go the leverage of the IANA contract. It's imperative to empower the Internet community to challenge ICANN decisions on situations that will arise in the decades ahead. That leads us to the final segment of our testimony, on the role for Congress in this transition.

7. The Role for Congress in Ensuring an Accountable ICANN After Transition

Members of this committee and Congress in general are right to raise questions and concerns about this transition, proposed accountability mechanisms, and potential stress tests. For example, the House Commerce Committee assigned several questions to the Government Accountability Office (GAO) last June and GAO staff has already met with many community participants (including two meetings with NetChoice). As Chairman Goodlatte asked in his February post on CircleID.com, "what guarantees, capabilities and conditions first should be demanded and stress-tested by the global multi-stakeholder community?"[20]

However, this committee –and all of Congress—can be more influential and helpful by insisting that NTIA require ICANN to accept and fully implement the multistakeholder community proposals *as a condition of the IANA transition*.

To prepare ICANN for a future independent of US government contracts, the Internet community needs to hold ICANN accountable, with powers like shareholders have over corporations, voters over their elected officials, and members over their trade associations. There are a lot of details left to decide, but the present draft transition proposals are a good start at bringing constituent accountability to ICANN, who has never faced formal measures such as shareholder resolutions and recalls of board directors.

The *White Paper* vision for ICANN should be preserved: ICANN should be led by, and accountable to its multistakeholder communities, including the private sector, civil society, and technology experts – along with governments. These stakeholders have built the Internet into the transformative platform that it is today. These stakeholders will create the innovations and make the investments to bring connectivity, content, and commerce to the next billion global Internet users and to future generations of Americans.

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[20] "Ensuring Trust in Internet Governance", 11-Feb-2015, on CircleID, http://www.circleid.com/posts/20150211_ensuring_trust_in_internet_governance/

Mr. ISSA. Thank you.
Mr. Corwin?

TESTIMONY OF PHILIP S. CORWIN, COUNSEL, INTERNET COMMERCE ASSOCIATION

Mr. CORWIN. Chairman Issa, Ranking Member Nadler, Subcommittee Members, I am Philip Corwin on behalf of the Internet Commerce Association, a domain industry trade group and member of ICANN's business constituency which I represent on ICANN's GNSO council.

I commend the Subcommittee for this hearing. Congress has a legitimate interest in an IANA transition and enhanced ICANN accountability that proceeds soundly and effectively. The stakes include the security and stability of the DNS, Internet free expression, and uncensored information.

Two cliches are apropos today. The first is, "If it ain't broke, don't fix it." The ICA consensus is that U.S. stewardship has been benign and beneficial and that ICANN accountability should proceed on its own merits. But the second is, "You can't put the toothpaste back in the tube." The NTIA's announcement raised global expectations. Hundreds of ICANN community members have already expended thousands of hours in designing transition and accountability measures. Therefore, Congress should not reflexively oppose the IANA transition but should exercise strong oversight and support of ICANN stakeholders.

While enhanced ICANN accountability measures are overdue, they will operate best only if ICANN's board and senior staff embrace a culture of accountability that assumes responsibility for the fallout of ICANN decisions and encompasses early consultation with the multi-stakeholder community that provides its organizational legitimacy.

We are some distance from that culture. The road to the NTIA's announcement led through Montevideo and Brasilia and was paved by ICANN's misappropriation of the Snowden disclosures. The CEO's travels in South America were backed by a secret September 2013 ICANN board resolution. These actions were not transparent or accountable and reflected no community consultation.

ICANN's community is now on the right stewardship and accountability track, but a final package will not be ready by September 30, much less the implementation of required pre-transition accountability measures. Therefore, NTIA should announce an ICANN contract extension soon. The final package must set key community rights in tandem with ICANN accountabilities in its bylaws and articles of incorporation.

Turning to .SUCKS, ICANN's request that the FTC and OCA in Canada determine its legality was an abdication of responsibility rather than its embrace. ICANN had more than a year to explore and take appropriate action under multiple contract options. There are other new TLD program issues. While the jury is still out on the program's ultimate success, the total number of new domains seems larger than market demand and many TLDs are practically giving domains away, which aids spammers and phishers. Major unresolved consumer protection and technical issues remain un-

solved, as well as uncertainty about spending $60 million in auction fees that ICANN has collected.

The rights protection mechanisms for new TLDs are working well, but any review of domain dispute procedures should set standard contracts between ICANN and arbitration providers that ensure uniform administration. There are no such contracts today. ICANN must start taking responsibility for fair administration of domain disputes.

Finally, besides ensuring full satisfaction of NTIA's principles, Congress should confirm that ICANN's continued post-transition U.S. jurisdiction is accepted and not a new irritation for those who would make ICANN a multilateral organization. You should also know that the transition does not mean ICANN will assume technical operation of key Internet functions. ICANN lacks the technical capacity to do so and is dependent on the experience and expertise of stakeholders for maintaining core functions. While the NTIA's announcement requires stakeholders to address certain important policies, there is no equivalent need to revamp DNS technical operations. The continued operational excellence of those operations will bolster the confidence of global users and the Internet's stability, security, and resilience.

I hope my testimony has been helpful to your inquiry. I would be happy to answer any questions, and I yield back the remaining 30 seconds of my time.

[The prepared statement of Mr. Corwin follows:]

Statement of Philip S. Corwin

Counsel, Internet Commerce Association

Before the House Judiciary Committee

Subcommittee on Courts, Intellectual Property and the Internet

Regarding

"Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation"

May 13, 2015

Executive Summary

- While enhanced ICANN accountability measures are long overdue they will operate optimally only if ICANN's Board and senior staff embrace a culture of accountability that encompasses early consultation with the multistakeholder community that provides ICANN's organizational legitimacy, and assumption of responsibility for the consequences of ICANN decisions.

- Congress should not reflexively oppose the IANA transition but should exercise strong oversight in support of ICANN stakeholders.

- The road to the NTIA's transition announcement was paved by ICANN's misappropriation of the Snowden disclosures to secure the April 2014 NETmundial conference.

- While the CWG-Stewardship and CCWG-Accountability participants have done extraordinary work and are on the right track, it is clear that a final package will not be ready for NTIA and Congressional review by September 30th, and that required pre-transition accountability measures cannot be implemented by then. Therefore, NTIA should announce an IANA contract extension by July. The final package must establish fundamental community rights in tandem with ICANN accountabilities in its Bylaws and Articles of Incorporation, and any future amendment must require a very high level of community consensus support.

- ICANN's request that the FTC and OCA determine whether the .Sucks gTLD business model is illegal is an abdication of responsibility rather than its embrace. ICANN had more than a year to explore and take action against the registry under available contract options.

- While the jury is still out on the new gTLD program the total number of new gTLDs appears larger than marketplace demand. There remain substantial unresolved consumer protection and technical issues, as well as uncertainty about how the decision to expend nearly $60 million in auction fees will be made.

- The RPMs for new gTLDs are generally working satisfactorily. However, any corrective review of the URS as well of as the UDRP should include the establishment of uniform contracts between ICANN and arbitration providers that contain adequate enforcement mechanisms to ensure uniform administration.

- In addition to ensuring that the NTIA's articulated principles are fully satisfied, Congress may wish to ascertain that ICANN's post-transition grounding in U.S. law and jurisdiction, as well as the continued performance of the root zone management functions by the private sector, do not provide a new cause for "irritation" by nations and other parties who wish to convert ICANN into a multilateral organization.

Chairman Issa, Ranking Member Nadler, and members of the Subcommittee, my name is Philip Corwin and I am pleased to address you today regarding the IANA functions transition and enhanced ICANN accountability on behalf of the Internet Commerce Association (ICA).

ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers.

The ICA was founded in September 2006 and I attended my first ICANN meeting in December of that year in Sao Paulo, Brazil. ICA joined ICANN's Business Constituency (BC) the following year. I was honored earlier this year when the members of the BC elected me to serve as one of its two representatives serving on the GNSO Council, the internal ICANN body that establishes policy for all generic top level domains (gTLDs).

I also serve as a member of the Internet Committee of the International Trademark Association (INTA) and on its Internet Governance Subcommittee. In that latter capacity I have played a substantial role in helping to develop and articulate INTA's views on the subject matter of today's hearing.

In addition to my role as ICA Counsel I assist clients in understanding and developing policy positions on domain name system (DNS) and digital intellectual property (IP) issues in Washington and ICANN as Founding Principal of the Virtualaw LLC consultancy. I am also Of Counsel to Greenberg & Lieberman, a Washington, DC law firm specializing in IP and DNS matters.

Getting the Transition and Accountability Right is Critically Important

I commend the Subcommittee for holding this hearing and thereby asserting the legitimate Congressional interest, as representatives of U.S. citizens and Netizens, in assuring that the IANA functions transition and accompanying enhancements of ICANN accountability are carried out is a sound and effective matter. As the Committee considers the issues involved it should of course consider the important interests of the United States and all U.S. participants in the ICANN ecosystem. In addition, it should take a broader view and act as steward for all the other private sector and civil society ICANN stakeholders who want and deserve a more accountable ICANN.

The stakes are tremendously important. They include assuring the future security and stability of the DNS, which has become the central platform for global commerce in the 21st century, as well as maintaining the Internet as an open platform for free expression and uncensored access to information.

We also need to ensure that, as the US contemplates transferring its stewardship role to the global multistakeholder community, that community is afforded the fundamental accountability powers required to ensure that ICANN retains and perfects its commitment to bottom-up, private-sector led DNS policy development -- and does not become dominated by governments and accompanying international political agendas, or devolve into an unaccountable and potentially corrupt organization.

I also want to emphasize, since my testimony is quite critical of some aspects of ICANN's current operations, that much about the organization is very good. ICANN's embodiment of the multistakeholder model (MSM) is a unique and largely positive experiment which, as in all human endeavors, has imperfections. The MSM engages stakeholders from throughout the world in sophisticated and highly cooperative efforts on policy and technical matters. ICANN in particular deserves praise for the exceptional manner in which it has employed remote participation tools so that global stakeholders can engage virtually in meetings, working groups, and other key activities. ICANN staff members, especially those with whom I regularly engage in the policy area, are dedicated, hardworking, and knowledgeable. So I want to make clear that, whatever specific criticisms of ICANN are contained in my testimony, they are there for the purpose of improving the operations and culture of an organization that is already exemplary in many aspects of its work.

If my testimony has one central message it is this: Enhanced ICANN accountability mechanisms that strengthen the MSM as expressed within ICANN are necessary and overdue. But the majority of accountability measures being contemplated are corrective, reactive, and therefore of the after-the-fact damage control category. They will operate optimally only if ICANN's Board and senior management develop and demonstrate a commitment to a culture of accountability that seeks to engage with the community from which it derives its legitimacy before important decisions are made, and that embraces taking responsibility for the consequences of those decisions.

It Ain't Broke – But the Toothpaste Has Been Squeezed

Many have reacted to the Administration's March 2014 announcement of its intent to relinquish the IANA stewardship role with the well-known statement, "If it ain't broke, don't fix it." While the ICA has not conducted an internal poll of its members, based

upon informal feedback I believe that is probably the consensus view within our Association. Our members' perception is that the U.S. has not abused its special relationship with ICANN – an organization that was spun out of the Commerce Department in 1998 – and that the regular re-awarding of the IANA contract and the review that accompanies it provides a useful and corrective restraint on ICANN. ICANN's relationship with NTIA also provides a first line of defense against any attempt at multilateral takeover and conversion to a government-dominated organization.

The U.S. downsized its relationship in 2009 when direct oversight was terminated and replaced by the voluntary Affirmation of Commitments (AOC) between the U.S. and ICANN. The NTIA has correctly characterized its remaining role of reviewing proposed changes to the root zone as primarily clerical – although periodic review of ICANN's performance when it rebids on the IANA functions contract helps to ensure that it keeps to its core mission and also deters other governments from implementing proposals to transplant those functions to a multilateral organization. Given the benign, minimal, and beneficial role that the U.S. currently plays the IANA transition can be viewed as entailing substantial risk for relatively little reward aside from its association with overdue new organizational accountability measures.

Yet, to raise another cliché, "You can't put the toothpaste back in the tube." The NTIA announcement has raised expectations among governments around the world – and, more importantly, among key Internet constituencies and stakeholders. Hundreds of members of the ICANN community have expended tens of thousands of collective hours in designing proposals for the IANA transition and enhanced organizational accountability measures – and that effort in and of itself is a test and demonstration of the MSM concept of Internet governance that has received longstanding bipartisan support from Congress. A successful transition will prove the value of a MSM based in bottom-up, private sector leadership and thereby strengthen it for the long term. The transition also provides the leverage for putting in place overdue accountability mechanisms that are necessary to assure that ICANN operates in the long-term public interest rather than its own self-interest.

But there's no denying that the withdrawal of U.S. stewardship carries risks. The accountability measures may prove inadequate, or the ICANN community may fail to exercise the responsibility and leadership required for their optimal operation. There is also the danger that the results of the transition may prove to be short-term rather than long, creating just a temporary transition between minimal U.S. stewardship and the subjugation of ICANN policy and operations to multinational governmental interests.

Given the high stakes and the current state of play, it would be unwise for Congress to prematurely and reactively intervene against the ongoing transition process. That could

be perceived as U.S. arrogance and the global reaction could undermine the long-term viability of the MSM and of ICANN itself.

Rather, Congress should remain actively engaged in monitoring the transition process through hearings like this and additional oversight measures to assure that the final transition and accountability package delivered for NTIA and Congressional review assures the long-term stability and security of the DNS and satisfies the other principles articulated by NTIA when it announced its intentions.

And it is perfectly appropriate for Congress to consider whether additional principles should be met. Chief among them would be assurances that there is a broad consensus among other governments, especially within the membership of ICANN's Governmental Advisory Committee (GAC), that the new ICANN operating model emerging from this process will be acceptable to them -- notwithstanding that ICANN will remain a California non-profit corporation subject to U.S. law and jurisdiction. I am in no way suggesting that the GAC's role should be enhanced in a post-transition world, but it is best positioned to provide a collective voice regarding the final transition and accountability plan for those nations engaged in DNS policy through the GAC's advisory role. There is really no point in proceeding with the transition if its completion will usher in near-term agitation to convert ICANN into an international intergovernmental organization in which governments are the main actors and the private sector and civil society are relegated to observer status.

While there have been some partisan differences regarding the wisdom and timing of the IANA transition, there has been longstanding unanimous support for the MSM. The best way for Congress to support the multistakeholder model is to support ICANN's stakeholders as they engage in the complex process of designing new stewardship measures for the critical IANA root zone functions, accompanied by enhanced accountability measures that strengthen ICANN's operational commitment to the bottom-up, private sector-led policy development process as well as to broader and earlier stakeholder involvement in other aspects of ICANN operations. Congressional support can also assure that the community-designed accountability enhancements are accepted and effectively implemented by ICANN's Board and staff.

How Did We Get Here? Via Montevideo and NETmundial

Before addressing the current status of the ICANN community's effort to fashion a comprehensive IANA functions transfer and enhanced ICANN accountability package, and suggesting an appropriate role for Congress, I believe it is important to briefly revisit the events that brought us to this juncture. They are not ancient history and are highly

relevant to understanding the need for accountability and transparency in ICANN operations.

In mid-2013 Edward Snowden went into hiding and began releasing vast amounts of classified information regarding NSA online surveillance activities, before resurfacing in Moscow under the protection of Vladimir Putin. I take no position today on the propriety of those NSA activities, the legality of Mr. Snowden's actions, or what reforms of NSA and other online intelligence practices and governing laws may be desirable.

However, regardless of what one thinks of the NSA or Mr. Snowden, one thing is quite clear – the current U.S. stewardship of the IANA function, consisting of the clerical role of reviewing and approving proposed changes to the DNS root zone upon transmission from ICANN, and then directing VeriSign to implement those changes, has nothing to do with online surveillance by the NSA or any other national intelligence agency, whether U.S. or foreign. The current U.S. role affords the NSA no advantage nor will its relinquishment result in any disadvantage in conducting whatever online monitoring it may lawfully engage in.

Yet the Snowden revelations were seized upon by the ICANN Board and senior management to set events in motion to terminate U.S. oversight. In September 2013 the Board passed a Resolution authorizing the CEO to undertake steps in that direction. That decision was made absent any consultation with the broad ICANN community, even though the Snowden revelations were well known at the time that ICANN held its mid-year meeting in Durban, South Africa in July 2013. The lack of consultation with the community at that meeting regarding the implications of the Snowden disclosures for ICANN was a serious accountability failure. And the Board's September Resolution was kept secret until months later – that was an unprecedented transparency failure. An argument can be made that the Snowden matter did have some impact on global support for ICANN, but whatever the legitimacy of those concerns they were no provided no excuse for the decision of ICANN's Board to act in secret absent any discussion within the community.

ICANN CEO Fadi Chehade signaled the organization's internal thinking and direction in a September 3, 2013 speech delivered at the Asian Pacific Regional Internet Governance Forum (IGF) in Seoul, South Korea in which he stated:

> You heard me announce recently in Durban that ICANN, for the first time, is setting up a legal structure in Switzerland. **That means that ICANN is going to seek to become an International Organization that is serving the world, not just as a private corporation in California.** These are important fundamental steps that we are exploring in order for ICANN to take a new global posture. (Emphasis added)

Empowered by that secret Board Resolution, ICANN's CEO traveled to Montevideo, Uruguay where ICANN and the so-called I-star Internet technical and civil organizations issued this statement which called for accelerating the globalization of ICANN and the IANA functions – and, disturbingly, called for governments to participate on an equal footing with other ICANN stakeholders:

> ***Montevideo, Uruguay*** – The leaders of organizations responsible for coordination of the Internet technical infrastructure globally have met in Montevideo, Uruguay, to consider current issues affecting the future of the Internet.
>
> The Internet and World Wide Web have brought major benefits in social and economic development worldwide. Both have been built and governed in the public interest through unique mechanisms for global multistakeholder Internet cooperation, which have been intrinsic to their success. The leaders discussed the clear need to continually strengthen and evolve these mechanisms, in truly substantial ways, to be able to address emerging issues faced by stakeholders in the Internet.

In this sense:

- They reinforced the importance of globally coherent Internet operations, and warned against Internet fragmentation at a national level. **They expressed strong concern over the undermining of the trust and confidence of Internet users globally due to recent revelations of pervasive monitoring and surveillance.**
- They identified the need for ongoing effort to address Internet Governance challenges, and agreed to catalyze community-wide efforts towards the evolution of global multistakeholder Internet cooperation.
- **They called for accelerating the globalization of ICANN and IANA functions, towards an environment in which all stakeholders, including all governments, participate on an equal footing.**
- They also called for the transition to IPv6 to remain a top priority globally. In particular Internet content providers must serve content with both IPv4 and IPv6 services, in order to be fully reachable on the global Internet. (Emphasis added)

The CEO then immediately traveled to Brasilia and met with President Dilma Rousseff in which he requested that Brazil host a meeting on the future of Internet governance. Emerging from that meeting, he declared:

> **I came personally to convey to her that when she spoke at the United Nations two weeks ago she spoke for all of us, she spoke for the world.** She expressed the world's interest to actually find out how we're all going to live in this new digital age. **She was the world's leader on that day and I came to her to thank her for her leadership and to discuss with her how we go from her vision of the future to some practical solutions, because the trust in the global Internet has been punctured, and now it's time to restore this trust through leadership and through institutions that can make that happen. And so today I am very pleased to share with you that Her Excellency Dilma Rousseff has accepted our invitation that we hold next year a global summit** that will bring leaders of the world, leaders of governments but also leaders of industry, leaders of civil society, leaders of academia, leaders from the technical community to come together here in Brazil and discuss how together we will base our work on governing the Internet in the core principles that she has been good such a good champion of. So I am delighted to thank her and thank Brazil for the continued leadership they are playing in this important subject. (Emphasis added)

President Rousseff's September 2013 UN General Assembly remarks were delivered after she canceled a state meeting with President Obama based upon Snowden revelations of NSA operations involving Brazil. In that speech she declared that, "The United Nations must play a leading role in the effort to regulate the conduct of States with regard to these [surveillance] technologies."

The event requested by ICANN became the NETmundial Conference hosted in Sao Paulo, Brazil in April 2014. The NTIA's March 14, 2014 announcement of the U.S. intent to relinquish its IANA stewardship role was made just one month prior. FOIA disclosures revealed that the White House played a key role in the timing and substance of the announcement.

That NTIA statement characterized the announcement as a natural end point:

> Transitioning NTIA out of its role marks the final phase of the privatization of the DNS as outlined by the U.S. Government in 1997.
>
> "The timing is right to start the transition process," said Assistant Secretary of Commerce for Communications and Information Lawrence E. Strickling. "We look forward to ICANN convening stakeholders across the global Internet community to craft an appropriate transition plan."

But the perception among many in the multistakeholder community was that the timing was strongly influenced by a desire to defuse the upcoming NETmundial conference so

that its central focus would not be repeatedly voiced demands for the U.S. to relinquish its IANA stewardship role

The two-day NETmundial meeting produced some useful declarative language in support of the MSM, and was most notable for the fact that it compelled governmental representatives to assume the same status as private sector and civil society participants wishing to speak there. Yet the fact remains that it resulted from a clandestine decision of the ICANN Board to misappropriate the Snowden revelations and use them to create political leverage on the U.S. to relinquish its oversight role. Any final accountability proposal must provide the means to prevent a recurrence of those events.

While not central to today's hearing, it is also worth noting that, while the NETmundial conference was initially billed as a one-off event, after it took place ICANN, Brazil, and the World Economic Forum (WEF) announced, in top-down fashion, that they were undertaking a NETmundial Initiative (NMI) in which each of them would have permanent representation on its governing body. Despite extensive efforts involving the expenditure of substantial ICANN staff and financial resources the NMI has failed to gain any significant stakeholder support. Civil society has rejected it as a top-down effort led by global elites, and the private sector has regarded it is duplicative of worthy existing efforts such as the Internet Governance Forum (IGF).

The State of Play on the IANA Transition and Enhanced Accountability

Last summer the transition and accountability planning process got off to a rough start when, on August 14, 2014, ICANN staff published an "Enhancing ICANN Accountability and Governance – Process and Next Steps" document that sought to dictate the process and timetable by which the ICANN community would undertake to fulfill the role foreseen for it by the NTIA. Many within the ICANN community viewed the proposed structure as designed to dilute the strength of any final recommendations for new enhanced accountability measures; especially the establishment of an independent appeals mechanism with the power to reverse decisions that violate ICANN Bylaws, and to discipline Board members and staff.

In reaction, the entire community of ICANN stakeholders sent an unprecedented joint letter to ICANN's Board and CEO on August 26th objecting to the proposed process and posing detailed questions about it. Signatories to that letter included the GNSO Council and all of the GNSO's stakeholder groups and constituencies, the Country Code Name Supporting Organization, the At-Large Advisory Committee, the Security and Stability Advisory Committee — and, most surprisingly, the Governmental Advisory Committee.

The community has remained relatively united since last August and there has been no subsequent attempt by the Board or senior management to dictate the substance and timing of the ongoing process. In fact, ICANN staff members have provided valuable and necessary support to the stakeholders engaged in the CWG-Stewardship and CCWG-Accountability. And ICANN has expended funds for two well-regarded outside law firms to render invaluable legal advice to the CWG and CCWG so that they can design stewardship and accountability measures that mesh with California public benefit corporation law. While the events of last August are now in the past the community's reaction to the staff document and the ensuing work to develop its own procedures added several months to the process, and are a reminder that we cannot presume that the Board will readily accept the community's final recommendations, especially in the realm of proposed accountability measures.

On April 22nd the CWG released a 90-page second draft report for 28 days of public comment. Notably, three of the report's six main sections are marked as still being "under development". Further, as noted upon its release, "The CWG-Stewardship's proposal has dependencies on and is expressly conditioned upon the CCWG-Accountability process", and that Accountability process is on a separate track and is several months away from completion, at a minimum.

In short, while many of the CWG's recommendations appear sound the report as a whole has large gaps in it and the critical accountability measures for the IANA root zone functions are still under development. Yet the CWG proposes to hold only this single truncated public comment period on a still-incomplete incomplete proposal and then send it on to the IANA Coordination Group – which is charged with integrating the CWG proposals on the naming functions with separate recommendations from the numbers and protocol communities.

While ICA has not yet formulated any overall comments on the CWG report, we will likely reject the notion that it should be forwarded to the ICG until the community has had the opportunity to comment upon a complete and final report in an additional comment period of at least 30 and preferably 40 days' duration. As Secretary Strickling has repeatedly remarked, we have only one chance to get all this right and 28 days' comment on an incomplete document is almost surely the path to getting it wrong.

Turning to the CCWG-Accountability, it released its initial report on May 4th for a 30-day public comment period. That 143-page document proposes means by which the community can:

- Spill the entire Board or remove individual Board members

- Veto changes to the ICANN Bylaws and other key operating and values documents
- Reject Board decisions on ICANN's strategic plan and budget

The report also recommends that ICANN revise its Bylaws to:

- Clarify the scope of its policy authority
- Incorporate key elements of the AOC
- Establish a set of fundamental "Golden Bylaws" that can be revised only with supermajority community approval

Finally, the report recommends the strengthening of key review and redress mechanisms that include an Independent Review Process (IRP) with clear authority to issue decisions that are binding upon ICANN's Board, and expanding the scope of the reconsideration process to encompass staff and Board decisions that contradict existing policy.

Commendably, the CCWG contemplates holding a second 30-day comment period this summer on an updated version of this very complex proposal. ICA has not yet had an opportunity to form even a preliminary judgment on the May 4th draft.

ICA members have participated in both working groups and we commend the extraordinary efforts of all involved in this prodigious undertaking, which is akin to redesigning an aircraft while it is in flight. Both groups appear to be heading in the right direction. But it is abundantly clear that it is most unlikely that we will have a complete and combined final package of stewardship and accountability measures that can receive adequate review and approval by ICANN's supporting organizations and advisory committee's prior to being forwarded for Board consideration, and then sent on for evaluation by the NTIA and Congress, prior to the September 30th expiration of the current term of the IANA functions contract.

In light of that, we were pleased to learn that on May 6th Assistant Secretary Strickling sent a letter to the leaders of the ICG, CWG, and CCWG requesting that they provide an update on their progress and an estimate of when finalization of the transition plan and implementation of pre-transition accountability measures would occur, no later than June 30th. It is our understanding that Secretary Strickling will also attend the upcoming ICANN meeting in Buenos Aires next month to solicit community views on these subjects.

ICA hopes that by early July the NTIA will announce the extension of the IANA contract for a reasonable period beyond September 30th to allow for all the time necessary for consideration and approval of a final combined transition and

accountability package and full implementation of required pre-transition accountability measures. That in turn will relieve some of the current pressure on the exhausted community members engaged in this undertaking and will ultimately allow for the development of a more fully considered and more completely vetted plan with a greater likelihood of long-term success.

The New gTLD Program and .Sucks

In remarks delivered on June 23, 2014 to the ICANN High Level Governmental meeting in London, U.K., Assistant Secretary of Commerce Lawrence Strickling said, "as ICANN has performed the IANA functions over the years, it has matured as an organization and has taken important steps to improve its accountability and transparency as well as its technical competence".

Unfortunately, certain aspects of the new gTLD program, and specifically the .Sucks controversy, bring that characterization of organizational maturity into question.

As we all are aware, on April 9th ICANN took the unprecedented step of requesting input from two national regulators regarding the legality of a contracted party's business activities. It requested that the Federal Trade Commission (FTC) and Canada's Office of Consumer Affairs (OCA) to determine whether the Vox Populi registry operator of .Sucks was engaged in illegal activities through its $2500 per year and higher sunrise pricing of domain names that also comprise trademarks registered in the Trademark Clearinghouse (TMCH) rights protection mechanism (RPM). That letter stated:

> **ICANN, through its registry agreement, may seek remedies against Vox Populi if the registry's actions are determined to be illegal.** ICANN is concerned about the contentions of illicit actions being expressed, but notes that ICANN has limited expertise or authority to determine the legality of Vox Populi's positions, which we believe would fall within your respective regulatory regimes… **We are very concerned about any possible illegality resulting from the alleged illicit actions of the registry and accordingly reach out to you to see if you can offer guidance on this matter.** (Emphasis added)

Aside from passing the buck for a problem it arguably has contractual authority to address, this ICANN initiative displayed a remarkable insensitivity to the goals of reducing U.S. oversight and the concerns in many parts of the ICANN community about jurisdictional issues related to the transition process.

Of course every registry operator knows that the terms of its Registry Agreement (RA) with ICANN is subject to interpretation and enforcement in the U.S. But the largest

owner of the Vox Populi registry is Momentous, a Canadian company, and it has also been reported that "its IANA record lists an address in Bermuda for its technical contact and Uniregistry's office in Grand Cayman as its administrative address".

In sum, the registry has no clear jurisdictional ties to the U.S. other than its contract with ICANN and making domains available for sale via registrars which may have U.S. contacts. By seeking to involve the FTC, ICANN may have established the precedent that any ICANN contracted party is subject to U.S. law enforcement simply by virtue of having signed a contractual agreement with ICANN. It also raises the very troubling possibility that, should the FTC ever determine that criminal conduct is evident, both ICANN and every registrar acting as a seller of .Sucks domains could be subject to prosecution under the US Racketeering Influenced and Corrupt Organization Act (RICO) statute, for which extortion is one of the leading predicate crimes that can be the basis of charging a criminal conspiracy. Yet as we don't know precisely what motivated ICANN to request FTC involvement the jury remains out on this important jurisdictional issue.

But the real problem here is that ICANN abdicated its responsibility and contractual authority to take action against highly questionable practices. Further, by seeming to claim that it can only intervene against registry actions declared to be illegal, it is questionably asserting that it has little if any authority to protect the public interest against unethical practices by contracted parties.

ICANN's action was precipitated by receipt of a letter from the GNSO's Intellectual Property Constituency (IPC) asking ICANN to halt the opening of the .Sucks sunrise registration period because its domain pricing practices were "predatory, exploitative and coercive". (Note: ICANN's Business Constituency has just sent a similar letter to the FTC, OCA, and ICANN's Board.)

That IPC letter could hardly have come as a surprise. Not only was the trademark and business community's longstanding concerns about this gTLD well known but, one year prior, on March 12, 2014, the then-Chairman of the U.S. Senate Commerce Committee, Jay Rockefeller, sent a letter to ICANN's Board regarding .Sucks in which he wrote:

> I view it as little more than a predatory shakedown scheme. The business model behind this gTLD seems to be the following: force large corporations, small businesses, non-profits, and even individuals, to pay ongoing fees to prevent seeing the phrase "sucks" appended to their names on the Internet.

Yet a year went by and ICANN did nothing, and now it is attempting to pass on the problem its gTLD program created to government regulators to be solved at taxpayers' expense. This suggests a troubling culture of unaccountability, a shirking of responsibility.

Even worse, as described in the IPC letter:

> Finally, we recently learned of a peculiar (and apparently unique) provision in Vox Populi's Registry Agreement. The .SUCKS Registry Agreement calls for Vox Populi to pay ICANN (i) a one-time fixed "registry access fee" of US$100,000 as of the Effective Date of the Agreement, and (ii) a "registry administration fee" of US$1.00 for each of the first 900,000 Transactions. **Thus, if Vox Populi's scheme succeeds, ICANN will receive $1 million more from .SUCKS than from any other registry with comparable success. The IPC is at a loss to understand why ICANN stands to receive this unique payout from .SUCKS.** (Emphasis added)

These unique provisions certainly create the impression that, rather than protecting the integrity of the new gTLD program and the public interest, ICANN is seeking to gain additional financial benefit from the .Sucks pricing scheme. ICANN has since tried to justify these provisions as assuring financial stability because the registry operator owes it about $1 million in past due registrar fees.

That revelation of substantial past due registrar fees from the .Sucks registry operator raises troubling questions about the new gTLD applicant review process:

- How did Vox Populi pass the background screening provisions of Sec. 1.2.1 of the Applicant Guidebook (AG), which includes "general business diligence", given that it was associated with non-payment of substantial amounts of past due registrar fees? That Section of the AG also states that "**Background screening is in place to protect the public interest in the allocation of critical Internet resources, and ICANN reserves the right to deny an otherwise qualified application based on any information identified during the background screening process**... ICANN may also contact the applicant with additional questions based on information obtained in the background screening process." How did ICANN weigh the "public interest" in this instance, and did ICANN submit any additional questions to this applicant given its prior financial history? We don't know because ICANN keeps all information about new gTLD applicant reviews confidential.

- In a related question, how did Vox Populi pass the initial evaluation in sec. 2.2 of the AG, which asks "Whether the applicant has the requisite technical, operational, and **financial capability** to operate a registry"; and was it subjected to Financial Extended Evaluation under Sec. 2.3.2?

- Finally, how is it that Momentous had $3 million to bid and win a private auction for .Sucks in November 2014 but was allowed to launch the registry without satisfying its substantial past due registrar debts to ICANN? (Emphasis added)

ICANN has informed the community that it is still reviewing the registry agreement to see if it has additional options in the event that the FTC or OCA fails to respond, or to identify specific illegal activities. That implies that, despite having a highly expert in-house legal department as well as expending more than $4 million annually for outside legal advice, ICANN has been unable to identify any contractual grounds for halting the .Sucks rollout or curbing its registry practices.

But there are multiple potential avenues that are apparent to anyone who has reviewed the new gTLD RA:

- Section 5.6 of the TMCH Terms of Service TOS states:

  > License for the Services. We grant you a limited, personal, non-commercial, non-exclusive, non- sublicensable, non-assignable license to access and use the Services. **You will not access or use the Services or Clearinghouse Content for purposes other than those stated in this Agreement, the Functional Specifications or the TMCH Requirements.** (Emphasis added)

  If it were determined that Vox Populi is in breach of this restriction on the use of TMCH content by using that data for objectionable pricing purposes then ICANN might have grounds for determining that it is in breach of Section 1 of Specification 7 of the Registry Agreement requiring that, "Registry Operator shall implement and adhere to the rights protection mechanisms ("RPMs") specified in this Specification", including the requirements of the TMCH. Such a finding would also set a precedent in regard to other registries that have apparently reverse engineered the TMCH to establish exorbitant pricing policies, although less extreme than those of .Sucks.
- ICANN fought hard to obtain Section 7.6 (Amendments and Waivers) of the new gTLD Registry Agreement which provides its Board with the power to approve Special Amendments governing Applicable Registry Operators. Indeed, even if the Applicable Registry Operators reject the Special Amendment the Board can still adopt it if, among other requirements, it is "justified by a Substantial and Compelling Reason in the Public Interest". The term "Substantial and Compelling Reason in the Public Interest" is defined to mean "a reason that is justified by an important, specific, and articulated public interest goal that is within ICANN's mission and consistent with a balanced application of ICANN's core values as defined in ICANN's Bylaws".

  A Section 7.6 Special Amendment could indeed address not just the alleged .Sucks shakedown but the substantially marked up prices of TMCH terms at other new gTLDs by limiting pricing to "cost recovery" plus a modest markup. That would return the TMCH to the status of an RPM that

actually protects rights holders rather than targeting them for price gouging. Such an amendment would need to be narrowly drawn to prevent registry abuse of that RPM, while refraining from setting a broad precedent for ICANN to act as a price control or competition authority.

It has become clear that Vox Populi is hardly the only contracted party which has reverse engineered the TMCH database for developing pricing policies. A February 2, 2015 ICANN staff report revealed that the 34,300 terms then contained in the TMCH had generated an astounding 25.2 million Trademark Claims Notices – for a program that at that point in time has resulted in only 4.2 million domain registrations. I have queried numerous parties for an explanation of these numbers, and the one that keeps coming back is that some entities are gaming the system by initiating domain registrations they have no intent to carry through to completion for the express purpose of discovering what terms were registered by trademark owners in the TMCH.

- Spec. 11, Para. 3(c) of the .Sucks registry agreement requires operation of .Sucks "in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies." The ICANN Board Governance Committee (BGC) has ruled that Spec. 11, Para. 3(c) "would prohibit [a registry operator] from granting undue preference to its affiliates, **or subjecting potential registrants…to undue disadvantages**." (Emphasis added) If the registry's pricing policies are viewed as subjecting TMCH registrants "to undue disadvantages" then ICANN could declare Vox Populi to be in breach of the registry agreement.

My overall point is this – ICANN was on notice for more than a year that the .Sucks registry was highly controversial and that its operation by Vox Populi might be particularly problematic given its then stated intention to charge $25,000 as a base price for certain domain registrations (subsequently reduced to 'only' $2500 per year, and up). Yet it did nothing in the intervening year to explore and implement what seem to be clear contractual avenues for curbing potential abuse. In that light, its referral of the situation to the FTC and OCA is not am embrace of responsibility but an abdication of it.

What happens with .Sucks is important not just for today but for any future round of new gTLDs. For if its pricing practices pass muster then the precedent has been set, and in the next round we can expect to see applications for .blows, .liar, .criminal, .scum, and a whole host of other pejorative terms with which no person or organization wants to be associated. Legitimate fair use criticism on the Internet does not require the existence of such gTLDs.

Other New gTLD Program Pricing and Consumer Protection Issues

But for the focus on the IANA transition and the effort to develop enhanced accountability measures, the new gTLD program would probably have received far more scrutiny over the past year. It is after all the most important decision made to date through the MSM process as well as the largest and riskiest undertaking in ICANN's history. It has also generated to date more than $300 million in application fees as well as $58 million in "last resort" contention set auction fees – and that latter figure may easily exceed $100 million before the first round is completed.

Within the domain investment and development community populated by ICA's members they have been varying opinions on the new gTLD program. Some believe that .Com, a few other incumbent gTLDs, and certain country code top level domains (ccTLDs) will remain the most dominant and desirable choices for domains, and therefore have little interest in acquiring new gTLDs. Others believe that at least some of the new gTLDs may gain significant market acceptance and have acquired certain domains within them; those individuals are now monitoring overall program developments and deciding whether they will renew those domains when their initial registration period ends. And some have participated directly in the program as consultants and providers of secondary market platforms for domain resale. Overall, there appears to be consensus that the rollout of new gTLDs were justified but that the scale of the program goes beyond the marketplace's absorptive capacity.

The decision to launch a new gTLD program with unlimited applications was a product of the MSM. ICANN's Business Constituency was among those who questioned whether there was an economic justification for a program of that breadth. The development of the Applicant Guidebook for the program, including the TMCH and other new RPMs, consumed three years, which is a cautionary fact when considering that the same community is now attempting to create stewardship and accountability measures in less than half the time.

In the end the program attracted applications for just over 1400 "strings" of which around 800 will provide domains that are available to the general public. Much of the justification for the program was the opportunity to provide international domain names in non-ASCII scripts such as Arabic, Chinese, and Cyrillic; to provide for community-based domains; and to attract applicants from the developing world. The program fell far short in all those goals. The program was also supposed to increase overall competition and consumer choice and trust, and the jury remains out on whether it has met those justifying benchmarks. Hopefully, at least some portion of the new gTLDs will gain sufficient marketplace acceptance to enhance overall competition.

It is far too early to evaluate whether the program will be judged to be an overall success or failure, much less which gTLDs will demonstrate long term market appeal. The general public still seems largely unaware of it although that may change as some major companies that have acquired .brand gTLDs light them up and commence to use them, in the process educating the public that the right of the dot can be as meaningful as the left. City name geo-TLDs such as .NYC may also have long-term staying and consumer awareness power.

As of mid-April total registrations in new gTLDs were just over 5 million with around 1.3 million distinct registrants acquiring them. Of the approximately 600 new gTLDs that have now launched only seven have more than 100,000 registrations. Within the top ten most registered gTLDs, only two have not resorted to pricing their product at very low levels of $1 per domain or less. The number one most registered gTLD also employed an opt-out domain registration program through which a well-known registrar stuffed nearly 400,000 free domains into existing customer accounts. While exploitive high-priced registration fees like those of .Sucks are an issue at one end of the new gTLD spectrum, there are numerous examples of free and low-cost registrations offered by registries seeking to boost their market position.

Overall it appears that the domain marketplace may not have the capacity to digest and provide long-term support to hundreds of new top level extensions. ICANN has prepared its FY 16 budget based on estimates that renewal for new gTLDs will be in the range of only 50-65%. That may be optimistic, especially for gTLDs that juiced their registration numbers through free opt-out registrations and free or near-free first year fees. It is entirely possible that later this year, even as more new gTLDs enter the marketplace, total registrations may decline due to non-renewals of first year registrations. ICA and its members are carefully monitoring ongoing market developments.

Among professional domain investors there is little interest in gTLDs that have employed low pricing tactics because an abundance of free or low-priced domains precludes the development of a vibrant secondary market with enhanced domain valuations. There is an economic saying that bad money drives out good. Similarly, in the domain space, bad registrations drive out good. Yet some of these registries are presenting their high rank to uneducated consumers as a reason to establish a personal or business website, which could be an unwise move if that gTLD is eventually going to be blocked by leading computer protection spam filters.

Indeed, a byproduct of free and low-cost registrations is that bad actors can exploit the situation. Last week the .Party extension offered free registrations and dozens of trademark infringing domains were registered. Last month the same registry operator, acting in conjunction with same registrar, offered .Science domains for free and then for

49 cents. That in turn resulted in more than 100,000 new domain registrations in eleven days and vaulted that gTLD into the number two total registrations position; many of the registered domains appear to have been for nonsense terms and made robotically. I have been personally inundated over the past few weeks with spam from .Ninja addresses; I cannot tell you if their links are to phishing or malware websites because I will not click on them.

If domain industry participants are aware of these developments simply by following domain industry press reports then ICANN should surely be aware of them too. Generally, ICANN's decision not to impose pricing rules or limitations on the new gTLD program was the correct one. But, just as when a registry like .Sucks employs coercive tactics to try to impose excessive domain pricing, there is also a problem when a registry's free and extremely low domain pricing attracts those who can abuse consumers and trademark owners. So far as I am aware ICANN has done nothing to address the situation.

Another unresolved issue or the new gTLD program is the absence of registrant validation requirements for certain GAC Category 1 strings that implicate highly regulated industries and professions in the health and fitness, financial, gambling, charity, and education sectors. The GAC issued a statement requesting adequate safeguards at the conclusion of the April 2013 ICANN meeting in Beijing. Yet two years later ICANN has failed to implement that advice, opting instead for the voluntary adoption by registries of Public Interest Commitment Specifications (PICS). PICS can be unilaterally altered by the registry at any time and have been adopted by only a small minority.

As a result of ICANN's inaction, in December 2014 the BC joined with the At-Large Advisory Committee (ALAC) in calling for "a freeze on contracting and delegation of any new gTLD in highly-regulated sectors that have failed to implement GAC safeguards." Four months later the situation remains gridlocked and these strings continue to be delegated absent effective safeguards. This is another unfortunate example of ICANN failing to act accountably and assume responsibility for the consequences of activities generated by organizational policy decisions.

Finally, as with .Sucks, there are other unanswered questions about the rigor of the applicant vetting process. For example, at least one registry operator whose parent organization had a documented history of cybersquatting losses sufficient to disqualify it was nonetheless approved as an applicant for multiple gTLDs.

New gTLD Technical Issues

Further, while the .Sucks and spammer/phisher situations are arguably fall outside of ICANN's core expertise, there are technical problems with the new gTLD program that ICANN has no excuse for missing. ICANN's core mission, after all, is to be technical manager of the domain name system.

One of those is "domain collisions". That occurs when a new gTLD string matches a term used for an intranet's internal management functions, and can result in system vulnerabilities and breakdown. ICANN's security and stability advisers gave it long advance notice of this challenge yet it was not adequately addressed prior to the launch of the new gTLD program. As a result hundreds of desirable second level domains are still being withheld from the market.

Another major technical issue is "universal acceptance". This refers to the fact that some new gTLDs may not work properly with popular web browsers, email clients, office suites, system administration tools, search engines, mobile apps, and other Internet platforms. This is a challenge that ICANN has been aware of for at least a dozen years, yet again new gTLDs were released without adequate attempts to address it. To the extent that certain gTLDs are being marketed to unsuspecting consumers without adequate disclosure that they may fail to work as intended – that they are defective products -- this can be viewed as a consumer protection issue.

More importantly, given the international political aspects of the IANA transition, a larger concern is that the problem is particularly acute for IDN gTLDs. For example, an April 1, 2015 presentation made at a DNS technical meeting in the Middle East revealed that Arabic character domains meeting the 2010 Internationalizing Domain Names in Applications (IDNA) standards nonetheless had a user acceptance rate of less than one percent! To the extent that ICANN has a responsibility to address this situation one can understand why global populations using non-ASCII scripts may find the new gTLD program's performance to be wanting. IDN gTLDs can never fully accomplish their intended purpose until these technical issues are successfully dealt with.

Last Resort Auction Proceeds and Their Accountability lessons

Another new gTLD issue directly related to accountability is what use to make of 'last resort' auction funds. When there are two or more applicants for the same gTLD that creates a 'contention set". When those applicants cannot resolve their contention by a variety of means, including a private auction, the winner is determined by a last resort auction and all of its proceeds go to ICANN.

With the recent $25 million bid of Google to secure control of the .App registry the total proceeds of those ICANN auctions has swelled to $58.8 million. The final sum by the end of the first round could go higher, perhaps to more than $100 million. That's serious money.

The subject of how these funds should be used has been raised in Public Forums at several ICANN meetings, and the Board had responded that the auction proceeds would be held separately from general revenues. It also said that the ICANN community would have a substantial say in deciding what ultimate uses would be made of the growing account.

Based on those Board statements the GNSO Council, after soliciting feedback throughout the ICANN community, decided at its March 2015 meeting, "to move forward with the creation of a CCWG by, as a first step, forming a drafting team to develop a proposed charter for such a CCWG, which could then be considered by all SO/ACs interested in participating".

In sum, the ICANN body responsible for gTLD policy, after taking into account prior Board statements and reviewing "the feedback received from all the GNSO Stakeholder Groups and Constituencies as well as other Supporting Organizations (SOs) and Advisory Committees (ACs)", transparently initiated a community-based, bottom up process for addressing the question of the best and most appropriate use of funds derived from last resort new gTLD auctions. The first step would be drafting a charter for the proposed Cross Community Working Group.

That's the way ICANN's MSM is supposed to work. What happened next is at considerable variance.

On April 15th the Chair of ICANN's Board sent an email to the Chair of the GNSO Council stating in relevant part:

> *The Board has explicitly committed to a full consultation process.* ***Input from the CCWG will be quite welcome, but so will inputs from other sources.*** *The Board has not chartered any group to make decisions about the auction funds, and we plan to proceed very deliberately.*
>
> *We will proceed very shortly with a call for inputs on general ideas and concepts, not specific projects.* ***We make a point of reaching outside the usual ICANN SO and AC structures to include the rest of the Internet community. We will, of course, be glad to mention the CCWG effort as one of the ways for people to be involved.***

> *I hope this is consistent with your understanding and expectations.* (Emphasis added)

This was not at all consistent with the Council's understanding and expectations, and on its April call several Council members, including myself, voiced their strong distress and concern. The community had initiated a bottom up mechanism, and the Board has now summarily dismissed that approach and revealed that it has already decided on a different course for moving forward. After substantial discussion the Council renewed its commitment to proceeding with a CCWG notwithstanding the Board's view that it would just be "one of the ways for people to be involved".

This Board action was not transparent. It apparently made its decision to reach beyond the ICANN community on this important matter without conveying that information to the community — until the Council action forced its hand.

This Board action also smacks of top down decision-making. If the Board thought there was a valid reason to reach outside of the ICANN community it could have explained its reasoning and consulted with the community on whether this approach made sense.

And this Board action again demonstrates the need for greater accountability mechanisms, as it has been presented to the Council as a fait accompli. It also seems like a clearly missed opportunity. Given the fact that the coming accountability enhancements will almost surely give the community substantially more influence over ICANN's budgeting, it was an opening to publicly embrace the concept in advance of formal adoption of accountability measures. That opportunity has now come and gone.

This Board decision also raises a fundamental question — just who is "the rest of the Internet community... outside the usual ICANN SO and AC structures"? Who populates that non-included Internet community when ICANN is wide open to participation by everyone in the Internet community? Who are they when the present community already includes broad representation of business, civil society, contracted parties, governments, technical groups, and every other category of those with a stake or interest in the domain name system?

In this regard, CEO Chehade has repeatedly stressed in his public statements that the ICANN community welcomes participation by all interested parties. Attendance at ICANN meetings has been growing steadily, and, as I already discussed, ICANN does an excellent job in facilitating remote participation in all its activities for those who can't attend in person. ICANN meetings also charge no registration fee, and ICANN has various programs to encourage and support participation from the developing world. Yet this Board action implicitly indicates an attitude that the ICANN community does not do an effective job in representing all Internet constituencies and it will therefore reach beyond it -- which in turn undermines the existing structure's legitimacy.

Whatever those answers are regarding the identity of "the rest of the Internet community", right now the Board's message to the ICANN community is: Thank you for taking the bottom-up initiative — but we will also solicit input from other unidentified parties outside the ICANN community "on general ideas and concepts, not specific projects" for the use of these tens of millions of dollars.

There are already multiple ideas out there for using those funds — from promoting Universal Acceptance of new gTLDs, to boosting developing world engagement, to bolstering ICANN's contractual compliance efforts. The monies involved are large enough to make their disposition matter. And the community is in the best position to assure that they are not used as a slush fund for currying favour, filling an ICANN budget gap, or supporting Directors' pet projects.

The Board's determination dilutes the say of a community-grounded CCWG and thereby leaves the ICANN community considerably marginalized. This Board plan also appears to leave it with wide discretion over how these funds will eventually be allocated. Rather than letting a community-driven process determine how the funds should be expended the Board will merely consult with the community, along with those unidentified third parties, and then "proceed very deliberately" to make its own decisions. This downgrading of the CCWG may well be a pyrrhic victory, as any utilization of the auction funds will most likely occur after new transition-related accountability measures have been implemented.

Indeed, this episode strengthens the case for the community exercising greater say over budget and special expenditure decisions. Under the current CEO's tenure ICANN staff ranks tripled within an eighteen month period, and two hew "hubs" and multiple additional outreach offices were established around the world. The proposed FY 16 budget proposes to add sixteen additional staff members, but not a single one will be in the policy support area, and the overall share of the budget allocated to policy is less than ten percent. Policy staff are already stretched to the limit and will have additional important work as accountability measures are approved and implemented. Earlier this month the GNSO Council and other ICANN constituencies urged the organization to reconsider project expenditures for policy support work.

New gTLD RPMs and the UDRP

I have already discussed the TMCH, which was one of the major new RPMs implemented in conjunction with the new gTLD program. The TMCH was created for two essential purposes. The first was to provide trademark owners with the right to make sunrise registrations of their marks in new gTLDs. Utilization of the TMCH has been lower than expected because rights holders appear to have decided that broad

defensive registrations make no economic sense for hundreds of new gTLDs. Now that it appears that the TMCH database has been reverse engineered to set high sunrise registration prices that will likely be a further deterrent to its use, unless ICANN opts to use its options to address this development contractually.

The other purpose of the TMCH is to generate a Trademark Claims notice to any would-be domain registrant seeking to register an identical match to a term in its database. There's nothing objectionable abut that conceptually, but ICA believes that receipt of the Claims notice by unsophisticated parties having little knowledge of trademark law may unintentionally deter registrations of generic dictionary word domains intended to be used for noninfringing purposes. Therefore, we recently advised ICANN that we support "the inclusion of more comprehensive information regarding generic words and infringement in the Claims notice, as well as clarifying under what circumstances the post-notice registration of a domain will be considered to constitute "bad faith" for UDRP and URS purposes".

The other key RPM is Universal Rapid Suspension (URS). This is a new arbitration procedure that is faster and less expensive than the traditional Uniform Dispute Resolution Policy (UDRP). A successful URS action results in the suspension of the infringing domain through the end of its registration term, with an option for the rights holder to extend the suspension by one additional year. Some rights holders have suggested that the URS should be amended to include a domain transfer option – that would convert the URS into a fast-track, low-cost version of the UDRP. A transfer option was extensively debated and ultimately rejected by the Special Trademark Implementation (STI) team that finalized the RPMs.

ICA recently advised ICANN that we would vigorously oppose any attempt to amend the URS to provide a domain transfer option as such a rapid and circumscribed process could be readily abused to further the growing scourge of reverse domain name hijacking (RDNH). RDNH can be thought of as "domain trolling", in which third parties with no legitimate rights seek to abuse the arbitration process to gain possession of a valuable intangible asset.

However, ICA is sympathetic to the concerns of trademark owners, and therefore suggested the alternative course of permanently barring the re-registration of a URS losing domain where the domain name/trademark is not a generic dictionary term and its registration by anyone other than the rights holder would almost surely constitute infringement. This concept could also be explored in regard to generic dictionary terms registered at gTLDs whose top level names correspond to the goods and services for which the word is trademarked by the prevailing complainant. Such an approach would not invite URS abuse for domain hijacking purposes but would afford permanent protection to infringed rights holders – and

without the unending costs associated with holding a domain defensively in a large and growing portfolio.

Reconsideration of the RPMs is expected to occur after receipt of a full staff report this coming fall reviewing their performance, with subsequent community evaluation. That process may also lead to review of the UDRP, which is the only ICANN consensus policy that has not been subject to policy review since the organization's inception.

One major problem with the UDRP from the perspective of both rights holders and domain registrants is that, while uniform is in its name, the actually application of the policy is anything but uniform and predictable. That problem will likely grow as ICANN accredits more regional UDRP providers in the developing world. And it is compounded by the fact that while ICANN's accreditation of a UDRP provider provides it with the authority to extinguish or transfer the valuable intangible asset known as a domain, ICANN has no contractual relationship with any UDRP provider.

ICANN's only enforcement authority with any third party arises from a contractual relationship, yet it has chosen not to have such authority vis-à-vis UDRP providers – which translates to taking no direct responsibility for the performance of arbitration providers. ICANN justifies that choice with the claim that the absence of a contract provides it with more flexibility to discipline UDRP providers – a claim that not only runs counter to common sense but is undermined by the fact that ICANN has never taken a single disciplinary action against any provider despite well-documented instances of questionable practices.

Effective ICANN accountability requires the existence of clear contractual boundaries and available enforcement mechanisms by which ICANN can intervene against UDRP and URS providers. That is why ICA has long called for UDRP reform to include the development of a defined contractual relationship between ICANN and UDRP and URS providers. Likewise, in 2010 the BC advised ICANN that it should implement "a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities". And in 2013 the BC strongly questioned a self-serving Staff report, issued without advance notice or community consultation, that took a strong position against placing UDRP providers under contract, incomprehensively asserting that ICANN had determined that "contracts would be a cumbersome tool to assert to reach the same outcome that exists today". In response, the BC reminded ICANN that it had recently been told, in the context of a regional UDRP provider's accreditation, that, "[T]he BC continues to urge the ICANN Board to instruct ICANN staff to expeditiously develop improved standards for the approval of UDRP providers, as well as uniform and enforceable standards governing the administration of UDRP cases by providers."

So far as URS providers go, ICANN retreated from its initial commitment to contractual relationships – a position adopted under strong community pressure – and instead entered into a simple two-page Memorandum of Understanding that provides little in the way of guidance and enforcement authority.

The absence of any meaningful contractual relationship between ICANN and domain dispute arbitration providers is clear evidence that it has failed to embrace a culture of accountability and to take meaningful responsibility for the consequences of its accreditation of such providers. That needs to change.

The Role of Congress

As previously noted, Congress has a legitimate and important role to play through oversight and evaluation of the ongoing state of ICANN, and of the community-based process to develop transition stewardship and enhanced accountability processes. It has a responsibility to judiciously exercise its authority on behalf of US stakeholders, but it can also assist global stakeholders by supporting the multistakeholder community's accountability recommendations and the subsequent embrace and adoption of those measures by ICANN's Board and management.

Congress should not reflexively oppose the transition, but it should closely review the final package delivered for NTIA review as well as ensure that key accountability measures recommended by the community, including any Bylaws changes and changes in the selection or composition of the ICANN Board, are fully implemented prior to the transition's occurrence.

When NTIA announced the transition in March 2014 it set the following principles for an acceptable transition and accountability package:

> NTIA has communicated to ICANN that the transition proposal must have broad community support and address the following four principles:
>
> - Support and enhance the multistakeholder model;
> - Maintain the security, stability, and resiliency of the Internet DNS;
> - Meet the needs and expectation of the global customers and partners of the IANA services; and,
> - Maintain the openness of the Internet.
>
> Consistent with the clear policy expressed in bipartisan resolutions of the U.S. Senate and House of Representatives (S.Con.Res.50 and H.Con.Res.127), which

> affirmed the United States support for the multistakeholder model of Internet governance, NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.

Those principles are good ones, but it is quite appropriate for Congress to consider whether they are sufficient, as well as what evidence it should require for judging their satisfaction. In that regard, and consistent with NTIA's declaration that it "will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution", Congress should consider whether the post-transition ICANN will be an operating model that is generally acceptable to the world's governments for the long-term, or whether we can expect renewed agitation in the post-transition near term to convert ICANN to a multilateral organization in which governments take the lead and the private sector and civil society are largely observers.

In a speech delivered to The Media Institute on September 29, 2014 Assistant Secretary Strickling stated:

> From the inception of ICANN in 1998, the United States government envisioned that its role in the IANA functions would be temporary. Over the years, many stakeholders took comfort in the fact that the United States provided some level of stewardship over ICANN. **However, many countries were irritated by our role because they believed that this relationship allowed the U.S. government to control the Internet.**
>
> We announced last March our goal to complete the transition of our role over certain aspects of the Internet's domain name system to the global Internet multistakeholder community. We did this to ensure that the multistakeholder model for DNS coordination continues. (Emphasis added)

Although the ICANN Bylaws currently declare that it is a private non-profit corporation headquartered in Los Angeles, the topic of continued U.S. jurisdiction has been one of substantial controversy with the working groups planning the transition and accountability. There will certainly be plenty to be irritated about post-transition for those parties who want to find a reason. ICANN will remain a Californian public benefits corporation subject to US and California laws, and that includes the OFAC regulations that bar it from transacting business with any terrorist or criminal organization. Even Germany, which restated its support for the MSM in a March 26, 2015 position paper, wants to make the Internet less "U.S. dependent", and wants ICANN to be bound by national laws on such subjects as data privacy and trademarks,.

And the transition will not change the fact that the actual root zone management (RZM) functions will continue to be conducted not by ICANN but by a private sector actor. As stated in a March 14, 2014 NTIA paper, "IANA Functions and Related Root Zone Management Transition Questions and Answers":

Q. What are the related root zone management functions?

A. The related root zone management functions are the management of the root zone "zone signing key" (ZSK), as well as implementation of changes to and distribution of the DNS authoritative root zone file, which is the authoritative registry containing the lists of names and addresses for all top level domains, effectively the Internet's phone book...

Q. Who performs the related root zone management functions?

A. VeriSign performs the related root zone management functions pursuant to a cooperative agreement with NTIA.

Q. What impact does this announcement have on the cooperative agreement with Verisign?

A. Aspects of the IANA functions contract are inextricably intertwined with the VeriSign cooperative agreement (i.e., authoritative root zone file management), which would require that NTIA coordinate a related and parallel transition in these responsibilities.

ICANN has operated as a California non-profit since it was spun out of the Commerce Department in 1999. We need assurance that its post-transition persona will last for the long-term. That is important not only to prevent any attempt at post-transition multilateral governmental takeover, but because the accountability mechanisms being designed by the community are being fashioned to work within the framework of California law. If the operational jurisdiction is changed post-transition the accountability mechanisms may not work as well – and some perhaps not at all.

How can such assurances of governmental support be obtained in advance of the transition? That is a tough question. But at a minimum it may be reasonable to request that the GAC issue a consensus statement of support for the final transition and accountability package to signal that it has strong support among the governments that participate directly within ICANN in an advisory capacity.

Conclusion

ICA appreciates this opportunity to inform the Judiciary Committee of our views on the stewardship and accountability process and related issues that illustrate the need for enhanced accountability measures. As we have stated, while those measures are

necessary they are insufficient as they are mainly correctives to the absence of a dedicated culture of accountability that derives its legitimacy from the multistakeholder community, and a willingness to embrace responsibility for foreseeable problems generated by ICANN policy and implementation decisions.

Congress has an important oversight role to play in monitoring the proposed transition of the IANA functions as well as ICANN's overall performance. Today's hearing is an expression of that role, and ICA stands ready to assist you in furthering it in whatever way this Committee finds helpful.

I would be happy to answer questions from Committee members.

Mr. ISSA. Thank you, Mr. Corwin.
Mr. Zuck?

TESTIMONY OF JONATHAN ZUCK, PRESIDENT, ACT|THE APP ASSOCIATION

Mr. ZUCK. Thank you, Chairman Issa, Ranking Member Nadler, and Members of the Subcommittee. Thanks for the opportunity to do clean-up here today, and I guess we will see, as the television series in the late '70's said, if eight is, in fact, enough.

ACT|The App Association represents over 5,000 app developers and information technology firms, with businesses in every congressional district, and part of a really booming industry. When we talk about the domain name system, as we are today, it is important to remember that these small businesses, like the ones I represent, are actually the majority of the domain name holders. Small businesses around the world have used the World Wide Web to create presence for themselves and distribution for their products that simply wasn't available in the physical world, on par with our larger brethren. This ability and integrity of the DNS is more important to small businesses than to any other community.

The basic question we have in front of us today is whether or not ICANN is ready to be independent of the United States Government. The simple answer that one can glean from the testimony you have already heard is no, but with the caveat that it can be with the enhanced accountability sought by the multi-stakeholder community with the proposed measures that were released on May 4th.

If you will allow me to paraphrase Winston Churchill, ICANN is the worst model for Internet governance, except for all the others. My personal journey here has been somewhat circuitous. I am a former software developer that went on to represent software developers, and for a number of years small businesses I represent were indifferent to the inner workings of ICANN because the DNS seemed to be working, until some articles came out in 2005 suggesting that governments wanted the function of ICANN to be intergovernmental instead of multi-stakeholder, as it has been. Suddenly, all of these small businesses were wearing "ICANN Rocks" t-shirts and asking me to get involved directly in the ICANN process.

So over the past 10 years, in some 30 meetings in windowless conference rooms around the world, we have worked together with the community and the NTIA to make ICANN a stronger, better managed, and more accountable organization. I am pleased to say we have achieved some success in a number of areas, and my constant refrain on performance metrics has led me to have the nickname "Metrics Man" inside of the community, and it is a nickname I wear with pride.

Of course, as you have already heard today, there is still a lot to be done to create the ICANN the multi-stakeholder community deserves. As a member of the intellectual property constituency within ICANN, I stand with my colleagues in frustration with ICANN's handling of the new gTLD program and the needs of rights holders in particular. .SUCKS is just one example and a

frightening precedent for what lies ahead for those trying to protect their intellectual property.

ICANN needs to find better mechanisms to protect IP while increasing consumer choice and competition in the domain name space. And they have to get serious about enforcing their contracts. If digital archery is anything to go by, ICANN should certainly leave the tech to the experts and keep themselves in a management role.

Finally, ICANN needs to find better ways to involve small businesses and to resolve their issues when they arise. The system is currently overwhelming and over-costly for companies that I represent to be meaningfully involved in the multi-stakeholder process. It is for these reasons that I view the pending IANA functions contract expiration as an opportunity on which to capitalize rather than something frightening to be avoided. What has been missing from all the reform efforts inside ICANN has been the teeth to make these reforms binding. It is certainly the case that NTIA provided an essential guidance and protection of ICANN throughout the years, but the true utility of this unique relationship reached its pinnacle with the affirmation of commitments in 2009. The announcement by NTIA of their plans to sunset the IANA functions contract has spurred a discussion of real ICANN accountability, the likes of which the organization has never seen.

As others have mentioned, thousands of people hours in the community have set forth a proposed accountability framework that promises binding accountability to the multi-stakeholder community. This new ICANN, ICANN 3.0, if you will, will be stronger, answer to the community it serves, and create an environment of constructive reform that will allow it to develop and grow as the Internet adds its next billion users.

That said, it is true that we have just one chance to get it right, and I believe that is where Congress can play a critical role. As Chairman Goodlatte wrote in his recent op-ed, it is certainly Congress' role to ensure that the proposed framework is indeed the work of the bottom-up multi-stakeholder process, the proposed framework passes various stress tests or worst-case scenarios, and the proposed framework, if accepted, is sufficiently implemented prior to the IANA functions contract expiration.

Real accountability, when you boil it down, is about power, and the power needs to be in the hands of the community before it is any less in the hands of the U.S. Government.

So once again, I thank you for the opportunity to speak today, and I hope you will join me in making the most of this historic opportunity. I am happy to take any questions.

[The prepared statement of Mr. Zuck follows:]

Testimony

of
Jonathan Zuck
President
ACT | The App Association

before the
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

on
Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation

May 13, 2015
2138 Rayburn House Office Building

ACT | The App Association

Summary of Statement by Jonathan Zuck
President, ACT | The App Association

Hearing on *Stakeholder Perspectives on ICANN: The .SUCKS domain and essential steps to guarantee trust and accountability in the Internet's Operation*

Before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

May 13, 2015

- ICANN has made many missteps and requires greater accountability.
    - ICANN has failed to be transparent in a number of instances
    - ICANN has failed the IP community in a number of instances including the mishandling of .SUCKS
    - ICANN has failed the small business community by providing insufficient means of participation and redress
- The IANA Functions transition is an opportunity to get accountability right. The community has worked hard over the past year to construct a proposal worthy of real consideration.
    - The proposed framework has real teeth
    - The proposed framework has the support of the community
    - The proposed framework is what is best for small businesses in the US
- Congressional oversight is required in three important areas:
    - Ensuring the proposed framework is indeed the work of the bottom-up multi-stakeholder consensus process
    - Ensuring the proposed framework passes various "stress tests"
    - Ensuring the proposed framework, if accepted, is sufficiently implemented to be permanent

My name is Jonathan Zuck and I serve as the President of ACT | The App Association. As a former software developer, it has been an honor to represent the interests of software companies for the past 17 years.

ACT | The App Association represents over 5,000 small and medium sized app companies and information technology firms. Unlike many companies within the ICANN ecosystem, whose business is predominantly the domain name system (DNS), small companies are the primary customers of that system. It's easy to forget but the majority of domain names are held by small organizations; it is from that perspective that I provide this testimony.

When our members asked us to become involved in ICANN in 2005, it was to help reform an organization that was in danger of capture. For the first half of ICANN's life there was very little interest in ICANN from the small business community, because the system appeared to be working. However, when media reports came out that some in the European Union sought greater governmental control over internet naming, our members made it clear that it was time for us to engage. The reality of this problem struck home when the former Prime Minister of Sweden, Carl Bildt wrote:

> *The European Union...in its wavering...has recently come down with a position that has brought it enthusiastic applause from Tehran, Beijing and Havana... It would be profoundly dangerous to now set up an international mechanism, controlled by governments, to take over the running of the Internet. Not only would this play into the hands of regimes bent on limiting the freedom that the Internet can bring, it also risks stifling innovation and ultimately endangering the security of the system.*[1]

It was clear that it was time to act. We joined in as part of the multi-stakeholder effort at ICANN generally, and within the Intellectual Property Constituency in particular, to expand opportunities for public participation, encourage operational excellence and develop metric-driven transparency to better facilitate accountability. Notably, I have so vigorously sounded the

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[1] "Keep the Internet Free," Carl Bildt, New York Times, October 11, 2005.

need for metric-driven accountability that I have been dubbed "Metrics Man" among ICANN stakeholders, and the resultant board resolution on metrics was named after me.

Ten years later, we are beginning to see performance metrics throughout ICANN including workgroups, reviews, strategic planning and contract compliance. However, more remains to be done. Efforts to acheive real accountability have largely floundered over the past decade but we have finally begun to make progress because of the work inspired by the pending IANA functions contract expiration. For the past year, ACT has been actively involved in developing the new accountability framework for ICANN that was submitted for public comment on May 4th.

In my testimony, I would like to make 3 main points:

1. ICANN has made many missteps and *must* adopt real accountability reforms, but still represents the best model for governance of the DNS.

2. The IANA Functions transition is an *opportunity* to get accountability right. The community has worked hard over the past year to construct a proposal worthy of real consideration.

3. Congressional oversight is required in 3 important areas:
    a. Ensuring the proposed framework is indeed the work of the bottom up multi-stakeholder consensus process.
    b. Ensuring the proposed framework passes various "stress tests."
    c. Ensuring the proposed framework, if accepted, is sufficiently implemented to be permanent.

ICANN Missteps

There have been a number of missteps on the part of ICANN that help to underscore the need for real accountability. Examples include:

1. *A board resolution was passed in secret which allowed ICANN's CEO to pursue a partnership with the government of Brazil to create yet another framework for internet governance*[2]
2. *The board's passivity regarding the recommendations of the Security and Stability Advisory Committee's (SSAC) recommendations on domain collisions*[3] *and dotless domains*[4]
3. *The board's ill-advised decision on singular/plural versions of the same TLDs*[5]
4. *The board's decision to accept a new gTLD applicant with questionable financials (Vox Populi)*[6]
5. *The lack of transparency surrounding the recent security breach* [7]

Each of these represents instances in which greater accountability to the community would have led to better outcomes.

Perhaps the mistakes that are felt by the widest audience are those related to intellectual property (IP), an area critical to ACT members. For years there have been difficulties with WHOIS data accuracy, contract compliance, and a disproportionate need for defensive registration by trademark (TM) owners.

The new gTLD program has exacerbated this phenomenon. Some of ICANN's activities have put IP at risk – demonstrating, in the process, ICANN's limited technical competence. In particular, ICANN's rollout of new TLDs has threatened trademarks and forced trademark holders to spend unnecessary time and money defending their marks. ICANN initially tried to address this issue internally and unilaterally, creating a complicated system

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[2] "ICANN Internet Governance Initiatives Sanctioned by Secret September Board Resolution," November 17, 2013
http://www.internetcommerce.org/Secret_ICANN/

[3] "SAC062 - SSAC Advisory Concerning the Mitigation of Name Collision Risk"
http://research.google.com/pubs/pub42959.html

[4] SSAC Report on Dotless Domains
https://www.icann.org/resources/pages/sac053-dotless-domains-2012-08-24-en

[5] "Plural gTLDs give ICANN huge credibility risk," Kevin Murphy, Domain Incite, April 10, 2013
http://domainincite.com/12648-plural-gtlds-give-icann-huge-credibility-risk

[6] "That mystery $1 million .sucks fee explained, and it's probably not what you thought, " Kevin Murphy, Domain Incite, April 1, 2015
http://www.brandregistrygroup.org/that-mystery-1-million-sucks-fee-explained-and-its-probably-not-what-you-thought/

[7] "ICANN e-mail accounts, zone database breached in spearphishing attack," Dan Goodin, Ars Technica, Dec 17, 2014
http://arstechnica.com/security/2014/12/icann-e-mail-accounts-zone-database-breached-in-spearphishing-attack/

that proved unworkable. When its internal attempt at a technical solution failed, the community responded by creating the Trademark Clearinghouse (TMCH).

While the TMCH is designed to handle certain functions on ICANN's behalf, ICANN has done a poor job of raising awareness of the TMCH and promoting its fundamental mechanisms. Instead, ICANN has been declaring victory on trademark issues and ignoring the realities of a vastly under populated clearinghouse of marks. ICANN's failure to adequately communicate the availability and value of the new mechanisms has left the general public largely unaware of these tools.

The recent introduction of the .sucks gTLD demonstrated that even though tools may be in place for trademark owners to protect their brands, these tools can be abused by a registry seeking to maximize "rents" from TM holders.[8] When second-level registrations for a particular domain are owned primarily by TM holders who do not wish to use the domain, there's a flaw in the system. I hope the upcoming review of the new gTLD program, along with the review specifically of the rights protection mechanisms, will help to reveal flaws in the system that facilitate rent seeking more than consumer choice and reflect avarice rather than consumer demand.

ICANN Accountability

ICANN is an organization in a state of almost perpetual self-study and reform, constantly commissioning studies, reorganizing the community and proposing changes for public comment. It is worth noting that considerable strides have been made in pursuit of operational transparency, and stakeholders are clearly encouraged by these strides. However, there are still nagging instances of opacity that plague the organization and decisions that defy explanation.

Moreover, improved transparency must be understood through the well worn phrase "necessary but not sufficient;" we must have additional

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[8] "IPC asks ICANN to halt controversial .Sucks domain name roll out," ANDREW ALLEMANN, Domain Name Wire, MARCH 27, 2015
http://domainnamewire.com/2015/03/27/ipc-asks-icann-to-halt-controversial-sucks-domain-name-roll-out/

mechanisms of discipline. All the transparency in the world does not lead to accountability if those mechanisms are not in place. Transparency, metrics and public participation are all simply tools to facilitate accountability. It is true that one cannot have accountability without transparency, but transparency alone does not lead to accountability.

There are many different definitions of "accountability" but stripped to its essentials, accountability is about power. The only real question is whether governed entities, in this case the "ICANN community," have the ability to hold to account (i.e. discipline) those that have been placed in a position of power or not. In short, the answer is no but the status quo is a little more complex.

There are currently three accountability structures in place to hold ICANN to account. The first, and perhaps least understood, is that worldwide participation in the naming system, managed by ICANN, is voluntary and subject to modification (as the Chinese have done). If the global community truly became dissatisfied with ICANN, a new root could be developed that everyone referenced instead of the one managed by ICANN.

This reality is both powerful and cautionary. It's powerful in the fact that ultimately ICANN needs to continue to generally please the global community in order to stay relevant but cautionary in that it reminds us that the internet is already "international" in the most fundamental aspects and everything we propose must hold up to the scrutiny of the global community.

Of course, as a practical matter, the threshold necessary to bring about wholesale change to the DNS, with all that is at stake economically and politically, is far too high to be of much use when trying to change the rights protection mechanisms in the new gTLD program. Instead it stands as the ultimate mechanism of accountability that no one imagines will ever come to fruition but reminds us we're all in this together.

The second structure of accountability that is much more approachable is the framework through which the board of ICANN is constituted. At its core, it is made up of members of the community, elected through a

combination of various constituencies of the community and ultimately subject to changes sought by the community. On its face, this would seem to be a very powerful tool for the community to use to hold the ICANN board and staff to account but again, in practice, it is a difficult tool to wield. The timeframes alone render this mechanism impractical. The amount of concerted, collective action, over a number of years, required to substantially change the makeup of the board is prohibitive and even then provide insufficient access to redress by individual parties. Nine times out of 10, the community makeup of the board is sufficient to ensure appropriate decisions. It is also true, as has been described to this committee in the past, that the board members owe their ultimate allegiance to the organization that is ICANN, not the various communities from which they sprung.

Finally, there is the relationship with the United States government or, more specifically, the NTIA within the Department of Commerce. The NTIA has, over the lifetime of ICANN, provided guidance and protection of the multi-stakeholder experiment that is ICANN. Through a combination of memoranda of understanding, joint project agreements and ultimately a voluntary agreement called The Affirmation of Commitments, the NTIA has sought to help ICANN mature into a strong independent global organization.

Little by little, the NTIA has stepped back and allowed ICANN to operate independently. In 2009 ICANN signed the Affirmation of Commitments (AoC), representing the last instance of prescriptive advice. The AoC confirmed ICANN's mission, its commitment to the global public interest and the security and stability of the DNS. Finally, the agreement specified a number of "reviews" that should periodically take place including those for Accountability and Transparency (also known as the ATRT review), WHOIS, rights protection mechanisms and an overall review of the new gTLD program that is set to begin this coming fall.

This AoC agreement is a voluntary one, and ICANN could walk away with 120 days notice. However even if ICANN couldn't simply walk away, the existing AoC doesn't have the teeth to require implementation of its recommendations, or the recommendations of the review teams. By the

time of the second ATRT review, only half of the recommendations of the first ATRT review had been implemented. Clearly, there is still something missing in the ICANN accountability framework.

Theoretically, the last tether the NTIA holds over ICANN is the contract for the IANA functions that NTIA maintains the right to terminate. The IANA functions are considered essential to ICANNs credibility as the shepherd of the global DNS and, as such, represent a kind of leverage the NTIA has over ICANN to ensure that it abides by the AoC and other commitments. This leverage has been invaluable in keeping ICANN on course.

That said, the IANA functions contract represents a fairly instrument when it comes to the operational accountability of the ICANN board and staff. It is an abstract and difficult-to-exercise tool in the context of a particular decision and one that the NTIA, given the global nature of the internet, is loathe to use. Consequently, while absolutely essential, the leverage provided by the IANA functions contract is not, and has never been, the real accountability framework that ICANN sorely lacked. Instead it can be more adequately described as a crutch, upon which the global community has relied, to postpone what was certain to be an all-consuming discussion of real accountability.

It is important to remember that all of the grievances that have been aired today describe decisions, indecision, missteps, and malfeasance that *all* occurred with the IANA functions contract firmly in place.

It is for that reason ACT regards the proposed transfer of the IANA functions to ICANN as an *opportunity* to finally get accountability inside ICANN. Absent the proposed transfer, it is highly unlikely the community would have found the determination to develop the comprehensive proposal for ICANN accountability that was released for public comment on May 4th. We believe the propose reforms to ICANN will ensure a long future for the organization, operating not only in the global public interest but in the American public interest as well.

The community has brought this proposal a long way, but there is a powerful role for Congress to ensure the new framework is sufficiently

comprehensive, addresses stress tests, and is implemented prior to any transfer of the IANA functions to ICANN takes place.

ICANN 3.0

To paraphrase Churchill, ICANN is built on the worst model for Internet governance…except for all the alternatives. Over the past 5 months, the Cross Community Working Group (CCWG) on Accountability has developed a comprehensive framework for accountability. At the same time, there was a recognition that the iterative nature of ICANN reform would continue and that no framework would be final. Accordingly, the work was divided into two "work streams," those measures that would need to be in place for the transition to occur and those that would be developed and implemented over time after the IANA functions transfer. The best way to describe the proposals in Work Stream 1 is those measures sufficient for the community to be empowered to bring about the reforms in Work Stream 2. Specifically, the new powers for the community include the ability to:

- Challenge board actions via Independent Review Panels whose decisions can be binding
- Veto Bylaw changes proposed by the ICANN board
- Veto strategic plans and budgets proposed by the ICANN board
- Control over periodic reviews required by the Affirmation of Commitments
- Remove individual ICANN board directors
- Recall the entire ICANN board as a last-resort measure

There are specific measures of interest to ACT, as a representative of small businesses that have to do with access to redress by individual parties.[9] These include issues such as:

[9] "Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) : Input Needed on its Proposed Accountability Enhancements (Work Stream 1)" https://www.icann.org/public-comments/ccwg-accountability-work-stream-1-2015-05-14-en

- Increasing transparency by publishing Board meeting minutes and draft statements online in a timely and searchable way. (Report Section 6)
- Improving the public comment period. (Report Section 9)
- Concerns about the reconsideration process, specifically a binding appeal process. The report notes that ICANN Board should convene to look at the restricting of the Independent Review Process (IRP) and the Reconsideration Process. (Report Section 11)

These mechanisms will allow small businesses to more easily involve themselves in ICANN processes and mechanisms for redress by reducing the cost of participation and improving transparency. Currently, a non-binding review of a decision by ICANN can cost around $1 million dollars, leaving small business out in the cold when it comes to redress. Significant improvement in the reconsideration process must be made if it is to be accessible to small businesses.

A Role for Congress

I am very pleased to be a part of the "briefing team" for this committee because there is a powerful constructive role for Congress in ensuring a successful transition to ICANN 3.0. Chairman Goodlatte laid the groundwork perfectly in an op-ed in February:

> *... permanent improvements to ICANN's accountability and transparency are critical to building public and congressional trust for any proposed transition. Any consideration of such a transition must be done carefully and in close coordination with Congress, rather than in a unilateral way. ... We also encourage ICANN to ensure that whatever results from this process shows that the outcome emanated from a true bottom-up multi-stakeholder process and was neither imposed on nor unduly influenced by ICANN's leaders, staff, or members of its board.*[10]

[10] "Ensuring Trust in Internet Governance", 11-Feb-2015, on CircleID, http://www.circleid.com/posts/20150211_ensuring_trust_in_internet_governance

Following Chairman Goodlatte's lead, I see Congressional oversight playing a critical role in three important ways:

1. Congress should insist that whatever framework is approved by the community is one borne from a bottom-up multi-stakeholder consensus in the ICANN community.
2. Congress should require that any accountability framework is measured against a comprehensive set of worst case scenarios or "stress tests" so that ICANN is in the best possible position to carry out its mission long into the future and resist encroachment by those who would see the DNS controlled by some multilateral structure such as the ITU.
3. Congress should ensure that reform is being implemented before the transition so accountability becomes permanent. At a minimum, core values and fundamental bylaws must be updated before any IANA contract transfer takes place. As Secretary Strickling outlined in his recent letter to the co-chairs of the CCWG on Accountability, "...transition planning should proceed according to whatever schedule the community sets" and that such a schedule should include the time necessary to "implement [the plan] after it is approved."[11]

The app makers I represent use the term "minimum viable product," or MVP, to describe a core set of functionality necessary before a product can go to market. Inherent in that expression is a recognition that time is not infinite and there will always be another version but there is a list of functionality that cannot be sacrificed to schedule. We find ourselves in a similar situation here. The situation is not without some pressure, from a variety of sources, but there is an MVP that must be implemented before NTIA can consider allowing the IANA Functions Contract to expire.

I hope we can make the most of this opportunity to implement real accountability inside ICANN and ensure the future of the multi-stakeholder

[11] "Letter to the CCWG from NTIA on the IANA Stewardship Transition" to co-chairs of the CCWG on Accountability from Secretary Lawrence Strickling, dated May 6, 2015.
http://mm.icann.org/pipermail/accountability-cross-community/attachments/20150506/81fc6ac/LetterInCCWGMay6.0001.pdf

model for internet governance which has served both the American and global public interest so well.

Thank you for the opportunity to appear before the Committee today and I look forward to addressing any questions you may have.

Mr. ISSA. Thank you, and thank you for paraphrasing Churchill. He never actually delineated whether the British parliamentary system or the U.S. republic system and federalism was better, so perhaps we can work that out in ICANN.

Mr. NADLER. The English and Scots are finding out.

Mr. ISSA. English and Scots are finding out says the Ranking Member.

With that, I ask unanimous consent that a rather lengthy letter to John O. Jeffrey from David Hosp be placed in the record, this letter from the offices of Fish and Richardson. It was referred to by the Ranking Member and I am sure will come up in our discussions.

Without objection, so ordered.

[The information referred to follows:]

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VIA EMAIL

May 11, 2015

John O. Jeffrey
General Counsel & Secretary
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Vox Populi Registry Agreement

Dear Mr. Jeffrey,

This firm represents ICANN's contractual partner, Vox Populi Registry ("Vox Populi"). I write regarding your letter to The Honorable Edith Ramirez, the Chairwoman of the Federal Trade Commission ("FTC"), and The Honorable John Knubley, the Deputy Minister of Canada's Office of Consumer Affairs ("OCA"), dated April 9, 2015, which forwarded a complaint letter from the ICANN Intellectual Property Constituency ("ICANN IPC"), and repeated and adopted the ICANN IPC's baseless allegations that Vox Populi has engaged in "illicit" activities, and that Vox Populi's practices are "predatory, exploitive and coercive." Your letter went even further, asking the FTC to investigate whether Vox Populi has engaged in any "illegal" activities. More recently, ICANN's Business Constituency ("ICANN BC") sent letters to Ms. Ramirez and Mr. Knubley, as well as to Akram Atallah, President of ICANN's Global Domains Division, which further republished and expanded upon these allegations.

None of the letters in question identifies any manner in which any law might actually have been broken; instead they merely suggest (without explanation or logic) that Vox Populi's pricing may lead to "cybersquatting" that could damage trademark owners. At the same time, though, the ICANN IPC's letter expressly recognizes that registrations on Vox Populi's .SUCKS registry are subject to ICANN's various trademark dispute resolution processes, which protect trademark owners from cybersquatting. And although the ICANN BC letter to the FTC and the OCA asserts that ICANN "does not wish to limit free speech or prevent criticism of any business," the only coherent expression of any potential concern is that businesses may feel compelled to register their trademarks "to defend [their] reputation from critics or competitors controlling their brand domain in .sucks and using it unfairly to criticize their products or services." To the extent such competitive use or criticism is unfair, trademark owners have a full complement of remedies that they can seek both through ICANN's dispute procedures and the laws of various different nations. As a result, it would seem that ICANN is not actually concerned about cybersquatting or any other illegal activity. Rather, ICANN appears concerned that registrations on the .SUCKS registry will be used to aggregate uncomplimentary commentary about companies and products—the very purpose for the registry that Vox Populi identified in the application it submitted to ICANN, and that ICANN approved.

FISH.
FISH & RICHARDSON

John O. Jeffrey
May 11, 2015

In sending these public letters, and making the false allegations contained therein, ICANN has disseminated defamatory statements about Vox Populi and its business practices aimed at depriving Vox Populi of the benefits of its contract with ICANN. These actions further violate the duty of good faith and fair dealing that is implied in every contract. They also contravene ICANN's own policies and statements of purpose. Finally, in suggesting illegality without any basis whatsoever, your actions (and those of the ICANN IPC and ICANN BC) have given rise to defamation claims against ICANN. Vox Populi hereby demands that ICANN, including any and all of its subdivisions, cease any and all such activity immediately.

As you know, on December 22, 2014, ICANN and Vox Populi entered into a contract under which ICANN voluntarily granted Vox Populi the right to operate the registry for ICANN's .SUCKS top level domain ("TLD") in exchange for financial compensation. The benefits of having a .SUCKS TLD have been recognized by consumer advocates for more than a decade. As early as 2000, well known consumer rights champions such as Ralph Nader and James Love petitioned ICANN to create a .SUCKS TLD, arguing that "[t]his TLD will be used to facilitate criticism of a firm or organization, such as aol.sucks, wipo.sucks, or even greenpeace.sucks. ... The domain would also be available for other uses, such as work.sucks, life.sucks, or television.sucks." The concept of a TLD that facilitates and aggregates legitimate complaints about companies and organizations is entirely consistent with the policies and stated goals of ICANN and the Internet community. As Mr. Nader noted fifteen years ago, it has always been understood that "the .sucks TLD will be offensive to some people," but it has nonetheless been recognized that the creation of the .SUCKS TLD will be beneficial because it will promote "free speech rights of individuals and small organizations."

And, of course, ICANN was fully aware of the goals and purpose of the .SUCKS registry when it entered into its contractual relationship with Vox Populi. Indeed, Vox Populi stated the purpose of the .SUCKS registry expressly in its registry application:

> The term "sucks" resonates around the globe, its intention is clear and understood. But it is now more than an epithet; it is a call to action. Whether registered by an activist or an executive, this new landscape will be devoted to encouraging an accelerated and legitimate dialog that can lead to improved customer satisfaction and market share.
>
> * * *
>
> There are few, if any, places for raw consumer commentary and corporate interests to cohere. The .SUCKS name space will enable the benefits of a dialogue without dampening its usual initial vehemence. With its specific focus, it will make it even easier for consumers to find, suggest, cajole, complain and engage on specific products, services and companies.

Vox Populi recognized the tensions that a registry specifically targeted to channeling consumer complaints might create. As a consequence, it was careful to include in its application provisions to address any concerns about abuse by registrants. As required by ICANN's application procedures, Vox Populi agreed to comply with ICANN's Uniform Dispute

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John O. Jeffrey
May 11, 2015

Resolution Procedures ("UDRP"), Uniform Rapid Suspension System ("URS"), trademark post-delegation dispute resolution procedure ("Trademark PDDRP"), and Sunrise Dispute Resolution System, each of which has been designed and implemented by ICANN to address those circumstances where a trademark owner believes that a registrant or a registration has infringed its rights or used a domain improperly. As a result, trademark owners are protected from abuse on the .SUCKS registry to the exact same degree that they are on any other registry.

Beyond that, Vox Populi voluntarily adopted policies to immediately address any registrant that uses a registration to engage in bullying. It implemented policies banning pornography on the .SUCKS registry, and it specifically adopted a "no parking policy" to prevent registrants from registering domains without making active use of the site. In all respects, Vox Populi has been scrupulous in implementing policies that are designed to advance the very goals that have been recognized as beneficial for the Internet community for more than a decade.

ICANN reviewed Vox Populi's application and approved it. ICANN also reviewed Vox Populi's launch plan and sunrise policies, approved them as well, and provided a launch schedule on which Vox Populi has relied.

In addition, ICANN's Governmental Advisory Committee (GAC), which includes as a member a senior policy advisor in the US Department of Commerce—the governmental agency that has overseen ICANN since its inception—specifically reviewed and commented on Vox Populi's registry application. The GAC's only comment was that ICANN should require the other applicants for the .SUCKS registry to include the non-bullying clause that Vox Populi already had in its application. In essence, the GAC recognized that Vox Populi's application went above and beyond what was appropriate and responsible.

Based on the extensive review of Vox Populi's application, ICANN entered into a contract with the company to manage the .SUCKS registry. In entering into this agreement, Vox Populi understood the value of the .SUCKS registry—both the value to the Internet community as an outlet for open discussion, and the value to Vox Populi as a business. Multiple parties submitted applications to obtain the .SUCKS registry, an auction was conducted among those qualified applicants, and Vox Populi's successful bid was based on its appraisal of that value and the assumption that ICANN would not interfere in its ability to manage the registry in accordance with its contractual obligations. The registry agreement itself contains specific financial obligations that Vox Populi is required to meet. And, as with all new TLD registries, ICANN made a specific, considered decision not to regulate the price at which domain names would be sold. In a recent response letter to the President of the ICANN IPC, Akram Atallah, the President of ICANN's Global Domains Division, noted that the imposition of price restrictions on new TLDs like the .SUCKS registry would be detrimental to the Internet.

> As you will recall, there was extensive discussion of whether price caps or controls should be included in new gTLD registry agreements when the new gTLD program was

formulated. In furtherance of such discussions, ICANN engaged an expert economic consultant to study the issue. The expert concluded that price caps or ceilings were not necessary or desirable, that the imposition of price caps might inhibit the development and marketplace acceptance of new gTLDs, and that trademark holders' rights could be protected through alternate rights protection mechanisms, such as the Uniform Rapid Suspension System (URS), the Uniform Domain Name Dispute Resolution Policy (UDRP), or trademark post-delegation dispute resolution procedure (Trademark PDDRP) you reference in your letter. Both before and after the study was released, this issue was thoroughly discussed and debated by members of the global multistakeholder community, and ultimately the determination was made not to impose price caps or price controls in the new gTLD registry agreements.

Consistent with both its contractual rights, and with the policy conclusions outlined in the study conducted by ICANN's own economic consultant, Vox Populi has priced the domains on the .SUCKS registry at levels that it believes are consistent with market value. Specifically, during the sunrise period, Vox Populi charges registrars $1999 for each domain registered on the .SUCKS registry, with a suggested retail price of $2499. Registrars are, of course, free to set the ultimate price to registrants as they see fit. Currently in the market, there are registrars selling domains for as low as $2024 and as high as $3977.99. Once the sunrise period has passed, Vox Populi will wholesale most .SUCKS domains to registrars at $199, with a suggested retail price of $249. Again, registrars will decide the retail price as they see fit. As with virtually all new TLD registries, these prices are set above the costs incurred by Vox Populi in operating the registry.

The prices for a .SUCKS registration are higher than those set by many other registries (though not all), particularly with respect to the sunrise period. In its registry application, Vox Populi recognized that a trademark owner's .SUCKS domain would be of significant value to a trademark owner to allow consumers to voice their concerns and engage in constructive dialogue with dissatisfied consumers. The original proposal for the formation of a .SUCKS registry put forward by consumer advocates would have banned companies from owning their own trademarks on the registry. In accordance with ICANN's Rights Protection Mechanism, however, Vox Populi has permitted trademark owners to purchase their trademarks as domains, and has granted those trademark owners the exclusive right to purchase their trademarks as domains during the mandatory sunrise period. In its application, Vox Populi noted that, "[b]y building an easy-to-locate, 'central town square' available 24 hours a day, 7 days a week, 365 days a year, the .SUCKS registry will become a recognized destination not just for [] one company, but for all. It will give assurances to customers that their voice can be heard. And it can become an essential part of every company's customer relationship management program." In this way, the .SUCKS registry provides significant value to those trademark owners who wish to avail themselves of the opportunity to register their trademark as a domain. In accordance with the decisions that ICANN itself made, Vox Populi may set the price for these registrations to capture such value and at a level that the market will bear. Regardless of ICANN's

inflammatory characterizations of Vox Populi's pricing, these prices, and the manner in which they were set, in no way violate Vox Populi's contract with ICANN or any laws.

Notwithstanding the fact that Vox Populi has operated in every respect in accordance with the letter, spirit, and intent of its agreement with ICANN, the ICANN IPC sent an inflammatory letter filled with spurious allegations to the president of ICANN's Global Domains Division, and you endorsed and forwarded that letter to the FTC. More recently, ICANN's BC sent similar letters to the Global Domains Division, as well at the FTC and the OPC. These letters contain too many factual misrepresentations to catalogue, but in the end they accuse Vox Populi of operating a "predatory scheme" that somehow makes it more likely that trademark owners' names will be registered by "cybersquatters." Of course, the argument makes no sense, because to the extent that a trademark owner's brand is registered as a domain by a cybersquatter, that trademark owner can avail itself of the remedies Vox Populi has provided through ICANN's own UDRP, URS or Trademark TDDRP procedures. As a result, it seems clear that ICANN is not concerned with trademark infringement or cybersquatting (for which everyone agrees there exist ready remedies), but is actually concerned that the .SUCKS registry may be used for the very purpose ICANN already approved—namely (as outlined in Vox Populi's registry application), "to create a new address on the web that will give voice to consumers," to provide a forum "for raw consumer commentary," and to "make it even easier for consumers to find, suggest, cajole, complain and engage on specific products, services and companies."

As Vox Populi's contractual partner and the regulatory entity that approved of the stated purposes of the .SUCKS registry, upon receipt of the ICANN IPC complaint letter, ICANN's appropriate response should have been to respond to the ICANN IPC and ask for some specific basis for the complaints. At the very least, it would have been appropriate to forward the complaint letter to Vox Populi to give the company the opportunity to respond <u>before</u> taking any action based on the allegations. Unfortunately, ICANN took neither of these reasonable actions. Instead, ICANN forwarded the defamatory allegations to the FTC and the OCA, in the process endorsing the allegations and further asserting that Vox Populi has engaged in "illicit," "illegal" activity that has been "predatory, exploitive and coercive." Your letter identifies no law that has been broken, no regulation that has been transgressed, and no contractual provision that has been breached. Rather, it makes broad, sweeping allegations without any factual support, and republishes the falsehoods of the ICANN IPC's initial complaint letter. The ICANN BC letters cite statutory provisions, but offer no explanations as to how Vox Populi's actions in any way transgress those provisions. And while the ICANN BC suggests that Vox Populi has violated its agreement with ICANN, it sites to no contractual obligation or provision that it alleges has been violated.

As I am sure you are aware, every contractual relationship carries with it an implied obligation of good faith and fair dealing. *Digerati Holdings, LLC v. Young Money Entm't, LLC*, 194 Cal. App. 4th 873, 885, 123 Cal. Rptr. 3d 736, 745 (2011) ("Every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do

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anything that would deprive another party of the benefits of the contract."). In this instance, notwithstanding the fact that Vox Populi has fulfilled every aspect of its obligations, and operated fully within the expectations of the parties, ICANN has chosen to take action to harm Vox Populi's ability to operate within the registry agreement and has breached its obligation to conduct itself in good faith. In addition, ICANN's actions are in contravention of its stated core values and policies. For example, in Article 3 of Vox Populi's registry agreement, ICANN covenanted that, "[c]onsistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner." It is hard to consider ICANN in compliance with this covenant when one of its internal constituencies writes a complaint letter to one of the organization's divisions about Vox Populi, and an officer in another section of the organization forwards that letter asking for an investigation into "illegal" activity without even seeking a response from Vox Populi first. Finally, ICANN's actions constitute defamation and trade libel that are fully actionable outside of the arbitration provisions of the registry agreement. *Goldline, LLC v. Regal Assets, LLC*, 2015 WL 1809301, at *5 (C.D. Cal. Apr. 21, 2015) (Commercial disparagement or defamation specifically involves injury to the reputation of a business rather than disparagement of quality of goods or services.). Indeed, these concerns are heightened by the fact that the ICANN IPC is made up, in part, of owners of other registries that will be competing with the .SUCKS registry.

We hereby demand that ICANN refrain from taking any further action in the future to impede Vox Populi's ability to operate the new TLD .SUCKS registry in accordance with its contractual rights and obligations. To the extent that ICANN, the ICANN IPC or any other ICANN constituencies engage in any further wrongful activities designed to injure Vox Populi, or prevent the operation of the registry, the company will take any and all actions necessary to protect its rights.

To be clear, Vox Populi has no interest in pursuing claims at this time. We believe that the FTC and the OCA will recognize quickly that there are simply no factual allegations that warrant any investigation and that ICANN has identified no laws or regulations under the FTC's or the OCA's purview that have been violated in any way. As a result, it is our hope that your letter has merely resulted in some passing, unfortunate publicity. However, if ICANN or any of its constituent bodies (or any directly responsible member thereof) engages in any further wrongful activity that prevents the company from fulfilling its contractual obligations and operating the .SUCKS registry as both ICANN and Vox Populi envisioned, the company will have no choice but to pursue any and all remedies available to it.

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John O. Jeffrey
May 11, 2015

This letter is written reserving all rights, and does not constitute a waiver of any claims for past actions taken by ICANN or any committee or division thereof.

Sincerely,

R. David Hosp

Cc: Mr. Akram Atallah, President, Global Domains Divisions, ICANN
Mr. Cherine Chalaby, Chair, Board New gTLD Program Committee, ICANN
Mr. Fadi Chehadé, President and Chief Executive Officer, ICANN
Mr. Steve Crocker, Chair, Board of Directors, ICANN
Mr. Allen Grogan, Chief Contract Compliance Officer, ICANN
The Honorable Edith Ramirez, Chairwoman, United States Federal Trade Commission
The Honorable Pamela Miller, Representative for Canada, Government Advisory Committee, ICANN
The Honorable Suzanne Radell, Representative for United States of America, Government Advisory Committee, ICANN
The Honorable John Knubley, Deputy Minister, Canada's Office of Consumer Affairs
The Honorable Thomas Schneider, Chair, Government Advisory Committee, ICANN
The Honorable Lawrence Stickling, Assistance Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration (NTIA)

Mr. ISSA. I will now recognize myself, and I will start with a simple question for all eight panelists. The question is simple; hopefully the answer will be yes or no.

Do we need more time? Do we need to exercise the extension in order to get it right in the transition?

Ms. STARK. So, what I would say is it is not about focusing on a specific date, Chairman. It is what you said: We have to get it right. The stakes are very, very high. Rather than trying to put an artificial timeline to this, I think what is important is to focus on the work that is being done and the progress that is being made.

Mr. ISSA. I will come back to you on this, I promise. But briefly, do we need more time than the short time remaining on the existing transition?

Ms. STARK. Certainly for public comment. INTA has actually formally requested an extension of time on the comment periods for the accountability——

Mr. ISSA. To each of you, do we need more time?

Mr. MISENER. Yes.

Mr. HORTON. Yes, although that is not the fundamental problem.

Mr. METALITZ. Yes, we do.

Mr. WOODCOCK. For protocols and numbers, absolutely not. We have already been waiting for 4 months. For names, absolutely, yes. They need the time to get it right.

Mr. DELBIANCO. Yes, we need more time, as the chart indicates. And a piecemeal approach, as Mr. Woodcock has discussed, leaves a very small piece of the meal for the naming community.

Mr. ISSA. Mr. Corwin?

Mr. CORWIN. Chairman, absolutely, we need more time, and in particular I would single out that the proposal put out by the working group on the naming functions, they need to schedule a second comment period. They put out an incomplete proposal for only 28 days comment, and they can't send it on to the next step until they give us a full proposal.

Mr. ISSA. Mr. Zuck, clean up. What would Churchill say?

Mr. ZUCK. Churchill would say that of course we need more time, but not indefinitely. I mean, I think something along the lines of 6 months would be enough to really get the proposal locked down and get the public comment and feedback and get something implemented.

Mr. ISSA. So paraphrasing for all of you, you do support a multistakeholder transition as long as all the prerequisites are met, it is a bottom-up approach, and the transition is one that we can live with for the long run. Good.

Ms. Stark, I am going to go back to you. In light of, if you will, .SUCKS, .AMAZON, perhaps the drug explanations that were so articulately said, do we need and how do we get, sort of point by point, how do we get to the kind of consistency and enforcement that is necessary to protect trademark holders, copyright holders, and obviously the unlawful acts on the Internet that are prohibited?

Ms. STARK. So, I think that the answer—thank you very much for that question, because I think it gets really to the heart of the matter. I think the real answer is that ICANN needs to actually enforce its existing contracts and policies. In a lot of these regards,

we are not asking for something new or more. We had a multi-stakeholder process from the bottom up that developed the rights protection mechanisms, that developed the WHOIS policies and other things that exist in the contracts, but we are not seeing proper resources devoted to compliance and enforcement.

Mr. ISSA. Do you think there need to be management changes or structural changes in the management to get that done? In other words, they used to do something, they are doing it less well rather than better. Do you see that as a management failure?

Ms. STARK. You know, I don't feel that I am qualified to speak about their management.

Mr. ISSA. You don't need to name names. [Laughter.]

Ms. STARK. But what I do think is that it is very important for this model to work, that all relevant interests are represented and listened to, and that that input is actually analyzed in a meaningful way and then incorporated into policies and procedures.

Mr. ISSA. Now I am going to ask one more question. It will probably get several comments.

Whether it is .SUCKS, or if you were going to have a German version of it, apparently it would be .SAUGT, I have no idea what it would be in Italian, in Chinese, in all the other possible languages. What I do know is there are 1,025,000 recognized names in the English language, and if we assume for a moment that we are going to promote and allow a proliferation of dot-somethings simply to gain more money, do you believe that inherently the stakeholders—and I will leave those who sell names out of the stakeholder business—the stakeholders, the actual users, the people who want perhaps one name for each function, perhaps only one name, period, are well served by trying to use every possible name in 209-plus languages?

If I see no answer, I will assume that you all think it is really a bad idea to simply proliferate names that end up with people having to buy thousands of them.

Mr. DELBIANCO. Thank you, Chairman Issa. The notion of more names comes about because we find ourselves 10 or 11 years ago with 20 generic top-level domains and none of them in a script other than the Latin script. In other words, nothing in Chinese or Korean or Japanese or Arabic. We hadn't built the Internet out.

So what the community did is allowed people to propose names. That is why we ended up with thousands of names proposed. There were no rules or structure about knowing that we would have one in the complaint category and one in the car category. If the community were to move in that direction for the next round, we would need several years probably of policy to come up with the structure of how many would we have in each category.

There are plenty of conversations along the lines of what you suggested, the idea of categories as opposed to wide-open season, like we have had in this round. But it would take the community to develop that.

Mr. ISSA. Okay. Quickly, because my time has expired.

Mr. METALITZ. Yes, I would agree. What you have described is how ICANN approached this most recent round. And while the jury is still out because they are only halfway through the round, I think we are going to find that the public has not been served by

letting anybody who wants to get any domain name, top-level domain that they wish without any criteria and without ICANN really making any decisions, letting them do that.

Mr. WOODCOCK. There are technical security reasons for allowing a brand TLD, allowing corporations to register their own top-level domain in order to be able to secure it more effectively.

Mr. ISSA. I will close with just one statement. That letter from Fish and Richardson says to me please don't say that this is legalized extortion. Please don't say that when we have an auctioning process that not only makes more money in debt relief to ICANN but, in fact, charges exorbitant prices to the very people who already own the intellectual property that is effectively being ransomed, please don't call it legalized extortion.

Well, I take great pride that under speech and debate, right or wrong, I call it legalized extortion.

I now recognize the Ranking Member.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Metalitz—I hope I got that right. Mr. Metalitz, a recent NetNames study found that 24 percent of global Internet traffic is dedicated to the infringing transfer of copyrighted content. Other data indicate that 68 percent of the top 500 pirate sites reside on U.S. registries; 59 percent reside on .com, .net, and .org, giving them an air of legitimacy. What contractual requirements and obligations should registries, registrars and registrants have to deal with this that we don't have?

Mr. METALITZ. Thank you for that question, Mr. Nadler. You have correctly stated that we have a huge problem in the legacy top-level domains, com and net and org, and that the contractual restrictions in their contracts with ICANN are not sufficient. One of the things that has been pointed out is there may be ways that we can use some of the advances that were made in the gTLD space. The new gTLDs had to take on some additional commitments to respond to copyright, piracy, and trademark counterfeiting in their spaces. We should look at applying those to the legacy gTLDs as well. That is part of the ICANN answer. Obviously, there may be things that can be done on a legislative level because these registries are based in the United States.

Mr. NADLER. To look back——

Mr. METALITZ. Pardon?

Mr. NADLER. To look back and apply some of what is being applied to the new domain names to the old ones.

Mr. METALITZ. Yes, and it is a step forward that this registrar accreditation agreement does apply to registrations in .com and .net. So pirate sites or sites engaged in illegal pharmacies can be addressed that way, if those agreements are enforced.

Mr. NADLER. Okay, thank you.

Ms. Stark, what are your views on the legality of the fee structure for early registration of certain premium .SUCKS domains at nearly $2,500? I understand there are a set of rights protection mechanisms and operators of new gTLDs which are intended to achieve the laudable goal of combatting cyber-squatting. As the chief trademark counsel of a major U.S. corporation, do you believe the structure being forwarded by Vox Populi with the ascent of

ICANN violates at least the spirit of the registry agreement? And what can be done about it?

Ms. STARK. I absolutely do believe that it violates the spirit of the agreement. I mean, the whole purpose of these rights protection mechanisms, like the clearinghouse, were to make an efficient system for intellectual property owners to protect their rights, and ultimately to help protect consumers from confusion and other types of abuse online. So when you take that mechanism and use it and turn it on its head to create some sort of premium pricing structure so that people who are being responsible and taking advantage of the mechanisms that the community developed to help them navigate this new world and you turn that on its head and turn it into a premium pricing structure, I absolutely think that violates the spirit——

Mr. NADLER. So that should be banned.

Ms. STARK. I do think that you don't——

Mr. NADLER. That pricing structure, that is, should be banned.

Ms. STARK. I don't think that you want to necessarily set premium—I am not saying there can't be premium pricing or that you can't have all kinds of pricing arrangements. I just don't think that you want to do it in a way that takes something that is meant to protect trademark owners and harm them.

Mr. NADLER. Well, it would be easy—I don't know that it would be right, but it would be easy to say no premium pricing arrangements. If you didn't say that, how would you distinguish decent ones from ones that shouldn't be allowed?

Ms. STARK. So, I think that is a process that has to come up through the community in the multi-stakeholder process. There are many different relevant stakeholders in that process, and if there are going to be limits on what happens in pricing, that should come from the community.

Mr. NADLER. Okay. So Congress shouldn't do anything about this. We should leave it to the multi-stakeholder process.

Ms. STARK. I think if we really are going to believe in the model, there should be oversight but that the model should be allowed to work.

Mr. NADLER. Okay, than you.

Mr. Zuck, the concerns over new gTLDs and potential IP and trademark infringements are well known. But there are extensive infringements in the .com space. I understand there are over 65,000 .com's that incorporate the word "sucks," for example. Shouldn't these be equally concerning? And what can you tell the Committee about plans for adding additional rights protections to legacy gTLDs like .com?

Mr. ZUCK. Thank you for the question. It is, in fact, the case that a lot of these issues have come up in the old TLDs, as you mentioned, and "sucks" shows up plenty of different places. So there is a constant and ongoing debate about whether there is a difference between the second-level and the top-level domain in terms of the terms used. I think a strong argument can be made that there is closer monitoring needed for the top-level domains, the stuff to the right of the period, than is necessarily necessary inside of an individual domain.

I think, as Mr. Metalitz said, I think taking some of the new contract arrangements that have been developed for the new gTLDs and applying them to the old ones can go a long way. But the reality is that a lot of the principles of protection are already in place, and it is just an execution issue of getting those contracts better enforced. That is the best thing that we can do, and to make sure the WHOIS database is accurate so that IP owners can go after infringers. Those are the key issues.

Mr. NADLER. Thank you.

Mr. Corwin, my last question, because I see the warning light is on. In your testimony you say there are too many new gTLDs. Will the market take care of an over-supply, or should ICANN have limited the number of applications from the outset, or should they now limit the number?

Mr. CORWIN. I am not sure I said there are too many. I said that the jury is still out on the overall success of the program. So far—and I represent professional domain investors, and they are being very selective about which new gTLDs they are acquiring, new domains.

The way I have thought about it is what company would introduce 1,400 new products in an 18-month period? I don't know any company that would do that. The market gets confused when there is that much new choice and new product. Even people within the community have a hard time keeping up with all the new names introduced each week, and as a result we see some of the leading top-level domains in terms of total registrations offering domains free or for 49 cents to a dollar to hype up their numbers, but it is not clear that anyone is going to renew those domains when they push the prices up to market price.

So the jury is out, but I just don't personally see market demand for 1,400 new ones, of which 800 are for the general public.

Could I just speak briefly to your last question?

Mr. NADLER. By all means.

Mr. CORWIN. The .SUCKS second-level domain treatment under the World Intellectual Property Organization arbitration guidance, particularly in North America and the U.S. where we have the First Amendment, is if you have company name Sucks.com, if it is a Web site used for legitimate criticism of a company or an individual, it is not infringement. If it is using that name and then infringing on their trademarks or their copyright and intellectual property, it is infringement. So you have to look at the content of the Web site. But the big difference is that nobody with a .com Sucks site is asking $2,500 a year to register it.

Mr. NADLER. Why is that? If I may, why is nobody doing that on the legacy TLDs?

Mr. CORWIN. Excuse me?

Mr. NADLER. Why is nobody doing that on .com? You are saying they are doing it on the new ones, they are not doing it on the old ones. Why?

Mr. CORWIN. A .com site pricing is frozen right now under a Commerce Department decision, and the other incumbent top-level domains tended to price around the same amount as .com, around $8 per domain per year, simply to be competitive. They couldn't get too high above that price and attract customers.

Mr. NADLER. My time has expired. Thank you.

Mr. ISSA. Would the gentleman briefly yield for a follow-up?

Mr. NADLER. I will yield my non-existent time gladly.

Mr. ISSA. Thank you. [Laughter.]

I just want to follow up and understand this. I have looked, and JerryNadlerSucks.com and .org both are available. DarrellIssaSucks.com and .org, for anyone that wants them, are available, and I am sure someone will find them. But they are, in fact, at GoDaddy $9.99 and $7.99, respectively.

Mr. NADLER. We are not in great demand.

Mr. ISSA. We are not in great demand. But my understanding is that AmazonSucks.com has been bought up by Amazon. The fact is that there has already been a long legacy of buying names to try to protect them. This latest shakedown is because there is now a new name and a new opportunity, and it is not available for first-come/first-serve. In other words, GoDaddy and the other sellers are not out there competing, something that we believe in, to try to sell you a name that multiple people can sell. You have an exclusive holder of a name who is holding it ransom as a form of extortion. Isn't that correct?

Mr. CORWIN. Certainly there is a big difference between DarrellIssaSucks.com—excuse me for saying that; it is not my personal belief—being available——

Mr. ISSA. The hearing is young. [Laughter.]

Mr. CORWIN. If it is registered, if it is criticizing your views on politics, it is okay. If it——

Mr. ISSA. But I am only dealing with the price.

Mr. CORWIN. But you can still acquire it for $9.99 a year, not $2,500 a year.

To answer what Ms. Stark said, there was an ICANN staff report on new rights protection mechanisms, and this was the numbers as of February. At that time there were 4 million total registrations in new TLDs, but there were 25 million claims notices generated. Now, let me explain that. When someone starts to register a term that is registered in the Trademark Clearinghouse, let's say it is Amazon, they get a notice that your use of this domain may be infringing, and then it is their decision. If they want a Web site about the Amazon rain forest, they can go ahead. If they want to pretend they are Amazon, they do it at their own risk.

In my opinion, there were not six times as many attempts to register infringing domains as there were actual domains registered at that point in time, and I have written an article about this. I have talked to the Trademark Clearinghouse people at the INTA meeting last week in San Diego. The only explanation I can get is that some parties—and they may be operators of new registries—began registrations not with the intent of registering domains but to find out—every time they get a claims notice back they say, oh, that name is in the clearinghouse, and now I can set a premium price for it. So a mechanism that was put in place to protect trademark holders is now being used to set extremely high prices from trademark holders.

Mr. ISSA. I thank the gentleman. Our time has expired.

Mr. Forbes?

Mr. FORBES. Mr. Chairman, thank you.

One aspect of the proposed transfer that we have not talked about in this Committee but has received attention in the House Armed Services Committee on which I serve is what happens to the .mil and .gov top-level domains? Even though .mil and .gov are used by the U.S. military, first responders, and Federal and state government agencies, the U.S. Government may not actually own those domains. So I would like to ask Mr. Corwin and Mr. DelBianco whether you agree that a reasonable condition of the IANA transition should include a written agreement that the U.S. Government has an exclusive, perpetual, no-cost right to those domains.

Mr. DELBIANCO. Thank you, Representative Forbes. It is quite easy, I think, for ICANN to give DOD and GSA permanent contracts, permanent, irrevocable contracts for .mil and .gov. What is harder, though, is to ensure that we have legal reach to force ICANN to honor those contracts, and let me explain.

This is about the risks of having a .gov or .mil be redirected during an emergency, like a coordinated attack on U.S. systems and infrastructure. For over 100 countries, their .gov domain is at the second level, to the left of the dot of gov.ca for Canada or .uk for the U.K. Another 50 countries have .mil to the left of the dot for their country code.

What is the difference? Well, their .gov and .mil is housed in a server on their soil, under their law and under their total control. For the U.S., it is a little different. As the inventor of the Internet, our .mil and .gov are at the top level, or the root of the DNS, and that is what the IANA contract is all about.

So we ought to ensure that ICANN remains subject to U.S. law and that the root remains physically on U.S. soil to address the concerns that you brought up, and we have a stress test on that, you will be glad to know we found that Article 18 of ICANN's bylaws requires the principal office of ICANN to stay in California, and if ICANN board attempted to change the bylaws, one of those new powers I described earlier could block that change.

But if this community and this Committee feels strongly, we could move Article 18 to the fundamental bylaws of the transition. That would mean that the community would have to give 75 percent approval of the board's attempt to leave the United States' jurisdiction.

Mr. FORBES. Good.

Mr. Corwin?

Mr. CORWIN. Just to add to that, this is the legacy of the fact that the United States invented the Internet and created these two top-level domains for military and government use. The transition should, of course, ensure that there are permanent contracts for the U.S. to continue operating them in perpetuity.

This is also why it is important that ICANN's jurisdiction stay within the U.S. It is also important to maintain U.S. jurisdiction because—I want to commend ICANN. ICANN has funded two very expert outside law firms to work at the direction of the community to design the new accountability measures, but they are being designed to fit within the framework of California public benefit corporation law, and if the jurisdiction ever changes, the accountability measures may no longer work or work as effectively.

So keeping these requires a contract, and making sure that it stays stable over the decades requires maintaining U.S. jurisdiction.

Mr. FORBES. Good. Thank you.

Ms. STARK AND MR. Misener, I am not sure if I will be able to get this question in my time, but if you were to visit ICANN's Web site and read the description for the Government Advisory Committee, it states: "The GAC is not a decision-making body. However, there are growing concerns regarding the GAC's influence over ICANN's multi-stakeholder process."

As representatives who are involved in the multi-stakeholder process at ICANN, can you shed some light on any notable examples where the GAC has interfered in the multi-stakeholder process which directly impacted your company or your respective companies? And what can be done to curb the growing influence of the GAC over the ICANN board of directors? And what type of unintended consequences do you think the IANA transition will have on the GAC?

Either one of you can get that. I only have about 60 seconds.

Mr. MISENER. Thank you, Mr. Forbes, very much. We have a very clear example of where the Government Advisory Committee stepped in and caused the board to reverse what had been a fairly straightforward process in which we had applied for a .AMAZON and some affiliated top-level domain names.

We support the proposed accountability reforms for ICANN, and I think they are a great idea. But I think, very importantly, they can't just be applied prospectively. ICANN always should have been accountable, and they shouldn't just now start to be accountable when they are forced to be so.

Mr. FORBES. Ms. Stark, anything you would like to add?

Ms. STARK. I would just say that we do think that the Government Advisory Council plays a very important role in the process and should be advisory. But as the Amazon example shows, it is dangerous when any one or a few governments are able to block what has been the process that was created by the full multi-stakeholder community.

Mr. FORBES. Mr. Chairman, thank you, and I yield back.

Mr. ISSA. Thank you.

I now ask unanimous consent that the letter that prompted the earlier letter from IPC be placed in the record.

Without objection, so ordered.

We also are in receipt of a letter from ICANN that I would like placed in the record.

Without objection, so ordered.

[The information referred to follows:]

March 27, 2015

Mr. Akram Atallah
President, Global Domains Division
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

RE: ICANN Requested to Immediately Halt .SUCKS Predatory Registration Scheme Designed to Exploit Trademark Owners

Dear Mr. Atallah:

By this letter, the Intellectual Property Constituency is formally asking ICANN to halt the rollout of the .SUCKS new gTLD operated by Vox Populi Registry Inc. ("Vox Populi"), so that the community can examine the validity of Vox Populi's recently announced plans to: (1) to categorize TMCH-registered marks as "premium names," (2) charge exorbitant sums to brand owners who seek to secure a registration in .SUCKS, and (3) conspire with an (alleged) third party to "subsidize" a complaint site should brand owners fail to cooperate in Vox Populi's shakedown scheme. The TMCH Sunrise period is an integral part of Vox Populi's scheme, and is slated to open on March 30, 2015. Thus, we seek ICANN's immediate action on this matter PRIOR to the launch of the .SUCKS TMCH Sunrise period.

Vox Populi has announced that it will charge trademark owners $2,499 *and up* to register domain names in the TMCH Sunrise period. Vox Populi's incredibly high fees will prevent many trademark owners from being able to take advantage of the TMCH Sunrise period, a mandatory Rights Protection Mechanism ("RPM") intended to protect the rights of trademark owners. This makes it more likely that trademark owners' marks will be registered by cybersquatters for much lower (potentially subsidized) fees at the launch of general availability. We recognize that there could be significant non-infringing uses of .SUCKS domain names, and the goal of preventing the launch of .SUCKS under the current predatory scheme is in no way an attempt to stifle legitimate criticism of trademark owners. In fact, in some cases, legitimate criticism can be useful to TM owners in helping them improve their products and services and differentiating them from their competitors. However, by discouraging trademark owners from using a key RPM, we believe that the registry operator's actions in establishing this predatory

scheme are complicit in, and encourage bad faith registrations by third parties at the second level of the .SUCKS gTLD, and thus drastically increase the likelihood of trademark infringement, all for commercial gain. As such, Vox Populi may well be liable under the Post Delegation Dispute Resolution Policy (PDDRP), may in fact be accountable under the various intermediary liability laws around the world, and may have breached its Registry Agreement with ICANN (as well as ICANN Consensus Policies) by adding additional elements (the subsidy and "sunrise premium" name schemes) which materially alters the mandatory RPM in a manner which renders them detrimental to brand owners, and a new registry service in the form of its everything.sucks platform.

One of the main tenets of all RPMs is that such mechanisms should be designed in a way that minimizes the potential for abuse and circumvention, rather than enhancing the potential for abuse and creating windfall profits by Registry Operators. The more RPMs that are open to abuse, and the more loopholes that are permitted, and even welcomed as "innovation," the less credibility and legitimacy the RPMs have, and the less they serve their intended purpose. ICANN cannot afford to allow one Registry Operator to unwind the RPMs which were adopted as a result of community input over several years.

.SUCKS Sunrise Program

As you may be aware, prior to the New gTLD Program, each registry (gTLD and ccTLD) was left to its own devices when implementing start-up RPMs. Most of the registries implemented a Sunrise Program whereby the holders of validated trademark rights were able to register domain names corresponding to their trademarks prior to such names being available to the general public. The prices for Sunrise registrations were encouraged to use a "cost recovery model" and ranged on the low end of $15 (in the case of .US), to several hundred dollars (in the case of .ASIA and .CO to name a few). Those costs included the fees paid for the validation of the trademarks in addition to the registrations themselves.

Faced with the concept of potentially hundreds of new gTLD registries each performing their own validations, intellectual property owners – through the Implementation Review Team ("IRT") in 2009 – introduced the notion of a Trademark Clearinghouse ("TMCH") whereby their marks could be validated once for all of the new gTLDs, as opposed to countless times for each individual gTLD. The concept was adopted by the ICANN community through the work of the Special Trademark Issues review team, made its way into the Applicant Guidebook and ultimately into Specification 7 of the Registry Agreement. It was intended that this would enable trademark owners wanting to register their brands (or in many cases having little choice but to register their brands) as domain names to do so in a much more economical manner, given that registries would be relieved of the burden (both in terms of financial and resources) of performing the validations themselves. Given that Registries no longer had to perform the validations (the most expensive part of registering Sunrise Domain names), it was believed by intellectual property owners that the costs of obtaining a Sunrise Registration would be substantially reduced.

For some new gTLDs, this turned out to be the case. In .NYC for example, the cost of a Sunrise Registration charged by the Registry to the Registrars was only an additional $15 above

the cost of a normal registration. In most cases, however, new gTLD Registries continued to charge a few hundred dollars despite the fact that this did not represent a "cost recovery" pricing model. In essence, Registries were charging more simply because they could and they knew that some trademark owners would be forced to pay those exorbitant prices to protect their marks.

In no case has this practice become more abusive than with respect to .SUCKS. Commencing on March 30, 2015, Vox Populi will charge trademark owners over ***250 times*** more than what it will charge most ordinary consumers for domain names upon the launch of general availability. https://www.nic.sucks/products

More specifically, and in direct violation of the spirit of the new gTLD RPMs, especially the TMCH, Vox Populi will levy against trademark owners that have chosen to protect their brands in the Trademark Clearinghouse administered by ICANN through its subcontractors, a penalty of $2,499 per registration per year (nearly $12,500 for a 5-year sunrise registration). By contrast, most ordinary consumers will be charged $9.95/year at general availability, assuming they accept the "subsidy" and allow their site to be hosted by the mysterious entity "Everything.SUCKS."[1] (Registrants who choose not to use the Everything.SUCKS platform will be charged $249.) This turns the TMCH, which is meant to be a shield for brand owners against abuse, into a sword that unscrupulous Registry Operators are using ***AGAINST*** brand owners to maximize economic gain.

.SUCKS Sunrise Premium Names

But Vox Populi's illicit scheme doesn't stop there. If a trademark owner decides that it will sit out the Sunrise Period and attempt to register its trademark as a domain name during general availability for $249 , it still may be forced to pay at least $2,499. This is because Vox Populi has now introduced its "Sunrise Premium" list. (Despite the name, "Sunrise Premium" pricing applies only during general availability.) If a trademark is on the Sunrise Premium list, it will always be at least $2,499 per year. The Sunrise Premium list is a list of strings compiled by Vox Populi from strings registered or blocked in other TLDs' sunrise periods, i.e., the most

[1] Vox Populi has provided no information on Everything.SUCKS, its agreement with Everything.SUCKS, or its affiliation (if any) with Everything.SUCKS. An Internet search revealed no trace of this entity. Through this "subsidy," Vox Populi effectively shows brand owners that, if they fail to register at an exorbitant price, a third party will be able to register for a pittance. This is an essential element of Vox Populi's coercive scheme. Furthermore, although provision of the Everything.SUCKS platform by Vox Populi, either directly, or through its subsidiary, appears to be a new registry service, the IPC is unaware of any RSEP request submitted by Vox Populi or approved by ICANN. *See* https://www.icann.org/resources/pages/rsep-2014-02-19-en.
In addition, in establishing a scheme where registrants of .SUCKS domain names can be subsidized by agreeing to use the Everything.SUCKS platform, Vox Populi has essentially allocated Everything.SUCKS to a third party prior to the TMCH Sunrise Period, rather than self-allocated as permitted under Specification 5 of the Registry Agreement, which appears to be in violation of ICANN's restriction against allocating any names prior to TMCH Sunrise. If the name has been allocated under an ICANN Qualified Launch Program ("QLP") – unlikely, as there are significant restrictions in QLPs against allocating prior to Sunrise – the information about the QLP is missing from the TLD Startup page for .SUCKS on the ICANN website. *See* https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/54.

widely protected and valuable trademarks. In other words, Vox Populi is targeting and punishing brand owners who have availed themselves of the RPMs or shown that they are susceptible to purchasing defensive registrations. Vox Populi's CEO, John Berard, has admitted that the Sunrise Premium list will be trademark-heavy. http://domainincite.com/18145-heres-why-trademark-owners-will-think-sucks-sucks. Vox Populi's strategy is obvious – to ensure that those trademark owners who have invested in protecting those trademarks by registering in the TMCH and registering domain names in other sunrise periods, and who are most likely to want to protect their trademarks by registering in .SUCKS, cannot avoid paying at least $2,499 per year, no matter when they register. This will have a chilling effect on TMCH registrations and consequently discredit all of the New gTLD Program RPMs in the eyes of brand owners, whose buy-in and adoption of new gTLDs is widely acknowledged to be critical to the success of the new gTLD program. Importantly, where brand owners are discouraged from using the TMCH due to this Registry Operator's scheme, this will lead to additional cybersquatting, confusion and fraud in the domain name space, with significant effects on consumers as well as brand owners. In other words, Vox Populi's predatory "get rich quick" scheme affects more than just its own registry; its actions threaten the integrity and validity of the TMCH and RPMs generally.

The IPC is charged with representing the interests of intellectual property owners – large or small, commercial or non-profit, and to provide to the GNSO and the ICANN Board timely and expert feedback before it must make any decision or take any position on any proposals, issues, policies, or otherwise, which may affect intellectual property, particularly as it interfaces with the DNS. http://www.ipconstituency.org/bylaws/. We believe that Vox Populi's practices discussed above can best be described as predatory, exploitative and coercive. Not only does the intellectual property community believe this to be the case, even domain investors and industry insiders who rarely agree with intellectual property owners on anything, agree that this practice is punitive in nature and should not be accepted[2].

We understand that ICANN has previously taken the position that it does not regulate pricing and that compliance has refused to take action based on a pricing issue. However, Vox Populi's entire business model, and in particular, the categorization of TMCH-registered and protected marks as "premium" and "sunrise premium" for the purposes of setting exorbitant pricing schemes and using "subsidized" domain names to maximize the likelihood that trademarks which are not registered during Sunrise will be registered by third parties, goes far beyond mere "pricing." This scheme constitutes an abuse and a perversion of the mandatory RPMs approved by the ICANN community, solely to make money off the backs of brand owners, and appears to violate the Registry Agreement as well as numerous Consensus Policies. It creates a mockery of the new TLD process and calls into question the very ability of ICANN as an organization to be able to administer the new gTLD program. This issue is particularly timely, given the accountability debate in which ICANN is embroiled.

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[2] See, e.g., http://domainincite.com/18145-heres-why-trademark-owners-will-think-sucks-sucks (Kevin Murphy, Domain Incite: "if you have a track record of defensively registering your trademark, Vox Pop is essentially penalizing you with higher fees."); http://marketingland.com/controversial-sucks-domain-almost-here-121505#.VQW2f0jdcC0.twitter (Rick Schwartz: "The entire extension is based on brand extortion."; Ron Sheriden: "plain and simple economic extortion"); http://www.domainsherpa.com/discussion-20150312/ at 36:27 (Michael Berkens, Andrew Alleman, and Page Howe criticize the .SUCKS launch plan.)

.SUCKS Registry Agreement

Finally, we recently learned of a peculiar (and apparently unique) provision in Vox Populi's Registry Agreement. The .SUCKS Registry Agreement calls for Vox Populi to pay ICANN (i) a one-time fixed "registry access fee" of US$100,000 as of the Effective Date of the Agreement, and (ii) a "registry administration fee" of US$1.00 for each of the first 900,000 Transactions. Thus, if Vox Populi's scheme succeeds, ICANN will receive $1 million more from .SUCKS than from any other registry with comparable success. The IPC is at a loss to understand why ICANN stands to receive this unique payout from .SUCKS.

In closing, we call on ICANN to put a stop to this coercive scheme based on an abusive modification of ICANN's RPMs. ICANN is the sole entity in the world charged with the orderly introduction of new gTLDs in a secure, reliable and predictable manner. If ICANN is unwilling or unable to put a halt to this, then who is?

Please do not hesitate to contact us if you have any questions regarding this significant matter. We look forward to ICANN's prompt response.

Best Regards,

Gregory S. Shatan
President, Intellectual Property Constituency

cc: Mr. Fadi Chehadé, *President and Chief Executive Officer, ICANN*
Mr. Cherine Chalaby, *Chair – ICANN Board New gTLD Program Committee*
Mr. Allen Grogan, Chief Contract Compliance Officer
Mr. Lawrence Strickling, *Assistance Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration (NTIA)*
Mr. John Berard, *CEO, Vox Populi*

KEY ISSUE UPDATES FROM THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN) A CALIFORNIA PUBLIC BENEFIT NONPROFIT CORPORATION

PRESENTED TO THE UNITED STATES HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

HEARING: STAKEHOLDER PERSPECTIVES ON ICANN: THE .SUCKS DOMAIN AND ESSENTIAL STEPS TO GUARANTEE TRUST AND ACCOUNTABILITY IN THE INTERNET'S OPERATION

WEDNESDAY, MAY 13, 2015

ICANN Key Issue Updates – May 2015

The IANA Functions Stewardship Transition and Enhancing ICANN Accountability Processes

IANA Functions Stewardship Transition

Much work has been performed with the ICANN community after the March 14, 2014 announcement by the NTIA of its intention to transfer the stewardship of the IANA Functions to the global multistakeholder community. The IANA Stewardship Transition Coordination Group (ICG) was formed, and two of the three operating communities served by the IANA Functions have completed their proposals. The third operating community, the naming function, has been participating through a Cross Community Working Group that just released its second draft proposal for public comment on April 22, 2015, closing on May 20, 2015. ICANN retained external counsel to provide legal advice directly to the working group as the proposal was being formed. After comments on the proposal are considered, the naming community will provide its final proposal to the ICG, and then the ICG will coordinate and deliver a proposal for the transition of the IANA functions stewardship to ICANN, which will in turn deliver that proposal to the NTIA for consideration.

ICANN recognizes and accepts that the community will want to have fall back mechanisms in place should the IANA functions operator not perform its function to the standards required by the community. An important part of any system that focuses on security and stability is to document processes for handling any failures of the system. ICANN supports the community processes that have been and are being used to develop the transition proposals, and supports the need for the ICG to coordinate the various transition proposals. ICANN awaits the outcome of that process.

While there are always areas for improvement, it is notable that each of the three operating communities have expressed satisfaction with ICANN's performance of the IANA functions.

Enhancing ICANN Accountability

On the Enhancing ICANN Accountability side, on May 4, 2015 the Cross Community Working Group on Enhancing ICANN Accountability posted a non-consensus based proposal for public comment. This proposal outlines the key areas of work that are to be included in Work Stream 1, or those enhancements or reforms to ICANN's accountability that must be committed to or in place at the time of the transition. Part of the Work Stream 1 effort is including meaningful enough mechanisms so as to assure ICANN's implementation of additional (or Work Stream 2) enhancements that are identified in the future. The Work Stream 1 proposals include:

- Identification of areas where the ICANN mission and core values could be strengthened;
- Revisions to redress and review mechanisms, such as ICANN's Independent Review Process;
- Incorporation of the Affirmation of Commitments into the ICANN Bylaws;
- Identification of certain ICANN Bylaws as "fundamental", or requiring community assent before they are modified;
- Changing ICANN into a designator or membership model, to enable the community to have a stronger voice in ICANN's budgeting and strategic planning processes; and
- Provisions for removal of individual Board members or the recall of the entire ICANN Board.

The working group also developed a series of stress tests against which the enhancements are tested, in order to assess how the recommendations strengthen ICANN's accountability in key areas. Some examples of stress tests are whether the recommendations would increase accountability in ICANN's response to a general financial downturn in the industry, or whether ICANN is less prone to capture by a particular interest group or entity.

To assist the group in developing their recommendations, at the working group's request, ICANN engaged two law firms to provide advice directly to the working group. Members of the working group have been responsible for managing those engagements in order to identify and obtain the advice needed.

The public comment will close on June 3, 2015. The working group is expected to have multiple meetings, including face-to-face and community sessions at ICANN's upcoming meeting in Buenos Aires, Argentina in order to consider community comment and develop consensus recommendations that will eventually be presented to the ICANN Board. The Board has already committed that it will not unilaterally modify any consensus-based recommendation arising from the community, and that it will take on the consensus-based recommendations coming out of the Enhancing ICANN Accountability process unless it determines that a recommendation is not in the global public interest and engages in a consultation process with the working group on the Board's concerns. The Board is currently developing a public comment submission on the draft report.

Once the report is finalized, ICANN will submit the Enhancing ICANN Accountability recommendations to the NTIA along with the proposal for the IANA Functions Stewardship Transition.

Contractual Compliance at ICANN: The 2013 Registrar Accreditation Agreement, and .SUCKS

In October 2014, ICANN announced the appointment of its first Chief Contract Compliance Officer to oversee Contract Compliance and Safeguards within ICANN. ICANN's Contractual Compliance Department now has over 20 staff members spread across ICANN's hub offices, providing contractual compliance support around the clock and in many languages. The expansion of the Contractual Compliance Department has been a necessary step to be ready for the expansion of registries under contract with ICANN through the New gTLD Program, and to enforce compliance with the heightened requirements imposed on ICANN's accredited registrars.

The 2013 Registrar Accreditation Agreement

During the development of ICANN's 2013 Registrar Accreditation Agreement (the "2013 RAA"), the global law enforcement community made 12 recommendations, all of which were addressed in the terms and conditions of the 2013 RAA. Among these were the incorporation into the 2013 RAA of several new provisions addressing the handling of reports of illegal activity on websites. These provisions require Registrars to maintain an abuse point of contact to receive reports of illegal activity submitted by anyone. In addition, Registrars are required to maintain a dedicated abuse point of contact to receive reports of illegal activity submitted by law enforcement, consumer protection and quasi-governmental authorities and to review complaints submitted by those sources within 24 hours. Registrars must take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse they receive.

In addition, Registrars of new gTLDs are required to include in their registration agreements a provision prohibiting registered name holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

When ICANN receives complaints regarding websites that are alleged to be engaged in illegal activity, ICANN forwards those complaints to the Registrar that processed the registration and asks the Registrar to investigate and respond. Typically, the activities alleged to be illegal are actions by the registrant or website operator, not by the Registrar.

Claims of infringement, unlawful sale or importation of pharmaceuticals or other illegal activity often raise difficult and complex legal issues on which the complaining party, the Registrar and the registrant may not always agree. In many cases, a Registrar will defer to courts to make a determination as to whether

activities engaged in by a registrant are contrary to law; in some cases, a Registrar may be comfortable in making that determination and taking action without a court order. When a Registrar is not comfortable making a determination as to whether the registrant or website operator is violating the law, the Registrar may suggest that the complaining party attempt to resolve the matter directly with the registrant or website operator, or that the complaining party seek a court order to resolve the issue.

ICANN is not empowered to resolve disputes when parties disagree over what constitutes illegal activity in multiple countries around the world. ICANN is not a law enforcement agency or court and has no regulatory authority. Our enforcement rights are derived solely from the terms and conditions of our contracts with Registrars and Registries. ICANN relies on courts and governmental regulatory authorities to police illegal activity. Consistent with our contractual rights, where a private party, law enforcement or a regulatory agency obtains an appropriate court order from a court of competent jurisdiction, ICANN will compel the contracted parties to comply with these court orders.

ICANN has the right to terminate a Registrar under the 2013 RAA if the Registrar is judged by a court of competent jurisdiction to have, with actual knowledge or through gross negligence, permitted illegal activity in the registration or use of domain names. To date, no complaining party has presented ICANN with a judgment meeting these criteria.

ICANN has neither the right nor the technical capability to "remove" or "disable" a website.

Because Registrars and parties submitting abuse complaints do not always agree on the appropriate interpretation of provisions of the 2013 RAA requiring Registrars to investigate and respond appropriately to reports of abuse, ICANN's Chief Contract Compliance Officer has reached out to representatives of those parties, as well as to other members of the ICANN multi-stakeholder community, to foster a discussion and attempt to find common ground regarding matters such as the minimum elements that should be contained in a bona fide abuse complaint requiring a response from a Registrar, the minimum steps that a Registrar must take to investigate and respond to a bona fide abuse complaint, and how illegal activity might be combatted outside the scope of contractual enforcement through voluntary efforts and best practices. The initial dialogue in these areas has been productive and discussions are ongoing.

Addressing Community Concerns: .SUCKS

After years of community debate and development, in 2011 ICANN launched the New gTLD Program. Leading up to that launch were thousands of pages of community comments and hundreds of hours of community work on the development of the Program, resulting in a robust Program that addresses issues

Mr. ISSA. We now go to the gentleman from Michigan for his thoughtful questions and comments.

Mr. CONYERS. Thank you, Mr. Chairman.

I would like to follow up on a Nadler-type question, which I would start off with Mr. Metalitz. We have discussed something about the obligations on registrars and ICANN. Now, in your view, are the registrars meeting these obligations, and is ICANN enforcing them sufficiently?

Mr. METALITZ. Thank you, Mr. Conyers. Well, with respect to the particular obligations I talked about in my testimony, the obligation to investigate and respond when they receive a report that a domain name that they have sold is being used to carry out illegal activity, no, I do not think that the registrars are complying with that, and I do not think that ICANN is yet requiring them to do so. This is something we are continuing to engage both with ICANN and with registrars about. But if you take a snapshot today, these provisions are not being enforced.

Mr. CONYERS. Mr. Horton, do you concur with that view? Turn on your mic.

Mr. HORTON. My apologies, Mr. Conyers. I concur with part of it. Our experience has been a little bit different. As I testified, we have actually seen that most domain name registrars voluntarily terminate services to illegal online pharmacies, and that may be because of the health and safety risks involved in that particular area. It is a relatively small number of domain name registrars that are responsible for most of the problem. But again, I am only talking about one particular area of abuse. We don't keep data on these other types of areas.

I do concur, however, that when a complaint is submitted to ICANN compliance, that they are not requiring compliance with Section 3.18. The core problem is this phrase "to respond appropriately." What does that mean? They have latitude to interpret that, and they have not done so in an effective way.

Mr. CONYERS. Ms. Stark, how do you weigh in on this question?

Ms. STARK. I agree with Mr. Horton that there are some registrars that are very good about responding. But I do think that ICANN has not devoted enough resources in general to compliance, and that there are important parts of the contract that need greater attention from ICANN directly.

Mr. CONYERS. Now, Mr. Zuck, you are on ICANN's IP working group. How does your experience stack up to the other contributions that have been made thus far?

Mr. ZUCK. Thank you for the question, Congressman. I guess our experience has been similar. I have been kind of assigned within the intellectual property constituency to be sort of the hound dog to the compliance department inside ICANN, and I was horrified to discover a few years ago that their database of complaints and responses was a folder in Outlook some 10 years into the organization's growth.

So I think that they have come a long way from the standpoint of even keeping track of what they are doing over the past 5 years, and they still need to do a lot better job, and I think that the new gTLD program came at a time that made it easy to overwhelm them, but I think they have made some progress. But there is cer-

tainly a long way to go in terms of contract compliance within ICANN. It is not quite the horror that it was 5 years ago.

Mr. CONYERS. What other suggestions or experience would you like to make on this subject?

Mr. DELBIANCO. Thank you, Mr. Conyers. Steve DelBianco here. Two other improvements we are making as part of our proposal. One is to make sure that when the community feels like compliance isn't happening, the community would have standing for the first time to be able to file for an independent review panel, and the community wouldn't have to come up with the $1 million it takes to pay for the attorneys and panelists.

Mr. CONYERS. Gosh.

Mr. DELBIANCO. So we are building in the ability to challenge those decisions, and when the panel comes back with a decision, it will be binding on ICANN.

The second would be that every year when ICANN puts forth a budget, if that budget lacks adequate funding for the systems that they need in compliance, like Mr. Zuck talked about, lacks the funding for compliance officers, we as a community can veto the budget until ICANN board comes back with the right budget.

Mr. CONYERS. Yes, sir.

Mr. METALITZ. Just a footnote to that. Let's not kid ourselves about this. There are many issues here where the community, the entire community might not see eye to eye. That community includes the registrars and registries that, in fact, provide over 90 percent of the funding for ICANN, and this is the problem that ICANN is facing in trying to develop a culture of compliance. It is very difficult to do that when you have to negotiate with and enforce rules against the people that are writing the checks that pay your salary.

So this is a problem that is inherent in the model, and I think it is something where maybe the community as a whole may not see the need, but certainly if you look at American businesses that depend on copyright and trademark protection, we certainly see the need, and we need some mechanism to make sure that ICANN responds appropriately.

Mr. CONYERS. I see that Mr. Horton concurs with that view.

Mr. HORTON. Mr. Conyers, I do, and I think that the additional thing that I would urge is transparency. As I testified, I think the core problem is that ICANN compliance is making decisions about what constitutes an appropriate response and then does not explain why. If they are making the right decision, what do they have to be afraid about in disclosing it to the multi-stakeholder community?

Mr. CONYERS. Thank you all very much.

Mr. Chairman, I yield back.

Mr. MARINO [presiding]. The Chair now recognizes the gentleman from Texas, Mr. Farenthold.

Mr. FARENTHOLD. Thank you, Mr. Chairman.

Mr. Metalitz, I understand the importance of protecting intellectual property, and what you are asking ICANN to do here, though, kind of sounds a lot like what you all tried and failed to get Congress to do with SOPA and PIPA. Isn't there in effect the forcing down and takedown of Web sites outside of the reach of U.S. law

on the basis of an allegation of infringement without any type of hearing or due process? That is kind of troubling to me. Would you like to comment?

Mr. METALITZ. Yes, I would. I think this is really an issue of whether ICANN will enforce the contracts that it has entered into. These contracts were negotiated. They were subject to public comment. There was a lot of public input, and throughout the community there was agreement that these would be the contractual standards. Those included concern about how domain names were used. Anytime you are talking about how a domain name is used, it is often being used to point to content, whether it is sales of illegal drugs, whether it is streaming and downloading of pirated material. So this is all firmly within——

Mr. FARENTHOLD. The concern remains similar to SOPA and PIPA, that you will cast such a broad net that you will infringe on people's free speech rights.

Mr. METALITZ. I think that is a concern, but I think if we can have this dialogue with ICANN about the way in which they will interpret, apply, and enforce this requirement to investigate and to respond appropriately, we can have that discussion about what the safeguards would be. But we need first to get ICANN to commit to enforcing, and transparently doing so, these contracts they have entered into.

Mr. FARENTHOLD. All right. And, Mr. Misener, given ICANN's accountability problems and the tendency to bend to the will of government, how can we in Congress ensure that ICANN's problems won't become worse and threaten the stability of the Internet after the U.S. Government terminates its contract with ICANN?

Mr. MISENER. Thanks, Mr. Farenthold, very much. I think what Congress needs to do is ensure that NTIA insists on these accountability reforms, that they be made in ICANN's bylaws as a condition precedent to the actual transition of the IANA functions. Also, of course, it would be a very positive sign if ICANN were to move ahead with the .AMAZON applications, which were very lawfully filed, and the government interference came in and——

Mr. FARENTHOLD. I am concerned about—actually, I am going to do that question second, and I will open this to folks on the panel.

At what point do we see such an explosion in top-level domains that it becomes worthless? The idea behind more top-level domains was to give more people the ability to register a domain name. But if I have to register blake.com, blake.net, blake.org, blake.biz, blake.us, blake.sucks, where does it stop? Why shouldn't just general intellectual property law say you can't register somebody's trademark in any global top-level domain, rather than, as Chairman Issa pointed out, extorting companies to register potentially thousands of variations of their domain names?

Mr. Corwin, you seem eager to jump on that.

Mr. CORWIN. Well, I think we are carrying out this experiment now with the first round of top-level domains and we are going to see what the market demand is. It was very expensive for these applicants to bid for each of these so-called strings. There was a $185,000 application fee. The average cost, when you put in the consultants and attorneys and the back-end technical providers, you are talking about half-a-million to a million dollars per applica-

tion just before you open it. If there is no market for this, it is hard to think that those types of applicants will be there at the next round. There may be .BRAND applicants. Hopefully there will be more applicants in foreign letter characters, Arabic and such.

But the key thing here—and then there are other costs. Dot-SUCKS, for example, had to spend an additional $3 million to win an auction because they were one of three applicants for that.

So I think the market will take care of this to some extent.

Mr. FARENTHOLD. I see a business opportunity in registering .SUX.

Mr. CORWIN. But in terms of pejorative terms like that, "sucks," there has to be some type of public interest standard. If that is allowed to proceed, why wouldn't we see in the second round applications for .LIAR, .CRIMINAL, .BLOWS the type of top-level domain that no person or company wants to be associated with?

Mr. FARENTHOLD [continuing]. Blake.sucks.com defensively.

Mr. CORWIN. The program should provide names that people want for positive reasons, not that they want to buy to protect themselves.

Mr. FARENTHOLD. Ms. Stark, did you want to add something? I am running out of time. Quickly.

Ms. STARK. I do. I just want to say that I don't think trademark owners in general are battling against free speech, and that is what a total prohibition of any domain names that contain an existing trademark would be. Trademarks are created out of language, and there are fair uses, and there needs to be a balance between free speech and what is intellectual property protection.

But I will say that in such an expansive new world, every brand owner of every size, my company included, is very resource challenged on how we are going to adequately protect what are valuable corporate assets that we have invested in for decades in this new world.

Mr. FARENTHOLD. Thank you.

I see my time has expired, Mr. Chairman.

Mr. MARINO. Thank you.

The Chair now recognizes the Congresswoman from Washington, Ms. DelBene.

Ms. DELBENE. Thank you, Mr. Chair, and thanks to all of you for being here with us today.

Mr. Misener, I wanted to follow up on the opinion on Amazon's application for .AMAZON. It seems like it has basically been a draw at this point. The opinion found there wasn't a basis for ICANN to turn down your application but also found that Amazon didn't have a clear right to have its application granted. So I wondered if you could explain for the Committee the process that you went through and what information was made available concerning ICANN's decision-making process for you, and kind of what comes next.

Mr. MISENER. Thank you very much, Ms. DelBene. It really wasn't and isn't a draw. It is a loss for us. The reason why is we are the ones who filed the application for .AMAZON and its Chinese and Japanese language equivalents, and we have, to date, been denied. No one else filed for those. No one else has intellec-

tual property rights to those names, including the countries in that region.

Those countries exerted influence over the Government Advisory Committee, which then persuaded the board to deny our applications. We followed the rules that had been developed over that 3-year process, that multi-stakeholder process. It was very clear in the guidelines, which are the rules that govern the application process, that the name "Amazon" was not in the prohibited class of geographic names. There is a whole list of lists, actually, within the guidebook, a very expansive list that includes things like Brazil and .BR and Peru, but nowhere is Amazon included in any of these lists.

So that process, which had developed the list of lists, just simply was ignored, under pressure from these other governments. Unfortunately, and it pains me to say so, but the U.S. Government ended up abstaining when they could have objected to this treatment of an American company.

Ms. DELBENE. And so what comes next now on your side?

Mr. MISENER. Unclear. We have other options, I suppose, legally. But the main thing, it seems to me, is during this extended, now IANA transition process, ICANN should take this opportunity to make itself whole in this regard. The adoption of accountability reforms is coming, and those accountability reforms should not just be applied prospectively. They should be applied as if they existed today. ICANN always should have been accountable, and if ICANN considers the new, improved review processes that are going to be adopted and considers them being applicable from Day 1, then that I think would solve our problem.

Ms. DELBENE. Thank you.

Mr. MISENER. Thank you.

Ms. DELBENE. Ms. Stark, I understand that part of the process for launching the new gTLDs is that ICANN established a committee of trademark law experts that made recommendations for stronger and more efficient protection of trademarks, and that many of their recommendations were adopted by ICANN, including a newer, faster, and cheaper procedure to take down a domain name that is violating a trademark owner's rights.

Can you compare what happened there and contrast that with how things existed in the .com regime, and provide any examples for the Committee of instances where a domain name was taken down based on those rules?

Ms. STARK. I am sorry, I don't have an example just off the top of my mind, but thank you for that question because the rights protection mechanisms are, of course, of great concern to INTA and all of its members. I think the new mechanism that you are talking about is the URS system, and there is one key difference with that that has made it maybe not the most optimal solution for trademark owners, and that is that at the end of the day, the domain name that is in question and that may be problematic is not actually reassigned to the owner, the trademark owner, at the end of that process.

So, yes, there are some efficiencies to the process, but I think that the ultimate resolution can be less than ideal for a lot of brand owners. So you will see that, even though it might be more expen-

sive and take more time, there are a lot of brand owners who are still resorting to what is called the UDRP, the Uniform Dispute Resolution Process, because that does include a transfer of the domain name at the end of the proceeding.

Ms. DELBENE. So do you think we have the right process in place, or what do you think we should do differently based on your learning now as we look towards——

Ms. STARK. You know, I would say that the process is always evolving, as we have seen with ICANN in general, and that while we have constantly tried to be an important voice in that multistakeholder community, to achieve the right balance between rights protection and innovation and competition and choice and free speech, I don't know that we have totally gotten to the right place. I think that the IPC in particular, but as well the BC, and even the Brand Registry Group within the ICANN community, are continuing to think hard about these kinds of issues, and as we see new spaces get launched, and as we see new behaviors, what we can do to make sure that the right balance is achieved.

Ms. DELBENE. Thank you.

My time has expired. Thank you, Mr. Chair.

Mr. MARINO. Thank you.

I am going to recognize myself for 5 minutes of questioning.

This question is for Ms. Stark. But, Mr. Metalitz and Mr. Zuck, if you have a different answer, would you please respond briefly?

Today, U.S. companies face ever-increasing intellectual property threats as more and more Web sites provide access to pirated content and counterfeit goods. I would like to ask about the registrar's accreditation agreement that required new obligations for registrars when presented with evidence of copyright or trademark infringements or other illegal activities.

Ms. Stark?

Ms. STARK. Thank you very much for that question. I think that piracy, of course, is really of great concern to my company in particular, but also counterfeit merchandise and other products like you have talked about in the pharmaceutical world are very important to INTA and its members. So this is an issue very near and dear to our hearts.

What I would say is, at a minimum, what we need to see is ICANN enforcing what already exists in the contracts. That would be WHOIS. That would be also contract compliance. If they have registrars who are not responding in the appropriate ways when they are notified of this type of illegal and infringing behavior, then there needs to be some teeth in the mechanisms that already exist, and I think that would be the thing we would hope to see the most.

Mr. MARINO. Thank you.

Mr. Metalitz, do you find that successful?

Mr. METALITZ. Yes. I would just add to that that the requirement that Ms. Stark is referring to is to take reasonable and prompt steps to investigate and respond appropriately to reports of abuse, including reports of the kind of illegal activity you are talking about. That is what needs to be enforced. This is not a question of any kind of automatic takedown. It is investigating and responding appropriately. That is not happening now, and we don't have the

transparency to even see what ICANN thinks is appropriate in this setting.

Mr. MARINO. Thank you.

Mr. Zuck?

Mr. ZUCK. Yes. Piracy is a growing concern for the app industry around the world. And so I support what has been said before, but I would also suggest that these new accountability measures we are putting in place is in large measure what has been missing from the universe in which we have been operating to date. So having the ability to actually enforce some discipline upon ICANN and to enact real and binding reform inside of ICANN I believe is the key to getting the kind of contractual compliance office inside ICANN that we have all been waiting for.

Mr. MARINO. This question is for Mr. DelBianco. In testimony before the Subcommittee last year, NTIA Administrator Strickling spoke of the importance of ensuring a stable legal environment for the IANA services. He subsequently informed the Committee that while he considered the U.S. to provide such an environment, that the stakeholders that are developing the transition plan are better placed to examine whether ICANN should continue to remain subject to U.S. law post-transition or not, he declined to answer whether protections need to be in place before the transition occurs to ensure that ICANN remains subject to U.S. law after completion, thereby admitting the possibility that this is negotiable.

It seems to me that it is essential that ICANN and IANA function operators remain subject to U.S. law going forward, and that there is no better legal environment to ensure the continued stability of these operations. I would like the record to reflect the opinion of you concerning this. What say you? I know I threw a lot at you right there.

Mr. DELBIANCO. You did, but you started by pronouncing my name perfectly, which comes from Marino to DelBianco. No problem.

In an answer I gave earlier to Representative Forbes, I was reflecting not only my own revised opinion but that of the Community Working Group, who took a look at whether ICANN's new bylaws should reflect a commitment that was made in the affirmation of commitments, a commitment to maintain its headquarters in the United States. And when you maintain headquarters or principal offices in the United States, that would mean that their legal presence includes the United States.

At the Commerce hearing in the Senate in February, ICANN CEO Fadi Chehadé? repeated his commitment that they would honor that. But the working group did not believe that any one person's commitment would matter and that the affirmation, frankly, could be discarded by ICANN with 120 days' notice.

So we followed through on your question by ensuring that the bylaws of ICANN reflect that its principal offices would remain in California, and while the community might be able to approve a change to that, the board could not do it on its own. The board could not change the bylaws to remove the presence in California unless the community elected to approve that, if we make it a fundamental bylaw. That is 75 percent of community voting members, and we have the voting ratio set up in our proposal. That would

mean that it would be a very popular decision to vacate the principal offices in California. It would have to have overwhelming support, 75 percent of the global community, not easy to get.

Mr. MARINO. Thank you. My time has expired.

The Chair recognizes the Congresswoman from California, Ms. Lofgren.

Ms. LOFGREN. Well, thank you.

As the chair of the California Democratic delegation, we thank you for keeping the facility in California.

I would like to ask unanimous consent to put in the record a letter dated today from the Electronic Frontier Foundation, Mr. Chairman.

Mr. MARINO. Without objection.

[The information referred to follows:]

ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

May 13, 2015

Hon. Bob Goodlatte, Chairman
House Judiciary Committee
2309 Rayburn HOB
Washington, D.C. 20515

Re: ICANN Oversight Hearing

Dear Chairman Goodlatte and Members of the Judiciary Committee:

As advocates for free speech, privacy, and liberty on the global Internet, we ask the Committee to resist calls to impose new copyright and trademark enforcement responsibilities on ICANN. In particular, the Committee should reject proposals to have ICANN require the suspension of Internet domain names based on accusations of copyright or trademark infringement by a website. This is effectively the same proposal that formed the centerpiece of the Stop Online Piracy Act of 2011 (SOPA), which this Committee set aside after millions of Americans voiced their opposition. Using the global Domain Name System to enforce copyright law remains as problematic in 2015 as it was in 2011.

The Domain Name System, administered by ICANN, is critical to the functioning of the Internet as a global system. It is vital to keeping Internet sites accessible the world over, by providing a uniform and unique way to reference each site. Trust in this system is vital, but that trust is undermined when governments or other authorities use the DNS system to censor the Web, whether by blocking or misdirecting domain name resolution requests as SOPA would have required, or by directly censoring domains by requiring domain name registrars to cancel or suspend them as it is being proposed that ICANN should do.

When SOPA was being considered four years ago, eighty-three Internet engineers, comprising many of the people who designed and built today's Internet, warned that "we cannot have a free and open Internet unless its naming and routing systems sit above the political concerns and objectives of any one government or industry."[1]

The Committee is aware of what happened next. In January 2012, millions of Americans wrote and called their Senators and Representatives, imploring them not to impose DNS blocking as a means of enforcing copyright and trademark. The Committee put SOPA aside and has not returned to it.

[1] "An Open Letter From Internet Engineers to the U.S. Congress," https://www.eff.org/deeplinks/2011/12/internet-inventors-warn-against-sopa-and-pipa

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This year, as the Department of Commerce considers withdrawing its oversight of ICANN, some spokespeople for major entertainment distributors have proposed pressuring ICANN itself to implement a system of domain name suspension based on accusations of copyright or trademark infringement. For example, on March 5th of this year, the Recording Industry Association of America wrote to ICANN's CEO, asking him to require domain name registrars to police alleged copyright infringement by websites as a condition of accreditation by ICANN.[2] And the Motion Picture Association of America has asked ICANN to reinterpret its agreements to require registrars to "promptly investigate and respond to use of domain names for . . . IP infringement."[3] The only way a domain name registrar can address copyright infringement accusations against an existing website is by suspending its domain name, causing it to disappear from the Internet for most visitors. This is a blunt instrument, inevitably censoring more speech than is necessary. If it occurs without a finding of infringement by a court, as the RIAA and MPAA proposals envision, then it constitutes a prior restraint on speech—the type most abhorred by our First Amendment legal tradition.

The essential operations of the Internet must not be used to further the political or business interests of any government or industry. It is no more appropriate to turn ICANN into a copyright police force than it would be to have that body enforce political censorship regimes based on foreign sedition or blasphemy laws.

Four years ago, in its one and only hearing on SOPA, Representative Jason Chaffetz memorably said that this Committee should "bring in some nerds" and consult with unbiased technical experts before changing the way the Internet runs. That remains sound advice. The open Internet, governed by sound technical principles and not by the policy preferences of special interests, is the single greatest creator of American jobs and economic growth today. We urge the Committee to preserve this openness by preserving the separation between intellectual property enforcement and the technical governance of the Internet.

Respectfully submitted,

Mitchell Stoltz
Staff Attorney

Jeremy Malcolm
Senior Global Policy Analyst

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[2] David Post, "ICANN, copyright infringement, and 'the public interest,'" The Washington Post, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/09/icann-copyright-infringement-and-the-public-interest/
[3] Alex Deacon, "ICANN52 and the year ahead," http://www.mpaa.org/icann52/#.VVFXwGYb482.

Ms. LOFGREN. I would note that basically the Electronic Frontier Foundation makes the point that those who are suggesting that ICANN require the suspension of Internet domain names based on accusations of copyright or trademark infringement are effectively making the same proposal that was the centerpiece of the Stop Online Piracy Act, otherwise known as SOPA, that was dropped by this Committee after millions of people melted the phone lines here in the Congress, and at that time 83 Internet engineers warned that we cannot have a free and open Internet unless its naming and routing system sits above the political concerns and objectives of any one industry or company, and that the only way a domain name registrar can address copyright infringement accusations is by suspending its domain name. It goes on with other issues.

My colleague, Mr. Farenthold, was talking about the contractual obligations that ICANN has, but one of the things I believe he did not mention that I think is key is that the registrars are required to take an action where there is a court order or an administrative finding, not based on mere allegations of wrongdoing, and I think that is an essential element that has been missing here in this discussion.

I think we are still in the brave new world of the Internet, and one of the things that I think is interesting is whose law applies where. In listening, Mr. Horton and Mr. Metalitz, to your testimony, talking about Web sites that are selling pharmaceuticals, whose law applies? If you go to a chemist in Britain and you buy aspirin, you can get aspirin with codeine over the counter. You can't get that in the United States. If you go to Mexico, you can buy antibiotics over the counter. You certainly can't do that here. But you can't buy Sudafed in Mexico even though you can do that here.

So I notice, Mr. Horton, that your redress was really to U.S. sites, as well as you, Mr. Metalitz, even though the Web sites complained of were really apparently operating in other countries and, so far as I know, complying with the laws of those countries. For example, the Romania server that you mentioned, Mr. Metalitz. I am not an expert on Romanian copyright law, but I believe they do have a right to make private copies for personal use or for what is called normal familial groups that would probably be infringement here in the United States. So whose law applies?

Mr. HORTON. I will go first. Congresswoman Lofgren, that is absolutely incorrect. First of all, as to your point about a court order, ICANN has stated in writing that a court order is not required in order for a registrar to take voluntary action and suspend a domain name.

The rogue Internet pharmacies that we notify registrars about are not operating legally anywhere. There is not a single country in the world in which it is lawful to sell prescription drugs without a prescription, to practice pharmacy without a pharmacy license, or to violate that country's drug safety laws. Every single domain name that we notify a registrar about is operating illegally everywhere it targets, and most of this is common sense. This is very easily verifiable on the face of the Web site, like the heroin Web site that I mentioned.

Mr. METALITZ. If I can respond on the copyright issue.

Ms. LOFGREN. Yes.

Mr. METALITZ. First of all, I don't have the EFF letter, but as you read it——

Ms. LOFGREN. I just got it, too.

Mr. METALITZ. I don't think anybody on this panel is advocating what that letter says. We are advocating enforcement of a provision that says registrars shall take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse. There is nothing in here about automatic takedown or without any verification. So that is point one.

Number two, on the applicable law, I think actually this is less of a problem in the copyright area than in almost any other area because we have a much clearer international standard. One-hundred-seventy countries belong to the Bern Convention. Approximately the same number of countries belong to the World Trade Organization——

Ms. LOFGREN. Well, if I may interrupt, in Britain, for example, they don't have a First Amendment, and they broadly constrain what we would consider to be inviolable free speech. They outlaw some of what their press does. That would not be effective here in the United States.

Mr. METALITZ. In copyright and in trademark as well, there is much more of a uniform international norm than there is on free speech issues or on any of these other issues. So, it is not a non-issue, but——

Ms. LOFGREN. Well, my time is up and, Mr. Johnson, I want to respect his time. I will pursue this further after the hearing, and I think there are some things that need to be clarified.

I thank the Chairman for his indulgence.

Mr. MARINO. The Chair recognizes the gentleman from Georgia, Congressman Johnson.

Mr. JOHNSON. Thank you.

I would like for you to continue your comments.

Mr. METALITZ. Yes. Thank you very much, Mr. Johnson. My only other point was, I mean, the example about private copying under Romanian law, this is not an issue of private copying. The itemvn.com Web site that we cite in our testimony is streaming and allowing downloads of music that hasn't been released yet, and before it is released it is available on that site without any license. So this is not private copying at all.

Mr. JOHNSON. So what we are really talking about is the ICANN Government Advisory Committee enforcing the rules that the stakeholders have agreed to in the 4-year process that it took to come up with this applicant guidebook, and you just want enforcement of the rules.

Mr. METALITZ. Essentially that is right, Mr. Johnson. This is a contract that we are talking about here that was entered into between ICANN and all of these registrars. It was a multi-year process to develop this contract, but it is down on paper now. Let's make sure that it is enforced and that we understand what the ground rules are.

Mr. JOHNSON. And, Mr. Misener, you complain of Amazon's adherence to the rules in applying for a gTLD which incorporated your very name that you have a trademark on. Though it may de-

note some geographic area, that geographic area or that geographic name was not among the names that were set forth in the applicant guide book which were to be prohibited from being assigned. So you applied for .AMAZON, and the countries of Brazil and Peru, through which the Amazon River runs, objected. I don't know what the basis of their objection was, but apparently your view would be that there was no basis in the rules to object based on geography. So you engaged in negotiations with those two governments and nothing happened, and so when it went to a decision the ICANN Government Advisory Committee recommended disapproval or denied your approval. Your contention is that there is no basis in the rules for that denial. What is your remedy?

Mr. MISENER. Mr. Johnson, thank you so much. That was a perfect summary of our circumstance.

The remedy, frankly, is to ensure that NTIA ensures——

Mr. JOHNSON. Well, outside of the NTIA adherence to its guide book, how can you enforce, or is there some kind of independent review? Because if you are going to have some accountability and some reliability and transparency and a rule of law, which is what the guidebook represents, a rule of law, there can be disputes about the meaning and intent of the rules, and so you would have to have some body to make a fair and impartial decision based on the clear language of the guidebook. What remedy exists to enable Amazon to have a day in court, if you would?

Mr. MISENER. Thank you, Mr. Johnson. There is not a good remedy right now within ICANN. One of the proposed reforms for ICANN accountability would establish a stronger independent review process within the body. So that process presumably would have allowed us to have our day in court without the government influence that occurred. We are just afraid because, frankly, there is very strong bipartisan support in the United States, also support between Congress and the Administration that the Internet should remain free of government control, and right now it is not.

Mr. JOHNSON. Let me stop you right there and ask Mr. Woodcock, why did the U.S. abstain from weighing in on the decision as to Amazon's registration of that name?

Mr. WOODCOCK. Fundamentally this is an issue that I have no particular expertise on because it is not my area.

Mr. JOHNSON. Excuse me. Does anybody know why? Can anybody say why? Was it a procedural advantage that the U.S. would retain from abstaining? Anybody know?

Yes, Mr. Zuck.

Mr. ZUCK. I guess I don't know for sure what their motivations were, but I continue to believe that the IANA contract itself is a cumbersome and unwieldy form of accountability, and that the U.S. finds itself in a very difficult position to exercise its will over ICANN in that way, and the other ways that it can exercise its will is through the GAC, through the international organizations which participate. But I think the replacement of that accountability mechanism with real accountability to the community is the key going forward.

Mr. DELBIANCO. And, Mr. Johnson, I wasn't in the room. None of us were in the GAC room when they made the decision whether to block the .AMAZON. So you can chalk it up to perhaps it was

politics. Maybe it was substantive. But more than likely, it was about the politics that go on as Nations decide how to support or oppose each other. But after that happened, the ICANN board had the opportunity to respectfully say we don't agree with your advice, and the board itself has that opportunity. In today's world, if we don't like the decision of the board, it is incredibly expensive, and only a few parties would have standing to be able to challenge that board decision and to have it be reviewed by an independent panel, and if that panel came back and said the board was wrong, the board could still ignore the panel.

This is why the reforms we have described would turn that upside-down so that aggrieved parties could appeal, and if the community, 75 percent of us, agreed, ICANN would pay the legal fees. And if the panel came back and said your decision was wrong, the board would have to do it over.

Mr. JOHNSON. Thank you.

Mr. ISSA [presiding]. Thank you.

I am just going to make a very quick follow-up as a close. In the Fiscal Year 2016 Commerce-Justice-State, language has been inserted for a second year—it was in last year—and it prohibits NTIA from using funds to relinquish IANA function. In other words, until the end of the Fiscal Year 2016, this transition would not be allowed to go forward.

Does anyone see that as anything other than the minimum that we should do within Congress' authority? In other words, slow down this process. It is not a renewal. It simply allows them not to relinquish.

Yes, sir?

Mr. WOODCOCK. Again, I think that there is a huge distinction to be made between the names community and the protocols and numbers community. The protocols and numbers community are peers, if you will, with ICANN. They develop policy globally through the multi-stakeholder process, and the result of that policy is merely copied over through the IANA process.

Mr. ISSA. I understand that the numbers resolve just fine, and nobody knows that I am 143196, et cetera. The reality, though, is that governance is a package deal, wouldn't you say? That trying to separate them would create a greater bureaucracy.

Mr. WOODCOCK. I disagree, respectfully. The three are completely separable. There are no interconnections between those three functions, and moving two forward on schedule would show good faith that the U.S. Government is not willfully impeding a global process.

Mr. ISSA. Noted.

Anyone else?

Yes, sir.

Mr. DELBIANCO. Thank you, Mr. Issa. I believe you said it right, governance is a package deal, especially when we are saying that leverage is necessary to get ICANN to agree to the rather tough reforms we are trying to impose upon them. So I do think we should keep them together. I think the Commerce Department will make a responsible extension of the IANA contract, and then what Congress does with respect to the rider, all of which are moving parts that have to overlay.

The chart I had up earlier showed that possibly the earliest is next spring, 2016. It might well likely leak into much later in 2016, and yet Commerce needs to have enough leeway to spend the resources necessary to answer your questions and to make sure that the stress tests have been applied, to make sure that the conditions have been met. Thank you.

Mr. ISSA. Thank you.

Mr. Misener, the Administration abstained from weighing in. Do you believe that they should have weighed in on this issue rather than leaving it as it ended up?

Mr. MISENER. Yes. They should have maintained their opposition to this treatment of Amazon. They initially were supportive, but 2 years ago I met with the relevant leaders of both NTIA and State, and they told us that they were going to abstain. We objected both on our private interests, but also on the precedent that had been set for the multi-stakeholder model and the U.S. support of that model and its commitment to it. We were disappointed, for sure.

Mr. ISSA. And ICANN, as I understand it, had the ability not to issue the name, period, simply to take it back and say it was a big mistake, we are not going to have a .AMAZON. Isn't that right?

Mr. MISENER. Well, that would have been an abrogation of the multi-stakeholder process which came up with that very definitive list of list of names on which Amazon was not included.

Mr. ISSA. You know, George Carlin had seven names he used on television, only to find out it locked him out of television. Isn't it possible, or isn't it prudent that even when names bubble up through a multi-stakeholder process, that when down the road you discover, like the first day of battle you discover that your battle plan had flaws in it because the enemy found them, shouldn't there be a process to go back through that loop and say is it really necessary to have .thisisstupid?

Mr. MISENER. Well, certainly we are looking for an accountability process to be adopted so that there can be strong accountability for the organization. But we have something like 1,600 trademarks worldwide that incorporate Amazon, 149 different countries worldwide, including in Brazil and Peru. Those are protected trademarks. That is our global brand. It is our core business brand. So we feel very slighted by the participants in the GAC who decided that some geopolitical interest simply trumped our IPR.

Mr. ISSA. It is interesting that in over 200 years of this Nation, and obviously longer than that ago that the Amazon River was named, nobody seemed to have come up and named their company Amazon. And yet you do it, and the next thing you know it is a great name for the whole world to have in a .AMAZON.

Let me just close with a question.

Mr. JOHNSON. Mr. Chairman?

Mr. ISSA. Yes, sir.

Mr. JOHNSON. If I might just ask one question.

Mr. ISSA. Of course.

Mr. JOHNSON. Is it a fact that the name .AMAZON is still available to a different registrant?

Mr. MISENER. It could be, and that is a serious concern of ours, that this could come up in a subsequent round and then be available to someone else who might have obtained that name, and then

we would be in a very difficult position to try to protect our IPR worldwide.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. ISSA. Great question.

Earlier I named some other sites that end in .com. I just want a yes or no because I think these two questions could be a good yes or no. Isn't it true that the most desirable ending, by far, is .com for almost anybody who wants it? It is the first choice of every registrant? Is that correct? Does anyone disagree with that?

Yes, Mr. Corwin.

Mr. CORWIN. Representing a trade group of domain investors which carefully watches what market value is placed on Web sites, .com domains, short non-infringing dictionary words with .com continue to command the highest price in the marketplace. That doesn't mean it will last forever, that there won't be other new TLDs which challenge that dominance down the road. But in today's marketplace a good short, non-infringing name with .com is a very valuable asset.

Mr. ISSA. And .com sells first. If people go to find something—I use GoDaddy, but you could go to any of them—they put a name in, and if .com is available, that is the one they take. It is even the default on many of them.

Mr. CORWIN. In fact, even individuals and companies that have acquired new TLDs, in many cases that new domain, when you type it in, it redirects you and you end up at their older .com Web site. So I am not saying——

Mr. ISSA. It is the opposite of whitehouse.com, which takes you to all kinds of non-.com sites.

Mr. CORWIN. Yes, don't send your school child to whitehouse.com.

I think as .brands enter the market, big corporations advertising at .company, the consumer will start to be educated to think more about the right of the dot. But we remain primarily in a .com world today.

Mr. ISSA. Okay, and I will get to you very quickly. But when Network Solutions had a monopoly, when it was one place, they made a lot of money selling these things at less than $15, right?

I have a basic question. If we assume for a moment that the charter of ICANN is or should be the interest of commerce—in other words, a fiduciary obligation to promote commerce, not to enrich themselves, or even enrich people who sell the names—then is there any real excuse to have a $2,500 price tag on any, absolutely any name at all? In other words, first come, first served. If you want a name, why does that name need to rise above the $10 that .com's are being sold for every day? I paid more or less the $10 when I bought DEI.com years ago. I think the price was slightly higher when Network Solutions had it, but it was still de minimis.

Mr. ZUCK. I feel like we enter into dangerous waters when we start talking about trying to control prices in that way.

Mr. ISSA. I didn't ask about controlling prices. I asked about——

Mr. ZUCK. I understand. I guess I am saying that——

Mr. ISSA. But please hear the question one more time. If the entity, ICANN, has an obligation in its charter, does or should have, that says it exists to make that product available at the lowest possible price, its process of putting those names out—for example, no

exclusives, sell the auction, don't buy exclusive rights, three people buy it. So when I talk about competition gets you an appropriate price and a monopoly gets you a monopolistic price, I understand you are saying we shouldn't be fixing prices, but we have an entity that has .SUCKS and is using its monopolistic power to extort money.

My question is that if we assume that ICANN exists for the public benefit, whether it is Amazon in your fight or any of them, and if there were fair competition, meaning people wanting to get these out there and nobody being able to camp on them unless they pay the fee and own it themselves, obviously you would have a reselling market, but in the primary, original sale market, is there any reason cost-wise that these names would have to cost more than $10 a year?

Mr. ZUCK. Cost-wise, I don't know. But if the market will bear that amount of money, it will show up in the secondary market anyway. WallStreet.com sold for a million dollars. So the truth of the matter is, whether it happens at the outset or in the secondary market, it is going to be a function of whether there is demand for that name.

Mr. ISSA. Yes, Mr. Corwin.

Mr. CORWIN. It really depends on the specific top-level domain. As I said, there was substantial up-front investment to apply for each one. Let me give you an example.

Mr. ISSA. There was substantial up-front to apply because that was the model ICANN was using.

Mr. CORWIN. I think if it gives positive value to the domain registrant and they believe it is worth it, and there may be other costs involved—the American Bankers Association and the Financial Roundtable applied for and they are getting .bank. That is only open to regulated financial institutions. They perceive value in that because it will be a tool for preventing phishing and other financial scams that are carried out through incumbent TLDs, and that validation process and other security measures associated with a top-level domain can justify a higher price to the registrant.

You have to investigate each case, but we don't want people being coerced to buy domains at much higher prices than they would ever pay if they didn't feel that if someone else gets that name, it is going to cause them reputational harm.

Mr. ISSA. There does seem to be two prices, the price when there is competition and the price when there is extortion.

I am going to go to Mr. Collins, but I will go quickly to you, ma'am. Go ahead, Ms. Stark.

Ms. STARK. So, I wanted to just address the principle underlying your question, Chairman Issa, which is isn't there a responsibility to promote commerce and competition, and I think by extension innovation? What I would say about the .SUCKS example is there are just over 36,000 trademarks in the Trademark Clearinghouse today. If each of those brand owners take their set of marks that they have in that clearinghouse and register them in the .SUCKS space for the $2,499 it costs, that is $90 million a year, because you have to renew those names each year. So that is $90 million.

And I think that those costs ultimately, as with any business, get passed on to the consumer. So when you break it down at its heart,

this turns out to be a tax on businesses and on innovation and on consumers.

Mr. ISSA. I certainly agree. It couldn't have been said better.

Mr. Collins?

Mr. COLLINS. Thank you, Mr. Chairman.

Again, I think this is interesting to see the results and also the discussion over ICANN because of the transition of ICANN and the termination of the IANA contract. The two main issues are, first, should we terminate that contract? Second, are we ready at this moment to terminate that contract?

The Committee a while back, last year actually, explored the first question in previous hearings, so my question and my line of thought is going to focus on the second. But based on the evidence I have seen—and I want to ask unanimous consent, Mr. Chairman, to enter into the record a laundry list of recent ICANN failures that should really——

Mr. ISSA. Without objection, the laundry list is placed in the record.

[The information referred to follows:]

The Global Intellectual Property Rights Center of the U.S. Chamber of Commerce
Comment on New gTLD Program: Rights Protection Mechanisms Review
May 1, 2015

The Global Intellectual Property Center (GIPC), an affiliate of the U.S. Chamber of Commerce, is a worldwide champion of intellectual property rights and is vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges. The GIPC leads efforts to promote innovation and creativity globally by advocating for strong IP rights and norms.

GIPC members include businesses actively engaged with ICANN and on Internet governance issues in a variety of areas, along with businesses both big and small, across all sectors that actively rely on the Internet every day to create growth and jobs. Our members operate globally, and thus our interest and perspective are not confined to the United States. Given our scope, the GIPC is uniquely positioned to offer viewpoints from a diverse group of stakeholders, representing various roles within the existing multistakeholder system. GIPC greatly appreciates the opportunity to comment on the "New gTLD Program: Rights Protection Mechanisms Review" Draft Report.

BACKGROUND

On February 2nd 2015, ICANN released a draft report on "Rights Protection Mechanisms Review." The Draft Report is a first step toward the issuance of an Issues Report requested by the GNSO Council that is due to be delivered by September 30th. These steps may eventually lead to a Policy Development Process (PDP) on Rights Protection Mechanisms (RPMs).

RPMs include, among other protections, a Trademark Claims and Sunrise registration process as well as two processes for conflict resolution: the Uniform Rapid Suspension (URS) procedure and the Uniform Domain-Name Dispute-Resolution Policy (UDRP). These tools intend to act as safeguards to protect brand owners from a variety of IP violations.

COMMENTS

As outlined below, GIPC has several concerns with the Right Protection Mechanisms Review itself and the RPMs as have been implemented by ICANN.

I. The RPM Review Should be Driven By Stakeholders, Not ICANN

As presented, the RPM Review fails to pose appropriate questions regarding the effectiveness of the tools to protect brand holders from infringement and cybersquatting. The questions raised in the RPM Review draw broad, forgone conclusions rather than seeking comment on brand owners' concerns both with the process by which the RPMs function and the actual protections the RPMs provide. It is simply premature to start soliciting responses and analyzing results/drawing conclusions without first paying proper attention to asking the right questions.

The RPM Review ought to solicit feedback from brand owners on issues of highest priority, as identified by brand owners themselves. Some RPM issues are technical or relate to implementation, which could easily be solved by the TMCH administrators for example, while other issues, like the failure of the RPMs to anticipate or prevent exploitation of brands as evidenced by .sucks (see further discussion below) raise serious policy and scope questions that should be discussed and evaluated as part of a holistic RPM Review. Asking the right questions up front will decrease burden on volunteers during the PDP process by allowing stakeholders to focus on the big issues. If ICANN wants meaningful participation through the bottom-up multistakeholder process, as it claims, it is critical that the questions asked in this (and other) comment periods get at the big issues that concern the community.

GIPC calls on ICANN to reengage brand owners with the goal of enabling them, rather than ICANN staff, to drive a holistic review of the RPMs as brand owners are the key beneficiaries of the protection tools. This would be consistent with ICANN's stated commitment to developing policy through bottom-up, multistakeholder processes and allow for meaningful engagement by the community most deeply impacted by the RPMs.

II. The RPMs Ought to Reduce Burden on Brand Owners

The Trademark Clearinghouse (TMCH) is a global repository for trademark data that is intended to provide protection to brand owners through a Sunrise period and a Trademark Claims period. However brand owners have found these mechanisms were neither adequately advertised, nor proved to be particularly useful in protecting trademarks against infringement and cybersquatting. For example, Sunrise dates and requirements were poorly publicized and detailed information was often discovered through third-parties rather than clearly and effectively announced by ICANN. These examples of miscommunication create a burden on brand owners as they must scramble to meet deadlines, and therefore are either not fully prepared to participate or do miss the opportunity to participate entirely.

Specifically, ICANN needs to provide

- greater detail on how the TMCH process operates,
- adequate public notice from ICANN on requirements and deadlines, and
- sufficient time for brand owners to meet those requirements and long enough deadlines to enable broader participation.

GIPC encourages ICANN to create a clear and well communicated process for distributing information to brand owners and then directly engage brand owners to ensure that the intellectual property community fully understands the RPMs processes and procedures. Notification via ICANN newsletters and at ICANN meetings is insufficient, as such communications reach only those stakeholders already deeply involved in ICANN. These communications do nothing to reach those audiences – including millions of brand owners worldwide – who have neither the time nor the resources to invest in monitoring ICANN alerts for the occasional issue that may be relevant to them.

III. The RMPs Must be Flexible Enough to Respond to Existing and Emerging Threats to Brand Owners

The recent actions by Vox Populi, through the roll out of the new gTLD .sucks, underscore the need for ICANN to consistently evaluate and seek brand owner feedback on the utility and credibility of the tools they put in place to protect brand owners. Are the RPMs helpful mitigating threats to brand owners? Are the right processes and policies in place to enable the RPMs to adapt to emerging threats? Simply put, the RPMs must be flexible enough to respond to existing and emerging threats to brand owners, not merely those that were contemplated at the time the RPMs were established.

As stated in the March 27, 2015 letter from the Intellectual Property Constituency (IPC), Vox Populi categorized TMCH-registered marks as "premium names" and subsequently charged exorbitant fees to brand owners who attempted to secure a registration in .sucks. The IPC went on to state, "The TMCH Sunrise period is an integral part of Vox Populi's scheme." Vox Populi used the RPMs, which are intended to protect brand owners, to extort money from those that wish to protect their brands. The fact that the RPM's failed to catch and/or halt this scheme calls into question the utility and credibility of the RPMs themselves. Unless ICANN moves quickly to address the failure of the RPMs to prevent this scenario, brand owners will have no basis to trust that the processes created to protect their trademarks will not be used against them in the future.

Additionally, because ICANN effectively enabled this situation to transpire by approving Vox Populi's application in the first place, questions have arisen about the possibility of other predatory actors entering the new gTLD system to take advantage of RPMs for exploitative and coercive purposes or engage in infringing activities. If Vox Populi can game the system so easily, what is to prevent other unscrupulous actors from concocting other schemes to attack or extort brand owners?

Lastly, ICANN's subsequent outreach to the U.S. Federal Trade Commission (FTC) and the Canadian Office of Consumer Affairs (OCA) also raises questions about deficiencies in the RPMs. ICANN's request for government intervention was seemingly done on an ad hoc basis in reaction to the recognition that Vox Populi's purposes were inappropriate, rather than as an intentional part of the designed IP protection mechanisms. This too is concerning, and calls into question the flexibility of the RPMs to respond to emerging threats.

IV. The RPMs Must be Broad Enough to Protect Many Types of IP Violations

Many brand owners are concerned that the RPMs' protections are too narrow in scope. For example, brand owners are concerned that the TMCH will only reject domain names that are a direct mark match, but will not consider a wider array of trademark variations. While we recognize that ICANN cannot prevent every conceivable infringement scenario, the RPMs must go further to protect existing IP rights consistent with the rule of law. At a minimum, the RPMs must provide a meaningful and efficient way for brand owners to seek broader protections through the TMCH.

Accordingly, GIPC encourages ICANN solicit feedback from the community on how the RPMs could be made more robust. This should be a component of a holistic, stakeholder-driven re-review of the RPMs, as called for in our comments above.

Conclusion

ICANN's RPM Review was intended to provide an initial evaluation of the effectiveness of the Rights Protection Mechanisms. However the discussion questions that were posed to stakeholders sought out granular responses rather than soliciting brand owners for their views on the function and substance of the RPMs themselves. In proceeding as such, ICANN suggests it is either not cognizant of the problems brand owners have with the RPMs, and/or not is not legitimately interested in hearing from brand owners. ICANN can begin to remedy this situation by reengaging with brand owners with the goal of learning from brand owners about what works, what doesn't, and what else is needed to run a fair, efficient, robust RPM system that protects intellectual property rights consistent with the rule of law.

Mr. COLLINS. Thank you. And my wife's part is took out, so it is just mine.

I believe ICANN is engaged in a pattern of behavior that indicates their lack of commitment to follow through on their contractual obligations that exist today. A multi-stakeholder model is effective when the community agreements are respected and enforced and when the administrator of ICANN takes seriously the responsibilities to live up to the commitments they made.

I am concerned about the lack of accountability and transparency I have observed on the part of ICANN. In fact, it is probably like an old commercial that we have seen on TV, the Cheez-It commercial. I just don't think they are ready, mature enough to be baked into a system, into a cracker. This is the part that just bothers me because there just doesn't seem to be the understanding of the concern that most of us have and that has been discussed here today.

So, a couple of questions. I want to start with Ms. Stark. The first is in 2011, you told Congress that the first round of new gTLDs would cost the business community conservatively $12 million in defensive registration fees. Some claim that that number was an overstatement. Was it?

Ms. STARK. No. I would actually say that for some companies that are really interested in protecting a whole host of brands, the numbers could be even worse. In 2011, I had noted that a large corporation might look to register maybe 300 defensive names in what was then anticipated to be about 400 spaces, and we averaged that out at just a cost of $100 a name, right? That is how we got to that $12 million.

Well, I think the costs today remain unknown. We haven't even delegated maybe half of the names into the space now. But you are not looking at 400 names any longer. You are looking at over 1,300 new spaces, and from our calculations the average sunrise registration in the spaces that have gone forward is more like in the $300 to $350 range when you average it across all those spaces. So that, again, was triple what we were talking about in 2011.

And then if you look at this .SUCKS example that we have been discussing throughout today, you are talking about for a single mark it costing $2,499 a year. And like I said, if the brand owners register all the marks they put into that clearinghouse, that is a cost to business of $90 million a year. It is extraordinary.

Mr. COLLINS. It is. I want to say right here just one more question, and it is a concern that rogue Web site operators are increasingly engaging in domain hopping, switching from one TLD to another to maintain their brand. For example, there are several sites that trade on the piratebay name, even though the sites' operators have been convicted of criminal copyright infringement. Some of these sites are existing TLDs, the piratebay.com, the piratebay.org, and others with new gTLDs.

Do you think it is fair that rights owners or law enforcement take action against one domain only to have the same problem arise, basically trading on the same name with a different TLD?

Ms. STARK. I think that that is an extraordinary challenge for companies like mine, and I very much appreciate you raising it. We are always looking for ways in which to more efficiently address these problems without having to tackle people as they hop around

the world and hop around the Internet from name to name to name. I don't know that I have a solution to that, but I do think that it really creates a resource challenge when what we are trying to do is get out legitimate content to people and spur innovation and productivity in that same Internet world, and what they are trying to do is simply steal it.

Mr. COLLINS. And I think this is something that is very important because it is sort of the tree here. We are following this out, and you can do it in other cases, criminal cases. You can do it in others. But especially in this kind of case where you have had this blatant kind of hopping around that is against, so I appreciate that.

Mr. Metalitz, how important is it for accuracy and integrity of the WHOIS database through the function of accountability and the rule of law to the online ecosystem? And also, how do these issues intersect with the public interest commitment, the registrar accreditation agreement, and the other ICANN standards of online accountability?

Mr. METALITZ. Thank you for that question. WHOIS is extremely important. It is a key element of accountability and transparency to know who you are dealing with online. ICANN was given stewardship of this database 15 years ago, back in the monopoly days, right after the monopoly days that the Chairman was referring to, and it has not fared well during that period. It is less accessible, and it is certainly less accurate, apparently less accurate now than it was then, and we have a problem now that 20 percent of the registrations in the gTLDs are registered to proxy services. It just puts a barrier between you and finding out who you are dealing with online.

I think your previous question to Ms. Stark was very well put, and we have two problems there. One is we have some legacy registries such as .org. So even after old piratebay.org was brought to their attention, and piratebay has been the subject of orders in many countries, the people who ran it have gone to jail in Sweden for copyright infringement, even after that, .org would not take any action on the operators of that registry.

Then we also have a problem with the country code top-level domains, the two-letter domains that ICANN has no control over, and some of them have been quite cooperative, but some have not. So this is another frontier that we still need to deal with in this effort to try to enforce our copyrights.

Mr. COLLINS. And I think that is something that the Chairman and I have worked on a great deal, because if we continue this hopping around, if we continue this non-transparency and this non-accountability, then we are simply setting ways that are affecting business. It is affecting really that ingenuity, that spirit that we are trying to incorporate, and especially when it comes to just blatant stealing and copyright infringement, let's just call it what it is. So I appreciate that.

I know Amazon has had an amazing story with ICANN and the problems there, and we could go into that. So I wanted to recognize that fact. I have seen that. And for all of us here, I think it is just an example that ICANN there is the problems here, and it is not ready, and I think that is the thing we go back to.

With that, Mr. Chairman, I yield back.

Mr. ISSA. Thank you.

I am going to close with a question. It is somewhat rhetorical, but I will let you weigh in if you want to, and it is similar to what Mr. Zuck and I had sort of a back and forth on.

ICANN is a California-registered non-profit. Now, non-profits, even though they pay their CEO millions of dollars, non-profits can only be non-profits if they, in fact, exist for a public benefit. So ICANN, contrary to Mr. Zuck and I's back and forth, has an obligation for service, and I am of the opinion that in a number of examples we have seen here today, including how they oversee, if you will, the multi-stakeholder process, they seem to have lost track of that. And certainly when you see that a relatively de minimis amount of money—it cost me less than $10 to get Issa.cc, which happens to be international, but it came through the process of you buy it online, and a number of others—most times when you want a name, if it is available, it costs you $10 or less. But when, in fact, it is a name that exists for the purpose of causing you to buy it in defense, it has an extortionary price.

My closing comments—and I will let anyone weigh in who wants to—is doesn't Congress have an obligation, along with the State of California I might say, to look at ICANN and say, you know, ICANN is making a ton of money, they seem to be in the operation of making a ton of money. It looks like in the case of .SUCKS that they simply wanted to recover a $900,000, $1 million IOU from a company that had failed to meet its earlier commitments, and this deal was a way to do it with an extra incentive to clear up an old balance.

If somebody disagrees, I would love to hear it. If you agree, briefly, and then we will call it a day.

Mr. DELBIANCO. At 17 years old, ICANN is really just a nascent institution. It is an evolving institution in the most rapidly changing industry the world has ever seen. So, guess what? Every year, every week, we are going to have new problems, just like the ones you have adequately described. And when these problems come up, we can't anticipate to say we check the box to say they have solved all the problems that they have, and they have solved all the problems that will ever be in order to say are they ready.

What we really need to say is that when they make bad decisions or implement good decisions poorly, we have got to be able to hold them to account, challenge their bad decisions, like this decision on the million-dollar fee to the .SUCKS. We ought to be able to challenge it, to know about it, and if they don't listen to what the community believes, we fire the entire board and start with a new board under the same public service principles.

Mr. ISSA. Mr. Corwin?

Mr. CORWIN. As a public benefit corporation, they certainly have an obligation to act in the public interest, and there has been a tremendous amount of money generated by the new top-level domain program, about a third of a billion dollars in application fees alone.

There is something going on right now that——

Mr. ISSA. Of course ultimately, the auction process, that is not serving the public interest. That is making them money. The public

interest is served when a company like Amazon gets value, and I will put it in a term that hopefully you will all agree with.

Horses running alone run slower than a horse with a jockey on it. But a horse with a 500-pound jockey doesn't run at all.

We, in fact, have a phenomenal horse. The naming system is what makes a string of first four and now six series of sequential numbers actually be usable by the public. That is the jockey that is making this enterprise work. When I type "fox.fox" for "fox.com," I get what I want in most cases. It works, where numbers would never do that. But if I simply put hundreds or thousands of $10 to $2,500 purchases on the back of an enterprise, I put a 500-pound jockey on that enterprise, as you said so well, Ms. Stark. I am taxing an enterprise.

That public benefit corporation has an obligation to these companies. They have an obligation to the stakeholder. The real stakeholder is commerce. It is not their enrichment in fees and a new set of profiteers that simply are in the business of hijacking the system and causing other enterprises to pay for, effectively, a heavier jockey.

We have to end it after this.

Mr. WOODCOCK. I think part of the issue is that there is a certain degree of complexity and unwieldy-ness to the current system. The accountability measures are there to NTIA, but it is a three-party system where the services that ICANN provides are provided to the community, but we rely on NTIA to provide the discipline to ICANN. Making ICANN directly responsible to the industry so that industry can provide its own self-governance is something I think everyone on this panel can probably agree to.

Mr. ISSA. Thank you.

This will be the very last comment because it is time to go.

Mr. METALITZ. Yes, thank you, Mr. Chairman. If I could just add the perspective of someone who has followed ICANN very closely over the past 15 years and had many opportunities to share my perspectives with this Subcommittee, which I really appreciate.

ICANN is an experiment, and experiments don't always work out neatly, and they don't always work out effectively at a particular snapshot. I think if you take the longer view, many of the problems we are talking about here show progress. These contracts that ICANN is not yet enforcing, they didn't even have these contracts until 2 years ago. And similarly on WHOIS, they are taking on the problem of proxy registrations. I don't know if they will be able to deal with it effectively, but they weren't even taking it on a few years ago.

So I think we have to look at the bigger picture to see—you are absolutely right, that as a public benefit corporation, ICANN needs to serve the public interest, and I think the oversight of this Subcommittee is an important factor. Continued oversight will be an important factor in making sure they do so.

Mr. ISSA. Thank you, and this concludes today's hearing. I want to thank all of our witnesses today.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses and additional material for the record.

I thank you, and we stand adjourned.

[Whereupon, at 12:44 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Mei-lan Stark: Further Answer to Question of Rep. DelBene

On May 13, 2015, I was pleased to offer testimony regarding Stakeholder Perspectives on ICANN: The .sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation on behalf of the International Trademark Association (INTA). During the hearing, Representative DelBene posed the following question:

> *As part of the process for launching new gTLDs, ICANN established a committee of trademark law experts that made recommendations for stronger and more efficient protection of Trademarks and that many of their recommendations were adopted by ICANN, including a new, faster and cheaper procedure to "take down" a domain name that is violating a Trademark owner's rights. Could you please compare and contrast this to the .COM regime, and provide the Committee with examples of instances where a domain name was taken down? Do you feel that trademark holder interests are being adequately protected?*

Six years ago, there were 190 million domain name registrations, 22 gTLD registries and ICANN's plan to expand the domain name system was in the starting gate. Today there are 250 million domain names and over 600 new gTLD registries are up and running. A further 600 are limbering up, and will be added in the next [6] months. It might be too early to pick the winners but it is easy to pick the losers – businesses large and small as well as consumers from every part the world. The rights protection measures that were promised to brand owners as "a tapestry of globally effective solutions"[1] turned out to be full of holes, offering little protection at much expense, that will be passed on to end-users.

ICANN pledged so much more to governments, business and community groups when it committed to the expansion of the domain name system in 2008. In 2009 the ICANN Board formed the Implementation Recommendation team (IRT) from a group of 15 brand owners[2], intellectual property lawyers and academics plus two representatives from registries and registrars to provide balance to achieve workable sustainable scalable solutions. At the Mexico City Open Meeting that same year, ICANN Chair Peter Dengate-Thrush said, "The Board has clearly heard and believes strongly that the concerns of trademark holders must be addressed

[1] See https://archive.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf

[2] Members of the IRT included representatives from large corporations such as Lego, Microsoft, Richemont, TimeWarner, and Yahoo! plus trademark attorneys from Argentina, Canada (a former Board Member of ICANN), France, Israel, Pakistan, USA as well as two registrars, one registry operator and an academic. Every member of the IRT was a member of INTA.

before this process is opened for applications. The establishment of this team is an attempt to get proposed solutions from the people with skill in trademark protection and other issues." Indeed, trademark rights were identified as one of the overall arching principles that needed to be addressed.

However, when the IRT published its final report, the Board declined to meet with the IRT, despite numerous requests to do so. Instead, ICANN staff were instructed to negotiate the IRT's recommendations through the ICANN community, without informing the IRT at the outset of its work that this would be done. This meant that many people with a vested interest in selling domain names or operating future registries were invited to shape complex rights protection measures. In creating a holistic "tapestry," the IRT created mechanisms of protection that worked together at both ends of the domain registration process - going in and coming out. The carefully crafted tapestry has been unraveled. Recommendations rooted in best practice and international law have been diluted to the point where they are ineffective or inflated with unnecessary expense. For example:

- **The Globally Protected Marks List:** Based on the most universal request by brand owners to ICANN, the IRT recommended that a small and limited number of "supernova" trademarks should be blocked from registration at any registry. ICANN staff unilaterally decided this proposal was unworkable, even though ICANN itself created a block list for their own names. Who can decide where to draw the line between famous and well-known trademarks and the rest, they asked? They promised a study into the idea that they never delivered. However, portfolio gTLD applicants, notably led by Donuts, successfully introduced their own "Domains Protected Marks List". Thus the private sector implemented what ICANN could not be bothered to investigate. The trouble is the DPML costs c. $3,000 per mark and works only across Donut's 200 registries not all 900 "Open" registries. Even though a few other registry operators are now adopting similar schemes, due to the clear popularity of the idea, they are startlingly expensive – thousands of dollars per name with an equal burden on renewal.

- **The URS, the Uniform Rapid Suspension Scheme** was designed by the IRT as a fast remedy to clear cut cases of cybersquatting. This is in contrast to the Uniform Dispute Resolution Proceeding (UDRP) that is available for legacy domains like .com. As Francis Gurry, Director General of WIPO warned in a press release of 16 March, 2009, "The sale and broad expansion of new top level domains in the open market, if not properly managed, will provide abundant opportunities for cybersquatters to seize old ground in new domains." The idea was simple: bad faith registrations supporting a website could be taken down within 14 days for $200, and could be scaled to handle multiple bad-faith registrations made by a single owner in one procedure. In designing this mechanism – which was itself a serious compromise by brand owners who wanted a stronger remedy including the ability to have the name transferred so it could not be taken hostage by another squatter. The UDRP allows for this remedy. The URS does not. The workability of the URS was discussed and negotiated with the representatives of the Registrar and Registry on the IRT. This simplicity was destroyed by the ICANN process: the cost to trademark owners increased by 75% ($350) and the process stretched out to a minimum of 28 days. A month is a long time on the internet: no business

wants a copycat website entrapping customers to be up for so long especially when the loser still does not pay.

- **The Trademark Clearinghouse** was never really envisioned as a rights protection measure: it was designed by the IRT as a cost-reduction mechanism so that brand owners could enter details of a current trademark into one central database, thus saving expense on having the same records validated time and again by different registries with different criteria and different pricing. Once again, ICANN allowed the costs to spiral and restricted the benefits. It gave the exclusive franchise to run the TMCH to Deloitte and IBM. They charge $150 for one record for one year or $435 for one record for three years. Most brand owners wanted to file for two years and hoped for a price comparable to the cost of a domain registration (not *18 times more* than a .com). This high price accounts for the low numbers of subscriptions to the TMCH: after two years, they have just 40,000 records (about 5% of all unique trademarks in the world). Compounding this failure of execution, the TMCH is now offering subscriptions to commercial search and watch services, exploiting the data submitted by trademark owners for their own profit, which is available to them solely because of ICANN's granting them that monopoly.

- **Sunrise:** The IRT recommended that every registry should operate an exclusive early access period for rights owners called a Sunrise. ICANN adopted this suggestion but the unintended consequence is the ability for registries to capture trademarks and charge significantly higher prices for them. When a registry operator like Vox Populi charges trademark owners $2,500 (*more than 100 times the cost* of a general availability registration) for a single domain in the .sucks Sunrise because you own a trademark in the TMCH, something is seriously wrong. Now we see registry operators listing trademarks as so-called Premium Names with premium prices. Surely trademark owners should be allowed to secure the names that consumers rely upon for the same price as infringers? We need to find a workable remedy for this predicament.

It would be premature to say that the new gTLDs have heralded an expansion in cybersquatting. So far there are only just over 5 million new gTLDs registered, compared to 120 million .com domains and 130 million ccTLD (Country) domains. The rate of registration under new gTLDs is too low for meaningful conclusions to be drawn yet. Infringers, like consumers and trademark owners are cautious about registering in the new extensions.

However, it is not premature to proclaim that trademark owners and consumers are paying a very high price for the new gTLD program. The example below illustrates this point clearly. A framework of functioning, affordable rights protection measures was designed by the IRT in the spirit of reasonable compromise. ICANN allowed it to become a patchwork of partially effective, overly expensive measures.

I do want to point out that the issues with inadequate RPM's do not necessarily apply to .brands as they are closed registries that are controlled by brand owners and distributed to end users who must meet certain qualifications. There is a much lower risk to trademark owners under this scenario.

With the second round of new gTLDs perhaps no more than two years away, INTA on behalf of brand owners and consumers across the USA and the six continents want the first round rights protection measures to be enhanced to be more effective and – very importantly – to be more affordable. Rights owners should be given access to measures that they can afford to purchase or to implement across portfolios of marks.

Why do these extra costs imposed on brand owners matter? It matters because domains are trusted by internet users as signposts to authentic content, genuine goods and services. If a domain name matching a brand or business name is taken by a third party, consumers are confused and often they are cheated. Abusive domain name registration underpins counterfeiting and fraud, phishing and identity theft. When enforcement costs become unreasonable then effective enforcement is compromised and consumers are exposed to more fraud and abuse.

At its most fundamental, the security and stability of the Internet relies on trust. If domains cannot be trusted, then the system will fail for all concerned. Congress must help ensure that ICANN adopts affordable, reliable, scalable, sustainable rights protection mechanisms to preserve trust in the system.

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Cost Example

Estimated Costs faced by typical medium size brand owner for one year (where the agent fees are the fees charged by the registrar or lawyer for fulfilling the service and the official fees are the prices charged by the registries)

- 25 registrations for most important marks at TMCH at $150 agent fees + $150 official fees = $7,500
- 25 registrations under Donuts DPML at $1,000 agent fees and $3,000 official fees = $100,000
- 25 Sunrise registrations across 100 registries at $50 agent fee and $100 official fees = $375,000
- 250 registrations under General availability at $30 agent fee and $30 General Availability fee = $15,000
- 5 URS complaints at $500 agent fee and $350 official fees = $4,250

Total = $501,750 for the first year, excluding internal resources

COALITION FOR ONLINE ACCOUNTABILITY
WWW.ONLINEACCOUNTABILITY.NET

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July 2, 2015

VIA EMAIL

Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515
Attention: Eric Bagwell *(eric.bagwell@mail.house.gov)*

Re: Hearing on "Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation" -- Responses to Questions for the Record

Dear Chairman Goodlatte:

Attached please find my responses to questions for the record from Representative Karen Bass (CA-37) following the Committee on the Judiciary's Subcommittee on Courts, Intellectual Property, and the Internet's hearing on "Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation" that was held on May 13, 2015.

If you have any questions or require any additional information, please do not hesitate to contact me. Thank you once again for the opportunity to testify.

Respectfully submitted,

Steven J. Metalitz

Counsel, Coalition for Online Accountability (COA)

Attachment

Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on "Stakeholder Perspectives on ICANN:
The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation"

May 13, 2015

Questions for Record from Rep. Bass

Responses of Steven J. Metalitz
July 2, 2015

Question 1:

Have any of the groups and companies that you represent submitted notices regarding infringement and illegal activity to registrars and ICANN?

Yes. Several participants in the Coalition for Online Accountability have complained to accredited registrars that domain names sponsored by those registrars are being used to carry out pervasive copyright infringement. At least two of these organizations, after failing to get any meaningful response from registrars (and in some cases being told by registrars that such complaints are not allowed), have pursued the matter by complaining to ICANN, asking that the registrars in question be investigated for violations of provisions of the 2013 Registrar Accreditation Agreement, including the requirement in section 3.18.1 that registrars "investigate and respond appropriately" to such complaints.

Question 2:

In your opinion is ICANN taking adequate action to clarify and enforce the Registrar Accreditation Agreement (RAA) provisions?

No. At least as of the date of this response (July 2, 2015), ICANN compliance has not to my knowledge enforced these provisions against registrars that sponsor domain names used for pervasive copyright infringement. None of the complaints to ICANN referenced above has led to any ICANN enforcement action against registrars or (to the knowledge of COA participants) to any corrective action by registrars. Except for those complaints still pending as of the date of this response, all the complaints to ICANN that COA participants have brought have been summarily dismissed for the stated reason that the registrar has "investigated and responded appropriately" to the complaint made to it. Nor has ICANN issued any formal or informal clarification of the RAA provisions in question. ICANN compliance staff has talked for months about issuing one or more "advisories" to clarify the relevant RAA provisions, but to date has not done so.

Question 3:

Section 3.7.7 of the ICANN Registration agreement says that ICANN "shall use commercially reasonable efforts to enforce compliance with the registration agreement between ICANN and a

Registered Name Holder." Then Section 3.7.7.9 of the agreement says that the Name Holder shall represent that, to the best of its knowledge and belief, its Name is NOT used in an infringing way. What are some commercially reasonable methods that ICANN can use to enforce compliance with this representation?

The RAA provision referenced in the question sets out the obligation of the registrar to use commercially reasonable efforts to enforce the representations that registrants are required to make in order to register a domain name. This includes the representation in section 3.7.7.9 that, "to the best of the Registered Name Holder's [i.e., the registrant's] knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party." ICANN's role is to enforce this obligation taken on by the registrar.

At a minimum, commercially reasonable efforts by the registrar would include investigating any complaint received from a third party that provides a reasonable basis for believing that a particular registrant is not fulfilling this representation, based on evidence that (1) a particular domain name is being used in a manner that infringes the rights of that third party (for example, by operating a website to which that domain name resolves that is engaged in or facilitating pervasive copyright infringement), and (2) the registrant is or reasonably should be aware of such use. Leaving to one side whether this provision imposes any proactive obligation on the registrar, it cannot be commercially reasonable for registrars to turn a blind eye to well-documented complaints of this kind; and those that do so should be subject to enforcement action by ICANN for non-compliance with section 3.7.7. Please note that some of the complaints to registrars summarized in response to the preceding two questions have specifically cited this provision; as noted above, none of these complaints has resulted in any corrective action.

February 11, 2015

Ensuring Trust in Internet Governance

By Representative Bob Goodlatte & Senator Chuck Grassley

This week in Singapore, important decisions are being made about the future of the Internet at the Internet Corporation for Assigned Names and Numbers (ICANN) 52 conference. At stake are fundamental questions: Should the American people surrender stewardship over core technical functions that have preserved the open and neutral operation of the Internet since its inception? Should the Obama Administration cede this authority to an organization many consider to be non-transparent, unaccountable and insular? If the administration insists on a transfer, what guarantees, capabilities and conditions first should be demanded and stress-tested by the global multi-stakeholder community?

This discussion began with the surprise announcement by the National Telecommunications and Information Administration (NTIA), an agency within the Department of Commerce, which asked ICANN to develop a proposal to transition NTIA's role as "the historic steward of the Domain Name System (DNS)." The announcement came as a shock to many who follow Internet governance issues and others who depend upon the Internet to communicate freely or conduct commerce around the world.

Indeed, NTIA's announcement appeared to directly contravene long-standing positions of both the legislative and executive branches that the United States should retain its stewardship in overseeing the management of the Internet for the benefit of users worldwide.

Since this announcement, the administration's process and the factors it weighed preceding this decision have not been fully disclosed. However, evidence suggests that the proposal to transition the responsibility for administering changes to all top-level domains, as well as serving as the historic guarantor of the DNS, was dictated not by technical considerations but rather in response to political motives. Moreover, questions persist as to whether the Obama Administration had the authority to commence such a transition without congressional oversight and approval in the first place.

In its original press release and subsequent communications, NTIA referred to two congressional resolutions, S.Con.Res.50 and H.Con.Res.127, which were passed by the 112th Congress. These resolutions affirmed House and Senate opposition to attempts by foreign governments and inter-governmental organizations to assume control over the Internet and generally endorsed the multi-stakeholder model of Internet governance. These resolutions were specifically intended to signal U.S. opposition to efforts by other nations to enlist the United Nations and empower the International Telecommunications Union as the global regulator of the Internet.

However, neither resolution mentioned ICANN, the Internet Assigned Numbers Authority (IANA) functions that NTIA now proposes to transfer oversight over, or contained a suggestion, explicit or otherwise, that the United States should contemplate surrendering stewardship over the administration of these critical functions to ICANN or any other entity. In fact, two other resolutions passed in 2005, H.Con.Res.268 and S.Res.323, affirmed that operation and management of the Internet's domain name and addressing system should remain under the oversight of the United States. The administration's practice of playing fast and loose with clear statements of Congressional intent is not the way to inspire confidence, build support or work towards achieving consensus.

Serious questions remain about the wisdom of ceding this authority, as well as the specifics of any transition. Our committees have been conducting oversight of ICANN and we will continue to closely examine the processes of the United States government and ICANN as these transition discussions continue.

We welcome NTIA Assistant Secretary for Communications and Information Larry Strickling's recent acknowledgements that there are no hard and fast deadlines for completing this process. If the administration is determined to give up oversight of ICANN and the IANA contract, permanent improvements to ICANN's accountability and transparency are critical to building public and congressional trust for any proposed transition. Any consideration of such a transition must be done carefully and in close coordination with Congress, rather than in a unilateral way. Further, we encourage members of the public and the many constituencies with interests in this process to make their voices and concerns heard. We also encourage ICANN to ensure that whatever results from this process shows that the outcome emanated from a true bottom-up multi-stakeholder process and was neither imposed on nor unduly influenced by ICANN's leaders, staff, or members of its board.

The U.S. has served as a critical and responsible backstop against censorship and threats to openness and free speech on the Internet. As a result, the Internet has thrived. We must ensure that these principles remain intact for all Internet users across the globe. The future of the Internet as a medium for free speech, the flow of ideas and global commerce is at stake, and must be protected.

Senator Chuck Grassley (R-Iowa) is Chairman of the Senate Judiciary Committee and Representative Bob Goodlatte (R-Va.) is Chairman of the House Judiciary Committee.

http://www.circleid.com/posts/20150211_ensuring_trust_in_internet_governance/

ICANN's accountability and transparency mechanisms need to be in place before the IANA transition takes place

by: Shane Tews

May 11, 2015 6:00 am

DomainNameSystem by Shutterstock

tags: ICANN, Internet governance

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The Domain Name System (DNS) is crucial for the ability of the Internet to be networked globally – it is the address book that matches numerical IP addresses with computers connected to the Internet. When you type the name of a website into your browser, the name can be translated into numbers that send you to the website's location. In order for the Internet to work, someone has to make sure that names and numbers are coordinated in a way so that devices have their own unique identifiers, that a certain website name always leads to the same place, and that different devices can communicate with one another. Currently, that someone is the Internet Corporation for Assigned Names and Numbers (ICANN), a California nonprofit designed in the 1990s. ICANN performs the first part of a set of tasks, known as the Internet Assigned Numbers Authority or IANA functions. The US Department of Commerce has awarded a contract to perform the IANA functions to ICANN since 1998, when the Internet's increasing size and scope dictated the creation of an organization that could manage this important task. By virtue of this contract, the US government has been a steward of the DNS; it is the only entity able to act as an oversight mechanism, ensuring that the IANA functions continue to run smoothly.

Since the inception of ICANN, the US government has always planned to transition oversight of the IANA functions to a private-sector-led organization that could better adapt to the increasingly global, rapidly changing nature of the Internet. True to this goal, Assistant Secretary Larry Strickling announced in March 2014 that the Department of Commerce would allow its IANA functions contract to expire if an appropriate transition plan was put in place by September 30, 2015. In this transition, the US government would vacate its position as an institutional overseer of the backbone operations of this specific aspect of the Internet. The government's position has always been that a suitable plan that protects the future of the Internet and that ensures that ICANN remains accountable and transparent must be in place in order for the transition to occur.

Since last year's announcement however, many of us who monitor ICANN have worried about the IANA functions contract being dissolved before the accountability and transparency structure of ICANN has been assured. Due to the importance of the IANA functions to the core existence of the current Internet infrastructure and the digital global economy, it is critical that the IANA functions remain in capable and accountable hands.

To achieve this goal, hundreds of individuals from civil society, academic institutions, governments, businesses, and technical network operators serve on working groups, support organizations, and advisory councils to ensure that a multi-stakeholder model continues to be the way in which decisions regarding Internet governance are made. To quell concerns about accountability of ICANN these groups of individuals are working hard to create a much stronger international safety net that will assure that the Internet will have many guardians instead of just one government.

By using a multi-stakeholder governance model, the different parties that have a stake in the Internet will watch over these important functions. Both Republican and Democratic administrations, as well as the US Congress, have historically agreed that the multi-stakeholder model is the best way to make decisions related to Internet governance. Additionally, The National Telecommunications and Information Administration (NTIA), a part of the Department of Commerce, has said it will not go through with the IANA transition unless ICANN develops a plan for that transition that (1) supports and enhances the multi-stakeholder model; (2) maintains the security, stability, and resiliency of the Internet DNS; (3) meets the needs and expectations of global customers and partners of the IANA services; and (4) maintains the openness of the Internet. NTIA also specified that it would not accepted a proposal that replaced its role with a different government-led or intergovernmental solution.

http://www.techpolicydaily.com/technology/icann-accountability-iana-transition/?print=1

Under the current model, adding a new record or making changes to an existing record happens in three steps: notification, verification, and implementation. ICANN coordinates the notification to add to or amend the unique identifiers, NTIA performs the verification step, and Verisign edits and implements the changes. This "triangle of trust" exists for a reason: while you do not necessarily need three parties to be involved, this separation on functions allows for transparency and a "trust but verify" point of validation. This keeps the multi-stakeholder community engaged and gives them the ability to oversee the health of the core Internet network operations. The "triangle of trust" keeps both the technical natives and the policy/political wonks comfortable with the IANA process.

Unfortunately, news came this past week that ICANN staff may be ignoring the work currently underway to ensure that ICANN has sufficient accountability and transparency once the Department of Commerce contract expires and NTIA exits its current oversight role. Reportedly, "[someone at] ICANN has verbally represented that they will reject any proposed agreement in which ICANN is not deemed the sole source prime contractor for the IANA functions in perpetuity." This destroys the "triangle of trust" and runs contrary to the spirit of using the multi-stakeholder community model as the place to cross-coordinate policymaking on the functionality of the Internet's core protocol functions.

A lot of time and effort has gone into preserving the multi-stakeholder model for Internet governance, and most of ICANN's staff have been working alongside various multi-stakeholder groups to make sure the transition is a success. We need to give these working groups the time needed to develop the right measures to strengthen ICANN's accountability and transparency. If this current process is done with credibility, it will withstand the scrutiny of those in the global community who question ICANN and its ability to serve the international community. ICANN should not try to monopolize the IANA function; it has to prove to the world that it can run the core functions of the Internet successfully and with a high level of cooperation.

Once a suitable accountability structure is in place, ICANN can be given the independence it desires, and oversight can move away from one government and towards the global community. Any transition process should recognize the "backstop" function currently provided by the US government and replace it with a multi-stakeholder accountability function that can ensure ICANN's stability and legitimacy moving forward. Once this global safety net is established, the IANA functions should be the next big item up for discussion, but not before then.

- See more at: http://www.techpolicydaily.com/technology/icann-accountability-iana-transition/#sthash.YwGIVPIs.dpuf

http://www.techpolicydaily.com/technology/icann-accountability-iana-transition/?print=1

The Honorable Darrel Issa
Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Doug Collins
Vice-Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
2138 Rayburn House Office Building
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The Honorable Jerrold Nadler
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
2138 Rayburn House Office Building
Washington, DC 20515

May 20, 2015

Dear Chairman Issa, Vice-Chairman Collins, and Ranking Member Nadler,

The Copyright Alliance submits this letter for the record concerning your May 13, 2015 hearing, "Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation" to bring attention to the current issues surrounding transparency and accountability within ICANN. The Copyright Alliance is a nonprofit, nonpartisan membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their work. The Alliance represents a diverse array of members in the creative fields who embrace the opportunities provided by a free and open Internet.

Maintaining a free and open Internet is crucial for American creators, who depend on a free Internet, coupled with meaningful legal protections to promote that freedom. For instance, appropriate and effective copyright protection is essential for ensuring online markets can develop on free market principles that allow creators to generate revenue from the use of their works. Additionally, meaningful copyright protection is vital for our

national economic interests: core copyright industries contributed over $1 trillion dollars last year to the U.S. economy, and provide almost 5.5 million good American jobs.[1]

As the U.S. government prepares to potentially relinquish control over key aspects of Internet governance to the private sector, understanding ICANN's role and making it more transparent and accountable is of the utmost importance. The Copyright Alliance endorses the testimony given by the Coalition for Online Accountability, and believes that ensuring ICANN's compliance with the provisions of contracts it has entered into is key to maintaining transparency and accountability.

As Steven Metalitz noted in his testimony,[2] ICANN and Internet registrars have agreed to a variety of contractual obligations in the 2013 Registrar Accreditation Agreement (RAA). Execution of this agreement is a prerequisite to accreditation to sell domain names in the new gTLDs. Under the terms of the RAA, Registrars must, among other things, make available and publicly accessible an up-to-date database of identity and contact information on domain name registrants (also known as the Whois service),[3] require registered name holders to represent that the registered name will not be "directly or indirectly used" to infringe the legal rights of any third party,[4] comply with the obligations specified in the Whois Accuracy Program Specification,[5] and "take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse."[6] These mechanisms were put in place after an extensive public comment process and years of community input. And while they provide meaningful tools for rights holders to protect against those who abuse gTLD domain name registrations by registering sites dedicated to copyright infringement, they are hollow without proper enforcement by ICANN.

We do not advocate for any new or expanded requirements, we simply suggest that the requirements ICANN has already set for itself be enforced. The multistakeholder community has already spoken by providing a private contractual framework. It is only by ensuring those contracts are "vigorously and transparently enforced,"[7] that a multistakeholder process can be successful.

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[1] STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT 6, 11 (Int'l Intell. Prop. Alliance 2014)

[2] *Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Steven Metalitz, Counsel, Coalition for Online Accountability) [hereinafter Metalitz Statement].

[3] See section 3.3.1 of the RAA.

[4] See sections 3.7.7 and 3.7.7.9 of the RAA.

[5] See section 3.7.8 of the RAA.

[6] See Section 3.18.1 of the RAA.

[7] Metalitz Statement, *supra* note 2, at 4 ("[T]he essence of the 'multi-stakeholder model' of DNS governance is the replacement of governmental regulation of a critical public resource with private contractual constraints and community oversight. This model only works when those contracts are strong and when they are vigorously and transparently enforced.").

Additionally, while these requirements provide safeguards important to all stakeholders, they are especially vital to individuals and small businesses that often lack the resources to effectively protect their creative works online. Without safeguards like those set out in the RAA, anonymous and untraceable actors can operate infringing sites which creators will not be able to identify or address. If ICANN properly enforces the mechanisms that it has already established, it will ensure proper accountability and promote greater freedom to launch new businesses and engage in legitimate activities over the Internet.

While the transition of ICANN's key technical functions to the multistakeholder community presents numerous challenges, as a non-profit organization and the primary organization governing the Internet, ICANN should stay committed to serving the public interest and the rule of law. The Copyright Alliance is grateful to the committee for its continued engagement and oversight of these issues and asks that you remain involved to ensure that the public interest in a truly open and free Internet is properly served.

Sincerely,

Terry Hart
Director of Legal Policy
The Copyright Alliance

Daniel Castro

Vice President

Information Technology and Innovation Foundation (ITIF)

"Stakeholder Perspectives on ICANN: The .SUCKS Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation"

Before the

Committee on the Judiciary

Subcommittee on Courts, Intellectual Property and the Internet

May 13, 2015

Chairman Issa, Vice Chairman Collins, Ranking Member Nadler, and members of the subcommittee, I appreciate the opportunity to share with you my thoughts about the ongoing efforts to promote trust and accountability in the governance of the Internet. I am vice president of the Information Technology and Innovation Foundation (ITIF). ITIF is a nonpartisan think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity. In my testimony, I will discuss the challenges presented by the U.S. government's decision to relinquish its historical oversight of key technical Internet functions and the importance of U.S. government oversight of this transition to ensure the adoption of the accountability mechanisms proposed by the global Internet community.

The U.S. Decision to Relinquish Oversight Creates Risk to the Stability of Internet Governance

While the U.S. government has long championed the goal of building an inclusive, global community of stakeholders to govern the Internet, it has also played a direct role in ensuring the security, stability, and resiliency of the Internet through its historical oversight of the Internet Assigned Numbers Authority (IANA) functions by the National Telecommunications and Information Administration (NTIA) in the U.S. Department of Commerce. The IANA functions include managing the root zone of the Domain Name System (DNS), allocating Internet Protocol (IP) addresses, and various other technical functions integral to the stability and security of the Internet. The DNS is the system that translates URLs, such as www.congress.gov, into IP addresses, such as 140.147.249.9. These functions were originally managed directly by contracts held by the U.S. government, but the U.S. government decided to transfer the management of the DNS and related functions to the private sector after it began to allow commercial use of the Internet in the 1990s. While the IANA functions deal mostly with technical issues, these issues can have an impact on a variety of important policies including intellectual property, free speech, privacy, trade, and commerce.

Last year, the NTIA announced that it intends to relinquish its oversight of the IANA functions before the existing IANA contract with the Internet Corporation for Assigned Names and Numbers (ICANN) expires in September 2015.[1] As I testified last year, this transition will create unique risks and challenges for Internet governance because ICANN, in its current form, lacks accountability mechanisms to ensure that decisions made about the DNS are in the public

[1]. "NTIA Announces Intent to Transition Key Internet Domain Name Functions," National Telecommunications and Information Administration, March 14, 2014, http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions.

interest.[2] Without the U.S. government serving as a backstop or additional accountability measures in place, ICANN's governance could be co-opted by special interests or foreign governments. In addition, ICANN may choose to put its own interests ahead of those of the global Internet community. For example, ICANN could expand or increase the fees it charges for key Internet resources to grow its own revenue at the expense of the best interests of global Internet users. While the current ICANN leadership has presented a positive vision for the future of the organization, any pledge, commitment, or oath it makes is not binding unless there is some accountability mechanism in place to back up that promise. Without U.S. oversight, ICANN needs new accountability measures that cannot be overturned by the whims of ICANN's current or future leaders. The reason the transition is so important is because this represents the last opportunity for the U.S. government to force ICANN to improve its governance.

ICANN Has Repeatedly Shown It Lacks the Capacity to Operate Without Oversight

One reason for such grave concerns about a future where ICANN is operating without any oversight is that the organization has a disappointing history of failing to uphold its commitments. Last year, an investigation into ICANN found that the organization ignored thousands of complaints about illegal websites that it was contractually obligated to investigate. For example, U.S. law enforcement agents tried to work with ICANN to take action against an online pharmacy which allegedly sold controlled substances that caused a man's death, but ICANN's compliance staff failed to contact the associated domain registrar to investigate the complaint.[3] In addition, even when ICANN officials were alerted to the organization's

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[2] Daniel Castro, "Should the Department of Commerce Relinquish Direct Oversight of ICANN," Testimony before the Subcommittee on Courts, Intellectual Property and the Internet, April 10, 2014, http://www2.itif.org/2014-castro-icann-testimony.pdf.

[3] Jeff Elder, "Icann, Regulators Clash Over Illegal Online Drug Sales," *The Wall Street Journal*, October 27, 2014, http://www.wsj.com/articles/icann-regulators-clash-over-illegal-internet-drug-sales-1414463403.

compliance department's repeated failures to uphold its contractual commitments, it still did not address the problem while publicly proclaiming it had.[4] Similar enforcement problems by ICANN have contributed to the rise of so-called "revenge porn" websites that feature sexually-explicit non-consensual photographs and videos.[5] ICANN's consistent failure to enforce its contracts, even while under U.S. government oversight, bodes badly for a future where even this limited restraint has been lifted.

Another example of ICANN's failure to uphold the public interest can be found in the current dispute over .SUCKS. In 2014, ICANN authorized the Vox Populi Registry to begin operating .SUCKS, a new global top-level domain (gTLD). This gTLD would allow users to access a website using an address such as "McDonalds.Sucks" rather than "McDonaldsSucks.com." As part of the process of creating the new gTLD, the Vox Populi Registry has created a highly dubious scheme in which it asks companies with well-known brands to pay large sums of money ($2,499 and up) to defensively register these domains to protect them from those who would disparage their brands.[6] Naturally many companies see this as nothing more than digital extortion that hurts both their brands and their consumers. ICANN has done little to address these complaints or take action to bring the Vox Populi Registry into full compliance with its contractual obligations which prohibit this type of behavior. However, ICANN has profited from the addition of this new gTLD. Once again, this shows that ICANN is willing put its own interests ahead of those of the global Internet community.

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[4] For more details, see the presentation by Garth Bruen available at http://www.knujon.com/icann/APPROVEDONLINEPHARMACY_public.pdf.
[5] Craig Timberg, "How violent porn sites manage to hide information that should be public," *Washington Post*, December 6, 2013, http://www.washingtonpost.com/business/technology/how-violent-porn-sites-manage-to-hide-information-that-should-be-public/2013/12/06/e0861378-3773-11e3-ae46-e4248e75c8ea_story.html.
[6] Gregory Shatan, Letter to Akram Atallah, President of Global Domains Division, ICANN. March 27, 2015, http://regmedia.co.uk/2015/03/27/ipc-sucks-letter-27mar15.pdf.

ICANN Needs Strong and Binding Accountability and Transparency Mechanisms to Become Trustworthy

In response to concerns about the transition as well as ICANN's ability to govern properly, the global Internet community has worked diligently over the past year to develop two proposals: one for the IANA transition and one for enhancing ICANN accountability.[7] Echoed throughout these proposals are a number of key principles to enhance oversight and accountability which have been endorsed by multiple stakeholders, including ITIF.[8] These principles include:

- Community of Stakeholders as Ultimate Authority: The community of ICANN stakeholders should be the ultimate overseer of the DNS, responsible for: promoting a single, decentralized, open, and interoperable Internet; preserving the integrity, transparency and accountability of IP numbers and their assignments; managing domain names, and protocol number assignments; maintaining the security, stability and resiliency of the DNS; and meeting the needs and expectations of global customers and partners of the DNS.
- Separation of Functions: To ensure the form of oversight and accountability that is appropriate for distinct activities, there should be a strong and clear separation of these three functions: policy making, dispute resolution and implementation.
- Policy Making Function: ICANN's existing structure of Supporting Organizations (SOs) and Advisory Committees (ACs), which provide technical and policy

[7] Drafts of these proposals are now publicly available. See "2nd Draft Proposal of the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions," ICANN, April 22, 2015, https://www.icann.org/public-comments/cwg-stewardship-draft-proposal-2015-04-22-en and "Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability)," ICANN, May 4, 2015, https://www.icann.org/public-comments/ccwg-accountability-draft-proposal-2015-05-04-en.
[8] "Key Principles for Coordination of Internet Unique Identifiers" is also available electronically at http://www2.itif.org/2014-key-principles-for-coordination.pdf.

guidance and which comprise its bottom-up, consensus multi-stakeholder model, should continue to be responsible for policy making. Their membership should be representative of the community of ICANN stakeholders and of the different regions of the world, including developing and developed countries.

- Dispute Resolution Function: ICANN's Independent Review Panel should be expanded to ensure a balanced structure with multi-stakeholder participation, strengthened into a new independent dispute resolution panel responsible for resolving disputes involving ICANN, and endowed with the final authority to impose discipline and sanctions and to remove board and staff members in defined egregious circumstances. This remedy process should be transparent, accessible, and timely.
- Transparency: ICANN should be audited annually by an independent accounting firm, and transcripts and detailed minutes of all meetings, including those of ICANN's Board of Directors, as well as complete documents and records should be made readily available.
- Consensus: A significant supermajority should be required for final action on all policy decisions to demonstrate broad support by the community of ICANN stakeholders.
- Budget and Revenue Limitations: ICANN's budget and the revenue to support it should be limited to meeting ICANN's specific responsibilities and should not change without SO and AC approval and the agreement of the registries and registrars who pay ICANN fees.

U.S. Oversight of Transition Is Necessary to Uphold Values of Global Internet Community

Some might argue that the U.S. government should stay out of the transition lest it appear that it is unfairly determining the outcome. However, if the U.S. government sits on the sidelines during the transition it risks letting the ICANN board or other special interests trample the views of the global Internet community. Instead, the U.S. government should use its current oversight authority to insist that it will not sign-off on the transition unless the ICANN board adopts the unadulterated proposals put forth by the global Internet community. This means that ICANN should not attempt to dilute the strength of the proposals by diminishing the role of stakeholders or reducing the oversight and accountability mechanisms. In addition, the U.S. government should insist that ICANN adopt and implement both the proposal for the IANA transition and the proposal for enhanced ICANN accountability before it authorizes the transfer. This insistence will ensure that ICANN does not later fail to implement the reforms demanded by the global Internet community once it is no longer under the watchful eyes of the U.S. government. Close U.S. government oversight of the transition is necessary because ICANN had made it clear that it may dismiss the proposed solutions from global Internet stakeholders. Most notably, ICANN's CEO Fadi Chehade's spoke recently at a forum with domain name industry insiders where he disparaged the independent team working to create more accountability within ICANN.[9] This suggest that ICANN's leadership has little respect for the proposals put forth by the global Internet community and may decide to override their voices as it suits them after freed from U.S. government oversight, regardless of what they commit to prior to the transition.

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[9] Chehade said, "There is no one today in the CWG [Community Working Group] who even understands how the functions work. I sent my CTO David Conrad to explain to them how the system works. ... Frankly, no one there even knew that he was talking about." See Kieren McCarthy, "Caught on camera: ICANN CEO slams the internet's kingmakers," *The Register*, March 24, 2015, http://www.theregister.co.uk/2015/03/24/icann_ceo_iana_transition/?mt=1427304151420.

Conclusion

The future of Internet governance is at a crossroads. For more than a decade, the U.S. government has served as a referee in the geopolitical game that constitutes global Internet governance, not to give an advantage to any particular stakeholders, but to make sure there was a level playing field for all. While the U.S. government does not directly intervene in ICANN's operations, its oversight has acted as a deterrent to most egregious malfeasance. Yet even today ICANN still manages to flout its own policies and procedures. As the U.S. government retires from this position and a new system of oversight and accountability emerges, it has an obligation to ensure that the will of the global Internet community prevails and no special interests, including foreign governments, are able to disproportionately exert influence on the final outcome. And it has an obligation to ensure that ICANN does not turn into the world's largest unregulated monopoly. This means that it should not accept any proposed transition plan that does not fully address the threats posed by this transition and reflect the will of the global Internet community. Through its oversight, Congress has the ability to send a clear and unambiguous message to ICANN's leadership that it will not accept anything short of a full embrace of the accountability, transparency, and oversight reforms recommended by the global Internet community. By insisting on good governance, Congress can help set ICANN on a positive trajectory that will maintain the security, stability, and resiliency of the Internet while allowing participation from a global set of stakeholders.

TESTIMONY OF DR. MILTON L. MUELLER
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BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

MAY 13, 2015

Thank you Mr. Chairman and members of the Committee for inviting my written testimony on today's hearing topic, "Stakeholder Perspectives on ICANN."

As you know ICANN is entering a new stage in its evolution, one in which the U.S. government finally transfers stewardship of the DNS root zone to nongovernmental institutions that are open to participation by everyone on the Internet. I strongly support this change and believe that, if done correctly, it will strengthen the independence and freedom of the Internet and its users.

I offer a perspective that this Committee doesn't get to hear from very often. I am a long time participant in ICANN on behalf of noncommercial users, and a professor and researcher on Internet governance. In ICANN's policy making processes the Noncommercial Stakeholder Group (NCSG) represents educators, nonprofits, libraries, public interest groups, individual rights advocates and civil society from all over the world.

I was also selected by the GNSO (ICANN's domain name policy development organ) as one of their representatives on the IANA Stewardship Coordination Group (ICG). The ICG was formed last year in response to the NTIA's call to develop a plan for the transition. The 30-member ICG is independent of ICANN and is the proverbial multi-stakeholder entity, operating in a bottom up fashion. We are the people of the Internet taking responsibility for our own governance.

There are a lot of things I could say to you about Internet governance and ICANN, but today I want to focus on one primary message:

1. **ICANN must not be given a permanent monopoly over the IANA functions.**

The IANA functions need to be moved into a legally separate affiliate of ICANN, and the right to perform the IANA functions should continue to be a contract awarded to whoever does the job most reliably and responsibly. It should not be a presumptive right of ICANN, an ICANN affiliate, or anyone else.

Most people understand now that the US Commerce Department served as an oversight and accountability mechanism for ICANN. It did this primarily through the IANA functions contract,

which was defined and awarded by the NTIA. The IANA functions refer to maintenance of the registries for top level domain names, internet addresses, and protocol parameters. These technical activities, which sound quite boring, are critical to the maintenance of a globally interconnected Internet. In the right hands, they are neutral coordination functions that facilitate freedom of action on the internet. In the wrong hands, they could be used to support regulating and stifling communications. Under NTIA, the IANA functions were treated as something that ICANN had to earn the right to provide. For better or worse, the contract was the carrot and the stick that kept ICANN in line.[i]

It is important to remove the U.S. government from this contracting role, for many reasons related to both foreign and domestic policy. We cannot credibly resist attempts by foreign governments or intergovernmental institutions to encroach on Internet governance while keeping one government – the U.S. – in a pre-eminent position. We need to practice what we preach, and complete the transition to a globalized, nongovernmental regime.

But once we get the NTIA out, we still need to keep ICANN accountable. The transition must not mean that ICANN is simply handed control of these critical Internet coordination functions. There should still be a contract and recurring renewal. The contracting parties should be the actual *users* of the IANA functions – the Internet Engineering Task Force (for protocols), the Regional Internet Registries (for IP addresses), and the domain name registries, registrars and users (for the DNS root) – not a government or an intergovernmental organization.

The simplest, most direct, and most effective form of accountability is the power to say "you're fired." And that is all the global Internet community is asking for. Right now there are proposals before the ICG that would give the three technical communities that rely on the IANA functions the right to terminate their contract and find a new operator if they are dissatisfied with the service they are getting from ICANN. All three of the operational communities (names, numbers and protocols) are asking for that in their transition proposals to the ICG.

Distressingly, we have learned that ICANN is pushing back against those proposals. A board member of an RIR has claimed that "ICANN has verbally represented that they will reject any proposed agreement in which ICANN is not deemed the sole source prime contractor for the IANA functions in perpetuity." Although ICANN board members have assured us that they support and respect the bottom up process, they have not denied that someone in their legal staff made that statement, nor have they adequately distanced themselves from that position.

If Congress is concerned about the political risks of the transition, it should support those of us who want the IANA functions operator to be subject to severable contractual arrangements with its direct customers. If the IANA functions become a monopoly of a particular organization, especially a wealthy and highly politicized entity such as ICANN, they could be taken over and abused. On the other hand if the names, numbers and protocol communities independently contract for their IANA functions, any takeover attempt is much more difficult, and there is stronger pressure to administer them in an impartial and technically correct way. Contracting for

the IANA functions retains the distributed control that is central to the success and freedom of the Internet.

2. The role of the U.S. Congress

The U.S. Congress doesn't govern the global Internet, but it does have authority over the NTIA. We support the NTIA's transition initiative and greatly appreciate Assistant Secretary Strickling's leadership in promoting multi-stakeholder governance. But we think that after more than fifteen years of routinely interacting with each other, ICANN and NTIA may have become a little too close. Only Congress can review what NTIA does and keep the pressure on them to make sure the ICANN/IANA transition is not overly influenced or dominated by the agenda of ICANN. Help us ensure that the transition responds to the needs of the much broader community of Internet users and providers.

At the same time, oversight must be timely and avoid needless delay. There are real limits to how far we can push back the implementation. Delaying the transition has global repercussions regarding the credibility of nongovernmental Internet institutions (the multistakeholder model); the credibility and trust afforded the United States on this issue; and the stability of the IANA functions provider. Of course we need to take the time required to do it right, but we cannot make this crucial coordinating function for the global Internet a political football.

Thanks again for your attention. If you have any followup questions feel free to ask them via email to: mueller@syr.edu

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[i] As a recent paper from David Post and Danielle Kehl put it: "NTIA retained the option of re-opening the procurement [of the IANA functions], if it was unhappy with ICANN's performance, and awarding the contract to some other party. Re-opening the IANA contract procurement was both a serious and a credible threat to ICANN's central role in DNS management. It would have had severe, and probably fatal, consequences for ICANN. Because ICANN's power ripples downward from the Root through the DNS hierarchy, without the ability to specify the contents of the Root Zone file it could no longer guarantee TLD operators that their domains would continue to exist in the DNS; those TLD operators could therefore no longer guarantee 2d-level domain operators that *their* domains would continue to exist in the DNS; and so on down the line. And if that is the case, why would a TLD registry operator choose to comply with ICANN directives (or pay ICANN a fee)?"

May 11, 2015

Hon. Darrell Issa, Chairman
Hon. Jerrold Nadler, Ranking Member
U.S. House of Representatives
Subcommittee on Courts, Intellectual Property and the Internet

Dear Mr. Chairman and Ranking Member Nadler:

I write in advance of the subcommittee's hearing on stakeholder perspectives regarding ICANN, scheduled for this Wednesday, May 13, 2015. On behalf of our company, Donuts Inc., and as a stakeholder with significant interests in the ICANN model, thank you for conducting this hearing on trust and accountability in the Internet's operation.

While I commend you on the distinguished panel invited to testify at this hearing, I believe additional perspectives are important if the subcommittee is to have a comprehensive understanding of the critical issues involved in the workings of the domain name system. Accordingly, I enclose and respectfully submit written testimony for your and your colleagues' consideration.

Thank you for your review of this statement, and please do not hesitate to contact me if our company can be of assistance.

Sincerely,

Jonathon L. Nevett
Co-Founder and Executive Vice President

Statement of Donuts Inc.

U.S. House of Representatives
Subcommittee on Courts, Intellectual Property and the Internet

May 11, 2015

Thank you for the opportunity to provide a statement in advance of this week's hearing, titled "Stakeholder Perspectives on ICANN: The .SUCKS Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation." We commend the subcommittee for its continued attention to important matters relating to the operation of the domain name system.

Background of Donuts Inc.

Our company, Donuts Inc., was founded in 2010 for the sole purpose of contributing to the expansion of Internet namespace through new generic top-level domains (gTLDs). We were privileged to attract more than $150 million in venture funding to launch our enterprise, and are responsible for creating dozens of jobs in the United States. Today, we operate the largest number of new gTLDs (approximately 190 to date), which include domain names that are not only varied, useful and semantically relevant, but bring an unprecedented level of competition to our industry and choice to consumers.

While our company was formally organized only five years ago, our team has long been involved in ICANN policymaking, including in the nine-year process of designing and finally launching the current round of new gTLDs. From beginning to end, no ICANN process was more thorough in its examination of issues relevant to the protection of intellectual property; rights holders enjoy more safety and security in new gTLDs than they do anywhere in cyberspace—most assuredly more so than in legacy gTLDs (such as .COM).

New gTLDs are Offering Consumers New Choices and Creating Communities

While the program is yet young, it has demonstrated success and continues to hold promise in creating new choices for consumers and creating communities for Internet users worldwide.

One of the principles of ICANN is competition, and the new gTLD program clearly reflects that principle. Over the past few years, Internet users have begun choosing domains that more closely reflect their interests and professions—from .GOLF to .TECHNOLOGY, from .PLUMBING to .PIZZA. As these communities emerge and flourish, Donuts wants to be a good steward and ensure a healthy domain system.

Conversely, consider what the namespace would be today had gTLDs not been artificially constrained only to .COM and a handful of other names more than two decades ago. Had hundreds of the new gTLDs now available been introduced then, concerns over their existence would not have materialized and they would have been considered a natural part of a pro-competition policy.

Now that they exist and are proving their utility they must be permitted to thrive.

As a responsible operator, Donuts is wholly committed to the beneficial growth of the program today and to the management of a healthy domain name ecosystem. We will continue to support the needs of rights holders and other groups interested in the domain name system. Very shortly, we will launch the Healthy Domains Initiative, which will invite stakeholders including registries, registrars, law enforcement, intellectual property experts, and others to cooperate to develop additional practices that will render expanding namespace an even safer environment.

Attention to .SUCKS Should Not Cause Broader Concern Over the New gTLD Program

New gTLDs have the strongest protections in the industry against fraud and abusive use through processes developed from the lessons learned of the first twenty years of the Internet. At the same time, we understand why members of Congress have an interest in the impact of the program. It's disappointing such issues have consumed a disproportionate amount of attention when, on balance, the program has been such a success.

There has been a high level of focus in the media regarding the .SUCKS gTLD—not only its existence, but specifically its pricing model. Indeed, the operation of this gTLD is one of the precursors of this hearing.

While Donuts staunchly supports free speech on the Internet, the subcommittee's concern over this gTLD is understandable. Had our company secured the administration of .SUCKS, our approach to its operation would have been identical to that of our other gTLDs: open and available to any user, protective of trademark holders' rights, competitively priced, and assertively proactive against abusive use. It's unfortunate that the approach of the current operator has caused not only concern over .SUCKS specifically, but also about the new gTLD program itself.

To date, more than 5.4 million names have been registered in new gTLDs, with 1.4 million of these in Donuts-administered names. Incidences of trademark infringement and other offensive behavior are far lower than program opponents predicted, and in fact, lower than incidences of .COM at the early stages of the Internet's growth.

This is a point worth making. Some of the issues we see with new gTLDs are reminiscent of the earliest days of .COM—namely, the rapid growth of domains and concern with how names are used. For example, in the early 2000s there was a surge in the use of permutations of the word "sucks" in the .COM space—for example, pepsisucks.com or verisignsucks.com. In fact, in the legacy TLD space, there remain more than 60,000 uses of this term, all in a namespace that does not employ the same rights protection mechanisms that new gTLDs do (note, however that not all are critical of companies or products—examples of more positive use would be "racismsucks" or "bullyingsucks"). It must be pointed out that domain registrations in the .SUCKS gTLD that *are* meant to critique are subject to far more stringent protections against infringement than are those in .COM.

Transition of Domain Name Oversight

We are aware of the subcommittee's interest in further reviewing the plan to transition stewardship of the Internet Assigned Numbers Authority (IANA) away from the National Telecommunications and Information Administration (NTIA). We too take a keen interest in this development, and I have played an active role in ICANN's discussions via the IANA Stewardship Transition Coordination Group (ICG).

Donuts supports the NTIA's plan to transition stewardship of the IANA contract to a privately led, multi-stakeholder entity, as well as the other important criteria for this transition that the NTIA identified in its March 14, 2014 announcement. Such support, however, is conditioned on ensuring that ICANN is subject to sufficient accountability mechanisms as part of the transition. It is extremely important that the community reach consensus on these important matters before any such transition takes place.

Conclusion

We want to leave you with two thoughts.

One, recognizing that various parties apply differing metrics to measure the gTLD program's accomplishments, we believe, as do others, that the adoption of new gTLDs and their enthusiastic use indicate the program is accomplishing its objective to create competition and widen consumer choice.

Two, while this is the case, it's critical that ICANN remain vigilant in its oversight of legacy and new gTLDs to ensure trust and accountability is guaranteed for Internet naming, while retaining accountability for its decisions. We advocate for ICANN's multi-stakeholder model and strongly support its robust compliance function. ICANN, on balance, has competently administered the broadest expansion of Internet naming in history, and we continue to support its model.

We again thank the subcommittee for its attention to the domain name system. Donuts welcomes the opportunity to be a resource for the Congress as it further examines new gTLDs and their existence and growth.

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