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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"

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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.

<u>Getting the Transition and Accountability Right is Critically Important</u>

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.

<u>It Ain't Broke – But the Toothpaste Has Been Squeezed</u>

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)

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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.