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

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Broadcast Music Inc. (BMI)

Motion Picture Association of America (MPAA)

Time Warner Inc.

Recording Industry Association of America (RIAA)

The Walt Disney Company

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EXECUTIVE SUMMARY

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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.

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.