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EXPANSION OF TOP LEVEL DOMAINS AND ITS EFFECT ON COMPETITION

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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EXPANSION OF TOP LEVEL DOMAINS AND ITS EFFECT ON COMPETITION

WEDNESDAY, SEPTEMBER 23, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m., in room 2141, Rayburn House Office Building, the Honorable Henry C. "Hank" Johnson, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Johnson, Conyers, Boucher, Quigley, Coble, Chaffetz, Sensenbrenner, Goodlatte, and Harper.

Staff present: (Majority) Christal Sheppard, Subcommittee Chief Counsel; Eric Garduno, Counsel; Rosalind Jackson, Professional Staff Member; (Minority) Sean McLaughlin, Chief of Staff and General Counsel; and David Whitney, Counsel.

Mr. JOHNSON. This hearing of the Subcommittee on Courts and Competition Policy will now come to order. Without objection, the Chair will be authorized to declare a recess of the hearing.

And, ladies and gentlemen, good morning. I would like to welcome everyone to this hearing and offer my thanks to the panel members for being here with us.

We meet today to discuss an important topic which has the potential to significantly impact consumers and trademark owners who use the Internet. In this hearing, we will address two main issues. The first is the proposal by ICANN that would allow an unlimited expansion of the top-level domain names. The second is the potential separation of ICANN into a fully independent entity.

As for the expansion of GTLDs, the heart of this matter is an uncertainty of how these actions would affect competition and the rights of trademark owners who spend sizable sums and dedicate countless employee hours protecting their trademarks from cybersquatters. When ICANN revealed their expansion plans, a tremendous public outcry came from trademark owners, worried about the infinite cybersquatting possibilities for which this plan may allow.

Through an ad hoc advisory body, ICANN has proposed certain trademark protections to assuage the trademark owners' concerns. However, such measures have not been formally adopted. And even if they were, some trademark owners feel such measures are not enough. And I know I butchered that word, "assuage."

Nevertheless, there is clearly some interest out there in expanding GTLDs beyond just cybersquatters and the pecuniary interest of registries and companies hoping to be registries.

I note that entities like New York City and Al Gore's Alliance for Climate Protection are interested in securing domains like .nyc and .eco, respectively. I also note that the expansion of GTLDs will allow non-Roman script characters to be used in GTLDs. These efforts seem meritorious to me.

However, what I don't understand is why ICANN is so committed to an unlimited expansion of GTLDs. Perhaps the ICANN witness can illuminate this for us.

The second main issue addressed here today is the potential separation of ICANN into a fully independent entity. Since its inception, ICANN has been tied to the U.S. Department of Commerce through a series of memorandum of understandings and now through a joint project agreement. The impact of this union instilled in ICANN transparency standards and has provided privacy and security policies for domain name registrants.

However, this union is set to expire on September the 30th of this year, and I do not believe that a continued relationship is necessary—excuse me, I do believe that a continued relationship is necessary to ensure transparency and pro-consumer benefits, especially as the expansion of GTLDs proceeds.

I fully support renegotiation of the agreement. However, should ICANN decide not to continue in an agreement, I and the American public would need assurances of ICANN's dedication to maintaining transparency, privacy and security that is crucial to protecting consumers and trademark owners, as well as marketplace competition.

Again, I thank the panel members for your testimony today and look forward to a lively discussion.

I now recognize our Ranking minority Member, Lamar Smith, for an opening statement.

I am sorry. Mr. Smith is not here. So Mr. Coble is the Ranking Member I will recognize for his opening statement.

Mr. COBLE. Thank you, Mr. Chairman. I was going to say, Mr. Smith has become invisible. I didn't see him up on the panel here.

Good to have you all with us.

And thank you, Mr. Chairman, for calling the hearing.

In the 108th Congress, the predecessor of the Subcommittee—on this Subcommittee conducted much needed oversight over the Internet Corporation for Assigned Names and Numbers, ICANN, and the United States Department of Commerce. As a result, the Commerce Department for the first time included in its agreement with ICANN a series of requirements to report on and improve the accuracy of the WHOIS database.

The accuracy of this database is critical to law enforcement, intellectual property owners, and the public who deserve truthful information about the identity of those who register a domain name. The then-chairman of the Subcommittee, Ranking Member Lamar Smith, also authored the Fraudulent Online Identity Sanctions Act, which the Congress enacted.

This law provides serious civil and criminal penalties when someone willfully provides false domain name contact information

in furtherance of a Federal crime or in violation of a federally protected intellectual property right.

Notwithstanding this progress, ICANN confronts a number of key opportunities and challenges today. Several of these are referenced in a letter Ranking Member Smith and I sent to Rod Beckstrom, the new president and CEO of ICANN, on September the 15.

Without objection, Mr. Chairman, I ask that our letter and Mr. Beckstrom's response be placed in the hearing record.

Mr. JOHNSON. Without objection.

[The information referred to follows:]

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September 15, 2009

Mr. Rod Beckstrom
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers
International Square
1875 I Street, NW, Suite 501
Washington, D.C. 20006

Dear Mr. Beckstrom,

Congratulations on your recent appointment as President and Chief Executive Officer of the Internet Corporation for Assigned Names and Numbers (ICANN). You assume responsibility of the principal private sector organization charged with maintaining the security and stability of the global Internet at a critical juncture. The contemporaneous consideration of the rollout of an unrestricted number of generic top level domains (gTLDs) in conjunction with the scheduled expiration of the Joint Project Agreement (JPA) presents historic challenges and turning points in Internet governance.

As senior leaders of the House Committee on the Judiciary, which has jurisdiction over matters that relate to criminal justice, competition and intellectual property rights, we have a longstanding interest in matters that affect the domain name system (DNS). In this capacity, we would like to share with you our concerns regarding the proposed new generic domain name expansion and the expiration of the JPA.

It has come to our attention that the proposed unlimited expansion of gTLDS will likely result in serious negative consequences for U.S. businesses and consumers. As new gTLDs are created, many businesses fear being forced to defensively register trademarks and variations of their marks to block cybersquatters from illegitimately trading on their good will and to protect consumers from increased incidences of fraud. We note that the absence of price caps in the new registry agreements could mean that legitimate businesses with an established consumer base and Internet presence may be discriminated against and compelled to pay a premium for each new domain name they register or renew. We also note that the record concerning the impact this proposed expansion will have on competition is woefully inadequate. To our knowledge, the only economic justification put forth thus far has been an ICANN-commissioned report that has

been widely criticized for failing to include empirical data or analysis in support of its conclusion that the unrestricted expansion of gTLDS will result in net consumer benefits.

We are aware that ICANN has taken some steps to respond to the concerns of intellectual property owners by establishing an Implementation Recommendation Team (IRT) charged with developing specific proposals to protect intellectual property interests. However, we note with disappointment that serious consideration of these interests did not occur in the normal course of ICANN's policy development process, and the IRT was formed only after considerable public outcry arose from the business and intellectual property communities. We further note that decisions regarding the execution of the IRT's recommendations have not been publicly announced as well as our concern that it appears such disclosures are not intended to be made available to the public prior to the scheduled expiration of the JPA. This apparent time-line reinforces the perception that ICANN decision-making processes lack critical transparency and accountability.

Given the late consideration of intellectual property concerns, the lack of a credible independent analysis on competition issues in the context of proposals to expand gTLD's, as well as ICANN's less-than-stellar track record on a variety of other issues (enforcement of registrar obligations, accuracy of publicly available Whois data), we have serious misgivings about the prospect of terminating the formal relationship between the U.S. Government and ICANN that is currently represented by the JPA. In the interests of better understanding ICANN's position on these and related matters, we will appreciate your providing the Committee with answers to the following questions:

1. Which of the recommendations of the IRT does ICANN plan to implement? What is the justification for not publicly announcing such decisions prior to the September 30, 2009 scheduled expiration of the JPA and instead deferring such public notice and review until the publication of the next version of the Draft Applicant Guidebook? If implemented, how will the recommendations put forth by the IRT serve to reduce or eliminate the need for defensive registrations? Will any of recommendations prevent price gouging by registries or registrars?

2. Does ICANN intend to carry out a comprehensive, empirical economic study to examine the impact on competition that additional gTLDs may have? If not, what confidence can the public have that the expansion of gTLDs will improve, rather than hinder, competition? Assuming the rollout goes forward, what steps will ICANN take to monitor the impact on competition in the future?

3. Do you recognize a need for and support the establishment of a permanent instrument that memorializes the relationship between ICANN and the U.S. Government? If not, what are your current thoughts on an extension of the JPA prior to its expiration on September 30, 2009? What key elements do you think should be incorporated into such a permanent or temporary agreement? What assurances do citizens of the United States have that ICANN will effectively meet the goals set out in the JPA if it or a successor agreement is not formally extended?

As a final matter, we wish to associate ourselves with many of the concerns articulated by the ICANN's Governmental Advisory Committee in their letter of August 18, 2009 (copy enclosed) to the Chairman of ICANN's Board. We would appreciate your assessment and response to the matters detailed in that letter, particularly as they relate to the stability of the Internet and the absence of clear evidence that the introduction of new gTLD's will provide net benefits to consumers.

The effects of policies adopted by ICANN transcends the narrow technical operation of the global Internet. The policy choices made and the manner they are implemented affect the rights, property and security of consumers, companies, non-governmental organizations and governments worldwide. With this enormous impact, ICANN has an obligation to ensure there are inclusive, transparent and accountable processes that consider fully the perspectives of all stakeholders, before rendering significant decisions or implementing substantial policy changes.

We urge you to weigh carefully the concerns expressed by us, the GAC, and other parties before finalizing a course of action and we look forward to receiving your written response by Tuesday, September 22, 2009.

Sincerely,

Lamar Smith
Ranking Member
House Committee on the Judiciary

Howard Coble
Ranking Member
Subcommittee on Courts and Competition
House Committee on the Judiciary

cc: The Honorable Gary Locke
Secretary of Commerce
United States Department of Commerce

The Honorable David Kappos
Undersecretary for Intellectual Property and
Director of the U.S. Patent & Trademark Office

The Honorable Lawrence E. Strickling
Assistant Secretary for Communications and Information
National Telecommunication and Information Association

The Honorable John Conyers
Chairman
House Committee on the Judiciary

The Honorable Hank Johnson
Ranking Member
Subcommittee on Courts and Competition
House Committee on the Judiciary

Enclosure

Governmental Advisory Committee
Chairman

Mr. Peter Dengate Thrush
Chairman of the Board
ICANN

Paris, 18 August 2009

Dear Peter,

In its Communiqué of the 35th ICANN meeting in Sydney, Australia, the GAC committed itself to provide the comments on the version 2 of the new gTLD Applicant Guidebook (further in the text - DAG2) which are the following:

I. ICANN'S PREPAREDNESS FOR NEW gTLD ROUND

1. Scalability of gTLD Expansion and Stability of the Internet

The GAC is aware that many root server operators have raised concerns about the effect that a major expansion of the gTLD space would have on the stability of the Internet. The GAC considers that a controlled and prudent expansion of the DNS space is of primary importance for safeguarding the stability, security and interoperability of the Internet on which the global economy and social welfare relies so much.

The GAC notes that the SSAC and RSSAC have been asked to prepare a report on the scalability of the root zone and the impact of the potential simultaneous introduction of new gTLDs, DNSSEC, IPv6 glue, and IDNs into the root zone, which will be published in August. The GAC will look to this report to provide reassurance that the scaling up of the root will not impair the stability of the Internet and that the technical safeguards are sufficient. The GAC is hopeful the report will stress the importance of developing an alert or warning system, as well as the need for a process for halting the adoption of new top level domains should the root zone begin to show signs of breach or weakness. It should be noted that although the GAC is encouraged this study is underway there is some concern as to why the proper analysis did not occur earlier.

2. Economic Studies

The GAC had registered its concern at the Mexico City meeting that the two preliminary reports on competition and price caps had not provided appropriate answers to the 2006 Board request for economic studies to be undertaken. Such analysis is needed to take full account of the entire domain name environment. The GAC remains concerned that the threshold question has not been answered whether the introduction of new gTLDs provides potential benefits to consumers that will not be outweighed by the potential harms.

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The GAC notes that the economic reports commissioned by ICANN have failed to distinguish adequately between real demand and derived demand arising from widespread concern in the business community about the multiplication of the opportunity for cybersquatting, fraud and malicious conduct generally. The GAC notes that the recent IRT report addresses a number of related intellectual property protection and enforcement issues. However, the GAC believes there is an urgent need for separate empirical research to be undertaken regarding the costs of defensive registrations and the impact on consumers of the availability of new gTLDs. To the extent that the uses of new gTLDs are innovative and respond to registrant demand, the GAC expects there would be benefits to consumers.

The GAC also recommends that any analysis of the gTLD environment encompass fact gathering beyond empirical studies. A thorough analysis would include interviews with and perhaps surveys of a wide cross-section of market participants. As a first step in this process, the GAC recommends that ICANN more systematically conduct outreach and data gathering from the variety of resources represented by the participants in the malicious conduct and e-crimes sessions in Sydney.

3. Competition

The GAC has considered whether there is a risk that the gTLD process could create a multitude of monopolies rather than increasing competition. This rests in part on important, but unanswered questions relating to: (1) whether registrants view gTLDs as reasonable substitutes for one another; and (2) why some registrants purchase the same domain name in multiple TLDs.

Further concerns have arisen regarding the apparent desire to alter existing policy that requires a structural separation between registrars and registries. Change to this policy should be guided primarily by whether and how such a change would benefit consumers and registrants. Studies to date have not fully addressed this aspect of the marketplace, nor have they included an analysis of the potential harm to domain name registrants of permitting registrars to operate as new gTLD registries.

4. Balancing Competing Business Models

Such is the global reach of the Internet that varied business models will arise amongst different commercial parties, especially where the parties operate in different jurisdictions, in different markets and in varying spheres of economic development.

While noting that applicants would be allowed to scale their applications, so that an applicant that intends to compete with large top level domains and have millions of registrations would require infrastructure on a greater scale, while a registry that intends to address a small local community would need infrastructure on a lesser scale, the GAC seeks reassurances that the evaluation of the applicant's business model would be conducted on merit and not rely solely on corporate size and financial criteria.

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5. Risk of End User Confusion

It will prove likely that the average Internet user will place greater emphasis on retaining the ease of navigation around the existing DNS. The DAG2 does not specifically address the issue of how the new gTLDs will integrate with the existing gTLDs. The GAC believes therefore that there is a need for more studies to be commissioned which assess the impacts of a radically changed new gTLD regime on end users. Such studies should focus in particular on the extent to which the expected proliferation of domains may cause confusion or may exacerbate the harms from the malicious conduct and criminal activity that consumers experience in the current marketplace, or whether a more measured rollout would be more beneficial and cause less consumer confusion. The GAC wishes to emphasize the point that such fact finding studies as these should have been conducted prior to the decision to introduce new gTLDs.

6. Administrative Resources

Consideration should also to be given to the increase in the required administrative resources available to ICANN for the management of the DNS arising from the expected significant increase in domains, and whether other activities, such as contract compliance, will be impacted by the possible diversion of resources to processing new gTLD applications.

The GAC also notes that potential new registries will come from many countries in the world with different languages and cultures. ICANN will need to address the need for it to adjust as an organization to a more diverse Internet community with the likely appearance of contractors outside the United States working within different legal environments and legal systems.

II. IMPLEMENTATION ISSUES

1. Level of Awareness among Stakeholders and the Business Community

ICANN should address the very low level of awareness of the proposed gTLD round amongst the business community, in particular amongst small and medium sized businesses, outside the Internet industry and the existing registry and registrar communities. The GAC recommends that ICANN more actively promote the opportunity for business in the period prior to the launch of the first and subsequent gTLD rounds.

2. gTLD Categories

The GAC proposes that ICANN should actively consider a more category-based approach to the introduction of new gTLDs. This could allow for different procedures for different types of TLDs, including non-commercial cultural, linguistic and regional gTLDs which would strengthen cultural diversity on the Internet, creation of

local content, and freedom of expression. It would also potentially lessen consumer confusion and provide a structure for a more measured rollout of new gTLDs.

Furthermore the GAC believes that the structure of the gTLD application fee regime should reflect these different categories and the limited financial resources available to applicants for some of them. The GAC also feels that it would be logical and reasonable to apply existing policy principles and processes for ccTLDs (such as those policy provisions outlined in the GAC's ccTLD principles) to any top level domains intended to service a specific community within a specific national jurisdiction.

3. Geographic Names at the Top Level

The GAC has commented on the use of geographic names as gTLDs on various occasions. The GAC principles of 28 March 2007 emphasize that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities" (Article 2.2). In a letter dated 24 April 2009, the ICANN Board received input from the GAC regarding the issue of geographic names as new gTLDs. In this letter the GAC pointed out that the rights of relevant governments or public authorities, as representatives of the sovereign state or territory, cannot be limited as such by ICANN or by any procedures introduced by ICANN for new gTLDs.

The GAC is of the opinion that the DAG2 is a substantial improvement on its predecessor, but that it does not yet fully reflect the GAC position that governments and other public authorities, as representatives of citizens of a sovereign state, territory, province or city, have a legitimate interest in the use of geographical names as new TLDs.

The GAC therefore proposes the following amendments to be incorporated in version 3 of the Draft Applicant Guidebook (further in the text - DAG3):

i. Strings that are a meaningful representation or abbreviation of a country name or territory name should not be allowed in the gTLD space

These strings represent countries or territories and the principle of sovereignty must apply. TLDs in this category should therefore be treated in the same way as ccTLDs.

The use of exhaustive listings (e.g. ISO 3166-1) will not cover all the ccTLD-like applications envisaged by the GAC and ccNSO, in particular in the following categories:
'Commonly referred to as' type strings representing a country or territory but which are not official titles, e.g. .america, .ceylon, .holland;
Common or general names that are often applied to more than one country, e.g: .guinea

ii. gTLDs using strings with geographic names other than country names or territories (so called geoTLDs) should follow specific rules of procedure

The Draft Applicant Guidebook already provides for specific rules of procedure, such as the creation of a Geographic Names Panel or the requirement that an applicant for a geoTLD must document the government's or public authority's support for, or non-objection to, the applicant's application, and must demonstrate the government's or public authority's understanding of the string being requested and its intended use.

However, the gTLD regime as proposed in DAG2 implies that the active involvement of public authorities would be limited to the application and evaluation phase of the new gTLD process. However, the GAC is of the view that the principles of subsidiarity should also apply after delegation. An approval or non-objection from the relevant government or public authority could for example be based on certain obligations on a gTLD registry for which the registry is held accountable (which may include direct legally binding agreement under contract with the relevant public authority). In such cases there could be a need for procedures that allow the relevant governments or public authorities to initiate a re-delegation process, perhaps because of infringement of competition legislation, misuse or breach of contract, or breach of the terms of approval/non-objection.

Furthermore, in cases of a change in the ownership structure of a geoTLD, ICANN should establish a new process of approval or non-objection for that geoTLD by the relevant public authority. The GAC will provide input in this regard in the near future.

4. Objection Procedures and Costs

The GAC considers that the dispute resolution process appears to have the potential to be extremely complex and protracted. The GAC also believes that the cost of pursuing disputes may well prove to be a barrier to legitimate objections by interested parties.

The GAC notes the importance of sensitivities with regard to terms with national, cultural, geographic, and religious significance. The GAC has serious concerns about the practical modalities for addressing objections on these grounds, including ICANN's proposal to establish a panel of three judicial experts which may not fully take account of cultural and other national and differences in legal interpretation as to what is morally offensive or threatening to public order.

Specifically the GAC believes that there is a need for more work to be done regarding the costs and the ability to object, noting that public interest groups may wish to object but may be unable to do so due to the costs involved. The GAC will deliberate further on alternative solutions with respect to how best to deal with applications for new gTLDs that may be considered morally offensive or threatening to public order.

Governmental Advisory Committee
Chairman

DAG2 appears to require governments to follow the same procedures and pay the same costs as other objectors. In situations where a government or public authority objects to a particular application on the grounds of public policy however, it would be inappropriate for ICANN to require the said public body to incur the costs or subject itself to the limitations associated with a formal objection process primarily designed for non-governmental stakeholders. Moreover, where the government or public authority is a member of the GAC, the ICANN By-laws already provide a more appropriate mechanism for the GAC to provide advice directly to the Board on issues of public policy.

The GAC notes that the public comment section associated with each application may well provide one avenue for governments wishing to make representations should they chose to use it. The proposed Independent Objector might also consider representations from governments at no cost to them. The GAC would therefore invite the ICANN Board to include these existing and potentially new provisions in the procedures foreseen for the DAG3.

The GAC would also point out that in many cases governments might already have to bear the costs associated with industry stakeholder and cross-government consultation, and increase their monitoring of the application process more generally just to make sure they are aware of issues raised by applications for new gTLDs.

5. Application Process

The GAC understands that ICANN intends to hold annual application rounds and that these would be announced at the same time as the current round. However, the GAC is of the view that there is a need for clarity on how often the application process for gTLDs will be run, for how long it will remain open and whether there will be a limit on the number of gTLDs released in each round. There is also a question as to whether translation services will be provided as internationalized gTLDs are introduced. The GAC understands that ICANN will set up a separate organization overseen by a director to process applications.

The GAC seeks clarification on how CANN will promote the new gTLD round so that affected parties are aware of their rights to object.

6. Application Fee and Surpluses

A single fee structure creates limitations, notably by skewing the market in favor of applications from the developed world and those with significant financial resources. The GAC notes that ICANN had stated in its briefings that it was difficult to forecast costs accurately enough to offer different tiers of pricing, including discounts for community-based TLDs. However, the GAC believes that experience gained in the initial round would inform decisions on fee levels, and the scope for discounts and subsidies in subsequent application rounds.

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Governmental Advisory Committee
Chairman

The GAC is of the view that clarification is urgently needed to explain the level of the fee for a single application and the costs on which it was based, including historic and legal liability costs. The GAC notes that where governments are involved, as, for example, sponsors of community-based applications, legal liability costs might be less.

The GAC understands that ICANN will set up a separate organization to process applications which would not be heavily staffed and thus not expensive to run. If this is the case, it should allow ICANN to lower the costs or to provide for a more tiered pricing system.

The GAC expects that the gTLD round may well generate substantial surpluses and is of the view that ICANN should make clear how it would use such surpluses. As noted in previous GAC comments, community consensus should be sought on appropriate uses for any surplus revenues.

Yours sincerely

Janis Karklins
Chairman of the Governmental Advisory Committee,
Ambassador of Latvia to France

ICANN Governmental Advisory Committee; GAC Secretariat
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22 September 2009

The Honorable Lamar Smith
Ranking Member
House Committee on the Judiciary

The Honorable Howard Coble
Ranking Member
Subcommittee on Courts and Competition Policy
House Committee on the Judiciary

House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Representative Smith and Representative Coble:

Thank you for your kind words of congratulations on my appointment as President and Chief Executive Officer of the Internet Corporation for Assigned Names and Numbers (ICANN). I am excited to take on this important challenge of working to maintain a unified, global Internet by protecting the integrity of the unique identifier system of names and addresses.

I appreciate the opportunity to respond to your letter of 15 September 2009, which asked a number of questions about: 1) the proposed new generic Top Level Domain (gTLD) processes, including: a) the work of ICANN's Implementation Recommendation Team (IRT) and b) the economic analysis surrounding new gTLDs; and 2) the need for a permanent instrument that memorializes the relationship between the United States Government and ICANN. I will address these issues below.

ICANN Policy for New Top-Level Domains

As your letter indicates, ICANN is working on ways to increase competition and innovation at the top-level of the Domain Name System (DNS). This is an ICANN policy, one that the United States government encouraged from the time of ICANN's formation eleven years ago. We fully recognize that there are remaining questions on the best path to implement this effort to liberalize the gTLD marketplace.

The implementation plan that ICANN is formulating results from a bottom-up, multi-year, multi-stakeholder policy process that proposed the creation of new gTLDs. The new gTLD policy development is the very type of process that the United States government envisioned, supported and encouraged through three presidential administrations.

ICANN staff, at the direction of its Board of Directors, has been working through various stages of proposing implementation of the new gTLD policy, which has involved detailed public consultation at many levels and via many forums. The comments on our proposals, our analysis of those comments and our revised plans for implementation are thousands of pages of consideration and reconsideration. The concerns of the intellectual property interests that you set out in your letter are very important to us within that process. ICANN takes these issues very seriously.

Let me directly address your questions.

Q1. Which of recommendations of the IRT does ICANN plan to implement? What is the justification for not publicly announcing such decisions prior to the September 30, 2009 scheduled expiration of the JPA and instead deferring such public notice and review until the publication of the next version of the Draft Applicant Guidebook? If implemented, how will the recommendations put forth by the IRT serve to reduce or eliminate the need for defensive registrations? Will any of the recommendations prevent price gouging by registries or registrars?

As you know, the IRT was formed at the ICANN Board of Director's direction by ICANN's Intellectual Property Constituency to provide solutions for potential risks to trademark holders in the implementation of new gTLDs. The IRT, as well as representatives from other stakeholder groups, have responded to ICANN's calls for proposed solutions to the overarching issue of trademark protections in new gTLDs.

The Board has not yet formally considered the proposals from the IRT. ICANN held public consultations on the proposals in New York, London, Sydney, Hong Kong, and Abu Dhabi. Those consultations have taken a good portion of time. There is no link to the conclusion of the JPA.

After this extensive consultation, ICANN is recommending the implementation of versions of the IRT's recommendations, such as a post-delegation dispute resolution procedure and a "thick Whois" requirement. In order to address concerns that some of the recommended solutions might impinge on existing policies such as the UDRP, or could themselves be the subject of policy development, ICANN may ask the GNSO to begin an expedited review of the recommended solutions in an attempt to reach consensus on an optimal path for launching new gTLDs with robust mechanisms to ensure the protection of legal rights.

ICANN's new gTLD policy includes a provision requiring that new gTLDs "must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law." Accordingly, ICANN will, to the extent possible, protect trademark holders from abusive registrations and from the need for defensive registrations in new gTLDs, but no final decision has been made yet on the exact mechanisms that will be employed.

The New gTLD Program is being designed to with a goal of reducing or eliminating the need for businesses to register domains defensively. One of the key features of protection measures being discussed is a "rapid suspension" system for freezing and suspending clearly infringing registrations in a timely and economical basis, consistent with procedures to ensure fairness. A mechanism for quickly suspending clearly infringing registrations will reduce the incentive for cybersquatters to engage in bad-faith registrations, thereby reducing or eliminating the pressure on organizations to make defensive registrations. A reduction in the perceived need to register names defensively will also have the effect of reducing the perceived power of new gTLD registries to charge organizations artificially inflated prices for registrations in order to avoid becoming the target of opportunistic cybersquatters.

Q2. Does ICANN intend to carry out a comprehensive, empirical economic study to examine the impact on competition that additional gTLDs may have?
If not, what confidence can the public have that the expansion of gTLDs will improve, rather than hinder, competition? Assuming the rollout goes forward, what steps will ICANN take to monitor the impact on competition in the future?

ICANN has commissioned three separate economic reports during the implementation phase of the New gTLD Program. You can see these reports at the ICANN website at http://www.icann.org/en/topics/new-gtlds/economic-analysis-en.htm . They have all recognized that the fundamental benefits of competition that apply in almost all other markets will also benefit Internet users. Those benefits include enhanced service offerings, competition, innovation and choice in the domain name market, while other costs to registrants and overall economic modeling need further analysis. I would like to first review some of the background on economic analysis work done to date, and then review possible actions to accommodate concerns that still exist.

Since the drafting of the White Paper, it has been a fundamental assumption that increasing the number of gTLDs will increase competition. The House Committee on Energy and Commerce relied upon this assumption when, in 2001, it initiated a hearing regarding potential detrimental effects to competition for ICANN's selection of only seven new TLDs out of 44 applicants for over 200 different TLDs in its early Proof of Concept round.

As ICANN has moved further along on the path to implementation, and as the documentation has become more specific, so have the criticisms attacking both the collective assumption that increasing the number of gTLDs will increase competition, as well as the findings within the economic reports. This is not a surprise in a limited-resource environment such as the availability of only 21 generic top level domains.

Any resultant delay of the launch of the New gTLD Program will inhibit competition in the use of generic, non-trademarked terms, according to Dr. Dennis Carlton, a noted economics professor and former Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice from October 2006 through January 2008, The potential innovations and uses for the new gTLD namespace will be stifled if limitations to entry are imposed.

In the end, calling for a delay in the entry of new gTLDs only serves to perpetuate existing market conditions: concentration within some existing registries, with most short generic strings unavailable, and those that trade on the value of the current marketplace, holding portfolios based upon the value of current .COM names.

Even with what appears to be the compelling benefits of competition, ICANN's commitment to open and transparent processes requires further action on ICANN's part to address the questions that have been raised surrounding the sufficiency of the economic studies commissioned to date. Accordingly, ICANN will retain economists to review and summarize work to date regarding the costs and benefits of new gTLDs, putting that work into the context of the questions some have said remain open, and then evaluate whether additional study is required.

Q3: Do you recognize a need for and support the establishment of a permanent instrument that memorializes the relationship between ICANN and the U.S. Government? If not, what are your current thoughts on an extension of the JPA prior to its expiration on September 30, 2009? What key elements do you think should be incorporated into such a permanent or temporary agreement? What assurances do citizens of the United States have that ICANN will effectively meet the goals set out in the JPA if it or a successor agreement is not formally extended?

The conclusion of the Joint Project Arrangement (JPA) between the National Telecommunications and Information Agency (NTIA) of the United States Department of Commerce (DoC) and ICANN, which is set for 30 September 2009, is the culmination of

almost eleven years of support for ICANN's organization building by the DoC. It is important to note that the conclusion of the JPA is not a termination of ICANN's relationship with the United States Government nor is ICANN an advocate of that possibility.

I am in discussions with the NTIA to establish a long-standing relationship to accommodate principles including the beliefs that ICANN should remain a nonprofit corporation based in the United States, and should retain an ongoing focus on accountability and transparency. ICANN has entered into numerous long-term contractual agreements with registries, registrars, country code operators and other parties. In fulfilling its role in coordinating this piece of the DNS, ICANN must be a permanent institution.

Accordingly, ICANN seeks to have a long term, formal relationship with the United States Government and also seeks to build long-term relationships with other countries and contractual partners as well.

ICANN's long term, developing relationship with the United States government is part of ICANN's evolution to strengthen its processes, enhance its accountability to all stakeholders, and maintain the security and stability of the DNS while bringing innovation and competition to Internet users world wide.

GAC Letter of 18 August 2009

As you reference in your letter, on 18 August 2009 ICANN's Governmental Advisory Committee (GAC) sent ICANN a letter with comments on addressing version 2 of the Draft Applicant Guidebook (DAG). Peter Dengate Thrush, the Chair of ICANN's Board of Directors, will be responding to the GAC by the end of this week. We will forward a copy of Mr. Thrush's response to the GAC letter when it is available.

Conclusion

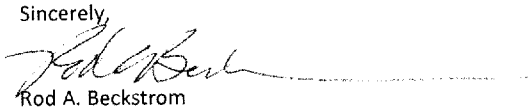
The new gTLD program is being managed on its own timetable, which is not dependent on the current discussions concerning the transition from the current Joint Project Agreement between ICANN and the U.S. Department of Commerce.

For additional information on the history of ICANN's efforts on new gTLDs, and other issues, please refer to the recently submitted "Testimony of Doug Brent" (ICANN's COO), who is scheduled to appear before the United States House Committee on the Judiciary, Subcommittee on Courts and Competition, on Wednesday, September 23, 2009.

Thanks so much for your expressed concern and interest, and your request that we take the important inputs from GAC, the intellectual property interests and others into

account. I hope that this information has helped you to understand the seriousness and caution with which ICANN approaches these endeavors. Please feel free to contact me if you have any further questions.

Sincerely,



Rod A. Beckstrom
President and CEO
ICANN
Addressing the Global Internet

Mr. COBLE. In a few minutes, we will receive testimony from the chief operating officer of ICANN and others with a substantial interest in the policies the organization adopts and the manner in which they are implemented.

It is difficult to overstate the impact of the Internet as a transformative technology. ICANN bears a tremendous responsibility in managing the technical aspects of the Internet to ensure the public is able to quickly locate the information they seek.

So, Mr. Chairman, I am not an engineer, nor am I a computer scientist. It seems to me that the safety and stability of the Internet must be the single most important focus of ICANN.

This past Friday, Mr. Chairman, I am told that an ICANN contractor recommended the implementation of a vital new security technology to protect consumers from fraud and cyber crime instead of immediately moving forward with plans to roll out an unlimited number of top-level domains. This recommendation was in a report that ICANN's own government advisory committee, GAC, noted in August was essential in determining the appropriate timing and scope of an expansion of top-level domains.

I might add, Mr. Chairman, that the GAC also expressed its concern as to why the proper analysis did not occur earlier. But unfortunately, this isn't the first time that ICANN appears to have neglected sound advice or failed to execute what one might think is a mandatory instruction.

In 2006, I am advised that ICANN's board of directors called for a comprehensive economic study before determining whether new top-level domains should be introduced. To date, I understand that study has not been—has never been conducted.

Just last month, a high-ranking Commerce Department official reiterated the need for such an objective study, writing, "We continue to believe that a threshold question, whether the potential consumer benefits outweigh the potential costs, has yet to be adequately addressed. NTIA continues to urge ICANN to undertake a comprehensive economic study prior to moving forward with the introduction of the new GTLDs, and we share NTIA's perspective that the overreaching issue should be resolved prior to new GTLDs having—being introduced."

Mr. Chairman, I ask that this August 18, 2009, letter from Laurence E. Strickling be made a part of the record.

Mr. JOHNSON. Without objection.

[The information referred to follows:]

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications and Information
Washington, D.C. 20230

AUG 18 2009

Mr. Alan C. Drewsen
Executive Director
International Trademark Association
655 Third Avenue, 10th Floor
New York, NY 10014-5617

Dear Mr. Drewsen:

Thank you for the kind words regarding my confirmation and for detailing the views of the International Trademark Association (INTA) members regarding issues associated with the Internet Corporation for Assigned Names and Numbers (ICANN).

On April 24, 2009, the National Telecommunications and Information Administration (NTIA) released a Notice of Inquiry (NOI) seeking comments regarding ICANN's performance under the Joint Project Agreement (JPA), as well as the model of private sector leadership and bottom-up policy development that ICANN represents. The record closed on June 8, 2009 with 86 comments. A review of the record reveals almost universal support for the existing model, but also reflects concerns regarding ICANN's execution of tasks, in particular as it relates to accountability and transparency in its decision-making. The views of INTA have informed the ongoing discussions between NTIA and ICANN about the best way to move forward, as the JPA expiration date approaches.

With regard to the introduction of new gTLDs, we continue to believe that a threshold question - whether the potential consumer benefits outweigh the potential costs as a result of this exercise - has yet to be adequately addressed. NTIA continues to urge ICANN to undertake a comprehensive economic study of the TLD market, among other things, prior to moving forward with the introduction of new gTLDs. We therefore share INTA's perspective that the overarching issues with ICANN's proposed new gTLD program should be resolved before new gTLDs are introduced.

I appreciate INTA's offer to work with NTIA on these important issues, and urge you to continue to keep us apprised of INTA's views and concerns.

Sincerely,

Lawrence E. Strickling

Lawrence E. Strickling

Mr. COBLE. In closing, Mr. Chairman, I want to make a couple of final points, if I may. First, I have a great concern about what will follow an unprecedented rollout of unlimited top-level domains in terms of increasing the risk to the public of malicious behavior online, as well as imposing tremendous new costs on companies, manufacturers, and service providers, costs that, I might add, will be passed on to consumers in many instances.

Secondly, I think there may be some who want to pit certain constituencies within ICANN against one another. That is not how I

approach these issues, and I don't believe you do, Mr. Chairman. What ICANN does affects every Internet user. The processes they follow must be truly transparent and lead to full accountability.

The quotes I cited earlier represent the views of the United States government and the key organization within ICANN and not private organizations. It is my hope, Mr. Chairman, that ICANN will take seriously these views and move forward with prudence and deliberation.

It is also my hope that this hearing signals a renewed commitment on the part of this Subcommittee that we will redouble our efforts in oversight in this area, which affects every American consumer and business.

This concludes my opening remarks, Mr. Chairman, and I yield back.

Mr. JOHNSON. Thank you, Mr. Ranking Member. And you and I will certainly work together as we move forward on this very important issue.

Are there any other Members who wish to make statements?

With no one having—okay, we have Chairman of the full Committee, Mr. John Conyers, who is recognized.

Mr. CONYERS. Thank you, Chairman and Ranking Member, Members.

We have in Judiciary more hearings than any other Committee, any other standing, or full Committee in the Congress. So, one of my goals is to reduce the number of hearings. And this is a hearing that we shouldn't have had to call, because if the parties had come together, I doubt if we would be here this morning.

And so, although I am in my usual good, jovial mood, I mean, look, we have until September 30th when the joint agreement expires. Everybody here knows everybody else, been working with each other. But you guys made us come here today. Here we are. We have a health care bill. We have troop increase in Afghanistan. We have the economy going through the roof, Congressional Black Caucus week, and here we are talking with all of you about, can we meet the September 30th deadline?

Well, if you don't meet the 30th deadline, you are going to all be sorry that you didn't make it, okay? So I have a lot of other things to say, but I want to continue the nice mood of the morning here and put the rest of my comments in the record.

And thank you, Mr. Chairman.

Mr. JOHNSON. Thank you, Mr. Chairman.

And I understand that my good friend, Congressman Chaffetz from Utah, wishes to make a statement.

You are recognized, sir.

Mr. CHAFFETZ. Thank you, Mr. Chairman.

And I will be very brief. I do appreciate you calling this hearing and appreciate you gentlemen for being here.

Among the issues that I hope we are able to address along the way is just, how is this beneficial to competition? Obviously, we want the world to be competitive, but there are some negative things, unintended consequences that happen with, perhaps, some of these actions that I hope were thoroughly explored before we implement something new.

Of particular concern is what would happen to companies and individuals, entrepreneurs and whatnot, who would need to potentially engage in defensive registration. How is that positive to the marketplace? Anything that happens that exacerbates fraud online is obviously of deep concern. It is used as such a tool in a positive way, but fraud is certainly an ongoing concern.

And, finally, I will just mention, again, some of the key areas that I would like to—and appreciate you addressing are, of the 21 generic top-level domains, why the expansion from there? Are we not meeting the market's needs with 21 of those?

And certainly, we have international demands, particularly in markets that use non-English characters and whatnot, and those need to be addressed, as well.

But I know you are aware of all those topics. I just want you to be aware of it. Those are some of the issues, at least from my perspective, that I would hope would be addressed, and if not addressed in this Committee, then certainly in the follow up.

But we appreciate your participation and your candor here and look forward to a productive meeting.

Thank you, Mr. Chairman.

Mr. JOHNSON. Thank you, Mr. Chaffetz. Or Chaffetz. I am sorry, Jason.

Mr. CHAFFETZ. Close enough.

Mr. JOHNSON. All right. Okay. Chaffetz. Okay.

Any other Members wish to make opening statements?

Without objection, other Members' opening statements will be included in the record.

I am now pleased to introduce the witnesses for today's hearing. Our first panelist is Mr. Doug Brent, chief operating officer of the Internet Corporation for Assigned Names and Numbers, ICANN. Mr. Brent has executive oversight of operational services, including Internet assigned number authority, and contracted parties such as registries and registrars. He oversees policy development support, as well as major product initiatives and international business operations functions.

Thank you for coming, Mr. Brent.

Second will be Mr. Richard Heath, president of the International Trademark Association. He is also vice president, legal and global anti-counterfeiting council in the legal group of Unilever PLC based in the United Kingdom. He served as head of the Corporate Trademarks and General Trademark Council at Unilever from 1996 to 2005, and he also served on INTA's board of directors from 1999 to 2003.

Third panelist is Mr. Stahura, Mr. Paul Stahura, founder of the registrar eNom and the chief strategy officer of Demand Media, the social media company which acquired eNom in 2006. ENom manages over 10 million domain names and connects Internet users to Web sites more than 2 billion times daily. Mr. Stahura has served for 8 years on the ICANN registrar constituency and has been active on the ICANN WHOIS task force for over 4 years.

Welcome, sir.

Our fourth panelist is Mr. Steve DelBianco. Mr. DelBianco is the executive director of NetChoice, which is a coalition of trade associations and e-commerce businesses that include Time Warner,

News Corp., and Yahoo. He is a well-known expert on Internet governance and online consumer protection and has advocated for business interests at the Internet Governance Forum and ICANN.

Thank you all. Thank you, sir. Thank you all for your willingness to participate in today's hearing.

Without objection, your written statements will be placed in the record. And we would ask that you limit your oral remarks to 5 minutes. You will note that we have a lighting system on your table that starts with a green light. At 4 minutes, it turns yellow, then red at 5 minutes. After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

Mr. Brent, please proceed with your testimony.

TESTIMONY OF DOUG BRENT, CHIEF OPERATING OFFICER, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN), WASHINGTON, DC

Mr. BRENT. Thank you, Mr. Chairman. Can you hear me okay?

Mr. JOHNSON. It seems like you probably need to cut that mic on.

Mr. BRENT. It is——

Mr. JOHNSON. It is on, okay? We can hear you much better.

Mr. BRENT. Thank you very much.

Mr. JOHNSON. Thank you.

Mr. BRENT. Mr. Chairman, Committee Members, thank you very much for the opportunity to come and talk with you today. My name is Doug Brent. I am chief operating officer of ICANN and have the day-to-day responsibility for much of the work that is under consideration by the Committee today.

The ICANN organization is just over 10 years old. We are a bottom-up, multi-stakeholder entity that coordinates key technical functions of the global Internet. We were born from the United States government "White Paper on the Management of Internet Domain Names and Addresses" and have benefited from the assistance and support of the United States government across three presidential Administrations.

ICANN stakeholders—many of whom are here today—range from governments to individual Internet users to businesses from the U.S. and around the globe.

I want to go directly to the concerns that I think are most significant to the Committee today. As Members are aware, ICANN's community is working to complete a process to bring competition to top-level domains. TLDs—and we have lots of acronyms in this world—TLDs, as they are known, are the part of the domain name to the right of the dot. Common examples are .org, .com, .net.

ICANN's work to increase competition is part of our history. In 1998, there was one business that registered domain names, and each name cost approximately $50 to register. ICANN has fostered an environment where hundreds of companies were created to register names, and the cost can be as low as $6 for individual registrants.

But why apply this competitive mandate to new top-level domains? Why expand now? What good will it bring?

Three reasons. First, the United States has encouraged ICANN to consider and implement new TLDs since ICANN was founded in

1998. It was part of the founding documents and part of the agreement since.

Second, there is every reason to believe that the benefits offered by competition for virtually every other market also apply to TLDs. New TLDs don't just mean more .coms, but the opportunity for real innovation in how names are used to the general benefit of Internet users. Already, there are strong and public campaigns for new names. Multiple parties have expressed interest in .eco, with one supported by former Vice President Al Gore, .basketball has been promoted by Shaquille O'Neal, and there are proposals from all over the world, from New York to Sydney to Paris, to have their communities represented at the top level.

Third, there are about 1.6 billion online around the world. Many of these Internet users aren't English-speakers, and their number is growing. As the domain name system presently operates, top-level domains can't be displayed in any character set other than that used for English. To break through that barrier, ICANN is working to introduce top-level domains in all of the languages of the world.

Planning and thinking for new GTLDs has been going over a decade. This has been a thorough process. Policy development began in 2005 and took nearly 3 years of development from community members—again, many here—including the intellectual property constituency. The implementation planning has been actively underway for more than 2 years, with numerous opportunities for live participation, remote participation, and formal written comments.

Importantly, the new GTLD work is not yet done. While numerous hard issues have been resolved along the way, some still remain. Intellectual property concerns are crucially important to ICANN. Even ICANN's chair is an intellectual property attorney. We have not and will not allow new TLD expansion that does not appropriately protect trademark holders.

Trademark holders want more tools for enforcement and protection at the second level. So do we. In fact, we asked for a team of intellectual property experts from all over the world to provide advice on how protections could be strengthened. I personally participated in that discussion, hundreds of hours in the last 6 months, and recommendations are now being actively considered.

In conclusion, ICANN did not casually think this plan up. This will not be an unbridled expansion. It is the work of many hands from a bottom-up process. There have been no fewer than 20 papers and submissions on the expansion of new GTLDs. In just the last 12 months alone, there have been two versions of the applicant guidebook, thousands of pages of commentary, analysis, and revisions, with more to come.

There is more work ahead of us, and that work will be and must be in the public interest. I thank Members for this opportunity and look forward to answering questions you have about ICANN.

[The prepared statement of Mr. Brent follows:]

TESTIMONY OF DOUG BRENT, CHIEF OPERATING OFFICER,

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

SEPTEMBER 23, 2009

Mr. Chairman and members of the Committee, thank you for the opportunity to speak before this Committee. I am Doug Brent, the Chief Operating Officer of the Internet Corporation for Assigned Names and Numbers (ICANN), I have management responsibility for much of ICANN's day-to-day operations.

I. ICANN in 2009

ICANN was created in 1998, born from the United States Government's "White Paper on the Management of Internet Domain Names and Addresses" (White Paper)[1], and with the assistance and support of the United States Government across three presidential administrations. ICANN is the manifestation of a bottom-up, multi-stakeholder entity that coordinates key technical functions of the global Internet, as was envisioned by the United States Government eleven years ago.

ICANN is really two things. First, a public benefit nonprofit, private sector led corporation organized under the laws of the State of California and headquartered there. Second, ICANN is a global organization of stakeholders, including participants from across industry, governments and individual Internet users. ICANN is recognized by the world community as the authoritative body for technical coordination and policy development regarding the stability and interoperability of the Domain Name System, or DNS, which for purposes of this testimony will be used to describe the coordinated system of domain names; Internet protocol addresses and autonomous system numbers; and protocol port and parameter numbers.

While ICANN has many stakeholders and interests, the work of ICANN is for the public benefit, specifically the benefit of domain name registrants and the global community of an estimated one billion Internet users. ICANN accomplishes this work for registrants and Internet users through a bottom-up, consensus-based process. While the focus of many of the discussions at the hearing today will be on how ICANN may further improve in this mission, in just over eleven years of existence, ICANN has achieved much. ICANN has become the place for stakeholder driven policy development on the management of the DNS and issues surrounding it.

ICANN has been a key facilitator of a single, global, interoperable Internet. ICANN has

[1] United States Department of Commerce, *White Paper on the Management of Internet Domain Names and Addresses*, *at* http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm (June 6, 1998) ("White Paper").

pursued policies that advantage the domain name registrant through the introduction and fostering of competition, predictably resulting in choice of vendors, differentiation in service offerings, and lower prices. Particularly in the last years, the ICANN community has made several landmark efforts towards enhanced protection for registrants, including the recent adoption of a new set of contractual rules for registrar behavior and enforcement.

Importantly, ICANN is in the implementation planning stage of defining the processes for adding new generic top-level domain names (TLDs) to the domain name system – the names after the dot – in all the languages of the world to expand the benefits of competition, innovation and choice. What is a new generic TLD (gTLD)? It might be a .FINANCE domain where consumers could be certain they were dealing with authentic financial institutions operating under secure conditions. It might be a .APACHE domain, where Native Americans would have a place for their online identity. It might be a .IBM domain, where marketers take charge of their global, online presence at a place on the Internet that customers and business partners could easily identify.

Related to the issues before this Committee, ICANN has a three-fold role in performing its public interest mission on behalf of the registrants of domain names.

1) As directed by its Bylaws, and its multi-stakeholder processes, to act to introduce competition into the TLD space in the worlds' languages through the expansion of TLDs;

2) To appropriately accommodate the varied and disparate set of interest groups that participate in ICANN's processes, including intellectual property interests; and

3) To provide registrant protections throughout the DNS, responding to changes in this dynamic marketplace.

As the Subcommittee is aware, the Joint Project Agreement (JPA) between the National Telecommunications and Information Agency (NTIA) of the United States Department of Commerce (DoC) and ICANN is due to conclude on 30 September 2009. That conclusion is the culmination of almost eleven years of organization building between ICANN and the DoC. Members of Congress have expressed important principles regarding the ongoing relationship between the United States Government and ICANN. Some of these include that ICANN should remain a nonprofit corporation based in the United States, in a lasting relationship with the U.S. Government, and with a particular focus on ongoing transparency and accountability. While these discussions are continuing between ICANN's CEO and the NTIA, my understanding is that all parties are striving for a relationship that is long standing and that accommodates these important principles, that will call for continuous improvement and periodic reviews of ICANN's accountability and transparency, and security and stability, among other things.

The remainder of my testimony will address some of the important considerations

associated with the introduction of new gTLDs and actions by ICANN to protect the interests of domain name registrants.

II. New generic Top Level Domains

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market: "The new corporation ultimately should ... oversee policy for determining the circumstances under which new TLDs are added to the root system."[2] The secure introduction of new gTLDs, as specified in the White Paper, remains an essential element of fostering competition and choice for Internet users in the provision of domain registration services.

The introduction of New gTLDs are identified as a core objective in each of MoUs (1998 – present) and the JPA, which state, "Define and implement a predictable strategy for selecting new TLDs."[3] The study and planning stages, extending back several years, include two trial rounds of top-level domain applications held in 2000 and 2003. Those rounds were used to shape the current process.

The policy recommendations to guide the introduction of new gTLDs were created by the Generic Names Supporting Organization (GNSO) over a two-year effort through its bottom-up, multi-stakeholder policy development process. The GNSO approved its Final Report on the Introduction of New Top Level Domains[4] in August 2007 by a 19-1-3 vote, a clear supermajority under the ICANN Bylaws.[5]

Principles guiding the policy development process included that:

- new gTLDs will benefit registrant choice and competition;
- the implementation plan should also allow for IDNs at the top level;
- the introduction of new gTLDs should not cause security or stability issues; and
- and protection of various appropriate interests requires objection and dispute resolution processes.

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[2] *Id.*

[3] *See, e.g.,* Amendment 6 to Memorandum of Understanding Between the U.S. Department of Commerce and The Internet Corporation For Assigned Names And Numbers, *at* http://www.ntia.doc.gov/ntiahome/domainname/agreements/amendment6_09162003.htm (Sept. 16, 2003).

[4] GNSO Final Report on the Introduction of New Top Level Domains, *at* http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm (Aug. 8, 2007) ("Final Report").

[5] *See* Annex A to the ICANN Bylaws, http://www.icann.org/en/general/bylaws.htm#AnnexA.

To date, ICANN has demonstrated that it is proceeding with deliberation in launching the New gTLD Program, and will continue on that path.

A. *New gTLDs will enhance competition and benefit registrants*

Several different economic reports, third-party observers, and ICANN stakeholders have recognized that the fundamental benefits of competition that apply in almost all markets will also benefit Internet users through enhanced service offerings, competition, innovation and choice in the domain name market. Still, others, including some here today, believe questions regarding possible costs to registrants and overall economic modeling need further analysis. I would like to first review some of the background on work done to date, and then look forward to possible actions to accommodate concerns that still exist.

Since the drafting of the White Paper it has been a fundamental assumption that increasing the number of gTLDs will increase competition.[6] This fundamental assumption was relied upon by the House Committee on Energy and Commerce when, in 2001, it initiated a hearing regarding potential detrimental effects to competition for ICANN's selection of only seven new TLDs out of 44 applicants for over 200 different TLDs in its early Proof of Concept round.[7]

ICANN has commissioned three separate reports during the implementation phase of the New gTLD Program.[8] ICANN is now on the cusp of finalizing many of the implementation details of the New gTLD Program, and as the documentation has

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[6] "The U.S. Government is of the view, however, that competitive systems generally result in greater innovation, consumer choice, and satisfaction in the long run. Moreover, the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically." White Paper, *supra* note 1.

[7] *See* Transcript of February 8, 2001 Hearing before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, House of Representatives, On Hundred Seventh Congress, First Session,*available at* http://archives.energycommerce.house.gov/reparchives/107/hearings/02082001Hearing37/print.htm ("some view ICANN's approval of only a limited number of names as thwarting competition").

[8] Dr. Dennis Carlton, Report Regarding ICANN's Proposed Mechanism for Introducing New gTLDs, *at* http://www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf ("Carlton I");
Dr. Dennis Carlton, Preliminary Analysis Regarding Price Caps for New gTLD Internet Registries,*at* http://www.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf ("Carlton II"); and
CRA International, Revisiting Vertical Separation of Registries and Registrars, *at* http://www.icann.org/en/topics/new-gtld-crai-report-24oct08-en.pdf ("CRA").

become more specific, so have the criticisms attacking both the collective assumption that increasing the number of TLDs will increase competition, as well as the findings within the economic reports.

But what remains clear, as stated by Dr. Dennis Carlton, a noted economics professor and former Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice from October 2006 through January 2008, is that any resultant delay of the launch of the New gTLD Program will inhibit competition in the use of generic, non-trademarked terms, and runs counter to the generally accepted view that market entry benefits consumers by expanding output and lowering price. The potential innovations and uses for the new gTLD namespace will be stifled if limitations to entry are imposed.[9]

While the New gTLD Program already included several protections for intellectual property concerns, and even more protections are under consideration right now, those requesting additional economic studies to take into account the costs to trademark holders fail to provide any specific evidence to support why entry into an entire market should be delayed. In the end, calling for a delay in the entry of new gTLDs only serves to perpetuate existing market conditions: concentration within some existing registries, most short generic strings unavailable, and those that trade on the value of the current marketplace, holding portfolios based upon the value of current .COM names.[10]

Similarly, delaying the introduction of new gTLDs for unsubstantiated fears of price gouging by way of forcing defensive registrations – based upon the omission of price caps in registry contracts – is not a sufficient reason to delay the benefits of introducing competition into the DNS. GTLDs without price caps exist today, yet the registry operators of those gTLDs have not been the subjects of complaints of opportunistic behavior.[11] Further, in a growing marketplace, it would not be rational for gTLD registries to be opportunistic in pricing. Finally, registrants are likely to benefit from new and innovative services and pricing models in the new gTLDs – models that we cannot even imagine today in the static marketplace.

Even with what appears to be the compelling benefits of competition, ICANN's commitment to open and transparent processes requires further action on ICANN's part to address the questions that have been raised surrounding the sufficiency of the economic studies under taken to date. Accordingly, ICANN will retain economists to review and summarize work to date regarding the costs and benefits of new gTLDs, putting that work into the context of the questions some have said remain open, and then evaluate whether additional study is required.

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[9] Carlton I, *supra* note 8, *passim*.
[10] *Id*. at paragraphs 75-76.
[11] *Id*. at paragraph 74.

B. *ICANN's Policy Processes take into account its varied and disparate constituents and stakeholders*

ICANN's bottom-up stakeholder driven model requires a thorough policy development process. The steps leading towards ICANN's decision to introduce new gTLDs followed this thorough process; ICANN followed a detailed and lengthy consultation process with all constituencies of the global Internet community represented by a wide variety of stakeholders – governments, individuals, civil society, business and intellectual property constituencies, and the technology community. This work was conducted in the GNSO, the supporting organization that has responsibility to set policy for the generic names area, and effectively acts as the representative of the Internet community for generic names. Also contributing to this policy work were ICANN's Governmental Advisory Committee (GAC), At-Large Advisory Committee (ALAC), Country Code Names Supporting Organization (ccNSO), and Security and Stability Advisory Committee (SSAC).

1. GNSO and Community Involvement in the New gTLD Program, including Policy Development

On 29 October 2003, the GNSO initiated the policy development process (PDP) for the creation and implementation of a regularly scheduled procedure and objective selection criteria for new gTLD registries.[12]

The GNSO Issues Report was released on 5 December 2005, and public comments were sought on the terms of reference.[13] Thirty-eight comments were received from 21 commenters, including comments specifically relating to trademark protection concerns. The GNSO followed its regular PDP on the introduction of new gTLDs. The end result of this policy work, the Final Report – Introduction of New Generic Top-Level Domains (Final Report) was issued on 8 August 2007.[14]

The GNSO considered and addressed trademark issues throughout the PDP on new gTLDs, well before implementation work had begun and the first Draft Applicant Guidebook (DAG) was issued. First, the GNSO, in February 2007, convened a working group and released an issues report on protecting the rights of others in new gTLDs. In June 2007, that working group produced a final report.[15] The working group was tasked with "determin[ing] whether to recommend to [the GNSO] Council a best practices approach to providing any additional protections beyond the current registration agreement and UDRP policy for the legal rights of others during the domain name

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[12] GNSO Minutes, http://gnso.icann.org/meetings/minutes-gnso-29oct03.html (Oct. 29, 2003).

[13] Annoucement of Release of GNSO Issues Report, http://www.icann.org/en/announcements/announcement-06dec05.htm (Dec. 6, 2005).

[14] Final Report, *supra* note 4.

[15] Report of Working Group on Protecting Rights of Others, http://gnso.icann.org/files/gnso/drafts/GNSO-PRO-WG-final-01Jun07.pdf (Jun. 1, 2007).

registration process, particularly during the initial start of a new gTLD. . . . A best practices document could be incorporated into the material for the application process for new gTLD applicants." The working group was not able to provide a list of rights protection mechanisms that could be universally applicable to all new gTLDs, in part, because of the expected diversity in new types of registry businesses. However the report set forth six recommendations to be used as principles for new gTLD operators to consider in their implementation plans. The report, including the recommendations, was provided to the larger group developing the Final Report. The working group report was authored in part by members of the Intellectual Property Constituency, which has been actively engaged in various stages of this process for years.

The 8 August 2007 Final Report makes a policy statement on the introduction of new gTLDs, stating: "Recommendation 3 – Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law." This includes trademark rights. This policy from the GNSO has been stated, in each iteration of the DAG, and ICANN has been working hard to create the details of the implementation of the policy presented on trademark issues. The New gTLD Program has, since the first DAG, included many protections for rights holders in the TLDs, such as a robust objection process for the use of trademarks in requested TLD strings. Further enhancements are being considered.

2. ICANN Board Decision on GNSO Policy Recommendation

On 26 June 2008, the ICANN Board, by resolution, adopted the GNSO policy recommendations for the introduction of new gTLDs and directed staff to develop and complete a detailed implementation plan and continue communication with the community on the implementation work.[16]

The DAG was first posted on 24 October 2008.[17] In addition to posting the DAG, ICANN posted several Explanatory Memoranda, including a Memorandum on Protecting the Rights of Others. This specific memorandum explains the rights protection mechanisms included for protection at the top level and in second level domain name registrations.[18]

The first DAG was posted for public comment for 76 days. ICANN received over 300 documents of commentary comments from participants in 24 different countries. In response to those comments, on 18 February 2009, ICANN released a second version of

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[16] ICANN Board resolution, http://www.icann.org/en/minutes/resolutions-26jun08.htm (June 26, 2008).

[17] Posting of Draft Applicant Guidebook, http://www.icann.org/en/topics/new-gtlds/comments-en.htm (Oct. 24, 2008).

[18] Memorandum on Protecting the Rights of Others, at http://www.icann.org/en/topics/new-gtlds/protection-rights-22oct08-en.pdf (Oct. 22, 2008).

the DAG (DAG2), along with a full analysis of the public comment received on the prior version.[19]

Because of the high volume and varying nature of the comments received on trademark protection issues in response to the DAG, ICANN did not elect to use the DAG2 to provide alternative proposals. Instead, ICANN noted that additional consultation was required on this issue: "ICANN intends to conduct a series of discussions with all relevant parties relating to proposed enhanced protections for trademark name holders. . . . If additional trademark protection mechanisms are agreed upon and included in the next guidebook, this would likely result in a cost savings to trademark holders, and additional consideration should be given to these concerns raised as part of any proposal."[20]

ICANN further stated: "ICANN must balance the needs of individuals and individual constituencies with the needs of the community at-large. As it pertains to trademark protection, ICANN recognizes the trademark rights holders' concerns with protecting their brands and controlling costs associated with defensive registrations. ICANN believes in protecting brand owners' trademarks and preventing abusive registrations. To that end, ICANN is continuing to evaluate and update its brand protection strategy and will be setting out a process to receive further inputs regarding appropriate mechanisms to enhance those protections."[21]

C. *ICANN Activities Since the Publication of the DAG2*

There are multiple open issues needing resolution prior to publishing a final DAG, and ICANN is actively engaged in consultation – or is coming to a point of closure on the additional consultations, on those issues.

At its March 2009 International Public Meeting in Mexico City, ICANN had several consultations with the public on the DAG2 and the status of the New gTLD Program. In addition to the discussions in Mexico City, ICANN opened a public comment period on the DAG2, from 18 February to 13 April 2009. ICANN analyzed the comments made at the Mexico City meeting as well as the public comments received through the public comment process, and produced another analysis document in May 2009.[22] At that

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[19] Posting of Draft Applicant Guidebook 2 ("Draft Applicant Guidebook: What You Told Us), http://www.icann.org/en/announcements/announcement-3-18feb09-en.htm (Feb. 18, 2009).

[20] New gTLD Draft Applicant Guidebook: Summary and Analysis of Public Comment, http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf, at page 75-76.

[21] *Id*. at 76.

[22] Applicant Guidebook: Public Comments Analysis and Revised Excerpts, http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf (May 29, 2009).

time, ICANN also posted excerpts of revised sections of the DAG2 for public comment. Trademark Protection is just one of the "Overarching Issues" that remain open for further consultation. Others include (1) Security and Stability; (2) Malicious Conduct; and (3) Demand/Economic Analysis).[23]

In June 2009, ICANN held its International Public Meeting in Sydney. The New gTLD Program was the subject of significant consultation and discussion in Sydney, including a five-hour session on Trademark Protections and Malicious Behavior, and a multi-hour session on issues of vertical integration in registries. Since the beginning of July, ICANN has held four consultation sessions, two devoted primarily to discussions of the IRT Final Report and Trademark Protection (New York and London) and two on more general new gTLD update issues (Hong Kong and Abu Dhabi). Where possible, ICANN has arranged for remote participation for participants who are not able to travel to the regional events. ICANN will also have multiple opportunities for consultation on the New gTLD Program at the upcoming ICANN International Public Meeting in Seoul in October 2009. Several ICANN senior staff participated in these meetings; I participated in-person in Sydney, New York, London and Hong Kong.

ICANN is also preparing to seek further input and guidance from the GNSO on certain of the Overarching Issues, including Trademark Protection, to continue the ongoing community consultation and assistance in the formation of the implementation process. ICANN is dedicated to its mission and core values of bottom-up, consensus driven work, even though this consultation may result in additional delays in publishing the final DAG and moving forward with implementation.

D. *The IRT and Continuing Work on Trademark Protection*

At ICANN's 2009 Mexico City meeting, the ICANN Board passed a resolution directing the formation of the IRT in response to community proposals of solutions to the trademark protection issues identified in the discussions of the DAG.[24]

ICANN's Intellectual Property Constituency (IPC) of the GNSO was integral in forming the IRT, which was ultimately comprised of 18 international members (nine from the United States), as well as two alternates and six ex-officio members.[25] IRT members dedicated a substantial amount of time in-person and on the phone for this significant effort. Further, ICANN provided travel expense support and staffing throughout the process.

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[23] Revised excerpts of New gTLD Applicant Guidebook Public Comment Forum, http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm.

[24] IRT Resolution, at http://www.icann.org/en/minutes/resolutions-06mar09.htm#07 (Mar. 6, 2009).

[25] IRT Membership Directory, at https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:20090407232008-0-9336/original/IRT-Directory.pdf.

The IRT issued a draft report, posted for public comment on 24 April 2009.[26] After review of the comments and public consultation, the IRT issued its final report on 29 May 2009.[27]

Some new elements of in the new gTLD process, to provide appropriate rights protection, and based in part on the IRT recommendations, will appear in the next DAG. These include both "thick" Whois information (the requirement that a registry maintain and offer Whois information in a centralized way), and a dispute mechanism for use after a registry has been created. In order to address concerns that some of the recommended solutions might impinge on existing policies such as the Uniform Domain Name Dispute Resolution Policy (UDRP) or could themselves be the subject of policy development, ICANN will be asking the GNSO to begin an expedited review of some of the recommended solutions in an attempt to reach consensus on an optimal path for launching new gTLDs with robust mechanisms to ensure the protection of legal rights.

E. *Mitigating Potential for Malicious Conduct*

Closely connected to concerns about rights protection are concerns about mitigating potential for malicious conduct; work on malicious conduct abuse is another active stream of work in the New gTLD Program. ICANN consulted with several key sources, including: the Anti-Phishing Working Group, the Registry Internet Safety Group, the Computer Emergency Response Team, and community and banking/finance associations and organizations. From these significant inputs, ICANN has identified several potential solutions to mitigate threats. ICANN staff recommends that a series of measures to mitigate malicious conduct be included in the DAG version 3, including enhanced background information and checks for applicants; a designated anti-abuse point of contact and documented procedures; a documented plan for DNSSEC implementation; a prohibition on wildcarding (redirection of non-existing domains, often to ad pages); the development of a domain suspension system; the provision for DNS glue record removal; and participation in an expedited registry security request process. ICANN also recommends the establishment of a voluntary security designation program for new gTLD registries to validate the establishment of an enhanced level of trust and meeting certain verification criteria. The reports that ICANN received that informed these recommendations are located at https://st.icann.org/new-gtld-overarching-issues/index.cgi?potential_for_malicious_conduct.

III. ICANN Has Achieved Great Success in Registrant Protections, and Continues to Improve and Innovate

ICANN has achieved significant successes in its mission of maintaining an interoperable,

[26] Public comment forum on IRT Draft Report, http://www.icann.org/en/public-comment/public-comment-200905.html#irtdr.
[27] IRT Final Report, at http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf (May 29, 2009).

secure and stable DNS. There still is room for improvement, and ICANN remains committed to moving forward in as transparent a method as possible, and remaining accountable to all stakeholders.

Some of ICANN's recent successes are:

DNSSEC: Coordination with the United States Department of Commerce and VeriSign to achieve the signing of the Root Zone with DNSSEC in the near future.

Enhanced RAA: Through a consensus process, ICANN has amended the Registrar Accreditation Agreement to provide greater consumer protections and increased authority for ICANN's Contractual Compliance efforts. In a benefit to registrants and registrars, ICANN lowered the per-domain registration fee for entities adopting the enhanced RAA.

Data Escrow: The full implementation of Registrar Data Escrow requirements. In just over two years, nearly 99% of all gTLD domain name registrations are currently covered by ICANN's Registrar Data Escrow program, which provides registrant protections in the event of registrar failure, non-renewal or termination. ICANN has recently instituted a Data Escrow audit program to increase the confidence that registrars are depositing sufficient registrant data.

Registrar Transfer: Formulation of a De-accredited Registrar Transition Procedure,[28] which provides for an orderly transition of registrations in the event of loss of accreditation. With a higher rate of registrar terminations, an orderly and planned transition procedure minimizes any registrant impact.

A. *ICANN's Contractual Compliance Work*

Most notable in registrant protection is the ongoing improvement of ICANN's Contractual Compliance work.

ICANN's recent registrar termination history demonstrates ICANN's commitment to the continuous improvement of its contractual compliance program. ICANN has terminated 38 registrar agreements since 2003, sending 24 termination notices and refusing to renew 14 registrar agreements, over the objection of those registrars. Fourteen of these registrar terminations – 36 percent – occurred in 2009.

The violations cited to support termination or non-renewal include: failure to pay ICANN fees (financial noncompliance is often one of the first signs that a registrar is unable to comply with other provisions of the RAA that are in place for registrant protection); failure to comply with data escrow requirements (6); failure to provide a working

[28] De-Accredited Registrar Transition Procedure, at http://www.icann.org/en/processes/registrars/de-accredited-registrar-transition-procedure-01oct08.pdf (Oct. 1, 2008).

website and Whois look up service (3); failure to comply with UDRP provisions (1); failure to investigate Whois data accuracy claims (1); and insolvency (1). Data on termination and non-renewals relate to cases where breaches went uncured. ICANN has issued hundreds of compliance notices, which in the vast majority of cases resulted in improved registrar performance. ICANN will continue to explore ways to identify registrar noncompliance early, take action swiftly and terminate those registrars that undermine the domain name registration process.

ICANN has committed significant resources in its budget to its contractual compliance program. ICANN's 2010 operating plan and budget sets out over US$3,000,000 for contractual compliance activities.

1. ICANN's Cybersquatting Enforcement Actions

Cybersquatting is a major concern for ICANN, the intellectual property community, law enforcement entities, and others interested in eradicating this harmful behavior. ICANN's role in combating cybersquatting has been invoked when those involved are ICANN-contracted parties.

Within the last twelve months, several cases were filed in United States courts alleging that ICANN-accredited registrars are engaging in cybersquatting. Accordingly, in 2009, ICANN terminated one registrar and refused to renew the accreditation of another registrar.[29] Currently, ICANN is assessing whether termination is appropriate in a case where a U.S. court found a registrar engaged in cybersquatting.

ICANN is working with its Registrar and Intellectual Property Constituencies to create advisories clarifying contractual terms for registrars relating to cybersquatting. Further, ICANN's multi-stakeholder community is working on revisions to the RAA, and this process will consider additional elements that would prevent possible cybersquatting by registrars.

It is also important to consider that the act of cybersquatting is not always tied to registrar behavior, and that cybersquatting can be directly addressed through the UDRP, established by ICANN in 1999.[30] The UDRP is an administrative procedure that addresses intellectual property concerns, including cybersquatting, decided by panels appointed under the auspices of the World Intellectual Property Organization (WIPO) and other approved UDRP providers.

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[29] Compliance letters, at http://icann.org/correspondence/burnette-to-sundin-11sep09-en.pdf; and http://www.icann.org/correspondence/burnette-to-malik-14jul09-en.pdf.
[30] Uniform Domain Name Dispute Resolution Policy, at http://www.icann.org/en/udrp/udrp.htm.

2. The Whois Data Accuracy Study

With the proliferation of domain name registrations, trademark holders have become increasingly more concerned about Whois data accuracy as they attempt to protect their intellectual property interests. In an effort to broaden and inform community discussion regarding Whois data accuracy, ICANN has undertaken a Whois Data Accuracy Study of domain name contact information accuracy. ICANN, in collaboration with the National Opinion Research Center (NORC), designed a multistage sample intended to yield a 95% confidence level regarding the results.[31] ICANN's study will determine whether registrant names and addresses are accurate. Study results will be publicly available in December 2009. Among its many possible uses, the study results will be used to guide ICANN's Whois related contractual compliance enforcement plans.

3. The WDPRS

Today, ICANN accredited registrars have a contractual obligation to investigate Whois data inaccuracy claims. ICANN facilitates this process with an on-line reporting system, Whois Data Problem Report System (WDPRS), originally deployed in 2002.[32] This system notifies a registrar that there is a claim of Whois inaccuracy, and allows the person filing the report to inform ICANN whether action was taken regarding the inaccuracy report after 45 days (i.e., Was the Whois data corrected? Is the Whois data still inaccurate? Was the domain name deleted?).

While ICANN has updated this system from time to time over the years, a system rewrite was completed in December 2008 to provide increased functionality and to add tracking capabilities.[33] ICANN also dedicated additional staff to handling Whois inaccuracy claims.

Since introduction of this new tracking system, ICANN has processed approximately 55,000 valid reports of Whois inaccuracy. Results show that 45 days after an initial complaint, about 8,000 (or fewer than 16 percent) of the reported domain names are still indicated by the complainant as remaining inaccurate. ICANN then manually handles each remaining complaint with the result that all but 1,285 (less than three percent) are unresolved. These unresolved complaints are the subject of compliance investigations, and escalated contractual compliance enforcement action is planned if registrar responses are not received.

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[31] Announcement of Whois Accuracy Study, at http://www.icann.org/en/compliance/norc-whois-accuracy-study-design-04jun09-en.pdf.

[32] At http://wdprs.internic.net/.

[33] Announcement of Revisions to WDPRS, at http://www.icann.org/en/announcements/announcement-19dec08-en.htm.

ICANN's WDPRS is not a panacea for Whois data accuracy; however, since its introduction in 2002, the WDPRS has continued to have a measurable impact on the accuracy of Whois data. ICANN will continue to make enhancements to this system to ensure that it positively impacts the accuracy of Whois data.

In the end, ICANN enforcement efficacy is determined by two factors: the dedication of resources to enforcement activity and a set of enforcement rules appropriate to meet the expectations of the community. ICANN has invested ever-greater resources into enforcement with positive results. The rules for compliance also need ongoing review. Today, ICANN can mandate that Whois accuracy complaints be investigated by registrars. In the future, a mechanism that truly requires and defines accuracy will make this process more efficient, effective and reliable.

ICANN is also turning its focus to the base level issue of availability of Whois lookup services. ICANN is developing and testing a software tool to monitor registrar compliance with the contractually mandated requirement for registrars to provide free, publicly available web-based Whois data lookup services. It is anticipated that ICANN will complete its testing and commence using this compliance tool by October 2009.

4. ICANN's Enhanced Contract Enforcement Tools

ICANN Staff worked with the Registrar community to propose a new set of contractual provisions that enhances ICANN's enforcement tools and remedies. In May 2009, ICANN's Board of Directors approved a series of important amendments to the contractual framework that governs ICANN's relationships with its registrars. The new RAA includes enhanced compliance tools. The new remedies include allowing ICANN to: (1) suspend registrars for failure to cure breaches; (2) impose sanctions for repeated, willful material breaches; and (3) take compliance action when registrars fail to respond to audit requests.

Either voluntarily, or as existing contracts expire, all registrars are moving to the new contractual basis and it is anticipated that all ICANN-accredited registrars will operate under the 2009 RAA within the next five years. The new RAA is being rapidly adopted, and ICANN has put in place financial incentives to accelerate the adoption of the new RAA as rapidly as possible.

IV. Conclusion

ICANN is the bottom-up, multi-stakeholder entity that coordinates key technical functions of the global Internet, as envisioned by the United States Government eleven years ago. ICANN, in fulfilling that role, has already fostered lower prices for registrants, via the introduction of a competition in the domain name registration market. The long awaited next step is to introduce competition and innovation at the top-level of generic domain names

Mr. JOHNSON. Thank you, Mr. Brent.
Mr. Heath?

TESTIMONY OF RICHARD HEATH, PRESIDENT, INTERNATIONAL TRADEMARK ASSOCIATION (INTA), NEW YORK, NY

Mr. HEATH. Thank you, Mr. Chairman. Can you all hear me?

Chairman Johnson, Ranking Member Coble, Chairman Conyers, Members of the Subcommittee, thank you for the opportunity to offer the perspective of trademark owners on the introduction of new generic top-level domains, or GTLDs, to the Internet's domain name system.

The International Trademark Association, or INTA, welcomes this Subcommittee's oversight of this important issue and appreciates initiatives such as this hearing and the September 15th letter from Representatives Smith and Coble that posed several key questions to the Internet Corporation for Assigned Names and Numbers, otherwise known as ICANN. INTA actively participates within ICANN and contributes to its policy development process.

Mr. Chairman, when a trademark is used as a domain name without the trademark owner's consent, consumers can become confused about the source of the goods and services being offered on the Internet. This confusion tarnishes and harms brands. It misleads consumers. And it results in decreased confidence in the Internet as an instrument of legitimate commerce.

For example, in 2009, a Get Safe Online study undertaken by the British government found that 44 percent of small businesses have been the victim of online crime. And most alarmingly, the fear of online crime has deterred 14 percent of all British citizens from using the Internet altogether. That is a substantial number.

Abuse of the domain name system has been a problem since the Internet was opened to commercial use, and the amount of abuse is steadily increasing, and the harm to trademark owners and consumers has been increasing, as well, both in scope and in severity.

Despite the hard work of the ICANN board and its staff, Mr. Chairman, we see significant increases in abuses of the domain name system and inadequate management by ICANN to address the problems, including their inability to enforce contracts.

The result in the current 21 GTLD space is at least the following issues: an increase in consumer confusion and decrease in confidence in the Internet; threats to public health, safety and security through Web sites selling counterfeit goods and services; propagation of malicious software that spreads viruses, spam, and leads to identity theft; tarnishment of brands and damage to the reputation of legitimate businesses; and, last but by no means least, an increase in business costs due defensive registrations, Internet monitoring, and expensive legal actions to enforce trademark rights, the costs of which are either passed on to consumers or absorbed by businesses, making them less competitive.

It is against this background that ICANN now plans to introduce an unlimited number of new GTLDs, which will increase the harm to businesses and consumers. So why introduce this program of expansion at all?

The key argument we have just heard from ICANN offers expanding the domain name space is the need to spur competition,

but ICANN cannot assume without empirical support that simply adding unlimited GTLDs to a complex economic model like the domain name system will necessarily increase competition in a manner that best serves and improves public welfare.

The critical issue for brand owners, consumers, and other Internet users is to ensure that the introduction of any new GTLDs is responsible, deliberate, and justified. We therefore believe that, before any additional GTLDs are introduced, ICANN should resolve what it has identified as the four overarching issues, namely trademark protection, the potential for malicious conduct, Internet security and stability, and top-level domain demand and economic analysis.

With respect to trademark protection, ICANN's board did create an implementation recommendation team—the IRT, as we have heard—to address new protection mechanisms in the face of a rollout of an unlimited number of GTLDs. The IRT, despite an extremely tight deadline, proposed some useful recommendations in its final report. But even if these recommendations are adopted by ICANN, they are untested, and they may not be adequate to address the unlimited expansion of new GTLDs proposed by ICANN.

With respect to an economic analysis, ICANN, despite asserting in its testimony, has yet to conduct an independent, comprehensive economic study of the domain name marketplace. INTA believes that ICANN should not implement any program for the creation of new GTLDs without fully understanding the beneficial and harmful effects of such actions on consumers, competition and intellectual property rights.

INTA is strongly critical of the process undertaken to date and of ICANN's decision to authorize an unlimited number of new GTLDs without prior economic study and without adequate protection for all Internet stakeholders.

As a result, we welcome the involvement of the Judiciary Committee on this important matter, and we ask that the Committee continue to work with ICANN, the Department of Commerce, and others in Congress in developing sound policies that protect the legitimate interests of the public.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Heath follows:]

PREPARED STATEMENT OF RICHARD HEATH

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TESTIMONY

OF

RICHARD HEATH
PRESIDENT
INTERNATIONAL TRADEMARK ASSOCIATION

"THE EXPANSION OF TOP LEVEL DOMAINS AND ITS EFFECTS ON COMPETITION"

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 2009

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Thank you, Mr. Chairman and Members of the Subcommittee, for this opportunity to offer the perspective of trademark owners on the introduction of new gTLDs to the Internet's domain name system. The International Trademark Association (INTA) welcomes the Subcommittee's and the Judiciary Committee's oversight of this important issue, and is appreciative of initiatives such as this hearing and the September 15th letter from Representatives Smith and Coble posing several key questions to the Internet Corporation for Assigned Names and Numbers, otherwise known as ICANN.

INTA is pleased to provide its views during this critical juncture in the evolution of the Internet, and during a defining moment in the ongoing transition of the management function of the domain name system to the private sector.

INTA has long supported the goal of private-sector-led management of the naming and addressing system of the Internet. INTA actively participates within ICANN and contributes to its processes and strongly supports the model of multi-stakeholder bottom-up coordination of the Internet's unique identifiers.

Originally, the Internet we are all familiar with was developed to enhance U.S. national security in an ever-changing technological world. Today, the Internet connects businesses, consumers and resources in ways never before imagined. Since the public's first use of the Internet, the medium has become an essential tool of communication, information and commerce. In this modern age of globalization, ensuring the stability, security and reliability of the Internet remains more important than ever to ensure our prosperity and security.

In the debate over the future of the Internet, trademark owners have consistently sought sound policies that promote the stability and security of the domain name system (DNS); ensure the integrity of domain names and their administration; and respect intellectual property rights and consumer interests in policy outcomes.

INTA has also long supported the principle that, in line with its core values, ICANN should promote competition and innovation in the DNS *only to the extent practicable and beneficial to the public interest.*

INTA supports a market structure that encourages innovation in the domain name space; after all, trademark owners are at the forefront of creating innovation in so many ways that benefit consumers on the Internet. But the call for innovation should not come at the expense of the public's interest, and should never jeopardize a secure and stable domain name system.

The correct time for the introduction of new gTLDs is when it can be clearly demonstrated that the introduction will not cause instability to the domain name system, and will produce improvements in consumer welfare that outweigh the cost

and harm that will affect Internet users and other stakeholders, including owners of intellectual property. INTA believes ICANN's new gTLD program has not yet made this showing.

An unlimited expansion of gTLDs will require brand owners to protect their brands in a large number of new unrestricted domain name spaces where domain name registrations will be open to any registrant on a first-come, first-serve basis. While some proponents of unlimited new gTLDs expect to profit from the increased volume of domain name registrations, consumers are certain to face increased levels of confusion about the goods and services they seek on the Internet caused by the dilution and infringement of intellectual property in an expanded generic domain name space.

As our testimony will expand upon, abuses of the domain name system remain at extremely high levels, due in part to ICANN's ineffective management of the Internet's naming and addressing system. INTA believes that an introduction of new gTLDs may offer potential benefits to consumers only if new gTLDs are introduced in a justified, timely, and responsible manner based on an empirical understanding of the realities of the domain name marketplace. Otherwise, INTA believes that unproductive and harmful uses of the domain name space will outweigh any potential benefits that may flow to the public.

Conflicts Between Trademarks and Internet Naming

In 1998, the U.S. Department of Commerce issued a policy statement on the management of Internet names and addresses, now referred to as the "DNS White Paper." In the White Paper, the United States government highlighted the conflicts between trademarks and Internet names. In particular, the White Paper noted that when a trademark is used as a domain name for commercial purposes without a trademark owner's consent, consumers can become confused about the source of goods and services being offered on the Internet. This user confusion misleads and harms consumers, tarnishes and harms brands, and results in decreased confidence in the Internet as a reliable instrument of legitimate commerce and communication.

Every new unrestricted generic domain name space that is created offers fresh opportunities for the unauthorized use of trademarks. This compels trademark owners to defensively register their trademarks to prevent consumer confusion about the origin and source of the goods and services they seek on the Internet.

Once registered in bad faith, misleading web addresses are used to perpetrate fraud, crime and a variety of harms, including the distribution of harmful counterfeit products to consumers, such as fake drugs and unsafe electrical equipment. Over the past several years the Internet has also witnessed a record number of cases of phishing attacks, cybersquatting, and malware attacks, all designed to inflict harm on consumers through the misappropriation of brand names.

Such threats to health and safety have a pervasive effect on the user experience of the Internet. For example, a study in 2006 by the British Government found 21% of UK respondents felt at risk from online crime versus only 16% who were concerned about physical burglaries. This year's "Get Safe Online" study found that 44% of small businesses had been the victims of some form of online crime, and that the fear of online crime has deterred 14% of British citizens from using the Internet altogether.

ICANN's Management of the DNS

Following the issuance of the White Paper in 1998, the U.S. Department of Commerce initiated a transition towards private-sector-led management of the Internet's DNS by entering into a Memorandum of Understanding (MOU) and later a Joint Project Agreement (JPA) with the newly formed ICANN.

ICANN's responsibility as the Internet's central coordinator of its unique identifiers – domain names and IP addresses – means its governance of the domain name system influences how trademarks and Internet names interrelate and coexist. The expectations of industry are that ICANN will administer the DNS in an accountable manner that minimizes conflicts, while balancing the needs of all stakeholders and the interests of the public in maintaining a secure and stable domain name system.

Abusive Registrations

To address the trademark dilemma identified in the White Paper, shortly after its formation, ICANN, in consultation with the World Intellectual Property Organization (WIPO), created a Uniform Domain Name Dispute Resolution Policy (UDRP), to address trademark conflicts with Internet names. Over the past decade, the UDRP has been used successfully by trademark owners around the world to resolve conflicts between trademarks and domain names that were registered and used in bad faith to deceive consumers.

While the UDRP has assisted trademark owners in recovering specific infringing domain names, the dispute process has not curtailed the level of abuse in the gTLD space. Even with the implementation of the UDRP and national laws aimed at cybersquatting, such as the Anticybersquatting Consumer Protection Act (ACPA), passed by Congress in 1999, domain name conflicts and abusive registrations continue to soar in record numbers.

Despite the fact that WIPO, one of several international dispute resolution service providers offering dispute services under the policy, has adjudicated over 15,000 UDRP-based cases, involving over 27,000 domain names, and has administered over 15,000 cases under other registry-specific dispute policies, abuse registrations of domain names continue at high levels.

The extent of the harm can be seen in the number of infringing domain names that are registered daily targeting consumers of all sectors of industry.

INTA believes ICANN must improve its management of the DNS before the tide of abuse identified in the White Paper, can be stemmed.

The situation is caused in part by the ease, speed, and low cost of registering, assembling and monetizing domain names to infringe intellectual property and commit other types of DNS abuse. Coupled with new difficulties in identifying and taking action against infringers on the Internet caused by the growth of proxy services that hide the identity of the owner of the domain name, fraud and other crimes on the Internet continue to target consumers. Meanwhile, corporations and especially small companies and others -- struggling through the recession in the United States and the global financial crisis -- continue to face severe difficulties coping with the proliferation of DNS-related abuse and crime. These problems will only get worse with an unlimited amount of new unrestricted gTLDs.

Contract Compliance

In lieu of government regulation, private-sector management of the DNS relies upon a system of contracts between private parties to govern the operation of the domain name system. The success of the entire ICANN experiment depends on whether these contracts are adhered to and enforced.

While ICANN has taken steps recently to improve its performance in this area, including increasing the size of its compliance staff and budget, dedicated resources in this area remain far too few. ICANN must do more to develop a strategic approach to compliance and to raise the profile of these issues within the organization and with its contracted parties and the public.

The problem of abusive registrations has been compounded by ICANN's inability to enforce its contracts with its registrars, and INTA believes that substantial work remains before ICANN's governance of these relationships provides trusted security and stability to the domain name system.

Of central concern is ICANN's inability to compel registrars to maintain a current and accurate database of contact information on registered domain names. Open access for trademark owners to information contained in the Whois database is necessary to locate and contact the true owners of problematic domain name registrations and web sites, and to swiftly institute legal action to prevent the abuse of intellectual property, Internet fraud and other schemes that confuse and deceive Internet consumers. The lack of an up-to-date Whois system has frustrated the attempts of trademark owners to enforce their rights on the Internet and protect consumers from targeted abuse.

Unfortunately, it has become a disturbingly common practice among domain name registrars to ignore omissions and misstatements in registrant information and, more recently, to promote the use of third-party proxy services that cloak registrant data.

Over the years, several ICANN-accredited registrars have themselves been found liable for engaging in fraudulent domain name abuse, yet ICANN has yet to take enforcement action on this specific issue or formulate a standardized policy for addressing the situation in the future.

ICANN's inability to maintain an accurate Whois system will cause continuing problems in a drastically expanded domain name space.

ICANN Governance

Another issue affects ICANN's performance – ensuring adequate commercial sector representation within its decision making. This has particular relevance to a successful introduction of new gTLDs.

Since ICANN was formed over a decade ago, commercial Internet users have sought a balanced representational structure that sufficiently accounts for their large stake in domain name system policies and outcomes.

Achieving adequate representation within ICANN has been an unsuccessful quest for the business community. In light of several ICANN restructuring efforts, the most current still under implementation, the business community has been further marginalized in ICANN decision making.

The result of this inadequate representation in governance is the formation of policies that do not address the basic concerns of intellectual property rights owners, including the subject of this hearing -- the proposed rollout of an unlimited number new gTLDs, which will place additional costs and burdens on the IP community.

In particular, it has been noted that ICANN's new gTLD process will disproportionately disenfranchise and harm small businesses and companies from developing countries who are unfamiliar or unable to meet the substantial costs of the new gTLD program. In general, INTA believes ICANN has not done enough to prepare the community for the impact of its processes.

The burdens on trademark owners of functioning under a poorly coordinated domain name system is significant, since in most of existing gTLDs managed by ICANN, the costs of addressing and mitigating the harms of IP-related domain name system abuse fall almost entirely upon the private sector business community.

In sum, current ICANN policies and enforcement efforts to date have been inadequate in dealing with the increase in abuses of the domain name system, which have the following pernicious effects:

- an increase in consumer confusion about the goods and services they seek through e-commerce;

- redirection of consumers to pornographic and other undesirable sites;
- threats to public health and safety through websites selling counterfeit products;
- propagation of various kinds of malicious software that spread viruses, SPAM and other forms of malware designed, inter alia, to steal personal identifying information;
- a decrease in user confidence in the Internet marketplace;
- tarnishment of brands and damage to the reputation of legitimate businesses; and
- an increase in business costs due to defensive registration, Internet monitoring and legal actions, much of which must be passed on to consumers.

It is against this background that ICANN now plans to introduce an unlimited number of new gTLDs.

Questionable Positive Impact of New gTLDs on Competition

In setting DNS policy, it is overly simplistic for ICANN to assume, without empirical support, that simply adding registrars and registries and unlimited gTLDs will inherently increase competition and public welfare. Increasing competition in a complex economic model like the domain name system requires that policies be formed on the basis of factually based research and analysis of the marketplace.

While ICANN relies upon the idea that competition will be enhanced through the expansion of new gTLDs, it has yet to commission any independent, empirical research or study to determine how new gTLDs should be introduced to maximize the likelihood that competition and increased consumer benefits will result.

INTA believes this work should have preceded the decision to introduce an unlimited number of new gTLDs, as only then would ICANN have the empirical data to support its decision and a full appreciation of its consequences.

This is particularly essential since there appears to be scant evidence of increased consumer welfare, competition or innovation as a result of prior rollouts of gTLDs. Further, the evidence suggests that significant costs were incurred in terms of trademark protection and consumer confusion.

For this reason, in comments made in December 2008, the National Telecommunication and Information Administration (NTIA) called for ICANN to commission an economic study to test whether the addition of new gTLDs fosters competition in a manner that benefits consumers. Although ICANN received some

analysis on these issues by an economic consultant it retained, his report which has already been heavily criticized by various constituencies, does not replace an independent empirical study of the domain name registration marketplace. INTA believes that ICANN should not finalize its policy for the creation of new gTLDs without understanding the beneficial and harmful effects of such actions on consumers and on competition.

Addressing the Overarching Issues

The critical issue for brand owners, consumers and other Internet users is to ensure that the introduction of any new gTLDs is responsible, deliberate and justified. Therefore, we believe that ICANN should be held to the stated intention of its Board to resolve the overarching issues of trademark protection, the potential for malicious conduct, Internet security and stability, and top-level domain demand and economic analysis before any additional gTLDs are introduced to the Internet.

With respect to the first overarching issue, trademark protection, the ICANN Board's initiative to form the Implementation Recommendation Team (IRT), while a positive response to the many comments critical of the proposed rollout of new gTLDs, should have preceded, and not followed, ICANN's decision to move forward with the rollout.

Despite an extremely tight deadline, the IRT did make very useful recommendations in its final report, and INTA offered detailed comments to ICANN, supporting the ICANN recommendations in principle (Exhibit A). But whether the IRT recommendations are sufficient and cost-effective, particularly given ICANN's intention to introduce an unlimited number of gTLDs, has yet to be demonstrated. In fact, related process questions, including the ICANN Board's refusal to receive briefings from the IRT at its most recent public meeting in Sydney, has caused many community members to question ICANN's management of the new gTLD process and its commitment to ensuring the IRT's and other community members' recommendations on trademark protections will be given adequate consideration in the new gTLD program.

INTA Recommendations

Trademark owners around the world, who are already overwhelmed in dealing with trademark infringement in the domain name system, will face much greater burdens and costs in protecting their trademarks across an exponentially larger number of new gTLDs.

In light of ICANN's track record in contractual compliance, and its inability to stem the abuse of trademarks in the DNS in a substantial way, INTA believes that new trademark protection mechanisms must be developed and tested and existing DNS management functions improved before new gTLDs are introduced.

Regardless, the introduction of new gTLDs must be based on empirical economic research so that ICANN can fashion the introduction of new gTLDs in a manner that maximizes consumer welfare and increases competition, while harm to intellectual property owners and consumers is avoided. INTA encourages ICANN to immediately commence this work and implement the outcomes into the new gTLD program.

Without mechanisms that are proven to be effective, a dramatic expansion of gTLDs guarantees that those who currently perpetrate and profit from widespread consumer fraud in the domain name system will seize this opportunity to further expand their schemes to the detriment of brand owners and consumers.

In support of this view of the harm that will be caused by the new gTLD initiative as presently structured and on the timetable that ICANN has in place, the Board of Directors of INTA passed a resolution (Exhibit B), opposing the currently structured introduction of an unlimited number of new gTLDs and the introduction of any new gTLDs until the four overarching issues that have been identified are resolved. Following the Board resolution, INTA sent a letter to ICANN (Exhibit C), raising these concerns about the new gTLD process.

The Transition

INTA supports the reaffirmation of the historical relationship between the United States government and ICANN as embodied in the current Joint Project Agreement, to ensure continued US government stewardship over these important Internet resources.

INTA continues to believe that the issues identified in the mid-term review of the JPA need to be resolved, including Representation, Contractual Compliance, Accountability, and TLD Management, before the transition to private sector led management can be completed. ICANN's commitment to these issues should be formalized in any new agreement with the US government. INTA informed the NTIA of its position on this issue in a letter to its new director Lawrence Strickling (Exhibit D).

INTA encourages ICANN to continue to engage with the community and commence work on the remaining outstanding issues before new gTLDs are introduced. INTA looks forward to working with ICANN, the Department of Commerce and Congress to continue its contribution to the development of sound polices that protect the legitimate interests of all stakeholders.

Thank you Mr. Chairman.

The International Trademark Association (INTA) is a not-for-profit membership association of more than 5,800 corporations, law firms and other trademark-related

businesses from more than 190 countries throughout the world. INTA is headquartered in New York with offices in Brussels and Shanghai. Its membership crosses all industry lines and sectors, from manufacturers to retailers to service providers, and is united in the goal of supporting the essential role trademarks play in promoting effective national and international commerce, protecting the interest of consumers, and encouraging free and fair competition.

EXHIBIT A

Comments of the
Internet Committee of
the International Trademark Association
on the Implementation Recommendation Team (IRT) Report

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Introduction

Numerous comments on the Draft Applicant Guidebook (DAG) for the new gTLD application process focused on consumer and intellectual property ("IP") protection. The IRT's formation by the ICANN Board highlights the significant need for trademark protection in the Internet DNS and for the establishment of additional rights protection mechanisms in the introduction of new gTLDs. These mechanisms must address, in particular, two issues that arise in the context of new gTLD applications: 1) trademark rights must be protected in the evaluation of new gTLD applications and 2) critically, rights protection mechanisms for the launch and post-launch phase of a new gTLD's introduction must scale to the anticipated volumes of abusive registrations in new gTLDs, as well as the increased aggregate volume of abuse across new and existing gTLDs.

With this background in mind, the Internet Committee of the International Trademark Association (INTA) commends the IRT members who have clearly invested a tremendous amount of hard work and thought in a short period of time in developing the IRT's recommendations. We are pleased to endorse the mechanisms proposed in the IRT report for protecting trademarks and consumers in the introduction of new gTLDs.

While the IRT recommendations are very constructive, in our preliminary comments,[1] and in the discussion below, we offer suggestions for further measures that we believe should be taken to make the recommendations of the IRT report stronger, more effective, less costly and less subject to "gaming."

However, our endorsement of these mechanisms, including our recommended enhancements, is **not**, we hasten to add, tantamount to saying that the IRT's recommendations resolve the overarching concern with protecting trademarks in the new gTLD launch. The Internet Committee continues to believe that this threshold question can not be adequately answered until ICANN completes a comprehensive economic study of the domain name registration market. Such a study would, inter alia, provide the data

[1] Preliminary Comments from the Internet Committee of the International Trademark Association on the Draft Implementation Recommendation Team (IRT) Report, http://forum.icann.org/lists/irt-draft-report/msg00029.html.

necessary to assess the potential benefits and costs to consumers of introducing new gTLDs.

The Committee believes that the economic study can inform the community and ICANN on questions fundamental to the introduction of any gTLDs, e.g. whether gTLD registries possess unacceptable market power. Absent the facts gained from such an economic study, the Committee finds it impossible to access, in a vacuum, whether the IRT recommendations adequately address the overarching issue of trademark protection in the introduction of new gTLDs.

Possible Improvements to the IRT Recommendations

As mentioned above, while supporting the IRT recommendations, we would like particularly to emphasize the importance of three of the proposals:

- **The Uniform Rapid Suspension System ("URS")** – This proposal may be the solution available to the largest numbers of trademark owners to provide quick relief for the prevention of abusive registrations and consumer confusion.
- **The "Thick" Whois Requirement** – Simplifying access to domain ownership information is critical to promoting transparency and confidence in the Internet marketplace. That the thick registry model is an existing, proven technology only makes it more important to implement in the new gTLD space. We are encouraged to have seen ICANN adopt the requirement for thick Whois service in the portions of the DAG III that have been published for comment.
- **The IP Clearinghouse** – This repository for information on intellectual property rights provides a critical platform for increasing the scalability of all other rights protection mechanisms, including potentially other mechanisms not specific to the new gTLD launch, such as the UDRP or claims of reasonable evidence of actionable harm under RAA 3.7.7.3.

In the case of each of the recommendations in the IRT report, although we made comments designed to improve it in our preliminary comments, our purpose here is merely to point out why each mechanism is critical to the overall "tapestry" of protection envisioned by the IRT report, and reiterate any suggestions that might improve the proposal.

Uniform Rapid Suspension System (URS)

The proposed URS is an important remedy for trademark owners. As the proliferation of new gTLD registries greatly increases the scale of abusive domain name registrations, the ability to put a quick end, at minimal cost, to clear cases of cybersquatting is critical. In particular, the following features are welcome:

A) the incorporation of a low cost pre-registration system (so the brandowner's trademark is "on file" for future disputes – but see note 5 below);

B) the ability to initiate the URS by filling out a simple form;

C) the opportunity for the Complainant to apply a URS proceeding to multiple registrants if they are related, e.g., as shell companies.

D) the fact that fees can be lower for batches of domain names owned by the entity;

E) the fact that names are locked as soon as the URS is initiated;

F) the provision of notice to the registry operator within 24 hours of filing the complaint with the third party provider;

G) the fact that the third party provider works on a cost-recovery basis; and

H) the inclusion of a limited 'loser pays' system, where the registrant of 26 or more domains bears the filing fee if it answers the complaint and loses.

The URS will prove particularly useful in cases involving numerous domain names, particularly ones displaying paid advertising, where the trademark owner's interest is not necessary in owning the domains but merely in ceasing the registrant's abusive use of the domains. Given the expected volume it will not be feasible to bring UDRP proceedings in all new domains. Thus, without the URS, the end result would be the persistence of sites that profit by confusing and diverting consumers from the legitimate brand owner whose trademark is reflected in the domain, to infringers and competitors.

However, we continue to urge that the following issues clarified or revised:

1. *Transfer of domain or domain suspension on ServerHold should be indefinite.* – The Committee continues to believe that the URS should allow for the transfer of domains as a remedy. However, in perhaps the most significant change that is needed to the IRT's recommendations, if the URS does <u>not</u> provide for transfer, the suspension of the domain should at least last indefinitely, or so long as the successful Complainant continues to periodically re-verify the validity of its own trademark rights (such as through the periodic re-verification process for the trademark's data in the IP Clearinghouse). Otherwise the URS will suffer from the same malady that saddles trademark owners with expensive portfolios of domains that were acquired defensively to eliminate consumer confusion but which have no business use—that serial enforcement actions are required over the same domain as it expires and is released. Instead, if the Complainant will not have the option of obtaining the transfer of the domain, it should at least be placed on indefinite ServerHold with no expiration.

2. *The Respondent Should Bear the Burden of Proving it has Legitimate Rights in the Domain.* – By allowing the registrant merely to supply "evidence" that they have *some* legitimate right in the domain name, and by allowing the registrant to answer at any time during the registration, the IRT invites registrants to delay the deactivation or transfer of the name by filing deficient or fabricated answers.

3. *Examination factors (trademark examination).* – The requirement that the complainant's registered trademark must have been issued by a jurisdiction that conducts substantive examination of trademark applications should make clear that it only requires examination on absolute grounds (of descriptiveness, functionality, etc.). While the IRT points out that reliance on registrations that undergo no substantive evaluation resulted in gaming the system during, for example, the .eu

launch,[2] this concern does not require relative examination, and requiring it would, as an example, render one of the world's most meaningful trademark registrations, a European Community Trade Mark (with an opposition system but no examination on relative grounds) an improper basis for a URS proceeding.

4. *Examination factors (standard of proof).* – Finally, as mentioned in our preliminary comment, we continue to prefer a "preponderance of the evidence" standard. We are very concerned that respondents will be able to game the system and that the barest scintilla of evidence will defeat a finding of entitlement if the standard is clear and convincing evidence. This is particularly true since, as with the UDRP, the "lack of legitimate interest" factor requires proving a negative proposition in a way that can rarely be done in more than a presumptive manner.

Requiring a "Thick" Whois Model in New gTLDs

We strongly support the IRT's proposal to require all new TLD registries to implement a "thick" Whois model, and commend ICANN for adopting this recommendation in the latest DAG amendments.[3] Simplifying access to accurate and reliable contact details for the true owner of the domain name registration is necessary to prevent abuses of intellectual property and to protect the public by preventing consumer confusion and consumer fraud in the Internet marketplace. INTA supports open access to accurate ownership information for every domain name in every top-level domain registry, for addressing legal and other issues related to the registration and use of the domain name. (See: INTA Board Resolution. Continued Open Access to the Whois Database. http://www.inta.org)

Even though thick Whois is not a novel idea, this should not in any way diminish its importance. The fact that the thick registry model is an existing, proven technology that registrars and registries already implement in every gTLD registry except .com, .net, and .jobs suggests that there is no reason not to implement it in the new gTLD space. Assuming large growth in both the number and geographic diversity of registrars, registries and registrants, accurate and thick Whois is a critical requirement if the gTLD space is expanded. Certainly, the public interest in easier access to domain ownership information that survives a registrar's failure or non-complaince should outweigh any interest by registrars in maintaining proprietary control over the data. Likewise, the availability of the data through other sources (registrars, and other sites displaying the data via Port 43) belies the assertion that the availability of the very same data from the registry's database implicates any protected privacy rights.

The IP Clearinghouse

The IP Clearinghouse performs a purely administrative function of collecting information on asserted intellectual property rights. Nevertheless, as mentioned above, one of the main concerns that trademark owners have with the new gTLD rollout is that existing remedies such as the UDRP and the U.S. ACPA are too expensive to scale across the anticipated

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[2] "In addition, reliance on registrations issued immediately upon application without substantive examination on absolute or relative grounds may result in gaming of the system, as seemed to occur during the introduction of .eu domain names, for example." Final Report, n.36.

[3] Applicant Guidebook: Public Comments Analysis and Revised Excerpts, http://www.icann.org/en/announcements/announcement-2-31may09-en.htm.

volume of abusive registrations. Therefore, the IP Clearinghouse is a critical platform for reducing the cost and time involved: a) for ICANN's contracting parties to implement rights protection mechanisms; and b) for intellectual property owners to obtain meaningful redress under other existing mechanisms (such as the UDRP or RAA 3.7.7.3, to the extent they can be adapted to take advantage of the Clearinghouse) or the IRT's other proposed mechanisms.

The Globally Protected Marks List ("GPML")

The Internet and, in particular, the domain name system, present unique challenges – both from the top level and the second level. Creating a list of protected marks that have global legal recognition and will be acceptable for blocking purposes by both trademark owners and Internet users is a challenge, one on which we believe the IRT has made a good start. We note that the IRT, in its final report, adopted several revisions that we proposed in our preliminary comments.[4] However, because the IRT has not finalized the numerical criteria for the GPML, we must reserve judgment. Nevertheless, it may be useful to reiterate why we believe the framework for a GPML is sound, and offer input to guide the attempt to settle on numerical criteria.

General Concerns with a GPML

Once again, we appreciate the IRT's revisions to distinguish the criteria and purpose for a "globally-protected" marks list from a list purporting to list "famous" or "well known" marks. This is significant because whether a mark is famous or well-known is a question of fact, and not of law, at a particular point in time and in a specific geographical region. In any attempt to list globally famous marks, it would be necessary—but extremely difficult—to take into account a conglomeration of laws and individual and corporate rights to be adopted by potentially all courts and mediation bodies simultaneously. The mark must be recognized by not just trademark owners and experts, but individuals with no trademark expertise whatsoever.

Focusing on the number and diversity of countries in which a mark is protected appears to be the best approach because it limits the list to only those marks that can obtain protection across a broad range of national laws and rights. The number and geographic diversity of trademark registrations is also a good indicator in light of the limited purposes for which the IRT proposes to use the GPML: a) to block second-level domain registrations that are an "identical match" for the GPM, and b) to subject new gTLD applications to comparison with the GPM at the string review stage. The former use requires near identity of the marks (hyphens and special characters aside), and the latter involves a "visual," "aural" and commercial impression (meaning) comparison. Neither of these tests takes into consideration the goods and services of the parties. Therefore, we agree that the criteria should be stringent because, if the bar is set too low, the GPML may unfairly lock out legitimate, but smaller trademark owners from obtaining domain names reflective of their own trademarks, on a global basis. That will occur irrespective of whether the owner of a listed GPM has a commercial interest in a particular domain name (or indeed if it is entitled to apply for a domain name in a specific registry due to geographic or industry requirements,

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[4] These revisions include eliminating all references to the list as even purporting to compile "well known" or "famous" marks," as opposed to merely ones that are "globally protected," and clarifying that the GPML should not have any precedential value in any dispute or resolution.

for example), or whether its interests are subservient to a rights owner with prior or superior rights in a particular jurisdiction or jurisdictions. Therefore, the aim of the GPML should be to encompass all those marks that are indeed so "globally protected," that few if any legitimate rights will be affected.

Qualitative Comments on the GPML Criteria

With these concerns in mind, in settling on particular GPML criteria, it is critical to choose criteria that do not favor one region or one legal regime over another,

1. **Number of countries versus registrations** – We appreciate that the IRT's final report places greater emphasis on the number of countries in which a mark is protected. However, upon further review, we suggest that the criteria can both be simplified and made more equitable through a two-pronged test for global protection. A trademark owner would need to satisfy either one of the two established criteria in order for the trademark to be included in the GPML.

2. One prong would focus **exclusively** on the number of countries (and the diversity of such countries) where a trademark is registered. In other words, we would suggest the criterion on the top of page 17 of the report be edited as follows:

   - Ownership by the trademark owner of [~~number~~] trademark registrations of national effect[5] for the applied-for GPM that have issued in at least [number] countries across all 5 ICANN Regions with at least:

     - [number] ~~registrations~~ **countries** in the North American region
     - [number] ~~registrations~~ **countries** in the European region
     - [number] ~~registrations~~ **countries** in the African region
     - [number] ~~registrations~~ **countries** in the Asian/Australian/Pacific region
     - [number] ~~registrations~~ **countries** in the Latin American/Caribbean region

   We suggest this change because a number of arbitrary variations in national laws may result in marks protected in an array of countries being covered by drastically different numbers of registrations. For instance, some countries allow and even encourage[6] registrations that cover multiple classes of goods or services, while others require a single registration for each class. In other countries, marks in certain fields are more or less likely to be filed in single or multiple-class applications than marks in other fields.[7]

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[5] We agree with the comments in IRT footnotes 9, 10, and 11 on page 17, requiring that the mark be on the superior register, in countries with two registers, that design marks be counted, so long as the GPM is identical to the registration's textual elements, and that registrations of supernational effect be counted for every country in which the registration provides national protection, respectively.

[6] Most significantly, both the European Community Trade Mark (CTM) system and the Madrid System for the International Registration of Marks not only allows multi-class applications, but charge set fees for up to three classes of goods or services, encouraging applicants to apply for fewer registrations with broader coverage.

[7] For instance, the immensely broad Class 9 covers all manner of computer hardware and software, many electrical appliances—from toasters to televisions, while "coasters," may be classified in four different classes based on material (paper, leather, plastic or cloth). In addition, the U.S. practice of

3. The second prong would focus on the number of trademark registrations held across a minimum number of ICANN regions. This threshold reflects the reality that certain trademarks have acquired their global protection through a high-level of protection in a more concentrated geographic area. In other words, we would suggest the criterion on the top of page 17 of the report to be reflected as follows:

    - Ownership by the trademark owner of [number] trademark registrations of national effect[8] for the applied-for GPM that have issued ~~across~~ in at least [number] of ICANN Regions ~~with at least~~.

4. **Deadline for registration** – We also agree that there should be a deadline after which registrations would not be applicable, to prevent gaming of the top level and second level process. The deadline should allow possibility for new GPMs to be added to the list later, perhaps by being set to "roll" to a particular time period before relevant application deadlines.

5. **Principal URL Corresponding to Mark** – Requiring the second-level domain for the principal online presence to be identical to the trademark appears to be a reasonable standard.

Quantitative Comments on the GPML Criteria

In regards to the first prong of the Committee's proposed criteria, we will reserve comment on the precise number of countries in which a mark should be protected until the proposed numbers have been released. However, we encourage ICANN and the IRT, in setting the criteria, to take into account not only the number of countries and trademark offices that exist in the world (194 independent states,[9] albeit many of them lacking trademark service mark registers), but also the marketplace realities of global commerce. For instance, 90 or 100, or 120 countries may represent nearly half to less than two-thirds the number, but may represent all but a small percentage of economic activity. It may not be commercially reasonable to expect even the most globally-protected marks to be registered in more countries than this.

Other Top and Second-Level Rights Protection Mechanisms

Post-Delegation Dispute Mechanism

In general, we agree that there should be a meaningful post-delegation review in cases where a registry, as a result of the string itself, or of the registry's policies, becomes a haven for cybersquatting. Furthermore, we applaud the IRT's agreement with our proposal to allow

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allowing advertising as a specimen of use for service marks but not trademarks for goods makes services more likely to be applied for in multiple class applications.

[8] We agree with the comments in IRT footnotes 9, 10, and 11 on page 17, requiring that the mark be on the superior register, in countries with two registers, that design marks be counted, so long as the GPM is identical to the registration's textual elements, and that registrations of supernational effect be counted for every country in which the registration provides national protection, respectively.

[9] *See* http://www.state.gov/s/inr/ris/4250.htm.

the third party to participate in the proceeding and press forward with the action against the registry if ICANN fails to find that the registry is in material breach of its agreement. Despite gains, the room that is left for improvement in ICANN's contractual enforcement suggests that the post-delegation procedure—and the participation of the complaining third party—may be necessary.

Pre-Launch Second-Level Rights Protection: The IP Claims Service

As outlined in the report, the IP Claims Service would provide the following benefits with respect to new second-level domains:

- *Identical match of a GPM:* registration blocked, unless registrant can claim that use would be consistent with generally accepted trademark laws.
- *Identical match of a mark in the IP Clearinghouse:* notice provided to IP owner and registrant; registrant must then opt to register the domain and make additional representations and warranties.
- Non-identical match of a GPM: no effect.
- Non-identical match of a mark in the IP Clearinghouse: no effect.

The IP Claims Service has the potential to be a very useful tool for most trademark owners, but, as discussed above, owners of marks in the IP Clearinghouse should be able to receive notices on matches of the trademarked term embedded within multi-word domains. In such cases, the registrant should similarly have to make the additional representations and warranties (particularly if the occurrence of false positives, like a hypothetical mark ERA within the domain perameters.tld can be avoided).

Additional Protections for Trademark Rights Beyond the gTLD Roll-Out

As mentioned above, part of the over-arching trademark issue with the launch of new gTLD registries is that it will likely exacerbate issues that currently exist in the domain name system. Because those issues may apply to all gTLDs, they may not have been within the scope of the proposals the IRT was chartered to address. For the same reason, it may be most appropriate to address these issues through RAA amendments, the PDP process, or other means. Nevertheless, we mention them here as a reminder that actions outside the new gTLD launch process may be necessary to address trademark concerns with the proliferation of abusive registrations expected following the new gTLD roll-out.

Proxy and Privacy Services

The most prominent of these is the need to enforce and enhance the means of obtaining the name and contact information for the underlying user of a domain registered to a proxy service. We agree, with the IRT, when it urged ICANN to consider the "development of universal standards and practices for proxy domain name registration services." As recently

pointed out by the IPC,[10] the spirit and language of RAA 3.7.7.3 is widely circumvented by registrar and registrant non-compliance. This issue affects all gTLD registries, and should be addressed on a holistic basis. Thus, we recognize that it may been outside the scope of the IRT's mandate, or even outside the scope of the new gTLD process. Nevertheless, providing meaningful trademark protection as the scale of domain name abuse escalates will require this issue to be addressed.

Thank you for considering our views on these important issues. If you have any questions regarding our submission, please contact External Relations Manager, Claudio DiGangi, at: cdigangi@inta.org

About INTA and its Internet Committee

The International Trademark Association (INTA) is a 131 year-old not-for-profit membership association of more than 5,500 trademark owners, from more than 190 countries, dedicated to the support and advancement of trademarks and related intellectual property as elements of fair and effective national and international commerce. Over the last decade, INTA has been a leading voice for trademark owners on the future of the Internet DNS, and it is a founding member of ICANN's Intellectual Property Constituency (IPC). INTA's Internet Committee consists of over 125 trademark professionals who evaluate treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the internet and develop and advocate policies to advance the balanced protection of trademarks on the Internet.

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[10] Intellectual Property Constituency, Letter to Doug Brent Re: Circumvention of Registrar Accreditation Agreement Section 3.7.7.3, Apr. 24. 2009.

EXHIBIT B

REQUEST FOR ACTION BY THE INTA BOARD OF DIRECTORS

Creation of New gTLDs and Trademark Protection

8 July 2009

ACTION REQUEST: The Executive Committee requests that the INTA Board of Directors approve a Resolution concerning the proposed introduction of an unlimited number of generic top-level domain names (gTLDs).

PROPOSED RESOLUTION:

WHEREAS, since the inception of the Internet Corporation for Assigned Names and Numbers (ICANN) in 1998, INTA, through its participation in the Intellectual Property Constituency, part of the governance structure of ICANN, and through written submissions to the U.S. Department of Commerce, to the U.S. Congress and to ICANN has consistently expressed concerns about the impact on rights holders and consumers of the expansion of the number of generic top-level domain names (gTLDs);

WHEREAS, despite strong industry concerns about the increase in rights violations (e.g., cybersquatting) and malicious behavior to defraud consumers (e.g., phishing, malware), ICANN increased the number of the original "legacy" gTLDs (.com, .edu, .arpa, .gov, .mil, .net, .org, .int) by seven gTLDs (.aero, .biz, .coop, .info, .museum, .name, .pro) in 2001 and by another six gTLDs (.asia, .cat, .jobs, .mobi, .tel, .travel) in 2005, which are administered by ICANN separately from the 248 two-letter country-code TLDs (ccTLDs);

WHEREAS, even with the implementation of such measures as the Uniform Dispute Resolution Policy (UDRP) and anti-cybersquatting laws, domain name abuse has proliferated and trademark owners continue to incur significant costs in enforcing their rights on the Internet;

WHEREAS, ICANN has yet to commission the independent, comprehensive economic study of the domain name registration market called for by its Board of Directors in 2006, which was to provide essential information and analysis relating to the exercise of market power by gTLD registry operators and to assess the likely impact of new gTLDs on rights holders, consumers and other Internet users and, accordingly, ICANN has demonstrated no adequate economic or public policy justification for the introduction of new gTLDs;

WHEREAS, despite this lack of justification, ICANN announced its intention in 2008 to drastically expand the generic domain name space by allowing for the unlimited introduction of new gTLDs;

WHEREAS, in its analysis of the public comments received on its new gTLD proposal, ICANN identified four overarching issues that needed to be addressed before it would introduce new gTLDs (Trademark Protection, Potential for Malicious Conduct, Security

and Stability issues, and Top-Level Domain Demand and Economic Analysis), none of which has been satisfactorily resolved;

WHEREAS, in response to continued industry concerns about the rollout of unlimited new gTLDs, ICANN in 2009 formed the Implementation Recommendation Team (IRT) which, under an extremely tight deadline, developed five proposals, which would in combination improve protection for trademark owners but whose ultimate success is untested and whose adoption by ICANN uncertain;

BE IT RESOLVED that additional generic top-level domains (gTLDs) should not be introduced unless and until ICANN resolves the overarching issues of trademark protection, the potential for malicious conduct, Internet security and stability, and top-level domain demand and economic impact; and

BE IT FURTHER RESOLVED, that any expansion of the generic domain name space must not be unlimited, but must be responsible, deliberate and justified.

BACKGROUND:

The domain name space on the Internet is constructed as a hierarchy. The space is divided into top-level domains (TLDs), with each TLD subdivided into second-level domains, and so on. Most TLDs with three or more characters are referred to as "generic" TLDs, or "gTLDs". There are currently twenty-one gTLDs. More than 240 national, or country-code, TLDs (ccTLDs) are administered by their corresponding national governments or through governmental arrangements with private parties.[1]

Policy discussions concerning how best to structure the top-level space of the Internet's addressing system have been ongoing since the Internet became open for commercial use in the mid-1990s.

In 1998, an independent Internet policy committee called the "gTLD-MoU" consisting of certain Internet stakeholders, proposed adding seven new gTLDs to the Internet.[2] Following the "gTLD-MoU" proposal, the United States government issued a "Green Paper" on Internet policy that proposed the addition of five new Top-Level domain names, with each new domain controlled by a separate registry.

INTA expressed concern with the "Green Paper" because the proposal for gTLD expansion was not formed through a consensus process of Internet stakeholders, and because the "Green Paper" appeared to pre-empt a responsibility that would fall under the purview of the yet-to-be formed private-sector-led coordinating body of the Internet's domain name system, which became the Internet Corporation for Assigned Names and Numbers (ICANN).

Following the reaction to the "Green Paper," the US government issued a revised policy document that became know as the "White Paper." INTA expressed satisfaction with

[1] A Proposal To Improve Technical Management of Internet Names and Addresses" US Department of Commerce. 1998

[2] Establishment of a Memorandum of Understanding on the Generic Top Level Domain Name Space of the Internet Domain Name System (gTLD-MoU). February, 1997.

certain provisions in the "White Paper" that suggested that there should be a prudent regard for the stability of the Internet, and that the expansion of gTLDs should proceed at a deliberate and controlled pace, which would allow for the evaluation of the impact of newly introduced gTLDs.

It was within this context that ICANN was formed in 1998 through the initiative of the United States Department of Commerce, National Telecommunication and Information Administration. ICANN immediately took on the task of considering the introduction of new gTLDs.

Beginning with its comments on the "Green Paper," INTA has consistently urged that any expansion of the gTLD space be done slowly with careful analysis of the impact of such expansion. In congressional testimony in 1998, INTA stated that new gTLDs should only be added, if at all, after the completion of a study by WIPO and that if additional gTLDs were to be added, such expansion should be at a one-at-a-time pace.[3] In congressional testimony in 1999, INTA reiterated its "go-slow" approach on new gTLDs.[4]

Subsequently, ICANN formed a Working Group on new gTLDs, which concluded that ICANN should introduce new gTLDs, and that ICANN should begin the introduction of gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period.[5]

In 2001 based on the conclusions of the Working Group, ICANN introduced seven new gTLDs and in 2005 ICANN further expanded the generic domain name space by introducing six more new gTLDs.

In 2005, WIPO issued a report entitled *New Generic Top Level Domains: Intellectual Property Considerations*, where it expressed the view that thematic differentiation in the DNS, or within a gTLD, could, at least in theory, provide trademark owners and Internet users with benefits. However, WIPO stated that, "such differentiation works only when gTLDs are restricted to limited and clearly circumscribed specific purposes. The less this is the case, the less will further gTLDs enhance the possibilities for differentiation."[6]

In the report, WIPO stated that the introduction of new gTLDs could lead to user confusion on the Internet when one trademark owner registers its trademark in one gTLD and another owner registers an identical or similar mark in another gTLD. WIPO also stated that, "to the extent Internet users are unable (or become unaccustomed) to associate one mark with a specific business origin, the distinctive character of a trademark will be diluted."

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[3] Testimony of Anne Chasser. HEARING ON TRADEMARKS, ELECTRONIC COMMERCE, AND THE FUTURE OF THE DOMAIN NAME ASSIGNMENT SYSTEM. Committee on Commerce Subcommittee on Telecommunications, Trade, and Consumer Protection. June, 1998

[4] Testimony of Anne Chasser. Internet Domain Names and Intellectual Property Rights. United States House of Representatives Committee on the Judiciary Subcommittee on Courts and Intellectual Property, July, 1999.

[5] Report of Working Group C. March 2000

[6] New Generic Top-Level Domains: Intellectual Property Considerations. WIPO Arbitration and Mediation Center. 2005.

To avoid these negative effects the WIPO report observed that trademark owners would be likely to try to register their marks in all gTLDs, and referred to a report commissioned by ICANN that suggested that those new gTLDs that had either no or only minimal registration restrictions, had the lowest number of new domain name registrants and the largest share of registrants that already held over 100 domain names.[7] The WIPO report further observed that the data suggested that a large number of domain names were registered for defensive purposes, and "from an IP perspective, adding more open, i.e., unrestricted and unsponsored gTLDs, is more likely to increase the likelihood of confusion (and the cost for defensive or preemptive measures) than the scope for brand differentiation."[8]

While new gTLDs were added to the domain name system in 2001 and 2005, the original gTLDs, primarily .com, still constitute over ninety percent of all gTLD domain name registrations. However, this expansion, particularly with respect to unrestricted gTLDs, led to an increase in cybersquatting and frauds directed at consumers. These threats to the stability and integrity of the Internet and to the trademarks of companies around the world have required brand owners to expend significant funds to protect and enforce their trademarks in the new gTLD space so as to prevent consumer confusion and preserve the investment in their brands.

As a result of these concerns, in January 2006 the Intellectual Property Constituency (IPC), part of the ICANN governance structure, advocated that "any new gTLD should create a new and differentiated space and satisfy needs that cannot reasonably be met through the existing gTLDs." [9]

In October, 2006, the IPC urged that ICANN "adopt selection criteria that will bring about TLDs for which there is legitimate demand from communities that have not been well served by the current TLDs, and prevent a proliferation of TLDs that are likely to simply lie fallow, or to depend for their viability upon unproductive defensive registrations."[10] In June, 2007, IPC reiterated the need to "limit any new gTLDs to those that offer a clearly differentiated domain name space with mechanisms in place to ensure compliance with purposes of a chartered or sponsored TLD." [11]

While in 2006, the Board of Directors of ICANN announced the intention to commission a comprehensive, independent economic study of the domain name registration market that might have provided information and verifiable conclusions about the impact of the introduction of the additional gTLDs, the study was never undertaken.

In 2008, ICANN's Board adopted a new gTLD policy based on an unrestricted or unlimited expansion of the new gTLD space. In light of the numerous comments ICANN received on this expansion proposal focusing on consumer and IP protection concerns,

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[7] Summit Strategies International, Evaluation of New gTLDs: Policy and Legal Issues, July 10, 2004.
[8] New Generic Top-Level Domains: Intellectual Property Considerations. WIPO Arbitration and Mediation Center. 2005.
[9] IPC Comments on Terms of Reference for New gTLDs. January 31, 2006.
[10] IPC Initial Comments on the GNSO Recommendation Summary Regarding the Introduction of New Generic Top Level Domains October 20, 2006.
[11] IPC Impact Statement Regarding the Introduction of New gTLDs. June 7, 2007.

the ICANN Board requested that the IPC form an Implementation Recommendation Team (IRT) to address the trademark protection issues that will arise as a result of the proposed expansion.

The final report of the IRT, a thoughtful and innovative document prepared within the unrealistically short time frame established by ICANN, highlights the significant need for trademark protection in the Internet DNS and for the establishment of additional rights protection mechanisms in the introduction of new gTLDs. However, there is no indication that ICANN will adopt these mechanisms or that they will ultimately turn out to be cost-effective and successful in protecting brand owners and consumers.

As a result, given that the harm associated with the unlimited expansion of the gTLD space proposed by ICANN – cybersquatting, fraud and significant expense to brand owners – is not offset by any currently justified improvements in the stability, integrity or innovation of the Internet, the Executive Committee of the Board recommends that it should be INTA's position that any expansion of gTLDs should only take place when the issues identified by ICANN, including trademark protection, have been resolved, and that any expansion of the generic domain name space must not be unlimited, but must be responsible, deliberate and justified.

EXHIBIT C

International Trademark Association
Representing Trademark Owners Since 1878

Alan C. Drewsen
Executive Director

July 24, 2009

Mr. Rod Beckstrom
Chief Executive Officer and President
Internet Corporation for Assigned Names and Numbers
International Square
1875 I Street, NW, Suite 501
Washington, DC 20006

Dear Mr. Beckstrom:

I am the Executive Director of the International Trademark Association (INTA), a 131-year-old not-for-profit membership association of more than 5,500 trademark owners and professional firms from more than 190 countries. INTA is dedicated to the support and advancement of trademarks and related intellectual property as elements of fair and effective national and international commerce.

On behalf of the entire membership of the INTA, I wish to congratulate you on becoming the Chief Executive Officer and President of the Internet Corporation for Assigned Names and Numbers (ICANN). We wish you success as you lead ICANN's important mission of coordinating the Internet's unique identifiers and ensuring the stable and secure operation of the Internet's domain name system.

Since the Internet was first opened for commercial use, INTA has been active in the deliberations concerning the introduction of generic top-level domains (gTLDs) to the Internet. INTA has supported ICANN in its work as the private-sector led coordinating body of the domain name system and is a founding member of the Generic Names Supporting Organization's (GNSO) Intellectual Property Constituency (IPC). We have worked over the years to advance sound policies that address the legitimate needs and concerns of commercial Internet users and the public.

It is in this spirit of cooperation and constructive contribution that INTA approaches the current debate over ICANN's planned introduction of an unlimited number of new gTLDs to the domain name system. INTA believes that the critical issue for brand owners, consumers and other Internet users is to ensure that the introduction of any new gTLDs is responsible, deliberate and justified. Therefore, we agree with the stated intention of the ICANN Board to resolve what ICANN has identified as the overarching issues of trademark protection, the potential for malicious conduct, Internet security and stability, and top-level domain demand and economic impact before any additional gTLDs are introduced to the Internet.

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However, the ICANN Board's initiative to form the Implementation Recommendation Team (IRT) and to undertake other steps in 2009 to deal with these overarching issues, while a positive response to the many comments critical of the proposed rollout of new gTLDs, should have preceded, and not followed, the decision to move forward. In that way, ICANN would have had the empirical data to support its decision and a full appreciation of its consequences.

In fact, the IRT, on an extremely tight deadline, came up with some very useful recommendations in the final IRT Report, but whether those recommendations are sufficient and cost-effective, particularly given ICANN's intention to introduce an unlimited number of gTLDs, has not been demonstrated. Clearly, significant work remains before ICANN's new gTLD program addresses the array of complicated challenges and obstacles for protecting trademarks and preventing consumer confusion and fraud in a drastically expanded gTLD space.

Trademark owners around the world, who are already overwhelmed in dealing with trademark infringement in the current gTLD and ccTLD domain name space, will face much greater burdens and costs in protecting their trademarks across an exponentially larger number of new gTLDs. Since ICANN's current DNS management mechanisms, including those designed specifically to deal with abusive domain name registrations, have proven inadequate for protecting trademarks in the twenty-one gTLDs currently in place, INTA believes that new mechanisms must be developed and tested and existing mechanisms improved before new gTLDs are introduced, and that in any case, the introduction of new gTLDs should be measured and not unlimited.

Moreover, without mechanisms that are proven to be effective, a dramatic expansion of gTLDs guarantees that those who currently perpetrate and profit from widespread consumer fraud in the domain name system will seize this opportunity to further expand their schemes to the detriment of brand owners and consumers.

In support of this view of the harm that will be caused by the new gTLD initiative as presently structured and on the timetable in place, the Board of Directors of INTA passed a resolution, a copy of which is enclosed, opposing the introduction of an unlimited number of new gTLDs and the introduction of any new gTLDs until the four overarching issues are resolved.

You have taken this important new position with ICANN at a critical time for the Internet, and, not bound by some of the flawed decision-making of the past, you have an opportunity to exercise new leadership. INTA is committed to working with you, your staff and the ICANN Board on these important issues.

Sincerely,

Alan C. Drewsen

Enclosure

EXHIBIT D

International Trademark Association
Representing Trademark Owners Since 1878

Alan C. Drewsen
Executive Director

July 24, 2009

Mr. Lawrence E. Strickling
Assistant Secretary for Communications and Information
Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Dear Mr. Strickling:

I am the Executive Director of the International Trademark Association (INTA), a 131-year-old not-for-profit membership association of more than 5,500 trademark owners and professional firms from more than 190 countries, including more than 2,000 established in the United States. INTA is dedicated to the support and advancement of trademarks and related intellectual property as elements of fair and effective national and international commerce.

On behalf of the entire membership of the INTA, I wish to congratulate you on becoming the Assistant Secretary for Communications and Information at the U.S. Department of Commerce. We wish you success as you lead the National Telecommunications and Information Administration's (NTIA) efforts in developing and managing telecommunication and information policies and infrastructure that will benefit the public.

Among the many telecommunications policies that affect trademark owners, INTA is particularly interested at this time in NTIA's oversight of the management of the Internet's domain name system (DNS) by the Internet Corporation for Assigned Names and Numbers (ICANN). For over a decade, INTA supported the U.S. Department of Commerce's initiative of transitioning certain key management functions of the DNS to the private-sector. INTA has been a leading voice for trademark owners in the development of DNS policies and in the management of its processes by actively participating and leading initiatives directly with ICANN and through the Intellectual Property Constituency.

On numerous occasions INTA provided extensive input to NTIA to assist the agency in its oversight of ICANN, and to ensure public accountability over ICANN's management of this extremely valuable public resource. The periodic reviews by NTIA identified many unresolved issues and significant deficiencies in ICANN's management of the DNS. While limited progress has been made on some issues, as acknowledged by NTIA during its recent mid-term review of ICANN's performance under the Joint Project Agreement (JPA), important work remains for ICANN to develop the public's confidence in its management capabilities and judgment. For example, ICANN has yet to develop a balanced organizational and governance structure that

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International Trademark Association

provides for the adequate representation of the independent business community in its affairs and decision-making. It is not clear how ICANN can function as a private sector-led coordinating body of the Internet's unique identifiers, unless the private sector, i.e., those businesses that have fostered the growth of the Internet and who have introduced innovative products and services, have adequate representation within ICANN's structure.

Another area to be addressed is ICANN's extensive difficulties in maintaining a system that ensures that the Whois database remains accurate and current. Widespread inaccuracies in the database of contact information for registered domain name holders have long frustrated those relying on the information to prevent and address criminal acts and consumer fraud in the Internet marketplace. Moreover, ICANN's contractual compliance program has yet to instill confidence in its stakeholders that its policies regarding this information will be adhered to or enforced.

To be sure, the most serious concern of trademark owners is ICANN's failure to develop an acceptable methodology for introducing new generic Top-Level Domain Names (gTLDs) to the Internet and, despite the lack of that methodology, its intention to introduce an unlimited number of new gTLDs to the Internet root server beginning in 2010. Trademark owners around the world, who are currently suffering from extensive domain name related trademark infringement in the current gTLD and ccTLD domain name space, will face the nearly impossible task of protecting their trademarks across an unlimited number of new gTLDs. And as a result, the harm to consumers that flows from abuses in the domain name system will increase exponentially as well.

In support of this view of the harm that will be caused by ICANN's new gTLD initiative as presently structured and on the timetable in place, the Board of Directors of INTA passed a resolution, a copy of which is enclosed, opposing the introduction of an unlimited number of new gTLDs and the introduction of any new gTLDs until the overarching issues with ICANN's program have been resolved.

Given these issues and ICANN's lack of accountability to the public, INTA believes that the NTIA should take the necessary steps to ensure that the JPA with ICANN is extended beyond the September 30, 2009, expiration date in order to allow ample time for a new accountability mechanism to be explored and implemented and for any increase in new gTLDs to be undertaken in a measured and responsible manner.

INTA looks forward to working with you and your staff on these important issues affecting business and consumers in the United States and throughout the world.

Sincerely,

Alan C. Drewsen

Enclosure

Mr. JOHNSON. Thank you, Mr. Heath.

Mr. Stahura?

TESTIMONY OF PAUL STAHURA, CHIEF EXECUTIVE OFFICER, PRESIDENT, eNOM, BELLEVUE, WA

Mr. STAHURA. Good morning. And thank you for inviting me to testify.

My name is Paul Stahura, and I am the founder of eNom, a domain name registrar in Bellevue, Washington. Registrars sell domain names that they get from registries.

I started eNom in my garage in 1997 before there was a competition in the registrar business. After ICANN introduced registrar competition, I was able to grow my business, and now eNom is the second-largest registrar in the world. It powers over 10 million domain names for consumers and businesses of all sizes and connects Internet users to Web sites 2 billion times a day. And I have been fighting for the last 12 years to bring competition to registries.

I couldn't agree more with the following recent statement of President Obama. "My guiding principle is and always has been that consumers do better when there is choice and competition. That is how the market works."

In my oral testimony today, I would like to make three points. One, there is high consumer demand for many new GTLDs. Two, there currently is little or no competition to satisfy this demand. And, three, we shouldn't prohibit competition because of trademark concerns. Instead, we should address these concerns.

Firstly, regarding demand, when it comes to consumer opinions and studies of economic demand, actions speak louder than words. Actual consumer behavior that registrars like mine see every day is more meaningful than a study. As Henry Ford once said, "If I asked my consumers what they wanted, they would have said a faster horse."

Name registrations worldwide are growing. And guess what? They are growing faster in the smaller, newer TLDs than the old, more established ones. This proves there is demand for names in new TLDs.

Now, regarding competition, the biggest benefit these new TLDs bring is competition, and, through competition, lower prices, more choice, and more innovation for consumers. When ICANN brought competition to registrars, the price was cut by more than half. And today, consumers have over 100 choices as to where they register domains and what services they get from the registrar. Now is time—it is actually past time to bring this competition to registries.

I want to talk about another kind of competition that TLDs will promote, not competition among domain name industry players, but competition among brand owners. Inter-brand competition is also good for consumers, but established brands don't like it.

For example, imagine if you built up a tremendous local shoe business and your name was United Shoes. You may have a trademark on the word "United" for shoes. It is your name, but you cannot get united.com. United Airlines already has it. United Van Lines and UnitedHealthcare cannot get it, either. Most memorable, meaningful .com names with the word "united" in it are taken.

But with new TLDs, each business could get a valuable name. You could get united.shoe, if ICANN made .shoe available. With united.shoe, among other things, consumers would be generally less confused about what this United does. Nike is probably happy that United Airlines is forcing United Shoes from getting united.com. Those established brands want those new brands to be unable to get their exact matching .com, and they don't want new TLDs, like .shoe.

Incumbent brands don't want to make it easy for new entrants to brand their new products with names in appropriate, meaningful TLDs. It is like the earlier, bigger companies got all the picks and

shovels to the Internet goldmine and the smaller, newer companies that come later have to settle for a toothpick and a spoon. Let's give them the same tools that the big guys have.

Finally, regarding trademark concerns, the bottom line is, trademark concerns with new GTLDs are being addressed through a long and open process. For many years, government advisory committee, intellectual property constituency, the IRT, with 18 intellectual property experts, the business constituency, the GNSO, noncommercial users, ISPs, and many other groups have been closely involved in this long process and have designed rights protection mechanisms that will be very effective and go far beyond what is currently in place in .com.

In conclusion, the U.S. government has a history of allowing the Internet to flourish. The benefits to citizens around the globe have been immeasurable. We should not depart from this wise precedent now.

Thank you.

[The prepared statement of Mr. Stahura follows:]

PREPARED STATEMENT OF PAUL STAHURA

Testimony of Paul Stahura

Founder of eNom and Chief Strategy Officer for Demand Media

House Committee on the Judiciary, Subcommittee on Courts and Competition Policy

Hearing on the Expansion of Top Level Domains and its Effects on Competition

September 23, 2009

Chairman Johnson, Ranking Member Coble, Members of the subcommittee: good morning and thank you for inviting me to testify today.

I am the Founder of eNom, a Bellevue, WA based corporation and domain name registrar. Registrars are companies which are authorized by ICANN to sell domain names like pizza.com or fightcancer.org. eNom is also a provider of websites and email services. eNom is the second largest ICANN accredited domain name registrar, by volume, in the world. It powers over 10 million domain names on its platform and connects Internet users to websites two billion times each day. Our executives have been involved in nearly every aspect of the domain name system from technical, policy and business perspectives at both registries and registrars, and dating back to the early years of Internet commerce before ICANN even existed.

eNom's parent company is Demand Media, a company that develops, promotes, and distributes web content. It is a top-25 web property worldwide in terms of unique visitors to its network of Internet media properties such as eHow.com. Livestrong.com, trails.com, and golflink.com. Demand Media is also the largest distributor of videos to YouTube and is widely considered to be at the forefront of social media.

I started eNom in 1997 in my garage in Redmond, Washington with one small computer on an ISDN line, and now the company is one of the largest domain name registrars in the world with hundreds of employees, loads of servers in five locations and millions of domain names under our management.

When I started eNom, there was no competition in the domain name registrar business (you had to get your domain name through the one provider…Network Solutions). Fortunately, one of the first steps ICANN took after its in inception was to introduce competition into the registrar business so companies like eNom, Godaddy and Register.com could flourish and provide innovation, better prices and more options for consumers. This is what competition does and I'm proud to say that eNom has brought choice, lower prices and innovation to consumers, as demonstrated by the 10 million names we currently manage.

Back in 1997, my true desire was to become a registry…a company that manages top level domains like .COM. Why just "sell" names when I can be the company that "produces" them. It seemed to me then, as it does today, that competition among top level domains was a good idea. Why should consumers be restricted to web "real estate" in just a limited number of locations? Why couldn't three be a dot web to compete with .COM? Why should all bands and businesses involved with the music industry be restricted to names in .COM when a domain name such as guitars.music or rollingstones.music may better fit their needs?

Unfortunately, despite the fact that as the introduction of competition through new gTLDs is part of ICANN's charter and is called for in the Joint Project Agreement between ICANN and the U.S. Department of Commerce, true competition in top level domains has not occurred. Yes, there are some more TLDs then there were 10 years ago, but the doors have essentially remained closed for entrepreneurs like me who have ideas for generic top level domains and are willing to risk significant capital and time in starting new businesses that can not only create jobs, but benefit consumers in many ways.

Some, including my wife, accuse me of being obstinate, but for me, it's simply a matter of not letting go of a good idea, so I have worked through the years to realize my dream of managing a TLD. However, without true competition, my dreams have been continually dashed. Past efforts to allocate new gTLDs were arbitrary and left ICANN in the position of selecting a limited number of names based on subjective criteria. The result is that some of these TLDs are "hobbled" or underutilized, due to their unattractiveness or restrictions that were placed on them. As a result, Internet "real estate" is still limited.

I credit ICANN for now realizing it's not in the best position to pick winners and losers and that market forces will better determine which TLDs are successful. Thus, ICANN and the DNS community have spent an extraordinarily long time devising a process that will be fair to all TLD applicants while providing strong protections for trademark holders. That is the only way to truly bring competition and innovation. With its current proposal for introducing new gTLDs, ICANN has wisely created open competition without a predetermined number or type of TLDs. ICANN has recognized that it is not in the position to determine that .BIZ is better than .WEB (for example)

It is true, theoretically, that the number of new potential gTLDS is unlimited. Practically, however, the number of new gTLDs will be limited by the stringent technical and financial requirements imposed by ICANN. In my view we are unlikely to see more than a doubling of the number of TLDs that currently exist. An analogy can be made to any State and their process for incorporating businesses in that State. They don't limit the number of applicants, but they do have requirements such as a fee and filing of articles of incorporation. However, not every citizen of the State asks to open a new business. Some don't have an idea, or the technical capabilities, or the time or the money to start such a business. These realities help determine who enters the market, not some arbitrary number set by the State. And, once the business is

launched, the market decides what is most innovative and desired by consumers, and thus, whether the business will be successful. Similarly, ICANN should not artificially limit the number of new TLDs.

Some who are advocating a limited approach to TLDs are voices for incumbents who are not excited about having competitors and have in the past advocated for niche TLDs like ".museums" or ".nonprofits", just like they argue for geographical or limited gTLDs today. It is as if, in the early days of television, CBS, NBC and ABC lobbied for all new stations to be like PBS because PBS is not for profit (like non profit registries like .ORG). Or, lobbied against CNN because they, the incumbents, already offered news, much like TLD opponents seeking to prevent open generic TLDs like .NEWS.

Let me be clear that despite being denied a TLD through the years, I am a supporter of ICANN. While I may not agree with all of their decisions, many of which have been adverse to me – I do believe that ICANN has a dedicated staff and is the correct organization to oversee the Domain Name System and that the organization has been doing a good job considering the vast array of conflicting interest they must take into account. The success of eNom and the hundreds of other competitive domain name registrars in existence today, is the result of ICANN policies that promoted competition in the registration of domain names. There is no question that competition among registrars has been tremendously beneficial for consumers and businesses. But now it's time to bring that same intense competition to the top-level of the domain hierarchy so consumers can also see benefits there. I believe the addition of new registries and new TLDs will bring benefits to the ICANN governance process too as we see more established corporations and institutions participating in the ICANN process as registries.

After all this time, I feel like I am closer to realizing my dream. Consumers and businesses are closer to a better, more innovative Internet with more choice and lower prices for them. However, despite the several years of arduous work by ICANN and the Internet community through an open and transparent process and public participation that has resulted in ICANN's "Draft Applicant Guidebook" (DAG) for new gTLDs, there are still those who want to deny me and many others the opportunity to operate a TLD. The Committee today is focused on two principal allegations ---a) consumers don't want them and b) the harm they will cause to trademark holders outweighs their benefits to consumers. These objections are being made primarily by those who fear competition and the unknown. We strongly believe objection "a" is inaccurate and regarding objection "b", we believe the trademark concerns are manageable particularly considering the competitive benefits of new gTLDs. We appreciate this opportunity to address these objections in turn.

DEMAND IS STRONG FOR NEW gTLDs

As a businessman and entrepreneur, I look forward to bringing a new TLD to give consumers choice, lower prices, and innovation. Like other advances with the Internet, new registries operating new gTLDs will create a ripple effect of job creation. Throughout our nation's history, we have seen these results from competition in the marketplace. I couldn't agree more with the following statement made just two weeks ago, and believe it applies to the Domain Name System as much as it does to the insurance or any other industry.

> *"My guiding principle is, and always has been, that consumers do better when there is choice and competition. That's how the market works."*
> – President Barack Obama

Meaningful Names are Essentially Non Existent in .COM

I've heard the concerns that new gTLDs will result in "serious negative consequences for U.S. businesses and consumers." I believe the exact opposite is true…that lack of competition and options in TLDs is harming US consumers and businesses. Today an effective web presence and identity is critical for business success and also desired by millions of individuals in the United States and around the globe.

Have you tried to register a name in .COM? Small businesses typically can't get the name they want, or even their 3rd, 4th or sometimes 10th choice. If Bob wants to register bobsmusicstore.com, Bob can't, unless he is willing to pay big money, upwards of a thousand dollars in this case, to the guy who got there first. How about soundstore.com? taken. How about mozartstore.com? Taken. Musicstoreplus.com? Gone. Bobsmusic.pro or music.museum may be available, but Bob cannot get a .PRO or .MUSEUM name because those registries are hobbled – they cannot register names to just anyone, besides the fact that Bob is not running a museum. Its obvious consumers would rather pay $10 to the new .MUSIC registry for bobs.music, or $10 for bobs.store (in a new .STORE gTLD). The technical functionality is exactly the same – but consumers get better names for lower cost with more open, generic meaningful TLDs.

A simple perusal of the registered domain names demonstrates that individuals, businesses (large and small), some with trademarks, some without, clearly find sparse availability of desirable names in the current primary (Registry) market. Many registrants are resorting to strained versions of their name just get some "real estate" in existing TLDs. For example, as detailed in a recent Inc. magazine article, we see Flickr.com. socializr.com, who are intentionally misspelling names, and others who are doubling or even tripling vowels in order to get a name at all. Thus, there domain names such as zoomr.com; yuuguu.com and even oooooc.com.

Evidence of Demand is All Around Us

Others are insisting that studies be conducted to "prove" that consumers want new gTLDs and they will benefit from them. Demand for new gTLDs certainly exists, although it is difficult for a "study" to prove so. However, we believe the following data and examples may be helpful in understanding the consumer demand that exists for new gTLDs and domain names in new gTLDs.

Our experience and that of many registrars shows that 70+ percent of consumers cannot and do not get their first "name of choice" when selecting a domain name. For example, Mary, a hair salon owner in Nebraska interested in "maryshair.com" will likely have to resort to something like "maryshairinomaha.com." With new gTLDs, Mary may be able to get marys.hair or maryshair.salon or mary.style. Today, no one can get motherhood.com or beaches.com because they are already taken, but with new gTLDs, a movie studio can get beaches.movie or motherhood.movie for their movie website.

The .COM space is simply too crowded. As the Internet grows and grows, there is a need for more and easy to remember domain names other than .COM names. A significant indication of demand for meaningful web names is that Facebook recently had 73 million users sign up for names such as facebook.com/stahura within 45 days of making this option available. However, I for one prefer a simple domain name because 1) the facebook URL is too long for me and 2) I don't control it like I would a domain name. What if facebook changes their rules or goes out of business? (ICANN protects for both of these situations with gTLDs). I would prefer stahura.family or stahura.facebook and I'm sure many others would prefer something similar. New gTLDs will provide these choices.

Demand for new names is a certainty. Even with the difficulty and high price of obtaining a good .COM name, millions of new names are registered every month. The growth rate of the TLDs with few names already registered is faster than the significant positive growth rate for the large TLDs (like .COM), proving that demand is even bigger for names from smaller, and oftentimes more specific and newer, TLDs. People say "why have new TLDs, if so many names are registered in the old ones?" The answer is even more names, and better names, for lower prices, will be registered in these new TLDs, if they were only allowed to exist.

Meaningful Names are Too Expensive and Out of Reach for Consumers and Small Businesses

For generic names, a wireless company cannot get clear.com except by paying hundreds of thousands of dollars on the "after market" (the non-Registry market) but they may be able to get clear.phones, clear.wire or clear.web for $50 or less when new gTLDs launch. That is a 10,000 fold price reduction, and for a better, more meaningful, name. A full service intellectual property website will be able to get trademarks.law for much less than having to pay hundreds of thousands, if not millions, of dollars for trademarks.com. It's no wonder to me that the speculators who own these second level domains don't want new TLDs.

The result of the current gTLD environment is that consumers who cannot obtain short, meaningful names in the current primary (registry) market are forced to buy from the secondary market where average prices are well over $1,000 per name. New TLDs would bring theses prices down and introduce alternatives. Regarding the secondary market, here are a couple of examples from leading auction sites for domain names. So, instead of a consumer having to pay:

a. $50,000 for RESUMES.COM, with new gTLDs, a better option for that consumer might be RESUMES.ONLINE for $20; or
b. $250,000 for JUSTSPORTS.COM, with new gTLDs, they may be able to get JUSTS.SPORTS for $25.

Trademark Holders Need Better Options Too

It is important to note the realities of limited supply and high prices of .COM to trademarked names as well as generic names. For many trademark owners, perfect fits are already taken in .COM. Thus, there is only one delta.com, united.com, andrew.com and apple.com. However, there are multiple Trademark holders for each of these words (in different trademark classes). Therefore, United Van Lines, who lost out to United Airlines for united.com, may be able to get united.shipping if new TLDs launch. With new gTLDs, trademark owners will be able to get meaningful domain names in extensions that are relevant and meaningful to their activities. This is very important for branding and marketing activities. For example, United Capital, who also lost out to United Airlines for united.com, may be able to get united.fund. Confusion between trademarks will be reduced, and the new domain name space will resemble the real world by having different categories of goods and services. In the example above, United Airlines will not have to worry about policing its trademarks in .FUND, because that describes a different class of goods and services. We know how this plays out in the real world, because we've seen that most companies currently, and logically, do not register in ccTLDs where they don't do business.

The vast majority of trademark holders will actually benefit from new gTLDs and for the small number of large, well-known brand names who fear cyber or typo squatting in new gTLDs, there will be multiple new rules with new gTLDs that will make protection of their mark much easier (a full discussion of which follows below).

Another way to think about how the current selection of gTLDs negatively affects trademark holders is to consider a similar hypothetical situation where the US Patent and Trademark Office initially had just three trademark classes called "miscellaneous", "network" and "non-profit organization", then later, adding "information", and "bizness" (spelled in the slang way) then a few years later, adding another called "asia" and another

called "museum". Most trademark applicants would use the original "commercial" class – that is the one that fits them best because most trademarks don't fit the other, available classes, and it came out first and everyone seems to be using it. The "commercial" class then becomes known, essentially as "miscellaneous". If there weren't more classes, everyone would pick that one. One can't use the fact that everyone is picking the miscellaneous class to argue that more trademark classes are not needed. This is a self-fulfilling argument. Not many good names for businesses would be left if whoever registered a trademark in "miscellaneous" had the sole ability to use that name for all types of goods and services. The meaning of ".COM" is so broad, that it has become meaningless. It's been no surprise to me that most small businesses and consumers can't find the "class" that closely represents them. When the classes are very broad or so specific *and* few that consumers and business do not fall into any of them well, they stick to .COM in exasperation.

Studies are Bad at Predicting the Future

Again, many individuals and serious business enterprises believe there is demand for new gTLDs and are already investing significant time and money in anticipation of new gTLDS. We hear continued call for a study of the "economic demand" for new gTLDs and whether the benefits of new gTLDs will outweigh the potential harms. I believe these "demands" are misguided. We don't need a study to direct our entrepreneurial endeavors, just like many entrepreneurs before us. Furthermore, "demand" is hard to prove and certainly impossible to quantify before launch of new technologies and products. Per our discussion above, there clearly is a need for, and benefit for, new gTLDs and as a businessman, I am willing to stake significant capital on that proposition. But the demand to prove "demand" is simply not how markets work.

We know that when it comes to new technology, consumer opinion often is a poor predictor of future demand. As Henry Ford once said: "If I asked my customers what they wanted, they would have said a faster horse." There is economic demand when a product or opportunity is offered and people buy it or use it. For example, was there economic demand for Federal Express? There was no government study done. It was not a process that took nine years. But once FedEx came into existence, magically, great demand was there. Was their demonstrated demand for Google? For eBay? For computers themselves? In 1943 the CEO of IBM said "I think there is a world market for maybe five computers.", and in 1977 the CEO of DEC said "there is no reason for any individual to have a computer in their home." Most people in 1985, including Bill Gates, thought that they didn't ***need*** more than 64K (of memory). *And, in 1985, when .COM was introduced as an alternative to two-letter country codes, nobody expected it to dominate all other internet extensions*

Come to think of it, was there "demand" for the Internet in the first place? The reality is there are many problems that have come with the Internet, but we deal with them because the advantages far outweigh the "harms."

Did the U.S. Government do a study to determine there would be "demand" for HD programming, 300 TV channels, pagers, cell phones, wifi, text messaging, etc when it auctioned more spectrum? And, was an analysis done to determine whether the projected new benefits were worth the costs associated with content problems such as copyright piracy? I don't think there was, but regardless, in the case of new gTLDs, great pains are being taken before implementation to minimize potential harm to trademark holders. This is being done without any such formal study. I address the subject of trademarks in detail below.

NEW gTLDs WILL FOSTER COMPETITION

We believe this assertion is undoubtedly true. Our comments, thoughts and analysis on the issue of demand and competition surrounding new gTLDs are not based on academic or professional expertise in economics but rather on 12 years of practical experience in the business of domain names.

Furthermore, ICANN and the United States government believe it true. As stated above, but it bears repeating -- the introduction of competition through new gTLDs is part of ICANN's charter and is called for in the Joint Project Agreement between ICANN and the U.S. Department of Commerce.

New gTLDs will Compete with .COM

Specific new TLDs like .MUSIC will not necessarily take a huge proportion of business away from .com but they will compete nevertheless For example, .DRESSES or .FASHION may compete with .COM much the same way a boutique women's fashion store competes with Neiman Marcus without taking away a significant amount of Neiman's overall business. However, **it's not inconceivable that a truly generic, broad-meaning, new TLDs like .WEB will eventually compete directly with .COM.** In, 1850 did anyone expect Los Angeles to rival New York City? In 1920, what would a demand study have shown about the demand to live in Las Vegas? Should we disallow a firm such as Tesla Motors (with their innovative electric cars) from entering the market because an existing firm has dominant market share? Does the fact the GM is selling a vast number of cars convince us that there is no need for Tesla and it should be prevented from entering the market? No, we believe the exact opposite is true.

Although it is possible a single, new TLD will emerge to threaten or eclipse .COM in size, just like Los Angeles emerged as another big city "competing" with NYC, we think it is far more likely that competition from new gTLDs will cause .COM to lose market share, or at least to grow at a slower rate, to the cumulative effect of many smaller to medium-sized TLDs. Previous

new gTLDs were less successful competing with .COM because there were few of them (and hence they lacked overall market visibility), and their ICANN selection process encouraged constrained business models. This round will be more successful because there will be more TLDs and they will not have to constrain their business models, in order to enter the market and win the TLD.

New gTLDs Will Compete With Each Other

The market for gTLDs will foster competition if allowed to operate like most other markets and real estate in general. Government generally don't limit "storefront" space in the physical word, thus, a woman's clothing store can open in the same mall as Neiman's, or across the street or across town and compete for customers who buy women's clothes at Neiman's. In our view, TLDs should compete with each other on price, availability, perceived value and features – like the overwhelming majority of other products do. We think this will be more beneficial to consumers than arbitrary and expensive-to-manage price controls.

As previously noted, many ccTLDs have come from behind to out-compete .COM in their markets. It seems illogical to us that national identity would be the only affinity strong enough to create this competition with .COM. As more TLDs are introduced, such as .ECO, .FAMILY, .SPORT and others, we think affinity groups (large and small) will place a higher brand value on their new TLD than they do on .COM.

Competition From New gTLDs Will Benefit Consumers

The following comments of Professor Dennis Carlton (a noted competition expert who previously served as a member of the Antitrust Study Commission that was created by this Committee) reflect our beliefs and our experience in Internet Commerce, as they reflect the experiences of millions of entrepreneurs before us in other industries:

"Like other actions that remove artificial restrictions on entry, the likely effect of ICANN's proposal is to increase output, lower price and increase innovation. This conclusion is based on the fundamental principles that competition promotes consumer welfare and restrictions on entry impede competition." and "The availability of new gTLDS also offers increased opportunities for registries and registrars to develop innovative services or business models that could provide significant opportunities for increases in consumer welfare." (Report of Dennis Carlton for ICANN regarding ICANN's Proposed Mechanism for Introducing new gTLDs, June 5, 2009, page 6).

ENHANCED TRADEMARK PROTECTIONS IN NEW gTLDs

As this Committee is keenly aware, one issue that ICANN continues to work on as it progresses toward the timely introduction of new TLDs concerns the protection of trademark rights in the domain name space. ICANN, trademark owners and potential TLD applicants such as ourselves care deeply about the protection of trademarks in the domain name system and have been significantly involved in developing new "rights protection mechanisms." Demand Media and eNom own intellectually property and we understand and support the important role it plays in our economy.

The Current Draft Applicant Guidebook For New gTLDS Includes Trademark Protections

Before we discuss the latest trademark protection activity within ICANN, it is important to note that even with no further modifications to the Draft Applicant Guidebook (DAG), trademark interests will have more protection in new TLDs than exist in .COM. For example, the current DAG already has in place significant trademark protections, including mandatory participation in the UDRP, mandatory top level legal rights objection, mandatory requirement that applicants detail measures to reduce abusive registrations, and mandatory centralized, and thick whois for registries.

Additional Trademark Protections Will be Adopted by ICANN Making New gTLDS Much More "safe" for Trademarks than .COM and Other Existing gTLDs

In addition to the trademark protections embedded in the DAG, last spring, ICANN established a committee (the Implementation Recommendation Team or "IRT") of eighteen trademark law experts from around the globe, and from large brand holders such as Microsoft and Time Warner, to make recommendations for even stronger and more efficient protection of trademarks in new TLDs. The IRT issued its final report last June. We applaud the IRT's efforts. The recommendations include 1) an ICANN contracted, centralized database of trademark information that must be used by registries, 2) a method for TM holders to "pre" register their trademarked names as a domain name in a new top level domain, and 3) a new, faster and cheaper procedure to "take down" a domain name that is violating a trademark owners rights, in some ways similar to the DCMA for copyrighted material. We support these new "rights protection mechanisms", with some small but necessary adjustments, and believe they will be a very significant improvement over the protections and remedies trademark holders currently have in .COM.

Between the provisions that are already in the DAG and the fact that ICANN is likely to adopt *significant* portions of the IRT recommendations for trademark protections offered by the IRT, we believe it is indisputable that this combination of requirements that will apply to registries

operating new TLDs will far surpass the trademark protections available in current TLDs such as .COM. And, many of the new registries are aggressively building in additional protections, including proactive policing and takedown measures, adopted from successful ccTLD policies.

Thus, trademark owners and others who are concerned about cyber and typo squatting and spam, phishing, pharming, and other forms of abuse (as we are) should welcome new TLDs and the rules that come with them.

Trademark Issues in New gTLDS Will be Manageable

As noted, we support all of the afore-mentioned trademark rights protection mechanism; no one should profit by stealing or abusing someone's intellectual property. *However, we also believe that trademark problems in new gTLDs will not be severe.* To begin with, our publicly available analysis of new TLDs introduced since 2001 (such as .BIZ, .INFO and .MOBI) shows there have been limited trademark defensive registrations within these TLDs, showing trademark issues continue to be vastly and disproportionately greater in .COM than in new TLDs:

http://www.circleid.com/posts/20090202_analysis_domain_names_registered_new_gtlds/

The amount of traffic and cyber-squatting won't increase significantly with new TLDs. There is only so much internet traffic and so many cyber-squatter dollars available at any given point in time. Doubling the number of TLDs, for example, will not double the amount of cyber-squatting. An analogy might be banks -- just because we build many new banks doesn't mean there will be a large increase in the number of bank robberies. Another example might be roads. If we build twice as many new roads there are not likely to be twice as many cars, twice as much total road-traffic, or twice as many road accidents. In fact, if the new roads are built with more safety features, as new TLDs will be, then as traffic moves to the new roads the number of overall accidents will decrease. Also, if we don't build more roads, folks will drive over the fields to get where they want to go -- witness the "imposter" issues that have come up in facebook and twitter URLs which are private unregulated name spaces.

Additionally, although some large trademark holders profess dire consequences for trademarks if new TLDs are introduced, many of the issues of concern to them are already happening in an entirely unregulated way for many consumers. A large and growing number of ISPs currently resolve queries for non-existent domains to pay per click (PPC) websites. For example, a consumer who uses Verizon as their ISP in the United States and who types in a URL such as www.secure.financing will be taken to a website offering a variety of PPC links including, at the time of this writing, an offer – *'Would You Like to Make $5,000 a Month Posting a Link on*

Google?'. Similarly, a Verizon customer who types in www.discountdrugs.pfizer will be returned a wealth of PPC links including those promoting products in competition with Pfizer. Our point here is that the issues of concern to Congress are already happening in many areas of the Internet in a completely unregulated way. By implementing the new TLD program along with some of the recommendations of the IRT we can better manage this existing behavior as it relates to ownership and use of domain names.

Competition Threatens Some Trademark Holders

A concern that large brand holders may have is inter-brand competition. Inter-brand competition, like the other competition, is good for consumers. For example, Parker Shoe Store, a new entrant in the shoe business, would have an easier time branding their company "parker.shoe" than "parkershoes.com". More consumers will associate "Parker" with "Shoes", can find them more easily among the fewer .SHOE names than the millions of .COM names, can be more assured that Parker are actually selling shoes, and be generally less confused about what Parker does. I suspect the big shoe brands would rather have this new shoe competitor have a hard time in branding their new brand by forcing Parker to get "Parker.pro" or "Parker.biz", or "ParkerShoeSeattle.com" for example.

Trademark Concerns Have Received Extensive Consideration by ICANN

There has been criticism that trademark issues have only recently been considered in conjunction with new gTLDs. This is simply not the case. ICANN did pay attention to trademark interests *'in the normal course of ICANN's policy development process'*. Extensive attention. The policy development process for new TLDs has been preceded for 3 years during which time intellectual property interests, and ICANN's own Intellectual Property Constituency (IPC), have been closely and deeply involved in the process. Specific to the new TLD process, the issues of rights protection were under direct and detailed consideration in the first half of 2007. The GNSO Protecting the Rights of Others Working Group (chaired by an Intellectual Property Constituency (IPC) member) delivered a 114 page consensus report to the ICANN community on trademark rights protection in new TLDs. Similarly, after a further year of consideration, the IPC issued its TLD 'Perfect Sunrise' document which also addressed the issues currently under consideration. So, the issues, proposed solutions, and community responses on this topic are not new. What is somewhat new is the IRT and its specific recommendations (although many of there recommendations are based on these prior discussions). Since the final IRT recommendations came out in June (which were preceded by preliminary recommendations in April), there has been and will continue to be extensive discussion of these recommendation for trademark protections in new gTLDs, as evidenced by today's hearing as well as the process laid out by ICANN.

In my view, the process argument is a red herring and the type of thing we frequently hear when one party does not get all of what they want. In this case, large trademark owners will get most of what they have asked for: much improved TM protections for the DNS. But what they shouldn't get is the right to stifle innovation and consumer choice -- rights that the law does not give them.

The Globally Protected Marks List is a Bad Idea

As much as we are in agreement with the IRT, I would like to take a moment to express concern over its recommendation for the creation of a "globally protected marks list" (GPML) which would grant preferential treatment in the DNS to a small number of large, corporate trademark holders. We have significant concerns with the practicality and usefulness of this Super List. To begin with, no one, including the IRT, can seem to come up with the appropriate criteria to be on the Super List. Furthermore, the process for Super List inclusion will likely be exceedingly political, for example, developing countries will fight for special criteria so it is not dominated by large corporate interests from developed countries. Finally, updated intellectual property laws and methods, particularly in the Internet age, have upheld the principle of post-usage enforcement rather than pre-usage approval. However the GPML will reverse this long-held principle and create a pre-usage approval burden. The bottom line is that we believe the costs and problems of the Super List will greatly exceed its benefits and that Trademark rights protection is much better served by other proposed RPMs including the objection process outlined in the current RFP/DAG.

New gTLDs Will Have Better Trademark "Laws"

A long time ago, many who served in this very body opposed the expansion of the United States because they believed the new states created by the Louisiana Purchase would be lawless. It's nearly the same thing with new gTLDs, but in this case, the new states, these new TLDs, will actually have stronger "laws" to protect trademark holders rights than the original "colonial" TLDs did. These lawless concerns were "managed" back then and we believe trademark concerns can, and are, being managed within the new gTLD process to the extent that new TLDs will far surpass the trademark protections available in current TLDs such as .COM.

CONCLUSION:

The U.S. Government Should Support Innovation and Economic Growth

New gTLDs will create enhanced competition which will result in financial investment and job creation in Internet commerce. Many individuals and businesses have capital waiting to invest in TLDs as well as business and hiring plans waiting to implement. Choice and competition have fostered breathtaking economic development in the Internet world and extraordinary economic progress over the past 15 years. We foresee many new business models springing up with the availability of new TLDs; most of us have seen very creative plans already. Like with many aspects of the Internet, innovation has always been key, has always outpaced expectations, and has led to the creation of new businesses (large and small), the expansion of existing businesses and the creation of many new jobs.

The U.S. government has a history of standing back and allowing the Internet to flourish. The benefits to citizens around the globe have been immeasurable. The USG should not depart from this wise precedent now.

ATTACHMENT

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Analysis of Domain Names Registered Across Multiple Existing TLDs and Implications for New gTLDs

Feb 02, 2009 8:43 AM PST | Comments: 8 | Views: 5,796

By Paul Stahura

Summary

• **Hypothesis** – Trademark holders are not, in general, registering their trademarks as domain names across the existing top-level domain (TLD) namespace.

• **Methodology** – Examine the domain names registered in the popular generic top-level domains ("gTLDs" such as .com, .net and .info) while utilizing other publicly available information such as the USPTO database of trademarks, the English dictionary, DNS entries, UDRP records and whois records, to determine if the hypothesis is true.

• **Conclusions** – 1) The vast majority of trademark holders are not registering their trademarks in all the current *generic* TLDs, let alone *all* the TLDs. Therefore, we do not expect them, in general, to register their trademarks in *new* gTLDs and 2) due to the expected costs to run a registry and the expected low number of defensive domain name registrations, there is no economic incentive for an applicant to obtain a TLD for the sole purpose of making money from defensive trademark registrations.

Introduction

If the hypothesis is true, then trademark holders, in general, do not appear to be "forced" to register their marks as domain names, otherwise you'd see more marks registered across the current TLD space.

Costs that exceed benefits arise when domain name registrants register their marks for the sole purpose of preventing another party from registering that mark as a domain name. If trademark holders are not registering their trademarks in existing TLDs, especially the open TLDs where registering trademarks is easy and inexpensive, then they probably would choose not to register them in new TLDs. At least they do not appear to be forced (to protect their trademark, or for any other reason) to be registering their marks, otherwise there would be many more marks registered across the TLDs (since costs and ease of registration is low for the set of seven TLDs studied).

Names registered in common across gTLDs

As of January 19 2009, by analyzing the zone files for a number of TLDs, we found there were 194,325 second level names registered across all of these popular seven TLDs: COM, NET, ORG, INFO, BIZ, US, and MOBI ("CNOIBUM"). Each of these TLDs has more than one million domain names. The smallest of which is .mobi, which has about one million names, therefore, about 20% of its zone file is registered across all of the other six TLDs. The number of common domain names registered across various TLDs decreases as more top level zone files are examined. We do not have access to all 300+ TLD zone files (such as .ca, .tv, .fr etc). If we did, we would be able to tell which names are registered in all 300+ top level zones. We can only guess it is less than 194,325.

If all of these 194,325 names were trademarks that would mean the trademark community incurs $1.5M per year per TLD in costs for registrations, if each name in each TLD cost $8 and there were no offsetting benefits to any of these registrants. But the cost number is difficult to calculate, because a) it is certain that not all of these registered names are trademarks, b) not all of them are registered to the same registrant (and one word mark, such as "delta" could have more than one trademark holder), c) the registrants enjoy offsetting benefits such as traffic, which wouldn't otherwise be brought to their content (website) if not for the registration of that domain name, and d) not all names cost the same for each TLD. While the task of estimating the per TLD costs is not easy, it's also not impossible.

Names not registered across gTLDs

We also want to get an idea of which names are NOT registered across these seven TLDs. Thus, we also looked at various misspellings of "verizon" (as one example), in an attempt to better understand if misspellings and typos of trademarks were registered across these TLDs. We picked Verizon as one example to examine because they are known to vigorously defend their marks in the domain namespace.

We examined 263 strings that we believe may be considered close typo variations of the string "verizon" or more distant variations, or contain the exact string "verizon" (154 contain "verizon" exactly and 109 do not) and which are registered in .com. We then determined if this list was registered in any of the other six TLDs (note though Verizon.mobi, Veriz0n.mobi, and Ver1zon.mobi appear to be registered/reserved, they do not appear in the .mobi zone file, nor do they resolve.)

Since there is no definition of what a "misspelling" is, we do not know all the misspellings of "verizon", so we couldn't check all of them, nor are we sure that all the strings on our list are "misspellings" (for example "horizon" is on the list). But we did find that (not counting "version", "horizon", and "verisign") only three of what may be misspellings of "Verizon" ("veriz0n", "ver1zon" and "verison") which are registered in .com are also registered across five or more of the other six gTLDs. We also found eight of the strings that contain "verizon" (exactly) are registered in .com and are also registered across five or more of the other six gTLDs. The majority of them were solely registered in .com and not in any other TLD that we examined.

As another example, we looked at "amazon". To determine its list, we scanned the whois and noticed that every domain name that had "amazon.com" as well as "8102" or "81266" (being Amazon's PO box numbers) in the whois output also had the same name servers in common. So we made a list of every .com name that has at least one of those name servers. We believe this is a nearly complete list of .com names where Amazon.com, Inc. is the registrant. We found 7,078 .com names (including 19 IDN names), 4,573 of which have the exact string "amazon" within the domain (for example "AMAZONKID.COM" and "EAMAZONIA.COM"—generally not typos), and 2,505 of which do not (for example "AMAZKN.COM", "AKAZONA.COM", "CICKRIVER.COM" and "EYEMDB.COM"—more likely typos than not). Then we

determined which of these names were registered across the other six TLDs. The results are as follows:

	Contains "amazon"		Does not contain "amazon"	
Registered across these TLDs	**Number of Names**	**Percent**	**Number of Names**	**Percent**
.com and 6 TLDs	34	0.7%	55	2.2%
.com and 5 TLDs	63	1.4%	79	3.1%
.com and 4 TLDs	28	0.6%	32	1.3%
.com and 3 TLDs	49	1.0%	52	2.0%
.com and 2 TLDs	218	4.7%	119	4.7%
.com and 1 TLD	435	9.2 %	262	10.5%
only .com	3,746	82.0%	1,906	76.0%
total	4,573	100.0%	2,505	100.0%

The vast majority (80%) of Amazon's names are registered solely in .com.

These are but two examples, but we can infer by them, and by the number of domain names registered in each TLD (there are many times fewer names registered in say .mobi and .biz compared to .com and .net) that misspelled/typos of trademarks are NOT generally registered across these seven TLDs, let alone across all of the more than 300 existing TLDs.

English dictionary words registered across gTLDs.

In an attempt to further characterize the set of 194,325 names, we looked at an English language dictionary. We compared the words in the dictionary to this list of domains which are in common across the set of TLDs.

We used the Princeton Dictionary (WordNet 2.1) which has names listed in four categories: nouns, verbs, adjectives, and adverbs. We removed the following characters from the words: "_", "-", "" (a quote), "." This resulted in 145,384 distinct words, though some words occur in multiple groups.

This results in 154,007 non-distinct English words in the dictionary database.

After analyzing the set of 194,325 "in-common" domains, we found that there are 173,175 domains in the set of 194,325 that *are not* words in the dictionary, and 21,150 that *are* words. So 89% are not single dictionary English words—they could be multiple-word strings, or non-English strings, or made up words as strings, or not words at all (such as numbers).

Do the registrations have the same registrant across these gTLDs?

For the 194,325 names, we then focused our attention on the whois for each name in each TLD to try to understand if the domains registered across this set of seven TLDs were registered by the same registrant or by different registrants.

It is difficult to parse out the registrant information for each name from each registrar's whois information for

each TLD. Therefore, we concentrated on the email addresses found in the whois, as they are easier to parse due to the fact that they have an "@" and other characteristics which easily distinguish them from other text in the whois output. We looked at every email address for every contact but we cannot tell which email is related to which contact. For example, we don't know that email address 'A' for domain example.com is the email address for the technical contact or the registrant contact or any other contact—but we do know the frequency with which it appeared in the record. Additionally, we do not know the underlying whois for names which are on ID Protect.

We assumed that names registered across all TLDs and have a common email address could either be registered to the same registrant or could, for example, have the same technical contact (say they were all registered at the same ISP domain name reseller) but have a different registrant contact. Given this, we looked at a two types of information, the email addresses in the whois and the name server names, to try to determine if the domain name had the same registrant in each TLD or a different registrant. For example, if the name has the same name servers and the same one email address in the whois across all TLDs, we figure it is very likely that the same registrant is the registrant for all the names across all the TLDs.

The effort to identify unique registrants resulted in the following:

Names which have two or more email addresses which are the same across all TLDs	1,469
Names which have only one email address that is the same across all TLDs	4,698
Names where the name servers are the same across all TLDs	20,715
Names which have the same name servers AND have two or more matching emails	1,096

We feel the number of names with the same registrant across the board is bounded by the following: it's no more than 20,715 and no less than 1,096. Due to the fact that many registrars use the same name server names across millions of registrants, we believe the 20,715 is high because different registrants could be using the same name servers. Of course a name could have the same registrant and also have different name servers across the TLDs. On the other hand if one email address is in common across the TLDs, we can probably assume the true number of names which have the same registrant contact to be higher than 4,698. One also has to consider ID Protect type services which do not disclose the underlying whois information but a) those services do not hide the name server names, and b) .US does not allow such services. So, based on all this, we estimate about 6,000 names (3%) are registered to the same registrant across these seven TLDs.

Then we turned our attention to answer the question "what if ***all*** the names registered to the same registrant across these gTLD were trademarks—what would the cost be?" We believe there is a correlation between price and volume. We compared .info and .biz. Both TLDs were introduced at the same timeframe (year 2000). The .biz per year fee is in the $6 range and .info price is in the $2 range (depends on various promotions)—one is three times more than the other. The .biz registry has two million names in the registry, and .info has five million—one is 2.5 times more than the other. Nearly the same ratios: price to price and volume to volume. So for higher fees, we would assume the volume of registrations would decrease, and likewise for lower fees, the volume would likely increase, and by proportionally the same amount. Therefore, if ***ALL*** 6,000 of these names were trademarks then that would mean the entire trademark community was spending about $48,000 per year per TLD (assuming an $8 registration fee—about the average in-volume retail price across these TLDs), or about $336,000 per year worldwide on all these gTLDs. And, we would

expect approximately this same dollar amount per TLD if the price were raised or lowered.

Of course, not all of the 6,000 same-registrant names are trademarks. Some utility (which offset the costs) flows to the registrant for having the name registered—even for a less familiar TLD like .mobi. Also, to figure the true cost, even if they were all TMs, we have to consider a) the registrants who were convinced (possibly by a zealous domain name salesperson) to register their mark across all the TLDs (to "protect" it) even though they may not have really needed to, and remove them from the 6,000 and b) other names not all registered to the same registrant, which may be distinctive one-holder trademarks, and increase the 6,000.

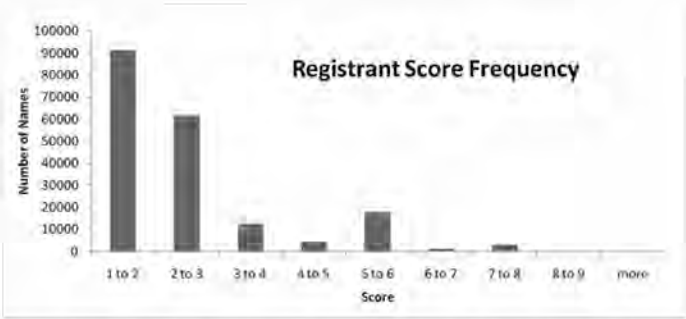
More on registrants across the gTLDs

As detailed above, our assessment reveals about 6,000 names are registered to the same registrant across all the seven gTLDs that we examined. But we also wanted to know how many names had six out of seven of the same registrants? Or four out of seven? How many names, again registered across all seven gTLDs, had none of the registrants that are the same? To determine this we again looked at the email addresses in the whois information and devised a score (see following table) with the lower score meaning the name has many different registrants across the gTLDs, and a higher score meaning the name has very few or one registrant across the gTLDs.

	DomainString1	DomainString2	DomainString3
TLD1	AB	AB	ABC
TLD2	AB	AB	DEF
TLD3	AB	AB	GHI
TLD4	ABC	AB	J
TLD5	DEF	AB	KL
TLD6	G	AB	MN
TLD7	D	AB	N
Total email addresses	14	14	15
Unique email addresses	7	2	14
Score = total/unique	14/7=2.0	14/2=7.0	15/14=1.07

In the table above, each letter represents a *unique* email address found in the whois output for the string.TLD domain. For example, in the whois output for DomainString1.TLD1, two unique email addresses were found, email address A and email address B. In the above table, DomainString3 has the most registrants because it has the lowest score, and DomainString2 has the fewest registrants because it has the highest score.

Using this method we calculated the registrant score for each of the 194,325 names registered across all the seven TLDs. The results are plotted below.



This shows that not only are most of the names registered across all the gTLDs NOT registered to the same registrant, but also that most of them are registered to *separate* registrants. In other words, each of the names is likely to have seven different registrants. This makes sense, because these names, by definition, are names which are registered in all the seven gTLDs. Thus, they are probably popular names, and therefore it is likely that each would be registered to a different registrant for each TLD. The names are spread out to different registrants each of whom gets value from a unique address.

How many of the 195K names registered across all of these seven gTLDs are trademarks?

We do not have access to a list of all the trademarks world-wide, nor to all the *registered* trademarks worldwide, but we do have access to the database of US registered trademarks. This is a good approximation of the set of registered word marks worldwide because many, if not most, of the word marks in the USPTO database are probably also word marks in other country's trademark offices. So, to answer the question of how many of the domain names are trademarks, we worked with the USPTO word mark database to get the list of all live word marks (including design mark and word mark combinations).

The appropriate query to the USPTO database resulted in a list of 1,457,676 live word marks. The list has duplicate word marks because more than one trademark holder may have a trademark on "M" for example. Of the 1.45 million non-dead word marks, we found 1.08 million are unique strings ("unique" meaning that they are not on the list more than once, for example: for two identical strings in two different trademark classes—that string would be counted just once); and, for example, among the list of 1.45 million, "GUARDIAN" is on that list 141 times, and "MACS" is on it eight times, while they are both represented once among the list of 1.08 million "unique" word marks. We removed the non-domain characters from the list of word marks (for example, all the spaces were removed).

After comparing the list of over 1 million USPTO word marks, we found 53,327 of them were also registered across all seven gTLDs. For example "ANDREW" is on the US trademark list AND is registered across CNOIBUM, as is "MICROSOFT". Note that 1) not all of the 53,327 registered domain names found to be USPTO word marks have a single trademark holder (compare "ANDREW" to "MICROSOFT") and 2) not all of them are distinctive (again compare "ANDREW" to "MICROSOFT). We found 21,366 which are not in the English dictionary and have just one trademark holder.

Other Costs?

One possible other source of costs to trademark holders does not flow to registries/registrars because it's not a name registration cost. It's for Universal Dispute Resolution Procedures ("UDRPs" or "DRPs"). The UDRP is the mechanism ICANN has contractually put in place with all registrars so that trademark holders may relatively inexpensively (compared to the court system, for example) dispute a domain name registration.

To get an idea of these UDRP costs we can look at .me as a proxy to better understand how much a new TLD may cost the entire trademark community in terms of UDRPs. We picked .me as an example because:

a) it has a valuable meaning ("me" is the nominative singular pronoun in English, and is the 73rd most frequently used word in English), probably comparable to new gTLDs,

b) though it is the country-code TLD for Montenegro, it has been positioned as a generic TLD,

c) it has been heavily marketed by a number of registrars including the largest,

d) the TLD was introduced recently, in early 2008, and

e) its mid-sized at 200,000 domain names currently registered (our estimate)

Since .me was launched until now (about a year), there have been 11 UDRP cases:

WIPO Case Number	Domain name(s)	Complainant	Respondent	Decision
DME2009-0002	gameload.me gamesload.me softload.me softwareload.me	Deutsche Telekom AG		Case active
DME2009-0001	overstock.me	Overstock.com, Inc.		Case active
DME2008-0008	mozilla.me	Mozilla Corporation Mozilla Foundation		Terminated
DME2008-0007	getfirefox.me	Mozilla Corporation Mozilla Foundation		Case active
DME2008-0006	firefox.me	Mozilla Corporation Mozilla Foundation		Case active
DME2008-0005	sprite.me	The Coca-Cola Company		Case active
DME2008-0004	danone.me	COMPAGNIE GERVAIS DANONE		Case active
DME2008-0003	exxonmobil.me	Exxon Mobil Corporation	Robert Christian	Transfer
DME2008-	porsche.me	Dr. Ing. h.c. F. Porsche	Georg Kohler	Transfer

0002				
DME2008-0001	creditmutuel.me	Confederation Nationale du Credit Mutuel	Epsilon production worldwide LLC	Transfer

All of the above were filed with the World Intellectual Property Organization (WIPO), and one was filed with National Arbitration Forum (NAF), which is: *ping.me Karsten Manufacturing Corp v. pingify networks, Inc (Claim Denied)*

The fees for each proceeding depends on a number of factors, such as the number of panelists chosen by the complainant (one or three, though it is very rare to use three panelists). For example, to use NAF it costs $1,300 for up to two domains and one panelist and WIPO is $1,500 for up to five domains and one panelist. If all the cases above have one panelist, which they likely do, the total UDRP fee for all of them would be $14,800. This amount does not include attorney's fees, which we estimate at another $2,000 each (for in-house preparation) or $22,000 total. Therefore the entire trademark community spent about $36,000 for UDRP disputes during the launch of the new generically positioned TLD ".me" in the past year. One should also note this is a one-time cost, and assumes all complainants win (one above has not so far). The yearly retail registration fee for all of the above names is less than $200 (13 x $15.00).

Conclusion

We estimate:

- There are 194,325 names which are registered in common across these seven gTLDs: .com .net .org .info .biz .us and .mobi (CNOIBUM)
- About 3% of the names in common across CNOIBUM are registered to the same registrant.
  - That is about 6,000 names per TLD
  - If ALL these names were trademarks, it is costing the worldwide set of trademark holders about $48,000 total per year per TLD on average (at $8/domain) to have their TM registered as domain names in gTLDs.
- There are 91,332 names registered across CNOIBUM (or about 47%) that have about six or seven *different* registrants
  - 61,575 or about 31% are registered to about five different registrants
- At least two trademark holders, but we expect trademark holders in general, do not appear to be registering misspellings of their trademarks outside of .com across all the other six gTLDs we studied. This is because those misspellings do not appear in the other TLDs zone files, not because they do appear but are not registered to the trademark holder. We believe this is due to the fact that these six non-com TLDs do not have the type-in traffic that .com has. We believe the typo names are not being registered by "cyber squatters" because there is less type-in traffic in the other TLDs compared to .com. Judging by their absence, these typos are not worth "squatting" so they are not worth "defending", so they just do not get registered.
- There are 53,327 names (or about 27% of the names registered in common across these seven gTLDs) which are USPTO registered word marks.

- 28,324 (or 53% of the word marks that are also domain names registered across all seven gTLDs) have more than one trademark holder, such as "Andrew". 25,003 have only one trademark holder.
- 12,118 (or 23% of the word marks) are also English dictionary words.
- 21,366 (or 40% of the word marks) are not in the English dictionary AND have only one trademark holder. These may be relatively distinctive word marks, or marks which comprise a combination of two or more descriptive words.

- Of 1.08 million unique USPTO word marks ("unique" because they were de-duped from a set of 1,457,676 word marks), only 53,327 (or about 5%) are registered across CNOIBUM
- Only 1.4% (21,366/1,457,676) of the live US trademarks have one trademark holder, are not English words, and are registered across CNOIBUM

While a small minority of USPTO trademark holders has registered their USPTO word marks across the seven gTLDs studied, ***the vast majority of trademark holders are not registering their trademarks in all the current gTLDs, let alone all the TLDs. Therefore, we do not expect them, in general, to register their trademarks in new gTLDs***.

We've looked at seven, generically positioned, relatively large, global TLDs. We believe most new TLDs will not be as general purpose as these seven TLDs, but will be more specific, such as .table. We believe that the set of trademarks which are registered across these seven TLDs, will drop off significantly for usage-specific TLDs, like .table. We do not believe that the relatively few trademark holders who do register names across these seven TLDs will continue to register names in a TLD like .table. Those trademark holders will be less interested in .table, but other users will be more interested in .table because of the very fact that the gTLD is specific. For example, a site selling billiards may want to call itself billiard.table instead of billiardtables.com, especially if billiardtables.com was unavailable. We believe that as the number of new TLDs introduced increases, the number of these niche or specific TLDs will increase faster, so the percent of niche TLDs to the total number of TLDs will continuously increase over time.

Based on

a) the number of common registrants across the gTLDs studied (1,096 on the low end and 20,715 on the high end, with an estimate of about 6,000),

b) the number of domains matching a word mark with one trademark holder and which are not dictionary words (21,366), and

c) other factors discussed above,

we estimate that about 7,000 names could be expected as defensive registrations in a truly generic TLD comparable to .info or .biz or .us, with fewer defensive names expected in more specific TLDs such as .table. We suspect this number of names would be confirmed by looking at recent sunrise registrations for such generically positioned TLDs as .tel, and .me, but we do not have access to that data.

Comparing the costs of operating a TLD registry (up-front fees to ICANN, annual fees to ICANN, and technical operating costs—which is hundreds of thousands of dollars per TLD), with the revenues that would flow from defensive trademark registrations (about 7,000 or fewer names) leads us to the conclusion ***there is no economic incentive for an applicant to obtain a TLD for the sole purpose of making money***

from defensive trademark registrations.

By Paul Stahura, Chief Strategy Officer, Demand Media

Related topics: Cybersquatting, Domain Names, Domain Registries, ICANN, Law, Top-Level Domains

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Comments

Good research... Another comment...
Jothan Frakes – Feb 02, 2009 9:30 AM PST

It is refreshing to see actual statistically prepared and referenced data as opposed to anecdotal percentages or cognitive distortion from certain trade groups or brand management companies that we'll undoubtedly see respond to this study.

Focusing on the primary point:

> ***"there is no economic incentive for an applicant to obtain a TLD for the sole purpose of making money from defensive trademark registrations."***

Amen to that. Or maybe low economic incentive. At least on a list of 100 economic incentives I'd suggest that it is present but in the lowest 20%.

At the heart of this: The way trademarks work and the way that domain names work are different and the pain seems to come from where they don't line up.

I will be at the INTA event in San Francisco next week and I'd appreciate the opportunity to sound out some progressive ideas that registry providers could reasonably accomplish to help remove some of the pain.

The brand strategy in the year 1999 was register anything and everything in every open extension. Domain name managers have, in the past decade, really honed their approaches to best apply their budgets to the matter. Registries, registrars and registrants have all gotten smarter and these findings support this assertion.

The figures presented in the study show a clear and concise picture of the 2009 state of brand.

Based upon the focus of the brands surveyed in the Stahura study, it certainly looks statistically like brands seem to trend towards the .COM namespace for their brand protection and defensive registrations.

I'd assert given my perspective on the matter that this has to do with where the traffic is. Type-in traffic is what might be interesting to a potential registrant other than a trademark owner, unless it is a

completely generic string.

There is little financial incentive for someone to allegedly 'typosquat' or infringe on a trademark in a new TLD. A new Top Level Domain would be new namespace, and that new namespace would conceivably have little or no type-in traffic.

Any brand management professional who works with domain names that you trust to provide an authentic answer about their brand strategy would validate this conclusion.

To assert that the economic incentive for a new TLD is to shakedown trademarks is not a complete stretch of reality, because many brands do register in many TLDs. Still more of the brand managers are making better choices and smarter buys in the space.

Thanks for putting some numbers to the hype
Antony Van Couvering – Feb 02, 2009 2:24 PM PST

Refreshing numbers-based approach. I'm surprised that you even have to broach the ludicrous notion that you would start a TLD just to soak trademark holders. That you felt the need to rebut that idea shows to what level has been stoked among trademark holders.

Even if instead of your 6,000 likely sunrise registrations you used the 30K that registered in .asia, your argument still holds: that trademark holders do not register in all TLDs, and they never have. They register in top TLDs and where they do business. Trademark holders do bear a cost with new TLDs, but it's not enormous. On the other side, the utility to Internet users is very large.

You address two important issues about TLDs.
Alex Tajirian – Feb 02, 2009 3:31 PM PST

You address two important issues about TLDs. However, I am having hard time relating your hypothesis, methodology and conclusions.

Hypothesis:
(1) If you don't have a model that tells you the conditions under which a company should register a TLD (such as http://domainmart.com/news/brand_name_strategy.htm), what is the significance of accepting or rejecting your hypothesis? Ie, without a model you don't know whether by not registering, trademark holders are doing the right or wrong thing. Moreover, even with a model, there would be a number of reasons for not owning other TLDs, such as someone else registered it first or not worth it.

(2) What does "in general" mean? Does it mean 51% or 95%? For example, a new drug is labeled safe, in general. If in general means only 5% die after taking the drug, would that be labeled safe, in general?

(3) Given your analysis, should there be a second hypothesis that "there is no incentive to obtain a new gTLD for the sole purpose of making money from defensive trademark registrations"?

The methodology seems to be based on visual/graphical and intuitive descriptors rather than testing

statistical hypotheses on proportions of TLD-related registrations.

Conclusions:
(1) Trademark holders are not "registering..." This suggests a time-related process, ie, looking at the pattern of registrations over time, instead of looking at registrations at a specific time. However, you seem to be testing the latter. Moreover, testing "registering" is implicitly a joint hypothesis that it makes economic sense to register under all gTLDs and that trademark holders are doing it.

Suppose that Amazon had registered under com, org, and info. Also assume that Amazon, based on the signaling model above, decided to sell org and info, as they may be more valuable to a non-profit organization involved in the Amazon jungle. After the sale, if you use your test for ownership of Amazon-related TLDs by Amazon.com, you would incorrectly conclude that Amazon is not registering under org and info.

(2) I don't understand the second conclusion. I am reading as, "If there is a low incentive to register defensive domain names, there is no incentive to register the new TLD." Also I am not sure where the figure "7,000 or fewer names" comes from.

Misleading study...
Mike Rodenbaugh – Feb 06, 2009 8:25 AM PST

Although the hypothesis and conclusion may be true, both are misleading. Paul fails to account for a lot of key facts. 1) defensive registrations, even if not the primary revenue generator for a new TLD registry, are an important and dependable early infusion of cash, largely unjustified and based on fear of the high cost of UDRP or other legal proceedings; 2) every recent, broad new gTLD (eu, mobi, asia... .co.nl?) has had far more than 7000 sunrise registrations; 3) geoTLDs, of which we expect more than 20 new ones in the next round (.lat, .africa, .berlin, .nyc, .paris, etc. etc. etc.), are particularly suited to defensive registrations by global businesses; 4) there has been minimal justification for brandowners to go after squatters in TLDs other than .com, because there is far less direct navigation traffic, infringement and/or crime in other TLDs; 5) it costs a lot more than $2000 in legal fees to prepare a URDP, as one must include the prior monitoring and investigation costs leading to that step; 6) this fails to consider the costs of defensively registering in more expensive ccTLDs—brandowners collectively spend exponentially more than $1.5m per year on defensive registrations, all to the benefit of ICANN and its contracting parties. I'm sure there's more...

In my opinion, the issue of defensive registrations would virtually disappear if ICANN implements a post-registration mechanism to suspend clearly abusive domains, which is much faster than the UDRP and thus effectively limits the current financial incentives to cyersquat (and thus, to defensively register).

And a misleading comment
Eric Brunner-Williams – Feb 07, 2009 7:44 AM PST

Mike,

The .berlin proposal is a municipal or city proposal, not a geographic regional proposal. The same

is true for .paris, as proposed by Sébastien Bachollet, and for .nyc, as proposed by Tom Lowenhaupt. All have non-ignorable public administration policy participation (which you've blithefully ignored).

The .africa proposal also has significant public administration policy participation (which you've also blithefully ignored), and I expect that the .lat proposal isn't quite as sanguinary as you imagine.

Those corrections offered, the initial two year period of pre-validation for .cat, now post-validation, has resulted in very, very few instances of abusive registrations, so your concluding conjecture is defensible (pun intended), though you've misplaced the agency, which is in the registry policy, and differentiates registry value propositions.

For the general CircleID reader, I'm the CTO of CORE, which operates the .museum and .cat registries' back-end, and we've some involvement with every proposal Mike mentioned in the comment above, and our "First Mile" workshop at the Cairo ICANN meeting on sunrise and land rush and the rights of others (linguistic and cultural institutions, public administrations, private marks holders) is as public as we, and ICANN staff, can make it. We can't make Mike read or reason however, there are limits to our awesome powers to do good in the DNS.

For Paul, good work. I know where you wanted to go with this and while we are pursuing different policy models, good data helps everyone who makes policy from data rather than prior opinion. FWIW, I suspect you are correct for the no policy model.

Thanks Mike. Appreciate your comments and
Richard J Tindal – Feb 07, 2009 4:33 PM PST

Thanks Mike. Appreciate your comments and respect your knowledge in this area.
I think you and Paul are agreeing on the key argument in his report. That trademark holders do not broadly register their marks in all existing gTLDs. They're selective and the protective activity in new TLDs is low.

What we're trying to do is peel away the onion layers around the real cost of trademark protection in new TLDs. The first thing we refute is the claim that existing TM holders will have to protect many of their marks in most new TLDs. This claim is being made in various forums. For example CADNA state the additional cost to trademark holders at $1.5B - which would mean huge levels of protection across all new TLDs as well as enormous increases in UDRP activity.

Our view is that since trademark holders are not broadly protecting in the TLDs introduced since 2001 they're not likely to do so in the 2009 TLDs. The data show a relatively small number of marks are registered across new gTLDs by the same entity. Said another way, the vast majority of protection is occurring in .COM. We think this will continue with the 2009 TLDs.

A leading brand-protection registrar recently stated 71% of client protective activity occurs in .COM, a high 20's percent occurs in NET, ORG and the ccTLDs, and 'negligible' protection occurs in new gTLDs. We think this data-point supports our Report.

We understand protective registration is not the only cost. But the WIPO UDRP statistics seem to

support the argument also. 94% of gTLD UDRP activity since 2001 has been in COM/NET/ORG and only 6% in new TLDs (or just 160 cases per year in new TLDs). Regarding the "7,000" number, as Paul said, his conclusion of about 7,000 defensive registrations per generic TLD can be easily confirmed by looking at recent new TLD trademark sunrise such as .me and .tel, for anyone that has those zone files (we don't).

As for a 'fast track' UDRP mechanism that would suspend clearly abusive domains – we're all for it. Especially if the complainant has liability for false takedown. If a policy development process hasn't started on that it should. As soon as it's passed it can be applied to COM where most agree the overwhelming majority of abuse is occuring. As a consensus policy it would also apply to the new TLDs.

In summary
Alex Tajirian – Feb 12, 2009 9:21 AM PST

> The data show a relatively small number of marks are registered across new gTLDs by the same entity.

Let "A" represent broadly protected TLDs.

Thus, if not A, then B.

> Said another way, the vast majority of protection is occurring in .COM.

Let "C" represent that the vast majority of current protection is in .com.

Thus, if C, then B.

Thanks for sharing your opinion on the implication of current TLD protection figures on new TLDs.

Good study
Mickey Beyer-Clausen – Feb 11, 2009 1:10 PM PST

Thank you so much for providing us with some real numbers. That definitely puts the ongoing trademark discussion into perspective. I also enjoyed reading Bhavin Turakhia's response to your post. As one of the applicants for a new gTLD, I am glad that someone has the bandwidth to respond to the concerns of trademark owners and to the ongoing attempt by some to prevent the new gTLD process from moving forward as approved, planned, and publicized by ICANN. We are many future gTLD applicants without the financial muscle to voice our opinions.

When I was with Speednames years ago, we regularly commissioned trademark studies only to find that companies did not register their names across all the TLDs. So to me, your numbers are not surprising at all.

We all understand and respect why trademark owners are afraid of additional costs but – like you and Bhavin – I don't believe the new TLDs will increase trademark owners' domain name registration cost

by much.

On the other hand, the new gTLDs will be a major leap forward - something that will revitalize the Internet, facilitate innovation, and provide more relevant "real estate" for online businesses around the world. I am certain we will all look back on the 2009 round in 5 years and applaud ICANN for their bold vision.

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Mr. JOHNSON. Thank you, Mr. Stahura.
Mr. DelBianco?

TESTIMONY OF STEVE DELBIANCO, EXECUTIVE DIRECTOR, NETCHOICE, WASHINGTON, DC

Mr. DELBIANCO. Good morning.

We are grateful to the Chairman and the Ranking Member for asking the question today: Is ICANN in its drive for new top-level domains really sticking with its mission and is it truly being accountable to stakeholders?

So let me start the same way I did in my written testimony: by apologizing to this Committee for dragging you into this food fight happening in the ICANN community. If ICANN really were accountable to the global stakeholders, we would have worked this out in our own bottom-up consensus process. But we got sidetracked along the road to new top-level domains.

First, a little bit of context here. The hearing is about—it is really about labels. And I think all of you have seen one of these before. It is a label maker. You punch in a label, hit the button, and it spits out one of these tags.

And the thing about labels is, I can put them on anything. I can put them on my Web page. I can put them on this microphone, this table. I can put them on anything, and it helps me to identify it, show what it is. But it also tells others what it is. As Mark Twain once said, it is labels that let you tell the difference between German wine and vinegar.

Advocates for new domains say that new labels are absolutely necessary for innovation and growth. But hang on. Every day, our industry and my members create new Web sites, applications, and services, like Twitter for messaging or Bing, the new search engine, and labels are just one of the ways that people find these new services far more than use search engines or links. The label is not the creation; it is just something we stick on it.

Now, Paul's group wants ICANN to give him one of these, so that he can make his own labels. I can't fault Paul for that. Having your own label maker is like printing money, especially if brands and banks have to buy labels to stop cybersquatting and consumer fraud.

I think it is time for an example. We are in a food fight today, so let's talk about .food, .food, a new top-level domain that is being proposed; .food won't create a single new restaurant. It won't create a new Web page. It won't create new restaurant reviews or online reservation sites for restaurants. They have already got those. All .food will be is another label that has to be purchased and stuck on to pages we already have on the Internet.

I am not saying that labels aren't important. They are important. It is just that more labels alone will not drive innovation and growth.

But new labels are hugely important to a segment of the population who don't have any labels at all. ICANN's label makers, the ones we have today, they print only in our Latin alphabet. ICANN doesn't have a label maker for over 56 percent of the people on this planet who don't use our alphabet at all for reading and writing. And that includes speakers of Arabic, Chinese, and a dozen languages in India alone.

ICANN has been working on a label maker that will do these international characters for several years, but China actually got

tired of waiting and just built their own a few years ago. Now, it shows that governments can and will splinter the Internet if ICANN doesn't deliver what they need, and that is not good.

Since all of us at this table have been working so hard to make sure we have a single global addressing system so that you can publish or read a Web page or send and receive e-mail no matter where you are on the planet, we have to bring China back to the fold and stop other nations from following their example.

ICANN was closing in on a label maker for these international characters, but then they opened things up for all kinds of new labels, even in our alphabet. That is what is created the land rush and the food fight that you are watching today.

So a good outcome of today's hearing would be having ICANN refocus its attention and efforts on these international labels and not just government-controlled labels, right? People in China and India want to have access to their own language versions of things like .com and .org and .asia.

Finally, today's hearing, I think, shows that ICANN needs better accountability to global users and to those who create the compelling content and services. It shouldn't take a congressional hearing to get ICANN to focus on fraud and abuse, but the U.S. government has given ICANN guidance like this in the past during our 10-year transition agreement.

For instance, a December 2008 letter from Commerce and Justice is really what prompted the creation of the IRT. The thing is, though, our transition agreement expires next Wednesday. We need a new accountability mechanism, something that will work better for all of us.

It is football season, so here is a football analogy. The coach's challenge and official review really works well. It lets you fix a bad call right there on the field when it happens, instead of waiting until after the game when it won't make a difference.

Well, Internet stakeholders need a coach's challenge, too. We need a way to get an official review of an ICANN decision when it happens, and there are tough questions about this review, like how to call for a review, who gets the coach's challenge flag, who are the review officials, and would the review be binding or advisory on ICANN? And I know some governments really want to shrink the U.S. government role with respect to guiding ICANN.

But here is why I think the rest of the world will welcome a continued defined role in—if the U.S. takes part of these reviews. First, the U.S. position on free expression and protection of human rights helps ICANN to push any censorship to the edge of the Internet and not in the core.

And, second, today's hearing I think shows that we are being sensitive and attentive to the number-one priority for a global Internet. The fact is a billion of us are online today, but there are 7 billion people on Earth. ICANN needs to empower the next billion users before trying to build more label makers for those of us that are already online.

So I will conclude just by saying that there is a lot that is right about ICANN. It is clearly the right model, and it is the way forward, but there is something missing. If I had to put a label on it, I would say it was accountability.

Thank you. I look forward to your questions.
[The prepared statement of Mr. DelBianco follows:]

PREPARED STATEMENT OF STEVE DELBIANCO

Statement of

Steve DelBianco

Executive Director

NetChoice

Testimony before the

House Judiciary Committee

Subcommittee on Courts and Competition Policy

Expansion of Top Level Domains and its Effects on Competition

September 23, 2009

Chairman Johnson, Ranking Member Coble, and distinguished members of the Subcommittee: My name is Steve DelBianco, and I would like to thank you for holding this important hearing on whether ICANN, in its drive to expand top-level domains, is staying true to its mission and accountable to its stakeholders.

I serve as Executive Director of NetChoice, a coalition of trade associations and e-commerce leaders such as AOL, eBay, Expedia, IAC, VeriSign, and Yahoo, plus more than ten thousand small online businesses. At the state and federal level and in international venues, NetChoice advocates for the integrity and availability of e-commerce.

It's a NetChoice priority to improve consumer trust and confidence in the Internet, so we vigorously support efforts to fight abusive registrations, phishing fraud, and malware attacks. Our concerns go beyond the costs of defensive registrations and shutting-down cybersquatters. Phishing attacks claimed a 40% increase in victims last year, and malware attacks now average 7,500 per day[1]. If these threats continue unabated, trust and confidence in the Internet will fade.

While we are grateful for your attention to this issue, we regret that Congress has been drawn into this contentious debate. If ICANN were properly accountable to users and other stakeholders, we would have been able to address our concerns and resolve our differences. As it happened, however, we need Congress and the Commerce Department to focus ICANN on its core mission and hold it accountable to stakeholders.

Why has the U.S. Congress had to address ICANN's top-level domain expansion?

Over the last twelve months, many businesses and consumer advocates have asked the Commerce Department and Congress to encourage ICANN to address consumer harm in the expansion of top-level domains (TLDs). Prior to your hearing today, two Senators and several House members—including Committee members Coble and Smith—have written to the Commerce Department and ICANN about these concerns.

But why has it been necessary for Congress to remind ICANN of its core mission to maintain the security and stability of Internet addressing? To understand how it's come to this,

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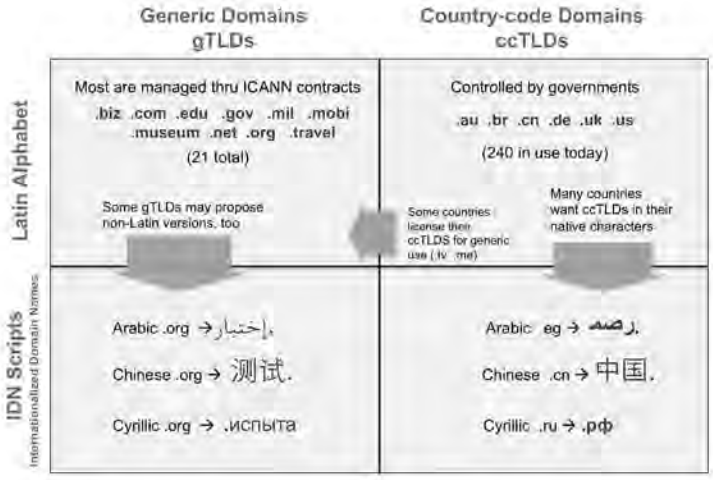
[1] MarkMonitor Brandjacking Index, http://www.markmonitor.com/download/bji/BrandjackingIndex-Review2008.pdf

one has only to look at how ICANN's priorities for new top-level domains became sidetracked over the last two years.

Before 2008, ICANN reflected the broader community's priority for enabling domain names and email addresses in the native characters used by most of the world's population. While our Latin alphabet is the most widely used script on the planet, over 56% of the world's population reads and writes in scripts other than Latin[2]. That means most of the world cannot read or write website or email addresses in their native scripts. This situation is intolerable for the governments serving those people, and will lead to a 'splintering' of the Internet if ICANN fails to meet the need soon.

The chart below helps to visualize the top-level domain space at issue in this hearing.

Top-level Domain Space



The top half of this chart refers to 260+ Latin-script domains that make up the entire Domain Name System (DNS) today. The bottom half of the chart shows some examples of

[2] John Paolillo, "Language Diversity on the Internet," pp. 43-89, in John Paolillo, Daniel Pimienta, Daniel Prado, et al., *Measuring Linguistic Diversity on the Internet*, UNESCO Publications for the World Summit on the Information Society 2005. See http://www.uis.unesco.org/template/pdf/cscl/MeasuringLinguisticDiversity_En.pdf

generic and country-code domains that would use non-Latin scripts once ICANN makes them available. For a decade, educational, civic, and consumer interests have been clamoring for these Internationalized Domain Names (IDNs) in order to bring information and communications to more of the world's potential Internet users. Businesses, too, are interested in reaching billions of potential new customers.

Apart from these opportunities, however, there is an urgent need for IDNs to avoid splintering of the single, global Internet. Today, Internet users in China are using their own DNS workarounds to enable all-Chinese addresses, even though they can't be used outside of China. The splintering of the Internet is a real threat and deserves ICANN's full attention.

While aware of the needs for IDNs, ICANN nonetheless decided to focus resources on expanding the number of domains in Latin scripts that are already served. We look forward to ICANN's explanation for this change in priority in today's hearing, but we expect to hear that competition is the reason the Internet needs more Latin domains. ICANN's web page for domain expansion states it this way: "*In a world with over 1.6 billion Internet users – and growing – diversity, choice and competition are key to the continued success and reach of the global network*[3]." Below we question ICANN's rationale and suggest that ICANN should focus on enabling the next billion Internet users before adding domains for users who are already online.

Will more Latin top-level domains create competition?

In 1997, President Clinton" directed the Secretary of Commerce to privatize the Domain Name System (DNS) in a way that increases competition and facilitates international participation in its management".[4] The result was the "White Paper", which established the basis to create ICANN and transition control of the DNS. The term "competition" appears 23 times in the *White Paper*, mainly referring to the "absence of competition in domain name registration". The Clinton Administration wanted competition among registrars, companies who sell domains to the public with a retail markup and other services. The *White Paper* also worried that competition among registries wouldn't constrain wholesale prices, because switching costs for established domain owners are relatively high.

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[3] ICANN Website, at http://www.icann.org/en/topics/new-gtld-program.htm

[4] The White Paper, at http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm

Thanks to ICANN's work over the last decade, there are now several hundred registrars competing to distribute domain names, driving retail markups down to just $5. ICANN also implemented registry contracts that limit wholesale prices for major domains. As a result, the annual cost of a .com name has fallen from $75 to under $12. Judging by competitors and prices in domain distribution, the competition mission assigned by the *White Paper* has been largely accomplished.

The *White Paper* also assigned ICANN the mission of creating more choices for those who want to register a domain name. With almost 200 million registered domains today, it's hard to see how choice is constrained in any meaningful way, especially when domain owners have practically unlimited choice about the content and applications they deploy.

Still, many registrants complain that their preferred domain name is already taken in the popular .com TLD, so ICANN is planning to offer more choices. It's true that .com holds the advantage of being the first and largest TLD, so uncertain users will often guess by appending .com when looking for a commercial domain name. In its Dec-2008 comments on ICANN's draft TLD guidebook, the U.S. Justice Department said this advantage of .com won't be diminished by new top-level domains[5]. But we believe the expansion of TLDs will drive users to use search instead of guessing at domain names. For example:

> *Members and staff of this committee may be familiar with Bullfeathers, a popular Capitol Hill restaurant. If you wanted to check their website about Bullfeathers' ability to host an event, you could take a guess with a domain name like www.bullfeathers.com.*
>
> *But you'd see right away that bullfeathers.com is definitely <u>not</u> the restaurant (it's a mobile communications installer on the Eastern Shore).*
>
> *Would you take another guess, say Bullfeathers.biz? After ICANN's TLD expansion, you might also guess at Bullfeathers.food, .diners, or .bars*
>
> *More likely, you'd just do a quick search on bullfeathers, and click on the link you're looking for (it's BullfeathersCapitolHill.com).*

ICANN's planned expansion of top-level domains would make it even less efficient to guess at domains. As the goliath in search, *Google* will be the big winner form an expansion of TLDs, along with the companies earning fees for defensive registrations. Likely losers in the planned TLD expansion would be website owners who would buy defensive registrations to reduce the risks and costs to fight cybersquatting and attempts to defraud their customers. These concerns have not yet been adequately addressed by ICANN, as explained in the next section.

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[5] NTIA and Department of Justice letters on Draft Applicant guidebook, Dec-2008, at http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf

ICANN has not yet addressed the risks and costs of this major expansion in top level domains

In late 2008, ICANN solicited public comments on its draft guidebook for new domain applications. The US government raised concerns shared by many NetChoice members and ICANN stakeholders by stating, *"[I]t is unclear that the threshold question of whether the potential consumer benefits outweigh the potential costs has been adequately addressed and determined."*[6]

The Commerce Department's letter called on ICANN to complete a promised economic study, and listed several unresolved concerns, including:

- Ensure that the introduction of a potentially large number of new top level domains will not jeopardize the security and stability of the DNS
- Demonstrate that ICANN has sufficient capacity to enforce contract compliance with an unknown number of new contracts
- Describe how ICANN will conduct legal reviews of applications and respect relevant national and international law, including property rights

For all these reasons, ICANN should slow-down its drive to expand Latin top-level domains and focus on enabling users who have no choices today – those who don't use our Latin alphabet.

ICANN should enable Internationalized domains <u>before</u> expanding Latin domains

As noted earlier, the need for non-Latin (IDN) domains has become critical in order to serve people using scripts like Chinese, Arabic, Japanese, etc. ICANN, however, decided to implement non-Latin domains as part of its broader expansion plan for Latin domains. When the larger expansion plan began to bog-down over objections and rights protection, it looked as if non-Latin domains would be delayed, too.

In reaction to governments' concerns about this delay, ICANN created a 'fast track' for non-Latin domains – *but only for country-code domains that are controlled by governments.* Global domains (such as .com, .org, .edu) are left on the slow track when it comes to serving the half of the world's population that doesn't use our alphabet. Websites seeking to reach non-Latin users must use a country-code domain, where governments can enforce restrictions on content and free expression.

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[6] NTIA letter on Draft Applicant guidebook, Dec-2008, at http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf

For example, an Arabic user seeking to enter google.com in all-Arabic could only choose from among Arabic versions of Google's domain that were allowed by governments who control Arabic country-code domains (google.sy in Syria; google.eg in Egypt; etc.) It would undoubtedly be more convenient and empowering for this Arabic user to have access to the real google.com domain address -- entirely in Arabic.

If the IDN fast track is reserved only for governments, the web's best content and applications would be much harder for non-Latin users to reach, undermining ICANN's accountability to registrants and the broader community of internet users.

ICANN is not adequately accountable to domain owners and Internet users

In its April-2009 letter to ICANN, the Coalition for Online Trademark Protection described how ICANN's business model is being transformed by the planned domain expansion:

> *In effect, ICANN has transformed itself from a cost-based revenue model to one where its revenue will grow with every domain registration and renewal. In this new model, ICANN has an inherent financial incentive to encourage new registrations. Moreover, ICANN continues to grow its revenue by generating demand for registrations whose only real purpose is to prevent cybersquatting and consumer fraud.*[7]

It may be too cynical to say that more revenue is behind ICANN's drive for new Latin TLDs. More likely, ICANN is just reacting to the vocal demands of entrepreneurs seeking to operate new domains, supported by registries and registrars who want to host and sell these new domains to the public.

These are the voices of legitimate stakeholders in the ICANN governance model, but their demands should be balanced against the concerns of consumers, businesses, governments, and others who question ICANN's readiness and priorities. Early in the process of developing policies for new domains, these concerns were out-voted by others on ICANN's policy council. Consequently, ICANN's first Draft Guidebook for new domain applicants lacked even minimum requirements to reduce abusive registrations and other activities that affect the legal rights of others. Even the second draft of ICANN's Guidebook gave applicants a passing grade for merely describing their intended mechanisms, even if they were likely to have little effect in preventing abusive registrations.

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[7] Coalition for Online Trademark Protection, 13-Apr-2009, http://www.nam.org/~/media/PolicyIssueInformation/TaxTechnologyDomesticEconomicPolicy/NAMCoalitionICANN.aspx

For the upcoming third draft of the Guidebook, ICANN is finally responding to pressure from the US and other governments to require minimum rights protection measures. However, it's inherent in the ICANN consensus model that these minimum measures will be less than consumers and brands want, and more than aspiring registries are willing to offer. Unless it is held accountable for improving security and stability, ICANN's consensus approach will tend to settle for minimal mechanisms that satisfy no one.

In comments on ICANN's Guidebook drafts, NetChoice suggested raising the bar and fostering competition among applicants to minimize abusive registrations.[8] We recommended that ICANN design a process where applicants compete to propose ever more effective rights protection mechanisms. For instance, members of three stakeholder groups have discussed significant protections that current TLD operators might offer in their proposals to operate IDN versions of these TLDs. Under one proposal, a domain owner wouldn't have to defensively register their current domains in any IDN version of that TLD operated by the same registry. So the owner of NetChoice.org would be the only person allowed to register NetChoice in non-Latin versions of .org.

A proposal like this could improve rights protection and minimize user confusion in IDN versions of existing domains. Further measures could be proposed by applicants seeking to win a TLD contract, especially when competing with other applicants for the same or similar string. As part of its mission to promote competition, ICANN should encourage new domain applicants to compete on minimizing abusive registrations.

ICANN has not embraced raising minimum protections or fostering competition in this way, but hearings such as this could help to hold ICANN accountable to domain owners and consumers. Indeed, ICANN performed economic studies and began looking at rights protection measures only after Commerce and Justice Departments and Congress weighed-in. Undoubtedly, this leverage is due to the presence of the Joint Project Agreement (JPA) between the US and ICANN. The JPA adds weight to a hearing like this, but we'll lose that weight at the end of September when the JPA expires.

To conclude our testimony, we suggest that ICANN will need a new accountability mechanism once the JPA expires, one that will hold it accountable to the broader interests of all Internet users.

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[8] NetChoice comments on Draft Applicant Guidebook, http://forum.icann.org/lists/gtld-evaluation/msg00017.html

ICANN needs a new accountability mechanism for the post-transition world

The JPA was about *transition* from USG to an international organization led by, and accountable to, the private sector[9]. In its preamble, the JPA states its purpose as, "*joint development of the mechanisms, methods, and procedures necessary to effect the transition of the Internet domain name and addressing system (DNS) to the private sector.*"

That transition has indeed occurred over the last decade: ICANN is now managing the DNS. But ICANN is not quite there when it comes to being accountable for its mission. We still need a mechanism for accountability, especially where the private sector is concerned.

In our June-2009 comments to the Commerce Department regarding JPA expiration, NetChoice suggested extending the JPA to protect ICANN from capture by the United Nations and other intergovernmental organizations, and to give ICANN time to implement better accountability mechanisms[10]. We realize that extending a transition agreement would only defer the difficult task of developing accountability, so it would be far better to adopt a permanent mechanism before the JPA is set to expire.

Forcing concerned stakeholders to seek Congressional intervention is neither a practical nor preferred method of holding ICANN accountable. Nor is it practical to pursue multi-year legal proceedings costing millions of dollars, such as the challenge of ICANN's decision on the xxx domain, the subject of arbitration meetings in Washington this week.

Instead, ICANN and its stakeholders need a reliable and workable accountability mechanism for the Post-transition world. It's football season, so here's a football analogy: the coaches' challenge and official review process has helped to correct bad calls *when they happen*, not after the game, when it's too late to make a difference. Nor do Internet stakeholders want to wait until after the game to challenge a policy that's already been issued. We need a mechanism like a football coaches' challenge, to get an official review of policy development as it happens. We might never have needed this hearing if stakeholders could have thrown-down a 'coaches challenge' at the point where ICANN decided its expansion plans would no longer give priority to non-Latin script communities.

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[9] Joint Project Agreement Between the U.S. Commerce Department and ICANN, 29-Dec-2006, at http://www.icann.org/en/general/JPA-29sep06.pdf

[10] NetChoice comments in response to NTIA NOI, Jun-2009, at http://www.ntia.doc.gov/comments/2009/dnstransition/063.pdf

To be sure, there are controversial aspects to creating a new accountability mechanism. For instance, how to call for a review, and how to select referees that perform the review? Are the review rulings binding on ICANN or advisory? And while some governments and the United Nations want the U.S. to relinquish its role, others appreciate the light-touch that Commerce Department oversight has provided for ICANN.

We believe that a continued and well-defined role for the Commerce Department will help to hold ICANN accountable to the private sector and public interests declared in the original *White Paper*. The U.S. Commerce Department is unrivaled in its support for worldwide businesses who spent a trillion dollars to bring the Internet to its first billion users. Moreover, U.S. leadership in promoting free expression and human rights is essential to push censorship to the edge of the net – not in core functions like the DNS.

Other governments and institutions should certainly join the Commerce Department to operate a new accountability mechanism. And all governments will continue to enforce their laws within the online medium. But the *White Paper's* founding principle for ICANN must be preserved: ICANN must be led by, and accountable to the private sector interests who will bring connectivity, content, and commerce to the next billion Internet users.

Mr. JOHNSON. Thank you, Mr. DelBianco. I always love it when demonstrative evidence is brought in. [Laughter.]

I will now commence with the questions for 5 minutes. What is ICANN's position on the trademark protection proposals in the IRT

report? And can we expect to see these proposals fully adopted by ICANN?

Mr. Brent?

Mr. BRENT. Thank you very much, Mr. Chairman.

As I mentioned earlier, I actually participated along with its IRT, another acronym, implementation recommendation team. The goal of that team was to come up with intellectual property protections that made sense in the intellectual property community for consideration inclusion in this new GTLD process.

Part of that process has been the issuing of a number of what we call guidebooks. A guidebook is the big application with all the rules that someone would need to participate in, and that would actually talk about what these intellectual property protections are.

There has been two issues of that guidebook, and a third is expected in the first week of October. That new guidebook will include at least two of these recommendations that have come up through this implementation recommendation team process.

The first of those is what is called thick WHOIS. What does that mean? That each new registry would have to provide a central repository for WHOIS and make that publicly available on a 24-by-7 basis.

The second one is, is what is called a post-resolution dispute mechanism. There is definitely concern by the intellectual property community that, with the creation of a new registry, that registry might engage in mal behavior. If it did, how would—you know, what would be the basis on which we would try to address that bad behavior? And that is called this post-resolution dispute mechanism.

There are other recommendations that have come up through this IRT that are still under consideration. Some important ones of those are what—URS, which is a faster and cheaper way to address arbitration of disputes related to second-level domain names. And another one is an intellectual property clearinghouse. Those are still under consideration at this time.

Mr. JOHNSON. Thank you.

This question is for each panelist. I would like for you to respond. Two reports, one by OECD and the other by Summit Strategies International, examine the first round of domain name expansion. Those reports indicate that consumer demand for the new GTLDs were well below expectations and that a significant portion of the demand experienced was likely defensive registration.

What are your thoughts on these reports, starting with Mr. Brent?

Mr. BRENT. Thank you again, Mr. Chairman.

You know, with all due respect to Mr. DelBianco, I would describe these new TLDs differently. I don't think they are a label maker. And we caught up in these technical terms, so let me just quickly review.

We talk about top-level domains and second-level domains. That is an entirely technically accurate way to describe how DNS works. But the way to really think about this is a top-level domain is a business. A second-level domain is a customer of that business.

So what do I mean? ICANN has registered the name icann.org to represent our organization; .org is company, public Internet reg-

istry, that runs about 10 million domain names at roughly $10 apiece, so you can see that there is real revenue associated with that. ICANN is a customer of that domain name.

So the notion is that new TLDs are not about just new labels, new names. Obviously, brands are important. That is why we have these intellectual property concerns. But the notion of new TLDs is a lot more about new potential service models, new businesses coming up in use of the Internet.

So in answer to your question, I think a lot of the early generic TLDs that were issued in the 2000 and 2003 rounds thought that their primary competition was, how do I become another .com? Probably what is of more value to consumers now and, you know, what I think most businesspeople would think of in a business plan is, how can I add value to end users, not how do I go compete with .com?

So I think, in these early rounds, there was a lot of notion of land grab. "I am going to, you know, have 80 million registrations and compete with .com." I think where we are today is, people are really realizing the opportunity for innovation. The financial industry, for example, is really looking at this in terms of innovation for secure, trusted financial domains.

So I think that is really the difference between the old model of, "I have just got to get a lot of numbers," versus this new model of creating real value added for end users.

Mr. JOHNSON. Thank you, Mr. Brent.

Mr. Heath?

Mr. HEATH. Thank you, Mr. Chairman.

I think those reports provide some useful pointers. It is important to note that they were done, some of them, actually in the last decade.

Mr. JOHNSON. They were done when, now?

Mr. HEATH. In the last decade. They are quite old. And I think they provide some useful pointers, but they were done at the time when the .com bubble was taking place in—at the turn of the century. And times have changed. The economic impacts have moved on completely from those days.

And I think, if we were to do them again now, particularly through an independent body like the OECD, you may find different findings, but I think they do provide some useful pointers. But the overall assumption that it increases competition I think is just not there, because, in my view, it decreases competition, because if we have to fund an awful lot more defense, a lot more legal actions, and all this registration process, that money is diverted from true innovation and R&D and creativity, and it diverts resources from other areas that could benefit the community, such as corporate social responsibility and all the good stuff that companies do around the world, because there is no value added in having an unlimited number of domain names.

And I think I would also say that if you were a company—let's take as an example like IBM. I wonder what the value is—the value difference is between ibm.com and .ibm. Now, I would wager there is no difference between those, but you would need a body like OECD or an independent analysis to determine that. And, frankly, that has not been done.

So I think both studies are useful. They provide some useful pointers. They need to be updated and we could usefully use them again. And I think it would be worthwhile revisiting it now, and that is in my testimony.

Mr. STAHURA. I think there is a big difference between ibm.com and .ibm. I think .ibm is way more valuable than ibm.com to IBM.

But to answer your questions, why were the registrations below expectations? I could tell you why. It was because, in that round, it was a beauty contest round. In order to get to TLD, you had to talk big. You had to say, "I am going to get, you know, many, many registrations." You know, I applied for a name in that round. I said I was going to get X registrations. I lost to somebody who was going to get Y, a much bigger number.

So in order to get to TLD, you had to say, "I am going to register a lot of names." So it is no surprise to me that, when you actually got the TLD, that the number of names registered in it is a lot less than what you had expected. So that is why it was below expectations.

And regarding the too much defensive registrations, first off, many millions of names were registered in those new TLDs. We did a study comparing those new TLDs to the old TLDs, like .com and .net, that you might have heard of, and that study said that the number of defensive registrations in .com was way, way more than the number of defensive registrations in the old set of new TLDs. So that is one reason why I think the number of registrations is low compared to .com and .net.

Also, back then, nobody knew that there was going to be more TLDs. It turned out, there wasn't more TLDs. So people rushed into those new TLDs back then, thinking, "You know, not sure that there is going to be a new one, so I would better defensively register everything I can think of." So that whole land rush mentality was another reason why the number of defensive registrations was high, even though it was low compared to .com.

So that is the reasons.

Mr. DELBIANCO. Thank you, Mr. Chairman.

I think we have to remember that Web sites and applications are what drive visitors and customers. It isn't the label. It is great if you can get a label that is easy for people to remember, because they might just type it in if they saw it on the side of a truck or on a billboard or heard about it, but it is not essential to have that business be successful.

I will give you an example. Right on the Hill here, we have a restaurant we all like to patronize, Bullfeathers, right? And if you wanted to find out whether they had a catering facility for tonight, we might jump on the Internet and type in "Bullfeathers." What would you put at the end? You would put .com. You would just sort of assume it is commercial and everybody remembers com.

So you would type in bullfeathers.com. Well, right away you would see that that is not the restaurant. It is a telecom and car stereo installer on the eastern shore of Delaware. So they don't compete at all, but it is different.

What would you do next? Would you guess at bullfeathers.biz or .us or, after Paul and ICANN launch thousands of new—hundreds of new domains, maybe you will guess bullfeathers.food,

bullfeathers.diner, bullfeathers.bars. I mean, sooner or later, you are going to stop guessing and do what? Use a search engine.

And that is why I think the studies we are speaking about today in your question are hopelessly out of date. As we have a lot of domains today, and we are going to add many more, people will just use search engines, because they give you a reliable, context-based, page-ranked look at the sites you want to visit.

And if we were going to do a study, Mr. Chairman, today, I would just look at what happened last week, right? We had a new TLD effectively launched when a country code, .cm for Cameroon, decided to open up their country code top-level domain for anyone to register. Well, they are breaking records. They are breaking records as people go to register names that end in .cm.

And why is that? Well, because a lot of people, when they type in, guess what? They make a mistake. They leave out the O in "com." And where does it take them? It takes them to Cameroon or .cm.

This is about typographical errors that are driving demand for people to get into that area. So naturally, defensive registration are ringing the cash register for the companies running .cm. Maybe we don't need another study. Just take a look at what is happening there today.

Mr. JOHNSON. Mr. Stahura, you wanted to respond to——

Mr. STAHURA. I mean, it is dot—Cameroon, a country. They can do what they want with their TLD, I believe. But there are provisions in the current version of the draft applicant guidebook that would prevent confusing, with another TLD that is confusingly similar to an existing TLD, like .com.

So, for example, even if I wanted to, I could not get .com or, you know, .kom, for example. So the new—we are not talking about this new round of TLDs producing domain names like .cm that Mr. DelBianco was just talking about.

Mr. JOHNSON. Thank you. I will now turn it over to the Ranking Member for questions.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. DelBianco, it may be a food fight, but at least it is a nonviolent, orderly food fight, and I commend you all for your civility to that end.

Mr. Brent, let me ask you, why was the comprehensive economic study recommended by the ICANN board in 2006 never been conducted?

Mr. BRENT. Thank you.

There are clearly important economic issues associated with new GTLDs. But just to be clear, this 2006 study that has been referenced many times—and I re-read the board resolution last night before I testified in front of the Committee—that 2006 resolution was not related to threshold questions of new GTLDs.

There was an economic study requested at that time that related to contractual issues with three top-level domains. I would be happy to provide that resolution to the Committee here.

But putting that aside for a second, that doesn't—there still are these open questions about, well, you know, what are the economic characteristics of new generic top-level domains? ICANN has actually, in the last 18 months, run three different economic studies.

There are some important issues there that, you know, may come up today, for example, registry-registrar separation or integration, sort of the vertical structuring of the industry, price caps in new generic top-level domains or not, on registration or on renewal.

So there are many of these important issues. ICANN has actually—because of the strong community interest in this area of economic analysis, we are going to take a further step, which is to bring on a new set of economists, different people entirely, have them review all the work done to date, put that work in the context of the questions that have been asked by various members of our community, and then assess have we answered the question at that time.

Mr. COBLE. Okay.

Mr. BRENT. I will say that—just to very quickly add on—I will say there is some concern, which I am sure you can understand—I know there are entrepreneurs on this panel, and my background was in venture-backed companies. And it is always difficult, at what point would you stop analyzing, do you stop studying?

We have done three. I think we are going to review that work in the context of the questions that have been asked and then say, is that enough? Have we addressed that question?

Mr. COBLE. Thank you, Mr. Brent.

Mr. Heath, is it your belief that ICANN did a sufficient job in seeking the views of trademark owners and consumers prior to the announcement of the proposed creation of an unlimited number of GTLDs?

Mr. HEATH. In a short word, no, I don't think they did, because I think they should have acted prospectively, rather than retrospectively, which would be a much more sensible way of doing it. And I think there is still a lot of work to be done, and we acknowledged what Mr. Brent said, that that work is still ongoing.

The work—has been very useful and very valuable, but it is safe to say that those recommendations are untested. It is not an exhaustive list, either. And it was pulled together in a very, very short and, frankly, unrealistic timeframe of just 8 weeks.

If we had had more time and we were consulted at the appropriate moment, we could have come up with some more substantial recommendations. They are good ones. They may work; they may not. We don't know. But we need to do more, and we need to have done it earlier, so I think they could have done more.

Mr. COBLE. All right. Thank you, sir.

Mr. DelBianco, although much of the testimony this morning has been about the protection of trademarks and other intellectual property, ICANN identified three other issues: potential for malicious conduct; security and stability of the Internet and top-level domain demand; and, finally, economic analysis.

In your opinion, to what extent do you feel that these other issues have been adequately addressed?

Mr. DELBIANCO. Thank you, Ranking Member Coble.

The adequately addressed is not sufficient to simply say, as Doug Brent has, that those are "under consideration." What will matter is seeing it—these requirements start to show up in the draft applicant guidebook, to where the minimum requirements that people that bid on these new top-level domains are more than just simply

disclosing what they are going to do, but meeting minimum standards of rights protection.

And as you go down that list of trademark protection, consumer protection, those are intertwined. The only reason these companies bother to protect brands and cybersquatting is to stop their customers from getting defrauded by visiting sites that are fraudulent, trying to steal their I.D. number for a bank site or an ISP or counterfeit goods.

This is about helping people avoid fraud. It isn't protecting rich American companies who are sacredly guarding their trademarks. So those are tightly intertwined.

And earlier, you asked a question about Mr. Brent, about why haven't studies been done? But I would remind you that the rest of the world is incredulous that we think we need to study whether they need the ability to type their domain names and e-mail addresses in their own language and alphabet.

Now, they need that now, and we ought to be focusing on that. Interesting that that didn't show up in that list of priorities, because ICANN has sort of smushed that in with the launching of all these new domains, like .web. We ought to be focusing on the rest of the world, because as the steward of the Internet, of a global Internet, that has been our mission.

Mr. COBLE. Thank you. Let me get to Mr. Stahura.

Mr. Stahura, we have heard about proposals to address the concerns of trademark owners regarding the introduction of an unlimited number of new GTLDs. What role would a registry or registrar play in implementing these proposals or others that may be suggested, Mr. Stahura?

Mr. STAHURA. Speaking about the unlimited number idea, there has been a lot of ideas to limit not just the number, but other things. For example, the IDN idea that Mr. DelBianco was just saying, IDN meaning international domain names, let's—you know, it is pretty much indisputable that, yes, we should have new top-level domain names in Chinese, in Arabic, and so on.

The question is, should we limit the rest of us so that we can't get our .blog. For example, in English and let the Chinese get .blog in Chinese first? It is back to competition. I think that they should—we should all go at the same time. They should be able to get .blog in Chinese or Arabic, and we should be able to get .blog in English. So that is one way of limiting it, letting them go first. Okay?

Another way is, limit the number. You know, we don't limit the number of patents each year. It is an unlimited number. We could have a number—unlimited number of patents next year. We don't, but we could. But it is—every year, it is pretty much the same number of patents. We don't limit it.

Another way to limit it is restricting the type of TLDs. For example, let's just have a TLD for the Lakota Indian tribe. And, yes, that is another way of limiting it, and maybe they will apply, this tribe will apply for .lakota. But that TLD—so one idea is to just limit it to restrict TLDs and not have any open TLDs, like .blog, for everyone else.

The problem with that limitation is that .lakota is only useful and restricted—it is only restricted to that Lakota people. So it is

another not good thing. Restricting TLDs makes it so that there is not as much benefit for everybody.

Mr. COBLE. Thank you.

My time is expired, Mr. Chairman. I yield back.

Mr. JOHNSON. Thank you, Mr. Ranking Member.

Next, we will hear from the esteemed representative from Virginia, Mr. Rick Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. I appreciate your having today's hearing relating to the management of the domain name system.

And I have a number of questions of our witnesses about how some of the proposals that ICANN has made could affect competition and could either benefit or adversely affect consumers. And let me start with the settlement agreement that was entered into between ICANN and VeriSign in 2006.

Excuse me. I have a terrible cold. I hope you can hear what I am saying.

In that agreement, which was subsequently approved by the Department of Commerce, VeriSign, for all practical purposes, was granted what amounts to a perpetual monopoly in its management of the .com registry. And, obviously, any time you have a monopoly in operation, there is the potential for adverse affects on consumers.

Now, we have had that agreement in place now for about 2 years. Maybe it is too early to cast any judgments about its effect in the marketplace, but I would like to give our witnesses today an opportunity to comment on the fact that, under the terms of this agreement, we will not have what amounts to a re-competition for management of the .com registry, because that troubled you.

Have you seen any problems so far? And do you have any suggestions for us as to how we might address whatever concern you have?

Mr. DelBianco, your hand was up first.

Mr. DELBIANCO. Thank you, Congressman Boucher.

You made the statement that VeriSign has some sort of permanent lock, but I want to make it clear, ICANN owns the label maker for .com. ICANN owns it. ICANN has a contract where currently VeriSign is the one running and investing in cranking out the labels——

Mr. BOUCHER. But under the terms of the settlement agreement that the Department of Commerce approved, there is the potential for what amounts to a perpetual re-award of that without competitive bidding.

Mr. DELBIANCO. There is the potential for renewal of a contract because ICANN's standard contract, the same contract it does for all the folks that run the label makers, so that if they perform their duties well and don't have any material breaches of their duties, they are entitled to a renewal of that contract without necessarily having to re-bid it.

Now, a lot of that has to do with the fact that they make massive investments, especially with the hundreds of millions of names that are in a registry like——

Mr. BOUCHER. Well, I gather you are defending the terms of the agreement. That is fine.

Mr. DELBIANCO. I am defending——

Mr. BOUCHER. But let me just say that many observers have questioned the fact that determining whether or not VeriSign is performing properly and doing a good job and meeting quality standards can be very subjective. And the best way, in the minds of many, to address matters like that is to have a re-competition with periodic recurrence. And that is not assured in this.

Let me ask other members of the panel if they have any views. Yes, sir?

Mr. STAHURA. Obviously, you know, I am in business to make money. I would love to re-compete and, try to win the .com contract. And I am sure if all my competitors were sitting here, they would all be saying the same thing in unison. Of course, we would love to run .com.

That contract is not going to come up for a while. I would also like to compete with them and get .web or .family. That is another way to compete and provide these benefits to the public.

Mr. BOUCHER. All right, so you are not—you are not expressing direct objection to that agreement.

Mr. Brent, do you want to be recognized? Nope? You have nothing say?

All right. Mr. Heath, anything?

Mr. HEATH. I don't have too much to comment on. I would simply say that surely this boils down to accountability and normal business rules. If the relationship you have in your contract is working and you have performance indicators on that contract and they meet those, then you want to renew it, and—that is fine. If you don't meet them and it doesn't work or there is a problem with it, then you terminate the contract and you go and look at somebody else.

Mr. BOUCHER. So it may come down to just how adequate these performance standards really are? As they are stated, do you think they are adequate? You don't really—I am seeing people nod. All right.

One further question, Mr. Chairman. I see my time is about to expire. One of the proposals that ICANN has put forward would allow the registries, such as VeriSign, that manage the top-level domains to begin to sell domain names directly to end users, in effect, going around the registrars, like GoDaddy, that carry that responsibility today.

And under the current structure, that is not permitted. Effectively, VeriSign and other TLD administrators have to wholesale to the registrars, who then in turn sell to the end user. And that structure does encourage competition, because you have a variety of registrars competing with each other.

It has been suggested that the managers of the top-level domain names might have information about end users that would enable them to obtain a marketing advantage, if they were given an opportunity to compete with the registrars in selling these domains directly to the end user. Does anyone on the panel share that concern or have any thoughts about it?

Mr. Brent?

Mr. BRENT. Thank you. Thank you, Mr. Boucher.

This is an active discussion going on within the ICANN community right now, and there is no resolution of this, but let me just quickly paint the picture, if I can.

There are two very extreme views on this topic. One is that would mostly be held by incumbent registries that—to prevent registrars from essentially getting in a business that is called backend registry services. If you—the best example of this today would be if you think about the .org registry, the public Internet registry, they have 10 million names, but it is actually a very small company, very few people, 10 or 20 people. They outsource the running of that registry to another company.

It is envisioned in this new GTLD round that that notion of backend registries will become a much more important aspect of the marketplace. And so there is a question from the incumbent registry point of view, should that be allowed for registrars to be in that business? Needless to say, the registrars have entirely the opposite view.

What ICANN has done to try to answer that question is, first of all, go through a community consultation process, but get two eminent antitrust economist/lawyers involved, Salop and Wright, to analyze this question for us. We have further meetings planned on this particular topic, and I would say this is going to take some time to resolve.

Mr. BOUCHER. Do you have a timeframe for resolving all of these various matters that are currently pending and—deciding when you are—whether or not you are going to have additional generic top-level domains and resolving issues like this, direct competition?

Mr. BRENT. Right, sir. I think this is probably something all the members here have more experience than I do. When it comes to a product launch or finishing a software product, I know how to put a date on that.

And what we have found in this process is it is a little bit like a foot on the gas and a foot on the brake at the same time. On the one hand, our community is strongly telling us: Finish this process and, on the other hand, only finish it when all the questions have been thoroughly answered.

Each time as we have approached this, each time we have approached a decision point, we have said the legitimate concerns must be answered before we can proceed. And this is another one of those that I could put a forecast up and say, "Perhaps it will take 3 or 4 months to resolve this registry-registrar vertical integration." Certainly, the process can't proceed until that question is answered.

Mr. BOUCHER. Mr. Chairman, with your indulgence, I would like to give some other panel members an opportunity to comment.

Yes, sir. I can't pronounce your last name.

Mr. STAHURA. Oh, sorry. Stahura.

Mr. BOUCHER. Thank you.

Mr. STAHURA. I am not sure I am pronouncing it right.

Your question about, you know, registries selling directly to the public, well, it is already happening in some registries, like country code registries that, you know, various countries have their top-level domains, and they do sell direct to the public, as well as

through resellers, which we call registrars. So it is already happening.

Essentially, it is called vertical integration. You know, the sale—the source of the product acquiring or, you know, selling direct to the public and—well, acquiring their reseller channel. And vertical integration provides a lot of benefits to consumers because it makes two companies together more efficient than if they were separate.

And, you know, I am not a competition expert, but it is usually allowed as long as there is not market power by one of the two that is acquiring each other.

Mr. BOUCHER. Well, when you have one company that manages the entire top-level domain registry, that might be one indication of there being market power——

Mr. STAHURA. Correct.

Mr. BOUCHER [continuing]. Particularly if they can use information unique to them to gain a marketing advantage.

Mr. STAHURA. Right. But it could also be that maybe there is a large registrar that is selling a small—you know, is acquiring a small registry. That is another indication of market power.

So absent market power, I think vertical integration provides efficiencies that, you know, consumers benefit.

Mr. BOUCHER. Okay.

Mr. DelBianco?

Mr. DELBIANCO. Thank you.

The structural separation has long been a case at ICANN to where the registries can't own registrars and registrars can't own registries. And that is really what stimulated the competition that the white paper called for 10 years ago. We have seen markups on domain names go from, what, $75 down to just $5. That is what competition has generated.

And that separation is a good thing, and many of us believe at ICANN, as I do, that we should maintain that separation. But in the new TLD contracts that are being anticipated, there is probably not going to be a separation between registrars being able to run their own registry.

And I think you had your example maybe a little bit backwards. There is no concept of—VeriSign selling .com directly, because they are covered by an existing contract, and they are not allowed to sell direct and never will under that contract.

Instead, it is the new contracts, like Paul's bidding on .web, I believe, and Paul is a registrar. He is the second biggest registrar on the planet. But he would also like to be a registry, so he would like to see that separation wall come down so that Paul can not only run the .web, but sell it, as well. And I believe that that has some concerns for a lot of us around the world because of insider trading—there is a phrase you would understand—insider trading.

Paul is going to be able, by running the .web, to not only know what people are trying to access in the page, but he will be able to control the inventory of those names, as well as distribution. I think we should maintain that separation as we roll forward into the new top-level domain.

Mr. BOUCHER. Thank you very much.

Thank you for your indulgence, Mr. Chairman. A very helpful discussion.

Mr. JOHNSON. Thank you, Mr. Boucher.

Next, we will hear from Mr. Chaffetz, from Utah.

Mr. CHAFFETZ. Thank you, Mr. Chairman.

And, again, thank you to our panelists.

One of my concerns is how we deal with the language issues, because that seems to me, from a global standpoint, a much bigger issue, particularly—you mentioned Japan, but obviously other countries that are using an alphabet that is perhaps different than ours.

Go back and explain to me what we are doing or not doing to take care of that issue.

Mr. BRENT. There are really two tracks of this—what is called internationalized domain names, which is that, in the very last part of a name, where you would see .com or .org, it could say, for example, .china in Chinese or it could say, you know, .food in Arabic.

So those names have undergone a lengthy technical development process—actually, not primarily managed by ICANN—that is going through the IETF, Internet Engineering Task Force, that is now just at the very brink of conclusion. So there is a whole technical set of efforts going on.

And then there are two ways that these internationalized names will show up. One is in what is called country code names, which we haven't spent a lot of time talking about, but that would be a .uk, .au, those—you know, those two-letter names. The countries that—particularly the ones that use non-Latin characters, non-English language, there is what is called the fast-track process, which is anticipated to culminate this year, where country code names, .china in Chinese or .saudiarabia in Arabic, could be put in place.

But, really, in the context of the generic names, which is more what we are talking about today, as several panelists have mentioned, we don't think that the notion of the government-run TLDs is all that people are looking for in other countries of the world and that part of this new GTLD process and what our policy development said from our bottom-up, multi-stakeholder world was to simultaneously launch new GTLDs, new top-level domains in international characters and in Latin characters at the same time.

Mr. CHAFFETZ. And with this looming deadline, what is the plan, given that, you know, next week is next week? So——

Mr. BRENT. Right. So I should say that the timing of this new GTLD program, at least in the mind of ICANN, is completely independent of the timing of our arrangements with the U.S. government. This is a process that has been going on literally for 10 years, so we couldn't have timed it to get in front of you today.

So, you know, the process has originally been targeted. We have passed original targets, in terms of delivery. The most recent delivery date we were aiming for was February of next year to launch the process. Based on where we are, we have a couple of outstanding issues, I am expecting that that date will likely be missed.

But we are talking about, you know, that kind of a launch timeframe. It would be, you know, many months from now.

Mr. CHAFFETZ. I don't know exactly how I feel about that answer, but if you—pattern of missing deadlines—yes, did you want to make a comment?

Mr. STAHURA. Yes, I would say there is—I thought that we would have new TLDs years ago. There has been pushback, pushback, pushback by forces. And so, you know, to say that somehow it was arranged that TLDs and the ending of the JPA would be kind of coincidental and one would be pushed back a week after the other one or a month or 2 months, that is just not true. We should have had TLDs a long time ago.

Mr. DELBIANCO. Thank you, Congressman, for sharing the concern about making sure the next billion people around the planet can use their own alphabet. The notion that folks in the Arab world can't even type google.com to do a search in all Arabic, they can't do it. They have to turn their keyboard sideways and use three-fingered salutes to turn "com" on their keyboards. That is intolerable. And I share your concern that we need to roll that out.

Mr. Brent has correctly said that we are giving governments a sort of fast-track on their country codes in native scripts, but think about it. A lot of those users want to use .asia in Chinese. I would like to be able to make netchoice.org accessible to people in Chinese. And I don't want to have to go to those countries and beg for their permission to host my domain in their particular script.

There are 22 countries that use the Arabic language, so an Arabic user, which of the Googles would they have to go to, google.eg in Arabic for Egypt, .sa for Syria in Arabic? No, they want google.com in Arabic. And Google shouldn't have to try to secure its rights in those new versions of .com, either. If they own Google.com, they ought to have an opportunity to either guard or light up that domain when it goes to the Arabic world.

And then, finally, you asked about timing. And there is one sort of coincidence of the timing, and that is, under this transition, we have exercised guidance and given guidance to ICANN on really thorny issues like this one, by refocusing their priorities, and that is what generated the IRT, frankly. That is what is causing them to pay a lot more attention to the economic studies.

ICANN has a lot of people to answer to, so it is very tough to know where to listen. But as Samuel Johnson once said, nothing focuses the mind like the thought of a congressional hearing in the morning. [Laughter.]

Mr. CHAFFETZ. Thank you. I see I am out of time here.

Thank you, Mr. Chairman.

Mr. JOHNSON. Thank you, Mr. Chaffetz.

I would like to ask about ICANN, but first I would like to know, which countries are the biggest users of ICANN's services?

Mr. BRENT. I am trying to think of the right way to answer that.

Mr. JOHNSON. Well, top three. I will limit it to that.

Mr. BRENT. There is the generic name space and the country code name space. In the country code name space, there is actually probably pretty even usage across the countries in the world and, in some sense, it is actually the least developed, least technically capable countries with whom we have to spend the most amount of time.

So, for example, ICANN typically will run security-oriented training with small countries. And, you know, very small countries around the world all want to have their Internet presence. So it is actually interesting that, in the country code space, it is sort of the smallest, least technically advanced demand the most resource from ICANN.

Mr. JOHNSON. Well, how prolific are the Chinese people at wanting to protect domain names within your registry that you control?

Mr. BRENT. Right, right. So, actually, as part of this implementation recommendation team process, the intellectual property interests within ICANN, we held a meeting in Hong Kong that I personally attended, specifically looking at these trademark interests.

And I would say there is a very great—a very high interest both in new generic top-level domains in China—that is, the Chinese people would like to see new top-level domains—and that they have many common concerns with those that Mr. Heath has expressed, in terms of protecting their trademarks. There is no doubt about that.

Mr. JOHNSON. So I take it that the Chinese use ICANN's services pretty frequently and to a great degree over other countries? Is that fair?

Mr. BRENT. Yes, I am not trying to be contradictory, but I don't think that is the right conclusion. I guess, really, as I said, it would be, you know, very small, you know, Mauritius or, you know, very small countries that tend to have not the technical expertise with whom we spend the most time.

And that China, for example, has a very—you know, the way they run the .cn infrastructure is very professional, very high tech, and they don't—we don't really spend a lot of time supporting them.

Mr. JOHNSON. Your board members, how many do you have? And how are they selected?

Mr. BRENT. Well, this is a little bit of a simplification. The ICANN board is almost legislative in nature, in the sense that it tries to be both representative of the various constituencies in ICANN, so contracted parties, registries and registrars. It tries to—and then there is also an independent nominating process, called the NomCom—again, another acronym—but a nominating committee that is an independent committee of something like 21 people—I believe that is approximately correct—who has geographic quotas in terms of filling board positions from around the world.

Our board is quite diverse. You know, obviously, we have people from North America, from the United States, and we have people from all over the world.

Mr. JOHNSON. See, you mentioned or someone mentioned on the panel about the Chinese pulling out of some—Mr. DelBianco, you want to help me with that?

Mr. DELBIANCO. In 2006, China lost patience with us and with ICANN, because we weren't able to deliver Chinese characters to the right of the dot. That is intolerable for them serving their own people to not be able to type an e-mail address or a domain name or a link on a Web page using their own characters.

You would see Chinese Web pages, Mr. Chairman, where everything on the Web page was in Chinese, except for the domain

name, except for the e-mail addresses that are on the page, or the links on the page. That was just intolerable that China decided to fork the Internet. They have their own mini-ICANN running inside of China that sits on top of ours, and it allows people in China to type real Chinese characters for the .cn, and they have their own version of .com and .org.

So that is what I mentioned in my testimony, that they have already splintered or forked the Internet.

Mr. JOHNSON. Is that a good thing or is that a bad thing?

Mr. DELBIANCO. It is a scary thing, because what it demonstrates is that we have lost our way at having one single, global Internet addressing system that works no matter where we are on the planet, the same security, stability, and reliability that, if you are flying on a mission to Shanghai, that your e-mails will reach you just as securely as ever, that you can send and retrieve your Web pages and e-mails without worrying about things being misdirected or going to the wrong page.

We need one addressing system. This is one world, one Internet. So it is a very bad thing, Mr. Chairman.

Mr. JOHNSON. All right. Have the Chinese ever been represented on ICANN's board?

Mr. BRENT. I have been with ICANN 3 years. During that 3-year tenure, no, but I believe—and I am happy to get back with a specific answer—I believe in, prior to that time, there has been Chinese board members at ICANN.

Mr. JOHNSON. All right. Thank you. My time has expired.

Mr. Goodlatte, of Virginia?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Brent, there is a strong likelihood that hundreds of new generic top-level domains will be granted in the short term if this proposal is enacted. Can you guarantee us right now that ICANN has the resources to properly enforce the rules that we will establish for the registries under this proposal?

Mr. BRENT. You know, I think the short answer is—and I am sure you want a short answer—I think the short answer is yes, and I think the longer answer is that the key to achieving that goal is to have the right rules.

You know, often what we find—and I think the reason why—and, you know, my spending time with a lot of the trademark, intellectual property people over the last 6 months has been a deep frustration about the way things work today.

Mr. GOODLATTE. But let me interrupt. Do you agree, based on the testimony of Mr. DelBianco and Mr. Heath, that maybe you don't have the right rules ready to go yet, that there are still a lot of things that need to be worked out here before we move ahead?

Mr. BRENT. You know, we might question a lot, but I think, absolutely, we have more work to do, and we are actively considering additional rules, not only in intellectual property protection, but I think, importantly, I would be happy—if the panel is interested—to talk about this notion of malicious use of the Internet, as well.

Mr. GOODLATTE. And can you guarantee me that ICANN has the resources to continue to perform its core role of ensuring the stability of the domain name system after the rollout of this proposal?

Mr. BRENT. Right. And I think, again, the short answer is yes. And the absolute prime directive of ICANN is this notion of maintaining a single, global, interoperable and secure and stable route zone.

Mr. GOODLATTE. Okay. Well, if the rollout of the new GTLDs gets held up, would ICANN still move forward with the rollout of internationalized domain names for current top-level domains in order to help other countries from—in order to help deter other countries from setting up their own balkanized versions of the Internet, as was described by Mr. DelBianco with regard to China?

Mr. BRENT. Sir, I can't give you quite as short an answer to that one, but bear with me for a second. So, first of all, I would want to respectfully disagree with Mr. DelBianco. It is an overstatement to say there is a fractured Internet today.

I certainly do agree that the goal—and extremely important to ICANN is this notion of a single, global, interoperable name space. We could have a technical debate about the state of China right now, but I don't think it would be of interest to the Committee. But that is, absolutely, the number-one goal.

In the very short term, the intention is before the end of this year to—for key countries in the world that use non-Latin characters, non-English countries, to give them—to delegate these names in their own languages for their country code domains.

So the easy example would be, for China, which today is .cn, to delegate a .china in Chinese characters.

The third question you asked is a little bit harder for me. I am the chief operating officer——

Mr. GOODLATTE. Well, let me ask Mr. DelBianco if he wants to respond to that.

Mr. DELBIANCO. You asked the question, Congressman Goodlatte, about current TLDs. And that means more than just the country codes. And as Mr. Brent indicated, a fast-track just for governments is not the track that Chinese users, Arabic users need. They want to get access to .org, .com, .asia, and all of those sites, not just the country codes.

And so I truly believe that we need to expand that track. And given the resource constraints, this is a very complex thing that ICANN is trying to do. We have been working for several years on these IDNs, or internationalized domain names.

So I think it is far better for ICANN to focus on getting that track out of IDN versions of top-level domains, work out the kinks in this system, and then, based on that, then let's move ahead for the Latin alphabet TLDs that are currently driving a lot of the food fight here today.

Mr. GOODLATTE. Okay. Now back to Mr. Brent.

Mr. BRENT. Yes, Mr. Goodlatte, I just didn't get a chance to answer—fully answer your question. The last part of your question was related to the launch of IDN separately from Latin character TLDs.

ICANN is a bottom-up policy development process. We are a multi-stakeholder organization. I wish, as CEO sometimes—as COO—I could make these decisions on behalf of ICANN. That is not my role.

The policy development—the policy work that went on for 3 years that involved, you know, probably tens of thousands of person hours, what came out of that was a policy recommendation for simultaneous launch of IDN TLDs and generic TLDs, in part for competition reasons, in part because of all of the same rules that we are concerned with for intellectual property protections, malicious use protections, for string similarity, for all of the complexities of this process must be done before the IDNs can be launched, and actually, in the view of the policy developers, should be the same for both IDNs and——

Mr. GOODLATTE. Well, let me follow up on that, because studies have shown that consumers are increasingly worried about the safety and security of the Internet. How do you think this proposal will contribute to consumer confidence in using the Internet? And let me ask the other panelists to talk about your raising concerns regarding intellectual property protections, as well?

Mr. Heath?

Mr. HEATH. Well, I think—I mean, what we have just been talking about, the international domain name system, there is clearly demand for that. And that probably is a parallel track from the opening up of GTLDs generally.

But you have touched on the issue of consumer confidence and safety on the Internet generally. There is some in my testimony on it. And the fact is, it is not as secure as it should be now, just with the 21 GTLDs we have at the moment. And, in fact, it has got worse. The study I referred to in my testimony, the British government carried out this year, they also carried it out about 3 years ago, and that the confidence in security of the Internet 3 years ago was a lot stronger than it is now.

And that is with the existing system. And our concern is that if an unliberated expansion of the GTLD space will just exacerbate that process and it will be orders of magnitude worse than it is now.

So I think if we can get the governance right on the existing system, then you can consider a measured rollout of names that are required according to demand, rather than doing everything all at once or simultaneously, which strikes me as being a bit silly.

Mr. GOODLATTE. Mr. Chairman, I know my time is expired, but Mr. Heath raises a point that I would like to—back to——

Mr. JOHNSON. Please.

Mr. GOODLATTE.—Mr. Brent to respond to.

Mr. JOHNSON. Please proceed.

Mr. GOODLATTE. Thank you. And that is—you know, we do have enforcement problems right now. And what enforcement mechanisms will ICANN have to employ to ensure that applicants and—we are going to have a wide—you know, we are not just talking about, you know, a limited array of people who are going to have the ability to have a GTLD. You are going to have all kinds of people applying and receiving them, maybe hundreds, maybe thousands.

How are you going to keep them—how are you going to have them comply with their own rules, once they have their own GTLD?

Mr. BRENT. Right. So it is sort of hard to—what level of detail to answer this question, but I think that there has been a couple of important areas where ICANN has been asked to develop—and, really, the ICANN community—to develop much more specific rules, intellectual property protections, which actually many are happy with at the top level, the sort of far-right-hand name in this new GTLD proposal already.

The big concern, as it is today, is around these second-level names. So it is a question of people behaving according to their rules, making it easier and cheaper for intellectual property rights holders to dispute things, to make it easy and cheap.

So there is a whole set of rules there around malicious conduct. You know, there are huge opportunities in these new TLDs to make rules that make malicious conduct harder for these new TLDs, make enforcement easier, and make it easier to manage a whole variety of TLDs on one contract, where today the 21 TLDs that ICANN have are all on separate arrangements with ICANN.

Mr. GOODLATTE. Mr. Stahura has been chomping at the bit, and then Mr. DelBianco.

Mr. STAHURA. I have so much to say. It has been 12 years. Thanks for giving me the opportunity to speak.

Regarding malicious conduct, it is sort of like we want to come out with new bank branches, but the number of bank robberies, because there are new bank branches, won't go up. The total number of bank robberies is probably going to be the same, even though we come out with more bank branches. And that is the first thing.

The second thing is, these new bank branches are going to have better safes, more security, so like these—like the IRT rules to protect trademark holders and so on. So the existence of new TLDs does not increase the amount of bad stuff that happens on the Internet.

Anybody could register a name right now in .com. There is a lot of—it is infinite name space in .com, okay? You could go in there and register a name now and do phishing with it. Coming out with .paul or .cool is not going to increase that.

Mr. GOODLATTE. Well, my debate coach in college said that analogy was the weakest form of argument, but I am not sure I see the analogy here, nor do I buy the argument that, if you have more bank branches, there won't be more bank robberies. It seems like there are more opportunities and there will be those who would be interested in breaking the law having more avenues to search out and find the weak spots where they could violate the law.

And if you have more people enforcing rules and enforcing them in different ways, people are going to shop for those places where they get the best deal on violating the rules. So I am a little concerned about that analogy.

And, Mr. Chairman, if you will allow, we will give Mr. DelBianco the last chance to answer, and then I will cease and desist.

Mr. DELBIANCO. Thank you, Mr. Chairman.

Mr. Brent talked about addressing Congressman Goodlatte's concerns by saying, well, yes, if you have the right rules, I think we could do it, if you have the right rules. And at the risk of using an analogy—— [Laughter.]

Mr. GOODLATTE. It is not easy.

Mr. DELBIANCO. Those of us who live in the capital——

Mr. GOODLATTE. We are setting a high standard here for——

Mr. DELBIANCO. Those of us who live in the capital region actually regard speed limit signs as merely advisory. You see, it is enforcement that matters. And that is where the rubber will meet the road at ICANN. Do we have the resources to do the enforcement of these new rules once we come up with them?

And I would hasten to add that rules that are written once and put into contracts instantly become obsolete. We are in an arms race with the bad guys. And contracts that stipulate how one handles the WHOIS may not be any help at all with tomorrow's generation of how they do phishing or fast flux hosting or new areas that they come up with, like domain tasting was something we hadn't anticipated in the rules.

So not only do we have to have enforcement, we have to be quick to adapt the rules we have to new threats to consumers and new threats for fraud on the Internet.

Mr. GOODLATTE. Well, I like that analogy better, but thank you, Mr. Chairman.

Mr. JOHNSON. Thank you, Mr. Goodlatte.

And, Mr. DelBianco, you will receive a reward that will be coming to you over the Internet for the dubious distinction of having made Mr. Goodlatte smile and laugh. [Laughter.]

No response.

Mr. GOODLATTE. And I am still smiling, Mr. Chairman.

Mr. JOHNSON. I would like to thank all the witnesses for their testimony today. Without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses and ask that you answer as promptly as you can to be made a part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

And with that, this hearing of the Subcommittee on Courts and Competition Policy is adjourned.

[Whereupon, at 11:37 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

ICANN

The Internet Corporation for Assigned Names and Numbers

March 25, 2010

Hon. Henry C. Johnson, Jr.
Chairman

Hon. Howard Coble
Ranking Member

Committee on the Judiciary
Subcommittee on Courts and Competition Policy
B-352 Rayburn House Office Building
United States House of Representatives
Washington, DC

Dear Chairman Johnson and Mr. Coble:

Thank you again for inviting me to testify in the September 23, 2009 oversight hearing concerning, "Expansion of Top Level Domains and its Effects on Competition." Below please find responses to the questions in your letter dated October 27, 2010. I apologize for the delay but we did not receive your letter until it arrived by e-mail on February 23, 2010.

If you have any additional questions, please do not hesitate to contact me.

Best regards,

Doug Brent
Chief Operating Officer

cc: Christal Sheppard
Eric Garduno
John Mautz

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The Internet Corporation for Assigned Names and Numbers

Responses to questions from Mr. Johnson, Chairman, Subcommittee on Courts and Competition Policy

1. The Internet Corporation for Assigned Names and Numbers (ICANN) recently signed an agreement with the Department of Commerce titled "Affirmation of Commitments" that, among other things, establishes important accountability mechanisms for ICANN. As you know, ICANN has been criticized in the past for a lack of accountability. A particularly important point raised by ICANN critics is that there are no real accountability mechanisms for ICANN's Board of Directors. Can you describe your efforts over the last year to improve the organization's accountability mechanisms? How do you respond to critics who argue that there are no mechanisms to hold members of ICANN's Board of Directors accountable for their actions? According to the Affirmation of Commitments, the Board of Directors has six months to take action in response to recommendations by the Advisory Committees called for in paragraphs 9.1, 9.2, 9.3, *and* 9.3.1. *Can you clarify whether ICANN leadership interprets this to* <u>*require*</u> *the Board of Directors to take action that carries out the recommendations provided by the Advisory Committees?*

ICANN's Bylaws set forth multiple accountability mechanisms for the organization, including the Reconsideration process (Article IV, Section 2), the Independent Review process (Article IV, Section 3), and the Office of the Ombudsman (Article V). The Reconsideration process and the Office of the Ombudsman allow those in the community to seek review of actions and decisions of ICANN staff and Board. The Independent Review process allows any person affected by a decision of the Board of Directors to seek a review of whether the actions were consistent with ICANN's Articles of Incorporation or Bylaws. The Independent Review process is conducted by an independent panel administered by the International Centre for Dispute Resolution.

ICANN also remains accountable to the community in many other ways, beyond accountability to the Board. Accountability mechanisms across the organization are critical, and have progressed substantially over the last years. ICANN has published performance results on an ever-expanding set of metrics on its public website, updated monthly. Taking into account feedback from the community, ICANN has consistently expanded public financial and operational reporting. ICANN has matured in its handling of public comment to provide more detailed and sophisticated analysis of how public comments are interpreted, and how comments are accommodated (or not) in implementation and policy decisions taken by ICANN.

All of these mechanisms are an attempt to provide additional public accountability for ICANN.

Regarding Board accountability mechanisms, in 2005, ICANN's prior President and CEO convened the President's Strategy Committee (PSC) to assist ICANN in addressing strategic issues. In 2008, the PSC began working on developing initiatives for Improving Institutional Confidence (IIC) in ICANN, and a main focus of that IIC work was enhancing ICANN's accountability to the multi-stakeholder community. Since the release of the PSC report on IIC in September 2008, the IIC work has been through multiple public comment periods and iterations, with a draft Implementation Plan released in February 2009. *See* http://www.icann.org/en/jpa/iic/draft-iic-implementation-26feb09-en.pdf. The IIC work continued to be a focus of discussions, and in July 2009, the PSC produced proposed bylaws changes recommending an additional accountability mechanism (allowing for community override of a Board decision) and proposing substantial changes to the Independent Review process. *See* http://www.icann.org/en/announcements/announcement-27jul09-en.htm. The revisions to the Independent Review process included recommending the implementation of a standing tribunal to oversee requests for independent reviews, and expanding the scope of matters that could be brought for independent review. Those proposed bylaws amendments were posted for public comment for nearly four months.

Prior to the issuance of the first IIC report, in June 2008 the very first Independent Review proceeding was initiated under ICANN's Bylaws. The documents from that Independent Review Proceeding are available at http://www.icann.org/en/irp/icm-v-icann.htm. At the time the proposed bylaws amendments were posted for public comment, the Independent Review proceeding was still underway, and many commenters noted that ICANN should not implement any changes to the accountability mechanisms prior to the resolution of the Independent Review proceeding, so that the experiences learned from that process could be integrated into any future revisions of the accountability mechanisms. ICANN heard that request.

The decision of the Independent Review Panel was handed down on February 19, 2010. While many of the findings were against ICANN, ICANN – in the spirit of accountability and transparency – posted the declaration within two hours of receipt, and later provided additional information in a blog posting by Rod Beckstrom, ICANN's CEO. *See* http://blog.icann.org/2010/02/landmark-step-in-icanns-use-of-accountability-mechanisms/. In accordance with ICANN's Bylaws, the Board considered the Independent Review panel's declaration at its meeting in

Nairobi, Kenya, and a document seeking comments on possible steps forward will be posted by March 26, 2010. *See* http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#15.

One of the first reviews required under the Affirmation of Commitments is the Accountability and Transparency Review as set forth in Paragraph 9.1. ICANN anticipates that the recommendations arising out of that review will be informative to the formation of heightened accountability mechanisms, which is another reason to postpone the implementation of the PSC's proposed bylaws amendments.

The review teams that are being formed for the Affirmation of Commitments reviews are to be comprised of members of ICANN's Advisory Committees, Supporting Organizations and independent experts. As noted in the question, after the review teams' recommendations have been subject to public comment and revised as necessary, the ICANN Board is to take action on the recommendations within six months. While ICANN has not yet undergone any of the reviews called for under the Affirmation of Commitments and cannot yet anticipate the form of the recommendations that will be made, the recommendations arising out of the reviews will be strong guidance for how the global internet community sees ICANN moving forward. The Affirmation reviews are an iterative process – set on a cycle – and it will be important for ICANN to continue to show progress in responding to recommendations arising out of those reviews. Responsiveness and receptiveness to the reviewer recommendations will be an extremely important component of ICANN's continued success in the Affirmation process. ICANN is, however, limited by its corporate form; ICANN is a California Nonprofit Public Benefit Corporation, and the fiduciary duties of Board members require that the Board makes decisions on behalf of the organization, and not act on directives from others. With that limitation in mind, ICANN anticipates that following the recommendations of the review teams will often benefit the public and be in the best interests of the organization.

2. ICANN's bottom-up structure was intended to encourage inclusiveness in Internet policy development. An important aspect of this inclusiveness is the diversity of race, nationality, and gender of those participating in the management and policy making bodies of ICANN. Can you describe the current diversity of race, nationality, and gender of ICANN, including the organization's staff, Board of Directors, and participants in the various internal policy development bodies like the Generic Names Supporting Organization (GNSO)? What policies or procedures do you have in place to ensure that decision makers within ICANN reflect broad diversity in race, nationality, and gender? What policies and procedures will you use to ensure that there will be diversity in race, nationality, and gender among the members of the aforementioned Advisory

Committees?

Diverse participation within ICANN is a core value, as stated in Article I, Section 2.4 of the ICANN Bylaws. ICANN strives for inclusiveness and diversity in its processes, and includes Bylaws requirements and operating procedure requirements on how appointments to the constituent bodies shall include considerations of diversity. ICANN's Bylaws, at Article VI, Section 2.2, require that ICANN's Nominating Committee, taking into account the full composition of the Board, ensure that the ICANN Board is composed of members who in the aggregate display diversity in geography, culture, skills, experience and perspective. The Nominating Committee is prohibited from making appointments to the Board so that there are over five Board members from any single geographic region. The Nominating Committee shall also ensure that the Board includes at least one Director from each ICANN Geographic Region. ICANN's Supporting Organizations – the other component of ICANN's Board selection process – are also expected to seek to ensure diversity among their Board appointees, and each Supporting Organization is prohibited from having both of its selections for Board members from the same geographic region. *See* Article IV, Section 2.3. ICANN's commitment to international representation is restated at Article VI, Section 5 of the Bylaws.

The Board of Directors meets the diversity requirement set out above – there are members from Australia, New Zealand, Ireland, Norway, India, South Africa, Gambia, Chile and France, in addition to the North American directors.

ICANN's staff is representative of over 25 countries. Under company policy, all persons are entitled to equal employment opportunity and ICANN does not discriminate against qualified employees or applicants because of race, color, religion, sex, pregnancy, childbirth or related medical conditions, family care status, national origin, ancestry, citizenship, age, marital status, physical disability, mental disability, medical condition, sexual orientation, veteran status, or any other characteristic protected by state or federal law.

Equal employment opportunity is extended to all persons in all aspects of the employer-employee relationship, including recruitment, hiring, training, promotion, transfer, discipline, layoff, recall, termination, compensation, benefits, and social and recreational programs. Whenever practical, ICANN will place employees in the job that best suits their abilities, interests, and skills, as well as ICANN's needs. ICANN will make reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless undue hardship would result.

Employment decisions comply with all applicable judicial precedents or statutory laws prohibiting discrimination in employment including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Immigration and Nationality Act, and any applicable state laws.

ICANN's Sponsoring Organizations and Advisory Committees are also expected to be comprised of diverse representatives. As detailed in Article VII, Section 5 of the Bylaws, the Nominating Committee makes selections of delegates to ICANN's Sponsoring Organizations and Advisory Committees, and for each appointment, the Nominating Committee shall consider diversity in representation.

On the Country Code Names Supporting Organization (ccNSO), members are nominated through the Geographic Regions. The ccNSO is headed by an Australian, and currently has over 100 members from all regions. *See* http://ccnso.icann.org/about/ccnso-membership-august-2003-november-2009.pdf. On the Generic Names Supporting Organization (GNSO), diversity requirements and considerations must be included in the Stakeholder Group charters, the Groups that select the GNSO councilors. The GNSO currently has councilors from every geographic region. *See* http://gnso.icann.org/council/members.html. The Governmental Advisory Committee (GAC) is by its nature diverse among geographic regions; representation is based upon governmental representation, and a list of the current representatives – from approximately 100 countries – can be found at http://gac.icann.org/gac-representatives. Finally, the At-Large Advisory Committee (ALAC) is formed through a complex structure of regional organizations representing all geographic regions, and the members of the ALAC represent all geographic regions. A current list of the members of the ALAC can be found at http://www.icann.org/en/committees/alac/.

In addition to the procedural safeguards in place to assure diversity in representation, ICANN also conducts significant outreach to broaden the diversity of the ICANN community. ICANN has an active group of regional liaisons, conducting outreach in all of the regions of the world. The Nominating Committee seeks out candidates from far and wide to serve in appointed positions. ICANN's international meetings also provide for great outreach opportunities with persons who may never otherwise attend an ICANN meeting or get involved in ICANN's processes. In addition, ICANN has a fellowship program to help support diverse participation at ICANN meetings. The fellowship program brings over 20 geographically, occupationally, and gender diverse participants to each international public meeting. The alumni of the fellowship program are becoming increasingly active in ICANN, and are forming the basis of a new generation of participants. More

information on the fellowship program can be found at http://www.icann.org/en/fellowships/.

Diversity is also a key consideration in the formation of the review teams for the performance of the Affirmation of Commitments reviews. In the call for review team members, ICANN included geographic diversity and gender balance as two of the five principles for composition of the teams. *See* http://www.icann.org/en/reviews/affirmation/call-for-applicants-11jan10-en.pdf. The call for candidate recently closed, and the pool of candidates is publicly posted at http://www.icann.org/en/reviews/affirmation/review-1-applications-en.htm. Gender and nationality are two of the factors noted for each volunteer.

3. ICANN's structure is also intended to encourage official engagement by all countries of the world. How diverse has official country representation been within ICANN's policy development bodies, and in particular the Government Advisory Committee, since ICANN's inception? Do you foresee greater official participation by countries in ICANN's structure, particularly in light of the creation of the aforementioned Advisory Committees?

The Governmental Advisory Committee (GAC) is created by ICANN's Bylaws, at Article XI, Section 2.1. The GAC is specifically charged with providing advice to ICANN on governmental concerns relating to ICANN's activities. The GAC is specifically allowed to put issues to the Board and provide input on policy issues. When the GAC provides input on public policy matters, the ICANN Board is bound to consider that input, and if the ICANN Board deems to take action that is inconsistent with the GAC advice, the Board must notify the GAC, state the reasons for such inconsistent action, and then try to work towards a mutually acceptable solution. The GAC also may appoint a non-voting liaison to the Board, as well as Liaisons to ICANN's Supporting Organizations and the other Advisory Committees. The GAC representative to the Board is a frequent participant in Board discussions, and the contributions of the current GAC representative are available in the Board minutes, posted on ICANN's website at http://www.icann.org/en/minutes/.

The GAC presents formal advice and input to ICANN through its communiqués, issued at every ICANN international public meeting where the GAC convenes a meeting. The GAC has issued 37 communiqués since 1999, demonstrating the history of official engagement of all countries of the world – as they choose to join the GAC. The communiqués can be found at http://gac.icann.org/communiques. Today, there are approximately 100 countries represented on the GAC.

The GAC – though not created by the Affirmation of Commitments – plays an

important role in ICANN fulfilling its obligations under the Affirmations document. First, within the Affirmation of Commitments, the United States Government affirmed the important and longstanding role of the GAC. *See* Affirmation of Commitments, Paragraph 6. ICANN and the Department of Commerce then committed that the review teams called for under the Affirmation of Commitments would be selected by the Chair of the ICANN Board as agreed to by the Chair of the GAC. While it is hard to foresee if this will create greater governmental participation in ICANN, the Affirmation of Commitments makes the GAC's continued engagement in ICANN an essential part of ICANN's future.

4. As I understand, ICANN does not currently plan on establishing price control mechanisms in the registry contracts for registries operating new top level domain names. What safeguards are in place to prevent registries from charging monopoly rents for domain names once companies and other Internet users have begun using them? What is the likelihood that existing registry contracts that include price controls, in particular the contract with Verisign for operation of the .com top level domain name, will eventually do away with price controls? Has there been any empirical analysis of the impact such a move would have on consumers and Internet users?

ICANN has not commissioned any empirical analysis of the impact of the removal of price controls from the .com contract, nor has ICANN evaluated the likelihood that the price controls would be removed from the .com contract or other existing registry agreements. ICANN notes that many other gTLDs do not have price controls specified in their Registry Agreements with ICANN, such as .aero, .asia, .cat, .coop, and .mobi. In addition, ICANN does not (and can not) require any of the ccTLDs to have price controls instituted in their registries.

In March 2009, ICANN posted Dr. Dennis Carlton's Preliminary Analysis Regarding Price Caps
For New gTLD Internet Registries, available at
http://www.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf. In his report, Dr. Carlton, a former Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice provided an analysis of whether price caps were necessary to insure competitive benefits of the proposed introduction of new gTLD registries. Dr. Carlton concluded that price caps are unnecessary to insure competitive benefits of the introduction of new gTLDs and instead could "inhibit the development and marketplace acceptance of new gTLDs by limiting the pricing flexibility of entrants to the provision of new registry services without generating significant benefits to registrants of the new gTLDs." Carlton, at Paragraph 6. Dr. Carlton noted that there are safeguards in

place that negate the need for the inclusion of price caps in new gTLDs, including vigorous competition for registrants at the outset of a new gTLD registry, and the harm to reputation that a new gTLD registry would face if the registry operator later acted opportunistically with its customers – harm that would impede that registry from attracting new customers in the long run. As Dr. Carlton noted, "the rationale for imposing price caps is weakest in rapidly growing industries." Carlton, at Paragraph 15. In addition, Dr. Carlton no ted the continued need to compete with the existing registries – including those subject to price caps – also serves as a control on opportunistic behavior. Carlton, at Paragraph 18. The price controls in existing registries are robust – for example, in the .com Registry Agreement, price controls extend to both new and renewal registrations (see Section 7.3(d) of the March 1, 2006 .com Registry Agreement). It is important to note that these controls will exert downward pricing pressure on new gTLD registries if they are to be price-competitive with existing registries. Dr. Carlton's work supports ICANN's current plan for not introducing price controls in new registries.

II. Responses to questions from Mr. Coble, Ranking Member, Subcommittee on Courts and Competition Policy

1. In October 2006, the ICANN Board directed the President to "commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market." The resolution listed several questions as examples. See http://www.icann.org/en/minutes/minutes-18oct06.htm. While it does not appear that a study directly responsive to this resolution was ever commissioned, your testimony refers to three other economic studies carried out in connection with the new gTLD process. Their relationship to the October 2006 resolution is contested, as is the relevance of the study ordered in 2006 to the new gTLD process.

In order to clarify the record on this important point, please respond to each of the questions below (drawn from the 2006 Board resolution) by stating succinctly ICANN's answer to each question, the basis for its response, and its view of the relevance, if any, of the question to the rollout of new gTLDs.
A. Is the domain registration market one market? Or does each TLD function as a separate market?
B. Are registrations in different TLDs substitutable?
C. What are the switching costs involved in moving from one TLD to another, and what is the effect of these costs on consumer and pricing behavior?
D. What is the effect of the market structure and pricing on new TLD entrants?
E. Are there other markets with issues similar to those found in domain registration

markets? If so, how are these issues addressed in those other markets, and by whom?

As I testified to in person, and later formally announced to the community at ICANN's International Public Meeting in Seoul, South Korea, ICANN is retaining economists to provide an analysis of all economic studies done to date and to determine the extent to which the questions cited above have been addressed. Notable independent economists are now retained, and their work is not yet completed. As a result, ICANN does not yet have a position to enumerate on these questions.

This further economic work is being conducted in three phases:

- First, the economists are surveying the studies already done, and are to consider and propose empirical studies to address the open questions (if any), and where additional work can serve to assess the costs and benefits of the new gTLD program.
- Second, after approval by ICANN, the economists will then conduct the additional empirical analyses. At this time, ICANN targets the completion of the studies in time for consideration at ICANN's June 2010 international public meeting in Brussels, Belgium.
- Third, once completed, ICANN will work with the economists to develop a plan for integration of the findings, if necessary, into the implementation plan for new gTLDs.

As discussed in my testimony, the October 18, 2006 Board resolution was not related to the threshold question of new gTLDs, but was instead related to contractual issues with three top-level domains. Also within my testimony, I provided citations to the prior economic work done within the new gTLD program, where many of the questions noted above have been addressed. *See* Testimony of Doug Brent, September 23, 2009, at Page 4.

2. Please describe in detail all specific aspects of the Affirmation of Commitments that ICANN reached with the Department of Commerce that respond directly to the concerns of intellectual property owners. Does the Affirmation of Commitments contain significant process or substantive improvements that in your analysis should cause intellectual property owners to take comfort that their rights will be honored and respected to a greater extent than in the past? Please explain your answer fully.

Paragraph 9.3 of the Affirmation of Commitments specifically states that ICANN will consider issues of rights protection in the expansion of the domain name space, among other specific issues such as security, stability, malicious abuse, competition and consumer protection. Many of these items have been part of the "overarching

issues" identified within the new gTLD program, issues that were discussed in great detail during the September 23, 2009 hearing on the expansion of top-level domains.

Intellectual property holders, as well as others interested in the new gTLD-related issues identified in the Affirmation of Commitments, have the added comfort that the launch of new gTLDs will be accompanied by a regular and robust review mechanism as imposed through the Affirmation of Commitments. This mechanism will include a review of the safeguards put into place within the new gTLD program to mitigate issues such as rights protection.

The Generic Names Supporting Organization's (GNSO) policy development process has also provided an ongoing avenue for intellectual property holders to access and participate in ICANN's policy development process, similar to other interests and constituencies. Within the GNSO, there is an Intellectual Property Constituency (IPC) that is formally recognized by the Board, and the IPC participates in the GNSO's policy work, including work on new gTLDs.

Notably, since I provided my testimony, ICANN has made significant advancements in creating rights protection safeguards in the new gTLD program. On March 12, 2010, ICANN's Board approved the inclusion of a Trademark Clearinghouse, a Uniform Rapid Suspension System and a Post Delegation Dispute Resolution Procedure for inclusion in the next version of the Draft Applicant Guidebook. *See* http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#6. Each of these proposals arose out of the Implementation Recommendation Team (IRT), a team created by the ICANN Board to assist in proposing safeguards for rights protections in the new gTLD program.

3. I understand that ICANN is proposing to reverse its policy of prohibiting registries from selling their own TLD direct to the public and allowing vertical integration of registries and registrars. Abusive practices such as "domain name tasting" have been curbed in the past by withholding refunds from a registry to a registrar for deleted names. In a vertically integrated registry and registrar, that financial penalty for tasting names is practically eliminated. What studies have you undertaken and what safeguards are you proposing to ensure that domain name tasting does not reemerge in vertically integrated registries and registrars?

Since the September 23, 2009 hearing, significant work has been done on the issue of vertical integration. This issue was the subject of a vigorous community debate at ICANN's international public meeting in Seoul in October 2009, without resolution of the issue. ICANN commissioned a report by noted economists, Steven C. Salop

and Joshua D. Wright on Registry-Registry Separation: Vertical Integration Options. This report is available at http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf. The report suggested that allowing vertical integration of registries and registrars that are unlikely to have market power – and imposing conditions on only those registries and registrars where market power is likely to be present – could be practical solutions to this complex economic question. Previously, ICANN had commissioned a report by CRA International, Revisiting Vertical Separation of Registries and Registrars, available at http://www.icann.org/en/topics/new-gtld-crai-report-24oct08-en.pdf.

The Board was presented with the Salop/Wright report on February 4, 2010 and the Board noted concerns with the report. *See* http://www.icann.org/en/minutes/minutes-04feb10-en.htm. Just prior to that Board meeting, on January 28, 2010, the GNSO voted to initiate a policy develop process on the issues of vertical integration. *See* http://gnso.icann.org/resolutions/#201001. At the Board's meeting on March 12, 2010, the Board resolved to continue to impose registry/registrar separation, and to require a strict separation among entities offering registry services in the new gTLD program and those acting as registrars. The Board's resolution created a stricter separation than currently exists, with the potential for any policy created by the GNSO on this topic to be considered for adoption as part of the new gTLD program. The Board did not want to set a threshold lower than what the GNSO policy development process may create, as that would "create an environment in which it would be difficult to later harmonize the new gTLD marketplace with the GNSO policy result." http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5. This provides a conservative approach to integration, while allowing a more complete policy development to take place. It is anticipated that the ultimate policies developed by the ICANN community with regard to vertical separation/integration will be guided by the public interest, considering the totality of service and price benefits, and potential harms.

4. I understand that by becoming a registry, a registrar will get access to sensitive data that would facilitate new forms of insider trading that can harm consumers. Given the track record of domain name tasting, front running by registrars, and ICANN's prior track record on enforcement, what safeguards have been created to prevent abuses in the new TLD round?

As noted in response to Question 3 above, the ICANN Board has elected to take a strict, brightline approach to the issue of registry/registrar separation, and deny any cross-ownership while the community's policy work is ongoing.

The Internet Corporation for Assigned Names and Numbers

While the cross-ownership concerns raised in the question are no longer present in the new gTLD program, it is important to note that ICANN has achieved great success in recent years in fights against domain name tasting. In 2008, the ICANN Board adopted the Add Grace Period Limits Policy (AGP Policy), a consensus policy developed by the GNSO and approved by the ICANN Board. The AGP Policy placed limits on the amounts of refunds that could be requested by a registrar for the deletion of names of within the Add Grace Period. In December 2009, ICANN posted a status report on the implementation of the AGP Policy, showing a 99.7% reduction in AGP deletes – a large source of domain name tasting and front running. It is also important to note that there is not unanimous consensus as to whether vertical integration would facilitate abusive registration practices.

5. In your testimony, you describe the policy development process that led to the introduction of new gTLDs. Does ICANN believe the constituencies that developed the new gTLD policy are representative of the global stakeholder community affected by the policy? If so, how does that square with the fact that ICANN's registrars and registries had twice the voting rights of other constituencies?

Yes, ICANN believes that the participants in the policy development process that led to the introduction of new gTLDs were representative. As noted in the final report issued by the GNSO on the Introduction of New Generic Top-Level Domains, at http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm, the principles laid out in the report were supported by *all* GNSO constituencies. With minor exceptions as identified in the final report, the recommendations and the implementation guidelines were also supported by *all* GNSO constituencies. The Report further notes that the GNSO considered public policy principles provided by the GAC.

Prior to the restructuring and improvements efforts still underway for the GNSO, the GNSO Council used "weighted" voting, which was a consensus-approved mechanism within the GNSO to allow for equalization of votes cast by GNSO Council representatives of gTLD registries and registrars as compared to the votes of the representatives of other constituencies as seated on the GNSO Council. This weighting is not appropriately described as "twice the voting rights." The weighted voting procedure – which is no longer in place on the GNSO Council – was a voting mechanism that the GNSO approved and followed for its internal policy development work. Further, some of the working groups identified – including a working group on Protecting the Rights of Others (http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf) as an input into the new gTLD policy work – were run on a rough consensus (i.e., not weighted)

voting basis.

While the weighted voting was targeted as an area for improvement of the GNSO, it does not mean that policies approved during the time of weighted voting – all policies approved prior to the seating of the new GNSO Council in October 2009 – are somehow flawed or are non-representative of ICANN's community. To be clear, the policy work on new gTLDs was not an independent driver of the GNSO improvements process. All organizations within ICANN are required to go under a structural review with a focus on improving effectiveness, and the GNSO improvements process arose out of this required structural review. *See* ICANN Bylaws, Article IV, Section 4. More information on the GNSO Improvements process can be found at https://st.icann.org/gnso_transition/index.cgi?gnso_improvements.

The new voting structure in the GNSO Council is based on a bicameral system, the Contracted House and the Non-Contracted house. The Contracted House is comprised of ICANN's Registrar and Registry Stakeholder groups, with three councilors each. The Non-Contracted House includes the Commercial Stakeholder Group (including the Intellectual Property Constituency, the Business Constituency and the Internet Service and Connection Providers), with six councilors total, and the Non-Commercial Stakeholder Group, which also has six councilors. Each house also has a councilor appointed by the Nominating Committee. As set forth in the ICANN Bylaws, the default voting method is for a single vote per councilor, with the default threshold set as a simple majority vote within each House. *See* ICANN Bylaws, Article X, Sections 3.8-3.9.

6. We heard testimony from trademark owners that there is widespread abuse in the current gTLD space, and that ICANN's management of the domain name registration process has failed to ensure the accuracy and integrity of domain name registration data in 21 gTLDs. Why isn't it reasonable to presume that these same problems will occur, and to a greater extent, in an unlimited expansion of new gTLDs?

As discussed in my written and verbal testimony, there are many safeguards that are being reviewed and/or put into place within the new gTLD program to create improvements in the new gTLD process.

Regarding trademark abuse, the implementation work for the new gTLD program includes substantial work regarding protection of rights of others, including trademark owners. As discussed in my response to Question 2 above, the ICANN Board approved the inclusion of new mechanisms for protection of rights of others in the forthcoming version of the Draft Applicant Guidebook, including the use of a Trademark Clearinghouse, a Uniform Rapid Suspension System, and a Post

Delegation Dispute Resolution Procedure. These mechanisms do not exist within gTLDs today, and the inclusion of these additional rights protection mechanisms were created – with the support of trademark holders – to reduce the likelihood of the same abuses occurring within the new gTLD program. As described in my written testimony, the Intellectual Property Constituency was integral in forming the IRT, the group that originally proposed these rights protections mechanisms. *See* Testimony of Doug Brent, September 23, 2009, at pages 9-10.

Domain name registration data, often referred to as Whois data, is also a focus of work for improvement in the new gTLD program. During my testimony, I discussed the new requirement for "thick" Whois information (the requirement that a registry maintain and offer Whois information in a centralized way) in new gTLDs. ICANN is further addressing the issue of the accuracy of Whois data on many fronts:

- First, a Whois review is required to be conducted under the Affirmation of Commitments, beginning on 1 October 2010. The Whois review is to focus on effectiveness on the policy and how the policy meets the needs of law enforcement and promotes consumer trust. *See* Affirmation of Commitments at Paragraph 9.3.1.

- Second, as noted in my written testimony, ICANN's compliance team is actively working on improving the Whois Data Problem Reporting Service to better administer and oversee complaints submitted to ICANN. *See* Testimony of Doug Brent, September 23, 2009, at pages 13-14. In addition, ICANN just published a draft report on a Whois accuracy study, http://www.icann.org/en/compliance/reports/whois-accuracy-study-17jan10-en.pdf, in an attempt to obtain empirical research from which to address Whois data accuracy.

- Third, the GNSO is also actively working on the issue of Whois data, with five potential areas of study. *See* http://gnso.icann.org/issues/whois/whois-update-chart-01mar10-en.pdf for an overview of the status of that work. Of particular relevance for the new gTLD program is the work underway for internationalized registration data, as directed by the Board at its June 26, 2009 meeting in Sydney, Australia. *See* http://gnso.icann.org/drafts/internationalized-data-registration-wg-draft-charter-27sep09.pdf.

One of the issues currently that ICANN currently faces regarding Whois is a lack of contractual enforcement power over registrars that have inaccurate registration data, as ICANN has a very narrow set of enforcement tools in the current version of

the Registrar Accreditation Agreement (RAA). There is currently a working group addressing potential future changes to the RAA, including changes related to increasing ICANN's enforcement power over registrars that are the subject of continual data accuracy complaints. More information on the RAA Additional Amendments Working Group can be found at https://st.icann.org/raa-related/index.cgi?working_group_b_raa_additional_amendments.

Underlying all of ICANN's work on Whois is the fact that across the world, there are competing privacy or data protection laws that may impact the availability of consumer identifying information. For example, the work done to date by the GNSO has identified that there may already be conflicts between Registrar's Whois obligations and local privacy laws, including some in force in Europe, which prohibit the collection and disclosure of information defined as personally identifiable.

All of this work will assist ICANN in assuring more integrity and accuracy in registration data in new gTLDs.

7. In your testimony, it is noted that one of ICANN's key mandates is to create competition in the domain name market and that new gTLDs "remain an essential element of fostering competition and choice for Internet users in the provision of domain registration services." What is ICANN's basis for concluding that new gTLDs are themselves " ... an essential element of fostering competition." What other methods does ICANN employ to foster competition and choice for Internet users in the provision of domain name registration services? In particular, the NTIA has suggested that competition could be increased in this area through competitive bidding of registry services for existing gTLDs. This approach would seem to have fewer negative effects on stakeholders and the domain name system. Why has ICANN rejected this approach in favor of introducing unlimited new gTLDs which impose the costs and harms described at the hearing?

Acting Assistant Secretary for Communications and Information, NTIA, Meredith A. Baker, did not suggest that an introduction of competition could be satisfied solely through competitive bidding of the existing gTLD registry agreements; instead, the request was for imposition of competitive bidding processes across new gTLDs. *See* Letter from Meredith Baker to Peter Dengate Thrush, December 18, 2008, available at http://www.icann.org/correspondence/baker-to-dengate-thrush-18dec08-en.pdf. To date, I have not seen any economic study suggesting that competitive bidding in the existing TLDs would be a sufficient means to introduce competition into the DNS. Even during the hearing, not a single panelist suggested that competitive bidding of the existing gTLD agreements would be a sufficient means for introducing competition into the DNS. Paul Stahura, who noted that he would

like the chance to bid to operate the .com agreement, stated that until that agreement expires, he'd still like the chance to operate a new TLD and compete on that level with the incumbent registry operators. Steve DelBianco noted the significant investment that registry operators must make into their businesses as a potential justification for presumptive renewal.

The concept of 10-year licenses with presumptive renewals is not unique to ICANN – in fact, the Federal Communications Commission (FCC) employs this practice for its spectrum licenses. *See, e.g.,* 47 CFR Section 90.149.

As I described during my testimony, expanding competition and introducing new top-level domains has been part of ICANN's work for over a decade. The Department of Commerce encouraged ICANN to expand the domain name space since ICANN was formed in 1998. As stated in my written testimony, "[s]ince the drafting of the White Paper it has been a fundamental assumption that increasing the number of gTLDs will increase competition.[1] This fundamental assumption was relied upon by the House Committee on Energy and Commerce when, in 2001, it initiated a hearing regarding potential detrimental effects to competition for ICANN's selection of only seven new TLDs out of 44 applicants for over 200 different TLDs in its early Proof of Concept round."[2]

As further noted in my oral testimony, competition is not about price alone, but about the service offerings made available to consumers. Some of those publicly declaring interest in new gTLDs are cities, communities, local language communities, high security TLD offerings, and others who think they can bring innovation to this marketplace. The benefits foreseen by these new entrants have not been offered within the existing name space.

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[1] "The U.S. Government is of the view, however, that competitive systems generally result in greater innovation, consumer choice, and satisfaction in the long run. Moreover, the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically." United States Department of Commerce White Paper on the Management of Internet Names and Addresses, June 5, 1998, *available at* http://www.icann.org/en/general/white-paper-05jun98.htm.
[2] *See* Transcript of February 8, 2001 Hearing before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, House of Representatives, On Hundred Seventh Congress, First Session, *available at* http://archives.energycommerce.house.gov/reparchives/107/hearings/02082001Hearing37/print.htm ("some view ICANN's approval of only a limited number of names as thwarting competition").

ICANN's decision to move forward with the introduction of top level domains – in conformity with the governmental expectations and nearly a decade's worth of policy work – is not a rejection of the scheme of competitive bidding. Instead, it is a continuation of the years of work already put into this process, to be sure that it is implemented in a measured, appropriate fashion and the overarching issues are addressed prior to launch.

8. We have heard that trademark owners have experienced problems with proxy services that mask the domain owner's contact data from real-time inspection, as provided through the Whois database, and that ICANN has not developed standardized processes for dealing with these issues. Why won't the problems that proxy services have been purportedly caused in the existing gTLD space be exacerbated in an environment with an unlimited number of top-level domains?

The use of proxy services has been an issue of discussion within ICANN for some time. ICANN already has some tools for addressing proxy registration issues. When a name is registered via a proxy service, the proxy service is the registrant of the domain name. The proxy service often will have a customer to which it licenses the use of the domain name. ICANN's Registrar Accreditation Agreement (RAA), as amended on May 21, 2009, now requires those registrants that license the use of domain names to third parties to "accept liability for harm caused by wrongful use of the Registered Name, unless [the registrant] promptly discloses the current contact information provided by the licensee and the identity of the licensee to a party providing the [registrant] reasonable evidence of actionable harm." *See* RAA, Section 3.7.7.3. This means that if a domain name licensee is causing "problems" for trademark owners, while the licensee's name may not be immediately accessible via a Whois lookup, the trademark holder has the ability to enforce any actionable rights against the licensee or the proxy service, if the proxy service fails to release the licensee's identity.

Further, among the Whois studies contemplated by the GNSO, as discussed in response to Question 6, includes work to address Whois issues stemming from the use of proxy and privacy registrations.

Finally, the rights protection mechanisms that are now approved for inclusion in the Draft Applicant Guidebook, Version 4, as noted in my response to Question 2 above, are geared to assisting in providing mechanisms to curtail new gTLD registrations (via proxy or otherwise) that infringe on the rights of others. The inclusion of other safeguards in the new gTLD program and the progress already made on proxy-related issues greatly diminishes the potential for proxy services to create harms within the new gTLD program.

ICANN

The Internet Corporation for Assigned Names and Numbers

9. ICANN has stated it will not introduce new gTLDs until stakeholder concerns have been addressed, including the four overarching issues with its new gTLD program. However, ICANN has also announced specific dates of when it plans to launch new gTLDs. Since it isn't clear how ICANN intends to address these concerns or the date when that process will be concluded, how does ICANN explain the contradictory signals being sent to the public?

ICANN is still working to address the overarching issues prior to the launch of the new gTLD program. As part of its project planning process, ICANN has set various launch dates for the new gTLD program, and as noted in my testimony, has watched launch dates pass. Given the continuing work on the overarching issues, when ICANN held its international public meeting in Seoul, South Korea in October 2009, ICANN removed the launch date of the new gTLD program from the timeline, and instead provided some expected timeframes for completion of various portions of the program necessary to move forward to acceptance of applications.

Since the Seoul meeting, there has been significant advancement on the overarching issues. As noted in response to Question 2, many of the issues related to rights protections have been addressed, and new proposals will be included in the forthcoming version of the Draft Applicant Guidebook. In March, the Board came to conclusion on six separate issues previously outstanding in the new gTLD program, and more work remains to be done.

ICANN heard the community's concerns surrounding a premature launch of the new gTLD program. In October 2009, a community-based proposal was made to consider Expressions of Interest in the new gTLD program, as a means of assessing the level of interest in applying for new gTLDs while the community work was still ongoing. *See* http://www.icann.org/en/minutes/resolutions-30oct09-en.htm#5. ICANN staff provided a proposed draft of an Expressions of Interest model for two rounds of public comment, and the community was divided on proceeding with the model. One of the major concerns raised against the opening of calling for Expressions of Interest was that it would effectively serve to launch the new gTLD program. On March 12, 2010, the Board decided that it would move forward with planning for the launch of the new gTLD program, and no longer consider moving forward with the Expressions of Interest. *See* http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#4. Staff was directed to continue working on the outstanding issues in the new gTLD process. Since the time that I appeared before you, ICANN has proceeded in exactly the manner I testified to – we are working through the issues, and significant progress has been made towards addressing the overarching issues prior to accepting

applications in the new gTLD program.

10. ICANN-accredited domain name registrars are permitted to use algorithms that generate alternative domain names when a user's first option is not available. Often the algorithm-generated domain name is confusingly similar to trademarks owned by third parties. There is potential that use of these algorithms might give rise to liability for infringement of intellectual property rights. What steps has ICANN taken to ensure that the use of these algorithms is consistent with laws dealing with intellectual property and consumer protection rights?

The Registrar Accreditation Agreement (RAA) governs ICANN's dealings with its accredited registrars. There is nothing in the RAA that specifically permits (or even refers to) the generation of alternative domain names as described in the question. Additionally, ICANN does not have a policy either authorizing or prohibiting the use of algorithms for the generation of alternative domain names, is not aware of any calls for policy development work in this area, and does not monitor its nearly 900 accredited registrars for potential use of algorithms in domain name generation. Accredited registrars are required to abide by all applicable laws and governmental regulations. *See* RAA, Section 3.7.2.

To the extent that an alternative domain name is generated by a registrar and registered by a registered name holder, every domain name registration is expected to not infringe on the legal rights of others. All ICANN accredited registrars are required to enter into registration agreements with their registered name holders, and those registration agreements must include a representation "that, to the best of the Registered Name Holder's knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party." *See* RAA, Section 3.7.7.9. All registered name holders also agree that the registrations are subject to ICANN specifications and policies for the resolution of disputes concerning the domain name, including the Uniform Domain Name Dispute Resolution Procedure (UDRP).

SENT VIA FEDERAL EXPRESS

November 13, 2009

The Honorable Henry C. Johnson, Jr., Chairman
Committee on the Judiciary
Subcommittee on Courts and Competition Policy
B-352 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman or Chairman Johnson,

Questions from Representative Coble, Ranking Member

1. I am told eNom has appeared towards the top of a list of ten registrars who host spam and that the company has also been identified as one of the top hosting sites for cybersquatters. What specific names does eNom take to curb spam, prevent cybercrimes and protect legitimate brands? Are there further steps that you're prepared to take to better police the sites under eNom's control and operation?

Response from Mr. Stahura:

I am not sure what particular list you are referring to or the accuracy of such a list. I am aware of some lists that are published on the web that purport to negatively rank registrars, but I question their legitimacy and the motivations of some who publish such lists. For example, the operator of one list contacted me and offered to help eNom come off their list for a hefty consulting fee.

Furthermore, eNom may appear on "lists" due to the sheer number of domain names we have under management and the large number of services we offer. eNom is the second largest registrar in the world and have over 11 million domain names under management. As a percentage of domains under management, eNom has very few instances of spam, phishing and other problematic activity.

Having said that, eNom has specific policies and procedures and a dedicated staff to combat spam and cybercrimes. The bad actors that perpetrate these activities not only cause harm to individuals, they also cause harm to the infrastructure and operations of eNom and we are committed to removing them from our platform.

In addition to our internal process we have a trusted relationship with law enforcement with whom we work very closely. We also work closely with anti-phishing and anti-spam entities and working groups. We would be happy to discuss privately our internal procedures and the manner in which we cooperate with law enforcement officials.

eNom is constantly updating its procedures and looking for improved methods for combating malicious Internet behavior. In so doing, we seek to balance the legitimate rights of consumers and businesses with the need to crack down on malicious behavior.

Even though eNom is active in working to address malicious conduct, we are not in a reasonable position of preemptively policing websites or the actions of domain name owners, much as an Internet Service Provider cannot prevent copyright infringement before it happens and a large Internet auction site cannot preemptively prevent the offering for sale of counterfeit goods on their website

2. <u>I am told that in the past, eNom has taken ownership of domain names that are identical or similar to famous trademarks. What practices does eNom have in place today to discourage and prevent cybersquatting?</u>

Response from Mr. Stahura:

I am not sure exactly what you were told and by whom, but eNom is not in the business of owning domain names that are identical or similar to famous trademarks. In fact, eNom has a policy against knowingly registering or holding domain names in derogation of third party trademark rights. eNom has been involved in an extraordinary low number of disputes involving domain names owned by eNom and these are very rare exceptions rather than the norm. Many companies are sometimes involved in litigation, etc. regarding alleged trademark, patent or copyright infringement but this does not equate to a practice of violating intellectual property rights and many such cases involve genuine disputes.

In regards to "discouraging and preventing cybersquatting," eNom is in the business of selling domain names to consumers and value added services to consumers. When a consumer purchases a name, they do so at their own risk. I do not believe any registrar should be required to make the judgment as to whether a domain name requested by a consumer *may* violate someone's intellectual property rights.

As you are well aware, a standing principle of intellectual property law is that of post-usage enforcement rather than pre-usage approval or policing. This principle has been upheld as intellectual property laws and procedures have been updated in the Internet age through, for example, the Anti Cybersquatting Protection Act, the Digital Millennium Copyright Act and ICANN's Uniform Dispute Resolution Procedure (UDRP).

If a trademark owner wins a lawsuit or a UDRP proceeding against a domain name owner, eNom acts swiftly to take down the domain and when requested, transfer the ownership of the domain names to the prevailing party.

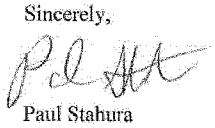
3. I am told that in the past, eNom has taken ownership of domain names that are identical or similar to famous trademarks. What practices does eNom have in place today to discourage and prevent cybersquatting? If one conducts a search on eNom's website for a famous brand, for example, in one searched for verizon.com, your website returns more than a dozen variation of Verizon's trademark with the prominent heading, "We also recommend"...Freeverizon, theverizon, yourverizon...and recommends that customers visit the afternic.com site to purchase these domain names. See http://www.enom.com.domains.registrar.asp?sld=verizon&tld+com. Does eNom post a warning to consumers that these trademarked domain names are the property of third parties and registering them may create liability under the Anticybersquatting Act for the purchaser. If not, why not?

eNom does not post such a warning for several reasons. First, we do not know who the buyer is; it could be Verizon or an agent of Verizon. Also, the software shows which domains are available for registration, not what the customer may or should do with the domain name they purchase. As stated above, eNom is not in the best position to determine whether a given domain name may violate someone's trademark rights.

It is important to note that trademark holders are not automatically entitled to own the domain name that matches or includes their trademark because there can be multiple trademarks for the same word in different classes and not all uses of a trademarked name are bad-faith uses. If a consumer decides to buy a domain praising or criticizing Verizon that may be within their rights, and by restricting their choices we may be limiting free speech and we may incur liability for taking down someone's domain name and website. In many cases, infringement may depend on the usage of the domain name. The bottom line is that registrars cannot determine appropriate or inappropriate usage at the time of the domain name sale.

Finally, I would like to emphasize that eNom does not condone cyberquatting, nor have we built a business profiting from the abuse of intellectual property rights or nefarious web-based activity. Occasionally, a name or service purchased by a consumer from eNom is used by that consumer in an infringing fashion, but we take steps to stop this behavior. Importantly, we take no steps to encourage trademark infringement nor do we attempt to profit from exploiting trademarked names.

Sincerely,



Paul Stahura
Founder

eNom, Inc, 15801 NE 24th Street, Bellevue WA, 98008

THE COALITION FOR ONLINE TRADEMARK PROTECTION

The Honorable Hank Johnson
Chairman
House Judiciary Subcommittee on
Courts and Competition Policy
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Howard Coble
Ranking Member
House Judiciary Subcommittee on
Courts and Competition Policy
2138 Rayburn House Office Building
Washington, DC 20515

September 23, 2009

Dear Chairman Johnson and Ranking Member Coble:

On behalf of The Coalition for Online Trademark Protection (COTP),[1] the undersigned thank you for holding a hearing to address critical competition issues surrounding the Internet Corporation for Assigned Names and Numbers' (ICANN) new top-level domain name roll-out. We applaud the Committee's leadership and support in ensuring the stability and security of the Internet domain naming system and also the protection of consumers and businesses from online fraud and anti-competitive practices that may be an unintended result of a rushed roll-out.

The Coalition understands, appreciates and supports ICANN's desire to roll-out new "internationalized" top-level domains for the world's population that do not read and write in Latinized scripts. We remain concerned however, that ICANN has moved ahead with a more ambitious project to introduce top-level domains in all scripts, without fully considering issues surrounding Internet security and stability, intellectual property protection and consumer fraud prevention.

In recent months ICANN has made great strides in reaching out to its many Internet constituencies. At the same time, we are concerned that ICANN has not established that the new roll-out is justified from a market-competition perspective. In addition, it is unclear what restrictions ICANN intends to place on the proposed top-level domains to prevent anti-competitive behavior such as market-gouging and what measures it would take against those who engage in these behaviors. Finally, we are not sure of ICANN's accountability to domain name owners and Internet users. We are hopeful that these issues will come up in the hearing, and will be fully addressed by the panel participants.

Thank you again for your leadership on an issue of critical concern to the vast number of U.S. companies that do business online.

Sincerely,

American Advertising Federation
Intellectual Property Owners Association
ITT Corporation
MarkMonitor
National Association of Manufacturers
National Marine Manufacturers Association
National Retail Federation
New Balance Athletic Shoe, Inc.
NetChoice
Retail Industry Leaders Association
Shop.org
Uniweld Products, Inc.
US Chamber of Commerce

[1] The Coalition for Online Trademark Protection is an ad hoc group of corporations, trade associations and business groups representing thousands of multinational companies and millions of employees and Internet users. The Coalition was formed in 2008 to protect consumers and businesses from online threats such as online fraud and the sale of unsafe counterfeit products. For more information, please contact Marc-Anthony Signorino at (202) 637-3072 or via email at MSignorino@nam.org.

COALITION FOR ONLINE ACCOUNTABILITY
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Copyright Industry Coalition Supports House Oversight Hearing on ICANN

The Coalition for Online Accountability (COA), representing nine copyright industry organizations and leading companies, commends the Subcommittee on Courts and Competition Policy of the House Judiciary Committee for holding an oversight hearing regarding the Internet Corporation for Assigned Names and Numbers (ICANN).

This timely hearing is an opportunity to address a number of crucial issues. ICANN is approaching several critical decisions, especially regarding the rollout of new generic Top Level Domains (gTLDs), and its future relationship with the U.S. government. The subcommittee's oversight is an essential ingredient to ensure that ICANN's decisions safeguard the stability and security of the domain name system (DNS) in general, and the interests of American consumers and businesses that rely upon strong intellectual property protection online.

ICANN's plan to recognize hundreds or even thousands of new gTLDs could dramatically transform the Internet. While certainly there is a potential for positive change, there are also serious downside risks to consumers, businesses and other Internet users, which ICANN has been slow to recognize. COA urges the subcommittee to address, among other questions: .

- How best to structure the scope and pace of the new gTLD rollout, based on sound economic analysis, to maximize the potential benefits to the public, while minimizing the risk of widespread consumer confusion that will undermine confidence in electronic commerce;
- How to ensure that the new gTLDs do not become havens for cybersquatting, copyright and trademark infringement, and other online crime and fraud;
- How to build into the new gTLD framework enhanced transparency and accountability, including through strong requirements to screen out improper registrants, and to preserve and strengthen the long-standing principle of making domain name registrant contact data publicly available through Whois services.

Even ICANN recognizes that its new gTLD plans are very much a work in progress. Earlier this year, its staff identified four "overarching issues" that must be resolved before the new gTLD application window can safely open. But as of today, barely six months before ICANN's target date to begin accepting applications, ICANN has not come to a firm position on a single one of these issues. Critical unresolved questions concern the rights of trademark owners; protection of consumers from online fraud and other malicious behaviors; and fundamental technical issues about the impact of adding hundreds or thousands of new TLDs to

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

the DNS, in the context of other sweeping technical changes already underway. Perhaps most fundamentally, ICANN has yet to conduct an objective assessment of the impacts of the rollout on competition and choice for consumers. We hope this hearing will help provide some answers to how and when ICANN plans to address these critical issues, and whether it will do so in a transparent and accountable way.

The current Joint Project Agreement (JPA) between the Department of Commerce and ICANN expires September 30. Serious questions have been raised by a wide variety of affected stakeholders, including the copyright industries, as to whether ICANN has fulfilled its 'transition' responsibilities and whether the Department should continue to have a substantive relationship with ICANN. The subcommittee should thoroughly explore these questions as well, since this hearing represents the last clear chance to evaluate ICANN's progress before the JPA expires.

COA has participated actively in ICANN since its inception, particularly through the Intellectual Property Constituency, in which COA participants hold a number of leadership positions. Most recently, we led the way in the formation of the Implementation Recommendation Team (IRT), a group of global legal and business experts who, at the ICANN Board's request, made extensive recommendations for ways to improve trademark protection and minimize consumer confusion in the new gTLD space. The fate of the IRT recommendations remains unknown.

Throughout our decade of engagement with ICANN, COA has been a strong supporter of this bold experiment in innovative governance approaches for a key aspect of the Internet. Today we believe strongly that ICANN owes the subcommittee some frank answers to some tough questions about new gTLDs and the expiration of the JPA.

For further information:

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COA (formerly the Copyright Coalition on Domain Names [CCDN]) consists of nine leading copyright industry companies, trade associations and member organizations of copyright owners. They are the American Society of Composers, Authors and Publishers (ASCAP); the Business Software Alliance (BSA); Broadcast Music, Inc. (BMI); the Entertainment Software Association (ESA); the Motion Picture Association of America (MPAA); the Recording Industry Association of America (RIAA); the Software and Information Industry Association (SIIA); Time Warner Inc.; and the Walt Disney Company.

COA's goal is to enhance and strengthen online transparency and accountability by working to ensure that domain name and IP address Whois databases remain publicly accessible, accurate, and reliable, as key tools against online infringement of copyright, as well as to combat trademark infringement, cybersquatting, phishing, and other fraudulent or criminal acts online.

Testimony of Josh Bourne
President and Co-Founder
Coalition Against Domain Name Abuse
Before the Subcommittee on Courts and Competition Policy

Hearing on the Expansion of Top Level Domains and its Effects on Competition
September 23, 2009

Mr. Chairman and distinguished members of the committee, thank you for convening this timely hearing on issues concerning the Internet Corporation for Assigned Names and Numbers (ICANN) and its plan to release an unlimited amount of generic top level domains (gTLDs). It is a topic that too few understand, and too little attention has been given to it. Today, there are over 1.5 billion users of the Internet, but it is likely that less than one percent of the users are even aware that Internet policy is set by ICANN, let alone how the drastic changes ICANN is about to implement will dramatically impact the space. Given the commercial significance of the Internet and the potential national security threats possible through the Internet, it is critical that the United States Congress involve itself in matters of domain name space policy and regulation.

My name is Josh Bourne and I am the president and founder of the Coalition Against Domain Name Abuse (CADNA). CADNA, a 501(c)(6) non-profit association, was founded over two years ago with the help of Fairwinds Partners and leading brand owners to combat a variety of abuses on the Internet. CADNA represents businesses vital to the American and global economies, including American International Group, Inc., Bacardi & Company Limited, Carlson/Carlson Hotels Worldwide/Carlson Restaurants Worldwide, Compagnie Financière Richemont SA, Dell Inc., DIRECTV, Inc., Eli Lilly and Company, Goldman, Sachs & Co., Harrah's Entertainment, Inc., Hewlett-Packard Company, Hilton Hotels Corporation, HSBC Holdings Plc, InterContinental Hotels Group, Marriott International, Inc., New York Life Insurance Company, Nike, Inc., Verizon Communications, Inc., Wells Fargo & Company, and Wyndham Worldwide Corporation.

CADNA was founded in response to the growing international problem of cybersquatting, which is the bad faith registration of a domain name that includes or is confusingly similar to an existing trademark. In addition to the mounting legal costs that companies now face in defense of their own domains, this infringement costs organizations billions of dollars in lost or misdirected revenue. CADNA works to decrease instances of cybersquatting in all its forms by facilitating dialogue, effecting change, and spurring action on the part of policymakers in the national and international

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arenas. CADNA also aims to build awareness about illegal and unethical infringement of brands and trademarks online. In the two years since its inception, CADNA has generated new intelligence that helps inform and expertly guide its members and increase awareness of CADNA's mission.

CADNA seeks to make the Internet a safer and less confusing place for consumers and businesses alike. Taking action against the practices of cybersquatting and domain name tasting and kiting, CADNA provides a framework for brand owners to protect themselves—as well as their investors, customers and partners—from illegal trademark infringement.

Thank you very much for the opportunity to present the views of our organization on this very important topic.

With only one week remaining on the Joint Project Agreement (JPA), we feel that it is critical for the Internet community and the US government to pause, take a step back, and reassess ICANN's success as a regulatory body. When US policy was developed in the late 1990s, the United States Government thought that by September of 2009 ICANN would exist as a transparent and reliable force for sensible and practical policies for the Internet. Unfortunately, this has proven not to be the case, and so governments must rethink its stance towards ICANN in a thoughtful and considered manner.

Members of the global business community believe that while ICANN has achieved many things, broad participation and involvement of its diverse stakeholders is not one of them. To date, those involved in ICANN policy have not represented the needs of users and user groups that utilize and depend on the Internet in widely varying respects. There is a lack of diversity, cross-constituency interaction, and overall balanced debate and discussion present in ICANN's day-to-day policy development and in international meetings, leaving much to be desired. For example, ICANN recently adjusted the voting structure of its policy-making body, the Generic Names Supporting Organization (GNSO), so that those with financial interests have a majority of the vote rather than allowing all Internet-using constituencies equal participation. While Internet users, businesses, and governments have slowly begun to take a greater interest in the domain name space, we fear that ICANN's current framework does not offer adequate opportunities or incentives to encourage broader involvement. It also does not allow for the development and implementation of good policy.

Unfortunately, ICANN has often fallen short of its duty to maintain the stability, reliability, and security of the Internet and tends to favor certain special interests rather than looking out for the diverse interests of the global Internet community. One prime example of this is the decision to open up the Internet to the creation of a limitless

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number of extensions, which benefits the very entities that control the GNSO- registrars and registries. Registrars and registries have long been working through ICANN to create policy to regulate the very product that they sell; it is no wonder now that they are pushing for a policy that will give them an unlimited supply of their product, regardless of that product's impact on the market.

CADNA does not claim that there should never again be another TLD launch; it may very well be true that a new TLD can provide innovation to the domain name space. However, opening up the floodgates to a potentially unlimited number of TLDs, with many of ICANN's own staff uncertain about the scalability of operations and with the current domain name space plagued with problems, is dangerous and irresponsible.

ICANN's plans to dramatically increase the number of website names available for registration will make the web exponentially more complex. Given the state of the current domain name governance system, priority should be given to correcting existing issues rather than expanding the space. For example, it is still too easy for cybersquatters to register domain names in bad faith that are lawfully associated with legitimate entities. Even without these proposed gTLDs, cybersquatting grew by 18% in the last quarter of 2008.

Cybersquatters are also extremely difficult to apprehend as a result of ineffectual ICANN policies. ICANN is aware of the fact that its requirements regarding WHOIS information are weak, leading to faulty or inaccurate information about the identities of cybersquatting domain name owners, but it has yet to adjust its policies. New gTLDs would only exasperate this problem. Rather than allowing this issue to go unchecked, ICANN should resolve it before increasing the size of the domain name space and the opportunities to practice fraud.

Conservative estimates put the average cost per sunrise registration around $300. If a typical company registered 20 domains in each sunrise period, the cost to participate in all 200 new gTLDs that could be added in 2010 would be $1.2MM. The costs of participating in new gTLD launches can be much greater than outlined above due to offers of special registrar queues to raise probability of successfully registering a domain, extra validation services, and gimmicky programs presented by new registries. Furthermore, as with gTLDs such as dot-MOBI, dot-EU and dot-ASIA, companies may feel compelled to defensively register hundreds of domains rather than a mere 20.

If brand owners chose to participate in just 10% of the new gTLDs to be launched in 2010, the average expenditure per brand just for 20 trademark sunrise registrations in each could be $120,000. This represents a steep 37.5 per cent cost increase since the average company spends less than $200,000/year maintaining their domain portfolio.

Brand owners who are already under water due to infringements in the 1000+ worldwide domain extensions will be forced to contend with the added complexity of policing the use of their brands in domain names. The costs of monitoring and enforcing the new gTLDs are likely to be significant. This is not to mention the brand dilution, proliferation of cybercrime and damage to the integrity of the Internet that are sure to occur. These new gTLDs will afford the most benefit to domain industry insiders, criminals and others that look to profit in an expanded Internet real estate market.

Below is a simple summary of the cost to businesses and consumers that a proliferation of gTLDs will create:

- An average company will spend $40,000 per year for online and domain monitoring
- Cybersquatting will grow at a rate of 100% year after year
- On average, a global corporation will face 5,000 infringements every year
- 50% of all cybersquatting sites receive meaningful traffic
- Cybersquatting sites that garner meaningful traffic receive an average of 600 visitors/year
- 25% of visitors to Pay-Per-Click (PPC) sites click on the posted links
- Of those who click on PPC sites, 75% click on the link provided and paid for by the brand owner represented in the domain name
- Average cost per click is $.50 (conservative est. since clicks can be 10+ times this amount)
- An average company files 10 Uniform Dispute Resolution Policy (UDRP) complaints per year (one domain per UDRP)
- The average total cost of each UDRP is $5,000
- An average company sends 150 cease and desist letters annually (assuming a 100% success rate)
- Cost per cease and desist letter is $50 (even if generated in-house)

  *These estimates do not include an estimate regarding the loss of sales or damage to brand value that occur as a result of cybersquatting activities.

It is important to remember that the average Internet user—every individual that uses the Internet for personal or business use—is also a victim of the current space. As a result of ICANN's policies, there is a lack of transparency and accountability online, so as Internet users continue to be vulnerable to phishing, malware deposits, diversion, and confusion there remains little opportunity for recourse and retribution. This would only expand exponentially along with any gTLDs that would be added.

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Thank you for your time and consideration on this very important matter.

Sincerely yours,

Josh Bourne
President, Coalition Against Domain Name Abuse

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Registries Constituency
Generic Names Support Organization
Internet Corporation for Assigned Names and Numbers

September 24, 2009

Hon. Hank Johnson
Chair, Subcommittee on Courts and Competition Policy
Committee on the Judiciary
United States House of Representatives
1133 Longworth House Office Bldg.
Washington, DC 20515

RE: **Hearing on: The Expansion of Top Level Domains and its Effects on Competition** –September 23, 2009

Dear Chairman Johnson:

This letter is sent to supplement and correct the record of the above Hearing held on September 23, 2009. I write in my capacity as Chair of the Registries Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). The Registries Constituency comprises all the parties under contract with ICANN to manage the registries of domain names in the generic top level domains (gTLDs).

In the course of the testimony on September 23, statements were made by several witnesses regarding the position and policy of the registries with regard to possible restrictions on cross-ownership of registries, registrars and back end service providers under ICANN's proposed guidelines for new gTLDs. Statements were made that the registries sought to prohibit registrars from owning and competing as back end registry service providers. This is not correct.

The registries support competition in the market for new gTLDs and firmly believe that all qualified back-end registry service providers – including providers affiliated with ICANN accredited registrars - should be permitted to compete to serve new and existing gTLDs.

The entire group of registries, operating within ICANN as the Registries Constituency, made a proposal, dated April 13, 2009, and posted on ICANN's web site at <http://forum.icann.org/lists/2gtld-guide/pdf87R06c18Sd.pdf>, that quite clearly would permit registry operators and registry service providers to own ICANN accredited registrars and vice versa. This proposal would simply limit the ability of a registry or registry service provider from acting as an authorized registrar, reseller or distributor of domain names within the TLD through the same entity that provides Registry Services for the TLD. The Constituency's proposal provides for certain exceptions for smaller registries, such as single registrant TLDs, and a 50,000 name carve out for community-based TLDs.

I ask that the record of the Hearing include this correction.

Respectfully submitted,

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September 28, 2009

Submitted electronically

Congressman Hank Johnson
Chairman, Subcommittee on Courts and Competition Policy
United States House of Representatives
Committee on the Judiciary
1133 Longworth House Office Building
Washington, DC 20515

Congressman Howard Coble
Ranking Member, Subcommittee on Courts and Competition Policy
United States House of Representatives
Committee on the Judiciary
1133 Longworth House Office Building
Washington, DC 20515

Dear Chairman Johnson and Representative Coble:

Re: Comment for the Record regarding September 23, 2009 Subcommittee Hearing: "The Expansion of Top Level Domains and its Effects on Competition."

The American Bankers Association (ABA)[1] appreciates the opportunity to comment, for the record, regarding the September 23, 2009, hearing held by your subcommittee entitled: "The Expansion of Top Level Domains and its Effects on Competition." We applaud the committee and your subcommittee for continuing to examine the implications of the Internet Corporation for Assigned Names and Numbers (ICANN) expanding the current number of top level domains. We wish to clarify that the ABA does not support expansion of the top level financial domains nor the beginning of the application process for new top-level domains until such issues of Internet security and stability, the potential for malicious conduct and trademark protection concerns are resolved.

There have been several recent instances where testimony by ICANN and economic reports completed on ICANN's behalf would lead one to the conclusion that the attractiveness of new top level financial domains is an important driver of domain expansion and that the financial industry is supportive of the expansion. For instance, during his testimony at the September 23 hearing, Mr. Doug Brent, Chief Operating Officer of ICANN used financial domains as his primary example of a new top level domain:

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.3 trillion in assets and employ over 2 million men and women.

> What is a new generic TLD (gTLD)? It might be a .FINANCE domain where consumers could be certain they were dealing with authentic financial institutions operating under secure conditions.[2]

Mr. Brent, in response to a question about the demand for new top level domains, further stated that the financial services industry is actively looking to develop a highly secure domain. While our industry is working closely with ICANN on security issues, this should not be construed as an endorsement by our industry of expansion or belief by us that sufficient demand for financial top level domains exists to justify the expense.

In Dr. Dennis Carlton's recent economic study for ICANN, the financial industry was cited as one of the primary areas of potential innovation when domain expansion occurs:

> A variety of innovations are likely to be facilitated by expansion of the number of gTLDs. For example: A gTLD dedicated to serving the financial services industry might require registrants to provide secure transactions. The certification provided in the gTLD name thus provides valuable information to consumers who desire secure financial transactions over the Internet.[3]

We believe that Dr. Carlton's study implies a level of support by the financial industry that currently does not exist.

In ABA's two recent comment letters to ICANN we have expressed our concerns about the impact of the expansion on financial services companies and our customers.[4] ABA recognizes that there may be potential long-term value in the development of differentiated top level domains, including highly secure domains devoted to and managed by the financial sector. We do not, however, believe that there currently is a strong business case for financial top level domains.

- Banks have already taken the branding steps necessary to be identified as a bank online. Rebranding using ".bank" materially increases branding costs without providing material benefits.
- It is unclear what the top level domain name would signify. The most promising use of ".bank" and like domains would be if the security within the domain could be marketed as a significantly safer environment from which to conduct online banking, thus driving up adoption. While controlling the domain registry would assist in keeping out "bad actors," it is not clear that the level of domain security, or

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[2] Testimony of Doug Brent, Chief Operating Officer, Internet Corporation for Assigned Names and Numbers (ICANN), before the US House of Representatives Committee on the Judiciary, September 23, 2009. Available at: http://judiciary.house.gov/hearings/pdf/Brent090923.pdf.

[3] Report of Dennis Carlton Regarding ICANN's Proposed Mechanism for Introducing New gTLDs, June 5, 2009. Available at: http://www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf.

[4] See ABA letters dated December 15, 2008 and April 13, 2009, available at: http://forum.icann.org/lists/gtld-guide/msg00101.html and http://forum.icann.org/lists/2gtld-guide/msg00077.html.

the level of overall Internet security for that matter, will be sufficient in the foreseeable future to be able to make such a claim.

- It is also unclear what the benefit would be to bank customers. In fact, customers would be at greater risk for being defrauded if they are operating in a world where they are not sure if their bank is, for instance, "bankname.com," "bankname.bank," or "bankname.finance,"

The financial industry continues to study these cost/benefit and security and stability questions along with defining what the proposed operating environment would be to establish and operate one or more new, financial services top level domains. While many of the new generic domains will pose no threat to trusted transactions over the Internet, any domain name associated with financial services should be restricted to financial services companies, with substantial restrictions, guidelines and proof of eligibility.

We continue to work closely with ICANN, in collaboration with others within the U.S. and global financial community, to address these concerns. We are appreciative of ICANN's willingness to engage us in these discussions as we work with them to meet two objectives. The first objective is to identify potential process changes within the Application Guidebook that would allow ICANN and the sector to both identify and evaluate applications for new top level domains where their use was primarily for offering financial services.
The second objective is to identify a set of security, stability and resiliency requirements for these financial TLDs. While we have made some progress, we do not believe that our objectives can be met within the timeframes, however lengthened, that ICANN envisions in 2010.

It is for these reasons that we believe an incremental approach toward top level domain name expansion is the most prudent course. Such a course would also allow those domain categories that do not pose a threat to trusted transactions to be released, while further, important work can be accomplished on improving the security and stability of the domain name system and the application process surrounding global financial domains.

This course is also consistent with the recent recommendations of the ICANN Governmental Advisory Committee, as expressed in an August letter:

> The GAC proposes that ICANN should actively consider a more category-based approach to the introduction of new gTLDs. This would allow for different procedures for different types of TLDs, including non-commercial cultural, linguistic and regional gTLDs which would strengthen cultural diversity on the Internet, creation of local content, and freedom of expression. It would also potentially lessen consumer confusion and provide a structure for a more measured rollout of new gTLDs.[5]

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[5] Letter from Janis Karklins, Chairman of the Governmental Advisory Committee, to Peter Dengate Thrush, Chairman of the Board, ICANN, August 18, 2009. Available at: http://www.icann.org/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf

An attractive means for a phased rollout would be to release non-Latin International Domain Names first. While the demand for additional Latin-based domain names is still unclear, there is substantial interest in the non-Latin domains. ICANN is currently planning to introduce non-Latin IDNs along with new Latin-based domains. A more controlled and prudent approach would allow for the release of non-Latin domains as a proof of concept.

Thank you again for the opportunity to supplement the hearing record. We look forward to continuing to work with your committee on these important issues. If there are any further questions, do not hesitate to contact me or Doug Johnson our Vice President for Risk Management.

Sincerely,

Diane Casey-Landry

cc: The Honorable John Conyers, Jr, Chairman, US House of Representatives Committee on the Judiciary
Mr. Rod Beckstrom, Chief Executive Officer, ICANN
Mr. Doug Brent, COO, ICANN