AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

ICANN GENERIC TOP-LEVEL DOMAINS (gTLD)

HEARING

BEFORE THE

SUBCOMMITTEE ON
INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

MAY 4, 2011

Serial No. 112–37

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

66–155 PDF WASHINGTON : 2011

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

LAMAR SMITH, Texas, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TIM GRIFFIN, Arkansas
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
DENNIS ROSS, Florida
SANDY ADAMS, Florida
BEN QUAYLE, Arizona
[Vacant]

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
MIKE QUIGLEY, Illinois
JUDY CHU, California
TED DEUTCH, Florida
LINDA T. SÁNCHEZ, California
DEBBIE WASSERMAN SCHULTZ, Florida

SEAN MCLAUGHLIN, *Majority Chief of Staff and General Counsel*
PERRY APELBAUM, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION, AND THE INTERNET

BOB GOODLATTE, Virginia, *Chairman*
BEN QUAYLE, Arizona, *Vice-Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
MIKE PENCE, Indiana
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TIM GRIFFIN, Arkansas
TOM MARINO, Pennsylvania
SANDY ADAMS, Florida
[Vacant]

MELVIN L. WATT, North Carolina
JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
JUDY CHU, California
TED DEUTCH, Florida
LINDA T. SÁNCHEZ, California
DEBBIE WASSERMAN SCHULTZ, Florida
JERROLD NADLER, New York
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California

BLAINE MERRITT, *Chief Counsel*
STEPHANIE MOORE, *Minority Counsel*

CONTENTS

MAY 4, 2011

Page

OPENING STATEMENTS

The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Subcommittee on Intellectual Property, Competition, and the Internet 1
The Honorable Melvin L. Watt, a Representative in Congress from the State of North Carolina, and Ranking Member, Subcommittee on Intellectual Property, Competition, and the Internet 3
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Intellectual Property, Competition, and the Internet 4

WITNESSES

Kurt Pritz, Senior Vice President, Stakeholder Relations, Internet Corporation for Assigned Names and Numbers (ICANN)
Oral Testimony 6
Prepared Statement 8
Mei-lan Stark, Senior Vice President, Intellectual Property, Fox Group Legal, and Treasurer, International Trademark Association (INTA)
Oral Testimony 29
Prepared Statement 31
Michael D. Palage, President and CEO, Pharos Global
Oral Testimony 44
Prepared Statement 45
Steven J. Metalitz, Counsel, Coalition for Online Accountability
Oral Testimony 49
Prepared Statement 51
Steve DelBianco, Executive Director, NetChoice
Oral Testimony 66
Prepared Statement 68
Joshua Bourne, President, Coalition Against Domain Name Abuse (CADNA)
Oral Testimony 74
Prepared Statement 77

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter from Kurt Pritz, Senior Vice President, Stakeholder Relations, Internet Corporation for Assigned Names and Numbers (ICANN), in response to post-hearing questions submitted by the Honorable Howard Coble, and further information on questions raised during the hearing 110
Submission from Steve DelBianco, Executive Director, NetChoice, in response to request from Representative Melvin L. Watt during the hearing 118

ICANN GENERIC TOP-LEVEL DOMAINS (gTLD)

WEDNESDAY, MAY 4, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:12 a.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Coble, Chabot, Issa, Jordan, Poe, Griffin, Marino, Watt, Conyers, Lofgren, Jackson Lee, and Waters.

Staff present: (Majority) Vishal Amin, Counsel; Olivia Lee, Clerk; and Stephanie Moore, Minority Counsel.

Mr. GOODLATTE. Good morning. The Subcommittee on Intellectual Property, Competition, and the Internet will come to order.

I have an opening statement.

Today we are holding an oversight hearing on ICANN's proposed generic top-level domain, or gTLD, proposal. We all understand the important role that ICANN, a nonprofit company, plays in supporting the infrastructure of the Internet while taking into account the needs of stakeholders and governments. But this proposed expansion of gTLD's has raised many questions, both positive and negative.

The gTLD proposal is designed to dramatically expand the number of top-level domains available. This expansion will raise significant revenue for ICANN, possibly launch new businesses to manage the new gTLD's, and create more options for registrars to sell domain names to consumers. The investment and economic potential from these new domains may be significant, but investment in economic potential should not necessarily be the focus of whether the gTLD proposal moves forward. We need to ask ourselves the tough questions.

How will this expansion affect trademark holders?

Will it create opportunities for fraud, increased consumer confusion, and IP theft?

Besides ICANN, who is asking for these new gTLD's, consumers, registrars, or those looking to create businesses around these new top-level domains, is the gTLD proposal simply a solution that is in search of a problem that may or may not exist?

Given the concerns expressed by some of ICANN's current enforcement efforts, how effective will ICANN be in enforcing its policies for an unlimited number of new gTLD's?

As we consider this proposal, it is important to remember that ICANN is a nonprofit corporation with a specific and clearly defined mission. As ICANN works to advance their proposal, governments and stakeholders need to be convinced that these gTLD's are necessary, not that they are simply profitable, but they are necessary to ICANN's mission to help ensure the safe functioning and infrastructure of the Internet.

Some have raised the concern that this proposal appears to be driven more by money than need to establish a program that will raise incredible amounts of revenue, potentially hundreds of millions of dollars. I think stakeholders, governments, and those of us here in Congress would like to know how this revenue will be utilized. Does ICANN have sufficient contracting, budget, and compliance staff to properly handle such large amounts of money, to prevent waste and even fraud? I think that before ICANN makes its final decision to move this proposal forward, a clear and transparent long-term draft budget plan needs to be developed hopefully before ICANN's June board meeting in Singapore.

Learning from the experiences of other industries, I am certain that ICANN will take a tough line to ensure that their potential budget is not wasted on corporate retreats, outsized salaries, bonuses, and other perks that are oftentimes associated with for-profit entities.

It is also important to remember that this hearing and all of our discussions on the new gTLD proposal are part of the backdrop for upcoming discussions between ICANN and the Commerce Department over renewal of ICANN's authority over an IANA function. As the Commerce Department establishes the conditions for contract renewal, I think that it may make sense for the Department to consider new conditions. We all agree that ICANN should remain a separate nonprofit corporation, but there needs to be safeguards in place to ensure that its focus remains on its core mission. That way precious resources can be targeted toward building up ICANN's core functions and ensure the stability of the Internet for everyone.

ICANN will need to continue working hard to be an effective steward for the whole community of stakeholders and governments that use the Internet, not just those who stand to make a profit from it. The goal for today's hearing will be to learn more about the positive and negative benefits for the Internet if the gTLD proposal moves forward. I would ask that we balance the costs and benefits of this proposal before a final decision is made to go forward, and in the end, if the costs of this proposal outweigh the benefits, it probably makes sense for ICANN to consider slowing down a bit, address the outstanding concerns, and extend the timeline for their final board decision.

Today we are going to hear from witnesses that will describe some of the outstanding concerns and how they are or are not being addressed. A major concern revolves around intellectual property protections. With every new gTLD that is created, a brand holder will be forced to replicate their Internet domain portfolio. Apart from the massive cost to register, brand holders will also

need to set up policing operations to ensure that their trademarks are not being infringed. It doesn't seem fair to create hundreds of new gTLD's and then force brand owners to spend millions of dollars to police something that they did not create or operate. The rollout of these new gTLD's will also complicate copyright enforcement, making it harder and more costly to find and stop online infringers.

I understand that ICANN is working to address these and other concerns by establishing a trademark clearinghouse and developing specific safeguards to protect brand holders and possibly consider a globally recognized trademark block list.

ICANN's new Applicant Guidebook also includes protections that the law enforcement community believes will help take into account some of the cyber security concerns raised by the gTLD proposal.

I look forward to hearing from all of our witnesses and hope that we can have a spirited discussion on the gTLD proposal and the steps that need to be taken to ensure that the backbone of the Internet remains strong, effective, and accountable to the global Internet community.

It is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman, and thank you for scheduling today's hearing.

The role of ICANN to the world community cannot be understated. As the entity charged with developing policy for the Internet, its reach is far and wide. ICANN's website notes that it is, "dedicated to keeping the Internet secure, stable, and interoperable." It furthers states that it, quote, promotes competition and acknowledges that although it does not control content on the Internet, through its coordination role of the Internet's naming system, it does have an important impact on the expansion and evolution of the Internet.

Today's focus on ICANN's proposed expansion of the generic top-level domain names complements our work in other areas to ensure that the Internet remains a free, robust, and trustworthy environment for legitimate commerce. Of particular interest in that regard is ICANN's maintenance of the Whois database. Whois is intended to obtain personal contact information from domain name registrants, in part to provide the public access to the identity of the registrant. The accuracy of the Whois database is critical to providing accurate information to consumers, to assisting law enforcement, and to protecting intellectual property rights holders.

With the proposed expansion of the gTLD's comes increased concerns about whether ICANN will be able to enforce the assemblage of truthful information into the Whois database. This is especially important if, as anticipated, the new gTLD's may be registered in a number of countries. ICANN maintains that the expansion of top-level domain names will stimulate competition and innovation. These are both laudable goals. Safeguards must be in place, however, to protect against the initiatives that threaten the rights of IP right holders, potentially expose consumers to fraudulent markets, and provide sanctuary through anonymity and inaccuracy to cyber criminals.

An accurate Whois database is a prerequisite to each of those protections. And I hope to hear how ICANN intends to correct the existing database and guarantee that any expansion will have mechanisms in place to guarantee accuracy of information on the front end of all future domain name assignments.

With that, Mr. Chairman, I thank you again for scheduling this important hearing and yield back.

Mr. GOODLATTE. We have a very distinguished and unusually—before we get to that distinguished panel, we have a distinguished Ranking Member of the full Committee, and I want to recognize him for his comments. The gentleman from Michigan is recognized.

Mr. CONYERS. Thank you, Chairman Goodlatte. I join you in your next assignment of welcoming all the witnesses, especially Mr. Pritz who carries a particularly large burden at this hearing.

We are here to look at what will happen to trademark owners and to intellectual property protection as a result of this Subcommittee's important work. I am worried that the benefits will not outweigh the concerns raised by so many stakeholders. I have heard from a lot of people on this. They are not anxious to have more new names issued because they believe that this expansion will require them to register countless domain names that will have to be registered to prevent online criminals from getting the names and confusing consumers. There are a lot of examples I could use to demonstrate that.

So the bottom line is it hasn't been made sufficiently clear that the new generic domain names will actually facilitate more open speech and commerce.

It is also clear that trademark holders and businesses will have to play active defense to protect their trademarked brands and reputations. So new generic domains will, unfortunately, create new opportunities for the sale of counterfeit goods, copyright infringement, and some forms of cyber crime. And so consumers will have to navigate these new criminal enterprises and be further vigilant.

Now, American and international law enforcement seeking to thwart crimes such as identity theft and child pornography could find it more difficult to locate and prosecute perpetrators using top-level domains set up in nations without working relationships with the United States. And so I see pitfalls that accompany the debut of new gTLD's.

This hearing serves as an appropriate place to start exploring these issues, but it is clear that ICANN has more work to do with regard to transparency, to creating safeguards to protect against the cyber crimes and property infringements that seem to me to be quite worrisome. And so I applaud the Subcommittee Chairman and the Ranking Member for having this hearing today.

I thank you for your time.

Mr. GOODLATTE. I thank the Ranking Member.

And now we will turn to that distinguished and unusually long panel of witnesses today.

Each of the witnesses' written statements will be entered into the record in its entirety, and I ask that each witness summarize their testimony in 5 minutes or less. To help you stay within that time, there is a timing light on the table. When the light switches from green to yellow, you have 1 minute to conclude your testi-

mony. When the light turns red, it signals that the witness' 5 minutes have expired.

Before I introduce our witnesses, I would like them to stand and be sworn.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you and be seated.

Our first witness is Mr. Kurt Pritz, Senior Vice President for Stakeholder Relations at ICANN. Mr. Pritz has served at ICANN for 7 years. He is charged with managing ICANN's key stakeholder relationships and is leading ICANN's implementation of the new gTLD program. His team delivered the first new gTLD document to the U.S. Government in 2004. Since then, he has led the effort to develop the gTLD Applicant Guidebook which was released in April, just a couple of weeks ago.

Prior to joining ICANN, Mr. Pritz spent nearly a decade at Walt Disney Imagineering. He also served at Eaton Corporation.

Mr. Pritz holds a B.S. and M.S. in physics, an M.B.A. and a J.D., and is admitted to the California State Bar.

Our second witness is Mei-lan Stark. Ms. Stark serves as the Senior Vice President for Intellectual Property at Fox Entertainment Group. In this role, Ms. Stark heads the group responsible for all trademark, copyright, domain name, and patent work for all of Fox Entertainment, including 20th Century Fox, Fox Searchlight Pictures, and Blue Sky Animation. Her group also supports the broadcast television network Fox, the cable TV networks, including FX, Speed, Fox Sports, Fox News, and the National Geographic Channel.

Prior to joining Fox, Ms. Stark spent several years with the Walt Disney Company and began her career as an IP attorney at Kilpatrick Stockton following her graduation from Yale Law School.

Ms. Stark currently serves as the treasurer on the International Trademark Association board of directors.

Our third witness is Mr. Michael Palage. Mr. Palage is an intellectual property attorney and an information technology consultant. He has been actively involved in ICANN operational and policy matters since its inception in both an individual and leadership role, including a 3-year term on the ICANN board of directors. He is also President and CEO of Pharos Global, Incorporated that provides consulting and management services to domain name registration authorities and has worked with over 45 percent of all new registry operators approved by ICANN over the last decade.

Mr. Palage holds a BSEE from Drexel University and a J.D. from Temple University School of Law.

Our fourth witness is Mr. Steven Metalitz. Mr. Metalitz is a partner at Mitchell, Silberberg and Knupp. He has been an active participant in ICANN since its inception and served six terms as President of ICANN's intellectual property constituency and is currently its Vice President. He is also counsel to the Coalition on Online Accountability representing seven leading copyright industry companies, associations, and membership organizations on a range of ICANN-related matters.

Earlier in his career, he held several senior staff positions with the U.S. Senate Judiciary Committee, including Chief Nominations

Counsel and Chief Counsel and Staff Director of its Subcommittee on Patents, Copyright and Trademarks.

Mr. Metalitz received his B.A. from the University of Chicago and his law degree from Georgetown University.

Our fifth witness is Mr. Steve DelBianco. Mr. DelBianco is the Executive Director of NetChoice where he focuses on issues dealing with Internet governance, online consumer protection, and Internet taxation. Mr. DelBianco has served as stakeholder advocate at meetings of the Internet Governance Forum and ICANN.

Before joining NetChoice, he served as the President of Financial Dynamics, an IT consulting firm.

Mr. DelBianco holds degrees in engineering and economics from the University of Pennsylvania and an M.B.A. from the Wharton School.

Our sixth witness is Mr. Joshua Bourne. Mr. Bourne is the President of the Coalition Against Domain Name Abuse, or CADNA. CADNA is a nonprofit association dedicated to consumer protection through building awareness about and advocating action to stop online trademark infringement. Mr. Bourne is also co-founder of Fairwinds Partners, a domain name strategy consultancy based in Washington, D.C. Mr. Bourne has had over a decade of experience working with brand owners on actions to take within the domain name space.

I want to welcome all of you and we will begin with Mr. Pritz.

TESTIMONY OF KURT PRITZ, SENIOR VICE PRESIDENT, STAKEHOLDER RELATIONS, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

Mr. PRITZ. Mr. Chairman, Ranking Member Watt, and Members of the Subcommittee, I am Kurt Pritz, Senior Vice President of Stakeholder Relations for ICANN, the Internet Corporation for Assigned Names and Numbers. And I am very pleased to be testifying before you today.

With the Internet scaling to over 2 billion users and enabling more than $2 trillion in global commerce each day, ICANN is hard at work promoting the goals set out in ICANN's mission: security, stability, and choice.

ICANN, together with the Internet community, has increased competition in the registrar marketplace and lowered the price of domain name registrations. ICANN, together with the Internet community, deployed internationalized domain names allowing users to use their own language across the Internet, and ICANN, working with the NTIA and VeriSign, has made the Internet safer through the deployment of DNSSEC, a certification/verification technology.

What is ICANN? We are a nonprofit public benefit corporation organized under California law. ICANN was created in 1998 by the United States Department of Commerce and Internet pioneers to be the private-led company that reflects the diversity of the Internet and enables the introduction of competition into the domain name system. By entrusting these mandates to a multi-stakeholder organization, the United States Government committed to take Internet policy out from a purely regulatory or a UN-type governance process. Lawrence Strickling, the Assistant Secretary of Com-

merce and head of the NTIA, recently confirmed that ICANN's multi-stakeholder model is the best way to protect and preserve the security and stability of the Internet.

ICANN's multi-stakeholder model gives an effective role to all those who wish to participate: governments through ICANN's Governmental Advisory Committee; business interests through ICANN's Generic Name Supporting Organization; and Internet end users through ICANN's At-Large Advisory Committee. They reflect the global diversity of the Internet and work toward developing policy and promote Internet stability and benefits for users.

The ICANN community follows clearly defined processes to form Internet policy. In 2007, through the bottom-up process, ICANN's broad base of stakeholders recommended that new top-level domains, the names to the right of the dot, such as dot com and dot org, be introduced in order to realize the benefits accruing from the opening of markets, introducing competition, serving communities, and encouraging innovation.

The ICANN community has also guided the implementation of that policy. Since 2008, ICANN stakeholders have contributed over 2,400 comments on implementation work, participated in 47 separate public comment periods, discussed six versions of a draft program guidebook, and 55 explanatory memoranda and independent reports. ICANN reviews and considers every comment provided and proposes changes to facilitate the development of Internet community consensus. Comments are heard and acted upon. Good faith and intensive participation from the people at this table and those that they represent led to the creation of a suite of trademark and consumer protection mechanisms that will help make this environment safer than it is now.

Participation by the governments through ICANN's Governmental Advisory Committee led to additional improvements in those right protection mechanisms.

In a diverse community, consensus building can be difficult and take time, and we have carefully spent the time needed to consider every possible perspective. After the ICANN Board of Directors considers the Applicant Guidebook on June 20th, the protections and processes will continue to evolve. The program calls for continual improvement and review.

Today, after more than 7 years of policy development and implementation work, it is time to move to the next phase. Through extensive work mentioned earlier, new gTLD's will offer more consumer protections and more trademark rights protections than exist today. Many stakeholders not represented at this table have waited years for the new gTLD program to launch, and careful planning on their part has been ongoing.

We will continue working hard to promote Internet security, stability, and choice and do our best to fulfill the vision of a private sector, bottom-up, multi-stakeholder model.

Thank you for inviting me to testify. I would be happy to answer any questions after this.

[The prepared statement of Mr. Pritz follows:]

TESTIMONY OF KURT PRITZ

SENIOR VICE PRESIDENT, STAKEHOLDER RELATIONS

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)
A CALIFORNIA PUBLIC BENEFIT NONPROFIT CORPORATION

BEFORE THE US HOUSE COMMITTEE

ON THE JUDICIARY

SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION AND THE INTERNET

HEARING ON NEW GENERIC TOP-LEVEL DOMAINS (gTLD)

MAY 4, 2011

Mr. Chairman and members of the Committee, thank you for the opportunity to address you today. I am Kurt Pritz, the Senior Vice President for Stakeholder Relations of the Internet Corporation for Assigned Names and Numbers (ICANN). Among other things at ICANN, I am responsible for managing the implementation planning for the program to introduce new generic top-level domains (also referred to as new gTLDs).

I. Recent Advancements at ICANN

In September 2009, the Subcommittee on Courts and Competition of this Committee held a hearing on the Expansion of Top Level Domains and its Effects on Competition. ICANN's former Chief Operating Officer, Doug Brent, had the privilege of testifying at that hearing. The record of that proceeding can be found at http://judiciary.house.gov/hearings/hear_090923.html. My testimony will provide background on the program as well as an update to show the continued progress towards implementing and launching the ICANN community's new gTLD program.

The work of the ICANN community has improved the program in many ways. I will describe how, through its bottom-up, multi-stakeholder policy development process, ICANN has prepared to implement a new gTLD program with many important provisions that address the interests of consumers and business:

- many strong provisions for the protection of intellectual property rights;
- review and objection rights created in coordination with governments and the ICANN community;
- consumer protections and heightened law enforcement coordination requirements; and
- the collection of information that will assist in evaluating the effects of the first application round.

I will also describe ICANN's continuing work in other areas, including the Affirmation of Commitments, the launch of top-level domains in international scripts (Internationalized Domain Names or IDNs), and implementation of Domain Name System Security Extensions (DNSSEC).

In all its work, ICANN continues to fulfill its longstanding commitment to accountability and transparency, which is fundamental to its credibility as the steward of the domain name system for the public benefit of the global Internet community, and to its ability to ensure that the global public interest is served.

II. The ICANN Model At Work: Implementation of New gTLDs

A. *A Multi-Stakeholder Organization*

ICANN was created in 1998 following the United States Government's "White Paper on the Management of Internet Domain Names and Addresses" (White Paper),[1] and has benefitted from the assistance and support of the United States Government across three Presidential Administrations.

ICANN is really two things.

First, it is a California public benefit nonprofit corporation, performing a technical coordination function for the global public interest.

Second, it is a global community of stakeholders, including industry, governments and Internet users.

ICANN is the authoritative body for technical coordination of the Domain Name System, the system that uniquely identifies computers and server addresses on the Internet. It does this through a stakeholder-driven, bottom-up, consensus-based policy development process.

A key mandate for ICANN is to create competition in the domain name market and to "oversee policy for determining the circumstances under which new TLDs are added to the root system."[2] ICANN pursues policies in the public interest through the introduction and fostering of competition, resulting in choice of vendors, differentiation in service offerings, and lower prices. The expected launch of the new gTLD program is consistent with the U.S. Government's mandate that ICANN foster competition and innovation.

On September 30, 2009, ICANN and the US Department of Commerce executed the Affirmation of Commitments, a landmark agreement that replaced the Joint Project Agreement under which ICANN had previously operated. The Affirmation memorializes ICANN's technical coordination role, and the US Government's commitment to the multi-stakeholder model. The Affirmation also sets out specific commitments on accountability, transparency and the interests of global Internet users; preservation of DNS security, stability and resiliency; promotion of competition, consumer trust and consumer choice; and enforcement of Whois policies. These commitments are woven into ICANN's ongoing work.

The multi-stakeholder model is essential to ICANN. Lawrence Strickling, Assistant Secretary of Commerce for Communications and Information, and Administrator of the National Telecommunications and Information Administration (NTIA), confirmed this when he stated that the Obama Administration's commitment to ICANN's multi-stakeholder model as the "best way to preserve and protect the security and stability of the Internet."[3]

B. *The ICANN Model*

ICANN's processes and policy development depend on the engagement of stakeholders around the world. Stakeholders participate in ICANN in many different ways, including participation in the policy development processes, in the public comment processes, on advisory committees, and in ICANN's public meetings.

ICANN's robust model is based on the principle of reaching consensus solutions to difficult problems.[4] First, a model solution is proposed. Through public comment processes and other engagement, the ICANN community provides its input. ICANN integrates that comment and produces a new version.[5] The cycle does not stop there. ICANN generally seeks further input from its Supporting Organizations,[6] the community of Internet end users, governments and others,[7] on the sufficiency of the second version. This cycle of iteration-comment-integration continues until no new ideas appear – that is when it is time to move forward and take action on the community's work. The ICANN model provides predictability, and protects against any single person or entity capturing the policy process or unduly influencing the outcome.

To address more challenging issues, ICANN brings together working groups of experts – many from within the ICANN community – to provide recommended solutions for further community review. ICANN *takes the time* to work with its community to form consensus-driven, community-based and vetted solutions.

C. *New Generic Top Level Domains – The ICANN Model at Work*

The new gTLD program demonstrates the strength of the bottom-up, multi-stakeholder process: The new gTLD program under discussion today is the implementation of an ICANN-community policy recommendation to achieve one of ICANN's foundational mandates.[8] ICANN has worked closely with the community in building an implementation plan.

1. The New gTLD Program: a Model of Community Engagement and a Careful and Orderly Process

In 2005, ICANN's Generic Names Supporting Organization (GNSO) initiated a formal, Bylaws-defined policy development process on the addition of new gTLDs. By a super-majority vote (19-1), the GNSO approved policy recommendations in 2007 and submitted them to ICANN's Board of Directors. In 2008 the ICANN Board approved the recommendations[9] and directed ICANN staff to commence the implementation phase. . The first version of the *Applicant Guidebook*, detailing the guidelines and requirements for the evaluation process, was released in October 2008; the sixth was released on April 15, 2011. *Applicant Guidebook* postings have been accompanied by 55 explanatory memoranda independent reports to date. For transparency, each new version of the *Applicant Guidebook* is posted in a redline format to show changes.

To date there have been **47** separate comment periods during the implementation phase of the new gTLD program, with nearly all for a minimum of 45 days.[10] ICANN has

produced a summary and analysis of every comment – 1350 pages of summary and analysis so far on the new gTLD program.

Comments previously addressed many substantive issues; today, the comments are more focused on small details. The comments informed further changes to the *Applicant Guidebook*, and a comment period is underway on the most recent version.

(a) The ICANN community has tirelessly contributed

The ICANN community has devoted tens of thousands of hours to the development of the new gTLD program, through formal and informal measures including online public comment fora and at public "open microphone" sessions at each of ICANN's public meetings. Nearly every ICANN Supporting Organization and Advisory Committee was represented in targeted community-based working groups or expert teams formed to address implementation issues.

The GNSO and its component stakeholder groups and constituencies participated in all aspects of the implementation work arising out of its policy recommendations. The Country Code Names Supporting Organization (ccNSO), representing ccTLD operators, was particularly active on issues relating to internationalized domain names (IDNs) in the new gTLD program.

ICANN's technical Advisory Committees provided direct input into the implementation work. For example, Root Zone System Security Advisory Group (RSSAC) members and Security and Stability Advisory Group (SSAC) members provided information that there is no expected significant potential impact of new gTLDs on the stability and scalability of the root server system.

Members of the At-Large Advisory Committee (ALAC) served on nearly every working group and team, giving the world's Internet users a voice in implementation discussions. The ALAC has been an active participant in the formal public comment process.

(b) Governments Provided Advice and Engaged In Broad, Substantive Consultations on New gTLDs

The Governmental Advisory Committee (GAC) has also been deeply and effectively involved in the new gTLD program. ICANN's Bylaws specify that the GAC "should consider and provide advice on the activities of ICANN as they relate to the concern of governments."[11] Throughout the new gTLD implementation work, the GAC provided advice on the versions of the *Applicant Guidebook*. In late 2010, as the Board moved closer to the *Guidebook's* finalization, close attention was paid to the concern that there were likely differences between GAC advice and the proposed *Guidebook*.

Under the Bylaws, the GAC has an assurance that the Board will take GAC advice into account.[12] The Board is obligated to inform the GAC of an action that may not be consistent with GAC advice, and the GAC and the Board must then try, in good faith, to identify a mutually acceptable solution.[13] If the GAC and the Board are not able to reach

full agreement, the Board is obligated to provide reasons why GAC advice was not followed.[14]

In an effort to identify and resolve differences, the ICANN Board and the GAC held a landmark face-to-face, three-day consultation meeting on February 28 – March 21, 2011. GAC representatives from Africa, the Americas, Asia-Pacific, and Europe all participated in the consultations, including the US representative to the GAC.

The GAC and the Board reached alignment on many of the twelve areas of potential difference as identified by the GAC.[15] The alignment included agreements that: additional economic study should be conducted after the first set of new gTLDs is made operational; the GAC would provide advice on individual proposed new gTLDs directly to the Board through Early Warning and Objection procedures; and that trademark protection mechanisms should be sharpened in several specific ways. All of the GAC's twelve issue areas have been addressed in some way, although some differences remain on sub-issues.

Face-to-face consultations resumed in March 2011, at ICANN's 40th Public Meeting in San Francisco, California. Further progress was made in identifying areas of alignment between the Board and the GAC positions. The Board and the GAC also invited community input, which was provided during public sessions and through written submissions that are available online.[16]

The Board and the GAC continued to work together and collected community comments. On April 15, 2011, ICANN produced a revision of the *Applicant Guidebook*, taking into account the compromises with the GAC and additional community comment.

The third GAC-Board consultation is ongoing, as is community input. Every company and individual expected to testify before this Subcommittee has participated in one form or another in these community input processes.

The Board and the GAC have each made compromises to reach this point and they plan a final consultation to address the remaining differences. This is expected around May 20, 2011 to review written materials. After consideration of public comment and the final GAC-Board consultation, ICANN will prepare a proposed final version of the *Applicant Guidebook* for posting on May 30, 2011. According to its March 18, 2011 resolution, the Board anticipates that version will be ready for approval on June 20, 2011 during the ICANN Public Meeting in Singapore.[17]

(c) Law Enforcement Agencies Are Active Contributors to the New gTLD Program Work

Law enforcement agencies worldwide have worked closely with ICANN in the new gTLD implementation process. Representatives of U.S. law enforcement agencies played a critical role in proposing standards for background screening for applicants. Law enforcement agencies worldwide, including the FBI, the UK Serious Organized Crimes

Agency (SOCA) and the Canadian Royal Mounted Police, supported proposals to aid in the prevention and disruption of efforts to exploit domain name registration procedures for criminal purposes. DNS abuse and security are regularly the subject of collaborative meetings between ICANN and the US law enforcement community, as well as representatives of international agencies.[18] ICANN expects this successful collaboration to continue.

(d) IP experts have been Involved at Every Step

Representatives of trademark interests and brand holders have been involved in the development of the new gTLD program since the beginning of the GNSO policy development work. Members of ICANN's Intellectual Property Constituency were among the authors of a June 2007 report on protecting the rights of others in new gTLDs.[19] This work arose out of the specific GNSO policy recommendation on new gTLDs that "strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law", a recommendation that is embodied in this implementation.

Following the publication of first draft of the *Applicant Guidebook* in October 2008, there were calls in the community for some additional rights protection mechanisms (RPMs). In March 2009 ICANN formed a team of 18 intellectual property experts from around the world[20] – the Implementation Recommendation Team (IRT).[21] The IRT's work, through five face-to-face meetings around the world and numerous conference calls, culminated in a report, finalized in May 2009, that recommended a number of new RPMs, but failed to reach consensus.[22] Because the community had not reached consensus on the IRT's proposed RPMs, ICANN requested further community assistance,[23] and the GNSO convened the Special Trademark Issues Review Team (STI), a multi-stakeholder volunteer team, which further refined the IRT recommendations[24] in the next version of the *Applicant Guidebook*.[25] In the past year, refinement of RPMs continued through further consultations with IP experts, public comment and GAC advice.

(e) Additional Subject Matter Experts Formed Teams to Guide the Implementation Process

In addition to the regular participants in its processes, the ICANN model affords opportunities for experts to provide assistance on particularly challenging topics. At times, ICANN retains experts, such as renowned economists, to provide reports for the community. Within the new gTLD program, ICANN commissioned five expert economic reports and retained the services of economists to study the anticipated benefits and cost of new gTLDs, effects of price controls, and the issue of vertical integration of registries and registrars – a study that informed the community debate over this difficult topic.

The ICANN model also provides a forum for community experts to provide input into the new gTLD implementation work. In addition to the IRT and the STI, many impressive

subject matter experts have guided the community to solutions on very difficult topics. These groups include:

- A Zone File Access Advisory Group (ZFA) set out standardized access zone file information to simplify access for those investigating abuses.[26]
- The Anti-Phishing Working Group (APWG), an industry association, provided an expert report through its Internet Policy Committee on malicious conduct issues that was integral in the community's consideration of a safe roll-out of new gTLDs.[27]
- The Registry Internet Safety Group (RISG), a global group of Internet-related organizations that work to combat Internet identity theft, provided a report addressing malicious conduct mitigation measures.[28]
- ICANN's Security and Stability Advisory Committee formed a working group to address "orphan glue records" in the DNS – a tool for malicious conduct. Its report provides guidance into the management of glue records.
- Experts from the Internet security first responder community provided advice on the design of tools to combat the potential for malicious conduct, including members of the Forum of Incident Response and Security Teams (FIRST).
- A High-Security Zone TLD Advisory Group (HSTLD) was formed within ICANN in response to requests from governments and the financial services sector to create higher security requirements for TLDs where users have expectations of higher security. The HSTLD included members of BITS, the technology policy division of The Financial Services Roundtable, and other community experts. The HSTLD released its final report in March 2011,[29] for the development of a standard that could be implemented within the first round of new gTLDs.

There are further examples of cross-community volunteer working groups: the Joint Applicant Support Working Group (JAS-WG) addressed support for needy applicants; the Joint ccNSO-GNSO IDN Working Team (JIG) discussed IDN-related issues; the Vertical Integration Working Group (VI-WG) addressed community solutions to the issue of Registry-Registrar cross ownership; and the Temporary Drafting Group (TDG) recommended enhancements to the new gTLD Registry Agreement and post-delegation dispute resolution procedures. Each group worked openly and transparently, and many have produced reports that have been the subject of public comment.

Importantly, ICANN listened to and acted on this work – including modifying germane *Applicant Guidebook* sections.

D. The Community Improved the *Applicant Guidebook* through the ICANN Model

This is the community's program. Through this extraordinary collaboration, the implementation of the community's policy for the new gTLD program looks entirely

different today than in October 2008. The many revisions to the *Applicant Guidebook* incorporated concerns raised by intellectual property holders, governments, law enforcement and security experts, technical experts, business interests, non-commercial interests, individual Internet users, and others.

Below are some highlights of the results of the community's work.

(a) Trademark Protection: New gTLDs Will Have Robust Rights Protection Mechanisms (RPMs)

New gTLDs will have significant, robust RPMs that don't presently exist in current gTLDs. The RPMs will help rights holders protect marks efficiently, in terms of both time and money. When new gTLDs launch, mark holders will have the opportunity to register their marks in a single repository that will serve *all* new gTLDs, the Trademark Clearinghouse. (Currently, trademark owners register in similar types of clearinghouses for *each separate* top-level domain that launches.) New gTLD registries are required to use the Trademark Clearinghouse in two ways. First, new gTLD registries must offer a "sunrise" period – a pre-launch opportunity for rights holders to register names in the new gTLD prior to general registration. Second, a Trademark Claims service will notify rights holders ("IP Claims") of domain name registrations that match marks in the Clearinghouse for a period of time at the beginning of general registration.

With new gTLDs comes the advent of the Uniform Rapid Suspension system (URS), a streamlined version of the Uniform Domain Name Dispute Resolution Policy (UDRP) process, allowing mark holders a quicker and simpler process through which clear-cut cases of infringing registrations can be "taken down." The URS and the current UDRP will remain mandatory within new gTLDs.

Locating potential infringers should be easier under new gTLDs. While existing gTLDs are only required to provide minimal information about registrants through a "thin" Whois model,[30] new gTLDs will be required to provide "thick" Whois data. Marks holders and law enforcement will thus be able to access more contact information for registrants in new gTLDs.

New gTLDs offer protections to mark holders in the event a registry is actively involved in domain name abuse. The Post-Delegation Dispute Resolution Procedure (PDDRP) provides a mechanism to make claims directly against registries affirmatively involved in abuses involving domain name registrations.

The ICANN community holds diverse views on the proper scope of RPMs, as evident in the community submissions in response to the Board-GAC consultations. However, the proposed RPMs are much broader than those in any prior version of the *Applicant Guidebook*. The proposed RPMs provide far more protections than currently available, and incorporate the need for RPMs into the broader community directive to move forward with the new gTLD program.

(b) Consumers Will Be Protected Through Efforts to Mitigate Malicious Conduct

The expert and community work to address the potential of malicious conduct in new gTLDs has generated many enhanced protections in the *Applicant Guidebook*. Nine specific mechanisms were developed that will improve consumer protection[31] and enhance the public interest. They include:

- Prospective registry operators will be appropriately reviewed for past criminal history according to established criteria, including the use of telecommunications or the Internet to facilitate crimes, illegal sale of drugs, violation of the UN Convention against Transnational Organized Crime and others. Where the applicant has a pattern of adverse decisions under the UDRP (Uniform Domain Name Dispute Resolution Policy), engaged in reverse domain name hijacking under the UDRP, or has been found to act in bad faith or reckless disregard under the US Anticybersquatting Consumer Protection Act (ACPA) or equivalent legislation, applications will be rejected.

- Each new gTLD will be required to have a plan to implement domain name system security extensions (DNSSEC), reducing the risk of "man-in-the-middle" attacks and spoofed DNS records.

- Enhanced, or "thick", WHOIS records at the registry level will allow more rapid search capabilities to facilitate efficient resolution of malicious conduct activities.

- A centralized zone file access system allows for more accurate and rapid identification of key points of contact within each gTLD. This reduces the time necessary to take corrective action within TLDs experiencing malicious activity.

- All new gTLD operators are required to establish a single point of contact responsible for the handling of abuse complaints. This requirement is a fundamental step in successfully combating malicious conduct within new gTLDs.

The flexibility inherent in the ICANN model, both in access to and ability to empower teams of experts to contribute to the community's work, has produced mechanisms to benefit all Internet users through safer online interactions in the new gTLD space. The contributions of the GAC and law enforcement broadened the scope of these protections.

(c) Further Protection against Defensive Registrations Not Supported

Some mark holders may suggest that the *Applicant Guidebook's* RPMs are not enough – marks holders will still face the costs of "defensive" registrations in all new gTLDs (the registration of mark-related domain names solely to ensure that someone else cannot register and use the name in bad faith).[32]

The available evidence does not support this position. Economists Michael Katz and Gregory Rosston performed a study of more than 200 top brands, and determined that brand holders do *not* register names in all available TLDs; that top international brands have a significantly lower rate of registration in gTLDs outside of .COM; and brand owners expend less funds to protect brands in less popular gTLDs.[33] While .COM and .NET together form just over 80% of the domain name registrations in gTLDs, a review of 2010 and 2011 UDRP filings with the World Intellectual Property Organization (WIPO) shows that *over 90%* of the UDRP filings are for .COM and .NET registrations.

Abusive registrations do not occur at the same rates in newer gTLDs because they do not return value to the abuser, and the effectiveness for defensive registrations diminishes sharply outside of .COM and .NET.

Alternate independent studies support the conclusion that as defensive registrations are made in proportion to the popularity of the gTLD, the large majority of defensive registrations are in .COM and .NET.[34] Only if a new gTLD is very popular will there be a significant need for defensive registrations. But, it also follows that if a new gTLD is popular, then it likely is delivering high benefits. Thus, the dual claims of low benefits and high defensive registration costs are unlikely to be simultaneously true.

In addition, not all "defensive" registrations are registrations without value to the mark holder. Mark holders can derive value through the use of productive registrations, such as those that redirect users to main sites.[35]

The robust rights protection mechanisms in the *Applicant Guidebook* provide mark holders with an alternative to engaging in defensive registrations.[36] The provision of effective protection mechanisms is shown to reduce the need for mark holders to engage in defensive registrations – but the RPMs cannot be complete; if the RPMs are too strict, the growth of a new TLD may be impaired.[37]

Unsubstantiated fear of forced defensive registrations is not sufficient reason to stall new gTLDs and delay the benefits of introducing competition into the DNS. The ICANN community has developed substantial cost-mitigation measures that benefit mark holders while remaining consistent with existing trademark law.

(d) Security and Stability: Expert Study Confirms No Expected Impact on the Stability of the Root

ICANN is committed to the following protections regarding root zone stability:

- To delegate new gTLDs at a rate well within the root server operator capabilities to maintain a stable, secure root zone.[38]
- A second round of applications will not be processed until the impact of first round delegations on root zone stability has been studied and undergone public comment.

- If the root server system shows signs of stress, the process can quickly be halted to preserve stability. ICANN will establish communications and monitoring.
- To prepare operationally to adequately serve additional TLDs with IANA-function services and contractual compliance oversight.

Based on the expert community analysis, the Board determined that the issue of the potential for harmful effects to the stability of the root zone was resolved. ICANN's commitment to studying the impact of first round delegations prior to proceeding with delegations from a second round of new gTLD applications is an important innovation from the GAC consultation process.

(e) Economic Studies: Confirm Overall Benefits of Opening the DNS; No Further Work Would Better Inform Board

Several 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 consumer choice in the domain name market.

Since the 1998 White Paper, it has been a fundamental assumption that increasing the number of gTLDs will increase competition.[39] The House Committee on Energy and Commerce relied on this fundamental assumption in 2001, when it held a hearing on the potential detrimental effects on competition when ICANN selected only seven new TLDs out of over 200 different TLDs in its early Proof of Concept round.[40]

However, as the new gTLDs come closer to launch, there has been increased criticism of this collective assumption. In response, ICANN commissioned five economic studies[41] that examined anticipated benefits and costs of the new gTLD program, the effects of price constraints, and the benefits of vertical integration. All support a conclusion that Internet users stand to benefit from the introduction of new gTLDs.

The Board and the GAC agree that further economic study at this time would not be beneficial. Instead, the Board and the GAC focused on the collection of information that will inform the analysis of the effects of the introduction of new gTLDs after the first round. The *Applicant Guidebook* now includes application questions that are specifically targeted to collect information relating to stated purposes and anticipated outcomes of each application, for use in later studies.

In response to more recent community calls for additional economic study on the potential costs and benefits of the expansion of the gTLD space, ICANN commissioned economists Michael Katz and Gregory Rosston, with the assistance of Theresa Sullivan, to perform a two-stage study. The Katz/Rosston reports were completed in June and December 2010, respectively, and each was posted for public comment.[42] Phase 1 provided a survey of published studies and resources on the potential impacts of new gTLD introduction and examined theoretical arguments on the benefits and costs of increased numbers of TLDs. Phase 2 provided reports of empirical studies proposed in

Phase 1, to help assess costs and benefits of new gTLDs.

Katz and Rosston's work was consistent with the basic findings of the previous reports, and supported an open approach in which new gTLDs are added to the root, subject to appropriate restrictions and mechanisms (such as RPMs) designed to minimize potential costs to marks holders and others. As discussed above – and as referenced in Katz's and Rosston's work – ICANN has adopted these restrictions, as seen in the inclusion of significant RPMs. The empirical studies they created and reviewed in Phase 2 were inconclusive about the balance of costs and benefits, though the inclusion of appropriate protections is expected to allow the benefits achieved through the differentiation of the name space to outweigh the costs.

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 "is likely inconsistent with consumer interests" and could "substantially reduce [consumer] welfare."[43] "ICANN's plan to introduce new gTLDs is likely to benefit consumers by facilitating entry which would be expected both to bring new services to consumers and mitigate market power associated with .com and other major TLDs and to increase innovation."[44] Delay 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. Potential innovations in the new gTLD namespace will be stifled if limitations to entry are imposed – essentially freezing the number of TLDs 15 years after the first commercial introduction.[45]

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 generic strings unavailable, and those that trade on the value of the current marketplace holding portfolios based upon the value of current .COM names[46]

2. Innovation and Jobs are waiting

The ICANN community has been working towards the introduction of new gTLDs for years. Throughout the implementation work, businesses have formed based on ICANN's commitment to implement the community's policy recommendations. For the past two years, future applicants have attended ICANN meetings, passing out buttons and materials with their ".EXAMPLE" prominently displayed. Consulting businesses to advise applicants have arisen. We have identified over *120* persons or entities that have publicly announced their intention to apply for new gTLDs. Nearly 90 declared applicants have active websites marketing their new gTLD idea proposing all types of gTLDs – city names, community ideas, branding opportunities for internationally known corporations and others. American jobs are already being created, and more will be when the program moves from the planning to approval.

We will never know the opportunities and creativity that will come through the introduction of new gTLDs will produce unless we move forward. When ICANN was in its infancy, who could have predicted the online possibilities we take for granted today? Since 1999, the Internet has brought about new companies and innovative ideas including marketplaces for commerce, communications and social networking: Facebook, Google and Twitter. New gTLDs hold that same potential for innovation.

From its inception, ICANN was charged with introduction of competition in the DNS through the introduction of new TLDs. The community formed a policy recommendation on how to do this. Through its private-sector led, bottom-up, multi-stakeholder process, ICANN developed a plan to implement that policy recommendation, consulted the public and took on board extensive comments. Formal approval of the new gTLD program's next phase will be a milestone in ICANN's commitment to accountability to the Internet community. But the commitment to accountability does not stop there.

(a) The ICANN Model Ensures Continued Review and Enhancement

Upon the introduction of new gTLDs, ICANN has committed to organize regular reviews "that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion."[47]

Governments will have an effective voice in the multi-stakeholder review teams; the GAC's Chair will approve their composition in cooperation with ICANN's CEO. Recommendations from the reviews will be subject to public comment, and the Board is committed to take action on them.

Today's new gTLD program reflects years of community comment and collaboration. The regular reviews will ensure that future application rounds are informed by the lessons that can only be learned by making new gTLDs operational. ICANN's work is not done, but the program must launch before further progress can be made.

III. ICANN Is a Reliable Steward of the DNS

ICANN continues to accomplish much for the benefit of the global Internet community beyond the new gTLD program. Recent achievements include:

A. *IDN ccTLD Fast Track Process*

In October 2009, ICANN approved the IDN ccTLD Fast Track Process through which countries and territories around the world can apply for TLDs in character sets other than Latin-based script.[48] Through this process, 27 IDN ccTLDs are now available on the Internet [49] with more on the way. This has opened the Internet to an additional two billion people within China and India alone.

A. *DNSSEC*

The Internet is becoming more secure. Following years of development and testing, on 15 July 2010, ICANN, in partnership with VeriSign and the US Department of Commerce, ICANN published the root zone trust anchor and a signed root zone became available.[50] The implementation of DNSSEC (or DNS Security Extensions) will eventually allow Internet users to know with certainty that they have been directed to the website they intended. This technology will help eliminate a whole class of security threats to the Internet.

ICANN is in active engagement with all registry operators to encourage adoption. As a result, over 75 gTLDs and ccTLDs now employ DNSSEC; most significantly, the .COM registry adopted it on March 31, 2011. DNSSEC will be mandatory in all new gTLDs.

A. *Root Zone Automation*

In performance of the IANA Function Contract, ICANN is partnering with VeriSign and the Department of Commerce to automate changes to the root zone. The root zone holds the authoritative directory of top-level domains, including technical contact information and name server information. This automation will make the processing of change requests more efficient.

B. *IANA Functions Department Business Excellence Initiative*

ICANN works to ensure that the IANA Functions Department can continue its operational excellence upon the launch of new gTLDs. The Department is undertaking a Business Excellence Initiative, and enhancing and documenting its processes.

C. *Continued Enforcement of Registrant Protections*

Another achievement for the benefit of the global Internet community is the continuous improvement in contractual compliance work. ICANN remains vigilant in its contractually-based consumer protection work and has strengthened the compliance team.

In the past 18 months, ICANN has either terminated or denied renewal of 27 registrars, and issued thousands of compliance notices.[51] ICANN accredited registrars have recently lost the right to offer domain names for, among other reasons, failure to: (i) provide a working website and Whois look up service; (ii) comply with data escrow requirements (required backups of registration data); (iii) maintain contact information; (iv) provide certificate of insurance; (v) maintain solvency; (vi) process registrant requests to transfer to other registrars; and (vii) post deletion and auto-renewal policies.

Other significant progress includes the relatively recent implementation of registrar data escrow where all registrar data is escrowed by ICANN so in the event of a registrar failure or termination, the data can be transferred to a successor registrar in order to protect registrants and their web sites

ICANN continues to explore ways to identify registrar noncompliance early, take action swiftly to bring them back into compliance and terminate those that undermine the domain name registration process. This compliance activity helps ensure a healthy Internet ecosystem.

ICANN also recently issued a breach notice to a gTLD registry, and is working with that registry to bring it back into compliance with its contractual obligations.

In early 2011, ICANN enhanced its Whois Data Problem Report System (WDPRS), a system that contributes to Whois accuracy.

D. *Fulfilling the Affirmation of Commitments*

The Affirmation of Commitments is a major milestone. ICANN dedicates significant time and resources to meet its commitments and to build on the significant progress it has already made. The Affirmation is not just a reflection of the Department of Commerce's commitment to the multi-stakeholder model; it is ICANN's commitment to the global Internet community to operate with *greater* accountability and *more* transparency.

What has ICANN done to date?

- In coordination with the community, has initiated the three reviews called for in the Affirmation: Accountability and Transparency; Security and Stability; and Whois.
- Within weeks of completion of the public comment period on the Final Report of the Accountability and Transparency Review Team (ATRT), staff completed detailed implementation plans to meet the recommendations.
- On March 18, 2011, the Board noted that all of the 27 recommendations should proceed to implementation immediately, pending appropriate resource, legal and research requirements.
- On April 21, 2011, the Board assigned the various recommendations to its committees for oversight of the implementation work.

ICANN has also started the implementation work to meet the ATRT recommendations:

- Starting with the Brussels Board meeting in June 2010, ICANN has been publishing Approved Resolutions reached at ICANN Public Meetings in the six UN languages.
- Starting with the 25 January 2011 Board meeting, ICANN is now providing translations of Approved Resolutions for *all* Board meetings and of the Minutes of Board meetings.
- Since that meeting, ICANN has also been posting rationales for Board actions, which are also translated. This includes rationales for all new gTLD-related actions taken in 2011, including the adoption of the rationale to support the

Board's decisions on Registry-Registrar Cross Ownership and the Completion of Economic Studies.

- In June 2010, ICANN began posting Board Briefing Materials along with the Minutes of each Board meeting.
- In March 2011, ICANN posted Guidelines for the Posting of Board Briefing Materials to better explain the redaction process. As explained in the Guidelines, ICANN is now providing a description of the basis of each redaction.

ICANN is committed to meeting all of its commitments under the Affirmation of Commitments, and will continue to report on the status of that work through the ICANN website.

IV. Conclusion

The ICANN community has worked tirelessly to create a new gTLD program that will introduce competition and innovation at the top level of the DNS. Thousands of pages have been written, thousands of comments received, reviewed and considered. Governments have provided advice; experts have weighed in. The new gTLD implementation program represents opportunities for innovation and enhanced competition, with a future of stronger rights protections, stronger consumer protections, and measured paths forward to future rounds.

Thank you for the opportunity to address this Subcommittee. I look forward to answering any questions that you have during the hearing.

---

[1] United States Department of Commerce, *White Paper on the Management of Internet Domain Names and Addresses* ("White Paper"), *at* http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm (June 6, 1998)
[2] *Id.*
[3] Lawrence Strickling, Welcome Comments, ICANN 40th Public Meeting, at http://svsf40.icann.org/meetings/siliconvalley2011/transcript-welcome-14mar11-en.txt (Mar. 14, 2011).
[4] While my testimony today focuses on implementation of community-driven policy recommendations, the ICANN model is also used in non-policy matters.
[5] ICANN strives to make its work accessible to the global Internet community. This year alone, ICANN budgeted $1.3 million for document translations to facilitate global participation in these comment processes.
[6] The Generic Names Supporting Organization (GNSO), Country Code Names Supporting Organization (ccNSO) and the Address Supporting Organization (ASO).
[7] ICANN's formal Advisory Committees are the Governmental Advisory Committee (GAC), The Security and Stability Advisory Committee (SSAC), The Root Server System Advisory Committee (RSSAC), and the At-Large Advisory Committee (ALAC).

[8] In addition to the White Paper, the introduction of New gTLDs was consistently identified as a core objective in each of ICANN's Memoranda of Understanding with the U.S. Department of Commerce (1998 – 2006) and the Joint Project Agreement, calling for ICANN to "[d]efine and implement a predictable strategy for selecting new TLDs." *See* 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). The study and planning stages, extending back several years, include two trial rounds of top-level domain applications held in 2000 and 2003. The experience of those rounds was used to shape the current process.

[9] GNSO Final Report on the Introduction of New Top Level Domains ("Final Report"), *at* http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm (Aug. 8, 2007); ICANN Board resolution, http://www.icann.org/en/minutes/resolutions-26jun08.htm (June 26, 2008); GNSO Minutes, http://gnso.icann.org/meetings/minutes-gnso-29oct03.html (Oct. 29, 2003).

One of the foundational documents influencing the GNSO Final Report and the community's implementation work is the GAC Principles Regarding New gTLDs, at http://gac.icann.org/system/files/gTLD_principles_0.pdf (Mar. 28, 2007).

[10] Comments came from multiple sources, including: NGOs and not-for-profit organizations, such as the Red Cross and the International Olympic Committee (IOC); governments, through the GAC and individually; ICANN's constituencies, Supporting Organizations and Advisory Committees; brand/mark holders, such as Microsoft, Yahoo, Time Warner, AT&T, BBC, and IBM; industry associations, such as International Trademark Association (INTA), World Intellectual Property Organization (WIPO), European Communities Trademark Association (ECTA), and the American Banking Association (ABA); individuals; small businesses/entrepreneurs and many other groups.

[11] ICANN Bylaws, Art. XI, Sec. 2.1.a, *at* http://www.icann.org/en/general/bylaws.htm#XI.

[12] ICANN Bylaws, Art. XI, Sec. 2.1.j, *at* http://www.icann.org/en/general/bylaws.htm#XI.

[13] *Id.*

[14] ICANN Bylaws, Art. XI, Sec. 2.1.k, *at* http://www.icann.org/en/general/bylaws.htm#XI.

[15] The Board provided notes to the GAC's identification of areas of difference. The Board Notes, available at http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf, capture the progress made during the consultation.

[16] Community comment on the Board/GAC consultations is compiled at http://www.icann.org/en/topics/new-gtlds/related-en.htm.

[17] March 18, 2011 resolution available at http://www.icann.org/en/minutes/resolutions-18mar11-en.htm#3.

[18] ICANN's relationships with law enforcement are not limited to the new gTLD program; ICANN coordinates regularly on security-related issues and to address threats to the DNS.

[19] 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).

[20] IRT Membership Directory, at https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:20090407232008-0-9336/original/IRT-Directory.pdf.
[21] IRT Resolution, at http://www.icann.org/en/minutes/resolutions-06mar09.htm#07 (Mar. 6, 2009).
[22] Public comment forum on IRT Draft Report, http://www.icann.org/en/public-comment/public-comment-200905.html#irtdr; IRT Final Report, at http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf (May 29, 2009).
[23] Letter from Rod Beckstrom to GNSO Council, http://gnso.icann.org/correspondence/beckstrom-to-gnso-council-12oct09-en.pdf (October 12, 2009).
[24] Final Report of the STI, at http://gnso.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf (December 11, 2009).
[25] March 10, 2010 Board resolutions, at http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#6.
[26] Zone File Access Advisory Group information and documents are available at http://www.icann.org/en/topics/new-gtlds/zone-file-access-en.htm.
[27] APWG Report on Potential Malicious Abuse and New gTLDs, https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/potential_for_malicious_conduct:20090619162304-0-3550/original/DRAFT%20Potential%20malicious%20use%20issues%2020090617.pdf (June 17, 2009).
[28] RISG Statement on New TLDs, https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/potential_for_malicious_conduct:20090519220555-0-2071/original/RISG_Statement_on_New_TLDs-20090519.pdf (May 19, 2009).
(March 11, 2011).
[30] While some existing gTLDs choose to use "thick" Whois models today, it is not required.
[31] While not related to mitigating malicious conduct, consumers and registrants will also be protected due to the work done on registry continuity and the creation of new transition procedures for use in the event of registry failure.
[32] An economic study commissioned by AT&T suggests that 97% percent of mark holder registrations in new gTLDs will be defensive registrations. *See* Michael Kende, "Assessment of ICANN Preliminary Reports on Competition and Pricing" (April 17, 2009). However, there are several reasons why the results of Kende's study provide little reason to oppose the new gTLD program. First, the study makes it clear that most defensive registrations take place on .COM. Second, Kende's definition of a defensive registration is overly expansive. According to Kende, defensive registrations would include domain names that can facilitate efficient user navigation by collecting and redirecting traffic, such as obvious misspellings. However, even if there were no fear of

typosquatting, it probably would make sense for companies to acquire some misspellings of their brand names.
Kende's work has been refuted by other economists, including Dr. Dennis Carlton, who produced a paper rebutting Kende's claims. *See* Dr. Dennis Carlton, "Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing", at https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/tld_demand_and_economic_analysis:20091007232802-2-13939/original/carlton-re-kende-assessment-05jun09-en.pdf (June 5, 2009).
[33] Michael Katz, Gregory Rosston and Theresa Sullivan, Economic Considerations in the Expansion of Generic Top-Level Domain Names – Phase II Report: Case Studies, at paragraph 8, http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf (December 2010) ("Katz/Rosston Phase II").
[34] See http://www.circleid.com/posts/20090202_analysis_domain_names_registered_new_gtlds/.
[35] Carlton, Comments on Kende, *supra* note 32, at paragraph 11.
[36] Carlton, Comments on Kende, *supra* note 32, at paragraph 16.
[37] Katz/Rosston Phase II, *supra* note 33, at page 52.
[38] While rates of 215-240 new gTLDs are expected over a one-to-two year period, it has been determined that the root zone servers can readily accommodate maximum rates of 1000 delegations per year. *See* October 2010 Root Zone Scaling reports are available at http://www.icann.org/en/announcements/announcement-2-06oct10-en.htm, and the public comment fora can be accessed from there as well. *See also* Letter from Jun Murai, Chair of RSSAC, http://www.icann.org/en/correspondence/murai-to-board-25nov10-en.pdf (25 November 2010).
[39] "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 **Error! Bookmark not defined.**.
[40] *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").
[41] 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"); CRA International, Revisiting Vertical Separation of Registries and

Registrars, *at* http://www.icann.org/en/topics/new-gtld-crai-report-24oct08-en.pdf; Michael Katz, Gregory Rosston and Theresa Sullivan, An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names, *at* http://www.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf ("Katz/Rosston Phase I"); and Katz/Rosston Phase II, *supra* note 33.

[42] Katz/Rosston Phase I, *supra* note 41, Katz/Rosston Phase II, *supra* note 33.

[43] Carlton I, *infra* note 31 paragraphs 23, 39 *passim*.

[44] *Id*. at paragraph 23.

[45] *Id*.

[46] Katz/Rosston Phase II, *supra* note 33, at paragraphs 75-76.

[47] Affirmation of Commitments, paragraph 9.3 http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm.

[48] The IDN ccTLD Process was created after consultation and planning with the ccNSO (Country Code Names Supporting Organization) and the GAC.

[49] These IDN ccTLDs represent 17 countries and territories. Due to language difference in country, for example, India has IDN ccTLDs delegated in seven separate scripts.

[50] Information on DNSSEC deployment can be found at http://www.root-dnssec.org/.

[51] Between the 2003 and the last time ICANN appeared before the Subcommittee, 38 registrar accreditation agreements were terminated or not renewed.

Mr. GOODLATTE. Thank you, Mr. Pritz.

Ms. Stark, welcome.

TESTIMONY OF MEI-LAN STARK, SENIOR VICE PRESIDENT, INTELLECTUAL PROPERTY, FOX GROUP LEGAL, AND TREASURER, INTERNATIONAL TRADEMARK ASSOCIATION (INTA)

Ms. STARK. Good morning, Chairman Goodlatte, Ranking Member Watt, and the Members of the Subcommittee. Thank you for this opportunity to present the views of intellectual property owners on the issues related to the introduction of new gTLD's.

My name is Mei-lan Stark and I am Senior Vice President of Intellectual property at Fox Entertainment Group, and I am appearing here today on behalf of INTA where I serve on a voluntary basis as treasurer and as a member of the board of directors. INTA is a not-for-profit association with 5,600 member organizations in over 190 countries.

It is an honor for me to appear before this Subcommittee which has long exercised leadership in the protection of IP and the fight against counterfeiting and piracy, including the consideration of rogue website legislation which will become even more important as new gTLD's are launched.

As trusted indicators of source and authenticity of goods and services, trademarks perform an important consumer protection role, preventing consumer confusion and allowing consumers to make rapid and informed choices among competitive offerings. But the societal benefits provided by intellectual property in general and trademarks in particular are threatened when the good will associated with a brand is misappropriated. So let me share a recent example that happened to Fox.

Our local Fox affiliate in Detroit, Channel 2, operates a website at myfoxdetroit.com. Well, a third party registered the name "myfox2detroit.com," and that leads to a pornographic site. So it is not difficult to imagine a scenario in which a child is researching a school report, looks online to find information that was contained in the local Fox evening news and finds themselves inadvertently on this pornographic site.

Mr. Chairman, there are currently 21 gTLD's such as dot com, and these top-level domain names introduced over the past dozen years have proven to be an absolute bonanza for those who use the anonymity, flexibility, and market reach of the Internet to deceive consumers as in my example.

Abusive domain name registrations also impose significant costs on business, costs that do not contribute to the creation of productive jobs, to innovation, or to overall financial health of companies. Given these costs, IP owners have been concerned about ICANN's proposal from the outset and believe that ICANN has not met its burden of proof that the societal benefits of the proposed gTLD expansion outweigh the harms and is truly in the public interest.

ICANN and others who will benefit financially as domain name registrars and registries suggest certain benefits that might arise from the proposal. However, the economists retained by ICANN, who delivered reports in 2010, did not confirm such benefits. They concluded that new, undifferentiated gTLD's are not likely to improve competition and that any other purported benefits are specu-

lative at best. To the extent they exist at all, they are most likely to arise from differentiated gTLD's such as IDN's or community-based domains.

On the other hand, the economists had no difficulty in identifying the cost for businesses and Internet users, including the effects from abusive registration, the harm to consumers from the spread of malware, phishing, and counterfeit products, reduced investment in IP by owners as a result of increased opportunities for misappropriation, and finally the losses from failed gTLD's themselves.

So let me focus for a minute on misappropriation of IP.

Despite recommendations from WIPO, the IPC, INTA, and the U.S. Government, and others, ICANN has not yet developed adequate trademark protection mechanisms. The ICANN Government Advisory Committee, or the GAC, made up of representatives of more than 100 countries, including the United States represented by the NTIA, has also recommended stronger rights protection mechanisms. We greatly appreciate the efforts of the NTIA and the GAC for identifying trademark and consumer protection as one of the 12 issues in ICANN's proposal in need of resolution.

Despite these objections from governments, IP owners, and others in the community, ICANN has announced that it will not undertake any more economic studies, that it does not plan to make any significant adjustments in the rights protection mechanisms, as announced, that it has the authority to accept only that part of the GAC advice with which it agrees, and that it hopes to finish this process and plans to begin the expansion of the gTLD space following the June meeting in Singapore.

We encourage ICANN not to press for a resolution next month but to take the time necessary to address the legitimate concerns of the public including intellectual property owners as to the protection of intellectual property and consumers, ICANN's commitment to enforce not only existing but all new registrar and registry agreements, the need to protect the investments in existing brands through defensive acquisition of new gTLD's, and underlying all of the above, the concern that ICANN has not properly weighed the potential costs and benefits to the public to arrive at a demonstrable net public good.

Mr. Chairman, thank you again for this opportunity to be here today. INTA looks forward to continuing to work with ICANN, the stakeholder community, and this Subcommittee in the responsible evolution of the domain names.

[The prepared statement of Ms. Stark follows:]

TESTIMONY

OF

MEI-LAN STARK
TREASURER AND MEMBER OF THE BOARD OF DIRECTORS
INTERNATIONAL TRADEMARK ASSOCIATION

"ICANN GENERIC TOP-LEVEL DOMAINS (gTLD) OVERSIGHT HEARING"

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION AND THE INTERNET
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

May 4, 2011

Good morning Chairman Goodlatte, Ranking Member Watt and Members of the Subcommittee. Thank you for this opportunity to present the views of intellectual property owners on the Internet Corporation for Assigned Names and Numbers or ICANN and the issues related to its planned introduction of an unlimited number of Internet generic top-level domain names (gTLDs) to the Domain Name System (DNS) of the Internet.

I am Mei-lan Stark, Senior Vice President, Intellectual Property, for Fox Entertainment Group. I am appearing today on behalf of the International Trademark Association (INTA) where I serve on a voluntary basis as Treasurer and a member of the Board of Directors. INTA is a not-for-profit membership association dedicated to trademarks and related intellectual property, with 5,600 member organizations in over 190 countries.

INTA's membership spans all industry lines and sectors and is united in support of the essential role trademarks and related intellectual property play as elements of fair and effective commerce. INTA serves as a leading voice for trademark owners, ensuring that trademarks are adequately protected so that consumers can rely on them to make informed decisions about the products and services available in all markets, including the rapidly growing online marketplace.

It is an honor for me to appear before this Subcommittee, which has long exercised leadership in the protection of trademarks and consumers and in the creation of efficiencies in the areas of civil enforcement, criminal enforcement, and coordination of federal intellectual property efforts in the fight against counterfeiting and piracy.

1. Intellectual Property Protection is Vital to Consumer Protection

Trademarks serve a critical function in our economy. As trusted indicators of source and authenticity of goods and services, trademarks perform an important consumer protection role. Trademarks prevent consumer confusion and mistake in the marketplace and serve to inform consumers. In fact, trademarks are one of the most effective and efficient communication tools ever employed. A brand communicates a vast array of information about the quality and characteristics of a good or service instantaneously thereby allowing consumers to make rapid and informed choices among competitive offerings. Simply put, consumers rely on brands in making purchasing decisions each and every day.

Throughout all the developments we have witnessed in communication technologies and mediums, and as a significant percentage of sales and consumer interactions migrate online, companies pursue this new market in one way that is unchanged from the days when all sales were made in stores or through mail-order catalogues – by developing goodwill and reputation in our brands. The goal of the brandowners is straightforward – to build a brand that consumers trust.

But when unauthorized misuses of trademarks, such as abusive domain names, are allowed to proliferate, the integrity of the brand is threatened and the vital consumer protection capacity of the brand is compromised. When consumers are directed through an abusive domain name to a site that they did not intend to visit and become the victims of phishing schemes, frauds, false advertising claims, or purchase dangerous counterfeit products, consumer are not only harmed,

they lose confidence in both the brand and in the usefulness of the Internet as a safe and reliable marketplace. The result is a diminished brand-experience for consumers. The loss of consumer confidence in turn impairs the effectiveness of the targeted brand as a source identifier and communication tool.

In today's Domain Name System ("DNS") of twenty-one gTLDs and nearly 300 ccTLDs, there are more than ample examples of abusive domain name registrations. It is precisely because these misuses can have such far-reaching and damaging effects on our trademarks and ultimately our customers that INTA and its members have worked to ensure that trademarks are afforded the same protection on the Internet as they have offline by promoting:

- minimum standards and practices in domain name registration procedures;
- maintenance of a publicly accessible "Whois" database providing free, reliable and accurate contact details on registered domain names;
- low-cost, uniform administrative procedures to address abusive registrations;
- a measured and justified approach to expansions of the top-level domain name space;
- rigorous enforcement of DNS-related agreements; and
- an adequate voice for intellectual property owners in the formulation of domain name policy.

II. Efforts to Improve the Ongoing Management of Internet Names and Numbers

Following the opening of the Internet for commercial use in the 1990s, a new era of global communication and commerce emerged. To address the challenges of managing Internet names and numbers in the new environment, the United States Department of Commerce issued a statement of policy, known as the White Paper that began transitioning control of the management of Internet resources, such as domain names, from government to a new organization led by the private sector.[1]

INTA has been on record supporting this privatization of the DNS to create a stable, representative organization that could meet the needs of global commerce and protect the public interest in the management of these resources.

In 1998, ICANN was incorporated, and it entered into a Memorandum of Understanding (MOU) with the Commerce Department to manage DNS policy and eventually to administer contracts with generic top-level domain name registries and registrars.

Responsibility for oversight of ICANN's activities was lodged in the National Telecommunications and Information Administration (NTIA), part of the Department of Commerce. Under the MOU, ICANN provided a series of status reports to the NTIA on its progress.

[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.

On September 29, 2006, NTIA and ICANN transitioned from their original MOU to the Joint Project Agreement (JPA). The JPA had a three-year term and provided for the Commerce Department to conduct a mid-term review of ICANN's performance under the agreement.

On October 29, 2007, the Department consulted with interested stakeholders to conduct the Mid-Term Review, to assess ICANN's progress in meeting the responsibilities outlined in the JPA.[2] INTA submitted comments that identified necessary improvements in core areas of ICANN's performance.[3]

Consistent with INTA's submission, the NTIA released a statement that while "ICANN has made significant progress in several key areas, most participants agree that important work remains to increase institutional confidence through implementing effective processes that will enable: long term stability; accountability; responsiveness; continued private sector leadership; stakeholder participation; increased contract compliance; and enhanced competition."[4]

In September 2009, at the conclusion of the JPA, ICANN and the Commerce Department moved to an "Affirmation of Commitments" (AoC) agreement.[5] The AoC was intended to re-affirm ICANN's continuing obligation to manage the DNS in the public interest.

A. ICANN's Policy Processes must adequately incorporate the views of the public, including intellectual property owners

INTA has long stated that ICANN must develop an organizational structure that reflects the appropriate representation of the public, including trademark owners and commercial users, in its affairs, and that adequate stakeholder representation is necessary before privatization of the management of the Internet DNS can be fully realized.

If the Internet is to serve the needs of international commerce, the private sector, including the intellectual property community, must have proper representation in the private sector model. Otherwise, DNS-related policy development and decision-making will not reflect the importance and relevance of intellectual property issues in the DNS to businesses, consumers and Internet users across the globe.

We have seen over the course of ICANN's history an erosion in the broad public representation called for in the White Paper. For example, through internal organizational reviews ICANN has reduced the business community's representation within its governance structure. As a result policies such as the new gTLD program have been approved without proper consideration of

---

[2] See announcement of: Commerce's NTIA Seeks Public Comments Regarding Joint Project Agreement with ICANN. October 29, 2007, available at: http://www.ntia.doc.gov/ntiahome/press/2007/PR_ICANNJPA_10292007.html

[3] See INTA Comments on Mid-Term Review of Joint Project Agreement (JPA). February 12, 2008. Available at: http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_079.pdf

[4] See NTIA Statement on the Mid-Term Review of the Joint Project Agreement (JPA) Between NTIA and ICANN. April 2, 2008. Available at: http://www.ntia.doc.gov/ntiahome/domainname/icann_jpa_080402.html

[5] See Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers. Available at: http://www.ntia.doc.gov/ntiahome/domainname/Affirmation_of_Commitments_2009.pdf

trademark and intellectual property issues. This has had the effect of reducing participation within ICANN in general due to the perception that business and consumer protection concerns often are ignored.

B. ICANN continues to experience challenges meeting its obligations under the AoC, including contract compliance

Contract enforcement is central to ICANN's competence in managing Internet Names and Numbers, and, while some limited progress has been made, contract enforcement has gone from "non-existent to "not-yet-adequate." ICANN's lack of resources with respect to contractual enforcement has directly led to conduct that translates into DNS instability, e.g., lax compliance by certain registrars and registries with respect to their obligations under the contracts, tolerance of inaccurate Whois information, and a lack of uniformity and cooperation with respect to proxy registrations.

INTA agrees with many other IP groups in recognizing that the success of the entire ICANN experiment depends on using contractual agreements as a substitute for government regulation, and the viability of that experiment remains in question so long as those agreements are not consistently and predictably enforced.[6]

One significant example of this lack of enforcement by ICANN is the registrars' obligation to maintain accurate Whois data. Access to reliable Whois information is necessary to ensure accountability in the domain name space for all users of the Internet, including intellectual property owners. Yet, for millions of registered gTLD domain names, this vital information is often false or inadequate, frustrating the efforts of not only intellectual property owners, but also law enforcement and anti-abuse groups.[7]

ICANN has not clearly indicated how it plans to address this shortcoming in contractual compliance should there be a large influx of new gTLD registries. Despite the dedicated efforts of the small number of compliance staff, to date ICANN has not provided adequate compliance resources, and proposed budgets do not indicate sufficient new resources to meet the challenges of the gTLD proposal.

III. Introducing New gTLDs

A. Introductions to Date

When the Domain Name System was first designed in the mid-1980s, seven three-letter "generic" top-level domains (.com, .org, .net, .edu, .gov, .mil and .int) and an expandable set of two-letter "country-code" top-level domains, such as .de for Germany, were introduced. For a variety of reasons, consideration was given to expanding the number of generic top-level domain names in the system.

---

[6] See Comments of the Intellectual Property Constituency. April 28, 2009. http://forum.icann.org/lists/op-budget-fy2010/pdf4fj6V4c2H5.pdf

[7] See Draft Report for the Study of the Accuracy of WHOIS Registrant Contact Information. (approximately 30% of the domain names sampled in the 5 largest gTLDs) were classified as fully or substantially failing an accuracy test. Available at: http://www.icann.org/en/compliance/reports/whois-accuracy-study-17jan10-en.pdf

In the White Paper, the Commerce Department concluded that the newly formed corporation would be the most appropriate body to consider the introduction of new gTLDs, based on global input, and this was one of the first tasks ICANN addressed shortly following its incorporation.

The White Paper also called upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process, to develop recommendations on DNS issues affecting intellectual property, including evaluating the effects, based on studies conducted by independent organizations, of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders.

These findings and recommendations were then submitted to the ICANN Board in conjunction with its development of a policy for the introduction of new gTLDs.

A report published at the time by WIPO concluded that intellectual property owners have experienced considerable difficulties in ensuring the protection of their intellectual property rights in the then-existing gTLDs, and that such problems might be ameliorated if ICANN proceeded to make various policy and administrative changes in the process of registering domain names, including enhanced protection for intellectual property owners.

WIPO went on to suggest that any new gTLDs would need to be introduced in a slow and controlled manner so that experience with the proposed improved practices and procedures could be monitored. That experience would be the arbiter of whether such practices and procedures did indeed result in a significant reduction of the problems that had been encountered by intellectual property owners.[8]

However, ICANN failed to adopt key recommendations of WIPO, such as a mechanism for protecting famous marks and other provisions aimed at improving the domain name registration process and the accuracy of contact details on registered domain names.

In 2000 ICANN began the process of introducing seven new top-level domains (.aero, .biz, .coop, .info, .museum, .name and .pro).

These seven new gTLDs were authorized as a "proof of concept" by ICANN to gain a first-hand understanding of the practical and policy issues involved in their introduction to the DNS.

In October 2002, following the introduction of the seven new domains, ICANN issued a *Plan of Action for New gTLDs*, which suggested the approach of "parallel processing," which allowed progression on yet another set of new gTLDs before the evaluation of the previous round was completed.

As a result, no comprehensive evaluation of the first round of gTLD expansion was undertaken prior to the decision to initiate a second round.

---

[8] The Management of Internet Names and Addresses: Intellectual Property Issues. Final Report of the WIPO Internet Domain Name Process. April 30, 1999. Available at: http://www.wipo.int/amc/en/processes/process1/report/finalreport.html

In December 2003, ICANN began a process to solicit proposals from sponsors of proposed new top-level domains and begin entering into contracts with the operators for seven additional gTLDs (.asia, .cat, .jobs, .tel, .travel, .mobi and .post).

In 2005, WIPO at the request of ICANN issued a report titled: "New Generic Top-Level Domains: Intellectual Property Considerations".[9] The WIPO report noted that, given previous experience with new gTLDs, it was likely that the opening of new domain name space would attract abusive registrations, and that additional safeguards including preventive trademark protection in any new gTLDs would be necessary.

WIPO's report further observed, "when one trademark owner registers its trademark in one such gTLD and another owner registers an identical or similar mark in another gTLD, the public will not be able to clearly attribute each domain name to a specific trademark owner without checking the web site content. This is likely to cause confusion. Moreover, 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. As a result, trademark owners are likely to try to register their marks in all such gTLDs."

The experience of brand owners in the existing twenty-one gTLDs, and the nearly 300 ccTLDs, has confirmed WIPO's observations. Among the costs incurred by brand owners are:

- defensive registrations of domain names and later renewals;
- retention of vendors or use of additional in-house resources to monitor the Internet for domain name abuses;
- legal fees and other costs involved in bringing UDRP proceedings or litigation against violators; and
- loss of traffic and sales from consumers diverted from the company's legitimate web site.

Nonetheless, in 2005 – the same year it began entering into registry agreements for the second round of seven new gTLDs -- ICANN initiated a policy development process that formed the basis of the current proposal for an unlimited number of new gTLDs.

B. ICANN's Current Proposal for New gTLDs

INTA is not against the expansion of the gTLD space. In fact, INTA has always recognized that the Internet will never be, nor should it be, static and that some expansion of gTLDs is to be expected under appropriate circumstances. The efforts of INTA and its members are intended to aid in the process of the expansion of the gTLD space with the overarching goal of assuring that any expansion is conducted in a timely, properly scaled, and responsible manner. For example, the Association has and continues to be a supporter of International Domain Names (IDNs), which permit domain names to exist in non-Latin characters such as Chinese, Arabic or Cyrillic.

[9] WIPO Arbitration and Mediation Center - New Generic Top-Level Domains: Intellectual Property Considerations (2005 Report). April, 06 2005. Available at: http://www.wipo.int/amc/en/domains/reports/newgtld-ip/index.html

That said, INTA remains concerned that the current proposal for new gTLDs has not yet been refined to the point of being ready for launch.

The proposal itself goes back to June, 2008, when the ICANN Board approved a set of policy recommendations for the introduction of new gTLDs.

Following that decision, ICANN issued a draft Applicant Guidebook (DAG), the road map that would be followed by interested parties applying for new gTLDs. After the receipt of the initial public comments on the DAG, ICANN identified four overarching issues in connection with its proposal that were required to be resolved: trademark protection; the potential for malicious conduct; Internet security; and top-level demand and economic impact.

In accord with ICANN's identification of these four overarching issues, in 2009 INTA passed a Board Resolution that new gTLDs should not be introduced until those issues were resolved and that any expansion of the gTLD space must be "responsible, deliberate and justified." These principles have not been satisfied, and INTA believes that more multi-stakeholder collaboration is required before ICANN can satisfy its own stated objectives for the introduction of new gTLDs.[10]

1. Economic Impact and Analysis

Before publishing the first Applicant Guidebook, ICANN did not undertake a comprehensive economic study that would include data on the performance of the existing gTLDs, an analysis of the effects of competition, and an understanding of where demand might originate. After the public comments, ICANN retained an economist to produce a report on the potential benefits and costs of its proposal, but the report failed sufficiently to assess the economic impact.

As a result, ICANN commissioned work by another set of economists, and in June 2010, published Phase I of *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names*.[11] This report provided an analytical framework to assess the economic impact of ICANN's proposal stressing the importance of the issue of external costs (which include costs associated with cybersquatting and consumer confusion).

Phase I summarized prior analyses of other reports related to the introduction of new gTLDs. It identified several shortcomings of previous studies and concluded that they were incomplete. The central finding was that additional information should be collected.[12]

The *Economic Framework* noted that domain name registrants may suffer costs in maintaining an Internet presence or protecting their trademarks, and that these costs "create a gap between the net private benefits of new gTLDs to their operators and total net benefits to society," and

[10] See INTA Board Resolution. Creation of New gTLDs and Trademark Protection. July 8, 2009. Available at: http://www.inta.org/Advocacy/Pages/CreationofNewgTLDsandTrademarkProtection.aspx

[11] See: An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names. June 2010. Available at: http://www.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf

[12] Reply to Comments on An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names. February 21, 2010. Available at: http://www.icann.org/en/topics/new-gtlds/analysis-response-economic-framework-21feb11-en.pdf

"because new gTLD applicants generally can be expected to make decisions to maximize their own (private) benefits rather than overall social benefits, an open-entry delegation process can lead to private decision-making that is not optimal for society as a whole."

Phase I of the *Economic Framework* cited the scarcity of empirical data necessary to assess the impact of new gTLDs and proposed studies to obtain this information.

Phase II of the *Economic Framework,* published in December of 2010, undertook case studies of earlier gTLD introductions and concluded:

(1) new undifferentiated gTLDs are unlikely to improve competition;
(2) there is no scarcity of names in existing gTLDs; and
(3) many stated benefits of new gTLDs are speculative, but the most likely arise from differentiated TLDs such as IDNs or community-based domains.

But Phase II went on to say that the costs to trademark owners and Internet users were real, and it cited:

(1) "misappropriation" of intellectual property, which history shows results in very real and substantial costs of domain name watching, defensive registrations, litigation and other enforcement efforts, and lost profits;
(2) domain navigation "dilution," which results in the increased cost/burden of navigation because there are potentially hundreds or thousands more places to look for the domain name of interest, and also includes, as the Report notes, costs that "cannot be mitigated;"
(3) harm to Internet users from cybersquatting, which history shows results in very real and substantial costs due to the spread of malware, phishing, and the offering of counterfeit products;
(4) reduced investment in IP, which results from the prospect of increased opportunities for misappropriation; and
(5) losses from failed gTLDs, which can create chaos for a company whose business is built around a domain name in a particular gTLD, as well as increased "clutter" on the Internet from links that fail to resolve.

The *Economic Framework* did not make an assessment of whether the benefits outweighed the costs in ICANN's proposal. But it did suggest that ICANN should continue its practice of introducing new gTLDs in discrete, limited rounds, and that by proceeding with multiple rounds, the biggest likely costs—consumer confusion and trademark abuse – could be evaluated in the earlier rounds to make more accurate predictions about later rounds.

There has been no demonstrable effort by ICANN to use the *Economic Framework* to tailor its proposal to maximize benefits and minimize social costs, for example by proceeding with a measured introduction of new gTLDs focusing on IDN or community-based domains. Thus, there is an increased risk that the net result of the new gTLD proposal will be negative.

In fact, while ICANN's own economists cited the lack of empirical data to access the costs, the ICANN Board determined that no further economic studies could better inform the Board's decision on this issue.[13]

2. Need for Stronger Intellectual Property Protection in the Applicant Guidebook

At the same time the economic study was under discussion, there was debate on how to protect trademarks in any new gTLD.

In response to significant concerns about the inadequacy of trademark protections in earlier Draft Application Guidebooks, ICANN formed an Implementation Recommendation Team (IRT) of trademark experts and members of other constituencies to recommend trademark protection mechanisms. The IRT submitted extensive and detailed recommendations to ICANN. The ICANN Board and Staff subsequently rejected or weakened key IRT recommendations. One issue that was rejected was the IRT's recommendation for an "exclusion" or blocking mechanism to minimize defensive registrations and costs for trademark owners as previously suggested by WIPO and later endorsed by the *Economic Framework.*

While the most recent version of the DAG makes some improvements in the Rights Protection Mechanisms ("RPMs") previously announced, the following are recommendations, inter alia, necessary to ensure adequate consumer and trademark protection:

- Uniform Rapid Suspension System (URS) – to be effective, the standards of proof must be brought into conformity to similar claims brought in civil disputes. The URS should provide trademark owners with a sufficient remedy to minimize the need for serial enforcement actions against the same domain name;
- Trademark Clearinghouse – to provide sufficient benefits, it is essential for the Clearinghouse, and its Trademark Claims Service, to remain operational past the sixty-day initial launch phase of the registry;
- The Clearinghouse must be integrated with other RPMs, such as the Uniform Rapid Suspension Procedure (URS); and
- Post-delegation Dispute Resolution Procedure – standards for registry conduct should ensure registries do not intentionally turn a blind eye to abusive conduct.

These recommendations, reflective of comments filed by the IP community on the various iterations of the Draft Applicant Guidebook, were also identified as outstanding issues in the advice from ICANN's Government Advisory Committee (GAC), which has been advising ICANN on these new gTLDs since March 28, 2007.[14]

In its December 9, 2010 communiqué to the ICANN Board, the GAC expressed concern that many of the original public policy issues it previously raised remained unresolved, which it believed resulted "primarily from the fact that the Board adopted the GNSO recommendations

[13] See Adopted Board Resolutions. 25 January 2011. Special Meeting of the ICANN Board of Directors. http://www.icann.org/en/minutes/resolutions-25jan11-en.htm#4.a

[14] See: GAC Principles Regarding New gTLDs. March 28, 2007. Available at: http://gac.icann.org/system/files/gTLD_principles_0.pdf

on new gTLDs without taking due account of GAC advice at that time, thereby creating a flawed process."[15]

Following the conclusion of ICANN's public meeting in December, 2010, the GAC accepted an invitation from the ICANN Board to meet intersessionally before ICANN's next public meeting in the interest of resolving outstanding issues with the new gTLD process.

Subsequently, the GAC and ICANN Board met intersessionally, and again during ICANN's last public meeting in March, 2011. During this time period, the GAC provided advice on a number of issues of concern to their governments, and the ICANN Board responded by agreeing to implement certain changes, which have been incorporated in ICANN's latest Applicant Guidebook.

On the remaining issues of GAC advice, including issues related to intellectual property protection, ICANN has either requested further clarification from the GAC, or indicated that its current view is not consistent with the GAC's advice.

Following their intersessional meeting in March, 2010, the GAC indicated it was "committed to taking whatever time is required to achieving these essential public policy objectives."[16]

At its last public meeting, the ICANN Board resolved that "the Board intends to complete the process set forth in the timeline in time for final approval of the new gTLD implementation program at an extraordinary meeting of the ICANN Board to be held on Monday, 20 June 2011, at the ICANN meetings in Singapore."[17]

3. Implications of ICANN's Proposal for Brand Owners

ICANN estimates 500 applications for new gTLDs in the first round and has publicly declared it will approve up to 1000 new gTLDs each year. I have already touched on the costs to brand owners and the threats to consumers in the current environment, and the harms for consumers are also immediate and real. Consumers may suffer the minor annoyance of being misdirected in their search, but they may also be subjected to the more significant threats of landing on harmful sites that sell counterfeit goods, that seek to steal personal identity, that shock the viewer, or that perpetrate other frauds.

In urging support for its plan, ICANN has emphasized the opportunity for each brand owner to purchase its own gTLD. Let's call it .brand. In order to do so, however, brand owners, who are seldom in the business of running domain name registries, will incur significant costs, which potentially include:

---

[15] ICANN Governmental Advisory Committee. GAC Communiqué – Cartagena. December 9, 2010. Available at: http://gac.icann.org/system/files/Cartagena_Communique_0.pdf

[16] ICANN Governmental Advisory Committee. Brussels Intersessional Meeting Communique. March 8, 2011. Available at: http://gac.icann.org/system/files/Brussels%20Intersessional%20Meeting-%20GAC%20Communique.pdf

[17] See ICANN Board Resolution. Process for Completion of the Applicant Guidebook for New gTLDs. 18 March 2011. Available at: http://icann.org/en/minutes/resolutions-18mar11-en.htm

- a $185,000 application fee payable to ICANN;
- an annual maintenance fee of $25,000 payable to ICANN;
- costs related to obtaining a letter of credit as part of the application;
- additional, undetermined costs in the many cases where winning an auction for their .brand will be necessary;
- more significantly, the infrastructure, the Information Technology and personnel costs that will be necessary to maintain a gTLD; or alternatively the costs to outsource the back-end services of the registry;
- the staffing and resources required to assure compliance with ICANN agreements and policies;
- the costs to operate RPMs such as the mandatory sunrise periods and trademark clearinghouse;
- staffing and resources to handle additional legal issues that will arise, such as third-party subpoenas;
- costs associated with possibly setting up a legal entity to own and operate the gTLD and any attendant tax implications;
- the marketing costs that must be incurred in moving a customer base, accustomed to finding the brand on its existing site, to this new gTLD.

For other brandowners, such as small and medium-sized businesses, or entities such as not-for-profit organizations, the costs of applying for a new gTLD will be prohibitive. These organizations will be excluded from applying for a top-level domain, and, with limited resources, will face extensive difficulties in protecting their intellectual property in any new gTLD space.

But even for brand owners contemplating such an investment, the opportunity may be nothing more than a defensive move to prevent another entity from acquiring a domain name that could dilute the brand virtually overnight, confuse consumers and later preclude the brand owner from acquiring .brand.

In addition to these risks, the really pernicious possibility under the process as currently formulated is that, except in some narrow, not yet well-defined circumstances, a brand owner that becomes a registry operator will not be able to walk away from its investment if it proves unworkable for any reason. If the registry operator does abandon the registry, ICANN can re-sell or reassign the gTLD. That may have no significance beyond the financial loss if the registry is generic, e.g. .film, but what if the brand owner acquired .brand? ICANN could sell that valuable piece of intellectual property to a competitor, to a third party, or to a third party with bad intentions. Any of those results will ruin, not just diminish the value of the brand. The brand owner contemplating whether to attempt to purchase .brand is unable to plan an exit strategy and could be forced to continue the operation of that registry. In other words, under this ICANN proposal the brand owner can be forced in and not be able to get out. This would be a disaster for the brand and its consumers.

IV. Conclusion

INTA appreciates the efforts of the ICANN Board and Staff to improve the Draft Application Guidebook and the proposed gTLD program, but our members continue to have a number of concerns about ICANN's gTLD proposal:

- the ability to adequately protect their intellectual property and their consumers;
- the ability to manage costs, which have not been quantified;
- uncertainties related to the effectiveness of the rights protection mechanisms;
- issues related to the process of applying for a new gTLD, including the effectiveness of the objection procedures and the scope of ICANN's authority over the gTLDs; and
- insufficient confidence that registrar and registry agreements will be enforced, especially with respect to Whois and abusive registrations.

As a result of ICANN's stated intention to finalize the entire new gTLD process at its next public meeting, scheduled for June in Singapore, intellectual property owners are also concerned that the imposition of this arbitrary deadline will impede ICANN's ability to address these important public policy issues.

INTA looks forward to continuing to work with ICANN, the stakeholder community and this Committee in the responsible evolution of the domain name system.

In closing, we want to express our sincere thanks to the U.S. Government, in particular the Department of Commerce, and the more than 100 national governments who make up the GAC for their support for effective rights protection mechanisms and their continuing oversight of this critical ICANN initiative.

Mr. GOODLATTE. Thank you, Ms. Stark.
Mr. Palage, welcome.

TESTIMONY OF MICHAEL D. PALAGE, PRESIDENT AND CEO, PHAROS GLOBAL

Mr. PALAGE. Chairman Goodlatte, Ranking Member Watt, and distinguished Members of the Subcommittee, my name is Michael Palage, and I would like to thank you for holding this important hearing on ICANN's current proposal for the unlimited expansion of new generic top-level domains.

Based upon my work with domain name registration authorities, I have a clear interest in wanting to see the new gTLD process move forward in a controlled, responsible manner. I have written extensively on this subject for pretty much over the last decade. And one of the reasons I have been so outspoken on this particular issue is ICANN's failure to get it right threatens the very core of the private sector leadership model which has made the Internet what it is today.

Over the last several months, ICANN has engaged in good faith negotiations with the Government Advisory Committee to resolve their outstanding differences. I am pleased to report, based upon the recent exchange between ICANN and GAC, that there appears now to be 14 remaining issues in which there is a material difference. My concern, however, is that there is very little time between now and June 20th in which to resolve these 14 remaining issues.

While I believe that over 97 percent of the Applicant Guidebook is finalized in a manner which is mutually agreeable to the community, it is this remaining 3 percent which causes me concern between now and June 20th. So what I would like to do is discuss three specific proposals to be constructive, and these changes, hopefully will be able to address the concerns of government, law enforcement, intellectual property owners in providing an adequate safety net should ICANN move forward next month.

The first change deals with a recent proposal that ICANN made in the draft Applicant Guidebook that includes the following statement. A consensus statement from the GAC that an application should not proceed as submitted will create a strong presumption for the board that that application should not be approved. Now, I think this has been a positive step taken by ICANN. However, I do not believe that it goes far enough. What I am proposing is a bylaw amendment that would treat that consensus advice on the same equal footing as a super majority vote from the GNSO. Now, the GNSO is the supporting organization within ICANN responsible for gTLD policy recommendations, and the current requirement under the ICANN bylaws is that a GNSO super majority vote requires a 66 percent vote by the ICANN board to override it. So what I am proposing is that the Government Advisory Committee should be treated on equal par. So again, this is a private-public partnership. We are asking that ICANN recognize in its bylaws the same equality.

The second proposed change. Again, this would be a bylaw change. Under the current ICANN bylaws, there is a requirement that nine directors affirmatively vote in support of ICANN entering into a contract with a registry operator. I am proposing that the bylaws be changed to require 66 percent of nonconflicted directors to vote in favor of a contract before moving forward. While some

in the community may argue that a simple majority would be sufficient, I respectfully disagree. The entry of a string into the Internet's authoritative root is not an insignificant undertaking. It is a change to the core foundation of the Internet. Just like two-thirds of the House and Senate are required to propose an amendment to the Constitution, I submit that a similar heightened standard should be applied in this standard.

The third point which I would like to address is holding ICANN accountable. Having been involved in ICANN over the years, I have seen a number of changes by ICANN in its agreements with registry operators, as well as some of the memorandums of understanding that it has engaged with other institutions. But what I would like to talk about today is a recent amicus brief that ICANN filed in the Ninth Circuit, and in this it claimed protection under the Noerr-Pennington doctrine.

Now, under this doctrine, private entities are immune from liabilities under the antitrust laws for attempts to influence the passage or enforcement of laws, even if those laws advocate it would have anticompetitive effects. Now, in its brief, ICANN made the following statement. Conduct in recommending the grant of registry operator rights is a core petitioning activity and its conduct in these decisions is not self-executing, but rather is implemented only by proposing conduct to the Department of Commerce which, in turn, decides whether to adopt ICANN's proposals.

As an organization that is potentially going to reap hundreds of millions of dollars in revenue, I don't believe it is appropriate that they should be seeking to potentially avoid liability by claiming that it is not making self-executing decisions but mere recommendations. Therefore, I would encourage this Committee to work with the NTIA in any future IANA services agreement with these particular services to make sure that there is no future immunity going forward.

Thank you again for allowing me to testify today and I look forward to answering any questions.

[The prepared statement of Mr. Palage follows:]

Prepared Statement of Michael D. Palage, President and CEO, Pharos Global

Chairman Goodlatte, Ranking Member Watt, and distinguished members of the Subcommittee: My name is Michael Palage, and I would like to thank you for holding this important hearing on ICANN's current proposal for the unlimited expansion of new generic top-level domains (gTLDs).

While some in the community have questioned the timing and objective of these oversight hearings so close to ICANN's self-proclaimed June 20th approval date, I am reminded of an old Chinese saying that "true gold does not fear the refiner's fire." If what ICANN has produced through this multi-year process is true gold, then there are no questions asked today which should not have a full and satisfactory answer.

As someone that has worked with almost 50% of all new gTLDs approved by ICANN over the last decade (.INFO, .ASIA, .MOBI, .POST, .JOBS and .COOP) as well as currently working with several new gTLD applicants I have a clear financial interest in wanting to see the new gTLD process move forward. I have been involved in the new gTLD implementation process since day one and have written extensively on the shortcomings of this process. The reason I have been so outspoken is because ICANN's failure to get it right threatens the very core of the private sector leadership model which has made the Internet what it is today.

Over the last several months the ICANN Board has engaged in good faith negotiations with the Governmental Advisory Committee (GAC) of which the United States Government is an active member. During this time ICANN has been addressing a

scorecard produced by the GAC which identified 80 outstanding points of concern, many of which are directly related to the mandate of this committee: law enforcement, intellectually property protection, and mitigating malicious conduct. I'm pleased to report that only 14 issues remain in which material differences appear to remain. My concern, however, is that there is very little time between now and June 20th to resolve these key differences.

Attached as an appendix to my witness statement is a compilation of articles which I have authored detailing the shortcomings in ICANN's new gTLD implementation process. In an ideal world and with the benefit of 20/20 hindsight, ICANN could have gone about this implementation process in a more prudent fashion to prevent the showdown it now faces with government representatives from around the globe.

The 14 remaining issues that the ICANN Board and the GAC must resolve before this process is finalized and the new gTLD Program starts fall within 4 broad subject matter areas:

- community string designation;
- registry/registrar separation;
- intellectual property protections, and
- geographic identifiers.

While some of the other witnesses have or will delve into specifics of the intellectual property issues, I would like to focus on what I believe is the biggest stumbling block toward the successful conclusion of the new gTLD implementation process: community string designation.

The current applicant guidebook provides a preference for applicants seeking a gTLD string if they achieve a "Community Priority Evaluation." To achieve this designation, applicants need to undergo a separate community designation evaluation and receive a minimum of 14 out of 16 total points from criteria developed by ICANN. If there is no successful community based applicant for that string, ICANN's default mechanism for resolving this contention is an auction between otherwise qualified applicants, without taking into account the quality of the application or which applicant would better represent the community.

The GAC has recommended a broadening of the definition of community strings to include all applications seeking to represent a cultural, linguistic, religious, or ethnic community, as well as those strings involving a nationally regulated sector (i.e. .bank, .pharmacy, etc.) in order to ensure that these particular assets are not just given to the "highest bidder", but if delegated, are put into the hands of a registry that can best represent the interests of the natural community. The GAC has further recommended that an application/string should be rejected if: (i) in the absence of documented support from the affected community or (ii) the proposed string is either too broad to identify a single entity as the relevant authority, or is sufficiently contentious.

To illustrate the concerns of the GAC consider the following example. The American Banking Association (ABA) and BITS, a division of the Financial Services Roundtable, have announced their intention to pursue a financial services gTLD. BITS has been active within the ICANN community over the past several years, including participation within the ICANN High Security Zone TLD Advisory Group, of which I served as chairman. If the ABA and BITS were to apply for specific financial services string and fail to score fourteen points, under ICANN's current criteria a venture capital backed applicant with no formal ties to the financial services community could be awarded that gTLD string if they were the highest bidder.

What many in the community struggle with is how a California public benefit corporation that is supposed to serve as a trustee of a global public resource can opt to award a top level domain like .bank to the party with the deepest pockets rather than giving it to a well-established and more responsible community-based organization.

In an effort to be constructive and suggest improvements, there are two changes that could to be made in the next six weeks to address this and the other shortcomings in the Draft Applicant Guidebook that would allow for the new gTLD program to launch, while providing governments, law enforcement, and intellectual property owners adequate safety nets to address their concerns.

One recent change to the Draft Applicant Guidebook reads as follows: *"a consensus statement from the GAC that an application should not proceed as submitted . . . will create a strong presumption for the Board that the application should not be approved."*

While this may seem like a positive change, in light of recent actions taken by ICANN, it is potentially insufficient to address the concerns of the GAC. Specifically, ICANN's Supporting Organization responsible for gTLD policy has a provision in the ICANN bylaws requiring the Board to accept a Supermajority vote of that Supporting Organizations Council, **unless** 66% of the ICANN Board members determines that "it is not in the best interests of the ICANN community or ICANN."

Instead of inserting text into the latest version of the Draft Applicant Guidebook that states there is a strong presumption that the Board will follow GAC Consensus Advice, I submit that the ICANN Bylaws should be amended to put GAC Consensus policy advice on parity with the gTLD Supporting Organization. If 66% of the ICANN Board disagrees with this GAC advice because it is not in the best interests of the ICANN community or ICANN, then is should not be accepted. Given the private-public partnership that ICANN is supposed to founded upon this should be a no-brainer.

Second, under the current ICANN Bylaws there is a requirement for nine affirmative votes amongst the 16 sitting directors for ICANN to approve entering into a new gTLD registry contract with a prospective applicant. I propose that this should be changed to require 66% of non-conflicted directors to vote in favor of the contract before ICANN enters into a registry agreement.

While ICANN is unlikely to accept this change, I would urge this committee to communicate this safeguard to the Department of Commerce so that the NTIA can incorporate it into any future IANA services agreement. This would ensure that ICANN or any other successor organization would be required to have a heightened level of approval from its Board prior to proposing entry of a string into the root.

While some in the community may argue that a simple majority should be sufficient, I respectfully disagree. The entry of a string into the Internet's Authoritative Root is not an insignificant undertaking. It is a change to the foundation of the internet. Just like it takes two-thirds of the House and Senate to propose an amendment to the US Constitution, I submit a similar heightened standard should apply in this situation.

One of the concerns raised by the Government Advisory Committee has been the inclusion of terms and conditions into the new gTLD application which preclude an applicant's recourse to the courts, and instead limit an aggrieved applicant to one of ICANN's internal review mechanisms, e.g. its reconsideration process, internal independent review, and ombudsman. ICANN has obtained legal opinions from multiple jurisdictions supporting the reasonableness of this waiver.

In seeking to hold ICANN accountable for its actions in connection with the new gTLD program it is interesting to look at ICANN's actions and representations over the last decade. In the original registry agreements that ICANN entered into with each respective registry operator, there was a cross indemnification between the parties. Specifically, ICANN would indemnify the Registry Operator in connection with their compliance with an ICANN specification or policy. Beginning in 2004, this cross indemnification was systematically withdrawn from the agreement, and now there is only a one-way indemnification in ICANN's favor. Therefore, a Registry Operator can be sued and held liable for doing what ICANN requires it to do, but have no recourse for indemnification under the registry agreement.

In 2007, ICANN entered into a Memorandum of Understanding with the United Nations Economic and Social Commission for Western Asia (UN–ESCWA). Paragraph 5 of this Agreement claimed that "nothing in this MoU may be interpreted or construed as a waiver, expressed or implied, or a modification, of the privileges, immunities and facilities which ICANN enjoys by virtue of the international agreements and national laws applicable to it." A California not-for profit corporation should not be allowed to claim privileges and immunities in a contract with a UN agency.

But perhaps most egregious is the recent amicus brief that ICANN filed before the Ninth Circuit in which it claimed protection under the Noerr-Pennington Doctrine. Under this doctrine, private entities are immune from liability under the antitrust laws for attempts to influence the passage or enforcement of laws, even if the laws they advocate for would have anticompetitive effects. Specifically, ICANN claimed that its "conduct in recommending the grant of registry operation rights is core petitioning activity" and that its "conduct in these decisions is not self-executing, but rather is implemented only by proposing conduct to DOC, which, in turn, decides whether to adopt ICANN's proposals."[1]

An organization that seemingly could reap hundreds of millions of dollars in revenue should not be able to avoid potential liability by claiming it was not making self-executing decisions but mere recommendations. When you look at ICANN's ac-

[1] http://www.icann.org/en/legal/cfit-v-icann/cfit-v-icann-amicus-brief-13jul09-en.pdf

tions over the last decade you see a California not-for-profit corporation that acts more like a for-profit corporation in seeking to maximize revenue while minimizing liability, instead of striving to act as a trustee of a global public resource.

I respectfully submit that the way to proactively address this fundamental wrong is to have the Department of Commerce include a provision in the next IANA services agreement that ICANN or any successor organization shall not be able to claim any immunity as a direct/indirect result of that agreement.

APPENDIX

Michael Palage, *What ICANN Can Learn from Humpty Dumpty,* CircleID, April 29, 2011, http://www.circleid.com/posts/what__icann__can__learn__from__humpty__dumpty/

Michael Palage, *Bringing a Responsible Closure to the gTLD Implementation Process,* CircleID April 18, 2011,http://www.circleid.com/posts/20110418__bringing__a__responsible__closure__to__the__gtld__implement__process/

Michael Palage, David Taylor and Faisal Shaw, *A Phased Array Early Warning System,,* CircleID, April 7, 201, see http://www.circleid.com/posts/a__phased__array__early__warning__system/

Michael Palage and Berin Szoka, *Request for Comments on the Internet Assigned Numbers Authority (IANA) Functions,* TechFreedom, National Telecommunication Infrastructure Agency, Notice of Inquiry, April 1, 2011, http://www.ntia.doc.gov/comments/110207099–1099–01/comment.cfm?e=46EEF30B–3611–4088–A2FC–F49CEF8D0B3F

Michael Palage, *GAC New gTLD No Fly Zone,* Circle ID, March 15, 2011, http://www.circleid.com/posts/20110315__gac__new__gtld__no__fly__zone/

Michael Palage, *New gTLDs and Children,* CircleID, February 27, 2011, see http://www.circleid.com/posts/new__gtlds__and__children/

Michael Palage, *New gTLD Auctions and Potential Unintended Consequences,* CircleID, January 26, 2011, http://www.circleid.com/posts/new__gtld__auctions__and__potential__unintended__consequences/

Michael Palage, *MOPO—The Latest Speed Bump on ICANN's New gTLD Superhighway,* CircleID, September 10, 2010, http://www.circleid.com/posts/20100910__mopo__the__latest__speed__bump__on__icanns__new__gtld__superhighway/

Michael Palage, *Top Three Reasons to Just Say No to ICANN's Current EOI gTLD Proposal,* Progress and Freedom Foundation, *Progress Snapshot* Release 6.3 January 2010, http://www.pff.org/issues-pubs/ps/2010/ps6.3-top-three-reasons-to-just-say-no.html

Michael Palage, *New gTLD Expressions of Interest: Proceed with Caution,* Progress on Point 16.24, Nov. 2009, http://www.pff.org/issues-pubs/pops/2009/pop16.24-new-gTLD-expressions-of-interest.pdf

Michael Palage, New gTLDs: Let the Gaming Begin—Part I: TLD Front Running, Progress on Point 16.17, Aug. 2009, http://www.pff.org/issues-pubs/pops/2009/pop16.17-new-gTLDs-gaming-front-running.pdf

Michael Palage, ICANN's Economic Reports: Finding the Missing Pieces to the Puzzle, Progress Snapshot 5.4, June 2009, http://www.pff.org/issues-pubs/ps/2009/ps5.4icanns-economic-reports.html

Michael Palage, ICANN's Implementation Recommendation Team for New gTLDs: Safeguards Needed, Progress on Point 16.10, Mar. 25, 2009.

Michael Palage, ICANN's "Go/No-Go" Decision Concerning New gTLDs, Progress on Point 16.3, Feb. 2009, http://www.pff.org/issues-pubs/pops/2009/pop16.3gTLD gonogo.pdf.

Mr. GOODLATTE. Thank you, Mr. Palage.

Mr. Metalitz?

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

Mr. METALITZ. Mr. Chairman, Mr. Watt, thank you very much for the opportunity to testify here on behalf of the Coalition for Online Accountability. It is our sixth time presenting testimony to this Subcommittee or its predecessors, and we appreciate the continued oversight that this Subcommittee hearing represents.

The new gTLD program is the initiative that more than any other is the yardstick by which the success of the ICANN model will be judged. That model is an innovative approach to the global management of a key Internet resource, not by governments through regulation and treaties, but by a private sector-led organization through contracts and agreements.

Our coalition supports that model. We have striven for years to make that model work, but on the threshold of the launch of this new gTLD program, we have to ask the question: Is ICANN actually acting in accordance with that model? Our answer, which we deliver here with regret, is no.

On some of the particulars of the new gTLD program, there are some positive signs. We discuss that in our written testimony. We appreciate these changes. Clearly the sixth iteration of the new gTLD Applicant Guidebook is far better than the version ICANN started out with. But in many areas, as our statement outlines, ICANN still has very far to go.

More importantly, on the most fundamental question, we think ICANN seems to have gotten it wrong. From all over the world, ICANN heard calls for a measured, targeted rollout of new gTLD's focused on those areas where there are clearly unmet needs. They heard this from copyright and trademark owners, but they also heard it from a wide swath of international business. They heard it from many governments including, I am glad to say, the U.S. Government. They even heard it from the expert economists they themselves hired. All of those calls ICANN has spurned. It is poised to plunge ahead with virtually the same framework it unveiled 3 years ago: fling open the doors to an unlimited number of new gTLD's, process them through a system that is biased toward approval, and make virtually no differentiation of these proposals. One size fits all. Let the chips fall where they may.

How did this happen? Under the ICANN model, the organization is supposed to be private sector-led, but on this issue, a very small and unrepresentative sliver of the private sector is leading, primarily the companies whose businesses are franchises created by ICANN itself, the accredited registrars on whom ICANN has bestowed a monopoly of the retail domain name registration business, present and future, and the existing gTLD registry operators, many of whom see this program as a bonanza to be outsourcing sources for their ostensible competitors.

New gTLD's are ICANN's future, but what about the present? Remember, under the model, we are substituting contracts for regulation, but what we see are weak contracts that are weakly enforced. And I would like to illustrate this with an issue that has already been mentioned and that this Committee has been concerned with for more than a decade: accurate and reliable Whois

data. We all know that all Internet users need this to know who they are dealing with when they visit a website.

Unfortunately, today just like 12 years ago when the Subcommittee first held a hearing on Whois, anyone who wants to register a domain name in dot com or dot net can simply lie about who they are. If you get caught and your registrar asks you to correct the data, you can just submit new and equally false data. No registrar will turn you down. ICANN will close its file, if it has even opened one. Or better yet, you don't have to submit any contact data at all for public access. You just use a proxy registration service that substitutes its contact data for yours. One in five gTLD registrations is now done this way, and while there are legitimate uses for these services, they are especially attractive to wrongdoers.

The registrar has the real data on who you are, but many of them will refuse to turn it over without a court subpoena even if there is overwhelming evidence that you are using the registration to commit piracy, counterfeiting, or other abuses. Why? Because there are weak contracts between ICANN and the registrars and they are weakly enforced through a contract compliance staff that does its best but never has enough resources to do the job right.

At the last ICANN meeting in San Francisco, all the eyes were on the main hall where the ICANN board and the Government Advisory Committee were discussing the new gTLD program, ICANN's future. But the reality of how the ICANN model works today was on display in a much smaller room. The issue was whether to move ahead with negotiation of a newer, stronger contract with registrars, one that would deal more effectively with this huge problem of unregulated proxy registrations, as well as a lot of other issues. Every business representative voted to move ahead. Every nonprofit, noncommercial representative voted to move ahead. But the registries and the registrars, the companies that ICANN set up in business, all voted no. Under ICANN math, that 12 to 6 vote, there was no consensus and contract reform is at a standstill.

So these realities of ICANN's present are why we can't be as optimistic as we would like to be about ICANN's future, and in particular, we can't be optimistic that the new gTLD rollout will overcome its fundamentally flawed premise and truly deliver benefits to the public without saddling third parties, notably trademark and copyright owners, with much of the costs.

Thank you very much for this opportunity and I look forward to responding to any questions.

[The prepared statement of Mr. Metalitz follows:]

COALITION FOR ONLINE ACCOUNTABILITY
WWW.ONLINEACCOUNTABILITY.NET

C/O MITCHELL SILBERBERG & KNUPP LLP • 1818 N STREET N.W., 8TH FLOOR • WASHINGTON, D.C. 20036-2406
TEL: (202) 355-7906 • FAX: (202) 355-7899 • E-MAIL: INFO@ONLINEACCOUNTABILITY.NET

ICANN Generic Top-Level Domains (gTLD) Oversight Hearing

Prepared Testimony of

Steven J. Metalitz
Counsel, Coalition for Online Accountability

Before the

Subcommittee on Intellectual Property, Competition and the Interuet
Committee on the Judiciary
United States House of Representatives

Washington, DC

May 4, 2011

Steven J. Metalitz
Mitchell Silberberg & Knupp LLP
1818 N Street, NW, 8th Floor
Washington, DC 20036 USA
Tel: (202) 355-7902; Fax: (202) 355-7899
Email: met@msk.com

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

Mr. Chairman, and members of the Subcommittee:

Thank you for this opportunity to present the views of the Coalition for Online Accountability (COA) on recent activities of the Internet Corporation for Assigned Names and Numbers (ICANN), and particularly on its plans to introduce new generic Top Level Domains (gTLDs). This timely hearing exemplifies the important oversight role that the Judiciary Committee has played for well over a decade on critical issues affecting the domain name system.

About COA

COA, and its predecessor organization, the Copyright Coalition on Domain Names, has played an active role on domain name issues since 1999. COA participants include three leading copyright industry trade associations (the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA), and the Software and Information Industry Association (SIIA)); the two largest organizations administering the public performance right in musical compositions, ASCAP and BMI; and major copyright-owning companies such as Time Warner Inc. and the Walt Disney Company. COA's goal is to enhance and strengthen online transparency and accountability by promoting the continued availability of the data needed for effective enforcement against online infringement of copyrights and trademarks. In particular, we work to ensure that domain name and IP address Whois databases remain publicly accessible, accurate, and reliable.

COA has been an active participant in ICANN's work to develop the new gTLD program, both on its own account and as a member of ICANN's Intellectual Property Constituency (IPC). As counsel to COA, I have represented the coalition within the IPC, completed six terms as IPC president, and now serve as its vice-president. COA (and CCDN)

have also testified five times before this subcommittee or its predecessor on domain name issues, and we welcome the opportunity to do so again.

The New gTLD Program: Unanswered Fundamental Questions

ICANN is in the final stages of launching the most sweeping and consequential initiative in its history: the roll-out of hundreds or even thousands of new generic Top Level Domains (gTLDs). This effort has already consumed the efforts of hundreds of people over a span of several years, at a cost of tens of millions of dollars. There have been half a dozen iterations of an "applicant guidebook," hundreds of pages in length, which sets out the ground rules for the new gTLD launch. There have been dozens of public comment periods, in many of which COA has actively participated, along with hundreds of other organizations, companies, and individuals. The new gTLD rollout could have a huge impact, not only on U.S. businesses in general and U.S. intellectual property owners in particular, but on literally billions of Internet users around the world. It is no exaggeration to say that it is by the results of this initiative, more than any others, that the success or failure of ICANN, as a great global experiment in innovative management of a key Internet resource, will be judged.

Given the high stakes and the vast resources devoted to this effort, it is all the more striking that ICANN has never squarely faced and persuasively answered some fundamental and inter-related questions. Why does the world need hundreds or thousands of new gTLDs? For whose benefit is this huge project being undertaken? And how should this enormous effort be focused and prioritized to maximize its potential benefits, while minimizing its very real risks to consumers, right holders, and the public at large? Instead, this entire program has proceeded on the untested premise that the floodgates should be opened to an unlimited number of new gTLDs, of all types and descriptions.

Even though many parties, including ICANN's own Board of Directors, called years ago for objective economic analysis of the domain name marketplace, ICANN dragged its feet in seeking the advice of knowledgeable economic experts on how to fashion the scope and pace of the rollout to maximize likely benefits and minimize potential risks. Once it finally did so, it declined to put any of their key recommendations into operation during the upcoming round. The most recent economic expert study commissioned by ICANN – dubbed the "Phase II report" – was released in December 2010. This report sent a clear and compelling message: "an open entry process may not lead to the socially-optimal number of new gTLDs," and therefore the new gTLD launch should be re-oriented to focus on certain categories of applications that offer the greatest potential benefits for the public, while discouraging others that will impose higher costs upon third parties.

The December 2010 study convincingly demonstrates that "additional generic, unrestricted TLDs using the Latin alphabet" fail both the benefits and costs prongs of this test. Phase II report, at 3. Such new gTLDs "would be unlikely to provide significant additional competition for .com," and cannot be justified on the basis of a supposed "scarcity of generic second-level domains," which the study finds is not "a pervasive problem." Id. While providing little prospect for public benefits, such "standard gTLDs with open registration policies" are also precisely the sort of new gTLD "most likely to attract defensive registration by owners of valuable brands," and thus to impose the most onerous external costs on third parties, especially the costs of public confusion and vulnerability to fraud. Phase II report at 74.

By contrast, the Phase II report indicated, "differentiated offerings" seem much more likely to provide public benefits, and to impose fewer external costs. This favorable balance may be most striking for gTLDs that use non-Latin character scripts (sometimes referred to as

Internationalized Domain Names, or "top level IDNs"). The same analysis might apply to Latin character gTLDs that are "either … community-based, or [that employ] restrictions on registrants or on the use of second-level domains within the gTLDs" (Phase II report at 3); but the report raises a caution flag about these, based on the disappointing experience of such applications as .mobi, .museum, or .aero in prior new gTLD launch rounds.

The bottom line is that the Phase II report, like some of its predecessors, called for a significant re-orientation of the planned new gTLD launch. Five months later, it is clear that this call will not be heeded. ICANN steadfastly refuses to prioritize new gTLDs, in order to preference those that meet a demonstrated need. It also largely continues to refuse to recognize that distinct categories of new gTLD proposals demand differential treatment. Some proposed new gTLDs may be targeted toward enhancing the Internet experience for "the next billion Internet users," whose everyday languages are written in non-Latin scripts; others will add little but confusion and noise to an already chaotic online environment. ICANN proposes to treat all these applications the same.

The opinions of ICANN's own experts have harmonized with the many voices calling on ICANN to take a more focused, targeted and incremental approach to the roll-out of new gTLDs. Those calls, coming from governmental agencies, commercial and non-profit entities, large institutions and individuals, from North America, Europe, and many other places, have all been rejected. The basic features of the new gTLD program today are the same as those announced some three years and six guidebook iterations ago:

- The number of new gTLDs to be approved will be essentially unlimited, constrained only by ICANN's ability to process applications;

- The process is biased toward approval of all applications meeting minimum technical and financial criteria, with only extremely limited grounds for objection recognized;
- Auctions will be used to resolve conflicting applications for the same TLD character string, with almost no detail on how the proceeds will be used;
- A "one size fits all" approach prevails, with very little categorization. Essentially the same process will apply whether the application is for a Top Level IDN in a script used by billions of people; a so-called ".brand" TLD intended to serve a single registrant; or an open, unrestricted Latin character TLD in the mode of .com.

Some Signs of Progress in the New gTLD Framework

While COA is quite disappointed that this framework remains unchanged, we must acknowledge that there has been some important progress over the years in some areas. In this statement we will mention three.

1. Rights Protection Mechanisms (RPMs)

As originally presented, new gTLD registries had virtually no obligations to take steps to respect the rights of trademark owners, such as by minimizing the need for defensive registrations in new gTLDs, or by adopting methods to quickly purge their rolls of cybersquatters or other "abusive registrations." Years of outcry from trademark owners have had some impact on this position. Now, all the new registries must provide a "sunrise" registration period in which trademark owners may pre-emptively register domain names identical to their trademarks, as well as an "IP claims service" in which registrants of second level domains are warned if the domain name they seek is identical to a trademark claimed by another party. These services will be enabled by a unified trademark clearinghouse database, a "one-stop shop" in which all mark owners may register their claims, and which all registries must consult in launching their services.

While this is real progress, a number of questions remain unresolved, and the bottom line is that the protections required before and during the launch of a new gTLD are quite limited. Only exact matches between trademarks and second level domain names will be covered. Thus, the new registry is not required to do anything to protect against an abusive registrant who varies a trademark by a single character (e.g., cnnn.[new TLD]); who adds a generic word to the mark (e.g., disneymovies. [newTLD]); or who simply engages in typosquatting (e.g., mircosoft.[newTLD]). None of these registrations will be pre-empted by a sunrise registration, nor will any such attempted registration trigger a notification under the IP claims service. And any cybersquatter willing to wait 60 days after a new gTLD launches could find an unimpeded path, since the requirement to provide an IP claims service expires at that point.

Beyond the trademark clearinghouse, new gTLD registries will be required to provide a Uniform Rapid Suspension service (URS). This is an important and potentially quite positive innovation. If implemented properly, it could provide trademark owners with a fast, inexpensive, and easy to use method to "take down" registrations that involve the most clear-cut cases of cybersquatting. Rights owners will be watching the implementation of this new remedy most closely, with an eye toward how it might be applied in the existing gTLDs, where widespread cybersquatting is not merely a looming threat but a costly reality.

2. Whois in the new gTLDs

The second area of progress involves an issue of long-standing concern to this subcommittee, and one on which COA (as CCDN) has presented testimony on several occasions: Whois data, including contact information on domain name registrants. Access to accurate and reliable Whois data is not only important for enforcing intellectual property rights, but is also

vital for consumer protection; law enforcement investigations of online crimes; and network security. Accurate Whois data plays a critical role in preventing or investigating all manner of online frauds. It even allows concerned parents to know with whom their children are dealing when they visit Internet websites. All Internet users have a stake in keeping Whois data accessible, and in improving the current abysmal level of its accuracy and reliability. No feature of the domain name system is more critical to ensuring accountability and transparency online.

In this area, as with rights protection mechanisms, constant pressure from the public – including law enforcement as well as intellectual property interests – has led to some improvement in ICANN's plans for the new gTLDs. Notably, all the new TLD registries will be required to make available to the public a unified Whois data base covering every registration in that Top Level Domain, no matter which retail registrar actually sells the registration service. This so-called "thick" Whois database structure stands in striking contrast to the current situation in .com and .net, in which the registry holds very little Whois data, and all contact information on registrants is collected and maintained separately by each of hundreds of accredited domain name registrars. This "thin" Whois system presents a huge compliance challenge to ICANN in enforcing the obligation to keep this vital data available to the public and to improve its accuracy and reliability.

COA is also pleased to note that the most recent version of the new gTLD applicant guidebook, released April 15, contains some incentives for new gTLD registries to do more to improve the accuracy and reliability of their Whois data. ICANN proposes that, in the evaluation process for new gTLD applications, applicants will receive an extra point if they commit to "measures to promote Whois accuracy," which "may include, but are not limited to, authentication of registrant information as complete and accurate at time of registration; …

regular monitoring of registration data for accuracy and completeness...; [and] policies and procedures to ensure compliance" by registrars (who will still be responsible for collecting registrant contact data) with Whois data accuracy obligations.

These are all policies which COA has been advocating, with regard to the existing gTLDs, for years. As CCDN told this subcommittee in testimony in 2002, "registrars [and we would now add registries, in the thick Whois environment] must adopt a three-point plan for dealing with registrants who provide false contact data: screen them out, check them out, and toss them out." We are pleased and gratified that ICANN recognizes that these represent best practices that all registries (and, in the case of the legacy "thin Whois" registries, all registrars) should employ to enhance transparency and integrity within their domains. But these steps do not go far enough. We see no reason why ICANN should recognize <u>any</u> new gTLD registries that refuse to adopt these common-sense methods to protect the public by enabling more effective action against online fraud and misconduct. Verification and re-verification of Whois data, and cancellation of registrations for which the Whois data cannot be verified or is obviously false, should be mandatory minimum standards for all new gTLDs, and for that matter should be implemented for the current gTLDs as well.

3. <u>Enhanced protections for vulnerable new gTLDs</u>

Finally, the most recent iterations of the new gTLD applicant guidebook suggest at least a potential for improvement with regard to policies to curb abusive registration and use of domain names, particularly for those new gTLDs most vulnerable to such abuses. As noted above, ICANN has steadfastly resisted any effort to tailor its new gTLD application process to recognize that certain categories of proposed new gTLDs attract heightened risks and thus should

meet more rigorous standards. Belatedly, however, ICANN has acknowledged that security safeguards for new gTLDs must be "commensurate with the nature of the applied-for gTLD string." The most recent draft applicant guidebook specifies that, in addition to new TLDs targeted to financial services, "other strings with exceptional potential to cause harm to consumers would also be expected to deploy appropriate levels of security."

While we welcome this recognition from ICANN that one size does not indeed fit all, ICANN must go much further to meaningfully reduce the foreseeable risks of opening up an unlimited range of new gTLDs. ICANN's Governmental Advisory Committee (GAC) took a far more responsible approach when it called for enhanced protections in proposed new gTLDs that "refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or *are targeted to a population or industry that is vulnerable to online fraud or abuse*." (emphasis added) Among other advantages, such a formulation would have clearly signaled that ICANN would provide more rigorous scrutiny for any proposed new gTLD string targeted to sectors such as music, movies or videogames, in order to guard against the risk that the new gTLD would be infested with copyright infringement.

It is unfortunate and short-sighted that the ICANN Board has rejected this GAC proposal. Even so, given the pervasiveness with which the Internet space has been characterized by services built on copyright theft, we believe that such new gTLDs clearly fit the "exceptional potential to cause harm" criterion in the current draft applicant guidebook. We urge ICANN to confirm this interpretation of its proposed guidebook language. In this regard we also commend the current proposal to provide incentives (in the form of an evaluation point) to gTLD proposals that include policies for "rapid takedown or suspension systems and sharing information regarding malicious or abusive behavior."

COA and its members plan to engage actively with entities applying for new gTLD strings targeted to our creative sectors, in order to foster the strongest possible safeguards against the significant risk that such new gTLDs will provide breeding grounds for copyright piracy; and we will also continue to engage with ICANN to encourage further incentives to deploy such safeguards in order to gain approval in the new gTLD process.

New gTLDs and the "ICANN Model": Contracts and Compliance

In sum, while we welcome the improvements just noted, they are not in themselves enough to overcome our serious concerns about the risks inherent in the new gTLD rollout in the manner in which ICANN plans to conduct it. Much ink has been spilled about the innovative "ICANN model" for Internet governance, and different players characterize it in different ways; but for us, the essence of the ICANN model (which COA supports) is the substitution of contractual constraints for governmental regulation of the domain name system, in a governance setting in which the private sector leads. The model only works to protect the public when those contracts are strong, and when those contracts are vigorously enforced. This will be doubly true – or more precisely, a hundred or a thousand-fold true – in the new gTLD environment.

Candidly, ICANN's track record in this field – strong contracts that are vigorously enforced – is not encouraging for the success of this venture. Its efforts to improve that record while simultaneously launching hundreds or thousands of new gTLDs amounts to repairing a damaged aircraft, not merely while it is in flight, but while it is preparing to ascend into orbit.

In today's gTLD environment – notably in the world of .com and .net – the key contractual framework is between ICANN and domain name registrars, in the form of the Registrar Accreditation Agreement. The RAA in its current form has fallen far short of setting

clear, enforceable ground rules that will advance such critical goals as significant improvements in Whois data quality, and in its accessibility. The issue of proxy registrations provides an illuminating case study.

Today, at least one out of every five gTLD domain names is registered in the name of a proxy service, often associated with a domain name registrar. This hides the identity of the domain name registrant from the world, thus undermining the public benefits of the Whois system that has been in place since the birth of the World Wide Web. Many legitimate registrants use proxy registration services; but both common sense and available data indicate the technique is particularly attractive to registrants who don't wish to be found because they will use their domain names to commit crimes, to violate the rights of others, or in other abusive ways. The RAA contains provisions intended to encourage the unmasking of such abusive proxy registrants; but the contract language is weak and ambiguous, and far too many domain name registrars exploit these weaknesses and thus allow spammers, copyright thieves, fraudsters and other wrongdoers to enjoy uninterrupted anonymity for their online misdeeds.

Two years ago, under intense pressure from the business community, from individual registrants represented by ICANN's At Large Advisory Committee, and from an unprecedented coalition of law enforcement authorities, ICANN put in motion a process to identify issues needing improvement in the RAA – including, but by no means limited to, reform of proxy registration – and to chart a path for renegotiating this keystone contract. But today that process is at a standstill. The "contracted parties" to ICANN – registries and registrars – have blocked the path. They have adamantly refused to accept any process in which the third parties vitally affected by the contract – commercial and non-commercial registrants, intellectual property interests, and Internet users – have any role in its re-negotiation, even as silent observers. Under

a "restructuring" carried out by ICANN over the past several years, these "contracted parties" have an effective veto over any proposal requiring consensus. The registries and registrars are now exercising that veto against any proposal regarding the ground rules under which they carry out the franchises conferred upon them by ICANN.

Meanwhile, ICANN's contract compliance efforts, while certainly improving and expanding from an abysmally low base, still fall far short of inspiring confidence that contracted parties will be held to those ground rules, no matter how weak the contracts themselves. When ICANN left the senior contract compliance position vacant for ten months (it was just filled in the past few weeks), that spoke volumes about the extent of the organization's commitment to this fundamental prerequisite for the success of its "model." Every year, COA and other intellectual property interests have complained to ICANN about inadequate resourcing of the contract compliance program in ICANN's budget. ICANN's response has been to issue for public comment a budget framework document that lumps contract compliance in with a dozen other programs so that its funding level is now entirely opaque. Instead of re-orienting its priorities, ICANN obfuscates them.

None of this provides any reason to believe that the new gTLD rollout will overcome its fundamentally faulty premise and truly deliver benefits to much of the public without saddling third parties – notably trademark and copyright owners – with much of the financial and legal costs. It also sheds an unflattering light on the answer to the fundamental question posed at the beginning of this testimony: for whose benefit is the new gTLD rollout being undertaken? It is crystal clear that those companies with franchises conferred by ICANN stand to benefit. Accredited domain name registrars will retain their monopoly over every single second level domain registration in hundreds or thousands of gTLDs, not merely a score of them as today.

(Even a company that intends to make registrations in a .brand TLD available only to its employees must hire an accredited ICANN registrar in order to do so.) The current gTLD registries will also prosper; nearly all the operators of the existing gTLDs are actively drumming up business to run the back-office operations of their ostensible "competitors" in the expanded gTLD universe. Trademark and copyright owners, meanwhile, will certainly incur additional costs, both through defensive registrations in order to protect their brands, and the need for stepped-up enforcement activities against online counterfeiting and piracy in the new gTLD space. The only issue is how much those costs will be, and to what extent ICANN's limited steps to address the RPM and Whois issues will cushion the blow. Meanwhile, in the broader Internet community, the impact of the rollout, in the way that ICANN plans to carry it out, seems more likely to confuse than to empower users, to sow insecurity rather than to expand consumer choice.

Role of the U.S. Government

We conclude with a comment on the role of the relevant US government agencies, and notably of the National Telecommunications and Information Administration in the Department of Commerce, which is the lead agency. We commend NTIA for its active engagement in ICANN's Governmental Advisory Committee (GAC), and for its direct participation in the first review called for under the Affirmation of Commitments between ICANN and the Department of Commerce. NTIA representatives and their colleagues in other agencies have spoken up forcefully on a number of issues, including protection of intellectual property rights and of consumers. We should also mention the positive role of federal law enforcement agencies in helping to bring together a broad coalition of their colleagues from other countries to advocate for much stronger ICANN efforts to improve the quality and maintain the public accessibility of

Whois data, in order to fight a wide range of online and offline crimes. All these efforts have produced concrete results in a number of areas discussed in this statement; without these efforts from the U.S. government, the limited progress we have described above surely would have been far more limited. NTIA has also played a critical role on the broader question of ensuring that governments in the GAC, as representatives of the public interest, can have meaningful input into the design and implementation of the new gTLD program.

As the new gTLD program exemplifies, the vision of "private sector leadership" for global management of the domain name system is far from being realized. Within ICANN today, only one part of the private sector is allowed to lead: the parties under contract to ICANN, who are among the most direct beneficiaries of the unlimited gTLD rollout that is being planned. Given this reality, an active US government role remains critical – including in supervising the key IANA function, and notably the ultimate approval of the addition of new gTLDs to the unified domain name root. The current contract under which ICANN performs this function on behalf of the Department of Commerce expires in September, and the terms under which this function is carried out in the future is an important matter for oversight by the Congress.

Thank you again for the opportunity to present the views of COA.

Mr. GRIFFIN [presiding]. Thank you.
Mr. DelBianco?

TESTIMONY OF STEVE DELBIANCO,
EXECUTIVE DIRECTOR, NetCHOICE

Mr. DELBIANCO. Thank you and I would like to thank the Committee for holding an oversight hearing on whether ICANN, in its quest to launch the new top-level domains, has really stuck to its mission and is really meeting its obligations under the Affirmation of Commitments.

I had the chance to testify at your last ICANN oversight hearing in September of 2009. And the questions dogging that hearing were things like was ICANN doing enough to mitigate abuse and minimize defensive registrations, the question of whether ICANN could ensure contract compliance for hundreds of new TLD's. Now, some aspects of those questions are still on the table. You have heard them today. But a lot has changed since 2009.

You remember on the day of that hearing, we were exactly 1 week away from the expiration of the U.S. Government's long-term agreement to transition ICANN to independence. Well, a week later, we had the Affirmation of Commitments, and I would submit that is a very promising framework for global accountability of ICANN.

Now, also in that 2009 hearing, the Chairman and Members of the Committee might recall that I also brought a label-maker with me to the hearing to use as a simple metaphor for what a TLD produces, these little labels that they would sell to website owners which would help people and users to find the website.

Well, since the 2009 hearing, ICANN has been listening to governments, businesses, and law enforcement concerns. So now the metaphorical label maker is way bigger and way more complicated. It has got trademark claims services. It has got rapid suspension, security standards, and community eligibility criteria. In fact, the new TLD metaphor doesn't even work any more. It is not a label maker. It is one of those big T-shirt printing machines that you see at arcades and print shops, only it doesn't print T-shirts, it prints TLD-shirts. The machine is so big that the guards in Rayburn wouldn't let me bring it into the building. But I did manage to smuggle in a T-shirt that I printed with it. And I have got it here with you. And it has got dot steve on it, which is my favorite new TLD, dot steve.

Now, this T-shirt is a lot more than just a little white strip that comes from a label maker because this will help people to find domains and it helps to define the guy who is wearing the shirt because all Steves, as you know, aspire to be as cool as Steve McQueen. So I think motorcycle.steve is going to be a very popular domain name.

Okay. So now that the T-shirt maker is so big and so complex and expensive, TLD applicants are going to need even more funding and more technical and legal experts to run a new registry. Well, that is going to be phenomenonally challenging for a TLD that is going to serve a small community, particularly a small language or script community. But the Affirmation of Commitments that ICANN signed says they have to serve global Internet users, and that includes the 5 billion people who aren't even online yet, and most of them don't even use our Latin alphabet. Now, these

people do need names and email addresses in their own scripts and languages, and I think ICANN can address this three ways.

First—and this is on the new TLD plan—they got to do some serious outreach all over the globe to tell businesses and organizations about the coming TLD revolution and how the next billion people are going to know how to get into the window when the applications begin.

Second, ICANN has got to help smaller, less experienced applicants navigate the complex process and find affordable help for technical, financial, and legal process.

Third, ICANN has got to give incentives, even discounted fees, to a TLD applicant so that they will offer lots of versions in different languages. I mean, we have got dot steve here and that is Latin script English language. But what about a dot stephanos in Greek letters? Or how about a dot stebu, which is Steve in Japanese letters? Those are necessary to serve the global public interest. And if ICANN doesn't do these things, most of the new TLD's we will see a year from today are going to be Latin scripts in the English language.

Then I ask you how will ICANN claim that is serving the global public interest as required? And I fear that outcome is going to play into the hands of ICANN critics at the United Nations where China leads a group of governments—they call it the G-77, but it more like 130 countries—who are demanding that the UN, quote, solve the issue of unilateral control of critical Internet resources. Translation: they want to take away the U.S. dominance of critical Internet resources like the DNS and IANA.

Now, if governments lose confidence and trust in ICANN through the expansion of these new gTLD's, we could lose the multi-stakeholder private sector model of a single global Internet. And ICANN's path, the government confidence building is through the reps on the GAC, the Governmental Advisory Committee. ICANN has got to cultivate the GAC as a partner and ally, not as an afterthought, which brings me to another TLD-shirt, only this time TLD doesn't stand for top-level domain. It stands for top-level directive. Take a look at this one. You know how they say mind the gap when you board a train in Europe? Well, this is the T-shirt we use in San Francisco. It says mind the GAC. And I can tell you this T-shirt demands your attention too. When ICANN is evaluating a new TLD application, we should mind the GAC. When you apply for a city name or a sensitive string, you have got to mind the GAC. When you operate a TLD and you get Whois inquiries from law enforcement, you have got to mind the GAC.

And GAC has begun to find its voice. We are just not always sure what the GAC is saying. Triple X is a great example. They approved it at the ICANN board meeting in March, but despite the fact that the GAC said there is no active support from the GAC for the introduction of dot xxx. Well, to those of us in the business and technical community, that really sounded like passive acceptance. So there is no surprise that the ICANN board approved xxx. They might have voted the other way if the GAC has been very clear because it is going to take a lot of time for us in the private sector and technical to understand what the GAC means. I mean, I have

been married 26 years and there are still a lot of times I have no idea what my wife really means when she says what she says.

So I will close by saying that congressional oversight is very helpful here, but I don't believe Congress should ask for specific changes to ICANN's new process. Nor should Congress send one of those back-off warnings to the United Nations right now, as Chairman Goodlatte did back in 2005. In today's atmosphere, I think that would provide ammunition to governments who complain about U.S. control of critical Internet resources, and it really raises the risk of having ICANN's private sector model get displaced by the UN. And that UN is a place where every country gets one vote, but the private sector gets no votes at all.

Thank you.

[The prepared statement of Mr. DelBianco follows:]

Prepared Statement of Steve DelBianco, Executive Director, NetChoice

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

I serve as Executive Director of NetChoice, a coalition of e-commerce and online leaders such as eBay, Expedia, News Corporation, VeriSign, and Yahoo, plus several thousand small online businesses. At the state and federal level and in international venues, NetChoice works to improve the integrity and availability of the Internet. NetChoice attended the last 17 ICANN meetings, where I serve as Vice Chair for Policy Coordination for the Business Constituency. I have also participated in all 5 meetings of the Internet Governance Forum (IGF) and testified in three previous Congressional hearings on ICANN and Internet governance.

In our testimony we compare issues now before this subcommittee to issues in play during your September 2009 ICANN oversight hearing, "*Expansion of Top Level Domains.*" In the 19 months since your last ICANN hearing, many difficult questions have been answered but several critical oversight issues remain and merit the subcommittee's attention.

In your September 2009 hearing there was palpable tension between advocates and skeptics of ICANN's new TLD program. ICANN management joined with businesses eager to operate new TLDs in predicting that innovation and competition would result from new domain labels. Other witnesses, including NetChoice, testified that online content and service innovation is not so dependent upon having new TLDs, since we've seen an explosion of new Internet sites and services under today's limited set of top-level domains.

However, we did acknowledge that one huge class of Internet users was truly in need of new TLDs. Over half of the world's population reads and writes in scripts other than the Latin alphabet. These Internet users could not enter websites or email addresses in their native script and language, and we encouraged ICANN to accelerate availability of Internationalized Domain Names, or IDNs.

Other business witnesses testified in the 2009 hearing that ICANN was failing to minimize defensive registrations and mitigate fraud as it expanded the TLD space. 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 TLDs lacked even minimum requirements to reduce abusive registrations, and the second draft gave applicants a passing grade for merely describing intended mechanisms, even if they were likely to have little effect in preventing abusive registrations.

The 2009 subcommittee heard conflicting views and questions on ICANN's new TLD plan: Were the costs to registrants justified by planned benefits to global Internet users? Was ICANN doing enough to mitigate abuse? Was ICANN ready to ensure contract compliance over hundreds of new TLDs?

On the day of that hearing, 23–September-2009, the US Government's latest agreement to transition ICANN to independence was expiring in just one week. All in the hearing room were wondering how ICANN would fare in a post-transition world.

Next, let's examine what's occurred in the 19 months since your 2009 oversight hearing.

ICANN's transition from a US Government experiment to an independent, multi-stakeholder organization led by the private sector

By September of 2009, the US Government had spent over a decade transitioning out of DNS management, as envisioned in President Clinton's 1998 *White Paper:*

> "The President directed the Secretary of Commerce to privatize the Domain Name System in a way that increases competition and facilitates international participation in its management." And, "The U.S. Government is committed to a transition that will allow the private sector to take leadership for DNS management." [1]

The transition was expected to take a few years, but by 2009 ICANN and the Department of Commerce (DOC) had extended the transition several times, the latest being a Joint Project Agreement (JPA) that was expiring on September 30, 2009—just a week after the hearing. NetChoice was among those calling for another JPA extension to give ICANN time to develop permanent accountability mechanisms. We were even more concerned about ICANN's vulnerability to government capture, especially after seeing proposals by the United Nations and European Commission to assume control over a newly-independent ICANN.

A week later, we were surprised when DOC and ICANN unveiled their new agreement, the *Affirmation of Commitments* [2]. The Affirmation established periodic reviews giving governments a defined oversight role in assessing ICANN's performance. This was like a welcome mat for governments who'd been wary of ICANN's unique multi-stakeholder process, and those who resented the legacy oversight role of the US government. The Affirmation also gave the global Internet community what it wanted: independence for ICANN in a framework bringing governments alongside private sector stakeholders, with a sharpened focus on security and serving global internet users.

So, what's happened since the Affirmation was signed? The first Affirmation review for "Ensuring accountability, transparency and the interests of global internet users" was completed last year, and generated sensible recommendations that ICANN has pledged to implement quickly. Two more Affirmation reviews are underway now. The second review is assessing ICANN's plan for "Preserving security, stability and resiliency". A third review will "assess the extent to which WHOIS policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust."

The fourth review required under the Affirmation addressed new gTLDs. Review 9.3 addressed ICANN's commitment for delivering promised results with its new gTLD plan:

> "If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion." [3]

It's too early to know whether these Affirmation reviews will meet their overarching goal: to hold ICANN sufficiently accountable to global stakeholders so as to build acceptance of ICANN's unique model of private-sector leadership. But the Affirmation deserves a chance to succeed, just as ICANN deserves a chance to show it can deliver new gTLDs responsibly and effectively.

However, ICANN's present board and management have adopted a different stance on the Affirmation and its oversight mechanisms. First, consider ICANN's answer to the Commerce Department's March 2011 Request for Comments on the Internet Assigned Numbers Authority (IANA) Functions. ICANN contends that the US "relinquished its oversight role" when it signed the Affirmation of Commitments.[4] ICANN offered this insight to urge Commerce to similarly relinquish its oversight role for IANA functions.

It's true that DOC relinquished oversight for the transition process described above. But the US government did not relinquish its role of holding ICANN accountable to its Bylaws, Articles of Incorporation, and the Affirmation of Commitments.

---

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

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

[3] Ibid.

[4] p.3 of ICANN response, March 25, 2011, at http://www.ntia.doc.gov/comments/110207099–1099–01/attachments/ACF2EF%2Epdf

Instead, the Affirmation broadens ICANN's accountability to serve the global public interest from this point onward.

Unless and until more governments sign the Affirmation, the US Commerce Department is the only entity to formally commit to the ICANN model and to holding ICANN accountable to its commitments. Commerce takes that commitment seriously, as shown by senior officials engaging in the Governmental Advisory Committee (GAC) and in Affirmation reviews. Many other ICANN stakeholders are engaging in Affirmation reviews too, with the expectation that this framework is how the global community will assess and improve ICANN's adherence to core commitments and accountability to global Internet users.

However, ICANN can terminate the Affirmation with just 120 days notice. And within a year of signing the Affirmation, ICANN's chairman told a group of European parliamentarians that he saw the Affirmation as a temporary arrangement that he'd like to eventually terminate.

This sentiment seems to hold true for more than just the Chairman of ICANN. In a meeting last summer in Brussels, we asked ICANN board members if the commitments in the Affirmation should be permanently adopted as part of ICANN's official charter. One board member immediately disagreed, saying the Affirmation made no commitments not already in ICANN's bylaws. We responded that the Affirmation includes important new commitments in paragraphs 3, 4, 7, and 8, plus those periodic reviews required in paragraph 9. But the present board saw no need to enshrine the Affirmation of Commitments as a permanent fixture in ICANN's future.

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

China and the United Nations don't support ICANN's model of private sector leadership

Several years after the US Government and the private sector created ICANN, governments around the world began waking-up to the idea that the Internet would be important to their future. And governments reflexively believe that anything *that* important just *has* to be run by governments. The United Nations (UN) jumped into Internet Governance at its 2005 World Summit on the Information Society. Discussions and resolutions there prompted Congress to respond, when Chairman Goodlatte and Congressman Boucher introduced HC Res 268 with these resolutions:

(1) it is incumbent upon the US and other responsible governments to send clear signals to the marketplace that the current structure of oversight and management of the Internet's domain name and addressing service works, and will continue to deliver tangible benefits to Internet users worldwide in the future; and

(2) therefore the authoritative root zone server should remain physically located in the United States and the Secretary of Commerce should maintain oversight of ICANN so that ICANN can continue to manage the day-to-day operation of the Internet's domain name and addressing system well, remain responsive to all Internet stakeholders worldwide, and otherwise fulfill its core technical mission.

For the next 5 years, the UN determined to co-exist with ICANN by holding an annual meeting called the Internet Governance Forum (IGF). IGF meetings have become increasingly productive and substantive, yet some governments now want to reform the IGF by reducing private sector participation and addressing more of the issues that ICANN handles today.

In its July-2010 statement to the UN, China's government declared its priority for UN work on Internet governance, saying, "First, the future IGF should, in accordance with the provision of Tunis Agenda, focus on how to solve the issue of unilateral control of the Critical Internet Resources." Translation: *Unilateral control* means US custody of the IANA contract and a US signature on ICANN's Affirmation agreement. *Critical Internet Resources* means IP addresses, root servers, and the policy setting and management of the DNS.

China wields tremendous voting power at the UN today. Its allies include over 130 governments who support China's call to reform the IGF, including migration of key ICANN and IANA functions to the International Telecommunication Union (ITU) of the United Nations.

Founded in 1865 to facilitate international telegraph agreements, the ITU predates the UN by more than 80 years. But while the ITU was still regulating telephone circuits, the Internet was evolving a multi-stakeholder model that draws on collective talents of industry, technologists, civil society, and Internet stakeholders around the world. In organizations like ICANN and the IETF representatives of governments, civil society and the private sector sit as equals, resolving matters through consensus building instead of political horse-trading.

UN/ITU leadership hasn't hidden their distaste for a model where governments share power with industry and civil society technologists. One ITU Secretary-General actually called this multi-stakeholder model a "waste of time," and warned ICANN leaders that sooner or later governments would take greater control of the organization.

The most obvious problem with ITU control of the Internet is the glacial pace at which UN organizations respond to changes in their policy environment. The ITU holds its major policy meeting once every four years—about the time it takes for a generation of Internet technology to be developed, deployed, and replaced by something better.

More troubling is how the United Nations' "one nation, one vote" policy is often manipulated by rich nations to influence the votes of needy nations. China is particularly adept at leveraging its economic investments in developing countries to curry votes in the UN.

Our request to this subcommittee is to endorse the ICANN model and help resist efforts to impose the UN governance model on technology innovation that is truly changing the world.

The Governmental Advisory Committee (GAC) has found its voice at ICANN

It hasn't been an easy learning process, but Governments and the private sector are gradually learning how to co-operate in a multi-stakeholder model. For its part, the GAC has been progressively engaging more deeply in ICANN policymaking for new gTLDS. It began with "GAC Principles Regarding New gTLDs" in March 2007, and added high-level comments on TLD Guidebook drafts in August 2009 and March 2010. Already this year, the GAC offered several detailed documents, including its extensive Scorecard for new gTLDs.

A year ago, after the ICANN meeting in Brussels, we warned the ICANN board that it risked ICANN's very existence if influential governments or the GAC felt alienated or ignored. But the ICANN board's interaction with the GAC was still obviously and dangerously strained through the March 2011 meeting.

While the current face-off between the GAC and ICANN Board is about the expansion of top-level domains, the underlying tension comes from more than just one policy decision—even one as big as new gTLDs. Even if the Board were 100 percent right on new gTLDs and the GAC were 100 percent wrong, ICANN's failure to adequately cultivate its relationship with governments seems like self-destructive behavior.

Support for the ICANN model among world governments is hardly universal. As noted above, many governments have been working through the United Nations to exert greater control over the Internet's addressing system.

Meanwhile, many members of the GAC are actively participating in ICANN's multi-stakeholder process while asking their home governments to protect ICANN from UN encroachment. GAC members have the potential to be ICANN's best advocates in the ongoing global debate over Internet governance, but first ICANN must adapt its processes to engage the GAC.

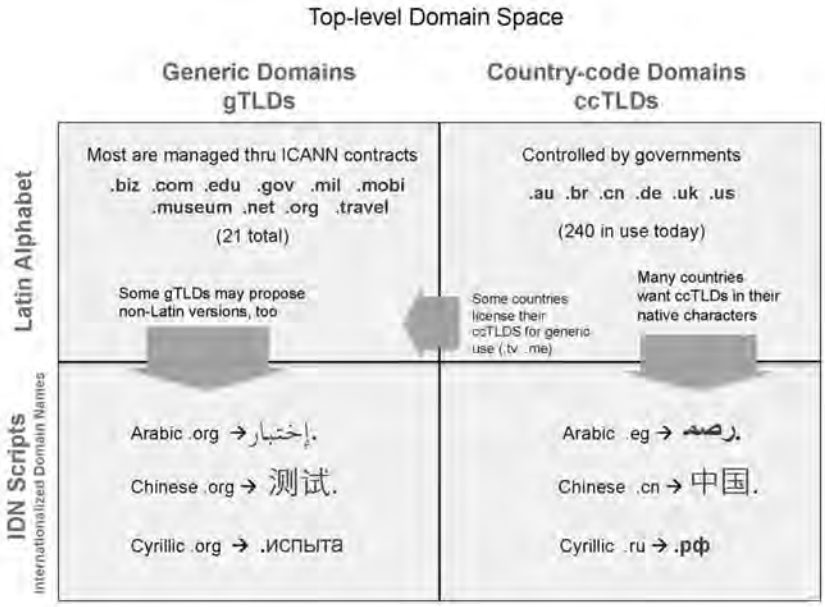
Fortunately, the strained face-to-face ICANN meetings in San Francisco this March were a turning point. ICANN can also make major repairs to its GAC relationship by implementing recommendations of the Accountability & Transparency Review. Ultimately, the ICANN community must recognize that governments are stakeholders, too. That will involve helping governments to understand new TLD proposals and assisting them in addressing rational objections. And it may also involve ICANN being flexible with governments who lack a mechanism to pay fees required to file objections.

The loss of government support is the largest threat to ICANN's future. On the other hand, the GAC can be ICANN's best ally if they're treated right. When ICANN holds its next meeting on new gTLDs, we hope to see more community members sporting "MIND THE GAC" T-shirts.

Promoting Generic TLDs for half the world that doesn't use our Latin alphabet

In 2009, ICANN supported only Latin characters in domain names and email addresses. But, as noted in my 2009 testimony, over 56% of the world's population reads and writes in scripts other than Latin[5]. The lack of Internationalized Domain Names (IDNs) threatened to splinter the net if other governments emulated China's solution to add Chinese TLDs within its borders.

This chart helps to visualize the domain space of Latin and IDN scripts in generic and country-code top-level domains:



The top half of this chart refers to 260+ Latin-script domains that were in the DNS in 2009. The bottom of the chart shows examples of generic and country-code domains that would use non-Latin scripts once ICANN made them available. For a decade, governments, business, and civil society clamored for IDNs in order to bring information, commerce, and communications to more of the world's potential Internet users.

When the gTLD expansion plan began to bog-down, it looked as if IDN domains would be delayed, too. In reaction to governments' concerns about this delay, ICANN created a 'fast track' for IDNs—*but only for country-code domains that are controlled by governments.* In November 2009, ICANN launched the "fast track" for

[5] 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

Country Code domains (ccTLDs), but generic domains (such as .com and .org) were 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 now must use a country-code domain, where governments can enforce local restrictions on domain ownership and site content.

For example, an Arabic user seeking to access YouTube.com in all-Arabic could only choose from among Arabic versions of YouTube domain that were permitted by governments who control Arabic country-code domains (youtube.sy in Syria; youtube.ly in Libya; etc.) It would undoubtedly be more convenient and empowering for Arabic users to access the global, generic address youtube.com—entirely in Arabic.

But ICANN's ccTLD fast track gave government-controlled ccTLDs a two-year head start against IDN versions of generic TLDs in terms of building market share of registrations and mindshare of Internet users. While non-government applicants can propose IDN versions of new gTLDs, they may find it hard to justify a million dollar investment to reach small linguistic communities, particularly if ICANN's fast-track let a ccTLD get there first.

In the upcoming round of new gTLDs, ICANN should actively promote and support gTLDs for small linguistic communities—particularly IDN scripts. ICANN can start by expanding its communications plan to educate global governments, businesses, and users about the ways that new gTLDs can serve local language communities. Next, ICANN should change its application fee schedule to create incentives for new gTLD applicants to offer versions of their TLD in additional scripts and languages. A simple incentive would be to reduce the $185,000 application fee for additional script versions. Moreover, the fee reductions could be structured to match the cost savings ICANN has acknowledged it would realize when evaluating multiple strings from the same applicant.

By whatever methods, ICANN should be encouraged to promote generic TLDs to serve all scripts and languages in the new gTLD process. To do otherwise would fail to meet the Affirmation of Commitments, which stressed "the importance of global Internet users being able to use the Internet in their local languages and character sets."[6]

Lessons learned from the .xxx debate and decision

The proposal for .xxx—the adult content gTLD—wasn't even on the agenda during the subcommittee's 2009 hearing. Now .xxx is part of the DNS, and the domain **search.xxx** resolves to the registry operator's website. What lesson can the subcommittee and ICANN community learn from the .xxx decision?

First, it's essential to remember that .xxx won't automatically expand adult Internet content, which already accounts for 12% of websites and 25% of search requests. The .xxx TLD just creates new labels for the 400 million adult pages already on the Internet, along with new services like micro-payments, virus checking, and content labeling.

The main lesson for ICANN is to understand how to communicate and interact with governments and the GAC on sensitive TLDs like .xxx, since there may be many sensitive strings in the upcoming round of new gTLDs. ICANN and the GAC are already moving towards consensus on early warning mechanisms and objection processes for sensitive strings, but the .xxx controversy at ICANN's last meeting demonstrates how difficult it can be for the private sector to comprehend nuanced government messages.

Surprisingly, there is still a question of whether the GAC was expressing a consensus objection when it said, "There is no active support of the GAC for the introduction of a .xxx TLD."[7] The lack of active support sounds like passive acceptance to a business or technical audience, so ICANN's board voted to proceed with .xxx. But ICANN's board might have voted the other way if it thought the GAC was clearly allied against .xxx. In the upcoming round, the GAC should be more explicit and ICANN should ask for clarification if it has any doubt about a GAC position.

Finally, Commerce Department officials expressed disappointment with ICANN's decision on .xxx, but there's an upside to that disappointment. It demonstrates that the US government does not exercise unilateral control at ICANN, as China and others often complain.

---

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

[7] GAC Communique—San Francisco, 18 March 2011, see http://gac.icann.org/system/files/GAC-communique-SFO.pdf

ICANN has made significant improvements to respond to government and business concerns about its new gTLD program

Our testimony has addressed oversight issues that concern ICANN's plan for new TLDs. We explained how ICANN's new Affirmation of Commitments should be used to hold ICANN accountable for its new gTLD policy decisions and compliance. We described the genuine threat from UN agencies and governments that don't embrace the multi-stakeholder model. We recognized improvements in GAC—ICANN interaction and encouraged continued improvements there, including lessons learned from the .xxx decision. And we called on ICANN to proactively encourage new gTLDs for smaller language communities and non-Latin scripts in order to serve the next billion global Internet users.

All of this provides context for the subcommittee to assess ICANN's new gTLD plan, but we have not gone into specific substantive changes needed in the new gTLD Guidebook. NetChoice is continuing to press those points directly to ICANN via the public comment process. We are also seeking support from other stakeholders and from members of the GAC. In other words, we are still trying to use the ICANN process to make improvements in ICANN policies.

This is not to say that the Committee shouldn't inquire about detailed deficiencies in the new gTLD plan. Indeed, we share many of the specific concerns expressed by our business colleagues on this panel today.

We just don't think that this subcommittee should contemplate legislation or resolutions addressing specific changes to ICANN's new gTLD process. Nor should Congress attempt to warn-off the UN and other governments with a resolution like that adopted in 2005, which would give China and its UN allies a proof point for their complaints about US control of ICANN.

In 2011, we are growing more concerned about the long-term prospects for the ICANN model of private sector leadership. Congress can do more to help preserve the ICANN model by supporting the Affirmation of Commitments as a permanent fixture, and to support our Commerce and State Departments in their efforts to secure broader government participation in ICANN.

Conclusion

We believe that the appropriate role for Congress and the Commerce Department is to hold ICANN accountable to the Affirmation of Commitments. The *White Paper* vision for ICANN must be preserved: ICANN should be led by, and accountable to the private sector interests that will make the huge investments to bring connectivity, content, and commerce to the next billion Internet users.

Congressional oversight is helpful to support NTIA and hold ICANN accountable to the Affirmation of Commitments—in all ways—not just for new gTLDs. But if Congress were to weigh-in on specific policies at ICANN, it would provoke those governments who complain the US maintains control over the domain name system. While there would be benefits of Congressional guidance to ICANN on new gTLDs, it could raise the risk of having ICANN's private sector model displaced by a UN model where every government—no matter who—gets one vote, and where the private sector gets no votes at all.

Mr. GRIFFIN. Thank you.

Mr. Bourne?

TESTIMONY OF JOSHUA BOURNE, PRESIDENT, COALITION AGAINST DOMAIN NAME ABUSE (CADNA)

Mr. BOURNE. Well, I would like to thank Chairman Goodlatte, Ranking Member Watt, Members of the Committee for the opportunity to submit testimony and, more importantly, for convening this hearing on such an important topic, about which too few Americans and Internet users across the world have sufficient awareness or understanding. Your decision to convene this hearing is a continuation of your strong leadership on Internet issues and the protection of our intellectual property.

To begin, I would like to provide a background on the organization I represent, the Coalition Against Domain Name Abuse. We

established CADNA 4 years ago, along with 10 companies, when we recognized there was no group dedicated to finding a meaningful and lasting public policy solution to the problems of cybersquatting and online infringement. Through our efforts to find creative and effective solutions to these problems, our coalition's attention was drawn to the Internet Corporation for Assigned Names and Numbers due to the commanding role it plays in the formation and implementation of domain name policy. More importantly, we learned of the even more influential and unchecked role ICANN has in the general direction of Internet regulation and policy.

4 years later, both the CADNA member companies and I are much getter educated in regards to the problems that Internet users around the world currently face, as well as the precarious power that ICANN wields, which could potentially help to resolve or further perpetuate these problems. CADNA has grown to a coalition to over 20 companies based both here in the U.S. and abroad. We have members representing a broad range of commercial industries, including financial services, retail, hospitality, pharmaceutical and others. I am proud to say that we are a leading voice on domain name policy, ICANN issues, and on ICANN's proposed gTLD program.

Despite the prevalence of the Internet in daily lives of most Americans, knowledge of Internet governance is decidedly scant. Very few people understand how the Internet operates or who has control over the domain name system. It is in this opaque context that ICANN operates, remaining free to develop policies without scrutiny from the general public or even for most members of the government.

Let me state up front that CADNA agrees with the ICANN model. We support the bottom-up, multi-stakeholder concept of ICANN governance. The problem is not ICANN itself. The problem is that ICANN has been captured by a constituency that stands to profit from its actions. When conceived in 1998, the bottom-up concept failed to develop checks against capture. At that time, nobody anticipated that any one constituency would develop strong economic interest in ICANN's actions and stand to gain so much financially from ICANN-developed policy. Few could foresee how bad actors would eventually place familiar brand names in domain names to confuse and engage their targets, just as Ms. Stark referred to earlier. The reality that has unfolded over the past 13 years shows that ICANN's original mission of bottom-up policy development in the interests of the entire Internet community has fallen short. At present, there is the ICANN community and there is the Internet community, and unfortunately, the interests of the two communities are not aligned.

Instead of representing the true community of Internet users, ICANN's community is predominantly comprised of companies with vested interest in selling domain names. What better way to sell domain names than through a mass introduction of new gTLD's? Brand owners will have no choice but to pay for the acquisition and maintenance of each defensive registration across as many of an anticipated 400 new gTLD's as possible to prevent infringement of their intellectual property. To this day, while the strongly biased ICANN community demands it, ICANN has not presented any con-

vincing economic justification for the new gTLD program showing actual demand for this mass rollout to the public. In fact, many small business owners and nonprofit organizations, with the exception of ICANN, are deeply concerned about the negative impact new gTLD's will have on their business and cost of defensive registrations.

Before ICANN goes through with its plan to roll out an estimated 400 new gTLD's in the coming months, the United States Government should leverage the upcoming renewal of the IANA contract to require an audit of ICANN. CADNA has long proposed the formation of a Federal commission composed of Internet experts, private sector representatives, academic representatives, government officials, and foreign government observers to fully audit ICANN before renewing the IANA contract.

CADNA urges you and your Committee to consider the implications of a flawed ICANN. The experiment is not lost. It just needs to be reviewed and adjusted, if necessary, just like any other new model created by private industry or government. ICANN cannot self-correct and needs external correction to make it accountable and aligned with what is good for the Internet and its 1.8 billion global users. While ICANN's gTLD initiative is what brings us together today, the underlying and most important subject of the hearing is ICANN as an institution and whether or not it serves the public interest. ICANN is a California-incorporated 501(c)(3). Before it is too late and other questionable policies are pursued, consider the leverage of the IANA contract renewal and bring ICANN into the 21st century.

Thank you for this opportunity to testify before you today.

[The prepared statement of Mr. Bourne follows:]

Testimony of Joshua S. Bourne
President of the Coalition Against Domain Name Abuse
United States House Judiciary Committee
Subcommittee on Intellectual Property, Competition and the Internet
Wednesday, May 4, 2011

I would like to thank Chairman Goodlatte, Ranking Member Watts, and members of the committee for the opportunity to submit testimony, and more importantly for convening this hearing on such an important topic, about which too few Americans and Internet users across the world have sufficient awareness or understanding. Your decision to convene this hearing is a continuation of your strong leadership on Internet issues and the protection of our intellectual property.

To begin I would like to provide background on the coalition I represent, the Coalition Against Domain Name Abuse (CADNA). I established CADNA three years ago along with ten companies when I recognized that there was no group dedicated to finding a more meaningful and lasting public policy solution to the problems of cybersquatting and online infringement. Through our efforts to find creative and effective solutions to these problems, our Coalition's attention was drawn to the Internet Corporation for Assigned Names and Numbers (ICANN), due to the commanding role it plays in the formation and implementation of domain name policy. More importantly, we learned of the even more influential and unchecked role ICANN has in the general direction of Internet regulation and policy.

Three years later, both the CADNA member companies and myself are much better educated in regards to the problems that Internet users around the world currently face, as well as the precarious power that ICANN wields, which could potentially help to resolve or further perpetuate these problems. CADNA has grown to a Coalition of over 20 companies based both here in the U.S. and abroad. We have members representing a broad range of commercial industries, including financial services, retail, hotel and leisure, pharmaceutical, and others. I am proud to say that we are a leading voice on domain name policy, ICANN-related issues, and on ICANN's proposed gTLD program.

Despite the prevalence of the Internet in the daily lives of most Americans, knowledge of Internet governance is decidedly scant. Very few people understand or care about how the Internet operates, or who has control over the domain name system. It is in this opaque context that ICANN operates, remaining free to develop policies without scrutiny from the general public, or even from most members of the government.

Let me state up front that CADNA agrees with the ICANN model. We support the "bottom up" concept behind ICANN governance. The problem is not ICANN itself. The problem is that ICANN has been captured by a constituency that stands to profit from ICANN actions. When

CADNA | The Coalition Against Domain Name Abuse, Inc.
1632 Wisconsin Ave, NW
Washington, D.C. 20007
+1 202.223.9252

conceived in 1998, the "bottom up" concept failed to develop checks against capture. At the time nobody anticipated that any one constituency would develop strong economic interest in ICANN's actions and stand to gain so much financially from ICANN-developed policy. Few could foresee how bad actors would eventually place familiar brand names in domains to confuse and engage their targets. The reality that has unfolded over the past 13 years shows that ICANN's original mission of "bottom up" policy development in the interests of the entire Internet community has fallen short. At present there is the ICANN community and the Internet community, and unfortunately, the interests of the two communities are not aligned.

Instead of representing the true community of Internet users, ICANN's community is predominantly comprised of those companies with vested interest in selling domain names; what better way to sell domain names than a mass introduction of new gTLDs. Brand owners will have no choice but to pay for the acquisition and maintenance of each defensive registration across as many of the 400 new gTLDs as possible to prevent infringement of their intellectual property. To this day, ICANN has not presented any convincing economic justification for the new gTLD program showing actual market demand for this mass rollout to the public. In fact, many small business owners and non-profit organizations (with the exception of ICANN) are deeply concerned about the negative impact new gTLDs will have on their business and cost of defensive registration. The International Olympic Committee is an excellent example of a non-profit that is concerned about the costs of this policy and the potential negative impact it will have on its brand.

For example, ironically, the recent roll out of .XXX has created a tremendous economic opportunity for those interested in selling domain names and, indirectly, ICANN for the fees it will receive. Not even the adult industry wanted .XXX. They had already established a brand under a separate extension, most likely .COM, but now were forced to consider defensive registration under .XXX. This challenge of defensive registrations also challenged all brand owners. Imagine Disney executives considering the prospect of Disney.XXX.

The new gTLD program will undoubtedly complicate intellectual property protection, cost brand owners scores if not hundreds of millions of dollars in enforcement of their trademark rights, and needlessly confuse and endanger consumers. This initiative, however, is only a single symptom of ICANN's financial and structural capture by commercial interests. If ICANN's current lack of accountability and transparency continues, the harm caused by the proposed gTLD program will not be the last.

Let me give you a second concrete example of poor ICANN governance that has created tremendous anxiety about a future with more than 400 potential new extensions. In May 2005, ICANN granted Employ Media a charter to act as the registry operator for .JOBS. The charter specifically defined that .JOBS was established to serve the needs of the international human resource management community. This changed when Employ Media, desperately in need of revenue, started selling second level domains for purposes outside of their charter. Months after learning of this, ICANN issued a strongly worded rebuke to Employ Media supposedly forcing them to take down sites that were outside of their charter. Employ Media has so far refused to

cease activities clearly outside the scope of the .JOBS charter, and ICANN has acquiesced to these delays. Today, ICANN is in negotiations with Employ Media to amend their charter. Unfortunately, there is no accountability in this process; ICANN's decision-making is arbitrary and may foreshadow similar developments when the new gTLDs are issued.

Finally, let me touch upon the interaction between the Government Advisory Committee and ICANN. The GAC is the only government body that has an official role within ICANN. Despite the GAC's official role, however, ICANN has no obligations to consider or implement GAC recommendations. Once again, ICANN accountability is missing. US Department of Commerce Assistant Secretary Strickling recently expressed his concerns about ICANN and the GAC, stating that "a weakness of the current model is that the ICANN bylaws and practices seem to envision that GAC advice often comes at the end of the policy development process. That should not be the case."

Before ICANN goes through with its plan to roll out up to 400 new gTLDs in the coming months, the United States government should leverage the upcoming renewal of the IANA contract to require an audit of ICANN. CADNA has long proposed the formation of a federal commission composed of Internet experts, private sector representatives, academic representatives, government officials, and foreign government observers to fully audit ICANN before renewing the IANA contract.

CADNA urges you and your committee to consider the implications of a flawed ICANN. ICANN is a California incorporated 501 (c)(3). Before it is too late and other questionable policies are pursued, consider the leverage of the IANA contract renewal and bring ICANN into the 21st century. Thank you for this opportunity.

CADNA I The Coalition Against Domain Name Abuse, Inc.
1632 Wisconsin Ave, NW
Washington, D.C. 20007
+1 202.223.9252

Mr. GRIFFIN. Thank you, Mr. Bourne.

Mr. Pritz, I want to start with you. I want to get to the fundamental reason for why you are doing what you are doing. Can you just sort of tell us why are you creating the new gTLD's and is it because of a consumer need, there is a real demonstrated consumer need? And if so, how will consumers benefit from this expansion?

Mr. PRITZ. Certainly. Thanks for the question.

First, I want to parse the definition of ICANN. The new gTLD program is from the large ICANN, the ICANN community that is comprised of all the people participating in this multi-stakeholder model. So this process involves ICANN staff taking and synthesizing the results of the community input into a program and implementation plan.

So where does this come from? It comes from the very birth of ICANN. In 1998 in a hearing, it was discussed that one of the primary purposes of this new corporation that was to provide Internet governance was to provide increased competition and opportunities for innovation. It was specified right at that time we could do that in two ways. ICANN could do that in two ways.

One was by introducing competition into the registrar marketplace. At the time ICANN was formed, there was one registrar, NSI, and they charged $75 or $80 for a domain name. That was a fairly straightforward introduction of competition. ICANN created a registrar marketplace where there are now 930-some odd registrars, and as you know, the price of a domain name is $8 or $10.

The other very specific instance that was discussed at that hearing was: how should the introduction of new top-level domains be introduced. It was perceived then, as now, that new TLDs will provide opportunity for innovation and more choice for consumers. At that time, it was specifically left for this new corporation to decide that.

So ICANN has actually spent 10 years—the big ICANN—looking at that problem. There have been two trial rounds of new gTLD introduction in 2000 and 2003, and there were significant lessons learned there. And then the GNSO, which is ICANN's primary policymaking organization, convened this 19-month intensive policymaking process where they considered this question, and they almost unanimously resolved that new gTLD's would provide innovation and choice. These are the experts that we all rely on in the Internet multi-stakeholder model that are knowledgeable of that model and will understand the benefits.

Mr. GRIFFIN. I am limited on time, so let me get a little follow-up here.

So assuming there is a consumer benefit—just assume that for the sake of argument—do you see these changes giving opportunity to rogue sites or for more rogue sites and parasitic sites to spring up? Do you concede that?

Mr. PRITZ. I think that new registrants will continue to register names, and whether they are all in dot com, dot net, and dot org now or whether they will register them in a broader base of sites, I think that the introduction of new consumer protection mechanisms and new rights protection mechanisms in the new gTLD's will actually make them a safer environment. It gives us more tools

for fighting them, and it provides more safeguards for trademark owners than exist now. So we are moving into a safer environment.

I just want to point out, for example, the example Ms. Stark gave of the rogue site regarding Fox—you know, that example ended in dot com. Most of the abuse occurs in dot com because there is a concentration of names there, and that is where abuse pays off. That is where defensive registrations occur.

Mr. GRIFFIN. I am growing short on time, so I will ask this last question. But could you comment on some of the safeguards that will be implemented or that you foresee being implemented that would help mitigate the opportunity for rogue sites, parasitic sites to increase as a result of these changes?

Mr. PRITZ. Yes. Well, as far as rogue sites go, there are three avenues. You know, this is a very, very important question and is not necessarily purely related to new gTLD's. But there are essentially three avenues for enforcement.

One is ICANN's contracts with registries and registrars that can be enforced. So there are provisions for investigation of false Whois and other provisions. So there is ICANN's contractual duties.

There are the obligations of law enforcement. When there is cybersquatting, that is illegal, and ICANN works closely with various law enforcement agencies in order to bring opportunities for more enforcement to them.

And third is competition authorities. So ICANN can refer to issues where there is infringement that unfairly creates barriers to competition to those authorities.

Finally, if you remember the question, Chairman, ICANN works actively with registries and registrars to identify and work in partnership to take down rogue websites. In fact, the latest version of the contract that we are proposing with VeriSign for dot net allows them to suspend certain rules in the contract to act affirmatively to take down those sites, but understand that when we do act in that way, that has to be done very, very carefully because that power could be abused too.

Mr. GOODLATTE [presiding]. Thank you.

The Chair now recognizes the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

Is there anybody on this panel who thinks that these new gTLD's is a bad idea?

[No response.]

Mr. WATT. So I am just trying to be clear on where people stand on this. I heard concerns being expressed about the steps toward implementation. Is there anybody here who thinks this should not be done?

Ms. STARK. Can I comment to that?

Mr. WATT. Well, I don't want you to comment. Either you think that it should be or it shouldn't be. Your testimony seems to be the clearest that you had some problems with the implementation of it, but I never did hear you say you thought this was a bad idea.

Ms. STARK. I don't think anybody in this community thinks it is an outright bad idea. What——

Mr. WATT. Okay, all right. You know, these are not trick questions. I am just trying to get through my own thought process here.

Then what is the compelling good idea/reason that this has to be done as far as you are concerned, Ms. Stark? Just give me one compelling good reason to do it.

Ms. STARK. To have it?

Mr. WATT. Yes.

Ms. STARK. I think that the idea of opening up spaces for expression in what Steve DelBianco talked about, non-Latin languages is——

Mr. WATT. Okay. Then you think other languages. And that can't be done in the dot com, dot net lingo just as well?

Ms. STARK. Not today, not the way the system is currently——

Mr. WATT. Well, not the way it is done today, but you know, what is the difference? You all keep talking about innovation. Changing somebody's name is not innovation. Allowing somebody to use a different name is not innovation. That is not adding anything new to life that I can tell.

Mr. DelBianco, Mr. Metalitz, help me here.

Mr. DELBIANCO. Ranking Member, you are right. Just adding a new label to an existing page or content doesn't really truly create innovation. However, 56 percent of the planet cannot even type in the domain name in their own language.

Mr. WATT. But that is not a function of whether you call something "steve" or whether you call it "net," is it? You can put the "steve" in front of the "net," "dot net" or you can put it "dot net dot steve dot watt dot steven," you know. You still haven't created anything new, have you?

Mr. DELBIANCO. You haven't there, but 56 of the planet can't use our alphabet when they read and write. So there is no capability to do Greek letters, Japanese or Chinese letters.

Mr. WATT. Tell me how this is going to make that better as opposed to what we have right now..

Mr. DELBIANCO. It will enable for the first time that an Arabic user could actually type an entire email address in all Arabic or a website name. He can't do that at all today.

Mr. WATT. Why can't the current system evolve to do that without new gTLD's?

Mr. DELBIANCO. This is that evolution.

Mr. WATT. Okay. Go ahead.

Mr. METALITZ. The current system is, to some extent, evolving to do that because in the country code top-level domains, operated one per country, including in countries that use these scripts, they are already moving into the internationalized domain names world where they can type it all in in their own script. But again, that is only one domain per country. It is dot cn in China. There would be dot eg in Egypt, for example. They now have their equivalents in their own scripts, and that means that the next billion people that are coming onto the Internet—some of them simply are so uncomfortable using the Latin alphabet that they are not going to be able to participate. That is the theory.

ICANN is already addressing this at the country code level, and I think the area where there is the best argument for new gTLD's is in this area.

Mr. WATT. I am taking a lot of time here. Would you all please, each one of you, write to me after this hearing what you think the

most powerful, persuasive reason is that we need to do this so that I will at least understand that part of it?

What stops now—well, I see people do it in front of the names of the dot net and the dot com, a bunch of stuff that I don't like. It seems to me that this is going to proliferate it behind the dot—offensive names, "nazi this," "nigger this." You know, it ain't only "steve" that we are talking about. What is it that stops that from happening now, Mr. Pritz? And what is built into this new system that will stop it from happening behind the dot as opposed to in front of the dot?

Mr. PRITZ. So there are a variety of protections in the new process whereby almost anyone can object to a proposed name. So the purpose of the new TLD is published and that TLD can be objected to. Governments can object to new TLD's. Also there will always be that abuse. The purpose for the program, though, is really to provide increased opportunities for these new TLD's to represent communities to tie to communities, dot navajo to tie to small businesses, to hook up——

Mr. WATT. You are answering my last question, Mr. Pritz. I didn't ask that question. That was the last question. That was the question before. I am asking you a new question. That is a new question I ask now. I gave you the opportunity to write me and tell me the answer to the last question I asked. I am trying to ask a new question now. Did you understand the question I asked?

Mr. PRITZ. Yes, I did.

Mr. WATT. All right. Answer that question because I am out of time already.

Mr. PRITZ. So there can be that, but there are also significant benefits to the program that outweigh the costs.

Mr. WATT. All right. I give up, Mr. Chairman. I am out of time.

Mr. GOODLATTE. You asked a good question and I think there will be some follow-up here.

Before we get into some more of that, I want to go down the line. I will start with you, Mr. Bourne. There are obviously benefits to doing this, at least to a limited expansion of top-level domains. I am not sure about the unlimited nature of it. But let me just ask each one of you, right now, if they move into this as quickly as launching it in June, will they be able to manage and enforce their policy with respect to unlimited numbers of TLD's, and will they be able to adequately police the registries that will manage these TLD's? Mr. Bourne?

Mr. BOURNE. I don't think so. I don't believe so.

There have been a great deal of issues with compliance to date as is. The issue with the scale of the rollout is really what concerns me the most. I have talked to businesses and I personally have considered what innovation might be possible in a new TLD space. For the most part, I am not that moved by those opportunities. It will take many, many years for new TLD's to potentially organize communities mainly because there is such a strong bias toward dot com today. The nature of a massive rollout can have only one intended purpose, which is to create chaos and create massive opt-in and buy-in from companies in particular.

Mr. GOODLATTE. Okay. We have to go down the line here. So, Mr. DelBianco?

Mr. DELBIANCO. Mr. Chairman, in your opening statement, you used the analogy of a backbone. Backbone is what you called it, a DNS. And adding hundreds of new top-level domains is like adding, well, hundreds of new vertebrae to a backbone. And the question will be does the nervous system extend into those new vertebrae because the nervous system of ICANN is the monitoring, supervision, and compliance measures that you asked about. Will it work? Well, you don't want to necessarily add 500 new vertebrae at once. They are going to have to do it in small batches, and as soon as they go into the root, as soon as those websites begin to light up, that is where monitoring and compliance is going to be so essential. It will be up to us in the community, government representatives, including U.S. Government through NTIA, to really ride herd on ICANN and beef up that compliance function. It is up to us to make sure we don't blow this because if we mess it up, ICANN probably gets replaced by something from the United Nations.

Mr. GOODLATTE. Mr. Metalitz?

Mr. METALITZ. Mr. Chairman, I think the answer to your question is no. ICANN is not capable of doing this today and certainly would not be capable of doing it if there is a massive rollout as they plan, up to 500 or 1,000 new gTLD's. To use the nervous system analogy, I think if this were to occur, we would have a high risk of a nervous breakdown.

Mr. GOODLATTE. Mr. Palage?

Mr. PALAGE. Serious concerns about the scalability of resources, but have them positively encouraged by some recent hires and investment in this area by ICANN.

Mr. GOODLATTE. Investments that could handle the rollout of multiple numbers of top-level domains compared to the number we have today?

Mr. PALAGE. Considering it is going to be an 18- to 24-month process, that does provide ICANN scalability. So if they continue to hire based upon current recent hiring levels going forward, potentially. But again, I do have serious concerns right now but have been encouraged by some positive steps they have taken.

Mr. GOODLATTE. Ms. Stark?

Ms. STARK. I think we are very concerned. Compliance issues have been one of the toughest that we faced so far in the space of only 21 gTLD's that took over a dozen years to implement and launch. You are talking about exponentially increasing that space, exponentially increasing the number of registrar and registry agreements that would require compliance, and given the track record, we don't have a lot of confidence that it would be successful.

Mr. GOODLATTE. Mr. Pritz?

Mr. PRITZ. The answer is yes. ICANN has a very strong——

Mr. GOODLATTE. How many? In the next, say, 24 months, how many of these new gTLD's will we see?

Mr. PRITZ. We will see maybe 200.

Mr. GOODLATTE. You think you can do 10 times the number that you administer now. It has taken decades to get to the point where you have good competency where you are now, and some criticize what you are doing now. But leave that as it may be, you can scale up a multiple of 10 times in 24 months.

Mr. PRITZ. Right. So 10 times sounds like a lot, but 200 is a pretty small factory. We also provide support for 250 ccTLD's through our IANA function. In the last 18 months, ICANN has terminated 50 registrars. We have sent out non-renewal or breach notices. We have sent out over 7,000 compliance notices. We have in place manpower plans and staffing plans for scaling the compliance function. ICANN recently hired a new director of compliance, Maguy Serad, with 20 years experience in compliance, and we have also added additional staff in that area.

Mr. GOODLATTE. So let me ask you about this. So considering these large number of domains will be defensive, will you commit today that if this proposal proceeds, ICANN will create a block list of globally recognized trademarks to be administered by ICANN's new trademark clearinghouse for future gTLD's that will protect nonprofits like the Red Cross or the Olympics, universities, or other brand holders?

Mr. PRITZ. So, first, we don't necessarily ascribe to the assumption that there will be large numbers of defensive registrations. First, there are new protections in this new version of——

Mr. GOODLATTE. Why not make the commitment?

Mr. PRITZ. That was one of the recommendations of the implementation recommendation team. WIPO has been working on a list of globally protected marks for 10 years.

Mr. GOODLATTE. I have heard that ICANN is already excluding some of their own technical marks on a block list for new gTLD's. If it is good enough for ICANN and for technical marks, it should be simple enough to include all brand holders.

Mr. PRITZ. So all brand owners is a vast number.

Mr. GOODLATTE. It sure is. But you just told me that you are ready to implement the rollout of 200 new gTLD's.

Mr. PRITZ. Right.

Mr. GOODLATTE. But now when I ask you about a block list to protect all the legitimate businesses and nonprofits and other entities that want protection from this sudden explosion in the number of these top-level domains, you tell me, well, to do it for all of them, that is a lot. So I will go back to my first question. Are you ready?

Mr. PRITZ. Yes, we are.

Mr. GOODLATTE. You are ready but you are not ready to protect the people who may be victimized by this.

Mr. PRITZ. No. We are ready.

Mr. GOODLATTE. All right. Are you worried that most of the new gTLD's that will be created will end up being unprofitable if these defensive registrations are taken out of the picture?

Mr. PRITZ. No, I don't think the business models for new gTLD's will rely on defensive registrations. I think it is demonstrable that there will not be defensive registrations in these new TLD's. Defensive registrations occur primarily in com because that is where the abuse is and that is where the action is. There have been other new TLD's introduced. They are small. There are no defensive registrations there.

Mr. GOODLATTE. Look, according to your draft 2012 budget, your new application fees could net over $92 million on top of your current $70 million operating budget with costs of administering this new program around $35 million. What are your plans for the rest

of the money, and why don't those plans include a block of not only your technical marks, but everybody else's legitimate brands?

Mr. PRITZ. ICANN's policy is that the fees for evaluating new TLD's be done on a cost recovery basis, and that is what it is. That fee has been very carefully calculated to cover the costs of evaluation. Because of all the issues we are talking about here today——

Mr. GOODLATTE. I thought your own budget contemplated the cost of administering this new program at around $35 million, and you could have fees of $92 million. So what happens to the other $57 million?

Mr. PRITZ. So of the $185,000, $100,000 of it goes directly to the evaluation. We are doing a very comprehensive evaluation because of the concerns we have heard here today. Every new TLD application is evaluated six different ways, six different tests, three against the applicant to test their financial and technical wherewithal, to do background checks to try to prevent the sort of abusive behavior we are talking about. We also test the TLD string, it is called, at the end to ensure that it doesn't break the Internet or doesn't tend to cause user confusion.

Mr. GOODLATTE. Let me ask you about one other area of expenditures because it looks to a lot of us like you are getting a lot of money here. We would like to see some commitment to using some of those resources to protecting intellectual property rights. You seem to be intending to protect your own intellectual property rights. Why not protect others since you are creating a major problem for them? So what are you going to use the money for? Do you know how much money ICANN has disbursed in bonuses since 2007?

Mr. PRITZ. No, I don't, but I know——

Mr. GOODLATTE. Can you get that for us?

Mr. PRITZ. Yes. I know it is posted——

Mr. GOODLATTE. Would you submit that to the Committee?

Mr. PRITZ. It is already posted and I will get it for you.

Mr. GOODLATTE. And do you know what the largest bonus awarded was?

Mr. PRITZ. No, I don't.

Mr. GOODLATTE. What the average was?

Mr. PRITZ. No.

Mr. GOODLATTE. Are any ICANN employees' or contractors' bonuses tied to the gTLD proposal or to completing it by June?

Mr. PRITZ. My bonus is tied. I can talk about me. My bonus is tied to moving the program forward. It has never been tied to a successful launch of the program.

Mr. GOODLATTE. What is the difference between a successful launch and moving the program forward?

Mr. PRITZ. Oh, that we will listen to community input, we will publish a next version of the Applicant Guidebook. There have been six versions of that. We will furnish the board with the right amount of documentation in order to consider the issues that are raised by the community.

Mr. GOODLATTE. But no member of ICANN bonus is tied to actually launching this.

Mr. PRITZ. Yes. I don't know. I know my bonus is not and I am the manager of the program.

Mr. GOODLATTE. We would be very interested in knowing whether people have a financial interest in moving this forward and particularly in moving it forward hastily by June. So if you would provide that information to the Committee, that would be very helpful to not only us but a lot of other people who are interested in what is going on here.

My time has expired. We will now recognize the Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Goodlatte.

First on a public consumer note, I have had a number of the ladies here in the Judiciary Committee tell me that it is freezing in here. I don't know if this is part of the deficit plan that the opposition has in mind of balancing the budget, but all I can tell you, Bob, is that when I was Chairman, I had the room warmer than you do now. [Laughter.]

Mr. GOODLATTE. I thought this topic would heat the room up. Maybe we just over-compensated, but we will check on that. I thank the Ranking Member for calling that to our attention.

Mr. CONYERS. Now, my fear, members of the panel, is that we may be talking about a done deal. We are acting like there is something that can interfere or make this thing better, but I have got the notion, Mr. Pritz, that there is going to be a vote in June and I think a lot of people already know what the outcome is going to be, don't you?

Mr. PRITZ. Honestly, I have never gained in trying to predict what our board of directors is going to do.

Mr. CONYERS. Well, the chairman of the board of directors thinks that it is. Chairman Peter Dengate Thrush was quoted as saying: You notice we have set up a special meeting early in the week because we want to have a party. We want to have a resolution to celebrate. End quote.

Mr. PRITZ. First, I want to point out that Peter Dengate Thrush is an intellectual property attorney and has paid particular attention to the issues that are raised here.

Second, while there has been talk in this Committee about this being a sudden event or quickly considered, I want to tell you that this has been the result of a very well managed, deliberate process to develop not just the policy for introducing new TLD's, but the manner in which they are introduced. And several times during the process, we have stopped. So when intellectual property interests came to ICANN, after we published the first version of the Applicant Guidebook and said we want more property rights protection in that guidebook, we tolled the process, convened——

Mr. CONYERS. All well and good, but the chairman of the board just told us all publicly—this isn't a private communication I am quoting. He said publicly it's a done deal, and you are giving me a lot of additional assurances, but I think the chairman of the board might know, as well or better than you, what the board is going to do.

Mr. PRITZ. Certainly they have targeted approval of this process for this meeting in Singapore. And ICANN is a very transparent and open place, and when the board has thoughts, they signal those to the community and identify those to the community and make those statements public.

Mr. CONYERS. Well, Thrush has already made it public. Not only has he predicted that it is going to carry, but he wants it done early enough to celebrate.

I hope I get a copy of what you all send the Ranking Member, Mel Watt, because I want to read it as well.

But I think I am going to have to communicate with the board chairman to ask if he can assure this Committee that we won't be going through with this early meeting to have a resolution to celebrate because I think it ought to be held up. And you know better than the rest of us, Chairman Goodlatte, we may need another hearing on this matter. I think this is not cause to celebrate. This is going to change the shape of this medium as we know it, and I would like to personally request of him to delay this early meeting and the consideration of this resolution as we have a lot of work to do. I am more troubled about this circumstance that caused us to come here than I was in the beginning.

And if I could get an additional minute, Mr. Chairman.

Mr. GOODLATTE. Without objection.

Mr. CONYERS. I would like to ask Attorney Stark and Mr. DelBianco to just briefly comment on my proposal.

Ms. STARK. Congressman Conyers, we would very much appreciate—additional time basically is all we are asking for. We are not wholesale against the expansion of the gTLD space, but we do believe that there are very complex issues that have not yet been resolved and that will impose tremendous implications for the public and costs on brand owners and the public as well. And as a result, we feel like this has such enormity, the scale of it, the magnitude of the change, the implications for the public, that it behooves everybody to take the time necessary to make sure that we do our best to get it right. And we just don't feel that the current version of the draft Applicant Guidebook and registry agreement do that, that there are still some very, very fundamental issues that remain open for discussion and need to be resolved.

Mr. DELBIANCO. Chairman Conyers, there is one positive aspect of having Peter Dengate Thrush schedule a party because he really wants a lot of the right guests to show up at his party, and if he throws a party and there are no governments in the room celebrating, there is no law enforcement there toasting an effective plan, there is no businesses, banking and financial institutions there, he is going to wake up with one heck of a hangover after that party. So the key for this is the pressure is on him and the pressure is on ICANN to get those guests to the party.

And how do they do it? They need to mind the GAC. If they pay attention to what the GAC has asked for—Governmental Advisory Committee—and deliver those safeguards, those responsible ways of delivering integrity, then we will all show up at that party and we can focus on launching TLD's in a responsible way. I feel like pressure on making the party the right party is more important than the U.S. Government unilaterally asking for a delay since, as I said earlier, that plays into the hands of 200 nations who don't even show up at ICANN and might want to follow China's lead saying their party is at the UN.

Mr. CONYERS. Joshua Bourne, could you comment?

Mr. BOURNE. I will. What I would caution the Subcommittee is to not just ask for a delay and further study on this TLD policy, instead to consider where it came from and whether that organization is functioning as it should and whether this policy, maybe if it is curtailed some or some additional trademark protections are put in place—will this be followed by another policy and another policy and the same kind of charter changes that have occurred in earlier introduced new TLD's to keep them afloat will follow new charter changes in the future when these new TLD orphans could end up destitute. We just do not see the demand in the user community for hundreds of new generic top-level domains today. The demand is within the ICANN community.

ICANN was captured. ICANN was a private enterprise that was set up to control scarce resources, making it ripe for capture. ICANN was set up in a way to try to make it more independent by allowing it to raise its operating budget as a function of how many domains get registered or renewed. That has aligned its interest with anybody who can help them grow that operating budget and do their job. ICANN is probably under tremendous pressure from various commercial interests in the domain name business who absolutely want this to move forward as quickly as possible. Our numbers show that anywhere between $500 million and $1 billion will be spent by companies to protect their IP. For what benefit?

So I go back to my original proposal which is band aids in a way would be to—sure, more intellectual property protection is useful and critical but they are just band aids. If we fix ICANN, ICANN will be accountable, predictable, have a long-term point of view, have an interest in protecting the public interest. And I think there is only one opportunity left really to do that, which is to work with NTIA on their renewal of the IANA contract and ensure that that leads to potential fundamental changes to how ICANN is structured and how it——

Mr. GOODLATTE. The time of the gentleman has expired.

The gentleman from North Carolina is recognized for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

Good to have you all with us this morning.

Mr. Bourne, I have several constituents who have invested to protect their trademark and corporate brands on the Internet. They expressed concerns that the new gTLD's will amount to another added cost to protecting their market brand. What do you say in response to that?

Mr. BOURNE. Congressman Coble, they are right to be concerned. If I understand that question correctly, the math that we have conducted showed that even a small trademark owner acting conservatively might spend a half a million dollars which they will have to respend every 2 years to own this duplicative, superfluous domain name portfolio. When you drill down on the numbers that lead to that half a million dollars a year for a small portfolio, we conclude only 3,600 defensive registrations per TLD. Just 5 years ago—or 4 years ago—excuse me—when dot asia launched, there were 15,000 approved trademark applications during their sunrise period. So predicting one-quarter of the level of participation, a

small brand owner might have to own another half million dollars worth of domain names.

Mr. COBLE. I thank you.

Mr. Chairman, I think you touched on this in your line of questioning too.

Mr. Pritz, let me ask you this. What protections, if any, are provided to ensure that ICANN will not approve new global top-level domains that will gravate problems we are already experiencing with online parasites and therefore simply become new havens for counterfeit, infringing, and possibly criminal activity?

Mr. PRITZ. There are several ways. One is in the application process for the new TLD's. There are new trademark protections put into those new TLD's and new consumer protections. So, for example, we convened a team of experts in Internet security and stability, and they gave nine concrete recommendations for mitigation of malicious conduct in new TLD's. All of those are incorporated into the Applicant Guidebook. There are measures such as background checks of applicants and the removal of records that might be used for malicious conduct purposes. So that will help create a safer environment. Plus, we have provided tools to trademark holders that I could explain some detail that will allow them to avoid these negative impacts.

Mr. COBLE. I thank the panel for your contribution.

Mr. Chairman, I yield back.

Mr. GOODLATTE. I thank the gentleman.

The gentlewoman from California, Ms. Lofgren, is recognized for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

Before asking my questions, I have been reflecting on how we got here and the discussions that we had in the 1990's when we actually supported the effort to establish ICANN. If you will recall, the Internet belonged to us because we invented it, but as it became commercially viable, the question was could the Department of Commerce and the U.S. Government control it, and we decided—and I am sure you will recall, Mr. Chairman, since we all participated in this Committee in the discussion and the decision-making—that it would be better to have a nonprofit that had multiple stakeholders and that that would be more viable in the international community. And although ICANN has not been without its missteps over the years, it actually has worked better than I thought. We sort of boldly asserted that this was going to work and it has.

Now, I am agnostic about whether these domain names are rolled out in June and how many, but I do think it is important to have this discussion in that broader context which is that China has a different agenda here about the Internet than we do and we need to make these decisions mindful that the freedom of the Internet is really what this is about.

I am interested. Mr. Pritz, you mentioned you thought there would be 200 new gTLD's. Do you have an estimate of how many of those 200 would be in an alphabet other than what we use in English?

Mr. PRITZ. No. My estimate——

Ms. LOFGREN. Do you have a guess?

Mr. PRITZ. 20 percent.

Ms. LOFGREN. Yes. I mean, to have the country level control of these domains means that China is going to decide what their citizens have access to, and so it is enormously important that we maintain ICANN and that we have private sector involvement if we are going to have a free Internet without breaking it and without allowing regimes with an agenda that is quite different than a free agenda to actually control this whole thing. And I think we are much closer to that challenge than we have acknowledged here.

The trademark issue, I think, has merit and I think ICANN has addressed it. Maybe they need to do more. I don't know. But I do think that if we are going to suggest that the United States has the ability to establish the trademarks for the rest of the world instead of WIPO, we are actually inviting China to rally poor nations to take over the control of the Internet.

And I understand everybody is coming from a point of view and that is legitimate and that is why you are here as witnesses. But let's put this in a perspective because a world where China dominates the control of the Internet is not a world that trademark owners will value in terms of protection of intellectual property.

So I guess that is not a lot of questions, but I am just concerned that we are on dangerous ground here.

Maybe this is a question I can ask you, Mr. DelBianco. You suggested that the Government Advisory Committee really needs to be dealt with in a very positive way. I think that is correct, but understanding that the agenda really isn't about the actual agenda, it is an agenda that really is for a takeover. How do you put the GAC agenda in the broader political context that we are talking about here?

Mr. DELBIANCO. Thank you, Congresswoman Lofgren and Mr. Chairman. I think you are exactly naming the point of the problem. When you think about it, there are well over 300 nations who participate at the United Nations. There are 250 different country code top-level domains, so the countries that have already jumped into the Internet at least with a Latin script. But inside of the GAC, we only have about 100 member countries, and of those 100, only about 60 show up at the typical ICANN meeting, and of those 60, well, roughly six do most of the talking. So we don't have broad participation in the GAC yet. The GAC is certainly very firm in what it now wants and I support most of what they have asked for. But we need to broaden that participation.

And one more thing: make it a higher-level, more senior-level person from each of those governments. I mean, if they are sending a very high-level diplomat to New York and take their seat at the UN, we need a high-level economic and business development and technology person representing that government at the GAC.

Ms. LOFGREN. If I could ask Mr. Pritz. Do you believe that your analysis on the domain name expansion that you have discussed here will be effective in maintaining the private sector ICANN model as compared to the UN government-controlled model as we look down the road a year or 2?

Mr. PRITZ. Yes, I do because ICANN has been responsive to the broad Internet community, including governments, and it is those governments that would work to create a model where it is a gov-

ernment-controlled model. So, for example, China looked to ICANN to create internationalized domain names. The threat there was that China was going to establish an alternate root system.

Ms. LOFGREN. And that is still a threat. We could break the Internet if we——

Mr. PRITZ. That is right and that is why it is important to be responsive to governments, and that is why it is important to have the GAC have a very effective role within ICANN and ICANN listen to all the governments across that. And so ICANN was responsive to the needs of the international community by creating IDN's just as ICANN is trying to be responsive to the broad community in closing this 7-year period of discussion on all the issues. Essentially there are now new issues. And the ICANN community that trusts this model has said every issue has been discussed. There have been no new issues raised in recent months. And so the confidence of governments and the rest of the Internet community in the ICANN model is based on their trusting that ICANN has listened and that ICANN can bring this process to a close after 7 years of careful listening to all interests, including the people at this table.

Ms. LOFGREN. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentlewoman.

The gentleman from California, Mr. Issa, is recognized.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Pritz, I look at the movement from IPv4 to IPv6, sort of go back to the numbers. We went from having 4.5 billion real URL's to having—I love to say this because I can't say it any other way than the way they say it—5 times 10 to the 28th combinations of numbers for each human being on the planet. We are not short of addresses. Right?

Mr. PRITZ. Right.

Mr. ISSA. And effectively an IPv6 address costs nothing to deliver to an individual. It is a fraction of a fraction of a fraction of a fraction of a penny to resolve. So the cost of the Internet operation on a per-event or on a per-location basis is a rounding error of zero. Would you agree to that?

Mr. PRITZ. Yes, for IP addresses.

Mr. ISSA. For IP addresses. So there is plenty of abundance.

Our real discussion here today is a plain name resolution question of uniqueness and price. A lot of people, as I have been listening—and I apologize. I have a hearing next door, so I have been running back and forth.

A lot of people are concentrating on the other side of the issue, you know, how many do I have to buy, who is going to be camping on, will there be confusion. There is a lot of that. I mean, to be honest, no matter what the number is, when I type in my name on Google, I am more likely to get somebody who truly dislikes my politics and has gone to great lengths to disparage me than I am to get my puff piece, as hard as I try. [Laughter.]

So the whole resolution process—there is no question. There are problems.

But let's go through another question that wasn't asked here today. Why is it that I got to pay GoDaddy from $10 to $10,000 for a name and not from a tenth of a cent to 10 cents for a name?

Why is it we are not driving the infinite possible down to the predictable consumer price that would normally occur in a free market?

Mr. PRITZ. So I think that for domain names, through the introduction of competition like the creation of GoDaddy, has driven down the price of domain names from $80 to $6, which is a stunning bargain, right, when you think about it.

Mr. ISSA. I can send a letter across the country for 47 cents. Everything is a relative stunning bargain.

Mr. PRITZ. Right.

Mr. ISSA. $6, if I have to buy 6,000 different variations of a name, is no longer a deal. 6 cents, if I have to buy 10,000, may be more de minimis to a corporation.

My question to you because it was a question that wasn't asked is how is it from an ICANN standpoint that I am being—we have got protection issues, and I know that is a big part of this. And if it hadn't been asked so often, I wouldn't go to a new line of questioning.

My question is, first of all, why in the world are there so many reserved names? If I want a good name from GoDaddy—and I am using them because I happen to have a lot of mine with them, and I use Zone in it to move things around. But at the end of the day, I have got a whole bunch of them and they are one of them that I buy from. But the good names that I might want have already been pre-grabbed and marketed in an upward way higher.

Why is it in a way that they are not being driven down? Real competition would imply that those names are being driven down to a penny to a user and prohibited from being camped on in order to resell. Why is it that is not the number one issue of ICANN, to stop camping on for profit either through, obviously, diversion, but the other part of it, simply making me buy and pay $6,000 or $8,000 or $10,000 for a name simply because you thought I would need it and you camped on it? Why is it that is not the number one issue at ICANN in an infinite universe in which the incremental cost of that name is a rounding error of zero? Because the name is just as cheap as the IPv6 address is before you, quote, mark it up.

Mr. PRITZ. A couple of reasons. One is it is ICANN's mission, right, to encourage competition, and one of the benefits of competition is to drive down costs and prices. If there are more top-level domains, that camping will be less effective. Domainers, those that invest in those names, are against new gTLD's because they are going to lose the value of their beach front property.

A second reason is that we don't want to drive the capital out of those markets by creating domain names for a penny. All the security and intellectual property protections and protections against consumers and the work of registrars and registries in enforcing their agreement and protecting registrants and having an infrastructure that always resolves the name 100 percent of the time—that is what costs money. The resolution of the IP addresses doesn't cost money.

Mr. ISSA. My time has expired. If I could have an additional 30 seconds, Mr. Chairman.

Mr. GOODLATTE. Without objection, the gentleman is recognized for an additional minute.

Mr. ISSA. Thank you, sir.

Mr. Bourne, looking at the other side of that coin, why is it that if I own dei@dei.com because I was early enough to grab my initials—I don't own issa.com. The International Sanitary Supply Association got there first. [Laughter.]

Mr. ISSA. And that was before people started comparing me to organizations like that. [Laughter.]

So why is it, though, that if I wanted a dei@dei equivalent for a penny times every possible registrant—why is it that as a, quote, user—let's assume the registered trade name is that. Let's say Viper, for example, viper.com, which is an asset of my former company. I don't own it. Why is it they shouldn't be able to, for a penny apiece, buy thousands of them? Because before they are sold to, quote, the new user, essentially a registered trademark owner, in order to protect them—why is it I am looking at $187,000 to protect all the different ways right now? And I know that dot com—that is the one that everybody wants. So they want vipers.com and 1viper.com. They want all the things that are close enough. And there is no question that is where the action is. But why is it that from a consumer standpoint the trademark owner shouldn't broadly be able to get that with certain limitations? Mr. Bourne or anyone else that wants to answer.

Mr. BOURNE. Well, they ultimately could, but I believe that——

Mr. ISSA. For a penny.

Mr. BOURNE. Pardon me?

Mr. ISSA. For a penny.

Mr. BOURNE. It is possible, but domains are driven by supply and demand. So the reason why the prices are higher for dot coms or that name that you wanted is because it is more in demand. I have seen, because my company monitors these things, the single word, dictionary term, commercially relevant dot infos not being renewed, being returned to the available names pool, and the bidding in the aftermarket is between $50 and $100. The similar term in dot com might be worth $50,000, $100,000.

So I think I understand the point that you are making which is that if there isn't a volume of these things, then the prices will go down. However, based on how the market interacts with names, demand is the highest for terms in extensions that are the most valuable and oftentimes because of——

Mr. ISSA. So dot xxx is clearly going to be where the action is after dot com you are saying?

Mr. BOURNE. I don't think so actually. I think that needs to still play out. I mean, the reality for brand owners is that—just imagine a group of Disney executives sitting around wondering whether to register disney.xxx, and there are hundreds of other characters and brand names.

Mr. ISSA. The characters would be different on that site.

Mr. BOURNE. It would be a problem if it was owned by a third party. So they are going to register all of those more than likely or protect them through whatever sunrise mechanism is available to them. To the companies in that industry, they may or may not choose to be there.

For the most part, I think that brand owners view all of these as defensive registrations, and the public, for people that register domain names, aren't interested.

Mr. ISSA. Thank you. I yield back. Or wait a second. Yes, sir?

Mr. DELBIANCO. Congressman Issa, viper.com has value because some people in this planet—they still guess. They heard about you on the radio. They saw you on one of your puff pieces, and they go to viper and they type in viper.com as a default. The new gTLD program will probably change this guess/assumption behavior that people do. For all they know, viper could be viper.auto because it is an auto security system or viper.cars or viper.security. And after a while, folks will stop guessing because it is a fruitless endeavor. They will jump into Google's search engine and they will search for viper. They will take a look at the different links that come up, and they are going to try to suggest which is the right one because is viper.com, the right one for you, or maybe viper.auto? Over time, those TLD's like dot auto have got to build the integrity to make that the preferred destination. That is the only way you will see those prices begin to come down.

Mr. ISSA. Thank you. Thank you, Mr. Chairman.

Mr. GOODLATTE. In the meantime, you are buying all of them.

Mr. ISSA. In the meantime, I am buying all of them, including all of those stopissa.com types. [Laughter.]

Mr. GOODLATTE. The Chair is pleased to recognize the gentlewoman from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman and Members. This has been a very interesting discussion and debate. I wish you could say that it has been very enlightening, but I think that I, along with perhaps some others on this Committee, still have a lot of questions.

I want to go to Mr. Metalitz who raised some very significant questions in his testimony, particularly as it relates to, I believe, the phase II study that indicated that some additional thought and direction should be given to this whole thing. What are you saying about this effort, Mr. Metalitz? What are you saying about ICANN? And what are you suggesting should or should not be done?

Mr. METALITZ. Well, Ms. Waters, I think what the economists were suggesting in the phase II study was that you should be differentiating between new top-level domains that are simply trying to create a new dot com—we have a dot com. We don't need another dot com on the one hand, and on the other hand, there may be new top-level domains that really would add value to the public and particularly globally.

Ms. WATERS. Such as?

Mr. METALITZ. Well, we mentioned before the ones that are in the non-Latin script so that people in these countries that don't use our alphabet would be able to participate more fully in the Internet.

So the phase II study said you should be taking these differences into account in how you set the scope of this rollout and the pace of this rollout, and that advice was actually echoing what a lot of governments were saying. It is echoing what a lot of the business community was saying. We are not opposed to new gTLD's, but

let's use some common sense and try to figure out where they are likely to do the most good.

Ms. WATERS. You sound as if in your testimony you are saying that ICANN has been ignoring this kind of advice, resisting——

Mr. METALITZ. Yes.

Ms. WATERS [continuing]. And moving forward in its own way.

Mr. METALITZ. The ICANN staff concluded that this advice was fine for the future. They are not going to use it in this round of new gTLD's. So basically it has had no effect.

Ms. WATERS. May I ask will ICANN's plan maintain their dominance in domain name registry?

Mr. METALITZ. I am sorry.

Ms. WATERS. Will they maintain their dominance in domain name registry?

Mr. METALITZ. Will ICANN maintain the dominance?

Ms. WATERS. Yes.

Mr. METALITZ. Well, I think people have mentioned before this threat of perhaps an alternative root, but basically the ICANN unique root is the main game in town. I mean, that is where people go to find these sites on the Internet. So really these decisions that ICANN makes are extremely consequential for the public both in terms of the ability to participate globally and also in terms of preventing consumer confusion. That is a huge risk when we go from a very small handful of gTLD's to a very large number, potentially hundreds or thousands or more.

Ms. WATERS. What problems would be created on the ICANN plan to open up the floodgates for unlimited domain name registrations? What kind of problems do you see? Ms. Stark?

Ms. STARK. Congresswoman Waters, thank you. I think that is a really important question. And one of the things that we think is critical is this whole concept that we have been talking about at length at this hearing which is the defensive registrations that brand owners will have to engage in. I mean, I think Mr. Pritz has said, well, when you look at the defensive registrations, you are seeing that primarily in dot com and not so much in dot biz or dot info or some of these other existing gTLD's. But that is looking back with 20/20 hindsight, and we won't have that advantage when these new gTLD's are rolled out to know which of those spaces are going to be phenomenonally successful, which will be moderately successful, which will have no relevance to either our company or our markets. So our history has proven that we don't have any choice but to engage in extensive defensive registrations from the outset in order to protect the irretrievable dilution of our brand and to ensure the integrity of the online experience for our customers and fans. So it is only later, once the market has played out, that you are maybe able to scale back those efforts, but initially they are going to be astronomical. And those costs are already significant in a world of 21 gTLD's. They become absolutely staggering in a world of hundreds.

You know, at one point ICANN—I think Mr. Pritz revised that number today to 200, but at one point had said there could be as many as 400 of these, and that might even be a conservative number. Well, conservatively a large corporation is looking to register maybe 300 defensive names in those 400 spaces. In the sunrise pe-

riod, that cost is maybe about $100 a name. That is $12 million for an individual company. And that is just the cost of defensive registrations. That is not about the personnel to manage and monitor that portfolio, to monitor the new gTLD spaces for abuses, and then of course, the cost to actually go and enforce and do something about things like myfox2detroit.

Ms. WATERS. So you are basically also telling me that small businesses or startup companies will be at a great disadvantage.

Ms. STARK. They will because many of those companies aren't going to have the luxury of even deciding whether they have enough resources to devote purely to defensive registrations that spur no innovation, that don't create productive jobs, and that literally sit dormant simply because they can't afford to have their brand name quashed in the new space.

Ms. WATERS. Thank you very much, Mr. Chairman. My time is up, but I am hopeful that somehow there will be some discussion about money. ICANN is a nonprofit. I am looking at the salaries of the CEO and wondering with these new gTLD's and the costs who is going to benefit and where will all of this new money end up. This article, which you are probably very much aware of—you released salaries. Beckstrom over $2 million guaranteed. CFO, $270K, per lawyer, 230. Does that continue to rise with all of the new systems, gTLD's? You can answer that. He is going to let me continue.

Mr. PRITZ. I would be happy to answer that.

ICANN salaries, first of all, are set in accordance with IRS regulations. It is a not-for-profit organization. ICANN salaries are set with the advice of competent firms that give advice on salary setting so that ICANN can be competitive in recruiting excellent talent, and we position ourselves to be about at the two-thirds level. If you think about how salaries are reported, salary ranges are reported and set. For officers, non-conflicted board members set ICANN salaries.

So ICANN's CEO compensation is set, first, based on the compensation of the past CEO and, second, with the idea that we need an excellent person in this position. This is an environment where we are processing billions of transactions and facilitating trillions of dollars in economic commerce. It is a very important job, as we have indicated here today. The salary of the CEO is generally, I think, less than that of trade association CEO's or some big hospital administration, so entities that are also not-for-profits.

Ms. WATERS. Thank you very much, Mr. Chairman. I yield back.

Mr. GOODLATTE. A very good question, Ms. Waters.

The Chair recognizes the gentleman from Pennsylvania, Mr. Marino, for 5 minutes.

Mr. MARINO. Thank you, Mr. Chairman.

I apologize for being late. I am jockeying three hearings this morning, and I hope I am not asking a question that has already been asked.

But given my law enforcement background, I want to talk a little bit about security, fraud, crime in general. The question is simple. We will start at this end of the table.

What role does ICANN play in promoting cyber security and how do you see gTLD expansion impacting efforts to address fraud, crime, and security?

Mr. BOURNE. Thank you, Congressman Marino. My sense is they play very little role in that. In fact, they will be the first to tell you that they have zero accountability and responsibility for what ends up on a website. It is not within their mandate, and they will be the first to tell you that.

The community, those who are like-minded and interested in consumer protection, will try to duke it out and try to eke out some kind of a solution that will limit the downside. However, it was the University of Chicago who late last year found that 77 percent of Whois records are defective somehow, and that is an important point that I will just follow up on right now.

There is enormous counter-party risk each and every time somebody gets on the Internet. It prevents wholesome people from buying goods from websites that could be perfectly law-abiding. It is small business owners. People are nervous about who they are dealing with online because there is no phone book that they can depend on.

Several years ago, ICANN had the opportunity to address that counter-party risk, to address that defect in the Whois database, and at the end of a very long process, decided to do nothing. And I believe the reason is because the ICANN community is so dominated by the registrars and the companies that have those relationships with the registrants that they obfuscated the process realizing that any solution would be on their shoulders lessening their bottom line. However, you see a policy like this one fast-tracked, it should be clear it is because of that revenue orientation.

Thank you.

Mr. MARINO. Go ahead. Bear in mind I have 5 minutes. That is all right.

Mr. DELBIANCO. Make it very quick. Three things.

We need to make sure we implement a system where names get suspended quickly if that name is where fraud and abuse is happening. So, for instance, there is a plan called Uniform Rapid Suspension. It is not particularly rapid, but we are working on that and the GAC is insisting on it.

Second would be that if a TLD, if dot steve really did tolerate a lot of abuse and fraud and didn't respond to law enforcement, there is a mechanism in there to take that TLD away from that operator and suspend it.

And the third is something called Whois. It is not entirely related to the new TLD program, but ICANN has got to increase the compliance of accuracy in Whois and stop allowing bad actors to hide behind things like a proxy or privacy registration.

Mr. MARINO. Thank you.

Mr. METALITZ. I think there is no question that the new gTLD rollout will increase the opportunities for fraud and abuse of the kind you are talking about.

Mr. MARINO. You bet.

Mr. METALITZ. The question is whether ICANN has built in enough protections. I think they have made some progress. I think it isn't adequate to this point. And the Uniform Rapid Suspension

is a good example. That is targeted at one particular kind of abuse. It is basically targeted at cybersquatting which is very important, but it really doesn't deal at all with many of the other types of misconduct that is going to be taking place, facilitated by these new top-level domain spaces.

And finally, in the last version of the Applicant Guidebook, there is a mention that ICANN would encourage and give an extra point in the evaluation to top-level domains that had another type of rapid takedown or suspension systems regarding malicious or abusive behaviors. The door is open a crack, I think, to press ICANN to do more in this area.

Mr. MARINO. Thank you. Anyone else care to comment on that? Sir?

Mr. PRITZ. Certainly. Thank you, Congressman.

Certainly when ICANN managed this process and looked at this very question, we decided, in ICANN style, to convene a set of experts in Internet security and cybersquatting who developed a set of protections that are implemented in the Applicant Guidebook particularly to address this problem. Will it eliminate the problem? No. Will there be a safer environment? Yes.

With Whois, we are requiring a thicker version of Whois in every registry. So registrants need to provide more information to be easier to find. So that was an improvement. ICANN is also undertaking several initiatives in the Whois program.

And finally, there are trademark protections implemented that I have described. One is the rapid takedown. Another is new remedies directly against registries that facilitate infringing behavior.

So I think it is those three things.

Mr. PALAGE. While I appreciate ICANN's effort to create the ultimate black box, I think the answer to your question is we don't know. For every new, innovative business model, there is probably a new, innovative business model for criminals to defraud. And I think this goes back to a point that many people have made here today. There is a need in the public-private partnership which ICANN is, for the private sector to work with governments through the GAC and through law enforcement to proactively address those concerns when they happen. And I think that is probably one of the most important things, is the flexibility for the unknown.

Mr. MARINO. And this is a rhetorical question. We will think about this some other day. Who and how do we pay for this?

I yield my time.

Mr. GOODLATTE. I thank the gentleman.

The gentlewoman from Texas, Ms. Jackson Lee, is recognized for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, I thank you and I thank Mr. Watt for this hearing.

And I would just like to inquire, Mr. Chairman—Mr. Chairman, I am inquiring. A question to you. As I have listened in the time that I was here—I had a previous hearing—I think there are enough questions being raised that I would be interested in another hearing being held, more information coming forward. So I make that request whether it be a full or whether it be your Subcommittee. I think this is an important question to be able to address.

Mr. GOODLATTE. Well, it is an important question, and we are closely monitoring what is taking place. And the possibility of another hearing certainly is there. I wouldn't want to say at this point in time what or when we might do.

But go ahead and ask your questions now, and if you have additional questions, we certainly can submit them in writing to the witnesses.

Ms. JACKSON LEE. I will do so. I always think a full airing of the answers is important. But I thank you for that thoughtful answer and hopefully we will have that opportunity.

I think the idea of structuring the domain names that business will have to engage in and the expansion that has been proposed by ICANN—I can understand that it is a useful tool for allowing more businesses to use websites with new domain name extensions. But if I have to express my concerns on the record, it is that the expansion of the so-called generic top-level domain names does not occur too quickly and at the expense of doing harm to the owners of intellectual property, job creation, and consumer protection and competition.

I am going to look forward to holding some meetings to understand and vet this a little bit more extensively because I have always said that job creation is crucial to, I think, the purpose and the mission of this Committee.

So my first question to you, Mr. Pritz—and I think you are going to answer Ms. Waters' question on salaries. I would like it to be a little bit more extensive. Maybe you can put it in writing. I am not asking for an answer, but to respond back in writing to the Committee that we all have access to understanding those salaries in light of where we are today in the economy.

Now, we have held a hearing with the U.S. Office of the Intellectual Property Enforcement Coordinator about rogue websites and massive job-killing problems with counterfeiting in intellectual property and theft. And the businesses know that my interest has always been to promote American genius, and sometimes that is stolen. And the coordination of law enforcement is an important aspect.

What means is ICANN and its licensees who grant domain names taking to work with law enforcement to combat this thievery of the intellectual property and genius of America?

Mr. PRITZ. We work very closely with law enforcement agencies across the world. We have regular meetings with representatives from the FBI. We hold three ICANN meetings every year. At every meeting, we have a session that is coordinated by law enforcement to discuss domain abuses and ways to remedy those, and we have teams of people that cooperate with law enforcement to do that. And we worked also with law enforcement in crafting this version of the——

Ms. JACKSON LEE. Do we need to give you more resources, or do you need a different structure to help you block what is an ongoing effort by those who seek to steal intellectual property from the United States?

Mr. PRITZ. So I will answer that by saying ICANN makes significant investment and will use, to a certain extent, the increased revenue from this program to increase its activities cooperating with

law enforcement and work with them on rapid takedown mechanisms. We have also worked with registries to allow them to work to take down names that are infringing in a hurry.

Ms. JACKSON LEE. But you are concerned with this issue. Is that right?

Mr. PRITZ. Yes, we are very——

Ms. JACKSON LEE. And you are concerned with the impact on smaller businesses and single entrepreneurs. You consider them an important component to this process of intellectual property.

Mr. PRITZ. Yes, and we consider this new gTLD program to have the greatest beneficial effect on small businesses. One of the positive aspects of it will be that this program can bring those small businesses closer to its customers and will also allow for the creation of new businesses and jobs in that way.

Ms. JACKSON LEE. Let me quickly go to each person. Just give me a quick—it could slow down. Ms. Stark, could we slow this process down to get in the concerns that you are expressing heard. Yes or no?

Ms. STARK. I think that it is important to take the real time necessary to put into place the effective rights protection mechanisms so that we can truly reach the goal that we all have which is to ensure the integrity of that consumer experience.

Ms. JACKSON LEE. Mr. Palage?

Mr. PALAGE. I would not oppose a delay. However, if this new gTLD process launches on June 20th, I want to make sure everybody on that plane has a parachute.

Ms. JACKSON LEE. Mr. Metalitz?

Mr. METALITZ. I am not really sure that the timing of this is the crucial question. I think if we stretch out the process but it remains on this path of an unlimited opening of new gTLD's, hundreds at a time without any differentiation——

Ms. JACKSON LEE. You need restraints.

Mr. DelBianco?

Mr. DELBIANCO. Don't slow it down. Raise the bar and mind the GAC.

Ms. JACKSON LEE. Joshua Bourne? Mr. Bourne?

Mr. BOURNE. I believe that the ICANN community is so heavily biased in one direction that what you get will be fully predictable today or tomorrow unless ICANN is truly looked at under a microscope and potentially some adjustments are made to how they form policy.

Ms. JACKSON LEE. I thank you.

I thank you, Mr. Chairman. I think the key question is how do we create jobs and encourage businesses and answer Mr. Bourne's question and get the product that is going to be helpful to everyone in this room. And I think we can do that, and I hope that we are going to be engaged as this Committee, in terms of the oversight, as we move forward.

With that, Mr. Chairman, I yield back.

Mr. GOODLATTE. I thank the gentlewoman.

I have a couple of oversight questions I am going to ask myself. I had the opportunity to ask Mr. Pritz at length about blocks, and I did not ask some of the other folks and I would particularly like to ask Ms. Stark. Would you be supportive of a globally recognized

trademarks block list administered by ICANN's new trademark clearinghouse for the gTLD program? And do you think this block list would be easy to administer, more difficult? Do you think that the fact that ICANN already does it for technical marks from registration by new TLD's now would indicate that this is something that could be a success? What is your opinion on this?

Ms. STARK. Mr. Chairman, I think that is a wonderful point, and I really appreciate you raising it.

I do think that the block list is something that was originally recommended by the implementation recommendation team as one of the protections that would go the farthest and be the most helpful in protecting from the outset intellectual property abuses in this new expanded space.

I think that the fact that we already have within the system this idea of a trademark clearinghouse shows that it should be something that ought to be able to be administered by ICANN and could be effective. The trademark clearinghouse in some ways is an offshoot or a watered-down version of the idea of a block list. So I absolutely think it is administrable and I absolutely think that it could be very beneficial to mark owners.

Mr. GOODLATTE. Mr. Palage?

Mr. PALAGE. 10 years ago, I served as the chair of ICANN's working group B which was entrusted with addressing protection of famous trademarks, and we addressed the issue of a block list back in 1999. The difficulties then, which still exist today, is devising that list. I do think it is something that we continue to need to move forward with and that WIPO perhaps provides the best path forward on providing something that works on a global basis. But in the short——

Mr. GOODLATTE. So Mr. Issa and I and others who are interested in this would be out of luck. Is that what you are telling me?

Mr. PALAGE. That is the problem of coordinating a global resource. It is not easy.

But I do think the point that you have made earlier about ICANN including its names on a protected list—ICANN did have a reserved name working group in which I participated, and in that I basically called for the removal of that list so that ICANN should have to rely upon the very same trademark protections that it is asking the private sector to rely upon. So until that list by WIPO is created, I think ICANN's list should be removed and they should have to sleep in the same bed they are asking businesses to sleep in.

Mr. GOODLATTE. Mr. Metalitz?

Mr. METALITZ. Yes, I would just say, as Ms. Stark pointed out, this was recommended by the team of experts that ICANN asked the intellectual property constituency to bring into existence. And then the proposal simply died on the vine. We asked ICANN for some research assistance, in terms of developing some objective criteria. Never got it.

I don't think this is an insurmountable problem. It is a difficult problem to figure out who gets on the block list and what the criteria are, but I think if we put good minds to work on it, we could quickly come up with something.

Mr. GOODLATTE. Thank you.

Ms. Stark, can you estimate the potential costs to your one company for defensive registrations? What ends up happening if a domain goes into litigation?

Ms. STARK. Well, the litigation costs would be extraordinary. But yes, if there were, say, 400 new generic top-level domain names that were launched, we have done our own benchmarking within our company with all the divisions, and we would probably be looking at a list that is a minimum of 300 to 400 names that we would have to defensively register in each of those new spaces. If you anticipate a sunrise registration cost in each of those domains as being an average of $100 apiece, you are talking about a minimum of a $12 million investment.

Mr. GOODLATTE. Over what period of time?

Ms. STARK. Initially as they roll out each of those 400——

Mr. GOODLATTE. And are there ongoing costs as well?

Ms. STARK. There would be tremendous ongoing costs. We would have to hire personnel to monitor that portfolio to determine renewal of that portfolio. We will have to still look at all those gTLD spaces for the abuses that take place such as the one I gave in my example in my testimony of myfox2detroit, and then, of course, all the resources that are taken to enforce against those misuses, including litigation against phishing and scam operations and other fraudulent behavior, as well as——

Mr. GOODLATTE. What does a small business do? It is already trying to combat rogue websites and so on that are posing as being them. Mr. Palage?

Mr. PALAGE. As a small business operator, what I try to do is work closely with my clients so that they know how to get in contact with me. So I think, as I said——

Mr. GOODLATTE. Great, but what if you are looking for new clients? Or what if somebody has head of you and they are just trying to find you on the Internet?

Mr. PALAGE. This goes back to, I think, the point Mr. DelBianco raised of the search engines, Google and Bing. I am very fortunate. When you type in "Mike Palage," the first two pages on Google and the majority links on Bing will point people to me.

Mr. GOODLATTE. "Goodlatte" is the same way. But these are names that are a little more unusual then "Smith" or "Jones" or various businesses that have more common names or more easily confused names.

Mr. PALAGE. So again, as a small business, I did not get my initial desired dot com name and I have looked again at some of the other alternative strings, particularly since those are a number of the clients that I work with. So I think the future is going to be about empowering these new TLD operators to distinguish themselves because if all we are doing is duplicating the name space, then ICANN has failed. We need to sit there and create—there has to be real choice and real differentiation and empowerment in these new gTLD's, not a mere duplication.

Mr. GOODLATTE. Ms. Stark, you wanted to add something?

Ms. STARK. I do. Thank you, Mr. Chairman.

I think the real challenge and risk for small business owners is that they spend all this time and resource coming up with a name that they think can represent them in the marketplace that they

are working to establish the good will behind and get consumers to recognize, and that in this new unlimited gTLD space, especially if we have a plethora of undifferentiated gTLD's such as Mr. Palage is mentioning, all that could be for naught overnight.

I mean, the power of it being diluted to the point of it not being meaningful anymore in the marketplace is really a powerful concern. And so I think that is one of the real extreme challenges for any small business owner as they are going forward. They already are trying to put their marketing resources into good search engine optimization practices, into actual formal marketing, and to have to divert those resources into defensive registrations that are really not productive is really tragic.

Mr. GOODLATTE. Mr. Palage, do you think that ICANN's Government Advisory Committee should have greater authority, perhaps even veto authority over new programs or proposals that go beyond ICANN's core mission?

Mr. PALAGE. As I said in both my written and oral testimony, I think they need to be on equal footing. It is a private-public partnership, and GAC consensus should be treated the same way that a super majority vote out of the GNSO Council should have. So what I am basically proposing is if there is GAC consensus, it would take two-thirds of the ICANN board to reject that recommendation, the same as with the GNSO right now under the existing ICANN bylaws.

Mr. GOODLATTE. Mr. DelBianco, what do you think about that?

Mr. DELBIANCO. I agree with Mr. Palage's idea of a super majority.

Let's also make sure that the GAC is a little clearer with us than they have been in the past when they truly object to something. I think you were out of the room at the time, Mr. Chairman, but when the GAC registered its opinion on dot xxx, all it said to the ICANN community was the words there was "no active support." That left all of us in the ICANN community wondering whether that meant go, stop, we don't care, leave it up to you. So we would like the GAC to be as clear as they can when they do want to exercise, as you call it, a veto.

Mr. GOODLATTE. "No active support"? That was the language?

Mr. DELBIANCO. Yes.

Mr. GOODLATTE. I don't think that would indicate "go." It might indicate other things, but it doesn't indicate "go."

Mr. DELBIANCO. Right, but we didn't think it really indicated absolutely, unequivocally "no."

Mr. GOODLATTE. Right, got you.

Does the gentleman from North Carolina or the gentleman from Michigan have any additional questions?

Mr. WATT. Mr. Chairman, I just want to reiterate the first question. You know, I keep hearing all of these objections and yet nobody on this panel—Ms. Stark says it is going to cost her $12 million. Yet, she thinks this is a good idea apparently. I am having trouble finding the compelling good reasons for doing this. So I wanted to just go back and reask each one of you to give me your most compelling, good reason for doing this. Period. Maybe it is the way this hearing is structured that we have gotten all of the negative comments about it.

I understand that we got to protect ourselves from China insisting that the UN do it, but it seems to me that this is a false proxy for doing that because as soon as we get more name domains, gTLD's, whatever they are called, out there, then there is going to be some other reason that China wants the UN to do this.

I don't see how this adds to innovation. I still don't understand that. It adds to people changing names, but I don't know how that adds to any intellectual innovation that I can see. Now, maybe I am just missing something here, but please be serious about your written response. This is not a trick question. I am just trying to understand. I understand what Ms. Lofgren said about the dangers of not proliferating names, but that just seems to me to be a proxy for some other concerns that are out there that maybe I just am missing something here.

I yield back.

Mr. GOODLATTE. I think the gentleman's point is well founded. If you do this wrong, you could create a greater risk of China or someone else moving forward with an international governmental takeover of the Internet, which we have resisted and I have resisted with Ms. Lofgren. You could create a greater risk than going slow or doing less.

The gentleman from Michigan?

Mr. CONYERS. Yes, sir. Could I yield to Mr. Palage who wanted to make a comment?

Mr. PALAGE. Yes, thank you. The one word I would use is "empowerment" for where TLD's can make a positive difference. So I am concerned about the unlimited rollout, but in a controlled, responsible manner, you can have——

Mr. WATT. Write it to me.

Mr. PALAGE. I will.

Mr. GOODLATTE. Well, thank you all.

Mr. CONYERS. Just one second.

Mr. WATT. He was answering my question.

Mr. GOODLATTE. The Chairman emeritus is maintaining the floor.

Mr. CONYERS. I just was thinking that this concern about China, if we don't do something. Am I being too pessimistic to think that China is going to do something regardless. I mean, if you think they are waiting to see the outcome of this before they start organizing developing countries, you got another thought coming.

Could someone comment? All right. I will recognize you again and then we will go to my friend.

Mr. PALAGE. I was in Beijing in January working with a number of Chinese businesses that are considering moving forward with gTLD initiatives and will be returning to China next month.

Mr. CONYERS. So what do you draw out of that?

Mr. PALAGE. I think the statement is what happens if we don't do anything. I think there are some people that may take the initiative to move forward. So this is about moving forward in a responsible manner so that, going back to Mr. DelBianco, everyone is at the party. So when we have the party, we want to make sure that all the important people are there.

Mr. CONYERS. Well, Mr. Palage, what I think is that China is going to move forward whether there is a party or not, and what-

ever we do here—I mean, I just don't get the sense that this largest country in the world is waiting to see what the Subcommittee in Judiciary does and how well we persuade you. I don't think they are operating at that kind of minute level. They could maybe care less.

Mr. DELBIANCO. Mr. Chairman, I might suggest to you that China doesn't really care about the new TLD's. Prior to the launch of the new TLD's, they had already created their Chinese versions of com and org. They only worked in China, but they worked anyway.

China's main concern is the fact that we are having this hearing in this city in this room before this Committee because that is a screaming billboard to them that says that the U.S. Government is exercising sort of a legacy control and oversight over the domain name system and critical Internet resources. That is what bothers them. The don't believe that this Government should have anything like the oversight role that we have and that we should have, since we actually created the Internet, launched ICANN, wrote the Affirmation of Commitments.

I invite China to sign the Affirmation of Commitments and join us in committing and helping ICANN to be successful. They are probably not going to do that. But let's do all we can to deny them of 130 other votes at the UN by serving the interests of hundreds of countries who maybe aren't participating in ICANN yet, but other countries who know that the Internet is going to be a large part of the economic growth and prosperity of their citizens.

Mr. CONYERS. And the last word to Mr. Bourne.

Mr. BOURNE. I would just echo what Mr. DelBianco just said in the sense that they are going to do what they want to do regardless.

I think that a greater concern is to do this wrong and fail, as Mr. Palage pointed out. And I think it is possible to avoid that through exercising caution but also enabling a process to reconsider the decisions that were made 13 years ago and potentially put ICANN on a path to be truly independent rather than possessed by certain commercial interests that drive that process.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. GOODLATTE. I think you wanted to say something.

Mr. PRITZ. Yes, thank you. I agree with everything Steve DelBianco said about China, but certainly that is not the reason for moving forward, to avoid what some other country is going to do. The reason for moving forward is to realize the benefits of this program. It is impossible to predict innovation. We could discuss for a long time the examples of Google and MySpace and Facebook and all the unanticipated benefits and unanticipated good for Internet users that have sprung from the Internet. And this initiative, as developed by the broad Internet community, not the ICANN staff, has identified this and worked on this for 7 years as the way to bring the most benefit to users.

Mr. CONYERS. Then you are for more hearings in the Committee?

Mr. PRITZ. Well, no. I am for more hearings to review this process to see how it works, to make midcourse corrections, but the process has been reviewed for 7 years. Every issue that has been raised has been discussed.

Mr. CONYERS. Well, not here.

Mr. PRITZ. No, certainly not here. That is what the ICANN multi-stakeholder model is about. Right? It has been discussed for 7 years——

Mr. CONYERS. Look, we trust you infinitely, but do you mind if we make our own inquiry?

Mr. PRITZ. Of course, not.

Mr. CONYERS. Well, then can you get this June 20th date postponed? Because this is all immaterial as far as the chairman of your board is concerned.

Mr. GOODLATTE. Let me just say that I don't know how much attention China is paying to what we are doing here today, but I do hope that the executive branch of our own Government is paying attention to what we are doing here today because they have the critical role that our Government has in representing our collective interests with regard to ICANN's move forward.

I am just going to close with the advice, Mr. Pritz, that no one wants to hold back the development of the Internet, but it just seems to me that there is an unleashing here of something that ought to be done in a more orderly process with a little more attention paid to the input coming in from governmental entities because I think that the end result is going to be very critical to the future of ICANN. And all of us here want ICANN to succeed and to not have some kind of international governmental entity where some of the roles of some interests around the world are not really in terms of seeing the explosive growth of the Internet and the freedom that the Internet brings with it taking place, but rather to serve the interests of particular governmental leaders and governmental entities.

So we would caution you, I think, that doing this too quickly, doing this without consideration for how the Internet is going to impact a lot of individuals, large and small, and entities, large and small, that operate on the Internet is absolutely critical and there should be nothing magical about June for moving forward on this.

So I thank all of the witnesses for their testimony today. This has been the lively hearing I thought it would be.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond to as promptly as they can so that their answers may be made a part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, again I thank the witnesses and this hearing is adjourned.

[Whereupon, at 12:43 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

The Internet Corporation for Assigned Names and Numbers

June 7, 2011

The Honorable Robert Goodlatte
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte,

Thank you for the opportunity to provide additional information after the May 4, 2011 hearing regarding ICANN's new gTLD program before the House Subcommittee on Intellectual Property, Competition, and the Internet.

Below you will find ICANN's responses to Representative Coble's written question, as well as further information on questions raised during the hearing.

Please let me know if you have any further questions.

Best regards,

Kurt Pritz
Senior Vice President, Stakeholder Relations

Los Angeles	**4676 Admiralty Way, Suite 330**	**Marina del Rey, CA 90292**	**USA**	**T +1 310 823 9358**	**F +1 310 823 8649**
Washington, DC	1101 New York Avenue, NW, Suite 930	Washington, DC 20005	USA	T +1 202 570 7240	F +1 202 789 0104
Brussels	6 Rond Point Schuman, Bt. 5	B-1040 Brussels	BELGIUM	T +32 2 234 7870	F +32 2 234 7848
Sydney	Level 2, 48 Hunter Street	Sydney NSW 2000	AUSTRALIA	T +61 2 8236 7900	F +61 2 8236 7913

One World. One Internet

Representative Coble's Written Question

Question:

ICANN continues to encourage brand owners to register and use top-level domains which correspond to their brand names. ICANN's rules, as set forth in the most recent iteration of the Draft Applicant Guidebook, do not provide the brand owner with the ability to wind down or close their brand registry on their own terms. Instead, these draft rules would allow ICANN to reassign or redelegate the brand registry to a third party without the brand owner's consent.

Since reassignment of a brand registry to a party other than the brand owner is likely to confuse consumers and damage the brand, why isn't ICANN providing the brand owner with the ability to wind down the brand registry rather than redelegating it to a third party? If the brand registry is redelegated, how will the owner be compensated for any dilution?

Answer:

The potential for a brand owner to operate a TLD corresponding with its brand name has been one of the ideas for innovation in the top-level domain name space that the community has brought forward during the years of discussion of new TLDs. Just as with community-based or geographic TLDs, ICANN has responded to community comment in refining the new gTLD program to address a wide range of potential registry and business models. The most recent Applicant Guidebook, posted on May 30, 2011, contains a new provision responding to community concerns similar to those raised within your question.

The ICANN Bylaws state that preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet should guide ICANN's decisions and actions. In pursuit of this principle ICANN identified the need to define processes to transition a new gTLD from one registry operator to another, the Registry Transition process. This process will ensure that a transition occurs in a secure, stable and reliable manner, while minimizing the impact on registrants and gTLD users, and providing transparency to the parties involved in the transition.

This initial Registry Transition process within the new gTLD program however, as pointed out by the community, did not address circumstances when the gTLD was solely for the benefit of the brand holder. As those comments were well taken, the Applicant Guidebook now addresses circumstances where Registry Transition is not necessary for the protection of the public interest and where ICANN would *not* transfer the operation of the TLD absent the Registry Operator's consent. The proposed Registry Agreement set forth in the Applicant Guidebook posted on May 30, 2011 states:

> After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process; **provided, however, that if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) transitioning operation of the TLD is not necessary to protect the public interest, then ICANN may not transition operation of the TLD to a successor registry operator upon the expiration or termination of this Agreement without the consent of Registry Operator (which shall not be unreasonably withheld, conditioned or delayed).**

It is not up to ICANN to determine how Registry Operators will use new gTLDs. If one potential usage is for a company to apply for a gTLD for the sole benefit of the brand owner and no unaffiliated third party holds any registrations in the TLD, that Registry Operator has the ability to wind down operations as it sees fit and not open itself to the risk of a transition against the Registry Operator's consent.

Questions Raised During the Subcommittee Hearing

Question 1:

What is the most powerful, persuasive reason for the launch of new gTLDs? Why do we need to do this?

Answer:

The launch of new gTLDs will bring competition, innovation and consumer choice to the Internet. It will bring new protections to consumers (as well as brand holders and others) that do not exist today in the DNS. Within this safer environment, community and cultural groups are already anticipating how they can bring their groups together in new and innovative ways. Companies and consumers that do not use the Latin alphabet will be brought online in their own scripts and languages. Industries and companies will have the opportunity to explore new ways to reach customers. The years of community work in planning have produced a robust implementation plan, and it is time to see that plan through to fruition.

As the Subcommittee heard during the May 4, 2011 hearing, there is general support for launching the new gTLD program. All of the witnesses at the hearing testified that they were in support of a launch of new gTLDs. While my fellow panelists may have disagreed on the scope or timing of the launch, or noted their wishes for additional changes to be in place prior to the launch, each panelist offered compelling reasons to support the launch of the program. It is now time to move forward.

The launch of the new gTLD program arises as a result of ICANN's accountability to its bottom-up, multistakeholder model and adherence to ICANN's mission. The introduction of new top-level domains into the domain name system (DNS) has been a fundamental part of ICANN's mission from its inception, and was previously specified in ICANN's Memorandum of Understanding and Joint Project Agreement with the U.S. Department of Commerce.

How did that mission become Internet policy? The ICANN community has done an extraordinary amount of work towards the launch of new gTLDs. There have been two planning rounds in 2000 and 2003, which allowed a limited introduction of new TLDs. In 2005, ICANN's Generic Names Supporting Organization (GNSO) initiated a policy development process that culminated in 2007 with an overwhelming supermajority vote of ICANN stakeholder groups approving policy recommendations to guide the launch of the new gTLD program under consideration today. The ICANN Board approved those community-created policy recommendations in June 2008, and since then the community has been hard at work creating, commenting on, and refining the implementation of this policy.

At the hearing, I reported to the Subcommittee that there had been six versions of the Applicant Guidebook detailing the guidelines and requirements for the evaluation process, and 55 explanatory memoranda. On May 30, 2011, ICANN produced a seventh version of the Applicant Guidebook, accompanied by three additional explanatory memoranda. The current Applicant Guidebook provides further refinement to items that have been under discussion for years, and incorporates many additional areas of agreement with ICANN's Governmental Advisory Committee (GAC). Subject to final consultations at the upcoming ICANN meeting in Singapore, the new gTLD program is ready to move forward.

The launch of new gTLDs is limited. It is limited in time, through a firm application window. It is limited in delegation rate, to assure the security and stability of the DNS. After the launch of the first round of new gTLDs, a second application window will only be opened after ICANN completes a series of assessments and refinements – again with the input of the community. A launch of the program does not signal the end of ICANN's or the community's work. Rather, a launch will allow further improvements based upon experience.

Question 2:

Do ICANN employees have a financial interest in moving the New gTLD program forward in June? Will the program transform ICANN into a for-profit institution? Can you provide additional information on ICANN salaries?

Answer:

A June 2011 approval of the new gTLD program will not directly benefit any ICANN employee. As I discussed at the hearing, as the manager of the new gTLD implementation, some of my at-risk (bonus) compensation is based upon the timely completion of work to provide the ICANN community and the Board with information on the program that may serve as the basis for a Board decision on the program. This includes such work as meeting the Board-approved deadlines for the posting of the Applicant Guidebook and other program materials. Compensation is not dependent upon the Board's decision to approve the program. The timing of the approval of the Applicant Guidebook is a decision that rests with the ICANN Board. The Board set the timeline under which ICANN staff is operating.

ICANN has been careful in accounting for the new gTLD program. The ICANN community, as well as the policy itself, has advised that the new gTLD program should be revenue-cost neutral. Fees collected and costs expended for the operation of the program will be accounted for separately from ICANN's general funds. On May 17, 2011, ICANN posted its draft FY12 Operating Plan and Budget for community comment. The Draft FY12 Operating Plan includes a detailed breakdown demonstrating ICANN's budget with and without the launch of the new gTLD program within FY12. See http://www.icann.org/en/financials/proposed-opplan-budget-v1-fy12-17may11-en.pdf, at pages 59-60. More information regarding the budgeting and cost reporting for the program is available in a new gTLD program explanatory memorandum on the New gTLD Budget, at http://www.icann.org/en/topics/new-gtlds/explanatory-memo-new-gtld-program-budget-22oct10-en.pdf.

As a not-for-profit, ICANN salaries are set carefully in accordance with IRS rules and regulations. ICANN obtains advice from independent professionals with appropriate expertise in compensation arrangements for U.S. based non-profit tax-exempt organizations, including with respect to organizations possessing a global employee base. ICANN needs to remain competitive in its salaries, so that it can recruit and retain excellent talent. As discussed at the hearing, trillions of dollars of commerce now take place on the Internet, with millions of transactions occurring. The work of ICANN officers and staff is integral in maintaining the security and stability of this globally-interoperable system.

Extensive details regarding ICANN's compensation practices are posted publicly, along with regular updates on ICANN key employee compensation. The most recent posting on ICANN's compensation practices is available at http://www.icann.org/en/financials/compensation-practices-01mar11-en.pdf. The Compensation Practices document provides in depth discussion regarding the calculation of all ICANN employee salaries, including the calculation of at-risk or bonus compensation. In accordance with IRS regulations, ICANN also identifies on its annual Form 990 return its highly compensated employees.

There is a need to clarify one statistic regarding the salary of ICANN's CEO that was cited at the hearing and is incorrect if taken out of context. Both at the hearing and in other venues, a statistic has been circulated that ICANN's CEO, Rod Beckstrom, is "guaranteed" $2 million dollars. To be clear, this is not Mr. Beckstrom's annual salary. The "guarantee" is in reference to the three-year term of Mr. Beckstrom's contract, which calls for an annual salary of $750,000. As discussed in the Compensation Practices document, Mr. Beckstrom's salary is set by non-conflicted Board members, in compliance with IRS rules and regulations.

Question 3:

Will ICANN commit to create a block list of globally recognized trademarks?

Answer:

As Michael Palage discussed at the hearing, more than a decade ago, the World Intellectual Property Organization (WIPO) investigated the development of a global "register" for well-known marks, but was unable to identify objective, globally acceptable criteria. At that time, WIPO suggested that a quantitative measure, such as the number of countries in which a mark is registered, as the IRT (Implementation Recommendation Team) suggested, is not the proper basis for protection. Even if a mark is not registered on a global scale, WIPO pointed out, it may still be globally recognized. Creating objective criteria to determine what should be on such a globally recognized list, however, proved too difficult. ICANN relies on existing rights and official lists in creating its rules.

Additionally, much of the ICANN community does not support the creation of such a broad list. For example, ICANN's Governmental Advisory Committee (GAC) has advised ICANN that "it would not support the extension of the reserved list into a de facto 'Globally Protected Marks List' (GPML)." For the limited list of names that are currently reserved from registration, "the GAC supports ICANN's continued application of very tightly drawn criteria for inclusion on the reserved names list." The time, commitment and resources (from ICANN and the community) needed to create and maintain such a list would provide only marginal benefits as such a list would apply only to a small number of names and only for identical matches of those names.

Question 4:

Are there any proposed safeguards against the introduction of a new top-level domain containing terms such as racial epithets?

Answer:

The new gTLD program as set out in the Applicant Guidebook – the document that describes the application and evaluation procedures for the proposed new gTLD program – contains multiple safeguards against sensitive strings such as these completing the evaluation process.

First, all applied-for strings will be publicly identified during the evaluation phase, and posted for community comment. This provides the public with an opportunity to be aware of the applied-for strings.

Second, governments – through ICANN's Governmental Advisory Committee – may provide direct advice to the ICANN Board of Directors on public policy matters relating to any application, particularly those that may violate national law or raise sensitivities. The consensus opinion of the Governmental Advisory Committee will create a presumption that the application should not be approved. Individual governments may also file objections as set forth below.

Third, members of the public may formally object to applications for TLDs that: infringe the legal rights of the objector, misappropriate community names, are contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law, or raise a likelihood of user confusion with another TLD. For example, some of the grounds upon which an applied-for string may be considered contrary to generally accepted legal norms relating to morality and public order are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law; or
- Incitement to or promotion of child pornography or other sexual abuse of children.

Fourth, an Independent Objector, responsible for acting solely in the best interests of the public that uses the global Internet, may file an objection against "highly objectionable" applications to which no other objection has been filed, using process set out above.

ICANN has also considered the issue of financial support for funding the objection and dispute resolution process to better enable the community in filing objections as deemed appropriate. ICANN has committed to provide funding to the At-Large Advisory Committee for objection filing and dispute resolution fees. The At-Large Advisory Committee is the home within ICANN for the voice of the Internet end-user, and is expected to create a robust process to vet potential objections. In addition, ICANN has committed to provide funding to individual national governments to support the filing of individual objections.

Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Submitted by Mr. Steve DelBianco

At the 4-May-2011 hearing on ICANN 's gTLD Expansion, Ranking member Watt asked panel witnesses to state their reasons for an expansion of generic top-level domains. In response, I offer four reasons:

1. Internationalized Domain Names. Presently, all generic top-level domains are in Latin alphabet and the English language. That may be good enough for the 1.5 billion users already on the Internet today. But of the next billion Internet users, less than half speak English. Moreover, 56% of the planet's population uses scripts other than Latin for reading and writing (e.g. Arabic, Chinese, Japanese, Korean, Hebrew, Greek, Urdu, etc.). The only way that non-Latin script users can enter domain names and email addresses entirely in their native scripts is to offer new gTLDs in non-latin characters. Attached is a comparison of the four types of TLDs, showing examples of non-Latin characters.

2. How can we grow the Internet if we stop the growth of the domain name system? The Internet is continuing to foster dramatic growth in the number of websites, pages of content, applications, and online services. If we do not expand the available top-level domains, this growth will be constrained when registrants find that their desired domain name is not available in the limited number of generic TLDs.

3. Competition. The original mandate that the US Government set for ICANN included increasing competition in the market for registration of domain names. For businesses who use domain names, **Competition** is the availability of multiple suitable TLDs where registrants may seek their desired domain name at reasonable prices and terms.

4. Choice. The Affirmation of Commitments executed between the US government and ICANN states that choice is among the imperatives for any expansion of new TLDs. For business users of the Internet domain name system, **Choice** is the availability of TLDs that offer different propositions as to the declared purpose and promised integrity of permitted registrants. A new .bank TLD, for example, might offer registrants enhanced security tools and rigorous screening to maintain consumer confidence in online banking.

Thank-you again for the opportunity to testify at the hearing last week. Please let me know if I can provide any additional insights or information.

Changes Coming to Top-level Domains

	Generic Domains gTLDs	Country-code Domains ccTLDs
Latin Alphabet	Most are managed thru contracts with ICANN **.biz .com .edu .gov .mil .net .org .travel** *110 million names in 21 TLDs*	Most are controlled by governments **.au .br .cn .de .uk .us** *75 million names in 240 TLDs*
Non-Latin scripts	Arabic .org → .إختبار Chinese .org → 测试. Cyrillic .org → .испыта	Arabic .eg → مرصد Chinese .cn → 中国. Cyrillic .ru → **.рф**

NetChoice
Convenience
Choice
Commerce