

COALITION FOR ONLINE ACCOUNTABILITY

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June 20, 2016

Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Honorable John Conyers, Jr.
Ranking Member, Committee on the
Judiciary
U.S. House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Patrick Leahy
Ranking Member, Committee on the
Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Goodlatte, Ranking Member Conyers, Chairman Grassley, and Ranking Member Leahy:

As Congress deliberates on the proposed transition to the Internet Corporation for Assigned Names and Numbers (ICANN) of the last functions of the Domain Name System (DNS) that remain under U.S. government oversight, it is timely to update you, on behalf of the Coalition for Online Accountability, on key developments since COA last testified on this topic thirteen months ago, before the House's Subcommittee on Courts, Intellectual Property and the Internet.

The bottom line on these developments is that significant questions remain regarding ICANN's current readiness to undertake all the roles which the "IANA functions transition" would remove from U.S. oversight. This letter focuses on two such questions: contract enforcement (which was a focus of our House subcommittee testimony in May 2015) and ccTLD redelegation (which has arisen since then).

1. Will ICANN enforce its contracts?

In our testimony last May, COA noted that "ICANN's multi-stakeholder model boils down to replacement of governmental regulation by private contracts and community oversight in managing the DNS. Strong contracts, vigorously enforced, are essential to this model." We raised questions at that time about ICANN's record of enforcement of obligations in its contracts

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Counsel: Steven J. Metalitz (met@msk.com)

with domain name registrars that require the registrars to respond to complaints that domain names they sponsor are being used for copyright or trademark infringement, or other illegal activities.

Regrettably, this situation has not improved over the past year. COA participants have brought to the attention of domain name registrars numerous examples of registrants who are using their domain names to operate sites that are clearly built upon the routine, blatant, egregious and pervasive infringement of copyright, particularly the theft of U.S. sound recordings, movies, and TV shows, including content that has not yet been licensed for online dissemination anywhere in the world. All too often, these registrars take no effective action to respond or even to investigate these complaints; and although several of these cases have been escalated to formal requests that ICANN investigate violations of the registrars' contractual obligations to ICANN, most of these request have been summarily dismissed, and none has resulted (to our knowledge) in any adverse consequences for registrars that have turned a blind eye to this massive copyright theft.

COA's 2015 testimony also noted the important Public Interest Commitments (PICs), taken on by all new generic Top Level Domain registry operators in their contracts with ICANN, that have the potential to sharply reduce the risk that this new space could become a haven for pirates, counterfeiters, and others who register domain names in order to carry out criminal activities. The new gTLD space is still very small compared to the footprint of the "legacy gTLDs" such as .com and .net, but COA participants have already begun to detect new gTLD domain names being used for sites that flagrantly and consistently violate copyright. Although several new gTLD registry operators have worked with some COA participants to remove these sites from the new gTLD space upon documented complaints, others have not. At the same time, COA is concerned by public statements from ICANN's Board chair that appear to signal an unwillingness to enforce these PICs, questioning whether the abuses to which they are targeted are somehow "outside ICANN's remit." The attached letter to ICANN's new CEO summarizes the concerns, and ICANN's failure to respond to them.

In sum, with regard to this critical issue, COA stands by the conclusion it expressed to the House subcommittee last May: If ICANN cannot effectively enforce the agreements it has signed, its readiness for the completion of the transition must be questioned.

2. Will the transition increase national security or legal risks in ccTLDs?

Another issue that has arisen during the negotiation of the plans for the IANA transition raises potential concerns for intellectual property protection, but also may have much broader implications. As you know, each of more than 250 UN-recognized countries, jurisdictions and territories has assigned to it a two-letter country code Top Level Domain (ccTLD), such as .us for the United States, .de for Germany, and so on. Today, as throughout ICANN's history, when a proposal is made to transfer operational responsibility for a particular ccTLD from one entity to another, the request is processed by ICANN; but the final decision to approve this transfer – a "redelegation," in DNS parlance – is made by the U.S. National Telecommunications and Information Administration (NTIA) in the Department of Commerce. When the IANA transition

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June 20, 2016
Page 3

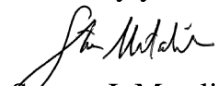
takes effect, this U.S. oversight will disappear. The question is what backstop mechanism replaces it.

When ICANN began, two years ago, to set “principles and criteria” for how it would operate the redelegation process and other IANA functions, it included a requirement that all such ICANN decisions would “be appealable by significantly interested parties”, and that the process for such appeals would “be independent, robust, affordable, timely, provide binding redress open to affected parties and be open to public scrutiny”. See *Proposal to Transition Stewardship of the IANA Functions*, <https://www.ianacg.org/icg-files/documents/IANA-transition-proposal-final.pdf>, at 88, paras. 7(v) and 5(vi). However, apparently after objections from entities within ICANN representing incumbent ccTLD operators, this provision for appeal was excised from the requirements. The final transition proposal lacks any oversight process for IANA decisions and actions regarding ccTLD root zone entries (including redelegations), and provides no timetable for developing such a process prior to the transition. See *id.* at para. 1160, page 62.

In short, it appears that the backstop that NTIA oversight currently provides against the risk that operation of a ccTLD might be redelegated to an entity affiliated with a sophisticated piracy and counterfeiting organization, a multinational criminal enterprise, or even a terrorist organization, is to be replaced with – nothing. Considering that every country on the globe, including notorious “failed states” and a number of sub-national territorial entities, is assigned its own ccTLD, it is hard to be confident that this risk is zero. We urge Congress to satisfy itself, before it approves the IANA functions transition, that the transition will not significantly increase this risk, to the detriment of global security and the rule of law on the Internet.

The continued oversight of the intellectual property impacts of ICANN policies and practices by the Judiciary Committees is greatly appreciated. Please do not hesitate to contact me if I can provide any further information.

Sincerely yours,



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

Attachment as stated

cc: Honorable Darrell Issa, Chairman, House Subcommittee on Courts, the Internet, and Intellectual Property
Honorable Jerry Nadler, Ranking Member, House Subcommittee on Courts, the Internet, and Intellectual Property
Honorable Lawrence Strickling, U.S. National Telecommunications and Information Administration (NTIA)
Mr. Göran Marby, President and CEO, Internet Corporation for Assigned Names and Numbers (ICANN)

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June 17, 2016

Mr. Göran Marby
President and CEO
Internet Corporation for Assigned
Names and Numbers (ICANN)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2563

Dear Göran:

I write to thank you for taking the time, during your first week on the job as ICANN CEO, to reach out to Greg Shatan and me as leaders of the Intellectual Property Constituency of ICANN's Generic Names Supporting Organization. I also write to follow up on one issue we discussed briefly on that call: ICANN's obligations to enforce its contracts, and specifically the Public Interest Commitments (PICs) contained in the agreements with registry operators for the new gTLDs.

As you know, under the PICs, every new gTLD registry operator must require their registrars to prohibit registered name holders in the new gTLDs from using their registered domain names to engage in specified forms of abuse, and to provide "consequences for such activities including suspension of the domain name." Among the specified abuses are listed "piracy, trademark or copyright infringement, fraudulent or deceptive practices, [or] counterfeiting". <http://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.htm>, Spec. 11 (Public Interest Commitments), section 3(a).

IPC considers these PIC obligations to be essential safeguards that must be vigorously enforced in order to promote the healthy development of the new gTLD namespace. They are especially critical to the creative sector groups participating in the Coalition for Online Accountability (COA), which I represent in the IPC, and on whose behalf I write today. These groups must confront on a daily basis the serious challenge of online abuse of their intellectual property rights, and have a vital stake in the success of what ICANN can do, within its mission, to encourage a healthy and safe online environment.

Accordingly, we were surprised and concerned by a recent public statement of the chair of ICANN's Board that cast serious doubt on ICANN's commitment to enforce the PICs. In a communication to the Governmental Advisory Committee on behalf of the Board, the Chair

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stated that four issues address by PIC 3(a) (piracy, copyright infringement, fraudulent or deceptive practices, and counterfeiting) “appear to be outside our mandate,” and was silent regarding trademark infringement, which the GAC Advice to which the Chair was responding also listed. Over the past few years, the Board has authorized the signing of hundreds of new gTLD registry agreements that specifically address these five issues. The Chair’s public statements on behalf of the Board threaten to undermine the credibility of these agreements, and of ICANN’s commitment to enforce them vigorously.

Furthermore, the revisions to the ICANN by-laws that the Board approved just last month explicitly enshrine ICANN’s authority “to negotiate, enter into and enforce agreements, *including public interest commitments*,” and specifically bar any party from challenging the PICs or other provisions of the new gTLD registry agreements “on the basis that such terms and conditions conflict with, or are in violation of, ICANN’s Mission or otherwise exceed the scope of ICANN’s authority or powers.” Revised By-Laws, § 1.1.d.ii and iv (emphasis added). This new articulation of ICANN’s core values and mission statement makes it even more pressing to clarify whether the Board in fact holds a contrary view.

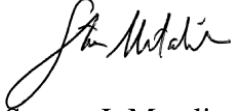
As mentioned on our call, IPC wrote to the Board Chair on April 11, asking for an explanation of his statements to the GAC, and posing several follow-up questions. <https://www.icann.org/en/system/files/correspondence/shatan-to-crocker-11apr16-en.pdf> To date we have received no reply from the Chair.

This was the context in which we discussed on our call the “open letter” you received from the Internet Association, and your reply dated May 27. See <https://www.icann.org/en/system/files/correspondence/marby-to-beckerman-27may16-en.pdf> We do not read your statements in that reply about ICANN’s Mission and Core Values as inconsistent with the new by-laws provisions cited above, nor with the need for strong ICANN enforcement of the PICs as well as other contractual obligations it has entered into. We know, though, that others may be reading your statements differently, and thus encourage you to look for early opportunities to spell out your commitment to vigorous contract compliance, and thereby set the right tone for your initial weeks as ICANN CEO.

Finally, may I note again how central the contract compliance function is to your role as CEO, and indeed to the entire multi-stakeholder model on which ICANN is based. That model depends fundamentally on the credibility of ICANN’s commitment to enforce the obligations contained in the contracts it has entered into with providers of services critical to the Domain Name System. If that credibility is undermined by signals that ICANN will give those obligations a cramped interpretation, or reduce them to the mere duty to recite “magic words” in service agreements, without regard to whether those provisions are ever enforced, then the compelling argument against regulation of the DNS by one or more governments is seriously, and perhaps fatally, weakened. At the same time, while you are surely correct that the role of ICANN CEO is in many ways unlike that of almost any other corporate or non-profit CEO, it seems indisputable that achieving effective contract compliance is a core implementation function that lies at the heart of your job. COA participants look forward to further dialogue with you on this issue, and to working with you toward the shared goal of an ICANN that excels in the performance of the critical role assigned to it in Internet governance.

Mr. Göran Marby
June 17, 2016
Page 3

Sincerely yours,

A handwritten signature in black ink, appearing to read "Steven J. Metalitz", written in a cursive style.

Steven J. Metalitz
Counsel to COA

cc: Greg Shatan, President, Intellectual Property Constituency (IPC)
Thomas Schneider, Chair, Government Advisory Committee (GAC)
Steve Crocker, ICANN Board Chair
Honorable Larry Strickling, National Telecommunications and Information
Administration (NTIA)