

COALITION FOR ONLINE ACCOUNTABILITY

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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

Should the Department of Commerce Relinquish Direct Oversight Over ICANN?

Prepared Testimony of

Steven J. Metalitz
Counsel, Coalition for Online Accountability

Before the

**Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
United States House of Representatives**

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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)

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

The Walt Disney Company

Chairman Coble, Ranking Member Nadler, and members of the Subcommittee:

Thank you for convening this hearing on the recent announcement by the National Telecommunications and Information Administration (NTIA) that it intends to allow its contractual control over ICANN's exercise of the "IANA function" to expire late next year. We especially appreciate this opportunity to provide once again to this subcommittee the perspective of associations, organizations, and companies that depend upon the rules set by ICANN to enable them to enforce their copyrights and trademarks online.

About COA

The Coalition for Online Accountability (COA), which I serve as counsel, and its predecessor organization, the Copyright Coalition on Domain Names (CCDN), has played an active role within ICANN since 1999. Today, when studies show that streaming audio and audio-visual content consumes far more Internet bandwidth than any other application, it is more important than ever that the voice of the creative community that depends on copyright protection is taken into account.

COA participants include 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 focus is the Domain Name System (DNS) administered by ICANN. Our main goal is to enhance and strengthen online transparency and accountability, by promoting the continued availability of the data needed for effective enforcement against online infringement

of copyrights and trademarks. COA has also been an active participant in ICANN's work to develop the new gTLD program, both on its own account and as a member of ICANN's Intellectual Property Constituency (IPC). COA (and CCDN) have testified six times before this subcommittee or its predecessor on domain name issues, and we welcome the opportunity to do so again today.

I. The NTIA "Transition"

NTIA's announcement certainly is important, and a proper topic for this subcommittee's ongoing oversight. It may help at the outset to be specific about what it involves.

A. The "IANA Function"

The transition recently proposed by NTIA concerns the "IANA function" that ICANN performs, and that NTIA oversees pursuant to its contract with ICANN. In the domain name system (DNS), the IANA function involves any changes to the authoritative listing of Top Level Domains – the space "to the right of the dot" – and the registries responsible for operating them.

Today, it is ICANN that decides which generic Top Level Domains (gTLDs) there will be, and who will operate them. It is ICANN that ratifies the decisions of others on these topics, in the case of country code Top Level Domains (ccTLDs). The IANA function is the documentation of those decisions and the process of making them operational.

NTIA's job in the IANA process is to make sure these steps are properly executed. Someone needs to perform that job in an accountable and transparent manner. If the entity performing that role is to change, it is critical that any proposed alternative be carefully evaluated, with input from the major stakeholders, including the content community.

B. ICANN's Other Critical Roles in the DNS

It is also important that we continue to focus on those important aspects of managing the domain name system that have already been transitioned from NTIA. In 2009, when NTIA let its Joint Project Agreement with ICANN expire, and substituted for it an Affirmation of Commitments (AOC), it marked a significant change in the U.S. government role. Notably, the AOC lacks any concrete enforcement mechanisms, and provides that either party – the Department of Commerce, or ICANN – may unilaterally withdraw from it on 120 days' notice.

Thus, for the past five years, ICANN has carried out many of its most important and impactful functions under the aegis of the AOC, and not on the basis of an enforceable contract with NTIA. These functions include (1) the biggest and most far-reaching initiative in ICANN's history – the rollout of thousands of new generic Top Level Domains – and (2) management of one of the most important Internet public resources that has been consigned to ICANN's stewardship – the database of contact data on domain name registrants usually referred to as Whois. Whois, and new gTLDs, also represent the core of this Committee's oversight activities regarding NTIA and ICANN over the past 15 years.

The challenges presented by these issues – and by others that ICANN is now grappling with – lie well outside the boundaries of the “IANA function.” But they are vitally important to key national economic interests, including but not limited to the major U.S. industry sector that relies on strong copyright protection, especially in the online environment. That sector now contributes one trillion dollars annually to the U.S. economy, and provides almost 5.4 million good American jobs. These issues are also critical to the huge U.S. business and consumer interest in preventing trademark infringement and similar fraudulent conduct on the Internet.

Active U.S. government involvement to protect these interests, and active oversight by this committee of the government's efforts to do so, will be just as critical in the years ahead as they have been over the past decade and a half – regardless of whether or not NTIA retains its contractual oversight of the IANA function.

C. Vehicles for U.S. Government Involvement

So how can the U.S. government maintain or even increase its active involvement on the important issues facing ICANN, above and beyond any possible “transition” of the IANA function? Two main vehicles are worth highlighting.

First, NTIA (and through it, other U.S. government agencies) should ramp up their engagement in ICANN's Governmental Advisory Committee (GAC). The U.S. government has always been a stalwart supporter of the GAC. In recent years, the GAC has become far more influential in shaping ICANN decision-making, particularly with regard to the new gTLD program. The U.S. government has played a vital role in these developments.

While COA does not agree with every position the GAC has taken regarding new gTLDs, on the whole the GAC influence on the process has been highly positive. In particular, the protections and safeguards for intellectual property rights in the new gTLDs, both against cybersquatting and other trademark infringements, and against the risk that the new gTLDs will become havens for copyright piracy and counterfeiting activities, are far stronger today than they would have been without the active involvement of the GAC. If these protections and safeguards are to be meaningfully implemented in practice, and ultimately to be brought to bear in the legacy gTLDs as well as the new ones, the GAC needs to remain vigilant, proactive, and forthright in providing its advice to ICANN's board and senior management.

There is some historical reason for optimism for the future US role in the GAC. From our perspective, it is not coincidental that, starting in 2009, as the US government stepped back from its comprehensive oversight role with ICANN under the Joint Project Agreement, it has become more active in the GAC, and has successfully encouraged some other governments to contribute constructively as well to GAC efforts to improve the new gTLD program. We hope that, no matter what happens regarding the IANA function, NTIA will redouble its efforts to make the GAC an effective and efficient channel for pressing ICANN to protect intellectual property rights, as well as other public interest priorities, throughout the Domain Name System.

Second, nothing flowing from the NTIA's recent announcement would change ICANN's obligation, spelled out in the Affirmation of Commitments, to remain a not-for-profit corporation headquartered in the U.S. and organized under U.S. law. This means that ICANN's structure and activities are ultimately subject to the jurisdiction of U.S. courts. The status of ICANN under U.S. law, as enshrined in the AOC, is a critical fail-safe feature.

II. What Comes Next

What are the critical challenges facing the U.S. government in its relationship to ICANN in the next months and years, and how important to meeting those challenges is strong oversight from Congress?

A. IANA Transition

The first question is what would replace NTIA's role in oversight of ICANN's stewardship of the IANA function if a transition were to occur? NTIA has stated that that a "transition" should not happen unless and until four critical parameters are met: enhancement of

the multi-stakeholder governance model; maintaining the security, stability and resiliency of the DNS; meeting the needs and expectations of global customers and partners of the IANA services; and maintaining the Internet as a global platform for discourse. It has also indicated that subordinating the IANA function to the oversight of a purely governmental or intergovernmental institution would not be acceptable.

There is widespread agreement on these criteria, as far they go. The challenge will be to implement these criteria rigorously in evaluating whatever successor model for IANA function oversight is proposed. In addition, both in evaluating IANA transition proposals, and in the broader Internet governance debate now unfolding, we urge NTIA, and other US government agencies, to spell out some other sound governance principles that may be implicit in its stated parameters, but that would benefit from greater visibility. These include:

- the need for meaningful participation by all interested parties, and for maximum feasible transparency in how the IANA function is carried out;
- protection of intellectual property rights as a critical ingredient for healthy growth and innovation in the Internet environment; and
- respect on the Internet for the rule of law, consistent with international norms and the principles of a free and democratic society.

Recently 38 global entertainment and cultural organizations, including several COA participants, joined together to emphasize that any new Internet governance structure must ensure a safe, stable, and secure Internet supported by the rule of law and the sovereign rights of states, consistent with international norms and the principles of a free and democratic society. I

attach to this statement the joint submission these organizations made to the upcoming NetMundial conference in Brazil.

ICANN has just kicked off the process for developing a transition proposal that NTIA will evaluate against these criteria. COA looks forward to participating in that process, both directly and through the ICANN IPC. Whatever specific proposal emerges, the process will almost inevitably cast a spotlight on ICANN itself. So it is appropriate to review ICANN's recent performance, the main challenges it faces, and the critical role that NTIA and the rest of the U.S. government, under Congressional oversight, must play in meeting them.

B. ICANN's Recent Track Record

When COA last testified before this subcommittee two years ago on ICANN's planned rollout of thousands of new generic Top Level Domains, the picture was rather gloomy. I am glad to report on a number of positive developments since then:

- Requirements for the new gTLDs were expanded to include a number of important safeguards, including some modest but meaningful improvements in the “rights protection mechanisms” available to prevent rampant cybersquatting in the new gTLD space, and to quickly and efficiently redress abusive registrations when they do occur.
- Perhaps more significantly from COA's perspective, all the new gTLDs must now take on “public interest commitments,” subject to ICANN contract enforcement, 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.

- ICANN has also issued a new (2013) version of its standard Registrar Accreditation Agreement (RAA), binding domain name registrars to somewhat stronger obligations to improve the accuracy of the Whois data on which intellectual property owners, law enforcement, consumers and members of the public rely to learn who is responsible for particular domain names and the websites and other Internet resources associated with them. The new RAA obligations apply to all registrations made in new gTLDs, but also to registrations in .com, .net and the other “legacy” gTLDs that are sponsored by the same registrars; and gradually, as contracts under the earlier versions of the RAA expire, the vast majority of domain name registrations across all gTLDs will become subject to these somewhat tougher Whois accuracy standards.
- ICANN is also taking other steps, following recommendations of a cross-constituency review team convened pursuant to the AOC, to try to improve access to, and accuracy of, Whois data. These include making available a single portal through which all gTLD Whois data can be accessed, and developing automated tools for identifying unverifiable Whois data, forwarding it to the responsible registrar, and monitoring follow-up efforts to either make the data accurate or suspend the registrations.
- Finally, ICANN has just adopted a consensus policy to require the two largest gTLD registries – .com and .net – to end their outlier status and consolidate all

Whois data at the registry level, rather than dispersing it across a thousand registrar databases around the world. This requirement to move to the so-called “thick Whois” architecture will make vital data more readily accessible and facilitate enforcement of Whois data accuracy requirements.

No one person or entity can take credit for all these significant improvements. As I have already mentioned, the invigorated activities of the GAC have been a critical ingredient in pressing ICANN forward, especially with regard to safeguards in the new gTLDs; and the responsible positions taken by some of the leading contracted parties against use of their services by pirates, counterfeiters, and other cyber-criminals must also be commended. However, a great deal of the credit must go to the new senior management of ICANN, and especially to its CEO, Fadi Chehade, who has brought a unique combination of pragmatic and visionary leadership, and seemingly inexhaustible energy, to a position that had long been lacking in both.

C. The Challenges Ahead

The main challenge facing ICANN today can be summed up in one word: execution. All the positive developments I have just described look pretty good on paper; but ICANN must make it a primary objective to ensure that they are thoroughly, promptly and proactively implemented by all the parties with which ICANN has contracts. It should never be forgotten that the essence of the much-talked- about “multi-stakeholder model” of DNS governance boils down to the replacement of governmental regulation of a critical public resource with private contractual constraints and community oversight. This model only works when those contracts are strong and when they are vigorously enforced.

Candidly, over the past decade and a half, ICANN’s track record on contract compliance does not inspire confidence. The development of stronger, clearer contracts, and the arrival of new leadership that stresses its commitment to contract compliance, are hopeful harbingers of change. But the challenge of instituting a true “culture of compliance” under thousands of new contracts with hundreds of new players is daunting; and some of the preliminary indications are not reassuring. Already, even before more than a handful of new gTLDs have gone live, we are seeing evidence of registry operators gaming the new rights protection mechanisms, seeking to circumvent the obligation to give trademark owners the option of pre-emptive registration of their marks as second level domains during a “sunrise period,” and undercutting the requirement that other registrants be put on notice when the domain name they seek to register is subject to the trademark claims of others. Whether ICANN can nip these problems in the bud could be a litmus test of how it responds to the compliance challenge. Will ICANN’s hard-working compliance staff be given the resources, the authority, and the institutional support they need? This question remains to be resolved; and the USG, along with like-minded governments, needs to keep the pressure on ICANN to resolve it.

ICANN’s execution challenge is not limited to enforcement of its existing contracts. It must also deliver on its commitment to make the current Whois system work for the millions of people, businesses and governments that rely on it. Steps to improve Whois accuracy have been promised, but are very slow in coming to fruition. The one-fifth or more of gTLD registrations that lurk in the shadows of the public Whois, through a completely unregulated proxy registration system, need to be brought into the sunlight, whenever the system is manipulated to make it impossible to identify or contact those responsible for abusive domain name registrations. The first steps toward greater accountability and transparency for the so-called

“.proxy” world were taken in the 2013 RAA, and must be actively enforced; but ICANN urgently needs to develop a more comprehensive and practical long-term solution.

A final challenge for ICANN in the gTLD space has already been flagged by NTIA and by many others (including the IPC), but ICANN’s response to it is unclear so far. Today, 99.9% of the problems we copyright and trademark owners encounter in gTLDs do not arise in the embryonic new gTLD space, but in the existing gTLDs – .com, .net, and the other twenty “legacy” registries. While that proportion will surely decline over time, as the new gTLDs take off, the improvements engineered into the new gTLDs will not directly apply to the main battlefield against online piracy, counterfeiting, and other infringements: the legacy gTLDs. How quickly can ICANN enable us to use this new arsenal on the main battlefield by applying these additional safeguards to the legacy gTLDs? It will take persistent pressure from USG and other concerned governments, as well as some bold leadership from ICANN senior management, to accelerate this critical process. The new consensus policy for “thick Whois” in the legacy gTLDs was an important step forward, but far more needs to be done.

Finally I need to note one other DNS area in which US government engagement, as well as strong Congressional oversight, is critical. The gTLD space is only one half of the domain name universe. The hundreds of two-letter country code TLDs, as well as a growing handful of ccTLDs using non-Latin characters, generally operate outside the matrix of ICANN contractual norms, and with very little oversight from ICANN or any other body. When pirates, counterfeiters and other online criminal operations set up shop in a ccTLD, the safeguards and remedial processes developed within the ICANN framework may be of little use.

There is no simple solution to this problem, but part of the answer surely lies on the inter-governmental level. Each ccTLD is associated with a specified geographic territory that is subject to the control of some national government, even though in many cases the operator of the TLD is entirely a non-governmental organization. Our government needs to work with other governments, through trade agreements, law enforcement relationships, and other means, to develop functional protocols for preventing abuse of ccTLD registration by criminal elements, up to and including the risk that some small ccTLD might be captured by bad actors. This is not an agenda item for NTIA alone, but certainly that agency has a great deal to contribute to finding effective solutions in this space.

Thank you for providing this opportunity to present the views of COA. I would be glad to respond to any questions.



Global Entertainment and Cultural Industry - Internet Governance Principles

- Area: SET OF INTERNET GOVERNANCE PRINCIPLES
- Entitled by: Ricardo Castanheira
- Region: Africa, Asia-Pacific, Canada, Caribbean, Central America, Europe, Mexico, South America, United States
- Organization: 37 Entertainment and Cultural Organizations from around the world (full list attached)
- Sector: Private Sector
- Keywords: Entertainment and Cultural Industry, rule of law, intellectual property, Tunis Agenda

Abstract

The Internet is changing lives all over the world. Once connected, people have access to job opportunities, products, and services that were previously unthinkable. People also rely on the Internet for entertainment and culture. We know from recent studies that consumer demand for online content is skyrocketing, which is driving broadband deployment. To ensure continued and sustainable growth of the Internet, the entertainment and cultural industry supports a governance structure that: Benefits from meaningful participation by all interested parties, which requires that stakeholders share knowledge and information; Fosters growth and innovation, which means systems must be interoperable and intellectual property rights protected; and Ensures a safe, stable, and secure Internet supported by the rule of law and the sovereign rights of states, consistent with international norms and the principles of a free and democratic society.

Document

The Internet is changing lives all over the world. Once connected, people have access to job opportunities, products, and services that were previously unthinkable. People also rely on the Internet for entertainment and culture. We know from recent studies that consumer demand for online content is skyrocketing, which is driving broadband deployment. To ensure continued and sustainable growth of the Internet, the

entertainment and cultural industry supports a governance structure that:

- Benefits from meaningful participation by all interested parties, which requires that stakeholders share knowledge and information;
- Fosters growth and innovation, which means systems must be interoperable and intellectual property rights protected; and
- Ensures a safe, stable, and secure Internet supported by the rule of law and the sovereign rights of states, consistent with international norms and the principles of a free and democratic society.

These concepts stem from the 2005 *Tunis Agenda for the Information Society*. While the foundation for these principles was laid in Africa, we look forward to continuing the dialog in South America at the Netmundial conference in Brazil, and to future discussions in other international fora.

Supported by the following 38 entertainment and cultural industry associations from around the world:

INTERNATIONAL ORGANIZATIONS: IPA: International Publishers Association (representing organisations from more than 50 countries in Africa, Asia, Australia, Europe and the Americas); FIAPF: International Federation of Film Producers Associations (producers' organisations from 28 countries on five continents); IFPI: International Federation of the Phonographic Industry (1,300 member companies from 66 countries).

AFRICA: ANCOP, Nigeria: Association of Nollywood Core Producers; SAFACT, South African Federation Against Copyright Theft (Southern African film, home entertainment and interactive games industries).

ASIA-PACIFIC: HKRIA, Hong Kong Recording Industry Alliance Ltd; RIAS: Recording

Industry Association (Singapore); RIM: Recording Industry Association of Malaysia; RIT: Recording Industry Foundation in Taiwan; TECA: Thai Entertainment Content Trade Association.

CANADA: CMPA, Canadian Media Production Association; Music Canada.

CARRIBEAN, CENTRAL AMERICA, AND MEXICO: AGINPRO, Guatemalan Association of Performers and Phonogram Producers; AMPROFON, Mexican Association of Phonogram Producers; BSCAP, Belizean Society of Composers, Authors and Publishers; Cinemagic, Mexico; CLAC, Mexico: Coalition for Legal Access to Culture; COSCAP, Copyright Society of Composers, Authors and Publishers; JAMMS, Jamaica Music Society; SOMEXFON, Mexican Society of Record and Music Video Producers; PRODUCE, Society of Phonogram Producers of Panama; SODINPRO, Dominican Society of Record Producers; FONOTICA, Costa Rican Society of the Recording Industry.

EUROPE: ISFE, Interactive Software Federation of Europe; IVF: International Video Federation (representing video associations from Belgium, Denmark, Finland, France, Germany, Italy, The Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom).

SOUTH AMERICA: ABPD, Brazilian Association of Record Producers; ABLF, Brazilian Association of Phonographic Licensing; APDIF COLOMBIA, Association for the Protection of the Intellectual Property Rights of the Recording Industry; ASAP, Salvadorian Association of Phonogram Producers; CAPIF, Argentinean Chamber of Phonogram Producers; CUD, Uruguayan Chamber of the Recording Industry IFPI; CHILE, Chilean Phonographic Association; UNIMPRO, Peruvian Union of Phonograms and Music Videos Producers; SOPROFON, Ecuadorian Society of Phonogram Producers; SGP, Producers Society of Paraguay; PROFOVI, Society of Phonogram and Music Video Producers (Chile), SICAV - Sindicato Interestadual da Indústria Audiovisual (Rio de Janeiro).

UNITED STATES: AAP: Association of American Publishers; ESA: Entertainment Software Association; MPAA: Motion Picture Association of America; RIAA: Recording Industry Association of America.