

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) 355-7900 • FAX: (202) 355-7899 • E-MAIL: INFO@ONLINEACCOUNTABILITY.NET

July 2, 2015

VIA EMAIL

Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515
Attention: Eric Bagwell (*eric.bagwell@mail.house.gov*)

Re: Hearing on “Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet’s Operation” -- Responses to Questions for the Record

Dear Chairman Goodlatte:

Attached please find my responses to questions for the record from Representative Karen Bass (CA-37) following the Committee on the Judiciary’s Subcommittee on Courts, Intellectual Property, and the Internet’s hearing on “Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet’s Operation” that was held on May 13, 2015.

If you have any questions or require any additional information, please do not hesitate to contact me. Thank you once again for the opportunity to testify.

Respectfully submitted,

Steven J. Metalitz

Counsel, Coalition for Online Accountability (COA)

Attachment

3541-00001 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*)

Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on “Stakeholder Perspectives on ICANN:
The .Sucks Domain and Essential Steps to Guarantee Trust and
Accountability in the Internet’s Operation”

May 13, 2015

Questions for Record from Rep. Bass

Responses of Steven J. Metalitz
July 2, 2015

Question 1:

Have any of the groups and companies that you represent submitted notices regarding infringement and illegal activity to registrars and ICANN?

Yes. Several participants in the Coalition for Online Accountability have complained to accredited registrars that domain names sponsored by those registrars are being used to carry out pervasive copyright infringement. At least two of these organizations, after failing to get any meaningful response from registrars (and in some cases being told by registrars that such complaints are not allowed), have pursued the matter by complaining to ICANN, asking that the registrars in question be investigated for violations of provisions of the 2013 Registrar Accreditation Agreement, including the requirement in section 3.18.1 that registrars “investigate and respond appropriately” to such complaints.

Question 2:

In your opinion is ICANN taking adequate action to clarify and enforce the Registrar Accreditation Agreement (RAA) provisions?

No. At least as of the date of this response (July 2, 2015), ICANN compliance has not to my knowledge enforced these provisions against registrars that sponsor domain names used for pervasive copyright infringement. None of the complaints to ICANN referenced above has led to any ICANN enforcement action against registrars or (to the knowledge of COA participants) to any corrective action by registrars. Except for those complaints still pending as of the date of this response, all the complaints to ICANN that COA participants have brought have been summarily dismissed for the stated reason that the registrar has “investigated and responded appropriately” to the complaint made to it. Nor has ICANN issued any formal or informal clarification of the RAA provisions in question. ICANN compliance staff has talked for months about issuing one or more “advisories” to clarify the relevant RAA provisions, but to date has not done so.

Question 3:

Section 3.7.7 of the ICANN Registration agreement says that ICANN “shall use commercially reasonable efforts to enforce compliance with the registration agreement between ICANN and a

Registered Name Holder.” Then Section 3.7.7.9 of the agreement says that the Name Holder shall represent that, to the best of its knowledge and belief, its Name is NOT used in an infringing way. What are some commercially reasonable methods that ICANN can use to enforce compliance with this representation?

The RAA provision referenced in the question sets out the obligation of the registrar to use commercially reasonable efforts to enforce the representations that registrants are required to make in order to register a domain name. This includes the representation in section 3.7.7.9 that, “to the best of the Registered Name Holder’s [i.e., the registrant’s] knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party.” ICANN’s role is to enforce this obligation taken on by the registrar.

At a minimum, commercially reasonable efforts by the registrar would include investigating any complaint received from a third party that provides a reasonable basis for believing that a particular registrant is not fulfilling this representation, based on evidence that (1) a particular domain name is being used in a manner that infringes the rights of that third party (for example, by operating a website to which that domain name resolves that is engaged in or facilitating pervasive copyright infringement), and (2) the registrant is or reasonably should be aware of such use. Leaving to one side whether this provision imposes any proactive obligation on the registrar, it cannot be commercially reasonable for registrars to turn a blind eye to well-documented complaints of this kind; and those that do so should be subject to enforcement action by ICANN for non-compliance with section 3.7.7. Please note that some of the complaints to registrars summarized in response to the preceding two questions have specifically cited this provision; as noted above, none of these complaints has resulted in any corrective action.