

Statement of

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The logo for NetChoice, featuring the word "Net" in a bold, dark blue font and "Choice" in a lighter blue font, all in a sans-serif typeface.

Testimony before the

House Judiciary Committee

Subcommittee on Intellectual Property, Competition, and the Internet

“ICANN Generic Top-Level Domains (gTLD) Oversight Hearing”

May 4, 2011

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.

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

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

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

³ Ibid.

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. 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

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

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.

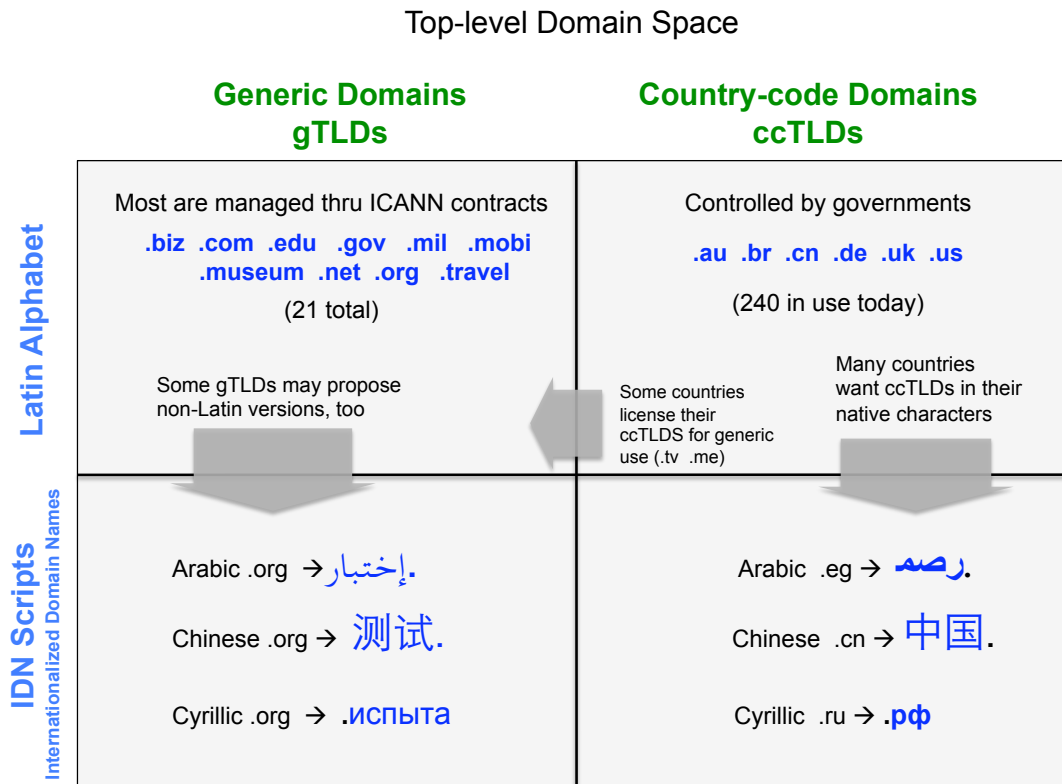
The loss of government support is the largest threat to ICANN's future. On the other hand, the GAC can be ICANN's best ally if they're treated right. When ICANN holds its next meeting on new gTLDs, we hope to see more community members sporting "MIND THE GAC" T-shirts.



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 Latin⁵. 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,

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

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 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.

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>

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.

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.