ICANN Generic Top-Level Domains (gTLD) Oversight Hearing

Prepared Testimony of

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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 short-comings 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 actions 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.

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

Appendix

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