

The ICANN GNSO “Business Constituency”



May 8, 2015

Mr. Akram Atallah
President, Global Domains Division
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Dear Mr. Atallah:

The Business Constituency (BC) is writing to ask ICANN to take strong action to address the troubling practices of Vox Populi Registry, a Canadian company to whom ICANN awarded an exclusive contract to operate the new generic top level domain (gTLD) known as .sucks. Definitive enforcement action is called for to support the community consensus represented by ICANN agreements and policies.

The way Vox Populi is bringing this gTLD to market runs counter to the Registry Agreement with ICANN and the intent of Consensus Policies on which this Agreement is based. Unaddressed, this creates a precedent that will seriously undermine the integrity of the systems that have been developed by community consensus, in carefully deliberated policy development processes, to minimize the potential for abuse and promote consumer confidence in the Internet as a safe, secure, and reliable place to conduct business.

ICANN has informed the community that its general counsel has sought clarity from relevant regulatory agencies in the United States and Canada as to whether Vox Populi's actions are illegal. We would like to understand the rationale for doing so. ICANN has ample authority, a clear obligation and the resources available to stop rogue practices through its contractual agreements with registries, its Compliance Department, and its broad duty to protect the public interest and the security and stability of the Internet, particularly for issues with global reach. Like all other gTLDs launched under ICANN's program, .sucks has a global reach. It is not clear why ICANN feels it should seek clarification from these two North American agencies.

Because ICANN has sought the advice of these agencies, the BC has opted to liaise with them. However, whatever clarification they provide to ICANN, while it may be helpful to the Board in its further consideration of the issue, should not be determinative. Regardless of the lawfulness of Vox Populi's pricing scheme, the practices represent a violation of the Registry Agreement and Policy and need to be addressed by ICANN.

The dangerous effects of Vox Populi's practices have been well outlined in the Intellectual Property Constituency's (IPC) March 27, 2015 letter to Mr. Akram Atallah, President, Global Domains Division at ICANN. The BC shares IPC's concerns about those practices and their

deleterious effects on businesses and consumers. Notably, the BC is concerned about the downstream effects of these practices on both consumers and ICANN. By discouraging trademark owners from using a key rights protection process, Vox Populi is in fact encouraging bad faith registrations at the second level of .sucks and thereby increasing the likelihood of trademark infringement, cybersquatting, confusion, and fraud in the domain space to the detriment of consumers, businesses, and the Internet community as a whole. Rights protection policies are based on the tenet that registration processes should be designed to minimize the potential for abuse and circumvention, not enhance that potential. Material departures from agreed upon approaches should be measured against this basic tenet. The process Vox Populi has established for .sucks does not hold up well under that analysis.

In addition, the BC is concerned with the long-term impact on the policy development process at ICANN if this precedent is allowed to stand. The legitimacy of the consensus based ICANN process relies entirely on the willingness of participants to adhere to it, and the community's ability to enforce adherence. In this instance, the enforcement mechanism is through ICANN's enforcement of its Registry Agreement with Vox Populi. If ICANN fails to take action to bring Vox Populi's actions in line with the Agreement and Consensus Policies, it undermines the credibility and legitimacy of the policy development process itself.

Vox Populi's tactics violate established consensus-based policies and practices that form the basis for the Registry Agreements and, in fact, the entire gTLD program framework. Viewed in its entirety, Vox Populi's pricing scheme is a violation of the Rights Protection Mechanisms (RPMs), which was developed through the extensive consensus-based policy making process established at ICANN and is designed to protect businesses, individuals, and consumers from cybersquatting, fraud, and abuse. For example, ICANN's "sunrise program" was created, consistent with the goal of creating an orderly environment for commerce, to permit trademark owners to register their validated marks efficiently, across many new gTLDs and with the assurances that the prices registries charged would be on a cost recovery basis¹. Specifically, it permits trademark owners who have trademarks that are validated by the Trademark Clearinghouse (TMCH) to register domain names corresponding to their trademarks early, before such marks became available to the general public.

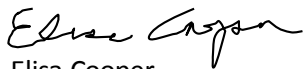
In stark contrast, Vox Populi plans to take trademarks registered in the TMCH and sell corresponding domain names at "\$2499 and up," a price much higher than the cost recovery basis contemplated by the consensus policies as reflected in the gTLD Applicant Handbook. This approach turns the creation of the TMCH on its head – instead of using the TMCH to promote an efficient approach to dealing with recognized trademarks, it penalizes businesses that have chosen to use the process and register their marks in the TMCH. If Vox Populi was populating the list using data from the TMCH, that too would be a breach of its registry agreement with ICANN prohibiting such activity.²

¹ Section 7 of ICANN new gTLD Applicant Guidebook, 4-Jun-2012, at <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

² See Trademark Clearinghouse Terms of Service Agreement for Registries and Registrars, Sections 7.2-7.4 (2015)

Vox Populi's actions are demonstrably counter to the public interest, the Registry Agreement with ICANN, and the intent of Consensus Policies developed by the community. Now is the perfect time for ICANN to exercise leadership in this area.

Sincerely,

A handwritten signature in black ink, appearing to read "Elisa Cooper". The signature is fluid and cursive, with a prominent loop at the end.

Elisa Cooper

Chair, ICANN Business Constituency