KEY ISSUE UPDATES FROM THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN) A CALIFORNIA PUBLIC BENEFIT NONPROFIT CORPORATION

PRESENTED TO THE UNITED STATES HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

HEARING: STAKEHOLDER PERSPECTIVES ON ICANN: THE .SUCKS DOMAIN AND ESSENTIAL STEPS TO GUARANTEE TRUST AND ACCOUNTABILITY IN THE INTERNET'S OPERATION

WEDNESDAY, MAY 13, 2015

ICANN Key Issue Updates – May 2015

The IANA Functions Stewardship Transition and Enhancing ICANN Accountability Processes

IANA Functions Stewardship Transition

Much work has been performed with the ICANN community after the March 14, 2014 announcement by the NTIA of its intention to transfer the stewardship of the IANA Functions to the global multistakeholder community. The IANA Stewardship Transition Coordination Group (ICG) was formed, and two of the three operating communities served by the IANA Functions have completed their proposals. The third operating community, the naming function, has been participating through a Cross Community Working Group that just released its second draft proposal for public comment on April 22, 2015, closing on May 20, 2015. ICANN retained external counsel to provide legal advice directly to the working group as the proposal was being formed. After comments on the proposal are considered, the naming community will provide its final proposal to the ICG, and then the ICG will coordinate and deliver a proposal for the transition of the IANA functions stewardship to ICANN, which will in turn deliver that proposal to the NTIA for consideration.

ICANN recognizes and accepts that the community will want to have fall back mechanisms in place should the IANA functions operator not perform its function to the standards required by the community. An important part of any system that focuses on security and stability is to document processes for handling any failures of the system. ICANN supports the community processes that have been and are being used to develop the transition proposals, and supports the need for the ICG to coordinate the various transition proposals. ICANN awaits the outcome of that process.

While there are always areas for improvement, it is notable that each of the three operating communities have expressed satisfaction with ICANN's performance of the IANA functions.

Enhancing ICANN Accountability

On the Enhancing ICANN Accountability side, on May 4, 2015 the Cross Community Working Group on Enhancing ICANN Accountability posted a non-consensus based proposal for public comment. This proposal outlines the key areas of work that are to be included in Work Stream 1, or those enhancements or reforms to ICANN's accountability that must be committed to or in place at the time of the transition. Part of the Work Stream 1 effort is including meaningful enough mechanisms so as to assure ICANN's implementation of additional (or Work Stream 2) enhancements that are identified in the future. The Work Stream 1 proposals include:

- Identification of areas where the ICANN mission and core values could be strengthened;
- Revisions to redress and review mechanisms, such as ICANN's Independent Review Process;
- Incorporation of the Affirmation of Commitments into the ICANN Bylaws;
- Identification of certain ICANN Bylaws as "fundamental", or requiring community assent before they are modified;
- Changing ICANN into a designator or membership model, to enable the community to have a stronger voice in ICANN's budgeting and strategic planning processes; and
- Provisions for removal of individual Board members or the recall of the entire ICANN Board.

The working group also developed a series of stress tests against which the enhancements are tested, in order to assess how the recommendations strengthen ICANN's accountability in key areas. Some examples of stress tests are whether the recommendations would increase accountability in ICANN's response to a general financial downturn in the industry, or whether ICANN is less prone to capture by a particular interest group or entity.

To assist the group in developing their recommendations, at the working group's request, ICANN engaged two law firms to provide advice directly to the working group. Members of the working group have been responsible for managing those engagements in order to identify and obtain the advice needed.

The public comment will close on June 3, 2015. The working group is expected to have multiple meetings, including face-to-face and community sessions at ICANN's upcoming meeting in Buenos Aires, Argentina in order to consider community comment and develop consensus recommendations that will eventually be presented to the ICANN Board. The Board has already committed that it will not unilaterally modify any consensus-based recommendation arising from the community, and that it will take on the consensus-based recommendations coming out of the Enhancing ICANN Accountability process unless it determines that a recommendation is not in the global public interest and engages in a consultation process with the working group on the Board's concerns. The Board is currently developing a public comment submission on the draft report.

Once the report is finalized, ICANN will submit the Enhancing ICANN Accountability recommendations to the NTIA along with the proposal for the IANA Functions Stewardship Transition.

Contractual Compliance at ICANN: The 2013 Registrar Accreditation Agreement, and .SUCKS

In October 2014, ICANN announced the appointment of its first Chief Contract Compliance Officer to oversee Contract Compliance and Safeguards within ICANN. ICANN's Contractual Compliance Department now has over 20 staff members spread across ICANN's hub offices, providing contractual compliance support around the clock and in many languages. The expansion of the Contractual Compliance Department has been a necessary step to be ready for the expansion of registries under contract with ICANN through the New gTLD Program, and to enforce compliance with the heightened requirements imposed on ICANN's accredited registrars.

The 2013 Registrar Accreditation Agreement

During the development of ICANN's 2013 Registrar Accreditation Agreement (the "2013 RAA"), the global law enforcement community made 12 recommendations, all of which were addressed in the terms and conditions of the 2013 RAA. Among these were the incorporation into the 2013 RAA of several new provisions addressing the handling of reports of illegal activity on websites. These provisions require Registrars to maintain an abuse point of contact to receive reports of illegal activity submitted by anyone. In addition, Registrars are required to maintain a dedicated abuse point of contact to receive reports of illegal activity submitted by law enforcement, consumer protection and quasi-governmental authorities and to review complaints submitted by those sources within 24 hours. Registrars must take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse they receive.

In addition, Registrars of new gTLDs are required to include in their registration agreements a provision prohibiting registered name holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

When ICANN receives complaints regarding websites that are alleged to be engaged in illegal activity, ICANN forwards those complaints to the Registrar that processed the registration and asks the Registrar to investigate and respond. Typically, the activities alleged to be illegal are actions by the registrant or website operator, not by the Registrar.

Claims of infringement, unlawful sale or importation of pharmaceuticals or other illegal activity often raise difficult and complex legal issues on which the complaining party, the Registrar and the registrant may not always agree. In many cases, a Registrar will defer to courts to make a determination as to whether

activities engaged in by a registrant are contrary to law; in some cases, a Registrar may be comfortable in making that determination and taking action without a court order. When a Registrar is not comfortable making a determination as to whether the registrant or website operator is violating the law, the Registrar may suggest that the complaining party attempt to resolve the matter directly with the registrant or website operator, or that the complaining party seek a court order to resolve the issue.

ICANN is not empowered to resolve disputes when parties disagree over what constitutes illegal activity in multiple countries around the world. ICANN is not a law enforcement agency or court and has no regulatory authority. Our enforcement rights are derived solely from the terms and conditions of our contracts with Registrars and Registries. ICANN relies on courts and governmental regulatory authorities to police illegal activity. Consistent with our contractual rights, where a private party, law enforcement or a regulatory agency obtains an appropriate court order from a court of competent jurisdiction, ICANN will compel the contracted parties to comply with these court orders.

ICANN has the right to terminate a Registrar under the 2013 RAA if the Registrar is judged by a court of competent jurisdiction to have, with actual knowledge or through gross negligence, permitted illegal activity in the registration or use of domain names. To date, no complaining party has presented ICANN with a judgment meeting these criteria.

ICANN has neither the right nor the technical capability to "remove" or “disable” a website.

Because Registrars and parties submitting abuse complaints do not always agree on the appropriate interpretation of provisions of the 2013 RAA requiring Registrars to investigate and respond appropriately to reports of abuse, ICANN’s Chief Contract Compliance Officer has reached out to representatives of those parties, as well as to other members of the ICANN multi-stakeholder community, to foster a discussion and attempt to find common ground regarding matters such as the minimum elements that should be contained in a bona fide abuse complaint requiring a response from a Registrar, the minimum steps that a Registrar must take to investigate and respond to a bona fide abuse complaint, and how illegal activity might be combatted outside the scope of contractual enforcement through voluntary efforts and best practices. The initial dialogue in these areas has been productive and discussions are ongoing.

Addressing Community Concerns: .SUCKS

After years of community debate and development, in 2011 ICANN launched the New gTLD Program. Leading up to that launch were thousands of pages of community comments and hundreds of hours of community work on the development of the Program, resulting in a robust Program that addresses issues

such as how the applications would be evaluated, how competing applications for the same or similar strings would be resolved, and rights protection mechanisms for the rollout of the new domains. One of the new gTLDs applied for within the Program was .SUCKS.

At the end of March 2015, ICANN received a letter on behalf of ICANN's Intellectual Property Constituency asking ICANN to halt the rollout of .SUCKS, a new gTLD operated by Vox Populi Registry Inc. In the letter, the Intellectual Property Constituency described the proposed business practices and actions of Vox Populi as "illicit" and "predatory, exploitive and coercive." As responsible stewards of the Internet, ICANN takes these allegations seriously.

ICANN's enforcement ability lies within a contractual framework. ICANN can enforce the terms and conditions of our contracts with registries, but it is the responsibility of governmental regulatory agencies, law enforcement and the courts to police illegal activity. ICANN is not a regulator and has limited expertise or authority to assess the legality of Vox Populi's activities.

Due to the serious nature of the allegations, ICANN sent letters to both the U.S. Federal Trade Commission (FTC) and, because Vox Populi is a Canadian enterprise, Canada's Office of Consumer Affairs (OCA) asking them to consider assessing and determining whether or not Vox Populi is violating any of the laws or regulations those agencies enforce. ICANN is currently evaluating remedies available under the registry agreement. As noted in those letters, if Vox Populi is not complying with all applicable laws, it may also be in breach of its registry agreement. ICANN could then act consistently with its public interest goals and consumer and business protections to change these practices through the contractual relationship with the registry.

ICANN is committed to look for ways that ICANN can help safeguard Internet users and registrants that may go beyond the contractual enforcement tasks for which we are responsible. Asking the FTC and OCA for their assistance in this matter is one example of how ICANN can work with others to strengthen consumer and business protections and enhance ICANN's ability to meet public interest goals