

## **ICANN's Uncertain State: 2014**

### **Accountability, Transparency and Organizational Future Remain Major Concerns as New gTLD Program Launches**

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#### **Introduction**

In a recent video interview<sup>1</sup> conducted while he attended the World Economic Summit in Davos, Switzerland, ICANN CEO Fadi Chehade stated “legitimacy comes from accountability”.

That statement is correct. It is also troubling, in that many of ICANN's recent policies and activities raise serious questions regarding whether it is sufficiently accountable and therefore perceived as acting in a legitimate manner – as well as whether it is continuing to faithfully abide by the Affirmation of Commitments<sup>2</sup> (AOC) it entered into when the US government terminated direct oversight of ICANN in 2009.

One thing is very clear: ICANN's President & CEO, with the full knowledge and backing of its Board, has seized on Edward Snowden's unauthorized revelations of NSA intelligence activities involving the Internet as a rationale for seeking to sever its remaining tie to the U.S government embodied in the contract to operate the IANA function. His “foreign policy” activities have included public endorsement of harsh criticism of the U.S. voiced by Brazil's President in a September 2013 UN address. ICANN's Internet governance initiatives have bewildered many observers, as ICANN's remit is limited to coordination of the Internet's unique identifier systems, particularly the DNS namespace, with security and stability its top priority.

ICANN has also attained “international status” in Switzerland that may presage its intent to abrogate the AOC and transfer its headquarters from Los Angeles to Geneva. ICANN may terminate the AOC at any time by providing 120 days' notice but is constrained from doing so as long as the U.S. remains counterparty on the IANA functions contract.

In reality the designated counterparty for the IANA contract has no bearing on any government's ability to conduct intelligence activities via the Internet. Yet the ICANN-led

initiative has now resulted in multiple developments focused on calls to “globalize” ICANN and the IANA function. However, the IANA contract is a strategic asset of the United States and cannot be transferred without U.S. acquiescence; such “globalization” could even require Congressional authorizing legislation.

But such globalization also raises profound legal and political issues – as well as the central question of whether a successful quest to transform ICANN into an International Organization with greatly diminished or even no U.S. ties would result in an organization with very substantial self-funding capabilities -- but without meaningful accountability and accompanying transparency. Central to all these issues is the question of whether ICANN presently is and will remain sufficiently accountable and transparent. That is a particularly critical question given that ICANN need not rely on appropriations from any government or international organization – with a current operating budget exceeding \$180 million and initial revenues from the new gTLD program already in excess of \$300 million and quite possibly rising to more than \$500 million once public auctions are held to resolve gTLD contention sets. Indeed, so long as there is interest among future applicants – whether it is voluntary or not, as could be the case for generic word brands seeking to protect their trademark at the top level of the DNS – ICANN can proceed to further increase its revenues through additional rounds of new gTLDs.

ICANN’s initiatives to sever its historic ties with the U.S, as well as five top-down mandated ICANN Presidential Strategy Panels undertaken absent any prior consultation with its own stakeholder community, have caused consternation within that community. While ICANN rhetoric focuses on maintaining and strengthening its multi-stakeholder model, its current practices indicate a management intent on redefining the structure and operations of the model. Intentionally or not, ICANN’s Internet Governance and Strategy Panel initiatives have also diverted the focus of its community and the public from the ongoing implementation of ICANN’s largest and most challenging program in history – the delegation of more than one thousand new gTLDs. While more than one hundred new gTLDs have launched to date their impact on security and stability, trademark rights, and consumer protection and competition authorities is just beginning to be recognized and evaluated – and early signs are worrisome.

All of these developments should raise concerns among policymakers, particularly within the U.S., and demonstrate the need for focused oversight, investigation, analysis and decision-making before the situation evolves past the point of no return.

## Executive Summary

### Montevideo Statement

- ICANN's CEO led the effort to organize the October 2013 meeting in Montevideo that asserted that revelations concerning NSA activities required accelerated globalization of ICANN and IANA functions. He did so pursuant to a secret September 2013 Board resolution that was not revealed until mid-November 2013.
- No consultation effort was engaged in with ICANN's stakeholders and constituencies before these decisions were made.
- Secret Board resolutions are not consistent with ICANN's commitment to transparency.
- ICANN Board actions have become more opaque in recent years. Steps should be taken to open Board meetings and actions to real-time public scrutiny.

### Brazilian Internet Governance Meeting

- Immediately after concluding the Montevideo meeting, and after traveling to Brasilia and receiving Brazilian President Dilma Rousseff's agreement to host an Internet Governance conference in that nation, ICANN's CEO Fadi Chehade remarked that "she spoke for all of us, she spoke for the world" when she lambasted the United States over NSA intelligence activities in a September 2013 UN general Assembly address. Again, this meeting and request had the support of ICANN's Board and was undertaken per their secret September Resolution. Chehade has agreed to be co-chair of the meeting and ICANN is contributing substantial funds to it.
- The United States, while rejecting any linkage between NSA activities and challenges to the current Internet governance model, has nonetheless agreed to be a co-host of the upcoming April meeting in Sao Paulo. No public explanation for this decision has been offered.
- While the primary goals of the meeting are Internet governance principles and a "roadmap for the future evolution of the Internet governance ecosystem", NSA surveillance activities and divesting the U.S. of the IANA contract are inevitable additional subjects of discussion given the Montevideo call for ICANN and IANA globalization, and other factors.

- ICANN stakeholders and other interested parties are struggling to organize and provide meaningful input to the conference organizers before the March 8<sup>th</sup> cutoff they have set for receiving it.
- Although proponents of the meeting portray it as an opportunity to build support for the multi-stakeholder model in advance of the late fall 2014 ITU meeting in South Korea, the Secretary-general of the ITU and nations that support placing ICANN functions within the UN orbit will be attending Sao Paulo and in a position to influence its deliberations and outcome.

#### European Commission Declaration

- On February 12, 2014 the EC declared that, due to NSA revelations, that ICANN and the IANA functions must be globalized per a clear timeline.
- While the EC reaffirmed support for the multistakeholder model and rejected transfer of key functions to the International Telecommunications Union -- declaring that “top-down approaches are not the right answer” -- it did not propose an alternative that would assure ICANN accountability.
- The EC’s position on jurisdiction and choice of law could lead to imposition of the European Union’s approach on data protection, cybersecurity, and other matters on entities outside its direct jurisdiction – including U.S. companies.

#### Potential Consequences of ICANN and IANA Globalization

- It is now being recognized that ICANN has embarked on a general campaign linked to the NSA revelations in order to sever its remaining U.S. ties and accompanying oversight.
- Any transfer of authority over the IANA contract raises questions regarding effective ICANN accountability; politicization of IANA control; choice of law for contracts between ICANN and the contracted registry and registrar parties; and other important matters.
- ICANN’s Board has just approved the creation of several President’s Globalization Advisory Groups (GAG) in order to further support ICANN globalization. The GAG will address the issues of the Affirmation of Commitments (“AOC”); policy structures; legal structure; root server system; the IANA multistakeholder accountability; and, Internet governance.

## **ICANN and IANA “Globalization” Requires U.S. Government Acquiescence**

- **The IANA contract is a critical asset of the United States and cannot be transferred to any other entity absent U.S. agreement.**
- **The Department of Commerce arguably lacks the authority to facilitate such a transfer absent authorizing legislation enacted by Congress.**
- **Given this open legal question and the importance of a stable and secure Internet to global economic activity, as well as the current state-of-play, it would be prudent for relevant Congressional committees to immediately initiate a dialogue with DOC/NTIA on this matter as well as undertake independent inquiries and oversight activities.**

## **ICANN’s Quest for “international Status”**

- **In addition to utilizing the NSA revelations as leverage to transfer the IANA contract and accompanying accountability, ICANN has diminished the status of its Los Angeles office to almost nominal headquarters status -- possibly in violation of letter, and almost certainly the spirit, of its 2009 Affirmation of Commitments with the United States. The LA office is now one of three co-equal “hubs”, with the others located in Asia – Istanbul and Singapore. ICANN’s CEO will be based in those Asian hubs for the majority of 2014.**
- **At the January 2014 Davos World Economic Forum, CEO Chohade stated that the “time has come” for the US to pass on its ICANN stewardship because it is “no longer sustainable”.**
- **ICANN has openly declared its intention to seek International Organization status, and has obtained some form of “international status” from Switzerland. It has also stated it is seeking legal status in other nations. While ICANN staff originally portrayed the Swiss move as only being in contemplation of relocating certain functions out of LA, recent press reports and subsequent statements indicate that ICANN may be planning to move its headquarters to Geneva.**
- **There has been no dialogue with the ICANN community’s stakeholders regarding such a fundamental change, and there has been no transparent revelation of any discussion by the ICANN Board of these plans and their implementation.**

- **International status could render ICANN impervious to litigation and the accountability it brings. This is particularly troubling for an organization with very substantial self-funding capabilities, with an annual budget now exceeding \$180 million and revenues from new gTLD applications exceeding \$300 million. Subsequent rounds of new gTLDs are being contemplated and would raise substantial additional revenues.**
- **ICANN is free to formally abrogate the AOC at any time by simply providing 120 days' notice. Many observers think it will likely do so upon transfer of the IANA functions contract away from the U.S. to another entity.**

### **Accountability and Transparency**

- **The AOC is the key leverage by which ICANN is required to undertake sweeping period reviews to ensure continued accountability and transparency.**
- **Any transfer of the IANA function would likely be accompanied by abrogation of the AOC. Thus it is a critical issue by what means ICANN accountability and transparency would be enforced in the wake of that development.**

### **Presidential Strategy Panels**

- **In another top-down management move at odds with ICANN's professed devotion to bottom-up consensus policymaking, CEO Chohade announced the creation of five separate strategy panels in July 2013. No advance consultation with the ICANN community regarding the need or potential focus and output of these panels ever took place.**
- **Early indications are that the recommendations of the panels may be highly disruptive to ICANN's present internal organization.**
- **Many members of the ICANN community feel that management's Internet Governance and Strategy Panels initiatives are overwhelming its stakeholders.**

### **Conflicts of Interest**

- **Ethical concerns are inherent within ICANN because Board members must have substantial technical DNS expertise to guide and constrain management, but such expertise is often tied to relationships with entities that can directly profit or be harmed by ICANN decisions.**

- In response to public concerns, ICANN adopted a revised Conflicts of Interest Policy in May 2012. Yet there continues to be a lack of transparency regarding what activities or affiliations cause Board members to recuse themselves on certain votes, or from service on key Board subcommittees.
- A strong case can be made for greater disclosure of the business and investment activities of ICANN Board members to heighten public confidence that Board decisions are consistent with the global public interest. Ethical concerns would be substantially diminished if Board meetings were open to public view and if the minutes memorializing Board meetings provided far greater detail than at present.

### **New gTLD Second Level Trademark Protections**

- After receiving significant community input, ICANN created two new rights protection mechanisms to assuage trademark owners' concerns regarding potential cybersquatting resulting from ICANN's unlimited new gTLD program – the Trademark Clearinghouse (TMCH) trademark registration database and the Universal Rapid Suspension (URS) expedited arbitration procedure. While these new tools are generally sound ICANN's implementation has been questionable.
- Registrations in the TMCH – at \$150 per trademark – have been far below expectations. Deloitte, which operates the TMCH under contract, has tried to spur registrations by expanding TMCH functions beyond those originally authorized. It has also embarked on what some regard as a scare campaign, warning US rights holders “that some of the biggest American brand names are at risk of intellectual property infringement online as the new TLDs are rolled out... This potentially compromises the reputation of each brand targeted”. The Deloitte “strategic consultant” issuing these warnings also serves as Chairman of ICANN's GNSO Council, which makes policy decisions for all gTLDs.
- The URS is just beginning to be tested and appears to be operating as planned.
- Initial reports of new gTLD registrations indicate substantial cybersquatting activity at such new “strings” as .guru and .bike. The potential cost of dealing with intentional infringement at new gTLDs was a major concern of Senate Commerce Committee Chairman Jay Rockefeller when he urged ICANN to restrict the first round of the new gTLD program

to a limited number of strings. Similar limitations had been urged by ICANN's Governmental Advisory Committee (GAC).

- Multiple internal factors contributed to ICANN's insistence on proceeding with an new gTLD program that allowed for an unlimited number of total applications as well as no limitation on the number of applications that could be submitted by a single entity.

#### **New gTLD Top Level Protections**

- The four separate grounds for objections to new gTLD strings were characterized by ICANN as protections provided to prevent abuse at the top level of the DNS through the new gTLD program. In practice they have proven to be expensive, generally ineffective, and resulting in conflicting decisions.
- One noteworthy failure was that of the Republican State Legislative Committee, the successful applicant for .gop, against a "portfolio applicant" for .republican. This failed objection should arguably never have been necessary because provisions in the program's Applicant Guidebook (AG) barred entities with a history of cybersquatting from participating in the program, and ICANN received copious documentation of that history for the particular portfolio applicant. ICANN has never explained why that AG provision was found to be inapplicable to this applicant.
- ICANN, to the consternation of most of its community, accepted "expert advice" that the existence of singulars and plurals of the same gTLD, differing only by the letter "s", would not be confusing to the public.
- ICANN has taken only the most limited action to reconcile inconsistent decisions of objection panelists. These inconsistencies were foreseeable given the failure to consolidate applications to identical strings, the latitude given to arbitration panelists, and the broad scope of the new gTLD program.

#### **Public Protections for New gTLDs relating to Regulated Industries and Professions**

- In April 2013 the GAC urged ICANN to impose a long set of stringent safeguards on new gTLDs associated with regulated industries and professions, lest domains in them be registered by bad actors for the purpose of perpetrating scams and attacks.

- A February 2014 ICANN Resolution on this subject fails to implement the GAC safeguards in a comprehensive or effective manner. The NTIA, which does not often publicly criticize ICANN, has just advised it that requiring domain applicants to merely “represent” that they possess necessary authorizations, charters, licenses or other credentials “is different from the affirmative obligation for the registry operator to verify or validate the credentials of domain names registrants that indicate participation in certain professional and regulated sectors, as the GAC requested”.
- ICANN has rebuffed requests to solicit comment on other protective measures relating to such regulated sector strings, such as a Policy Advisory Board model supported by members of its Business Constituency and At-Large Advisory Council.
- ICANN’s main requirement for public protections – Public Interest Commitment specifications (PICs), while containing four mandatory measures, generally leave registry operators to propose the details of their own PICS without adequate accountability or safeguards. The PICs proposed by the applicant for the largest number of new gTLDs – including the particularly exploitable .charity – are weak and reserve the right of full cancelation as of January 2016.
- Absent effective safeguards and their enforcement by ICANN, the costs of problems emanating from these domains will be borne by the public and by governmental consumer protection and competition authorities.

### Name Collisions

- Collisions between internal system administrative labels and new gTLD strings can lead to system crashes and vulnerabilities to hacking.
- Notwithstanding that its primary job is technical management of the DNS, and that the potential problem had been raised by ICANN’s own security and stability advisers in 2009, ICANN management failed to recognize or begin to address the issue of name collisions until it had closed the new gTLD application window.
- ICANN’s review process for security and stability issues raised by individual gTLD applications were based on criteria that excluded consideration of name collisions.
- ICANN has yet to comprehensively address the name collisions issue but is allowing new gTLDs to commence operation under an “alternative path

to delegation”. This alternative path did not result from an open technical effort and has not been publicly analyzed by ICANN’s Security and Stability Advisory Committee (SSAC); ICANN has never disclosed what entity developed or influenced the adoption of the alternative approach.

- There are continuing questions regarding the effectiveness of ICANN’s efforts to educate the IT community regarding name collisions and the steps to be taken to ameliorate their effects.

#### **Use of Auctions to Resolve Contention Sets**

- ICANN decided after receiving community input that in lieu of qualitative evaluation of competing applications for the same gTLD it would utilize public auctions as the contention resolution method of last resort. This translates into the wealthiest applicant taking control of the string regardless of the merits of its proposed business model or the public benefits that could flow from competing applications.
- These public auctions could provide ICANN with tens or hundreds of millions of dollars in additional revenues, with the costs to be eventually recouped from registrants in the encompassed strings. ICANN has not yet determined or announced how these potentially very large auction proceeds will be used or provided firm assurances that they will not be added to general revenues.
- As one example, the result of this reliance on applicant monetary resources as the ultimate determinant resulted in the October 2013 withdrawal of the DotGreen charitable organization applicant for the .green gTLD when faced with the possibility of an auction against three well-funded portfolio applicants.
- The European Union (EU) recently advised ICANN that this use of auctions “is at odds with the “diversity and innovation” policy that ICANN seeks to promote” and urged ICANN to develop a more level playing field.
- In September 2013 ICANN entered into a contract with an auctions manager that was not the subject of publicly solicited competing bids. The contract will be extremely lucrative for the provider, guaranteeing four percent of the first \$10 million bid in any auction. A public tender and competing bids would almost surely have resulted in a less generous agreement for the selected contractor.

## **Internet Governance: Evolution or Revolution?**

### The Secret Board Resolution Underlying the Montevideo Statement

On October 8, 2013, ICANN CEO Fadi Chehade joined with nine other heads of organizations responsible for coordination of the Internet's technical infrastructure in signing the "Montevideo Statement on the Future of Internet Cooperation".<sup>3</sup> The Statement "expressed strong concern over the undermining of the trust and confidence of Internet users globally due to recent revelations of pervasive monitoring and surveillance" – a reference to Edward Snowden's release of materials describing NSA Internet monitoring activities. It went on to call for a number of actions, of which the most significant and unprecedented was a call "for accelerating the globalization of ICANN and IANA functions, towards an environment in which all stakeholders, including all governments, participate on an equal footing". Any connection between the NSA revelations and the IANA contract is more emotional than causal; as one recent analysis observed, "Although there seemed to be no direct connection between the controversies, the native internet institutions – already worried about their alleged competition with the ITU – seem to have felt as if they might be tarred with the NSA brush. On October 7, 2013, we got the Montevideo statement."<sup>4</sup>

As the United States holds a unique role in regard to ICANN, serving as the sole counterparty to the Internet Assigned Names Authority<sup>5</sup> (IANA) contract, this portion of the Statement clearly advocates terminating that relationship, without designating what entity might replace the U.S. ICANN has been awarded the IANA contract since its inception and through the IANA function is responsible for the global coordination of the DNS Root, IP addressing, and other Internet protocol resources. The IANA function is the basis for all of ICANN's policy authority, and without it applicants in its new gTLD program could not be assured that it had any foundation for actually delegating the "strings" they had applied for. The U.S. has never used its IANA counterparty status to block the delegation to the authoritative root zone directory of any top level domain recommended by ICANN or to delete any existing TLD.

While the Montevideo Statement was signed by ten entities, the actual work of coordinating its issuance was performed by CEO Chehade pursuant to a secret Resolution passed by the ICANN Board on September 28<sup>th</sup>. Notwithstanding ICANN's official commitment to transparency and accountability, this action was not reported in the official recitation<sup>6</sup> of Approved Board Resolutions adopted on September 28<sup>th</sup>, nor is there any reference to the discussion underlying the secret Resolution in the official Minutes<sup>7</sup> of the meeting. A little more than a week after that Board meeting, Judith Duavit Vazquez resigned<sup>8</sup> from the ICANN Board absent any accompanying

explanation, with that resignation becoming effective on October 7<sup>th</sup> – one day before the Montevideo Statement was signed.

The secret resolution was not revealed or explained until November 17, 2013, during the final ICANN meeting of the year in Buenos Aires, Argentina, in response to multiple community requests regarding the basis of CEO Chehade's authority to engage in this activity, as well as his subsequent trip to meet with Brazilian President Dilma Rousseff. In its "Resolution Re: Multi-Stakeholder Internet Governance"<sup>9</sup>, the Board revealed that "on 28 September 2013, the ICANN Board authorized the CEO to, among other things, "work with other key organizations and leaders to establish a coalition towards the formation of a movement or initiative" ("Coalition"), in order to address increasing concerns regarding the effectiveness of a "global, open, multi-stakeholder Internet governance system."" That document also claims that "the CEO regularly reported to the Board as these activities were emerging, to which the Board provided insight, guidance, and support through reports at Board meetings on 23 October 2013, 8 November 2013 and 16 November 2013" (again, none of these reports or the Board's response are described with any significant detail in the Minutes or Preliminary Reports of those meetings,<sup>10</sup> which clearly raises significant questions regarding the transparency of Board meetings and actions).

ICANN has not provided an adequate explanation of why it felt it could not trust "the community" with knowledge of its September 28<sup>th</sup> Resolution in advance of the meeting in Montevideo. A November 14<sup>th</sup> blog post by Board Chairman Steve Crocker, "ICANN's Mandate to Preserve and Enhance Multistakeholder Internet Cooperation", states:

The ICANN Board recognizes that the single, open, global, interoperable Internet is under threat of failing due to emerging pressures on multistakeholder governance. As a consequence, the Board gave the ICANN CEO a mandate to work with other key organizations and leaders to establish a coalition to evaluate and participate in the formation a movement or initiative for an Internet cooperation agenda. We are pleased with his initial engagement with the Internet organizations and the broader multistakeholder community.

But the multiple stakeholders in ICANN's community were deprived of any advance knowledge of the initiative leading up to Montevideo. Nor was there any attempt to engage with that community during the July 2013 ICANN meeting held in Durban, South Africa to gauge whether and what course it believed ICANN should take in response to the many Snowden revelations already made public. Oral statements from ICANN officials made during the Buenos Aires meeting provided the unconvincing rationale that any advance notice of the initiative could have jeopardized it.

This secret Board Resolution, while unprecedented, is just the latest example of a contraction of the transparency of its operations, without which it can have no effective accountability. In May 2012 ICANN announced<sup>11</sup> that, “to improve the ICANN Meeting experience for all participants”, it would no longer hold open public Board meetings at any of ICANN’s three yearly meetings, but would replace them with a one hour session in which “the Board will outline what they have heard during the week”. While the public Board meetings sometimes had a choreographed feel, they at least provided some understanding of the views of individual members and the internal dynamics within the Board. The published Minutes of Board meetings contain little in the way of description of any of the discussion that leads to adopted Resolutions or other actions, or deferrals of action, or of the positions taken by individual Board members.

Indeed, in an age when meetings of important public bodies – including nearly every meeting of U.S. Congressional committees and subcommittees, and of policymaking bodies at all levels of government around the world -- are webcast in real time and permanently archived, it seems unacceptable for the Board of a non-profit entity charged with important public responsibilities and publicly committed to transparency to operate in such an opaque fashion. This lack of transparency inevitably erodes confidence in Board decisions. While recognizing that certain personnel and other sensitive matters might be justifiably discussed in closed session and redacted from written records, there seems little excuse for ICANN not to adopt digital technologies that make Board deliberations accessible in real time on a global scale.

#### ICANN CEO’s Request that Brazil Host an Internet Governance Meeting

Immediately following the issuance of the Montevideo Statement, CEO Chehade traveled to Brazil and subsequently met with President Dilma Rousseff. While Chehade has publicly stated that he ‘absolutely shared” his plans to travel to Brazil with his colleagues in Montevideo, although he only expected to be meeting with a Minister and not President Rousseff, other participants in the Montevideo meeting maintain that they had no advance notice of his plans. ICANN’s Board is on record stating “the CEO regularly reported to the Board as these activities were emerging”, and that those activities included “encouraging the establishment of and support for a meeting on multi-stakeholder Internet governance that is now likely to take place in Brazil in April 2014”<sup>12</sup>. So the Board is on record that it knew of and supported this outreach.

Indeed, Chehade did request Brazil to host such an Internet Governance meeting and it is scheduled to take place on April 23-24, 2014 in Sao Paulo, Brazil. Immediately following his meeting with Rousseff at which he made the request, he delivered a video statement<sup>13</sup> in which he stated:

I came personally to convey to her that when she spoke at the United Nations two weeks ago she spoke for all of us, she spoke for the world. She expressed the world's interest to actually find out how we're all going to live in this new digital age. She was the world's leader on that day and I came to her to thank her for her leadership and to discuss with her how we go from her vision of the future to some practical solutions, because the trust in the global Internet has been punctured, and now it's time to restore this trust through leadership and through institutions that can make that happen.

The UN remarks that Chehade referred to as speaking for "the world" were angry words denouncing the U.S. after revelations of NSA intelligence-gathering activities in Brazil, delivered just after Rousseff canceled a state visit with President Obama. Some have questioned the propriety of the head of a US corporation that was created by the U.S. Commerce Department and derives its authority from the U.S.-held IANA contract endorsing such anti-U.S. remarks.

At the UN she stated<sup>14</sup>:

Recent revelations concerning the activities of a global network of electronic espionage have caused indignation and repudiation in public opinion around the world... Tampering in such a manner in the affairs of other countries is a breach of International Law and is an affront to the principles that must guide the relations among them, especially among friendly nations...

We face, Mr. President, a situation of grave violation of human rights and of civil liberties; of invasion and capture of confidential information concerning corporate activities, and especially of disrespect to national sovereignty.

We expressed to the Government of the United States our disapproval, and demanded explanations, apologies and guarantees that such procedures will never be repeated...

**The United Nations must play a leading role in the effort to regulate the conduct of States with regard to these technologies.**

**For this reason, Brazil will present proposals for the establishment of a civilian multilateral framework for the governance and use of the Internet and to ensure the effective protection of data that travels through the web.**

(Emphasis added)

As can be seen, President Rousseff advocated a government-dominated, multilateral approach to Internet governance centered in the UN when she spoke there. CEO Chehade claims that he converted her to the cause of multistakeholderism when he met

with her. In any event, his praise for her UN remarks embraced her direct linkage of NSA activities to a need for major revision of Internet governance<sup>15</sup>. That linkage was recently rejected by U.S. Ambassador Daniel Sepulveda, who stated in remarks<sup>16</sup> made at the Center for Strategic and International Studies (CSIS) on January 23, 2014:

Some foreign observers have chosen to conflate the issue of intelligence gathering with U.S. positions on Internet governance, posing new challenges that could disrupt the current multi-stakeholder system of Internet governance. In fact, these issues are not the same. Nevertheless, given this conflation, the Administration reaffirms our commitment to the open Internet and the multi-stakeholder approach to Internet governance. We will redouble our efforts to strengthen and make more inclusive its policy-making, standards setting, and governance organizations.

Since the announcement of the Brazil meeting the ICANN community and many other persons and entities concerned with Internet governance have been scrambling to keep up with and influence its development. An entity dubbed 1net<sup>17</sup> has been established by ICANN and other signatories of the Montevideo Statement to facilitate that involvement, but many participants feel that it has not evolved far beyond the mailing list stage. The planners of the Brazil meeting have set a final date of March 8<sup>th</sup> (recently extended from March 1<sup>st</sup>) for all input on its agenda yet it remains clear what organized views it will receive from 1Net. ICANN has also established a Cross-Community Working Group (CCWG) to coordinate preparations for the meeting within the ICANN community, but as of mid-February it remained mired in preliminary organization and is nowhere close to developing consensus input.

The Sao Paulo meeting has been billed as a partnership between the Brazilian Internet Steering Committee<sup>18</sup> and 1Net and CEO Chehade is the meeting's Co-Chair. The meeting is slated to include 700 participants in Sao Paulo, about half from governments and the other half from civil society, academia, the private sector and the technical community; for the latter group, participation will be determined through submission of an expression of interest with the ultimate selections being made by conference organizers.

The main topics for the meeting<sup>19</sup> will be:

- Internet governance principles
- Roadmap for the further evolution of the Internet governance ecosystem

However, they will not be the only topics, and one of the others will be "human rights principles". While proponents of the meeting have repeatedly stated that it will not venture into a discussion of surveillance activities conducted on the Internet by the NSA

or other national intelligence services, the introduction of "human rights principles" may make such a discussion inevitable. After all, it was that linkage of the NSA to alleged human rights violations and a consequential necessity for changes in Internet governance that was at the core of President Rouseff's UN remarks. Another topic is the "internationalization of every aspect of internet governance" which is likely to translate into a focused discussion of removing the US as the sole counterparty to the IANA contract and replacing it with some yet to be defined substitute.

In his CSIS remarks, Ambassador Sepulveda said the US was considering its "best potential role" and that "the meeting holds promise in advancing the global community's understanding of Internet governance if: (1) the agenda is developed in a truly multistakeholder fashion; (2) participation at the meeting is broad and inclusive; and (3) any follow on activity is guided by, and ultimately supportive of, the multistakeholder system rather than an intergovernmental mechanism of centrally imposed regulation or mandates." Since that statement it has been announced that the U.S. will participate as a meeting co-host and a member of its High-Level Multistakeholder Committee<sup>20</sup>. While that decision may be justifiable, no U.S. official has provided a rationale for it.

ICANN and other supporters of the Brazil meeting portray it as offering an effective means to build support for the multistakeholder model and thereby help diminish the possibility that serious attempts to bring it or its functions within the UN orbit will be made during the ITU Plenipotentiary Conference to be held in South Korea from October 20 – November 7. However, on February 20<sup>th</sup> the ITU announced<sup>21</sup> that the "ITU will participate in Brazil's 'Netmundial' Global Multistakeholder Meeting on the Future of Internet Governance... ITU Secretary-General Dr Hamadoun I. Touré will join the High Level Multistakeholder Committee (HLMC) as one of two representatives of the United Nations, alongside Wu Hongbo, Under Secretary-General of the United Nations Department of Economic and Social Affairs (UNDESA)...ITU welcomes Brazil's timely efforts to facilitate a global dialogue on these important matters and looks forward to transparent, open, constructive and meaningful discussions that are inclusive of all nations and stakeholders, from developing and developed countries alike, with a view to ensuring a better, more secure Internet for all." The press release makes extensive reference to the 2005 World Summit on the Information Society (WSIS) meeting, characterizing it as the "world's first truly open, inclusive multi-stakeholder global meeting on ICT policy"; although some Internet governance observers mark WSIS as the opening salvo in a long-term effort to bring ICANN functions within the UN orbit.

We cannot predict what Dr. Toure will say in Sao Paulo, but he will be in a position to work the crowd of attendees if he wishes to suggest that ICANN's functions should be relocated to the ITU or to a newly created agency within the U.N. constellation. It may be telling that the ITU press release states, "Dr Touré praised Brazilian President Dilma

Rousseff for taking the initiative to further open and inclusive dialogue on efforts towards ensuring trust and confidence in the Internet, which is now recognized by countries worldwide as a critical resource for growth and ongoing socio-economic development”. – but makes no mention of CEO Chehade or ICANN, or their seminal role in requesting that Brazil host such a conference.

It appears that ICANN’s request for this Brazil meeting was a deliberate strategy by ICANN to leverage concerns regarding the NSA revelations and thereby precipitate developments deemed beneficial to its apparent goal of severing its remaining unique tie to the United States as IANA contract counterparty. The results of the Brazil meeting cannot be predicted but it is a venture with considerable risk for both ICANN and the multistakeholder model.<sup>22</sup>

### The European Commission Declaration

On February 12, 2014 the European Commission (EC) issued a press release headlined “Commission to pursue role as honest broker in future global negotiations on Internet Governance”.<sup>23</sup> The opening lines of that document implicitly tie the EC action to the NSA revelations, stating, “In the wake of large-scale Internet surveillance and reduced trust in the internet, the European Commission today proposes a key reform to the way the Internet is managed and run. The proposal calls for more transparent, accountable and inclusive governance.” Building on the Montevideo Statement, the EC calls for “Establishment of a clear timeline for the globalization of ICANN and the “IANA functions””.

One positive aspect of the EC position is its rejection of placing ICANN under the control of the UN-affiliated International Telecommunications Union (ITU). As the release states, “[EC Vice-President Neelie] Kroes said: “Some are calling for the International Telecommunications Union to take control of key Internet functions. I agree that governments have a crucial role to play, but top-down approaches are not the right answer. We must strengthen the multi-stakeholder model to preserve the Internet as a fast engine for innovation.” The Commission firmly supports a real multi-stakeholder governance model for the Internet based on the full involvement of all relevant actors and organisations.”

The press release was accompanied by a far more extensive “COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS”<sup>24</sup> That document recognizes the need for an effective ICANN accountability method and cites the AOC as a role model for future developments:

Accountability mechanisms for actors in the Internet space are essential, including organisations responsible for key Internet tasks. Mechanisms such as self-assessment and independent (peer) review can strengthen implementation and recommend improvements. The Affirmation of Commitments of the Internet Corporation for Assigned Names and Numbers (ICANN), and its use of multistakeholder review panels could be one inspiration for other organisations and processes.

However, the Communication does not actually propose an effective accountability mechanism to replace the AOC, and is harshly critical of ICANN's current legal status as a California non-profit corporation:

ICANN's status under Californian law with a contractual relationship to a single country has not changed. The exclusive relationship of ICANN with a single government – as illustrated by its Affirmation of Commitments – originates from the history of the Internet and must become more global in an era of the Internet as it has become a vital support function of societies and economies in the whole world.

Following that critique, the Communication states:

The Commission will work with all stakeholders to

- identify how to globalise the IANA functions, whilst safeguarding the continued stability and security of the domain-name system;
- establish a clear timeline for the globalisation of ICANN, including its Affirmation of Commitments.

The “Building Confidence” section of the Communication makes clear that the EC envisions the European Union's approach to data protection, cybersecurity, and other matters as a keystone of a future Internet governance regime:

The Commission will work with the Council and Parliament to achieve rapid adoption and implementation of key legislation, including the reform of the data protection framework and the proposed Directive on network and information security, in order to strengthen trust online.

The Communication recognizes that jurisdiction and choice of law rules will be a key matter for consideration as any ICANN globalization is considered: “At the international level, conflict rules are insufficiently developed, leading to unsolved conflicts of laws beyond the Union. In particular for Internet related services that are inherently cross-border in nature, such as cloud-computing services, this complexity at international level

can be harmful for growth. Addressing the tension between an international Internet and national jurisdictions should also take into account the diversity of cases that can be subject to these conflicts, which are not apt to be addressed by one single mechanism.”

It then goes on to outline steps the EC will take to promote harmonization of laws and policies applicable to Internet activities:

The European Commission will launch an in-depth review of the risks, at international level, of conflicts of laws and jurisdictions arising on the Internet and assess all mechanisms, processes and tools available and necessary to solve such conflicts. All options for action at the Union or international level will subsequently be carefully considered, including possible legislative initiatives or additional guidelines as needed, subject to appropriate impact assessments. This work will build on existing policies.

### Potential Consequences of ICANN and IANA Globalization

As described above, both the Montevideo Statement and the EC call for globalization of ICANN and the IANA authoritative root zone server and related functions, and ICANN initiated the request for the April 2014 meeting in Brazil focusing on principles and a framework for further evolution of Internet governance. While many of these initiatives have been couched in terms of preserving and strengthening the multistakeholder model, even the media is now recognizing that ICANN's underlying motivation is to sever its remaining U.S. ties as embodied in the IANA contract, and that it has seized on Edward Snowden's NSA revelations as a means of doing so:

The group that for years has managed the Internet's architecture under a contract with the Commerce Department is ramping up efforts to sever its link with the U.S. government. The Internet Corporation for Assigned Names and Numbers, a Los Angeles-based nonprofit that manages the domain-name system and other essential Web functions, is pushing to transform itself into a global organization without U.S. oversight. European Union officials are backing the campaign, which has picked up steam in the wake of revelations about widespread Internet surveillance by the National Security Agency.<sup>25</sup>

As ICANN is already a global organization due to the global expanse of the Internet, its establishment of multiple offices around the world, and the global participation of individuals in its constituencies, advisory committees, working groups, and staff, the call for further globalization may seem benign. But it is really a call for divesting the U.S. of its IANA counterparty role, which in turn raises a host of complex and critical questions, including:

- Will the IANA contract be permanently delegated to ICANN with no new counterparty designated? Such a move would terminate the essential leverage provided by the need to periodically renew the IANA contract as a means of driving ICANN to abide by the accountability and transparency provisions of the AOC. And would an ICANN holding permanent possession of the IANA function be a more tempting target for politicized takeover, whether by the ITU or through other means?
- If IANA counterparty status is maintained but transferred from the U.S., to what entity will it be delegated? Since the prevailing position of those calling for globalization is that vesting it in a single nation is unacceptable, will we see the establishment of a multi-party “Internet Security Council” composed of multiple nations? And which nations would be included in that group? While the EC deems itself an “honest broker”, any multi-governmental group vested with IANA oversight responsibility would be hard pressed to exclude the BRIC nations – Brazil, Russia, India, and China – and some of them are already engaged in pervasive Internet censorship and domestic surveillance that goes far beyond the collection of metadata. Other nations would no doubt want to be included as well. While the U.S. has never used its counterparty status to block or remove a TLD, would such multi-governmental responsibility invite politicization and raise the specter of ccTLD removal or re-delegation as a political weapon exercised via ICANN?
- ICANN’s registry operator and registrar contracted parties are now governed by U.S. and California law. In the event that ICANN becomes an International Organization headquartered outside the U.S., will those contracts be subject to a new legal regime? And will ICANN become litigation-proof, which in its own way would be a substantial diminution of accountability?
- What legal regime will apply to all business actors who conduct Internet activities through domains? This is an important question for U.S. business, as the U.S. and EU approaches on data security, privacy, completion rules, free speech and other matters diverge significantly. The EC has made clear that it will seek to reduce the complexity of issues subject to jurisdictional and conflict-of-laws questions through exploration of “all mechanisms, processes and tools available and necessary to solve such conflicts”. One such mechanism might be to amend the Registrar Accreditation Agreement (RAA) between ICANN and registrars to require that registrants for all newly registered or renewed domains abide by certain laws and policies regardless of where they are domiciled; in this manner, ICANN could exercise quasi-legislative functions at the behest of its new overseers.

These are but a few of the issues that will inevitably arise during any attempt to globalize ICANN and the IANA function. None of the debate around IANA includes any claim that it is “broken” and needs to be fixed. As noted, the U.S. has never used its counterparty status and related rights to block a single TLD delegation recommended by ICANN, and ICANN itself recently noted that there are “extremely high levels of customer satisfaction according to the results of the 2013 Internet Assigned Numbers Authority (IANA) Functions Customer Satisfaction Survey<sup>26</sup>”.

On February 17, 2014 ICANN’s Board adopted a Resolution on President’s Globalization Advisory Groups<sup>27</sup> (GAG) that approved “the creation of several President’s Globalization Advisory Groups in order to support further ICANN globalization....These Advisory Groups will deal with the following topics: Affirmation of Commitments (“AOC”); policy structures; legal structure; root server system; the IANA multistakeholder accountability; and, Internet governance.” Each Group will be composed of Board members and will advise and make recommendations to the full Board on these topics. The Resolution contains a rather extraordinary delegation of power to the CEO, declaring that, “the President and CEO shall have the authority to change the Advisory Groups and their composition from time to time, without requiring a further resolution.” While the resolution states that the GAG entities will consult with the community, the community will have no opportunity to comment on the wisdom or propriety of this latest action, as the Rationale for the Resolution concludes, “This is an Organizational Administrative Function for which public comment is not required.” It of course remains to be seen what positions the Board will take on the critical matters being addressed via the GAG.

One thing is very clear – ICANN’s initiative to sever its U.S. ties has already resulted in far more multi-governmental involvement in determining the evolution of Internet governance than existed prior to the Montevideo Statement. Any future Internet governance regime that divests the U.S. of IANA counterparty status is likely to involve far more multi-governmental interaction with ICANN policies and operations than the mere advisory role now embodied in the operations of its Governmental Advisory Committee (GAC).

#### “Globalization” Requires U.S. Government Acquiescence

A key factor that cannot be overlooked amidst the ongoing push for ICANN and IANA globalizations is that the IANA function is presently an asset and arguably the property of the United States government and cannot be transferred to any other entity absent the consent of the U.S. Just as the U.S. remains the sole superpower in the analog world, it holds the same role in the virtual realm of the DNS. While the strategic and

economic importance of the Internet and the politics surrounding it could not have been envisioned when ICANN was created in 1998, the U.S. has a special responsibility to ensure that the Internet remains a medium of free trade and expression and does not become an international political football.

Further, the decision to transfer the IANA function is, arguably, one that cannot be made solely by the Executive Branch but requires Congressional authorizing legislation. In response to Congressional inquiry during ICANN's early days, the General Accounting Office (GAO) provide this analysis<sup>28</sup> in 2000:

### **The Department's Authority to Transfer Control Is Unclear**

**The question of whether the Department has the authority to transfer control of the authoritative root server to ICANN is a difficult one to answer.** There are no statutory authorities or international agreements governing the management and operation of the domain name system and the authoritative root server, although several federal entities have facilitated and funded its development. As we noted earlier, Congress has not chosen to legislate in this area. The government has long been instrumental in supporting and funding the Internet and the domain name system. Major components of the domain name system were developed by, or under, agreements with agencies of the U.S. government. ...

**It is also unclear whether such a transition will involve a transfer of government property to a private entity. If so, the transfer would have to be consistent with federal property laws.** It may be difficult to determine the government's property interests connected with the root server system since the government's involvement in the development of the Internet stems from government contracts and other agreements and the language and practices under them over a 30-year period. **The Department has not determined whether the transition will entail the transfer of such property and so it is unclear if the Department has the requisite authority to effect such a transfer.**

The Department states that to date it has not transferred any government property to ICANN under the agreements it currently has with the corporation nor does it plan to do so. The Department also states that it has no current plans to transfer policy authority for the authoritative root server to ICANN, and therefore it has not developed a scenario or set of circumstances under which such control would be transferred. **Thus, it remains unclear whether a transfer of policy control would involve the transfer of government property. Specifically, in response to our question regarding its legal authority to transfer control**

over the authoritative root server to ICANN or the necessity for legislation to do so, the Department's general counsel advised us by letter dated June 7, 2000:

**"In the absence of such plans, we have not devoted the possibly substantial staff resources that would be necessary to develop a legal opinion as to whether legislation would be necessary to do so. In the absence of the underlying legal analysis, we decline to speculate about such an important issue."** (pp.25-27)

**...The agreements make clear that the Department retains final policy authority over the "A" root server.** A fact sheet on the agreements contained the following statement with respect to the management of the authoritative root server:

"Nothing in these agreements affects the current arrangements regarding management of the authoritative root server. [Network Solutions] will continue to manage the authoritative root server in accordance with the direction of the Department of Commerce. The Department of Commerce expects to receive a technical proposal from ICANN for management of the authoritative root and this management responsibility may be transferred to ICANN at some point in the future.

**The Department of Commerce has no plans to transfer to any entity its policy authority to direct the authoritative root server."** Since the signing of these agreements, the Department and ICANN have entered into a sole source contract. This contract involves the performance by ICANN of administrative functions associated with root management. The contract states "This [administrative] function, however, does not include authorizing modifications, additions, or deletions to the root zone file or associated information that constitute delegation or redelegation of top-level domains. **The purchase order will not alter root system responsibility defined in amendment 11 of the Cooperative Agreement.**"

**According to the Department, it has no current plans to transfer policy authority for the authoritative root server to ICANN, nor has it developed a scenario or set of circumstances under which such control would be transferred.** (pp.29-30) (Emphasis added)

Five years later, at the time of the World Summit on the Information Society (WSIS), the Department of Commerce again emphasized<sup>29</sup> that the U.S. intended to retain its role in

controlling the root zone file – control embodied in the IANA contract that has been renewed with ICANN on a periodic basis:

Date: June 30, 2005

**The United States Government intends to preserve the security and stability of the Internet's Domain Name and Addressing System (DNS).** Given the Internet's importance to the world's economy, it is essential that the underlying DNS of the Internet remain stable and secure. *As such, the United States is committed to taking no action that would have the potential to adversely impact the effective and efficient operation of the DNS and will therefore maintain its historic role in authorizing changes or modifications to the authoritative root zone file. (Emphasis added)*

**Governments have legitimate interest in the management of their country code top level domains (ccTLD).** The United States recognizes that governments have legitimate public policy and sovereignty concerns with respect to the management of their ccTLD. As such, the United States is committed to working with the international community to address these concerns, bearing in mind the fundamental need to ensure stability and security of the Internet's DNS.

**ICANN is the appropriate technical manager of the Internet DNS.** The United States continues to support the ongoing work of ICANN as the technical manager of the DNS and related technical operations and recognizes the progress it has made to date. The United States will continue to provide oversight so that ICANN maintains its focus and meets its core technical mission.

**Dialogue related to Internet governance should continue in relevant multiple fora.** Given the breadth of topics potentially encompassed under the rubric of Internet governance there is no one venue to appropriately address the subject in its entirety. While the United States recognizes that the current Internet system is working, we encourage an ongoing dialogue with all stakeholders around the world in the various fora as a way to facilitate discussion and to advance our shared interest in the ongoing robustness and dynamism of the Internet. In these fora, the United States will continue to support market-based approaches and private sector leadership in Internet development broadly.

Given this record, it is evident that:

- The question of whether the Commerce Department has freestanding authority to transfer the IANA contract away from U.S. government control is a “difficult” one and the Department has not expended the substantial legal resources required to answer it because it has never officially contemplated such action.

- The IANA contract may constitute U.S. government property requiring legislative authorization for any transfer to be legal.
- A stable and secure Internet is essential to the global economy.

At a minimum these facts and circumstances would argue for vigorous Congressional involvement with and inquiry into future control of the authoritative root zone server. The functions performed by ICANN pursuant to the IANA contract include the allocation of IP address blocks, editing the root zone file (including any changes in gTLD or ccTLD records), and coordinating the assignment of unique protocol numbers. Any consideration of transferring the IANA function to ICANN or another entity on a permanent basis must consider the impact of that action on effective accountability and transparency for that organization. Any contemplation of transferring the function to a multistakeholder or multilateral entity must consider whether that would be likely to lead to increased politicization of these functions, as well as the economic damage that could result if such politicization resulted in actions adverse to the U.S. and its allies.

Congressional oversight of this subject would arguably involve not just the Commerce committees, which have direct oversight over NTIA, but the Homeland Security committees (given their ongoing involvement with cybersecurity) and the Foreign Relations committees (given the State Department's ongoing role in the Internet governance debate). That inquiry could begin with a Congressional request that the Department of Commerce inform it as to whether the current administration contemplates acquiescing to various entreaties that the IANA function be globalized and, if it does, that the Department engage in the very substantial legal analysis required to provide its views on whether such a transfer can be facilitated absent Congressional authorization through specific legislation. Congress might well wish to make the same request of its own legal research arms as well as outside legal scholars to obtain a diversity of opinions.

Even if the Department and other legal experts conclude that specific authorizing legislation is not required, the NTIA might nonetheless desire to have some indication of Congressional approval of such transfer if it is indeed being contemplated, as once the IANA function is transferred away from U.S. control it cannot be recalled -- and the consequences of such a transfer on ICANN accountability and DNS security and stability could well be profound.

### **Continuing Accountability, Transparency and Top-Down Management Concerns**

## Diminishing U.S. Ties and the Quest for “International Status”

In Section 8(b) of the AOC ICANN affirms its commitment to “remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community”.

Notwithstanding that commitment, ICANN has recently diminished the role of its US headquarters in Los Angeles (LA), California to being just one of three co-equal management “hubs”, with the others located in the Asian cities of Istanbul and Singapore. This downgrading of LA to mere nominal headquarters status is reflected in CEO Chehade’s January 10, 2014 Blog post in which he states, “As you may have heard, I plan to split my residence this year among the cities in which ICANN has operational hubs. From mid-February through April, I will be based in the Singapore hub. Later this year, I will also relocate to Istanbul.”<sup>30</sup>Note that there is no mention of LA.

There are also clear signs that ICANN plans to and already is establishing legal status in other nations to either compliment or replace its U.S. legal presence. On September 3, 2013 CEO Chehade declared at the Asian Pacific Regional Internet Governance Forum (IGF) in Seoul, South Korea:

“You heard me announce recently in Durban that ICANN, for the first time, is setting up a legal structure in Switzerland. **That means that ICANN is going to seek to become an International Organization that is serving the world, not just as a private corporation in California.** These are important fundamental steps that we are exploring in order for ICANN to take a new global posture.” (Emphasis added)<sup>31</sup>

ICANN subsequently provided this explanation<sup>32</sup> of that declaration:

ICANN is not currently planning to set up a headquarters office in Switzerland. We will have an engagement center in Geneva, along with others scattered around the world but our three main hubs, as Fadi has previously announced, will be in L.A., Istanbul and Singapore.

While that statement denies any intent to establish a “headquarters office” in Geneva (at least at the present time) it provides no satisfactory explanation of what the Seoul statement actually meant or what ICANN is really planning.

According to the OECD, an International Organization (IO) is defined as follows: “International organisations are entities established by formal political agreements between their members that have the status of international treaties; their existence is recognized by law in their member countries; they are not treated as resident institutional units of the countries in which they are located.”<sup>33</sup> ICANN’s existing

outreach office in Geneva, established to facilitate interaction with the multiple UN agencies headquartered or maintaining offices there, is presently subject to Swiss law in regard to its ICANN's activities in Switzerland. Converting that office to one of an IO would require a treaty or other multilateral agreement and would exempt ICANN from Swiss or any other sovereign law.

Another hint of ICANN's plans emerged on October 22, 2013, when CEO Chehade made this statement as the Internet Governance Forum in Bali, Indonesia:

“While we are a California corporation today there is nothing that precludes us from being also, in addition to that, **a legal organization in other places, and we intend to do that** in order to make ICANN a more international organization.<sup>34</sup> (Emphasis added)

It is particularly noteworthy that he utilized the plural phrase “other places”, rather than the singular “another place” – as well making a clear declaration that, in ICANN's view, “nothing”, including the AOC, precludes ICANN from establishing a legal presence under the laws of other nations.

During a late December 2012 meeting on ICANN's Engagement Strategy for Europe<sup>35</sup>, its Vice President for European Engagement Nigel Hickson reportedly stated:

Within the last day or so, the Swiss government approved "international status" to ICANN through its Geneva office. Fadi has started a debate about the jurisdiction of ICANN. It could be possible in the future to transfer some of ICANN's operations under Swiss jurisdiction.<sup>36</sup>

We can only speculate in regard to which of its functions ICANN may be planning to transfer to Geneva or other cities where it establishes a legal presence. This will add to the hollowing out of its Los Angeles office as a meaningful headquarters.

Credible reports continue to appear regarding the possibility of a move of the headquarters function to Geneva. On February 14, 2014 the Swiss newspaper Le Temps cited several anonymous sources within ICANN that such a move was a “very likely scenario”<sup>37</sup>.

The AOC also makes clear that ICANN is to act with public input and on behalf of the public. Yet, aside from the substance of what is being contemplated, there are serious questions about the opaque process leading up to this exploration of IO status. There has been no ongoing dialogue with the ICANN community in regard to this, nor has there been any revelation of in-depth consideration of it by the ICANN Board to which management reports. As noted above, many matters are discussed in ICANN Board meetings that are not reflected in subsequent Minutes or other relevant documents.

Nor has been there been any explanation of whether any benefits resulting from the establishment of IO status for at least some of ICANN's operations would primarily flow to the public – or to ICANN as an organization. Indeed, there has been speculation that ICANN may be pursuing this course to further insulate itself from potential litigation related to the new gTLD program, or to ameliorate potential threats to its non-profit status due to the very substantial sums it has collected from it (more than \$300 million in net new application fees alone, with additional substantial income to be derived soon from the proceeds of auctions resolving string contention sets) -- as well as the additional income that will soon flow from new gTLD registries and domain registration fees. All this incoming cash adds heft to an annual budget that is already north of \$180 million. What would it mean for an organization with this level of continuing, self-generated income, independent of any need for outside funding, to be able to act with even less accountability than exists today?

Those rapidly escalating revenues also underline the dangers of a self-funded ICANN without sufficient oversight to assure transparency and accountability, with the potential for it to become an insulated, power wielding organization. The potential ramifications of establishing IO status are profound. The “White Paper”<sup>38</sup> that was the blueprint for ICANN's establishment specifically stressed the importance of assuring that relevant law, especially antitrust/competition law, applied to ICANN. But IO status could exempt ICANN contracting and business practices from that restraint.

There is another possible course for ICANN's future, a radical one that is nonetheless permitted by the AOC. And that is outright rejection of it through strategically timed provision of notice from ICANN to the U.S. The last section of the AOC states:

The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party.

What would the U.S. do if such notice was delivered, especially if that took place after an international “Summit”, like the upcoming meeting in Brazil, declared that ICANN should be free of all vestiges of U.S. control? Would the U.S. accept or resist such unilateral ICANN secession? The Montevideo Statement's call for ICANN's globalization, signed by ICANN's CEO, is a clear harbinger of that possibility and the corresponding need for advance planning.

So are other recent statements from CEO Chehade. In a January 10, 2014 interview<sup>39</sup> he insisted that there is only an eighteen month window to create a new model of Internet governance. And in a video interview<sup>40</sup> conducted at the January 2014 World Economic Summit in Davos, Switzerland he opined that the “time has come” for the US to pass on its ICANN stewardship because it is “no longer sustainable” due to the fact

that the Internet now underlies a significant percentage of world economic growth. But of course the very growth of the Internet as a foundation for world commerce indicates the need for extreme care in making changes in the management and oversight of the DNS.

Most recently, as a new gTLD conference held in Washington, DC, the head of ICANN's new gTLD reportedly gave this answer when questioned on whether ICANN planned to relocate its headquarters to Geneva:

There are no plans to move outside of the US, but you have to be somewhere, your have to be incorporated somewhere, so it's an ongoing issue

When ICANN was first created by contract with the US, it was always envisioned that the multistake (sic) model would work so well that at a certain point, and it may have taken a lot longer than first thought that ICANN could operate without the contract, the contract would not be required and it ICANN could operate on its own there are some who think that time is now<sup>41</sup>.

Another domain industry journal found more evidence of ICANN's intent to relocate in a February 17, 2014 Board Resolution. Declaring, "ICANN's board of directors has given the clearest indication yet that the organization wants to set up an HQ overseas, further loosening ties with the US government."<sup>42</sup>

The signs are unmistakable. ICANN has downgraded the headquarters centrality of its Los Angeles offices, has openly declared its pursuit of legal status in Switzerland and other nations, and has indicated that its present arrangement with the U.S. is unsustainable and that the entire Internet governance framework must be altered within the next year-and-a-half. Yet no one in official Washington is asking tough questions about what AOC abrogation would mean for future Internet stability and openness, much less for maintaining effective accountability and transparency for ICANN operations.

### Accountability and Transparency -- ATRT2

Section 9.1 of the AOC, titled "Ensuring accountability, transparency and the interests of global Internet users", contains an ICANN commitment to "to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders". In order to implement this commitment, it also requires that "ICANN will organize a review of its execution of the above commitments no less frequently than every three years". The result of that commitment is the Accountability

and Transparency Review Team (ATRT) Report. The second such Report (ATRT2<sup>43</sup>) was issued for public comment on January 9, 2014<sup>44</sup>

The importance of the ATRT report and its grounding in the AOC was recognized in a February 12, 2014 blog post<sup>45</sup> from President Chehade. It reads in part:

At nearly 300 pages, the recently published Accountability & Transparency Review Team Report, including recommendations and five appendices, doesn't pretend to be an easy read with simple solutions that can be implemented overnight. Nor should it be. Instead it is a serious and complex report, mandated by the Affirmation of Commitments. The AOC is unique in that it provides for multistakeholder review mechanisms – it is an agreement that reinforces ICANN's accountability to the global community. The report provides a snapshot of where ICANN is today regarding its accountability and transparency efforts, and a roadmap for improving those. It is crucial to ICANN's credibility within the Internet governance ecosystem.... There won't be a day when we decide: "*OK, we're accountable and transparent now, so we can stop reviewing these things.*" Long-term accountability is not a box you check, or a certificate you hang on the wall. It's a continuous, evolving process of careful implementation and review.

While many members of the ICANN community would disagree with various findings and recommendations within ATRT2, almost none would disagree that this AOC-mandated process is critical to ensuring ICANN's continued accountability and transparency. The rigorous process involved in conducting the ATRT review ensures that every aspect of ICANN's operation and policies is open to scrutiny and community comment. Many of the recommendations in the ATRT2 – such as better metrics and standards for Board membership and activities, increasing the transparency of the GAC, and improving the public comments process – are important to ICANN's credibility and continued effectiveness.

But, as noted in the prior section, ICANN is free at any time to terminate the AOC 120 days after providing notice of such intent to the U.S. Such action is unlikely as long as the U.S. retains control of the awarding of the IANA contract, as the authority it provides is central to ICANN's ability to provide technical management and expansion of the DNS. But it would be highly likely if IANA and ICANN are globalized as is called for in the Montevideo Statement, by Brazil and the EC, and by other parties. Abrogating the AOC would be a natural consequence of terminating the last vestige of ICANN's unique relationship with the U.S.

If "evolution" of Internet Governance proceeds, critical questions will include what entity (if any) holds IANA counterparty status, and whether a terminated AOC with the U.S. is replaced by a similar list of commitments to a new entity charged with assuring ICANN's

continued accountability and transparency – and actually willing to enforce it and unhindered by internal divisions in doing so.

Transferring the IANA contract to ICANN on a permanent basis could eliminate most of the leverage that results in the ATRT being a meaningful exercise. As CEO Chehade observed, “Long-term accountability is not a box you check, or a certificate you hang on the wall. It’s a continuous, evolving process of careful implementation and review.”

### Top-Down Mandated Presidential Strategy Panels

In July 2013, during the opening ceremony of the ICANN meeting held in Durban, South Africa, CEO Chehade “announced the creation of five new ICANN Strategy Panels that will serve as an integral part of a framework for cross-community dialogue on strategic matters”<sup>46</sup>. While ostensibly designed to conduct work on strategic areas identified by the ICANN community, this initiative was undertaken without any prior consultation with the ICANN community. The Chairs and members of the Panels were chosen by ICANN management and many of those members have no prior experience with or involvement in ICANN; all the panels report to CEO Chehade.

These panels are beginning to release their preliminary conclusions and feedback is being solicited from the community<sup>47</sup>. It remains to be seen whether the output from these panels will be productive to the ICANN community’s dialogue or a further diversion from matters that have higher priorities within the community. There is reason for skepticism. For example, the Strategy Panel on Multistakeholder Innovation<sup>48</sup> has proposed that “to make ICANN more legitimate and inclusive” it should “crowdsource” each stage of decision-making. It also proposed – ironically, at a time when ICANN purports to be busy defending the multistakeholder model – that ICANN should “Move from “Stakeholder” Engagement to Global Engagement” , elaborating:

ICANN should therefore experiment with running parallel processes for one year side by side with existing stakeholder groups to prepare for their possible phase-out in some cases. For instance, ICANN could pilot organizing participants topically rather than by currently existing constituency groups (defined by interest). Within such an experiment, the crowdsourcing practices described above can be used as alternatives and complements to existing stakeholder group practices.

ICANN’s Generic Names Supporting Organization (GNSO) is organized by interest-based constituency groups, so this proposal is a direct challenge to the effective legacy structure through which many ICANN stakeholders have expressed themselves since

its inception. (Working groups on specific issues are, on the other hand, open to any stakeholder regardless of constituency – so to that extent the proposal is redundant.)

ICANN has maintained that the strategy panels are merely advisory and not meant to replace the bottom-up consensus process that has been the basis of ICANN policymaking. But the entire creation of the panels was a top-down management decision absent any prior community consultation. And the output of these panels will occupy a major portion of the time and attention of participants in ICANN's next public meeting to be held in March 2014 in Singapore. Combined with the discussions of ICANN's Internet governance initiatives, little time or energy will be left to address the many unresolved issues related to the new gTLD program – which may well be an intended result.

In a February 18<sup>th</sup> conference call between CEO Chohade and the heads of ICANN's supporting organizations and advisory committees, he made these remarks concerning consideration of the Strategy Panels' output at the upcoming ICANN Singapore meeting:

One is to frankly carry the strategic planning process, which has been going now for several months, to its final stages. Take all the input from the panels that the last three of them will issue, I think, Theresa, their reports by this weekend. So all four will be done by this weekend. They will issue their reports. We have the in parallel strategic planning process with the board and the staff and the community that has been going on, bringing all these things to a certain level that allows us in London to nail and seal the strategic plan for the next five years would be really good.... Keep in mind as you comment on these that the strategic panel's recommendations are just that. They're recommendations. I can assure you we don't have a plan to embrace them as is. We plan to debate them, to discuss them, to dismiss those that don't make sense, to embrace those that make sense, and explore them further. I think it's very important to appreciate what these are. As I said before this is input that we can take or throw away. It's up to us. We're the community, this is our strategic plan, it's our ICANN, and we chose to use external views so that we can get external views that, as I'm sure you would appreciate, sometimes would be very useful and new perspectives that would open new opportunities for us. And sometimes they would be off the mark and we would recognize that as a good community and deal with that.<sup>49</sup>

It seems implausible that the reports and recommendations of five panels created and filled by the CEO and framing the discussion of a five-year strategic plan will simply be “thrown away”. Those who frame the discussion control the discussion, and while these top-down inputs may be amended by the community the final result is far more likely to

be close to what they recommended, and what management desired, than what would have emerged from a true bottom-up community-driven process.

On that call Chehade also stated that the other two topics that he hoped would be the main focus in Singapore were the ATRT2 recommendations and ICANN globalization – while curiously stating that he hoped that would not get into matters of Internet governance – “I’m hoping with your help that we don’t end up having another meeting for a whole week consumed by issues of Internet governance”. That seems particularly odd given that one of the Board GAG entities created to support ICANN globalization is focused on Internet governance. Adhering to his request would also deprive the community of an opportunity to comment on the Internet Governance meeting being held in Sao Paulo less than a month later. (Finally, it’s worth noting that neither he nor any other participant on that call mentioned discussion of unresolved new gTLD program issues.)

Many members of the ICANN community feel that current management is increasingly engaged in top-down initiatives and decision-making that are at odds with ICANN traditions and principles. One member of ICANN’s Business Constituency expressed the feeling that management is engaged in a dedicated denial of service attack on community members -- overwhelming them with so many independent management initiatives that the community must respond to that its own views and priorities are suppressed.

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### Conflicts of Interest

In order to effectively carry out its responsibilities ICANN’s Board of Directors and staff must possess expertise and skills related to the organization’s technical management responsibilities. This inevitably requires consideration and appointment of individuals associated with the relatively small pool of companies and organizations related to DNS functions, and that in turn raises the possibility of at least perceived conflicts of interest on ICANN’s Board and in its staff ranks. The Board in particular must consist of individuals with substantial expertise in matters relating to ICANN’s functions if it is to provide informed guidance and act as an effective check on management. But that very expertise generally is based upon involvement with constituencies and entities that have a financial and policy stake in ICANN decisions.

In June 2011 the ICANN Board voted to launch the new gTLD program after three years of development of its Applicant guidebook. That was the final meeting presided over by its then-Chairman of the Board, and very shortly after leaving that position it was announced that he had taken a leadership position with one of the leading potential

gTLD portfolio applicants. The resulting press and community attention, including input from the GAC,<sup>50</sup> resulted in ICANN reviewing and revising its conflicts of interest policies. In March 2012 ICANN put out a revised Conflicts of Interest Policy for public comment.<sup>51</sup> A new Conflicts of Interest Policy was adopted on May 6, 2012<sup>52</sup> and a Summary of a Conflicts of Interest and Ethics Practices Review was published in May 2013.<sup>53</sup>

While these responsive efforts are commendable, the fact remains that four non-staff, voting members of ICANN's Board have been precluded by conflicts from serving on its subsidiary New gTLD Program Committee (NGPC<sup>54</sup>), which oversees and makes final decisions on all aspects of the new gTLD program. Further, it is not transparent at all as to what circumstances and relationships give rise to or eliminate a conflict.

For example, on February 7, 2014 ICANN's Board adopted a Resolution stating that Board Chairman Steve Crocker was no longer prevented by conflicts from being a member of the NGPC. The Resolution<sup>55</sup> stated:

The Board Governance Committee (BGC) Subcommittee for Conflicts & Ethics on new gTLDs initially evaluated all Board members' statements of interest related to new gTLDs when the membership of the NGPC was first established. The Subcommittee continues to review new Board members' new gTLD related statements of interest and any changes in previously made statements of interest for the purposes of determining if any Board member (including voting Directors and no-voting Liaisons) has an actual, potential or perceived conflict of interest such they should not be a member of the NGPC.

When the Subcommittee first evaluated the statements of interest, Steve Crocker was determined to be conflicted. Dr. Crocker has recently reported some changes to his statement of interest relating to new gTLDs and the Subcommittee has thoroughly evaluated those changes. The Subcommittee has determined the Steve Crocker is no longer generally conflicted as it relates to new gTLDs. As such, the Subcommittee has recommended that Dr. Crocker be made a voting member of the NGPC. The Board agrees.

The decision may well have been correct. Yet nowhere in the Resolution or otherwise is it revealed what actual, potential, or perceived conflict gave rise to the original determination, or what had changed to alter the evaluation. This does not seem consistent with ICANN's purported commitment to transparency – a commitment that is especially important in the area of ethics.

A strong case can be made for greater disclosure of the business and investment activities of ICANN Board members to provide better assurance to the public that Board decisions regarding policy, contract awards, and other matters are made absent any considerations that are not aligned with the paramount interest of ICANN in concert with its responsibilities to the global Internet using public. Concerns about ethics are heightened by the fact that ICANN Board meetings are held behind closed doors and that subsequent minutes reveal almost nothing about the positions of individual Board members, as well as whether votes were taken and what they were.

Similar concerns extend to senior staff with decisional authority. In a scenario similar to the “revolving door” occurrences common in Washington, DC, the former head of ICANN’s new gTLD program has become the Executive Director of the Domain Names Association<sup>56</sup>, a new trade group that “aims to play a key role in helping consumers, business, public-benefit organisations, and others understand the benefits and take advantage of the upcoming expansion of the Internet name space” and that includes Donuts and Rightside (the new name for United TLD Holdco) at the top level of its Board and membership<sup>57</sup>.

## **Unresolved Issues for the New gTLD program**

### Questionably Effective Second Level Trademark Protections

Brand owners of all sizes are already afflicted by intentional domain-centered trademark infringement – “cybersquatting” – in a domain name system (DNS) consisting of only 21 gTLDs and some major country code TLDs (ccTLDs). Companies and other parties find that “defensive portfolios” of trademark variation domains in multiple TLDs must be maintained year after year, at substantial total annual registration fees, simply to keep them out of the hands of cybersquatters. Nonetheless, it is simply impossible to prevent the registration and resale of domain names that contain a trademark, much less a confusingly similar variation of one, in all available gTLDs and ccTLDs. Brand owners feel victimized when their rights are utilized by others to promote the sale of competing or counterfeit goods or to generate advertising revenues, and consumers are put at risk of being marketed fake goods of inferior or even dangerous quality as well as the distribution of malware, phishing attacks, and other cyber-harms.

Prior to the new gTLD program, the only recourse against an infringing domain was to:

- Send a cease-and-desist letter, which often went ignored – especially when the infringer was an illicit entity based in a foreign jurisdiction (and it is often difficult

to impossible to even find a bona fide recipient, given the unreliability of domain registration WHOIS records and the use of privacy/proxy services to hide a registrant's identity and contact information).

- Bring an arbitration action pursuant to ICANN's Uniform Dispute Resolution Policy (UDRP)<sup>58</sup>. Each UDRP filing requires a fee starting at about \$1500, plus additional costs for expert trademark counsel. A successful UDRP results in the transfer of the domain to the rights holder complainant – who must then pay perpetual annual registration fees to keep it from getting back into the control of cybersquatters.
- Bring a trademark infringement action in a court of national jurisdiction. This is substantially more expensive than a UDRP but may provide civil money penalties or restitution, depending on national law, as well as the ability to bring an *in rem* action when the registrant cannot be located.

Brand owners expressed their deep concerns to ICANN that launching a program of unlimited new gTLDs could vastly expand their expenses for both defensive registrations and anti-infringement legal actions. In response, ICANN provided two new rights protection mechanisms (RPMs) to bolster defenses against trademark infringement at the second (domain) level.

The first mechanism is the Trademark Clearinghouse (TMCH)<sup>59</sup>. For a fee of \$150 per year per validated trademark, the TMCH provides a trademark owner with the right to participate in the “sunrise” registration period of all new gTLDs, prior to domains sales opening to the general public. The positive aspect of this is that the trademark owner can register each registered mark in a new gTLD before a cybersquatter can do so<sup>60</sup>. The negative aspect is that each registration incurs recurring annual costs – and the annual registration fee at some new gTLDs is substantially higher than at incumbent gTLDs like .com. In addition, sunrise registration fees can be high or even extortionate – one applicant for the .sucks gTLD set a sunrise registration fee of \$25,000 per domain!

<sup>61</sup>

The TMCH also provides a system – the Trademark Claims Notice – which generates a warning notice to any prospective registrant seeking to register a domain when its name is an exact match to the mark registered in the TMCH. The Notice warns the registrant that he may be committing infringement, but it does not prevent the registration from being consummated (only a sunrise registration can do that). If the registration is consummated the rights holder is notified by the TMCH so that it can consider its legal remedies – which then cost additional substantial sums to implement.

Utilization of the TMCH has been substantially below expectations. As of mid-December 2013 total registrations stood at about 20,000, a small fraction of total global trademark registrations. In an apparent effort to boost registrations, Deloitte – which operates the TMCH under a contract with ICANN – announced that it would indefinitely extend the period in which it provides notice of potentially infringing domain registrations to rights holders who continued their TMCH registrations<sup>62</sup>. Surprisingly, while many rights holders are unaware of or have chosen not to utilize the TMCH, it appears that many other parties have gamed the TMCH registration process and have registered generic terms that should not be permitted to be trademarked – yet these illegitimate registrations will trigger Trademark Claims Notices and deter innocent parties from registering non-infringing domain names<sup>63</sup>.

By mid-February, TMCH registrations had risen somewhat, to about 25,000. At that time spokespersons for Deloitte began to use a much scarier method to try to stimulate sales. As reported in Adweek<sup>64</sup>:

Try to follow this. Ican, the international organization that has begun to roll out hundreds of new generic top level domains over the objections of brands worried about domain abuse, is now warning brands that they are at risk of domain abuse.

At the end of last month, the first of what will be hundreds of new domains (suffixes to the right of the dot in a url, like .guru, .photography) went live, adding to the more commonly-known domains like .com and .net.

Ican's solution to protecting trademarks in the new Internet domain universe is its Trademark Clearinghouse, a place where brands can register their exact names, but only their exact names, to prevent squatters and fraudsters from expropriating their brand identity on the Internet. The Trademark Clearinghouse is run by Deloitte and IBM, which get paid if trademark and brand owners sign up.

But companies apparently aren't rushing to pay the \$150/year per domain fee to register each brand.

According to data from the Trademark Clearinghouse released Friday, unknown entities have pre-reserved their interest in registering domain names for every one of the nation's 50 most valuable brands, as compiled by brand consultancy Interbrand. Research found that brands in the food and beverage space have left themselves most vulnerable with domains like [pepsi.us](http://pepsi.us), [kfc.in](http://kfc.in), and [kelloggs.net](http://kelloggs.net) in the control of entities not affiliated with the brands.

"Although the new gTLD program is set to enhance competition, innovation, and consumer choice on the Internet, our research shows that some of the biggest American brand names are at risk of intellectual property infringement online as the new TLDs are rolled out, with many unknown entities eager to capitalize on the traffic and illegitimate opportunities a branded website will generate. This potentially compromises the reputation of each brand targeted," said Jonathan Robinson, strategic consultant to the Trademark Clearinghouse in a statement.

Robinson's statement reads like an indictment from the advertising community, which has been fighting for more trademark protections in the years leading up to the roll out.

"This is just more evidence of why we were encouraging more protections for trademarks," said Dan Jaffe, evp of the Association of National Advertisers. The ANA was one of more than 160 companies and organizations that had pushed for limited protected registrations that would apply across all the domains as they were cleared to go live.

To Greg Shatan, a partner with Reed Smith who specializes in intellectual property law, it's a blatant sales pitch. "They're trying to drum up business. The only way the [Trademark Clearinghouse] gets paid, is if trademark and brand owners are scared."

The trademark identity problem for brands is just beginning. So far, 84 of the brands included in the Icanm study have taken legal action against third parties infringing on their intellectual property online. (Emphasis added)

A similar warning was delivered by Mr. Robinson in regard to UK brand names in another publication<sup>65</sup>, which reported:

Its research analysed the pre-reservation data of new gTLDs .web, .online, .shop, .app and .blog for brand names featuring in consultancy Interbrand's 'Best Global Brands' of 2013.

The TMCH found that 98 percent of the most valuable brands have been pre-ordered as domain names under .web, and 96 percent under .online.

In the UK, third parties have already pre-reserved their interest in registering the domain names of 80 percent of the UK's 50 most valuable brands under .web.

Third parties have attempted to pre-order 78 percent of the UK's top 50 most valuable brands under .online, 72 percent under .app, 70 percent under .shop and 68 percent under .blog, according to the research.

Further analysis revealed that 54 percent of these brands are currently not in control of key domain names across major existing domain extensions...

With gTLDs such as .bike, .clothing, .guru, .holdings, .plumbing, .singles and .ventures now generally available, Jonathan Robinson, a strategic consultant to the TMCH, fears that brands' reputations could be under threat.

The TMCH continued its dire warnings in a February 20<sup>th</sup> press release, declaring that "Unknown entities have pre-reserved" their stake in registering new domains related to "100 percent" of the "top 50 most valuable" brands in the U.S., warning that brand owners who do not register their trademarks in the TMCH will be the victims of those who "register domains in order to pass themselves off as the brand or capitalize on web traffic to these new domains," and noting that forty-eight percent of the top 50 brands in the U.S. are "currently not in control of key domains," especially brands in the food and beverage industries". Mr. Robinson is quoted in the release stating, "Our research shows that some of the biggest American brand names are at risk of intellectual property infringement online as the new gTLDs are rolled out, with many unknown entities eager to capitalize on the traffic and illegitimate opportunities a branded website will generate."

In addition to his role as "strategic consultant" to Deloitte, Mr. Robinson is currently the Chairman of the Generic Names Supporting Organization (GNSO) Council, the ICANN body charged with developing policy for all gTLDs.

The limitations of the TMCH were the subtext of a reaction from Kellogg spokesman Kris Charles, who said, "Kellogg owns hundreds of brands around the world and securing every domain name for those brands is not feasible. Since we cannot own everything, we monitor our brands through a variety of means and take aggressive action when necessary to prevent infringement or dilution of our trademarks." Other than generating a Trademark Claims Notice that can be ignored by a prospective registrant, the main value of the TMCH is the standing it gives brand owners to take advantage of the "sunrise" registration period for each new gTLDs in which they can secure domains incorporating their marks ahead of the opening of sales to the general public. But such sunrise registrations are generally priced much higher than general public sales, so this can be a very expensive strategy for a company with a thick, global trademark portfolio. Many prefer to rely on their traditional brand protection services and to take follow-up action against identified infringers through the cease-and-desist letters and the URS, UDRP, or litigation.

Christine Willett, ICANN's Vice President of Operations for its New gTLD division, defended the TMCH mechanism, remarking, "ICANN has taken great care to protect trademarks during the rollout of new gTLDs using a variety of rights protection

mechanisms including the Trademark Clearinghouse. The New gTLD Program was designed to afford more protection in the new TLD space than exists in the old TLD space, but brand owners have to manage their online protection strategy with the same attention they use to manage brand protection in the brick-and-mortar world. The Trademark Clearinghouse is intended to help them in that regard.”<sup>66</sup>While that statement is accurate, many major brand owners continue to regard the new gTLD program as generating substantial new defensive costs with little in the way of offsetting benefits.

Given the apparent ineffectiveness of the TMCH to deter infringing domain registrations, brand owners are likely to make use of the other new RPM – Uniform Rapid Suspension<sup>67</sup> (URS). The URS is an arbitration procedure meant to supplement the UDRP for “slam dunk” infringement cases. Each filing costs only \$500. The burden of proof for a successful action is somewhat higher than a UDRP, and when infringement is found the offending domain is suspended and does not resolve for the remainder of its registration period, but is not transferred to the complainant.

It is too early to gauge the extent to which the URS may be utilized. But early indications are that cybersquatting is extensive at some new gTLDs, and that infringing names are already being resold on the secondary market.<sup>68</sup>As one domain industry blog reported in regard to Donuts’ .guru string:

[gurudomainnamesforsale.guru](http://gurudomainnamesforsale.guru) which appears to be the first aftermarket site dedicated to .Guru domain name launched today.

The site unfortunately has many .guru domain names listed for sale that are trademarked terms, including:

ChickFilA.guru, GoldmanSachs.guru, NeimanMarcus.guru, CocaCola.guru, MGM.guru, PGA.guru, TheMasters.guru, TheUSOpen.guru...

The site also has several political names:

Hillary.guru, Obama.guru, Clinton.guru, RNC.guru, DNC.guru, TeaParty.guru, JebBush.guru

Indeed, the first successful use of the URS at new gTLDs was apparently a filing undertaken by IBM against IBM.ventures and IBM.guru, which resulted in suspension of those domains in six days.<sup>69</sup>

More pernicious cybersquatting is also occurring at the new .bike gTLD, another string operated by Donuts. A February 11, 2014 analysis<sup>70</sup> of the top 10 bicycle brands by sales volume in the U.S. plus another ten brands that came up most frequently in

search results found that all 20 were registered in .bike – but that only 4 of those 20 domains were clearly registered by the trademark owner, and that 13 of the domains had been registered by unrelated third parties who were likely cybersquatters. The unauthorized registration of canondale.bike is probably of greater concern to that company than if it had occurred at .guru because the potential for consumer deception, including the sale of counterfeit bikes and parts, is far higher given that bike is the generic label for its industry.

If these registrations are any indication, trademark owners will need an infringement strategy guru – and lots of money – to address cybersquatting at hundreds of new gTLDs open to domain registrations by the general public. Many of the large portfolio applicants are offering their own proprietary blocking services to prevent a trademark from being registered across all their gTLDs. In that regard, Donuts, which filed the largest number of gTLD applications and is the registry operator of .guru and .bike, is offering a Domains Protected Marks List (DPML<sup>71</sup>). However, the DPML service costs about \$3,000 per trademark for a five-year registration!<sup>72</sup> While this may be less expensive than five years of defensive registration costs across all of Donuts' gTLDs it is still prohibitive for many companies. As a result, World Trademark Review reported in January 2014 that only 12 of the top 28 public companies had utilized the DPML service for any of their trademarks.<sup>73</sup>

The new gTLD program is in a very early rollout phase, with the benchmark number of one hundred delegations reached on January 21, 2014<sup>74</sup>. As of February 20, 2014 the total number of domain registrations in new gTLDs had just passed 125, 000, with .guru (35,000) and .photography (18,000) leading the pack<sup>75</sup>. Total registrations are likely to escalate rapidly throughout 2014 as the early delegation gTLDs leave their “sunrise” and “land rush” registration phases and open sale to the general public, and as hundreds of additional new gTLDs are delegated to the root zone file and begin their own sales and marketing campaigns.

The potential for such significant new infringement and associated cost burdens on rights holders has been a continuing concern of U.S. Senate Commerce Committee Chairman Jay Rockefeller. In December 2011 Chairman Rockefeller wrote<sup>76</sup> to Commerce Secretary John Bryson and NTIA Administrator Lawrence Strickling, “I’m concerned that this expansion of generic, top-level domains, if it proceeds as planned, will have adverse consequences for the millions of American consumers, companies, and non-profit organizations that use the Internet on a daily basis... I am now asking that you work with your international counterparts and ICANN to ensure that ICANN’s plan to expand top-level domains is implemented in a cautious, limited manner, which minimizes the likelihood of negative impacts.”

Rockefeller's letter also noted the concerns of the Federal Trade Commission regarding "the potential for significant consumer harm resulting from the unprecedented increase in new gTLDs" and the agency's request that ICANN implement it as a limited "pilot program". ICANN of course proceeded undeterred with implementation of a program of unlimited new gTLDs.

Rockefeller restated and amplified his concerns in a June 26, 2013 letter to ICANN Board Chairman Stephen Crocker<sup>77</sup>. In that communication he noted that ICANN had committed to the NTIA to review possible improvements to the program including dealing with the perceived need for defensive registrations. He also noted that the GAC had communicated the need for reinforcement of processes for raising and addressing shareholder concerns in its April 2013 communique. The letter concluded by asking ICANN to consider a limited first round of new gTLDs to allow for an effective one-year review as required under the AOC. ICANN, not surprisingly, continued to implement its program of unlimited applications – because by that point in time all the applications had already been received.

Factors within ICANN that led to the decision to launch an unlimited new gTLD program probably include the fact that ICANN's constituencies and even its Board consist of many individuals aligned with companies that can profit from various aspects of the program; as well as ICANN's aversion to making subjective judgments, and its tendency to outsource key decisions and analyses -- all of which occur in a corporate culture with a strong aversion to any action that might invite litigation. Now that the unlimited new gTLD program is being implemented through gTLD delegations and new domains going live there will be an opportunity to observe and judge whether its costs to business and consumers are outweighed by its purported stimulation of innovation and competition.

### Ineffective Top Level Objection Processes

As the new gTLD Applicant Guidebook was developed, ICANN was urged to develop and implement protections against trademark infringement at the top level of the DNS as well. In response, ICANN developed four separate dispute resolution processes<sup>78</sup>:

1. *String Confusion Objections*

String is confusingly similar to an existing TLD or to another applied-for gTLD string - delegating two or more similar TLDs could cause user confusion

2. *Legal Rights Objections*

String violates the legal rights of the objector

### 3. *Limited Public Interest Objections*

String contradicts generally accepted legal norms of morality and public order recognized under principles of international law

### 4. *Community Objections*

Substantial opposition to the gTLD application exists from a significant portion of the community that the gTLD string targets

Each of these objection processes is handled by a separate ICANN-designated dispute resolution provider. Bringing an objection is exceedingly costly, with filings fees alone running into the tens of thousands of dollars.

In practice, the vast majority of top level objections have failed. In many cases those decisions were correct because the objections were brought by competitors to the applicants and had no sound basis. But in other instances the objections had a rational basis but were doomed because the standards required to prevail are almost impossible to meet.

For example, the well-known retail clothing chains of Limited and Express brought legal rights objections against third party applications for .limited and .express. The objections failed because their brand names are dictionary words, their trademark rights are circumscribed within particular nations and not global, and those generic terms can have other meanings beyond retail clothing sales.

The resulting message to even globally recognized brand owners who have valuable trademarks in generic words is clear – the only way to protect that mark at the top level of the DNS in the next round of the new gTLD program is to spend hundreds of thousands of dollars in application, consulting and legal fees to obtain it as a “.brand” gTLD because there is no other effective means of preventing another party from acquiring and operating it. Thus, inadequate protections in the first round may spur involuntary defensive gTLD applications in future rounds.

Similarly, the Republican State Leadership Committee (RSLC) – which successfully applied for .gop – was unable to prevent a portfolio applicant from acquiring .republican through a community objection. The rationale for that decision was that even though the RSLC is the state level body of one of the two major U.S. political parties, it did not speak for the global community of adherents of the republican form of government, or for other organizations that utilize the word republican in their name.

What was particularly galling about this .republican decision is that the objection may never have been needed in the first place -- because the applicant for both .republican and .democrat is a wholly owned subsidiary of Demand Media (DM), a company that

has been accused of long record of cybersquatting and that should arguably have been disqualified as a gTLD applicant under a provision of the Applicant Guidebook stating:

In the absence of exceptional circumstances, applications from any entity with or including any individual with convictions or decisions of the types listed in (a) – (m) below will be automatically disqualified from the program....

m. has been involved in a pattern of adverse, final decisions indicating that the applicant or individual named in the application was engaged in cybersquatting as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), the Anti-Cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or other equivalent legislation. Three or more such decisions with one occurring in the last four years will generally be considered to constitute a pattern.

ICANN was advised in July 2012<sup>79</sup> of that documented history of cybersquatting and received a second letter on this subject in April 2013,<sup>80</sup> after it failed to disqualify Demand Media as an applicant. The first letter advised ICANN that Demand Media appeared to be coordinating many of its gTLD applications with Donuts (which is headed by former DM company executives) and that there were an:

extraordinary number of rulings against Demand Media companies by UDRP panels – based on findings of bad faith, cybersquatting and/or typosquatting – which rulings demonstrate Demand Media’s ineligibility to pass ICANN’s Background Screening...Public filings reveal that the Demand Media Group has, collectively, suffered at least 39 adverse UDRP decisions. This number includes 33 cases where the respondent was “Demand Domains” or some variation thereof, five cases where the respondent was “eNom” or some variation thereof, and one case where the respondent was “Acquire This Name”, another member of the Demand Media Group...Possibly more important is that, of the 39 rulings against the Demand Media Group, the tribunals made express findings of “bad faith,” “typosquatting” and/or “cybersquatting” on the part of the named member of the Demand Media Group in 24 – almost two-thirds – of those cases. Of these 39 rulings against the Demand Media Group, 22 have been rendered within the past four years.

The April 2013 letter was directed to ICANN as well as to three top officials of the NTIA. It again targeted the business relationship between Demand Media and Donuts and argued:

In light of these facts, it is beyond question that Donuts is serving as a “backdoor” for Demand Media to acquire control over new gTLDs when Demand Media, itself, is barred by ICANN's rules from doing so.

Although it is possible that Demand Media's trick -- of forming a new entity to participate in the gTLD process to obscure its own indirect participation -- has simply deceived the ICANN personnel administering the gTLD program, that explanation would be troublesome. The alternative scenario would, however, be far uglier: that ICANN personnel made a thoughtful decision to ignore Donuts's relationship with Demand Media and to approve Donuts's continued participation in the gTLD process, knowing that -- in so doing -- they were approving Demand Media's acquisition of control of gTLDs in contradiction to ICANN's eligibility rules.

Either way, a full and reasoned explanation is necessary: not only to fulfill ICANN's obligation of transparency, but to address facts that -- left unexplained -- buttress the concerns of many that ICANN is not yet prepared to oversee the Internet without active supervision by governmental authorities, and particularly the US Department of Commerce.

ICANN has never explained how Demand Media passed its new gTLD applicant background check<sup>81</sup>, which is supposed to be the first line of defense against abuse of the new gTLD program. United TLD Holdco, the applicant for .republican, has also applied for and will operate .democrat. As there are no restrictions regarding registrants at these gTLDs, they are likely to be used for a variety of websites that confuse Internet users/U.S. voters regarding the actual positions of major party political candidates, and may even be utilized to gather donations by entities with whom the contributors disagree because of confusion regarding the actual sponsorship and control of websites. They may even be used to host “adult content” – as one August 2013 article speculated, “Could [www.Vote.Republican](http://www.Vote.Republican) Be a Porn Site Next Year?”<sup>82</sup> United TLD Holdco, a wholly owned subsidiary of Demand Media, recently changed its name to Rightside;<sup>83</sup> its January 2014 registration statement confirms that it has interests in Donuts and will provide it with back end registry services.

String confusion objections have been another area of intense controversy. The problem is grounded in the fact that ICANN tends to outsource qualitative decisions to “outside experts”. So-called experts retained by ICANN informed it that the public would not be confused by singular and plural versions of a gTLD “string” that were differentiated solely by an “s”. Despite widespread outcry from its own community ICANN has maintained its position that it will not second-guess such “experts”. Yet, when string

objections involving singulars and plurals were filed with arbitrators at the International Centre for Dispute Resolution (ICDR) their separate “experts” came up with conflicting decisions, sometimes involving the very same string. Some of those arbitrators felt that they, unlike ICANN’s Board, were not bound by the prior expert panel’s determination that singulars and plurals were not confusing.

On February 11, 2014 the NGPC published for public comment a proposed review mechanism to address the Perceived Inconsistent Expert Determinations in certain New gTLD Program String Confusion Objection proceedings.<sup>84</sup> While the NGPC characterizes these inconsistent decisions as “perceived” they are in fact quite real and the entire situation has become confusing to the point of embarrassment. It is also noteworthy that this is not a proposal to modify the Reconsideration Process to address inconsistent expert determinations, or to modify the operation or foundational standards of the objection review panels to minimize or prevent future inconsistencies in future gTLD application rounds, but only a limited one-time procedure. The NGPC has without explanation narrowly defined ‘Inconsistent SCO Expert Determinations’ as “objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ” -- which excludes situations in which different objectors raised concerns about the same string and received different expert determinations. This results in having the proposed mechanisms apply only to disputes involving .com/.cam and .car/.cars but not to other objections that yielded inconsistent results.

As for the proposed standard of review – “Could the Expert Panel have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and procedural rules?” – that is unlikely to resolve anything in practice, as it would require a three-member expert panel of the ICDR to determine that one of their colleagues had previously reached an unreasonable determination. Excluding the .com/.cam dispute, most of the other inconsistent decisions are grounded in the initial expert report accepted by ICANN stating that singulars and plurals of the same string were not confusingly similar. Given that foundational document, it is hard to envision how the proposed standard of review would alter the outcome for the .car/.cars situation.

Summing up, the objection processes established by ICANN to protect parties against infringing or other troublesome applications at the top level of the DNS have proven in practice to be expensive, ineffective, and inconsistent. The NGPC’s limited proposal to address two string confusion cases barely scratches the surface of the work required to reform and enhance these processes for any future round of new gTLDs.

It should also be noted that ICANN has established a Post-Delegation Dispute Resolution Policy (PDDRP) that is designed to shut down a registry that is operated in an inappropriate manner. That mechanism has yet to be tested.

### Lack of Adequate Public Protections for New gTLDs relating to Regulated Industries and Professions

In addition to trademark infringement, “bad actors” can utilize domains to perpetrate scams on unsuspecting Internet users. That ability may be enhanced when domains are registered at new gTLDs that implicate regulated industries and professions. Consumers may reasonably believe that a domain registered at such a gTLD connotes that a domain registrant meets the qualifications for and possesses the necessary credentials to participate in the regulated industry or profession. If high registrant validation and eligibility requirements are not maintained it then becomes far easier to perpetrate scams on consumers relying on the gTLD label as evidence of legitimacy.

Seeking to protect the public by diminishing that potential for abuse, in April 2013 the GAC addressed this matter in its Beijing Communique<sup>85</sup>. Annex I of the Communique, under the heading of “Consumer Protection, Sensitive Strings, and Regulated Markets”, notes, “Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm.”

The GAC then proposed a series of safeguards applicable to a non-exclusive list of dozens of applied-for gTLDs encompassing such sectors as children, health and fitness, financial services, charitable organizations, intellectual property, and professions. The GAC also proscribed additional safeguards for gTLDs related to industries and professions with clear and/or regulated entry requirements.

The NGPC finally took action on the GAC’s request through a Resolution adopted on February 5, 2013.<sup>86</sup> Annex 2<sup>87</sup> of that Resolution displays the NGPC’s proposed approach to resolving the GAC concerns and protecting the general public against illicit activities based in new gTLDs related to regulated sectors.

Several things are noteworthy about this NGPC action:

- The majority of the strings originally identified by the GAC are relegated to a category requiring only three minimal safeguards, not the full scope of eight safeguards. The reason for the differentiation is unclear and unexplained – for

example, it is not obvious why .medical is subject all safeguards but .health is not; likewise for .creditcard versus .credit, etc.

- Registry operators are required to include various safeguard requirements in their Registry-Registrar Agreements, but have no ongoing obligations to actively monitor and enforce such provisions.
- Registry operators are, for those gTLDs subject to the full panoply of safeguards, required to “clear a pathway” for working relationships with regulators and self-regulatory bodies in order to develop risk-mitigation strategies aimed at fraudulent and illegal other activities – but are not required to develop such relationships with other expert stakeholders such as civil society consumer advocacy and protection groups and similar entities.
- And, in perhaps the biggest flaw, registries for the full safeguards gTLDs are only required to include a provision in their Registry-Registrar Agreements that require registrars to obtain “a representation” from registrants that they possess any necessary authorizations, charters, licenses, or other credentials for participation in the sector associated with the gTLD string. Scam artists who provide false WHOIs contact data and intend to perpetrate frauds will have no hesitation clicking on a box or engaging in whatever other action is requested to make such a non-validated and false representation.

That watered down requirement was strongly criticized in a February 4<sup>th</sup>, 2014 letter sent to ICANN Board Chairman Stephen Crocker by U.S. Assistant Secretary for Communications and Information Lawrence Strickling,<sup>88</sup> Secretary Strickling emphasized that “the concept of “representation” is different from the affirmative obligation for the registry operator to verify or validate the credentials of domain names registrants that indicate participation in certain professional and regulated sectors, as the GAC requested”. His letter also indicates continuing questions regarding whether the NGPC action effectively prevents a gTLD registry operator using restricted registration policies from granting undue preference to any particular party, or subjecting potential registrants to any undue disadvantage. This dilution of the GAC’s requested safeguards appears at odds with one of ICANN’s Core Values, as stated in Section I. 2.11 of the Bylaws<sup>89</sup> :

In performing its mission, the following core values should guide the decisions and actions of ICANN:

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

Various other ICANN stakeholders are also concerned about the perceived weakness of public safeguards for strings related to regulated sectors. Leading members of the Business Constituency and the At-Large Advisory Committee sent a letter<sup>90</sup> to the Chairman of the NGPC on January 27, 2014 requesting that a proposed model for a Public Advisory Board (PAB) that could include all relevant stakeholders in setting applicable policies for regulated sector gTLDs be published by ICANN for public comment in order to inform discussion at the upcoming Singapore meeting. That letter was responded to on February 4<sup>th</sup><sup>91</sup> by ICANN's Vice-President for gTLD Operations in which they were told that ICANN would not put the PAB model out for comment – but which noted that registry operators were free to voluntarily adopt such a model. The proponents followed up with a response<sup>92</sup> to that refusal on February 14<sup>th</sup>.

That negative response is indicative of a new gTLD division that views gTLD applicants as customers and public policy concerns as beyond its remit. As a consequence, the potential cost to registry operators of implementing effective safeguards (which could readily be priced into the cost of domains for regulated sectors) takes precedence over the potential costs to consumers who rely on new gTLD labels as evidence of bona fide registrants, as well as the enforcement costs placed on government consumer protection and competition authorities to address scams based in such new gTLDs and assure pro-competitive practices.

ICANN's other proposed route to protecting the public is through requirements on new gTLD operators to develop Public Interest Commitment specifications (PICS). Specification 11 of the Updated Registry Agreement<sup>93</sup>, "Public Interest Commitments", sets forth a series of binding contractual requirements on a new gTLD registry operator that collectively aim to ensure that it will conduct its activities in a manner consistent with the public interest; with the registry operator's written obligations enforceable by ICANN as well as a Public Interest Commitment Dispute Resolution Process (PICDRP). Section 3(c) obliges the registry operator to "operate the TLD in a transparent manner consistent with general principles of openness and non---discrimination by establishing, publishing and adhering to clear registration policies".

While Section 11 is a useful start, it fails to adequately address the GAC concerns because it leaves it to the registry operator to propose its own PICS without accountability or safeguards solicited from the full range of stakeholders affected by a given gTLD. Indeed, some of the PICS proposed in current applications include wording that enables the registry operator to arbitrarily change or eliminate PIC components without consequence or recourse, post-delegation.

For example, the PICS<sup>94</sup> proposed by Donuts, the applicant for the largest number of new gTLDs, in regard to thirty-nine separate gTLDs implicating such regulated/restricted

access sectors as the practice of law and accounting, provision of medical and dental services, and lending and investment services, fails to address basic safeguards requested by the GAC in its Beijing Communique, including the establishment of working relationships with relevant regulatory and industry self-regulatory bodies in order to mitigate the threats of fraud and other illegal activities (and many of these strings fall within the low safeguard group as designated by the NGPC in its recent Resolution and will therefore be exempt from such requirements). Donuts' bid for the .charity gTLD is particularly demonstrative of the need for verifiable registrant qualification criteria that protects Internet users, given well-documented and numerous infringements of legitimate charities as well as the fraudulent "charity" solicitations that proliferate after natural disasters and other human calamities. Further, Donuts' PICS proposal rejects being subject to any future form of the Registrar Accreditation Agreement (RAA) and reserves the right to modify or discontinue any and all of its own PICS commitments as of January 2016. This is hardly the formula for enforceable long-term commitments that PICS were intended to serve. And, weak as the PICS approach currently stands, there is no assurance that ICANN's enforcement will be consistent or effective.

### Name Collisions

"Name collisions" occur when new gTLD strings (e.g., .corp or .mail) match names used internally by business and other installed computer systems. Names that formerly did not resolve at the top level of the DNS now will, and the resulting conflicts can cause internal systems to malfunction or crash, and also circumvents several widely deployed security protection measures (e.g., X.509 PKI certificates for secure communications and privacy scoping for "super cookies" in browsers), thereby creating vulnerabilities that can be exploited by adversaries seeking access to valuable or sensitive proprietary data.

Even though ICANN spent more than three years developing the Applicant Guidebook (AG) for the new gTLD program, culminating in Board approval the program in June 2011 and an application acceptance period extending from January through April 2012, the issue of name collisions and effective means for dealing with it was not publicly raised until January 2013<sup>95</sup>. ICANN's Security and Stability Advisory Committee (SSAC) completed an "Advisory on Internal name certificates that was publicly released on March 15, 2013<sup>96</sup>.

That document's Executive Summary made clear the very serious nature of the potential risk:

The SSAC has identified a Certificate Authority (CA) practice that, if widely exploited, could pose a significant risk to the privacy and integrity of secure Internet communications. This CA practice could impact the new gTLD program. The SSAC thus advises ICANN take immediate steps to mitigate the risks.

Further reporting on its own empirical analysis, the SSAC stated:

As shown in our empirical analysis, there are at least 37,000 internal name certificates used in thousands of enterprises. Although this practice *might* make sense in the previous two autonomous systems (DNS and CAs), with the introduction of new gTLDs, namespace collisions and other man-in-the-middle attacks (see Finding 4) will become more apparent. In addition, because many of the applied for TLDs are common, generic terms the risk of collisions increases.

Two findings in this report are particularly salient regarding the scope and duration of new risks related to the gTLD program:

**Finding 4: The practice for issuing internal name certificates allows a person, not related to an applied for TLD, to obtain a certificate for the TLD with little or no validation, and launch a man-in-the-middle attack more effectively.**

and

**Finding 5: The CA / Browser (CA/B) forum is aware of this issue and requests its members to stop this practice by October 2016. The vulnerability window to new gTLDs is at least 3 years.**

... Although this is welcome news, this is still *problematic* because ICANN plans to delegate new TLDs in 2013, introducing vulnerability for potential new gTLDs until October 2016.

That SSAC Advisory ended with this recommendation:

**Recommendation: The ICANN Security Team should immediately develop and execute a risk mitigation plan.**

An entry in the Advisory's Appendix again highlights the significant potential level of risk:

Due to the sensitive nature of this issue, the SSAC did not follow its customary publication procedures; instead, the SSAC delivered an interim advisory to the ICANN Security Team. The ICANN Security Team took immediate action.

Two weeks after the publication of that SSAC Advisory, VeriSign sent a letter<sup>97</sup> to the attention of ICANN's President and CEO and its Chairman, as well as the Assistant Secretary for Communications and Information at the Department of Commerce, accompanying a report on "New gTLD Security and Stability Considerations" prepared by Verisign Labs. That analysis identified a multitude of issues beyond CA practices that needed to be addressed to ensure the security and stability of the DNS.

Its Abstract summed up its findings:

*Abstract*—The introduction of multitudes of new generic Top Level Domains (gTLDs) into the DNS (the Internet's de facto name mapping system) will have far-reaching effects. Any party concerned with the issues of privacy, trust, confidence, or the overall security of the DNS after the addition of new gTLDs (either from the consumer or the operator perspective) is implicitly depending on the Internet Corporation for Assigned Names and Numbers (ICANN) and the broader DNS community to appropriately address these issues before delegating any new gTLDs. The risk of a misstep during the process of introducing new gTLDs to the global DNS could have far-reaching and longlasting residual implications.

Many of the issues cataloged in this report focus on work that is currently *not* done, and should be completed before any new gTLDs can be deployed in a safe and secure manner. To both illustrate the concerns that exist and to clearly identify the rationale behind these concerns, the general areas of focus in this report are: Root Server System implications, Operational Readiness for gTLD Registries, and Risks of Name Collisions on the Internet, all of which will potentially have a considerable impact on the security and consumption of new gTLDs, as well as on the broader existing DNS ecosystem.

On April 18, 2013 the SSAC issued a response<sup>98</sup> to a Board Resolution adopted on September 13, 2012 that requested the SSAC to provide advice on how "interdisciplinary studies of security and stability implications from expanding the root zone more than an order of magnitude should be carried out and whom else should be consulted". That letter made it implicitly clear that prior inquiry during the development of the new gTLD program had been inadequate, stating, "The SSAC believes that the community would benefit from additional inquiry into areas in which uncertainty remains relating to the expansion of the root zone." It recommended that one goal of the studies should be to, "Engage with communities that may not have been fully consulted by previous investigations on the impacts of the new generic Top Level Domain (gTLD) program" and noted that, "Additional interdisciplinary studies should add to the work that has already been done by including the perspective of communities that may not have

been fully consulted or engaged during previous investigations into the impacts of the new gTLD program.”

In addition to the technical concerns of protocol, namespace and DNS Security Extensions (DNSSEC) issues, the SSAC also recommended that further inquiry be made into the non-technical concerns of economic, business, end user and Law Enforcement/Internet Crime actors. Their description of that final issue is particularly telling in regard to the unresolved risks still remaining at this late stage of new gTLD program development:

The potential for phishing or pharming attacks to take advantage of a more diverse top-level namespace; the control and accessibility of registration data; takeover of a registry or registrar by criminal elements; the implications of a significant increase in the size of TLD zone files on the ability to monitor for abusive or malicious registrations; coordination of abuse reporting among a larger and more diverse community of registries and registrars; changes in the registrar/reseller landscape including more accredited registrars and more non-accredited registrars that ccTLDs can choose from; and Domain Generation Algorithms that span 1000 registries and the related matter of sink-holing, blocking, or transferring registrations.

The Conclusion of that SSAC response also clarified that prior inquiries and responses had been incomplete and that many concerns remained unresolved:

The SSAC believes that the community would benefit from further inquiry into lingering issues related to expansion of the root zone as a consequence of the new gTLD program. Specifically, the SSAC recommends those issues that previous public comment periods have suggested were inadequately explored as well as issues related to cross-functional interactions of the changes brought about by root zone growth should be examined. The SSAC believes the use of experts with experience outside of the fields on which the previous studies relied would provide useful additional perspective regarding stubbornly unresolved concerns about the longer-term management of the expanded root zone and related systems.

During this period the name collision discussion generated some friction between VeriSign and NTIA. On May 30, 2013 a letter<sup>99</sup> was sent from VeriSign to NTIA in which it noted that, while working with ICANN to improve the root zone system, there were significant issues not addressed in a letter sent by ICANN to NTIA on May 16. Their letter went on, “We have discussed these issues with ICANN but ICANN declined to include these points in our joint letter to you...These are important points on which it is critical that there be no misunderstanding as we strongly believe certain issues have not

been addressed and must be addressed before any root zone managers, including Verisign, are ready to implement the new gTLD program.” The letter went on to make a number of recommendations and offered assistance in developing policy in conjunction with ICANN and NTIA in Verisign’s role as Root Zone Maintainer and operator of 2 of the 13 global root servers.

That letter received a delayed response<sup>100</sup> dated August 2, 2013, in which NTIA stated it was “very surprised” to receive that input and then went on to state, in reference to development of an early warning system for challenges to the DNS root server system as a result of new gTLDs, that “we expect and encourage your active participation and leadership in concluding work in time for the launch of the new gTLD program within the time frame articulated by ICANN’s senior management”. That letter concluded:

NTIA and VeriSign have historically had a strong working relationship, but inconsistencies in VeriSign’s position in recent months are troubling. Given your obligations under the *Agreement*, NTIA fully expects VeriSign to process change requests when it receives an authorization to delegate a new gTLD.

That letter concluded by asking VeriSign to confirm in writing by August 16th its willingness to process change requests for the new gTLD program. VeriSign provided that assurance on August 8<sup>th</sup>, but its letter<sup>101</sup> noted the difference between the “ability” and “advisability” of adding up to 100 TLDs to the root zone weekly, and noted that under its Cooperative Agreement with the Department of Commerce it had a duty “to serve the public interest in the continued security and stability of the Internet domain name system”. That letter also noted that concerns about security issues raised by the introduction of new gTLDs went back as far as a 2005 National Research Council report and that ICANN’s SSAC had first issued advisories in 2009 that ICANN take certain steps prior to introducing new gTLDs, but that these steps had never been implemented. The letter also alleged that ICANN has been “dismissive” of the March Verisign labs report –but, noting ICANN’s repeated postponement of the start of new gTLD delegations, claimed that “Verisign’s efforts very likely helped prevent substantial damage and disruption to users of global Internet infrastructure....ICANN must be more receptive to multi-stakeholder input, which will enable it to be less reactive in planning the rollout of new gTLDs”. Finally, in regard to forewarning users of the potential impact of new gTLDs, the letter declares that, “This pre-delegation responsibility fell squarely on ICANN. However, on August 5, 2013, ICANN unilaterally and abruptly proposed to shift this obligation ...and associated liabilities, to applicants and new gTLD registry operators who are not ideally positioned to discharge these obligations.”

Some new gTLD applicants have alleged that VeriSign has raised concerns regarding name collisions and other technical vulnerabilities in order to delay the exposure of

its .com and .net registries to new competition. However, VeriSign has itself submitted applications for fourteen new gTLDs and has been selected to provide back end registry services for 220 other applications. In any event, the SSAC advisories confirm that its concerns have merit and that critical issues remain unresolved.

ICANN issued a proposal to mitigate name collision risks in August 2013.<sup>102</sup> In October 2013 the NGPC adopted a Resolution for Addressing the Consequences of Name Collisions<sup>103</sup> that includes a New gTLD Collision Occurrence Management Plan<sup>104</sup> That plan includes an “alternative path to delegation” that allows a registry operator to proceed to delegation prior to receiving its SLD collision occurrence assessment report (subject to established processes and procedures); if the registry operator chooses this alternative path to delegation, it must initially block *all* SLDs that appear in the “day in the life of the Internet” (DITL) dataset while the assessment is conducted. Also, on November 11, 2013 ICANN signed an agreement with JAS Global Advisors LLC to lead the development of the Name Collision Occurrence Management Framework<sup>105</sup>. However, the Framework being developed by JAS is behind schedule.

There remain substantial concerns that ICANN’s adopted approach is sufficient. A January 17, 2014 letter<sup>106</sup> from senior executives at VeriSign to the new gTLD division charges that “name collision risks are rapidly becoming endemic” and notes that the “alternative path” was not the product of an open technical effort but simply announced as is. With the pace of new gTLD delegations rapidly advancing it will soon become evident whether these concerns are justified and whether diverse Internet users will experience technical failures and unnecessary vulnerabilities.

However, it is apparent there are some very real concerns in the technical community related to the risks name collisions pose. There are also legitimate questions as to whether ICANN has undertaken sufficient efforts to communicate the risks of name collisions resulting from new gTLD delegations to the technical community, and perhaps more importantly, the broader set of potentially impacted parties, so that they may take prophylactic steps to minimize risks and the impacts in their environments. It is also noteworthy that ICANN is delegating new gTLDs and addressing name collisions in a period when the technical manager of the DNS lacks its own head of technical operations.<sup>107</sup>

### Concerns over Use of Auctions as Exclusive Method for Resolving Contention Sets

Although it is a non-profit corporation charged with protecting the public interest, and has touted the new gTLD program as encouraging the development of innovative and more competitive business models, ICANN nonetheless determined that in all cases of

“contention sets” – more than one application for the same new gTLD – the registry contract would be awarded to the highest bidder in an ICANN-conducted public auction if the competing applicants were unable to reach agreement among themselves by other means<sup>108</sup>. This can readily translate into the wealthiest applicant taking control of the string regardless of the merits of its proposed business model. ICANN has a tendency to utilize such “objective” means of resolving disputes rather than engage in more subjective determinations that might be the basis for litigation brought by a disgruntled party.

The result of this reliance on wealth as the ultimate determinant resulted in the October 2013 withdrawal of the DotGreen charitable organization applicant for the .green gTLD. DotGreen had not sought to be designated as a community applicant, the only way to avoid the auction process, because of the extremely high requirements that ICANN set for such “community” designation, with a need to show extensive organizational history and global reach.

In a statement issued at the time of its withdrawal, DotGreen CEO Annalisa Roger stated:

While DotGreen supported the New gTLD program, we believe we exhausted all options within the framework of the New gTLD applicant guidebook and the multi-stakeholder model for procuring .green management. DotGreen remains locked in contention facing an auction among three registry competitors from the Internet industry. Unfortunately it is impossible for DotGreen to proceed within these circumstances.<sup>109</sup>

DotGreen had planned to use proceeds of its registry operation to fund worthy environmental projects around the globe, but was locked in contention with portfolio applicants Demand Media, Afilias, and Top Level Domain Holdings, all of which are seeking to operate the .green gTLD for profit. Applicants in contention sets have already resolved many of them through negotiations or private auctions, which are encouraged by ICANN. An August 2013 private auction involving eight separate gTLDs yielded an average winning bid of \$1.2 million<sup>110</sup>. These private auctions are structured so that losing bidders get a portion of the overall bids, providing them with new funds for other auctions; in October 2013 it was reported that portfolio applicant Top Level Domain Holding (TLDH) has raised \$4.8 million by losing bids for the .lawyer and .website gTLDs<sup>111</sup>. In January 2014 it was reported that TLDH had raised an additional \$33.6 million through an institutional investor share placement, raising its total war chest to about \$63 million<sup>112</sup>.

On December 17, 2013 ICANN opened a public comment period on New gTLD Auction Rules.<sup>113</sup> Applicants’ bidding limits will be determined by their initial deposits – deposits

under \$2 million will be capped at ten times that amount, but there is no upper limit when the deposit is \$2 million or more<sup>114</sup>.

Tellingly, the European Union (EU) filed a comment strongly questioning the use of auctions as the sole determinant for resolving contention sets,<sup>115</sup> stating:

We are deeply concerned about the implications that the Auction Rules in the gTLD program may have for the protection of public policy interests, competition, openness and innovation...As expressed in several comments already submitted during the comment period, **the current Auction Rules are advantageous for portfolio applicants rather than for small, innovative and community applicants, which is at odds with the "diversity and innovation" policy that ICANN seeks to promote**...It would be desirable to give these applicants a more even playing field when they come up against larger portfolio holders in the contention process. Also, ICANN's auction rules has not yet proven convincing to the community and deserves being revisited in light of the input received...There seems not to be any incentive for financially strong applicants to solve the contention 'through voluntary agreement among the involved applicants'...This solution places an unnecessary burden on applicants and departs from the artificial assumption that parties are eager to negotiate. (Emphasis added)

The comment period on the auction Rules closed on February 4, 2014 and it remains to be seen whether ICANN will modify them in any way in response to the criticisms received from the EU and other parties. Making a change at this late date would undoubtedly cause consternation among the largest portfolio applicants, regarded as "customers"<sup>116</sup> to be serviced, who have provided ICANN with millions of dollars in revenue since each new gTLD application required a \$185,000 fee – and would also reduce ICANN income from auctions. ICANN has yet to decide how it will use the additional tens or hundreds of millions of dollars likely to be derived from public auctions.

Although comments were solicited on Auction Rules in December, it has recently emerged that ICANN awarded an extremely lucrative contract to manage its public auctions on September 13, 2013. This contract<sup>117</sup> was awarded without any publicly issued Request for Proposals that would have surely attracted competing entities and lowered ICANN's overall costs. As characterized by one potential auction administration competitor:

On 13 September 2013, ICANN entered into what may well be the most lucrative contract ever granted in ICANN's history with Power Auctions LLC to conduct its Last Resort Auctions for new gTLD strings with more than one applicant...

Under the agreement ICANN paid Power Auctions \$230,000 which is “intended to cover the development of the auction rules, the auction system and system user manual”.

So ICANN is covering all the costs of Power Auction development of the auction platform.

The contract with PowerAuctions is one of no downside, all costs have been paid by ICANN leaving Power Auctions only with Tremendous upside which can easily reach tens of millions of dollars in fees.

Moreover it seems the same platform that ICANN paid Power Auctions \$230,000 to develop that they are using under a related company, Applicant Auction, to hold private auctions to settle contention between new gTLD applicants...

The fact that ICANN clearly anticipated new gTLD auctions going over the \$10 million mark on some strings indicates that both ICANN and Power Auctions anticipated that they system they designed was designed to increase the prices paid by the applicants which would increase the amount of money paid by the winning applicants to ICANN and increase the amount of money Power Auction made from the auctions.<sup>118</sup>

Other key aspects of the uncontested contract awarded to PowerAuctions include:

- Power Auctions will be paid an auction management fee of four percent of the winning bid up to \$10 million (which would translate into \$400,000 for a single \$10 million auction), and an additional two percent of all bids in excess of \$10 million.
- The minimum per auction fee will be \$15,000 regardless of the amount of the winning bid.
- An auction management fee of \$10,000 will be paid for auctions that are scheduled but where participants resolve their differences prior to it being conducted.
- There is a guaranteed minimum of \$135,000 in total auction management fees to be paid even if no auctions are ever held.

Summing up, ICANN’s decision to utilize auctions as the sole means of resolving contention sets favors deep-pocket portfolio applicants and seems at odds with its stated goal of fostering diversity and innovation in applicants and application proposals. The awarding of a lucrative contract to conduct the auctions without any public notice or

bidding competition raises serious questions regarding ICANN's transparency and business practices.

### **Conclusions and Next Steps**

This status report has documented a wide range of concerns and questions regarding ICANN's current operations and future plans. Central to all of them is the issue of whether ICANN is currently operating with sufficient accountability and transparency, through a bottom-up consensus process, and in the interest of the global Internet-using public. The answers to these questions will determine the future stability and security of the domain name system and the growing global e-commerce that it supports.

As ICANN has deliberately precipitated a new global debate on the question of whether the IANA function contract should be transferred from the United States to another entity, it is incumbent that the U.S. government engage in an open and public discussion of the legal requirements for and implications of such action. Given the likelihood that any such transfer may require implementing legislation, and in any event should only be undertaken by the Executive Branch with the unmistakable backing of Congress, there is a clear and present need for all of the Congressional committees with jurisdictions and responsibilities related to this critical issue to begin to engage in focused oversight, investigation, analysis and decision-making. Given the history of the development of the DNS this responsibility falls upon the U.S. and should not be shirked.

- <sup>1</sup> [http://www.huffingtonpost.com/2014/01/24/fadi-chehade-davos\\_n\\_4635949.html](http://www.huffingtonpost.com/2014/01/24/fadi-chehade-davos_n_4635949.html)
- <sup>2</sup> <http://www.icann.org/en/about/agreements/aoc/affirmation-of-commitments-30sep09-en.htm>
- <sup>3</sup> <http://www.apnic.net/publications/news/2013/montevideo-statement-on-future-of-internet-cooperation>
- <sup>4</sup> <http://www.internetgovernance.org/2014/02/19/do-the-nsa-revelations-have-anything-to-do-with-internet-governance/>
- <sup>5</sup> <https://www.iana.org/>
- <sup>6</sup> <http://www.icann.org/en/groups/board/documents/resolutions-28sep13-en.htm>
- <sup>7</sup> <http://www.icann.org/en/groups/board/documents/minutes-28sep13-en.htm>
- <sup>8</sup> <http://www.icann.org/en/groups/board/documents/secretarys-notice-07oct13-en.htm>
- <sup>9</sup> <http://www.icann.org/en/groups/board/documents/resolutions-17nov13-en.htm>
- <sup>10</sup> The Preliminary report of the November 8<sup>th</sup> Special Meeting of the ICANN Board does state, “The Board received an update from the CEO regarding the ongoing work following from the 28 September 2013 resolution of the Board regarding Internet coordination efforts, and how this work could continue into ICANN Buenos Aires meeting. **The Board agreed that this would be an appropriate time to make the 28 September 2013 resolution public.**” (Emphasis added) <http://www.icann.org/en/groups/board/documents/prelim-report-08nov13-en.htm>
- <sup>11</sup> <http://www.icann.org/en/news/announcements/announcement-30apr12-en.htm>
- <sup>12</sup> <http://www.icann.org/en/groups/board/documents/resolutions-17nov13-en.htm>
- <sup>13</sup> <http://blog.planalto.gov.br/brasil-vai-sediar-encontro-mundial-sobre-governanca-da-internet-em-2014/>
- <sup>14</sup> [http://www.scribd.com/document\\_downloads/170601718?extension=pdf&from=embed&source=embed](http://www.scribd.com/document_downloads/170601718?extension=pdf&from=embed&source=embed)
- <sup>15</sup> For additional background on the events leading to the Brazil Internet Governance meeting see [http://www.circleid.com/posts/20131115\\_icann15\\_born\\_in\\_the\\_usa\\_but\\_will\\_it\\_stay\\_api1/](http://www.circleid.com/posts/20131115_icann15_born_in_the_usa_but_will_it_stay_api1/)
- <sup>16</sup> [http://www.circleid.com/posts/20140124\\_usg\\_provides\\_first\\_official\\_statement\\_on\\_montevideo\\_brazil/](http://www.circleid.com/posts/20140124_usg_provides_first_official_statement_on_montevideo_brazil/)
- <sup>17</sup> <http://1net.org/>
- <sup>18</sup> <http://www.cgi.br/> , he original press release announcing the meeting can be found at <http://www.nic.br/imprensa/releases/2013/rl-2013-62.htm>
- <sup>19</sup> [http://www.circleid.com/posts/20140203\\_downsizing\\_sao\\_paulo/](http://www.circleid.com/posts/20140203_downsizing_sao_paulo/)
- <sup>20</sup> <http://netmundial.br/blog/2014/02/06/announcement-of-nine-countries-at-the-high-level-multistakeholder-committee/>
- <sup>21</sup> [http://www.itu.int/net/pressoffice/press\\_releases/2014/05.aspx#.UwdKqBaEzzl](http://www.itu.int/net/pressoffice/press_releases/2014/05.aspx#.UwdKqBaEzzl)

- <sup>22</sup> For additional background on the Brazil meeting see <http://www.nic.br/imprensa/releases/2013/rl-2013-62.htm>, <http://cgi.br/brmeeting/announcement2.html>, <http://netmundial.br/>, and [http://mm.icann.org/pipermail/ccwg-internet-governance/attachments/20140131/397c4789/EMC1stmeetingJan27\\_Executivereport.pdf](http://mm.icann.org/pipermail/ccwg-internet-governance/attachments/20140131/397c4789/EMC1stmeetingJan27_Executivereport.pdf)
- <sup>23</sup> [http://europa.eu/rapid/press-release\\_IP-14-142\\_en.htm](http://europa.eu/rapid/press-release_IP-14-142_en.htm)
- <sup>24</sup> [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=4453](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=4453)
- <sup>25</sup> <http://www.politico.com/morningtech/0214/morningtech13007.html>
- <sup>26</sup> <http://www.icann.org/en/news/announcements/announcement-15jan14-en.htm>
- <sup>27</sup> <http://www.icann.org/en/groups/board/documents/resolutions-17feb14-en.htm>
- <sup>28</sup> <http://www.gao.gov/assets/90/89949.pdf>
- <sup>29</sup> <http://www.ntia.doc.gov/other-publication/2005/us-principles-internets-domain-name-and-addressing-system>
- <sup>30</sup> <http://blog.icann.org/2014/01/new-year-new-momentum/>
- <sup>31</sup> Video of address at <http://www.ustream.tv/recorded/38212109>
- <sup>32</sup> <http://domainincite.com/14390-no-icann-isnt-moving-to-switzerland>
- <sup>33</sup> <http://stats.oecd.org/glossary/detail.asp?ID=1434>
- <sup>34</sup> <http://domainincite.com/14795-us-raises-itu-bogeyman-as-chehade-pushes-for-exit>
- <sup>35</sup> <https://community.icann.org/display/gseeuropewkspc/ICANN+Engagement+Strategy+for+Europe>
- <sup>36</sup> Contemporaneous notes of reliable anonymous source present at Brussels meeting.
- <sup>37</sup> <http://domainincite.com/15816-icann-heading-to-geneva-after-all>
- <sup>38</sup> <http://www.icann.org/en/about/agreements/white-paper>
- <sup>39</sup> <http://siliconangle.com/blog/2014/01/10/icanns-fadi-chehade-says-we-have-18-months-to-find-new-governance-for-a-single-internet-or-else/?angle=silicon>
- <sup>40</sup> [http://www.huffingtonpost.com/2014/01/24/fadi-chehade-davos\\_n\\_4635949.html](http://www.huffingtonpost.com/2014/01/24/fadi-chehade-davos_n_4635949.html)
- <sup>41</sup> <http://www.thedomains.com/2014/02/19/is-icann-leaving-the-us-here-is-akram-atallah-of-icanns-answer/>
- <sup>42</sup> <http://domainincite.com/15837-board-confirms-icann-seeks-non-us-hq>
- <sup>43</sup> <http://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec13-en.pdf>
- <sup>44</sup> <http://www.icann.org/en/news/announcements/announcement-09jan14-en.htm>
- <sup>45</sup> <http://blog.icann.org/2014/02/how-icann-is-accountable-to-the-global-community/>
- <sup>46</sup> <http://www.icann.org/en/news/announcements/announcement-15jul13-en.htm>

<sup>47</sup> See, for example, <http://www.icann.org/en/news/announcements/announcement-12feb14-en.htm>

<sup>48</sup> <http://www.icann.org/en/about/planning/strategic-engagement/multistakeholder-innovation>

<sup>49</sup> Transcript of “CEO/Community Leaders Conference Call”, Tuesday, 18 February 2014 at 1300UTC,  
Transcript -20140216\_CEO\_Community

<sup>50</sup> <https://gacweb.icann.org/display/GACADV/Ethics+and+Conflict+of+Interest>

<sup>51</sup> <http://www.icann.org/en/news/public-comment/board-coi-review-11mar12-en.htm>

<sup>52</sup> <http://www.icann.org/en/groups/board/governance/coi>

<sup>53</sup> <http://www.icann.org/en/about/governance/coi/summary-ethics-review-13may13-en.pdf>

<sup>54</sup> <http://www.icann.org/en/groups/board/new-gtld>

<sup>55</sup> <http://www.icann.org/en/groups/board/documents/resolutions-07feb14-en.htm#2.b.rationale>

<sup>56</sup> <http://thedna.org/>

<sup>57</sup> <http://thedna.org/members.html>

<sup>58</sup> <http://www.icann.org/en/help/dndr/udrp/policy>

<sup>59</sup> <http://newgtlds.icann.org/en/about/trademark-clearinghouse>

<sup>60</sup> ICANN has also adopted a “Trademark-Plus-Fifty” (TM+50) implementation of the TMCH, which allows a rights holder to register up to fifty variations of each mark that have been recovered in a UDRP or litigation. In practice TM+50 has not been utilized to any significant extent.

<sup>61</sup> See <http://www.thedomains.com/2013/12/19/youve-got-to-be-kidding-25k-for-a-sucks-domain-name-registration/> and <http://domainnamewire.com/2013/12/19/this-one-graphic-threatens-to-derail-progress-in-the-new-tld-program/>

<sup>62</sup> See <http://domainincite.com/15293-tmch-extends-trademark-claims-indefinitely-kinda>, <http://domainnamewire.com/2013/12/12/trademark-clearinghouse-extends-alert-service-beyond-90-days/>, and <http://domainnamewire.com/2013/12/13/a-little-bit-more-about-the-trademark-clearinghouses-extended-alert-service/> Generation of Trademark Claims Notices to registrants is limited by ICANN policy to the first 90 days of a new gTLD’s operation, and was not affected by this change.

<sup>63</sup> <http://domainnamewire.com/2014/02/10/how-common-words-like-pizza-money-and-shopping-ended-up-in-the-trademark-clearinghouse-for-new-tlds/>

<sup>64</sup> <http://www.adweek.com/news/technology/icann-brands-are-risk-domain-abuse-new-top-level-domains-155584>

<sup>65</sup> [http://www.ipprotheinternet.com/ipprotheinternetnews/article.php?article\\_id=3513#.Uvwfh16YZaS](http://www.ipprotheinternet.com/ipprotheinternetnews/article.php?article_id=3513#.Uvwfh16YZaS)

<sup>66</sup> “Domain Names”, Washington Internet Daily, February 21, 2014

- <sup>67</sup> <http://newgtlds.icann.org/en/applicants/urs>
- <sup>68</sup> <http://www.thedomains.com/2014/02/11/1st-aftermarket-of-guru-domains-launches-is-full-of-trademarks/>
- <sup>69</sup> See <http://www.thedomains.com/2014/02/13/ibm-wins-its-urs-on-ibm-ventures-ibm-guru-6-days-after-filling/> and <http://domainincite.com/15755-ibm-files-urs-complaints-against-guy-who-spent-6000-on-two-domains>
- <sup>70</sup> <http://m.reedsmith.com/report-on-the-initial-gtld-launch-taking-a-ride-with-bike-02-11-2014/>
- <sup>71</sup> <http://www.donuts.co/dpml/>
- <sup>72</sup> <http://domainincite.com/14546-donuts-trademark-block-list-goes-live-pricing-revealed>
- <sup>73</sup> <http://www.thedomains.com/2014/01/30/day-1-donuts-trademark-review-only-12-of-27-top-brands-bought-the-donuts-block-dpml/>
- <sup>74</sup> <http://www.icann.org/en/news/announcements/announcement-2-21jan14-en.htm>
- <sup>75</sup> <http://www.thedomains.com/2014/02/20/new-gtld-registrations-top-125k-as-today-technology-land-directory-open-up-strong/>
- <sup>76</sup> See [http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=3f52b7aa-fa5f-4abe-9b77-3081f1dc7e13&ContentType\\_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group\\_id=505cc3fa-a767-40f4-8ac2-4b8326b44e94&MonthDisplay=12&YearDisplay=2011](http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=3f52b7aa-fa5f-4abe-9b77-3081f1dc7e13&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=505cc3fa-a767-40f4-8ac2-4b8326b44e94&MonthDisplay=12&YearDisplay=2011) and [http://www.commerce.senate.gov/public/?a=Files.Serve&File\\_id=0b2bb368-f3a1-4173-9e24-3392fd1677dc](http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=0b2bb368-f3a1-4173-9e24-3392fd1677dc)
- <sup>77</sup> <http://www.icann.org/en/news/correspondence/rockefeller-to-crocker-26jun13-en.pdf>
- <sup>78</sup> <http://newgtlds.icann.org/en/program-status/odr>
- <sup>79</sup> <http://www.icann.org/en/news/correspondence/stoler-to-crocker-et-al-28jul12-en>
- <sup>80</sup> <https://www.icann.org/en/news/correspondence/stoler-to-crocker-et-al-06apr13-en.pdf>
- <sup>81</sup> <http://domainincite.com/13211-icann-wont-say-how-demand-media-passed-its-new-gtld-background-check>
- <sup>82</sup> <http://www.nationaljournal.com//congress/could-www-vote-republican-be-a-porn-site-next-year-20130826>
- <sup>83</sup> <http://rightside.co/>
- <sup>84</sup> <http://www.icann.org/en/news/public-comment/sco-framework-principles-11feb14-en.htm>
- <sup>85</sup> [https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20April2013\\_Final.pdf?version=1&modificationDate=1365666376000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20April2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2)
- <sup>86</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-05feb14-en.htm>

- 87 <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-2-05feb14-en.pdf>
- 88 <http://bit.ly/LQUAnC>
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- 112 <http://domainincite.com/15704-tldh-raises-33-6m-to-fight-new-gtld-auctions>
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- 116 <http://newgtlds.icann.org/en/applicants/customer-service>
- 117 See <http://newgtlds.icann.org/en/applicants/auctions/summary-development-management-agreement-15jan14-en.pdf> for “Summary of Auction Development and Management Agreement”
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