

# COALITION FOR ONLINE ACCOUNTABILITY

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## **ICANN Generic Top-Level Domains (gTLD) Oversight Hearing**

Prepared Testimony of

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Before the

**Subcommittee on Intellectual Property, Competition and the Internet  
Committee on the Judiciary  
United States House of Representatives**

Washington, DC

May 4, 2011

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Broadcast Music Inc. (BMI)

Motion Picture Association of America (MPAA)

Time Warner Inc.

Recording Industry Association of America (RIAA)

The Walt Disney Company

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Mr. Chairman, and members of the Subcommittee:

Thank you for this opportunity to present the views of the Coalition for Online Accountability (COA) on recent activities of the Internet Corporation for Assigned Names and Numbers (ICANN), and particularly on its plans to introduce new generic Top Level Domains (gTLDs). This timely hearing exemplifies the important oversight role that the Judiciary Committee has played for well over a decade on critical issues affecting the domain name system.

#### About COA

COA, and its predecessor organization, the Copyright Coalition on Domain Names, has played an active role on domain name issues since 1999. COA participants include three leading copyright industry trade associations (the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA), and the Software and Information Industry Association (SIIA)); the two largest organizations administering the public performance right in musical compositions, ASCAP and BMI; and major copyright-owning companies such as Time Warner Inc. and the Walt Disney Company. COA's goal is to enhance and strengthen online transparency and accountability by promoting the continued availability of the data needed for effective enforcement against online infringement of copyrights and trademarks. In particular, we work to ensure that domain name and IP address Whois databases remain publicly accessible, accurate, and reliable.

COA has been an active participant in ICANN's work to develop the new gTLD program, both on its own account and as a member of ICANN's Intellectual Property Constituency (IPC). As counsel to COA, I have represented the coalition within the IPC, completed six terms as IPC president, and now serve as its vice-president. COA (and CCDN)

have also testified five times before this subcommittee or its predecessor on domain name issues, and we welcome the opportunity to do so again.

### The New gTLD Program: Unanswered Fundamental Questions

ICANN is in the final stages of launching the most sweeping and consequential initiative in its history: the roll-out of hundreds or even thousands of new generic Top Level Domains (gTLDs). This effort has already consumed the efforts of hundreds of people over a span of several years, at a cost of tens of millions of dollars. There have been half a dozen iterations of an “applicant guidebook,” hundreds of pages in length, which sets out the ground rules for the new gTLD launch. There have been dozens of public comment periods, in many of which COA has actively participated, along with hundreds of other organizations, companies, and individuals. The new gTLD rollout could have a huge impact, not only on U.S. businesses in general and U.S. intellectual property owners in particular, but on literally billions of Internet users around the world. It is no exaggeration to say that it is by the results of this initiative, more than any others, that the success or failure of ICANN, as a great global experiment in innovative management of a key Internet resource, will be judged.

Given the high stakes and the vast resources devoted to this effort, it is all the more striking that ICANN has never squarely faced and persuasively answered some fundamental and inter-related questions. Why does the world need hundreds or thousands of new gTLDs? For whose benefit is this huge project being undertaken? And how should this enormous effort be focused and prioritized to maximize its potential benefits, while minimizing its very real risks to consumers, right holders, and the public at large? Instead, this entire program has proceeded on the untested premise that the floodgates should be opened to an unlimited number of new gTLDs, of all types and descriptions.

Even though many parties, including ICANN’s own Board of Directors, called years ago for objective economic analysis of the domain name marketplace, ICANN dragged its feet in seeking the advice of knowledgeable economic experts on how to fashion the scope and pace of the rollout to maximize likely benefits and minimize potential risks. Once it finally did so, it declined to put any of their key recommendations into operation during the upcoming round. The most recent economic expert study commissioned by ICANN – dubbed the “Phase II report” – was released in December 2010. This report sent a clear and compelling message: “an open entry process may not lead to the socially-optimal number of new gTLDs,” and therefore the new gTLD launch should be re-oriented to focus on certain categories of applications that offer the greatest potential benefits for the public, while discouraging others that will impose higher costs upon third parties.

The December 2010 study convincingly demonstrates that “additional generic, unrestricted TLDs using the Latin alphabet” fail both the benefits and costs prongs of this test. Phase II report, at 3. Such new gTLDs “would be unlikely to provide significant additional competition for .com,” and cannot be justified on the basis of a supposed “scarcity of generic second-level domains,” which the study finds is not “a pervasive problem.” *Id.* While providing little prospect for public benefits, such “standard gTLDs with open registration policies” are also precisely the sort of new gTLD “most likely to attract defensive registration by owners of valuable brands,” and thus to impose the most onerous external costs on third parties, especially the costs of public confusion and vulnerability to fraud. Phase II report at 74.

By contrast, the Phase II report indicated, “differentiated offerings” seem much more likely to provide public benefits, and to impose fewer external costs. This favorable balance may be most striking for gTLDs that use non-Latin character scripts (sometimes referred to as

Internationalized Domain Names, or “top level IDNs”). The same analysis might apply to Latin character gTLDs that are “either ... community-based, or [that employ] restrictions on registrants or on the use of second-level domains within the gTLDs” (Phase II report at 3); but the report raises a caution flag about these, based on the disappointing experience of such applications as .mobi, .museum, or .aero in prior new gTLD launch rounds.

The bottom line is that the Phase II report, like some of its predecessors, called for a significant re-orientation of the planned new gTLD launch. Five months later, it is clear that this call will not be heeded. ICANN steadfastly refuses to prioritize new gTLDs, in order to preference those that meet a demonstrated need. It also largely continues to refuse to recognize that distinct categories of new gTLD proposals demand differential treatment. Some proposed new gTLDs may be targeted toward enhancing the Internet experience for “the next billion Internet users,” whose everyday languages are written in non-Latin scripts; others will add little but confusion and noise to an already chaotic online environment. ICANN proposes to treat all these applications the same.

The opinions of ICANN’s own experts have harmonized with the many voices calling on ICANN to take a more focused, targeted and incremental approach to the roll-out of new gTLDs. Those calls, coming from governmental agencies, commercial and non-profit entities, large institutions and individuals, from North America, Europe, and many other places, have all been rejected. The basic features of the new gTLD program today are the same as those announced some three years and six guidebook iterations ago:

- The number of new gTLDs to be approved will be essentially unlimited, constrained only by ICANN’s ability to process applications;

- The process is biased toward approval of all applications meeting minimum technical and financial criteria, with only extremely limited grounds for objection recognized;
- Auctions will be used to resolve conflicting applications for the same TLD character string, with almost no detail on how the proceeds will be used;
- A “one size fits all” approach prevails, with very little categorization. Essentially the same process will apply whether the application is for a Top Level IDN in a script used by billions of people; a so-called “.brand” TLD intended to serve a single registrant; or an open, unrestricted Latin character TLD in the mode of .com.

### Some Signs of Progress in the New gTLD Framework

While COA is quite disappointed that this framework remains unchanged, we must acknowledge that there has been some important progress over the years in some areas. In this statement we will mention three.

#### 1. Rights Protection Mechanisms (RPMs)

As originally presented, new gTLD registries had virtually no obligations to take steps to respect the rights of trademark owners, such as by minimizing the need for defensive registrations in new gTLDs, or by adopting methods to quickly purge their rolls of cybersquatters or other “abusive registrations.” Years of outcry from trademark owners have had some impact on this position. Now, all the new registries must provide a “sunrise” registration period in which trademark owners may pre-emptively register domain names identical to their trademarks, as well as an “IP claims service” in which registrants of second level domains are warned if the domain name they seek is identical to a trademark claimed by another party. These services will be enabled by a unified trademark clearinghouse database, a “one-stop shop” in which all mark owners may register their claims, and which all registries must consult in launching their services.

While this is real progress, a number of questions remain unresolved, and the bottom line is that the protections required before and during the launch of a new gTLD are quite limited. Only exact matches between trademarks and second level domain names will be covered. Thus, the new registry is not required to do anything to protect against an abusive registrant who varies a trademark by a single character (e.g., cnnn.[new TLD]); who adds a generic word to the mark (e.g., disneymovies. [newTLD]); or who simply engages in typosquatting (e.g., microsoft.[newTLD]). None of these registrations will be pre-empted by a sunrise registration, nor will any such attempted registration trigger a notification under the IP claims service. And any cybersquatter willing to wait 60 days after a new gTLD launches could find an unimpeded path, since the requirement to provide an IP claims service expires at that point.

Beyond the trademark clearinghouse, new gTLD registries will be required to provide a Uniform Rapid Suspension service (URS). This is an important and potentially quite positive innovation. If implemented properly, it could provide trademark owners with a fast, inexpensive, and easy to use method to “take down” registrations that involve the most clear-cut cases of cybersquatting. Rights owners will be watching the implementation of this new remedy most closely, with an eye toward how it might be applied in the existing gTLDs, where widespread cybersquatting is not merely a looming threat but a costly reality.

## 2. Whois in the new gTLDs

The second area of progress involves an issue of long-standing concern to this subcommittee, and one on which COA (as CCDN) has presented testimony on several occasions: Whois data, including contact information on domain name registrants. Access to accurate and reliable Whois data is not only important for enforcing intellectual property rights, but is also

vital for consumer protection; law enforcement investigations of online crimes; and network security. Accurate Whois data plays a critical role in preventing or investigating all manner of online frauds. It even allows concerned parents to know with whom their children are dealing when they visit Internet websites. All Internet users have a stake in keeping Whois data accessible, and in improving the current abysmal level of its accuracy and reliability. No feature of the domain name system is more critical to ensuring accountability and transparency online.

In this area, as with rights protection mechanisms, constant pressure from the public – including law enforcement as well as intellectual property interests – has led to some improvement in ICANN’s plans for the new gTLDs. Notably, all the new TLD registries will be required to make available to the public a unified Whois data base covering every registration in that Top Level Domain, no matter which retail registrar actually sells the registration service. This so-called “thick” Whois database structure stands in striking contrast to the current situation in .com and .net, in which the registry holds very little Whois data, and all contact information on registrants is collected and maintained separately by each of hundreds of accredited domain name registrars. This “thin” Whois system presents a huge compliance challenge to ICANN in enforcing the obligation to keep this vital data available to the public and to improve its accuracy and reliability.

COA is also pleased to note that the most recent version of the new gTLD applicant guidebook, released April 15, contains some incentives for new gTLD registries to do more to improve the accuracy and reliability of their Whois data. ICANN proposes that, in the evaluation process for new gTLD applications, applicants will receive an extra point if they commit to “measures to promote Whois accuracy,” which “may include, but are not limited to, authentication of registrant information as complete and accurate at time of registration; ...



regular monitoring of registration data for accuracy and completeness...; [and] policies and procedures to ensure compliance” by registrars (who will still be responsible for collecting registrant contact data) with Whois data accuracy obligations.

These are all policies which COA has been advocating, with regard to the existing gTLDs, for years. As CCDN told this subcommittee in testimony in 2002, “registrars [and we would now add registries, in the thick Whois environment] must adopt a three-point plan for dealing with registrants who provide false contact data: screen them out, check them out, and toss them out.” We are pleased and gratified that ICANN recognizes that these represent best practices that all registries (and, in the case of the legacy “thin Whois” registries, all registrars) should employ to enhance transparency and integrity within their domains. But these steps do not go far enough. We see no reason why ICANN should recognize any new gTLD registries that refuse to adopt these common-sense methods to protect the public by enabling more effective action against online fraud and misconduct. Verification and re-verification of Whois data, and cancellation of registrations for which the Whois data cannot be verified or is obviously false, should be mandatory minimum standards for all new gTLDs, and for that matter should be implemented for the current gTLDs as well.

### 3. Enhanced protections for vulnerable new gTLDs

Finally, the most recent iterations of the new gTLD applicant guidebook suggest at least a potential for improvement with regard to policies to curb abusive registration and use of domain names, particularly for those new gTLDs most vulnerable to such abuses. As noted above, ICANN has steadfastly resisted any effort to tailor its new gTLD application process to recognize that certain categories of proposed new gTLDs attract heightened risks and thus should

meet more rigorous standards. Belatedly, however, ICANN has acknowledged that security safeguards for new gTLDs must be “commensurate with the nature of the applied-for gTLD string.” The most recent draft applicant guidebook specifies that, in addition to new TLDs targeted to financial services, “other strings with exceptional potential to cause harm to consumers would also be expected to deploy appropriate levels of security.”

While we welcome this recognition from ICANN that one size does not indeed fit all, ICANN must go much further to meaningfully reduce the foreseeable risks of opening up an unlimited range of new gTLDs. ICANN’s Governmental Advisory Committee (GAC) took a far more responsible approach when it called for enhanced protections in proposed new gTLDs that “refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or *are targeted to a population or industry that is vulnerable to online fraud or abuse.*” (emphasis added) Among other advantages, such a formulation would have clearly signaled that ICANN would provide more rigorous scrutiny for any proposed new gTLD string targeted to sectors such as music, movies or videogames, in order to guard against the risk that the new gTLD would be infested with copyright infringement.

It is unfortunate and short-sighted that the ICANN Board has rejected this GAC proposal. Even so, given the pervasiveness with which the Internet space has been characterized by services built on copyright theft, we believe that such new gTLDs clearly fit the “exceptional potential to cause harm” criterion in the current draft applicant guidebook. We urge ICANN to confirm this interpretation of its proposed guidebook language. In this regard we also commend the current proposal to provide incentives (in the form of an evaluation point) to gTLD proposals that include policies for “rapid takedown or suspension systems and sharing information regarding malicious or abusive behavior.”

COA and its members plan to engage actively with entities applying for new gTLD strings targeted to our creative sectors, in order to foster the strongest possible safeguards against the significant risk that such new gTLDs will provide breeding grounds for copyright piracy; and we will also continue to engage with ICANN to encourage further incentives to deploy such safeguards in order to gain approval in the new gTLD process.

#### New gTLDs and the “ICANN Model”: Contracts and Compliance

In sum, while we welcome the improvements just noted, they are not in themselves enough to overcome our serious concerns about the risks inherent in the new gTLD rollout in the manner in which ICANN plans to conduct it. Much ink has been spilled about the innovative “ICANN model” for Internet governance, and different players characterize it in different ways; but for us, the essence of the ICANN model (which COA supports) is the substitution of contractual constraints for governmental regulation of the domain name system, in a governance setting in which the private sector leads. The model only works to protect the public when those contracts are strong, and when those contracts are vigorously enforced. This will be doubly true – or more precisely, a hundred or a thousand-fold true – in the new gTLD environment.

Candidly, ICANN’s track record in this field – strong contracts that are vigorously enforced – is not encouraging for the success of this venture. Its efforts to improve that record while simultaneously launching hundreds or thousands of new gTLDs amounts to repairing a damaged aircraft, not merely while it is in flight, but while it is preparing to ascend into orbit.

In today’s gTLD environment – notably in the world of .com and .net – the key contractual framework is between ICANN and domain name registrars, in the form of the Registrar Accreditation Agreement. The RAA in its current form has fallen far short of setting

clear, enforceable ground rules that will advance such critical goals as significant improvements in Whois data quality, and in its accessibility. The issue of proxy registrations provides an illuminating case study.

Today, at least one out of every five gTLD domain names is registered in the name of a proxy service, often associated with a domain name registrar. This hides the identity of the domain name registrant from the world, thus undermining the public benefits of the Whois system that has been in place since the birth of the World Wide Web. Many legitimate registrants use proxy registration services; but both common sense and available data indicate the technique is particularly attractive to registrants who don't wish to be found because they will use their domain names to commit crimes, to violate the rights of others, or in other abusive ways. The RAA contains provisions intended to encourage the unmasking of such abusive proxy registrants; but the contract language is weak and ambiguous, and far too many domain name registrars exploit these weaknesses and thus allow spammers, copyright thieves, fraudsters and other wrongdoers to enjoy uninterrupted anonymity for their online misdeeds.

Two years ago, under intense pressure from the business community, from individual registrants represented by ICANN's At Large Advisory Committee, and from an unprecedented coalition of law enforcement authorities, ICANN put in motion a process to identify issues needing improvement in the RAA – including, but by no means limited to, reform of proxy registration – and to chart a path for renegotiating this keystone contract. But today that process is at a standstill. The “contracted parties” to ICANN – registries and registrars – have blocked the path. They have adamantly refused to accept any process in which the third parties vitally affected by the contract – commercial and non-commercial registrants, intellectual property interests, and Internet users – have any role in its re-negotiation, even as silent observers. Under

a “restructuring” carried out by ICANN over the past several years, these “contracted parties” have an effective veto over any proposal requiring consensus. The registries and registrars are now exercising that veto against any proposal regarding the ground rules under which they carry out the franchises conferred upon them by ICANN.

Meanwhile, ICANN’s contract compliance efforts, while certainly improving and expanding from an abysmally low base, still fall far short of inspiring confidence that contracted parties will be held to those ground rules, no matter how weak the contracts themselves. When ICANN left the senior contract compliance position vacant for ten months (it was just filled in the past few weeks), that spoke volumes about the extent of the organization’s commitment to this fundamental prerequisite for the success of its “model.” Every year, COA and other intellectual property interests have complained to ICANN about inadequate resourcing of the contract compliance program in ICANN’s budget. ICANN’s response has been to issue for public comment a budget framework document that lumps contract compliance in with a dozen other programs so that its funding level is now entirely opaque. Instead of re-orienting its priorities, ICANN obfuscates them.

None of this provides any reason to believe that the new gTLD rollout will overcome its fundamentally faulty premise and truly deliver benefits to much of the public without saddling third parties – notably trademark and copyright owners – with much of the financial and legal costs. It also sheds an unflattering light on the answer to the fundamental question posed at the beginning of this testimony: for whose benefit is the new gTLD rollout being undertaken? It is crystal clear that those companies with franchises conferred by ICANN stand to benefit. Accredited domain name registrars will retain their monopoly over every single second level domain registration in hundreds or thousands of gTLDs, not merely a score of them as today.

(Even a company that intends to make registrations in a .brand TLD available only to its employees must hire an accredited ICANN registrar in order to do so.) The current gTLD registries will also prosper; nearly all the operators of the existing gTLDs are actively drumming up business to run the back-office operations of their ostensible “competitors” in the expanded gTLD universe. Trademark and copyright owners, meanwhile, will certainly incur additional costs, both through defensive registrations in order to protect their brands, and the need for stepped-up enforcement activities against online counterfeiting and piracy in the new gTLD space. The only issue is how much those costs will be, and to what extent ICANN’s limited steps to address the RPM and Whois issues will cushion the blow. Meanwhile, in the broader Internet community, the impact of the rollout, in the way that ICANN plans to carry it out, seems more likely to confuse than to empower users, to sow insecurity rather than to expand consumer choice.

#### Role of the U.S. Government

We conclude with a comment on the role of the relevant US government agencies, and notably of the National Telecommunications and Information Administration in the Department of Commerce, which is the lead agency. We commend NTIA for its active engagement in ICANN’s Governmental Advisory Committee (GAC), and for its direct participation in the first review called for under the Affirmation of Commitments between ICANN and the Department of Commerce. NTIA representatives and their colleagues in other agencies have spoken up forcefully on a number of issues, including protection of intellectual property rights and of consumers. We should also mention the positive role of federal law enforcement agencies in helping to bring together a broad coalition of their colleagues from other countries to advocate for much stronger ICANN efforts to improve the quality and maintain the public accessibility of

Whois data, in order to fight a wide range of online and offline crimes. All these efforts have produced concrete results in a number of areas discussed in this statement; without these efforts from the U.S. government, the limited progress we have described above surely would have been far more limited. NTIA has also played a critical role on the broader question of ensuring that governments in the GAC, as representatives of the public interest, can have meaningful input into the design and implementation of the new gTLD program.

As the new gTLD program exemplifies, the vision of “private sector leadership” for global management of the domain name system is far from being realized. Within ICANN today, only one part of the private sector is allowed to lead: the parties under contract to ICANN, who are among the most direct beneficiaries of the unlimited gTLD rollout that is being planned. Given this reality, an active US government role remains critical – including in supervising the key IANA function, and notably the ultimate approval of the addition of new gTLDs to the unified domain name root. The current contract under which ICANN performs this function on behalf of the Department of Commerce expires in September, and the terms under which this function is carried out in the future is an important matter for oversight by the Congress.

Thank you again for the opportunity to present the views of COA.