



golf clubs

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July 17, 2018

VIA EMAIL: iipp2018@ntia.doc.gov, dredl@ntia.doc.gov
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue NW, Room 4725
Attn: The Honorable Administrator David Redl
Washington, DC 20230

Re: Notice of Inquiry on International Internet Policy Priorities

Dear Assistant Secretary Redl:

I write on behalf of Karsten Manufacturing Corporation (“Karsten” or “we”) and its related entity, Ping Registry Provider, Inc. (“Ping Registry”). By way of background, Karsten is the parent company of Ping, Inc., the manufacturer of PING® branded golf clubs and related accessories. Through its affiliate, Ping Registry, it is also the operator of the .Ping top-level domain name, which it acquired at great expense through a compelled “ICANN Auction”. We thank the NTIA for opening up this comment period on these important Internet governance topics. We further thank the NTIA, under the new administration, for its excellent efforts to protect American interests within ICANN and for having the courage to ask the hard questions contained in the Inquiry.

As we did before the so-called “Transition” through my testimony before Congress, we write to raise the alarm regarding the current state of ICANN following the illegal “transition” of the oversight of IANA functions. We use the word “transition” loosely as there was no Act of Congress or other action by the United States Government (USG) by which the inherently governmental function of the oversight of the IANA functions was “transitioned”, “transferred” or otherwise handed over to ICANN. In fact, quite the opposite occurred when Congress passed legislation¹ preventing any spending on the “transition” – legislation that was intentionally ignored by the prior administration. Apparently, the plan of the prior administration was to passively wait out the expiration of the agreement in place with ICANN. However, therein lies a flaw with the plan, since a former holder of a government contract does not “inherit”² a right to continue performing the function (and charging the public for its performance via “taxes” on

¹ See <https://docs.house.gov/meetings/RU/RU00/20141210/102799/BILLS-113rcp113-59pp.pdf> at Section 540 (“SEC. 540. (a) None of the funds made available by this Act may be used to relinquish the responsibility of the National Telecommunications and Information Administration during fiscal year 2015 with respect to Internet domain name system functions, including responsibility with respect to the authoritative root zone file and the Internet Assigned Numbers Authority functions.”) See also <https://www.gpo.gov/fdsys/pkg/PLAW-114publ113/html/PLAW-114publ113.htm> at Section 539 (“Sec. 539. (a) None of the funds made available by this Act may be used to relinquish the responsibility of the National Telecommunications and Information Administration, during fiscal year 2016, with respect to Internet domain name system functions, including responsibility with respect to the authoritative root zone file and the Internet Assigned Numbers Authority functions.”)

² ICANN represents the following in Section 7 of its Root Zone Maintainer agreement with Verisign, but does not indicate from where it received such rights, powers and Authorizations. There was no act of Congress “selling off” the IANA functions (nor could there be, since this is an inherently governmental function):

(a) ICANN’s Warranties. ICANN represents and warrants that (i) it has all necessary rights, powers and Authorizations to enter into and perform this Agreement and grant the licenses herein...”



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second level domain name registrations and quarterly charges to registry operators) for which it had a contract simply because the contract expired. A corporation with a former contract to provide government services does not retain the right to keep providing those services just because the contract expires. Applying that conclusion to other government services, such as defense contracting, would breach national security and lead to chaos . . . and the Internet is no less important.

ICANN now admits that it has depleted \$36 million³ of its resources in the so-called “transition” leaving it without adequate reserve funds. Let that sink in: the organization that claims to be responsible for global coordination of all Internet Protocol (IP) addresses and other IANA functions believes itself to be inadequately funded for that purpose. Further, as described in our answers to some of the questions below, ICANN finds itself in even more disarray since the USG has stepped back from its oversight role such that ICANN is now bowing to other governments who are extending their authoritarian rules over American internet users. We believe it is not too late for the USG to resume its historic oversight of the IANA functions and, in doing so, help steady ICANN and protect the security of the Internet for users in the US and throughout the world.

I. The Free Flow of Information and Jurisdiction

A. What are the challenges to the free flow of information online?

Consumers and businesses share information via the Internet because they believe that the medium is safe. The kinds of information shared by consumers and businesses today was unthinkable just ten years ago. Examples of sensitive information that is shared via the Internet to perform services include online banking, stock trading, and prescription fulfillment, among many others. The “currency” of the Internet is information, but the backbone of that currency is consumer trust. Once consumer trust is lost, information flow will follow. We are standing at the precipice of a loss of consumer trust, and oddly enough, ICANN’s overreaction to foreign regulation is what has taken us to this place.

With foreign powers and certain contracted parties asserting more control over ICANN since the USG stepped away under the prior administration, the ICANN Board and Staff seem unable or unwilling to stand for the principle of limited regulation. ICANN’s over-implementation of the European Union’s General Data Protections Regulation (GDPR) is a prime example. Specifically, by requiring GDPR to be applied to all WHOIS data, and not just the data provided by Europeans or to organizations within Europe, ICANN has created a safe haven for cybersquatters, criminals and other bad actors by making the data to identify those bad actors even more difficult to acquire. They have also magnified the power and reach of the EU. Presumably this decision by ICANN Staff, which was ratified by an ICANN Board vote, was meant to ease the burden on contracted parties. However, it essentially allows Brussels to regulate the U.S. domestic domain name marketplace and it has resulted in a safe haven for bad actors. As bad actors are able to take advantage of consumers in an environment that allows them to conceal their identity with greater ease, consumers will lose their trust. If consumers do not trust the Internet, they will necessarily restrict the information that is shared.

³ See <https://www.icann.org/en/system/files/files/proposed-reserve-fund-replenishment-strategy-06mar18-en.pdf> We believe the money was ill spent on an illegal attempt to “transition” responsibility of the IANA function.

B. Which foreign laws and policies restrict the free flow of information online? What is the impact on U.S. companies and users in general?

GDPR, as discussed above, is a timely example of such a foreign law. The growth of the Internet and the commerce it fosters depends upon the ability of all stakeholders rather than a select powerful government to drive policy decisions. ICANN's recent actions implementing the GDPR globally have put the EU in charge of the US marketplace and harmed American manufacturers and placed American consumers at risk by making it unreasonably expensive and challenging to determine who is behind online sales of counterfeit products.

Attempts to stifle speech at the domain-name top level, discussed below, is another example of a foreign policy position that has gained traction in ICANN and is gaining more traction as ICANN is contemplating opening another round of new gTLD registry applications.

C. Have courts in other countries issued internet-related judgments that apply national laws to the global internet? What have been the practical effects on U.S. companies of such judgments? What have the effects been on users?

No comment at this time.

D. What are the challenges to freedom of expression online?

Within the ICANN context, there remains a push by governments to restrict use of "culturally sensitive" terms in top-level domain names, which may then in turn lead to restrictions in second-level domain names. "Culturally sensitive" terms could mean anything, including religious terms, geographic terms, and political terms. For example, we remind the NTIA that applications for .halal and .islam were the subject of "GAC Early Warnings" – a process entirely the creature of ICANN implementation and not local national laws and certainly not the laws of the United States.⁴ Such "GAC Early Warnings" were also in direct contravention of ICANN's own policy on the introduction of new gTLDs which stated clearly, "The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law."⁵

Another example is the current push by certain governments to exclude any city name from the list of possible future top-level domain names (not just capital city names, which was the level of censorship in ICANN's last round). Since the additional censorship that is being proposed by certain foreign powers is at the domain-name top level, the censorship would apply to all potential users of that top-level domain name (those who wish to register second-level domain names but cannot), even those end users who are U.S. citizens. Importantly, there is no international law allowing governments to globally censor words. In their attempt to have ICANN create a new "international right" for governments to block speech at the top level the foreign powers are not carving out exceptions for new gTLD applicants who live in jurisdictions, like the US, that value free speech and open markets over censorship and heavy regulation.

⁴ See <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>.

⁵ See <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> at Principle G.

E. What should be the role of all stakeholders globally—governments, companies, technical experts, civil society and end users—in ensuring free expression online?

Our comments are limited to the role of governments and companies.

- Governments

Governments at ICANN are supposed to act only through Consensus Advice. Like Civil Society, the positions of governments tend to be fragmented along cultural lines. For example, some governments have no issue with interfering with free expression online. Since Consensus Advice is defined narrowly within ICANN, the role of the USG should be one of preventing Consensus Advice designed to inhibit free expression. This is not to say that the USG should avoid participating in Consensus Advice that is designed to inhibit abuse or bad actors. Free expression does not protect criminal or fraudulent speech. Content regulation should be left to national governments to enforce locally if that is the way their law and culture works.

Content regulation and restrictions on the freedom of association should not be in the purview of ICANN. This includes the “shadow regulation” of content by ICANN through the disallowance of new gTLD applications that certain governments⁶ would prefer not be granted. ICANN should be vigilant to assist with reported abuses, for example, trademark infringements, criminal activities, and terrorism. However, other than a very narrow set of identified threats, ICANN should remain outside of content regulation. U.S. citizens need a strong USG tie to ICANN in order to give ICANN the strength of will to stand up to would-be censors.

- Companies

A subset of companies is represented within ICANN by the Business Constituency (BC),⁷ however, it is comprised primarily of domain name industry associations, Internet and entertainment businesses. Some members, in fact, are from the domain name warehousing and sales industry, for example the Internet Commerce Association,⁸ which consistently advocates for the weakening of intellectual property protection within ICANN.

Manufacturers are not well represented despite the BC’s reported attempts to reach out to small and medium enterprises. We believe that ICANN should take steps to welcome manufacturers, especially small and medium sized enterprises, and the various state and national associations representing them, by preemptively forming constituencies for each group and engaging in outreach to populate those

⁶ We do recognize that certain governments have the ability to prohibit speech of their citizens. While this is not the American way, it is a fact. As a result, the governments who are seeking help from ICANN to prohibit speech are, essentially, asking for the ability to extend their local powers globally. While it would be unfortunate if certain governments were to prohibit their citizens to apply for various top-level domain names, local laws (or edicts, etc.) could be made locally and affect the local population. By using ICANN as a channel to expand their agenda, the net effect is a restriction on the speech of U.S. citizens. Herein lies a great danger that the NTIA should vigorously oppose, not only on its own merit but for the precedent that it sets.

⁷ See <https://www.bizconst.org/bc-membership-list>.

⁸ Which describes itself as “The Internet Commerce Association (ICA) is a non-profit advocating for the rights and interests of domain name owners and related service providers.” See <https://www.internetcommerce.org/>.

constituencies. Non-tech and non-entertainment companies are naturally less oriented toward ICANN-related policy issues, but ICANN decisions greatly affect such businesses as more and more manufacturers are belatedly discovering. ICANN, with the help of the USG, can bridge that gap and bring all relevant business voices to the table.

Bridging the gap to bring manufacturers into the ICANN policy making process is an urgent matter and failure to do so has real world consequences. For example, the sale of fake pharmaceuticals today costs those manufacturers billions of dollars and puts consumers at risk.⁹ However, other manufacturers are now and will become at risk. For example, as driverless cars take to the road in upcoming years, they will be subject to malicious hacking. Likewise, as consumer products, such as children's clothing is printed at home, the importance of having safety-approved design files safely reach their destination with dangerous files being weeded out, is obvious.

ICANN needs to bring all types of manufacturers to the table by providing a safe place for manufacturers of tangible goods to express their unique risks and needs, without squeezing them into a single group of opposing interests such as with organizations that push for less protection for intellectual property within ICANN. The USG should encourage and support manufacturers to apply for their own House with various types of manufacturers (heavy, light, consumer products, auto, pharma), each having their own constituencies, so that the distinct voices of the various manufacturers can be heard within ICANN. Importantly, each manufacturing constituency should have its own permanent seat on the GNSO Council and the Manufacturers House should have a permanent seat on the ICANN Board.

Until more businesses and manufacturers are welcomed into ICANN with their own constituencies, their voices for free expression online will continue to be drowned out by certain ICANN insiders seeking the path of least resistance to their global influence.

F. What role can NTIA play in helping to reduce restrictions on the free flow of information over the internet and ensuring free expression online?

We believe there are some practical steps that the NTIA can take. These include, among others:

- insisting that ICANN respect free expression;
- advocating strongly for reasonable access to WHOIS records, which have been inappropriately blocked by over-compliance by ICANN with the GDPR (preventing the discovery of the true identities of Internet bad actors who attempt to sell counterfeit goods, commit acts of terrorism, etc.);
- making it known that the USG will block any GAC advice that hinders free expression online;
- taking steps to enhance competition throughout the DNS; and
- advocating for the creation of a Manufacturers House/Constituencies as outlined in E. above.

⁹ See <http://www.worldtrademarkreview.com/Intelligence/Anti-counterfeiting/2017/Industry-insight/The-costs-of-counterfeiting-an-exemplary-study-of-the-pharmaceutical-industry>.

G. In which international organizations or venues might NTIA most effectively advocate for the free flow of information and freedom of expression? What specific actions should NTIA and the U.S. Government take?

No international organization or venue comes close to what the USG could accomplish if it abandoned the prior Administration's fanciful theory that ICANN had a valid right to run the IANA functions absent USG oversight. The handover directly controverted Congress' direction to the NTIA¹⁰, and ICANN does not inherit a new government contract to run the IANA functions just because the former contract lapsed.

H. How might NTIA better assist with jurisdictional challenges on the internet?

We believe it is reasonable for the NTIA to advocate for a change in the Registrar Accreditation Agreement requiring registrants to submit to the courts where the registrar is located (if located within the United States) and to the California courts (if the registrar is located outside of the United States) for jurisdiction for all third-party disputes involving generic top-level domain names. If cybersquatters, counterfeiters, and other bad actors knew that they would be doubtlessly subject to the jurisdiction of U.S. courts, this would likely have a sobering effect on Internet mischief makers.

II. Multistakeholder Approach to Internet Governance

A. Does the multistakeholder approach continue to support an environment for the internet to grow and thrive? If so, why? If not, why not?

We remain alarmed that the multistakeholder model, absent USG oversight, seems deeply inadequate even if applied only to policy issues related to ICANN's role as a seller of access to the contractual right to operate domain name registries and registrars. The absence of a strong USG tie has resulted in foreign powers stepping into the vacuum. If this cannot be remedied by the NTIA resuming its oversight role in ICANN matters, alternative models may need to be considered.

B. Are there public policy areas in which the multistakeholder approach works best? If yes, what are those areas and why? Are there areas in which the multistakeholder approach does not work effectively? If there are, what are those areas and why?

For years, the multistakeholder model worked fairly well for the protection of intellectual property.¹¹ However, with the advent of GDPR and ICANN's failure to adequately plan for it and ICANN's over-compliance with it, ICANN no longer has in place a suitable system to access WHOIS information, which makes enforcement of trademarks more expensive and time consuming. The loss of meaningful access to WHOIS also weakens ICANN's own enforcement policies such as the UDRP, since the UDRP specifically calls for bad faith to be evidenced through showing a pattern of cybersquatting behavior.

¹⁰ See Footnote 1 above.

¹¹ The multistakeholder model was never perfect when it came to rights protection since there exists within ICANN many participants who have an anti-intellectual property bias, forgetting, of course, that trademarks especially protect consumers. Ironically, some of the strongest anti-intellectual bias can be found in the very groups within ICANN that claim to represent consumers.

The multistakeholder model has seen its limitations in problems that ICANN has experienced since the USG stepped back from its oversight role. The most obvious example is the missteps, discussed above, that have led to ICANN creating an environment where it is even easier for bad actors to hide their identity. The bungling by ICANN of GDPR implementation has led to many negative consequences.

Another poignant example is the financial struggles wherein ICANN admits that it does not have adequate funds in its reserve account and is now considering raiding the funds collected through its “Auction” process when it sold off new gTLD registries in the last round through which it collected over \$230 million. Not only were the auction proceeds supposed to be earmarked for purposes outside of ICANN operations, we are now nearly six years after the close of applications for the first round and the multistakeholder model has yet to produce a definitive answer on how those funds are to be used.

The multistakeholder model does not work effectively for IANA functions, as those are an issue of national security, not of the preferences of the multistakeholder community, or a subset thereof.

The multistakeholder model works best under USG oversight ensuring the free speech rights of Americans and the intellectual property rights of American businesses and manufacturers.

C. Are the existing accountability structures within multistakeholder internet governance sufficient? If not, why not? What improvements can be made?

No. As noted in these comments, ICANN is in a significant state of turmoil and there does not seem to be adequate leadership to promptly address the various problems.

Also, many of the accountability measures adopted in the last revision to the Bylaws simply do not appear capable of working and have never been tested. For example, the convoluted “Empowered Community” has yet to act during a crisis (and requiring basically the entire world of ICANN participants, including members of the GAC, to come together to act in unity on any topic in a timely manner is wishful thinking).

The major improvement to accountability structures that can be made is a reversion to USG oversight.

D. Should the IANA Stewardship Transition be unwound? If yes, why and how? If not, why not?

Yes, although calling it a “transition” is a misnomer. There was never any legal “transition.” Please see our comments in the introductory paragraphs above. As a short-term measure, the Department of Commerce should initiate a new agreement with the current Root Zone Maintainer, Verisign, to continue its work while the DOC determines next steps for a long-term solution.

We believe that it would be reasonable for ICANN to retain policy development responsibility for its current registries and any future registries that it sells, subject to oversight by the USG, including a right to veto policy that is designed to interfere with free expression or create a safe environment for bad actors. However, the IANA functions are of national security concern and should not be in the hands of a private party having no contract with the USG and whose structure makes it vulnerable to foreign interference and perennial underperformance.

E. What should be NTIA's priorities within ICANN and the GAC?

Within ICANN and the GAC, we believe the NTIA should focus on:

- pushing to complete a unified access model, either through the soon-to-be-launched ePDP or through Staff-led action (or both) that allows access to WHOIS information to confront infringers, bad actors, and dangerous criminals and terrorists;
- pushing for the next Round of new gTLDs to be as censorship-free as possible, including eliminating any restrictions on the use of "culturally sensitive" and related terms and being prepared to vote "no" should fellow GAC members wish to use their role to curtail speech of U.S. citizens and companies; and
- insisting that the auction proceeds actually go to the higher purposes advertised in the Applicant Guidebook and not to ICANN to plug holes in its budgets and reserve funds, which have arisen through ICANN's own mismanagement.

F. Are there any other DNS related activities NTIA should pursue? If yes, please describe.

No comment at this time.

G. Are there barriers to engagement at the IGF? If so, how can we lower these barriers?

No comment at this time.

H. Are there improvements that can be made to the IGF's structure, organization, planning processes, or intercessional work programs? If so, what are they?

No comment at this time.

I. I. What, if any, action can NTIA take to help raise awareness about the IGF and foster stakeholder engagement?

No comment at this time.

J. What role should multilateral organizations play in internet governance?

No comment at this time.

III. Privacy and Security

A. In what ways are cybersecurity threats harming international commerce? In what ways are the responses to those threats harming international commerce?

As mentioned above, ICANN's failure to adequately plan for GDPR and its over-compliance with this foreign law has created an Internet environment which is even more friendly to bad actors than before. This will inevitably lead to loss of consumer trust and harm to domestic and international commerce.

B. Which international venues are the most appropriate to address questions of digital privacy? What privacy issues should NTIA prioritize in those international venues?

We believe that local legislation, applied narrowly by ICANN, is the most appropriate venue, not “international venues” and not over-compliance by ICANN. ICANN’s failure in the implementation of GDPR has resulted in de facto regulation by Brussels of interstate commerce and commerce within all 50 States.

Since nearly every business in the 50 States has a website and/or email, they are currently offered no alternative but to deal with ICANN and its contracted parties since ICANN currently has no competition in the marketplace. ICANN’s impact is enhanced when it farms out its legal compliance to Europe or other foreign powers, rather than narrowly tailoring it to our domestic markets.

Regulation by foreign powers of a significant portion of our economy will invariably have a deleterious effect on job creation, innovation, and capital expenditures as the regulation from other governments reflects the will of the people from those places, but does not reflect the will of American people.

IV. Emerging Technologies and Trends

A. What emerging technologies and trends should be the focus of international policy discussions? Please provide specific examples.

No comment at this time.

B. In which international venues should conversations about emerging technology and trends take place? Which international venues are the most effective? Which are the least effective?

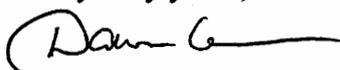
No comment at this time.

C. What are the current best practices for promoting innovation and investment for emerging technologies? Are these best practices universal, or are they dependent upon a country’s level of economic development? How should NTIA promote these best practices?

No comment at this time.

We are available to discuss any of the above issues with you at your convenience.

Very truly yours,



Dawn Grove
Corporate Counsel
Karsten Manufacturing Corporation

TESTIMONY
OF
DAWN GROVE
CORPORATE COUNSEL
KARSTEN MANUFACTURING CORPORATION
PROTECTING INTERNET FREEDOM: IMPLICATIONS OF ENDING U.S. OVERSIGHT
OF THE INTERNET.
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL
COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEPTEMBER 14, 2016

Executive Summary

Dawn Grove, who serves as Corporate Counsel, is appearing on behalf of Karsten Manufacturing Corporation (Karsten). Karsten is the parent company of PING, a U.S. manufacturer of premium custom-fit golf equipment, and PING REGISTRY PROVIDER, INC. (PING REGISTRY), the ICANN contracted party that operates the .PING branded top level domain name.

While many have diligently worked on the IANA transition for several years, ICANN's structure remains seriously flawed, and rushing the transition through now in its current state will endanger manufacturers' rights to their trademarked brand names, severely disadvantage states' rights, jeopardize national security, and prevent the safeguarding of the Internet freedoms we have come to depend on.

* * * * *

Good morning, Chairman Cruz, Ranking Member Coons and members of the Subcommittee,

I thank you for this opportunity to share the view of a U.S. manufacturer and its subsidiary's experience as an ICANN contracted party regarding the proposed IANA transition. Many thanks to you for caring about these most important and time-sensitive issues.

I. Introduction

My name is Dawn Grove, Corporate Counsel for Karsten Manufacturing Corporation. I also chair the Arizona Manufacturers Council and serve on the board of directors of the Arizona Chamber of Commerce & Industry, both of which oppose the current IANA transition. (See attached portions of the Arizona Chamber of Commerce & Industry 2016 Business Agenda.) Karsten Manufacturing Corporation is the parent company of both PING and PING REGISTRY. PING is one of the top three golf equipment brands in the U.S. and provides over 800 jobs in Arizona that people want to hang onto—nearly 60% of our workforce has worked with us for over 10 years, and nearly 30% of our workforce has worked with us for over 20 years. I have worked at Karsten for only 18 years, so I am relatively new. We are a closely held, private family business started by my grandfather in his garage, and we have been passionately designing and manufacturing custom-fit premium golf equipment in Arizona for the past 57 years.

PING has built a reputation for innovation, design, quality, and service and we actively protect our brand name in many ways including with trademarks throughout the world. While golf clubs are our bread and butter, we make and license a wide variety of products—apparel, hats, gloves, backpacks, towels, software, cradles to use iPhones to analyze a golfer's putting strokes; Apple even once licensed our PING trademark for its social media for a number of years. We have vigilantly protected our brand name in many categories, including for domain name registry services. Our name is our lifeblood, and we aim to ensure that the PING name reflects the innovation and perfection we put into every one of our custom-built golf clubs.

II. Our Experiences With ICANN's Monopoly

Despite the extremely high cost of applying for a gTLD—the application fee unilaterally set by ICANN is \$185,000—Karsten, through its affiliated company, PING REGISTRY, paid the \$185,000 application fee for .ping. In our application, we informed ICANN of our well-known rights to our famous PING marks. We also paid legal experts to help us navigate the application process, and we set aside hundreds of thousands of dollars for startup costs for the registry, all to satisfy ICANN's extremely unpredictable application process. We understood then, as we do now, that the Internet is also a place to lead as innovators and wanted to ensure a secure way of communicating with our customers and protecting them from counterfeit products in the future. More importantly, we did not want to risk having someone else obtain the exclusive right to use our PING mark as a registry term via a contract with ICANN. It ended up being the right decision, because a wealthy ICANN insider based in India that had never made or sold a PING product, had not trademarked the name throughout the world or otherwise had any respectable claim to our name, filed a competing application with ICANN for .ping. The fact that one of the other applicant's affiliated companies had a number of Uniform Dispute Resolution Policy decisions against it did not deter the applicant. It should have, since the Applicant Guidebook makes it clear that parties with a history of adverse domain name decisions should not apply to run registries.

At first, we felt hopeful that ICANN would do its job, as any company would that takes due diligence seriously, and vet proposed registries against known trademark registrations. ICANN is not above the trademark laws of the United States and should not offer registry contracts in violation of well-established trademark rights. We also expected ICANN to follow its own charter, bylaws, and the Applicant Guidebook, and disqualify the competing applicant based on our trademark rights and the other applicant's history of adverse domain name decisions against its affiliate. To be sure that ICANN's applicant background review did not miss these prior adverse decisions, we made ICANN directly aware through the filing of public comments, which is the method of communicating to ICANN about such concerns. Despite ICANN's actual knowledge of the India company's problematic history and actual knowledge of our rights in our global brand, it became clear that ICANN had no intent to vet the other applicant or deter its desire to run a registry consisting of our PING mark. We realized there was no structural incentive for ICANN to follow its bylaws and rules (which would have prevented ICANN from awarding our name to the other applicant), and there was no process and no one willing to actively hold ICANN's new gTLD staff accountable. You see, when there are competing applications for the same term, ICANN simply forces all applicants into an auction. When we asked ICANN to postpone the auction and provided it, again, with actual notice of our trademark rights, ICANN's counsel threatened to terminate our application for .PING if we went to the courts to seek relief. If ICANN terminated our application for seeking to enforce our trademark rights, it would have ensured that the company from India would obtain the operating contract to run a registry consisting of our brand. We had no choice but to pay ICANN's auction price. I cannot begin to tell you how scary it was for my family to go into that auction not knowing whether we would be able to keep our PING name after all these years. We ended up paying ICANN \$1.5 million at the auction to reclaim our name from ICANN. If ICANN is prepared to sell a domain name consisting of our brand to a third party with full knowledge of our trademark rights unless we paid an enormous sum, all the while under the close watch of the Department of Commerce, you can imagine how this experience has left us very wary of how a monopoly, such

as ICANN, will act if the Department of Commerce completely abdicates its historic oversight role.

III. Our Experience is Early, But Not Unique

ICANN benefits to the tune of potentially millions of dollars every time there's an auction and, indeed, has taken over \$230 million from businesses in auction proceeds alone since it rolled out its top level domain name program. ICANN also accepted an extra million dollars in a side deal with the .sucks registry, which company turned the Trademark Clearinghouse on its head and instead of using it for its purpose of allowing trademark owners a central place to detail their registered trademarks, allows the unscrupulous to pressure brands into purchasing .sucks domain registrations at unusually high prices to avoid having people post defaming comments on brandname.sucks websites. Of course, twisting brand owners' arms for high payments based on their trademark rights should never be the intended purpose of any registry, but ICANN's financial structure derives its revenue from selling more and more top and second level gTLD's to the business community; holding more auctions increases its resources and power to influence others. Its revenue has no tie to whether it follows its own charter and rules.

Commerce says ICANN made all the changes multistakeholders wanted and that Commerce cannot influence the process. However, there were fundamental changes requested by the global multistakeholders which the ICANN Board rejected at the Dublin meeting last year. For example, the global multistakeholders requested a very common Single Member Model of governance where the stakeholders would be empowered as the Single Member to address issues on an ongoing basis. The ICANN Board rejected this in favor of an untested Sole Designator Model of governance that only allows the multistakeholders to come together as an "Empowered Community" to address crises on occasion, rather than day-to-day oversight, assuming the whole world of global stakeholders can agree on what constitutes such a crisis. It was highly rumored that the Board's position was that it would rather there be no transition than a transition with the Single Member Model in place. Predictably, the members of the multistakeholder community within the Cross Community Working Group for Accountability caved under the pressure rather than stand up to the ICANN Board and the transition plan now anticipates the Sole Designator experiment in Internet governance. Instead of implementing the change to the bylaws this spring so that they could be tested for a few months prior to the proposed transition, the ICANN Board made the accountability reforms contingent on the transition, signaling that the ICANN Board may not really believe that it should improve its accountability to the community.

IV. This Handoff Is More Than a Technical Matter

ICANN is currently accountable to NTIA for both policy and technical functions until a transition is made away from NTIA oversight. NTIA has announced that it is now ready to transition its stewardship of the Internet policy and technical functions to ICANN and its global stakeholders. Following the transition, ICANN will be a stand-alone monopoly accountable only to its stakeholders, including 162 foreign government members and 35 "observers" (the "Governmental Advisory Committee" or "GAC"). Under recent accountability reforms, which are set to become effective only upon transition, GAC "consensus advice" must be taken unless overridden by a supermajority of the ICANN Board. If the policy functions were to remain under the oversight of the Department of Commerce, perhaps the transition would not be as

troubling. However, the transition is not merely just about who performs technical functions, no matter how many times proponents of the transition make that claim or call it just a spreadsheet. If there were nothing at stake here, none of us would be here and none of the advocates who are pushing hard for this transition to occur would be pushing as hard as they are.

V. No Role for State Governments

State governments are excluded from participating as voting members of the GAC. The only way for a State government to have its concern reach a vote within the GAC is if the NTIA decides to champion the State's cause. Even assuming the NTIA were to decide to champion such causes, the NTIA's voice will be lessened in the GAC following transition. The United States will be a mere equal with other governments, such as Iran, Russia, or even tiny countries like Grenada. States, such as California, Texas, and New York, whose GDP and populations dwarf many GAC members, will have no voting seat at the table. With the U.S. Government giving up its oversight role, U.S.-based law enforcement agencies will be on the same footing as agencies from other countries. With foreign interests leading the charge to move ICANN out of the U.S., registries and registrars may be less likely to respond to information requests from various State Attorneys General. This will make it harder for federal law enforcement and State Attorneys General to determine where threats are originating from that impact its citizens. If the ICANN model is so inclusive, where are the seats at the GAC table for the 50 sovereign States?

VI. Expanded Role for Foreign Governments

The transition plan that ICANN sent to the NTIA lacked a promised provision in the bylaws making it clear that GAC "consensus advice" would not trigger a mandatory, supermajority ICANN board vote. Stakeholders who voted in Marrakech for the transition plan voted for the proposal based upon that promised provision ensuring that the GAC would remain in its advisory role and not dictate policy to the ICANN Board and community. Instead, as feared, governments now possess essentially unlimited power to "advise" the ICANN Board to take or not take actions. There are no guardrails around what subject matter GAC advice can cover or when that advice needs to be provided. Importantly, "consensus advice" does not require unanimous agreement of all countries on the GAC, only that there is "general agreement in the absence of any formal objection." In other words, the United States' GAC representative need not vote yes for "consensus advice" to be binding on the ICANN Board, only not object to what others are doing. Unless the ICANN Board has the political will to stand up against inappropriate GAC advice, and it has shown in the past that it does not, ICANN will be vulnerable to capture.

During its stewardship, the U.S. has strived to create an environment where the entire world community had free and open access to the Internet. It is essential to U.S. manufacturers that such an environment continues, and in order to accomplish that goal, the transition must ensure that checks and balances are in place to resist and prevent capture by governments which could act to restrict this access.

VII. Lack of NTIA Authority

The NTIA's involvement with ICANN has been via the Executive Branch and not with Congressional authority. The NTIA itself acknowledges that it never had authority to regulate ICANN:

“Throughout the various iterations of NTIA's relationship with ICANN, NTIA has never had the legal authority to exercise traditional regulatory oversight over ICANN”
https://www.ntia.doc.gov/files/ntia/publications/iana_stewardship_transition_assessment_report.pdf at 4 (accessed 8-21-2016).

Conversely, the NTIA also states that while it has contracted with ICANN, it has the authority to discontinue contracting with ICANN for the IANA services:

“Just as federal agencies can enter into contracts they need to fulfill their missions without specific legislative authority, federal agencies can discontinue obtaining such services when they no longer need them.” *Id.* at 6.

What is missing from the NTIA analysis is clarity on what happens to a federal contractor when the government ceases contracting with it for services. It appears that both the NTIA and ICANN are operating under the assumption that a former federal contractor “inherits” the right to continue performing services absent a contract. Applying that conclusion to various government services, such as defense contracting, would lead to chaos. The Internet is no less important to national security. In order for any transition to be legitimate, and for ICANN to retain its policymaking and technical functions legitimacy after transition, Congress must act, but should act promptly to delay the transition, repair ICANN's faulty structure, and test the repaired structure for some period of years prior to any potential transition.

VIII. Unsolved Problems

NTIA reviewed this proposal and found not even one item amiss despite ICANN drafting whole new provisions not vetted previously by the multistakeholder community in contravention of its own rules. Clearly, NTIA rushed the final decision in order to meet an artificial deadline. There is no time to implement the accountability changes prior to the deadline and to test them in advance. There are a number of changes included in the proposal that are not fully developed or will require proof testing before it is clear that they achieve the objectives stated. As mentioned before, the ICANN Board has made **all** of the accountability changes **contingent** on the transition occurring, providing no time to “test drive” them.

In ICANN's rush to meet the NTIA's deadline, important work was left undone. This is what ICANN means when they refer to “Workstream 2.” However, some of the most important issues were pushed off into Workstream 2, such as the permanent jurisdiction of ICANN and the protection of human rights, including free speech. Make no mistake, there are participants involved in the Workstream 2 work who desire to see ICANN leave California and be reconstituted in another jurisdiction outside of the easy reach of the federal courts. Likewise, there are participants within the Workstream 2 process who wish to cherry-pick which human rights are observed by ICANN and which are not. Where ICANN is formed and whether or not ICANN respects the longstanding human rights enjoyed by every American, such as free speech,

are not minor considerations. The transition should not occur until these issues are firmly and finally resolved and Congress consents to the outcomes.

IX. Conclusion

Right now, ICANN is under contract with the NTIA, which contracts provide guardrails to what ICANN can and cannot do. While the NTIA's governance might have been a "light touch," particularly over the most recent years, that does not undo the benefits of NTIA's stewardship. If NTIA's stewardship had no real effect, there would be no clamoring for the transition to occur. The so-called "Empowered Community," a convoluted structure of stakeholders that will only be activated in times of crisis, is not suitable to provide day-to-day oversight of ICANN's Board. Instead, after the transition, which will result in a power vacuum, the stage is set for an enhanced GAC to step into the role previously held by the NTIA. Not every GAC member values free speech, predictable markets, and intellectual property protections for consumers. Replacing the NTIA with the enhanced GAC whose "consensus advice" is binding absent a supermajority pushback from the ICANN Board flunks the NTIA's own test of what a suitable transition plan should entail.

Congress, at a minimum, should require the NTIA to renew the IANA contract prior to September 30, 2016, and to ensure that all community-approved accountability changes in the bylaws and procedures of ICANN be implemented and be operational for a reasonable time period, protocols rightfully followed, and risks to manufacturers and other trademark rights holders addressed prior to any transition. An orderly, legitimate transition, if desired, then can be considered by Congress in cooperation with the NTIA.

My hope is that Congress will intervene to safeguard the free and open Internet for the use of the world, and hold Commerce to actively oversee ICANN's activity and help repair its faulty structure in the waning hours when it still has time and authority to do so. No country is better suited than the United States to safeguard the Internet for the use of the world, because more than many of the nations around us, we protect intellectual property, value free speech, safeguard the free exercise of religion even for those who believe differently than we may, and champion the rights of minorities.

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Karsten, as an ICANN contracted party, manufacturer, and Arizona employer, thanks the subcommittee for its continued action in this matter and urges Congress to take steps to ensure that any transition of the oversight of the policy and technical functions to ICANN be prevented from occurring at least until ICANN's faulty structure is repaired and ICANN has completed all the necessary work and has evidenced for a significant period of time that it is truly accountable and ready to fulfill its commitments globally.

Thank you.