



Testimony

of

Jonathan Zuck

President

ACT | The App Association

before the

Committee on the Judiciary

Subcommittee on Courts, Intellectual Property and the Internet

on

Stakeholder Perspectives on ICANN: The .Sucks Domain and
Essential Steps to Guarantee Trust and Accountability in the
Internet's Operation

May 13, 2015

2138 Rayburn House Office Building

My name is Jonathan Zuck and I serve as the President of ACT | The App Association. As a former software developer, it has been an honor to represent the interests of software companies for the past 17 years.

ACT | The App Association represents over 5,000 small and medium sized app companies and information technology firms. Unlike many companies within the ICANN ecosystem, whose business is predominantly the domain name system (DNS), small companies are the primary customers of that system. It's easy to forget but the majority of domain names are held by small organizations; it is from that perspective that I provide this testimony.

When our members asked us to become involved in ICANN in 2005, it was to help reform an organization that was in danger of capture. For the first half of ICANN's life there was very little interest in ICANN from the small business community, because the system appeared to be working. However, when media reports came out that some in the European Union sought greater governmental control over internet naming, our members made it clear that it was time for us to engage. The reality of this problem struck home when the former Prime Minister of Sweden, Carl Bildt wrote:

The European Union...in its wavering...has recently come down with a position that has brought it enthusiastic applause from Tehran, Beijing and Havana... It would be profoundly dangerous to now set up an international mechanism, controlled by governments, to take over the running of the Internet. Not only would this play into the hands of regimes bent on limiting the freedom that the Internet can bring, it also risks stifling innovation and ultimately endangering the security of the system.¹

It was clear that it was time to act. We joined in as part of the multi-stakeholder effort at ICANN generally, and within the Intellectual Property Constituency in particular, to expand opportunities for public participation, encourage operational excellence and develop metric-driven transparency to better facilitate accountability. Notably, I have so vigorously sounded the

¹ "Keep the Internet Free," Carl Bildt, New York Times, October 11, 2005.
http://www.nytimes.com/2005/10/10/opinion/10iht-edbildt.html?_r=0

need for metric-driven accountability that I have been dubbed “Metrics Man” among ICANN stakeholders, and the resultant board resolution on metrics was named after me.

Ten years later, we are beginning to see performance metrics throughout ICANN including workgroups, reviews, strategic planning and contract compliance. However, more remains to be done. Efforts to achieve real accountability have largely floundered over the past decade but we have finally begun to make progress because of the work inspired by the pending IANA functions contract expiration. For the past year, ACT has been actively involved in developing the new accountability framework for ICANN that was submitted for public comment on May 4th.

In my testimony, I would like to make 3 main points:

1. ICANN has made many missteps and *must* adopt real accountability reforms, but still represents the best model for governance of the DNS.
2. The IANA Functions transition is an *opportunity* to get accountability right. The community has worked hard over the past year to construct a proposal worthy of real consideration.
3. Congressional oversight is required in 3 important areas:
 - a. Ensuring the proposed framework is indeed the work of the bottom up multi-stakeholder consensus process.
 - b. Ensuring the proposed framework passes various “stress tests.”
 - c. Ensuring the proposed framework, if accepted, is sufficiently implemented to be permanent.

ICANN Missteps

There have been a number of missteps on the part of ICANN that help to underscore the need for real accountability. Examples include:

1. *A board resolution was passed in secret which allowed ICANN's CEO to pursue a partnership with the government of Brazil to create yet another framework for internet governance*²
2. *The board's passivity regarding the recommendations of the Security and Stability Advisory Committee's (SSAC) recommendations on domain collisions³ and dotless domains⁴*
3. *The board's ill-advised decision on singular/plural versions of the same TLDs⁵*
4. *The board's decision to accept a new gTLD applicant with questionable financials (Vox Populi)⁶*
5. *The lack of transparency surrounding the recent security breach*⁷

Each of these represents instances in which greater accountability to the community would have led to better outcomes.

Perhaps the mistakes that are felt by the widest audience are those related to intellectual property (IP), an area critical to ACT members. For years there have been difficulties with WHOIS data accuracy, contract compliance, and a disproportionate need for defensive registration by trademark (TM) owners.

The new gTLD program has exacerbated this phenomenon. Some of ICANN's activities have put IP at risk – demonstrating, in the process, ICANN's limited technical competence. In particular, ICANN's rollout of new TLDs has threatened trademarks and forced trademark holders to spend unnecessary time and money defending their marks. ICANN initially tried to address this issue internally and unilaterally, creating a complicated system

² "ICANN Internet Governance Initiatives Sanctioned by Secret September Board Resolution," November 17, 2013
http://www.internetcommerce.org/Secret_ICANN/

³ "SAC062 - SSAC Advisory Concerning the Mitigation of Name Collision Risk"
<http://research.google.com/pubs/pub42959.html>

⁴ SSAC Report on Dotless Domains
<https://www.icann.org/resources/pages/sac053-dotless-domains-2012-08-24-en>

⁵ "Plural gTLDs give ICANN huge credibility risk," Kevin Murphy, Domain Incite, April 10, 2013
<http://domainincite.com/12648-plural-gtlds-give-icann-huge-credibility-risk>

⁶ "That mystery \$1 million .sucks fee explained, and it's probably not what you thought," Kevin Murphy, Domain Incite, April 1, 2015
<http://www.brandregistrygroup.org/that-mystery-1-million-sucks-fee-explained-and-its-probably-not-what-you-thought/>

⁷ "ICANN e-mail accounts, zone database breached in spearphishing attack," Dan Goodin, Ars Technica, Dec 17, 2014
<http://arstechnica.com/security/2014/12/icann-e-mail-accounts-zone-database-breached-in-spearphishing-attack/>

that proved unworkable. When its internal attempt at a technical solution failed, the community responded by creating the Trademark Clearinghouse (TMCH).

While the TMCH is designed to handle certain functions on ICANN's behalf, ICANN has done a poor job of raising awareness of the TMCH and promoting its fundamental mechanisms. Instead, ICANN has been declaring victory on trademark issues and ignoring the realities of a vastly under populated clearinghouse of marks. ICANN's failure to adequately communicate the availability and value of the new mechanisms has left the general public largely unaware of these tools.

The recent introduction of the .sucks gTLD demonstrated that even though tools may be in place for trademark owners to protect their brands, these tools can be abused by a registry seeking to maximize "rents" from TM holders.⁸ When second-level registrations for a particular domain are owned primarily by TM holders who do not wish to use the domain, there's a flaw in the system. I hope the upcoming review of the new gTLD program, along with the review specifically of the rights protection mechanisms, will help to reveal flaws in the system that facilitate rent seeking more than consumer choice and reflect avarice rather than consumer demand.

ICANN Accountability

ICANN is an organization in a state of almost perpetual self-study and reform, constantly commissioning studies, reorganizing the community and proposing changes for public comment. It is worth noting that considerable strides have been made in pursuit of operational transparency, and stakeholders are clearly encouraged by these strides. However, there are still nagging instances of opacity that plague the organization and decisions that defy explanation.

Moreover, improved transparency must be understood through the well worn phrase "necessary but not sufficient;" we must have additional

⁸ "IPC asks ICANN to halt controversial .Sucks domain name roll out," ANDREW ALLEMANN, Domain Name Wire, MARCH 27, 2015

<http://domainnamewire.com/2015/03/27/ipc-asks-icann-to-halt-controversial-sucks-domain-name-roll-out/>

mechanisms of discipline. All the transparency in the world does not lead to accountability if those mechanisms are not in place. Transparency, metrics and public participation are all simply tools to facilitate accountability. It is true that one cannot have accountability without transparency, but transparency alone does not lead to accountability.

There are many different definitions of “accountability” but stripped to its essentials, accountability is about power. The only real question is whether governed entities, in this case the “ICANN community,” have the ability to hold to account (i.e. discipline) those that have been placed in a position of power or not. In short, the answer is no but the status quo is a little more complex.

There are currently three accountability structures in place to hold ICANN to account. The first, and perhaps least understood, is that worldwide participation in the naming system, managed by ICANN, is voluntary and subject to modification (as the Chinese have done). If the global community truly became dissatisfied with ICANN, a new root could be developed that everyone referenced instead of the one managed by ICANN.

This reality is both powerful and cautionary. It’s powerful in the fact that ultimately ICANN needs to continue to generally please the global community in order to stay relevant but cautionary in that it reminds us that the internet is already “international” in the most fundamental aspects and everything we propose must hold up to the scrutiny of the global community.

Of course, as a practical matter, the threshold necessary to bring about wholesale change to the DNS, with all that is at stake economically and politically, is far too high to be of much use when trying to change the rights protection mechanisms in the new gTLD program. Instead it stands as the ultimate mechanism of accountability that no one imagines will ever come to fruition but reminds us we’re all in this together.

The second structure of accountability that is much more approachable is the framework through which the board of ICANN is constituted. At its core, it is made up of members of the community, elected through a

combination of various constituencies of the community and ultimately subject to changes sought by the community. On its face, this would seem to be a very powerful tool for the community to use to hold the ICANN board and staff to account but again, in practice, it is a difficult tool to wield. The timeframes alone render this mechanism impractical. The amount of concerted, collective action, over a number of years, required to substantially change the makeup of the board is prohibitive and even then provide insufficient access to redress by individual parties. Nine times out of 10, the community makeup of the board is sufficient to ensure appropriate decisions. It is also true, as has been described to this committee in the past, that the board members owe their ultimate allegiance to the organization that is ICANN, not the various communities from which they sprung.

Finally, there is the relationship with the United States government or, more specifically, the NTIA within the Department of Commerce. The NTIA has, over the lifetime of ICANN, provided guidance and protection of the multi-stakeholder experiment that is ICANN. Through a combination of memoranda of understanding, joint project agreements and ultimately a voluntary agreement called The Affirmation of Commitments, the NTIA has sought to help ICANN mature into a strong independent global organization.

Little by little, the NTIA has stepped back and allowed ICANN to operate independently. In 2009 ICANN signed the Affirmation of Commitments (AoC), representing the last instance of prescriptive advice. The AoC confirmed ICANN's mission, its commitment to the global public interest and the security and stability of the DNS. Finally, the agreement specified a number of "reviews" that should periodically take place including those for Accountability and Transparency (also known as the ATRT review), WHOIS, rights protection mechanisms and an overall review of the new gTLD program that is set to begin this coming fall.

This AoC agreement is a voluntary one, and ICANN could walk away with 120 days notice. However even if ICANN couldn't simply walk away, the existing AoC doesn't have the teeth to require implementation of its recommendations, or the recommendations of the review teams. By the

time of the second ATRT review, only half of the recommendations of the first ATRT review had been implemented. Clearly, there is still something missing in the ICANN accountability framework.

Theoretically, the last tether the NTIA holds over ICANN is the contract for the IANA functions that NTIA maintains the right to terminate. The IANA functions are considered essential to ICANN's credibility as the shepherd of the global DNS and, as such, represent a kind of leverage the NTIA has over ICANN to ensure that it abides by the AoC and other commitments. This leverage has been invaluable in keeping ICANN on course.

That said, the IANA functions contract represents a fairly instrument when it comes to the operational accountability of the ICANN board and staff. It is an abstract and difficult-to-exercise tool in the context of a particular decision and one that the NTIA, given the global nature of the internet, is loathe to use. Consequently, while absolutely essential, the leverage provided by the IANA functions contract is not, and has never been, the real accountability framework that ICANN sorely lacked. Instead it can be more adequately described as a crutch, upon which the global community has relied, to postpone what was certain to be an all-consuming discussion of real accountability.

It is important to remember that all of the grievances that have been aired today describe decisions, indecision, missteps, and malfeasance that *all* occurred with the IANA functions contract firmly in place.

It is for that reason ACT regards the proposed transfer of the IANA functions to ICANN as an *opportunity* to finally get accountability inside ICANN. Absent the proposed transfer, it is highly unlikely the community would have found the determination to develop the comprehensive proposal for ICANN accountability that was released for public comment on May 4th. We believe the proposed reforms to ICANN will ensure a long future for the organization, operating not only in the global public interest but in the American public interest as well.

The community has brought this proposal a long way, but there is a powerful role for Congress to ensure the new framework is sufficiently

comprehensive, addresses stress tests, and is implemented prior to any transfer of the IANA functions to ICANN takes place.

ICANN 3.0

To paraphrase Churchill, ICANN is built on the worst model for Internet governance...except for all the alternatives. Over the past 5 months, the Cross Community Working Group (CCWG) on Accountability has developed a comprehensive framework for accountability. At the same time, there was a recognition that the iterative nature of ICANN reform would continue and that no framework would be final. Accordingly, the work was divided into two “work streams,” those measures that would need to be in place for the transition to occur and those that would be developed and implemented over time after the IANA functions transfer. The best way to describe the proposals in Work Stream 1 is those measures sufficient for the community to be empowered to bring about the reforms in Work Stream 2. Specifically, the new powers for the community include the ability to:

- Challenge board actions via Independent Review Panels whose decisions can be binding
- Veto Bylaw changes proposed by the ICANN board
- Veto strategic plans and budgets proposed by the ICANN board
- Control over periodic reviews required by the Affirmation of Commitments
- Remove individual ICANN board directors
- Recall the entire ICANN board as a last-resort measure

There are specific measures of interest to ACT, as a representative of small businesses that have to do with access to redress by individual parties.⁹ These include issues such as:

⁹ “Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) - Input Needed on its Proposed Accountability Enhancements (Work Stream 1)”
<https://www.icann.org/public-comments/ccwg-accountability-draft-proposal-2015-05-04-en>

- Increasing transparency by publishing Board meeting minutes and draft statements online in a timely and searchable way. (Report Section 6)
- Improving the public comment period. (Report Section 9)
- Concerns about the reconsideration process, specifically a binding appeal process. The report notes that ICANN Board should convene to look at the restricting of the Independent Review Process (IRP) and the Reconsideration Process. (Report Section 11)

These mechanisms will allow small businesses to more easily involve themselves in ICANN processes and mechanisms for redress by reducing the cost of participation and improving transparency. Currently, a non-binding review of a decision by ICANN can cost around \$1 million dollars, leaving small business out in the cold when it comes to redress. Significant improvement in the reconsideration process must be made if it is to be accessible to small businesses.

A Role for Congress

I am very pleased to be a part of the “briefing team” for this committee because there is a powerful constructive role for Congress in ensuring a successful transition to ICANN 3.0. Chairman Goodlatte laid the groundwork perfectly in an op-ed in February:

... permanent improvements to ICANN's accountability and transparency are critical to building public and congressional trust for any proposed transition. Any consideration of such a transition must be done carefully and in close coordination with Congress, rather than in a unilateral way. ... We also encourage ICANN to ensure that whatever results from this process shows that the outcome emanated from a true bottom-up multi-stakeholder process and was neither imposed on nor unduly influenced by ICANN's leaders, staff, or members of its board.¹⁰

¹⁰ “Ensuring Trust in Internet Governance”, 11-Feb-2015, on CircleID, http://www.circleid.com/posts/20150211_ensuring_trust_in_internet_governance/

Following Chairman Goodlatte's lead, I see Congressional oversight playing a critical role in three important ways:

1. Congress should insist that whatever framework is approved by the community is one borne from a bottom-up multi-stakeholder consensus in the ICANN community.
2. Congress should require that any accountability framework is measured against a comprehensive set of worst case scenarios or "stress tests" so that ICANN is in the best possible position to carry out its mission long into the future and resist encroachment by those who would see the DNS controlled by some multilateral structure such as the ITU.
3. Congress should ensure that reform is being implemented before the transition so accountability becomes permanent. At a minimum, core values and fundamental bylaws must be updated before any IANA contract transfer takes place. As Secretary Strickling outlined in his recent letter to the co-chairs of the CCWG on Accountability, "...transition planning should proceed according to whatever schedule the community sets" and that such a schedule should include the time necessary to "implement [the plan] after it is approved."¹¹

The app makers I represent use the term "minimum viable product," or MVP, to describe a core set of functionality necessary before a product can go to market. Inherent in that expression is a recognition that time is not infinite and there will always be another version but there is a list of functionality that cannot be sacrificed to schedule. We find ourselves in a similar situation here. The situation is not without some pressure, from a variety of sources, but there is an MVP that must be implemented before NTIA can consider allowing the IANA Functions Contract to expire.

I hope we can make the most of this opportunity to implement real accountability inside ICANN and ensure the future of the multi-stakeholder

¹¹ "Letter to the CCWG from NTIA on the IANA Stewardship Transition" to co-chairs of the CCWG on Accountability from Secretary Lawrence Strickling, dated May 6, 2015.
<http://mm.icann.org/pipermail/accountability-cross-community/attachments/20150506/9f16c6dc/LettertoCCWGMay6-0001.pdf>

model for internet governance which has served both the American and global public interest so well.

Thank you for the opportunity to appear before the Committee today and I look forward to addressing any questions you may have.