



ACT | The App Association

Testimony

of
Jonathan Zuck
President
ACT | The App Association

on
Protecting Internet Freedom:
Implications of Ending U.S.
Oversight of the Internet

before the
Senate Committee on the Judiciary
Subcommittee on Oversight, Agency
Action, Federal Rights and Federal
Courts

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Building





Chairman Cruz, Ranking Member Coons, and distinguished members of the Committee: 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 innovative software development companies for the past 18 years.

ACT | The App Association represents more than 5,000 small business app makers and connected device companies across the United States. Our member companies leverage the connectivity of smart devices to create innovative solutions that make our lives better. ACT provides a unique voice in representing the countless small business that hold the majority of domain names, and which are customers of the organizations whose business is the Domain Name System (DNS).

My extensive involvement with ICANN, spanning more than 30 meetings over more than a decade, includes:

- Participation in numerous policy working groups
- Work on improving contract compliance
- Development of a new framework for policy working groups to incorporate measurable success metrics
- Development of metrics to measure the success of the new gTLD program
- Leadership within the Cross Community Working Group on Accountability
- Chair of the ongoing review of Competition, Consumer Choice and Consumer Trust (CCT)



In my testimony today, I elaborate on the following key messages:

- DNS is a key technical resources to the functioning of the Internet by facilitating the identification of connections, to which the Internet Assigned Numbers Authority (IANA) functions are integral. For nearly 20 years, the Internet stakeholder community – which includes the U.S. government – have been partnered with the Internet Corporation for Assigned Names and Numbers (ICANN) to shift the responsibilities and processes of the DNS to the Internet community to ensure that it is not controlled by any government, and also functions in a transparent and accountable manner. To address the needs of small businesses who rely on a properly-functioning DNS, I have personally been engaged within ICANN for more than a decade to ensure that ICANN operates accountably.
- In anticipation of the IANA transition, both the National Telecommunications and Information Administration (NTIA) and ICANN have undertaken an intensive effort to ensure that the IANA functions can be responsibly transferred from the U.S. Government to the Internet community. With recent revisions to its Bylaws, the ICANN has now put into place a robust accountability framework that will ensure the transparent and responsible management of the DNS, protected from undue governmental interference.
- We now approach a key milestone in this transition with the September 30, 2016 expiration of NTIA oversight of IANA functions, with more transparency and accountability measures put into place than ever before. At this critical time, Congress should ensure that the IANA transition proceeds as planned, and should continue to consult with experts at NTIA as well as those engaged in ICANN’s processes to understand and monitor the status of the IANA transition and its impacts. Delaying or derailing the decades of collaborative work by the Internet community to finalize the transition would be deeply damaging to the trust held in the technical functioning of the Internet, and would enable those who seek to put government(s) in control of the DNS.



I. How We Got Here

DNS, the system responsible for identifying resources connected to the Internet, is a crucial element of the Internet infrastructure.ⁱ While DNS management has been a necessity since the days of the Advanced Research Projects Agency Network (ARPANET), with the explosive growth of the Internet by the late 1990s, President Clinton issued an Executive Memorandumⁱⁱ privatizing the DNS in recognition of the need for competition and international involvement in the administration of changes to the authoritative root zone file (the database containing the lists of names and addresses of all Internet top-level domains). By mid-1998, after public consultation, the NTIA determined the essential functions of the DNS and its IANA functions, which include [1] the coordination of the assignment of technical Internet protocol parameters; [2] the administration of certain responsibilities associated with DNS root zone management; [3] the allocation of Internet numbering resources; and [4] other services related to the management of the .ARPA and .INT top-level domainsⁱⁱⁱ), and further resolved that these functions should be handled by the private sector through a not-for-profit corporation.^{iv}

Shortly after, ICANN was established by the private sector to fill this role. Since then, 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 an effective and transparent organization.

ICANN activities were not initially of concern to small business innovators. “If it’s not broke, don’t fix it” was the attitude of most entrepreneurs without the bandwidth to follow ICANN minutia. However, our members became concerned after reports in the media of efforts by some in the European Union to increase governmental control over Internet naming.^v As a result, our members recognized the need for significant reform inside ICANN, strongly requested in 2005 that ACT involve itself with the organization on their behalf. We answered this call by fully engaging in ICANN as part of its multi-stakeholder effort widely, and specifically within ICANN’s Intellectual Property Constituency, to develop opportunities for meaningful public contributions, driving improved processes, and advancing measurable transparency to realize accountability within the system. I have so vigorously led the effort within ICANN for this needed metric-driven accountability that a resulting board resolution on metrics is now commonly referred to as the “Zuck Resolution” by ICANN stakeholders.



As time went on, despite the best intentions of NTIA through its agreements with ICANN, a recurrence of missteps on the part of ICANN demonstrated the need for true accountability. In May of 2015, I testified before the House Judiciary Committee about the state of DNS management and its future.^{iv} These mistakes by ICANN have impacted a wide range of stakeholders in the Internet ecosystem, but particularly those who hold intellectual property (IP) rights. For example, difficulties arose with accuracy of the WHOIS resource,^{vii} contract compliance, and a need for defensive registration by trademark owners. Further, as I've discussed in previous testimony, the new generic top level domain (gTLD) program, and the resulting Trademark Clearing House (TMCH), have intensified these effects on rights holders.^{viii} It became clear that the utility of U.S. government stewardship of ICANN had peaked with the Affirmation of Commitments and that a new, far more operational, form of accountability framework within ICANN was necessary.

In 2014, NTIA took the significant step of requesting that ICANN convene global stakeholders to develop a plan for the IANA transition away from NTIA. NTIA required that this plan have “broad community backing” and:^x

- Support and enhance the multi-stakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectations of the global customers and partners of the IANA services; and
- Maintain the openness of the Internet.

Further, NTIA also affirmed that it would not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.^x Conjecture about the motives of NTIA to propose this transition when they did are not as relevant as the point the corporation had reached in its evolution; an inflection point for its growth.

The global internet community undertook an effort to develop improved frameworks for IANA stewardship and accountability through two respective “tracks.”^{xi} Work by the global community within both tracks, which resulted in ICANN Board-approved changes to its bylaws, will provide a level of transparency and accountability to ICANN which has never existed before. These enhanced accountability mechanisms are addressed in further detail below.



After resolving further questions related to the transfer (such as status of the IANA functions contract as U.S. property)^{xii} on August 16, 2016, NTIA confirmed that its oversight of IANA would expire on September 30, 2016, and that ICANN has the appropriate accountability mechanisms in place for the IANA transition to be completed.^{xiii} We commend NTIA’s decision to move forward with its commitment to finalize ICANN’s independence, and strongly believe that the ICANN community has succeeded in putting significant accountability mechanisms in place and is ready for this transition. The system is designed for continuous improvement from a truly multi-stakeholder community, ensuring people around the globe can benefit from an internet hardened against capture by governments or a singular entity. This is a historic moment reflecting 18 years of hard work from the international internet community to create a workable, reliable framework.

In my May 2015 testimony on this topic, I noted that Congress has an important role in ensuring that the new framework is sufficiently comprehensive, addresses stress tests, and is implemented prior to any transfer of the IANA functions to ICANN. After over ten years of personally working to “right the ship” and just days before the final step in the U.S. government’s long-standing commitment to privatize the DNS by completing the IANA stewardship transition, I can confidently say to this Committee that vastly improved accountability measures as well as measurable performance metrics have been put into place throughout ICANN in alignment with Congressional concerns.

II. The New ICANN Accountability Framework

As noted above, in anticipation of the IANA transition, ICANN and the global community undertook an intensive effort to develop improved frameworks for IANA stewardship and accountability through two respective “tracks,” one addressing IANA stewardship and the other ICANN accountability. With updates to ICANN’s Bylaws now finalized, today the community can – for the first time – know that it is guaranteed the ability to do such things as:

- Inspect ICANN’s internal documents and records;
- Veto the budget
- Challenge board actions using binding Independent Review Panels;
- Veto bylaw changes proposed by the ICANN board;
- Approve changes to fundamental bylaws
- Control the periodic reviews required by the Affirmation of Commitments; and
- Remove individual ICANN Board members (or even recall the entire ICANN Board).



In addition, today the strong constituencies within the ICANN structure provide crucial mechanisms for community input and oversight of the ICANN as a whole.

In my May 2015 testimony, I also noted that a threshold question that must be asked to ensure both transparency and accountability is whether, at the end of the day, the ICANN community that includes countless Americans has the ability to hold to account (i.e. discipline) those who have been placed in a position of power.^{xiv} While I could not say this was true absent the new accountability framework, I can now squarely answer “yes” to this question.

No community is more impacted by intellectual property infringement than the small business community, and I have long labored to ensure that ICANN honors its obligations to enforce on the contracts that provide these protections. Notably, through new language in its bylaws,^{xv} the new accountability measures in place today do not negatively impact ICANN’s duties or abilities to enforce contracts, either through the use of the binding Independent Review Process (IRP) arbitration process^{xvi} or utilizing the established consensus process to improve the ICANN compliance department’s interpretations and understanding of their obligations. Over time, needed changes to ICANN enforcement processes will undoubtedly be identified and appropriately addressed, consistent with the organization’s mission to continue to improve.

I also urge you to continue to view ICANN as a constant work-in-progress, as it is constantly examining itself for faults and ways to improve on them. For example, while ICANN’s “Work Stream 1” (measures that need to be in place for the transition to occur) has concluded, the organization is now turning to “Work Stream 2” (those measures that would be developed and implemented over time after the IANA functions transfer). I remain deeply engaged in these (and other) organizational improvement processes, and urge this Committee to seek detailed status updates on how this work progresses.



III. Congress Should Support the IANA Stewardship Transition

The stakeholder community at large has poured an incredible amount of effort and resources into making improvements to ICANN in order to realize the original vision of the U.S. Government to privatize the DNS. The engaged community, unanimously, is supportive of the IANA transition. However, some lingering concerns remain that have in part led to us being here today before this Committee as witnesses.

Based on the history of the DNS and its operation, as well as the ICANN accountability mechanisms I have been involved in putting into place, I am able to address some of these concerns below:

ICANN will not change its legal status and/or physically move its headquarters from California, and this Committee can be assured that ICANN will remain a California-based not-for-profit corporation. The Affirmation of Commitments obliges ICANN to remain a U.S.-headquartered not-for-profit corporation, and ICANN’s CEO has publicly affirmed the organization’s understanding of this pledge.^{xvii} Further, the requirement for ICANN to remain a California-based not-for-profit company is reflected in its Articles of Incorporation^{xviii} in the ICANN Bylaws.^{xix} The new accountability framework ensures the community the right to veto bylaw changes and to approve changes to the Articles of Incorporation.

The IANA transition will have no effect on the role of any government or governments in ICANN’s operations, and I urge this Committee to carefully review the mechanisms put into place to address the role of governments in ICANN. The completed transition does not increase the role of governments over ICANN (or the Internet). Governments – including the U.S. government – do and will continue to have an advisory role in the operations and policies of ICANN. The mechanism for this influence within ICANN is called the Governmental Advisory Committee (GAC), and serves a unique role – namely to advise on governmental concerns related to laws and international agreements based on *consensus*.



It's true that GAC advice, when delivered without objection, is given some deference, but there is no obligation to accept or implement that advice. Instead there is merely the requirement that the Board attempt to find a compromise with the GAC recommendation. One of the important provisions of the new accountability framework is that this special deference only comes into play when GAC advice is delivered without objection, effectively giving the United States a veto within the GAC that was not previously ensured.^{xx} If this consensus GAC advice, which must be accompanied by a clear rationale, is transmitted to the ICANN Board, the Board may reject this advice through a 60% majority vote; further, the Board at this point shall try to find "a mutually acceptable solution."^{xxi} An Independent Review Process is available to examine whether, after accepting GAC advice, the ICANN Board has stepped out of line with its Articles of Incorporation, Bylaws, or mission. Finally, should GAC consensus advice be accepted by the ICANN Board, the GAC is intentionally put in a position of less influence by ICANN Bylaws, which prevent the GAC (and only the GAC, not other constituencies) from taking proactive steps within the ICANN process to challenge the implementation of GAC advice.

Without question, authoritarian governments elsewhere in the world are seeking to use the Internet in an abusive way to control those under their authority – and they are in some cases effectively able to do this through the management of traffic where it is crossing into their country's borders. However, these governments cannot control the global Internet's core because it is governed by the multi-stakeholder community through ICANN. Further, ICANN's Bylaws explicitly state that ICANN must not hold any governmentally authorized regulatory authority, and ICANN is limited from restricting services that use the Internet's unique identifiers or the content that such services carry or provide outside of its specific established duties.^{xxii}

In summary, there are an exhaustive number of checks and balances (and limits) on the role of governments in ICANN, and this Committee can be assured that the completion of the IANA transition will give no increased control of ICANN (nor the Internet) to any government or governments.

This Committee should disregard speculative statements suggesting that ICANN is "exempt" from antitrust law and/or that the completion of the IANA transition raises antitrust law concerns with respect to Verisign's extension of the .com Registry Agreement with ICANN through 2024. First, this Committee can rest assured that ICANN is subject to U.S. antitrust laws, like any other U.S. corporation; in fact, compliance with U.S. laws intended to prevent anticompetitive behavior will be crucial to the successful functioning of ICANN to the benefit of every American that relies on the Internet in some way.



Second, I urge your careful review of a recent analysis from the Department of Justice’s (DOJ) Antitrust Division regarding the extension of the .com Registry Agreement which details the extensive and ongoing collaboration between the DOJ Antitrust Division and NTIA, the latter of which must approve such an extension under an established standard.^{xxiii}

This Committee should carefully consider the harmful consequences of a delay or derailment of the IANA transition. The U.S. government has made a commitment to all Americans, and the rest of the world, to facilitate the operation of the DNS through a multi-stakeholder approach rather than one hostage to any government. It has been central to efforts consistent with this goal for nearly 20 years. To change course would violate this commitment and throw the operation of the DNS into uncertainty, making it an easier target for those seeking to shift control of the DNS to the same governments we seek to prevent from controlling and abusing it. The Internet will be significantly more free when no government controls the IANA resources.

Based on the above, I offer the following recommendations to this Committee and all members of the U.S. Congress:

- Congress should ensure that the IANA transition proceeds as planned, without delay. A last-minute derailment of this long-labored transition would cause uncertainty and damage trust in the functioning of the Internet, enabling those who seek to shift the DNS to under the control of other governments or an international governmental organization.
- Congress should continue to consult with experts at NTIA as well as those engaged in ICANN’s processes to understand and monitor the status of the IANA transition and its impacts. I and a diverse community of engaged stakeholders stand ready to help educate and work with Congress to ensure an effective, fair, and open DNS.

IV. Conclusion

In a nearly two-decade marathon, we now find ourselves nearing the finish line and completing the privatization of the DNS. I urge this Committee to support the IANA transition proceeding smoothly and on time. Not only will this benefit the diversity of stakeholders who have worked to bring us to this point, but, more importantly, it will benefit the countless number of Americans who rely on an effective DNS every day in their personal and professional lives.

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



End Notes

- ⁱ Daniel Karrenberg, Internet Society Member Briefing #16: The Internet Domain Name System Explained for Non-Experts, available at [https://www.internetsociety.org/sites/default/files/The%20Internet%20Domain%20Name%20System%20Explained%20for%20Non-Experts%20\(ENGLISH\).pdf](https://www.internetsociety.org/sites/default/files/The%20Internet%20Domain%20Name%20System%20Explained%20for%20Non-Experts%20(ENGLISH).pdf) (last visited Sept. 12, 2016).
- ⁱⁱ The White House, “Memorandum for the Heads of Executive Departments and Agencies,” (July 1, 1997), available at <http://clinton4.nara.gov/WH/New/Commerce/directive.html>.
- ⁱⁱⁱ NTIA, “IANA functions,” available at <https://www.ntia.doc.gov/category/iana-functions> (last visited Sept. 12, 2016)
- ^{iv} NTIA, “Statement of Policy, Management of Internet Names and Addresses,” (DNS White Paper), 63 Fed. Reg. 31741 (1998), available at <http://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>.
- ^v See, e.g., “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
- ^{vi} See Testimony of Jonathan Zuck, President, ACT | The App Association, on Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet’s Operation before the U.S. House Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet (May 13, 2015), available at <https://judiciary.house.gov/wp-content/uploads/2016/02/Jonathan-Zuck-ICANN-Hearing-Statement-1.pdf> (2015 Zuck Testimony).
- ^{vii} ICANN’s WHOIS Lookup provides the ability to lookup any generic domains to find out the registered domain owner. See <https://whois.icann.org/en>.
- ^{viii} See 2015 Zuck Testimony at 4-6.
- IX Press Release, NTIA, NTIA Announces Intent to Transition Key Internet Domain Name Functions (March 14, 2014), <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.
- ^x Id.
- ^{xi} Testimony of Steve DelBianco, Executive Director, NetChoice, on Examining the Multistakeholder Plan for Transitioning the Internet Assigned Number Authority before the U.S. Senate Committee on Commerce, Science, and Transportation (May 24, 2016) at 4-6, available at https://www.commerce.senate.gov/public/_cache/files/a39deb50-84ee-4f13-83cd-9823883907a6/AC4DFC5ED691EC9D3B934501B3BE051A.delbianco-testimony.pdf.



^{xii} E.g., Letter from NTIA to Representatives Sensenbrenner and Duffy sent June 11, 2015 (“...[T]he termination of NTIA’s contract with ICANN would not result in the transfer of United States Government property because there is no evidence that (1) the Department has transferred Government property, including intellectual property owned by the Government, to ICANN; (2) ICANN possesses Government property, including intellectual property owned by the Government, created under the IANA functions contract; or (3) the termination of the contract would cause Government property, including intellectual property owned by the Government, to be transferred to ICANN.”).

^{xiii} See Letter from Lawrence. E. Strickling, Assistant Secretary for Communications and Information, U.S. Dept. of Commerce to Göran Marby, President and CEO, ICANN (Aug. 16, 2016), available at <https://www.ntia.doc.gov/files/ntia/publications/20160816marby.pdf>.

^{xiv} See 2015 Zuck Testimony at 7.

^{xv} See Bylaws for the Internet Corporation for Assigned Names and Numbering, A California Nonprofit Public-Benefit Corporation (adopted by ICANN Board on May 27, 2016), available at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf> (ICANN Bylaws).

^{xvi} See ICANN Bylaws at Sec. 4.3 (“Independent Review Process for Covered Actions”).

^{xvii} Roll call vote on H.R. 805 (Jun. 23, 2015), available at <http://clerk.house.gov/evs/2015/roll377.xml>

^{xviii} See Articles for Incorporation of the Internet Corporation for Assigned Names and Numbering (Rev. Nov. 21, 1998) at Sec. 3, available at <https://www.icann.org/resources/pages/governance/articles-en> (ICANN Articles of Incorporation).

^{xix} ICANN Bylaws at Article XVIII (“OFFICES. The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”).

^{xx} See ICANN Bylaws at Sec. 12.2.

^{xxi} Id.

^{xxii} ICANN Bylaws at Sec. 1.1.

^{xxiii} See Letter from Peter J. Kadzik, Assistant Attorney General, Department of Justice to Senators Cruz and Lee, and Representative Duffy sent Aug. 31, 2016.



1401 K Street NW Suite 501
Washington, DC 20005

 202.331.2130

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