Statement of

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Testimony before the

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Subcommittee on Courts and Competition Policy

Expansion of Top Level Domains and its Effects on Competition

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Chairman Johnson, Ranking Member Coble, and distinguished members of the Subcommittee: My name is Steve DelBianco, and I would like to thank you for holding this important hearing on whether ICANN, in its drive to expand top-level domains, is staying true to its mission and accountable to its stakeholders.

I serve as Executive Director of NetChoice, a coalition of trade associations and e-commerce leaders such as AOL, eBay, Expedia, IAC, VeriSign, and Yahoo, plus more than ten thousand small online businesses. At the state and federal level and in international venues, NetChoice advocates for the integrity and availability of e-commerce.

It's a NetChoice priority to improve consumer trust and confidence in the Internet, so we vigorously support efforts to fight abusive registrations, phishing fraud, and malware attacks. Our concerns go beyond the costs of defensive registrations and shutting-down cybersquatters. Phishing attacks claimed a 40% increase in victims last year, and malware attacks now average 7,500 per day[1]. If these threats continue unabated, trust and confidence in the Internet will fade.

While we are grateful for your attention to this issue, we regret that Congress has been drawn into this contentious debate. If ICANN were properly accountable to users and other stakeholders, we would have been able to address our concerns and resolve our differences. As it happened, however, we need Congress and the Commerce Department to focus ICANN on its core mission and hold it accountable to stakeholders.

Why has the U.S. Congress had to address ICANN's top-level domain expansion?

Over the last twelve months, many businesses and consumer advocates have asked the Commerce Department and Congress to encourage ICANN to address consumer harm in the expansion of top-level domains (TLDs). Prior to your hearing today, two Senators and several House members—including Committee members Coble and Smith—have written to the Commerce Department and ICANN about these concerns.
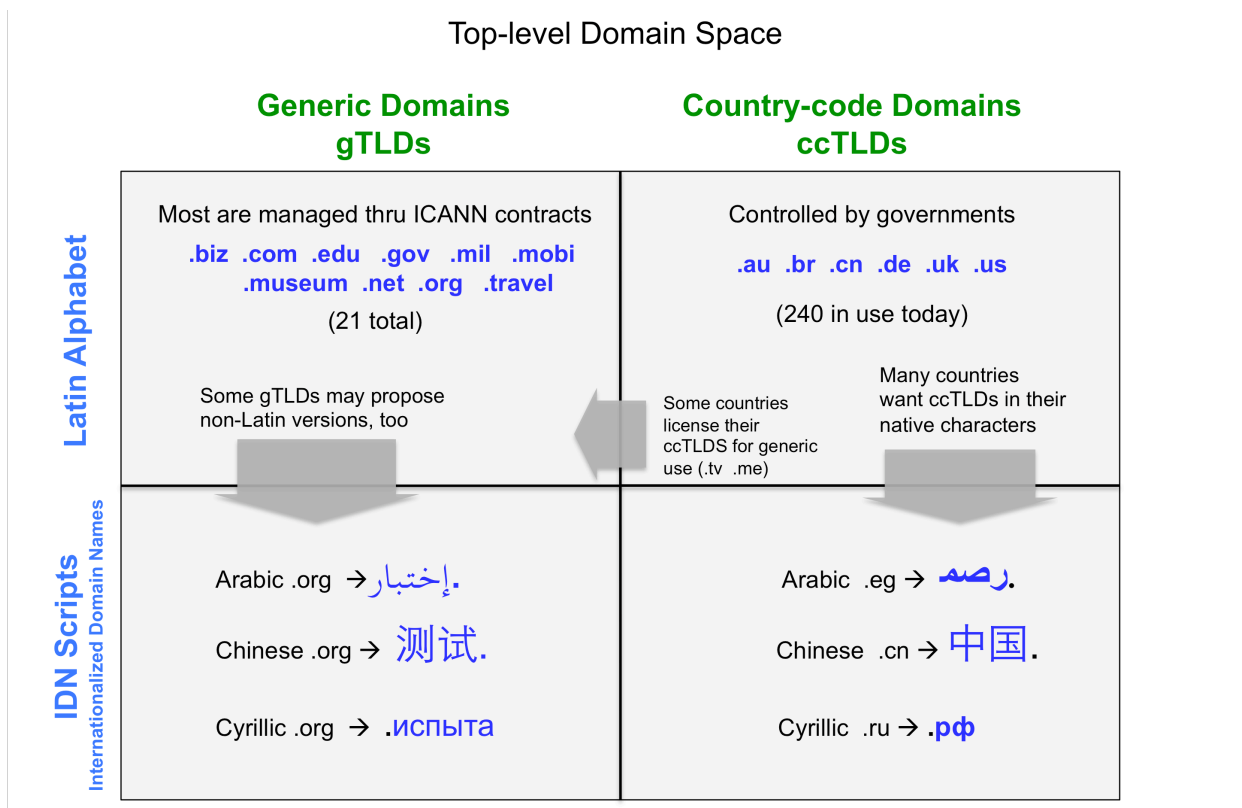
But why has it been necessary for Congress to remind ICANN of its core mission to maintain the security and stability of Internet addressing? To understand how it's come to this,

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[1] MarkMonitor Brandjacking Index, http://www.markmonitor.com/download/bji/BrandjackingIndex-Review2008.pdf

one has only to look at how ICANN's priorities for new top-level domains became sidetracked over the last two years.

Before 2008, ICANN reflected the broader community's priority for enabling domain names and email addresses in the native characters used by most of the world's population. While our Latin alphabet is the most widely used script on the planet, over 56% of the world's population reads and writes in scripts other than Latin[2].   That means most of the world cannot read or write website or email addresses in their native scripts. This situation is intolerable for the governments serving those people, and will lead to a 'splintering' of the Internet if ICANN fails to meet the need soon.

The chart below helps to visualize the top-level domain space at issue in this hearing.

Top-level Domain Space

	Generic Domains **gTLDs**	**Country-code Domains** **ccTLDs**
Latin Alphabet	Most are managed thru ICANN contracts **.biz .com .edu .gov .mil .mobi** **.museum .net .org .travel** (21 total) Some gTLDs may propose non-Latin versions, too	Controlled by governments **.au .br .cn .de .uk .us** (240 in use today) Some countries license their ccTLDS for generic use (.tv .me) Many countries want ccTLDs in their native characters
IDN Scripts Internationalized Domain Names	Arabic .org → **‏.إختبار** Chinese .org → **测试.** Cyrillic .org → **.испыта**	Arabic .eg → **‏.مصر** Chinese .cn → **中国.** Cyrillic .ru → **.рф**

The top half of this chart refers to 260+ Latin-script domains that make up the entire Domain Name System (DNS) today. The bottom half of the chart shows some examples of

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[2] John Paolillo, "Language Diversity on the Internet," pp. 43-89, in John Paolillo, Daniel Pimienta, Daniel Prado, et al., *Measuring Linguistic Diversity on the Internet,* UNESCO Publications for the World Summit on the Information Society 2005. See http://www.uis.unesco.org/template/pdf/cscl/MeasuringLinguisticDiversity_En.pdf

generic and country-code domains that would use non-Latin scripts once ICANN makes them available. For a decade, educational, civic, and consumer interests have been clamoring for these Internationalized Domain Names (IDNs) in order to bring information and communications to more of the world's potential Internet users. Businesses, too, are interested in reaching billions of potential new customers.

Apart from these opportunities, however, there is an urgent need for IDNs to avoid splintering of the single, global Internet. Today, Internet users in China are using their own DNS workarounds to enable all-Chinese addresses, even though they can't be used outside of China. The splintering of the Internet is a real threat and deserves ICANN's full attention.

While aware of the needs for IDNs, ICANN nonetheless decided to focus resources on expanding the number of domains in Latin scripts that are already served. We look forward to ICANN's explanation for this change in priority in today's hearing, but we expect to hear that competition is the reason the Internet needs more Latin domains. ICANN's web page for domain expansion states it this way: "*In a world with over 1.6 billion Internet users – and growing – diversity, choice and competition are key to the continued success and reach of the global network*[3]." Below we question ICANN's rationale and suggest that ICANN should focus on enabling the next billion Internet users before adding domains for users who are already online.

Will more Latin top-level domains create competition?

In 1997, President Clinton" directed the Secretary of Commerce to privatize the Domain Name System (DNS) in a way that increases competition and facilitates international participation in its management".[4] The result was the "White Paper", which established the basis to create ICANN and transition control of the DNS. The term "competition" appears 23 times in the *White Paper*, mainly referring to the "absence of competition in domain name registration". The Clinton Administration wanted competition among registrars, companies who sell domains to the public with a retail markup and other services. The *White Paper* also worried that competition among registries wouldn't constrain wholesale prices, because switching costs for established domain owners are relatively high.

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[3] ICANN Website, at http://www.icann.org/en/topics/new-gtld-program.htm

[4] The White Paper, at http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm

Thanks to ICANN's work over the last decade, there are now several hundred registrars competing to distribute domain names, driving retail markups down to just $5. ICANN also implemented registry contracts that limit wholesale prices for major domains. As a result, the annual cost of a .com name has fallen from $75 to under $12. Judging by competitors and prices in domain distribution, the competition mission assigned by the *White Paper* has been largely accomplished.

The *White Paper* also assigned ICANN the mission of creating more choices for those who want to register a domain name. With almost 200 million registered domains today, it's hard to see how choice is constrained in any meaningful way, especially when domain owners have practically unlimited choice about the content and applications they deploy.

Still, many registrants complain that their preferred domain name is already taken in the popular .com TLD, so ICANN is planning to offer more choices. It's true that .com holds the advantage of being the first and largest TLD, so uncertain users will often guess by appending .com when looking for a commercial domain name. In its Dec-2008 comments on ICANN's draft TLD guidebook, the U.S. Justice Department said this advantage of .com won't be diminished by new top-level domains[5]. But we believe the expansion of TLDs will drive users to use search instead of guessing at domain names. For example:

> *Members and staff of this committee may be familiar with Bullfeathers, a popular Capitol Hill restaurant. If you wanted to check their website about Bullfeathers' ability to host an event, you could take a guess with a domain name like www.bullfeathers.com.*
>
> *But you'd see right away that bullfeathers.com is definitely <u>not</u> the restaurant (it's a mobile communications installer on the Eastern Shore).*
>
> *Would you take another guess, say Bullfeathers.biz? After ICANN's TLD expansion, you might also guess at Bullfeathers.food, .diners, or .bars*
>
> *More likely, you'd just do a quick search on bullfeathers, and click on the link you're looking for (it's BullfeathersCapitolHill.com).*

ICANN's planned expansion of top-level domains would make it even less efficient to guess at domains. As the goliath in search, *Google* will be the big winner form an expansion of TLDs, along with the companies earning fees for defensive registrations. Likely losers in the planned TLD expansion would be website owners who would buy defensive registrations to reduce the risks and costs to fight cybersquatting and attempts to defraud their customers. These concerns have not yet been adequately addressed by ICANN, as explained in the next section.

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[5] NTIA and Department of Justice letters on Draft Applicant guidebook, Dec-2008, at
http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf

ICANN has not yet addressed the risks and costs of this major expansion in top level domains

In late 2008, ICANN solicited public comments on its draft guidebook for new domain applications. The US government raised concerns shared by many NetChoice members and ICANN stakeholders by stating, *"[I]t is unclear that the threshold question of whether the potential consumer benefits outweigh the potential costs has been adequately addressed and determined*."[6]

The Commerce Department's letter called on ICANN to complete a promised economic study, and listed several unresolved concerns, including:

- o Ensure that the introduction of a potentially large number of new top level domains will not jeopardize the security and stability of the DNS

- o Demonstrate that ICANN has sufficient capacity to enforce contract compliance with an unknown number of new contracts

- o Describe how ICANN will conduct legal reviews of applications and respect relevant national and international law, including property rights

For all these reasons, ICANN should slow-down its drive to expand Latin top-level domains and focus on enabling users who have no choices today – those who don't use our Latin alphabet.

ICANN should enable Internationalized domains <u>before</u> expanding Latin domains

As noted earlier, the need for non-Latin (IDN) domains has become critical in order to serve people using scripts like Chinese, Arabic, Japanese, etc. ICANN, however, decided to implement non-Latin domains as part of its broader expansion plan for Latin domains. When the larger expansion plan began to bog-down over objections and rights protection, it looked as if non-Latin domains would be delayed, too.

In reaction to governments' concerns about this delay, ICANN created a 'fast track' for non-Latin domains – *but only for country-code domains that are controlled by governments*. Global domains (such as .com, .org, .edu) are left on the slow track when it comes to serving the half of the world's population that doesn't use our alphabet. Websites seeking to reach non-Latin users must use a country-code domain, where governments can enforce restrictions on content and free expression.

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[6] NTIA letter on Draft Applicant guidebook, Dec-2008, at http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf

For example, an Arabic user seeking to enter google.com in all-Arabic could only choose from among Arabic versions of Google's domain that were allowed by governments who control Arabic country-code domains (google.sy in Syria; google.eg in Egypt; etc.) It would undoubtedly be more convenient and empowering for this Arabic user to have access to the real google.com domain address -- entirely in Arabic.

If the IDN fast track is reserved only for governments, the web's best content and applications would be much harder for non-Latin users to reach, undermining ICANN's accountability to registrants and the broader community of internet users.

ICANN is not adequately accountable to domain owners and Internet users

In its April-2009 letter to ICANN, the Coalition for Online Trademark Protection described how ICANN's business model is being transformed by the planned domain expansion:

> *In effect, ICANN has transformed itself from a cost-based revenue model to one where its revenue will grow with every domain registration and renewal. In this new model, ICANN has an inherent financial incentive to encourage new registrations. Moreover, ICANN continues to grow its revenue by generating demand for registrations whose only real purpose is to prevent cybersquatting and consumer fraud.[7]*

It may be too cynical to say that more revenue is behind ICANN's drive for new Latin TLDs. More likely, ICANN is just reacting to the vocal demands of entrepreneurs seeking to operate new domains, supported by registries and registrars who want to host and sell these new domains to the public.

These are the voices of legitimate stakeholders in the ICANN governance model, but their demands should be balanced against the concerns of consumers, businesses, governments, and others who question ICANN's readiness and priorities. Early in the process of developing policies for new domains, these concerns were out-voted by others on ICANN's policy council. Consequently, ICANN's first Draft Guidebook for new domain applicants lacked even minimum requirements to reduce abusive registrations and other activities that affect the legal rights of others. Even the second draft of ICANN's Guidebook gave applicants a passing grade for merely describing their intended mechanisms, even if they were likely to have little effect in preventing abusive registrations.

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[7] Coalition for Online Trademark Protection, 13-Apr-2009,
http://www.nam.org/~/media/PolicyIssueInformation/TaxTechnologyDomesticEconomicPolicy/NAMCoalitionICANN.ashx

For the upcoming third draft of the Guidebook, ICANN is finally responding to pressure from the US and other governments to require minimum rights protection measures. However, it's inherent in the ICANN consensus model that these minimum measures will be less than consumers and brands want, and more than aspiring registries are willing to offer. Unless it is held accountable for improving security and stability, ICANN's consensus approach will tend to settle for minimal mechanisms that satisfy no one.

In comments on ICANN's Guidebook drafts, NetChoice suggested raising the bar and fostering competition among applicants to minimize abusive registrations.[8] We recommended that ICANN design a process where applicants compete to propose ever more effective rights protection mechanisms. For instance, members of three stakeholder groups have discussed significant protections that current TLD operators might offer in their proposals to operate IDN versions of these TLDs. Under one proposal, a domain owner wouldn't have to defensively register their current domains in any IDN version of that TLD operated by the same registry. So the owner of NetChoice.org would be the only person allowed to register NetChoice in non-Latin versions of .org.

A proposal like this could improve rights protection and minimize user confusion in IDN versions of existing domains. Further measures could be proposed by applicants seeking to win a TLD contract, especially when competing with other applicants for the same or similar string. As part of its mission to promote competition, ICANN should encourage new domain applicants to compete on minimizing abusive registrations.

ICANN has not embraced raising minimum protections or fostering competition in this way, but hearings such as this could help to hold ICANN accountable to domain owners and consumers. Indeed, ICANN performed economic studies and began looking at rights protection measures only after Commerce and Justice Departments and Congress weighed-in. Undoubtedly, this leverage is due to the presence of the Joint Project Agreement (JPA) between the US and ICANN. The JPA adds weight to a hearing like this, but we'll lose that weight at the end of September when the JPA expires.

To conclude our testimony, we suggest that ICANN will need a new accountability mechanism once the JPA expires, one that will hold it accountable to the broader interests of all Internet users.

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[8] NetChoice comments on Draft Applicant Guidebook, http://forum.icann.org/lists/gtld-evaluation/msg00017.html

ICANN needs a new accountability mechanism for the post-transition world

The JPA was about *transition* from USG to an international organization led by, and accountable to, the private sector[9]. In its preamble, the JPA states its purpose as, "*joint development of the mechanisms, methods, and procedures necessary to effect the transition of the Internet domain name and addressing system (DNS) to the private sector*."

That transition has indeed occurred over the last decade: ICANN is now managing the DNS. But ICANN is not quite there when it comes to being accountable for its mission. We still need a mechanism for accountability, especially where the private sector is concerned.

In our June-2009 comments to the Commerce Department regarding JPA expiration, NetChoice suggested extending the JPA to protect ICANN from capture by the United Nations and other intergovernmental organizations, and to give ICANN time to implement better accountability mechanisms[10]. We realize that extending a transition agreement would only defer the difficult task of developing accountability, so it would be far better to adopt a permanent mechanism before the JPA is set to expire.

Forcing concerned stakeholders to seek Congressional intervention is neither a practical nor preferred method of holding ICANN accountable. Nor is it practical to pursue multi-year legal proceedings costing millions of dollars, such as the challenge of ICANN's decision on the xxx domain, the subject of arbitration meetings in Washington this week.

Instead, ICANN and its stakeholders need a reliable and workable accountability mechanism for the Post-transition world. It's football season, so here's a football analogy: the coaches' challenge and official review process has helped to correct bad calls *when they happen*, not after the game, when it's too late to make a difference. Nor do Internet stakeholders want to wait until after the game to challenge a policy that's already been issued. We need a mechanism like a football coaches' challenge, to get an official review of policy development as it happens. We might never have needed this hearing if stakeholders could have thrown-down a 'coaches challenge' at the point where ICANN decided its expansion plans would no longer give priority to non-Latin script communities.

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[9] Joint Project Agreement Between the U.S. Commerce Department and ICANN, 29-Dec-2006, at
http://www.icann.org/en/general/JPA-29sep06.pdf

[10] NetChoice comments in response to NTIA NOI, Jun-2009, at
http://www.ntia.doc.gov/comments/2009/dnstransition/063.pdf

To be sure, there are controversial aspects to creating a new accountability mechanism. For instance, how to call for a review, and how to select referees that perform the review? Are the review rulings binding on ICANN or advisory?   And while some governments and the United Nations want the U.S. to relinquish its role, others appreciate the light-touch that Commerce Department oversight has provided for ICANN.

We believe that a continued and well-defined role for the Commerce Department will help to hold ICANN accountable to the private sector and public interests declared in the original *White Paper*. The U.S. Commerce Department is unrivaled in its support for worldwide businesses who spent a trillion dollars to bring the Internet to its first billion users. Moreover, U.S. leadership in promoting free expression and human rights is essential to push censorship to the edge of the net – not in core functions like the DNS.

Other governments and institutions should certainly join the Commerce Department to operate a new accountability mechanism. And all governments will continue to enforce their laws within the online medium. But the *White Paper's* founding principle for ICANN must be preserved: ICANN must be led by, and accountable to the private sector interests who will bring connectivity, content, and commerce to the next billion Internet users.