Seven Key Topics to Track During ICANN 53 in Buenos Aires

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The 53rd international meeting of the **Internet Corporation for Assigned Names and Numbers (ICANN)** commences in earnest on Monday, June 22, 2015, in Buenos Aires, **Argentina**, with some sessions beginning as early as Saturday, June 20. As always, several high-profile topics have emerged amidst community discussions leading up to this meeting, all of which are relevant to established registry operators, new **generic top-level domain (gTLD)** applicants and brand owners alike.

1. **IANA Transition and ICANN Accountability Issues**

   Unsurprisingly, the planned Internet Assigned Numbers Authority (IANA) stewardship transition from oversight by the US National Telecommunications and Information Administration (NTIA) to the global stakeholder community, and corresponding ICANN accountability enhancements, continue to dominate ICANN community discussions, and we expect no less in Buenos Aires. Since the most recent ICANN meeting in Singapore in February 2015, the Cross-Community Working Group on the IANA Stewardship Transition (CWG-IANA) has published a second draft transition proposal for public comment, addressing a number of the serious concerns raised in response to the first draft proposal. Public comments on the second proposal were received through May 28, 2015, and the CWG-IANA is currently reviewing the comments in preparation for further discussion of the revised proposal in Buenos Aires. In general, comments from brand owners and other stakeholders were supportive of the revised proposal, although a number of areas have been identified for further improvement, particularly areas heavily reliant on developments from the parallel and interrelated Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability).

   Fortunately, the CCWG-Accountability has also published its initial draft proposal, presenting tentative recommendations and alternatives for enhancing ICANN accountability, although the CCWG highlighted that the draft does not necessarily reflect the consensus views of its members. Specific proposals, vital to preventing and remedying discriminatory, disparate or otherwise unfair conduct by ICANN, include "fundamental Bylaws" which cannot be changed without community approval, binding independent review panels, expanded and transparent requests for reconsideration, and stress tests designed to empower the community to *inter alia* remove individual ICANN Board members or reject its decisions. Public comments on the draft proposal were received through June 3, 2015, and will be considered by the CCWG-

Accountability leading up to and during the Buenos Aires meeting. Now that both working groups have released proposals, we expect substantial discussion to take place in Buenos Aires as to how the IANA transition will proceed.

The Buenos Aires meeting will therefore be another key opportunity to advance stakeholder views on the IANA transition proposal and the CCWG-Accountability proposal. For any party ever engaged in one of ICANN's current accountability mechanisms, it is evident that vast improvements are sorely needed to make each one more than a mere exercise in futility.

2. **Use of Two-Letter, Country and Territory, and Other Geographic Names at the Second and Top Level**

Historically, two-letter and country and territory names have not been available as second level domains in new gTLDs due to concern from governments that they would be confused with official governmental resources. Although ICANN formalized a procedure for the release of two-letter names at the second level after the 2014 Los Angeles meeting, additional pressure from several members of the Governmental Advisory Committee (GAC) led to a number of modifications to the process approved by the ICANN Board in Singapore, namely an additional 30 days of public comment and enhanced notification to governments as to each release request. In addition, ICANN, working closely with the GAC, has been developing a similar process for requests to release country and territory names at the second level, including the development of a public database to inform whether individual GAC members intend to agree to all requests, review them case by case, or not agree to any. Since the Singapore meeting, representatives of .BRAND applicants and other supporters have petitioned ICANN to permit .BRAND TLD operators free release of two-letter names and country and territory names, in view of the closed registry model and very low likelihood of consumer confusion stemming from the use of these names in .BRAND TLDs. ICANN has yet to respond to this request, and we expect proponents to push ICANN to respond in Buenos Aires. We also understand that the GAC is on pace to provide an update regarding the country/territory release process, which continues to receive a flurry of attention on their private email list.

In addition, we expect members of the GAC sub-working group on geographic names to provide an update to the community on the status of the "Argentina proposal," an overly broad proposal that simply refuses to die despite the lack of any basis in law and continued united community opposition. Our hope is that the community will continue to pressure that sub-working group to abandon the proposal, in light of fundamental concerns raised in response to the original draft proposal. We also expect an update from the Cross-Community Working Group on the Use of Country and Territory Names as TLDs (CWG-CTN), whose work overlaps with that of the GAC sub-working group. The CWG-CTN continues to refine an "Options Paper" that will underlie its efforts to develop a framework for the treatment of country and territory names, including two- and three-letter codes, at the top level. We expect some preliminary discussion surrounding these overlapping work streams that could potentially modify treatment of geographic names in future rounds of new gTLDs.

3. **The .SUCKS gTLD Launch**

There have been a number of significant developments concerning the .SUCKS new gTLD since the Singapore meeting, precipitated by a March 27, 2015, letter from the Intellectual Property Constituency (IPC) renewing long-standing complaints about the registry's pricing

practices. In response, ICANN punted the matter to US and Canadian consumer protection authorities, although it declared that it would also undertake a compliance review of .SUCKS. The US Federal Trade Commission (FTC) provided a reply to the ICANN letter indicating that it would monitor registry practices in the space, but declining to reveal any pending investigation or concrete action against the .SUCKS registry. Thus, no direct action has yet been taken against .SUCKS, which extended its Sunrise period rather coincidentally after publication of the FTC letter until June 19, 2015, which dovetails with the start of the Buenos Aires meeting. We expect brand owners to press ICANN on registry agreement breach theories in Argentina, while a response from the Canadian Office of Consumer Affairs remains outstanding.

4. **Planning for Subsequent New gTLD Rounds**

The Discussion Group on Future New gTLD Application Rounds (DG) is currently in the process of drafting a charter for a new Policy Development Process (PDP) to carry forward the DG's recommendations for possible improvements to the new gTLD program. The DG will likely provide the draft charter to the Generic Names Supporting Organization (GNSO) Council in advance of the Buenos Aires meeting, and propose a motion for the Council's consideration in Buenos Aires to approve the charter and launch the proposed PDP. There have been some murmurs among certain stakeholders that the DG work product is not fully representative of community views, which may bubble up in Buenos Aires; however, the PDP will be open to all stakeholders and is the forum where actual recommendations for policy changes will be determined. We expect the substantive issues considered by the DG, and which will likely feed into a PDP, to be the subject of some discussion during the Buenos Aires meeting, although, again, the PDP itself will be the key forum for injecting advocacy positions with respect to any reform to new gTLD policies for future application rounds.

Importantly, brand owners and .BRAND TLDs will want to ensure that new delegations of gTLDs, as well as potential re-delegations, will be accompanied by both an application process, in order to vet prospective registries, and an objection process, in order to assert legal rights to a particular string. Improvements in both processes will be necessary based on gaps encountered in the 2012 new gTLD application and objection round.

5. **Registry Agreement Negotiations**

As registry agreement (RA) negotiations continue to unfold, ICANN remains conflicted by its unambiguous Applicant Guidebook representation to negotiate amendments by exception, versus its position of leverage and its strong interest in maintaining a uniform agreement for all TLDs. Accordingly, ICANN continues to consider exceptional amendments for uniquely situated entities, largely accommodating national law, as well as outside-the-box solutions, including extrinsic written assurances, and complementary written procedures clarifying ambiguity in the RA. Where these novel solutions are unavailing, ICANN also continues to defer to community policy development, and built-in recurring RA negotiations with the Registry Stakeholder Group (RySG). Buenos Aires will undoubtedly present yet another venue for continued negotiations and discussions with the ICANN legal team.

A dangerous line persists between unenforceability based on ICANN's absolute refusal to amend contract language on a "take it or leave it" basis, versus ICANN's ability to assuage applicant concerns and provide accommodations outside of the four corners of the agreement. New gTLD applicants, especially .BRAND TLDs, are well advised to stick to their

guns—particularly where agreement provisions might stand contrary to applicable law—and see the negotiation process to the very end, rather than simply capitulate. Unfortunately, applicants who have already executed the base agreement without negotiations may have missed out on opportunities to gather valuable evidence in the (albeit remote) event that disputes arise concerning the RA down the road.

6. **Privacy and Proxy Services Accreditation Issues**

The Privacy & Proxy Services Accreditation Issues (PPSAI) Working Group published its initial report and recommendations for public comment on May 5, 2015, and is soliciting feedback through July 7, 2015, including during community sessions in Buenos Aires. Although the work of the group has received limited community attention to date, we expect more robust community discussions in Buenos Aires in response to the initial report, as the subject of privacy and proxy services, and access thereto, are key issues for nearly all ICANN stakeholders, including brand owners, registry operators, registrars, consumer protection advocates, privacy and free expression advocates, and, of course, service providers themselves. Indeed, the initial report addresses an accreditation scheme for privacy and proxy services providers, as well as rules for relaying complaints to customers, and revealing underlying customer contact information based on *bona fide* complaints. The initial report may also read on whether corporate registrars and law firms, in registering domain names for their clients, must be accredited as privacy service providers. While written public comments will be essential in advancing stakeholder positions on privacy and proxy service accreditation recommendations, it will also be important to gauge community reactions and leverage the community sessions in Buenos Aires.

7. **ICANN Contractual Compliance Issues**

Although ICANN contractual compliance has consistently been a key issue, particularly for the intellectual property community, the Buenos Aires meeting presents the first in-person opportunity to reconvene with the compliance department since commitments were made in Singapore to facilitate community discussions surrounding the compliance process and interpretations of key contract provisions in the RA and the Registrar Accreditation Agreement (RAA). Provisions that have been highlighted during these discussions include Section 3.18 of the 2013 RAA, which requires registrars to investigate and respond appropriately to complaints of intellectual property infringement and other abuses involving a domain name the registrar manages. Intellectual property owners and registrars have sought clarity from ICANN regarding the obligations to investigate and respond. Indeed, registry operators equally demanded better clarity and predictability from ICANN in interpreting RA language, preferably before any compliance action as opposed to afterwards. We expect an update on these facilitated discussions, and further illumination as to the compliance department's treatment of these and other similar obligations in the RAA and RA.