

**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.

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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](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.