

The ICANN GNSO “Business Constituency”



May 8, 2015

The Honorable Edith Ramirez
Chairwoman
United States Federal Trade Commission
600 Pennsylvania Avenue
Washington, DC 20850

The Honorable John Knubley
Deputy Minister
Canada's Office of Consumer Affairs (OCA)
C.D. Howe Building
235 Queen Street
Ottawa, Ontario K1A 0H5
Canada

Dear Chairwoman Ramirez and Deputy Minister Knubley:

We are writing to you on behalf of ICANN's Business Constituency (BC), regarding the recent letter you received from ICANN relating to widely reported, troubling marketing practices of Vox Populi Registry, a Canadian company to whom ICANN awarded an exclusive contract to operate the new generic top level domain (gTLD) known as .sucks.

Given that ICANN has undertaken the extraordinary step of seeking consumer protection agency review of Vox Populi's marketing and sales practices, we are writing to echo those concerns and to urge the FTC and OCA to expeditiously determine whether these practices constitute unfair trade practices. However, the BC wants to convey that it remains committed to ICANN and the private sector led, multistakeholder model for coordination of the domain name system and our members will continue to actively participate in ICANN to advocate for the interests of businesses and consumers.

It is important to note that although we have concerns about the marketing practices of .sucks, the Business Constituency does not wish to limit free speech or prevent criticism of any business. We do not believe that exploitative and unfair business practices are conducive either to promoting end-user confidence in the Internet or to fair competition in the domain name space. On the contrary, the pricing structure adopted by Vox Populi for .sucks domain names is predicated purely on expecting the businesses and brands that drive global growth to pay extortionate fees for no consumer or market benefit.

By way of background, the Business Constituency has been a commercial stakeholder and part of ICANN since its inception. The BC represents large and small businesses and business

associations from around the globe. Our mission is consistent with the consumer protection goals of the FTC and the OCA, and is to ensure that ICANN's policy positions promote consumer confidence in the Internet as a safe, secure, and reliable place to conduct business.

The concerns articulated about the .sucks gTLD and Vox Populi's practices are not new. In March of 2014, Senator Rockefeller wrote a letter to ICANN urging them to reject any application for .sucks, because he believed any ostensible benefits from the new gTLD would be outweighed by unfairly defaming individuals, nonprofits, and businesses¹. Sen. Rockefeller worried that .sucks would be used "primarily as an opportunity to generate income through 'defensive registrations.'"

At the time, Vox Populi had begun accepting pre-registration fees of \$2500 with threats to raise prices for trademark owners up to \$25,000 per domain name. Despite knowing of these concerns, ICANN nevertheless awarded the contract for .sucks to Vox Populi. Unfortunately, these known concerns have now become reality and Vox Populi's sales and marketing practices have garnered widespread media coverage.

Vox Populi's exploitive pricing and unfair marketing practices have been well outlined in a letter that the Intellectual Property Constituency (IPC) sent to ICANN and referenced in ICANN's letter to you². The BC shares the IPC's concerns about those practices and their deleterious effects on businesses and consumers. As part of its marketing strategy, Vox Populi has chosen specifically to target businesses that have worked hard to build consumer recognition and trust with exorbitant "sunrise" registration fees to register a domain name in .sucks. For businesses who own trademarks, each domain name registered in .sucks will cost \$2499 *and up*. These rates are over 250 times higher than Vox Populi plans to charge ordinary consumers after the .sucks gTLD becomes available to the general public. Vox Populi's tactics exploit businesses that neither want nor need these domain name registrations but feel unfairly pressured to register purely for defensive purposes.

Moreover, the defensive motives that pressure businesses to register in .sucks go beyond the typical defensive motive – preventing an unauthorized party from displaying a website that could deceive consumers into believing they had reached an authentic source for information, goods, or services. With .sucks, a legitimate business has an additional motive – to defend its reputation from critics or competitors controlling their brand domain in .sucks and using it to unfairly criticize their products and services. Together, these motives will drive many businesses to purchase defensive registrations. .Sucks not only harms business but more importantly consumers, as it can create confusion by displaying a misleading website that provides inaccurate information.

Vox Populi's unscrupulous sales tactics run contrary to ICANN's established consensus-based policies and practices. As explained in the IPC letter, ICANN, and the broad community who participate in its multi-stakeholder process, created a special set of "Rights Protection Mechanisms" (RPMs), which were consensus-based policies designed to protect businesses,

¹ Letter to ICANN from Sen. Rockefeller, 12-Mar-2014, at <https://www.icann.org/en/system/files/correspondence/rockefeller-to-crocker-12mar14-en.pdf>

² ICANN letter from BC, IPC, and Brand Registry Group, 14-Apr-2015, at <https://www.icann.org/en/system/files/correspondence/sutton-cooper-shatan-to-crocker-14apr15-en.pdf>

individuals, and consumers from cybersquatting, fraud and abuse likely to occur after the rollout of thousands of new gTLDs. For example, ICANN's "sunrise program" was designed to permit trademark owners who have trademarks that are validated by a new Trademark Clearinghouse (TMCH) to register domain names corresponding to their trademarks early, before such marks became available to the general public. Sunrise registrations were created to permit trademark owners to register their validated marks efficiently, across many new gTLDs, and with the assurances that the prices registries charged would be on a cost recovery basis³.

In stark contrast, Vox Populi's unfair and deceptive sales and marketing plans are to take trademarks registered in the TMCH and sell corresponding domain names not only during the sunrise period, but also after general availability period, at "\$2499 and up" under a category they deem "Premium Sunrise" pricing. The exorbitant charges exploit and penalize businesses that chose to avail themselves of ICANN's protection mechanisms by registering their marks in the TMCH.

It is not clear how Vox Populi selected the names for inclusion on their "Premium Sunrise" list, but should it transpire that Vox Populi populated the list using data from the TMCH, this could be in breach of its registry agreement with ICANN prohibiting such activity⁴. Vox Populi's demand that businesses pay \$2499 and up for names that it unilaterally decided to be "Premium Sunrise", apparently well-known trademarks, cannot be seen as anything other than blatantly predatory when compared to the \$9.95 per year it intends to charge ordinary consumers for domain names in .sucks (although the \$9.95 price is tied to having the consumer agree to be "subsidized" and hosted by an unknown entity known as "Everything.Sucks" along with unknown terms and conditions).

Under Canada's Unfair Practices law, examples of false, misleading or deceptive representations, including unconscionable representations, cover a number of situations, such as those in which:

- (1) the price grossly exceeds the price at which similar good or services are readily available to like consumers;
- (2) the consumer is unable to receive a substantial benefit from the subject-matter of the representation;
- (3) the consumer transaction is excessively one-sided in favour of someone other than the consumer;
- (4) the terms of the consumer transaction are so adverse to the consumer as to be inequitable; and
- (5) the consumer is being subjected to undue pressure to enter into a consumer transaction.⁵

³ Section 7 of ICANN new gTLD Applicant Guidebook, 4-Jun-2012, at <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

⁴ See Trademark Clearinghouse Terms of Service Agreement for Registries and Registrars, Sections 7.2-7.4 (2015)

⁵ 2002, c. 30, Sched. A. <http://www.ontario.ca/laws/statute/02c30>

Similarly, the Federal Trade Commission's authority under Section 5 to prohibit "unfair" trade practices includes those practices that cause or are likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. Sec. 45(n). Section 5(a) specifically includes acts or practices involving foreign commerce that cause or are likely to cause reasonably foreseeable injury within the United States or involve material conduct occurring within the United States. See also FTC Policy Statement on Unfairness.⁶

In this instance, Vox Populi is targeting U.S., Canadian and other global businesses with its predatory pricing and unfair marketing practices. Vox Populi was awarded an exclusive agreement by ICANN to operate a registry, along with the fiduciary duties to the public that come along with running a registry. Unfortunately, this also means that businesses who choose not to pay Vox Populi's extortive prices for domain names that correspond to their key brands in .sucks have no way to reasonably avoid monetary harm and any corresponding harm to the goodwill associated with their brands.

The FTC has noted in the past that most cases of substantial injury to consumers involve monetary harm, as in cases where sellers coerce consumers into purchasing *unwanted goods or services*. Overt coercion is conduct that contradicts established public policy (see discussion of ICANN Rights Protection Mechanisms, consensus policies and registry contractual provisions above). We note that the FTC in the past has worked hand-in-hand with Canadian authorities to protect businesses targeted by online schemes, including the recent scam out of Canada targeting small businesses by selling them unwanted online yellow pages ads.⁷ See also enforcement action taken by the FTC and Canadian authorities against online marketers selling bogus free trial offers⁸.

Although there may be arguable benefits to the public from specific, non-infringing uses of .sucks domain names, and the BC does not take issue with such legitimate uses, these do not outweigh the recurring substantial harms to business consumers caused by Vox Populi's current deceptive marketing plans. We also note that there are many new ICANN accredited registries whose new gTLDs benefit consumers and whose policies and practices in no way resemble those of Vox Populi.

The BC believes that ICANN will benefit from any guidance you can offer regarding Vox Populi's specific tactics, but in the longer term, we believe it would be better for ICANN, under its unique self-governance model, to self-enforce to protect global stakeholders and the larger public interest from future harms. As such, regardless of whether the FTC and OCA choose to take direct action against Vox Populi, we are hopeful that your agencies can provide ICANN with specific guidance about what activities constitute deceptive trade practices in the sale and

⁶ FTC Guidelines on Unfairness, <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>

⁷ See <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-halts-online-yellow-pages-scammers>.

⁸ See <https://www.ftc.gov/news-events/press-releases/2012/02/ftc-halts-deceptive-practices-marketer-who-collected-359-million>.

marketing of new gTLDs. While we believe ICANN already has ample authority to stop rogue practices through enforcement of its contractual agreements with registries, its Compliance Department, and under its broad duty to protect the public interest and the security and stability of the Internet, the current situation proves the urgent need for your intervention to protect consumer and business interests alike.

Sincerely,

A handwritten signature in black ink, appearing to read "Elisa Cooper". The signature is fluid and cursive, with a prominent loop at the end.

Elisa Cooper
Chair, ICANN Business Constituency