

VIA EMAIL

May 11, 2015

John O. Jeffrey
General Counsel & Secretary
ICANN
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R. David Hosp
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Re: Vox Populi Registry Agreement

Dear Mr. Jeffrey,

This firm represents ICANN's contractual partner, Vox Populi Registry ("Vox Populi"). I write regarding your letter to The Honorable Edith Ramirez, the Chairwoman of the Federal Trade Commission ("FTC"), and The Honorable John Knubley, the Deputy Minister of Canada's Office of Consumer Affairs ("OCA"), dated April 9, 2015, which forwarded a complaint letter from the ICANN Intellectual Property Constituency ("ICANN IPC"), and repeated and adopted the ICANN IPC's baseless allegations that Vox Populi has engaged in "illicit" activities, and that Vox Populi's practices are "predatory, exploitive and coercive." Your letter went even further, asking the FTC to investigate whether Vox Populi has engaged in any "illegal" activities. More recently, ICANN's Business Constituency ("ICANN BC") sent letters to Ms. Ramirez and Mr. Knubley, as well as to Akram Atallah, President of ICANN's Global Domains Division, which further republished and expanded upon these allegations.

None of the letters in question identifies any manner in which any law might actually have been broken; instead they merely suggest (without explanation or logic) that Vox Populi's pricing may lead to "cybersquatting" that could damage trademark owners. At the same time, though, the ICANN IPC's letter expressly recognizes that registrations on Vox Populi's .SUCKS registry are subject to ICANN's various trademark dispute resolution processes, which protect trademark owners from cybersquatting. And although the ICANN BC letter to the FTC and the OCA asserts that ICANN "does not wish to limit free speech or prevent criticism of any business," the only coherent expression of any potential concern is that businesses may feel compelled to register their trademarks "to defend [their] reputation from critics or competitors controlling their brand domain in .sucks and using it unfairly to criticize their products or services." To the extent such competitive use or criticism is unfair, trademark owners have a full complement of remedies that they can seek both through ICANN's dispute procedures and the laws of various different nations. As a result, it would seem that ICANN is not actually concerned about cybersquatting or any other illegal activity. Rather, ICANN appears concerned that registrations on the .SUCKS registry will be used to aggregate uncomplimentary commentary about companies and products—the very purpose for the registry that Vox Populi identified in the application it submitted to ICANN, and that ICANN approved.

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In sending these public letters, and making the false allegations contained therein, ICANN has disseminated defamatory statements about Vox Populi and its business practices aimed at depriving Vox Populi of the benefits of its contract with ICANN. These actions further violate the duty of good faith and fair dealing that is implied in every contract. They also contravene ICANN's own policies and statements of purpose. Finally, in suggesting illegality without any basis whatsoever, your actions (and those of the ICANN IPC and ICANN BC) have given rise to defamation claims against ICANN. Vox Populi hereby demands that ICANN, including any and all of its subdivisions, cease any and all such activity immediately.

As you know, on December 22, 2014, ICANN and Vox Populi entered into a contract under which ICANN voluntarily granted Vox Populi the right to operate the registry for ICANN's .SUCKS top level domain ("TLD") in exchange for financial compensation. The benefits of having a .SUCKS TLD have been recognized by consumer advocates for more than a decade. As early as 2000, well known consumer rights champions such as Ralph Nader and James Love petitioned ICANN to create a .SUCKS TLD, arguing that "[t]his TLD will be used to facilitate criticism of a firm or organization, such as aol.sucks, wipo.sucks, or even greenpeace.sucks. ... The domain would also be available for other uses, such as work.sucks, life.sucks, or television.sucks." The concept of a TLD that facilitates and aggregates legitimate complaints about companies and organizations is entirely consistent with the policies and stated goals of ICANN and the Internet community. As Mr. Nader noted fifteen years ago, it has always been understood that "the .sucks TLD will be offensive to some people," but it has nonetheless been recognized that the creation of the .SUCKS TLD will be beneficial because it will promote "free speech rights of individuals and small organizations."

And, of course, ICANN was fully aware of the goals and purpose of the .SUCKS registry when it entered into its contractual relationship with Vox Populi. Indeed, Vox Populi stated the purpose of the .SUCKS registry expressly in its registry application:

The term "sucks" resonates around the globe, its intention is clear and understood. But it is now more than an epithet; it is a call to action. Whether registered by an activist or an executive, this new landscape will be devoted to encouraging an accelerated and legitimate dialog that can lead to improved customer satisfaction and market share.

* * *

There are few, if any, places for raw consumer commentary and corporate interests to cohere. The .SUCKS name space will enable the benefits of a dialogue without dampening its usual initial vehemence. With its specific focus, it will make it even easier for consumers to find, suggest, cajole, complain and engage on specific products, services and companies.

Vox Populi recognized the tensions that a registry specifically targeted to channeling consumer complaints might create. As a consequence, it was careful to include in its application provisions to address any concerns about abuse by registrants. As required by ICANN's application procedures, Vox Populi agreed to comply with ICANN's Uniform Dispute

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Resolution Procedures (“UDRP”), Uniform Rapid Suspension System (“URS”), trademark post-delegation dispute resolution procedure (“Trademark PDDRP”), and Sunrise Dispute Resolution System, each of which has been designed and implemented by ICANN to address those circumstances where a trademark owner believes that a registrant or a registration has infringed its rights or used a domain improperly. As a result, trademark owners are protected from abuse on the .SUCKS registry to the exact same degree that they are on any other registry.

Beyond that, Vox Populi voluntarily adopted policies to immediately address any registrant that uses a registration to engage in bullying. It implemented policies banning pornography on the .SUCKS registry, and it specifically adopted a “no parking policy” to prevent registrants from registering domains without making active use of the site. In all respects, Vox Populi has been scrupulous in implementing policies that are designed to advance the very goals that have been recognized as beneficial for the Internet community for more than a decade.

ICANN reviewed Vox Populi’s application and approved it. ICANN also reviewed Vox Populi’s launch plan and sunrise policies, approved them as well, and provided a launch schedule on which Vox Populi has relied.

In addition, ICANN’s Governmental Advisory Committee (GAC), which includes as a member a senior policy advisor in the US Department of Commerce—the governmental agency that has overseen ICANN since its inception—specifically reviewed and commented on Vox Populi’s registry application. The GAC’s only comment was that ICANN should require the other applicants for the .SUCKS registry to include the non-bullying clause that Vox Populi already had in its application. In essence, the GAC recognized that Vox Populi’s application went above and beyond what was appropriate and responsible.

Based on the extensive review of Vox Populi’s application, ICANN entered into a contract with the company to manage the .SUCKS registry. In entering into this agreement, Vox Populi understood the value of the .SUCKS registry—both the value to the Internet community as an outlet for open discussion, and the value to Vox Populi as a business. Multiple parties submitted applications to obtain the .SUCKS registry, an auction was conducted among those qualified applicants, and Vox Populi’s successful bid was based on its appraisal of that value and the assumption that ICANN would not interfere in its ability to manage the registry in accordance with its contractual obligations. The registry agreement itself contains specific financial obligations that Vox Populi is required to meet. And, as with all new TLD registries, ICANN made a specific, considered decision not to regulate the price at which domain names would be sold. In a recent response letter to the President of the ICANN IPC, Akram Atallah, the President of ICANN’s Global Domains Division, noted that the imposition of price restrictions on new TLDs like the .SUCKS registry would be detrimental to the Internet.

As you will recall, there was extensive discussion of whether price caps or controls should be included in new gTLD registry agreements when the new gTLD program was

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formulated. In furtherance of such discussions, ICANN engaged an expert economic consultant to study the issue. The expert concluded that price caps or ceilings were not necessary or desirable, that the imposition of price caps might inhibit the development and marketplace acceptance of new gTLDs, and that trademark holders' rights could be protected through alternate rights protection mechanisms, such as the Uniform Rapid Suspension System (URS), the Uniform Domain Name Dispute Resolution Policy (UDRP), or trademark post-delegation dispute resolution procedure (Trademark PDDRP) you reference in your letter. Both before and after the study was released, this issue was thoroughly discussed and debated by members of the global multistakeholder community, and ultimately the determination was made not to impose price caps or price controls in the new gTLD registry agreements.

Consistent with both its contractual rights, and with the policy conclusions outlined in the study conducted by ICANN's own economic consultant, Vox Populi has priced the domains on the .SUCKS registry at levels that it believes are consistent with market value. Specifically, during the sunrise period, Vox Populi charges registrars \$1999 for each domain registered on the .SUCKS registry, with a suggested retail price of \$2499. Registrars are, of course, free to set the ultimate price to registrants as they see fit. Currently in the market, there are registrars selling domains for as low as \$2024 and as high as \$3977.99. Once the sunrise period has passed, Vox Populi will wholesale most .SUCKS domains to registrars at \$199, with a suggested retail price of \$249. Again, registrars will decide the retail price as they see fit. As with virtually all new TLD registries, these prices are set above the costs incurred by Vox Populi in operating the registry.

The prices for a .SUCKS registration are higher than those set by many other registries (though not all), particularly with respect to the sunrise period. In its registry application, Vox Populi recognized that a trademark owner's .SUCKS domain would be of significant value to a trademark owner to allow consumers to voice their concerns and engage in constructive dialogue with dissatisfied consumers. The original proposal for the formation of a .SUCKS registry put forward by consumer advocates would have banned companies from owning their own trademarks on the registry. In accordance with ICANN's Rights Protection Mechanism, however, Vox Populi has permitted trademark owners to purchase their trademarks as domains, and has granted those trademark owners the exclusive right to purchase their trademarks as domains during the mandatory sunrise period. In its application, Vox Populi noted that, "[b]y building an easy-to-locate, 'central town square' available 24 hours a day, 7 days a week, 365 days a year, the .SUCKS registry will become a recognized destination not just for [] one company, but for all. It will give assurances to customers that their voice can be heard. And it can become an essential part of every company's customer relationship management program." In this way, the .SUCKS registry provides significant value to those trademark owners who wish to avail themselves of the opportunity to register their trademark as a domain. In accordance with the decisions that ICANN itself made, Vox Populi may set the price for these registrations to capture such value and at a level that the market will bear. Regardless of ICANN's

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inflammatory characterizations of Vox Populi's pricing, these prices, and the manner in which they were set, in no way violate Vox Populi's contract with ICANN or any laws.

Notwithstanding the fact that Vox Populi has operated in every respect in accordance with the letter, spirit, and intent of its agreement with ICANN, the ICANN IPC sent an inflammatory letter filled with spurious allegations to the president of ICANN's Global Domains Division, and you endorsed and forwarded that letter to the FTC. More recently, ICANN's BC sent similar letters to the Global Domains Division, as well as to the FTC and the OPC. These letters contain too many factual misrepresentations to catalogue, but in the end they accuse Vox Populi of operating a "predatory scheme" that somehow makes it more likely that trademark owners' names will be registered by "cybersquatters." Of course, the argument makes no sense, because to the extent that a trademark owner's brand is registered as a domain by a cybersquatter, that trademark owner can avail itself of the remedies Vox Populi has provided through ICANN's own UDRP, URS or Trademark TDDRP procedures. As a result, it seems clear that ICANN is not concerned with trademark infringement or cybersquatting (for which everyone agrees there exist ready remedies), but is actually concerned that the .SUCKS registry may be used for the very purpose ICANN already approved—namely (as outlined in Vox Populi's registry application), "to create a new address on the web that will give voice to consumers," to provide a forum "for raw consumer commentary," and to "make it even easier for consumers to find, suggest, cajole, complain and engage on specific products, services and companies."

As Vox Populi's contractual partner and the regulatory entity that approved of the stated purposes of the .SUCKS registry, upon receipt of the ICANN IPC complaint letter, ICANN's appropriate response should have been to respond to the ICANN IPC and ask for some specific basis for the complaints. At the very least, it would have been appropriate to forward the complaint letter to Vox Populi to give the company the opportunity to respond before taking any action based on the allegations. Unfortunately, ICANN took neither of these reasonable actions. Instead, ICANN forwarded the defamatory allegations to the FTC and the OCA, in the process endorsing the allegations and further asserting that Vox Populi has engaged in "illicit," "illegal" activity that has been "predatory, exploitive and coercive." Your letter identifies no law that has been broken, no regulation that has been transgressed, and no contractual provision that has been breached. Rather, it makes broad, sweeping allegations without any factual support, and republishes the falsehoods of the ICANN IPC's initial complaint letter. The ICANN BC letters cite statutory provisions, but offer no explanations as to how Vox Populi's actions in any way transgress those provisions. And while the ICANN BC suggests that Vox Populi has violated its agreement with ICANN, it sites to no contractual obligation or provision that it alleges has been violated.

As I am sure you are aware, every contractual relationship carries with it an implied obligation of good faith and fair dealing. *Digerati Holdings, LLC v. Young Money Entm't, LLC*, 194 Cal. App. 4th 873, 885, 123 Cal. Rptr. 3d 736, 745 (2011) ("Every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do

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anything that would deprive another party of the benefits of the contract.”). In this instance, notwithstanding the fact that Vox Populi has fulfilled every aspect of its obligations, and operated fully within the expectations of the parties, ICANN has chosen to take action to harm Vox Populi’s ability to operate within the registry agreement and has breached its obligation to conduct itself in good faith. In addition, ICANN’s actions are in contravention of its stated core values and policies. For example, in Article 3 of Vox Populi’s registry agreement, ICANN covenanted that, “[c]onsistent with ICANN’s expressed mission and core values, ICANN shall operate in an open and transparent manner.” It is hard to consider ICANN in compliance with this covenant when one of its internal constituencies writes a complaint letter to one of the organization’s divisions about Vox Populi, and an officer in another section of the organization forwards that letter asking for an investigation into “illegal” activity without even seeking a response from Vox Populi first. Finally, ICANN’s actions constitute defamation and trade libel that are fully actionable outside of the arbitration provisions of the registry agreement. *Goldline, LLC v. Regal Assets, LLC*, 2015 WL 1809301, at *5 (C.D. Cal. Apr. 21, 2015) (Commercial disparagement or defamation specifically involves injury to the reputation of a business rather than disparagement of quality of goods or services.). Indeed, these concerns are heightened by the fact that the ICANN IPC is made up, in part, of owners of other registries that will be competing with the .SUCKS registry.

We hereby demand that ICANN refrain from taking any further action in the future to impede Vox Populi’s ability to operate the new TLD .SUCKS registry in accordance with its contractual rights and obligations. To the extent that ICANN, the ICANN IPC or any other ICANN constituencies engage in any further wrongful activities designed to injure Vox Populi, or prevent the operation of the registry, the company will take any and all actions necessary to protect its rights.

To be clear, Vox Populi has no interest in pursuing claims at this time. We believe that the FTC and the OCA will recognize quickly that there are simply no factual allegations that warrant any investigation and that ICANN has identified no laws or regulations under the FTC’s or the OCA’s purview that have been violated in any way. As a result, it is our hope that your letter has merely resulted in some passing, unfortunate publicity. However, if ICANN or any of its constituent bodies (or any directly responsible member thereof) engages in any further wrongful activity that prevents the company from fulfilling its contractual obligations and operating the .SUCKS registry as both ICANN and Vox Populi envisioned, the company will have no choice but to pursue any and all remedies available to it.

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This letter is written reserving all rights, and does not constitute a waiver of any claims for past actions taken by ICANN or any committee or division thereof.

Sincerely,



R. David Hosp

Cc: Mr. Akram Atallah, President, Global Domains Divisions, ICANN
Mr. Cherine Chalaby, Chair, Board New gTLD Program Committee, ICANN
Mr. Fadi Chehadé, President and Chief Executive Officer, ICANN
Mr. Steve Crocker, Chair, Board of Directors, ICANN
Mr. Allen Grogan, Chief Contract Compliance Officer, ICANN
The Honorable Edith Ramirez, Chairwoman, United States Federal Trade Commission
The Honorable Pamela Miller, Representative for Canada, Government Advisory Committee, ICANN
The Honorable Suzanne Radell, Representative for United States of America, Government Advisory Committee, ICANN
The Honorable John Knubley, Deputy Minister, Canada's Office of Consumer Affairs
The Honorable Thomas Schneider, Chair, Government Advisory Committee, ICANN
The Honorable Lawrence Stickling, Assistance Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration (NTIA)