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Probir Mehta
Acting Assistant United States Trade Representative
for Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

2015 Special 301 Out-of-Cycle Review of Notorious Markets
Docket No. USTR-2015-0016

Dear Mr. Mehta:

The Center for Democracy & Technology (CDT) appreciates the opportunity to submit these brief reply comments regarding the nomination of domain name registrars for the 2015 Notorious Markets List. U.S. intellectual property laws provide no basis for a general obligation on foreign registrars to take action against clients when notified of infringing activity by rightsholders. Further, the International Corporation for Assigned Names and Numbers (ICANN) has nowhere suggested that the Registration Accreditation Agreement (RAA) obliges registrars to take on this policing function, or that ICANN intends to police registrars to ensure compliance with such an obligation. If anything, it has stated the opposite. At a time when ICANN accountability mechanisms are a matter of active discussion and debate, attempting to wield the RAA as a domestic policy lever would be deeply problematic.

The inclusion of the Canadian registrar Tucows on the 2014 List of Notorious Markets[1] surprised and alarmed several observers of the Special 301 process because the report mentioned nothing that Tucows did or failed to do that would subject Tucows to liability under U.S. law. Under Section 230 of the Communications Act, Internet intermediaries such as domain registrars are not responsible for content they had no role in creating or posting.[2] Registrars also are not subject to the notice-and-takedown regime for copyright infringement under Section 512 of the Digital Millennium Copyright Act because they do not host or

[1] United States Trade Representative, *2014 Out-of-Cycle Review of Notorious Markets*, March 5, 2015 ("2014 Notorious Markets List"), at 12, *available at* https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-%20Published_0.pdf.
[2] 47 U.S.C. § 230.

store infringing content.[3] Despite U.S. law not imposing any general obligation or liability on registrars with respect to copyright infringement by registrants, the United States Trade Representative ("USTR") placed Tucows on the list of notorious markets because it was "an example of a registrar that fails to take action when notified of its clients' infringing activity."[4] It is somewhat arbitrary to use the notorious markets list to make an example of an entity whose conduct appears to be wholly lawful. Action inconsistent with domestic intellectual property laws would be a sensible minimum threshold for a "successful" nomination for the notorious markets list.[5]

The 2014 Notorious Markets List cited the RAA that ICANN enters into with registrars as the obligation registrars fail to live up to if they do not "take action" when notified of illegal activity.[6] In its comments for the current cycle, the Motion Picture Association of America likewise invokes "RAA obligations" and asks to partner with the USTR, other federal agencies, other governments, and ICANN to "enforce the RAA."[7] Section 3.18 of the 2013 RAA states that a registrar "shall take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse."[8] However, ICANN could not have been clearer that it "is not a global regulator of Internet content, nor should the 2013 [RAA] be interpreted in such a way as to put us in that role."[9] Reading the RAA to require registrars to take action against websites after a report of abuse thrusts ICANN into a copyright enforcement role it does not want and would be deeply problematic for multistakeholder Internet governance.

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[3] 17 U.S.C. §512(c).
[4] 2014 Notorious Markets List at 16.
[5] Action inconsistent with domestic law would be an appropriate requirement before placing a particular cyberlocker (or, for that matter, any entity) on the notorious markets list. *See, e.g.*, Comments of the Recording Industry Association of America, Docket No. USTR-2015-0016, October 5, 2015, at 15-19 (nominating 13 cyberlockers).
[6] 2014 Notorious Market List at 10 & n.16 (citing 2013 ICANN Registrar Accreditation Agreement ("2013 RAA"), available at https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en (last visited October 12, 2015)).
[7] Comments of the Motion Picture Association of America, Docket No. USTR-2015-0016, October 5, 2015, at 12-13.
[8] 2013 RAA, Section 3.18.
[9] Allen R. Grogan, ICANN Chief Contract Compliance Officer, "ICANN Is Not the Internet Content Police, June 12, 2015, *available at* https://www.icann.org/news/blog/icann-is-not-the-internet-content-police; *see also* Comments of the Electronic Frontier Foundation, Docket No. USTR-2015-0016, September 16, 2015, at 2 (noting that the RAA leaves registrars "with discretion as to what steps, if any are necessary and appropriate for it take in response" to reports or abuse).

It would be particularly ill advised to thrust ICANN into the role of global Internet content regulator in the midst of the Internet Assigned Numbers Authority (IANA) transition. Throughout the IANA transition, CDT and others have stressed the importance of mechanisms to make ICANN accountable to all communities with a stake in Internet governance.[10] Accountability is important in part because it helps ensure that ICANN does not succumb to pressure from a government or governments to assume an Internet content policing function. Indeed, when the U.S Commerce Department's National Telecommunications and Information Administration (NTIA) announced the IANA transition, it stressed the importance of an open Internet and the multistakeholder model, as well as the unacceptability of proposals that would replace NTIA's "role with a government-led or an inter-governmental organization solution."[11]

Pressure from federal agencies and other governments on ICANN to "enforce the RAA" is the type of government-driven policymaking for the domain name system that NTIA's vision of the IANA transition seeks to avoid. Further, invoking the RAA as a vehicle to carry out the U.S.'s intellectual property enforcement policies risks other governments undertaking similar efforts to enforce their domestic content laws and policies. This would pose unacceptable risks to both free expression and sound multistakeholder Internet governance. CDT therefore strongly advises against an aggressive reading of the RAA to support the inclusion of registrars on the next out-of-cycle list of notorious markets.

Respectfully submitted,

/s/ Erik Stallman
Erik Stallman
Director, Open Internet Project
Center for Democracy & Technology

[10] *See* Matthew Shears, Center for Democracy & Technology, "ICANN Accountability Enhancements Key in Moving IANA Transition Forward," September 24, 2015, *available at* https://cdt.org/blog/icann-accountability-enhancements-key-in-moving-iana-transition-forward/.

[11] National Telecommunications & Information Administration Press Release, "NTIA Announces Intent to Transition Key Internet Domain Name Functions," March 14, 2014, *available at* http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions.