



March 27, 2015

Mr. Akram Atallah
President, Global Domains Division
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

RE: ICANN Requested to Immediately Halt .SUCKS Predatory Registration Scheme
Designed to Exploit Trademark Owners

Dear Mr. Atallah:

By this letter, the Intellectual Property Constituency is formally asking ICANN to halt the rollout of the .SUCKS new gTLD operated by Vox Populi Registry Inc. (“Vox Populi”), so that the community can examine the validity of Vox Populi’s recently announced plans to: (1) to categorize TMCH-registered marks as “premium names,” (2) charge exorbitant sums to brand owners who seek to secure a registration in .SUCKS, and (3) conspire with an (alleged) third party to “subsidize” a complaint site should brand owners fail to cooperate in Vox Populi’s shakedown scheme. The TMCH Sunrise period is an integral part of Vox Populi’s scheme, and is slated to open on March 30, 2015. Thus, we seek ICANN’s immediate action on this matter **PRIOR** to the launch of the .SUCKS TMCH Sunrise period.

Vox Populi has announced that it will charge trademark owners \$2,499 *and up* to register domain names in the TMCH Sunrise period. Vox Populi’s incredibly high fees will prevent many trademark owners from being able to take advantage of the TMCH Sunrise period, a mandatory Rights Protection Mechanism (“RPM”) intended to protect the rights of trademark owners. This makes it more likely that trademark owners’ marks will be registered by cybersquatters for much lower (potentially subsidized) fees at the launch of general availability. We recognize that there could be significant non-infringing uses of .SUCKS domain names, and the goal of preventing the launch of .SUCKS under the current predatory scheme is in no way an attempt to stifle legitimate criticism of trademark owners. In fact, in some cases, legitimate criticism can be useful to TM owners in helping them improve their products and services and differentiating them from their competitors. However, by discouraging trademark owners from using a key RPM, we believe that the registry operator’s actions in establishing this predatory

scheme are complicit in, and encourage bad faith registrations by third parties at the second level of the .SUCKS gTLD, and thus drastically increase the likelihood of trademark infringement, all for commercial gain. As such, Vox Populi may well be liable under the Post Delegation Dispute Resolution Policy (PDDRP), may in fact be accountable under the various intermediary liability laws around the world, and may have breached its Registry Agreement with ICANN (as well as ICANN Consensus Policies) by adding additional elements (the subsidy and “sunrise premium” name schemes) which materially alters the mandatory RPM in a manner which renders them detrimental to brand owners, and a new registry service in the form of its everything.sucks platform.

One of the main tenets of all RPMs is that such mechanisms should be designed in a way that minimizes the potential for abuse and circumvention, rather than enhancing the potential for abuse and creating windfall profits by Registry Operators. The more RPMs that are open to abuse, and the more loopholes that are permitted, and even welcomed as “innovation,” the less credibility and legitimacy the RPMs have, and the less they serve their intended purpose. ICANN cannot afford to allow one Registry Operator to unwind the RPMs which were adopted as a result of community input over several years.

.SUCKS Sunrise Program

As you may be aware, prior to the New gTLD Program, each registry (gTLD and ccTLD) was left to its own devices when implementing start-up RPMs. Most of the registries implemented a Sunrise Program whereby the holders of validated trademark rights were able to register domain names corresponding to their trademarks prior to such names being available to the general public. The prices for Sunrise registrations were encouraged to use a “cost recovery model” and ranged on the low end of \$15 (in the case of .US), to several hundred dollars (in the case of .ASIA and .CO to name a few). Those costs included the fees paid for the validation of the trademarks in addition to the registrations themselves.

Faced with the concept of potentially hundreds of new gTLD registries each performing their own validations, intellectual property owners – through the Implementation Review Team (“IRT”) in 2009 – introduced the notion of a Trademark Clearinghouse (“TMCH”) whereby their marks could be validated once for all of the new gTLDs, as opposed to countless times for each individual gTLD. The concept was adopted by the ICANN community through the work of the Special Trademark Issues review team, made its way into the Applicant Guidebook and ultimately into Specification 7 of the Registry Agreement. It was intended that this would enable trademark owners wanting to register their brands (or in many cases having little choice but to register their brands) as domain names to do so in a much more economical manner, given that registries would be relieved of the burden (both in terms of financial and resources) of performing the validations themselves. Given that Registries no longer had to perform the validations (the most expensive part of registering Sunrise Domain names), it was believed by intellectual property owners that the costs of obtaining a Sunrise Registration would be substantially reduced.

For some new gTLDs, this turned out to be the case. In .NYC for example, the cost of a Sunrise Registration charged by the Registry to the Registrars was only an additional \$15 above

the cost of a normal registration. In most cases, however, new gTLD Registries continued to charge a few hundred dollars despite the fact that this did not represent a “cost recovery” pricing model. In essence, Registries were charging more simply because they could and they knew that some trademark owners would be forced to pay those exorbitant prices to protect their marks.

In no case has this practice become more abusive than with respect to .SUCKS. Commencing on March 30, 2015, Vox Populi will charge trademark owners over **250 times** more than what it will charge most ordinary consumers for domain names upon the launch of general availability. <https://www.nic.sucks/products>

More specifically, and in direct violation of the spirit of the new gTLD RPMs, especially the TMCH, Vox Populi will levy against trademark owners that have chosen to protect their brands in the Trademark Clearinghouse administered by ICANN through its subcontractors, a penalty of \$2,499 per registration per year (nearly \$12,500 for a 5-year sunrise registration). By contrast, most ordinary consumers will be charged \$9.95/year at general availability, assuming they accept the “subsidy” and allow their site to be hosted by the mysterious entity “Everything.SUCKS.”¹ (Registrants who choose not to use the Everything.SUCKS platform will be charged \$249.) This turns the TMCH, which is meant to be a shield for brand owners against abuse, into a sword that unscrupulous Registry Operators are using **AGAINST** brand owners to maximize economic gain.

.SUCKS Sunrise Premium Names

But Vox Populi’s illicit scheme doesn’t stop there. If a trademark owner decides that it will sit out the Sunrise Period and attempt to register its trademark as a domain name during general availability for \$249, it still may be forced to pay at least \$2,499. This is because Vox Populi has now introduced its “Sunrise Premium” list. (Despite the name, “Sunrise Premium” pricing applies only during general availability.) If a trademark is on the Sunrise Premium list, it will always be at least \$2,499 per year. The Sunrise Premium list is a list of strings compiled by Vox Populi from strings registered or blocked in other TLDs’ sunrise periods, *i.e.*, the most

¹ Vox Populi has provided no information on Everything.SUCKS, its agreement with Everything.SUCKS, or its affiliation (if any) with Everything.SUCKS. An Internet search revealed no trace of this entity. Through this “subsidy,” Vox Populi effectively shows brand owners that, if they fail to register at an exorbitant price, a third party will be able to register for a pittance. This is an essential element of Vox Populi’s coercive scheme. Furthermore, although provision of the Everything.SUCKS platform by Vox Populi, either directly, or through its subsidiary, appears to be a new registry service, the IPC is unaware of any RSEP request submitted by Vox Populi or approved by ICANN. See <https://www.icann.org/resources/pages/rsep-2014-02-19-en>.

In addition, in establishing a scheme where registrants of .SUCKS domain names can be subsidized by agreeing to use the Everything.SUCKS platform, Vox Populi has essentially allocated Everything.SUCKS to a third party prior to the TMCH Sunrise Period, rather than self-allocated as permitted under Specification 5 of the Registry Agreement, which appears to be in violation of ICANN’s restriction against allocating any names prior to TMCH Sunrise. If the name has been allocated under an ICANN Qualified Launch Program (“QLP”) – unlikely, as there are significant restrictions in QLPs against allocating prior to Sunrise – the information about the QLP is missing from the TLD Startup page for .SUCKS on the ICANN website. See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/54>.

widely protected and valuable trademarks. In other words, Vox Populi is targeting and punishing brand owners who have availed themselves of the RPMs or shown that they are susceptible to purchasing defensive registrations. Vox Populi's CEO, John Berard, has admitted that the Sunrise Premium list will be trademark-heavy. <http://domainincite.com/18145-heres-why-trademark-owners-will-think-sucks-sucks>. Vox Populi's strategy is obvious – to ensure that those trademark owners who have invested in protecting those trademarks by registering in the TMCH and registering domain names in other sunrise periods, and who are most likely to want to protect their trademarks by registering in .SUCKS, cannot avoid paying at least \$2,499 per year, no matter when they register. This will have a chilling effect on TMCH registrations and consequently discredit all of the New gTLD Program RPMs in the eyes of brand owners, whose buy-in and adoption of new gTLDs is widely acknowledged to be critical to the success of the new gTLD program. Importantly, where brand owners are discouraged from using the TMCH due to this Registry Operator's scheme, this will lead to additional cybersquatting, confusion and fraud in the domain name space, with significant effects on consumers as well as brand owners. In other words, Vox Populi's predatory "get rich quick" scheme affects more than just its own registry; its actions threaten the integrity and validity of the TMCH and RPMs generally.

The IPC is charged with representing the interests of intellectual property owners – large or small, commercial or non-profit, and to provide to the GNSO and the ICANN Board timely and expert feedback before it must make any decision or take any position on any proposals, issues, policies, or otherwise, which may affect intellectual property, particularly as it interfaces with the DNS. <http://www.ipconstituency.org/bylaws/>. We believe that Vox Populi's practices discussed above can best be described as predatory, exploitative and coercive. Not only does the intellectual property community believe this to be the case, even domain investors and industry insiders who rarely agree with intellectual property owners on anything, agree that this practice is punitive in nature and should not be accepted².

We understand that ICANN has previously taken the position that it does not regulate pricing and that compliance has refused to take action based on a pricing issue. However, Vox Populi's entire business model, and in particular, the categorization of TMCH-registered and protected marks as "premium" and "sunrise premium" for the purposes of setting exorbitant pricing schemes and using "subsidized" domain names to maximize the likelihood that trademarks which are not registered during Sunrise will be registered by third parties, goes far beyond mere "pricing." This scheme constitutes an abuse and a perversion of the mandatory RPMs approved by the ICANN community, solely to make money off the backs of brand owners, and appears to violate the Registry Agreement as well as numerous Consensus Policies. It creates a mockery of the new TLD process and calls into question the very ability of ICANN as an organization to be able to administer the new gTLD program. This issue is particularly timely, given the accountability debate in which ICANN is embroiled.

² See, e.g., <http://domainincite.com/18145-heres-why-trademark-owners-will-think-sucks-sucks> (Kevin Murphy, Domain Incite: "if you have a track record of defensively registering your trademark, Vox Pop is essentially penalizing you with higher fees."); <http://marketingland.com/controversial-sucks-domain-almost-here-121505#.VQW2f0jdeC0.twitter> (Rick Schwartz: "The entire extension is based on brand extortion."); Ron Sheriden: "plain and simple economic extortion"); <http://www.domainsherpa.com/discussion-20150312/> at 36:27 (Michael Berkens, Andrew Alleman, and Page Howe criticize the .SUCKS launch plan.)

.SUCKS Registry Agreement

Finally, we recently learned of a peculiar (and apparently unique) provision in Vox Populi's Registry Agreement. The .SUCKS Registry Agreement calls for Vox Populi to pay ICANN (i) a one-time fixed "registry access fee" of US\$100,000 as of the Effective Date of the Agreement, and (ii) a "registry administration fee" of US\$1.00 for each of the first 900,000 Transactions. Thus, if Vox Populi's scheme succeeds, ICANN will receive \$1 million more from .SUCKS than from any other registry with comparable success. The IPC is at a loss to understand why ICANN stands to receive this unique payout from .SUCKS.

In closing, we call on ICANN to put a stop to this coercive scheme based on an abusive modification of ICANN's RPMs. ICANN is the sole entity in the world charged with the orderly introduction of new gTLDs in a secure, reliable and predictable manner. If ICANN is unwilling or unable to put a halt to this, then who is?

Please do not hesitate to contact us if you have any questions regarding this significant matter. We look forward to ICANN's prompt response.

Best Regards,

Gregory S. Shatan
President, Intellectual Property Constituency

cc: Mr. Fadi Chehadé, *President and Chief Executive Officer, ICANN*
Mr. Cherine Chalaby, *Chair – ICANN Board New gTLD Program Committee*
Mr. Allen Grogan, *Chief Contract Compliance Officer*
Mr. Lawrence Strickling, *Assistance Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration (NTIA)*
Mr. John Berard, *CEO, Vox Populi*