ORAL ARGUMENT SCHEDULED FOR JANUARY 21, 2016

Appeal No. 14-7193

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUSAN WEINSTEIN, individually as Co-Administrator of the Estate of Ira William Weinstein, and as natural guardian of plaintiff DAVID WEINSTEIN (minor); JEFFREY A. MILLER, as Co-Administrator of the Estate of Ira William Weinstein; JOSEPH WEINSTEIN; JENNIFER WEINSTEIN HAZI; DAVID WEINSTEIN, minor, by his guardian and next friend SUSAN WEINSTEIN,

Plaintiffs-Appellants.

v.

ISLAMIC REPUBLIC OF IRAN; IRANIAN MINISTRY OF INFORMATION AND SECURITY; AYATOLLAH ALI HOSEINI KHAMENEI, Supreme Leader of the Islamic Republic of Iran; ALI AKBAR HASHEMI-RAFSANJANI, Former President of the Islamic Republic of Iran; ALI FALLAHIAN-KHUZESTANI, Former Minister of Information and Security,

Defendants,

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Appellee.

Consolidated with 14-7194, 14-7195, 14-7198, 14-7202, 14-7203 and 14-7204

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR PLAINTIFFS-APPELLANTS IN RESPONSE TO THE UNITED STATES AS *AMICUS CURIAE*

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Abbreviation	Meaning
ccTLD	Country-code top level domain name.
DE	Citation to a docket entry in *Weinstein v. Islamic Rep. of Iran*, No. 00-cv-2601 (D.D.C.). Page citations rely on the page numbers on the ECF stamp atop each page, rather than on the original page numbers appearing at the bottom.
DNS	Domain Name System.
EFT	Electronic funds transfer.
FOI	Framework of Interpretation Working Group, *Framework of Interpretation [Regarding] Delegation and Redelegation of [ccTLDs]*.
FSIA	The Foreign Sovereign Immunities Act, codified at 28 U.S.C. 1602-1611.
GAO	U.S. Government Accountability Office.
ICANN	Appellee, Internet Corporation for Assigned Names and Numbers.
IP	Internet Protocol. When used as part of the phrase "IP address," refers to a numerical label assigned to an electronic device that connects to the Internet (*e.g.* a computer or mobile phone).
RFC 1591	Network Working Group, *Domain Name System Structure and Delegation*, Request for Comments 1591
NTIA	The National Telecommunications and Information Administration, an agency within the Department of Commerce.
SA	The supplemental appendices filed by both parties.
TRIA	The Terrorism Risk Insurance Act of 2002. Section 201 thereof is codified as a note to 28 U.S.C. 1610(g).

BRIEF FOR APPELLANTS IN RESPONSE TO UNITED STATES

In 2008, on letterhead issued by the Department of Commerce, NTIA declared that *because* a particular ccTLD "is associated with" land under the jurisdiction of the United States, that ccTLD "is [therefore] a United States Government asset." It further "*instructed* ICANN that the United States Government *must* approve any decisions regarding the redelegation of [that] ccTLD." (SA 63-64) (emphasis added).

Commerce maintained the position that the Internet's root zone belongs to the U.S. as late as 2012. For instance, Commerce required its 2012 contract with ICANN to declare that "[a]ll deliverables provided under this contract," which include an "automated root zone" and the management thereof, "become the property of the U.S. Government." DE 89-3 at 150-51.

In its brief to this Court, penned not even four years later, the Government, joined by both Commerce and NTIA, writes that "[n]o government[, including the U.S.,] owns or controls the root level of the Internet. Nor does ICANN or any other single entity." (Gov't Br. 1). Thus, despite its prior contrary statements, despite admitting that the Internet was invented and developed by the U.S. (Gov't Br. 6), and despite that the Government points to no evidence that the U.S. somehow at some point relinquished its ownership over the Internet, the Government claims that the Internet is a peculiar creation, unlike any that ever was; it is used, gainfully exploited, and creates exclusive rights, but cannot be owned. (Gov't Br. 10).

So desperate is the Government to disown the Internet, it implausibly argues in a footnote that when it wrote in 2008 that "the .UM ccTLD is a United States government asset" (SA 63), it actually meant that the .UM ccTLD is closely related to the U.S., such that the U.S. is "the relevant local agent for decisions affecting [it]." (Gov't Br. 17). That is not merely absurd, it is also disingenuous. The 2008 letter is the Government's response to an earlier letter by one Bill Manning, in which Manning "claim[ed] to be the operator of the .UM [ccTLD]." The Government's letter was intended to refute Manning's claim. It argued that the .UM ccTLD was (and still is) *owned by* the U.S. and had been administered by another "on behalf of the [U.S.]" (SA 63-64). As the Government now reads that letter, it was unresponsive to Manning.

Trying to bolster its claim, the Government argues that, in deciding whether to transfer a ccTLD, ICANN does not and cannot treat the views of the relevant local government as "dispositive" and can transfer ccTLDs without consent of that government. (Gov't Br. 14-16). It never accounts for its earlier directive to ICANN that ICANN "must" permit the U.S. to "approve any decisions regarding the redelgation of the [.UM] ccTLD." (SA 64).

Why the sudden about-face? Said simply: Edward Snowden. Reeling after Snowden revealed confidential information about U.S. surveillance programs in 2013, the Government attempted to placate the global community by surrendering

its role in Internet governance.[1] NTIA and ICANN took the first public step towards that goal on March 14, 2014, announcing that NTIA will surrender its supervisory role, allowing some other body—ICANN?—to take over.[2] The Government's position is thus not a long-standing well-considered policy. It is an expedient solution, not yet two years old, addressing a political kerfuffle. Quite possibly, when a new President takes office in 2017, this new "policy" will be abandoned.

The Government claims to have support from Congress. (Gov't Br. 7). It relies on a couple of non-binding resolutions that expressed support in general terms for a *future* governance model that is "free from government control." *E.g.*, S. Con. Res. 50, 112th Cong. (2012).[3] But even those resolutions indicate that the *present*

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[1] L. Gordon Crovitz, Op-Ed., *Not Obama's to Give Away*, WALL ST. J., Sept. 27, 2015, http://www.wsj.com/articles/not-obamas-to-give-away-1443386189; John Hayward, *Obama's Plan to Surrender Internet Control may be Unconstitutional*, BREITBART, Sep. 29, 2015, http://www.breitbart.com/big-government/2015/09/29/obamas-plan-surrender-internet-control-may-unconstitutional/.

[2] NTIA, *NTIA Announces Intent to Transition Key Internet Domain Name Functions*, Mar. 14, 2014, https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions; ICANN, *Administrator of Domain Name System Launches Global Multistakeholder Accountability Process*, Mar. 14, 2014, https://www.icann.org/resources/press-material/release-2014-03-14-en.

[3] The Government also cites S. Res. 71, 114th Cong. (2015). (Gov't Br. 7). But that resolution expressly takes no position on U.S. policy; it is intended to promote education—study both for *and against* the Government's position—regarding that policy.

governance model involves government control. Further, the control those resolutions seek to avoid is despotic international control, not U.S. control. *See id.*

In fact, Congress does *not* support NTIA's planned surrender of the Internet. For example, in December 2014, Congress passed an appropriations act that prohibited NTIA from using FY2015 appropriated funds to "relinquish" its responsibilities "with respect to Internet domain name system functions, including responsibility with respect to the authoritative root zone file[.]" P.L. 113-235 § 540, 128 Stat. 2217. On June 3, 2015, the House passed an appropriations bill extending that prohibition to include FY2016 appropriated funds. H.R. 2578 § 536, 114th Cong. (2015). And on June 23, 2015, by a vote of 378-25, the House passed a bill that would prohibit NTIA from relinquishing its control over the Internet until 30 legislative days pass after NTIA submits a report to Congress that provides certain details related to the proposed transfer. DOTCOM Act of 2015, H.R. 805, 114th Cong (2015). The lead sponsor of the DOTCOM Act, Rep. Shimkus, testified on the House floor that the objective of the bill is to enable Congress, if it finds doing so appropriate, to "take action to either completely stop the transfer or require...safeguards to be put in place." Cong. Rec. H4,550 (daily ed. June 23, 2015).[4]

[4] *See also* H. Con. Res. 268, 109th Cong. (2005) ("Whereas the origins of the Internet can be found in United States Government funding of research.... [T]he authoritative root zone server should remain physically located in the United States and the Secretary of Commerce should maintain oversight of ICANN[.]"); S. Res.

Congressional opposition to the new Government policy runs quite deep. A September 15, 2015, letter from the Chairmen of the House and Senate Committees on the Judiciary, together with Senator Cruz and Rep. Issa to the GAO Comptroller General provides a good illustration.[5] Therein, the aforementioned congressmen assert that the Government has previously designated the Internet's "root zone" as a "national IT asset," cite to others for the proposition that "the United States acquired title to the root zone file because it was invented pursuant to Department of Defense contracts," and note that Ira Magaziner, an aide to President Clinton, asserted U.S. ownership over the DNS.[6] The congressmen further assert that transfer of the root zone might violate the Property Clause, U.S. CONST. Art. IV, § 3.[7] They thus ask the GAO to review whether 1) "termination of the NTIA's contract with ICANN" would result in any transfer of property to ICANN, 2) the root zone file or any related assets

323, 109th Cong. (2005) ("Whereas the Internet was created in the United States and has flourished under United States supervision and oversight.... Whereas on June 30, 2005, President...Bush announced that the United States intends to maintain its historic role over the master 'root zone' file of the Internet.... [B]e it *Resolved*, That the Senate...calls on the President to continue to oppose any effort to transfer control of the Internet to the United Nations or any other international entity[.]").

[5] Letter from Senator Charles Grassley, *et al.*, to Gene Dodaro, Sept. 22, 2015, http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-09-22%20CEG%20Cruz%20Goodlatte%20Issa%20to%20GAO%20%28Report%20on%20ICANN%20Oversight%20Transfer%29.pdf.

[6] *Id.* at 2.

[7] *Id.* at 1-2.

are U.S. government property, and 3) the NTIA has authority to transfer the root zone file or any related assets.[8] It appears that if the NTIA executes its plans without congressional support, it will face litigation—most likely in this Circuit.

Thus, the policy asserted here by the Government *was* not the policy of the U.S. until recently, *is* not the policy of the U.S. in the sense of being ratified by congressional action, likely *will not be* the policy of the U.S. in the relatively near future, and might not even be constitutional. This Court should not adopt it.

ARGUMENT

I. This Court Should Not Handle NTIA's Political Hot Potato

The Government has gratuitously interjected a highly political issue into this appeal; given Senator Cruz's opposition, it may soon be elevated to presidential politics. That political issue might resolve independently, such as with the election of a new President and the adoption of a new federal policy. Or it might require future litigation. In either case, the nature of the U.S.'s interests in the root zone and related assets need not be resolved now. Given its political implications, that issue *should* not be resolved now. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1174 (D.C. Cir. 1982) (noting judicial "respect for the political branches and a disinclination to intervene unnecessarily in their disputes"); *see also Galli v. New Jersey Meadowlands Comm'n*, 490 F.3d 265, 293 (3d Cir. 2007) ("[B]ecause we judges are

[8] *Id.* at 2.

removed from...politics, we need to exercise restraint from making decisions which will impact the free flow of political discourse.") (Baylson, *J.*, dissenting).

If, following remand, the NTIA's interests in the root zone are actually made an issue in this case that is subjected to discovery and inquiry below, it may then be necessary for this Court to consider the issue. But because the issue 1) was not raised or considered below, 2) was not raised by any party on appeal, and 3) is not the subject of discovery or any record evidence, and because a ruling by this Court would likely antagonize Congress, reaching it now is a "startlingly unattractive idea, given [this Court's] respect for a coequal branch of government." *Vander Jagt*, 699 F.2d at 1176 (internal quotation marks omitted).

II. The Government's Brief Demonstrates the Necessity of Discovery

1. The Government argues that historical rules, understandings, and practices must be evaluated in assessing the existence of property interests in the attached Internet assets. (Gov't Br. 10-11). But it fails to note that much—indeed, *most*—of the materials that would be necessary to perform that evaluation are not in the record. And the record that does exist is misleading.[9] Indeed, the Government focuses much

[9] Below, ICANN relied on a document called ICP-1 (SA35-SA37), which has been resoundingly rejected—even by ICANN. In a letter to the Commerce Department, ICANN wrote that ICP-1 "lack[s]...the appropriate support of interested and affected parties" to render it authoritative. ICANN, Email from Jamie Hedlund to Sheryl Sanders, June 26, 2012, https://www.icann.org/en/system/files/files/

of its attention on a document called RFC 1591 (Gov't Br. 11, 14-15), without informing the Court that RFC 1591 has been extensively and recently interpreted. That recent interpretation of RFC 1591 is not in the record.

In October 2014, the *Framework of Interpretation [Regarding] Delegation and Redelegation of [ccTLDs]* ("*FOI*") was published.[10] It was written by a working group of members of ICANN's Country Code Names Supporting Organization (comprised of ccTLDs), ICANN's Government Advisory Committee (including Suzanne Radell, a senior policy advisor in NTIA's Office of International Affairs), and others.[11] The *FOI* reports that the working group spent three years reviewing existing ccTLD practices and consulting with the international community to provide the ICANN Board clear guidance in interpreting RFC 1591. *FOI* at 3. It was subsequently adopted by a formal resolution of ICAAN's board of directors.[12]

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contract-hedlund-to-sanders-redacted-26jun12-en.pdf. ICP-1 now appears on ICANN's website in ICANN's archives and is marked as potentially "outdated or incorrect." *See* ICANN Archives, ICP-1, http://archive.icann.org/en/policies/icp-1-archived.htm.

[10] It is available on ICANN's website at http://ccnso.icann.org/workinggroups/foi-final-07oct14-en.pdf.

[11] *See FOI* at 15; NTIA, Spotlight on NTIA: Suzanne Radell, Senior Policy Adviser, Office of International Affairs, https://www.ntia.doc.gov/blog/2013/spotlight-ntia-suzanne-radell-senior-policy-adviser-office-international-affairs.

[12] ICANN, Approved Board Resolutions, June 25, 2015, https://www.icann.org/resources/board-material/resolutions-2015-06-25-en#1.d.

The *FOI* makes clear that ICANN may unilaterally transfer a ccTLD *only* in the rare instance that, "after notice and a reasonable opportunity to cure," the ccTLD manager "egregious[ly] or persistent[ly]" fails to meet its responsibilities such that it "imposes serious harm or has a substantial adverse impact on the Internet community by posing a threat to the stability and security of the DNS." *Id.* at 8-9. The *FOI* expressly prohibits ICANN from transferring a ccTLD where ICANN has concerns only regarding "equity, justice, honesty, or...competency," stating that "such issues would be better resolved locally." *Id.* at 9. Further, transfer is "a last resort" and ICANN "should use all means at its disposal to assist the manager to change conduct considered to be substantial misbehavior" before resorting to transfer. *Id.* Finally, where ICANN does resort to transfer, the outgoing ccTLD manager is entitled to appeal. *Id.*

The Government relies on RFC 1591 to argue that ccTLDs involve no property interests. (Gov't Br. 11). The *FOI* and existing ccTLD practices (as determined by the working group that wrote the *FOI*) strongly indicate that ccTLD managers do have property interests and that RFC 1591 employs very strong measures to *protect those property interests*, authorizing transfer only in extreme cases. Certainly, to the extent that understanding how the Internet community views ccTLDs and their operators is important to this proceeding, discovery is necessary.[13]

[13] The Government's position is contrary to that of many ccTLD managers around

2. ICANN argued that its control of the root zone is "limited." In particular, it argued that it is prohibited from "delegating or re-delegating [top level domain names]," stating that such changes must be approved by the Government. (ICANN Br. 4). This is essential to ICANN's argument. ICANN asserts that because it lacks plenary authority to transfer ccTLDs, it is not a proper garnishee. (ICANN Br. 32-33) ("Appellee lacks the unilateral authority or capability to transfer or re-delegate any [top level domain].").

The Government tells a different tale, directly contradicting ICANN. It indicates that *its* governance role is negligible and any limitations on ICANN are a function of some international consensus and policy documents drawn by ICANN. *E.g.* (Gov't Br. 6-7, 14, 16) ("The agency's role...is limited to ensuring that ICANN has followed appropriate procedures and avoided technical errors.") ("ICANN can and sometimes does 'redelegate' the management of a particular [ccTLD] to a different entity[.]") (asserting that Government policy dictates that the Government not play a role in controlling the Internet) (declaring ICANN a trustee over the Internet).

It is quite likely that neither the Government nor ICANN is offering a complete story; the truth likely lies somewhere else entirely. Discovery will help to find it.

3. The Government makes, and in some instances relies upon, many other factual

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the globe. Their legal interests ought to be fully represented before this or any other Court reaches issues that would define their rights and financial interests.

claims that lack a scintilla of support in the record. For example:

- ICANN's contract with NTIA regarding Internet governance imposes "no-cost," is "largely symbolic," and defines the U.S.'s "vestigial role in the domain name system." (Gov't Br. 6-7). ICANN claims to have placed the contract into the record, but Appellants have not had opportunity to inquire about any superseding contracts, subsequent documents might have affected the contract's interpretation or application, or any other matter that might alter the rights and obligations of the Government and ICANN. Moreover, the Government's position seems to be inconsistent with that of many in Congress (*see supra*).

- "[A] U.S. court has no meaningful way to enforce the attachment of a [ccTLD] or ensure its transfer to a judgment creditor." (Gov't Br. 12). That is pure conjecture. It is unsupported by *any* evidence. And it is unlikely to be true, given that both ICANN and the Government are under the jurisdiction of U.S. courts and that ICANN has exercised unilateral authority to effect transfers in the past. *See* (Gov't Br. 16); (Opening Br. 10, 16); (Reply Br. 10, 21, 30).

- "[N]o rational company would 'purchase' from plaintiffs the right to manage the [ccTLDs] associated with defendants" at any price. (Gov't Br. 13). This too is conjecture that is unlikely to be true.

- ICANN and the "global Internet community" has legal authority to impose restrictions on the use and alienation of Internet assets. Alternatively, ICANN's

policies and prior acts are somehow determinative as a matter of law. *See* (Gov't Br. 14-17). But neither ICANN nor any asserted global consensus have any legal authority over the judgment debtors or the Appellants.

- ICANN lacks a mechanism for transferring control of specific IP addresses. (Gov't Br. 20). This is a topic about which *no* record evidence exists.

- ICANN lacks control over the regional Internet registries. (Gov't Br. 20). Same.

III. The Government Severely Undermines *Umbro* and thus ICANN

ICANN relies principally upon *Network Solutions v. Umbro*, 529 S.E.2d 80 (Va. 2000), which held that *second* level domains are not attachable. (ICANN Br. 27-29); *see also* (Reply Br. 29). The Government convincingly demonstrates the error of *Umbro* and the futility of ICANN's reliance on it. (Gov't Br. 11-12); *see also Xereas v. Heiss*, 933 F. Supp. 2d 1, 6 (D.D.C. 2013). In trying to argue that ccTLDs are not owned by the sovereigns they service but are merely delegated to them by ICANN, the Government distinguishes second level domains,

> which are commonly acquired and alienated *unilaterally* by particular entities or individuals under the laws of a particular country and are therefore...*naturally characterized as personal property*. Indeed, in certain circumstances, *federal law treats second-level domain-name registrations as property* for some purposes. The Department of Justice also seeks and obtains forfeiture of second-level domain-name registrations under statutes providing for the forfeiture of "property."

(Gov't Br. 12 (internal citations omitted) (emphasis added)). Thus, *Umbro* is

inconsistent with background principles, federal statute,[14] and the regular practices of the Department of Justice in many forfeiture cases around the country. So too ICANN's general notion that domain names are un-attachable.

IV. The Government's Principal Argument is Incoherent

The Government asserts that the attached Internet assets are not described by FSIA and TRIA because they are not property or assets "of" the judgment debtors. (Gov't Br. 8-9). But as the Government itself acknowledges, 28 U.S.C. 1610(g) and TRIA are relevant to this case only if the assets are immune from attachment under 28 U.S.C. 1609. (Gov't Br. 3). Section 1609 uses *precisely* the same language, immunizing from attachment "the property...of a foreign state." § 1609. Thus, if the Government has correctly interpreted the phrase "property of," it has removed the attached Internet assets from protection under § 1609, rendering FSIA and TRIA irrelevant. Indeed, the Government directly argues that the judgment debtors have no personal property interest in the attached Internet assets. (Gov't Br. 14-18). If so, it is obvious that the assets do not enjoy sovereign immunity.

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[14] *E.g.* 15 U.S.C. 1125(d)(1)(C)("In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the *forfeiture* or cancellation of the domain name or the *transfer* of the domain name to the owner of the mark.") (emphasis added); 1125(d)(2)(D) ("The remedies in an in rem action under this paragraph shall be limited to a court order for the *forfeiture* or cancellation of the domain name or the *transfer* of the domain name to the owner of the mark.") (emphasis added).

If the assets are not immune under § 1609, the *only* pertinent question is whether D.C. attachment law permits the attachment of the judgment debtors' interests in the property, whatever those interests might be. In light of its positon regarding immunity, the Government's decision to write about FSIA and TRIA and "[no] other question" is odd. (Gov't Br. 9 n.9).

V. This Court's *Heiser* Decision Supports the Appellants' Position

The Government cites to *Heiser v. Islamic Rep. of Iran*, 735 F.3d 934 (D.C. Cir. 2013), apparently (but not explicitly) arguing that, under the law of this Circuit, a judgment creditor relying on § 1610(g) or TRIA may not attach the assets of its judgment debtor unless the judgment debtor has possession of and owns those assets outright, as if in fee simple. (Gov't Br. 9, 14). But *Heiser* did not so hold. Rather, *Heiser* required that the judgment debtor have a cognizable and non-contingent interest in the property, noting the general rule governing attachment that "a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor." *Heiser*, 735 F.3d at 938. In applying that rule to the unusual facts presented by an electronic funds transfer ("EFT")—noting that, in a mid-stream EFT, title does not pass until the next entity in the transaction assents—this Court held that downstream entities in the transaction (perhaps excluding the ultimate beneficiary of the EFT) *have no interest at all* in the proceeds

of the transaction. *Id.* at 940-41.[15] In *Heiser*, Iran owned or controlled the banks of the EFT's ultimate beneficiaries. *Id.* at 936. While those banks at one point had a "contingent future possessory interest in the funds," once the EFTs were blocked, the contingency collapsed along with any Iranian interest. Attachment was thus foreclosed. *Id.* at 937, 941. But, this Court indicated, if an Iranian bank had originated an EFT or was a originator's bank, the Iranian banks would have possessed an attachable interest. *Id.* at 941.

Thus, rather than presenting an obstacle to attachment, *Heiser* supports the Appellants' position: If it can be shown after discovery that the judgment debtors have some cognizable interest in the property (including any realized non-possessory future interest or any right to possession akin to a lease or a license) that is attachable under D.C. law, those assets can be—and have been—attached by the Appellants.

VI. A Top Level Domain Name is Not Merely a "Name"

Not long after accusing Appellants of "a fundamental misunderstanding of the operation of the Internet," ICANN likens the .IR ccTLD to the name "Iran." (Gov't Br. 1, 9) (describing the asset as a mere "designation in cyberspace"). But it is undisputed—even by the Government—that domain names are valuable assets that

[15] The Government's erroneous construction of *Heiser* relies on quotations out of context and ignores the facts of *Heiser* and this Court's special treatment of EFTs, which are materially different from the attached assets here. (Gov't Br. 14).

define rights, are bought and sold, and are treated by law as property. (Gov't Br. 11-12); *Kremen v. Cohen*, 337 F.3d 1024, 1027, 1030 (9th Cir. 2002).[16] Not so regarding the name "Iran." Rather, ccTLDs are assets. Those assets are expressed as a name, but they consist of a right to control, a right to exclude, and a right to exploit for beneficial enjoyment, among other rights.

VII. The Assertion that the ccTLDs are Held in Trust is Frivolous

Relying only on its own conjecture, non-binding policy documents, and its observation that ICANN has imposed restrictions on the use and alienation of ccTLDs, the Government asserts that ccTLDs are held by ICANN or, alternatively, by ccTLD managers (*compare* (Gov't Br. 11, 15, 18) (manager as trustee) *with* (Gov't Br. 14, 17, 19) (ICANN as trustee))[17] in trust to the benefit of the entire human race. (Gov't Br. 14-17). The Government's position has utterly no basis in law. If it is true that there are legal[18] restrictions on the alienation of ccTLDs, that

[16] The Government nonetheless asserts, without explanation, that ccTLDs ought to be treated differently than second level domain names. (Gov't Br. 12). But, as Appellants explained, without refutation by the Government, ccTLDs are *more* likely to constitute property than other domain names. (Opening Br. 33-36); (Reply Br. 28-29).

[17] It is telling that the Government cannot get straight whether it believes that the trustee is ICANN or the ccTLD managers. Its confusion is unsurprising: The Government relies on no evidence to assert a new untested and undeveloped improbable argument.

[18] That ICANN unilaterally asserts such restrictions does not mean that it has legal

does not render the ccTLDs non-property or non-attachable. Real property is often subject to similar restrictions, such as those imposed by homeowner's associations and co-ops. Such restricted property is attached all the time and without controversy.

VIII. The Government's Contentions Regarding Rule 69 are Meritless

1. The Government asserts that because the Internet assets are held in trust, Appellants cannot attach them under D.C. law, which, the Government asserts, forbids attachment of trust property where the trustee is the judgment debtor. (Gov't Br. 18-19). That argument is so poorly developed, it hardly warrants response. To make the argument viable, the Government would first have to establish that the trustees here are the judgment debtors. It does not do so; indeed, the Government is unsure whether ICANN—as opposed to the judgment debtors—is the trustee. *See supra*. If indeed ICANN is the trustee and the entire human race is the beneficiary, who is the owner? And what role is played by the sovereign judgment debtors? If the judgment debtors are the owners, it is obvious that their property is attachable, any hypothetical trust relationship notwithstanding.

Further, the Government's position creates more questions than it resolves: What legal instrument made the judgment debtors trustees over these assets? What are their obligations as trustees? Do they have any other rights or interests aside from

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authority to impose them or that any person or sovereign state is bound to abide by them.

being trustees? The answers to those questions are essential.

2. The Government additionally asserts that because ICANN did not actually claim control over the judgment debtors' IP addresses before Appellants served their writs of attachment, Rule 69 does not permit attachment of the IP addresses. (Gov't Br. 20). The Government is essentially arguing that *D.C. law* does not permit attachment on these facts.[19] But for that proposition, it cites to only one inapposite case. *See id.* The Government correctly states that *Consumers United Ins. v. Smith*, 644 A.2d 1328, 1355-56 (D.C. 1994), requires, as a condition on attachment, that a garnishee be in possession of the attached assets at the time of service of the writ. But the Government ignores the facts of that case.

Consumers United pertained to monetary deposits in a bank account. The judgment debtor argued that assets deposited in the account after service of the writ of attachment were nonetheless attached. The D.C. Court of Appeals held, unremarkably and consistent with volumes of cases covering the attachment of bank accounts, that the writ of attachment operated only on those assets credited to the account by the date of service. *Id.* at 1354-56. *Consumers United* did *not* hold that assets not in the physical possession of the garnishee are never subject to attachment.

[19] Presumably, the oddity of the U.S. Government arguing the terms of D.C. attachment law, while simultaneously arguing against certification to the D.C. Court of Appeals (Gov't Br. 20), was not lost on the Government. Perhaps that is why it opted to couch its argument as one about Rule 69.

To the contrary, it wrote: "[T]he writ of garnishment will reach sums which the garnishee unconditionally owes to the debtor at the time the writ is served but which the garnishee *has not yet posted* to the debtor's account." *Id.* at 1356 n.34 (emphasis added). Further, *Consumers United* says nothing at all about intangible assets.

The attached IP addresses are intangible assets that ICANN controls. That ICANN did not make a formal demand for those assets before the writ of attachment was served does not render those assets less under ICANN's control. And demand for those assets would have changed nothing—physical possession of intangible assets is impossible. They are attachable under D.C. law and, accordingly, Rule 69.

IX. The Government Ignores Background Principles of Property Law

The Government argues that the root zone belongs to no one. (Gov't Br. 1). Its argument is perplexing. It is undisputed that the U.S., through contracts and funding, developed the internet for governmental use. It is further undisputed that the U.S. never formally transferred those assets to anyone or otherwise rendered them ownerless. The Government's position, therefore, must be that the Internet's root zone was *never* owned by the U.S., despite the U.S.'s considerable investments in its development.

The Government is rewriting property law. The U.S. developed the Internet at great expense, is responsible for materially all of the intellectual property that went into its development and was responsible materially all of the physical property

necessary to support the Internet in its infancy. The clear presumption is therefore that the U.S. owned (and still owns) the root zone. But, without citation to authority or even reasonable analogy, the Government asserts otherwise. It is able to point to no other intangible asset that was developed through considerable investment but remains unowned by its creator or investor.

It makes no intuitive sense to say that the root zone is owned by *no one*. To paraphrase this Court, "if [ICANN and the Government] do[] not own that property, then someone else must." *Heiser*, 735 F.3d at 939. That is the nature of all property: It is owned and controlled by someone or something. The Government has yet to identify the mystery owner.

Even if ccTLDs are somehow different from other forms of property in a manner not yet explained, that does not necessarily mean that they are not own-able or the subject of *any* property interest. Iran, North Korea, and Syria have a property interest in their ccTLDs. That interest in property, however it may ultimately be defined, is attachable under D.C. law and it is what Appellants seek.

CONCLUSION

For the reasons set forth herein and in Appellants' opening and reply briefs, the order of the court below should be vacated and this case remanded with instructions to conduct discovery.

Dated: Baltimore, Maryland
January 13, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with this Court's order of November 23, 2015. It does not exceed 20 pages, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated: Baltimore, Maryland
January 13, 2016

/s/ Meir Katz
Meir Katz