

# THE COALITION FOR ONLINE TRADEMARK PROTECTION

---

May 14, 2009

The Honorable Gary Locke  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

Dear Secretary Locke,

On behalf of The Coalition for Online Trademark Protection (COTP),<sup>1</sup> the undersigned organizations ask your support to ensure the continued involvement of the Department of Commerce in governance of the Internet. The stability and security of the Internet is an issue of critical concern to the vast number of U.S. companies that do business online.

The Department of Commerce's National Telecommunications and Information Administration (NTIA) is ICANN's principal supervisory body. One of NTIA's chief roles has been to hold the Internet Corporation for Assigned Names and Numbers (ICANN) accountable for its actions through a series of benchmarks and reviews. Unfortunately, ICANN is preparing to conclude its longstanding Memorandum of Understanding with the Commerce Department in September 2009. Absent a continuing relationship with NTIA, it is unclear whether ICANN's evolution into a responsible organization will continue.

As representatives of businesses that depend on a stable and secure Internet, we have serious concerns about the impact of this change on the accountability, transparency and stability of one of the Internet's key management bodies. We urge you to reexamine ICANN's planned "transition" and determine what steps the Commerce Department can take to ensure that those plans do not undermine the stable and effective oversight of the Internet's addressing system.

## **The U.S. Government's Role as a Steward of the Internet**

Since the advent of the Internet's Domain Name System (DNS) the U.S. government has played a critical role in the oversight and management of the DNS. The Commerce Department oversaw the transition of day-to-day DNS management to ICANN, a then-experimental private-sector-led body. Throughout ICANN's evolution, Commerce has provided critical guidance and a secure backstop for ICANN, prodding ICANN to be more accountable to its stakeholders, improve transparency and strengthen security. In our view, that partnership has been highly successful, and indeed critical to building ICANN's global credibility.

---

<sup>1</sup> The Coalition for Online Trademark Protection is an ad hoc group of corporations, trade associations and business groups representing thousands of multinational companies and millions of employees and Internet users. The Coalition was formed in 2008 to protect consumers and businesses from online threats such as online fraud and the sale of unsafe counterfeit products. For more information, please contact Marc-Anthony Signorino at (202) 637-3072 or via email at MSignorino@nam.org.

At this point, ICANN asserts that the work of the Commerce Department in this area is now completed. Based on comments submitted to the NTIA's 2008 midterm review of the ICANN Joint Project Agreement (JPA), a broad cross-section of ICANN stakeholders do not agree that the JPA should end and feel that the organization has not completed the steps necessary to safely terminate its MOU/JPA with Commerce.

### **Industry's Concerns for the Future of ICANN and the Internet**

For the business community, the chief concerns with ICANN continue to center on accountability, representation and redress. One of the Commerce Department's chief roles in the ICANN process has been to hold the organization accountable for its actions through a series of benchmarks and reviews. This mechanism has assured a baseline level of accountability by an organization with the authority to make decisions that drastically impact businesses around the world. ICANN has proposed no real mechanism to replace that role if the JPA ends in September 2009.

All but one of the accountability mechanisms offered by ICANN in its "Improving Institutional Confidence" documents require approval only by the ICANN board, leaving ICANN accountable only to itself. The only other mechanism available is the ability of the ICANN community to vote to fire the entire ICANN board, a nuclear option potentially leading to highly unpredictable results and one that should only be used in extreme circumstances. While the business community, through public comments to ICANN and the Commerce Department members of the business community, has repeatedly asked ICANN to offer additional accountability mechanisms, ICANN has not offered any alternatives. At a minimum, we would like to see movement on this front before ICANN is allowed to abandon its relationship with the U.S. government.

Under the broad rubric of accountability, representation and redress are of particular concern to the business community. The ongoing effort to restructure one of ICANN's key constituency groups – the Generic Names Supporting Organization (GNSO) – could significantly dilute the voting power of industry. Under current proposals, the Business Constituency within ICANN would be significantly reduced in its power to shape policy.

To support this change, ICANN has noted in multiple forums that the business community represents only "one stakeholder" within the ICANN process, an assertion that highlights our concern. The "one stakeholder" represents three distinct groups: the intellectual property constituency, Internet service providers and the broad global business community. Together, the membership of this "one stakeholder" has invested more money in Internet development and stands to lose exponentially more as a result of adverse ICANN decision-making than all other stakeholders combined.

On the issue of redress, for parties that hold no contracts with ICANN -- including most of the members of the business community – there is no reliable mechanism to challenge adverse ICANN decisions. As mentioned above, all serious redress mechanisms within ICANN are routed directly back to the ICANN board. These are decisions that have the

potential to cost the business community billions of dollars, and once they are made, there is simply no equivalent of a court of higher appeal to which businesses can turn.

### **The New gTLD Program: A Case Study**

ICANN's current effort to create thousands of new Internet domains is the most recent example of this phenomenon. The business community has, from the outset of the policy development process, expressed strong concern that creating a potentially unlimited number of new Internet domains could translate into a crushing financial burden for companies that would be forced to defensively register their own marks and pursue cyber-pirates in each of those new addressing codes. When ICANN decided to press forward, regardless of those issues, global industry was left with no option but to fall in line and prepare for the worst.<sup>2</sup>

While we understand why ICANN might see certain benefits from the introduction of a new gTLD program, we take issue with how the project was undertaken. For instance, when they were charged by ICANN's board of directors to undertake an independent empirical study to see if there was a need for competition in the DNS, ICANN staff forewent the study, assumed the need for new gTLDs and instituted the new top-level domain rollout. Only when stakeholders complained to Congress and the Administration did ICANN staff hire an economist to produce a short report, which unsurprisingly concluded that ICANN should rollout new gTLDs.

We fear that by rushing into the gTLD rollout without due diligence, and ignoring industry warnings ICANN staff is putting the stability and security of the Internet at risk. Specifically, experts in cybercrime and online fraud prevention agree that the gTLD program as currently modeled will cause a rise in online abuses, directly harming consumers. Likewise, the costs to industry will be exorbitant due to the need for defensive registrations across all the new gTLDs, as well as the potential costs of intellectual property rights protection against widespread infringement. There is further risk to the Internet's stability and security posed by so many simultaneous changes to the root zone, such as adding new gTLDs as well as internationalized domain names for gTLDs and country code TLDs. These examples highlight ICANN's organizational immaturity and the need for continued U.S. government involvement.

### **Summary**

In 1998, ICANN was a bold experiment, and in many ways the experiment continues. Managing this critical component of Internet infrastructure through a bottom-up, private-sector-led process is, and should remain, the goal for all involved with the process. Although ICANN is imperfect, it has succeeded in several key areas, and remains an important force in the space. At the same time, there are key areas where ICANN must evolve, and absent a continuing relationship with the Commerce Department, it is unclear whether that evolution will continue.

---

<sup>2</sup> It should be noted that in response to overwhelming concern voiced by the business community, ICANN created the Implementation Review Team to propose an intellectual property protection plan.

We understand that there is significant pressure coming from ICANN itself and from some within the international community for ICANN to "take the next step" in its development by severing its traditional relationship with the U.S. government. However, the U.S. government has a responsibility – as expressed in NTIA's 2005 Statement of Principles on the Internet's Domain Name and Addressing System – to uphold the stability of Internet. In the case of ICANN, this means continuing the invaluable process of guiding ICANN toward its final destination as a sustainable, credible and accountable entity in charge of managing a critical global resource.

We respectfully urge you to examine the status of the MOU/JPA to determine what the Commerce Department can do to stabilize and protect this critical resource.

Sincerely,

American Advertising Federation  
American Apparel & Footwear Association  
American Intellectual Property Law Association  
Consumer Electronics Association  
Intellectual Property Owners Association (IPO)  
Internet Commerce Coalition  
National Association of Manufacturers  
National Marine Manufacturers Association  
National Retail Federation  
NetChoice  
U.S. Chamber of Commerce