



June 8, 2009

Via Electronic Mail (dnstransition@ntia.doc.gov)

Ms. Fiona M. Alexander
Associate Administrator
Office of International Affairs
National Telecommunications and Information Administration
United States Department of Commerce
1401 Constitution Avenue, N.W.
Room 4701
Washington, D.C. 20230

Re: Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Address System

Dear Ms. Alexander:

The purpose of this letter is to provide the remarks of the International Trademark Association (INTA) in response to the April 20, 2009 request for comment on the "Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Address System." As you may be aware INTA (<http://www.inta.org>) is a not-for-profit membership association based in New York City that is comprised of approximately 5,500 brand owners and professional firms from more than 190 countries who are dedicated to the support and advancement of trademarks and related intellectual property as elements of fair and effective national and international commerce. INTA has long served as a leading voice for trademark owners on the future of the Internet DNS, and we are also a founding member of the Intellectual Property Constituency (IPC) of ICANN.

Executive Summary

INTA has supported the goal of a transition to private-sector management of the Internet DNS and understands the current concerns with having ICANN tethered to a single national government. However, the overriding issue is ensuring the continued stability and security of the Internet for the benefit of the public—businesses, consumers, and other individuals who rely on the Internet. It is INTA's position that, at this point, ICANN can not be held fully accountable to the public without governmental oversight, and, more importantly for present purposes, there is insufficient time to develop a new and viable oversight model to replace the Joint Project Agreement ("JPA") prior to its current expiration date. Accordingly, and in light of the NTIA's more than ten-year history of successful partnership with ICANN, the NTIA must maintain its present

oversight through the JPA until new accountability mechanisms for ICANN can be designed and NTIA's responsibilities effectively and seamlessly transferred.

The extension of the JPA is particularly important given the potential for instability posed by such current ICANN initiatives as its planned roll-out of new gTLDs and the potential reconstitution of the Generic Names Supporting Organization (GNSO). For the NTIA to sever its relationship with ICANN now would pose too great a risk to the interest of all stakeholders, including the U.S. government, in ensuring the stable and secure development of Internet commerce and communication.

During an extension of the JPA, the NTIA and ICANN can continue working on the issues, discussed more fully in INTA's responses to the questions posed in the request for comment, that remain unresolved or unaddressed following the most recent mid-term review, including:

Representation – Substantial work remains for ICANN to develop an organizational governance structure that provides for the adequate representation of commercial Internet users, including trademark owners, within ICANN's governance. Representation is a critical issue to the question of whether ICANN is competent as a private-sector regulatory body of the DNS. ICANN's latest plan to reserve half of the representation on its GNSO Council to the registrars and registries it oversees is as fundamentally flawed as if half of the seats on the FCC or half of the rulemaking leadership of the FDA were reserved for the industries those agencies regulate.

Contract Compliance – Contract enforcement is central to ICANN's competence as an Internet governance body, and, while some limited progress has been made, ICANN has repeatedly demonstrated inadequate enforcement of even its most fundamental and longest-standing contractual policies. ICANN's lack of commitment and resources with respect to contractual enforcement has directly led to conduct that translates into DNS instability, e.g., lax compliance by registrars with respect to their obligations under the RAA, tolerance of inaccurate Whois information, and a lack of uniformity and cooperation with respect to proxy registrations.

TLD Management - ICANN's proposed New gTLD program is seriously deficient in many regards and raises serious consumer protection and public safety concerns. ICANN's New gTLD program contemplates the introduction of a potentially unlimited number new gTLDs and presents an array of complicated and important challenges and obstacles that ICANN has not sufficiently addressed with any specificity or certainty.

Accountability – While the IANA services contract maintained by ICANN is a critical technical Internet infrastructure management agreement, the contract does not provide the community with sufficient accountability over ICANN's governance, especially in light of the range of technical and policy matters under ICANN's purview,

and the limited efficacy that would result from re-assuming the IANA function if NTIA became dissatisfied with ICANN's progress. Neither ICANN's proposals for new accountability mechanisms, nor the fact that it is headquartered in the United States, are sufficient for providing the community with real oversight and accountability over ICANN's decisions. INTA encourages the NTIA and ICANN to work in conjunction in extending the Joint Project Agreement in order to explore whether sustainable accountability mechanisms can be developed that are acceptable to all stakeholders.

Question 1

The DNS White Paper articulated four principles (i.e., stability; competition; private, bottom-up coordination; and representation) necessary for guiding the transition to private sector management of the DNS. Are these still the appropriate principles? If so, have these core principles been effectively integrated into ICANN's existing processes and structures?

Response 1

INTA continues to believe that these four principles are appropriate for the oversight of ICANN. While ICANN has made progress in establishing a basic infrastructure to meet these four principles and has shown flexibility in reacting to and responding to challenges in this cyber universe, there are still significant gaps in the application of these principles to ICANN's actions. Accordingly, INTA recommends the extension of the Joint Project Agreement until these issues can be explored and adequately addressed.

Stability

As noted in INTA's previous comments,¹ the principle of "stability" as originally set forth in the DNS White Paper encompassed significantly more than the narrow, self-defined mission of "coordinating the management of the technical elements of the DNS".² The White Paper's frequent reference to matters other than Internet protocols and root servers included the protection of trademarks in the Internet DNS,³ strongly suggested that stability was never contemplated to be merely technical efficiency, and also included the user's ability to reach his/her intended destination in cyberspace. As INTA has previously stated:

"From a purely technical perspective it may be the root servers and protocols that make the Internet work, but it is brand awareness -- the familiarity of a 'name' by the average 'Netcitizen' -- that has made the Internet a part of so many lives and the indispensable tool that it is today."⁴

The Internet plays a vital, role today in culture, commerce, and everyday communication, and ICANN is intended to be the single, self-regulating arbiter of Internet navigation. Given this, ICANN cannot claim, on the one hand, the right to make decisions that affect the user's ability to navigate the Internet, while, on the other hand, claim that there is no benchmark principle for evaluating ICANN's performance of that function.

In evaluating how successfully ICANN has tended to the "stability" of the Internet, it is appropriate to assess: (1) how well ICANN has coordinated the management of the technical elements of the DNS; and (2) how well ICANN has anticipated and accounted for the implications to Internet users of the implementation of those technical decisions. ICANN must commit adequate resources and its will to the monitoring and enforcement of the contractual obligations of its registrars and registries, as well as other threats to the stability of the Internet such as phishing, pharming and the lack of a global standard for proxy registrations and the release of WHOIS data.

The Internet cannot be a safe, stable and secure place if it is beyond the realm of law. The basic role for ICANN or any governing entity includes setting the "rules of the

¹ INTA's Letter Comments to DNS Transition, July 5, 2006("INTA 2006 Letter"); INTA's Letter Comments to JPA Mid-Term Review, February 12, 2008 ("INTA 2008 Letter").

² ICANN website at <http://www.icann.org/tr/english.html>

³ 71 Fed. Reg. 31,746-7 (May 26, 2006).

⁴ Testimony of Anne Chasser, President of the International Trademark Association, Before the U.S. House of Representatives Subcommittee on Courts & Intellectual Property, at http://www.inta.org/index.php?option=com_content&task=view&id=620&Itemid=152&getcontent=3, July 28, 1999.

road” and enforcing those rules. If ICANN is to be a fully, independent, self-governing entity, it must be willing to set *and* enforce those rules. As a private actor, ICANN can only govern by strong leadership, robust membership agreements/contracts and enforcement of those agreements and contracts. To date, ICANN still only employs five individuals devoted to contract enforcement and monitoring,⁵ and ICANN has terminated only four registrars in the past year for non-compliance with contractual obligations.⁶ Despite the Updated Contractual Compliance Program: Philosophy, Vision and 2008 Operating Plan,⁷ ICANN has not significantly increased its compliance efforts. ICANN needs to set a proactive agenda for monitoring and enforcement by, among other things, establishing a set of escalating penalties for: (i) non-compliance with contractual agreements; (ii) inaccurate Whois data; (iii) vicarious responsibility by registrars for reseller non-compliance with Register Accreditation Agreements (“RAA”); (iv) registry and registrar non-cooperation with UDRP proceedings; and (v) proxy registration and release of Whois data.

Stability of the Internet is also significantly affected every time a new gTLD is introduced. While this has been a relatively controlled process in the past, the launching of more new gTLDs at an ever increasing pace has an inherently destabilizing effect on the Internet. While this destabilizing effect can be relatively temporary for any single gTLD, the duration of the instability is increased by the rate at which such new gTLDs are released and the preparation of the marketplace for the new gTLDs. ICANN still has not finalized its new gTLD policy, but its current plan contemplates an ever-increasing rate of new gTLD releases with less and less marketplace preparation required through mandatory pre-launch mechanisms. These same concerns apply with even greater negative consequences to the introduction of internationalized domain names (IDNs).

Independently, ICANN’s untried Domain Failover Policy may be severely tested in the coming months by the unprecedented global financial crisis. The Domain Failover Policy was created in direct response to the RegisterFly registrar failure. To date this policy is untested. Given the current worldwide economic crisis and the increased risk of business failures, registrar failures should also be anticipated in the coming months. Apart from other concerns, it is critical that the NTIA’s relationship with ICANN not be terminated prior to adequate testing of the Domain Failover Policy.

Competition

ICANN appears to hold the simplistic belief that more actors (registrars and registries) and more resources (gTLDs) inherently increase competition, and that competition is always beneficial to consumers. Unfortunately, increasing competition in this complex economic model is not so simple. For example, ICANN’s proposal to relax the current vertical separation requirements between registrars and registries will not

⁵ ICANN website at <http://www.icann.org/en/compliance/staffing-plan.html>.

⁶ ICANN website at <http://www.icann.org/en/compliance/>.

⁷ See id.

enhance competition but, indeed, will inhibit competition. Since many registrars own vast portfolios of domain name registrations, granting registrars preferential access to domain names in certain registries will deny equal access and inhibit competition. Equal access and vertical separation prevent particular registrants from having preferred access to domains in particular registries. Preventing this privileged access is a compelling reason to maintain vertical separation, especially since ICANN has not developed a consensus policy limiting registrar warehousing of domain names as envisioned since the RAA was drafted.⁸ The current regime already suffers from the problem wherein registrars are encouraged to passively register domain names incorporating well-known trademarks and populate the holding pages on those sites with pay-per-click advertisements or other practices that generate revenue for the registrar. Relaxing the current vertical separation between registries and registrars does not appear to do anything towards ameliorating this problem and likely exacerbates it.

Likewise, the generation of additional gTLDs does not *de facto* increase competition. In 2006, ICANN originally directed its staff to undertake an economic study to determine the competitive effects of increasing the number of gTLDs.⁹ The study was never undertaken, and in 2008 the Department of Justice raised concerns regarding the final balance of consumer benefit and harm in creating additional gTLDs and regarding ICANN's ability to constrain new registry operators from exercising market power.¹⁰ The Department of Commerce has called for ICANN to commission an economic study to test whether the addition of new gTLDs fosters competition in a manner that benefits consumers and whether the increase in gTLDs would have any detrimental effects on consumers.¹¹ Although ICANN received preliminary reports on these issues by Dennis Carlton,¹² the Intellectual Property Constituency (IPC) has expressed its views that these reports are not what the ICANN Board called for – an independent empirical study of the domain name registration market -- and are, at best, very preliminary and, at worst, seriously flawed and more appropriately viewed as advocacy than analysis.¹³ A review of the Carlton Reports by Michael Kende of Analysys Mason references data that indicates that instead of creating valuable new domain space, new gTLDs have not operated to constrain prices below ICANN-set price caps and have engendered significant costs in terms of trademark protection.¹⁴ To date

⁸ ICANN Registrar Accreditation Agreement, section 3.7.9.

⁹ Noted in Meredith Baker, Dept. of Commerce Letter to Peter Dengate-Thrush, dated December 18, 2008, http://www.ntia.doc.gov/comments/2008/icann_081218.pdf.

¹⁰ Deborah A. Garza, Dept. of Justice, Letter to Meredith A. Baker, regarding ICANN's Draft RFP for New gTLDs, dated December 3, 2008, http://www.ntia.doc.gov/comments/2008/icann_081218.pdf.

¹¹ Meredith Baker, Dept. of Commerce Letter to Peter Dengate-Thrush, dated December 18, 2008.

¹² Preliminary Report of Denis Carlton Regarding Impact of New gTLDs on Consumer Welfare, <http://www.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>, and Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, <http://www.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>, both released March 4, 2009 (Carlton Reports”).

¹³ <http://forum.icann.org/lists/competition-pricing-prelim/msg00021.html>, p. 20.

¹⁴ See *id.*

ICANN has not commissioned the robust economic study called for by the Department of Commerce. Moreover, to attempt to finalize a policy for the creation of new gTLDs without understanding the beneficial and harmful effects of such actions on consumers and on competition is ill-advised.

Although the number of registrars has increased since 2006, it is not clear that increasing the number of registrars alone will increase competition. Currently, approximately 800 registrars are accredited by ICANN.¹⁵ However, it is impossible to easily determine whether there are truly 800 separate registrars or whether many of the registrars are related entities. Likewise, it is impossible to assess the geographic diversity of representation even among the registrar constituencies because no transparency in the ownership of registrars is required by ICANN.

Private, Bottom-Up Coordination

ICANN has made minimal gains in engaging with the private sector, and still has considerable disincentives for private sector participation, regardless of whether that participation is through public comment, attendance at meetings or attempted participation in working groups. Without meaningful review and action on public comments, there is no incentive for private sector participation through the comment process. The Policy Development Process (“PDP”) for the GNSO Council, as set forth in ICANN’s bylaws, does not require Council members to review public comments submitted in connection with the PDP. Instead, the Bylaws mandate that a Staff Manager review and summarize public comments. The substance and timing of such summaries, particularly in the context of the timing of the comment periods, demonstrate the absence of meaningful consideration and the opportunity to do so. Yet, it would make no difference if the GNSO did read and consider the public comments submitted since ICANN has no process or procedure for evaluating public comments and incorporating them into policy recommendations. To be consistent with the principle of private, bottom-up coordination, ICANN must create a process for encouraging, reviewing, considering and incorporating public comments into ICANN policies.

Independently, it is still difficult to locate information from the pages of the Supporting Organizations (“SO”) and Advisory Committees (“AC”). Very few members of the private sector are willing to devote the time and energy to negotiating the labyrinthine SO and AC web sites. In addition to enacting a process for encouraging, reviewing, considering and incorporating public comments into ICANN policies, ICANN must also act affirmatively to ensure that private stakeholders who do not participate daily in ICANN activities are aware of public comment periods and topics, and the supporting information necessary to prepare such comments. If stakeholders are unaware of the opportunity to participate, and/or lack the tools and information to make pertinent comments, the value of the public comment process is nullified. Therefore, ICANN should take steps to ensure that the community is aware of important initiatives under

¹⁵ ICANN web site at <http://www.icann.org/en/registrars/accredited-list.html>.

consideration by publishing formal notices in a variety of sources, both online and offline.

ICANN must also make greater efforts to make attendance practical for private attendees. Ironically, given ICANN's function, web based participation at meetings is not available. Location, cost, scheduling and planning of ICANN meetings also act as disincentives for private sector participation. While ICANN has recently made attendance more practical by selecting locations that are transportation hubs, there must be sufficient notice for such meetings, more than the six months notice ICANN provides. Considering that these meetings take place literally all over the world and travel time is significant, sufficient time must be allocated to allow private stakeholders to plan attendance. The further ahead private sector participants can plan and prepare for a meeting, the more likely they are to attend and provide meaningful input.

Finally, an independent barrier to private sector participation is the glacial pace and unwarranted complexity of the policy development process. These pervasive negative characteristics deter current private stakeholder participants from initiating new policy initiatives and deter participation by new private stakeholders.

Representation

INTA has long stated that ICANN must develop an organizational structure that reflects the appropriate representation of trademark owners and commercial users in its affairs, and that adequate stakeholder representation must be achieved before the privatization of the management of the Internet DNS can occur.

If the Internet is to serve the needs of international commerce, the intellectual property community must have proper representation in ICANN. Otherwise, ICANN policy development and decision-making may not fully understand or appreciate the importance and relevance of intellectual property issues to businesses, consumers and Internet users across the globe.

Over the course of ICANN's history there has been an erosion of the business community's representation within ICANN. Far from making progress on this critical issue, INTA believes that ICANN has moved in the wrong direction in regards to fulfilling its JPA responsibilities regarding representation. INTA believes that these JPA obligations must be met before DNS management can be fully transitioned to the private sector.

On multiple occasions, through internal organizational reviews led by its Board of Directors, ICANN has reduced the business community's representation within its governance model. Several years ago, an "equalized voting" system was created to institutionalize weighted-voting for gTLD registries and registrars. Since then, weighted-voting has been used in all GNSO matters, including in elections for Board of Director

seats, and in the policy development process (PDP) for New gTLDs, over the concerns of the business community.

Weighted-voting has reduced the representation of trademark owners and commercial users in ICANN policy development, and as a result, policies, such as the new gTLD program, have been approved that lack the proper consideration of trademark and intellectual property issues. Institutionalized weighted-voting has also had the effect of reducing participation within ICANN in general as a result of the perception that business and consumer protection concerns often are not listened to.

While the private-sector business community has long requested the elimination of weighted-voting with ICANN, its proposals to do so have been disregarded. For example, the ICANN Board of Directors recently rejected a compromise proposal that would have eliminated weighted voting within the organizational structure. ICANN is now in the process of implementing a reconstituted GNSO structure that maintains the imbalances of the “equalized voting” system, with additional restructuring that further marginalizes private-sector business representation within ICANN.

Unfortunately, a new GNSO structure that preserves the predominant voice for contracted parties and dilutes the voice of commercial Internet users is contrary to improvement in the multi-stakeholder model and the improved participation of all stakeholders. A multi-stakeholder model is most likely to succeed in an environment where all stakeholders have an incentive to participate and all stakeholders have an equal voice. The current and future enhanced voice for registrars and registries is a disincentive for the participation of other stakeholder groups. This creates the undesirable result of effectively having the registrars and registries constituencies being self-regulating without meaningful influence by any other stakeholder. Favoring the very contracted parties ICANN regulates over the commercial and individual users of the Internet within the GNSO is in direct contravention of the principle of bottom-up coordination since it mutes the participation of the end users of the Internet, and subverts the very principle of representation.

As the NTIA’s DNS Project continues, INTA looks forward to the development of structures and meaningful mechanisms that enable the full representation of the private-sector business community in DNS management issues.

Question 2

The goal of the JPA process has been to transition the coordination of DNS responsibilities, previously performed by the U.S. Government or on behalf of the U.S. Government, to the private sector so as to enable industry leadership and bottom-up policy making. Is this still the most appropriate model to increase competition and facilitate international participation in the coordination and management of the DNS, bearing in mind the need to maintain the security and stability of the DNS? If yes, are

the processes and structures currently in place at ICANN sufficient to enable industry leadership and bottom-up policy making? If not, what is the most appropriate model, keeping in mind the need to ensure the stability and security of the Internet DNS?

Response 2

To examine whether private sector oversight remains the most appropriate model to increase competition and facilitate international participation in the coordination and management of the DNS, it is crucial first to examine whether ICANN is on a path to being a functional body for regulating the Internet DNS, which has become a fundamental platform for worldwide commerce and communication.

Three structural issues cast doubt on ICANN's ability to manage the DNS for the public benefit if the JPA expires and ICANN is no longer directly accountable to any higher authority. First, seemingly in answer to calls in the JPA and during the JPA mid-term review, ICANN is poised to move from a system that provided weighted voting to the registries and registrars ICANN is supposed to regulate, to one that continues to provide those same entities half of the voting power in the GNSO while reducing the voice of commercial users of the Internet and still failing to ensure a viable consumer protection voice in the GNSO Council. Second, as a private entity regulating the DNS solely through contractual obligations with registries and registrars (and contractual provisions required of domain registrants), ICANN has only recently increased its contract enforcement activities from "non-existent" to "not-yet-adequate". Third, ICANN is unable to make changes to the RAA immediately effective upon all registrars (with amendments instead applying to each registrar as its accreditation is up for renewal). These issues leave ICANN unable to enact necessary regulation, unable to enforce basic protections already in place, and unable to provide a predictable legal environment where the rules and consumer protections apply to all participants equally.

Given ICANN's lack of progress on these fundamental governance issues, INTA has begun to question whether a self-regulatory model can provide critical institutional accountability and consumer protection. ICANN has provided laudable leadership with respect to certain technical matters, but there are many management and policy issues, such as the stakeholder representation in the GNSO and the introduction of new gTLDs, that ICANN has not shown that it is capable of adequately addressing. As noted above, in INTA's view, Internet security and stability is not merely limited to the Internet's technical operation.

Further underscoring INTA's concerns that a self-regulatory model may never work in as dynamic environment as the Internet DNS, ICANN has repeatedly demonstrated inadequate enforcement of even its most fundamental and longest-standing policies. The maintenance of accurate Whois data has been required by every version of RAA, but after nearly ten years, ICANN is still grappling with how to address the systemic issue of incomplete or inaccurate Whois data. The collapse of RegisterFly is

also illustrative of ICANN's fundamental shortcomings. Only after this collapse did ICANN begin to work on enforcing the data escrow provisions of the RAA and yet, even several years after the RegisterFly debacle, registrar compliance with their data escrow obligations still remains very inconsistent.

One of the objectives of the JPA was to encourage bottom-up participation in policy making. Yet, as more fully as discussed in response to Question 1 above, rather than increasing participation in policy making by consumers and business users, ICANN has done the contrary. It has shifted policy making away from the parties affected and has concentrated policy making in the hands of the contracted parties that have the largest financial interest and who provide ICANN with substantially all of its funding. The reconstitution of the GNSO will only exacerbate this issue, and INTA remains very concerned about the impact that this will have on the rights of consumers and brand owners.

If leaving ICANN free of public oversight is untenable, the strongest argument for extension of the JPA with NTIA is that only the most rudimentary consideration has been given, by any party, to the most appropriate model for ICANN oversight to ensure the confidence in the stability and security of the Internet DNS. An interim extension of the JPA is necessary for all stakeholders—government, the commercial sector, and individuals—to develop and implement a permanent accountability mechanism to replace the oversight that has historically been provided by NTIA.

Question 3

The original agreement and the first six amendments to the JPA contained a series of core tasks, and in some cases, date-specific milestones. Have these tasks been accomplished and have these milestones been met? If not, what remains and what steps should be taken to successfully address them?

Response 3

ICANN has not meaningfully embraced the reality that there are significant policy issues that go beyond the technical operation of the Internet and that have a significant effect on the Internet's value as a tool for global communication and commerce. In February 2008, INTA submitted comments during the midterm review that identified a number of non-technical areas in which the goals of the JPA had not yet been met.¹⁶ Since that time, ICANN has published its 2008 Annual Report, which under the terms of the JPA should have explicitly described ICANN's progress in regard to its responsibilities under the JPA. We regret that the Annual Report did not provide a

¹⁶ See Letter from Rhonda A. Steele to Suzanne Sene, February 12, 2008, available at http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_079.pdf, ("INTA Midterm Comments").

specific update to complement ICANN's January 2008 submissions during the midterm review.

As will be further discussed in response to Question 4 below, considerable work remains necessary with respect to many of the core task areas identified in the annex to the JPA, including security and stability, accountability, top-level domain management, and the multi-stakeholder model. Although ICANN stated in its submission to the NTIA during the midterm review that it strives to develop additional mechanisms for involvement by those affected by ICANN policies, the weighted voting afforded the registrar and registry contracted parties within the GNSO, and the current move to further shift the balance of control toward those parties, is directly contrary to ICANN's statements made during the midterm review. Likewise, the JPA, as amended, specifically requires ICANN to "devote adequate resources to contract enforcement." As noted in response to prior questions, we recognize that ICANN has indicated a desire to improve contract compliance. However, despite the efforts of ICANN's five-member compliance staff, registrars continually and habitually fail to comply with even the most basic tenets of the RAA, especially with regard to proxy services and access to Whois data. In short, ICANN's failure to achieve these basic functions of any "governing" body—ensuring that rulemaking is not co-opted by the regulated industry and that rules, once set, are enforced—calls into question whether ICANN can ever attain many of the milestones that have been set for it.

Question 4

In 2006, the focus on specific milestones was adjusted to a series of broad commitments endorsed by the ICANN Board as an annex to the JPA. Specifically, ICANN committed to take action on the responsibilities set out in the Affirmation of Responsibilities established in ICANN Board Resolution 06.71, dated September 25, 2006. Those responsibilities included activities in the following categories: security and stability, transparency, accountability, root server security and relationships, TLD management, multi-stakeholder model, role of governments, IP addressing, corporate responsibility, and corporate administrative structure. What steps has ICANN taken to meet each of these responsibilities? Have these steps been successful? If not, what more could be done to meet the needs of the community served in these areas?

Response 4

Security and Stability

As noted in response to several of the questions above, it has long been INTA's position that the "security and stability" of the Internet refers to more than ICANN's commitment to coordinating the technical protocols related to DNS and root servers. The critical role of the Internet in commercial enterprise, academia and everyday communications makes it clear that protection of users of the Internet, including the

efforts of trademark owners to protect their brands from misuse and fraud, is inextricably tied to ICANN's responsibilities in this area. Accordingly, INTA believes that ICANN's responsibility to coordinate the technical elements of the DNS also requires ICANN to take a proactive approach to instituting decisive policies and processes to protect Internet users from the results of ICANN's technical decisions.

INTA believes that ICANN must develop polices to address the widespread abuse of the domain name system, like phishing, pharming, and the proliferation of malware that harms Internet users. The unresolved concerns surrounding cybersquatting and the inaccuracy of Whois data and the role of proxy services in preventing the accessibility to crucial information needed to protect Internet users further supports our conclusion that ICANN is not ready for transition away from the NTIA and the requirements of the JPA. The failure by ICANN and by its accredited registrars to ensure the accuracy and access to this important information has resulted in significant costs to trademarks owners committed in their efforts to locate companies or individuals responsible for infringing, fraudulent and malicious activities on the Internet, and to protect consumers and users of online content. The persistence of these issues underscore why ICANN's continued accountability to regulatory authority is essential.

Transparency, Accountability and Corporate Responsibility

In ICANN's "Accountability & Transparency Frameworks and Principles" document dated January 2008, ICANN identified three types of accountability:

1. Public sphere accountability which deals with mechanisms for assuring stakeholders that ICANN has behaved responsibly;
2. Corporate and legal accountability which covers the obligations that ICANN has through the legal system and under its bylaws; and
3. Participating community accountability that ensures that the Board and ICANN's executives perform functions in line with the wishes and expectations of the ICANN community.¹⁷

INTA recognizes ICANN's modest (albeit, in some cases, labor intensive) efforts toward improving transparency in these areas, such as the use of translation and interpretation services for non-English speakers and readers. Nonetheless, INTA believes much more remains to be accomplished:

¹⁷ See, ICANN Accountability & Transparency Frameworks and Principles, at p. 4, <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>

Public Comment Process

INTA believes the touchstone for transparency is ICANN's ability to engage in open and honest self-reflection about its governance, practices and policies, and to engage in truly participatory improvement of the same. Although ICANN conducts public comment periods for engaging stakeholders about important issues, as noted in response to Question 1, such comment periods are often ineffective. The periods are not long enough for stakeholders (particularly corporate or association stakeholders) to consider carefully and comment on the questions raised. The effect of, or results from, ICANN's review of such comments is completely unclear,¹⁸ which perhaps acts as a deterrent to participation. Therefore, for ICANN to be accountable to stakeholders by providing "mechanisms for assuring ICANN has behaved responsibly" as identified above, ICANN should not simply make information about its practices and policies available for viewing and comment by the public; rather, ICANN needs to engage in a meaningful dialogue with DNS stakeholders about how ICANN is policing and correcting its own practices and policies.

Financial and Transparency and Accountability

ICANN released its "Proposed Framework for the Fiscal Year 2010 (FY10) Operating Plan and Budget" in February 2009 and planned to post a more detailed draft by 17 May 2009 for additional public comment and feedback. ICANN reported that it expects the ICANN Board will adopt the budget at its Sydney meeting in June 2009. In light of the enormous role ICANN plays in Internet governance, INTA believes ICANN has a responsibility to provide more transparency regarding its financial operations, including details related to amounts paid to consultants. As INTA has previously commented:

- ICANN should identify all consultants who received annual payments from ICANN of \$50,000 or more.
- ICANN should adopt a code of conduct for all consultants that requires them to disclose to all stakeholders their retention by ICANN.
- To avoid conflicts of interest, ICANN should require consultants it retains to refrain from working on ICANN-related matters for individual ICANN constituents.

These recommendations¹⁹ have not been adopted much less squarely considered by ICANN. Because many DNS stakeholders, especially Internet users, are affected by ICANN's financial stability and operational success, transparency related to ICANN's financial and operational planning is crucial.

¹⁸ See INTA Midterm Comments, supra note 16, p. 6-7.

¹⁹ INTA Midterm Comments, supra note 16, p. 4.

Corporate Responsibility and Accountability

Finally, in addition to the areas mentioned above, ICANN must do more to improve corporate responsibility and accountability, so that DNS stakeholders are confident that ICANN, its board and executives are performing its functions in the best interests of the Internet community at large. ICANN last conducted a review of its corporate responsibility mechanisms in 2004. ICANN should conduct an updated review of its corporate responsibility mechanisms as soon as practical and report its findings.

As INTA previously commented during the midterm review,²⁰ ICANN must revise the current conflict of interest policy for its Board. It is unacceptable that Board members with a conflict of interest are nonetheless permitted to participate in Board discussions on the topic on which they are conflicted. Preventing a Board member from casting a vote when there is a conflict is important, but that Board member should be recused from all related discussions. It appears that ICANN's proposed revision to its Conflicts of Interest Policy²¹ does nothing to address this concern. Under section 2.4 of the revised policy, a member of ICANN's Board may still participate in Board deliberations on matters on which they have been determined to have a conflict of interest or direct financial interest, so long as he or she first identifies the conflict and does not vote on the matter.

TLD Management

INTA believes that the presently contemplated introduction of numerous new gTLDs presents an array of complicated and important challenges and obstacles that ICANN has not sufficiently addressed with any specificity or certainty. ICANN has demonstrated it has difficulty effectively managing the addition of new TLDs to the root, and its plan to add an unlimited number of new TLDs has raised significant and valid concerns from many stakeholders, including trademark owners, law enforcement, and governments. Significant concerns remain regarding the negative affects of ICANN's new gTLD program on consumers, businesses and domain name registrants.

ICANN has not effectively addressed how the addition of these new TLDs will impact the governance of its own GNSO Council, let alone provided information and assurances related to its ability to effectively and fairly manage the influx of new registries and registrars. In addition, many stakeholders have questioned how ICANN will define the eligibility requirements for sponsored gTLDs. With the introduction of these new registries, ICANN must address the attendant concern that problems with the inaccuracy of Whois data discussed above will inevitably increase without clear and precise direction from ICANN to these new registrars and registries. In the absence of concrete solutions for these extremely significant issues, ICANN cannot consider the

²⁰ See INTA Midterm Comments, supra note 16, p. 5.

²¹ ICANN, [Proposed] Conflicts of Interest Policy, <http://www.icann.org/en/committees/coi/coi-policy-06may09-en.pdf>; see also Announcement of Public Comment Period, <http://www.icann.org/en/announcements/announcement-06may09-en.htm>.

implementation and proposal for the introduction of new TLDs as an achievement under the JPA.

Multi-Stakeholder Model

ICANN hosted a Regional Meeting featuring the multi-stakeholder model as a central topic in April 2008. The model was presented to Internet users from various professions and offered for analysis and feedback to determine if a bottom-up model is an effective approach for development to achieve stability and security on the Internet. As discussed in response to several of the questions above, INTA believes that ICANN's mandate to achieve a bottom-up policy development process is compromised by the weighted voting rights regime created by ICANN's bylaws.²² INTA urges ICANN to restructure its voting system in a manner that shifts an inordinate amount of control and influence away from the contracted parties that provide substantially all of its funding..

Role of Governments

INTA encourages ICANN to support the increased participation of governments in ICANN. Issues surrounding the introduction of IDN, the internationalization of the Internet—particularly for developing countries lacking resources for research and implementation—and the need to provide a stable regulatory environment for the development and growth of the Internet all underscore the importance of government participation in ICANN. In addition, if ICANN is to be true to its goal of focusing on technical administration of the DNS, it must work with governments to facilitate the operation of national law on the Internet through the enforcement of its WHOIS policy. For instance, a robust and accurate Whois system to determine and locate the party responsible for a web site is a key threshold issue in obtaining redress under national law for any violation of law on the Internet.

IP Addressing

The Guidelines for the implementation of IDNs was revised by the working group of registries, and the ICANN Board endorsed the new Guidelines in 2005. The ICANN Board also instructed the IDN working group to continue its work and to provide specific recommendations for further improvement. INTA urges continued work towards refining the Guidelines so that the needs of all constituency groups and the community are met.

Question 5

The current JPA called for NTIA to conduct a mid-term review. That review revealed that ICANN needed to take further steps to increase institutional confidence related to long-term stability, accountability, responsiveness, continued private sector leadership, stakeholder participation, increased contract compliance, and enhanced competition. What steps has ICANN taken to address the concerns expressed in the

²² See ICANN Bylaws, Article X, Section 5, at <http://www.icann.org/en/general/bylaws.htm>

mid-term review process? Have these steps been successful? If not, what more could be done to meet the needs of the community served in these areas?

Response 5

INTA does not believe that ICANN has taken the correct steps to address the concerns of the community raised during the mid-term review of the JPA, and that in certain key areas such as representation and accountability, ICANN has moved in the wrong direction and has further reduced institutional confidence in its governance.

ICANN Must Increase Confidence in its Accountability and Responsiveness

As noted above, INTA has long-held the view that Internet security and stability does not stem from purely technical issues. The definition of a secure and stable Internet DNS requires ICANN to smoothly manage both the technical infrastructure of the DNS as well as the legal and contractual infrastructure governing that system. If ICANN cannot successfully manage the legal and contractual framework governing the components of the DNS, such as the contracts governing the registry operators and registrars, long-term stability cannot be achieved and neither will ICANN be able to attain institutional confidence in its long-term stability.

In previous submissions concerning ICANN's relationship with the NTIA, INTA recommended that ICANN take steps to increase the reliability and transparency of domain name registration information, such as ensuring the procurement and maintenance of accurate Whois information. Accurate domain name ownership and contact information is necessary to enforce laws governing Internet-based activity and, therefore, accurate Whois data is critical to the long-term consumer confidence in the stability and security of the Internet marketplace. In response to concerns about Whois data, ICANN created a "Whois Data Problem Reporting System" to report inaccurate and incomplete Whois information via InterNIC. Unfortunately, the implementation of the reporting system appears to be handicapped as ICANN takes no responsibility for the correction of the data and suggests that complaints be addressed to the affected registrar.²³ INTA recommends that ICANN take responsibility for the reliability and transparency of Whois data by requiring verification and authentication of Whois data, and by enforcing those requirements. INTA recommends that ICANN take responsibility for Whois data complaints and address them directly, instead of delegating this responsibility to registrars whose pecuniary interest is not aligned with the public's interest in an open and accountable Whois system.

²³ "Your report will be forwarded to the sponsoring registrar, who will be responsible for investigating and correcting the data." http://www.internic.net/problem_reports/p4.html

Reformulation of the Current System of Stakeholder Participation

In ICANN's case, stakeholder participation is more than merely a matter of considering diverse viewpoints. The entire thesis for ICANN's ability to be accountable without direct government oversight depends on participation by diverse stakeholders holding ICANN accountable to the public. Even more fundamental than the private, bottom-up nature of ICANN's governance is the premise that the Internet should be governed for the benefit of the public—the commercial and non-commercial users of the Internet. However, INTA has lost confidence in the multi-stakeholder model as a sole means of holding ICANN accountable to the public given that presently, ICANN's governing system of weighted voting rights means that the very industry ICANN is charged with overseeing—registrars and registries—have more votes and thus a greater voice in the GNSO Council. Proposals to restructure the GNSO Council would further decrease the say of private sector businesses and still preserve half the votes in the GNSO Council for the contracted party industry that ICANN regulates. Moreover, although there has been some effort to broaden the voice of non-contracted non-commercial users, no change has come to fruition and consumer protection and other non-commercial interests continue to be woefully underrepresented at ICANN. Although ICANN's core values are stated as a bottom-up, participatory, transparent policy formulation process, the slant of the current and proposed organizational structure toward the parties that provide ICANN with substantially all of its funding does not provide Internet users, business owners, and the public at large with the means necessary to effect changes in the management of the DNS. If stakeholder participation cannot be made effective, since ICANN's accountability to the public is essential, the NTIA should consider exploring more permanent and more meaningful oversight structures.

ICANN Must Increase Contract Compliance

As discussed in this letter in response to a number of NTIA's other questions, the success of ICANN's private sector Internet governance depends on its ability to police the individual components of the DNS through its contracts. Indeed, the basic role of any kind of governing entity includes not only setting "laws," but enforcing them. As a private actor, ICANN's "laws" are its contracts. To fulfill its basic responsibilities for Internet governance, ICANN must take a more active role in monitoring and demanding compliance from contracted parties by enforcing its rights with respect to those entities. Moreover, recent experience with proposed RAA amendments shows that ICANN may be unable to adopt RAA amendments as consensus policies, and thus that any changes to the RAA may only apply to a particular registrar when its contract renews. If these issues of contract law result in new rules applying unevenly and in many cases not coming into force for up to five years after adoption, it casts doubt on the very premise of a private entity—whose only instruments of law are its contracts—being able to govern so critical a resource as the Internet DNS.

Moreover, rogue contracted parties still exist despite complaints to ICANN from many constituencies. A Registration Abuse Policies Working Group was established as a

result of a GNSO resolution dated December 18, 2008, but that Working Group is still in the early stages and *much* more progress must be made before INTA can be convinced that ICANN's policies in this regard actually reinforce the stability and security of the DNS and the Internet as a whole. Similarly, ICANN has to date taken no compliance action against registrars who themselves have been found to engage in rampant cybersquatting, even though the RAA requires registrars to comply with *all* laws.

As INTA has previously recommended, ICANN should develop a system of graduated sanctions for non-compliance, culminating in the measured, controlled and predictable termination of a contract. At present, the only remedy against registries and registrars is termination. ICANN is understandably reluctant to terminate its contracts, as that would introduce instability into the DNS. However, tolerating non-compliance is also a serious source of instability in the system: ICANN must seek a middle-ground between these two positions, and stewardship from the NTIA may be needed with respect to this issue. In addition, ICANN must enhance its ability to make amendments to the RAA universally applicable, immediately upon final adoption.

Question 6

The JPA between the Department of Commerce and ICANN is an agreement by mutual consent to effectuate the transition of the technical coordination and management of the Internet DNS in a manner that ensures the continued stability and security of the Internet DNS. Has sufficient progress achieved for the transition to take place by September 30, 2009? If not, what should be done? What criteria should be used to make that determination?

Response 6

INTA does not believe that ICANN has achieved sufficient progress for the transition to take place, and structural deficiencies in the areas of contract compliance, representation, and bottom-up coordination necessitate the extension of the JPA.

As discussed in response to several of the questions above, INTA has significant concerns regarding ICANN's inability to effectively enforce its mandates. As a private, non-governmental entity, ICANN must primarily rely upon contractual rights, rather than laws or regulations, to influence and conform the behavior of entities that directly affect the stability and security of the Internet such as registrars and registries. ICANN's lack of commitment and resources with respect to contractual enforcement has directly led to conduct by registrars and registries that translates into DNS instability, e.g., lax compliance by registrars with respect to their obligations under the RAA, tolerance of inaccurate Whois information, and a lack of uniformity and cooperation with respect to proxy registrations. As noted above, the RegisterFly circumstance remains illustrative of ICANN's difficulty in enforcement short of full termination of its contracts, which remains the only realistic means by which it can enforce its policies. ICANN's difficulty in enforcing its contracts is also of concern with respect to IDN TLDs.

Given the extremely significant changes to the DNS that are presently being contemplated, 2009 would be a particularly poor time for the NTIA to end its relationship with ICANN. As the NTIA is aware, new gTLD policies have yet to be completed, much less implemented, and the outcome of this policy-making exercise will have a significant influence on Internet stability and security. INTA remains extremely concerned that this program will lead to a spike in online fraud at a time when the sagging global economy has stretched the brand enforcement budgets of private industry to their limits.

Preserving the accountability of ICANN is essential. INTA believes that a new oversight regime is necessary before the JPA relationship should be considered complete. Regulatory oversight of ICANN remains necessary, and the NTIA should preserve the JPA to allow time for global debate upon an oversight structure to potentially replace ICANN's unilateral relationship with the Department of Commerce. This concept will be discussed further in regard to Question 7 below.

Question 7

Given the upcoming expiration of the JPA, are there sufficient safeguards in place to ensure the continued security and stability of the Internet DNS, private sector leadership, and that all stakeholder interests are adequately taken into account? If yes, what are they? Are these safeguards mature and robust enough to ensure protection of stakeholder interests and the model itself in the future? If no, what additional safeguards should be put in place?

Response 7

INTA does not believe that there are sufficient safeguards in place to ensure DNS security and stability, and at present the interests of all stakeholders are not adequately protected.

As discussed in response to several questions above, INTA continues to have particular concerns regarding the present accountability and oversight regime. While INTA acknowledges ICANN's maturation, such maturation is unlikely to continue without stewardship, and INTA credits much of ICANN's maturation to date to its relationship with, and oversight by, the NTIA. Nearly all of the hundreds of submissions in response to the November 2, 2007 NTIA request for public comment as a part of the JPA mid-term review acknowledged in one form or another that the JPA should not end, and there has not been sufficient development since then – particularly with respect to accountability – to suggest that ICANN is now ready to go it alone. However, each previous time that ICANN has gone through a benchmarking and review process related to its relationship with the NTIA, the organization has moved forward in a positive fashion. To our knowledge, there is presently no replacement accountability and review mechanism even contemplated.

The explosion in the development of Internet commerce and communication has made governmental involvement in the regulation of the Internet all the more crucial. Even those now advocating for more international involvement are not suggesting that the abolition of governmental oversight is an appropriate alternative. While it *may* be appropriate to create a direct oversight body comprised of international governments or organizations, significant further exploration of how this can be effectively accomplished is necessary, and, in the meantime, continued governmental oversight is essential. In light of its over ten year history of successful partnership with ICANN, the NTIA appears to be the only governmental authority, in the U.S. or otherwise, that is capable of capably handling that role at present, and the NTIA's role should continue until if and when its responsibilities can effectively and seamlessly be transferred.

Should the JPA be permitted to expire, the NTIA's oversight of ICANN will cease without protecting the interests of the public, and specifically the users, groups and companies who are non-contracted stakeholders. ICANN's policy of weighted voting has already placed an unacceptable amount of authority with those in the best position to profit from the insufficiently regulated expansion of the DNS and Internet as a whole, and, thus, the interests of the public and the business community have been exposed to usurpation. In addition, the ongoing effort to reconstitute the GNSO is of particular concern and threatens to further skew the power structure of ICANN in favor of the parties whose interests most threaten Internet and DNS stability and security. Certainly, these initiatives must have also aroused concern at the NTIA.

With the Internet having become in an incredibly short amount of time the most valuable telecommunications and commerce vehicle in world, the NTIA can ill afford to permit the complete privatization of its oversight when the growth and development of the Internet and the DNS continues to evolve so rapidly and when so much policy development that will directly affect stability and security is on the horizon.

Question 8

The JPA provides that before its termination, NTIA and ICANN are to collaborate on a DNS Project Report that will document ICANN's policies and procedures pursuant to the agreement. What should be included in this report?

Response 8

Consistent with INTA's comments above in response to many of the questions posed by the NTIA, ICANN must document how it has achieved sufficient transparency, and it should demonstrate that it has adopted and is adhering to a sufficient conflict-of-interest policy. ICANN should also detail its track record with respect to the enforcement of its contractual rights concerning (1) the maintenance of current and accurate Whois data for domains registered within its purview, (2) compliance by registrars with UDRP decisions, and (3) overall compliance with provisions of its RAA. ICANN should also report its policies for ensuring the participation of the private sector, especially brand

owners and e-commerce operators, in ICANN's policy-generating processes. ICANN's report should detail its outreach efforts to these groups, as well as ICANN's internal understanding of the causes for the deficiencies noted by INTA in 2008 as a part of the midterm review.

INTA's 2008 comments also highlighted a problem in ICANN's tendency to open deliberations on a topic but its failure to follow deliberations with useful action. Specifically, ICANN's calls for studies of issues affecting stakeholder interests in domain acquisition practices (squatting, front-running, etc.) have produced little in the way of meaningful data and no coherent policies for combating abuses identified by stakeholder groups. To address this concern, ICANN must report what policies it has or will adopt to ensure that topics raised for inquiry and deliberation are translated into action items. Further, ICANN should also report on the policies it has implemented to ensure that its internal deliberations are reviewable by stakeholder groups.

INTA respectfully believes that the compilation of these responses and comments would underscore that ICANN is simply not prepared to move away from the construct of the JPA and NTIA oversight.

Conclusion

As noted at the outset of this letter, given that the DNS is fundamental to the stable and secure development of Internet commerce and communication, the NTIA's role as ICANN's steward should continue. While due consideration should be given to the possible installation of an alternate accountability mechanism to replace the oversight that has historically been provided by the NTIA, the NTIA's role should continue at least until its responsibilities can effectively and seamlessly be transferred. Particularly given the potential for instability posed by such current ICANN initiatives such as its planned roll-out of new gTLDs and the potential reconstitution of the GNSO, the JPA should be extended to allow ample time for the prospect of a new accountability mechanism to be explored further.

Should the NTIA have questions about any aspect of the foregoing, please do not hesitate to contact Claudio DiGangi, INTA External Relations Manager, Internet & the Judiciary, at: cdigangi@inta.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan C. Drew". The signature is fluid and cursive, with a long horizontal stroke extending to the right.