THE COALITION FOR ONLINE TRADEMARK PROTECTION

June 5, 2009

Ms. Suzanne R. Sene
Office of International Affairs
National Telecommunications and Information Administration
1401 Constitution Ave, NW, Room 4701
Washington, DC 20230

Re: Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System (Docket No. 090420688–9689–01)

Dear Mrs. Sene:

On behalf of The Coalition for Online Trademark Protection (COTP),[1] we ask your support to ensure the continued involvement of the Department of Commerce in the governance of the Internet through an extension of the Joint Project Agreement currently in place with the Internet Corporation for Assigned Names and Numbers (ICANN).

This Coalition recently outlined a number of concerns about the workings of ICANN in a letter to Commerce Secretary. That letter was entered into the record of this proceeding and can be found at http://www.ntia.doc.gov/comments/2009/dnstransition/002.pdf.

Rather that repeat word for word our concerns outlined in that letter, we will summarize our chief concerns and touch on some issues not covered in that correspondence.

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

Throughout ICANN's evolution, The Department of Commerce has provided critical guidance and a secure backstop for ICANN, encouraging 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.

At this point, ICANN asserts that the work of the Commerce Department in this area is 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.

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[1] 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.

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. 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.

Intent Should Not Equate With Accomplishment

With the September 2009 expiration of the JPA looming on the horizon, ICANN has recently embarked on a series of new programs designed to address issues raised during the midterm review and by ICANN's own President's Strategy Committee (PSC). While we applaud these efforts and will do what we can as an active participant in the multi-stakeholder process to ensure that they are successful, these efforts represent work that should have been underway for quite some time, not launched right before the deadline of the JPA.

In the continuum of accomplishment, some of these programs are still in the development stage, subject to community feedback, and are far from achieving the goals set out. For example:

In a forum held in Washington, DC earlier this year, we heard from ICANN staff about their efforts to improve contractual compliance. Efforts to date were deemed inadequate and we heard that resources were being dedicated to strengthen a core function of ICANN that is critical to protecting consumers and businesses alike from predatory practices by rogue registrars. However welcome this statement was, it has to be viewed in light of promises made by ICANN Chairman Peter Dengate Thrush in his testimony to the Mid Term Review open meeting. In his statement, he said that work was beginning immediately (February 2008) to address these core compliance issues. While the intent to fix this critical problem is there, we are concerned about the lack of significant action on the issue. A full year had passed between Mr. Dengate Thrush's promises to NTIA and the beginnings of the process to implement changes to the program.

Also from that same testimony, Mr. Dengate Thrush outlined the promise for the PSC, of which he is co-chair. The PSC was to look at the feedback gathered through various sources, including the NOI for the Mid-Term review of the JPA and put together a plan to address the concerns of the community for a post JPA ICANN. The work of the PSC is important but the timeliness in relation to the expiration of the JPA leaves little time for the development and implementation of the recommendations necessary for transition in a post-JPA environment. ICANN stakeholders participating in the PSC process have made some very important recommendations that we believe should be in place before ICANN walks away from the JPA.

Devaluation of the Business Community Voice within ICANN

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. The business constituency is a significant investor 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, there is no reliable mechanism to challenge adverse ICANN decisions. 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.

Finally, we have seen instances where ICANN staff openly discount the importance of the voice of business in key ICANN proceedings:

> "There's no doubt that business has concerns about the Applicant Guidebook - it has made that clear through a number of responses. But I think you are missing something fundamental here: ICANN is a multistakeholder organization and all the critical voices, as loud as they are, have come from one stakeholder - business.
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> The USG's letters are, of course, from a government but from a government that has a very unique relationship with ICANN. And, if you read the letters, virtually all of its concerns stem from the business and competition perspective."[2]

The New gTLD Program

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. Despite this feedback, ICANN decided to move forward with the program. While ICANN did recently create the Implementation Review Team (IRT) to propose an intellectual property protection plan, it did so only in response to overwhelming concern voiced by the business community, and quite late in the process.

Despite the creation of the IRT, four major policy areas remain unresolved. Described as "Overarching Issues" by ICANN, these issues pose significant challenges to consumer welfare, stability and security of the DNS and the protection of intellectual property. In light of this, ICANN continues to push forward with the gTLD process, including recently announcing that applications will be accepted in Q1 of 2010.

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[2] http://www.circleid.com/posts/icann_gtld_proposal_hits_wall_now_what/#4797

Efforts to address these overarching concerns are in various stages of activity with none of them near completion. 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.

Experts in cybercrime and online fraud prevention agree that the gTLD program as currently modeled will cause an increase 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 the programs' making 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.

While the specific concerns with the new gTLD Program are all examples of a program in process, taken as a whole however, the method and process in which ICANN decided to move forward with the program causes great concern.

ICANN has noted its intent to become more transparent, more accountable, and more responsive to constituents' needs, for which we applaud ICANN. Until the proper safeguards and processes can be put in place and shown to work, we feel the need for continued U.S. government involvement.

Conclusion

At a recent policy discussion in Washington DC, ICANN staff said that their performance under the JPA has worked "tolerably well." We believe the goal for ICANN should be much higher than "tolerable" and the transition to independence must be based upon a track record of excellence and accomplishment, not intent.

At this time we think that is would be unwise for the United States Government to reduce its role to solely that of GAC participant and filer of comments at such a critical time for ICANN and the Internet. 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,

The Coalition for Online Trademark Protection