



International Trademark Association

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

Submitted via email at JPAMidTermReview@ntia.doc.gov

Dear Ms. Sene:

The International Trademark Association (INTA) is pleased to respond to the November 2, 2007 request for comment on the “continued transition to the private sector of the technical coordination and management of the Internet’s domain name and addressing system.”¹ INTA (<http://www.inta.org>) is a not-for-profit membership association of more than 5,500 trademark owners and professionals, from more than 190 countries, dedicated to the support and advancement of trademarks and related intellectual property as elements of fair and effective national and international commerce. For more than 10 years, INTA has been the leading voice for trademark owners on the future of the Domain Name System (DNS), and we are a founding member of the Intellectual Property Constituency (IPC) of the Internet Corporation for Assigned Names and Numbers (ICANN).

Executive Summary. INTA recognizes that ICANN has made progress towards achieving many of the milestones in the Joint Project Agreement (JPA). That progress, however, has not yet resulted in the satisfaction of ICANN’s obligations under the JPA. Considerable work remains outstanding on virtually every milestone. For these reasons, INTA is opposed to the early termination of the JPA.

¹ 72 Fed. Reg. 62220 (Nov. 2, 2007).

Question 1: *In the JPA, ICANN agreed to undertake the following with respect to security and stability: “ICANN shall coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?*

Response 1: Since entering into the JPA a little more than fifteen months ago, ICANN has continued to realize additional achievements in connection with the security and stability of the Internet. For example, in 2007 ICANN brought online additional root-server systems, adding enhanced resiliency and performance of the L-root servers.

Beyond resiliency improvements, ICANN should be commended on procedural improvements, such as the establishment of a more formal process for consideration of new registry services (the “funnel”), the design and initial operation of the Registrar Data Escrow program, and the drafting of the Registry Failover Plan. Yet, closer examination of these processes highlights the absence of definitive achievements and the existence of remaining work.

For example, the funnel process appears to be successful, but the absence of any mechanism to solicit or obtain evaluations and feedback from registry participants renders that conclusion uncertain. Further, given ICANN’s admission that registrars are only now beginning to enroll in the Registrar Data Escrow program, ICANN’s characterization of the program as an achievement is premature. Allowing the JPA to continue through its full term would provide ICANN with the opportunity to fully implement the program and the Internet community with the opportunity to make an informed assessment of ICANN’s success at doing so. Indeed, the difficulties associated with the transition of domain names after the RegisterFly failure and ICANN’s poor record with regard to obtaining contract compliance from registrars underscore both the importance of this program’s success and the need for further evaluation time to ensure both that registrars do enroll in escrow data and that ICANN takes enforcement action against non-compliant registrars. Finally, ICANN itself notes that the Registry Failover Plan has not been finalized – let alone implemented. The critical need for an effective Registry Failover Plan, especially as ICANN moves towards the adoption and implementation of a plan to introduce new gTLDs, also demonstrates why it is essential that the JPA not be terminated before its completion date.

INTA recognizes the positive contributions made by the Security and Stability Advisory Committee (“SSAC”). Its reports are informative and generally well-received by INTA’s members and the wider Internet community. SSAC’s reports, as we discuss further below, illustrate a broader interpretation of “security and stability” and one that we endorse. The recent acknowledgement by the SSAC chair that “others choose whether to use our advice” underscores the need for a stronger role for the SSAC to ensure sound policy development on security and stability issues.

Because the Internet Assigned Numbers Authority (IANA) automated request tracking system is in beta form, the full effect of the system remains to be seen.

As summarized above, ICANN is either doing well or making progress on Internet architecture issues, such as those pertaining to root name servers, host hardware, operating systems and name server software versions, network connectivity and internal procedural matters. Although INTA acknowledges that ICANN's ongoing efforts do reflect some achievement and promising activity, security and stability are not narrowly limited to matters of technical efficiency. We noted in our July 5, 2006, submission that "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. Because of the undeniably important role that the Internet plays today in culture, commerce, and everyday communication, the decisions that ICANN makes cannot be looked at in an engineering vacuum."²

The strategic priority of ensuring "the stable and secure operation of the Internet's unique identifier systems" serves as the central mission in ICANN's Bylaws, and is further reflected in ICANN's "core values" of "[p]reserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet." This strategic priority, to be fully effective, must also focus on, for example, non-technical matters and threats to the security and stability of the Internet's unique identifier system, such as domain tasting, phishing and pharming, and the lack of a global standard for proxy registrations and the release of WHOIS data. These and other issues, if left unchecked, have the ability to undermine the security and stability of the Internet as a tool for global communication and commerce. ICANN must use its mandate and work within the JPA work to individually or collaboratively address these non-technical issues that represent a growing challenge to the overall security and stability of the Internet.

Security and stability are also not narrowly limited to gTLDs notwithstanding ICANN's actions that suggest the contrary. The .TRAVEL registry operator's request for a wildcard service was rejected on the ground of security and stability concerns. Yet, ICANN has taken no action to prohibit the use of wildcard mechanisms by ccTLD registries. This increased use of wildcard mechanisms by ccTLDs – the most widely known operated by the .cm ccTLD registry – also poses a growing challenge to the overall security and stability of the Internet.

Question 2: *In the JPA, ICANN agreed to undertake the following with respect to transparency: "ICANN shall continue to develop, test and improve processes and procedures to encourage improved transparency, accessibility, efficiency, and timeliness in the consideration and adoption of policies related to technical coordination of the Internet DNS, and funding for ICANN operations. ICANN will innovate and aspire to be a leader in the area of transparency for organizations involved in private sector management." What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe*

² Comments from International Trademark Association responding to NTIA "Request for Comments" on the "continuation of the transition of the technical coordination and management of the Internet domain name and addressing system (Internet DNS) to the private sector." (May, 2006)

that progress has been made, please explain how and why? Could more be done by ICANN in this area?

Response 2: INTA recognizes and acknowledges that ICANN has made great strides in the area of transparency. However, because ICANN's budget exceeds 50 million dollars annually and continues to increase, its expenditures warrant greater transparency and accountability. Although the annual budgetary process has provided some important high-level insight into these expenditures, additional transparency mechanisms along the following lines should be implemented:

- ICANN should identify all consultants who receive 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

An additional significant aspect to transparency requires a more thorough disclosure of accounting for all sources of revenue and funding for ICANN. However, ICANN's own analysis of its progress on transparency, as reflected in its "Table Outlining ICANN Fulfilling the 10 Responsibilities in the JPA, including documentary evidence" (the "ICANN Table") does not include any analysis of such revenue and funding sources. Because ICANN serves numerous and diverse constituencies, and acts as a public trust for the Internet community, it is imperative that ongoing transparent records be available that account for, among other things, all revenue streams flowing to ICANN, every person and legal entity that is a revenue source, the percentage of ICANN's budgets and expenditures accounted for by such persons and entities, and how ICANN is using its revenue and funding. Further work remains to be done.

Further progress is needed in the area of financial transparency. ICANN's 2007 Annual Report provides only a limited appendix with selected pages from ICANN's Audit Report for Fiscal 2006-2007 that might explain ICANN's revenue/budget processes. Neither ICANN's Annual Report nor the ICANN Table contains qualitative analyses about ICANN's goals or objectives in the area of financial transparency. ICANN should clearly identify and report annually which, if any, persons or entities that are ICANN revenue sources have a role in the governance, operation or policy-making of ICANN, and the nature of that role. These additional measures would achieve greater transparency for the general public of ICANN's revenue and funding sources, and finance-related transparency goals and greater transparency for the entire Internet community of ICANN's efforts to avoid conflicts of interest. As discussed further below, the fact that ICANN receives the majority of its direct funding from the Registry and Registrar Constituencies – both of which have weighted voting on the GNSO Council – creates inherent governance conflicts that require attention.

ICANN has made significant progress in making information accessible to the Internet community and the general public. It is much easier to locate general information on ICANN's

website, to identify through its website the topics that are the subject of public comment (and to determine where to submit comment), and to obtain the updates available through the news magazine and fact sheets. While it is easier to locate general information on ICANN's website than it was even a year ago, it is still not easy to do and it remains very difficult to locate information from the pages for the Supporting Organizations ("SO") and Advisory Committees ("AC"). Very few members of the private sector are willing to spend the time necessary navigating the incomplete and poorly organized SO and AC websites. Similarly, it is commendable for ICANN to create Processes pages, but their value is diminished when – as is the case for the Compliance and GNSO sections – the information provided has not been updated for 11 and 3 months, respectively. Moreover, as discussed further below, ICANN must act affirmatively to ensure that stakeholders who do not participate daily in ICANN activities are aware of public comment topics and periods. If stakeholders are not aware of the opportunity for public comment, the impact of making the topics more easily identifiable on ICANN's website is nullified.

Another area in which ICANN has made progress, but in which much remains to be done, is transparency to speakers (and readers) of languages other than English. The increased use of translation and interpretation is important if ICANN is to increase global participation and transparency. Yet, ICANN has not provided language interpretation at its meetings in all of the official languages of the United Nations, let alone the languages of its meetings attendees who hail from countries around the world. ICANN's ability to provide language interpretation and translate documents in other languages is particularly relevant to the anticipated introduction of both Internationalized Domain Names ("IDNs" -- which were tested in eleven languages) and new gTLDs.

With respect to ICANN Board work, INTA recognizes the increased transparency and efficiency in making reports of Board meeting minutes available. Similar increased transparency and efficiency would be welcomed in connection with minutes of Board committees. As we discuss in connection with Question 9, the conflict of interest policy currently followed by the Board is insufficient. It is not sufficient for a Board member with a conflict of interest to simply forgo his or her vote on the final Board action on the relevant issue; that Board member must recuse herself/himself from all Board discussion of the particular issue.

Question 3: *In the JPA, ICANN agreed to undertake the following with respect to accountability: "ICANN shall continue to develop, test, maintain, and improve on accountability mechanisms to be responsive to global Internet stakeholders in the consideration and adoption of policies related to the technical coordination of the Internet DNS, including continuing to improve openness and accessibility for enhanced participation in ICANN's bottom-up participatory policy development processes." What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?*

Response 3: ICANN emphasizes at its meetings and within its public statements the importance of the core values of transparency, openness, accessibility, and bottom-up stakeholder participation. INTA credits ICANN for creating a “public comment” section within its website³ and for demonstrating flexibility in extending the length of the various comment periods to enable greater global participation by interested stakeholders in the development, consideration and adoption of policies related to the technical coordination of the Internet DNS. Nevertheless, for the reasons that follow, we cannot agree that ICANN has fully met its responsibilities to develop, test, maintain and approve accountability mechanisms as specified in the JPA. As explained below, ICANN must demonstrate more tangible achievement in the following categories, among others, before the requirements of the JPA can be considered fulfilled and ICANN can operate without oversight:

Inadequate Knowledge and Use of Complaint Procedures

ICANN endeavors to provide three methods of dispute resolution available to individuals who feel they have been treated unfairly in their dealings with ICANN. Merely making these procedures available, however, is not enough. ICANN must actively encourage use of these procedures and demonstrate this use to ensure accountability. ICANN’s Strategic Plan should include an objective of raising the public’s awareness and use of these procedures. The fact that no requests were made to the Reconsideration Committee in Fiscal Year 2007⁴ and only four requests were made in Fiscal Year 2006⁵ strongly suggests a lack of public awareness. The public must also be educated about the jurisdictional limitations of the procedures to ensure that the resources dedicated thereto are used to review disputes that can be resolved by the Reconsideration Committee, Independent Review Panel and ICANN Ombudsman, respectively.

ICANN’s Unresponsiveness to Public Comments

ICANN’s core values of bottom-up, participatory, transparent policy formulation cannot be achieved in the absence of meaningful review and consideration of public comments. As of today, there is no meaningful review of and action on public comment. ICANN simply cannot credibly claim that it has met the objective of developing, testing, maintaining, and improving accountability mechanisms responsive to stakeholders if it has no apparent mechanism for the meaningful review of and action on public comment by its policy makers.

The current practices of the GNSO Council and the Board demonstrate this critical omission. The Policy Development Process 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, and based on the GNSO Council and Board discussions, it appears most do not do so. Instead,

³ http://www.icann.org/public_comment/

⁴ <http://www.icann.org/committees/reconsideration/>

⁵ <http://www.icann.org/committees/reconsideration/rc-annualreport-06dec06.htm>

the Bylaws mandate that a Staff Manager review and summarize public comment. 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. For example, 81 public comments were received by the August 31, 2007 close of the public comment period on the policy recommendations for the introduction of new gTLDs. Staff provided the GNSO Council with a five-minute oral summary of the comments at the beginning of the September 6, 2007 meeting in which the GNSO Council voted on the policy recommendations. Similarly, 238 public comments were received by the October 30, 2007 close of the public comment period on Whois. Staff provided the GNSO Council with a three-page summary of the comments at the start of the October 31, 2007 meeting in which the GNSO Council voted to end the Whois policy development process.

Yet, it would have made no difference even if all GNSO Councilors had read all public comments submitted on these two important policy issues or ICANN staff had provided extensive, detailed summaries. The fact remains that ICANN has no process or procedure for evaluating public comments and incorporating them into policy recommendations. Several GNSO Councilors noted and raised concerns about this critical omission during consideration of the introduction of new gTLD policy recommendations. ICANN has failed to act.

What is the point of having a public comment period if the public comments are ignored? How can ICANN claim that it has improved openness and accessibility for enhanced participation in ICANN's bottom-up participatory policy development processes if participation through public comment is irrelevant? Why should private sector participants – or any participants, for that matter – spend the time necessary to prepare and submit substantive and thoughtful comments⁶ if the comments and the investment they embody will be ignored? To be consistent with its core values, ICANN must create and implement procedures to ensure that all public comments are afforded meaningful review and consideration in the policy development process.

Registrar Accreditation & Outreach

It is not clear whether ICANN is advancing the goals of geographic diversity and competition among registrars. Without transparency in ownership of the registrars, it is impossible to ascertain whether ICANN's geographic diversity and competition goals are being advanced. The

⁶ ICANN has recently posted its own "Submit Comment to JPA Midterm Review" form, which ICANN created, setting out seven statements supporting ICANN's submission to the NTIA. ICANN directly solicits others to support its statements and merely allows the "submitter" to complete two blanks for his/her name and email address. ICANN's dissemination of such a form on such an important and complex issue not only flies directly in the face of its eighth Core Value to make decisions by applying documented policies neutrally and objectively, with integrity and fairness, but also strongly suggests that ICANN itself has no interest in receiving thoughtful, substantive public comments. That would certainly explain why there is no meaningful review of and action on public comment.

Registrar Accreditation Agreement should be revised to address, among other issues, transparency in ownership for all accredited registrars.

Remote Access/Participation in ICANN Meetings

ICANN deserves credit for seeking to improve the ability for remote participation in its meetings, which is particularly important given the difficulties many members of the Internet community have in traveling to the disparate locales of the regular meetings. The number of remote participants is generally considered to be low, which is directly attributable to the perception of many remote participants that it is not possible to participate meaningfully remotely. ICANN's creation of a dedicated forum to discuss the challenges of remote participation is a good first step;⁷ it must move beyond discussion and take further concrete steps to increase meaningful participation and comment from remote participants. Consideration should be given to using standard "Webinar" and video conferencing tools that facilitate meaningful participation by remote attendees. ICANN should also consider making transcripts available on a live feed to help overcome video latency and other technical shortfalls that may occur.

ICANN Blog

ICANN's blog provided an effective and useful sounding board during the recent RegisterFly situation. Unfortunately, use of the ICANN blog has been sporadic since that time. The blog will truly constitute an achievement if and when there is robust participation by Internet stakeholders and ICANN representatives. Processes also should be implemented to: (i) take action with respect to issues raised on the blog, and (ii) publicly report these actions so that Internet stakeholders are aware of the impact of their blog comments and further encouraged to participate.

Question 4: *In the JPA, ICANN agreed to undertake the following with respect to root server security and relationships: "ICANN shall continue to coordinate with the operators of root name servers and other appropriate experts with respect to the operational and security matters, both physical and network, relating to the secure and stable coordination of the root zone; ensure appropriate contingency planning; maintain clear processes in root zone changes. ICANN will work to formalize relationships with root name server operators." What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?*

Response 4: No comment.

⁷ <http://public.icann.org/forum/remote-participation>

Question 5: *In the JPA, ICANN agreed to undertake the following with respect to TLD management: "ICANN shall maintain and build on processes to ensure that competition, consumer interests, and Internet DNS stability and security issues are identified and considered in TLD management decisions, including the consideration and implementation of new TLDs and the introduction of IDNs. ICANN will continue to develop its policy development processes, and will further develop processes for taking into account recommendations from ICANN's advisory committees and supporting organizations and other relevant expert advisory panels and organizations. ICANN shall continue to enforce existing policy relating to WHOIS, such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing and administrative contact information. ICANN shall continue its efforts to achieve stable agreements with country-code top-level domain (ccTLD) operators. What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?"*

Response 5:

Consideration and Implementation of new TLDs and the Introduction of IDNs

INTA recognizes the effort and achievement made by the GNSO Council in developing and approving policy recommendations for the introduction of new gTLDs. Unless and until the ICANN Board approves those policy recommendations, however, the recommendations are not deemed consensus policy and cannot be considered an achievement under the JPA. INTA is aware that the Board continues to evaluate the policy recommendations, but has not yet set a target date for voting on the new gTLD policy. This continued evaluation provides the Board with an opportunity to address an important security, stability, and consumer protection interest not yet reflected in the policy recommendations. More specifically, unlike the earlier introduction of new gTLDs, current applicants for gTLD are not required to have pre-launch mechanisms to discourage abusive registrations and protect the rights of others. In the absence of such mechanisms, it is a virtual certainty that the launch of each new gTLD will introduce numerous second-level domains that violate trademark owners' rights and that are registered for the purpose of defrauding consumers and undermining the security and stability of the Internet as a forum for global commerce. This same concern applies also, and with perhaps even greater negative consequences, to the introduction of IDNs.

Whois

INTA Members continue to advise INTA that false or missing Whois data is a common occurrence. Accurate domain registrant contact information in the Whois database is necessary for a wide variety of law enforcement needs and to prevent online fraud and other legal misconduct, including trademark infringement. Trademark owners and their counsel must be able to identify and locate domain name owners in order to protect consumers from confusion and fraud by obtaining accurate contact details for those responsible for websites seeking consumers' financial information, offering counterfeit products, or other forms of online fraud.

Indeed, being able to determine and locate the party responsible for a website is a key threshold issue in obtaining redress for any violation of law on the Internet. INTA respects ICANN's technical mandate, leaving policy development largely up to various national laws. However, ICANN can only maintain that technical character if it does not—as its Whois system does now—pose an obstacle to the application of national law on the Internet.

Accurate Whois information is vital to prevent consumer confusion, maintain brand integrity and to provide trademark owners with legal recourse when these wrongs take place. Consumers are well served when a fraudulent or deceptive website is taken down as a result of a cease-and-desist letter sent and *received* due to accurate Whois information. Accurate Whois information promotes judicial economy and efficiency by allowing trademark owners to amicably resolve infringement matters without resorting to immediate litigation, subpoenas, etc. in an effort to determine who actually controls a website. Accurate Whois information facilitates efficient and effective law enforcement efforts.

Although ICANN points to its implementation of the Whois Data Problem Report System (WDPRS) as an achievement in combating inaccurate or incomplete Whois information, the statistics provided by ICANN in its April 27, 2007 report indicate that only 3.4% of domain names that were the subject of WDPRS reports during the timeframe of February 28, 2006 - February 28, 2007 resulted in corrected Whois information.⁸ The Whois data was reported as unchanged for over 85% of the domain names that were the subject of WPDRS reports during this period. Accordingly, it is INTA's view that ICANN has not achieved sufficient progress on the Whois accountability front to warrant transition of the system to its complete control.

Given the problems with accuracy in the current Whois system, ICANN's priority since October 1, 2006, should have been the implementation of measures to ensure that the existing requirements for timely, unrestricted and public access to accurate and complete WHOIS information are effective. On the contrary, ICANN's main work on Whois was, incredibly, to develop an "operational point of contact" proposal that would have excused all individuals from maintaining accurate registrant contact information and further relaxed the disclosure requirements for technical and administrative contact information.

The problem of inaccurate Whois data and the failure of ICANN, through its accredited registrars, to ensure the accuracy of such data has generated significant costs for trademark owners in their efforts to locate the individuals or companies responsible for the infringing domain name or website. Trademark owners often have no choice but to hire private investigators to obtain accurate contact data or to place anonymous bids for domain names that violate their rights. During such investigations and acquisitions, the harm to consumers and to the goodwill represented by the infringed marks continues.

⁸ See ICANN's Whois Data Accuracy and Availability Program: Description of Prior Efforts and New Compliance Initiatives, April 27, 2007, <http://www.icann.org/whois/whois-data-accuracy-program-27apr07.pdf>

ccTLD Agreements

INTA recognizes and acknowledges ICANN's entry into agreements with 24 ccTLD operators since October 2006. A review of a list of the ccTLDs covered by these agreements highlights the fact that numerous significant ccTLD operators are not parties to an Accountability Framework agreement or exchange of letters. For example, ICANN has entered into agreements with the ccTLD operators for fewer than half of the 15 countries with the highest GDP and fewer than half of the 15 countries with the highest number of Internet users. In addition, ICANN has not entered into agreements with the ccTLD operators of the ccTLDs of concern to INTA's members -- .cm, .tv, and .co. Further achievement is necessary in this area before the JPA is terminated.

Question 6: *In the JPA, ICANN agreed to undertake the following with respect to the multi-stakeholder model: "ICANN shall maintain and improve multi-stakeholder model and the global participation of all stakeholders, including conducting reviews of its existing advisory committees and supporting organizations, and will continue to further the effectiveness of the bottom-up policy development processes. ICANN will strive to increase engagement with the Private Sector by developing additional mechanisms for involvement of those affected by the ICANN policies. What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?"*

Response 6: Neither the multi-stakeholder model nor global participation of all stakeholders has improved since October 2006 and structural changes now under consideration seem likely to adversely impact both the multi-stakeholder model and global participation. While ICANN has made progress with reviews of the advisory committees and supporting organizations, the effectiveness of the policy development process is questionable. ICANN may believe it has increased engagement by the private sector or made participation in ICANN more attractive to its members, it has instead created disincentives to participation. We elaborate on each point below.

The continued weighted voting afforded the Registrar and Registry Constituencies within the GNSO is directly contrary to improvement of the multi-stakeholder model and improved participation of all stakeholders. A multi-stakeholder model is most likely to succeed in an environment in which all stakeholders have an incentive to participate and all stakeholders have an equal voice. Weighted voting for the registrars and registries is a disincentive for the participation of other stakeholder groups because members of those constituencies know that the registrar and registry constituencies have the power to veto any policy they do not like or do not want. Conversely, any policy supported by those two constituencies is virtually certain to be approved – regardless of its impact on the remaining four. As a result, the policy development process has been captured by these constituencies, which are also ICANN's two largest direct sources of funding. In essence, the GNSO voting model provides a veto over the actions of the regulatory body (ICANN) by the regulated industry.

Yet the February 3, 2008 Report of the Board of Governance Committee GNSO Review Working Group on GNSO Improvements (“GNSO Improvements Report”)⁹ proposes to perpetuate and emphasize the divide. Although the plan would eliminate weighted voting, the Registrar and Registry Constituencies would remain separate and each be afforded four votes on the GNSO Council. The Internet Service and Connection Providers, Commercial and Business Users, and Intellectual Property Constituencies would be merged into a “commercial registrants” stakeholder group and, instead of having a total of nine votes on the Council, would have only four votes. The combined voice on the GNSO Council of these three private sector-oriented constituencies will decrease from one-third to one-fourth. On an individual constituency basis, the voice of each on the GNSO Council will decrease by 50%. The “some stakeholders are more equal than others” model will be perpetuated under the plan now proposed for adoption by the ICANN Board.

The proposal divides constituencies on the artificial boundary of those who are “under contract” with ICANN (registries and registrars), and those who are not (ISPs, business users, intellectual property owners, and non-commercial registrants). It also is based on the erroneous assumption that all “commercial registrants” have identical interests. In the alternative, the plan is based on the recognition that the interests of these three constituencies and any other new commercial registrant constituencies are not identical and intends to pit these private sector participants against each other. We view neither alternative as likely to improve the multi-stakeholder model and the global participation of all stakeholders.

In addition to these factors, the lack of meaningful review and consideration of public comments and the issues associated with remote participation also adversely affect participation by stakeholders on a global basis.

Another impediment to improved multi-stakeholder and global stakeholder participation is the policy development process, which is needlessly complicated, inflexible, and slow. These pervasive negative characteristics deter current stakeholder participants from initiating new policy initiatives and new stakeholder participants from becoming part of the policy process.

ICANN has conducted the reviews of its existing advisory committees and supporting organizations and appears to be continuing to do so. However, ICANN's ongoing and as yet unfinished reviews of a number of important bodies, namely, the DNS Root Server System Advisory Committee, the At-Large Advisory Committee, the Board of Directors, the Country Code Names Supporting Organization and the Address Supporting Organization may be considered a worthwhile activity but, since such reviews are unfinished, they are not an achievement.

⁹ The GNSO Improvements Report is accessible at <http://www.icann.org/topics/gnso-improvements/>.

Regrettably, ICANN has not increased engagement with the private sector by developing additional mechanisms for involvement of those affected by the ICANN policies. It has, instead, created considerable disincentives for private sector participation – regardless of whether that participation is through public comment, attendance at meetings, or attempted participation in working groups.

We discussed in connection with Question 3 the lack of meaningful review of and action on public comment. Without meaningful review of and action on public comment, there is no incentive for private sector participation through the public comment process. Private sector participants simply will not invest the time, money, and other resources necessary for the preparation and submission of thorough and thoughtful comment in a process in which such comments will ultimately be ignored.

The current locations, cost, scheduling, and planning of the ICANN meetings also act as disincentives for private sector participation. Private sector participants are unlikely to obtain budgetary approval to attend meetings that are in far-flung, difficult-to-reach locales (especially if usually associated with resort or adventure travel) such as San Juan, Marrakech, Bucharest and Delhi; for which the hotel rooms exceed USD 300 per night; for which the locations are announced less than a year in advance; for which hotel information is released two months before the meeting; and for which the final schedule and relevant policy documents are distributed only two or three weeks before the meeting begins. Private sector participants are far more likely to obtain budgetary approval to attend meetings in relatively easy-to-reach regional travel hubs such as Toronto, Brussels, Quito, Hong Kong, or Dakkar with reasonably priced hotels for which the location is announced one year before the meeting, and for which the final schedule is set six months before the meeting. The farther ahead private sector participants can plan for the meeting, the more likely they are to attend and provide a meaningful contribution.

By comparison, for example, INTA expects 8,000 attendees at its Annual Meeting this May in Berlin.¹⁰ INTA announced Berlin as the location nearly five years ago in 2003, distributed hotel and meeting schedule information in November 2007, and required all speakers to submit outlines of their presentations in December 2007. All speakers and attendees are volunteers. INTA is able to complete its advance planning because it has a 19 member volunteer Programs Committee and creates project teams charged with planning all aspects of its Annual Meeting.

ICANN, which recently dissolved its Meeting Committee, should reconstitute it and seek volunteers, particularly those from the private sector who have experience in planning and seeking budgetary approval to attend meetings comparable to ICANN's meetings.

¹⁰ INTA invited Dr. Twomey to speak at its Board of Directors luncheon held in conjunction with the May 2007 Annual Meeting in Chicago, Illinois. This meeting is referenced in the ICANN Table.

Finally, private sector participation in ICANN's working groups merits brief comment. The recent facilitation of broad private sector participation in the Whois Working Group is commendable and should be encouraged for future working groups. It is important, however, that undue emphasis not be placed on "ICANN experience" such that otherwise qualified individuals (e.g., financial services sector personnel for the Whois Working Group) are not unnecessarily excluded.

Question 7: *In the JPA, ICANN agreed to undertake the following with respect to the role of governments: "ICANN shall work with the Government Advisory Committee Members to review the GAC's role within ICANN so as to facilitate effective consideration of GAC advice on the public policy aspects of the technical coordination of the Internet." What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?*

Response 7: No comment.

Question 8: *In the JAP, ICANN agreed to undertake the following with respect to IP addressing: "ICANN shall continue to work collaboratively on a global and regional level so as to incorporate Regional Internet Registries policy-making activities into the ICANN processes while allowing them to continue their technical work. ICANN shall continue to maintain legal agreements with the RIRs (and such other appropriate organizations reflecting this work)." What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?*

Response 8: No comment.

Question 9: *In the JPA, ICANN agreed to undertake the following with respect to corporate responsibility: "ICANN shall maintain excellence and efficiency in operations, including good governance, organizational measures to maintain stable, international private sector organization, and shall maintain relevant technical and business experience for members of the Board of Directors, executive management, and staff. ICANN will implement appropriate mechanisms that foster participation in ICANN by global Internet stakeholders, such as providing educational services and fostering information sharing for constituents and promoting best practices among industry segments." What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?*

Response 9: ICANN is to be commended for its achievements thus far in this area. In particular, ICANN appears to be committed to numerous outreach and training activities around the world, as well as efforts to improve its website.

However, many of the achievements listed by ICANN in response to this question do not appear to include substantive activities on the part of ICANN but rather listings of personnel

appointments or plans for future actions. While the appointments and elections outlined in ICANN's response are impressive, they are, as previously noted, not specific evidence of activities in support of corporate responsibility. In addition, we would note that while the increase in staff for the Director of Compliance is welcome, it unfortunately still leaves this critical area woefully understaffed.

Good governance mandates the avoidance of conflicts of interest and the appearance of impropriety. The conflict of interest policy currently applied to the Board is insufficient. It is not sufficient for a Board member with a conflict of interest to simply forgo his or her vote on the final Board action on the relevant issue; that Board member must recuse herself/himself from all Board discussion of the particular issue. Allowing a Board member to participate in the discussion of an issue in which he or she is prohibited from voting effectively renders moot the prohibition on voting.

Question 10: *In the JPA, ICANN agreed to undertake the following with respect to its corporate administrative structure: "ICANN shall conduct a review of, and shall make necessary changes in, corporate administrative structure to ensure stability, including devoting adequate resources to contract enforcement, taking into account organizational and corporate governance 'best practices.'" What progress do you believe ICANN has achieved with regard to this Responsibility since October 1, 2006? If you believe that progress has been made, please explain how and why? Could more be done by ICANN in this area?*

Response 10: While ICANN reports that it has engaged in a review of its corporate administrative structure, and that further review is underway, it is not clear that adequate progress has been made toward identifying and implementing necessary changes to that structure to ensure long term stability. Additional reviews resulting in a concrete strategy for change and evidence of measurable success are still necessary. Furthermore, while ICANN has made some progress in dedicating resources to the critical task of contract enforcement, those resources are inadequate to support this most basic responsibility of ICANN as an Internet governing body. In order to function as a self-governing entity independent of oversight, ICANN must dedicate more resources to compliance and demonstrate that it vigorously enforces its contracts, which will necessitate hiring additional staff and outlining and implementing a specific plan to identify and address non-compliance.

Corporate Structure and Organizational Status

With respect to its corporate structure and organizational status, ICANN reports that it has reviews underway with international law firms which presumably relate to its organizational status and governance frameworks. While these reviews are a positive first step, they are not in and of themselves a measure of ICANN's achievement in adopting corporate governance best practices.

ICANN also reports that legal counsel has been asked to assist by surveying potential alternative organizational structures under both U.S. and foreign law. In addition, criteria and values for further analysis of potential structures have been identified, and the results of this further review

will be provided to the community at the ICANN meeting in Paris in June 2008. While these activities have resulted in some progress, the review obviously is not complete. For example, questions remain concerning the sufficiency of conflict of interest requirements for board members.

Until the long-term corporate administrative structure of ICANN is clear and in place, it is not in a position to function independent of oversight. At present, while ICANN has undertaken some activities to assess corporate structure and governance issues, further work on these issues is needed, and it is too early to conclude that ICANN has achieved the JPA's objective and made the necessary changes in its corporate administrative structure to ensure stability.

ICANN cited the Report of President's Strategy Committee ("PSC") as further evidence of its achievement in relation to corporate administrative structure. Although the activities of the JPA, including its consultation with stakeholders, is to be applauded and some recommendations have resulted from the review, these tend to be general in nature and lacking in detail, and accordingly offer little evidence of measurable outcomes or metrics for assessing performance to support the conclusion that ICANN has met its objectives under the JPA. Rather, it appears that the PSC is still in the process of evaluating progress and generating specific objectives for future implementation. For example in relation to the issue of ICANN's "Legal Status and Identity," the PSC's October 2007 Report notes that it conducted an initial analysis only, and identified issues for further review such as maintenance of ICANN's "not for profit status," the appropriateness of labor laws and ensuring that any new structure allows ICANN to maintain its accountability mechanisms.¹¹ The Report further stated that the mechanics for implementation would follow at the ICANN meeting in Paris in June 2008. Further information on the reviews, goals and performance metrics should be made available to address this lack of detail and to allow a correct assessment of progress made to date.

Contract Compliance

For the Internet to be a safe, stable, and secure place for commerce and discourse, it must not be a realm completely beyond the rule of law. The basic role of any kind of "governing" entity includes not only setting "laws," community rules, and norms, but enforcing them. If ICANN is to take on responsibility as a fully independent, self-governing entity, it must be ready to enforce such "laws," community rules, and norms as are within its scope. Moreover, as a private actor, the only manner by which ICANN is able to set and give meaning to its rules is through the formation and robust enforcement of its contracts. Thus, unless and until ICANN vigorously enforces its contracts, it will not fulfill its most fundamental responsibility as an Internet governance body, and will not be in a position to operate independent of oversight.

¹¹ Report of President's Strategy Committee, ICANN Board Annual Meeting, October 2007, page 3 – available at: <http://icann.org/psc/report-2007.pdf>.

ICANN has engaged in some activities aimed at enhancing the monitoring and enforcement of its contracts, but its demonstrated progress with respect to this most critical function is only in its earliest stages. Appointing a Director to the Contract Compliance Project (“CCP”) as well as an audit manager and data analyst are laudable steps. However, a staff consisting of five members is inadequate to make a measurable dent in the significant problem of compliance.¹² Likewise, while the 2007 Semi-Annual Contractual Compliance Audit Report (“Audit Report”)¹³ presents a modest first attempt at identifying problems and providing a baseline of issues, it does not provide sufficient basis to claim that ICANN is dedicating adequate resources to compliance issues, nor does it support the contention that ICANN is vigorously enforcing its contracts as required to promote long-term stability. In addition, while the Audit Report is a good start, the audit’s informational inputs seem insufficiently low, and the Audit Report did not provide detailed outputs. For example, while the Registrar Primary Contact Audit did not check the accuracy of the primary contact information for every registrar, the Audit Report nonetheless reported an increase in registrar contractual compliance with the Registrar Accreditation Agreement (“RAA”) based solely on the responses received from registrars who voluntarily responded to the CCP’s solicitation to update their primary contact information.¹⁴ Furthermore, while the Audit Report provides general information concerning registrar compliance with working website and Whois service availability requirements, it neither identifies non-compliance registrars nor sets forth a specific course of action to address such non-compliance.

ICANN must begin to proactively engage on the issue of contract compliance instead of merely reacting to the problem of non-compliance. For example, while conducting audits and reporting the occurrence of non-compliance is one step in a robust compliance program and helps to improve transparency, ICANN needs to formulate precise objectives regarding what affirmative, proactive steps it will take once armed with that information in order to achieve compliance. In particular, ICANN should set specific objectives concerning how it will enforce its contracts by, among other things, addressing: (i) non-cooperation with the UDRP by registrars and registries; (ii) inaccurate Whois data; (iii) the responsibility of registrars for their resellers’ non-compliance with the RAA issues; and (iv) the potential development of an escalated process for parties that are out of compliance with ICANN’s contracts.

Given the rampant occurrence of non-compliance, it is evident that despite the progress that ICANN has made, it is not prepared to assume full responsibility for governance of its subject

¹² See Contractual Compliance Department Organizational Chart – available at <http://www.icann.org/compliance/staffing-plan.html>.

¹³ ICANN 2007 Semi-Annual Contractual Compliance Audit Report, October 18, 2007 – available at <http://www.icann.org/compliance/reports/contractual-compliance-audit-report-18oct07.pdf>.

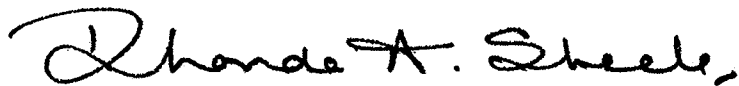
¹⁴ See ICANN 2007 Semi-Annual Contractual Compliance Audit Report, October 18, 2007, p. 6 – available at <http://www.icann.org/compliance/reports/contractual-compliance-audit-report-18oct07.pdf>.

matter independent of oversight at this time, and that not enough progress has been made to warrant terminating the JPA at this time.

There currently are more than 900 ICANN-accredited domain name registrars¹⁵ world-wide governed by ICANN's Registrar Accreditation Agreement (RAA) which requires that registrars have all of their registrants enter into an agreement wherein each registrant "shall provide to Registrar accurate and reliable contact details and promptly correct and update" those details during the term of the registration.¹⁶ Despite the RAA's clear requirement for accurate and reliable data, trademark owners continue to encounter blatantly false or incomplete data when accessing Whois records. This problem is exacerbated by ICANN's failure to enforce the RAA and strip registrars of accreditation for repeated offenses. To date, only one registrar has been stripped of ICANN accreditation for failure to comply with the RAA.¹⁷ Until ICANN aggressively pursues violations of the RAA and provides concrete data supporting its position that Whois data accuracy has substantially improved, the Joint Project Agreement should remain in force and the transition of the Domain Name System to the private sector delayed.

Thank you for the opportunity to submit comments on the transition of the Internet DNS to private sector management. We also look forward to discussing our comments at the public meeting on February 28, 2008. In the interim if you have any questions concerning INTA's response, please contact Claudio DiGangi at cdigangi@inta.org.

Sincerely yours,



Rhonda A. Steele
President

¹⁵ See ICANN Releases RAA Public Consultation Comments, October 23, 2007, <http://www.icann.org/announcements/announcement-23oct07.htm>

¹⁶ RAA, <http://www.icann.org/registrars/ra-agreement-17may01.htm>, at paragraph 3.7.7.1.

¹⁷ See *ICANN v. RegisterFly*, <http://www.icann.org/general/litigation-registerfly.htm>