BUTERA & ANDREWS
Attorneys at Law
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-1701
202-347-6875
Philip S. Corwin, Partner
pcorwin@butera-andrews.com

By E-Mail:
JPAMidTermReview@ntia.doc.gov

February 15, 2008

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

Re: Docket No. 071023616-7617-01; Notice of Inquiry regarding Midterm Review of the Joint Project Agreement (JPA) between the Department of Commerce and ICANN

Dear Ms. Sene:

This comment letter is submitted by the Internet Commerce Association (ICA) in regard to the November 2, 2007 Federal Register notice in regard to the above-referenced Docket item.

ICA is a not-for-profit trade association representing the direct search industry. Its global membership is composed of individuals and companies that invest in domain names (DNs) and develop and monetize the associated websites, as well as providers of services to such entities. ICA's members collectively hold portfolios comprised of tens of millions of DNs. Domain name investors and developers are the new media and e-commerce companies of the twenty-first century, with the current asset value of the direct search industry standing in excess of $10 billion and with these assets generating at least $1-2 billion in annual advertising revenues and associated e-commerce transactions. ICA's mission is to promote the benefits of the activities of professional domain name investors, owners and developers to the press, advertisers, and governmental authorities on a global basis; and to strive for fairness among regulators and in ICANN's dispute resolution process as well as in the taxation and treatment of DN registrants under all relevant laws, regulations, and agreements in the U.S. and other nations. ICA provides a unified voice for a membership with common interests and a diverse collection of experience in the professional domain name ownership community. The community represented by ICA

has risked large amounts of capital in order to develop domain names. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself.

Executive Summary

While the ICA has observed some improvements in ICANN's general transparency and accountability over the first half of the JPA, and while we do perceive some greater sensitivity to the needs and objectives of the professional domain investment and development community, we cannot support termination of U.S. oversight over ICANN at this point in time for the following reasons:

- **ICANN has failed to assure domain name (DN) registrants that the pricing and performance of generic top level domain (gTLD) registries will be optimized. To the contrary, it hasentered into near-perpetual, above-competitive rate contracts with these registry operators.**
- **ICANN failed to protect registrant interests or adequately respond to registrant requests for assistance during the initial collapse of RegisterFly in 2006-7. While ICANN has taken some ameliorative steps since then it is still unclear when a strengthened Registrar Accreditation Agreement (RAA) will be finalized, much less when it will be implemented, whether such implementation will be on a uniform basis, and whether enforcement will be adequate to protect registrant interests and rights.**
- **ICANN has under consideration a proposal for "improvements" of its Generic Names Supporting Organization (GNSO) that would substantially downgrade the role of all business interests, including the domain monetization industry, in shaping ICANN policies.**
- **ICANN's Governmental Affairs Committee (GAC) has grown substantially in membership and has become increasingly influential in ICANN policymaking. Yet the GAC continues to close all its meetings to the public and the press in complete contravention of ICANN's commitment to greater transparency and accountability. The ICA must oppose any suggestion that U.S. oversight of ICANN be terminated until such closed sessions become the rare exception rather than the general rule.**
- **ICANN recently considered a proposed dispute resolution policy (DRP) for new gTLDs that is substantially less protective of DN investments than the current Uniform Dispute Resolution Policy (UDRP) and would abet reverse hijacking of DNs presently controlled by ICA members. Further, it has been proposed that this DRP should eventually be applied retroactively to existing gTLDs, including .Com.**
- **ICANN has failed to exercise adequate oversight over the presently approved providers of UDRP arbitration services and, as a result, has allowed a growing degree of non-uniformity that encourages complainant forum-shopping that is disadvantageous and fundamentally unfair to DN registrants. Further, ICANN has failed to consider additional procedural safeguards to assure adequate due process in UDRP proceedings, and has**

just approved a new UDRP arbitrator that is viewed by many in the DN community as biased in its administration and decision-making.

- **ICANN's policy development process remains deficient insofar as ICANN often fails to articulate the rationale for a particular proposal or recognize and elaborate upon its long-term implications.**

In addition to the above reasons, which we discuss at greater length in the remainder of this comment letter, we believe that the U.S. should only consider termination of oversight over ICANN after ICANN provides firm and enforceable assurances that it will maintain a physical headquarters and organizational form that assures that aggrieved parties will have adequate recourse, by litigation or other means, to take issue with ICANN decisions. Further, any decision to terminate oversight must be preceded by receipt of a clear and credible transition plan that contains a detailed description of how a post-JPA ICANN will operate in a manner that preserves the private sector orientation envisioned for ICANN at the time of its creation.

It appears to us that there are three potential alternatives for ICANN's future development:

1. **Realization of the goal of full privatization in a manner that maintains ICANN as a private sector enterprise operating in a bottom-up, consensus-driven manner encompassing all affected and interested constituencies.**
2. **The effective transformation of ICANN into something akin to a trade association for contractual parties (registries and registrars).**
3. **The de facto transformation of ICANN into an intergovernmental organization (IGO) similar in operation and mindset to an UN-affiliated entity and under the primary influence of its Government Affairs Committee (GAC).**

Only the achievement of alternative 1 would be consistent with the original vision of ICANN's creators, while a detour toward alternatives 2 or 3 (or some combination thereof) would be a most unfortunate outcome.

The ICA is fully committed to supporting and realizing the goal of ICANN's full privatization at the earliest feasible time. But we believe that the issues raised in this letter must be fully addressed and resolved in advance of U.S. oversight termination if our members' existing DN investments are to be protected and if an environment is to be maintained that encourages further capital investment inflows. In short, DN owners and investors must know that ICANN's future evolution maintains acceptable levels of risk.

Finally, as our members are based around the globe, we do not view the U.S. as inherently superior to other nations in the ability to exercise ICANN oversight. However, continued U.S. oversight is favored at this point in time because the U.S. was the source of the concept of spinning off DNS management from the government sector to the private and is most likely to press for successful

completion of this transition in a manner that maintains an adequate role and a positive environment for entrepreneurial business sector investments related to Internet DNs.

The gTLD Registry Lock-In and Its Adverse Impact on DN Registrants

The ICA was originally organized in large part out of consternation within the domain name investment and development community over ICANN's failure to establish effective means to assure reasonable pricing in the generic Top Level Domain (gTLD) registry area -- as evidenced by the settlement of litigation between ICANN and VeriSign that awarded essentially perpetual control over .Com at pricing levels far higher than would have been set by a competitive re-bid process. Just a short time prior to this settlement VeriSign won continued operation of .Net, but did so in a competitive re-bid process that reduced registration fees by one-third, from $6 to $4. Many expert observers believed that, because of its much larger economies of scale, registration fees on .Com would have fallen by at least one-half, to $3, if competitive bidding had been permitted -- as we believe was required under the contract then in effect. Unfortunately, ICANN extricated itself from the VeriSign litigation at a heavy cost to DN registrants, awarding VeriSign a new six-year contract that let the $6 fee stand without reduction, and in addition permitting VeriSign to increase registration fees in four out of the 6 contract years without any justification whatsoever. As we read the contract it is essentially perpetual, as it is nearly impossible for VeriSign to lose the right to presumptive renewal. We estimate that this unjustified contract will provide a "gift" to VeriSign's shareholders in excess of $1 billion over its term. VeriSign maintained during Congressional oversight of this matter, and while the Department of Commerce considered whether the contract should be approved (which it finally did in November 2006), that it would not abuse this pricing increase power. Yet, in April 2007 it took advantage of the increase without justification clause at the first opportunity and announced the maximum permissible registry fee increases for both .Com and .Net. At that time the ICA stated:

The Internet Commerce Association (ICA) calls upon Congress and the Department of Commerce to exercise the strongest possible oversight over the increase in registry fees for .Com and .Net just announced by VeriSign. The seven percent increase for .Com and the ten percent increase for .Net are the maximum allowed under its registry operator contracts with ICANN, and come at a time when the pricing of other Internet services such as bandwidth, access and anti-hacker protection continues to fall…When the Department of Commerce approved the current .Com registry agreement on November 30, 2006 it insisted upon an amendment by which it retained oversight over any changes to its pricing provisions, and stated that VeriSign's future operation of .Com would be approved only if the Department concluded "that the approval will serve the public interest in…the operation of the .com registry, and the provision of registry services at reasonable prices, terms and conditions." The ICA believes that responsible public officials engaging in thorough scrutiny of this announced price increase are likely to conclude that the new price for .Com is unreasonable and that VeriSign's announced intent is inconsistent with the general public interest as well as the specific interest of domain name registrants.

Unfortunately, this deeply flawed .Com agreement became the model for subsequent registry contract renewals for .Biz, .Org and .Info, some of which were inexplicably rushed through years ahead of their renewal date. The ICA was one of more than 1,000 unique individuals and entities who commented on ICANN's proposal for the fundamental and essentially permanent revisions of the .Biz, .Org, and .Info gTLDs. These comments ran strongly against the proposal, by a ratio of 200 to 1. Nothing could better illustrate the disconnect between ICANN and the Internet community on this matter than the lopsided ratio of this vociferous opposition.

As ICANN's own September 7, [2006] "Summary of Public Comments" memo notes, process concerns noted by commentators included:

- Insufficient public information regarding ICANN's reasoning underlying both the timing and substance of the proposals.
- A public comment period (30 days) that was entirely too short, given the permanent and fundamental nature of the proposed changes.
- The premature nature of the proposals, given that the agreements in question do not expire for another one to three years.
- The manner in which the proposals undermined the legitimacy of ICANN's own Policy Development Process 06 (PDP 06), in which the Generic Names Supporting Organization (GNSO) Council was addressing such core gTLD management issues as permanent assignment of domain names to registry operators, consensus policies, price constraints, and the use of traffic data.

In short, had ICANN been operating in a transparent and consensus-driven manner it would not have negotiated these proposed agreements in secret with incumbent registry operators, it would not have proposed them prematurely and without adequate policy justification, and it would not have given the broad Internet community insufficient time in which to fully digest their implications and prepare comprehensive commentary.

Additionally, ICANN's own "Summary of Public Comments" listed the serious deficiencies of these gTLD registry agreement proposals that were readily apparent to the affected public but either went unperceived or ignored by ICANN staff:

- Unrestricted, differential registration and renewal fees could be applied in a manner to suppress political and economic views disfavored by the registry operator, a power with chilling future potential should DNS governance ever be transferred to a politicized organization.
- Unrestricted, differential registration and renewal fees could create significant barriers to entry, especially for small businesses; result in extortionate renewal fees, given the lock-in effect of the high cost and potential detrimental business fallout for registrants switching to an alternative gTLD; effectively constitute a "domain name tax" on successful e-businesses; and create conflicts with trademark law if a registrant was unable or unwilling to pay an extortionate initial

registration or renewal fee and the registry operator auctioned its trademarked domain name to the highest bidder (including a direct competitor).

- The allowance of the use of traffic data for any commercial purpose could undermine data privacy, and allow the registry operator to, in effect, compete against its own registrants by engaging in "domain-tasting" in order to determine how high a price the market would bear for a specific new domain name registration.
- The presumptive renewal provision was tantamount to a grant of perpetual monopoly; would permit registry operators to commit multiple, fundamental and material breaches of their agreements and flaunt ICANN authority for extended periods without risking loss of the contract; and made inadequate utilization of market mechanisms, such as competitive re-bidding, to provide discipline and assure high levels of service and reasonable pricing policies.

It is apparent from these comments that adoption of the proposed agreements would fundamentally change the mission and character of the gTLD registries and of the Internet itself. Yet the only policy rationale provided by ICANN was after the fact, contained in its September 7th Summary of Public Comments document, in which it asserted that it "sought to strengthen the stable and secure operation of the Internet's unique identifier systems, while reducing any unnecessary entanglement in the economic regulation of the competitive market for domain registration services".

Unfortunately, what ICANN viewed as "unnecessary entanglement" in the operation of registry operators appeared to others as a complete abdication of its duty to protect the public from potential abuse of a perpetual monopoly. Its view that there currently exists a "competitive market" for gTLD registrations ignores the fact that some domain extensions (e.g., .Com) are inherently more valuable than others; that businesses established at a particular domain name cannot readily switch to another without risking economic ruin; that some businesses must register their name across a broad range of gTLDs, particularly to protect their trademarks; and that some .gTLDs (e.g., .Mobi, for consumers and providers of mobile phone products and services) are the only practical domain available for a particular type of online activity. It also ignores the very real possibility that entrenched gTLD registry operators may choose to collude, rather than compete, in pricing policies that benefit all of them at the expense of domain name registrants.

And, of course, the presumptive renewal policy abandons the one form of competition that would protect the public against poor service and unreasonable pricing, especially given ICANN's apparent antipathy to active price regulation – that is, competition to operate the gTLD registries through the periodic market testing of an open re-bidding process. When such market testing was allowed to operate, such as for the .Net gTLD, it resulted in an across-the-board, one-third reduction of registration prices. When it was prevented from operating, such as in the.Com settlement, the result was no registration price reduction and allowance of future seven percent annual price increases absent any underlying justifications.

These gTLD agreements, eventually approved by ICANN in somewhat modified form (e.g., elimination of differential pricing) despite overwhelming community opposition, demonstrated ICANN's vision for the future of the existing gTLDs – perpetual renewal linked to unjustified price increases. That is a prescription for unjustifiable profiteering by the gTLD registries (with a portion of that windfall upstreamed to support ICANN's burgeoning bureaucracy) at the expense of the public here and abroad. In this regard, the just-released proposed ICANN budget for FY 08-09 projects $61 million in revenue, with about 90% of that revenue generated by fees on gTLD registrations. This is the tenth year in a row that ICANN's budget has increased, and if this trajectory continues it will not be many years in the future when DN registrants are shouldering the cost of a DNS "technical manager" with a $100 million annual budget. At a certain point DN registrants must ask whether this level of cost is really required or whether it simply represents organizational empire-building.

As ICANN contemplates authorization of many new gTLDs, there is a danger that such presumptive renewal clauses will become the norm for these new entities as well. Newly approved gTLDs are likely to keep registration fees low at first, but successful entrants would likely maximize their pricing over time. Further, it remains to be seen whether newly authorized gTLDs will in any way effectively challenge the dominance of existing extensions such as .com and thereby exert some moderating influence on price increases. While we have no objection to contractual provisions that provide registries with a true presumption that their operator status will continue on the basis of good service and fair pricing, we remain very concerned about presumptions so heavily weighted in their favor as to constitutive perpetual renewal barring extraordinary incompetence or massive material contractual breaches, especially when they are combined with the ability to levy price increases absent any justification whatsoever.

RegisterFly and the Compelling Need for a Strengthened and Actively Enforced RAA

The protection of the data demonstrating that a registrant has legitimate control of a domain name, as well as protection against theft or unauthorized transfer of that DN, is a matter of fundamental importance to investors and developers who expend large sums of money for a particular DN. Unfortunately, under the current Register Accreditation Agreement (RAA) registrants cannot be fully assured that their investment will be adequately protected, as was demonstrated in last year's RegisterFly debacle.

In late 2006 and early 2007 multiple reports, many of which were filed with ICANN, indicated that tens of thousands of DN registrants were having their DNs lost or stolen due to incompetence or malfeasance at the ICANN-accredited RegisterFly registrar.

On February 21, 2007 the ICA sent an urgent letter to ICA President Paul Twomey that included the following:

It has come to our attention that an ICANN-accredited registrar is in the midst of what appears to be a near-complete operational breakdown, and that its ongoing failure to carry out its responsibilities is causing substantial economic loss to tens of thousands of

DN registrants in both the United States and multiple foreign jurisdictions…We hope ICANN agrees that this is an extremely serious situation and that failure to expeditiously resolve it in a manner that protects the interests of RegisterFly's customers will cast a serious pall over the credibility of ICANN's registrar accreditation program.

According to press reports, RegisterFly.com of Boonton, New Jersey – which claims to control approximately two million DNs on behalf of nearly one million registrants domiciled in the U.S. and 120 other nations -- has had very serious operational problems for the past several weeks. As an apparent result of these problems, DN registrants who have utilized its services have reportedly:

- *Been unable to recover DNs that were not automatically renewed per their customer agreement.*
- *Have lost DNs they had paid for when those DNs were allowed to lapse well before their expiration date.*
- *Have had their DNs "hijacked" and sold to third parties.*
- *Have been charged multiple times for the same registration service, even when that service is not subsequently performed.*
- *Have had great difficulty in contacting RegisterFly's customer service and, on those rare occasions when able to do so, have been told that no meaningful assistance can be provided.*

The letter went on to provide further details of the meltdown and to raise questions about what immediate assistance ICANN could provide to RegisterFly customers, as well as what changes to the substance and enforcement of the Registrar Accreditation Agreement (RAA) would be made by ICANN to assure that such a situation never recurred.

On March 26, 2007 ICANN released a Factsheet on RegisterFly and Registrars. Shortly thereafter, at is meeting in Lisbon, ICANN conceded that it had never actively enforced the critically important data escrow provisions that are part of the RAA it has entered into with more than 900 accredited registrars located around the globe. On May 29, 2007 ICANN announced that GoDaddy would take over the portfolio of more than 850,000 GTLD DNs still held in RegisterFly's portfolio.

In March 2007 the ICANN Board also authorized development of a new and strengthened RAA to prevent a situation of this type from happening again. On October 23, 2007 ICANN released a compilation of public comments received on recommendations for changes in the RAA. Unfortunately, it appears that dissemination of the next version of this RAA has been delayed ,which prevented concerned parties from knowledgably discussing it at the just-completed ICANN meeting held in Delhi, India from February 11-15, 2008.

An important and praiseworthy step was taken by ICANN in November 2007, when it announced that it had entered into a data escrow agreement with Iron Mountain Intellectual Property Management, Inc. and that all ICANN-accredited registrars must regularly deposit a backup copy of their gTLD registration data with ICANN through

ICANN's arrangement with Iron Mountain or, in the alternative, elect to use a Third Party Provider of RDE services that has been approved by ICANN. It has just been announced that approximately 775 registrars have already made known their intention to utilize the Iron Mountain data escrow service, and this is certainly a step in the right direction toward effective protection of registrant domain name data.

So, in the area of protecting registrants regardless of which ICANN-accredited registrar they use, some progress has been made. ICANN did respond effectively in the RegisterFly matter, but only after waiting far too long to intervene and rebuffing registrant pleas for assistance for many months. ICANN has proposed to strengthen the RAA and has implemented stronger data escrow provisions. And ICANN has modified their website to make it far easier for registrants to raise concerns about a particular registrar and request ICANN assistance.

That said, the jury is still out. ICA members want to see ICANN promulgate a strengthened RAA as soon as possible and to put it into effect on a uniform date regardless of when any particular registrar's current RAA is due to expire. And the real test will be whether ICANN expends adequate staff and funds on RAA enforcement.

Finally, there is one recent development which raises questions about whether RAAs will continue to be uniform or will increasingly diverge based upon the domicile of the registrar. In December 2007 ICANN announced that, as of January 2008, it would implement a new procedure by which registrars could seek exemption from the WHOIS compliance provisions of the existing RAA based upon a conflict with relevant national privacy law, in order to allow for the presence of accredited registrars in nations which have privacy statutes in conflict with WHOIS requirements. While this particular procedure will provide exemptions that protect registrant privacy, the ICA is nonetheless concerned that it creates a precedent by which the new RAA, regardless of how strong, may be undermined by other national laws and thereby leave registrants with no assurance that the registrar they choose is governed by a standard agreement that is uniformly enforced.

<u>The Downgrading of Business Sector Influence by Proposed GNSO "Improvements"</u>

ICANN is in the process of considering a proposal for GNSO "improvements" that would substantially reduce the ability of the three present business sector constituencies – commercial and business users (CBUC), intellectual property (IP), and Internet service providers (ISP) to influence ICANN's policymaking process. This downgrading would be accomplished by shifting much of the policy development process to ad hoc working groups while simultaneously awarding half of all voting power to the two constituencies with which ICANN has direct contractual relationships (registries and registrars), with the combined noncontractual business sector constituencies sharing one-quarter of all voting power. As the ICA has just been provisionally approved as a member of CBUC this downgrading of business sector policy influence will diminish the ability of professional registrants to influence ICANN policymaking.

The ICA shares the substantial concern of other business entities that, under the pending proposal, the contractual constituencies will have little incentive to make the ad hoc working groups effective drivers of policy decisions – and, at the same time, the diminished role of noncontractual business entities will undermine their incentive to continue active participation in the ICANN process. In the long term this will diminish ICANN's credibility and quite possibly lead to the perception that it has morphed into a trade association for the contractual parties. This result would be at sharp odds with the original vision of ICANN as a consensus-driven, bottom-up organization taking its overall direction from commercial and noncommercial users of the domain name system, and not from the middlemen who administer it. No firm decision regarding termination of the JPA should be undertaken until a final decision on the future structure and operation of the GNSO has been made and the results of that decision have been observed for a reasonable period of time.

On the final day of its just-completed Delhi meeting the ICANN Board voted to put the GNSO improvements plan out for public comment for a period of only 30 days, rather than the far more meaningful 60 day period sought by many members of the business constituency – especially given that the main recommendations were accompanied by two sharply dissenting minority reports. The Department Of Commerce should carefully monitor this ongoing process to assure that there is no unseemly rush to implement a controversial proposal that may permanently degrade the ability of noncontractual business interests to meaningfully influence ICANN policymaking.

A Closed Door GAC is Incompatible with Transparency and Accountability

As self-described by ICANN's Government Advisory Committee (http://gac.icann.org/web/about/gac-outreach_English.htm) –

ICANN receives input from governments through the Governmental Advisory Committee (GAC). The GAC's key role is to provide advice to ICANN on issues of public policy. In particular, the GAC considers ICANN's activities and policies as they relate to the concerns of governments, particularly in matters where there may be an interaction between ICANN's policies and national laws or international agreements. The GAC's meetings are usually held three or four times a year in conjunction with ICANN meetings. Currently, the GAC is regularly attended by over 30 national governments, distinct economies, and multinational governmental organisation such as the ITU and the World Intellectual Property Organisation (WIPO).

Membership of the GAC is open to all national governments, distinct economies as recognised in international fora, and multinational governmental organisations and treaty organisations.

It then goes on to provide a description of the scope of GAC activities –

What has the GAC done recently? The GAC has considered and provided advice on a variety of issues, including:

- *what issues and public policy considerations ICANN should take into account when selecting new generic top level domains;*
- *guidance on matters related to the development of multilingual domain names (domain names in scripts other than the Latin alphabet such as Chinese, Cyrillic, and Arabic for*

example) including intellectual property protection, consumer protection, and cultural issues;

- *principles for guidelines aimed at co-ordinating future domain name testbed environments, consistent with the need to foster innovation and creative experimentation; and*
- *principles for the sound management and administration of ccTLDs, including the development of the GAC document Principles for the Delegation and Management of Country Code Top Level Domains , which gives guidance on the roles of ICANN, governments, and registries in the operation of ccTLDs.*

Clearly, the GAC is a highly influential component of ICANN. And it is becoming more influential with each passing year. GAC concerns about the proposed .XXX registry for adult content led its proponent to develop a final contract that would have so involved ICANN in content review, consumer protection and other activities far beyond its technical management role that the ICA was compelled to oppose it; the contract was rejected at the March 2007 Lisbon meeting, with members of the ICANN Board publicly alleging unwarranted political pressures on that vote. The GAC is also the main proponent of restrictions on new gTLD names that offend "morality and public order", criteria that others have charged would turn the Domain Name System (DNS) into a regime for censorship. And the GAC is the main proponent of allowing national governments to assert control over all domain names of "geographic or national significance" on new gTLDs, and of a new DRP that provides DN registrants with substantially less due process and appeals rights than the existing UDRP.

Yet this highly influential ICANN component persists in its policy of holding all meetings behind closed doors, barred to the public and press. Commendably, the U.S. has stated that the achievement of greater transparency and accountability in ICANN operations will be a key criterion for judgment on whether existing oversight should be terminated or extended in fall 2009.. While ICANN has made some positive strides in making some of its operations more transparent and accountable, the GAC has remained completely off-limits, and this is a glaring anomaly..

A further concern for DN registrants is that while they are shut out from even observing GAC proceedings the leading proponent for IP interests and arbitrator of UDRP cases, the World Intellectual Property Organization (WIPO), is a member of the GAC (due to its UN agency status) and able to actively participate in all of its meetings. In other words, trademark and other IP interests have direct ability to influence GAC policies and recommendations while DN interests have no opportunity to comment until they are a fait accompli.

Another cause for concern is ICANN's continued and Board-approved exploration of changing its status from that of a California non-profit corporation to a Private International Organization (PIO). While the PIO concept is somewhat amorphous, a main goal appears to be making ICANN decisions litigation-proof by being beyond the jurisdiction of any national court. Taken together, the prospect of the potential end of U.S. oversight of ICANN, conversion of ICANN to PIO status, and continued secrecy for the GAC lead to the possibility that a mini-UN will become entrenched within ICANN and allowed to conduct its deliberations and make its decisions in secrecy -- and that subsequent ICANN implementation of those decisions will be beyond any court challenge. Such a development would be directly contrary to the strong bipartisan opposition expressed by many members of Congress when the possibility of transferring ICANN's responsibilities to a UN-affiliated entity was contemplated in conjunction with the 2005 World Summit on the Information Society (WSIS) meeting.

Even if this scenario does not come to pass, the conduct of all GAC meetings behind closed doors simply invites suspicion and is at complete odds with ICANN's professed goal of greater transparency and accountability. While nearly every ICANN constituency holds some small portion of its meetings in closed session, only the GAC does so for every meeting (other than the highly choreographed public sessions with the GNSO and the Board, at which no public comment or questioning is permitted). If the GAC expects to play an increasing role in shaping ICANN policy then the community and the free press have every reason to want to be able to observe its deliberations.

Therefore, the ICA is firmly opposed to any consideration of terminating U.S. oversight over ICANN until closed door GAC meetings become a rare exception and not the constant rule. As Supreme Court Justice Luis Brandeis opined, "Sunlight is said to be the best of disinfectants."

No Undermining of Current UDRP Standards

In June 2007 ICANN's Generic Names Supporting Organization (GNSO) issued a Report on a New Dispute Resolution Process for Intergovernmental Organization (IGO) Names that could also be applied to all new gTLDs created by ICANN going forward. While there are, at present, only 132 IGOs with 289 abbreviations and 581 names currently registered, the proposal was of far broader import. Substantively, it departed from established trademark law by proposing to permit governments, "at no cost and upon demand", to object to all DNs asserted to have "national or geographic significance" even if there was no alleged abuse involving the DN; it is by no means clear what DNs would be viewed as having "national significance" but it appears that would encompass any DN that any government asserted to fit within that classification, and DNs of "geographic significance" would appear to include any name appearing on a map, including city and country names.

Procedurally, it would have been a major step backwards for protecting DN registrants. As one commentator compared it to the existing UDRP –

Under the current UDRP the rules state that:

4. a. Applicable Disputes. You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; ***and***

(ii) you have no rights or legitimate interests in respect of the domain name; ***and***

(iii) your domain name has been registered ***and*** *is being used in bad faith.*

In the administrative proceeding, the complainant must prove that ***each*** *of these three elements are present.*

I've emphasized above the words "and" and "each." Contrast this with the language in the draft report for IGO dispute resolutions:

"4. a. Applicable Disputes. You are required to submit to a mandatory administrative proceeding in the event that an International Intergovernmental Organization (IGO) (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

(i) the registration ***or*** *use, as a domain name, of the name* ***or abbreviation of the complainant*** *that has been communicated under Article 6ter of the Paris Convention is of a nature:*

(a) to suggest to the public that a connection exists between the domain name holder and the complainant; ***or***

(b) to mislead the public as to the existence of a connection between the domain name holder and the complainant; ***or***

(ii) on the ground that the registration ***or*** *use, as a domain name, of a name* ***or abbreviation of the complainant*** *protected under an international treaty violates the terms of that treaty.*

In the administrative proceeding, the complainant must prove that ***any*** *of the elements (i)(a) or {i)(b) or (ii) - is present."*

Notice that in the proposed policy, the domain registrant (respondent) has much weaker protection compared to the UDRP because the complainant need only prove a ***single*** *element is present. If one is for the rights of registrants, then this proposal is clearly preposterous, especially for registrants of short domains (2 to 5 characters in length) which may randomly collide with the acronyms of IGOs.*

Under this draft policy, the existing registrant would not even be able to argue that the domain name was registered in good faith, or that they had a legitimate use of their own that is entirely unrelated to that of the complainant. The existing registrant might even have a trademark of their own (e.g. AOL, who owns the short AOL.com as well as AIM.com), but that could not be used as an affirmative defense. Under the UDRP, a complainant would need to show that a domain was "registered ***and*** *used in bad faith," but element 4.(ii) of the proposed policy is much less balanced, allowing the complaint to theoretically succeed only on the basis that an abbreviation of the complainant is identical to that of the registered domain name.* ***This is a recipe for mass reverse domain name hijacking of short domain names by IGOs.*** *Many businesses, individuals, law firms, non-profits and others legitimately own short domain names that have nothing to do with IGOs, yet these domain names would potentially be at risk under this proposed policy, especially if it was extended to existing TLDs like .com or .org.*

ICA agrees that this was indeed a recipe for mass reverse DN hijacking – not just for IGOs but for all DNs of "national or geographic significance". And, as he notes, the Report specifically contemplates that this new DRP may eventually be applied to existing gTLDs, affecting tens of thousands of valuable DNs that in no way violate the existing UDRP! And, to add insult to injury, the DRP appeals procedure is only vaguely described but would not provide the same right of judicial appeal as the existing UDRP because IGOs do not want to submit to the authority of any national court, and national governments do not want to submit to any system of jurisprudence other than their own. There is also the great danger that, if implemented, this new DRP will be cited as a model by trademark and other intellectual property interests for altering the existing UDRP to their advantage, and the acute disadvantage of DN registrants.

At its June 2007 meeting in San Juan the GNSO rejected the ICANN staff recommendation that it be given authority to proceed to implement these recommendations, but it did request that ICANN staff develop a model DRP for new gTLDs for its review. While the proposed new DRP for IGOs was rejected at the ICANN meeting held in Los Angeles in November 2007, the possibility of a new and less protective DRP for the many new gTLDs that ICANN plans to authorize remains a matter of great concern for ICA members. While the ICA's member Code of Conduct is respectful of trademark rights we do not believe that the dispute process should be expanded to cover objections beyond the scope of trademark, and we do believe that a reasonable balance must be maintained between the rights of trademark owners and those of domain name investors and developers.

Growing Lack of Uniformity in the UDRP Process

When ICANN was established trademark and other IP interests had a seat at the table, while the domain monetization community did not – because it did not then exist, and few foresaw that domain names would acquire substantial stand-alone valuations. So the UDRP process was naturally biased in favor of trademark interests, and that bias is compounded by the fact that the World Intellectual Property Organization (WIPO) is the leading ICANN-approved Uniform Dispute Resolution Policy (UDRP) arbitrator. As the value of DNs grows registrants find themselves increasingly embroiled in disputes under the UDRP process. ICA members rely upon a uniformly and impartially administered UDRP to protect their assets against false claims of infringement and reverse DN hijacking. Yet ICANN's failure to exercise meaningful oversight over the UDRP has rendered it less uniform in application and has permitted worrisome trends to develop.

To correct this situation ICANN must monitor approved UDRP arbitrators to ensure compliance with procedural rules. For example, attorneys involved with the defense of DN registrants report that complainants often ignore the strict response time limits that are supposed to be enforced when a registrant requests a 3-member arbitration panel, and that arbitrating organizations like WIPO preserve the complainant's right to proceed when their complaint should be properly dismissed. When ICANN has attempted to intervene in such matters their action has been ignored without consequence by the arbitration panel. In addition, while the five names submitted by WIPO and other

arbitrators for the third member of the panel are supposed to be "neutral" a review of their records often indicates that all have consistently ruled on behalf of complainants.

There is also a need to establish a meaningful right to appeal within the UDRP process. Respondents face two problems with the present appeals process. First, the "mutual jurisdiction" agreed to by a complainant when it files is often a jurisdiction in which the respondent cannot avail itself of any opportunity to file a petition for relief. Second, when it is a jurisdiction like the U.S. the standards of applicable statute law (in that case, the Anti-Cybersquatting Protection Act) differ from UDRP standards so that the resulting decision is never binding upon UDRP arbitrators. ICA members would therefore support the establishment of a meaningful and neutrally administered right of appeal within the UDRP structure, even if accompanied by an additional filing fee.

There are other worrisome trends in UDRP decisions, Increasingly we see decisions in which "parked" pages are regarded negatively even though no credible charge of infringement or bad faith can be leveled against the registrant - the UDRP process should not become a method for dictating approved business models where there is no underlying trademark infringement. And the ICANN Board has just approved the Czech Arbitration Court (CAC) to be a UDRP arbitrator even though its application will permit "class action" complaints through which a group of major trademark owners can file a combined and coordinated complaint against a single registrant. That registrant will have far less in the way of financial resources to defend itself against a complaint which, simply by its joint nature, may prejudice the arbitration process. Attorneys familiar with CAC's administration of .EU complaints have raised serious questions about the expertise and neutrality of its arbitrators, and are very concerned that this recent ICANN approval will encourage jurisdictional forum-shopping by complainants to the detriment of registrants.

As our industry continues to develop it is critical to assure that the UDRP affords a neutral forum with full due process rights for DN registrants. ICANN has so far failed to act in a manner that fully provides such assurance.

<u>The Need To Fully Articulate Policy Rationales</u>

While the ICA strives to comment on all ICANN matters of significance to our members, our ability to do so in a meaningful and fully informed manner is often frustrated by ICANN's failure to articulate the policy basis for or implications of particular proposals.

For example, in February 2007 the ICA filed a comment letter with ICANN in opposition to the revised proposal for an .XXX gTLD for adult content. Our reasons for doing so illuminate a multitude of problems with the ICANN policy process that remain to this day:

The ICA takes no position on the general question of whether it is appropriate to authorize any specialized top level domain (TLD), including .XXX, with the intent and expectation that it host explicit adult sexual content. However, we would oppose any

requirement that content of a particular nature, including sexual content, be hosted and located solely at specifically designated TLD. The DNS should not be utilized as a means of zoning the Internet for the purpose of segregating content of any nature, as any fiat to that effect inevitably involves registries in the classification and possible censorship of content, and also requires ICANN to stray far from its narrow and proper mission in order to enforce the operative provisions of registry agreements and overarching ICANN policies.

For the reasons stated below, the ICA is firmly opposed to ICANN Board approval of the Revised Proposed Agreement (RPA) on .XXX, and urges the Board to reject it promptly and with finality.

Executive Summary

The ICA opposes approval of the Revised Proposed Agreement on .XXX because---

1. *The RPA would inevitably involve ICANN, through its enforcement authority and responsibility, in matters that lie far outside its narrow technical mission and are the proper province of national government and multinational law enforcement and consumer protection authorities.*
2. *The RPA would set a number of extremely undesirable precedents, including--*
   - *Establishing registry-specific content restrictions that will authorize the registry operator to establish proprietary extralegal standards and to review and prohibit otherwise legal content.*
   - *Requiring registrants to involuntarily contribute, through a designated "tax" built into their registry fee, to specified public interest organizations based upon the nature of the content hosted at their domain name; as well as support third party monitoring activities that presume that registrants will not abide by their contractual obligations.*
   - *Establishing a registry-specific forum, outside of ICANN's own internal structure for receiving input from interested parties, for the discussion and resolution of matters that are pervasive to most or all TLDs.*
3. *The sponsoring organization for .XXX appears to be presently controlled by the registry proposing this new TLD – an entity standing to gain very substantial revenues if the RPA is approved -- and there is no assurance that this sponsor will ever achieve sufficient independence, much less adequate participation from those parties who might utilize this new TLD. As a general matter, the approval of any sponsored TLD (sTLD) should be contingent upon a finding by ICANN that the sponsoring organization is a bona fide and independent entity at the time the TLD proposal is submitted for its consideration, and not merely a registry-controlled "shell" to be given substance at some later date; and that the proposed contract governing the relationship between the sponsor and registry operator be available to the community and Board prior to any Board vote on a proposed TLD.*
4. *The process by which this RPA was negotiated and presented to the broad ICANN community once again, unfortunately, provides evidence that ICANN is in need of profound internal culture reform as regards transparency and accountability. The*

very fact that ICANN staff and .XXX proponents were in continuing discussions and negotiations following the Board's 9 to 5 vote against the proposed .XXX agreement on May 10, 2006 was neither publicized by ICANN nor known by the interested Internet community – the existence of these ongoing proceedings was in fact opaque to and hidden from that community. At no time during these negotiations did ICANN seek any input from the community as regards the appropriateness of the significant precedents that the developing agreement would set, a failure in regard to both transparency and accountability. Additionally, the January 5th notice of the Revised Proposed Agreement fails to contain a single word of explanation as to why ICANN staff believe the provisions of the newly negotiated Appendix to the original agreement sufficiently address the concerns of the community that resulted in the Board's rejection of that agreement by a nearly 2 to 1 margin. Nor is there a single word of recognition or discussion in the January 5th notice that the proposed Appendix contains numerous provisions that establish new precedents that could well migrate to other TLD registry agreements and would inevitably involve ICANN in areas far outside the scope of its narrow technical mission if it takes its contract enforcement responsibilities seriously. The ICA finds it inexplicable that ICANN would operate in such an opaque and unaccountable manner in regard to a registry proposal that had generated widespread criticism and debate as well as input from an unusually broad and diverse range of commentators both within and outside the general ICANN community. This failure is particularly incomprehensible given that the decision as to whether ICANN should be completely privatized at the conclusion of its current Memorandum of Understanding (MOU) with the U.S. Department of Commerce (DOC) in 2009 is contingent, first and foremost, on its achievement of greater transparency and accountability in its operations. We would respectfully suggest that, particularly during a period when ICANN is seeking to achieve full privatization, it should adhere strictly to its narrow technical responsibilities and should not be clandestinely negotiating revised agreements for controversial TLDs that would inevitably require substantial expansion of its staff (and substantial additional financial support from domain name registrants) for contract oversight and enforcement responsibilities regarding matters that fall far outside its intended mission and implicate powers and duties that properly belong to national governments and multilateral organizations.

Our letter went on to note how this process was at odds with ICANN's commitment to greater transparency and accountability and how it also revealed a need for far greater articulation of the thinking underlying policy and related proposals:

In our October 31, 2006 comment letter to ICANN "Regarding Transparency and Accountability Management Operating Principles", we noted the two paramount reasons for ICANN to get the matter of transparency and accountability right:

1. *First, there remains strong concern throughout the Internet community that ICANN has been operating in an opaque and cavalier manner -- that it fails to explain or even recognize the policy assumptions that underlie key decisions; that*

it announces critical policy changes as fait accompli after agreeing to them in private contract negotiations; that it makes primarily cosmetic changes in response to strong and negative consensus feedback from the affected Internet community; and that it lacks an adequate administrative proposal and review process to permit meaningful community participation in policy development.

2. *Second, the new Joint Project Announcement ratified by ICANN and the U.S. Department of Commerce (DOC) on September 29th identifies "greater transparency, accountability, and openness in the consideration and adoption of policies related to the technical coordination of the Internet DNS" as the leading priority for which the DOC will assess progress in the continuing transition of ICANN to the private sector. Similarly, the Affirmation of Responsibilities approved by ICANN's Board on September 25th commits ICANN to continuing improvements in transparency, accountability, and an improved policy development process. While ICA commends these priorities and commitments, they must move from the realm of mere rhetoric by being translated into genuine and indisputable progress in the manner in which ICANN conducts its operations and develops fundamental policy. We believe that substantial progress in these areas must be the precondition for any future termination of the MOU between ICANN and the DOC and completion of ICANN's transition to full privatization.*

Unfortunately, in its handling of this revised .XXX proposal, ICANN has once again operated in an opaque and unaccountable manner and has failed to provide the Internet community with any meaningful rationale as to why it believes the new components of the agreement's Appendix cure the proposal's prior deficiencies that led to its rejection.

The current version of the .XXX proposal was unveiled by ICANN on March 19, 2004, and the initial comment period opened on April 30, 2004 (an earlier iteration of .XXX was proposed in 2000 and subsequently rejected by ICANN). The proposal generated great controversy, to say the least. Remarkably, it managed to unite anti-pornography activists and most commercial purveyors of pornography in opposition to its realization. The former opposed .XXX out of concern that it would significantly expand the quantity of online explicit adult content as well as legitimize its acceptability. The latter opposed .XXX due to fears that it would inevitably lead to calls for all adult content to be located at .XXX, converting the DNS into an Internet zoning and content control regime. Additionally, the 2005 request of the DOC that ICANN provide additional time for commentary, to which ICANN complied, led to charges that this constituted evidence of inordinate U.S. control over ICANN, notwithstanding similar requests from GAC members. Finally, a revised .XXX registry agreement was posted on April 18, 2006. In a Special Meeting held on May 10, 2006 the ICANN Board defeated a motion to approve the revised .XXX registry agreement by a 9-5 vote.

There was no reason for the Internet community and other interested parties to believe anything other than that the May 10th Board vote constituted final and conclusive action on this matter. At the time of the vote the current .XXX proposal had been pending for more than two years (and the overall concept for six years), had generated substantial debate and comment, and had been substantially revised in an attempt to satisfy some of

the many criticisms raised against it. Most Board members who explained their vote against the agreement based their position upon profound skepticism that the proposal's sponsor could ever effectively implement its various enforcement commitments. There was no public directive from the Board to ICANN staff to reenter negotiations with ICM Registry for the purpose of yet again revising the proposal to again attempt to satisfy the objections of the dissenting majority of the Board. Such authorization of entry into new negotiations was also never made an agenda item at subsequent 2006 meetings of the Board.

Therefore, it was with great surprise that we and others learned, from a January 4, 2007 notice "ICANN Announces Plans for Conclusion of sTLD Application Process", that:

> *"The ICANN Board considered the agreement at its meeting on 10 May 2006 and voted not to approve the agreement as proposed, but did not reject the application. The applicant has continued to work to modify the agreement in order to address public policy issues raised by the GAC. ICM and ICANN Staff have been renegotiating a revised agreement in preparation for community review and board consideration. ICANN will post that agreement upon completion of the present round of discussions for public comment." (Emphasis added.)*

The fine semantic distinction between rejection of the agreement, as opposed to the application, was certainly not well understood by the community, which had every reason to believe that ICANN had settled this matter with finality. This wording of this explanation was also disingenuous in that ICANN's commitment to post the revised agreement "upon completion of the present round of discussions" (implying that they were yet ongoing) was posted on a date on which those negotiations had clearly been concluded -- as the Revised Proposed Agreement on .XXX was posted on the very next day -- January 5, 2007.

In short, following the ICANN Board's rejection of the .XXX Proposal on May 10, 2006 ICANN staff entered into yet another round of negotiations with ICM Registry, from which a new proposal emerged last month. During that seven month period of undisclosed negotiations the interested community had every reason to believe that ICANN had taken final action on this matter. While we can understand why ICANN wished to avoid the renewed firestorm of controversy that would have been generated by conspicuous public notice that its staff had entered into yet another negotiating round on .XXX preparatory to Board consideration of a RPA, and while we certainly do not believe that the community need be kept apprised on a real-time basis of the minute details of ICANN's contract negotiation process, it seems apparent that ICANN meant this process to be opaque and hidden, rather than transparent and publicly known. That this apparently deliberate obfuscation occurred during the very period when ICANN was committing to greater transparency and accountability in negotiations for its own revised MOU with the DOC is extremely discouraging, and substantially undercuts ICANN's credibility on the key precondition for its ultimate full privatization…

The process by which .XXX has been resurrected for further consideration and comment also fails to meet acceptable standards of transparency and accountability in other ways. ICANN's January 5, 2007 publication of the Revised Proposed Agreement fails to:

- *Explain why ICANN staff believes that the negotiated Appendix to the proposal rejected by the Board on May 10, 2006 adequately addresses the issues that caused the Board to reject it.*
- *Discuss or provide a rationale for any of the unprecedented provisions contained in it.*
- *Explain how the multiple new contract oversight and enforcement duties to be assumed by ICANN fall within the bounds of ICANN's narrow technical mission or are reasonably and appropriately related to that mission.*

ICANN's failure to address these critical areas results in interested and concerned members of the Internet community playing a guessing game as regards ICANN's internal policy development process. Such failure is not only evidence of a continued lack of operational transparency but also makes it far more difficult for the community to knowledgably comment and thereby hold ICANN accountable for its decision-making process. If ICANN staff believes it can make a good argument that the results of their secret negotiating process make the current .XXX proposal deserving of Board approval they should state it openly for community evaluation and critique; assumedly, they have or will prepare such background materials for the Board, and we see no confidentiality concerns that would prevent their dissemination to the community. In the absence of such explanatory materials many members of the community might well fail to comprehend the full scope and implications of this RPA and the many precedents it would establish.

We continue to see similar gaps to this day. For example, the above-noted decision to allow registrars to apply for exemption from aspects of their WHOIS obligations under the RAA fails to explain or delineate whether there is any point at which a particular national law would be so at variance with WHOIS responsibilities that a registrar based in such a nation could not be approved by ICANN – yet such a "bright line" standard is indispensable to prevent some nations from seeking to become "privacy havens" attractive to cybersquatters. Similarly, ICANN failed to state whether this decision sets a precedent whereby national laws that were destructive rather than protective of registrant rights – such as a requirement that locally domiciled registrars submit all disputes to national courts under laws adverse to registrants, rather than to the UDRP process – might be acceptable.

ICANN simply must start giving better explanations of why it is taking certain actions -- and fully grapple with their implications.

<u>Any Future Termination of the JPA Must be Based on Firm Assurances Regarding ICANN's Domicile and Legal Structure</u>

ICANN was intended to be a test of whether administration of the DNS could be undertaken by a non-profit private sector organization that was fully respectful of private enterprise and property rights and the entrepreneurial spirit that has built the Internet and

the dynamic new commercial entities it supports and enables. As noted above, the ICANN Board has voted to further explore the concept of converting ICANN from a non-profit corporation to a Private International Organization which would likely be much less liable to legal recourse by aggrieved parties, Further, ICANN has recently admitted in the press that it has already given consideration to relocating to Geneva, Switzerland and that, when it ultimately end its special relationship with the U.S., it will have "equally strong relations with all the other governments of the world that have an interest in a safe, secure, single, interoperable Internet". We believe that this potential relocation and change in organization form threatens the possibility of ICANN morphing into another IGO headquartered in Geneva, like the International Telecommunications Union, and increasingly acting at the direction of a GAC meeting behind closed doors. Such a transformation would be a betrayal of the original ICANN concept and the ideals that gave birth to it. Therefore, we believe that any future decision to terminate U.S. oversight of ICANN must be preceded by firm and binding assurances as to permanent headquarters and organization structure

Conclusion

We appreciate your consideration of the ICA's views in this matter. We intend to attend and participate in the February 28th Public Meeting on this matter and look forward to working with the Commerce Department and with ICANN as all parties strive to improve ICANN's performance in furtherance of full privatization at some future date.

Sincerely,
Philip S. Corwin
Counsel, Internet Commerce Association