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

Ref: Comment in response to the NTIA Notice of Inquiry under the Midterm Review of the Joint Project Agreement between the Department of Commerce and ICANN

Dear Ms. Sene,

I am pleased to provide the following submission in response to the NTIA Notice of Inquiry under the Midterm Review of the Joint Project Agreement between the Department of Commerce and ICANN.

Telepathy, Inc. is the registrant of a large portfolio of generic domains. In addition, Telepathy has been the Respondent in a dozen Uniform Dispute Resolution Policy (UDRP) arbitrations concerning Telepathy's rights to maintain the registrations of certain domains that it owns.

I can therefore speak from direct experience to the consequences of ICANN's policymaking.

ICANN is overly solicitous of the interests of the powerful companies who have the greatest access to it, while it acts contrary to the interests of the broader Internet community which it has effectively deprived of influence in the decision and policy making process.

ICANN's decisions to bypass a competitive bid process for the renewal of the dot-com registry and to instead perpetuate the Verisign monopoly and to authorize price increases has imposed an unjustified monopoly tax of hundreds of millions of dollars on the Internet community as a whole.

ICANN has created a UDRP process that tilts in favor of the Complainant, most notably in that there is no penalty for bringing frivolous complaints and in that the only remedy allowed is the seizure and transfer of the subject domain. ICANN's lax oversight of the UDRP procedures allows panelists to introduce novel interpretations of the UDRP criteria without any review, guidance, or enforcement by ICANN to ensure that the 'Uniform' procedures remain uniform.

A more deeply rooted problem with ICANN is a structural inequity that renders the Internet community at-large powerless and without a voice, while giving those companies who have contractual relationships with ICANN undue influence over ICANN policy making.

ICANN is an organization charged with entering into contracts and making policy for the benefit of the Internet community as a whole, but whose structure gives the contracting parties a disproportionate say in ICANN's decision making. This weakens the 'arms-length' separation needed for ICANN to act in the best interests of the overall Internet community and instead produces sweetheart deals such as the Verisign no-bid monopoly registry renewal.

ICANN is on course to develop into an insular, in-bred organization, catering to and beholden to the power centers within its constituency groups with no structural means for the interests of the larger Internet community to be expressed.

As John Kenneth Galbraith remarked- "Regulatory bodies, like the people who comprise them, have a marked life cycle. In youth, they are vigorous, aggressive, evangelistic and even intolerant. Later they mellow, and in old age—after a matter of ten or 15 years—they become, with some exceptions, either an arm of the industry they are regulating or senile."

The only influence the public at large has on ICANN is through the JPA with the U.S. Department of Commerce. I urge the Department of Commerce to use the authority that it has delegated to ICANN to fix the structural problems with ICANN and set it on a more democratic course, lest the Internet be overseen by an organization beyond the reach of the community it was designed to serve.

Issues with ICANN

Structural Issues

a) ICANN is moving in a counter-democratic direction. After open elections selected board members who advocated greater openness and were critical of the Board's secretive decision making process, the nominated members, who

remained in the majority, discontinued open elections in favor of a system where all board members are appointed from within the existing ICANN power structure.

b) Those groups with contractual relationships with ICANN, such as the registry and registrar constituencies "are more equal than others", having twice as much say as other constituencies.

Verisign Agreement

c) Verisign, a member of the registry group, which has twice as much voting power as most other groups, received a sweetheart, no-bid, monopolistic contract renewal from the same ICANN board that it had undue influence in selecting.

d) The Verisign registry agreement creates a monopoly in violation of the ICANN charter obligation to foster competition. The agreement allows Verisign to extract monopoly rents of hundreds of millions of dollars a year from the Internet community as a whole. Instead of looking after the interests of this community, ICANN is plundering the community, including adding hefty fees for itself to pay for a large staff many of who spend their time planning junkets and conferences in locations far removed from most Internet users.

UDRP

e) the US Government opened the new territory of the Internet to "homesteading" on a first-come first-served basis. Now the 'railroads' have come to town in the form of TM interests who want domains registered by the original Internet pioneers years ago. The TM interests are using a UDRP process that has inadequate protections for domain owners to seize without compensation domains that they covet.

f) ICANN makes no effort to police panelists, to review their decisions, to see whether they are rendering decisions consistent with UDRP principles, or to remove those who substitute their own views for the UDRP policies.

g) The views of certain panelists who wish to weaken domain owner rights are becoming more prevalent in UDRP decisions, as their interpretations are cited in an increasing number of decisions. There is a 'group think' effect as what were at first radical re-interpretations of UDRP policy are repeated enough times so as to replace the original intent of the UDRP policy.

h) The steady weakening of domain owner rights is reinforced by a process where companies seeking a domain can "forum-shop" between competing arbitration bodies, and select panels composed primarily of IP lawyers who are not barred from representing TM claimants in the same forum in which they serve as 'neutrals'. The forums select the pool of panelists and the TM interests select the most favorable forums.

i) the UDRP process is jeopardizing the value of hundreds of millions of dollars worth of US-owned assets that are increasingly subject to seizure by international arbitrators, enforcing foreign trademarks, using standards that are contrary to US

law.

Role of Domain/Registrant Community

j) The Registrant community, although it is often most deeply affected by ICANN decisions, has no adequate voice within ICANN nor even a constituency that is responsive to its concerns.

In conclusion, the larger Internet community does not have a voice at ICANN. ICANN is structured to be responsive to the large players who profit from the Internet, often at the expense of small businesses and individual users. Unless the Department of Commerce exercises its influence to make the structure of ICANN more democratic, the Internet will be in the hands of a policymaking body unduly influenced by the very same entrenched interests that ICANN is charged with negotiating with on behalf of the larger Internet community.

Regards,

Nat Cohen
President
Telepathy, Inc.