



February 15, 2008

By E-mail to JPAMidTermReview@ntia.doc.gov

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

Re: **Midterm Review of JPA with ICANN [Docket # 071023616-7617-01]**

Dear Ms. Sene:

Please accept these comments from the Entertainment Software Association¹ on the Midterm Review of the Joint Project Agreement.

Summary

ICANN is the right model for governing the domain name system, and we strongly support ICANN's continued management of the DNS. ICANN has made noteworthy progress in several key areas, and the day is approaching when it makes sense to talk about the "post-JPA" environment. But it would be premature to have those discussions now.

The Department of Commerce should not grant ICANN's request for early release from the JPA. There remain troubling shortcomings in the way ICANN implements its multi-stakeholder model and enforces its Whois policies:

- ICANN's new "working group" model of bottom-up policymaking is unproven and, based upon ESA's direct experience with the Whois Working Group, may actually hamper meaningful stakeholder participation (JPA Annex A, ¶ 6).
- ICANN needs better mechanisms to engage the private sector in key policies that affect commercial interests (JPA Annex A, ¶ 6).

¹ ESA is the U.S. trade association exclusively dedicated to serving the business and public affairs interests of companies that publish video and computer games for video game consoles, personal computers, and the Internet.

- ICANN has yet to demonstrate its willingness to use its contract tools to hold registrars and registries accountable for non-compliance with Whois obligations (JPA Annex A, ¶¶ 5 & 10).

Provided ICANN can make meaningful progress on these issues, and others NTIA may deem appropriate, the next 18 months may be an opportune time to explore post-JPA options.

Introduction

A well-managed Internet is vital to the future innovation and growth of our industry, and we welcome this opportunity to comment upon ICANN's progress in stewarding the domain name system.

We believe that the U.S. government got it right when, nearly 10 years ago, it decided to transition technical management of the DNS to a private sector entity independent of government control. That decision has proven remarkably fruitful, and ICANN has made great strides in fostering a stable and reliable DNS.

In September 2006, ICANN and the Department of Commerce entered into a three year Joint Project Agreement. That agreement referenced 10 milestones developed by the ICANN Board.² NTIA has asked for comment on whether ICANN has made sufficient progress on those milestones as part of a midterm review contemplated by the JPA.³

ICANN now asks the Department of Commerce to terminate the JPA.⁴ ICANN asserts that the JPA "is no longer necessary" because its Board has determined that ICANN has achieved all 10 milestones identified in the JPA. While ICANN has made progress on several milestones, it has not made sufficient progress on key tasks to justify taking the extraordinary step of ending the JPA early. Structural changes underway in ICANN threaten to undermine the multi-stakeholder model and further diminish the voice of the private sector on key reforms (JPA Annex A, ¶ 6). Meanwhile, ICANN has yet to make concrete progress on contract enforcement (JPA Annex A, ¶¶ 5 & 10), particularly as it relates to enforcing its Whois policies.

Multi-stakeholder Model

To demonstrate its progress on this milestone, ICANN points to its recent

² See ICANN Board Resolution No. 06.71, Affirmation of Responsibilities (Sept. 25, 2006).

³ See The Continued Transition of the Technical Coordination and Management of the Internet's Domain Name And Addressing System: Midterm Review of the Joint Project Agreement, 72 FED. REG. 62220 (Nov. 2, 2007).

⁴ Letter from Peter Dengate Thrush to NTIA (Jan. 9, 2008), at p. 7.

GNSO review.⁵ That process led the Board Governance Working Committee's GNSO Review Working Group to propose profound changes to the way ICANN develops policy.⁶

One of those proposed changes involves transferring core policy development activity from the GNSO Council to informal working groups, which would become "the foundation for consensus policy development by the GNSO Council."⁷ ICANN emphasizes in a recent report that this new model will make policy development "more inclusive and representative and—ultimately—more effective and efficient."⁸

Our first-hand experience with this new model did not suggest any of these benefits. ESA actively participated in the recent Whois Working Group. While we have engaged in ICANN issues before, the WWG marked the first time we have directly participated in a GNSO-commissioned policy group. We invested many hours over several months alongside other dedicated stakeholders on all sides of the issue. Like them, we actively participated in mailing lists and weekly phone conferences. We submitted a proposal, revised it based on comments received, and engaged in good faith discussions on other proposals. Other participants did likewise—and even more.⁹ Unfortunately, as we now know, the working group failed to develop a workable implementation plan. We think this is telling—for it reveals some disturbing flaws in the working group approach as a means of constructive multi-stakeholder participation.¹⁰

Like other content owners, ESA had reservations about the need for (and workability of) the original OPoC proposal. Nevertheless, we engaged in the WWG in a good faith effort to explore implementation options that would adequately address privacy concerns while preserving reasonable access by legitimate third parties. A workable implementation plan did not emerge because privacy proponents did not satisfactorily respond to the widespread concerns of the private sector.

ICANN touts the working group model as preferable to the current approach (task forces) because it does away with formal voting and allows for broader participation by eliminating the requirement for participants to be formally

⁵ See *id.* at p. 20 (of attached table outlining ICANN fulfilling the 10 Responsibilities in the JPA).

⁶ See ICANN Bd. Governance Comm., Report of the Board Governance Committee GNSO Review Working Group on GNSO Improvements (Feb. 3, 2008).

⁷ *Id.* at p. 19.

⁸ *Id.* at p. 3.

⁹ Philip Sheppard, the overall chair of the WWG, did a remarkable job in a very difficult situation, and we commend his leadership.

¹⁰ Some may say that the disappointing results are merely a function of the complexity of the Whois issue. While that no doubt was a factor, it does not fully explain the lack of progress. The WWG began its discussions with the premise of developing an *implementation* of OPoC—not rearguing the merits of that approach (a far more contentious and complex issue).

affiliated with a particular constituency. The “anyone can participate” approach is commendable for its inclusiveness and worth exploring further.

That said, the loose structure and lack of well-defined procedures can hamper productive dialog. Time and again, a handful of vocal participants clogged the WWG mailing lists with off-topic missives that diverted discussion away from core issues. Keeping the group “on task” during the weekly phone conferences proved to be almost as difficult as the Whois issue itself. Nearly every call sparked a debate on whether a particular issue was (or was not) within the scope of the limited mandate of the WWG or its sub-groups. This is healthy, to a point. But some participants repeatedly channeled the discussion to broader issues that we lacked the mandate or expertise to decide.¹¹

For us, though, the most frustrating part of participation is that we did not come away from the experience with a sense that our views received due consideration—at least in the early, formative stages of the process. This was particularly true of our involvement in one of the WWG sub-groups. We went into this process with the expectation that it would be a competitive negotiation of views. What we did not anticipate is that the chair of the sub-group would endorse or decry particular proposals and viewpoints, both on the calls and in e-mail lists. This lack of neutrality tainted the process and chilled negotiations.

The rough-and-tumble nature of the working group process might be more inclusive, but we question whether it engenders the right sort of conversations. It is noteworthy that the WWG featured little input from law enforcement or government representatives, despite repeated pleas by participants for their active engagement. We lost critical perspectives, and our work product suffered as a result.

ESA is not alone in these frustrations. Participating stakeholders from a variety of constituencies and viewpoints shared remarkable unanimity on one thing: That the Whois Working Group failed at the process level.¹²

¹¹ For instance, there was a continuous and time-consuming debate on the requirements of EU data protection law among a group of participants who (as best as we could tell) lacked any in-depth knowledge of the subject.

¹² Comments posted to the Whois Working Group mailing list in the days leading up to the Final Report are illustrative: Tim Ruiz, representing Go Daddy (Aug. 21, 2007): “this type of WG process needs to be rethought before trying it again” to which Ross Rader, representing Tucows, responded (Aug. 21, 2007): “No kidding”; Palmer Hamilton, representing a consortium of banking interests (16 Aug. 2007): “there has been little inclination among the members of our Working Group to find middle ground”; David Maher, representing Public Interest Registry (Aug. 7, 2007): “Opening a working group to the entire world and inviting any and all with an axe to grind to participate is not a proper basis for determining support for controversial positions. The fact that 3 or 40 support a position means nothing unless their affiliations are taken into account.” See ICANN E-mail List Archives (gnso-whois-wg), <http://forum.icann.org/lists/gnso-whois-wg/> (last visited Feb. 12, 2008).

ICANN has downplayed the disappointing outcome of the Whois Working Group, stating in a recent report that “the WHOIS WG is not directly relevant to establishing a working group model for future policy development work” because it focused on implementation issues “rather than reach[ing] a consensus position on work that had already been done.”¹³

We disagree. The WWG is directly relevant, for it speaks to the utility of the model to both attract broad participation and foster consensus. It was precisely because the group could not reach consensus on fundamental issues that it sputtered out. This unfortunate result represents an early (and important) failure of the working group model.

No doubt ICANN can improve upon its approach, and indeed it has proposed several useful adjustments to the working group structure in the wake of the WWG.¹⁴ Nevertheless, the utility of the working group approach, and whether it truly fosters productive multi-stakeholder buy-in, remains largely unproven. ICANN should be required to demonstrate more successful implementations of this concept (within ICANN) before it “checks the box” that it is advancing the multi-stakeholder model vis-à-vis working groups.

Failure to Adequately Engage Private Sector

Private-sector leadership of innovation and investment in the Internet is a core principle of the JPA, as recognized in the preamble of that agreement.¹⁵ The video game industry has invested millions of dollars in bringing innovative online games to consumers and continues to invest millions more in light of the rising popularity of Internet-enabled games. The Internet is key to our industry’s economic future.

It is vital that ICANN’s multi-stakeholder model provide the private sector an effective voice in policymaking that impacts commercial interests (such as enforcement of Whois policies and roll-out procedures for new top-level domains).

Recent developments involving the GNSO Council call into question whether that model, as envisioned by ICANN, adequately engages the private sector. In its February 3 report on GNSO Improvements, the Board Governance Committee’s GNSO Review Working Group recommended significant restructuring of the Council. Here is how the composition of the Council would change:

¹³ Report on GNSO Review at p. 13.

¹⁴ *See id.* at pp. 16-18.

¹⁵ Joint Project Agreement,

http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/icannjpa_09292006.htm (last visited Feb. 8, 2008).

Constituency	Current (weighted voting): 21 councilors / 27 votes	Proposed (non-weighted voting): 19 councilors / 19 votes
Registrars	3 (x 2 votes per councilor)	4
Registries (gTLD)	3 (x 2 votes per councilor)	4
Intellectual Property	3	
Business	3	
ISP	3	
Commercial Users		4
Non-Commercial Users	3	4
Nominating Committee	3	3

This proposed change would greatly weaken the voice of the private sector in important ongoing policy debates before ICANN. It would collapse the ISP, Business Users, and Intellectual Property constituencies into a single, ill-defined “stakeholder group.” We question the wisdom of joining all three constituencies into a single entity. The idea, for instance, that ISP and IP perspectives are duplicative has gained some currency within ICANN; but nowhere else in the world would this proposition be seriously defended, given all the disagreements over the past decade between copyright owners and ISPs regarding online enforcement. The interests are sufficiently distinct to merit retaining the current constituencies. Merging them runs the risk that important perspectives may get lost in inter-constituency deliberations among the former constituencies (or, more precisely, within the next “stakeholder group”) and never benefit from the broader reflection and deliberation of those outside the stakeholder group.

While we are pleased to see ICANN move away from weighted voting, the new structure is no great improvement for the private sector. The overall effect of the proposed restructuring would reduce the combined voice of the private sector by roughly a third—from 9 of 27 votes (33 percent) to 4 of 19 votes (21 percent) on the Council. Reducing the voting power of the constituencies that represent business (other than registrars and registries, who have contracts with ICANN) does not signal support for private sector leadership. The upshot of the total package is that it would undercut ICANN’s mandate to “increase engagement with the Private Sector by developing additional mechanisms for involvement of those affected by the ICANN policies.” (JPA Annex A, ¶ 6).

Contract Compliance

ICANN, as a private sector entity, has a limited toolkit for enforcing its policies. It must rely upon contract enforcement. ESA and many other IP interests remain deeply concerned by ICANN’s apparent reluctance to invoke its contract remedy provisions to address recalcitrant registrars and registries who fail to honor their Whois obligations.

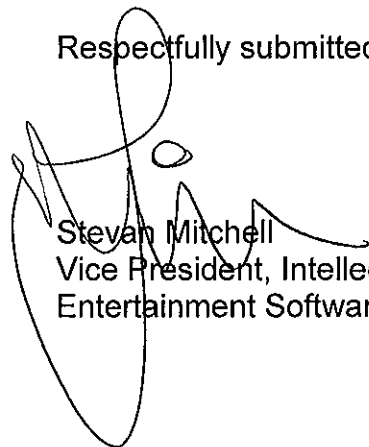
In 2005, the Government Accountability Office issued a report on Whois data accuracy.¹⁶ The GAO studied the top three generic top-level domains (.com, .net., and .org) and concluded that 3.89 million registrations (8.65%) had at least one instance of patently false or incomplete data in the required Whois fields. GAO also studied ICANN's Whois Data Problem Report System to test its effectiveness. GAO submitted 45 error reports (culled from a random sample of 900 registrations) to the WDPRS; only 11 of the domain name holders responded with updated contact information. A more recent ICANN report, from April 2007, found that in some 28 percent of cases in which clearly false Whois data was reported via WDPRS, nothing was done about it.¹⁷

Access to a public Whois service populated by accurate record data is vital to the intellectual property enforcement efforts of both ESA and our member companies. This is particularly true now, where new file transfer protocols and higher speed broadband access services have greatly reduced the time it takes to upload and download pirated game software. We urge NTIA not to release ICANN from its contract until ICANN has made more substantial progress in enforcing compliance with contractual obligations regarding the Whois service. This would include making the WDPRS more effective and undertaking (and acting upon the results of) a comprehensive audit of Whois data accuracy. Enforcement of these policies is a task that ICANN specifically imposed upon itself in the JPA,¹⁸ and it is clearly one that has not been achieved yet.

Conclusion

ESA thanks the NTIA for this comment opportunity, and we look forward to discussing the future of ICANN during the second half of the JPA's term.

Respectfully submitted,



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¹⁶ See U.S. Gov't Accountability Office, Internet Management: Prevalence of False Contact Information for Registered Domain Names (Nov. 4, 2005), <http://www.gao.gov/docdb/lite/summary.php?rptno=GAO-06-165&accno=A41038> (last visited Feb. 8, 2007).

¹⁷ See ICANN, Whois Data Accuracy and Availability Program: Description of Prior Efforts and New Compliance Initiatives, at p. 12 (April 27, 2007), <http://www.icann.org/whois/whois-data-accuracy-program-27apr07.pdf>.

¹⁸ JPA Annex A, ¶ 5.